Wimberly Lawson
Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

Briefly

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Brent A. Morris

"[A]ll employers can use the case as an opportunity to review their Social Media Policies."

HOW "FREE" SPEECH CAN BECOME EXPENSIVE, DISTRACTING AND DAMAGING

As we recover from a week-long "Election Night" in 2020, let's return to the unexpected and tense evening of November 8, 2016. In the early morning hours after the results came it, when it became clear that Donald Trump had shocked the world with an electoral victory, Danyelle Bennett, a 911 dispatcher for the Metro Government Emergency Communications Center of Nashville, Tennessee ("Metro"), went to Facebook to comment on the win, as millions of others did.

Ms. Bennett, however, certainly crossed any line of decency as she celebrated the President's victory. She posted on her public profile - "Thank god we have more America loving rednecks. Red spread across all America. Even n***** and latinos voted for trump too!" [she did not include asterisks.] Immediately, co-employees of Metro responded to her in shock as to her racist comment. One co-worker stated – "Was the n***** statement a joke? I don't offend easily, I'm just really shocked to see that from you." Another colleague (an African-American woman) called her and explained why the post was offensive. Ms. Bennett took her post down that night, but the damage was done.

The next day at work, her Facebook post had circulated among the workplace. Ms. Bennett's supervisors received reports about complaints and conversations over the post. Two employees complained that it was offensive. One member of the public complained, linking Ms. Bennett's personal account to her position at Metro because her position was in her bio. The public post even got the attention of the Mayor's office. At the end of an investigation, in which Ms. Bennett stated that her co-workers were just "playing the victim," she was terminated for conduct "unbecoming of an employee of the Metropolitan Government."

Ms. Bennett filed a lawsuit in federal court, claiming that her Facebook post was political speech protected by the First Amendment. She argued, therefore, that she was wrongfully discharged. In another interesting twist, the case was heard by Eli Richardson, a recent Donald Trump appointee. The judge sent the case to a trial jury, and the jury concluded that Bennett's speech "was not reasonably likely to impair discipline by superiors at [Metro], to interfere with the orderly operation of [Metro], or to impede performance of Bennett's duties at [Metro]." The jury did however conclude that the post was "reasonably likely to have a detrimental impact on close working relationships at [Metro] and undermine the agency's mission."

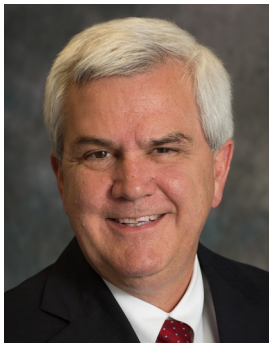
Based on these findings, the district court ruled from the bench, in a surprising opinion, that because the Facebook post represented the "mere use of a single word" and generally concerned the election, it amounted to core political speech protected by the First Amendment, and therefore Metro was unjustified in terminating the plaintiff. The jury, told to calculate her damages, did not seem to have their heart in any large verdict, awarding only $25,250.

Earlier this year, the 6th Circuit released their opinion on the case, unanimously overturning the opinion of the District Judge. They stated that the word was patently offensive and that employees' concerns over the language, including the "detrimental impact on close working relationships for which personal loyalty and confidence are necessary," overrode any First Amendment concerns. In a strongly worded moment, the Court stated that "[t]he district court's reference to Bennett's use of "n*****" as 'the mere use of a single word' demonstrates its failure to acknowledge the centuries of history that make the use of the term more than just 'a single word.' The use of the term 'evok[es] a history of racial violence, brutality, and subordination.'"

So what lessons can we take from this case? If you are a governmental employer (or a semi-governmental employer, a sometimes-difficult analysis), you can see that

Continued on page 4

TOTALLY TRACKING TIME WORKED FOR TELEWORKERS



Howard B. Jackson

"What if employees are working when not asked to do so, or even against [the employer's] instruction?"

It is common knowledge that one impact of the pandemic has been an increase in the number of employees who telework. Further, most expect that the percentage of employees who telecommute will remain far higher than pre-pandemic levels after the crisis ends.

For teleworkers who are non-exempt the circumstances create questions related to how the employer accurately records and pays for hours worked. In August, the Wage and Hour Division of the Department of Labor issued a Field Assistance Bulletin addressing this subject.

Of course, non-exempt employees must be paid for all hours worked. This includes time that the employer requests the employee to work, as well as all time the employer suffered or permitted the employee to work. In other words, even if the employer tells the employee not to work, if the employee performs work they must be paid.

In the telework setting what does it mean for an employer to "suffer or permit" an employee to work? And how is the employer to know about time that an employee worked when they are not requested to do so?

