EMPLOYMENT LAW: SECOND CIRCUIT DECISION LIMITS SCOPE OF RETALIATION CLAIMS

In a recent decision that limits the scope of retaliation claims under Title VII, the Second Circuit found that an employee who merely participates in a company’s internal sexual harassment investigation does not engage in “protected activity” under Title VII.

In Townsend v. Benjamin Enterprises, Inc., the Second Circuit rejected a retaliation claim brought by an HR director, who alleged that her employment was terminated because she participated in an investigation of a fellow employee’s sexual harassment allegations concerning a vice president of the company. The employee reporting harassment had not filed a charge with the Equal Employment Opportunity Commission (EEOC) and therefore, the HR director had participated in only the company’s internal investigation. Based on these facts, the Second Circuit ruled that the HR director’s participation was not protected activity within the meaning of Title VII.

Under Title VII, it is unlawful for an employer to retaliate against an employee who participates in an “investigation, proceeding or hearing under this subchapter.” The Second Circuit determined that an “investigation … under this subchapter” refers only to an investigation that occurs in conjunction with or after the filing of an EEOC charge. The Second Circuit declined to interpret Title VII’s anti-retaliation protections more broadly merely because conducting company investigations is an important part of deterring conduct that violates Title VII. The appellate court affirmed the lower court’s summary judgment ruling for the employer.

The Townsend case limits the scope of potential retaliation claims under Title VII’s participation clause in a significant way and brings the Second Circuit in line with other federal appellate courts that have considered this issue. The Townsend case is also important because the Second Circuit has made clear that employers will be held strictly liable for the harassing conduct of those employees who are senior enough to be considered the company’s alter ego or proxy. At trial, one of the plaintiffs alleged that she had been sexually harassed by the company’s only vice president, who was also the husband of the company’s president. The district court rebuffed the company’s attempt to mount a Faragher/Ellerth affirmative defense to the plaintiff’s sexual harassment claim.

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In the Faragher and Ellerth cases, the Supreme Court established an affirmative defense for employers when the harassing employee is a supervisor. An employer must show that:

- it did not take a tangible employment action against the plaintiff;
- it exercised reasonable care to prevent and correct the harassing behavior; and
- the plaintiff unreasonably failed to take advantage of the company’s preventive or corrective opportunities or to avoid harm otherwise.

In Townsend, the district court found that the alleged harasser was not merely a supervisor, but was really the company’s alter ego. The Second Circuit agreed with the district court.

Of particular significance to the Second Circuit was that the alleged harasser was not only the company’s only vice president, he was also a shareholder who “exercised a significant degree of control over corporate affairs.”

The Townsend decision is likely to have a considerable impact upon smaller companies defending against harassment allegations that target company presidents, owners, partners or corporate officers. In order to avoid strict liability, these companies will be challenged with the need to show that, despite an executive’s senior-level status, he or she did not have so much control over the company so as to be the company’s alter ego or proxy.

>> The Bottom Line

The Second Circuit decision in Townsend is a mixed bag for employers. On one hand, companies can continue to conduct internal investigations of employee harassment and discrimination complaints without fear that this may expose the company to a Title VII retaliation claim by an employee who merely participates in the internal investigation. On the other hand, defending harassment claims will become more difficult for some employers because, at trial, companies may not simply rely on company policies and procedures, and the plaintiff’s failure to take advantage of them, where the accused supervisor holds a sufficiently senior-level position at the company.

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INTELLECTUAL PROPERTY LAW:
ROSETTA STONE: STILL NO “KEY” TO CRACKING GOOGLE’S ADWORDS PROGRAM

Google’s AdWords program, which allows a marketer to use a competitor’s trademark as a trigger for its own online advertisements when consumers run a Google search, has been subject to numerous legal challenges, as we have previously reported (see April 2011 Intellectual Property Litigation Alert here).

The most recent development is a decision by the Fourth Circuit Court of Appeals, in a case brought by Rosetta Stone, the language learning company. The appellate court reversed the lower court’s earlier dismissal of Rosetta Stone’s claims for trademark infringement and dilution. The Fourth Circuit’s decision, like other recent ones, presents no easy answer to the question of whether the use of trademarks as keywords is infringement. Rather, these types of challenges will have to be addressed on their individual merits, case by case.

The lower court had previously dismissed Rosetta Stone’s claims, finding that Google was not liable for its sale of Rosetta Stone’s trademark as keywords in the AdWords program. Over 30 amici, or “friends of the court,” weighed in to address their concerns – including trademark owners in support of Rosetta Stone, and internet service providers and first amendment organizations in support of Google.

The appellate court agreed with the lower court that in the context of keyword advertising, the most important factors to determine likelihood of confusion (the standard for determining trademark infringement) are: intent, actual confusion, and sophistication of the customers. However, unlike the lower court, it found that there were disputed issues of fact on each of these factors precluding the earlier dismissal, and it remanded the case to the lower court. Most interestingly, the appellate court pointed to Google’s own internal studies for evidence to support the likelihood of confusion. Even though these studies applied broadly to Google’s AdWords program, and were not limited to Rosetta Stone’s trademarks or keywords, they might be used as evidence against Google in future cases.

