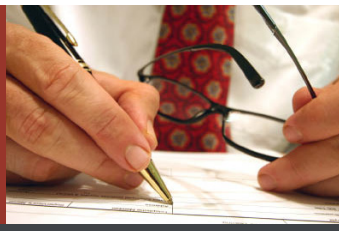
Labor & Employment Update



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Talk Isn't Always Cheap

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By John W. Smith T

We know them well. "A picture is worth a thousand words." "Actions speak louder than words." "Talk is cheap." With sayings like these, it is not surprising that people are careless with what they say or how they say it. Unfortunately, when that happens, words often do matter. This is certainly the case in the employment context.

For example, it is well known that hostile words can create a hostile work environment, actionable by an employee if the language is severe and pervasive. However, we sometimes forget that what is said (and not said) can have important implications in other employment situations. Recent decisions from the Alabama Supreme Court and the Sixth Circuit Court of Appeals demonstrate that inconsistent explanations given to an employee who is being terminated can have adverse consequences.

In ***Ex parte Wood***, 2010 WL 4272676 (Ala. Oct. 29, 2010), the employee suffered an on-the-job injury and subsequently returned to work with restrictions. He complained about ongoing pain and left work several times to seek medical treatment, but he failed to get the proper approval. He also did not report back to work in a timely fashion. As a result, the employee was written up for several violations of workplace attendance rules. After one such occasion, the employee had angry words with the human resources manager about his attendance problems, ultimately inviting her to kiss him in an unusual place. These comments were overheard by co-workers. After learning about the employee's attendance problems and comments, the plant manager decided to terminate the employee for both reasons "considered together." However, according to the proof at trial, when the plant manager communicated the decision to the employee, he mentioned only that the employee was being discharged because the employee "had left work early that day without permission." During the trial, the human resources manager testified that the "sole reason and only basis" for the discharge was because the employee left work early without permission, although she added that foul language would have been an alternative basis for termination had the employee not had attendance issues.

The employee won a $50,000 verdict at trial, but the Alabama Court of Civil Appeals reversed. The appeals court noted that the employer's stated reasons for the termination were legitimate. Indeed, the employee admitted making the comment and the company's handbook mentioned foul language as a basis for discharge. After further appeal, however, the Alabama Supreme Court reinstated the verdict for the employee. The Court reasoned that evidence of pretext existed as a result of the inconsistent explanations given to the employee for the termination. It stated that it is reasonably possible for the trier of fact to conclude that the employer relied on the alternative basis for the decision "after the fact to bolster its allegedly pretextual reason."

Similarly, in ***Eades v. Brookdale Senior Living***, 2010 WL 3927246 (6th Cir. 2010), the employee sued for age discrimination and retaliation following his termination. The employee contended that his supervisor treated him in a harassing and intimidating way which he said was motivated by his age. After several meetings to address the employee's concerns as well as to address the performance problems the employee was having, the company asked the employee if he would be interested in either moving to another position with the company or taking early retirement with severance. The employee was told to go home to think about it. The employee subsequently learned that he had been terminated and was being offered a reduced severance. The employee sued. The employer initially won summary judgment, but the Court of Appeals

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for the Sixth Circuit reversed. As evidence of pretext, the employee pointed to a number of different reasons for the termination which the employer had provided. The Court of Appeals agreed, noting that the company had "changed its story many times" including (1) at the time of the termination; (2) in its position statement to the EEOC; (3) during discovery; and (4) in its legal briefs during the case. The Court of Appeals said that an "employer's changing rationale for making adverse employment decisions can be evidence of pretext."

These cases reinforce the importance of carefully making, processing and defending termination decisions. The reasons for the termination should be evaluated and finalized before the termination. Once the reasons have been defined, the appropriate supervisors need to be informed of (and support) the decision. If the termination is to occur in person, it is good practice to have two managers present to witness the conversation. It is also good practice to confirm in writing the reason(s) for the decision to the employee, including giving the employee a letter or some other documentation that states the reasons clearly. Any difficulties that arise during the termination meeting should likewise be documented. At the EEOC stage, it is wise to involve counsel early, to make sure that the position statement is consistent with the grounds for termination. Finally, the mangers involved in the termination decision should review the submission to the EEOC to ensure its accuracy. Once litigation arises, they may be questioned about the contents of the EEOC response, and any inconsistencies between their testimony and the EEOC submission can be harmful to the employer's defenses. In sum, it is wise to be clear and consistent about the reasons for the termination of an employee. After all, "loose lips sink ships."

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Bradley Arant Boult Cummings LLP has received the fourth highest number of top-tier rankings in the country in the inaugural U.S. News & World Report – Best Lawyers list of top U.S. law firms. As it has done for many years for hospitals and colleges, this year U.S. News, working with the attorney ranking company Best Lawyers in America, ranked U.S. law firms based on a number of criteria, including client satisfaction.

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