COLLAZO FLORENTINO & KEIL LLP Client Advisory

For Clients And Friends Of The Firm

June 5, 2012

Recent Notable Decisions in Employment Law

Recently, state and federal courts in New York have issued several important decisions regarding at-will employment, wrongful discharge claims, sexual harassment claims, and union insignia on employee uniforms. These decisions are summarized below.

New York Courts Re-Visit the At-Will Employment Doctrine

On May 8, 2012, two New York courts opined on the at-will employment doctrine. In *O'Neill v. New York University* and *Sullivan v. Harnisch,* the courts reaffirmed that employment in New York is presumed to be at-will and that only in limited circumstances can an employee defeat the at-will presumption to bring a wrongful discharge claim.

At-will employment means that an employer may terminate an employee at any time and for any reason, so long as the reason does not violate a statute, constitution, or public policy. In *Murphy v. American Home Prods. Corp.*, the New York Court of Appeals held that at-will employees cannot sue their former employers for wrongful discharge.

However, not all employees are at-will. If, for example, an employee can prove that he or she entered into an employment contract with his or her employer, contractual terms may dictate when an employee can be terminated. In *O'Neill v. New York University*, O'Neill persuaded the court that he was not an at-will employee and the court allowed him to proceed with his claim for wrongful discharge.

O'Neill was hired by NYU as a non-tenured, full-time faculty member. In 2009, O'Neill reported internally that he believed his supervisor committed research misconduct. Several months later, he attempted to institute grievance proceedings regarding the purported misconduct. That afternoon, he was terminated from employment for alleged "unprofessional behavior", citing his behavior during a telephone call in which his "tone became very argumentative" and his "voice rose in anger."

O'Neill filed a lawsuit claiming that NYU retaliated against him by terminating his employment for reporting alleged research misconduct. NYU defended that O'Neill's claim should be dismissed because he was an at-will employee and could be terminated for any reason and at any time. The court disagreed with NYU.

The court held that an employee may rebut the at-will presumption if he/she demonstrates that his/her employer made the employee aware of an "express written policy limiting the employer's right of discharge" and that the employee relied upon this policy. In this case, the NYU Faculty Handbook provided that appointment for a non-tenured faculty position "shall be for a definite period of time, not exceeding one academic year unless otherwise specified." Moreover, O'Neill's non-tenured appointment was renewed annually, and in the most recent renewal letter, NYU stated that O'Neill's appointment with NYU was "contingent upon continued employment in good standing with the [NYU] School of Medicine and compliance with all University and School of Medicine rules and regulations and other contractual obligations."

747 Third Avenue
New York, N. Y. 10017
Tel: 212-758-7600
www.cfk-law.com

The court held that NYU's policies and the renewal letter contained express contractual promises that limited NYU's right to terminate O'Neill's employment. Therefore, O'Neill's employment relationship with NYU was not at-will and his claim for wrongful discharge was reinstated.

New York Court Declines to Adopt an Exception to the At-Will Employment Doctrine for Compliance Officer Employed in the Financial Services Industry.

In *Sullivan v. Harnisch*, on the other hand, Sullivan failed to persuade the court that he should be able to sue his former employer for wrongful discharge. Sullivan, former Chief Compliance Officer ("CCO") of a hedge fund, was fired several days after he raised objections about stock trades to Harnisch, the Chief Executive Officer and President. Sullivan sued Harnisch and the hedge fund, claiming that he was terminated from employment because he "spoke out" about "manipulative and deceptive trading practices".

Sullivan alleged that as CCO of a hedge fund, he was responsible for reporting improper stock trades to the company and that because he was allegedly terminated for reporting stock trades he believed to be improper, he should be able to sue for wrongful discharge. The court disagreed.

