

Employment Law Newsletter

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An Anti-Harassment Policy and Complaint Procedure Is Not a Defense for Harassment Perpetrated by Supervisors Under New York City Law

In a recent decision, the New York Court of Appeals (New York's highest state court) held that if an employer has an anti-harassment policy and complaint procedure, the employer cannot use them as a defense to harassment perpetrated by supervisors under New York City law. Therefore, New York City employers with four (4) or more employees are subject to strict liability if their supervisors harass or retaliate against subordinates. However, it is still advisable for employers to maintain anti-harassment policies and complaint procedures because they can be invoked (1) to mitigate damages claimed by victims of supervisory harassment under New York City law; (2) as a defense to claims of harassment by non-supervisors under New York City law; and (3) as a defense to claims of harassment that do not result in an adverse employment action under New York state and federal law.

On May 6, 2010, in *Zakrzewska v. The New School*, the New York Court of Appeals (New York's highest court) held that the affirmative *Faragher-Ellerth* defense, available under federal and New York state law for claims of sexual harassment and retaliation, does not apply to the same claims brought under the New York City Human Rights Law (the "NYCHRL"). The NYCHRL applies to employers with four (4) employees or more, which makes it applicable to most New York City businesses.

The *Faragher-Ellerth* affirmative defense is set out in two 1998 Supreme Court decisions, namely *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). It provides

that, under the federal anti-discrimination statute, Title VII of the Civil Rights Act of 1964, as amended, an employer is not liable for sexual harassment committed by a supervisory employee where there is no adverse employment action and the employer can show it exercised reasonable care to prevent and promptly correct harassing behavior and the employee unreasonably failed to avail herself of the corrective opportunities made available.

In *Zakrzewska*, the New York Court of Appeals held that the language of § 8-107 of the NYCHRL does not comport with this defense. The legislative history behind NYCHRL § 8-107 explains that it provides strict employer liability for sexual harassment and retaliation perpetrated by a supervisor or manager. The Court concluded, however, that the policies and procedures that shield an employer from liability under *Faragher-Ellerth* merely serve to mitigate liability under the NYCHRL for supervisory or managerial harassment or retaliation, but in cases where mitigation is appropriate, it does not apply to compensatory damages, costs and reasonable attorneys' fees. Similarly, the Court held that the *Faragher-Ellerth* defense would apply to sexual harassment and retaliation perpetrated by non-supervisory employees, as it does under Title VII.

While the New York Court of Appeals took note of the policy considerations involved in this holding, it determined that it was the legislature and not the Court that could decide to alter the current liability scheme.

Ultimately, the fact that *Faragher-Ellerth* does not apply to claims for supervisory or managerial sexual harassment or retaliation under the NYCHRL, does not alter our recommendations to employers to maintain comprehensive anti-discrimination and anti-harassment policies and complaint procedures. Not only does a policy and complaint procedure provide a potential defense to federal and state claims and co-worker harassment under local law, as well as potentially limit damages under local law, they can aid in preventing discrimination and harassment in the first place and avoiding litigation.

Does Your Company Need a Social Media Policy?

While most employers already have an Electronic Communications and Internet Usage Policy in place, the increase in popularity of social networking sites such as Facebook or MySpace, business networking sites like LinkedIn or Plaxo, and microblogs such as Twitter have many employers wondering whether their existing policies need to be expanded to provide guidelines with respect to employee use of such sites. We recommend that all clients adopt an Electronic Communication and Internet Usage Policy in addition to a Social Media Policy, as set forth below.

Some Considerations

Social media policies, like many other types of employer policies, will vary depending on the industry and the specific employer in that industry. In the financial services industry, where there are regulatory considerations, concerns regarding the privacy of clients and investors, and the protection of the company's intellectual property and confidential information are paramount, social media policies are becoming a necessity.

Information shared online can be seen by a wide and often unexpected or unintended audience. Additionally, such information may be forwarded or shared endlessly. As such, postings on social networking sites as well as postings on blogs or videos on media-share sites like YouTube, have the potential to cause embarrassment and reputational damage to both the employee and the employer. An employee may also be violating duties to the employer in the event information of a confidential or proprietary nature is disclosed.

What Can be Restricted?

On Company Equipment

An employer has the right to control conduct that takes place during the work day or while using company technology or equipment. In determining what to restrict, the employer must balance the need to protect its interests and the interests of its clients with an individual employee's freedom of expression. As a first step, employers should ban the hosting or maintenance of a blog or website using the company's technology or equipment without the company's prior written approval. Next, employers should decide whether they wish to block access to certain networking sites, so that they cannot be accessed by employees on the company's equipment. The

blocking of sites like Facebook and Twitter is becoming more commonplace as employers realize that they can distract employees from their duties during the workday, resulting in decreased productivity.

