

Labor & Employment Law UPDATE

*Practical and preventive information for managing
your workplace*

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Public Employers: First Amendment Wrongful Termination Claim Highlights Importance of Proper Procedures for Strong Defense

Overview

The U.S. District Court for the District of Nebraska recently granted summary judgment to a Nebraska public employer on a First Amendment claim alleging that protected speech unlawfully motivated the plaintiff employee's termination. Following oral argument, the court granted summary judgment to the public employer, finding that the plaintiff had failed to show that his protected speech was a motivating factor in the employer's decision to terminate his employment. The decision highlights the importance of implementing protocols and channels designed to immediately address employee concerns that may involve protected speech in order to preserve the employer's ability to defend every element of a First Amendment-based wrongful termination claim.

Background

In mid-2004, a Nebraska public employer hired the plaintiff as an at-will employee, which means the plaintiff could be terminated for any reason or no reason at any time without notice, so long as the termination did not violate the constitutions and laws of the United States and the State of Nebraska. Six months after being hired, the plaintiff confronted an executive director, alleging in a threatening manner that the executive director had violated the employer's business procedures and harassment policies. The executive director reported the incident to a human resources official, who investigated the incident and determined that the plaintiff's actions had been confrontational, threatening, and motivated by a desire to secure a former employee's reinstatement. The HR official recommended that the employer terminate

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the plaintiff's employment. Acting on this recommendation, the employer terminated the plaintiff in early 2005.

The Ruling

In moving for summary judgment, the public employer presented evidence that it had decided to terminate the plaintiff based on the HR official's assessment. The plaintiff did not dispute that the HR official had made her recommendation in good faith; rather, the plaintiff merely contended that her assessment was inaccurate. At oral argument, the public employer highlighted the plaintiff's failure to dispute the HR official's reasons for terminating the plaintiff. The District Court granted summary judgment for the employer because the plaintiff failed to present any evidence that the proffered reason for his termination was pretextual or that protected speech had motivated the public employer's decision to terminate his employment.

Lessons

Public employers are uniquely at risk of having former employees allege wrongful termination on First Amendment grounds. To succeed on such a claim, the former public employee must prove: (1) he engaged in protected speech (*i.e.*, speech on a matter of public concern); (2) his interest as a citizen in commenting on the issue outweighs the public employer's interest in promoting efficient public service; and (3) his speech was a motivating factor in the action taken against him. In many cases, such a claim will turn on the first two of these elements. Indeed, much of the jurisprudence involving First Amendment employment claims dwells almost exclusively on the complicated issues that these two elements present.

Yet, as evidenced by this case, the "motivating factor" element can provide public employers with an opportunity to obtain a favorable outcome without the need for a jury trial. Moreover, the likelihood of a favorable outcome can be increased through creation of protocols and channels specially designed to immediately address employee concerns that may involve protected speech. As such, public employers should be sure to create appropriate channels and protocols that together will preserve their ability to defend every element of a First Amendment-based wrongful termination claim.

Kenneth W. Hartman
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Public employers are uniquely at risk of having former employees allege wrongful termination on First Amendment grounds.

Wage and Hour Opinion Letters Provide Guidance on On-Call Periods and Training Programs

The Wage and Hour Division of the United States Department of Labor (DOL) recently issued two instructive Opinion Letters on the Fair Labor Standards Act (FLSA). In a December 18, 2008 letter, the DOL addressed whether a particular "on-call" period constituted hours worked under

the FLSA. There, the employer required its employees who were “on-call” to be reachable at all times, abstain from alcohol and similar substances, and report to work within one hour of notification.

The DOL noted that whether time that is spent on-call is compensable under the FLSA is a “question of fact decided in the context of each case.” Under the FLSA regulations, employees who are not required to remain on the premises and need only notify the employer where they may be reached are not considered to be working while on-call so long as they are “free to engage in personal activities” when not on-call. If, however, “the on-call conditions are so restrictive or the calls so frequent that the employee cannot effectively use that time for personal purposes,” the on-call time is compensable.

The DOL noted that there are a variety of factors to examine when determining whether employees can use on-call time effectively for personal purposes, including geographic limitations on the employee’s movements, frequency of calls received, a fixed time limit for responding, trading on-call responsibilities, and use of a pager to ease restrictions, among other things. The DOL concluded that since the employer’s requirements were “not so restrictive to convert on-call periods into hours worked” and the call-backs were rare, the on-call periods were not compensable.

