Fenwick Employment Brief

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EMPLOYEE FIRED AFTER FIANCÉE FILED EEOC CLAIM ALLOWED TO PURSUE RETALIATION CLAIM UNDER TITLE VII

The United States Supreme Court, in *Thompson v. North American Stainless, LP,* extended the scope of Title VII's anti-retaliation protections by ruling that an employee who was terminated shortly after his fiancée filed a claim with the Equal Employment Opportunity Commission (EEOC) was allowed to pursue a Title VII retaliation claim against their common employer.

Eric Thompson and his fiancée Miriam Regalado both worked for North American Stainless (NAS). In 2003, Regaldo filed an EEOC claim alleging sex discrimination. Three weeks after learning of the claim, NAS fired Thompson. The Supreme Court granted certiorari to determine whether *Thompson's* termination constituted unlawful retaliation for *Regaldo's* complaint, and whether Thompson had a valid cause of action under Title VII (reported in the 07/14/10 FEB).

The Supreme Court held that if the facts alleged by Thompson are true, NAS's action firing Thompson constituted actionable unlawful retaliation. Title VII prohibits employers from discriminating against employees for engaging in protected conduct, including making complaints of sexual harassment. Title VII's anti-retaliation provision prohibits employer actions that might dissuade a reasonable worker from making or supporting a claim of discrimination. The Supreme Court held that a reasonable worker might be dissuaded from making a sexual harassment claim if she knew her fiancé would be fired. In so ruling, the Supreme Court refused to create a categorical rule that retaliatory actions against third-parties do not violate Title VII. The Court also declined to identify a class of relationships for which third-party retaliation is unlawful, and instead held that the standard must be objective to avoid uncertainties and unfair discrepancies.

The Supreme Court additionally held that Thompson had standing to sue NAS for violating Title VII. Title VII protects employees from their employer's unlawful actions by allowing civil actions by "persons aggrieved" by employer action. In this case, Thompson was not an accidental victim of the retaliation against Regaldo, but rather, the employer injured Regaldo specifically by terminating Thompson. Thompson clearly fit the definition of a person aggrieved, and therefore had standing to sue under Title VII.

In the face of this case, employers should be aware that retaliation now extends beyond just employees who have engaged in protected activity, but also to those employees with close relationships to the complaining employee. Employers should consider reviewing their anti-retaliation policies with this in mind.

USE OF PERSONAL EMAIL ON WORK COMPUTERS CAN DEFEAT ATTORNEY-CLIENT PRIVILEGE

In a recent California Court of Appeals decision, *Holmes v. Petrovich*, the court held that emails sent by an employee to her attorney on a work computer were not attorney-client privileged because they were sent from a work email account.

Gina Holmes was hired as an executive assistant to Paul Petrovich. Shortly after Holmes was hired, she informed Petrovich that she was pregnant. Petrovich became upset at this disclosure, and exchanged a series of emails with Holmes stating that, while he did not intend to violate any laws, he felt taken advantage of. In response, Holmes emailed an attorney from her work email account indicating that she felt she was working in a hostile environment. Holmes eventually emailed Petrovich to inform him that his feelings regarding her pregnancy left her with no alternative but to end her employment.

Thereafter, Holmes filed a suit for sexual harassment, retaliation, wrongful termination, violation of privacy rights, and intentional infliction of emotional distress. At trial the jury was shown several emails between Holmes and her attorney. Holmes argued that these emails were attorney-client privileged. The trial court, however, ruled that Holmes's emails, sent on a company computer, were not protected by the attorney-client privilege because they were not private. This conclusion was supported by the language of the company's detailed computer usage policy, which stated in unambiguous terms that:

- Company technology resources should be used only for company business and employees are prohibited from sending or receiving personal emails;
- Employees have no right to privacy for personal information created on company computers;
- Email is not private communication;
- The Company may inspect all files or messages at any time; and
- The Company would periodically monitor technology resources for compliance with Company policy.

