FENWICK & WEST LLP

# Weekly Employment Brief

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Trey Wichmann Contributor 650.858.7813
Patricia Nicely Kopf Editor 650.858.7219

**Company's Failure to Take Reasonable Steps to Protect Trade Secrets Defeats Claim of Misappropriation by Former Employees**

In a case that illustrates the risk of not taking active steps to keep trade secret information confidential, the Supreme Court of Vermont recently held that a company's failure to do so was fatal to the company's claim of trade secrets misappropriation. In *Omega Optical, Inc. v. Chroma Technology Corp.,* several Omega Optical employees quit and formed Chroma Technology and began producing a competing product similar to one Omega had developed. The court held that even though the former employees had acquired a substantial amount of information from Omega that was protectible as trade secrets, the company failed to prove the former employees used the information in breach of a duty of confidence. Applying Vermont law, the court held that the employer-employee relationship, without more, does not create a duty of confidentiality. It found that Omega had no internal confidentiality or non-disclosure policies, had very few security measures in place and that even those limited security measures were not enforced or monitored. As this case demonstrates, companies that have trade secrets must inform their employees of confidentiality requirements and implement procedures to protect confidential information. They must also regularly monitor and enforce those procedures, or they risk being without a remedy when employees leave with the information.

**Fifty-Year Old Laid-Off Employee Will Proceed to Jury Trial on Age Discrimination Claim Based on Recruiter's Comments and Replacement by Younger Person**

As companies continue to conduct layoffs, a federal District Court in Minnesota provided a reminder that businesses should not use reductions in force as an excuse to eliminate older workers. In *Kult v. Deluxe Corp.,* a 50-year old manager who had been with the company for 30 years was laid off when the company eliminated his department as part of a reduction in force. The company permitted laid-off workers to find alternative positions in the reorganized company. Unlike several younger workers, Kult was unsuccessful in his attempts to obtain reassignment. He subsequently attended a recruiting fair, where his former company had a booth. Kult alleged that the company recruiter said that the company viewed people like him as "dinosaurs" and that they wanted to hire younger managers. Kult also alleged that a year after his termination, the company filled his old job and hired a 38-year-old individual for the position. The court held that although the reduction in force constituted a legitimate, non-discriminatory reason for Kult's termination, the recruiter's comments and the hiring of the younger worker in a position that was substantially similar to plaintiff's was sufficient evidence of pretext to send the case to a jury. This case illustrates the scrutiny with which courts will examine the termination of older workers as part of reductions of force, particularly when the older employee's duties are eventually transferred to a younger worker.

**Harassment Claim Based on Supervisor's Frequent Ethnic Slurs Also Proceeds to Jury Trial**

In another defeat for employers, a federal district court in Arizona recently denied an employer's motion for summary judgment on a race harassment claim. In *Vasquez v. Atrium, Inc.,* a Mexican-born plant foreman complained that his Caucasian supervisor, the plant manager, frequently called him and other Hispanic employees "wet backs," "spics," and similar racial slurs. Vasquez claimed he complained about the offensive comments to the company's general manager ("GM") and threatened to quit if they did not stop. When the GM confronted the plant manager, he denied the allegations, but the GM then failed to investigate further, and failed to direct the plant manager to stop the name-calling or issue any type of warning about past or continued use of such slurs. When the slurs resumed, Vasquez quit and sued for racial harassment and constructive discharge. The court found that despite evidence that Vasquez himself had referred to Caucasians as "gringos" and "white trash," there was enough evidence supporting Vasquez's claim to take the case to a jury. Moreover, the court found that, if proven, no reasonable juror would consider the use of such slurs tolerable in "the 21st century working environment." This case demonstrates the critical importance of preventing use of offensive language in the workplace and the need to thoroughly investigate and respond to allegations of offensive language.

**Employee Who Resigned Right Before Layoff Not Entitled to Damages for Company's Alleged Violation of WARN**

The Arizona Court of Appeals recently held that an employee who resigned prior to a layoff was not entitled to damages for a WARN Act violation his employer committed by not giving notice of the layoff. In *Shannon v. Computer Associates International, Inc.,* an employee who presented computer seminars decided to resign and become an independent contractor for the company as needed. The company agreed to keep Shannon on the payroll through the end of the month, until the next month's scheduled seminars began. Later that same month, the company announced a mass layoff for the end of the month, but failed to provide employees the sixty-day notice period required by the federal Worker Adjustment and Retraining Notification ("WARN") Act. The company decided not to use Shannon's services for the scheduled seminars, and Shannon sued for unpaid wages and back pay for the violation of the WARN Act. The court held that Shannon was not an "affected employee" entitled to notice of the layoff because he already knew his employment would be terminating as the result of his voluntary quit. While this was a positive result for the employer, companies should be mindful of the complex requirements of the WARN Act and work closely with employment counsel to comply with the Act.