Labor Letter

September 2012

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW
Solutions at Work®
www.laborlawyers.com

When "Let's Keep It Quiet" Is An Unfair Labor Practice

By Ray Haley (Louisville)

On July 30, 2012, the National Labor Relations Board (NLRB) issued a bad decision for any employer that expects employees to maintain the confidentiality of internal investigations (such as investigations of employee misconduct, allegations of discrimination, and the like). In *Banner Health System* the Board held that a blanket rule prohibiting employees from discussing an ongoing investigation violated their legal rights, unless "legitimate and substantial justification exists."

Background

Jo Ann Odell, a human resources consultant for Banner Health System, routinely asked employees participating in an internal investigation not to discuss the investigation among themselves while it was ongoing. Consistent with her practice, Odell made this request of Banner employee James Navarro, who was interviewed in connection with a charge of insubordination.

Navarro filed an unfair labor practice charge against Banner claiming, in part, that Odell's request violated his Section 7 rights. Section 7 of the National Labor Relations Act protects discussions between two or more employees concerning the terms and conditions of their employment, as well as communications for other mutual aid or protection.

The Board issued a complaint, which was tried before an Administrative Law Judge. The ALJ rejected Navarro's claim, finding, instead, that Banner's request that employees refrain from discussing internal investigations while they were ongoing was justified by its concern with protecting the integrity of the investigation.

The Board's Decision

After a review, the Board reversed the ALJ's decision on this point. An employer must demonstrate the existence of a substantial business justification that outweighs employees' Section 7 rights to justify such a prohibition of employee discussions of ongoing investigations. In the Board's view, a general concern with protecting the integrity of an investigation was simply insufficient to outweigh employees' Section 7 rights. Instead, the Board reasoned that an employer may be able to justify a restriction such as this if it determined:

- a witness needed protection;
- there was reason to believe evidence would be destroyed or fabricated; or
- it was necessary to prevent a "cover-up."

Continued on page 4

Depositions 101

Six Things You Need to Know About Depositions

By Jennifer Achtert (San Francisco)

If you are a manager or in Human Resources (or both!) long enough, it's almost inevitable that you will need to appear for a deposition. Although your attorney will meet with you to prepare for the deposition – more on that below – it can be helpful to have an idea of what to expect even before that meeting. This article gives you six key pieces of information about being deposed.

1. You're In For A Long Day

Your deposition will last longer than you think it will – and quite possibly much longer than you think it could or should. By the time your deposition is scheduled, you may have had one or more meetings with your attorney to discuss the facts of the case. Your deposition is likely to be longer, and more detailed, than any of those meetings. Federal law limits depositions to 7 hours, and some states set limits as well – those limits were not set in a vacuum. It is not unusual for depositions of (some) company witnesses to last a full day.

2. That's Why Your Attorney Needs To Meet With You

Your attorney will meet with you in advance to prepare for your deposition – typically a few days or a week before your deposition. Depending on your attorney, your involvement in the case, and the facts of the case – among other factors – your attorney will ask you to set aside anywhere between one and four hours, or possibly longer, to prepare for your deposition. Your attorney knows this is an imposition, and understands that you have many other things to do. However, your attorney also knows that it's important that you are prepared for your deposition. (Your attorney may also believe, as I do, that it's better to have a meeting end early than to have it run late.) Remember that unless you are an

Continued on page 4

Supervisor-Subordinate Relationships: Never A Good Idea

By Rich Meneghello (Portland, OR)

Since many people spend most of their waking hours at the office, and often spend more time with coworkers than family members, it's not unusual for workplace romances to blossom. But if that romance is between a supervisor and a subordinate, it could easily be a disaster waiting to happen. In fact, a prime example of how things can go south recently arose in Oregon's House of Representatives.

