

Employment Law & HR Update

“Solving Employee Problems Before They Happen”

by

Scott Warrick, JD, MLHR, SPHR

HUMAN RESOURCE CONSULTING, EMPLOYMENT LAW & TRAINING SERVICES

(614) 367-0842 – Office (614) 738-8317 – Cell

www.scottwarrick.com

JANUARY 2008

President Bush Signs FMLA Amendment Into Law

On January 28, 2008, President Bush signed into law an amendment to the Family and Medical Leave Act (FMLA) that expands its coverage to the families of U.S. service men and women.

Under this amendment, covered businesses are now required to offer up to 26 weeks of unpaid leave to employees who need to provide care to wounded U.S. military personnel.

The new law also requires employers to provide 12 weeks of FMLA leave to immediate family members (spouses, children or parents) of soldiers, reservists and members of the National Guard who have a “qualifying exigency.” Unfortunately, the new amendment does not define what is meant by the term “qualifying exigency.” However, such “qualifying exigencies” will most likely include a covered family member being deployed overseas and a covered family member being recalled to active duty.

The Department of Labor has stated that the new “caregiver leave” requirements will be effective as of January 28, 2008. However, the “active duty leave” requirements for family members will not be effective until the Secretary of Labor issues its final regulations defining what is meant by “any qualifying exigency.” The Department of Labor noted that it “is expeditiously preparing such regulations. In the interim, the DOL encourages employers to provide this type of leave to qualifying employees.”

Employers should therefore begin updating their policies and notifying their employees about the new amendment as soon as possible. (Please see attached Sample FMLA Policy.)

NLRA Protects Workers Who Make False Statements To Customer

In Jolliff v. NLRB, No. 06-2434 (6th Cir., Jan. 22, 2008), John Jolliff, Steven Daniels and other employees of TNT Logistics of North America Inc. were unhappy about their terms and conditions of employment. So, they decided to put all of their grievances together into a letter. This letter listed the various complaints these employees had with TNT. However, this letter also included the following statement:

“[s]ome drivers are being asked [by dispatchers and management] to *fix their log books* to make extra runs. These drivers are being asked by dispatchers and management to do these runs and either fix their log books or turn their heads on it” (emphasis added)

The employees then sent this letter to not only corporate executives at TNT Logistics, which is based in Florida, but they also sent the letter to a corporate officer at Honda, TNT’s largest customer.

However, the employees did not sign the letter. Instead, they only referred to themselves as “we the dockworkers and drivers” at the Ohio TNT facility.

Managers at the Ohio TNT location questioned employees and discovered who had sent the letter. Three employees were terminated.

The employees filed charges against TNT with the National Labor Relations Board (NLRB), claiming that they were terminated for exercising their rights under the NLRA. The Board held for the employer, TNT, reasoning that the employees were discharged “for cause” because the letter was not protected under the NLRA.

On appeal, the Sixth Circuit Court of Appeals reversed the NLRB’s decision and found for the employees. In reaching its decision, the Sixth Circuit looked to see if appealing to a third party, which in this case was Honda, is permissible under the NLRA.

The National Labor Relations Act (NLRA) protects the rights of employees to organize and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. “Mutual aid or protection” includes seeking to improve the terms and conditions of employment through channels outside the immediate employer-employee relationship.

The Sixth Circuit then looked to the United States Supreme Court’s previous decision in Eastex, Inc. v. NLRB, 437 U.S. 556 (1978). In that case, the Supreme Court held that the “mutual aid or protection” clause of § 7 of the NLRA protects employees who “seek to improve terms and conditions of employment or otherwise improve their lot as employees by using channels outside the immediate employee-employer relationship.” The Court then reasoned that if employees did not have this protection under the NLRA, then employees would be ...

“... open to retaliation for much legitimate activity that could improve their lot as employees. As this could ‘frustrate the policy of the Act to protect the right of workers to act together to better their working conditions,’ we do not think that Congress could have intended the protection of § 7 to be as narrow as [to exclude protection outside the employer-employee context].”

Having decided that appealing to a third party, such as a customer, is protected under the NLRA, the court looked to see what comments are protected and which ones are not.