On appeal, the court affirmed the decision of the trial court stating that the communications in question did not constitute "confidential communications between client and lawyer" because Holmes knew of the company policy regarding no personal use, she had been warned that the company would monitor its computers for compliance with company policy, and she was warned that she had no right of privacy as to message created on company computers. The court described the communications as "akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him."

This decision is another great example of the need for employers to be very specific when drafting computer usage policies. Employers must decide whether to allow personal use of not only company computers, but also company email systems and web-based email solutions. If employers intend to monitor employee use of company computers and email, language should be included noting that the company may monitor computers and/or email and language that messages created on company computers are not private.

NEWS BITES

California Supreme Court Rules Private Discussions Between Client And Attorney During Mediation Are Not Admissible In Malpractice Actions

Cassel v. Superior Court involved the mediation of a business dispute in which the plaintiff, Michael Cassel, agreed to accept a settlement of $1.25 million dollars for his claims. Cassel then sued his attorneys for malpractice, breach of fiduciary duty, fraud and breach of contract claiming his attorneys coerced him to settle for an amount lower than he told his attorneys he would accept and for less than the case was worth. Prior to trial, Cassel's attorneys moved to exclude all evidence of private attorney-client discussions both immediately preceding and during the mediation on the topics of mediation settlement strategies and the attorneys' efforts to persuade Cassel to reach a settlement. The trial court granted this motion, but the Court of Appeal vacated the trial court's order. The California Supreme Court subsequently reversed the judgment of the Court of Appeal and reinstated the trial court's exclusion order.

Evidence Code Section 1119 governs the admissibility of oral and written communications during mediation. In pertinent part, Section 1119 states "all communications, negotiations, or settlement discussions between participants in the course of a mediation…shall remain confidential." The California Supreme Court held that the term "participants" was not limited to the actual *parties* to the mediation (that is, the litigants themselves), but rather included *all* participants, including the attorneys representing the litigants. As such, communications between a mediation party and his or her own counsel are covered by Section 1119 and inadmissible in malpractice actions. The Court stressed it was interpreting Section 1119 and invited the Legislature to reconsider the decision if it disagreed. The Court

also refrained from specifically delineating what communications are made "for the purpose of, in the course of, or pursuant to, a mediation."

Ninth Circuit Holds That Employees Who Leave Their Jobs Because The Business Is Closing Have Not "Voluntarily Departed" Under The WARN Act

In *Collins v. Gee West Seattle LLC,* a case of first impression, the Ninth Circuit ruled that employees who leave their jobs after being informed that the business is closing are suffering an "employment loss" and are not "voluntarily departing." On September 26, 2007 Gee West Seattle, an automobile franchise with approximately 150 employees, informed its employees that it would be closing its doors on October 7, 2007. By October 5, 2007, only 30 employees were reporting to work at the Gee West facilities. After the business closed, several employees sued claiming that Gee West had violated the WARN Act by not giving 60-days notice before closing its doors.

The WARN Act requires that employers not order a plant closing or mass layoff without a 60- day notice period if the shutdown will result in an employment loss at a single site for more than 50 employees. Gee West argued that since all but 30 employees had left their jobs of their own free will prior to October 7, 2007, Gee West's closing did not trigger the WARN Act's 60-day notice requirement. The Ninth Circuit disagreed, and held that rather than count the number of employees remaining *on* the date of closure, the starting point for analyzing "employment loss" is to determine how many positions will be eliminated *by* the date of closure, which in this case was 150 positions. Without evidence of departures for reasons other than the announced impending shutdown, the court held it is unreasonable to conclude that employees voluntarily departed after receiving notice of the upcoming closure. The Court therefore concluded that Gee West was liable for WARN Act violations unless it could establish valid defenses on remand. This decision places the burden on the employer to prove that employees left for reasons other than shutdown for purposes of calculating whether a shutdown falls under the WARN Act notice requirement.

