



IT'S THE LAW



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Handbook Can Mean Trouble For Employer If Not Properly Written

Did you ever envision that your handbook could result in the filing of an Unfair Labor Practice Charge by a union at the National Labor Relations Board? This is exactly what happened to an employer that was not union and sold heavy construction equipment throughout Kentucky and Indiana. Language was contained in the handbook which the NLRB found constituted an unfair labor practice. The Company explained its approach to "employee relations" as follows: "We, as a Company, prefer to deal with people directly rather than through a third

party. This is a non-union organization. It always has been and it is certainly our desire that it always will be that way. . . You have a right to join and belong to a union and you have an equal right NOT to join and belong to a union. If any other employee should interfere or try to coerce you into signing a union authorization card, please report it to your Supervisor and we will see that the harassment is stopped immediately."

During the course of its organizing campaign, the International Union of Operating Engineers Local 150 ("Union"), filed several unfair labor practice charges against this employer which included a charge that its employee handbook interfered with its employees' right to organize under the National Labor Relations Act ("NLRA"), specifically Section 8(a) (1) provides that it shall be an unfair labor practice for any employee to interfere with, restrain or coerce employees in the exercise of their right to organize collectively under the NLRA. In order to establish a violation of the Act, the test is not whether proof of coercive intent or effect is necessary. Rather, the test is whether the employer engaged in conduct which may reasonably be said to tend to interfere with the free exercise of an employee's rights under the NLRA. The NLRB found that the employer's handbook invited the employees to report "harassment" by union organizers attempting to bar employees from signing authorization cards. The NLRB reasoned an employer interferes with the employee's rights to engage in union solicitation when an employer invites its

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employees to report instances of fellow employees' bothering, pressuring, abusing, or harassing him or her with union solicitations and implied that such conduct would be punished.

The employer appealed the NLRB's decision to a federal court in Illinois. The court stated that it rejects the NLRB's "per se" approach. Instead, the federal court of appeals stated that they focused on a fact-based contextual inquiry to determine whether an employer violates the NLRA.

In finding that the NLRB's ruling was supported by substantial evidence, the federal court of appeals stated that the context in which the employer's policy was set forth is important. The policy was located in a section of the handbook entitled "Employee Relations Philosophy," which sets forth the employer's desire to remain union-free as opposed to being part of a more general anti-harassment policy. Second, the employer's focus of the prohibition against "harassment" was union activity. There is no acknowledgment by the employer that an opponent of a union might also harass, interfere or coerce fellow employees into rejecting union representation. The federal court of appeals distinguished the language contained in this employer's handbook from that in another handbook which was, in fact, approved by the NLRB in 1987 that provided, "*Remember, do not sign a card because you are threatened, tell us and we will protect you. It is your right to have a union. It is your right not to have a union. Our Company will try to see to it that your rights are preserved no matter how you choose. Tell us if someone is trying to stop your freedom of choice.*"

It is incumbent upon an employer to use language in a handbook that is not reasonably subject to an interpretation which would unlawfully affect the exercise of an employee's Section 7 rights. It is a good practice for employers to review handbooks at regular intervals to ensure that they do not run afoul of the law.

Written Interoffice Communications May Result in Defamation: Management Beware

The ability to investigate employee misconduct is an essential function of management. However, the need for companies to communicate internally in a free and candid manner must be approached with the utmost care, as the threat of defamation lawsuits may be one misstep away. When allegations of misconduct are directed toward an employee, management must react. Absent the rights and benefits accorded union members, management may generally choose to suspend the employee with or without pay, terminate him or allow him to continue working. An internal investigation must transpire and it is at this stage that the employer may become vulnerable to a defamation suit. To prove defamation, an individual must establish a false statement was made in an unprivileged published communication which resulted in damage. Publication is an essential element to prove a cause of action. Illinois courts have determined that interoffice reports, termination memos and performance evaluations sent between corporate officers may constitute publication for purposes of defamation. While such communications may be considered publications, such communications may be protected as a "qualified privilege." A qualified privilege means that a communication between management that otherwise may be actionable outside the corporate environment is not actionable due the circumstances under which it was made. This privilege requires that the statement (1) was made in good faith; (2) concerned a subject in which the person making the statement had an interest or duty; and (3) was made to a person having a corresponding interest or duty. For instance, the privilege attaches to communications disseminated during the course of management's investigation into employee misconduct. This privilege is not absolute and an inter-office communication may be the source of a defamation claim if the privilege is abused. The following is a summary of a defamation suit brought by a

terminated employee and illustrates how management's "abuse" of the qualified privilege can result in defamation.

