

WIMBERLY LAWSON SEALE WRIGHT & DAVES, PLLC

ATTORNEYS & COUNSELORS AT LAW

February 2005 Volume 5, Issue 2

NLRB RULES ON LAWFULNESS OF EMPLOYER'S WORK RULES

About our Firm

Wimberly Lawson Seale Wright & Daves, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Nelson & Schneider, P.C., Atlanta, Georgia; Wimberly Lawson Daniels & Brandon, Greenville, South Carolina; Wimberly, Lawson, Suarez & Russell, Tampa, Florida; and Holifield & Associates, P.C., Knoxville, TN.

Locations

Knoxville Office

Bank of America Building, Suite 900
550 Main Avenue
P. O. Box 2231
Knoxville, Tennessee 37901-2231
Phone: 865-546-1000/Fax: 865-546-1001

Morristown Office

929 West First North Street
P.O. Box 1066
Morristown, Tennessee 37816-1066
Phone: 423-587-6870/Fax: 423-587-1479

Cookeville Office

1420 Neal Street - Suite 201
P.O. Box 655
Cookeville, Tennessee 38503-0655
Phone: 931-372-9123/Fax: 931-372-9181

Nashville Office

200 Fourth Avenue South
Suite 900
Nashville, Tennessee 37219
Phone: 615-727-1000/Fax: 615-727-1001

Website: www.wlswd.com

Affiliated Offices

Wimberly, Lawson, Steckel, Nelson & Schneider, PC
Atlanta, Georgia

Wimberly Lawson Daniels & Brandon
Greenville, South Carolina

Wimberly, Lawson, Suarez & Russell,
LLC
Tampa, Florida

Of Counsel

Holifield & Associates, P.C.
Knoxville, Tennessee

For years there has been some tension in NLRB rulings concerning employer work rules which seek to prohibit harassment-like conduct on the premises, and the idea that employees should not be deterred or "chilled" from engaging in legitimate union organizing activities or other concerted activities for mutual aid or protection, whether a union is involved or not. Many employers have instituted seemingly innocent and arguably legally required rules, such as those pertaining to harassment, only to subsequently find out that they have been struck down by the Labor Board as over-broad and unlawful. The consequences of such a finding are quite severe to an employer, as any discipline administered under such over-broad, unlawful rules, could also be legally challenged. Further, unions use such rules to set aside secret ballot elections that employers have won, sometimes by overwhelming margins, because of the technicality of having an illegal rule in place during the pre-election period. Fortunately, the NLRB has now issued a very helpful ruling, favorable to

employers, concerning these subjects, in Lutheran Heritage Village - Livonia, 343 NLRB No. 75, 176 LRRM 1044 (11/19/04). The ruling in this case also demonstrates the continuing effect of the

"Bush NLRB" which currently has three Republicans and two Democrats as members.

In this case, the administrative law judge, as affirmed by the NLRB, found that the employer's "no solicitation," "no loitering," and "no unlawful strikes, work stoppages, slowdowns, or other interference," rules were unlawfully over-broad or ambiguous and because a reasonable employee could conclude that these rules proscribed Section 7 activity, the rules were found to violate the Labor Act. Several other employer rules, however, including rules prohibiting "abusive and profane language," "harassment," and "verbal, mental and physical abuse" were found lawful because they were intended to maintain order in the employer's workplace and did not explicitly or implicitly prohibit Section 7 activity.

In explaining its rulings, the Board said that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. The inquiry into whether the maintenance of the challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, the Board will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependant upon a showing of one of the

following: (1) employees would reasonably construe the language to prohibit Section 7 activities; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Applying these concepts, the Board finds that a rule prohibiting "abusive language and profane language" is not unlawful on its face. Employers have a legitimate right to establish a civil and decent workplace. The same analysis applies to rules prohibiting to "verbal, mental and physical abuse." The Board found no evidence that the challenged rules had been applied to protected activity or that the employer adopted the rules in response to protected activity. Rather, the rules served legitimate business purposes of maintaining order in the workplace and to protect the employer from liability by prohibiting conduct that, if permitted, could result in such liability. Further, a reasonable employee reading these rules would not construe them to prohibit conduct protected by the Act. Where, as here, the rule does not refer to Section 7 activity, the Board will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way. The Board majority distinguishes its position from the two dissenting Democrats, who argue that the maintenance

Inside.....

Know Your Attorney
Patty K. Wheeler.....Page 2

Department of Labor
Supports Employer
Response to Monday
and Friday Absences.....Page 2

ADA Does Not Permit
Disclosure That Co-Worker
Has Communicable Disease.....Page 3

Employers Praise EEOC
Mediation, But Few
Participate.....Page 3

Settlement Offer Or Extor-
tion - Inquiring Minds
Want to Know.....Page 3

of such rules is unlawful because, in their view, the rules could be applied to prohibit conduct that, under certain circumstances, the Board would find protected under the Act. One of the two dissenters suggests that the proper approach is to mandate that employers specify in their work rules that the rules do not apply to Section 7 activity, but the majority refuses to adopt such an approach.

