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Briefly

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EMPLOYEE BARRED FROM SENDING LETTERS TO CUSTOMERS COMPLAINING OF DISCRIMINATION

Mary Dee Allen....

"In recent years, various forms of protestors have engaged in 'corporate campaigns' designed to harm a company's reputation ...."

In a recent discrimination case against the plaintiff's former employer, the employer counter-sued for defamation, tortious interference with business relationships, and unlawful use of civil proceedings/abuse of process. The counterclaims were prompted by correspondence from the plaintiff indicating his intention to contact the employer's customers accusing the employer of "discriminatory and abusive practices" that were "illegal, immoral or both." The employer contended that the proposed correspondence was defamatory, unfounded and posed a serious threat to its business relationships with its customers. The employer filed a motion requesting that the court issue a temporary restraining order and preliminary injunction to prevent the plaintiff from communicating with its customers in this manner. The plaintiff contended that his proposed correspondence was protected free speech.

The federal district court found that plaintiff's participation in litigation does not afford him a license to disparage the employer and/or damage its business relationships. The court further found that the employer had a reasonable probability of success on the merits of its state law counterclaims, should plaintiff send his proposed correspondence accusing the employer of discriminatory, illegal and abusive practices. The court determined that the employer would likely suffer irreparable injury if the plaintiff was not enjoined from contacting the employer's customers to denounce alleged "illegal" and "immoral" practices, and that the proposed communications were not intended for a proper purpose. Consequently, the court concluded that the public interest favored the issuance of an injunction against such communications. *Rodriguez v. National Freight, Inc.*, 122 FEP Cases 481 (M.D. Pa. 2014).

Editor's Note: In recent years, various forms of protestors have engaged in "corporate campaigns" designed to harm a company's reputation, and the present case involves a similar campaign undertaken by a plaintiff in an employment discrimination lawsuit. The court's opinion is aggressive in two respects. First, it found that the employer's counterclaims likely stated valid claims for defamation, tortious interference with contractual relationships, and abuse of process. Second, in spite of the plaintiff's free speech argument, the court order enjoined or prohibited the plaintiff from communicating

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KNOW YOUR ATTORNEY
JEROME D. PINN

JEROME D. PINN is a Member of the Knoxville, Tennessee office of the firm, which he joined in 1996. His law practice includes an emphasis in employment discrimination and wrongful discharge litigation, as well as ADA and FMLA compliance, Wage and Hour law compliance, and affirmative action compliance. He received his Bachelor of Arts degree in Government and History from Cornell University, and his law degree from the University of Michigan. He has been admitted to practice in the United States District Courts for the Eastern, Middle and Western Districts of the State of Tennessee.

DETERMINING STRATEGY ON WHEN AND HOW TO FIGHT AN UNEMPLOYMENT CLAIM

G. Gerard Jabaley

"[A] simple unemployment claim suddenly becomes a more serious matter…"

Perhaps the most common form of employment "litigation" is a claim for unemployment compensation. Such claims are so common that only a few employers even consider this as "litigation," although such cases often involve a hearing before a state administrative officer or "judge." Similarly, a record can be established, often by a recording that can later be transcribed. Such a transcript can be useful to an employer, or to a plaintiff, in any subsequent litigation of a more serious nature, such as a discrimination lawsuit.

Further, the mere fact that an unemployment claim is challenged by an employer may cause a former employee to seek the advice of an attorney. The claimant's attorney may suggest a stronger course of action for the employee than a simple unemployment claim, such as an EEOC charge or discrimination lawsuit. In either event, a simple unemployment claim suddenly becomes a more serious matter.

The authors have experienced numerous "horror stories" of having a personnel clerk show up at an unemployment hearing, only to be confronted not only by the claimant, but also by the claimant's attorney, who demands important documents and asks some particularly penetrating questions. The clerk or company representative may or may not be prepared to answer such questions, but in any event the result is that the plaintiff is able to establish a potentially favorable record for a subsequent more serious claim. The company is often not prepared for this possibility.

In spite of these considerations, most employers choose to "fight" an unemployment claim if the employee has been discharged. An employee who has been laid off or who resigns for a good reason can normally draw unemployment benefits, while an employee discharged for a good reason normally cannot draw unemployment benefits. The key is whether the discharge was for a good reason, which under the laws of most states requires willful misconduct. Consider the example of an employee discharged for low productivity. If an employee seeks unemployment compensation and testifies that he or she tried to do their best, they can normally draw unemployment benefits, because they have not committed willful misconduct. On the other hand, if an employee's low productivity is due to failure to follow company instructions, the failure to follow instructions can often constitute willful misconduct, resulting in a denial of unemployment benefits.

Grounds for an employer to defend an unemployment claim furnish "textbook" training for any type of disciplinary action. It is desirable for there to be a written set of company rules, and the employer should show that the employee violated those rules. It also helps if there were one or more prior written warnings prior to the discharge decision.

In order to facilitate the processing of unemployment claims, many states require an employer to provide a written notice of termination on a designated form for terminating an employee. Rarely is there a penalty for failure to provide such a form, however. Similarly, usually there is no penalty against an employer for failing to respond to an unemployment claim that has been filed, other than the fact that the claim is more likely to be granted if the employer does not oppose it.

Why do employers oppose unemployment claims of former employees? Some employers oppose such claims as a matter of principle, finding it totally inappropriate that when an employee is discharged for willful misconduct, they are then able to benefit from their termination. In addition, a series of multiple recoveries of unemployment benefits on the part of former employees may cause the employers "experience rating" to go up, meaning an increase in the proportion of wages that has to be paid as unemployment taxes to the state.

Some employers agree to not oppose the former employee's unemployment claim as part of a negotiated severance or settlement. If the former employee has waived any rights against the former employer, some employers consider their agreement not to oppose an unemployment claim as a small price to pay for such a settlement.

HOW BANKRUPTCY CAN AFFECT EMPLOYMENT LITIGATION

Rebecca Brake Murray

"The problem emerges when a plaintiff fails to identify the lawsuit as property in the bankruptcy matter…"

While people do typically apply bankruptcy law to employment litigation, sometimes a bankruptcy matter can play an intricate role in how the employment litigation proceeds. Depending on the circumstances, a bankruptcy matter can later come back to haunt a plaintiff. The typical scenario is when a plaintiff files a lawsuit or an EEO complaint and then later files for bankruptcy. The problem emerges when a plaintiff fails to identify the lawsuit as property in the bankruptcy matter. A recent case from the United States District Court for the Eastern District of Tennessee highlights the problems that can occur.

In *Hedrick v. Tennessee Valley Authority Board of Directors*,[1] United States District Court Chief Judge Varlan dismissed the plaintiff's lawsuit after finding that the plaintiff had no standing to sue—that is, the plaintiff did not have a concrete interest in his own lawsuit. 3:13-CV-409, 2014 WL 1515422 (E.D. Tenn. Apr. 18, 2014). Specifically, the plaintiff filed an administrative complaint against the defendant alleging racial discrimination and retaliation. While the administrative complaint was pending, the plaintiff filed for Chapter 7 bankruptcy. As part of his bankruptcy proceeding, he was supposed to report all of the property he owned, which expressly included all lawsuits and administrative proceedings to which he was a party. The plaintiff failed to report that he had initiated an administrative action against TVA.

Subsequently, the plaintiff filed a lawsuit asserting claims for a hostile work environment on the basis of racial and sexual discrimination under Title VII of the Civil Rights Act of 1964 and the Tennessee Human Rights Act ("THRA"). The defendant filed a motion to dismiss arguing, among other things, that the plaintiff did not have standing to sue because the lawsuit properly belonged to the bankruptcy estate and not to the plaintiff.

The Court agreed with TVA that the plaintiff did not have standing, and it ultimately dismissed the case. The Court reasoned that the bankruptcy estate is "comprised of 'all the legal or equitable interests of the debtor in property as the commencement of the [bankruptcy] case.'" The Court continued that the plaintiff/debtor's property includes any causes of action and that the trustee of the bankruptcy estate becomes the representative once a bankruptcy matter is initiated. It is the trustee who has the "capacity to sue and be sued." Because the trustee is the only one with power to sue, the plaintiff did not have standing to pursue his cause of action. The Court noted, however, that if the trustee formally abandoned the claim, the claim would then re-vest in the plaintiff, allowing the plaintiff to bring the suit. In this case, the lawsuit was never properly abandoned because the plaintiff failed to report the action in his bankruptcy proceeding. Basically, the Court held that the lawsuit was not his anymore because he had filed for bankruptcy.

As Hedrick clearly demonstrates, a bankruptcy matter can shape how another litigation proceeds. Failing to disclose lawsuits or administrative proceedings appears to be a common problem—a problem that can be all too devastating to a plaintiff's case. If the plaintiff's lawsuit is frivolous, it is unlikely that the trustee will pursue to an action. If the trustee decides not to pursue the action, the plaintiff can proceed, but only after the trustee formally abandons the lawsuit. This creates more hoops that the plaintiff must jump through before the court can even consider the merits of the underlying lawsuit.

[1]*The author notes that the Firm was involved in a companion case, and the plaintiff's lawsuit was also dismissed.*

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"EMPLOYEE BARRED FROM SENDING LETTERS"

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with the employer's customers in this manner, despite the fact that courts are usually reluctant to prohibit speech prior to it being made, since doing so could "chill" free speech. Undoubtedly, one of the reasons the employer was successful in this case was that the plaintiff was proceeding pro se (without an attorney). In addition, the plaintiff's various communications with the court suggested a desire on the part of the plaintiff to punish the employer, with no bona fide reason given for the communications.

PLAINTIFF REFUSED TO CHANGE HER HAIRSTYLE
FROM DREADLOCKS TO SOMETHING "PROFESSIONAL"

J. Brent Wilkins

"[D]ress code issues are contentious and sometimes lead to litigation."

A plaintiff recently sued an employer alleging that its dress code prohibiting dreadlocks constituted an unlawful employment practice that discriminates on the basis of race. While she was given an offer of employment, it was on the condition that she cut off her dreadlocks, and the offer was withdrawn when she refused to do so. The employer's policy stated:

> "All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines ... hairstyles should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable."

The court granted the employer's motion to dismiss the complaint, finding that the facts alleged in the complaint did not support a plausible claim for discrimination. The court stated that employers' grooming policies are outside the purview of Title VII, citing an earlier Fifth Circuit ruling where the court held:

> "Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race, and national origin. ... [A] hiring policy that distinguishes on some ... ground [other than sex], such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity. ... Hair length is not immutable and in the situation of employer vis a vis employee enjoys no constitutional protection. If the employee objects to the grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job."

Editor's Note: While this case correctly summarizes the majority of the federal court rulings, such dress code issues are contentious and sometimes lead to litigation. This is demonstrated by the fact that the EEOC brought the claim against the defendant employer, trying to convince the court that such claims should be allowed. EEOC v. Catastrophe Management Solutions, 122 F.E.P. Cases 758 (S.D. Ala. 2014).