Fenwick Employment Brief

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"ME TOO" SEXUAL HARASSMENT EVIDENCE ADMISSIBLE

In a troubling case for employers, a California court of appeal held in *Pantoja v. Anton* that it was prejudicial error for a trial court to exclude so-called "me too" evidence of sexual harassment of other employees.

Lorraine Pantoja, a former employee of attorney Thomas Anton and his professional corporation, sued Anton and his firm for alleged sex discrimination and sexual harassment in violation of the California Fair Employment and Housing Act. Pantoja alleged that during her employment, Anton slapped and touched her buttocks, touched her leg while offering her $200, asked for a shoulder massage and called her a "stupid bitch."

A key issue at trial was whether Pantoja could introduce evidence from other former employees who allegedly suffered similar harassment by Anton –including allegations that Anton leered at women's buttocks frequently, pulled the elastic of a female employee's bra to read the label, told the same employee to wear see-through clothing, and patted female employees on their buttocks and thighs more than once. Pantoja admitted that she did not witness the alleged "me too" evidence and thus it did not affect her work environment. The trial court initially ruled that such evidence was inadmissible character evidence, unless Pantoja "personally witnessed such acts" and the acts "adversely affected her working environment." (Generally, the rules of evidence prohibit the introduction of evidence of a person's character or trait when offered to show that the person has a propensity to act in conformance with the character evidence.) Pantoja's attorney repeatedly sought to introduce the "me too" evidence not as "character" evidence, but to show that Anton had a discriminatory intent and to rebut Anton's testimony that he never engaged in any harassing conduct. The trial court later reaffirmed its earlier ruling and determined that the evidence was not admissible to prove Anton's intent or to impeach his testimony, because the evidence neither involved events that took place while Pantoja was employed nor affected her work experience. The jury rejected Pantoja's claims, and she appealed.

A court of appeal reversed and agreed with Pantoja that the exclusion of the "me too" evidence was unfairly prejudicial. The court concluded that evidence that Anton harassed other women outside of Pantoja's presence could have assisted the jury not by showing that Anton had a propensity to harass women, but by showing he harbored a discriminatory intent or bias based on gender. Further, admission of the evidence would have allowed the jury to evaluate the credibility of Anton and other defense witnesses who stated that Anton did not use the words Pantoja claimed, did not direct profanities at Pantoja and did not have a discriminatory intent. The court stated that the probative value of the evidence was "unquestionable," and that any possible prejudicial effect of its introduction could have been mitigated by a limiting instruction to the jury.

The court's very broad view of the admissibility of "me too" evidence is alarming for employers. Not only does the decision have the potential for significantly expanding discovery in sexual harassment cases, it represents a significant hurdle to summary judgment dismissal before trial. Moreover, the introduction of "me too" evidence at trial creates a significant risk of juror confusion. Finally, this decision amplifies the importance of proactive training on preventing sexual harassment, and taking swift corrective action when harassment occurs.

NLRB FOCUSED ON EMPLOYEE SOCIAL MEDIA POSTS

In its latest decision addressing protected activity in the context of employee social media posts, the National Labor Relations Board ("NLRB") held that a New York nonprofit unlawfully terminated five employees for posting criticisms of a co-worker on Facebook.

In response to a comment from a coworker, one of the five employees posted on her Facebook page on Saturday (a non-work day) that "a coworker feels that we don't help our clients enough . . . My fellow coworkers how do u feel?" (The coworker who made the original comment appeared to have a personal dispute with at least one of the posters and was trying to get the posters terminated or at least disciplined.) The post elicited a number of responses from the four other employees about their difficult working conditions. After the coworker who made the original comment complained about the posts, the Executive Director of the nonprofit immediately terminated the five employees and informed them that the posts constituted bullying and harassment.

The NLRB issued a complaint against the employer, asserting that the terminations violated Section 8(a)(1) of the National Labor Relations Act ("NLRA"). Section 8(a)(1) of the NLRA provides that it is unlawful to "interfere with, restrain or coerce" employees in the exercise of their Section 7 rights. Among other things, Section 7 protects the rights of employees to engage in "concerted activities" for the purpose of "mutual aid or protection." **All** employees enjoy Section 7 rights whether or not they are a member of a union, and regardless of whether or not they work for a unionized enterprise.

Traditionally, the NLRB and courts have broadly interpreted the scope of Section 7. Concerted activities have been held to include any discussion that an objective observer could determine was intended to lead to group action on matters of common concern. Discussions of wages or criticisms of supervisors among employees, regardless of the reasonableness of the words used, have been held to constitute protected concerted activity. Thus, even referring to supervisors as "a-holes" has not rendered activity unprotected; activity must be so extremely intolerable as to be "abusive" before it will lose Section 7 protection.

