FENWICK & WEST LLP

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Jehan Jayakumar Contributor 650.335.7643
Victor Schachter Co-Editor 650.335.7905
Dan Mccoy Co-Editor 650.335.7897

Plaintiff's Post-Termination Misconduct May Bar Reinstatement And Front Pay Award

The Eighth Circuit Court of Appeals (encompassing Minnesota, Missouri and other Midwestern states) recently held that courts may consider a plaintiff's *post*-termination misconduct when determining whether front pay and/or reinstatement are viable remedies for Title VII discrimination.

In *Sellers v. Mineta*, the Federal Aviation Administration ("FAA") terminated Wendi Sellers after she complained of sexual harassment and assault by a co-worker. Sellers secured a job with Bank of America ("BofA"), and later sued the FAA under Title VII for gender discrimination and retaliation. A jury awarded Sellers nearly $700,000 for back pay and emotional distress. Thereafter, Sellers sought an order from the trial court reinstating her to her prior position with the FAA, or in the alternative, an award of front pay. However, as the court considered Sellers' request, BofA terminated her employment when she attempted to process an unauthorized loan application. The court eventually concluded that reinstatement was infeasible because of the acrimony between Sellers and the FAA, but awarded Sellers front pay as an alternative remedy.

The Eighth Circuit reversed. The court acknowledged that a front pay award may be appropriate where reinstatement is impractical or impossible due to circumstances *beyond the plaintiff's control*. However, where a plaintiff's *own misconduct* renders reinstatement infeasible, the court held that it would be inequitable for plaintiff to receive the exceptional, alternative remedy of front pay. The court remanded the case to the district court to determine whether Sellers would have been ineligible for reinstatement to the FAA because of her misconduct at BofA. Although it is unclear how a California court would analyze this issue under the state's anti-discrimination statute, the Sellers decision nevertheless offers a valuable lesson regarding how a plaintiff's post-termination conduct can impact damages that may arise in a Title VII discrimination or harassment claim.

Court Articulates Limits On Customer Non-Solicitation Clauses

Many employers require employees to agree not to solicit the employer's customers following the termination of their employment. However, a California court of appeal recently clarified the limits on the enforceability of such agreements.

In *Thompson v. Impaxx*, Plaintiff Daniel Thompson worked for a company acquired by defendant Impaxx. As a condition of his employment with Impaxx, Thompson was required to sign an agreement that, for one year following the termination of his employment, he would not call on, solicit or take away any customers or potential customers with whom he would have any dealings as a result of his employment. When Thompson refused to sign the agreement, Impaxx terminated him. Thompson sued Impaxx on the theory that termination of an employee for refusal to sign an unenforceable covenant not to compete constitutes a wrongful termination in violation of public policy. The trial court dismissed the claim, concluding that Impaxx's agreement was narrowly drawn, intended to protect Impaxx's legitimate proprietary interest in customer information, and therefore enforceable. A state court of appeals disagreed and reversed.

The court first reiterated the well-settled rule in California that covenants not to compete in contracts other than for the sale of the goodwill of a business or the dissolution of a partnership are void. The court then acknowledged that,

while the Impaxx agreement did not prevent Thompson from continuing in his profession or from working for a competitor, it was, nevertheless anti-competitive in nature and not specifically tied to the protection of trade secrets and confidential information. As such, the agreement violated the rule that non-solicitation agreements "are void as unlawful business restraints *except where their enforcement is necessary to protect trade secrets*." The Impaxx agreement was neither expressly nor impliedly limited to solicitation involving the company's confidential information. Moreover, Thompson and Impaxx disputed whether the *identity* of the company's customers constituted confidential information, such that an agreement not to solicit those customers could be enforced. Thus, the court returned the case to the trial court for resolution of the confidentiality issue.

In light of this decision, employers should carefully re-examine their *customer* non-solicitation clauses to ensure they are tied to the protection of trade secrets and/or confidential business information.

Cumulative Allegations Enable Employee To Take Race Harassment Claims to Trial

A recent decision from the Ninth Circuit Court of Appeals (encompassing California and other western states) highlights the types of workplace behavior that may rise to the level of unlawful racial harassment under Title VII. In *McGinest v. GTE Services Corp.*, plaintiff George McGinest, an African-American male, alleged that his employer of twenty-three years, GTE, fostered a racially hostile work environment. Specifically, McGinest claimed that: (i) he endured racial epithets and slurs by coworkers and supervisors; (ii) GTE denied his requests for overtime; (iii) he observed racist graffiti in GTE's bathrooms; and (iv) GTE refused to change the badly worn tires on his company vehicle because of his race, resulting in a car accident and serious physical injuries to McGinest.

To establish a racial harassment claim under Title VII, a plaintiff must show that the workplace was both subjectively and objectively hostile, and that the harassment was sufficiently severe or pervasive so as to alter the conditions of the victim's employment and to create an abusive working environment. The trial court dismissed McGinest's harassment claim on the ground that the alleged incidents of harassment, even if true, were "sporadic" and for the most part adequately remedied. The Ninth Circuit reversed, primarily on the ground that the district court did not fully consider the cumulative impact of the alleged harassment. The court acknowledged that "not every insult or harassing comment will constitute a harassing environment." However, the Ninth Circuit concluded that McGinest presented sufficient allegations of racial harassment that, if true, would rise to the level of "severe or pervasive" harassment under Title VII. Thus, the Ninth Circuit remanded the case for trial.

Employers should look to the *McGinest* decision as a guide regarding the type of cumulative evidence that will suffice to create a Title VII race harassment claim that will survive a motion to dismiss.