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Recent Cases Bolster Employers' Right to Discipline Employees for Comments to Media or in Blogs

By Alejandro Valle, Esq.

We live in the age of the Information Superhighway. Information spreads fast, both through traditional media like newspapers and through newer methods of communication like blogs and social networking sites. Employers might be concerned over what information - about themselves, their customers, and their employees - is being circulated in the various forms of available media.

One question that arises in this context is: Can an employer lawfully discipline or even terminate an employee for the contents of a personal (albeit publicly-available) blog or for leaked reports to the press?

The answer often turns on the nature of the employer (public vs. private) and the nature of the content being disseminated, including whether that content is confidential.

In 2008, the United Stated Court of Appeals for the Sixth Circuit (covering Kentucky, Michigan, Ohio and Tennessee) issued an opinion which reversed a federal trial court's ruling that had dismissed a First Amendment retaliation claim by a former employee of a not-for-profit entity. See *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169 (6th Cir. 2008). While the employer entity was a private corporation under Michigan law, its funding came almost exclusively from public state and federal sources (for purposes of distributing significant financial aid to elderly members of the community). Accordingly, the court treated the employer as if it were a public employee terminating an employee for her speech.

The speech in question consisted of comments made by a

program coordinator of the not-for-profit entity to a local newspaper reporter. The comments were regarding a sexual harassment lawsuit by another employer against the entity's executive director. The court of appeals held that these sorts of comments - regarding sexual harassment allegations against a quasi-public official (or at least a private actor responsible for distribution of public funds) - were comments touching on matters of public concern. The court explained that "matters of public concern" for purposes of this analysis include whether a government entity or public official is discharging governmental responsibilities appropriately or whether such entities and individuals are breaching or might be breaching the public trust. Reporting on allegations of racial or sexual harassment by public or quasi-public employers is "inherently" a matter of public concern, according to the Sixth Circuit Court of Appeals.

The Court also found it noteworthy that the newspaper reporter in this case had sought out the employee, not vice versa, and that the information provided had been specific as opposed to "generalized assertions." Ultimately, the lower court's finding in favor of the employer was reversed, and the terminated employee was allowed to proceed with her claim for First Amendment retaliation.

More recently, on the other hand, another federal appellate court - the Ninth Circuit Court of Appeals (covering Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington) - upheld a public employer's transfer of an employee from a "curriculum specialist" and "instructional coach" position to a classroom teaching position because of comments the employee made on her personal blog. See *Richerson v. Beckon*, 2009 WL 1975436 (9th Cir. 2009). The employee's position as an "instructional coach" required her to maintain a trusting relationship with the advisees that were assigned to work with her. Nevertheless, in her personal blog (which was publicly available) she made several "highly personal" and abusive comments about her employers, union representatives, and fellow teachers. These individuals were not mentioned by name but were "easily identifiable."

The employer claimed the transfer was needed because once the blog was discovered several of the teachers and other employees complained and/or refused to work with her, and she lost her ability to maintain trusting relationships as an instructional coach. The court of appeals, assessing the employee's claim of First Amendment retaliation, held that the speech in question did touch on matters of public concern, but also disrupted co-worker relations, eroded close working relationships premised on personal loyalty and confidentiality, and interfered with the speaker's performance of her duties. Thus, the legitimate interests of the school district outweighed the employee's First Amendment free-speech interests, and the transfer did not violate her constitutional rights with regard to her Internet blog.

Ultimately, while her speech had touched on a matter of public concern, countervailing interests of the public employer - with regard to maintaining co-worker relations and ensuring performance

of assigned duties - served to justify its employment action despite the employee's free-speech rights.

Moving to the context of private employers, the Sarbanes-Oxley Act of 2002 (a legislative result of the Enron scandal, among others), provides protection against discrimination or termination for employees of publicly-traded companies who provide information regarding conduct that the employee reasonably believes is a violation of securities laws or other federal laws related to fraud against shareholders. One question that arises is: To whom should information be provided for a "whistleblower" to be protected under Sarbanes-Oxley? Does providing information to the media count? The statute itself does not state that reports to the media qualify, instead limiting its protection to employees providing information for federal regulatory or law enforcement officers, members of Congress or Congressional committees, or persons with supervisory authority over the employee. Recent case law in one federal court suggests that this limitation of scope should be strictly construed. See *Tides v. The Boeing Company*, 2010 WL 537639 (W.D. Wash. Feb. 9, 2010).

In *Boeing*, a private employer terminated two employees after learning that the employees had been leaking confidential information to a local reporter regarding what the employees believed was an unethical auditing culture and a hostile work environment toward those who sought to change it. The court in the *Boeing* case held that Sarbanes-Oxley limits authorization for whistleblower claims to those who provide information to the groups listed in the statute and that media groups were not on that list. Moreover, the court held that the employer had proven that it would have terminated these employees for the disclosure of confidential material regardless of whether or not the information was leaked specifically to the media, and the former employees could not establish that this legitimate basis for termination was somehow made up or contrived as a pretext. The employees were not able to overturn the judgment in favor of the employer.

Ultimately, employers need to be aware that the flow of information today is quick and widespread and, thus, difficult to control. The same technologies that help business compete and perform also allow employees and others to disseminate information about an employer quickly to sources not otherwise intended, such as media outlets and blog readers. While employees of public entities have significant protections against retaliation for exercise of free-speech rights, these protections are not unlimited. Nevertheless, public employers - and private employers that might be considered public employers - should proceed with caution with respect to matters involving an employee's free-speech rights. Moreover, private employers - particularly publicly-traded companies - need to be mindful of whistleblower protection from Sarbanes-Oxley and from state laws that offer similar protections to employees. While Sarbanes-Oxley generally will not be helpful to an employee who leaks confidential information to a media outlet, at least according to the *Boeing* case, employees might nevertheless be protected for similar external disclosures directed at federal agents or members of Congress.

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