Fenwick Employment Brief

April 15, 2013 Daniel J. McCoy 650.335.7897
Sheeva J. Ghassemi-Vanni 650.335.7191

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FENWICK & WEST LLP

Upcoming Breakfast Briefing: Drafting and Enforcing Commission Plans in California

May 7 (Mountain View, 7:30-10:00 a.m.)
May 8 (San Francisco, 9:30-11:00 a.m.)

Please join us for a complimentary breakfast briefing, during which we will review legal pitfalls and best practices with commission plans and agreements, including common drafting mistakes, key provisions that should be included in every plan, and how plans impact exempt classifications.

Click here for more information on the Mountain View session.

Click here for more information on the San Francisco session.

CALIFORNIA COURT ADDRESSES ADMISSIBILITY OF "ME TOO" EVIDENCE OF DISCRIMINATION

In *Hatai v. Dept. of Transportation*, a California court of appeal upheld a trial court's decision to exclude "me too" evidence of discrimination from individuals outside of the plaintiff's protected class, but in doing so highlighted when such evidence will be admissible in a discrimination case.

Kenneth Hatai was a Senior Traffic Engineer of Asian heritage working at Caltrans in Los Angeles. His supervisor, Sameer Haddadeen, is of Arab ancestry. Hatai and his co-workers disliked Haddadeen's management style, claiming he made employees suspicious of one another and wrongfully accused them of misconduct such as falsifying time cards. Karem Al-Chokhachi (an employee of Arab descent) was also offended when Haddadeen allegedly told him in Arabic that they should be friends and "stick together."

Hatai, Al-Chokhachi, and other employees complained to Caltrans, accusing Haddadeen of discrimination and harassment based on race and national origin. Caltrans investigated, but ultimately found no legal violation. Hatai complained multiple times about Haddadeen, but never to the effect that Haddadeen discriminated against him because of his Asian heritage (a point that he repeatedly conceded in litigation).

When Hatai's performance faltered, Haddadeen placed him on a written warning documenting eleven examples of his insubordination and failure to meet deadlines. Hatai responded with legal claims against Caltrans and Haddadeen for discrimination and harassment. Hatai did not allege that Haddadeen discriminated against all non-Arabs; rather, he alleged discrimination against Hatai due to his Asian heritage.

The defendants moved to exclude "me too" evidence from other employees (both Asian and non-Asian) who claimed that Haddadeen discriminated against them. In response, Hatai sought to reposition the case as one of Arab favoritism rather than anti-Asian discrimination. The trial court rejected Hatai's theory and excluded the "me too" evidence.

While the court excluded the evidence in this particular case, it observed that such evidence will be admissible in other contexts, for example, when there is favoritism of one protected class that has an adverse effect on multiple related protected classes (e.g., multiple national origins). When such evidence is admissible, it can and likely will significantly expand discovery and make for a more complex case.

NEWS BITES

Employee Social Media Account Ownership Still Uncertain

Who owns an employee's social media account when it is used to promote the employer's business? This is a hot-button topic and developing area of employment law, and a Pennsylvania federal court recently shed more light on this issue.

In *Eagle v. Morgan*, Linda Eagle was an executive at Edcomm, Inc. The company encouraged employees to create LinkedIn accounts and to use them to promote

the business. Eagle created an account using her Edcomm email address and gave her password to a few Edcomm employees to enable them to update her account and respond to inquiries. Edcomm then terminated Eagle. Thereafter, Edcomm accessed Eagle's account, changed her password, and replaced most (but not all) of her information with that of the new interim CEO. Eagle could not access her account, and Google and LinkedIn searches for "Linda Eagle" directed the user to Eagle's prior LinkedIn account bearing the interim CEO's name and partial information. Less than a month after her termination, LinkedIn restored account access to Eagle.

Eagle sued Edcomm and related parties for invasion of privacy, conversion, and other claims. The court found Edcomm liable for unauthorized use of name, invasion of privacy, and misappropriation of publicity, but awarded no damages. According to the court, Eagle did not prove the fact of damages with reasonable certainty: she did not point to any actual or potential lost business, and the method she used to calculate damages was likewise speculative and hypothetical.

