Fenwick Employment Brief

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SOX WHISTLEBLOWER LAW DOES NOT PROTECT EMPLOYEES WHO LEAK DOCUMENTS TO THE MEDIA

In *Tides v. Boeing*, a federal district court in Seattle ruled that two employees who leaked documents to the media were not protected whistleblowers under the Sarbanes Oxley Act ("SOX"). While performing auditing tasks for Boeing, employees Nicholas Tides and Matthew Neumann concluded that Boeing's auditing culture was unethical and the work environment was hostile to those who sought change. After several complaints to Boeing, Tides and Newman provided information and documents to a Seattle newspaper reporter. When Boeing learned of the disclosure, it terminated both men. Tides and Neumann then sued for wrongful termination.

Tides and Neumann claimed that Boeing terminated their employment in retaliation for the media disclosure, in violation of the SOX whistleblower protection laws. However, the court found that SOX protects employees against retaliation only when they provide information to supervisors, a federal regulatory or law enforcement agency or a member of Congress or a congressional committee. The court held that "[c]ommunications with the media are not protected by SOX."

Tides and Neumann nevertheless argued that their internal complaints to management – which were covered by SOX – also led to their termination. The court rejected this theory as well, finding that Boeing would have terminated Tides and Neumann because of the media disclosure even if they had not made the internal complaints.

COURT AFFIRMS PROPRIETY OF MIXED MOTIVE DEFENSE IN FEHA PREGNANCY DISCRIMINATION CASE

A California court of appeal recently held that employers may assert a so-called "mixed-motive" defense to discrimination claims under the state's Fair Employment and Housing Act ("FEHA"). In *Harris v. City of Santa Monica*, the plaintiff claimed that her former employer, the City of Santa Monica, terminated her because she was pregnant, in violation of FEHA. The city asserted that it terminated Harris for poor performance (of which there was significant evidence), and not because of her disclosure of her pregnancy one week prior to termination.

At trial, the city asked the court to instruct the jury that if the city had both discriminatory and non-discriminatory reasons for termination, the city would not be liable if the legitimate reason – *i.e.* Harris' performance problems - alone was sufficient to justify termination. The court denied the request and instead instructed the jury that the city was liable for discrimination if Harris' pregnancy was a motivating reason/factor for her termination. The jury found in favor of Harris and awarded her nearly $600,000 in damages and attorney's fees.

The court of appeal reversed and sent the case back for re-trial. The court held that, while the at-issue jury instruction did not expressly misstate the law, it was incomplete because it did not provide the city with a complete defense if the jury found that the city would have terminated Harris for poor performance even if she had not been pregnant. The court instructed the lower court to issue the city's requested jury instruction. Nevertheless, on re-trial, Harris will be allowed to argue that the city acted with discriminatory animus despite the significant evidence of performance problems, and that such animus unlawfully motivated its termination decision.

Had the city been unable to proffer objective and significant evidence of Harris' performance problems, it is quite likely that the court of appeal would not have disturbed the jury's verdict. This case is a further reminder of the importance of active and contemporaneous management of employee performance problems.

NEWS BITES

Florida Employee May Proceed With Claim To Recover Unrecorded Overtime

In *Frew v. Tolt Technical Services Group LLC*, a federal district court in Florida ruled that an hourly employee who failed to record all of his overtime could nevertheless proceed to trial on a claim to recover the unrecorded time. Steven Frew, a retail store technician, regularly recorded 40-45 hours of work per week although he claims to have actually worked 45-55 hours per week. Frew claimed that he did not record the extra time on his timesheets to avoid criticism from management about inefficiency. Frew's employer argued that Frew's timesheets should control and he should not be able to recover overtime compensation for unrecorded hours. Frew countered that, because his employer allegedly had a practice of reviewing his and other employees' cell phone usage and GPS data regarding their use of company vehicles, his employer knew or should have known that Frew was working in excess of the hours recorded on his timesheets. The court refused to dismiss the case and allowed it to proceed to trial, finding that there was a factual dispute over what Frew's employer knew or should have known.

This ruling is a reminder that employers must be mindful of and promptly address apparent discrepancies between recorded and actual work hours.

