Fenwick Employment Brief

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NLRB PROHIBITS USE OF WORK EMAIL FOR UNION ORGANIZING

The NLRB ruled in *The Guard Publishing Company, dba The Register Guard* that employers may enforce a policy that prohibits employees from using employer email for "non-job-related solicitations" (including union organizing efforts), so long as they do so in a non-discriminatory manner. The Register Guard, a newspaper, gave an employee two warnings for sending emails supporting a union. The employee filed an NLRB complaint alleging that the newspaper's policy was unlawful, and that, in practice, the newspaper allowed employees to send non-work related emails. The Board found no evidence that the newspaper permitted emails urging support for other groups or organizations, although the newspaper did permit personal use of the email system for birth announcements, ticket offers and the like. Such personal use did not translate into a license to use the newspaper's email system to express union support. To avoid claims of discriminatory enforcement, employers must uniformly enforce the policy and prohibit email solicitation for any group or organization such as charities and/or political causes.

UNION MUST BE ALLOWED TO DISTRIBUTE HANDBILLS IN SHOPPING MALL

Asked by the NLRB to opine whether California law allows a mall owner to restrict a union from distributing handbills calling for a consumer boycott of a mall tenant, the California Supreme Court held that such a restriction violated the state Constitution's free speech clause because a mall is a "public forum." In *Fashion Valley Mall LLC v. NLRB*, the court rejected the mall owner's argument that its narrow ban on "boycott" activity (while permitting "expressive activity") should pass legal muster. The court opined that, while the mall owner may place reasonable limits on the time, manner and place of "speech," the owner must remain "content" and "viewpoint" neutral as to the substance of the communication. Conversely, private-sector employers that do not open their property to public use are generally not covered by the First Amendment free speech clause. However, employers are cautioned that federal and California law afford employees (union and non-union alike) the right to discuss wages and other terms and conditions of work.

EMPLOYER LIABLE FOR RETALIATION AND FAILURE TO ENGAGE IN INTERACTIVE PROCESS

In an unfavorable decision for employers, a California court of appeal affirmed a jury verdict (including $1 million in punitive damages) in favor of an employee for retaliation and the employer's failure to engage in the interactive process over reasonable accommodations. In *Wysinger v. Automobile Club of Southern California*, the plaintiff had a heart condition and arthritis. He repeatedly asked management and human resources for a transfer to reduce his commute time, which requests the employer allegedly ignored.

After plaintiff complained about a new pay plan, his supervisor allegedly responded "it doesn't matter what you did for this company for 30 years… You can die at your desk. We'll replace you tomorrow." Plaintiff then filed a complaint with the EEOC, after which the employer allegedly treated him coldly, issued unfavorable job evaluations and rejected him for a promotion opportunity. On these facts, the court upheld the retaliation verdict and the employer's liability for failure to engage in the interactive process. The court explained that unlike the federal ADA (which does not create separate liability for failure to engage in the interactive process), California's FEHA allows an independent cause of action for violation of the obligation to engage in a good faith interactive process. Accordingly, even if a reasonable accommodation does not seem realistic, California employers nonetheless must engage in the interactive process in good faith.

NEWS BITES

Employee's Release Does Not Extend to USERRA Rights

In *Perez v. Uline*, a California court of appeal allowed a plaintiff to pursue a claim for violation of the federal Uniformed Services Employment Reemployment Rights Acts even after he signed a severance agreement containing a general release. Upon return from military duty, Perez was laid off by Uline and accepted the offered severance in return for a general release. The court explained that USERRA does not permit employees to waive their rights (unless the waiver is supervised by a court or the federal Department of Labor). However, the court ruled that the release was valid as to the other claims arising out of Perez's employment, including his claims for defamation and overtime compensation.

New Legal Standard for ADA Cases

Reversing earlier case law, the federal Ninth Circuit Court of Appeals established a new standard for disability cases requiring the employee to prove that s/he is qualified to perform the essential functions of the job with or without reasonable accommodation. Further, the employer may establish business necessity for its refusal to hire based upon the employee's inability to safely perform the job. In *Bates v. United Parcel Service Inc.*, the trial court held that UPS violated the ADA by refusing to hire deaf applicants for driver positions. Remanding the case for further consideration under the new standard, a full panel of the Ninth Circuit ruled that plaintiff must prove that he is qualified to safely drive the UPS package-delivery vehicle, and that UPS may be allowed to put forth evidence to justify its safety standard as a business necessity.

Court Refuses to Enforce Arbitration Clause in Employee Handbook

In *Mitri v. Arnel Management Co*, the employer attempted to compel arbitration of a sexual harassment lawsuit based upon an arbitration provision in an employee handbook. A California court of appeal refused to compel arbitration where the handbook acknowledgment form only acknowledged that employee "read and understood" the handbook. The court explained that the acknowledgment form lacked any words of "agreement" to arbitrate. Further, the handbook's arbitration provision contemplated a separate, formal arbitration agreement, which did not exist.

Employee Wrongfully Terminated for Complaining about Fraud

In *Casella v. SouthWest Dealer Services, Inc.*, a California court of appeal affirmed a jury verdict for wrongful termination in violation of public policy against a company selling extended warranties. Plaintiff had complained to management that retail customers were quoted an inflated monthly payment for the automobile in order to entice customers to purchase an extended warranty at supposedly low (but inaccurate) prices. The court held that such an internal complaint about a fraud on the public violated California public policy.

Court Limits Claim for Wage Penalties to One Year

In *McCoy v. Superior Court*, the California court of appeal held that claims to recover California Labor Code waiting time penalties are subject to a one-year statute of limitation. Plaintiff brought a class-action lawsuit against a provider of temporary employees, alleging that the employer failed to timely pay final wages on completion of temporary work assignments. Although the employer had paid all wages owed, plaintiff sought penalties for late payments. The court ruled that plaintiff was limited to seeking penalties for the one-year period before the lawsuit was filed.