In this case, the NLRB determined that the Facebook postings, in reaction to a coworker's criticisms of the manner in which the employees did their jobs, constituted protected activity. The judge held that it was irrelevant that the employees "were not trying to change their working conditions and that they did not communicate their concerns" to their employer, because the employees "were taking a first step towards group action to defend themselves against the accusations they could reasonably believe [the coworker] was going to make to management." The NLRB ordered the employer to reinstate the employees and make them whole for lost earnings and benefits.

Shortly after this decision, the NLRB Acting General Counsel issued a memorandum reviewing fourteen recent unfair labor practice cases involving the use of Facebook, Twitter and YouTube. In these cases, the NLRB found the following employee activities involving social media protected: negative remarks about a supervisor, criticisms of the employer's sales event (which related to concerns over sales commissions), and postings concerning the employer's tax withholding practices. The NLRB also found other practices unprotected: a news reporter's critical tweets about his editors and a local television station, complaints about not getting a raise and doing work without tips, criticisms of the employer's services, and negative remarks about the employer's mentally disabled clients. The key factor in distinguishing between protected and unprotected activity is whether an employee, in making the comments, was seeking to induce or prepare for group concerted activity, or merely engaging in an individualized gripe.

In its memorandum, the NLRB also discussed several unfair labor practice charges involving employer social media policies, and determined that portions of the policies were unlawful, in that they could reasonably be construed as prohibiting protected conduct.

These developments demonstrate that the NLRB is at the forefront of enforcing employee social media rights, in both union and non-union workplaces. In light of the new posting requirement (see below), employers should be mindful that knowledge about the NLRB as a forum for resolving disputes concerning social media is likely to increase dramatically. Employers should carefully review their social media policies and practices to ensure that they are in compliance with the requirements of the NLRA, and be cautious when disciplining or terminating employees based on social media activity.

NEWS BITES

Employers Required To Post Notices Of Labor Rights By November 14

The NLRB recently issued a rule that requires most private-sector employers, whether unionized or not, to post a notice by November 14, 2011 that informs employees of their NLRA rights. (Very small employers whose operations do not affect interstate commerce are not subject to the posting requirement.) The notice must be posted in a location where the employer typically posts workplace notices, and must also be posted on a company's intranet or internet site if personnel rules and policies are customarily posted there. Employers are not required to distribute the posting by e-mail or other electronic means.

The notice, which will be available for download from www.nlrb.gov by November 1, notifies employees of their NLRA rights, including the right to form, join and assist a labor union, to bargain collectively, to discuss terms and conditions of employment with co-workers or a union, to strike and picket and to refrain from any of these activities.

Employee Not Entitled To Reinstatement Rights After Exceeding CFRA Leave

In a decision that stresses the importance of timely and accurate CFRA notice and recordkeeping procedures, a California court, in *Rogers v. County of Los Angeles*, held that an employee who used up her 12 week allotment of CFRA leave and did not return to employment until 19 weeks after her leave began was not entitled to job reinstatement.

Katrina Rogers, a County of Los Angeles employee with 36 years of tenure, went on leave for work-related stress. Her employer promptly designated the leave as CFRA leave for a serious health condition. During the leave, the County underwent organizational changes, which included the transfer of Rogers to another department. Rogers returned from her leave 19 weeks after it began, and when she learned of the proposed transfer, became "visibly upset" and "hostile" as she felt the transfer was a "demotion" and a "slap in the face." Rogers sued the County for, among other things, a violation of her CFRA rights.

After a jury verdict in favor of Rogers for $356,000, the County appealed. The court of appeal held that Rogers could not prevail on her claim for CFRA interference because her right to reinstatement expired when the 12-week protected CFRA leave period expired. The court further held that Rogers could not prevail on her claim that she was unlawfully retaliated against for exercising her CFRA rights, as she produced no evidence to rebut the County's legitimate, non-discriminatory reason that she was transferred for business efficiency. The court of appeal reversed the trial court and directed it to enter judgment in favor of the County.

Key to the County's victory was its prompt designation of Roger's leave as CFRA leave, which caused Rogers to be unprotected after she used up her allotted 12 weeks of protected CFRA leave. Timely and consistent personnel procedures for designation of FMLA/CFRA

absences are critical to ensure that leave periods are used properly, and provide employers with options to deal with employees who exceed their protected leave.