For the same reasons, the Board majority finds the rule prohibiting

harassment to be lawful, rejecting the dissenters' view that the rule could be applied unlawfully to prohibit protected activity, e.g., an employer could unreasonably term "harassment" an effort to persuade a reluctant employee to join the union.

The Board does find unlawful the employer's loitering rule, on the basis that it is over-broad and ambiguous, in that employees could reasonably interpret the rule to prohibit them from lingering on the employer's premises

after the end of the shift in order to engage in Section 7 activities, such as the discussion of workplace concerns. The Board does indicate that a more narrowly tailored rule might be okay. The Board refuses to pass on the validity of its earlier ruling holding unlawful a rule prohibiting "false, vicious, profane or malicious statements." The Board noted that the rule in that case was in the disjunctive, and thus false statements were prohibited even if they were not malicious

and that non-malicious false statements can be protected in the context of a union/management dispute.

Editor's Note - *This case is very helpful to employers both in the fact that it addresses a large number of common work rules, and also that it furnishes an analysis by which other work rules may be reviewed. The danger in the ruling, however, is that it is a 3-2 ruling, and thus may not survive in a subsequent administration where Democrats on the Board are again in the majority.*

DEPARTMENT OF LABOR SUPPORTS EMPLOYER RESPONSE TO MONDAY AND FRIDAY ABSENCES

Employers are legitimately concerned about an excessive number of Monday and Friday absences, particularly in light of their limited powers to discipline employees for absences that might be covered by the Family and Medical Leave Act (FMLA). Recently, in response to such issues, the DOL Wage and Hour Division issued an Opinion Letter dealing with the re-certification of medical conditions where there is no specified minimum duration of incapacity and

where the employee has a pattern of absences on Mondays and Fridays (Wage and Hour Opinion Letter No. 127, 5/25/04).

Wage and Hour explained that the FMLA allows an employer to request re-certification of an employee's medical condition every thirty days for pregnancy, chronic, or permanent conditions in cases where no minimum duration of incapacity is specified in the original medical certification. The Division added that the re-certification must be

requested in connection with an absence. If circumstances have changed significantly or if doubt has been cast on the continuing validity of the certification, re-certification may be requested more frequently than every 30 days. A pattern of Monday / Friday absences can cast doubt upon the employee's stated reason for the absence, provided there is no evidence of a medical reason for the timing of the absences, Wage and Hour said. Information may be sought

from the employee's health care provider about the pattern during the re-certification process by including an absence record with the medical certification form or asking whether the likely duration and frequency of the employee's incapacity due to the chronic condition is limited to Mondays and Fridays. In addition, with the employee's permission, a health care provider representing the employer may contact the employee's health care provider to clarify the medical certification information.

KNOW YOUR ATTORNEY



PATTY K. WHEELER

Patty is a Member in the Knoxville, Tennessee office of Wimberly Lawson Seale Wright & Daves, PLLC. Her law practice includes an emphasis in employment law, alternative dispute resolution, premises liability, workers' compensation, education law, products liability and commercial law. She received her Bachelor of Arts degree from the University of Arts and Sciences of Oklahoma and her Master's degree from

the University of Oklahoma. She received her Ph.D. and J.D. from the University of Southern California. Patty is a member of the Knoxville, Tennessee and American Bar Associations; State Bar of California; East Tennessee Lawyers Association of Women; Tennessee Lawyers Association for Women. Vice President, Tennessee Mediation Association 2001-2002; Board of Directors, Tennessee

Mediation Association. In the community she has served on the Board of Directors for the Tennessee Justice Center, the Board of Governors for the Knoxville Bar Association, the Knoxville Civil Service Merit Board as a Knoxville Civil Service Merit Board Hearing Officer and as Vice President and on the Board of Directors for the Tennessee Mediation Association.

ADA DOES NOT PERMIT DISCLOSURE THAT CO-WORKER HAS COMMUNICABLE DISEASE

The Americans With Disabilities Act (ADA) prohibits an employer disclosing to employees that a co-worker has Hepatitis C, the EEOC advised in an informal guidance letter (EEOC Advisory Letter, 6/17/04). The Advisory Letter is characterized as an informal discussion, not an official EEOC opinion. It states: "The ADA contains no

provision requiring employers to notify employees that a co-worker has a disability.



To the contrary, it prohibits employers from

disclosing medical information about applicants and employees." The employer had expressed concern that the disease might be transmitted if co-workers shared the same drinking glass or plate.

The informal advisory letter does list several circumstances in which an employer may

inform others about confidential medical information. For example, a supervisor may be informed in order to provide reasonable accommodation or safety personnel may be told if an employee may require emergency treatment. The advisory letter lists no exception for providing information to co-workers, however.

EMPLOYERS PRAISE EEOC MEDIATION, BUT FEW PARTICIPATE

According to one survey, some 96% of participating employers in EEOC mediation said they would use the program again. On the other hand, a relatively low number of employers participate in the voluntary program, as EEOC statistics show that in the past two years only about 31% of employers who are offered mediation agree to engage in the process. In contrast, more than 80% of charging parties agree to participate in the program.

