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Inside this Issue

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LEHR MIDDLEBROOKS & VREELAND, P.C.
LABOR & EMPLOYMENT LAW

Employment Law Bulletin

To Our Clients And Friends:

The end of the calendar year is an optimum time for employers to engage the workforce in discussions about the year that is about to conclude and the challenges and opportunities the organization faces in 2008. Where possible, leadership should set aside "face time" with the workforce, thanking them for their efforts during 2007, highlighting organizational accomplishments and reviewing the business climate currently and on the horizon.

Employees are like passengers on a plane. We like to hear from the captain, even when the air is smooth, to tell us where we have been, where we are now, and to prepare us for what lies up ahead, including unforeseen turbulence. If change is a continuing theme within the organization, stress the urgency of the need for change and why the status quo or "that's the way we have always done it and done it well" is unacceptable. The key themes for a successful 2008 on the shop floor, patient floor or sales floor should be no different from what they are in the executive office; each individual has a different set of accountabilities, but the theme for what each individual must work toward in 2008 should be a universal one within the organization.

BREACH OF FIDUCIARY DUTY COSTS EMPLOYEES $4.1 MILLION

Employers are becoming more aggressive in holding employees accountable for breaches of their fiduciary duty to the employer or their unauthorized disclosure of employer trade secrets. On November 15, 2007, in the case of *Navigant Consulting Co., v. Wilkinson* (5th Cir.), the court upheld the award by a Texas jury of $4.1 million to Navigant Consulting, Inc. of Chicago.

Employees John Wilkinson and Sharon Taulman ran Navigant's class action claims administration business based in Dallas. This included responsibility for business development, claims administration and virtually all aspects of the organization's business. They signed non-compete, non-solicitation and confidentiality agreements. They were approached by a competitor to buy Navigant's Dallas business, though they did not own it. They engaged in negotiations for the sale of the business, and as part of the negotiations, provided the competitor with confidential information about their employer. That effort fell through, but they pursued the same course of action with other competitors, which also fell through. Concurrent with their effort to sell the business they did not own, they entered into a four year lease on behalf of Navigant. After a technician alerted Navigant that Wilkinson instructed him to send company information to another server, Navigant investigated and directed Wilkinson to cease these activities. Shortly thereafter, he resumed trying to sell the business he did not own and when that fell through, he and Taulman attempted to buy the business from Navigant. When that offer was rejected, they left Navigant to work for a competitor.

In upholding the jury award, the Court of Appeals stated that "an employee in a position of trust and confidence who attempts to sell his employer's business for personal gain violates the most basic norms of fair dealing and good faith," as does "the disclosure of confidential information and solicitation of employees."

Granted, the actions in this case are among the most egregious we have ever seen. However, employee breach of fiduciary responsibilities and confidentiality does not have to reach this level of egregiousness for an employer to have a legitimate reason to take aggressive action to protect its business interests, including suing the [the former] employees. Not only may such a decision be prudent to protect the business, it also affirms to the workforce that integrity matters and those who breach it not only harm the company, but they harm its entire trustworthy workforce.

EMPLOYEES BLESSED WITH $756,000 RELIGIOUS DISCRIMINATION AWARD

Two former employees were awarded $756,000 in back pay and damages after they were terminated by their employer for missing a day of work to attend an annual religious convention. *EEOC v. Southwestern Bell, d/b/a AT&T Sw.&SBC Communications* (E.D. Ark. October 23, 2007).

The two employees in January 2005 asked their manager for a day off to attend a Jehovah's Witnesses Convention in July 2005. The employees were told the day before the convention began they were not permitted to attend. They attended the convention and were suspended upon their return to work. Two weeks thereafter, they were terminated.

Under Title VII and several state fair employment practices statutes, an employer is required to accommodate an employee's religious beliefs or practices, unless to do so would be an "undo hardship." The employer argued that requiring others to work overtime to replace these two employees for that day was an "undo hardship." Clearly, the jury did not buy that. Although undo hardship for religious

accommodation does not have to be as significant as under the Americans with Disabilities Act, it has to be something more than one day of overtime for two employees once a year.

