ROBINSON & COLE LLP
Labor, Employment & Benefits

No Compelled Self-Defamation in Connecticut

Victor Cweklinsky was fired from his job at Mobil Chemical Company for taking paid medical leave without a medical basis, after Mobil learned that he had convinced his doctor's office manager to change the date on his return-to-work letter. Cweklinsky later filed a lawsuit against Mobil for defamation. Because Mobil had not published the allegedly defamatory statement to anyone else, Cweklinsky brought his claim under the doctrine of "compelled self-publication defamation," asserting that he had been compelled to publish the allegedly defamatory statement to prospective employers because they asked him why he left his position with Mobil.

In Cweklinsky v. Mobil Chemical Company (1/6/04) the Connecticut Supreme Court ruled that Connecticut does not recognize the doctrine of self-publication defamation. Although the court acknowledged that job applicants are expected to provide honest answers during job interviews, it reasoned that public policy concerns favored the rejection of this doctrine. In particular, the court was concerned that allowing self-defamation claims to go forward would chill workplace communications and discourage employers from giving performance evaluations and explaining why they were terminating employees.

Employee Refusing to Sign a Non-Solicitation Agreement Can Bring Claim for Wrongful Termination

After Impaxx, Inc. purchased a company called Pac-West Labels, it required each former Pac-West employees to sign a contract declaring that "for a period of one year following the termination of employment, I will not call on, solicit, or take away any of Pac-West Label's customers or potential customers with whom I have had any dealings as a result of my employment by Pac-West Label." Daniel Thompson refused to sign this agreement and was fired. He sued Impaxx for wrongful termination in violation of public policy. Impaxx defended on the ground that the contract was permissible under a California statute permitting covenants not to compete in certain situations, and thus, Thompson's termination did not violate public policy. In Thompson v. Impaxx, Inc. (12/8/03), the California Court of Appeals ruled that anti-solicitation agreements are unlawful unless they are necessary to protect trade secrets. Thompson alleged in his complaint that the identities of Pac-West's customers were not confidential because they could be readily identified through public means. The court ruled that the question of whether the anti-solicitation agreement necessary to protect a trade secret was a question of fact, and that Thompson had a right to argue his wrongful termination claim to a jury.

Broad Test Adopted for Determining Whether an Entity Is a Joint Employer under the FLSA

Alleging violations of the Fair Labor Standards Act, a group of garment workers filed a lawsuit against their immediate employers (the contractors who hired and paid them) and the manufacturing companies that entered into agreements with the contractors to have the clothing assembled. The garment workers claimed that the manufacturing companies were joint employers under the FLSA because they worked predominantly on the manufacturing companies' products, their work was integral to the creation of those products, and they were directly supervised by agents of the manufacturing companies. The manufacturing companies argued that they were not joint employers because they did not hire or fire the plaintiffs, control or supervise the conditions of employment or work schedules, determine the rate and method of payment, or maintain employment records. In making this argument, the manufacturers relied on the so-called "economic reality" test or "Carter test" set forth by the Second Circuit Court of Appeals in Carter v. Dutchess Community College (1984).

In Zheng v. Liberty Apparel Company, Inc. (12/30/03), the U.S. Court of Appeals for the Second Circuit ruled that the manufacturers' defense was based upon a misunderstanding of the Carter test. Although the existence of those four factors can be sufficient to establish joint employer status, those factors are not necessary to establish an employment relationship. Because the FLSA defines "employ" as "to suffer or permit to work" courts must apply a more expansive analysis. In determining whether a principal is a joint employer, the courts should consider the following factors, as well as any other factors they deem relevant: (1) whether the principal's premises and equipment were used by the workers; (2) whether the sub-contractors had a business that could shift as a unit from one putative joint employer to another; (3) the extent to which the workers performed a discrete function that was integral to the principal's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the principal or its agents supervised the workers; and (6) whether the laborers worked exclusively or predominantly for the principal.

Personal Grooming Code Barring Men from Wearing Earrings Was Not Discriminatory

Fareway Stores' unwritten personal grooming code prohibited men, but not women, from wearing earrings and ear studs. When Michael Pecenka began working at Fareway's warehouse, he was told by his supervisor that he had to remove his ear stud or cover it with a bandage while he was working. Pecenka refused to comply with this unwritten rule. When Fareway terminated his employment, Pecenka filed a lawsuit claiming discrimination on the basis of sex. In Pecenka v. Fairway Stores, Inc. (12/17/03), the Iowa Supreme Court ruled that Pecenka's termination did not violate Title VII or Iowa's anti-discrimination statutes, ruling that the anti-discrimination statutes were intended to end the perpetuation of sexist attitudes in employment which significantly affect employment opportunities and "were not meant to prohibit employers from instituting personal grooming codes which have a de minimis effect on employment."

Employees Who Were Not Included in a Reduction In Force, and Thus Were Not Eligible for Enhanced Severance Benefits, Had No Claims under ERISA

When Employers Casualty Company implemented a reduction-in-force in 1990, it offered an enhanced retirement package to all employees who were terminated within a three-month window, satisfied certain age and service requirements, and filed a written election to receive such benefits. In the fall of 1992, ECC implemented another RIF, and offered an enhanced retirement package, under similar conditions. In 1993, ECC implemented a third RIF with a similar enhanced retirement package. By this time, several employees asked ECC to include them in the 1993 RIF, so that they would be eligible for the enhanced retirement package. Some of the employees who made this request were not selected for termination. ECC froze the plan effective at the end of 1993, which barred any further benefit enhancements. By 1994, ECC could no longer stave off its financial difficulties and closed its doors. The employees who were terminated in 1994 were not offered the enhanced retirement package available during the earlier RIFS. Thirteen employees filed a lawsuit against ECC under the Employee Retirement Income Security Act, claiming that ECC interfered with their rights under the pension plan by failing to terminate them so as to make them eligible for the enhanced benefits. In Bodine v. Employers Casualty Company (12/12/03), the U.S. Court of Appeals for the Fifth Circuit rejected the employees' claims on the grounds that none of the provisions of ERISA prohibited ECC's actions. In particular, the appeals court noted that section 510 of ERISA is intended to prevent unscrupulous employers from discharging or harassing employees; it is not intended to prohibit an employer from retaining an employee so as to avoid payment of benefits.

Employee's Failure to Exhaust his Administrative Remedies under a Severance Plan Backfires and Results in Award of Attorneys' Fees to the Employer

F. John Stark III worked for PPM America, Inc. as vice president and counsel. PPMA terminated his employment. Stark sued PPMA, contending he was entitled to severance pay and a bonus under PPMA's change of control severance plan, after PPMA's ultimate parent, Prudential plc, restructured its subsidiaries. He did not exhaust his administrative remedies under the severance plan because he believed the effort was futile. The trial court found that Stark failed to exhaust his

administrative remedies and dismissed his lawsuit. The trial court also awarded PPMA $260,000 in attorney's fees under ERISA's fee-shifting provision. Stark appealed.

In Stark v. PPM America, Inc. (1/9/04) the U.S. Court of Appeals for the Seventh Circuit affirmed the dismissal and award of attorney's fees. The appeals court noted that the change of control severance plan had extensive provisions establishing an administrative process to review any claims under the plan and that Stark failed to pursue that administrative process. The court agreed with the trial court that an award of attorney's fees was proper due to Stark's failure to exhaust his internal remedies, his evasive and shifting legal theories, and his inability to show that a change of control actually had occurred under the plan. The court also agreed that the trial court's calculation of the attorney's fee award was proper, reducing the request from $493,000 to $260,000.

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