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Briefly

February 2011 Volume 11, Issue 2

EMPLOYER ACCUSED OF RACIST FIRINGS
ESTABLISHES DEFAMATION CASE AGAINST PROTESTERS

Mary Dee Allen....

"A very recent ruling has been issued in which a California employer appears to have successfully attacked such protest activities."

Over the years, many employers have been stigmatized by protests against their employment practices, sometimes being accused of racism, sexism, discrimination, and the like. In a few instances, the activities have included so-called corporate campaigns against employers by activist groups, attempting to harm the employer and to achieve certain goals, which are, at times, different from those stated on their protest signs. A very recent ruling has been issued in which a California employer appears to have successfully attacked such protest activities. Overhill Farms, Inc. V. Lopez, 110 FEP Cases 1460 (California Court of Appeals, November 15, 2010).

By way of background, the employer, Overhill Farms, was advised by the Internal Revenue Service (IRS) that 231 of its then-current employees had provided invalid Social Security numbers, and warned that this situation could expose it to the imposition of liability. Overhill Farms then notified the identified employees that their Social Security numbers were invalid according to the IRS, and provided them the opportunity to correct the erroneous information to avoid termination of their employment. Only one of the identified employees provided Overhill Farms information showing that the allegedly invalid Social Security number was, in fact, valid. The remainder of the identified employees either admitted they had submitted an invalid Social Security number and were not authorized to work in the U.S., or ignored Overhill Farms requests for information. As a result, their employment was terminated.

Several of the terminated employees got involved with a community activist and participated in protests outside Overhill Farms two plants and also outside of one customers place of business. The protest efforts included issuing a press release and handbills which claimed that Overhill Farms had used a supposed discrepancy of Social Security numbers as a pretext for employment discrimination which was both racist and a targeted attack on older and more senior employees.

Overhill Farms then sued the individual employees for defamation, intentional interference with prospective economic advantage, intentional interference with contractual relations, extortion, and unfair competition. All of Overhill Farms claims were based on alleged defamatory statements made by the employees during the course of the protests.

A California state trial court concluded that Overhill Farms had carried its burden of proving a probability of prevailing on all of its claims except the unfair competition claim, rejecting the employees efforts to get the case dismissed. On appeal, the California Court of Appeals upheld the the trial courts rulings. It noted that the employees primary contention was that none of the alleged statements constituted defamation because none declared or implied a provably false assertion of facts. To the contrary, the appellate court found that the statements contained in the employees written press releases, leaflets and flyers accused Overhill Farms of more than harboring discriminatory attitudes; they accused Overhill Farms of engaging in a mass employment termination based upon racist and ageist motivations. The court found that such an accusation clearly constituted a provable fact; indeed, the court noted that employer motivation for terminating employment is a fact employees routinely attempt to prove in wrongful termination cases.

Editors Note - While this case is not a final ruling on liability, it certainly is a sign that employers victimized by corporate campaigns do have legal rights in the face of such inappropriate publicity campaigns by protest groups.

HEALTH REFORM UPDATE
CHALLENGES TO HEALTHCARE LAW CONTINUE

Catherine Shuck..

"While the Republicans will continue their efforts to repeal the healthcare law, the real focus and battleground will be on how parts of the law might be changed or repealed."

Even as states, insurers, and employers continue to move forward with implementation of the Patient Protection and Affordable Care Act (PPACA), various challenges to the law continue. First, on January 19, the House of Representatives voted to repeal the healthcare law by a vote of 245-189, with three Democrats joining the entire Republican caucus in the majority. The Republicans were not able to garner enough support to advance the repeal measure in the Senate, however, where it failed to clear an early procedural hurdle on February 2. In any event, the President would certainly veto any such repeal.

While the Republicans will continue their efforts to repeal the healthcare law, the real focus and battleground will be on how parts of the law might be changed or repealed. One part of the law seems headed for repeal: at the same time it rejected outright repeal, the Senate voted 81-17 to repeal the extremely unpopular 1099 provision in PPACA. That provision, which takes effect in 2012 and is intended to generate revenue to offset PPACAs expenses, requires businesses to file a 1099 tax form identifying anyone to whom they paid $600 or more for goods or merchandise in a year. The measure will likely pass the House, and President Obama indicated in the State of the Union Address that he would sign it.