On the other hand, some employers do not wish to completely block access to social networking sites during the workday. Rather, they may view the sites as a valuable networking tool for developing business or conducting research. In this case, the employer may wish to draft its policy to state that while at work, accessing social networking sites should be reserved for business-related activities only, such as client development or research.

Once an employer determines what the parameters of its policy should be, the employer can then work with its internal or external IT service personnel to establish firewalls to block or restrict access to sites that the employer does not wish employees to view. The policy should also make clear that any attempt to circumvent any firewalls may result in disciplinary action.

On an Employee's Personal Computer

Employers are often confused about what they can restrict once the employee has gone home and is using a personal computer. Clearly, employers have less of an ability to control an employee's online activities when those activities take place on the employee's own time and a personal computer. However, there are a number of business concerns that can be protected, regardless of who owns the computer equipment being used and when the activity is taking place. These concerns can be addressed in the company's Social Media Policy, by clearly stating that the prohibitions remain in effect at all times, regardless of the computer equipment being used.

Key Elements of a Policy

Some of the key elements that an employer may wish to include in its Social Media Policy are as follows:

- Employers should prohibit employees from hosting or maintaining a blog or website which makes reference to the company name, uses a company logo, or provides business advice or information without first obtaining the employer's prior written consent.
- Employees should be reminded that the company's policies relating to confidential information apply to all internet communications. Accordingly, for example, employees may be prohibited from revealing any information relating to any client, trade information, specific stocks

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being considered, etc. Similarly, employees should also be prohibited from disclosing or distributing any of the company's internal communications, such as memos, policies, compensation information, etc.

- Employees should be prohibited from making any statement on any blog or website identifying his or her comments or views as reflecting or representing those of the employer or its clients.
- Employees should be prohibited from making disparaging comments or statements about the company, its principals, clients, investors, vendors or competitors on any blog or website.
- Last, employees should be instructed that any biographies listed on a networking site, such as LinkedIn, must be truthful and accurate.

Employers should note that the Financial Industry Regulatory Authority ("FINRA") and the National Futures Association have released guidance concerning social media policies. The guidance provides that if an employer permits its associated persons to use social media to communicate about the company and its business, then such social media and communications must be monitored and maintained as part of the company's compliance function. Accordingly, the employer must institute policies and procedures to ensure that associated persons who participate in such communications are properly trained to do so and are appropriately supervised such that the communications comply with all applicable rules. These policies and procedures should include instructions on appropriately identifying and obtaining access to such employee's social media communications.

Promoting Civility

A Social Media Policy may also be used as a tool to promote civility in the workplace and beyond. The policy should refer to the company's anti-harassment policy and state that employees must not make comments or statements that demean, disparage, insult or harass another person based on their age, gender, nationality, race, religion, sexual orientation or as a member of any other protected class in any online forum.

Additionally, as a further measure to promote the exchange of ideas in a transparent, responsible, and civil manner, some employers have begun to prohibit anonymous postings. The theory behind this is that if individuals are made more accountable for their online actions, they will be less likely to besmirch the reputation of another, and more likely to conduct themselves in a polite and civil manner. Employees should be reminded that the company's and their individual reputation is always on display and that they should not post things that they would not want to be seen by the public at large.

Conclusion

A Social Media Policy can be a concise statement. In fact, the policy can often be worked into an already existing Electronic Communications and Internet Usage Policy and will be no more than a series of bullet points. What is important is that the policy is clearly communicated to employees, so that they are aware of its existence and its parameters. Once an employer has made its employees aware of the restrictions, it should work with its IT professionals to conduct random monitoring of employee online activity to ensure compliance with the policy.

The United States Supreme Court Rules That If Clearly Delegated The Task, An Arbitrator Decides Whether An Arbitration Agreement Is Unconscionable

In late June, the United States Supreme Court held, in a 5-4 opinion authored by Justice Scalia in Rent-A-Center v. Jackson, 2010 U.S. Lexis 4981 (June 21, 2010), that an arbitrator, not a court, should decide whether the parties' agreement to arbitrate is enforceable where the parties have delegated that question to the arbitrator. Employers increasingly mandate that their employees agree to arbitrate disputes arising out of their employment. In the event of a subsequent dispute, an employee will often challenge that agreement in court on the grounds that it is "unconscionable," contending that the agreement was a condition of their employment or that specific terms of the agreement were unfair. The Supreme Court's decision in Rent-A-Center continues the Court's recent trend of pro-arbitration decisions and makes it far more likely that disputes surrounding the enforceability of arbitration agreements will be resolved by an arbitrator, rather than a court. Legislation pending in Congress, however, would reverse the Court's holding in Rent-A-Center, and require that a court, rather than an arbitrator, determine the enforceability of an agreement to arbitrate.