A supervisor conducted a performance review of an employee. During the review, the employee received a substantially lower evaluation than he had previously. The review upset the employee and the supervisor conducting the review reported to the Vice President of the company that the employee used profanity during the review. After the performance review, a written memo was prepared by the supervisor explaining the employee's conduct during the review as well as outlining additional patterns of unacceptable conduct, such as making derogatory comments about supervisors on several other occasions. The written memo was given to the Vice President who reviewed it and subsequently terminated the employee. The employee filed a defamation suit against the corporation and two supervisors for defamation. A jury returned a verdict against all defendants on the defamation claim and awarded punitive damages.

On appeal, the defendants argued the written memo was protected by a qualified privilege and therefore its contents could not be defamatory. The appellate court disagreed. Relying on other Illinois case law, the court concluded communications in an interoffice memo will not be protected if there is a reckless disregard of the employee's rights. The court determined the corporation acted recklessly because it failed to conduct an investigation to determine the merits of the accusations levied against the employee. Neither the employee or employee's supervisors were interviewed prior to the Vice President terminating the employee. As a result, the failure of management to investigate the matter resulted in a finding of recklessness and the qualified privilege was lost.

The above referenced case underscores the importance of conducting an investigation into allegations of misconduct prior to disseminating an interoffice memo - especially when the memo provides recommendations of suspensions and/or terminations. Interviewing the employee and all potential witnesses is a must. The initial confrontation of the suspect

employee is critical. An employer may only have one opportunity to confront an officer, employee or third party before that person "lawyer's up." Oftentimes, the employer enjoys the benefit of the element of surprise, which enables management to obtain information and gauge an employee's reaction and responses when confronted. When interviewing other employees, determine the interviewee's basis for information. The interviewee does not necessarily have to have personal knowledge, and it is acceptable to obtain hearsay information. Hearsay information will almost always lead the employer to someone who has personal knowledge. Lastly, avoid disclosing the sources of information received from other interviews. Keep in mind that employees may be reluctant to get involved or may be unwilling to disclose all personal knowledge if they believe the information provided will not be confidential for purposes of the investigation.

In sum, great care should be taken to ensure that opportunity presented by the confrontation is not squandered and the investigation is thorough and well documented. Obtaining accurate information about the wrongful conduct at an early stage of the investigation not only enables the company to immediately deal with the problem but also increases the likelihood that any interoffice memos that result from the investigation will be protected communication and will not be found to be defamatory.

New OFCCP Rules Under Laws on Affirmative Action for Vets

The Labor Department's Office of Federal Contract Compliance Programs ("OFCCP") issued a final regulation clarifying the obligations of all federal contractors, including construction under Vietnam Era Veterans Readjustment Assistance Act of 1974 (70 Fed. Reg. 72148).

The Rule was effective January 3, 2006.

Under the VEVRAA, employers with a federal contract or subcontract of at least \$25,000 must take affirmative action to hire and promote qualified covered veterans.

The rule defines construction as “construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services” and includes supervision, inspection, and other onsite functions incidental to actual construction.

The final rule revises existing OFCCP regulations regarding the affirmative action under VEVRAA to incorporate changes made by the Veterans Employment Opportunities Act of 1998 (VEOA) and the Veterans Benefits and Health Care Improvement Act of 2000 (VBHCIA).

The VEOA changes give VEVRAA protection to a new group of “other protected veterans” – defined as those who have served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized.

The VBHCIA amended the primary act by creating a new class of protected veterans - “recently separated veteran”. Such a veteran is defined in the VEVRAA as “any veteran during the one-year period beginning on the date of such veteran’s discharge or release from active duty.”

The final published rule does not address changes made to the VEVRAA by the Jobs for Veterans Act, which was signed by President Bush Nov. 7, 2002.

The JFVA applies to federal contracts and subcontracts entered on or after December 1, 2003, raised the threshold for coverage to contracts or subcontracts of at least \$100,000.



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