A strong "lesson learned" for employers is to be sure that frontline managers and supervisors know their rights and responsibilities regarding workplace issues. The manager in this case did not have to know the details of religious accommodation under Title VII; he only needed to know that the employees raised a question that had potential legal implications, and, therefore, he should have sought assistance from the HR. Too often, by the time those knowledgeable within an organization become aware of an inappropriate decision made by a frontline manager or supervisor, the cleanup costs become significant.

THE HANGMAN'S NOOSE

We are stunned and disturbed by the increasing number of cases claiming that nooses were hung in the vicinity of or directed toward black employees. Most recently, a settlement of $290,000 was reached in the case of *EEOC v. Helmerich & Payne International Drilling Company*, (S.D. MS., October 9, 2007) over workplace racial harassment, including the noose. As stated by EEOC Chair Naomi Earp, "nooses are closely associated with racial intimidation, violence, and death, and therefore have no business in the workplace. It's time for corporate America to be more proactive in preventing and eliminating racist behavior."

To our knowledge, nooses do not suddenly appear at a workplace where there is collegiality, harmony and an atmosphere free of harassment and intimidation, including restroom and locker room graffiti. An employer's approach needs to be on three fronts. First, aggressively communicate the organization's values and philosophies – do not leave it as an email communication, but make it something that is reviewed within departments or shifts. Secondly, an employer can only under-react to a racial, sexual or other form of hostile environment - - an employer cannot really over-react. Racially derogatory language or inflammatory bumper stickers, T-shirts or other expressions are not only unprotected, but should be dealt with immediately and decisively. Third, do no ignore the "red flag" signals of an employee or employees who may have problems complying with the employer's culture of a workforce that tolerates protected class differences. For some individuals, professional counseling may be required. For others, termination may be appropriate.

OSHA TIP: OSHA RULE ON PAYMENT FOR SAFETY GEAR

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at (205) 226-7129.

In a press release on November 15, 2007 OSHA announced its long-awaited rule on employer payment for required personal protective equipment (PPE). With a few exceptions, the rule requires the employer to pay for PPE that is required by OSHA's general industry, construction, and maritime standards. The agency notes that employers already pay for approximately 95% of these types of PPE.

This rule will become effective on February 8, 2008 and its provisions must be fully implemented by May 8, 2008. This six month deadline gives employers time to adjust existing payment policies where necessary to comply with the new rule.

Various health standards like those for inorganic arsenic and cadmium and other

standards already include language stating that required PPE is to be furnished at no cost to the employee. However, most OSHA standards do not explicitly address the issue of payment. The general provision covering PPE found in 1910.132 states, "protective equipment shall be provided, used and maintained" and goes on to state that where employees provide their own protective equipment, the employer shall be responsible to assure its adequacy…"

The lack of uniform guidance on this issue led to conflicting interpretations by OSHA, employers and the Review Commission. To address this, OSHA set forth a policy in 1994 stating that for all PPE standards the employer must both provide and pay for the required PPE, except in limited situations. The excluded items included those of a personal nature that could be used by the employee off the job such as steel-toe safety shoes. The Review Commission subsequently vacated a citation based on this policy in 1997, finding a failure to reconcile the policy with other agency letters of interpretation. In response to this decision OSHA issued a proposed standard addressing the payment for PPE in 1999.

The rule creates no new requirements for PPE beyond those currently spelled out in OSHA standards. It does not require payment for uniforms, safety-toe footwear, prescription eyewear, weather-related gear (extraordinary clothing such as heavy coats for working in warehouse freezers **would** require payment by the employer) logging boots, or other items that are not PPE. Further,employers are not required to pay for everyday clothing, such as long-sleeve shirts, long pants, street shoes and normal work boots. This exception applies even when the employer requires employees to use these items, and the clothing provides protection from a workplace hazard.

If employees choose to use PPE they own, employers will not need to reimburse them. The standard does make it clear that employers cannot require employees to provide their own PPE and the employee's use of the PPE they own must be completely voluntary. The employer remains responsible for ensuring that required PPE provides adequate protection even when it is provided and owned by the employee.

