...continued.

Backing It Up

Substantiation of a claim in an ad means that there must be a reasonable basis for the claim in the form of objective evidence. The kind and amount of evidence depend on the claim, but at the very least the advertiser must have the level of evidence it purports to have. If the ad boasts that "two out of three doctors" recommend a product, the advertiser must be able to produce a reliable survey to prove the claim. For more general representations, the required level of proof is determined by factors such as what experts in the field think is necessary. Health and safety claims, in particular, must be supported by competent and reliable scientific evidence. As flattering as they may be, testimonials from satisfied customers usually are insufficient to substantiate a claim requiring objective evaluation.

Comparative Ads

The policy of the FTC actually is to encourage the naming of or reference to competitors, so long as there is clarity and such disclosure as may be needed to avoid deception of the consumer. Even ads that disparage the competition are permitted if they are truthful and not deceptive. The FTC requires neither less nor more substantiation for comparative ads than for other advertising.

Enforcement

The FTC marshals its resources in order to pay closest attention to ads that make claims about health or safety ("Acme water filters remove harmful chemicals from tap water"), and ads that make claims that consumers would have difficulty checking out for themselves ("ABC hairspray is safe for the ozone"). The FTC also concentrates on national rather than regional or local advertising, patterns of deception rather than isolated disputes, and cases that pose the greatest threats of widespread economic injury.

Depending on the nature of the violation, the FTC or the courts can choose from a variety of remedies. These include cease and desist orders, civil penalties, orders to make refunds to consumers, and informational remedies such as running a new ad to correct misinformation in the original ad. Other federal legislation allows businesses to sue competitors for making deceptive claims in advertising. ■

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Arbitration Clauses in Employment Contracts

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Federal Advertising Guidelines for Business

HUTCHISON & STEFFEN
ATTORNEYS

Legal Matters

Issue 1, 2016

ARBITRATION CLAUSES IN EMPLOYMENT CONTRACTS

The Federal Arbitration Act requires courts to enforce clauses in commercial contracts that require arbitration of disputes. The U.S. Supreme Court has ruled that transportation workers engaged in interstate commerce are exempt from the Act. For other types of workers, the effect of the Supreme Court ruling was to reaffirm the enforceability of mandatory arbitration provisions in agreements entered into by workers engaged in interstate commerce.

Interstate Commerce Requirement

The Act's requirement that workers be engaged in interstate commerce is not especially difficult to meet, given the interconnectedness of the economy. When a nurse at a hospital tried to avoid binding arbitration of her wrongful discharge claim by arguing that her employment agreement had no impact on interstate commerce, the argument failed. The court pointed out that the nurse's employment depended on the constant use of supplies purchased from other states and that the hospital treated many out of state patients. More often than not, similar connections can be made between most jobs and the flow of interstate commerce, especially for large employers.

Level Playing Field

To say that employers and employees generally may bind themselves to arbitration is not to say that there is no judicial oversight. In the time since the Supreme Court cleared the way for mandatory arbitration, courts have been occupied with creating a level playing field when employers make the signing of an arbitration agreement a condition of employment. If its terms weigh too heavily in favor of the employer, the agreement, or at least the offending part, may be ruled invalid.

Finding that an arbitration agreement was "utterly lacking in the rudiments of evenhandedness," one federal court refused to enforce an agreement that allowed only the employer to choose the panel from which an arbitrator would be selected. Supposedly the parties were to achieve a fair result by using an alternate

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strike method to arrive at one arbitrator, but, given that the whole pool was selected by the employer with no constraints, "an impartial decision maker would be a surprising result." It may be possible to avoid this particular defect by stating in the agreement that the parties will use an arbitration service that takes measures to find an unbiased arbitrator having no potential conflicts of interest.

Paying the Costs

Splitting the costs of arbitration evenly between the parties may seem reasonable on its face, but some courts have invalidated such clauses as being too burdensome for individual employees. Aside from considering the respective abilities of the parties to pay what can sometimes be substantial up front costs for arbitration, there is a concern that the prospect of shouldering those costs has a "chilling effect" on employees' rights to have their grievances heard. Alternative approaches include payment of all costs by the employer, waiver of the employee's share on a case by case basis if it is beyond the employee's means, or capping an employee's share at the level of costs that would be incurred in court.

To Arbitrate or Not?

Even before an arbitration clause is agreed to, and perhaps later scrutinized by a court, the parties need to consider some distinctions between mandatory arbitration and litigation. Since it is easier to request arbitration than to file a formal complaint in court, use of arbitration may mean an increase in disputes to be resolved. A decision maker in arbitration, if he or she is familiar with the industry in question, could understand complex issues better than a jury would. In arbitration, the dispute itself and the terms of any award frequently are kept confidential, affording the parties more privacy than a trial in open court. Finally, some of the same features that make arbitration a simpler and more streamlined approach, like limited fact-finding and having no right to appeal, could weigh in one party's favor and against the other, depending on the circumstances of the case. ■

"It may be possible to avoid this particular defect by stating in the agreement that the parties will use an arbitration service...."

