Fenwick Employment Brief

May 13, 2011
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EMPLOYER MAY LAWFULLY TERMINATE EMPLOYEE FOR DISABILITY-CAUSED THREATS OF VIOLENCE TOWARD COWORKERS

In *Wills v. Superior Court of Orange County*, a California appellate court considered the case of Linda Wills, a long-time employee of the Orange County Superior Court who suffers from bipolar disorder that subjects her to depressive and manic episodes. The court held that employers need not tolerate (or accommodate) an employee's threats or violence toward coworkers, even when that conduct stems from the employee's disability.

After about 8 years of employment with the Superior Court, she was assigned to a police department's lock-up facility where she was to assist in arraigning criminal suspects. Wills arrived at the facility, rang the buzzer for entry and, after several minutes, was admitted. Upon entering the lockup area, she "angrily swore and yelled" at the department employees, accused them of intentionally leaving her in the summer heat, and told an officer that she had added him and the facility assistant to her "Kill Bill" list. Wills disputed this version of events, denying she threatened to put anyone on a "Kill Bill" list and offering that she and the officer were joking. Both the officer and assistant felt threatened by Wills' demeanor and statement, however, and understood the "Kill Bill" comment to refer to a violent movie in which the main character created a list of people she intended to kill. The assistant reported the incident to her supervisor and asked whether she should obtain a restraining order. Other employees also viewed Wills' conduct as threatening. The police department reported the incident to the Superior Court and demanded that Wills not be assigned to its facility in the future.

Unbeknownst to Wills, the incident occurred during the initial phase of a severe manic episode brought on by her bipolar disorder, and she took medical leave within a few days of the events at the lock-up facility. While on leave, Wills sent a variety of communications to Superior Court employees that the recipients interpreted as threats, including:

- Sending a coworker a ringtone, which in its audio portion directed the recipient to check her messages, growing louder and angrier and ending in a "shrieking directive" containing foul language and a reference to blowing something up.

- Emailing rambling messages to several coworkers in which Wills "vented a wide array of thoughts and emotions."

Several weeks later, after the manic episode ended and Wills returned to work, the Superior Court placed her on paid administrative leave to investigate the various complaints regarding her conduct. Wills' doctor submitted a note explaining that her conduct stemmed from bipolar disorder and that Wills did not pose a danger. Nonetheless, the Superior Court terminated Wills' employment, citing various reasons including the incident at the police department and her inappropriate and threatening communications with coworkers. In response, Wills filed a charge with the Department of Fair Employment and Housing and later filed suit. Among other things, she claimed the Superior Court discriminated against her by terminating her for misconduct that stemmed from – and indeed was part and parcel of – her bipolar disorder medical condition.

The California Court of Appeal upheld the termination, rejecting Wills' claim and holding that an employer need not tolerate or accommodate an employee's disability-related threats and violence. It distinguished three decisions from the federal Ninth Circuit appeals court offered by Wills to support her position as inadequately reasoned or factually inapposite. *Gambini v. Total Renal Care* (employee did not engage in threats against coworkers even though they found her outbursts frightening), *Dark v. Curry County* (inadequately reasoned), and *Humphrey v. Memorial Hospitals Association* (inadequately reasoned). The court

expressly limited its ruling to the facts of the case – that is, to threats and violence – and expressly reserved the question of what obligations an employer may have to accommodate other forms of disability-related misconduct. The court observed that its ruling "strikes the appropriate balance between protecting employees suffering from a disability and allowing employers to protect their employees and others from threats of violence and the fear that a hostile or potentially violent employee will act on those threats."

While this decision provides welcome guidance and latitude for employers to address threats and violence in the workplace, potential ambiguities remain. What amounts to a threat or violence against a co-worker? Must an employer accommodate outbursts that generally frighten coworkers but fall short of a threat to anyone in particular (as in *Gambini*), even if other employees feel threatened by the behavior? Given the pitfalls, employers should tread lightly in this area and seek counsel when considering whether to discipline employees for disability-related conduct, even if the conduct appears threatening or violent at first blush.