The more difficult issue, of course, is whether or how to modify PPACAs requirement that all individuals obtain health insurance by 2014 or pay a penalty tax (the so-called individual mandate). While Congress considers the issue, numerous lawsuits are wending their way through the federal courts challenging the individual mandate as unconstitutional. At this writing, four federal trial courts have dismissed challenges to PPACA, holding that the individual mandate is constitutional. Those cases are now on appeal. More notably, two federal trial courts have ruled the other way, holding that PPACA is unconstitutional. The latest ruling came in a case being heard in Florida, which has been joined by 26 states (Georgia is among the plaintiffs, but Tennessee is not). Those cases are now on appeal as well, with seven cases still pending in the federal trial courts. The Supreme Court will likely have the final say on the issue.

Fortunately, since the most critical elements of the law do not take effect until 2014, there will be time for such a controlling decision and for any interim amendments to the law before the major implementation required in 2014.

OBAMA ORDERED REVIEW OF FEDERAL REGULATIONS

Carol Merchant...

"The President said his Executive Order would strike the right balance… "

On January 18, 2011, President Obama signed an Executive Order requiring a government-wide review of outdated regulations that stifle job creation and make our economy less competitive. The President said his Executive Order would strike the right balance between economic growth and protecting the environment and public health and safety. Federal agencies have 120 days to submit a plan for how they intend to review existing regulations.

Business groups hailed the announcement as a step in the right direction, while many wonder if it is primarily cosmetic in an effort to counter the image that the President was anti-business. In defending attacks from both the right and the left, Administration officials said the President was merely formalizing the cost-benefit analysis the Administration has already been following.

A September 2010 study for the Small Business Administration concluded that complying with federal regulations costs companies with fewer than 20 employees an average of $10,585.00 a worker, compared with $7,755.00 per employee for large companies. Therefore, regulatory agencies are supposed to simplify compliance procedures for small business.

EEOC ISSUES
FINAL GINA REGULATIONS

Suzanne Roten....

"The EEOC has received about 200 charges alleging GINA violations since the Act took effect "

On November 9, 2010, the Equal Employment Opportunity Commission (EEOC) published its final regulations implementing the Genetic Information Nondiscrimination Act (GINA). These final regulations took effect January 10, 2011, and will be codified at 29 CFR Part 1635.

GINA actually took effect for employers on November 21, 2009. The EEOC has received about 200 charges alleging GINA violations since the Act took effect, but reports indicate that about three-fourths of those GINA charges also allege ADA violations. Regarding the interplay with other employment discrimination rules, the final GINA regulations specifically provide that during a fitness for duty or post-job offer medical exam, questions regarding family medical history are no longer permitted. The Act and the final regulations distinguish between medical exams for employment-related purposes and those for medical treatment, with questions touching on genetic information allowable only in the latter.

Among the other changes in the final regulations are the inclusion of more examples in the text of the regulations regarding what constitutes a genetic test, and clearer statements regarding the six exceptions to employers liability for acquiring genetic information. The final regulations also discuss the commercially and publicly available information exception in the context of employer internet searches and discovery of information on social networking sites. Generally, employers cannot search such sites with the intent of finding individuals genetic information.

Additionally, the final regulations make it clear that when an employer lawfully possesses genetic information, the employer does not have to create a new file but rather can place such data in an existing confidential medical information file. The medical file must be kept separate from an employees personnel file.

The final regulations also address employee wellness programs. The proposed regulations would have allowed employers to use genetic information in connection with voluntary wellness programs, but did not define such programs. The final regulations address in a way favorable to employers the concern as to whether wellness programs that provide financial incentives would still be considered voluntary.

KNOW YOUR ATTORNEY
ANDREW J. HEBAR

ANDREW J. HEBAR is an Associate in the Knoxville, Tennessee office of the firm, joining in June 2008. His law practice includes an emphasis on workers' compensation defense, employment law, general civil practice and subrogation. Andrew is a native of Black Creek, WI. Andrew is a 1997 graduate of the National Academy of Railroad Sciences in Overland Park, Kansas. He worked several years with the Burlington Northern and Santa Fe Railway. Andrew graduated summa cum laude with a B.B.A. in Business Management from the University of Memphis in 2002, as the top student in the Business Management program. He also minored in Political Science and received top student recognition in that program. He obtained his Doctor of Jurisprudence degree from the University of Tennessee College of Law in Knoxville, Tennessee, graduating in 2005. Andrew worked in various positions in the subrogation department of a large boutique insurer of commercial trucking before reaching a position as in-house subrogation counsel prior to entering the private practice of law.

