

LABOR AND EMPLOYMENT LAW UPDATE



YES, VIRGINIA, THERE ARE SANCTIONS FOR FRIVOLOUS LAWSUITS

In July 2005, Campbell & LeBoeuf, P.C. obtained a sanction award of \$114,777.50 on behalf of a client who had been subjected to a frivolous lawsuit. The sanction award represented the attorneys and expert witness fees incurred by the client in defending the suit. Although the opportunity to seek and recover sanctions is not presented by every case decided in a defendant's favor, a number of federal and state laws do define the circumstances under which sanctions may be appropriate.

EMPLOYMENT DISCRIMINATION LAWS: Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Civil Rights Attorney's Fees Awards Act of 1976 and many state discrimination laws grant discretion to a court to award attorney's fees to a "prevailing party." In *Christianburg Garment Co. v. EEOC*, the Supreme Court held that attorney's fees can be awarded to a defendant as the "prevailing party" if "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."

FEDERAL LAWSUITS: Apart from statutes which specifically authorize an award of attorney's fees to a prevailing defendant, there are three potential sources of sanctions under federal law for a frivolous lawsuit. The judicial code grants discretion to a court to assess

attorney's fees and costs against an attorney who prolongs litigation "unreasonably and vexatiously" thereby increasing the defendant's litigation expenses. 29 U.S.C. § 1927. Rule 11 of the Federal Rules of Civil Procedure allows the imposition of sanctions against an attorney or unrepresented party for filing a lawsuit which has no arguable merit and/or is being presented for an improper purpose, such as to harass. It is also within a federal court's inherent power to order sanctions against a party or its attorneys under appropriate circumstances.

STATE LAWSUITS: State law and procedural rules also provide state courts with the authority to award sanctions for groundless lawsuits filed in bad faith or for another improper purpose, such as harassment. In Texas, such authority is found in Chapter 10 of the Texas Civil Practice and Remedies Code and Rule 13 of the Texas Rules of Civil Procedure.

A DAUNTING BURDEN: Under most authority, the defendant bears the burden of proving that a claimant or his attorney has knowingly acted inappropriately in filing or continuing a frivolous lawsuit. Even then, the decision of whether to order sanctions lies within the sound discretion of the court.

Once a court has made the decision to order sanctions, the question then turns to the most appropriate sanction to impose for the misconduct. In this regard, the court considers not only the dual goals of punishment and deterrence but also the due process rights enjoyed by a plaintiff and his legal counsel.

THE UPSHOT: Sanctions for a frivolous lawsuit are rare and sanctions in excess of \$100,000 are rarer still. If supported by competent evidence, however, a motion for sanctions can be a useful tool for recovering the costs of defending a baseless suit or negotiating a favorable settlement. Of course the threat of a motion for sanctions carries considerably more weight coming from a firm which has actually carried through on a threat in the past and obtained a very favorable result for its client.

WORK RULES CAN VIOLATE THE NLRA

The National Labor Relations Act (“NLRA”) protects the right of all non-supervisory employees to engage in “concerted activities . . . for their mutual aid or protection.” This right extends to both union and nonunion employees. Recent decisions of the National Labor Relations Board (“NLRB”) have held that the mere maintenance of a work rule prohibiting certain conduct or speech can circumvent this right even if the rule is not enforced.

WHAT ARE “CONCERTED ACTIVITIES?” The activities protected by the NLRA are those engaged in by employees to better their working conditions. Generally, the term “concerted” denotes the activities of two or more employees. The term can include, however, the activities of one employee undertaken for the benefit of two or more employees.

GENERAL PRINCIPLES: A work rule which explicitly prohibits concerted activities is unlawful. Even if a rule does not explicitly restrict activities protected by the NLRA, a violation can still be found upon a showing that (1) employees would reasonably construe the rule to prohibit concerted activities; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of concerted activities. Since the viewpoint of a “reasonable” employee may form the basis of a NLRA violation, a rule may be unlawful without regard to the employer’s motivation in promulgating the rule. Amongst the penalties for a NLRA violation is the requirement that a notice be posted informing employees of their right to “form, join or assist a union.”

GUARDSMARK, LLC: In this June 7, 2005 decision, the NLRB found that a work rule which prohibited employees from registering complaints with the employer’s clients violated the NLRA. The Board said that the rule entrenched upon the rights of employees “to enlist the support of an employer’s clients or customers regarding complaints about terms and conditions of employment.”

CLAREMONT RESORT AND SPA: In this June 16, 2005 opinion, the NLRB held that a work rule which prohibited employees from having “negative conversations” about supervisory personnel violated the NLRA. The Board reasoned that employees

could reasonably construe the rule to prohibit concerted activities protected by the Act.

RECOMMENDATION FOR EMPLOYERS: The NLRB decisions show that the laws affecting the workplace are constantly evolving. Policies implemented as recently as one or two years ago may no longer be legally sound. Accordingly, it is strongly recommended that employers have their employment policies reviewed by legal counsel at least once per year.

DISCLAIMER

This paper is not intended to provide legal advice in general or with respect to any particular factual scenario. Any such advice should be obtained directly from retained legal counsel.

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