A House Is Not A Home

Matt Wingard (R) has been an elected representative in Oregon's House since 2008, representing a district spanning from southeastern Washington County to southwestern Clackamas County. Wingard, 39 years old and unmarried, was recently accused of misconduct by a former aide who says she was pressured into engaging in a sexual relationship with him. The woman, who was 20 years old at the time, pointed to sexually-explicit text messages between the two, and now alleges that Wingard furnished her with alcohol when she was minor.

When the story broke, he admitted a consensual relationship, but denied providing her with alcohol when she was a minor. Their relationship only lasted three weeks, but those three weeks have already proven very costly for Wingard. First, he was forced from his post as deputy Republican Leader of the House when the allegations broke. Later, he was stripped of his co-chairmanship of the House Education Committee.

Finally, as the breadth of the scandal grew and his support dwindled, Wingard announced that he was dropping his reelection bid and would be leaving the House at the end of his term. Some speculate that if further damaging allegations arise, Wingard may be forced to leave the legislature even sooner. What was once a promising political career has been destroyed because of a short-term but very ill-advised liaison.

I would hazard a guess that most managers reading this article for guidance are not elected representatives who stand to lose their political careers, and I would also assume that most employers reading this to determine how to manage their workforces will never endure a scandal that reaches the front pages of the news.

Still, a workplace romance gone sour – especially between supervisor and subordinate – can be a legal and practical nightmare for all involved, and there are certainly lessons to be learned from the Wingard affair. I will try to spell out the most likely scenarios here for the doubters.

It Ain't Over Till It's Over – And Maybe Not Then

I think we can all agree that romantic relationships can have one of two outcomes – they can either end, or they can continue. In the case of a supervisor-subordinate relationship, it can cause legal headaches even if it blissfully continues. That's because peers of the subordinate, or even non-affected employees, can still take legal action against the company as a result of the relationship. A coworker who perceives favoritism between the romantic pair can claim to a court, "Well, it was obvious to me that the only way to succeed at the company was to sleep with your boss, and I'm not going to do that, so I'm suing."

Even if that is incorrect, try proving a negative in a court of law. Further, imagine the other applicants for the subordinate's position – they might later learn of the relationship and sue the company claiming that the manager only hired the subordinate because of an intended romantic relationship. And this isn't even mentioning the morale issues that could result from this type of relationship, and even the perception that might

start inside and outside the company that the subordinate isn't necessarily qualified for the position but only retains the role because of the romantic link. That could unnecessarily and unfairly put a damper on someone's career.

And, on the other hand, the stark reality is that most romantic relationships end. And many end poorly. If the supervisor dumps the subordinate, that person will be both a jilted lover and a disgruntled employee, ready to spin any story for his or her own financial gain. That person could claim that they were forced into the relationship against their will, that they were either expressly or implicitly told that they needed to engage in sex in order to keep their job or advance in the company.

Even if the relationship ends in a mature and polite manner, it only takes a change in job status months later for the subordinate to change their tune and invent a story about how they felt pressured into a relationship. And if the subordinate dumps the supervisor, that supervisor might react in an immature and irresponsible manner common among spurned lovers– sending text messages, emails or voice mails pleading for a return. What may be considered romantic by some might be considered creepy by others, and those messages could turn up as evidence in a lawsuit demonstrating the inappropriate pressure now being laid upon the subordinate.

The Bottom Line

These are just some of the ways in which supervisor-subordinate relationships could end up damaging your company. You could and should ensure that your company policies prohibit such relationships, and you should train your managers about the policy and the reasons to avoid this problem.

If you learn of such a relationship, perhaps through self-identification, take immediate steps to ensure that the chain of command is broken somehow through transfer of responsibilities (but, of course, making sure that the junior employee isn't forced from a role that they could later claim as retaliation).

For more information contact the author at RMeneghello@laborlawyers.com or 503.242.4262.

Fighting Back Against Cybersmears

By Spencer C. Skeen and Timothy L. Johnson (San Diego)

Good, honest, and loyal employees are the greatest asset of any company. Unfortunately not all employees are great. Some are dishonest; others are vindictive. Not surprisingly, ex-employees who are fired due to dishonesty are the most likely ones to post a defamatory blog about their former employer.