The standard addresses the matter of replacement PPE. Frequency of replacement is not included since that is determined by each standard that requires the PPE. If not otherwise excepted, replacement PPE must be paid for by the employer **unless** the employee loses or intentionally damages the item.

Finally, the rule does not specify the method employers must use to pay for the PPE. They may use allowances, reimbursement systems, or distributions from a plant inventory as long as the employee receives the PPE at no cost.

If you have any questions about PPE or other OSHA matters, please contact me at 205-226-7129.

WAGE AND HOUR TIP: CURRENT WAGE AND HOUR HIGHLIGHTS

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at (205) 323- 9272. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.

Wage and Hour litigation continues to be very active. According to an article in the October 1, 2007 issue of Business Week magazine, there has been more than $1 Billion in back wages paid out annually to resolve these claims.

Further, the article profiles one former defense attorney, now representing plaintiffs, who has recovered almost $500 million for employees. **The area of the law that causes the most grief is determining which employees are exempt and which ones are non exempt. During the past few years there have been several large settlements for stock brokers, software engineers and customer support workers. Presently there are several cases involving pharmaceutical sales representatives regarding their exemption status.** Other large issues involve the failure of employers to pay employees for all hours worked. For instance, juries have found that Wal-Mart owes $250 million in two states because of failure to pay for all time worked and there are more 70 other suits pending against them on the subject.

Another issue is the time an employee spends "donning and doffing" protective gear, such as protective aprons in a poultry processing plant or flame retardant clothing in a foundry. In September 2007 the U. S. Third Circuit Court of Appeals overturned a verdict in favor the employer, Tyson Foods. At the original trial the jury had been instructed that the definition of "work" required some form of exertion. The jury found that the donning and doffing of safety and sanitary gear was therefore not work. The Appeals Court stated that exertion was not required for the activity to constitute work and thus the time spent in the donning and doffing was work. In determining whether the time involved should be considered *de minimis* the court stated that the court should include the aggregate time involved all day rather than just one time. In this situation the employee was required put the gear on at the beginning his shift, remove it at each of his two lunches, put it on after each lunch and remove it at the end of his shift. A plaintiff's expert witness had testified that the total time was more than 13 minutes per shift and the court stated that this should be used in determining whether the time was de minimis.

Not all litigation is going against the employer. In September, Birmingham U. S. District Judge Coogler found that seven Dollar General store managers meet all of the requires for the executive exemption. Some 1600 Dollar General store managers had filed separate suits against the firm and the parties agreed to use these seven managers to assist the parties in resolving the common legal issues. The count that even though these managers spent the majority of their time in non-management tasks their primary duty of management as they were responsible for the operation the store. However, other courts have found such employees to be nonexempt and there are several other cases pending against retailers.

Employers should remember that one requirement for exemption as an executive is that the employee must be paid on a salary basis. Recently a U. S. District Court in Illinois found that five otherwise exempt employees of a credit card processing company, whose salaries were docked a total of 12 times, were not paid on a salary basis and thus were not exempt. The regulations are very specific that deductions from the salary of an exempt employee may not be made for absences of less than a full day.

Employers who have been lucky enough to be investigated by the Wage and Hour Division and were found to owe some back wages have most likely been given a back wage receipt (Form WH-58) for the employee to sign that states that by accepting these back wages he/she is giving up rights to sue under the FLSA. The form has some entries that show the period of time the back wages cover. An employee of a Nevada cable company received, in March 2004, back overtime compensation and signed a form WH-58 stating the period covered was from May 4, 2002 through November 10,2003. In September 2004 the employee filed a suit alleging he was due additional wages for a period before May 2002. While the employer argued that he had

given up his rights to sue, the U. S. Ninth Circuit Court of Appeals ruled that he could purse the matter as he had only waived his rights for the period shown on the back wage receipt.

