ROBINSON & COLE LLP
Labor, Employment & Benefits

Employee Novelist's Comments about Brooklyn Crime Statistics Related to Matters of Public Concern and Were Protected under the First Amendment

Shortly after being promoted to work in the Homicide Bureau of the King's County, New York District Attorney's office, Robert Charles Reuland, an Assistant District Attorney, published a novel about a homicide prosecutor in a fictionalized version of King's County. After the novel was published, Reuland was profiled in a *New York* magazine article about attorneys in New York. In the profile, Reuland is quoted as saying "Brooklyn is the best place to be a homicide prosecutor…. We've got more dead bodies per square inch than anyplace else." This statement upset local politicians, as well as the District Attorney, Charles Hynes, who felt that the statement was harmful to the D.A.'s office. When Reuland attempted to explain the comment to Hynes, Hynes became even more upset at Reuland. Hynes told Reuland that he should not speak with the press or outsiders about the D.A.'s office and accused him of wanting to work in the Homicide Bureau only to better promote his novel. Hynes transferred Reuland to another department. A few months later, when Reuland requested a transfer back to Homicide, Hynes (through a subordinate) demanded Reuland's resignation.

Reuland filed a lawsuit against Hynes, claiming that he had been demoted fired in violation of his First Amendment right to free speech. Hynes moved for summary judgment, arguing that Reuland's comments did not relate to matters of public concern, and thus, were not protected by the First Amendment. In Reuland v. H Reuland v. Hynes(6/17/04), the U.S. District Court for New York decided that the novel – although fictional – described the workings of the criminal justice system, which was a matter of public concern. The court also concluded that Reuland's comment to *New York* magazine and his attempts to explain himself to Hynes related to the crime rate in Brooklyn, and thus, were also potentially matters of public concern. Accordingly, the court ruled that Reuland was entitled to try to prove his claims to a jury and denied summary judgment.

Other than a Claim under COBRA, all Other Benefit Claims Raised by Worker Allegedly Misclassified as an Independent Contractor Were Untimely under ERISA

Sue Downes worked for J.P. Morgan Chase & Company (or its predecessor) as an independent contractor for ten years. Throughout that period of time, Downes never received any healthcare, vacation, pension, or other employee benefits from J.P Morgan. After her discharge, Downes filed a lawsuit against J.P. Morgan, claiming that J.P. Morgan has deliberately misclassified her as an independent contractor instead of as an employee in order to deny her benefits in violation of the Employee Retirement Income Security Act. In Downes v. J.P. Morgan Chase & Company (6/8/04), the U.S. District Court for New York dismissed her claims that J.P. Morgan violated ERISA as untimely, ruling that the ERISA violation occurred (if at all) when she was first classified as an independent contractor, not ten years later when she was discharged. The court, however, allowed Downs to pursue her claim that J.P. Morgan violated the Consolidated Omnibus Budget Reconciliation Act by failing to provide her with the opportunity to purchase continuation coverage when she was discharged.

Mass E-Mail Broadcast Did Not Provide Adequate Notice of Employer's Arbitration Policy

General Dynamics Government Systems Corporation established a dispute resolution policy that purported to require all employment-related disputes to be resolved exclusively through arbitration. The policy was distributed to all employees via a broadcast e-mail message. The e-mail message itself did not describe the arbitration policy, other than to state that the company had developed a dispute resolution policy to address legal issues raised either by an employee or the company. The message did not indicate that the policy was mandatory or that it would apply to discrimination claims. Attached to the e-mail message was a copy of the policy together with a two-page flyer describing its key provisions. Neither the e-mail message nor the attachments notified the employees that the policy would have the effect of changing the employees' legal rights. General Dynamics did not require the employees to signify that they had received the e-mail or had read the policy and understood its implications. General Dynamics did not hold any meetings to discuss the policy, nor did it send the employees any information regarding the policy in paper form.

Sometime later, when employee Roderick Campbell filed a disability discrimination lawsuit against the company, General Dynamics moved to stay the lawsuit and compel arbitration. The U.S. District Court for Massachusetts denied General Dynamics' motion in Campbell v. General Dynamics Government Systems Corporation (6/3/04), ruling that the arbitration policy was unenforceable. Without deciding whether e-mail could ever be any appropriate means of providing employees with written notice of an arbitration policy, the court held that sending a mass e-mail that did not appropriately signify the importance of the policy, without even tracking whether the employees read the message, opened the attachments or understood the policy, failed to satisfy the minimum requirements for providing notice of an arbitration policy.

Massachusetts Does Not Recognize Doctrine of Self-Compelled Defamation

Roy White, a manager at Blue Cross/Blue Shield, was fired after a hospital accused him of revealing the details of a confidential financial settlement between the hospital and Blue Cross. Although White denied any wrongdoing, Blue Cross terminated White's employment without investigating the validity of this allegation. Even though Blue Cross never made any defamatory statements about White to any prospective employers, White sued Blue Cross for defamation, arguing that he had been forced to tell prospective employers why he had been fired. Joining Connecticut (and several other states), the Massachusetts Supreme Judicial Court decided that it did not recognize the doctrine of self-compelled defamation.

In White v. Blue Cross and Blue Shield of Massachusetts, Inc. (6/11/04), the court stated that adopting the doctrine of compelled self-publication would be "ill-advised" and potentially would "stifle communications in the workplace," leading employers to decide not to provide employees with any reasons for employment decisions, including discharge, depriving employees of any opportunity to contest those decisions. The court also noted that employers have no control over the statements of former employees and that the calculation of damages for self-defamation would be unpredictable.

NLRB Reverses Itself Again and Rules that *Weingarten Right* Does Not Extend to Non-Union Workplaces

The National Labor Relations Board ruled in IBM Corporation and Schult (6/9/04) that an employee's right to have a co-worker present at an investigatory interview which the employee reasonably believes could lead to disciplinary action against the employee (the 'Weingarten right") exists only when the employees are represented by a union. This decision overrules the NLRB's 2000 decision in Epilepsy Foundation of Northeast Ohio, which extended the Weingarten right to non-union employees.

The NLRB based its decision to limit the Weingarten right to unionized workplaces on the following considerations: (1) coworkers do not represent the interests of the entire work force; (2) coworkers cannot redress the imbalance of power between employers and employees; (3) coworkers do not have the same skills as a union representative; and (4) the presence of a coworker may compromise the confidentiality of information.

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