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Fenwick Employment Brief

July 19, 2004

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Private Sector Employee Cannot Sue for Wrongful Discharge Based upon Alleged Violation of "Free Speech" Right

In *Grinzi v. San Diego Hospice Corporation*, the California Court of Appeal held that a private sector employee has no First Amendment right of free speech to support a claim for wrongful discharge in violation of public policy. Joan Grinzi worked for the hospice, a private corporation. The hospice fired Grinzi for using the e-mail system for promoting an investment club that the hospice believed to be an illegal pyramid scheme. Grinzi sued the hospice alleging, among other claims, wrongful discharge in violation of her U.S. First Amendment right of free speech. The court held that the First Amendment free speech provision does not establish a public policy against terminations by private employers for speech-related activities. It ruled that the right of free speech applies only to government actions. Employers are cautioned, however, that other provisions of California and federal law protect employee speech-related activities. For example, California Labor Code § 1101 prohibits employer restrictions on employee political activities, and the federal National Labor Relations Act protects speech related to "concerted activity" by employees, *i.e.*, communications to improve wages, hours or other terms or conditions of employment.

Former Employee Allowed to Pursue Claim for Wrongful Discharge for Complaining About Fraudulent Billing Practices

Broadening the tort of wrongful discharge in violation of public policy, the California Court of Appeal held that a former employee alleging that he was discharged because he complained about fraudulent billing practices and refused to implement those practices could proceed with his suit. In *Haney v. Aramark Uniform Services, Inc.*, the state court opined that the public policy of discouraging fraud constitutes a fundamental public policy of California sufficient to support the employee's wrongful discharge claim. In an earlier case, *Foley v. Interactive Data Corporation*, the California Supreme Court held that in order to state a tort claim for wrongful discharge, the conduct at issue must impact a public concern and not just the private interests of the employer. There, the employee was allegedly discharged after notifying his employer that his new supervisor was under investigation by the FBI for embezzlement at his former employer. The court rejected the claim for wrongful discharge in violation of public policy, holding that no public policy was implicated and that Foley's disclosure of information about his supervisor to his employer served only the private interest of the employer. In contrast, Haney complained to his employer about the employer's fraudulent practice of overcharging and misleading its customers, *i.e.*, the public. The court opined that the state Penal Code makes it a crime to defraud any person of money and that accordingly Haney's refusal to participate in a crime implicated public policy sufficient to support his wrongful discharge claim. Employers should tread with caution before disciplining an employee who has complained about any fraud on the public.

Former Employee Allowed to Proceed with Fraudulent Inducement Claim

Sharp practices in negotiating the hiring package of an employee may result in an award of tort damages against the employer. In *Agosta v. Astor*, the employer owned and operated two radio stations in Southern California. The employer had a series of conversations with Agosta for an opening as general sales manager. Agosta said he wanted a position as sales manager of both stations, certain pay and benefits, and an offer in writing before he would give notice to his current employer. The employer offered Agosta a position as sales manager for only one station. Agosta rejected the offer since he was already working as an account executive at a much larger station making considerably more money. The employer verbally agreed to make him the sales manager for both stations. Agosta asked for a written offer. The employer accused Agosta of questioning his integrity. However, the employer faxed Agosta an offer that both parties signed. Agosta then gave his current employer notice of resignation. The next day, the employer presented Agosta with a written compensation plan that varied from the terms of the written offer letter. Nonetheless, Agosta signed the plan. Several days later, the employer verbally told Agosta that he was again changing the compensation terms. Agosta objected saying that he would not have changed jobs had he known Astor would renege on their deal. The employer then terminated Agosta. About a week later, the employer offered to re-hire Agosta as sales manager but to manage only a single radio station. Further, the terms related to pay and benefits were worse than the original offer that Agosta rejected. Agosta refused the offer and sued for fraud. The court held that on these facts, Agosta could proceed with his claim of fraudulent inducement, *i.e.*, by inducing him to enter into an employment contract and intentionally promising him compensation terms that the employer never intended to honor. Negotiations related to hiring are frequently the source of tort claims for fraud. Employers should exercise caution in making representations about compensation and other terms. Further, employees who have changed jobs may have "detrimentally relied" upon such representations and employers should avoid unilaterally changing the agreed upon terms.

