

This is an advertisement.

Management Update

The Voice of the Worker: When Can Employers Prohibit Political Discussions in the Workplace?

The old adage that people should not talk about politics, religion or sex in a social setting is probably also good advice for discussions in the workplace. With the November elections rapidly approaching, and the electorate being split and highly energized, employers are well advised to know the do's and don'ts of disciplining employees who might "talk politics" in the workplace.

As with politics, the laws applicable to curbing political discussions in the workplace are generally local. State laws vary on whether an employer can take disciplinary action against an employee for voicing political opinions in the workplace.

In most states, workers are employed at will, which means that either party can end the employment relationship at any time, with or without cause, so long as the employee is not discharged for a prohibited or unlawful reason. Thus, in a state that has a pure at-will employment doctrine, an employer is free to discharge an employee who voices political opinions in the workplace.

The complicating factor is that many states have significantly limited the at-will employment doctrine. For instance in Connecticut, private employees have first amendment rights that are similar to those held by governmental employees. In Connecticut, an employee who expresses a political opinion in the workplace cannot be disciplined for that opinion unless it "substantially or materially interfere[s] with the employee's bona fide job performance or the working relationship between the employee and the employer . . ."

Several other states have limited the at-will employment doctrine by making it unlawful to discriminate against a person for engaging in lawful off-duty conduct. Although we often equate these "off-duty" laws to protecting smokers' rights, these laws also apply to political opinions expressed outside of the workplace. For example, in Colorado it would be unlawful for an employer to take an adverse employment action against an employee because he or she voiced a political opinion on his or her own time – say for instance during a lunch break or while

preparing for work. Although these laws, by their very name, only apply to conduct outside of work, employers in states that have such laws must exercise caution. For example, a crafty plaintiff's lawyer could claim that the reason given by an employer for discharging or disciplining an employee was pretext and that the real reason for the action was because the employee voiced a political opinion or otherwise

Continued on page 5 ▶



IN THIS ISSUE

THE VOICE OF THE WORKER	1
NEW WHITE COLLAR REGULATIONS	2
10 REASONS PEOPLE PLAY GOLF	3
COURT UPHOLDS BOARD DETERMINATION	4

The New White Collar Regulations: Are Your Employees Still Exempt?

How will the DOL's revised white collar regulations affect me? That is the question many employers are asking themselves. Consider the situation of ABC company, which employs a number of computer specialists. The company has always treated these employees as exempt believing the duties they perform meet the DOL's requirements for the computer employee exemption under the white collar regulations. Since the DOL did not change the duties test for the computer employee exemption, ABC doesn't think it needs to worry about the impact of the new regulations on these employees.

What ABC doesn't realize, however, is that the revision of the minimum salary requirement for exempt employees does impact the exempt status of these computer employees. These computer employees are paid \$350 per week on a salaried basis. Their pay does not depend on the number of hours they work.

Under the old regulations, the employer considered these employees exempt because they were paid on a salary basis that exceeded the minimum level required for both the "short" and "long" duties tests and the employer believed they performed exempt duties. Under the new regulations, however, it is clear that the employees' salaries do not meet the required minimum of \$455 per week to be considered exempt.

Additionally, not only does the revision of the minimum salary requirement for exempt employees impact their exempt status, the company was already in error in its interpretation of the duties requirement for the computer employee exemption. Because the DOL has indicated it intends to focus its attention on those employees compensated at or close to the minimum salary required for exemption, it is essential not only

that ABC increase the compensation of these employees so that they are paid on a salary basis of at least \$455 per week or an hourly rate of \$27.63, but also that it closely examine the duties these employees perform to make sure they meet the duties test for the computer employee exemption. The requirements for the computer employee exemption are highly technical and many employers erroneously designate employees as exempt under this provision.



This is just one example of how the revised white collar regulations can impact unsuspecting employers. Ford & Harrison attorneys are currently conducting a variety of educational sessions discussing the revised white collar regulations. Additionally, our firm has prepared a number of publications discussing these revisions, including our FLSA Desk Reference, the Wage & Hour chapter of our SourceBook,

our Wage & Hour manual and "white papers" analyzing the revised regulations. Our attorneys and consultants are also experienced at conducting wage and hour audits. The revisions to the white collar regulations have raised public awareness of the wage and hour laws in general and now may be a good time to consider auditing your payroll practices to ensure that you are in compliance with all aspects of the Fair Labor Standards Act.

