Labor, Employment & Benefits e-News

JUNE 12, 2006

In This Issue

Supreme Court Limits Protection for On-the-Job Speech of Public Employees

As Deputy District Attorney at the Los Angeles District Attorney's Office, Richard Ceballos wrote a memo questioning whether a deputy sheriff had lied in his affidavit in support of a search warrant. His supervisor directed Ceballos to amend the memo to make it less accusatory, which Ceballos did. Ceballos then met with representatives of the DA's office and the sheriff's department to express his concerns, but the D.A.'s office decided to continue with the prosecution. Ceballos informed the defense attorney that he believed the search warrant affidavit included false statements and later testified about his conclusions at the hearing. Following his testimony, Ceballos alleged that he experienced retaliation, including the removal of many of his duties, the threat of transfer to a lower level position, and the denial of a promotion. Ceballos sued, claiming retaliation for his memo in violation of the First and Fourteenth Amendments. The trial court found in favor of the county, finding that the memo was not "protected speech" under the Constitution. The appeals court reversed and concluded that the allegations in the memo were protected under the First Amendment. The county appealed.

In Garcetti v. Ceballos (5/30/06), the U.S. Supreme Court ruled that public employees who make statements as part of their official duties are not protected by the First Amendment and are not immune from being disciplined for those statements. Although the court noted that "the First Amendment protects some expressions related to the speaker's job," even when made inside the workplace, that protection depends on whether the employee was acting pursuant to his official duties, or was speaking as a citizen. The court concluded that "when public employees make

statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline." That court further noted that "Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case." The court explained that allowing Ceballos to be protected by the First Amendment when he was merely performing his job would require courts to become immersed in the employer-supervisor relationship of government employers, "mandating judicial oversight of communications between and among governmental employees and their supervisors in the course of official business." [back]

20 Years of Sexual Banter Did Not Affect Job Performance

Kevin Nitsche worked as a Utility Foreman for Osage Valley Electric Cooperative. Nitsche alleged that over his 20-year employment for Osage Valley, his immediate supervisor, Steven Hanson, created a hostile work environment by subjecting Nitsche to unwanted sexual banter about females. Nitsche also alleged that his supervisor made obscene sexual jokes, played a pornographic video for him and other co-workers while they were playing poker at his house, frequently looked at pornographic magazines in his presence, put snakes and mice in Nitsche's lunch box, authored a derogatory poem about Nitsche and posted it on the Company's bulletin board, calling Nitsche a "dumb ass" for spilling molasses at work, and made lewd comments concerning women and sex with women. In addition, on two or three occasions, Nitsche alleged that Hanson stuck a shovel between Nitsche's legs and rubbed him with it. Nitsche reported the incident involving the belittling poem to Osage Valley's Assistant General Manager and also to Osage Valley's then-President, who advised Nitsche that concerns of a personal nature should be brought to the attention of John McClure, Osage Valley's General Manager and Chief Executive Officer. Nitsche did not immediately speak to McClure about the poem. Nitsche was fired following an incident in which he threatened a co-worker over a prior physical altercation with another co-worker. Nitsche sued alleging hostile work environment sexual harassment in violation of Title VII of the Civil Rights Act of 1964. The trial court ruled in favor of Osage Valley prior to trial. Nitsche appealed.

In Nitsche v. CEO of Osage Valley Elec. Coop. (5/8/06), the U.S Court of Appeals for the Eighth Circuit upheld the trial court's ruling, concluding that (1) there was insufficient evidence to establish Hanson's harassing conduct towards Nitsche was based on sex, (2) the harassment did not affect a term, condition or privilege of employment because Hanson's conduct did not rise to a level of actionable hostile work environment sexual harassment, and (3) there was insufficient evidence Osage Valley either knew or should have known of the harassing conduct. The court noted that while Hanson's behavior was crude and immature, it occurred sporadically over the course of approximately 20 years, was not physically violent or threatening, and did not unreasonably interfere with Nitsche's work performance. The court also noted that some of Nitsche's allegations did not involve any sexual conduct or connotation, and that the pornographic video was shown in Hanson's home, not the workplace. The court concluded that because "Title VII is not designed to purge the workplace of vulgarity," Nitsche failed to demonstrate an actionable hostile work environment sexual harassment claim. [back]