Under *Wieder v. Skala*, 80 N.Y.2d 628 (1992), there is a narrow exception to the general rule that former at-will employees cannot sue their former employers for wrongful discharge. In *Wieder*, the court held that an employee-attorney could sue his former employer-law firm for wrongful discharge when the employee-attorney was terminated for refusing to violate the New York Code of Professional Responsibility. However, in *Sullivan*, the court declined to extend the *Wieder* exception to Sullivan, as CCO of a financial services firm. The court was not persuaded that a CCO for a financial services firm stands in the same shoes as the employee-lawyer in *Wieder*. "Important as regulatory compliance is," the court held, "it cannot be said of Sullivan . . . that his regulatory and ethical obligations and his duties as an employee 'were so closely linked as to be incapable of separation.'" Rather, Sullivan was an at-will employee who could be terminated at any time and for any reason. Sullivan's wrongful discharge claim was dismissed.

In a strongly worded dissent, Chief Judge Lippman stated that the "majority's conclusion that an investment advisor [like defendant] has every right to fire its compliance officer, simply for doing his job, flies in the face of what we have learned from the Madoff debacle, runs counter to the letter and spirit of this Court's precedent, and facilitates the perpetration of frauds on the public." Despite this dissent, the at-will presumption remains the common law in New York, and at-will employees cannot bring claims against their former employers for wrongful discharge.

Federal Court Reinstates Sexual Harassment Claim Alleging Same-Sex Harassment

On May 4, 2012, in *Redd v. New York State Division of Parole*, the United States Court of Appeals for the Second Circuit reinstated the sexual harassment/hostile work environment claim of a female employee of the New York State Division of Parole ("Parole"). Redd alleged she was sexually harassed and subject to a hostile work environment when on three occasions a Parole supervisor, Washington, touched Redd's breasts, including one occasion when the offensive touching took place in front of another supervisor. Redd testified these episodes made her uncomfortable, that she backed away from Washington to refuse her advances, and that she tried to avoid Washington "at all costs". Although Washington was not Redd's direct supervisor, Washington repeatedly asked Redd to come to her office. Washington never apologized to Redd for these incidents or ever indicated that the behavior was accidental.

The District Court dismissed the sexual harassment/hostile work environment claims. The Court of Appeals reversed. The Court of Appeals held that a jury could find the three physical touchings were not simply episodic, but that the supervisor's physical contact was substantially abusive. The court stated that "repeated touching of intimate parts of an unconsenting employee's body is by its nature severely intrusive and cannot properly be characterized as abuse that is 'minor'. This is not a manner in which women 'routinely interact' . . . and it is not conduct that is normal for the workplace." The court found enough evidence in the record to

demonstrate that the allegedly harassing conduct was severe and pervasive.

Redd was also permitted to have a jury decide whether the harassing conduct occurred because of her sex/gender. When a sexual harassment allegation is predicated on harassment by someone of the same sex/gender, courts have previously noted that a plaintiff can prove the harassment was motivated by sex/gender by citing to credible evidence that the harasser is homosexual. Notably, in this case, the court held that Redd was not required to prove that the supervisor's touchings were motivated by sexual desire to support an inference that that harassing conduct occurred because of Redd's sex/gender. Rather, a plaintiff may prove the harassment was motivated by sex through credible evidence that he/she "is harassed in such sex-specific and derogatory terms by another [member of the same sex/gender] to make it clear that the harasser is motivated by general hostility to the presence of [members of the same sex/gender] in the workplace." In this case, the court held that a jury must decide whether the harassing conduct occurred because of Redd's sex/gender.

Federal Court Dismisses Retaliation Claim and Faragher/Ellerth Defense

On May 9, 2012, in *Townsend v. Benjamin Enterprises, Inc.*, the Second Circuit Court of Appeals decided two issues of first impression: (1) whether an employee can make out a viable claim of retaliation under Title VII in connection with the employee's participation in an internal investigation prior to any proceeding before the EEOC; and (2) whether the *Faragher/Ellerth* affirmative defense is available to an employer for sexual harassment purportedly committed by a senior executive who is a proxy or alter ego for the employer.