"Reasonable" Accommodation Does Not Require Creating Special Position or Providing an Assistant to Disabled Employee

In *Watkins v. Ameripride Services*, the federal Ninth Circuit Court of Appeals held that the employer properly accommodated the employee and was not required to either create a position for him or to assign him an assistant to enable him to perform the job. John Watkins worked as a route service driver for Ameripride, delivering and picking up uniforms. He worked alone, and the job required heavy lifting. After Watkins injured his wrist, Ameripride paid him at his regular rate, and assigned him to make special deliveries and perform some telephone duties for two months. Thereafter, the company offered him a telephone position at a reduced rate of pay. There were no other vacant positions for which Watkins was qualified. Watkins rejected the offer, and sued Ameripride for failure to reasonably accommodate by not allowing him to continue making special deliveries and by not assigning him an assistant. Rejecting the claim, the court ruled that the company was only required to assign Watkins to another existing, vacant position for which he was qualified, and there were no open positions except for one handling telephone calls, which Watkins declined. Further, the employer was not required to assign a permanent assistant to accommodate Watkins. The Watkins case underscores that, where disability issues are properly handled, employers can prevail against a discrimination claim.

Wal-Mart to Appeal Class Certification Order in Sex Discrimination Case

Wal-Mart Stores, Inc., the nation's largest private employer, announced that it would appeal the order of the federal district court in Northern California approving class-action status in a sex-discrimination lawsuit. The *Betty Dukes, et al. v. Wal-Mart* class action would encompass an estimated 1.6 million current and former female employees who worked at the company's approximately 3500 stores since 1998, reportedly the largest private civil rights case in U.S. history. The plaintiffs allege that Wal-Mart's pay and promotion procedures resulted in less pay for female workers and the failure to promote qualified women. The class-action ruling was not a decision on the merits, but it raised the litigation stakes considerably by creating the prospect of an award covering the entire class and not just the named plaintiffs. In addition to appealing the class-action ruling, the company also announced a new pay structure and job classification to ensure pay equity. With increasing equal pay and failure-to-promote class action litigation, employers are forewarned to periodically review compensation and selection processes to address any possible disparities.

Hooters Ex-Manager Sentenced to Jail for Videotaping Change Room

A former manager of a Hooters restaurant in Southern California who secretly videotaped 14 female applicants changing into waitress uniforms was just sentenced to five years in state prison. Juan Aponte earlier pleaded no contest to five felony charges, including eavesdropping. California law makes it a crime to conduct surveillance or to video record in restrooms or change rooms. Aponte and the restaurant chain also face several civil lawsuits for damages filed by the affected women.

Supervisor Properly Discharged for Throwing Turkeys at Employees

Facts are sometimes stranger than fiction. John Carrillo, a former supervisor for Zacky Farms, sued his employer for retaliation after taking a medical leave of absence. Carrillo worked at Zacky's turkey farm in Fresno. In the weeks before Thanksgiving, Carrillo took a leave of absence for stress. The following February, Zacky discharged Carrillo after a number of subordinate employees complained that Carrillo was verbally abusive, shouted profanities at them, and on more than one occasion threw turkeys at them. During the trial, Carrillo admitted that he swore, used threats and threw turkeys at them to "motivate" his workers. After a 16-day jury trial in the Fresno Superior Court, the jury ruled in the employer's favor. The jury apparently agreed with the employer that Carrillo crossed the line when he threw turkeys at employees to "motivate" them. Given increased concerns about violence in the workplace, judges and juries are increasingly less tolerant of "bullying" by employees, whether such misconduct is overt or less subtle than that exhibited in this case.