If you have questions about the revised white collar regulations, Ford & Harrison publications or training sessions, or any provision of the Fair Labor Standards Act, please contact the Ford & Harrison attorney with whom you usually work or one of the following: John Duvall, jduvall@fordharrison.com, 904-357-2000; Joe Godwin, jgodwin@fordharrison.com, 904-357-2000; or Fred Atterbury, fatterbury@fordharrison.com, 407-418-2300. ■

10 Reasons People Play Golf (Tennis, Bowl)

Summer is here and many of us are thinking about golf and other sports. The question is why can some employees spend eight hours at work just going through the motions, but then have the energy to play 18 holes of golf, two hours of tennis or bowl all night? Why aren't people as motivated by their jobs as they are the sports they play? Here are ten possible reasons:



1. A clearly defined goal – par is what golfers evaluate their performance against.
2. A challenge – golfers love to hit a good drive or make a long putt, but it is not easy.
3. The opportunity for the player to set his or her own standards – golfers strive for par, but most really want to just get better.
4. Established rules that apply to everyone – scoring and penalty rules are all clearly defined; yes, some cheat, but those are cheaters, not golfers.
5. Immediate feedback – the joy of a good drive and the ache of a bad slice are seen and felt immediately.
6. The opportunity for socialization – interaction with others during and after the round make playing even more worthwhile.
7. Positive recognition – there are always many more comments like “great shot” or “it almost went in,” than criticisms.
8. Lessons and practice will yield improvement – if the player receives good coaching and practice, he or she will get better.
9. A pleasant environment – it's always nice on a golf course.
10. It's fun – yes, it can be frustrating, but that too makes it fun.

We can take the fun out of golf or any sport by doing those things that we often do in the work environment. That is,

1. Fail to establish and communicate clearly defined goals.
2. Ensure the work is not challenging; anyone can do it.
3. Fail to establish clear standards of performance.
4. Change the rules or apply them inconsistently.
5. Give poor or infrequent feedback.
6. Prohibit social interaction on the job.
7. Refuse to spend time training people to do the job well.
8. Always tell people when they do something wrong and seldom praise them.
9. Provide a work area that is dirty, unsafe or unpleasant and don't repair the equipment.
10. Don't allow people to have fun.

Management needs to provide the proper ingredients that will allow employees to perform at their best. Everyone is motivated. They are either motivated to produce or to run out the door as soon as the workday is over. We can't help your golf game, but if you want to change the environment in your organization, our management consultants have some ideas. You can contact either Richard Reinhardt, reinhardt@fordharrison.com, 901-291-1546, or Pam Breeckner, pbreeckner@fordharrison.com, 901-291-1534. ■

Court Upholds Board Determination that Employee Was Discharged Because of Union Animus

A recent decision by the Seventh U.S. Circuit Court of Appeals enforcing a National Labor Relations Board (“Board”) order demonstrates the importance of consistently enforcing employment policies in a uniform, non-discriminatory manner, especially when disciplining an employee who is a known union supporter. In *SCA Tissue North America v. NLRB*, the court enforced the Board’s order affirming a decision by an Administrative Law Judge (ALJ), which held that the termination of a union supporter for violation of the employer’s code of conduct unlawful. The employer claimed it fired the union supporter because he violated the company’s code of conduct by leaving work three hours early on two consecutive mornings without management permission. The ALJ and the Board disagreed and found the employer acted out of union animus. It ordered the employee reinstated and made whole for lost earnings and benefits.

In this case, Sandoval, a long-time employee whose last documented performance problem occurred over two and half years before his termination, was discharged after he left work early two days in a row without a manager’s permission. The ALJ and the Board found in favor of the Board’s General Counsel (GC) and against the employer. The Seventh Circuit enforced the Board’s decision, even though the GC relied on four incidents, all of which were outside of the statute of limitations, to establish union animus.

The first two incidents occurred during the union campaign, when the plant manager warned all employees that they could not talk about the union on the shop floor and told Sandoval to remove his union button because it violated SCA’s “no jewelry” policy. The Board adopted the ALJ’s determination there was no ban on non-work-related conversations and the no jewelry policy had never been enforced, at least with respect to wedding rings, watches and SCA pins. Since neither policy was uniformly enforced prior to or after the campaign, the Seventh Circuit held that the Board was entitled to rely on these instances of selective enforcement as evidence of union animus.

The other two incidents the GC relied on to show union animus (the manager’s order to Sandoval to cover his union T-shirt as they walked through the shop and the parting comment about Sandoval’s “attitude”) occurred after Sandoval was discharged. Although SCA argued it had a right to control disruptive outbursts on the production floor regardless of their nature and that the manager’s follow-up comment about Sandoval’s attitude was innocuous, the Seventh Circuit found the scene described by Sandoval would not leave the impression that Sandoval’s behavior created a disturbance warranting the manager’s direction.