Employer's Policy Limiting Employee Contact With Media Violated NLRA

In its Trump Marina Associates decision, the National Labor Relations Board ("NLRB") recently concluded that an employer violated the National Labor Relations Act ("NLRA") when it maintained and enforced rules restricting employees from speaking to the media about concerted activities, and interrogated an employee about violation of such rules.

Trump Marina Associates operates an Atlantic City casino. An Administrative Law Judge ("ALJ") ruled that Trump violated the NLRA when it disciplined employee Mario Spina, an open union supporter, in connection with a union representation election at the casino. Thereafter, Spina was quoted in a union publication to the effect that the ALJ issued the correct ruling and that Trump had discriminated against him. The casino learned of the quote and led an investigation into whether Spina violated the casino's media policy, which provided that only certain individuals were authorized to speak to the media. Spina was then questioned by casino management. The ALJ found, and the NLRB agreed, that Trump's policy against speaking to the media, and its subsequent interrogation, violated the NLRA and the casino was ordered to cease and desist such practices.

Employers should note that, although this dispute involved union organizing efforts, the concerted activities prong of the NLRA applies in non-union environments as well.

Court Rejects Religious Discrimination Claims Related To Sabbath Observance

In *Waltzer v. Triumph Apparel Corp.*, a New York-based Jewish employee, Marilyn Waltzer, requested an early departure from work on Fridays so that she could arrive home in time to observe the Jewish Sabbath. Waltzer's employer, Triumph Apparel, offered her a 3 pm Friday departure, which Waltzer rejected as unreasonable. Waltzer misled her employer by stating that she needed a 1 pm departure so as to mentally and otherwise prepare for the Sabbath, when in fact she wanted the 1 pm departure because she spent her weekends in Pennsylvania and needed the extra time for the drive. Triumph reaffirmed the 3 pm departure offer, or alternatively a four day workweek at a reduced salary, to accommodate Waltzer's Sabbath observance. When she rejected these accommodations, Triumph terminated her employment, and she sued under federal and state law for religious discrimination. A New York federal district court ruled that Waltzer had not established that she sincerely believed she needed to leave work before 3 pm to observe her religion. In any event, the court found that Triumph offered reasonable accommodations to Waltzer.

California's "Kin Care" Law Does Not Apply To Uncapped Sick Leave Plans

The California Supreme Court held that California Labor Code Section 233 ("Kin Care"), which allows employees to use their accrued sick leave to care for sick family members, does not apply to uncapped sick leave policies. In *McCarther v. Pacific Telesis Group*, Pacific Telesis maintained a sick leave policy where an employee could take paid sick leave five consecutive days in a seven-day period. This entitlement renewed each time the employee returned to work, with no cap. The court held that the Kin Care law had been written to apply only to those employers that provided measurable, banked amounts of sick leave and not to policies such as Pacific Telesis Group's that lacked specific accruals or a cap.

Gardener Engaged Twice In One Year by Restaurant Was An Independent Contractor, Not Employee

In *Lara v. Worker's Compensation Appeal Board*, a restaurant engaged Jose Lara on two occasions to perform gardening work. On the second occasion, Lara fell from a roof and sustained injuries. He filed a claim for worker's compensation, which was granted based on a conclusion that Lara was employed by the restaurant. The Worker's Compensation Appeals Board reversed that decision, and a California court of appeal affirmed the Board's reversal, holding that Lara was an independent contractor and therefore ineligible for worker's compensation benefits. Both the Board and the court relied upon the following: (i) Lara maintained an independent business as a gardener; (ii) he had several customers; (iii) he performed services for the restaurant that were not part of the restaurant's regular business; (iv) the restaurant exercised no control over the manner in which Lara performed the gardening; (v) Lara was paid on a job-by-job (and not hour-by-hour) basis; and (vi) the services were clearly episodic in nature. While the facts in *Lara* were strongly in the restaurant's favor, the case is an important reminder that businesses must carefully examine worker classification.

COBRA Subsidy Temporarily Extended

On March 2, 2010 President Obama signed a temporary extension of the COBRA subsidy. This extension continues the 65% COBRA premium subsidy through March 31, 2010. The bill expands eligibility for the COBRA subsidy to some individuals who are involuntarily terminated after they experience a qualifying event of reduction in hours. Congress is currently weighing a longer extension of the COBRA subsidy which would extend the program until December 31, 2010.