The Fourth Circuit also vacated the lower court’s dismissal of the contributory infringement claim, finding that Google’s allowance of known infringers and counterfeiters to bid on Rosetta Stone keywords was evidence that could defeat summary judgment. Trademark owners should take this as guidance to diligently notify search engines of any known infringers’ use of their trademarks as keywords.

>> The Bottom Line
The Rosetta Stone decision shows that brand owners and advertisers need to be diligent and wary in their interactions with search engine’s keyword advertising programs. Brand owners who believe their trademarks are being infringed should quickly notify search engines about all infringing activity of which they are aware. Brand owners should also carefully consider whether to use a competitor’s trademark as a keyword in a search engine advertising program, as this could be found to be infringing. In addition, any advertising used in connection with a keyword program needs to be carefully vetted to ensure it is not likely to confuse consumers into believing that there is an association between the advertiser and the competitor whose trademark is used as a keyword.

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COMMERCIAL LAW:
NEW YORK COURTS, NOT THE PARTIES, HAVE THE LAST WORD ON CONTRACTUAL INTENT

Under New York law, the courts interpret contracts to determine the intent of the parties. If the writing used in a contract is unambiguous, the agreement is generally enforced in accordance with its plain meaning. If the writing is ambiguous, the courts may look to evidence, outside of the four corners of the contract, to determine the parties’ intent.

Issues may arise when the language in the contract is facially unambiguous, but does not reflect the intent of the parties. In those cases, rules of contract interpretation would generally not permit courts to use extrinsic evidence because that is only allowed when the contractual language is ambiguous. However, courts are naturally reluctant to enforce provisions that were not intended by the parties, and may resort to the equitable remedy of reformation (or a rewriting of the contract) to avoid an unintended or otherwise absurd result. Two recent appellate decisions in New York help answer the question, what may the courts do if interpretation of a contract provision is unsupported by extrinsic evidence as to intent and reformation has not been requested?

The Appellate Division, Second Department recently answered this question in Ross v. Sherman. The appellate court overturned the lower court’s determination that the plaintiff was not entitled to attorneys’ fees for the defendant’s breach of contract because the agreement provided that the “losing party” would recover attorneys’ fees in the event of a breach. The appellate court ruled that the plaintiff was not required to seek reformation of the contract and that no extrinsic evidence was necessary to find that the plaintiff was entitled to attorneys’ fees because the parties obviously intended to award the “prevailing party” with attorneys’ fees. It supported its finding by ruling that the provision awarding the “losing party” attorneys’ fees was ambiguous. However, though the provision might seem absurd, there was nothing “ambiguous” about the provision awarding the “losing party” attorneys’ fees.

Without citing any precedent for its finding that a facially unambiguous provision could be revised without reference to extrinsic evidence, the appellate court surprisingly ruled that courts can carry out the intentions of the parties by “transposing, rejecting, or supplying words to make the meaning of the contract more clear.” This, the appellate court determined, was the best way to remedy an absurdity in a contract. But it expressed no opinion on why reformation, which requires a showing of clear, positive and convincing evidence, was not the proper remedy for correcting a drafting mistake. While it appears that the appellate court reached the “right result” by failing to require that the parties provide extrinsic evidence to confirm their actual intent, it appears to have broken new ground in contract construction by relying on its own intuition as to the intentions of the parties.

The Appellate Division, First Department in ERC 16W Ltd. P’ship v. Xanadu Mezz Holdings similarly appears to have adopted judicial divining as an approved method of contract construction. There, the appellate court read into a construction loan agreement that a lender’s assignee could be sued for breaching the loan agreement. The assignee had agreed to fund a portion of the construction loan, but there was no express provision in the agreement that allowed the plaintiff to sue the assignee for failing to fund its portion of the

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loan. The only express language in the agreement provided that non-defaulting lending parties would be required to fund the shortfall caused by the assignees’ failure to fund its portion of the loan unless the assignee was replaced by a party that would perform the assignees’ funding obligations. The appellate court determined that this provision encompassed an unambiguous promise by the assignee to fund its portion of the loan, and ruled that the plaintiff could enforce this provision in a lawsuit.

In reaching its conclusion, the appellate court determined that it would be unfair and commercially unreasonable if the plaintiff were deprived of the ability to sue the assignee for failing to fund the construction loan. But just like the appellate court’s decision in Ross, the court here did not rely on extrinsic evidence in overturning the lower court’s ruling in favor of the defendant. Rather, the appellate court determined that it could interpret an ambiguous provision of a contract in favor of a party if a contrary result would create an unfair advantage or place one party at the mercy of the other. Notably, the dissent in ERC opined that there was nothing ambiguous about the agreement and that the construction loan was commercially reasonable given the market conditions at the time it was executed.

>> The Bottom Line

The decisions in Ross and ERC appear to hold that, without resort to reformation, a court can use its own judgment of fairness and reasonableness in enforcing questionable contractual provisions rather than looking to extrinsic evidence to determine the actual intent of the parties. These cases unfortunately make it harder than ever for companies to predict with certainty the way their contracts will be interpreted in litigation.

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