The Wage and Hour Division of the Department of Labor continues to investigate employers and to press for the payment of back wages where they determine employees were not properly paid. Recently, a Houston home mortgage company paid over $1.8 million in back wages to almost 600 branch managers, loan officers, loan processors and clerks who were paid on a commission-only basis and had not been paid overtime for working over 40 hours in a week.

In a case under the Family and Medical Leave Act the U. S. First Circuit Court of Appeals found the employer was correct and ruled that under certain circumstances holidays should be counted as FMLA leave. An employee of Boston University, who was using intermittent FMLA leave, took intermittent leave in two multi-week blocks. The court found, citing regulation 825.200(f) that even though holidays do not normally count as FMLA leave when it is taken intermittently, they do count when the leave is taken in an increment of a week or more.

If I can be of assistance you may reach me at 205 323-9272.

EEO TIP: SUPREME COURT TO REVIEW KEY EMPLOYMENT CASES

This article was prepared by Jerome C. Rose, EEO Consultant for the Law Firm of LEHR MIDDLEBROOKS & VREELAND, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the U. S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in Alabama and Mississippi. Mr. Rose can be reached at (205) 323-9267

The U. S. Supreme Court began its new term on October 1, 2007 and it will review a number of significant employment cases. Actually it will review seven employment cases including four involving various issues under the ADEA, one under the ADA, one involving ERISA, and one under Section 1981. Given the limited space in this article we have chosen to present summaries of three cases that seem to be generating interest nationwide two of which will have some direct impact on case law in the Eleventh Circuit.

The cases for review in this article can be summarized as follows.

1. **Can an Intake Questionnaire be Used as a Charge?** In the case of *Federal Express Corp. v. Holowecki,* U. S. No 06-1322, the Supreme Court will review the Second Circuit's holding that "Patricia Kennedy's (one of three charging parties) Intake Questionnaire and accompanying verified affidavit, filed with the Equal Employment Opportunity Commission, constituted an EEOC charge that satisfactorily fulfilled the ADEA's exhaustion requirements." Additionally,the Second Circuit held that Kennedy's EEOC charge was sufficient to permit some eleven named plaintiffs who never filed EEOC charges to take advantage of the single filing or piggybacking rule and thereby also satisfy the ADEA's exhaustion requirements. Eventually there were fourteen plaintiffs, including the separate charges of George Robertson and Kevin McQuillan, who were over the age of 40 and who complained that certain policies and practices of Federal Express, discriminated against them on the basis of age.

The district court had found that the two separate charges filed by George Robertson and Kevin McQuillan, were untimely and that the intake questionnaire filed by Patricia Kennedy was not a charge under the ADEA. In reversing the district court, the Second Circuit found that all of the charges were timely and that the questionnaire was a charge since it

contained all of the elements required by the EEOC's Regulations found at 29 CFR 1626, namely: (a) sufficient information to identify the alleged respondent company, and (b) a description of the alleged unlawful discrimination. Additionally, the Second Circuit and some other circuits, including the Eleventh Circuit, also require a clear indication by the charging party that he or she desires to "activate the EEOC's investigation and/or conciliation process."

Incidentally, the holding in this case was reviewed in detail in the September 2007 issue of the *Employment Law Bulletin* mainly because the Eleventh Circuit, like the Second Circuit, also allows an Intake Questionnaire to substitute for a charge if certain conditions are met. See *Wilkerson v Grinnell Corp.* 270 F.3d 1314, (11th Cir. 2001).

2. **Can Retaliation Be Included in A Race Claim Under Section 1981?** In the case of *CBOCS West Inc. (Cracker Barrel Restaurants) v. Humphries,* U.S. 06-1431, the Supreme Court will review the holding by the Seventh Circuit to the effect that a retaliation claim for opposing race discrimination can be made under Section 1981 of the Civil Rights Act of 1866, as amended by the Civil Rights Act of 1991. According to the Seventh Circuit, the 1991 amendments to Section 1981 were specifically enacted to reverse the holding in *Patterson v. McLean Credit Union*, 491 U. S. 164, which held that an employee could not challenge an employer's conduct under Section 1981 after the employment relationship (i.e. post formation) had been established, except for race discrimination. In this case, an African-American associate manager, