

Labor and Employment Law Update

A COMPANY'S PUBLIC IMAGE COUNTS

In *Cloutier v. Costco Wholesale Corp.*, the Court of Appeals for the First Circuit in Boston, Docket No. 04-1475, 12/1/04, held that an employee's insistence that her religious views prompted facial piercings did not require Costco to accommodate those views. Thus, refusal to cover the piercings while at work warranted a refusal to let her continue in her job.

The employee was a member of the Church of Body Modification. The Company had a policy of "no facial jewelry" while at work. The employee's refusal to comply with this policy was found to warrant discontinuing her employment because, while in some circumstances there may be a duty to accommodate religious beliefs, such accommodation is not necessary where there would be an undue hardship imposed on the company. In this case, the court held it would be an undue hardship because Costco had a legitimate interest in preserving its public image. The court stated "Costco has made a determination that facial piercings, aside from earrings, detract from the 'neat, clean and professional image' that it aims to cultivate. Such a business determination is within its discretion."

In this case it was eyebrow piercing, which the employee alleged was part of her religion. At one point, Costco offered to let the employee return to work if she wore plastic re-

tainers or a bandage over her jewelry, but she refused this accommodation based on her interpretation of her religious obligations. The employee was subsequently terminated and brought suit alleging discrimination under Title VII and under Massachusetts statutes.

The U.S. District Court found in Costco's favor on the basis that it had offered a reasonable accommodation. The First Circuit, however, affirmed on different grounds, holding that even an accommodation would impose an undue hardship on Costco by depriving it of control over its public image. The court also noted that many companies have personal appearance standards, including dress codes, which have survived challenges that they are violative of employees' religious beliefs. These

Rubin and Rudman LLP provides counseling and representation in all areas of labor and employment law. The members of the Labor and Employment Law Group are:

Michael R. Coppock, 617-330-7049

James B. Cox, 617-330-7089

Robin Lesses Ellis, 617-330-7090

Paul J. Hodnett, 617-330-7134

Paul J. Kingston, 617-330-7133

Alison J. Little, 617-330-7094

Denise I. Murphy, 617-330-7123

Mark Peters, 617-330-7151

This update was written by Paul J. Kingston.

have involved policies concerning facial hair and jewelry.

This decision is consistent with a very recent ruling by the Court of Appeals in San Francisco. (*Jespersen v. Harrah's Operating Co.*, 9th Cir., No. 03-15045, 12/28/04) In that case, Harrah Entertainment Inc., which ran a casino bar in Reno, Nevada, the Court held it could terminate a female bartender who refused to wear makeup at the casino. The court held that grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex. The female employee had argued that the company policy was sexual discrimination because it did not require male bartenders to wear makeup. However, the court noted that a prior case held a company could require men to have short hair but permit longer hair for women. Common sense would find no discrimination in either case.

These two cases illustrate that a company's public image can overcome challenges made on the basis of religious beliefs or on the basis of alleged sexual discrimination.

NLRB SUSTAINS RULES AGAINST PROFANITY AND HARASSMENT

Section 7 of the National Labor Relations Act gives very broad rights to employees in the workplace as it pertains to "protected" activity. In general, this refers to the rights of employees to organize a union or to collectively discuss working conditions. In this case, the employer had work rules prohibiting abusive and profane language, verbal, mental, and physical abuse and harassment. A challenge was made on the basis that such rules interfered with the employees' "protected" activity.

The Board found that these rules were not unlawful on their face, and recognized an employer's right to have a "civil and decent workplace." It found no indication that protected activity was being limited or that the rules

were in response to protected activity, but rather they were designed to maintain order and to protect the employer from liability. *Luther Inheritance Village - Livonia*, 343 NLRB No. 75. Interestingly, this case tracks, albeit on a separate statutory context, the right of an employer to promulgate reasonable work rules as indicated by the two cases cited above relating to challenges based on religious beliefs and sexual discrimination. There appears to be a more realistic and practical recognition by the Federal Courts and by the NLRB that employers do have the right to regulate conduct in the workplace in order to maintain order and to protect their public image.

NEUTRALITY AGREEMENTS AND REAL ESTATE DEVELOPERS

It has become fashionable amongst unions to promise support to a developer in obtaining public financing and permitting in exchange for fast track recognition of the union. Typically, if a union seeks to obtain recognition for employees, it files a petition at the NLRB and the employer has a right to a hearing to determine the eligibility of voters and the right to engage in a campaign exercising its right of free speech. The neutrality agreement requires the employer to recognize the union if it submits authorization cards signed by a majority of the employees. This is known as voluntary recognition. It typically requires the employer to refrain from expressing any position which would paint the union in a negative light and often requires the employer to make its facilities available to the union, as well as providing names and addresses of its employees.

These neutrality agreements can be problematic in two ways: 1) they circumvent the traditional NLRB processes, and 2) they raise issues about the legality of unions pressuring employers in order to obtain public financing and permitting, as well as the legality of providing support to the union, which could be

construed as violative of the National Labor Relations Act.