About The Case

The underlying litigation arose from an arbitration agreement that Antonio Jackson signed in connection with his employment by Rent-A-Center in 2003 (the "Agreement"). The Agreement provided that any employment dispute between Jackson and Rent-A-Center, including claims for discrimination, be submitted to arbitration. The Agreement delegated to the arbitrator the exclusive authority to resolve any dispute relating to the enforceability of the Agreement, including any claim that it was void or voidable.

In 2007, Jackson's employment was terminated by Rent-A-Center. He subsequently filed an action in federal district court alleging racial discrimination and retaliation. Rent-A-Center moved to dismiss or stay the proceedings under the Federal Arbitration Act (the "FAA") and to compel arbitration, arguing that Jackson was obligated under the Agreement to arbitrate his discrimination claim.

Jackson opposed the motion on the grounds that the Agreement was unenforceable because it was unconscionable under Nevada law, and that the issue of unconscionability must be decided by a court, rather than an arbitrator. He argued that the Agreement was unconscionable because it was a non-negotiable condition of his employment, and also insofar as it limited discovery, required the parties to split the arbitration fees, and was one-sided, only covering claims that an employee might bring against Rent-A-Center, but not claims the employer might raise against the employee. Rent-A-Center responded that Jackson's claim that the Agreement was unconscionable was required to be determined by an arbitrator, not a court, because the Agreement expressly provided that an arbitrator would have the exclusive authority to resolve any dispute about the enforceability of the Agreement.

The United States District Court for the District of Nevada agreed with Rent-A-Center that the clear terms of the so-called delegation clause in the Agreement required the court to refer Jackson's claim that the Agreement was unconscionable to an arbitrator for decision. A divided panel of the Ninth Circuit, however, reversed the District Court on the question of who (the court or arbitrator) had the authority to decide whether the Agreement was enforceable. See 581 F.3d 912 (9th Cir. 2009). Notwithstanding the Agreement clearly delegating the threshold issue of the enforceability of the Agreement to an arbitrator, the Ninth Circuit found that where "a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court." *Id.* at 917. The Ninth Circuit held, therefore, that under such circumstances, the court must decide whether an arbitration agreement is unconscionable, and an arbitrator can not decide the issue.

The Supreme Court's Decision

The Supreme Court reversed the Ninth Circuit's decision and held that the clause in the Agreement delegating disputes relating to the enforceability of the Agreement to an arbitrator was presumptively enforceable, thus the threshold question of unconscionability must be determined by an arbitrator.

The Court observed that under the FAA, arbitration agreements are a matter of contract between the parties and courts are required to enforce them according to their terms. Accordingly, where an agreement to arbitrate includes a clear provision that an arbitrator will determine the enforceability of the agreement, and a party challenges the

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enforceability of the agreement as a whole, the challenge is for an arbitrator to decide. The Court did, however, qualify its holding, stating that if a party specifically challenges the delegation clause as unconscionable – and does not challenge the “entire agreement” – then, under the FAA, a court, and not an arbitrator, should rule on the dispute. The Court’s opinion, however, left unanswered under what circumstances a district court could ever appropriately identify a challenge directed only to the delegation clause, rather than to the entire agreement, particularly when the claim is that the contract is unconscionable.

The Court held that because Jackson did not raise a specific and discrete challenge to the delegation clause in the Agreement, but rather claimed, as is typically the case when an employee challenges a predispute agreement to arbitrate, that the agreement as a whole was unconscionable, an arbitrator, not a court, must resolve the challenge.

What This Means For Employers

The Agreement in *Rent-A-Center* contained a delegation clause that clearly and specifically granted to an arbitrator the “exclusive authority” to resolve any dispute relating to the Agreement’s enforceability. That provision is both more encompassing and more specific than the typical language in an arbitration agreement mandating that

“all disputes” arising out of an employment relationship be resolved in arbitration. If an employer desires to have threshold questions of arbitrability, including challenges by an employee that the agreement to arbitrate is unconscionable, resolved by an arbitrator rather than by a court, it should review the relevant language of its arbitration agreements in light of the Supreme Court’s opinion in *Rent-A-Center*.

Potential Legislative Response

The *Rent-A-Center* decision will spur efforts in Congress to pass the Arbitration Fairness Act (H.R. 1020, S. 931). Those proposed bills, both of which are currently in committee, provide that the validity or enforceability of an arbitration agreement is a determination to be made by a court, under federal law, rather than an arbitrator, regardless of the terms of the agreement. As proposed, the legislation would reverse the holding in *Rent-A-Center*.

Importantly, the pending legislation also would amend the FAA and invalidate any predispute arbitration agreement if it requires arbitration of an employment dispute or a dispute arising under any statute intended to protect civil rights (among the other disputes). Consequently, any agreement to arbitrate an employment dispute between an employer and employee would be enforceable only if it is made after a dispute has arisen.

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