



Employee's Termination for Posting Scriptures Condemning Gays did not Constitute Religious Discrimination

The federal Ninth Circuit Court of Appeals (covering California) upheld a lower court's ruling that an employee's termination for refusing to remove anti-gay scriptures from his work area did not constitute religious discrimination. In *Peterson v. Hewlett-Packard* ("HP"), plaintiff Richard Peterson, in response to the posting by HP of workplace diversity posters that included a photograph of a gay employee, posted two scriptures in his cubicle that condemned gays. HP asked Peterson to remove the scriptures and he agreed, but only if HP removed the diversity posters from the workplace. In response, HP removed the scriptures and placed Peterson on a paid leave of absence, to allow him to reconsider his decision. When he returned, Peterson reposted the scriptures, and HP terminated him for insubordination.

Peterson alleged that his termination constituted unlawful religious discrimination under federal civil rights laws. The lower court rejected Peterson's claim and concluded that HP discharged Peterson not because of his religious beliefs, but because he violated the company's anti-harassment policy by fostering a hostile work environment through his scriptures, and because he was insubordinate. The court also rejected Peterson's claim that HP failed to accommodate his religious beliefs. The only "accommodations" Peterson was willing to accept—permission to post the harassing scriptures or removal of the diversity posters—would have imposed an undue hardship on HP. The Ninth Circuit upheld this analysis.

This decision confirms that religious tolerance in the workplace has limits, especially when religious expression interferes with the employer's efforts to create a harassment-free environment.

OK to Search Employee's E-Mail on Company Server

The federal Third Circuit Court of Appeals affirmed the dismissal of an employee's claim that his employer violated the Electronic Communications Privacy Act ("ECPA") when it searched his e-mails. In *Fraser v. Nationwide Mutual Insurance*, Nationwide discovered that plaintiff Richard Fraser, an insurance agent for the company, drafted letters to two competitors regarding alleged customer dissatisfaction with Nationwide. Concerned that Fraser might have revealed company secrets, Nationwide accessed its computer network server to review Fraser's e-mails. The search confirmed Fraser's disloyalty to Nationwide and the company terminated its agency agreement with him.

The court rejected, on two grounds, Fraser's claim that Nationwide's review of his e-mails violated the ECPA. First, although ECPA prohibits *interception* of e-mails, the court found Nationwide did not intercept Fraser's e-mails, because it did not review the e-mails at the time of transmission. Second, while ECPA prohibits the unauthorized access of e-mails in temporary, intermediate storage, or e-mails being held for backup protection, the statute includes an exception for seizures made by the *provider* (i.e. the entity that enables users to send and receive e-mail) of the e-mail communication service. The court found that Nationwide was the provider for purposes of the ECPA exception.

Newly Enacted Fair And Accurate Credit Transaction Act Simplifies Harassment Investigation Process

On December 4, 2003, President Bush signed the Fair and Accurate Credit Transaction Act ("FACT Act"), which modifies the Fair Credit Reporting Act ("FCRA"). The FACT Act eases employer notice obligations regarding investigations of employee misconduct. Under FCRA, an employer hiring an outside investigator or law firm to conduct an investigation and prepare a report regarding, for example, claims of workplace harassment, was required to provide the alleged wrongdoer with notice of the investigation. Under the new FACT Act, which became effective January 1, 2004, employers are no longer required to provide notice of an investigation into suspected employee misconduct. The FACT Act also permits investigation into violations of company policies without notifying the alleged wrongdoer. However, if an employer takes adverse action against the employee based on information received from the investigation, the employer must provide the employee with a summary of the communications upon which the adverse action is based. The summary must include the nature and substance of the communications, but need not include sources of information, such as the identity of individuals interviewed.

Due to the infancy of this legislation, employers are advised to stay tuned for cases interpreting the new law. Note that the FACT Act has no impact on California's Investigative Consumer Reporting Act.

New Laws in California

Before he left office, Governor Davis signed into law several new employment related bills that took effect January 1, 2004. The laws include the following new rights for employees:

Enhanced Whistleblower Protection: An employer is prohibited from subjecting an employee to an adverse action based on the employee's disclosure of information to the government or a law enforcement

agency. Should the employee show, by a preponderance of the evidence, that the employer based an adverse action on this activity, the employer must then demonstrate, by clear and convincing evidence (a heightened burden of proof), that the adverse action would have occurred for legitimate, independent reasons, even if the employee had not engaged in the protected activity. The law also requires employers to post a list of employees' rights under whistleblower laws, together with a whistleblower hotline number to the California Attorney General's office. Finally, employers are subject to monetary penalties for violation of the statute.

Protection From Transgender Discrimination: It is now unlawful for employers to discriminate against employees based on their perception of the employee's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the employee's sex at birth. This change in the law prohibits, for example, discrimination against a man because he has more feminine characteristics or behavior than those traditionally associated with men.

Time Off For Crime Victims: Employers must provide time off for employees who are the victim of a crime, or whose immediate family member, registered domestic partner or child of a registered domestic partner are crime victims, to attend court proceedings related to the crime. Employees must provide their employers with written notification of the court proceedings, unless advance notice is not feasible.