The main factor cited by employers in refusing to participate was the employer's perception that the merits of the case did not warrant mediation.

This was cited by nearly 94% of employers' responses to the survey. The second major factor, cited in 57% of the responses, was that employers did not believe that the EEOC was likely to issue a "reasonable cause" finding. The third most common reason given (50%) was the perception, although incorrect, that the mediation program required monetary settlement.

In another survey, this one by the American Bar Association, the survey revealed that the most important reason for declining mediation was about the quality of mediators. Other reasons were similar to those in the

earlier study, a belief that the charge was without merit, that a monetary settlement was required, and that pressure would be applied to settle meritless charges.

Since 1999, the EEOC has mediated more than 50,000 cases, about 70% of which were resolved in an average time of 85 days, about half the time it takes to resolve a charge through the investigative process.

Another related report reveals information about EEOC charge filings during fiscal year 2003. The average time for processing a discrimination charge was 160 days. The EEOC found "merit" in about 20% of the charges filed

with it. Another 63% were deemed to have "no reasonable cause," and 17% of the charges resulted in "administrative closures" (such as failure to locate the charging party, no statutory jurisdiction, failure of the charging party to cooperate, and other administrative reasons). Race remained the largest category of charges, representing some 35% of the total; sex was second, representing about 30% of the total charges; and retaliation claims were included in almost 28% of the total charges. Age was listed in almost 24% of the total charges, and disability allegations were in about 19% of the total charges.

SETTLEMENT OFFER OR EXTORTION - INQUIRING MINDS WANT TO KNOW

Two recent highly publicized employment cases revealed a lot of public controversy and "hard ball" legal tactics. In one situation, Governor James McGreevey of New Jersey, was threatened with a sexual harassment suit exposing a homosexual affair with another state official. McGreevey abruptly announced his resignation,

explaining why, and took the threat to the U.S. Department of Justice, and the FBI is still reportedly investigating the situation.

In another situation, when conservative talk-show host Bill O'Reilly, was threatened with a sexual harassment suit, he reacted by filing suit against both the claimant and her attorney, alleging extortion

and claiming they were seeking \$60 million in return for her silence. This case was quickly settled several days later, with all charges withdrawn, and under secret terms that will never be disclosed.

In both cases, the defendants took the defensive, exposing the allegations and counter-attacking. The recent

article by former federal prosecutor, Robert Mintz, in the Fulton County Daily Report, discusses these developments and raises the question of how many others are threatened with negative publicity about very personal matters, and choose to pay their accusers to go away secretly. Mintz discusses whether the accusation resolutions

RETURN SERVICE REQUESTED

SAVE THE DATE
2005
Labor & Employment Law Conference
October 13 - 14, 2005
MARRIOTT
Knoxville

February 2005 - Volume 5, Issue 2

PAGE 4

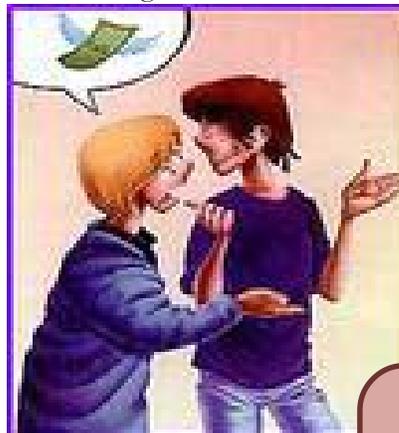
were fair claims and settlements or a new form of “legalized extortion.”

Rumors are legend that prominent public officials, sports stars and the like are paying “hush money” to keep someone silent. Claims by someone for money backed by the threat of going public with embarrassing information, seem to come within the definition of extortion. Extortion is defined as taking something of value from another with his consent but by unlawful means. The unlawful means can include economic harm or even damage to reputation.

On the other hand it is not unusual for claimants or their lawyers to contact their adversaries in advance of litigation, with a demand for settlement. The threatening of litigation is not itself extortion, and

indeed our legal system encourages parties to make their claims and to settle cases privately without going to court.

Mintz points out that the critical distinction between a lawful settlement demand and an extortion demand is whether the threat and actual filing of a suit is a



legitimate use of the legal system by a plaintiff whose

primary purpose is to seek redress in the courts for a violation of some legally cognizable right. Further, use of the legal system is particularly dangerous inasmuch as legal claims and court pleadings are not subject to defamation laws.

Mintz then addresses the issue of whether unwarranted claims could ever expose a plaintiff and/or his attorney to criminal prosecution for extortion. Mintz concludes that the answer is yes, but not likely. Either the legal claims would be so utterly lacking in merit or the demands so grossly excessive that a conclusion

could be reached that the suit or threatened suit was little more than a shake-down scheme in disguise of litigation.

In addition to the criminal theory of extortion, there are certain civil legal remedies for frivolous litigation. In many situations, it is possible for a defendant to be awarded his costs and attorneys fees in having to defend a frivolous case. Although such civil remedies for a defendant are not common, they are certainly much more common than the possibility of convicting the plaintiff or his attorney of extortion.

Rumors are legend that prominent public officials, sports stars and the like are paying “hush money” to keep someone silent.