Fenwick Employment Brief

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JURY TO DECIDE ADEQUACY OF FMLA RECERTIFICATION NOTICE DELIVERED BY EMAIL

A recent case allowing an employee to take claims under the federal Family and Medical Leave Act ("FMLA") to trial underscores the importance of not simply following rote notice procedures, but ensuring such communications are — in fact — effective.

In *Gardner v. Detroit Entertainment, LLC*, plaintiff Summer Gardner, a former casino employee, sued her employer for FMLA interference. Due to a degenerative spinal disorder, Gardner was unable to work after being on her feet for several days in a row and was approved for periods of intermittent leave. During the period in question, her medical provider anticipated that she would have four such episodes in a month. In September 2011, however, Gardner was absent on intermittent FMLA leave on nine occasions, including every Sunday. Due to this deviation from the then-current leave certification, the casino's third-party leave administrator sent Gardner an email requesting that she recertify the basis for her leave. When the administrator did not receive the recertification, it sent another letter via email, this time advising Gardner that her intermittent leave was denied as of the date of the recertification request. The casino treated all absences after that date, including those Gardner had identified as FMLA leave, as unauthorized and ultimately terminated Gardner for excessive absenteeism.

Resolution of the employer's motion for summary judgment turned on adequacy of the administrator's re-certification notice to the employee. The casino argued that applicable regulations permit oral notice, such that its email notice was "more than required under the regulations to provide adequate notice." It also offered circumstantial evidence that Gardner had approved notice via email. In contrast, Gardner denied she opened the email or received adequate notice of the recertification request. She further denied she ever approved FMLA notice via email and offered evidence that prior FMLA communications had been conducted through postal mail consistent with her previous request.

In denying the employer's motion, the Michigan federal district court opined on the difference between email and oral notification: "oral notice, a person-to-person communication, guarantees actual notice to the employee. The transmitting of an email, in the absence of any proof that the email had been opened and actually received, can only amount to proof of constructive notice." The court found the distinction "particularly significant" where an employee had requested correspondence by postal mail and not email, and concluded that a jury must decide whether Gardner had made such a request.

This decision is an important reminder that FMLA administration practices should provide employees with actual, not just presumed or constructive, notice. Here, the court questioned the adequacy of email delivery absent proof of receipt. Just three months ago, in *Lupyan v. Corinthian College Inc.*, the United States Court of Appeals for the Third Circuit questioned the adequacy of notice via postal mail without return receipt or a tracking number. In both *Gardner* and *Lupyan*, employees withstood their employer's summary judgment motion by contesting the adequacy or efficacy of the employer's FMLA notice, and neither employer had definitive proof of receipt. Compounding the situation, it appears neither employer attempted to engage its employee through personal contact, which can be a great approach to avoid or clear up confusion regarding a FMLA leave. Had either employer reached out to the employee live — in person or via phone — it could have proactively addressed the notice issue before the employee made a federal case (literally) of the situation.

"EGREGIOUS" INSUBORDINATE FACEBOOK POST NOT PROTECTED BY NLRA

The National Labor Relations Board ("NLRB") upheld a San Francisco nonprofit's decision not to rehire two

employees due to their Facebook conversation. In *Richmond District Neighborhood Center*, the nonprofit ran an after-school center for high school students (the "Center"). In May 2012, the Center held a meeting in which personnel anonymously identified the pros and cons of working at the Center; the meeting resulted in a significant number of concerns to management. Shortly thereafter, two of the employees in attendance thought that management was not taking those concerns seriously and tried to meet with their supervisor—to no avail.

The Center employed its personnel on an annual basis, with employment ending at the conclusion of the school year and the Center re-hiring much of the same personnel prior to the new school year according to its needs and funding. As part of that process, the Center offered the same two employees re-employment for the next year, although one was demoted due to a poor performance review. The employees then engaged in a Facebook conversation that advocated insubordinate acts including: refusing to obtain required permission before organizing youth activities, disregarding specific school-district rules, neglecting their duties and jeopardizing the Center's future. Another employee forwarded the conversation to the Center's management, which withdrew the employees' re-employment offers.

The National Labor Relations Act (the "Act") protects employees' rights to engage in concerted activity for their mutual benefit and aid. An employer cannot discipline an employee for having engaged in activity protected under the Act. The NLRB has broadly recognized protection in social media activities, recently extending the Act's protections in the Facebook context to approval of commentary critical of an employer and an employee's profane tirade.