The Court also rejected the employer’s affirmative defense that it would have taken the same action even if the manager harbored union animus because Sandoval left work early two days in a row without permission. The Court noted that the record was replete with examples of other employees with “terrible employment histories” who also committed code of conduct violations and were not discharged. The Court concluded SCA’s past willingness to give second and third chances to poor employees with a myriad of performance problems, but not to Sandoval, who had a good work record, smacked of disparate treatment. ■

John-Edward Alley
jalley@fordharrison.com

participated in the political process on their own time.

This is also true in states like New York, California, South Carolina, Louisiana, and Wisconsin, where specific statutes protect employees who participate in the political process or have political views or party affiliation.

A final consideration regarding the expression of political opinions in the workplace is whether the employer is unionized. In a unionized workforce, employees who distribute handbills or other literature expressing an opinion about a political candidate who supports a particular union or the rights of unionized workers in general may be engaging in conduct that is protected by the National Labor Relations Act (the "Act").

This issue has created serious dilemmas for employers who do not want to violate the rights of their unionized workforce but who nonetheless want to keep political distributions out of their workplace. In analyzing this predicament, courts must determine whether the distributed material falls under the purview of Section 7 of the Act. Section 7 guarantees

employees the right to "engage in concerted activities for the employees' mutual aid and protection, such as the distribution of union material." Employees are protected "so long as [the distribution] is done in a nonworking area and during nonworking times." *The Mead Corporation, Fine Paper Division v. McBrayer*. For an employer to interfere with such activity would violate the Act's intent.



However, the U.S. Supreme Court has held that "where the distributed literature is purely political or remotely connected to the concerns of employees, it may fall outside the protection of Section 7." *Eastex v. NLRB*. In making this determination, courts will examine whether the distributed literature is "so attenuated as to be deemed outside the scope of the mutual aid and protection clause." *Eastex*. Although each situation is fact intensive and must be analyzed individually, courts will consider certain factors when determining whether leaflets are purely political. Where the literature is "related

to an election, supports particular candidates, and the content cannot be found to relate to the employee's problems and concerns it is deemed purely political." *Mead*, citing *Firestone Steel Prod. Co. v. Local 174 International Union*. In such a case, the literature does not fall within the confines of Section 7 because the content does not "bear a relationship to the employees' interests as employees" and the employer may then restrict the distribution rights of its unionized workforce. *Eastex*.

In conclusion, whether from a red state, blue state, or purple state, an employer needs to know the applicable state law regarding political speech and participation, and should consider the nature of the speech if operating under a union contract.

If you have questions about this issue or any labor or employment related issue, please contact the authors or the Ford & Harrison attorney with whom you usually work. ■

John C. Lowrie
jlowrie@fordharrison.com

Steve F. Ventura, Jr.
sventura@fordharrison.com

MANAGEMENT UPDATE

FORD & HARRISON LLP
Creative Workplace Solutions
1275 Peachtree Street, N.E. • Suite 600
Atlanta, Georgia 30309

This is an advertisement.

The Management Update is a service to our clients providing general information on selected legal topics. Clients are cautioned not to attempt to solve specific problems on the basis of information contained in an article. For information, please call Lynne Wingate 404-888-3858 or write to the Atlanta address below.

Editor Amy W. Littrell
alittrell@fordharrison.com

FORD & HARRISON LLP
Creative Workplace Solutions

1275 Peachtree Street, N.E. • Suite 600
Atlanta, Georgia 30309
404-888-3800 • FAX 404-888-3863

225 Water Street • Suite 710
Jacksonville, Florida 32202
904-357-2000 • FAX 904-357-2001

100 S.E. 2nd Street • Suite 4500
Miami, Florida 33131
305-808-2100 • FAX 305-808-2101

101 E. Kennedy Blvd. • Suite 900
Tampa, Florida 33602-5133
813-261-7800 • FAX 813-261-7899

2100 Third Avenue North • Suite 400
Birmingham, Alabama 35203
205-244-5900 • FAX 205-244-5901

350 South Grand Avenue • Suite 2300
Los Angeles, California 90071
213-237-2400 • FAX 213-237-2401

100 Park Avenue • Suite 2500
New York, New York 10017
212-453-5900 • FAX 212-453-5959

1300 19th Street, N.W. • Suite 700
Washington, DC 20036
202-719-2000 • FAX 202-719-2077

1675 Broadway • Suite 2150
Denver, Colorado 80202
303-592-8860 • FAX 303-592-8861

6750 Poplar Avenue • Suite 600
Memphis, Tennessee 38138
901-291-1500 • FAX 901-291-1501

300 South Orange Avenue • Suite 1300
Orlando, Florida 32801
407-418-2300 • FAX 407-418-2327

Certification as a Labor and Employment Law Specialist is not currently available in Tennessee.
Visit our web site at www.fordharrison.com