The court first looked to Congress’ intent to encourage free debate on issues that divide labor and management when it passed the NLRA. The court held that an employee’s appeal to a third party, which in this case was TNT’s largest client, Honda, is protected under the NLRA if it *relates to the employer’s labor practices and mere opinion or is not maliciously false*.

Consequently, there is a two-part inquiry for determining whether the employees’ statement of “fixing the books” loses its protection under the NLRA.

First, the NLRB must determine whether the logbooks statement made by the employees was “false” within the context of defamation law. In other words, was this statement presented as a “fact” or was it presented as being a mere opinion, hyperbole, or rhetorical exaggeration. If the statement was presented as a mere opinion, it would not be defamatory. However, if it was presented as a “fact,” then the court need to move onto the second step in this analysis, which is to determine if the statement was made with “actual malice.”

No specific test exists to determine whether a specific statement is presented as a fact or as opinion. Instead, the U.S. Supreme Court held that:

“A statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection” and that “statements that cannot ‘reasonably [be] interpreted as stating actual facts,’” are not actionable.”

The Court then relied on the “general tenor” of the context in which the statement was made in determining whether it was “sort of loose, figurative, or hyperbolic language that would eliminate any impression that the writer was being serious.”

Jolliff testified at the hearing that the company had established new time standards for driving routes and that because the drivers’ performance bonuses were tied to completing routes within the allotted time, the new standards created pressure for the drivers either to drive illegally or to falsify their logs. While Jolliff and Daniels concede that TNT did not *expressly* instruct its drivers to “fix their logs,” the employees argued that “TNT’s impossible time allotments presented drivers, in their estimation, with an impossible choice: either drive unsafely and be on time, or drive safely and fudge the records.”

However, the Sixth Circuit held that the reasonable interpretation of the meaning of the phrase “fix their log books” and “being asked by dispatchers and management to do these

runs and either fix their log books or turn their heads on it” does not suggest hyperbole or opinion. Instead, these comments relating to “fixing the books” were intended to be viewed as “factually based statements.”

Therefore, since these statements were presented as facts and not opinions, the Sixth Circuit then had to decide if these statements were made with “actual malice.” In doing this, you need to look to the party who actually made the statement, who was Jolliff. Jolliff said that “*some* drivers were” being asked by “dispatch and management” to fix the logbooks. Even if Jolliff was never personally asked to fix the logbooks, there might still have been good reason for him to believe that *other employees* had been asked to fix the logbooks.

Therefore, the Sixth Circuit held that even though the statement was presented as a “fact,” it was still related to *the employer’s labor practices and was not maliciously false* since there was a reasonable basis for the employees to believe that some employees were asked to fix the books.”

As a result, even though this statement by these TNT employees was false, they were still protected under the NLRA for sending this comment to TNT’s largest client, Honda.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

When an employee commits “treason” and complains to a third party about the organization, **STOP AND THINK BEFORE YOU HAVE AN EMOTIONAL REACTION.**

If the employee is complaining to third parties about the terms or conditions of employment, employers must determine whether these complaints are protected. This can be done by simply applying the Sixth Circuit’s analysis, as outlined in this case.

- Did the employee make a factually based comment to the outside party?
- Was there any reasonable basis for the comment, thus making it “without malice”?

Ohio's Minimum Wage Law

On November 7, 2006 Ohio voters passed Issue 2, which amended Ohio’s Constitution to require employers to pay a basic minimum wage to employees. As of January 1, 2008, Ohio’s minimum wage rose to \$7.00 per hour. Tipped employees must be paid at least half of the minimum wage rate, but their tips must bring the employee up to at least the minimum wage rate.

Each year, Ohio's minimum wage will increase by the rate of inflation according to the Consumer Price Index for the prior 12 months. Therefore, every December, employers should check with the Ohio Department of Commerce to see what the minimum wage rate will be for the upcoming year.

Employers can also check the minimum wage rates for all 50 states by going to:

<http://www.dol.gov/esa/minwage/america.htm#Ohio>

Please see attached fact/question sheet for more information on Ohio's Minimum Wage Law.

www.scottwarrick.com

© 2008 G. Scott Warrick