Here, however, the NLRB sided with the employer. The NLRB concluded "the pervasive advocacy of insubordination in the Facebook posts, comprised of numerous detailed descriptions of specific insubordinate acts, constituted conduct objectively so egregious as to lose the Act's protection and render [the two employees] unfit for further service." The NLRB rejected the argument that, considered against the background of the May 2012 meeting and the employees' record showing no history of insubordination, the conversation could not reasonably be viewed as proposing insubordinate conduct. Rather, given "the magnitude and detail of insubordinate activities advocated," the Center was reasonably concerned the employees would act on their plans. The NLRB observed that the Center "was not obligated to wait for the employees to follow through on the misconduct they advocated."

While encouraging, the decision does not provide unfettered discretion to discipline employees for online activities that are critical of an employer or seemingly propose insubordinate activity. Employers must use great care in responding to such activity and are advised to consult counsel before taking any action.

NEWS BITES

Amidst Widespread Scrutiny, NLRB Reaffirms D.R. Horton and Invalidates Arbitral Collective Action Waivers

Bucking the jurisprudence of nearly 40 federal and state courts, in *Murphy Oil USA, Inc.*, the National Labor Relations Board ("NLRB") revisited—and a majority reaffirmed—the rationale in its *D.R. Horton* decision. In *D.R. Horton*, the NLRB found that mandatory, pre-employment arbitral waivers of class, collection and joint claims regarding wages, hours and working conditions violated "concerted activity" protections under the National Labor Relations Act. *See* February 2012 FEB. That decision has been widely criticized in federal and state courts. At least one California appellate court expressly rejected the NLRB's rationale in *D.R. Horton*. *See* June 2012 FEB. Indeed, on appeal from the NLRB's *D.R. Horton* decision, the United States Court of Appeals for the Fifth Circuit similarly rejected the rationale and refused to enforce the NLRB's order requiring D.R. Horton to rescind the waiver. *See* December 2013 FEB.

Murphy Oil includes a strongly-worded dissent and a scathing commentary on the decision that lays the groundwork for future challenges. NLRB member Harry I. Johnson, III characterizes the majority's decision as an "unfortunate example of a Federal agency refusing to follow the clear instructions of our nation's Supreme Court on the interpretation of the statute entrusted to our charge, and compounding that error by rejecting the Supreme Court's clear

instructions on how to interpret the Federal Arbitration Act, a statute where the [NLRB] possesses no special authority or expertise." He goes on to accuse the majority of "effectively ignoring the opinions in nearly 40 Federal and State courts" and "choos[ing] to double down on a mistake that, by now, is blatantly apparent."

Given the volume of cases pending before the NLRB on this same issue and the polarized approaches of the NLRB and federal and state courts, the *Murphy Oil* decision is not likely to be the last word on this issue. Stay tuned for further developments.

Following Client Directive Lands Security Company in EEOC Cross-Hairs

A Florida-based security company removed Alberto Tarud-Saieh from his $8-an-hour security position, just days after starting the post, due to a client complaint. Specifically, the president of the community association where the officer was stationed called the company and stated, "The company is a joke. You sent me a one-armed security guard." Tarud-Saieh had previously lost an arm in a car accident.

The Equal Employment Opportunity Commission sued, and a jury found that the company violated the federal Americans with Disabilities Act for making an employment decision based on the client's discriminatory stereotype. The jury awarded the officer nearly $36,000, and the EEOC is still pursuing an injunction and other equitable relief including court-mandated training. This decision is a good reminder that employers cannot blindly follow client directives in making employment decisions: a client's unlawful bias (or uninformed stereotype) will taint the employer's decision, exposing the employer (not the client) to discrimination claims.

Unpaid Interns Settle Class Action for $5.85 Million

After three settlement conferences and months of negotiations, class action plaintiffs have requested that a New York federal district court preliminarily approve a $5.85 million settlement of their claims against Condé Nast. One of a spate of actions against large media companies, the plaintiffs sought unpaid wages and related damages on behalf of unpaid interns engaged by the company since 2010. According to court papers, the individual settlement payouts are expected to be $700-$1,900 per class member, depending on the nature of the internship position, whether a prior stipend was received, and the number of claims made against the settlement proceeds. Also proposed are attorneys fees' and costs of about $660,000 (or 11% of the total proceeds) and $10,000 incentive payments to each of the named plaintiffs.

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