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RECENT RULING LIMITS AT-WILL PROVISIONS OF EMPLOYEE HANDBOOK

Most employers have employee handbooks, and most employers have done a pretty good job of including at-will statements therein and statements that the handbook does not constitute a contract of employment. However, a recent decision of the Alabama Supreme Court has alarmed many employers as to the sufficiency of their handbook provisions. *Davis v. City of Montevallo*, 2023 Ala. Lexis 7 (January 13, 2023).

In this case, the handbook contained provisions that employment was at-will and also included a disclaimer in the handbook that stated it does not create any contract whatever. Unfortunately for the employer, the Alabama Supreme Court rejected arguments based on these provisions, reasoning that the employees' status as at-will was irrelevant to the question of whether the employer had to follow stated discharge procedures, because the reason for termination is distinct from the means of termination. The court also rejected the disclaimer because the disclaimer only applied to a contract of any specific period of time. The court further rejected the sufficiency of the contract disclaimer stating the employer retained the freedom to change the policies and procedures, noting that the employer's stated right to change it procedures was different from language expressly reserving the right to deviate from those procedures.

The court relied on the fact that "an employee handbook can represent a binding contract obligating the employer to satisfy certain conditions precedent to dismissing an employee." It found that the detailed step-by-step discharge procedure was worded in mandatory terms, including the pervasive use of "shall" when describing the discharge procedures. The court found that the use of such mandatory terms demonstrated that the employer chose to make some provisions in the handbook, specifically the discharge procedures, binding on the employer.

The ruling reversed summary judgment in favor of the employer and sent the case back to the trial court to determine whether the employer violated the handbook's discharge procedures.

Three dissenting members of the court found that the disclaimer language "I understand that nothing in this handbook . . . places a limitation on . . . the city's freedom to terminate the employment relationship at any time" was effective to disclaim away any binding contract. Nevertheless, the Alabama Supreme Court relied on technical reasoning to determine that the average employee would have interpreted the handbook provisions regarding the mandatory discharge procedures as binding.

Editor's Note: This decision and its reasons may send "shockwaves" through the employer community, suggesting employers be extremely careful in the drafting of handbook disclaimers, and also to get a competent labor and employment law attorney to carefully review them.

IF YOU HAVE A COMPANY INTRANET SITE, READ THIS

Many employers have company non-public intranet sites allowing employees to communicate with the company and each other on matters of interest. A recent National Labor Relations Board (NLRB) decision involving Lush Cosmetics discusses problems with its intranet site called the "Hive." *Lush Cosmetics, LLC*, 372 NLRB No. 54 (Feb. 10, 2023).

The purpose of the "Hive" is to share general news and guidelines with employees, and employees can respond, like, and comment on the employer's post, as well as engage in discussion with each other. There is a usage policy for the Hive which states that the employer "welcomes all respectful thoughts and musings" but has "zero-tolerance for defamatory and/or personal attacks on anyone in the Lush Community." The usage policy contains content guidelines requiring postings to be professional, work related and secure.

A particular employee posted comments that addressed various corporate restructuring and described the employer's officials as "vultures" and its CEO as a "scumbag" and posted comments on the employees' working conditions and the need for union representation. The post told the employer to stop harassing employees who want to join a union and highlighted the employees' need for living wages.

The employer's Human Resources representative wrote a letter to the employee referring to the posts and indicated they appeared to be intended to disparage the company and its managers. The letter indicated that posting unsubstantiated allegations on the Hive is not acceptable and in the future the employee is asked to refrain from making unsubstantiated allegations on the Hive. The employee was warned that if he continued such inappropriate conduct, the company may consider his actions to amount to misconduct. The company did indicate that for the purpose of further clarity, he may continue to express his views concerning unionization on the Hive.

The employee ultimately resigned even though he was not further disciplined for the post, and filed unfair labor practice charges with the NLRB. The NLRB determined that the statements in the letter should be analyzed as an allegedly unlawful threat under the Board's totality-of-circumstances standard. The Board analyzed the letter to the employee under this standard and found that the letter could easily be understood as a warning against communicating with fellow employees about terms and conditions of employment on the Hive. Because the letter suggested that future postings about employees' terms and conditions of employment on the Hive would result in discipline or other unspecified reprisals, it was found to be an unfair labor practice and the employer was ordered to post a notice that stated, among other things, that it will not threaten unspecified reprisals if an employee engages in protected concerted activities.

In another recent case, *Apple*, a major technology company has been hit with unfair labor practice complaints, accusing the company of maintaining work rules that "prohibit employees from discussing wages, hours, or other terms and conditions of employment." These complaints not only attacked policies in Apple's employee handbook, but also claimed that Chief Executive Officer Tim Cook sent emails restricting staff from disclosing "business information" that could be interpreted to mean just about anything.

Editor's Note - The analysis in this case is similar to that of other cases dealing with social media. However, the circumstances are more serious in that the alleged concerted activity occurred on the employer's own intranet system. The strategy and rules in setting usage guidelines and handling such situations are quite technical and controversial, and so advice of counsel is necessary. A few employers have gone so far as to discontinue their intranet systems.