The Internet creates ideal opportunities for disgruntled former employees to anonymously attack ex-employers, destroy individual reputations and spread lies about companies they worked for. The Internet is extremely effective when used for this wicked purpose. After all, the Internet is the world's largest publication. As the U.S. Supreme Court observed in *Reno v. ACLU*, with the Internet "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."

"Who Said That?"

What should employers do about cyberlibel? It may depend on when the libel occurred. The National Labor Relations Board has taken the position that employees who make comments about common workplace issues on the Internet are engaging in protected, concerted activity. If the Internet posts were made by the employee before the employment relationship ended, they may be protected, depending on the nature and veracity of the statements. If the statements were made after employment terminated, the protections of the National Labor Relations Act should not apply. So, an employer may have more freedom in how it chooses to respond.

Employers dealing with post-termination cybersmear might consider filing a civil action for defamation or trade disparagement. Employers who pursue this path must overcome some legal hurdles. For instance, many cybersmearers do their damage on the Internet anonymously. Consequently, you may need to subpoena the Internet service provider (ISP) to identify the blogger. This can be difficult. In *Krinsky v. Doe No.6*, the California Court of Appeal held that a plaintiff must make a prima facie showing that she has a valid claim against the anonymous defendant before she can even discover the defendant's identity.

Even if the identity of the blogger is known, there are difficulties. The acronym SLAPP stands for "strategic lawsuit against public participation," and refers to lawsuits aimed at silencing critics by threatening to sue them. The laws against such perceived wrongs are referred to as anti-SLAPP statutes. There is no federal anti-SLAPP law, but a number of states have them – California's is the strongest. Cybersmearers can use such anti-SLAPP laws to counter defamation claims.

By way of example, California's statute allows defamation defendants to file special motions to strike if the case concerns an "act in furtherance of right of petition or free speech under the United States or California Constitution in connection with a public issue." If successful on such a motion, the lawsuit will be dismissed and the cybersmearers can recover their attorneys' fees and costs.

To successfully oppose an anti-SLAPP motion, an employer must provide evidence to establish it has a "probability of prevailing" on the merits of its causes of action. This is different than a traditional lawsuit where proof issues are reserved for trial.

In addition, the Communications Decency Act provides ISPs with immunity from lawsuits regarding the content of publications made by others. Thus, an employer is generally prohibited from suing the ISP as a means of stopping the cybersmear campaign.

Get Creative

In light of these and other issues, it may be difficult to pursue defamation claims against former employees who engage in cybersmear. But it's not impossible. When the publication involves a provably false statement of fact, you can generally overcome objections to subpoenas and anti-SLAPP motions.

You could also consider filing alternative claims. Unfair competition claims may be pursued when the ex-employee is trying to compete unfairly against the employer's business by spreading lies and falsehoods. Trademark, copyright infringement, and trade-secret claims may be available when the blogger makes reference to confidential or proprietary information in a cybersmear campaign. Furthermore, all 50 states have laws that prohibit electronic forms of stalking, harassment or cyberbullying.

There are a variety of other potential claims that may be considered. It can be a vicious cyber-world out there. An employer that is educated, prepared, and creative can often win when combating cybersmear by former employees.

For more information contact either of the authors: email SSkeen@laborlawyers.com, TJohnson@laborlawyers.com, or call 858.597.9600.

Depositions 101

Continued from page 1

experienced expert witness or in-house counsel, your attorney has attended many more depositions than you have, and is asking you to set aside time so you can be fully prepared.

3. You Will Be Out Of Your Element

When you're in a deposition, you're out of your element. You will be on the opposing attorney's turf – probably both literally and figuratively – in his or her office and in an unfamiliar situation. No matter how strongly you believe in your case – and no matter how strongly you believe that your opponent and his or her attorney are wrong – you need to take your deposition seriously. Resist the urge to try to prove that you're the smartest person in the room – even if you are! Try to accept that your day of deposition will not be fun, and that you may not have a chance to tell the other attorney everything you want to share.

