

## **Employee May Sue Employer Over Truthful But Arguably Malicious E-Mail to Co-Workers**

February 24, 2009

A recent decision by the Court of Appeals for the First Circuit is a reminder that employers should think twice before making an example of an employee who engaged in misconduct. In *Noonan v. Staples, Inc.*, the Court held that a former employer could sue his employer for libel after it sent a truthful e-mail to the workforce about his termination.

The plaintiff, Alan Noonan, was a sales employee of Staples. An audit determined that Noonan had violated the company's policy on expense reports, and Staples terminated his employment. A vice president of Staples sent an e-mail to approximately 1500 employees informing them that Noonan had been terminated and that he had not complied with the company's travel and expense policy. In addition, the company determined that Noonan's termination was for "cause" and that he was not entitled to exercise any stock options pursuant to a stock option agreement.

Noonan sued Staples for libel based upon the mass e-mail and for breach of the stock option agreement. Noonan conceded that there were errors in his expense reports but denied that he deliberately padded them. He argued that because the mistakes were inadvertent, the mass e-mail was false and defamatory and his termination was not for cause under the stock option agreement. The federal district court granted summary judgment to Staples on both claims.

On appeal, the First Circuit reversed the grant of summary judgment to Staples on the libel claim. The Court rejected Noonan's argument that the e-mail was false. However, it explained that a statement, even if true, can form the basis of a libel action if the plaintiff proves that the defendant acted with actual malice, meaning ill will or malevolent intent. The Court found that there was evidence to support actual malice: the vice president had never referred to a terminated employee by name in a mass e-mail and the e-mail was sent to employees who did not travel or fill out expense reports. Because a jury could infer from these facts that the vice president sought to humiliate Noonan, the Court concluded that a jury could find that Staples had acted with actual malice and that summary judgment was inappropriate.

On a positive note, the First Circuit refused to disturb Staples's conclusion that Noonan's termination was for "cause" and that he had forfeited his stock options. The stock option agreement provided that Staples, in its sole discretion, was empowered to make this determination. Because of this language, the First Circuit held that its review was limited to determining whether the company acted arbitrarily, capriciously, or in bad faith. While Noonan argued that he did not willfully defraud Staples through his expense reports, the Court explained that Staples reasonably concluded that he had violated company policy. It thus affirmed summary judgment to Staples on Noonan's claim of breach of the stock option agreement.

The Court's decision on the libel claim means that employers should be cautious about making an example of an employee for engaging in misconduct. Even a truthful statement can be the basis of libel if the statement singles out an employee and is out of the ordinary from the employer's usual practice. As to the stock option claim, *Noonan* instructs that employers should carefully review their stock option agreements to ensure that the documents contain language giving them discretion to make determinations, such as whether a termination was for cause. Such language will limit the scope of a court's review of a decision to deny an employee stock options under the agreement.

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