Complaint Regarding Racist Outburst Not Protected Activity

Robert Jordan, an African American, worked as a network technician assigned to IBM in Maryland by a staffing agency, Alternative Resources Corporation. Jordan worked at the IBM location for four years without incident. In October 2002, Jordan was watching news coverage that police in

Montgomery County, Maryland had captured two African American men suspected of being the snipers who had randomly shot 13 individuals, killing ten, in separate incidents in Maryland, Virginia, and the District of Columbia. A white IBM employee watching the news with Jordan exclaimed, "they should put those two black monkeys in cage with a bunch of black apes and let the apes f--k them." Offended, Jordan reported the statement to two IBM supervisors and to his manager, and indicated he was going to take his complaint to the IBM site manager. Jordan discussed the incident with two other co-workers, who told him that the employee had made similar racist comments before. A month after his complaint, Jordan was fired because he was "disruptive," his position "had come to an end," and because management personnel "don't like you and you don't like them." Jordan sued IBM and Alternative Resources Corp. for retaliation in violation of Title VII of the Civil Rights Act of 1964 and violation of various state employment laws. The trial court ruled that Jordan was not protected by Title VII from his employer's retaliation because no objectively reasonable person could have believed that in reporting the outburst to management, Jordan was opposing an unlawful hostile work environment. Jordan appealed.

In Jordan v. Alternative Resource Corp. (5/12/06), the U.S. Court of Appeals for the Fourth Circuit agreed with the trial court. The court "readily concluded" that the comment did not rise to actual hostile work environment because, although it was unacceptably crude and racist, it was an isolated emotional response directed at the snipers through the television set and was rhetorical in so far as it was not related to any fellow employee. The court agreed that "no objectively reasonable person could have believed that IBM's Montgomery office was in the grips of a hostile work environment or that one was taking shape" and that "the only reasonable conclusion is that [the employee's] comment was prompted by the unique and surely never-to-be repeated capture of snipers in the area." The court rejected Jordan's argument that Title VII must protect a complaint of a single incident to management because otherwise employees will be caught in the "double bind" of risking termination by reporting harassing conduct immediately, or waiting too long to report it and having a claim dismissed. The court found that an employee must reasonably believe that the isolated harassing event he has witnessed is the "first step on the road to perdition." The court also noted that "employers who trap employees by firing those who use their anti-harassment reporting procedures could very well lose their affirmative defense in cases where employees do not report suspected violations." With respect to the alleged other racists comments that co-workers reported to Jordan, the court disregarded the incidents because Jordan failed to identify where or when those comments were made or what was said. [back]

Alamo Found Liable For Post-September 11th Backlash Bias

Somalia-born Bilan Nur worked as a Customer Sales Representative for Alamo Rent-A-Car from 1999 to 2001. In 1999 and 2000, Alamo permitted Nur to wear a head covering for religious reasons during the Muslim holy month of Ramadan. However, following the terrorist attacks in New York and Washington, D.C. on September 11th, 2001, Alamo refused to permit Nur to observe her religious custom in December 2001. Alamo concluded that the Company dress code prohibited the wearing of a scarf and offered Nur the accommodation of allowing her to wear her head covering at work, unless she was servicing clients. Nur refused to comply with Alamo's directive and it terminated her employment. Nur sued alleging religious discrimination in violation of Title VII of the Civil Rights Act of 1964.