Additionally, in a December 19, 2008 letter, the DOL considered whether store managers would lose their exempt status under the FLSA by participating in a seven-week training program to become eligible for promotion to area sales manager. In the facts analyzed in the opinion letter, the

employer selected several high-performing store managers to participate in the training program to become an area sales manager, a position which supervised eight to ten store managers. The FLSA regulations state that “exemptions do not apply to employees training for employment in an executive... capacity who are not actually performing the duties of an executive... employee,” but the store managers had already been working for years as *bona fide* exempt managers.

The DOL concluded that the store managers would not lose their exempt status simply by participating in the training program. The DOL reasoned that even though the store managers were not performing significant amounts of exempt work during the training, “the primary duty test for executives need not be met each and every workweek in all cases.” The DOL opined that the seven-week training program was not itself “an employment position with the company” and that it was unreasonable to conclude that the store managers’ primary duties changed during the seven weeks. The DOL observed that “their primary duty continues to be that of an exempt store manager” because the training was for a limited duration and the store managers would return to their normal duties following training. The DOL maintained, “Under these circumstances, where the trainees are employed in exempt positions and are temporarily reassigned to training for a different exempt position, it is our opinion that the exemption is not lost during the training period.”

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ADA Amendments Act is Not Retroactive, Fifth Circuit Holds

The ADA Amendments Act (ADAAA) expands the reach of the Americans with Disabilities Act (ADA) to cover persons not previously considered to be disabled. While the law stated it was effective on January 1, 2009, the open question is whether Courts would apply the law retroactively to employers. This is a significant issue because an employer could have declined to accommodate an employee in 2008 who was not disabled under the ADA before the Amendments Act was passed and would not have violated the law at that time. But if the Court applied the ADAAA retroactively, the Court could hold the employer liable for breaching the ADA even though the employer was complying with the law as it existed at that time.

The Fifth Circuit Court of Appeals, in *EEOC v. Agro Distrib. LLC*, became the first appellate court to answer the question and it held that the ADAAA does not apply to employer conduct that occurred prior to January 1, 2009. The Court cited Supreme Court precedent stating that Congressional intent to apply a law retroactively must “clearly appear” in the Act. Accordingly, the Court found in favor of the employer because the employee was not disabled at the time he requested the accommodation

because under the prior interpretation of the ADA, the employer could consider the employee’s mitigating measures in determining whether he was disabled under the Act.

Lesson for Employers

The decision demonstrates the significance of the ADAAA. Had the Court applied the ADAAA retroactively, the employer would not have received summary judgment and the case would have gone forward to trial.

Christopher R. Hedican

Make Whole Relief for Discrimination May Require a Court to Award Additional Funds to Pay Increased Income Taxes on the Back Pay Award

The Third Circuit Court of Appeals affirmed a district court judgment which added an additional \$7,000 in damages to a plaintiff’s judgment to cover the additional

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tax burden the plaintiff incurred because of the verdict. Because the plaintiff would receive several years of back pay in one lump sum, he would owe more taxes than he otherwise would have owed had the employer continued his employment and he received his paychecks as usual. The Court joined the Tenth Circuit Court of Appeals, which had issued a similar holding that the Court's inherent equitable power to grant "make whole relief" to discrimination victims allows it to "gross up" the damage award for taxes. However, the court noted that plaintiffs were not automatically entitled to such recovery and must put on evidence to support the claim.

Lessons for Employers

The majority of circuit courts that have addressed this issue have agreed that courts may gross up the damage awards to cover additional taxes. This increases the employer's exposure in discrimination claims and may be a relevant factor in deciding whether to settle a case or to persuade a plaintiff to take a structured settlement.

Christopher R. Hedican

Save the Date!

The 21st Annual Baird Holm Labor Law Forum will be held on Thursday, May 7, 2009 at the Qwest Center Omaha. Watch for more details and agenda information coming soon!

**The contents of this update are intended for general informational purposes only and should not be construed as legal advice. Readers are urged not to act upon the information contained in this publication without first consulting an attorney.*

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