OBLIGATION TO "PROVIDE" – AS OPPOSED TO "ENSURE" – BREAKS AND MEAL PERIODS UNDER CALIFORNIA LAW GAINS FURTHER TRACTION

Another California appellate court has weighed in on perhaps the most closely watched wage-and-hour question facing California employers, again holding that employers must "provide" rest breaks and meal periods to non-exempt employees, but need *not* "ensure" or force employees to take them. In *Flores v. Lamps Plus Inc.* (the "*Lamps Plus Overtime Cases*"), plaintiffs sued their former employer Lamps Plus alleging a wide variety of wage and hour violations, including violation of rest break and meal period obligations. Plaintiffs asked the court to certify the claims for class treatment. The trial court refused, and its decision was upheld on appeal because the meal period and rest claims required individualized inquiries that were not amenable to class treatment.

In reaching its decision, the court assessed the nature of an employer's obligations regarding meal periods and rest breaks, since those obligations informed the type of proof needed to establish a violation. Looking at the plain language of the applicable statutes, wage order and regulations, the court concluded that an employer's mandate is to "provide" or "authorize or permit" employees to take, and to not force employees to work through, meal periods and breaks. According to the court, "[t]he notion that an employers must ensure all employees take their meal and rest periods is utterly impractical," placing an "undue burden on employers whose employees are numerous or who . . . do not appear to remain in contact with the employer during the day."

Where an employer is required to "provide" meal periods and rest breaks, but not to "ensure" they are taken, plaintiffs seeking class certification may try to show a company policy and practice of depriving employees of meal periods and rest breaks. In the *Lamps Plus Overtime Litigation*, Plaintiffs could not do so and certification was denied. Lamps Plus established that it notified employees of their right to meal periods and rest breaks, obtained assurance from employees they would comply with the law, and disciplined employees for failing to do so. Plaintiffs' proffered evidence to the contrary merely reflected divergent experiences among the potential class members and representatives, rather than a company-wide policy or practice of depriving employees of meal periods and rest breaks. Because resolution of whether Lamps Plus violated its meal period and rest break obligations required an inquiry into each employee's experience, not amenable to class-wide proof, Plaintiffs' certification request was denied.

With several California appellate courts in the last four years reaching similar conclusions that employers must only "provide" rest breaks and meal periods (*see* *Brinker Restaurant v. S.C.*, *Brinkley v. Public Storage*, *Hernandez v. Chipotle Mexican Grill, Inc.*, and *Faulkenbury v. Boyd & Associates*, all pending before the California Supreme Court; and *Tien v. Tenet Healthcare Corporation*, review requested) and numerous federal courts agreeing, this decision is a welcome showing of continued support for a common-sense and practical approach to the meal period and rest break obligation debate. We continue to await the final word, however, from the California Supreme Court in the *Brinker* cases.

NEWS BITES

NLRB Seeks Relocation Of Boeing Work From New SC Facility To WA State

On April 20, 2011, the National Labor Relations Board ("NLRB") issued a complaint against Boeing, alleging it improperly transferred work from its unionized facility in Washington to a new, non-union facility in South Carolina in retaliation for union activity at the Washington facility. The NLRB further alleges Boeing made coercive statements to employees regarding strikes and other union activities, and seeks an order forcing Boeing to complete the work intended for the new South Carolina facility in Washington. Boeing denies the charge and, in a 10-page letter to the NLRB, contends no existing work in Washington was transferred to North Carolina and no union employees in Washington lost jobs, and asserts that the NLRB, through misquotations and mischaracterizations, has done "a grave disservice" to Boeing and its executives, shareholders, and employees. The NLRB recently responded in a short letter and released a public statement indicating "[t]here is nothing remarkable or unprecedented about the complaint" that was issued after the NLRB's thorough investigation, careful review, and invitation to the parties to present their cases and discuss possible resolution. The complaint is set for hearing on June 14.