Townsend alleged that Vice President Hugh Benjamin, the husband of Michelle Benjamin, the President of Benjamin Enterprises ("BE"), sexually harassed her for almost two years. Townsend complained about the harassment to Michelle Benjamin and reported the harassment to Karlean Victoria Grey-Allen, the Human Resources Director. Grey-Allen conducted an investigation of the complaint and conferred with the company's management consultant about the harassment allegation. Michelle Benjamin terminated Grey-Allen after Grey-Allen conferred with the management consultant, alleging that she breached confidentiality. An outside Human Resources organization completed the investigation and concluded that no harassment took place. Townsend resigned soon thereafter. She and Grey-Allen then jointly filed a complaint with the EEOC.

Grey-Allen alleged that she was terminated in retaliation for participating in an investigation of a harassment complaint, even though no charge had been filed with the EEOC at that time she was involved in the internal investigation in her capacity as Human Resources Director. The court disagreed and held that Title VII does not afford protection against retaliation to employees who participate in an internal investigation of a harassment complaint that is unassociated with a formal EEOC charge. The court determined that the language of Title VII and the case law from other circuits supports the conclusion that Title VII's anti-retaliation protection does not include participation in an internal employer investigation unrelated to a formal EEOC charge.

The court also held that BE and the Benjamins are not entitled to the *Faragher/Ellerth* affirmative defense. The *Faragher/Ellerth* defense absolves an employer of liability for a hostile work environment created by a supervisor. To take advantage of the defense, the employer must demonstrate that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the employee unreasonably failed to take advantage of any preventive or corrective opportunity provided by the employer or to avoid harm otherwise. However, the Court held that if the alleged harasser was employed in a sufficiently high position within the organization to be considered the organization's proxy or alter ego, the *Faragher/Ellerth* defense is unavailable. The Court, in deciding this issue of first impression, drew from case law from other circuits and the EEOC's Enforcement Guidance.

Employer's Limitation on Number of Union Buttons Worn Does Not Constitute Unfair Labor Practice

On May 10, 2012, the Second Circuit Court of Appeals declined to enforce an order by the

National Labor Relations Board ("Board") that Starbucks committed an unfair labor practice by maintaining a dress code policy forbidding employees from wearing more than one button bearing union insignia. Starbucks maintains a dress code policy that encourages employees to wear multiple pins and buttons issued by Starbucks, as part of a reward and promotion program. Starbucks also implemented a policy prohibiting employees from wearing multiple (*i.e.,* more than one) pro-union button as part of a settlement in another matter before the Board. An unfair labor practice charge was brought against Starbucks, alleging the one-pin policy violated the National Labor Relations Act ("Act").

The court acknowledged that wearing union insignia at work is a lawful exercise of an employee's rights under the Act. However, the court recognized that an employer may limit the wearing of union insignia under "special circumstances" which include the employer's right to maintain a certain employee image. The court found that Starbucks is entitled to oblige its employees to wear buttons promoting its products and to mitigate any distraction that political buttons, such as union buttons, would create. Because Starbucks adequately maintained an employee's right to wear one union button, the court found that Starbucks successfully established that the one button restriction was "a necessary and appropriate means of protecting its legitimate managerial interest in displaying a particular public image through the messages contained on employee buttons."

Moreover, the court remanded to the Board to decide whether Starbucks violated the Act when it terminated an employee, who, while off duty, engaged in a protest of Starbucks's one-button policy and used obscenities in front of customers. The court held that an employee may lose the protection of the Act by using obscenities in front of customers, and that an employer has an "entirely legitimate concern . . . not to tolerate employee outbursts in the presence of customers." However, because the employee was off duty when he engaged in his outburst, the court ruled that the Board should decide whether the Act protects off-duty employees under these circumstances.

Conclusion

If you have any questions or need further guidance regarding these decisions, please contact Adam Harris at (212)-758-7724 or any other attorney at the Firm.

This Advisory is intended for informational purposes only and should not be considered legal advice. If you have any questions about anything contained in this Advisory, please contact Collazo Florentino & Keil LLP. All rights reserved. Attorney Advertising.