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OSHA MAKES NEW PUSH FOR ENGINEERING
OR ADMINISTRATIVE CONTROLS OVER NOISE RATHER THAN PPE

Mary Moffatt Helms

"OSHA intends to change its noise enforcement policy to authorize issuing citations requiring the use of administrative and engineering controls when feasible."

Under the current interpretation of OSHAs noise control standard, employers are allowed to use personal protective equipment (PPE) to reduce employee exposures to noise, as opposed to much more expensive engineering or administrative controls. OSHA is now proposing to eliminate this approach and to consider engineering and administrative controls to be feasible so long as they will not threaten the employers ability to remain in business or if the threat of liability results from the employers having failed to keep up with industry safety and health standards.

Under OSHAs current noise standard, employers are required to implement feasible engineering and administrative controls to reduce noise to permissible levels, but are only cited for failure to use engineering or administrative controls when hearing protectors are shown to be ineffective or the cost of the controls are less than the cost of a hearing conservation program. In the proposed revision, OSHA instead would consider engineering or administrative controls economically feasible when their costs do not threaten an employers ability to stay in business. Administrative controls may involve limiting how long an employee can work in an area with high noise levels, while engineering controls would reduce the decibel level of a particular machine.

OSHA intends to change its noise enforcement policy to authorize issuing citations requiring the use of administrative and engineering controls when feasible. The new policy would specify that feasible administrative or engineering controls must be used to reduce noise to acceptable levels and that personal protective equipment, such as earplugs, must be used only as a supplement when administrative or engineering controls are not completely effective. Many employers are concerned those proposed changes would impose unreasonable costs for their businesses. The proposed interpretation is important and on December 6, DOL announced the deadline for submitting comments to OSHA (originally due December 20, 2010), has been extended to March 21, 2011. DOL has also announced it intends to hold a stakeholder meeting before the end of the comment period to listen to the concerns of businesses and workers about the proposed interpretation.

EMPLOYEE DOWNLOADS NUMEROUS DOCUMENTS
FROM EMPLOYERS COMPUTER WHILE SECRETLY WORKING FOR COMPETITOR

Jeff Jones

"While on medical leave, the defendant remained an employee, and as long as he was an employee he retained permission to use the computer system…"

Many employers are plagued with employees or former employees stealing the company's trade secrets or other confidential information following their employment, and sometimes engaging in such activities during their employment. In some recent litigation, the plaintiff, Accenture, contended that one of its employees violated various sections of the Computer Fraud and Abuse Act (CFAA), misappropriated trade secrets, converted Accenture's secret information, and breached his contract with the Accenture. Accenture contended that during a leave of absence, the defendant had started working for a competitor, and that the employee downloaded numerous documents and passed them on to the competitor, despite having acknowledged and agreed to comply with various policies, including Accenture's confidentiality policy, security policy, dual employment policy, work station security standard, and mobile device policy.

The defendant filed a motion to dismiss the statutory CFAA claim. The court granted the defendant's motion to dismiss, finding that he did not access the secure network without authorization despite his violations of confidentiality, security, and dual employment policies. While on medical leave, the defendant remained an employee, and as long as he was an employee he retained permission to use the computer system, and thus a statutory violation was not established.

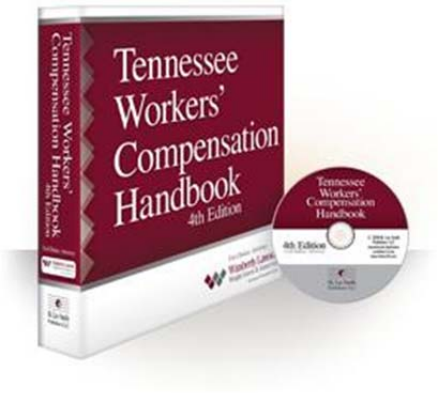

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Table of Contents (complete Table of Contents available on our website)

About the Author

Attorney **Fredrick R. Baker** is a Member in the Cookeville, Tennessee, office of **Wimberly Lawson Wright Daves & Jones, PLLC,** which he joined in 2001. His law practice includes an emphasis in workers' compensation and employment discrimination, as well as ADA and FMLA compliance. Fred is on the Advisory Board for the Tennessee Workers' Comp Reporter. He received his Bachelor of Arts degree in Philosophy, *summa cum laude*, from Transylvania University and his law degree, *magna cum laude*, from the University of Tennessee. Fred has earned a Martindale-Hubbell Peer Review Rating of AV Preeminent.

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