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Comprehensive handbook helped lead to dismissal of case

Employees failed to show they engaged in FLSA-protected activity

By Gregg M. Kligman

Complying with Fair Labor Standards Act posting requirements and maintaining a comprehensive handbook are key strategies hospitality companies can use to defend themselves in the event of an FLSA retaliation claim. In *Barquin v. Monty's Sunset, L.L.C.*, No. 12-cv-24180 (S.D. Fla. 10/02/13), former front of the house employees of restaurant Monty's Sunset brought an action alleging that Monty's terminated their employment in violation of the FLSA.

Servers employed by operated by Monty's Sunset, L.L.C., alleged that their employment was terminated after they complained about high credit card fees, high tip outs, and other issues related to their compensation. Notably, the complaint did not allege that Monty's failed to pay the servers minimum wage or overtime. In addition, the workers alleged, under state

law, that Monty's tortiously interfered with their business relationship with customers by enacting a policy that prohibited customers from leaving a tip beyond an automatic service charge when such charge was added to a customer's bill.

After discovery, Monty's moved for summary judgment, arguing that the employees never engaged in activity protected by the FLSA because they never complained of FLSA violations to management. The restaurant also argued that there was no causal connection between the servers' complaints about their compensation and the termination of their employment.

The court agreed with Monty's and dismissed the FLSA retaliation claim. The court also dismissed employees' state law tort claim holding that Monty's employees did not have a relationship with Monty's customers that would give rise to a tortious interference claim.

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Drug testing policy did not violate right of disabled worker

Casino did not discriminate against employee who refused drug test

Drug testing policies have come under more scrutiny in recent years with more employers grappling with how to enforce drug-free workplaces with employees claiming a medical need for narcotics or medical marijuana. In *Brown v. Mystique Casino*, No. 3-723/13-0012 (Iowa Ct. App. 10/02/13), an appeals court held that a casino did not discriminate against an employee when it terminated him for refusing to take a drug test.

Phillip Brown worked as a maintenance laborer for the casino beginning in 1999. He wore a brace on a leg injured years earlier and took narcotic analgesics for pain.

In 2006, Brown's supervisor discovered that he had been taking the narcotic hydrocodone on the job. Because of safety concerns, Brown was forbidden from operating power tools or driving

vehicles while he was on the medication. The supervisor testified that Brown reported that he went off the drug about four months after the restriction and he was returned to normal duties. However, Brown continued to take the prescription narcotics at work.

In 2010, Brown had increased issues with his leg and was allowed to take his medication when he was off duty, but was prohibited from bringing the drugs on casino property.

Later that year, Brown cut his finger at work, but declined to show the injury to the emergency medical technician on duty. The following day, his supervisor insisted the EMT examine the finger, and he was sent to the hospital for stitches accompanied by his supervisor. Pursuant to casino policy, the supervisor also told Brown he would have to submit to a drug test for illegal substances — not prescriptions — because he had been involved in an accident that resulted in

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“The court found that the employees knew their guaranteed minimum hourly wage was above the federal minimum wage, and they did not allege that they failed to receive minimum wage or that the company neglected to pay them overtime.”

— Gregg Kligman, attorney

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With respect to the servers' FLSA retaliation claim, the court noted that the FLSA forbids employers "to discharge ... any employee because such employee has filed any complaint ... under or related to" the FLSA. Therefore, it was necessary that the employees establish that they:

(1) Engaged in activity protected by the FLSA;

(2) Subsequently suffered an adverse employment action; and

(3) That there was a causal connection between the protected activity and adverse employment action.

Importantly, the court held that general workplace grievances will not give rise to an FLSA anti-retaliation action.

In opposing the motion for summary judgment, the servers' affidavits characterized their complaints to Monty's as expressing confusion over the method of compensation — tips versus hourly wages — and high credit card fees. The court determined that these complaints were too vague to constitute protected activity.

Expanding upon this determination, the court found that no reasonable juror could have found that the employees had put Monty's on notice about claims of FLSA violations. This was particularly true given that an FLSA poster informing employees of the federal minimum wage was posted in the workplace, and that every employee signed an acknowledgment of their receipt of a copy of the employee handbook, which outlined the minimum hourly wage each employee would receive, the amount of credit card deductions that would be withheld, and the threshold after which employees would receive overtime.

Despite determining that the employees had not engaged in an activity protected under the FLSA, the court also stated that the servers' complaints were not reasonable.

The court found that the employees knew their guaranteed minimum hourly wage was above the federal minimum wage, and they did not allege that they failed to receive minimum wage or that the company neglected to pay them overtime. As such, Monty's was awarded summary judgment on plaintiffs' retaliation claim.

The court also easily awarded summary judgment to Monty's on the servers' tort claim. Under

Review handbook for compliance

By Gregg M. Kligman

The lawsuit *Barquin v. Monty's Sunset* demonstrates that employers can protect themselves from allegations of Fair Labor Standards Act retaliation through compliance with the federal statute and well-crafted employee handbooks. Employers must ensure that the statutory FLSA minimum wage poster is posted and clearly visible to all employees. Handbooks should contain clear and explicit information regarding the calculation of pay, the employer's pay period and pay day, overtime, deductions, clock procedures, and gratuities. Failure to do so could result in liability that may have otherwise been avoided.

Employers are also advised to sit down with their employees when they raise questions regarding wages, even if they are not alleging improper payment. Taking the time to understand an employee's concern and explaining pay procedures could avoid the potential for costly litigation.

In addition, this case demonstrates, at least under Florida law, that restaurant employees do not have a business relationship with customers. The relationship belongs to the restaurant and the employees merely service those customers as a product of their employment at the restaurant. ■

Florida law, in order to prevail on a tortious interference claim, the employees had to show: (1) The existence of a business relationship; (2) Monty's knowledge of that relationship; (3) An intentional and unjustified interference with that relationship by Monty's; and (4) Damages as a result of Monty's actions.

The court focused exclusively on the first element — the existence of a business relationship. The employees argued that the business relationship was between customers and the servers "to the extent that it involves payment of tips."

The court rejected this holding, noting that the customers were Monty's customers, not the servers' customers. The servers were simply hired to serve Monty's customers, and this did not give rise to an independent relationship between the servers and Monty's customers. Therefore, there was no cognizable business relationship between the servers and the customers and their tort claim was dismissed.

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