The legal status of neutrality agreements is presently a “hot button” issue at the NLRB and in Congress. The General Counsel of the NLRB has expressed concern that neutrality agreements can be viewed as requiring an employer to deal with a union before it establishes its majority status, which would be illegal. He has also expressed concern whether such voluntary recognition by card check should continue to be a bar to a petition which might be filed by the employees seeking recognition of another union or seeking decertification of the recognized union. An election conducted under NLRB auspices is a bar to such petitions for a defined period of time. The card check voluntary recognition aspect of the neutrality agreement is pending before the Board in *Dana Corp.*, 341 NLRB No. 150.

The issue has come to the attention of Congress. Senator Arlen Specter of the Senate Appropriations Subcommittee on Labor, Health and Human Services and Education has taken an interest in the matter. There is pending legislation to allow so-called “card check” union certification which presently occurs only after an NLRB election. The legislation is the Employee Free Choice Act, which would require the NLRB to certify a union when an employer is presented with evidence that a majority of its employees have signed union authorization cards designating a union as their representative. (S.1925, H.R. 3619)

MASSACHUSETTS ATTORNEY GENERAL ISSUES ADVISORY ON INDEPENDENT CONTRACTORS

It has always been a difficult matter to determine who is an independent contractor and who is an employee. Employers are often inclined to try to classify a person as an independent contractor because there are no Social Security contributions or workers’ compensation in-

surance involved. Concerned about misclassification, the Massachusetts Legislature has enacted new amendments in an attempt to avoid these misclassifications. It may be that these amendments apply only to public construction because they were part of legislation dealing with public construction; that issue remains to be resolved.

Because of these new amendments, persons who might be considered independent contractors under the so-called 20 Factors Test promulgated by the Internal Revenue Service, the Fair Labor Standards Act, and Massachusetts common law will now be considered to be employees.

Now there is a three part test: First, the independent contractor must not be subject to the “control and direction” in connection with his/her employment. This requires that the person’s activities and duties be actually carried out with independence and autonomy. The person must do the job using his/her own way of doing so and determine what time will be spent working on the job. Second, an independent contractor’s work must be “outside the usual course of business of the employer.” If a person performs the same work as the employee, he/she will not be an independent contractor. The test used to have a second aspect which would maintain independent contractor status, i.e., the person performed his/her work outside the employer’s physical place of business; this alternative test remains for unemployment compensation eligibility. Thus a person who works out of his/her own home, but in the same business as the employer, will no longer be considered an independent contractor, but will not be viewed as an employee for unemployment compensation coverage. Third, the independent contractor must work in an “independently established trade, occupation, profession or business.” That is to say, the person must represent himself to the public as “being in business to perform the same or similar services.” He/she would have to provide services to clientele which are of the same

kind as he/she provides independently. It would seem that a person who has had an ongoing relationship with an employer and who works exclusively for the employer would not be able to satisfy this particular standard.

The statute is violated when two events happen: One, an improper classification; second, a violation of one or more laws set forth in the Independent Contractor Law including several of the wage and hour, taxation, and worker's compensation statutes. There are civil and criminal penalties involved as well as permitting the Attorney General to prohibit violators from participating in public works bidding.

These independent contractor amendments create a great deal of confusion, and care must be exercised.

DEFAMATION BY CONDUCT

Usually defamation occurs when one has spoken or written falsely about another. What about defaming someone by deed or conduct? The Massachusetts Supreme Judicial Court for the very first time held that defamation can occur from physical acts, but the case before it didn't satisfy the standard. (*Phelan v. Macy's Department Stores Co., Mass., No. SJC - 09278, 12/16/04*).

The plaintiff was an assistant director of accounts payable for Filenes, a division of Macy's. Because of questions about money owed in this department, an investigation ensued. The plaintiff was told not to have contact with people in his department while the investigation was ongoing and a security guard accompanied him throughout the day wherever he went.

Believing others viewed the conduct as defaming him, plaintiff brought suit. The SJC held that one can be defamed by conduct, but not this plaintiff because he failed to produce any witnesses who believed that he had done something wrong. At worst, the SJC held, the conduct was ambiguous, and that's not enough to satisfy the burden of proof.

Given the requirements imposed on businesses by Sarbanes-Oxley, this case gives some assurances that their obligation to investigate matters will not automatically trigger exposure on another front.

RUBIN AND RUDMAN LLP PRACTICE AREAS:

Labor and Employment Counseling and Representation: grievances, arbitration, certification elections, collective bargaining, unfair labor practices at the NLRB, wage and hour claims, prevailing wage claims, discrimination claims before the EEOC and MCAD, wrongful discharge claims, representation in state and federal courts, personnel policies and statutory compliance.

Real Estate Development and Leasing

Environmental, Land Use, Permitting, Zoning

Power Plant Siting, Licensing, and Rate Setting

Estate Planning; Estate and Trust Administration

Public and Private Construction Contracting and Claims

Corporate, Business, and Tax Bankruptcy

Securities Regulation and Arbitration

Representation Before State and Federal Administrative Boards

Representation Before Medical and other State Licensing Boards

Alcoholic Beverages Licensing Issues

Legislative Representation

Complex Commercial Litigation

Criminal Defense

Domestic Relations