Court Clarifies Distinctions Between Sabbatical and Vacation Policies

Under California law, accrued vacation is a form of wages, vests as work is performed, and must be paid out on termination of employment. In contrast, paid sabbatical leave is a special purpose, conditional benefit that is not a form of wages under the Labor Code, and therefore does need not be paid out upon termination of employment. The recent *Paton v. Advanced Micro Devices, Inc.* case highlights the importance of carefully drafting and implementing sabbatical leave policies.

In *Paton*, the employer's sabbatical leave program permitted full-time salaried employees to take an eight-week sabbatical leave after seven years of service. The program contained other conditions, which included meeting certain performance standards prior to taking a sabbatical. After seven years of employment, the plaintiff sought but was unable to take a sabbatical, first because business reasons prevented him from doing so, and a second time because he was placed on a performance improvement plan. After resigning, plaintiff filed a lawsuit to recover the value of the sabbatical leave.

The trial court granted summary judgment in favor of the employer, finding that the program constituted a sabbatical leave program, not a vacation policy, as a matter of law. A court of appeal disagreed and reversed, finding that the ultimate fact to be determined – the employer's purpose in establishing the sabbatical leave policy – could not be resolved without a jury trial. The court also identified four factors that would show that a sabbatical leave program is not regular vacation:

1. The leave is granted infrequently. The court noted that "seven years is the traditional frequency and it seems an appropriate starting point."

2. The leave should be longer than that "normally" offered as vacation.

3. The leave should be granted in addition to regular vacation. The court noted that this point carries more weight when the amount of vacation offered is "comparable in length to that offered by other employers in the relevant market."

4. The program should "incorporate some feature that demonstrates that the employee taking the sabbatical is expected to return to work after the leave is over."

Employers should carefully review their sabbatical leave programs in light of the *Paton* decision.

Bombardment Of Employer's Email And Phone Systems States A Claim For Violation Of Computer Fraud And Abuse Act

In *Pulte Homes, Inc. v. Laborers Int'l Union of North America*, after a home building company allegedly terminated eight employees for pro-union activity, the employees' union encouraged its supporters to inundate the e-mail and phone systems of the employer's sales offices and executives with thousands of messages in support of the discharged workers. The calls and e-mails overloaded and bogged down both the company's e-mail and voicemail systems, and prevented customers from reaching the company and employees from accessing e-mails and voicemails.

Pulte sued the union, alleging several state tort claims and violations of the federal Computer Fraud and Abuse Act ("CFAA") and moved to enjoin the union's e-mail and phone campaign. The trial court dismissed the lawsuit and Pulte appealed the dismissal of the CFAA claims. The Sixth Circuit Court of Appeals reversed the lower court and held that the company adequately stated a "transmission" claim under the CFAA, *i.e.*, that the union "knowingly cause[d] the transmission of a program, information, code or command, and as a result of such conduct, intentionally cause[d] damage without authorization,

to a protected computer." The court found that the two key elements of the claim, damages and intent, were satisfied: the diminished ability to send and receive calls and e-mails was sufficient damage to the company, and the company alleged that the union had the conscious purpose of causing damage to the company's computer system. The Court remanded the case for a jury trial.

California Organ Donor Law Clarified

Governor Brown recently approved minor revisions to California's organ and bone marrow leave law that clarifies the scope of leave rights for employees who donate organs or bone marrow. Under existing law, employers are required to grant a leave of absence of up to thirty (30) days to an employee who is an organ donor and up to five (5) days for an employee who is a bone marrow donor, in a one-year period. Further, the leave of absence does not constitute a break in service with respect to salary adjustments, sick leave, vacation, annual leave or seniority. The recent amendment clarifies that the leave duration should be calculated based on business, rather than calendar, days, and that the one-year period is measured from the date the employee's leave begins and consists of twelve (12) consecutive months. The amendment also clarifies that such leave does not constitute a break in continuous service for purposes of paid time off policies.

Reminder: Employers Must Give 90 Days' Notice Prior To Requiring Employees To Use Accrued Vacation/PTO

Many businesses elect to shut down all or a majority of operations during the year-end holidays. According to the California Division of Labor Standards Enforcement, if an employer desires to mandate the use of accrued vacation or paid time off ("PTO") by employees during such shutdowns, it must provide no less than one full fiscal quarter or 90 days' (whichever is greater) notice of the employer-mandated usage of vacation or PTO. If such notice is not provided, employers may permit employees to voluntarily draw down on their balances, but cannot force such a draw down.

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