Social media account ownership is an unsettled area of the law, and more courts will need to weigh in on the issue before employees can gain greater clarity about ownership rights. A similar case involving an ownership dispute over a Twitter account (*PhoneDog, LLC v. Kravitz)* settled before the court could address the merits. In the meantime, employers that wish to have control over and ownership of social media accounts maintained by their employees should establish such an understanding and agreement with the employee through a clear written policy or agreement, and consult legal counsel about the interplay between such writings and applicable law.

Verbal Disclosure Of Private Facts Actionable

A California appellate court expanded the basis for a public disclosure of private facts claim in *Ignat v. Yum! Brands, Inc.*

Melissa Ignat worked in the real estate title department at Yum! Brands, Inc. – the parent company of fast food favorites such as KFC, Taco Bell, and Pizza Hut. She periodically missed work due to her bipolar disorder. During a medical leave that Ignat took to deal with the disorder, her supervisor told co-workers that Ignat was bipolar. Following this disclosure, Ignat's coworkers allegedly shunned and ostracized her. Yum! eventually terminated Ignat, and she sued for invasion of privacy based on public disclosure of private facts.

The trial court dismissed the case on the ground that Ignat's cause of action required written disclosure of private facts, which did not occur. A California appellate court disagreed, quoting a 1950 case stating that verbal disclosure of a private matter "may be as rapid as the wagging tongue of gossip and as devastating as the printed page …." The court held that, in the modern era, there should be no distinction between verbal and written disclosure for purposes of a publication of private facts privacy claim; this distinction is "better suited to an era when the town crier was the principal purveyor of news."

Employee Asked To Wear French Maid's Costume Not Sexual Harassment

In *Westendorf v. West Coast Contractors of Nevada, Inc.*, the Ninth Circuit upheld the dismissal of a sexual harassment complaint, despite offensive comments made by plaintiff's supervisor and coworkers, including a request that she wear a maid's costume at work.

Jennifer Westendorf was a project manager assistant at West Coast Contractors (a construction contractor) for about five months. At the beginning of her employment, her supervisor (Dan Joslyn) called her tasks "girly work" and then apologized. Once per week, Westendorf worked in a trailer at a construction site where employee Patrick Ellis was stationed. Joslyn also supervised Ellis. Over the course of a few months, and on four or so occasions, Ellis made a few comments to Westendorf regarding the size of a coworker's breasts, women's use of tampons, and multiple orgasms. He also told her she needed to clean the trailer while wearing a French maid's costume and said "f*** you" to her several times. Joslyn participated in the discussion about a coworker's breasts and laughed at Ellis's jokes. After Westendorf complained about the behavior, she was terminated.

The court held that the alleged harassment was not severe or pervasive and thus could not support a sexual harassment claim, because there were only about a half dozen incidents (of the clearly sex or gender-based comments), all involving verbal comments, over a five-month period. Thus, the sexual harassment claim was dismissed, but her retaliation claim survived.

This case highlights a very important distinction between harassment and retaliation claims. Westendorf did not have enough evidence to support a harassment claim. Yet for a retaliation claim, she need only show protected activity (i.e., a good faith complaint about harassment, not that the conduct actually constituted actionable sexual harassment) and a causal connection between that activity and her eventual termination. This is a reminder for employers that retaliation claims can often survive even when the underlying harassment cannot be proven.

Revised I-9 Form

On March 8, 2013, United States Immigration and Citizenship Services released a revised I-9 form. The revised form has clearer instructions and additional data fields, among other changes. Employers must use the revised form starting May 8, 2013. It can be found here or at http://www.uscis.gov/files/form/i-9.pdf.

San Jose Minimum Wage Ordinance

San Jose's Minimum Wage Ordinance, effective March 11, 2013, requires employers to pay employees at least $10.00 per hour for work performed within the city. This amount may increase annually based on the cost of living. San Francisco also increased its minimum wage this year from $10.24 to $10.55.

Computer Software Exemption Salary Requirement

The salary requirement for California's computer software employee exemption increased this year, effective January 1, 2013. Now employees meeting this exemption must be paid at least $39.90 per hour or $83,132.93 per year for full-time employees (not less than $6,927.75 per month). The 2013 wage increased about $1.00 per hour and $2,000.00 per year respectively from 2012.

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