Fenwick Employment Brief

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COURT RULES THAT EMPLOYER VIOLATED NLRA BY PUBLISHING POLICY ON CONFIDENTIALITY

In *Cintas Corp. v. NLRB*, the Court of Appeals for the District of Columbia Circuit ruled that an employer committed an unfair labor practice under the National Labor Relations Act (NLRA) by simply publishing its policy on confidentiality, even though the rule did not expressly forbid protected discussions nor was there evidence that the rule was used to prohibit protected activity. In this case, Cintas sought to maintain confidential information through an employee handbook rule that prohibited employees from disclosing "the confidentiality of any information concerning the company, its business plan, its partners [employees] … accounting and financial matters."
A separate disciplinary rule stated that an employee could be punished for violating a "confidence" or releasing confidential information without authorization.

The union filed unfair labor practice charges with the NLRB alleging that the company policy could be applied in a coercive manner interfering with the employees' right to discuss the terms and conditions of their employment with others. The company argued the language in the confidentiality policy did not explicitly prohibit employees from engaging in legally protected activity. The NLRB found in favor of the union.

On appeal, the court held that the mere maintenance of an overly broad rule chilled the exercise of Section 7 rights to engage in mutual aid and protection. Additionally, the court cited the fact that the company had made no effort in its rule to distinguish Section 7 protected behavior from violations of its company confidentiality policy, and therefore an employee could reasonably construe the policy to prohibit activity protected by the Act.

This decision is an important reminder to employers that, while protecting the confidentiality of proprietary company information is critical, policies protecting that information must be worded to avoid any ambiguity that might interfere with employees' protected rights to discuss work conditions under the NLRA.

THREAT OF VIOLENCE BY WHISTLEBLOWER WAS REASONABLE JUSTIFICATION FOR TERMINATION

While violence in the workplace raises compelling issues for employers, a company must balance the rights of individual employees under state and federal labor laws in addressing such issues. In *Morriss v. LG&E Power Services*, Morriss believed that technicians were manipulating and editing emissions data and reported his findings to the plant manager and state environmental board. When Morriss was later arrested for assaulting his wife (who was a co-worker), other employees expressed their concern about his increasingly erratic and possibly violent behavior. After a paid leave of absence to seek counseling, Morriss signed a "Return to Work" agreement stating that he would not permit his personal issues to interfere with work. However, his wife obtained a subsequent restraining order for his forcing his way into his wife's home and assaulting her. He was terminated for violating his return to work agreement.

Morriss alleged that he was terminated for reporting that technicians were manipulating and editing emissions data. However, the Administrative Review Board (ARB) found that the evidence supported LG&E's concern about Morriss' threat to his wife and other co-workers, and determined that his violence-related termination was not a pretext for discrimination.

The ARB said that the burden was not on the employer to show that it thought Morriss was a danger to the workplace. Rather, the burden was on Morriss to show that his employer did not genuinely believe that he was a threat and therefore acted in retaliation for his protected activity. The ARB found that none of the evidence presented was directly linked to Morriss' complaints of emissions data tampering to his termination.

COURT HOLDS QUESTIONABLE IMMIGRATION STATUS NOT A VALID DEFENSE WHERE PRETEXT FOR UNLAWFUL TERMINATION

In *Incalza v. Fendi North America, Inc.*, Ninth Circuit Court of Appeals held that a retailer could not use the Immigration Reform and Control Act (IRCA) to defend its unjust firing of a manager under California law because it had options other than firing the employee for being an undocumented worker. The court said the IRCA justification was merely pretext for an unlawful termination and confirmed a jury award of $1.08 million.

Incalza, an Italian citizen, worked for Fendi in both its New York City and Beverly Hills stores for 13 years on visas obtained and renewed with the assistance of Fendi. When Incalza's visa ultimately expired, Fendi fired Incalza telling him that nothing could be done about his visa problems. Incalza asked to take a leave of absence because he was about to marry a U.S. citizen and thus would be eligible for a green card. The company refused.

The court held that it was possible for Fendi to obey federal law because there were lawful remedies short of discharge. Looking to the legislative history and congressional intent for IRCA, the court explained that IRCA does not require employers to fire workers who are unauthorized, but permits employers to suspend or grant unpaid leave while an employee corrects the problem with his documentation.