With regard to suffer or permit to work, the Bulletin notes that employers are charged with both actual knowledge of time worked as well as constructive knowledge. What does constructive knowledge mean? It means that even if the employer did not know of the time worked, it should have known through reasonable diligence, for example:

- An employee participates in conference calls outside of their usual hours and reports only the regularly scheduled hours, or
- An employee submits reports that show they are working on projects that involve time outside of their usual schedule but are reporting only their regularly scheduled hours worked.

How should employers obtain accurate records of time worked and avoid the "should have known" issues? The Bulletin recommends, and we agree, that an employer should establish a reasonable reporting procedure for both regularly scheduled time and time worked outside of that schedule. In addition, the employer must publicize that procedure and train employees in how to use it. By using this process the employer should accurately capture all time worked. The Bulletin notes that where an employer has established such a procedure and the employee fails to report unscheduled hours, worked the employer "is not required to undergo impractical efforts" to determine whether an employee has worked unreported hours.

A word of caution is in order. Establishing an appropriate reporting process will not constitute reasonable due diligence where the employer expressly or tacitly discourages employees from accurately reporting time worked.

Suppose an employer has the system in place but some employees simply do not report time worked outside their normal schedule? Employers are not required to go to extraordinary efforts to determine a discrepancy. For example, the Bulletin notes that an employer need not comb through cell phone or other such records of activity each week to determine whether an employee worked outside their usual schedule.

What if employees are working when not asked to do so or even against instruction? The Bulletin notes that the Fair Labor Standards Act and its regulations expect employers to exercise their control to see that work is not performed when the employer does not want work to be performed. This can be done via giving express instruction, and by imposing corrective action if the instructions are not followed. But the corrective action may not include failure to pay for the time that the employee worked.

In summary, a wise employer can obtain an accurate record of hours worked by establishing a proper reporting procedure, training employees on its use, and following it honestly. Such an ounce of prevention can prevent thousands of dollars of "cure."

DOL PROPOSES NEW RULE DEFINING *INDEPENDENT CONTRACTORS VS. EMPLOYEES* UNDER THE FLSA

Carol R. Merchant

"The DOL's proposed regulation … for the first time, sets a proposed rule to interpret the FLSA on this issue and provide broad agency-backed definitions."

On September 22, 2020, the U.S. Department of Labor (DOL) announced a proposed rule addressing how to determine whether a worker is an employee under the Fair Labor Standards Act (FLSA) or an independent contractor.

The FLSA requires covered employers to pay their nonexempt employees at least the federal minimum wage for every hour worked, and overtime pay for every hour worked over 40 in a workweek - and mandates that employers keep certain records regarding their employees. A worker who performs services for an employer as an independent contractor, however, is not an employee under the Act. Thus, the FLSA does not require an employer to pay an independent contractor either the minimum wage or overtime pay, nor does it require that an employer keep records regarding that independent contractor. This difference makes it critical that an employer understands the criteria to be used in determining whether a worker is an employee or an independent contractor.

The FLSA does not precisely define who is an employee. Until now, the DOL has relied on the courts, industry-specific regulations, fact-specific opinion letters and a fact sheet to offer tests to be applied in making a determination on the status of a worker. Federal appellate courts have differed on what factors to use when testing whether a worker is an independent contractor or an employee, and on how to weigh and apply those factors. The Sixth Circuit, which covers Tennessee and Kentucky as well as other states, has used a six-factor test which considered the permanency of the relationship, the degree of skill required for rendering the services, the worker's investment in equipment or materials, the worker's opportunity for profit or loss, the degree of the alleged employer's right to control the manner in which the work is performed, and whether the service rendered is an integral part of the alleged employer's business. No single factor has been determinative.

The DOL's proposed regulation, thus, for the first time, sets a proposed rule to interpret the FLSA on this issue and provide broad agency-backed definitions. The proposed rule adds a new 29 CFR Part 795 to delineate these definitions. The DOL also proposes to strike previous industry-specific interpretations set forth in 29 CFR 780.330(b) and 778.16(a) and replace them with cross-references to the interpretation set forth in the proposed rule. The regulations addressing independent contractor status under the Migrant and Seasonal Agricultural Worker Protection Act are not being revised.

The DOL proposes that the central inquiry as to whether an individual is an employee or an independent contractor under the FLSA is "whether, as a matter of economic reality, the individual is economically dependent on the potential employer for work." In other words, the key question is whether workers are more closely akin to wage earners who depend on others to provide work opportunities or entrepreneurs who create work opportunities for themselves. A further relevant question is whether the worker providing a certain service to a potential employer is an entrepreneur in that line of business.

The DOL's proposed rule explicitly gives two "core factors" more weight than all others:

- The nature and degree of an individual's control over the work; and
- The individual's opportunity for profit or loss.