4. Your Attorney Is Not Just Taking Notes

On the day of your deposition, your attorney is not just taking notes. Although you are the "star" of your deposition, your attorney is working as well. Your attorney will – to the extent permitted by your particular jurisdiction – act as your coach, cheerleader, and, potentially, your nagging parent. Your attorney may encourage you, advise you, or remind you of the rules of a deposition. Don't ignore your attorney.

5. Your Job Doesn't End After The Deposition

Although you are allowed (and even encouraged) to breathe a sigh of relief when your deposition is over – your job is not done. Your attorney will send you a copy of the transcript of your deposition a few weeks after your deposition. Although it can be tedious to read over testimony, it is a very good idea to do so. Later, you may be asked for additional documents or information, you may be asked to provide a declaration, and you may be asked to testify at trial or arbitration.

6. The Truth Will Set You Free (Or At Least Allow You to Sleep At Night)

As your attorney will tell you – probably more than once – the most important rule for a deposition is to tell the truth. Please take this to heart, and please don't be insulted when your attorney tells you this. While most witnesses understand the need to tell the truth, it is impossible to overstate the importance of being truthful.

Your attorney will have many more tips and information for you before your deposition. These six tips will point you in the right direction, and help you go into that meeting with a better idea of what to expect from your deposition.

For more information contact the author at JAchtert@laborlawyers.com or 415.490.9000.

When "Let's Keep It Quiet" Is An Unfair Labor Practice

Continued from page 1

While it is unclear whether the above reasons are merely illustrations, as opposed to exclusive, it appears that a blanket restriction (or even a routine request) is likely to run afoul of the NLRB's expectations.

What Does This Mean For You?

This ruling is actually an expansion of an existing Board precedent. As far back as 1989, Board law held that it was unlawful for an employer to instruct an employee who had reported sexual harassment "not to talk to anyone [but their supervisors] about the matter." The reasoning was this would have prevented them not only from discussing the matter with other employees, but also with their union representatives.

Banner is significant because it highlights the risk to employers inherent in making blanket "requests" either orally or in writing that employees keep any internal investigation "confidential." It will clearly not be sufficient to claim that such requests are necessary to preserve the integrity of the investigation.

A better approach would be to limit such requests to situations where there is a legitimate and demonstrable safety concern, a concern about witness tampering, or a risk of lost evidence. Even in such instances, the request should ideally be limited to time (*i.e.* the duration of the investigation) and scope (*i.e.* during work time and on company property).

Additionally, you should avoid disciplining, or threatening to discipline, employees for failing to maintain the confidentiality of an internal investigation unless clearly warranted by the circumstances (such as when one or more of the considerations set forth above is present).

For more information contact the author at RHaley@laborlawyers.com or 502.561.3990.

Office Locations

Atlanta
phone 404.231.1400

Boston
phone 617.722.0044

Charlotte
phone 704.334.4565

Chicago
phone 312.346.8061

Cleveland
phone 440.838.8800

Columbia
phone 803.255.0000

Dallas
phone 214.220.9100

Denver
phone 303.218.3650

Fort Lauderdale
phone 954.525.4800

Houston
phone 713.292.0150

Irvine
phone 949.851.2424

Kansas City
phone 816.842.8770

Las Vegas
phone 702.252.3131

Los Angeles
phone 213.330.4500

Louisville
phone 502.561.3990

Memphis
phone 901.526.0431

New England
phone 207.774.6001

New Jersey
phone 908.516.1050

New Orleans
phone 504.522.3303

Orlando
phone 407.541.0888

Philadelphia
phone 610.230.2150

Phoenix
phone 602.281.3400

Portland
phone 503.242.4262

San Diego
phone 858.597.9600

San Francisco
phone 415.490.9000

Tampa
phone 813.769.7500

Washington, DC
phone 202.429.3707

Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters