Fenwick Employment Brief

August 16, 2011 Michael Sands Editor 650.335.7279
Betsy White Contributor 650.335.7931

Fenwick
FENWICK & WEST LLP

NLRB DECIDES NON-UNIONIZED EMPLOYEES' DISPARAGING STATEMENTS ABOUT EMPLOYER, MADE ON PUBLIC TELEVISION, QUALIFY FOR PROTECTION UNDER NLRA

The National Labor Relations Board ("NLRB") ruled last month that an employer's termination of non-unionized employees who had appeared on a television newscast wearing their uniforms while making disparaging statements about the employer violated the National Labor Relations Act ("NLRA"). The NLRB held that the employees' behavior constituted protected concerted activity within the meaning of Section 7 of the NLRA because the statements were related to a work dispute and were not disloyal, reckless or maliciously untrue.

The employer in this case, MasTec, Inc., installs and maintains satellite television equipment for DirecTV in Florida. MasTec service technicians were allegedly encouraged to persuade customers to permit the DirecTV satellite receivers to be connected to the customers' home telephone lines. Although a telephone connection is not required for the system to function, it does provide customers with additional features and assists DirecTV in making programming decisions by providing a record of what customers are viewing. Even though there was often no extra charge for the telephone line connection, many customers resisted the installation for a variety of reasons.

The contract between DirecTV and MasTec allowed for penalties to be imposed on MasTec if it failed to meet certain performance standards. In 2006, DirecTV reportedly informed MasTec that penalties would be assessed if MasTec did not increase the percentage of telephone line connections for new installations. In response, MasTec allegedly told its employee service technicians that they would be back-charged $5 for every receiver installed without a phone line connection if they failed to achieve a telephone line connection rate of at least 50 percent. When the service technicians voiced opposition to the new policy at several employee meetings, MasTec supervisors reportedly suggested ways around customers' reluctance – including one manager who reportedly told them to do "whatever it takes" and to tell the customers "whatever you have to tell them" to get the customers to agree.

After a number of service technicians received deductions from their paychecks in accordance with the new policy, one of them contacted a local television news reporter and arranged for a group of service technicians to drive from the MasTec facility, using the company's vans, for a group interview. The news station broadcast a story the following month in which the technicians, wearing uniforms bearing the DirecTV logo, described MasTec's new policy and made statements indicating that they were instructed or encouraged to lie to customers. One employee stated that his supervisor at MasTec had said, "tell the customer whatever you have to tell them. Tell them if these phone lines are not connected the receiver will blow up." The employees also made statements indicating that customers would incur extra charges for the unnecessary telephone line installations, when in fact that was only true for custom rather than standard installations.

After the story aired, MasTec terminated the employees who appeared on the broadcast and the employees filed an unfair labor practice charge with the NLRB. After the NLRB investigated the charge, the case went to hearing, and an administrative law judge ruled in favor of MasTec, finding that the employees statements were "so disloyal, reckless, and maliciously untrue" as to lose protection under the NLRA. The employees appealed the decision to the NLRB Panel in Washington, D.C., which reversed the ALJ's decision.

The NLRB Panel began its analysis by citing Section 7 of the NRLA, which provides, in part, that employees "shall have the right … to engage in … concerted activities for the purpose of … mutual aid or protection." The NLRB Panel noted that under Section 7, "employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection." Applying this standard, the NLRB Panel found that none of the technicians' statements made during the newscast were maliciously untrue—noting that

the mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are *maliciously* untrue. The NLRB also found that the statements were not disloyal or reckless, reasoning, "[w]hile the technicians may have been aware that some consumers might cancel [DirecTV's] services after listening to the newscast, there is no evidence that they intended to inflict such harm on [DirecTV], or that they acted recklessly without regard for the financial consequences to [DirectTV's] businesses."

We previously reported on a string of NLRB issued complaints addressing the scope of protected concerted activity under Section 7 of the NLRA. Given the recent enforcement activity by the NLRB, employers should keep in mind that the NLRA's reach extends to non-unionized workplaces and that violations can carry significant consequences—in this case, MasTec was ordered to immediately reinstate the terminated employees and to provide them with full backpay. The takeaway from this decision is that employees' communications to third parties, so long as they are related to a work dispute, may qualify as protected activity under the NLRA even if the communications are false, misleading, inaccurate, or highly objectionable to management.

IN TWO RECENT DECISIONS, CALIFORNIA APPELLATE COURTS REFUSE TO HONOR EMPLOYMENT ARBITRATION AGREEMENTS

Last month the California Courts of Appeal issued two separate decisions denying employers' attempts to compel arbitration agreements on the grounds that such agreements were unenforceable. For employers, these cases underscore the importance of reviewing mandatory arbitration agreements to ensure that they meet strict legal requirements, as the courts will closely examine such agreements to ensure that employees' rights are being adequately protected.

In *Zullo v. Superior Court*, California's Sixth Appellate District Court of Appeal reversed a lower court's order compelling arbitration of an employee's lawsuit alleging violation of California's Fair Employment and Housing Act on the grounds that the arbitration agreement was procedurally and substantively unconscionable. The defendant's petition to compel arbitration was based on an arbitration policy contained in the employer's handbook, a copy of which was provided to the employee when she was hired. The employee had signed and returned to the employer an acknowledgment of receiving the handbook. The court found that the arbitration agreement, being buried within the employment handbook with a host of other "take it or leave it" policies, was procedurally unconscionable because it did not provide the employee with a meaningful opportunity to negotiate. And the agreement was substantively unconscionable, according to the court, because it was overly one-sided; only those types of claims that would be brought by an employee were subject to the arbitration agreement, whereas a full range of remedies was preserved for the types of claims that would be brought by the employer against the employee. Upon concluding that the arbitration agreement was unconscionable and unenforceable as written, the court ordered the trial court to enter a new decision denying the employer's petition to compel arbitration.

In *Brown v. Ralphs Grocery Co.*, California's Second Appellate District Court of Appeal issued a decision regarding the enforceability of employment arbitration agreements that limit employees' rights to assert class and representative actions. Ralphs' mandatory arbitration agreement barred employees from asserting class actions as well as representative actions under California's Private Attorneys General Act ("PAGA"). Citing California precedent finding most class action waivers to be unconscionable, the lower court refused to enforce the arbitration agreement and Ralphs in turn appealed that decision. In the interim, before the appellate court issued its decision, the U.S. Supreme Court held in *AT&T Mobility LLC v. Concepcion* that California case law invalidating class action waivers in consumer arbitration agreements is preempted by the Federal Arbitration Act ("FAA"). Notwithstanding this decision from the Supreme Court, the California appellate court elected not to extend the holding in *AT&T Mobility* to the PAGA waiver in Ralphs' arbitration agreement and that consequently, "the trial court correctly ruled that the waiver of plaintiff's right to pursue a representative action under the PAGA was not enforceable under California law." The Court remanded the case to the trial court to decide whether this one unconscionable provision could be severed or instead should invalidate the entire arbitration agreement. Both the majority and concurring/dissenting opinions hinted that the California Supreme Court should grant review to decide how broadly or narrowly to construe *AT&T Mobility*.

NEWS BITES

Plaintiff Whose Sales Territories Were Reduced Upon Pregnancy Announcement Survives Summary Judgment in Retaliation Case Against Employer

A recent ruling by the United States District Court for the District of Columbia denied an employer's motion for summary judgment, holding that a former employee's lawsuit under the FMLA should be allowed to proceed to trial. In *Breeden v. Novartis Pharmaceuticals*, the plaintiff was a former pharmaceuticals sales rep whose sales territory was cut in half when she announced that she was pregnant. Upon her return from FLMA maternity leave, her position was eliminated entirely at the recommendation of an outside consulting firm. Although the employer asserted that plaintiff's maternity leave was not a consideration in the decision to eliminate her position, her pregnancy was mentioned in a PowerPoint presentation that the consulting firm prepared regarding the realignment. Based on the evidence presented during the parties' summary judgment briefings, the appellate court concluded that a reasonable jury could find that the employer's actions constituted unlawful retaliation.

California Appellate Court Denies "Split Shift" Pay to Employees Working Consecutive Overnight Shifts

In *Securitas Security Services USA, Inc. v. Superior Court (Holland)*, security guards brought an action against their employer alleging a failure to pay split shift pay per Wage Order No. 4, which defines a "split shift" as "a work schedule" that "is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal breaks." The term "work schedule" is not defined in either the wage order or the Labor Code, and Plaintiffs argued that it should be defined as a calendar workday. The California Court of Appeal held that split shift pay is required only when an employee's actual work shift is split, and not simply because an employee's shift carries over from one workday to the next.

California District Court Issues $5 Million Verdict in Retaliation Case

A jury trial in the United States District Court for the Central District of California earlier this summer resulted in a $5.4 million verdict against an employer who fired a plant manager after he reported the CEO's sexual harassment of one of his employees. When the plant manager learned that the company's CEO had allegedly hugged, kissed, and verbally harassed one of his plant administrators, he complained directly to the CEO, asking him to apologize. The CEO went to the company's personnel department, which conducted an internal investigation finding that plaintiff had "improperly reported" the incident by directly approaching the CEO rather than going through proper HR channels. The plaintiff was then fired by the company's operations manager, allegedly based on the content of the investigation report. In a unanimous ruling, the jury awarded $418,771 in past and future lost wages, $1 million for past and future emotional distress and other economic loss, and $4 million in punitive damages.

Court Finds for EEOC in Abercrombie & Fitch Hijab Suit

A federal district court in Oklahoma recently held that an EEOC employer must make religious accommodations to its dress code, even if doing so could arguably detract from its "corporate image." The EEOC brought this action against clothing retailer Abercrombie & Fitch after it denied employment to a teenage girl who wore her hijab, a religiously mandated headscarf, to a job interview. The company maintained that the wearing of a head scarf would violate its narrow uniform policy to which all employees were expected to adhere. The court disagreed, finding that Abercrombie had failed to provide sufficient evidence to show that it would have sustained anything more than minimal "undue hardship" by accommodating the woman's religious expressions, and as such its actions constituted unlawful religious discrimination under Title VII of the Civil Rights Act.

Follow us on Twitter at: http://twitter.com/FenwickEmpLaw