Questions On Government Background Check Form Asking About Illegal Drug Use Do Not Violate The Right To Informational Privacy

In *National Aeronautics and Space Administration v. Nelson,* contract employees at a NASA facility sued claiming that two parts of a standard government employment background investigation violated their Constitutional privacy interest in avoiding disclosure of personal matters. The first part asked whether an employee had "used, possessed, supplied, or manufactured illegal drugs in the last year," and if so asked the employee to provide information about "any treatment or counseling received." The second part asked references if they had any reason to question an employee's honesty or trustworthiness. It also asked references if they had any adverse information concerning, among other things, an employee's violation of law, financial integrity, abuse of alcohol or drugs, or mental or emotional stability, and if so to provide an explanation.

The Ninth Circuit ruled that NASA (an agency of the United States Government) had a legitimate interest in conducting basic employment background checks to ensure the security of its facilities and in employing a competent, reliable workforce. The questions at issue were reasonable, employment-related inquiries that furthered the NASA's interests in managing its internal operations. Also, the information collected is shielded by statue from unwarranted disclosure. The mere fact that the non-disclosure requirement is subject to exceptions did not undermine the protections provided. As such the inquiries were held not to violate any Constitutional right to informational privacy.

Ignorance Of The Law Is Not A Defense For Failure To Provide Properly Itemized Wage Statements

In *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement,* a California Court of Appeal ruled that an employer who failed to provide itemized wage statements to workers the employer had mischaracterized as independent contractors due to a mistaken belief of law is still liable for the civil penalty associated with that failure.

Heritage Residential Care, Inc. misclassified 16 employees as independent contractors. When the DLSE came to perform a workplace inspection, it determined the employer was in error and issued a citation for violating the Labor Code as well as a civil penalty. Labor Code 226.3 requires the Labor Commission to take into consideration whether the violation was inadvertent. The Court defined "inadvertent" as unintentional, accidental or not deliberate. Because the employer had *intentionally* decided not to provide itemized wage statements, its actions were not "inadvertent" under the statute even though they were based on a misunderstanding of the applicable law. As always, employers should exercise care when classifying employees; deliberate decisions, even those based on mistakes regarding the law, can still lead to civil penalties and liability.

First Circuit Holds "Faith Healing" Trip Does Not Constitute Medical Care Within The Meaning Of The FMLA

In *Tayag v. Lahey Clinic Hospital, Inc.*, the First Circuit ruled that an employee fired for taking seven weeks off work to accompany her husband on a series of "healing pilgrimages" in the Philippines was not terminated in violation of the Family and Medical Leave Act (FMLA). Maria Tayag's husband received no conventional medical treatment on the trip and saw no doctors or health care providers. Tayag described the trip as a series of "healing pilgrimages" with incidental socializing.

The FMLA allows employees twelve workweeks annually to care for a spouse if the spouse has a "serious health condition." The FMLA defines "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves continuing treatment by a health care provider. "Health care provider" is defined as a doctor of medicine or osteopathy who is authorized to practice medicine or surgery. Tayag argued that because an exception exists allowing members of the Christian Scientist faith to be treated by those not otherwise deemed as "health care providers" under the FMLA, it would be unconstitutional to disallow an exception for healing by a Catholic priest. The First Circuit disagreed, holding the Christian Scientist exception exists to benefit patients whose religions forbid ordinary medical care, a category inapplicable to Tayag's husband. As such, Tayag's seven-week absence was not protected leave under the FMLA.

Summary Judgment Reversed Holding That Determination Of Employee Or Independent Contractor Should Be Made By A Trier Of Fact, Considering The Totality Of The Evidence

In *Arzate v. Bridge Terminal Transport, Inc.*, a California Court of Appeal reversed a trial court grant of summary judgment for the employer. Truck drivers for Bridge Terminal Transport signed independent contractor agreements and later sued the company claiming they were employees and were due damages for various Labor Code violations based on the misclassification.

The Court reiterated previous California decisions holding that the determination of employee or independent contractor status is fact-intensive and reversed summary judgment, holding that the case involved competing, if not necessarily conflicting, evidence that must be weighed by the trier of fact. The court held that since competing evidence existed, the trial court erred when it ruled that plaintiffs were independent contractors as a matter of law. This case makes clear that the determination of employee or independent contractor is fact-intensive and it may therefore be difficult for employers to prevail in such cases at the summary judgment stage.