PAY GAINS ARE SHRINKING

Everyone can feel the high inflation levels that have been plaguing the U.S. over recent months. Recent data indicates the high inflation levels are cooling at least somewhat. The U.S. Department of Labor (DOL) reported on January 31 that wage and benefit gains slowed in the second half of 2022, after touching the highest reading since current data collection programs

began in 2001. Specifically, wage and benefit growth ran at an annualized rate of 4% in the fourth quarter, well below the 5.8% rate recorded early in 2022. Nevertheless, government officials see the recent pace of wage growth as still elevated given the 2% inflation target. Other signs that the labor market is slowing including lay-offs initially concentrated in finance and tech companies, but now spreading.

BENEFIT ADJUSTMENTS WHEN COVID-19 EMERGENCY ENDS

The Biden administration has announced that the COVID-19 emergency will end May 11, 2023. Employers should prepare now for changes that will occur after the emergency declaration ends.

First, although employer plans are still expected to cover COVID-19 tests, employer plans will be able to require cost-sharing by beneficiaries for COVID-19 tests to match normal medical coverage of in-network services. Employer plans may continue covering COVID tests given in doctors' offices as part of regular medical coverage. Health plan beneficiaries may have access to COVID tests through local governments or other sources.

Second, although most group plans are required to cover COVID vaccines as preventive services within the network, the government is expected to run out of money for paying for the vaccines this year. The plans will have to bear the cost of the vaccines thereafter. Pfizer and Moderna are expected to raise prices significantly.

Third, federal funding for COVID treatments, like Paxlovid and Labevrio, will be exhausted this year. Plans will have to pay the full costs thereafter.

Fourth, the transition from the federal government to the commercial markets paying for the tests, vaccines and treatments may be challenging. Employers want the IRS to issue guidance about pre-deductible coverage for COVID diagnosis and treatments under health savings account-eligible deductible health plans. It is not clear whether the current guidance will continue.

Fifth, on July 10, deadlines that were extended for special enrollment in health plans for events like losing coverage or having children will end. Employer plans must communicate to employees that the extended period for electing COBRA coverage will change from 1 year to 60 days.

Sixth, relaxed restrictions on telehealth and virtual care services for part-time and temporary staff will end. Unless Congress acts, employer plans will be out of compliance if part-timers and others who are not eligible for the major medical plan are allowed to use the virtual care services.

NO GOOD DEED GOES UNPUNISHED
. . . but sometimes the do-gooder is vindicated

The U.S. Court of Appeals for the Eleventh Circuit just held - shock alert! - that paying an employee more than is legally required does not violate the Fair Labor Standards Act. This should seem obvious, but apparently it wasn't, until now.

The case involved an employee who was compensated using the fluctuating workweek (FWW) method allowed by the Fair Labor Standards Act (FLSA). This method is for workers who normally are paid on an hourly basis and are not exempt from the FLSA's overtime requirement. The employer pays a nonexempt employee a fixed weekly salary, plus overtime when the employee works over 40 hours. The weekly salary can't be reduced or docked, except in extraordinary circumstances; and the employer must explain the pay method to the employee (that should be in writing).

An employee compensated using this method is entitled to overtime but it's calculated differently. Because the weekly salary covers all hours worked - whether 30 or 50 - the employer only has to pay an additional .5 times the regular rate, instead of the usual 1.5 times. To calculate FWW overtime the employer divides the weekly salary by total number of hours worked and pays half that rate times the number of hours over 40. That satisfies the FLSA because the employee gets the required 1.5 their regular rate when the .5 premium is added to the basic rate covered by their salary.

When this method is strictly applied it means that the more the employee works, the less they earn per hour. But it doesn't have to be that way. In the case before the Eleventh Circuit the employer instead divided the weekly salary by 40 and then paid .5 times that amount for every overtime hour. In addition to simplifying the paperwork, the net effect was to avoid the diminishing-rate problem by paying more than the regulations actually required.

You'd think the employee would have been happy with that but they sued, claiming that they should get back pay at 1.5 times their regular rate for overtime hours because the employer hadn't strictly followed the regulations. This led the Court, in a snappy 7-page opinion, to observe that the FLSA sets a pay floor, not a pay ceiling. The FLSA isn't violated when the employer pays more than the minimum required.

Critical to this employer's success in the court was a memo the employee had signed explaining how his pay would be calculated, which satisfied the FLSA's requirement of an understanding.

The fluctuating workweek method can work well for certain employers and employees when the number of hours to be worked varies. The employee gets a guaranteed weekly wage, plus an overtime bonus; and the employer can compensate overtime hours at one-third the normal cost.

The case is *Hernandez v. Plastipak Packaging, Inc.*, No. 22-11608, 2023 U.S. App. LEXIS 1665 (11th Cir. Jan. 23, 2023).

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