Until then, it is likely the claims will continue to be the subject of much – and very public – discussion, but not just between Boeing and the NLRB. A simple online search for the terms "Boeing" and "NLRB" reveals numerous state governments, businesses, unions, and politicians reeling over the complaint and subsequent commentary. Some, including the International Association of Machinists and Aerospace Workers that originally complained about Boeing's practices, have touted the importance of the complaint and fighting alleged union-busting tactics. Others do not agree. For instance, the Attorneys General for eight states have asked the NLRB to withdraw the complaint, calling it an "assault" on an employee's right to work. The Committee on Education and the Workforce for the U.S. House of Representatives appears to have taken interest in the complaint, having commenced an inquiry into the NLRB's actions and requested information about the allegations that Boeing transferred work to South Carolina where, apparently, no unionized employees lost jobs or suffered financially due to Boeing's establishment of the new facility.

Employee Lacking Required Security Clearance May Proceed With Discrimination Claim

In *Zeinali v. Raytheon Company*, plaintiff Hossein Zeinali alleged that his former employer, Raytheon Company, unlawfully discriminated against him based on his race and national origin when it allegedly fired him for failing to obtain a "Secret" level security clearance. Raytheon hired Zeinali as an engineer in 2002, but continued employment was condition upon him obtaining "Secret" clearance. In 2006, after four years of employment, Zeinali's clearance was denied; Raytheon fired him, citing several reasons with the clearance denial as the primary one. In his lawsuit, Zeinali claimed Raytheon retained two non-Iranian engineers who lacked security clearance while he, an Iranian, was fired. The California Court of Appeal found that this evidence called into question both whether the security clearance was a bona fide requirement and whether Raytheon's main reason for terminating him was pretextual, and allowed Zeinali to proceed to trial on his claims.

Refusal To Re-Hire Not Retaliatory In Light Of Erratic Behavior And Threats

In an unpublished decision, the federal Sixth Circuit appeals court (covering Tennessee and other states) concluded that an employer had legitimate business reasons for refusing to re-hire a former director of a family resource center after her management function was outsourced. In *Lyons v. Metropolitan Government of Nashville and Davidson County*, plaintiff Jessica Lyons claimed, among other things, that the government retaliated against her for filing two complaints with the Equal Employment Opportunity Commission ("EEOC") when it twice failed to re-hire her as a guidance counselor in the months following her layoff. While the decisions not to re-hire Lyons followed closely in time after Lyons's EEOC charges, the court upheld the government's legitimate business reasons for the decisions: (1) Lyons had been "threatening in her behavior and was making

questionable statements about the school system and its employees" and (2) Lyons told her therapist that she "felt like blowing up the school" (which statement was immediately relayed to the school and the government).

WA Employee Entitled To Trial On Arbitration Opt-Out

A Washington appellate court has allowed a former Macy's employee to proceed to trial on the issue of whether she opted out of Macy's arbitration program. In *Neuson v. Macy's Department Stores Inc.*, Anjelia Neuson alleged Macy's discriminated and retaliated against her and wrongfully terminated her employment after she returned to work from her medical leave stemming from a workplace injury. Macy's moved to compel arbitration of Neuson's claims, citing its four-step resolution process, Solutions InSTORE, that culminated in binding arbitration. While the appellate court found the Solutions InSTORE program enforceable, it concluded that Neuson raised a triable question of fact regarding whether she had opted out of the program. Neuson claimed she signed a document refusing arbitration and denied receiving or completing any further forms after her break in service and transfer. The court noted that the issue was complicated by Macy's use of an electronic signature to confirm receipt of information without evidence that only Neuson had access to such signature.

Former Employee Sues Coworker For Defamation And Fraud

What you say in the workplace can land you in hot water outside the office, so an employee of Lucasfilm Entertainment Company Ltd. has learned. In early April 2010, the federal district court in Northern California denied Donald Bies' motion to dismiss a lawsuit against him filed by his former coworker, Tabitha Totah. Totah alleges that Bies defamed her to supervisors through, among other things, statements about her alleged sexual promiscuity and unprofessional conduct, and then defrauded her by denying he had made such statements. She further alleges she learned the truth – that Bies had lied to her – through his sworn deposition testimony, which he provided in Totah's prior lawsuit against Lucasfilm. In addition to defamation and fraud, Totah seeks damages for intentional infliction of emotional distress.