Defining an Employee as a "Supervisor"

Title VII of the Civil Rights Act of 1964 prohibits the creation of a harassing hostile work environment based on the prohibited forms of discrimination, such as discrimination based on sex or race. To hold the employer liable for the harassment, the plaintiff must show that the work environment was so pervaded by discrimination that the terms and conditions of employment were altered. Isolated or trivial occurrences are not likely to be sufficient.

If the harassing employee is the victim's coworker, that is, someone no higher in the chain of command than the victim is, the employer is liable under Title VII only if it was negligent in controlling working conditions. However, if a supervisor's harassment of an employee culminates in a tangible employment action, such as a termination or a demotion, the employer is strictly liable under Title VII.

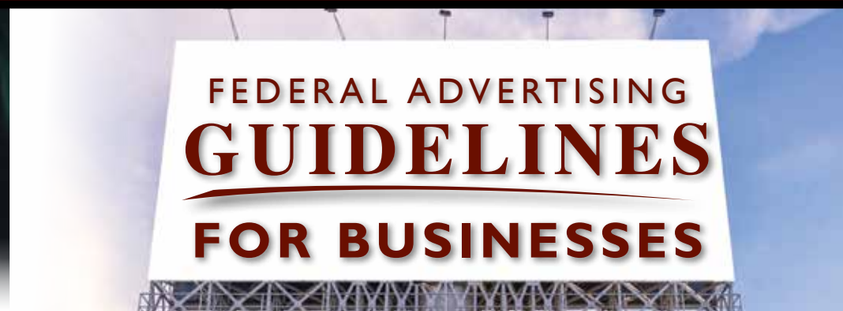
When, as is very often the case in harassment litigation, there has been no tangible employment action taken against an employee who is harassed by a supervisor, under prior U.S. Supreme Court precedents the employer may escape liability under Title VII by establishing a two pronged affirmative defense. The employer must prove that (1) the employer exercised reasonable care to prevent and correct any harassing behavior, and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.

Recently the Supreme Court clarified the issue of when a harassing fellow worker is a "supervisor" and not merely a coworker for purposes of making the employer entity liable for that harassment. In the case before the Court, the plaintiff was an African American employee in a university's catering department. She alleged that a white employee to whom she had been assigned as an assistant harassed her by using racial epithets and relegating her to menial jobs because of her race.

The plaintiff argued that the harasser was the plaintiff's "supervisor" for Title VII purposes because the harasser had been given the ability to exercise significant direction over the plaintiff's work, a power that also enabled her to racially harass the plaintiff. In this argument the plaintiff had no less an ally than the Equal Employment Opportunity Commission, which had taken basically the same position in an enforcement guidance it had issued.

The Court rejected the plaintiff's claim, finding that for a harassing individual to be considered a "supervisor" under Title VII, with all that that means for employer liability, a more demanding and restrictive definition of "supervisor" was appropriate. Unlike the harasser in the case before it, whose powers over the plaintiff did not extend beyond generally directing her daily activities, a fellow employee will be considered a supervisor only when the employer has empowered that employee to effect a significant change in the victim's employment status.

To be a supervisor, the employee must be empowered to take tangible employment actions against the victim such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. ■



Federal Advertising Guidelines for Businesses

The Federal Trade Commission Act prohibits advertising that is untruthful, deceptive, or unfair, and it requires advertisers to have evidence to back up their claims. There are also other federal laws applicable to advertisements for specific types of products and state laws that apply to ads running in particular states.

Unfairness

An advertisement is unfair if it causes "consumer injury." The Federal Trade Commission (FTC) uses a three part test to determine if a consumer injury has occurred or is likely to occur as the result of an advertisement: (1) the injury must be "substantial"; (2) the injury must not be outweighed by any offsetting consumer benefits; and (3) the injury must be one that consumers could not reasonably have avoided. An injury may be substantial because of monetary harm or unwarranted health and safety risks. More subjective effects, such as offending the tastes or opinions of consumers, generally will not constitute a substantial injury. The FTC will also consider whether a challenged practice violates established public policies and whether the conduct is immoral, unethical, oppressive, or unscrupulous in deciding whether it is unfair.

The Act recognizes that, in general, the government expects the marketplace to be self correcting, with informed consumers making purchasing decisions without regulatory intervention. The FTC may step in, however, when sellers use practices that distort free market decisions, such as by withholding critical information from consumers or pitching questionable products to highly susceptible and vulnerable classes of purchasers such as the terminally ill.

Deception

An ad is deceptive if it contains a statement or omits information that is material and is likely to mislead consumers. Information is material if it is important to a consumer's decision to buy or use a product. Examples include representations about a product's performance, features, safety, price, or effectiveness.

The FTC will scrutinize an ad for deceptiveness from the point of view of the typical consumer who sees it. The focus is on the whole context of an ad, rather than whether certain words are used. Sometimes what an ad does not say is most important. If the ad is for a collection of books, it is deceptive to withhold from consumers the fact that they will receive only abridged versions of the books. An ad that says, "this product prevents colds" and one that says, "this product kills germs that cause colds" both claim to prevent colds, but the first claim is expressed, and the second is implied. The FTC expects an advertiser to be able to back up both types of claims with proof and to have such proof before an ad runs.

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