Examples in the proposed regulatory text of an individual's substantial control include setting his or her own work schedule, choosing assignments, working with little or no supervision, and being able to work for others, including a potential employer's competitors.

In discussing the opportunity for profit or loss, the proposed regulations examine the worker's economic investment as part of the equation. This factor would weigh towards an individual being an employee to the extent the individual is unable to affect his or her earnings through initiative or investment or is only able to do so by working more hours or more efficiently.

Proposed §795.104(c) explains that the two core factors are each afforded more weight in the analysis of economic dependence than are any other factors. If both core factors point towards the same classification, their combined weight is substantially likely to outweigh the combined weight of other factors that may point towards the opposite classification. In other words, where the two core factors align, the bulk of the analysis complete. At the same time, if the two core factors do not point toward the same classification, the remaining enumerated factors will usually determine the correct classification.

The proposed regulations delineate three other factors to consider:

- The amount of skill required for the work;
- The degree of permanence of the working relationship between the individual and the potential employer; and
- Whether the work is part of an integrated unit of production.

The "skill required" factor weighs in favor of classification

Continued on page 4 ▶▶

"'FREE' SPEECH CAN BECOME EXPENSIVE"

continued from page 1

the First Amendment provides powerful protections for your employees' speech. In a case involving explicitly racist speech, openly published on Facebook and viewed by other employees, the trial court still determined that such speech was protected. The 6th Circuit's overturning of that result does, at the very least, suggest that using the "n-word" even in a political context is grounds for dismissal if other employees are upset by its usage.

So what if you are a private employer? Obviously, you are free to terminate any employee that engages in the sort of language used by Ms. Bennett. And you very likely should terminate an employee using any such language, as any lesser disciplinary measure could be used against you in a lawsuit should the same employee become the target of that suit. In other words, in a racial discrimination lawsuit, opposing counsel can use your failure to terminate an employee using the "n-word" or similarly extreme racial language as evidence of a culture of racial insensitivity or bias.

The trickier analysis, however, involves less extreme racial language. When, for instance, an employee posts on Facebook or any other platform language that is problematic but perhaps not patently offensive, your best defense is having a solid Social Media Policy. Such policies clearly lay out the expectations of the employer as it relates to an employee's conduct outside of work on media platforms. The language of the policy should explicitly reserve the right to discipline employees for language used on social media or the internet at large. These policies are actually helpful to employees, as it has been our experience that many employees believe that the First Amendment protects their "free speech" outside of the workplace. The short answer – it does not. Employees have no First Amendment protections as it relates to discipline by a private employer.

Finally, Social Media Policies insulate the employer from claims that the offending employee(s) were wrongfully terminated. For instance, imagine a suit brought by an employee who was terminated for allegedly inappropriate Facebook posts, but said employee argues that they were in reality fired for some illegal reason (for example, retaliation for filing a workers' compensation claim). In that case, the Social Media Policy will provide the precise mechanism of termination which helps the lawyers argue for the defense of the employer.

This case worried employers for months as we waited on the 6th Circuit decision. To have ruled that Ms. Bennett's posts were "protected political speech" would have potentially created untenable situations with co-employees and would have left governmental employers with little options to prevent hostility. Thankfully, the 6th Circuit ruled that there is no place for extreme language in the workplace, and all employers can use the case as an opportunity to review their Social Media Policies.

"INDEPENDENT CONTRACTORS VS. EMPLOYEES"

continued from page 3

as an independent contractor where the work at issue requires specialized training or skill that the potential employer does not provide. Otherwise, it weighs in favor of classification as an employee.

The "degree of permanence" factor would weigh in favor of an individual being classified as an independent contractor where his or her working relationship with the potential employer is by design definite in duration or sporadic. In contrast, the factor would weigh in favor classification as an employee where the individual and the potential employer have a working relationship that is by design indefinite in duration or continuous. The DOL notes that the seasonal nature of some jobs does not necessarily suggest an independent contractor classification, especially where the worker's position is permanent for the duration of the relevant season and where the worker has done the same work for multiple seasons.

The "integrated unit" factor weighs in favor of employee status where a worker is a component of a potential employer's integrated production process, whether for goods or services. The preamble to the proposed regulations provides the example of a programmer who works on a software development team as being more likely to be an employee. Another example of employee classification would be where an individual works closely alongside employees and performs identical work, or work closely interrelated with those employees. Conversely, where an individual service provider can perform his or her duties without depending on the potential employer's production process, the factor would favor classification as an independent contractor.

As noted above, it may not be necessary to spend much time analyzing these last three factors if both of the first two factors (the nature and degree of a worker's control over his or her work and the individual's opportunity for profit and loss) point to the same classification.

It is important to remember that at this point in time these are only "proposed" regulations. Further review and administrative steps must be completed before a final regulation can be issued.