In EEOC v. Alamo Rent-A-Car (5/26/06), the U.S. District Court for Arizona ruled that Alamo discriminated against Nur based on her religion and failed to reasonably accommodate Nur's religious beliefs. The court discounted the accommodation Alamo offered Nur, finding that it "required her to remove her head covering during Ramadan when she served clients, but still required her to serve clients, making it impossible for Ms. Nur to avoid removing her head

covering at work." The court concluded that the Company feared damage to its corporate image and a breakdown in Company dress policy if Nur were to be allowed to wear her head covering and, therefore, failed to reasonably accommodate Nur's religious beliefs. The Phoenix, Arizona office of the Equal Employment Opportunity Commission described the case as the first "backlash discrimination" suit it has brought to court since the September 11th terrorist attacks. [back]

Participating in Porn Is Not Protected Speech

Ronald Thaeter and Timothy Moran were deputy sheriffs with the Palm Beach County Sheriff's Office (PBCSO). In early 2000, the two deputies agreed to participate in sexually explicit photographs and videotapes for a pay-per-view website operated by the wife of a third deputy sheriff, who was also a participant. Thaeter appeared in still photographs of consensual group sexual activity. One of the photographs included a naked woman lying on top of a PBCSO marked police car. In addition, Thaeter participated in a "streaming video" in which he engaged in explicit sexual activity. Moran also participated in explicit group sexual activity shown in still photography, but was not featured in any videos. The officers asked that their faces be obscured; however, film editing was not successful and the men could be identified. In October of 2000, a private citizen made an anonymous complaint to the PBCSO regarding the participation of the police officers and the portrayal of a nude female posing on a marked patrol car.

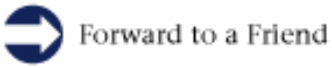
PBCSO hired an investigator who concluded that the deputies did not commit misconduct by violating the department ethics code, but that, because Thaeter's and Moran's wives received profits from the websites, the deputies had engaged in misconduct by failing to get permission for outside employment. Following a hearing by a disciplinary board, the two deputies were terminated. However, a hearing board subsequently reversed the ruling, finding that no violations of the ethics or off-duty employment rules had occurred. Ultimately, however, the sheriff rejected the hearing board's finding and the deputies were terminated. The deputies challenged the decision, and the sheriff was ordered to reinstate the officers. The sheriff refused, and the deputies sought an injunction under the First Amendment of the U.S. Constitution to force him to reinstate them. A trial court rejected the First Amendment claims and the deputies appealed.

In Thaeter v. Palm Beach County Sheriff's Office (5/26/06), the U.S. Court of Appeals for the Eleventh Circuit upheld the terminations. Although public employees may have First Amendment protection, the court noted that public employers may also place restraints on speech. The court concluded that Thaeter and Moran violated Palm Beach County's ethics rules and its prohibition against unauthorized work when they participated in the pornographic website. The court found that the fact that the two men attempted to conceal their identity in the photographs and on the video underscored the fact that the officers "realized that this off-duty conduct was done in contravention of the rules governing their PBCSO employment." The court concluded that the conduct was "detrimental to the mission and the functions of the employer" and "reflected on their fitness as Deputies and undermined public confidence in the PBCSO." [back]

Smith Barney Settles Brokers' Overtime Claims for $98 million

Securities brokers employed by CitiGroup Smith Barney brokerage unit sued Smith Barney alleging that they were improperly classified as exempt employees under the Fair Labor Standards Act and therefore failed to receive proper overtime. In the largest settlement to date of overtime claims against the financial services industry, Smith Barney announced that it will pay $98 million to settle claims on behalf of approximately 200,000 current and former brokers, in Bahramipour v. CitiGroup Global Markets, Inc. f/k/a Solomon Smith Barney (settlement announced 5/24/06). The settlement awaits final approval by the U.S. District Court for the Northern District of California and resolves cases brought in California, New York, and New

Jersey. [back]



For more information, please contact Stephen Aronson or phone him at 800-826-3579. Visit our Labor, Employment and Benefits website at www.rc.com. To view back issues, visit our searchable archives. If you would like certain information covered in future communications, let us know. We welcome your feedback.