This case underscores the fact that the legality of an employees' immigration status does not automatically justify termination and alternative remedies need to be considered.

CALIFORNIA COURT RULES UNDOCUMENTED WORKERS MAY SUE FOR FAILURE TO PAY PREVAILING WAGE

A California Court of Appeal held that the Immigration Reform and Control Act (IRCA) and a 2002 Supreme Court ruling prohibiting back pay awards to illegal aliens for violations of labor laws do not preclude undocumented workers from suing an employer for failure to pay prevailing wage rates on public works projects. In *Reyes v. Van Elk Ltd.*, four employees who performed welding work for Van Elk on construction projects in Los Angeles County filed suit against Van Elk for failure to pay the prevailing wage as required by California law on public works projects. Van Elk moved to have the case dismissed because the plaintiffs were undocumented workers and thus did not have standing to bring suit.

While recognizing that IRCA established an employment verification system to prevent employment to people not authorized to work, the court stated that the employer produced no evidence that the four plaintiffs provided false work authorization documents. If the plaintiffs provided false documents, then the wage claim for unpaid wages would be disallowed by the Supreme Court's ruling in *Hoffman Plastic Compounds, Inc. v. NLRB*, the court said.

Relying on federal cases holding that IRCA did not limit remedies for wages available to undocumented workers, and that under the Fair Labor Standards Act the definition of "employee" was not limited to citizens, the Court held that the plaintiffs had standing to raise claims for prevailing wages.

NEWS BITES

San Francisco Board Of Supervisors Approves Health Care Security Ordinance

The San Francisco Board of Supervisors approved a Health Care Security Ordinance that creates a Health Access Program offering comprehensive health care services to uninsured individuals in San Francisco. The goal is to ensure that the companies who already pay for their employee's health care coverage continue to do so and to reduce the burden on San Francisco tax payers to provide health care for the uninsured.

Beginning January 1, 2008, all employers with an average of 50 or more employees must make mandatory health care expenditures to or on behalf of their covered employees. The effective date for employers with an average of 20-49 employees is April 1, 2008. This ordinance does not apply to employers with less than 20 employees.

Under this ordinance, employers with 100 or more employees must contribute at the rate of $1.76 per hour for each employee. Employers with 20-99 employees must contribute at the rate of $1.17 per hour for each employee. The contribution requirement may be met in a number of different ways: (1) payments to a third party to provide health care insurance; (2) contributions by the employer to the Health Access Program; (3) contributions to a health savings account; (4) direct reimbursement to employees for expenses incurred in the purchase of health care services; and (5) costs incurred by a covered employer in the direct delivery of health care services to its covered employees.

For additional information, the text of the ordinance and notice to employers can be found at: http://www.sfgov.org/site/olse_index.asp?id=45168.

Seventh Circuit Court Holds Timing Of Job Loss Triggered WARN Act Though Acquirer Offered Jobs

The Seventh Circuit Court of Appeals held that the closing of a manufacturing plant without advance notice to employees violated the Worker Adjustment and Retraining Notification Act (WARN), even though another firm purchased its assets and offered employment to many of the Meridian employees. However, because the formal closing of the asset sale did not occur until more than a week after Meridian employees were terminated, Meridian was obligated under WARN to notify its employees to the upcoming plant closing. Applying a literal interpretation of the statute, the court declined to apply the exception for situations where the purchaser retains a seller's employees because the employees were terminated before the sale was completed.

Worker's Pay Protest Not Protected By FLSA When Repeated To Customers

The Fair Labor Standards Act (FLSA) protects an employee's right to complain to his supervisors about receiving straight-time pay for overtime work. However, the FLSA will not protect him from discipline when an employee reports the pay issue to his employer's customers, a Mississippi federal court ruled. The court stated that not all opposition to an employer's alleged violations of law is protected against retaliation. Title VII of the 1964 Civil Rights Act requires the courts to balance the rights of employees and the legitimate business needs of the employers on a case-by-case basis applying a "rule of reason." Here, the court said, when the employee was told that the matter of his overtime pay would not be discussed any further, he could either have dropped the matter or file a complaint with the Department of Labor. The court ruled that complaining to a customer about the situation was not a "reasonable option" because the complaints undermined and disrupted the employer-customer relationship and the employee failed to show that complaining to a customer was warranted by the employer's conduct.