EMPLOYMENT LAW UPDATE
Legal News℠
FOLEY
FOLEY & LARDNER LLP
JANUARY 2012

Labor and Employment Law Weekly Update (Week of January 9, 2012)

Potty Mouth Employee Loses Protection

Written by: Michael C. Lueder

The NLRB ruled that it was unlawful for Plaza Auto Center to fire car salesman Nick Aguirre after he swore at the company's owner (http://tinyurl.com/7cfy2dz). Mr. Aguirre had only worked at the car dealership for two months, but in his short tenure, he raised a lot of complaints about his working conditions. Mr. Aguirre constantly asked his supervisors about how his commissions were calculated and when he could take bathroom and meal breaks. He griped about being employed on a 100-percent commission sales basis and said he should at least receive minimum wage.

Each time Mr. Aguirre complained, his supervisors told him if he did not like his working conditions, he should find a job elsewhere. The NLRB found that such responses to complaints about working conditions are unlawful under section 8(a)(1) of the National Labor Relations Act. The federal court of appeals for the Ninth Circuit in California agreed (http://tinyurl.com/7669dyq). Lesson Number One: Do not tell employees to lump it or leave it when they complain about working conditions.

But there is more to this story. One day, Mr. Aguirre's grumbling got more aggressive. He went to his supervisors' office to meet with the company owner, where he went into an expletive-laden tirade. Mr. Aguirre told the supervisors in the room that the boss was stupid, nobody liked him, and everyone talked about him behind his back. Mr. Aguirre then stood up, pushed his chair, and told the owner, Mr. Plaza, that if he was fired, Mr. Plaza would regret it. Mr. Plaza then fired Mr. Aguirre.

The NLRB found that Mr. Plaza could not lawfully fire Mr. Aguirre due to this conduct because Mr. Aguirre did not physically threaten or intimidate Mr. Plaza. Therefore, according to the NLRB, Mr. Aguirre did not lose the Act's protections when complaining about his working conditions. The NLRB found that both the place — the manager's office — and subject matter of discussions — working conditions — were appropriate, and the company's unfair labor practice of telling Mr. Aguirre to quit provoked his outburst. The NLRB ignored the finding of its own administrative law judge that Mr. Aguirre's conduct was obscene, personally degrading, and accompanied by menacing conduct and language. With this decision, the NLRB ruled for the first time that the Act's protections are not lost unless verbal abuse is accompanied by some physical conduct or at least a threat that is physical in nature.

The federal court found that this part of the decision could not stand. It concluded there is nothing in the history of the cases or the statute that requires a physical threat to lose the Act's protection. Mr. Aguirre's cursing, hollering, and carrying on were enough to warrant his termination regardless of the merits of his complaints. Lessen Number Two: Even when an employee complains about working conditions, he can lose the protections of the National Labor Relations Act if he pushes it too far. This will usually require at least some hollering, verbal abuse, and obscene language.

Lesson Number Three: The past is anything but prologue with this NLRB. Time and time again, the NLRB has made rulings that significantly depart from prior precedent and must be reversed in the courts. While the courts have and will correct much of the NLRB's over-exuberance, such suits cost the charged companies a lot of money. Therefore, before you terminate someone for using harsh language when complaining about working conditions, make sure you consider the cost of overturning a potentially adverse ruling from the NLRB.

NLRB Delays Its Notice-Posting Rule Once Again

Written by: Lawrence T. Lynch

Regular readers of Foley's *Legal News: Employment Law Update* will know that the NLRB has proposed a rule that would require most private sector employers in the United States to post a notice that informs their employees about their rights under the National Labor Relations Act. These rights include the right to form, join, or assist a union and the right to bargain collectively with their employers through their chosen representatives. The NLRB issued the final rule on the posting requirement on August 30, 2011 (http://tinyurl.com/43ucj78). See the NLRB's proposed poster (http://www.nlrb.gov/poster) and the NLRB's FAQ document (http://www.nlrb.gov/faq/poster) about the rule. Should the rule become effective, the poster is essentially the same as the one that federal contractors are already required to post under Executive Order 13496.

The new rule (http://tinyurl.com/7s7ko99) was to go into effect on November 14, 2011. In response to lawsuits that various employer groups filed to stop the rule, the NLRB postponed the effective date to January 31, 2012. At the request of the federal judge who is hearing two of the complaints, the NLRB has announced that the rule's effective date will be April 30, 2012. This is the same effective date as the NLRB's new rule on its union election procedures, which also is being legally challenged by employer groups.

The NLRB's employee posting rule will require employers to post the notice even if they do not have any unionized employees. Employers who use an intranet or Internet site to post personnel rules would need to post the notice on such sites. If 20 percent or more of the workforce is not fluent in English, translations of the notice must be posted in the employees' other languages. Translated notices (http://www.nlrb.gov/poster) also are available from the NLRB. We will keep our readers advised as to future developments on this new posting requirement.

Legal News is part of our ongoing commitment to providing legal insight to our clients and colleagues. If you have any questions about or would like to discuss these topics further, please contact your Foley attorney or the authors of this week's issue.

ABOUT FOLEY

Foley & Lardner LLP provides award-winning business and legal insight to clients across the country and around the world. Our exceptional client service, value, and innovative technology are continually recognized by our clients and the legal industry. In a recent survey of *Fortune* 1000 corporate counsel, conducted by The BTI Consulting Group (Wellesley, Massachusetts), Foley received a top five ranking out of 300 firms for delivering exceptional client service. In addition, Foley received 19 national first-tier rankings on the 2011 – 2012 U.S. News – Best Lawyers® "Best Law Firms" list, and *CIO* magazine named Foley to its prestigious CIO-100 list in 2011 for technological innovation that enhances business value. At Foley, we strive to create legal strategies that help you meet your needs today — and anticipate your challenges tomorrow.

FOLEY
FOLEY & LARDNER LLP