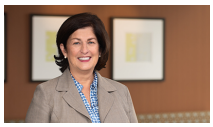
BARNES & THORNBURG LLP

Sticks And Stones: When Texts And Emails Will Hurt You

July 18, 2017 | | Employment Discrimination,Labor And Employment



Jennifer Stocker
Partner
Grand Rapids
Managing Partner

Sticks and stones may break my bones But words will never hurt me Recent legal decisions painfully remind us that words, specifically words in a text, instant message or email, can derail an employer's position or defense. The informality of these electronic communications tends to create the mindset that they are less subject to exposure or scrutiny than a formal written letter or memorandum. In a recent case, *Martin v. Tall Brown Dog, LLC,* the plaintiff was a recently hired leadership/business development employee for the defendant staffing company. The plaintiff, Jennifer Martin, advised her vice president when she became pregnant, then a month later asked how to plan for delivery because she had not been with the staffing company long enough to be eligible for leave under the FMLA. One business day later, the company's vice president called the plaintiff into his office. The plaintiff claims the vice president told her, "This is not going to work out," after which the plaintiff cleaned out her desk and left the facility. The vice president, on the other hand, states the purpose of the meeting was to discuss the plaintiff's performance and scorecard results that he had suggested they discuss a month earlier, and that he did not tell the plaintiff she was fired. Following the meeting, however, the vice president sent an email to the CEO and others which read, "I let Jennifer go today." The plaintiff sued for pregnancy discrimination under Title VII and Michigan's Elliott-Larsen Civil Rights Act. Not surprisingly, the U.S. District Court for the Eastern District of Michigan would not let the employer out of the case on summary judgment, ruling that the case should move forward and that a jury needed to decide the question of whether the plaintiff had been terminated. The vice president's email stating, "I let Jennifer go today" derailed the employer's chances for early dismissal of the lawsuit. Additionally, the close temporal proximity between the plaintiff's communications and her termination, one month from her notice of pregnancy and one day since her inquiry about how to plan for delivery, added to the court's resolve that a jury should decide the case. Compounding the problem for the employer was the fact that while the employer alternatively argued that the plaintiff's poor performance warranted termination, there was deposition testimony from the plaintiff's supervisor that her performance did not warrant termination. Another recent decision by the National Labor Relations Board (NLRB) in New York held that an employer's text to an employee returning from leave was problematic under the NLRA's rules against illegal interrogation of an employee. The employee sought extended leave to visit an ill family member then signed a union authorization card as part of an organizing campaign before going on leave. The employee

RELATED PRACTICE AREAS

Arbitration and Grievances
EEO Compliance
Labor and Employment
Workplace Culture 2.0

RELATED TOPICS

Family and Medical Leave Act (FMLA)
Martin v Tall Brown Dog
National Labor Relations Board (NLRB)
Pregnancy Discrimination
Title VII

thereafter no longer needed the leave, so he texted his supervisor, asking to be put back on the work schedule. The supervisor's response via text was, "What's going on with u? U working for [us] or u working in the union?" A unanimous NLRB had no problem finding that the exchange, even though it was not face-to-face, was an illegal interrogation about an employee's union activity in violation of NLRA Section 8(a)(1). The NLRB further found that the supervisor's subsequent failure to place the employee back on the schedule constituted an unlawful termination. Unlike formal memos or letters, smartphones and computers afford immediate means of communication that too often are sent in the heat of the moment and without forethought or editing. The takeaway from these cases and others is that, in this age of immediate and informal connectivity, supervisor training is imperative to avoid having impulsive words in a text, email or instant message held against an employer.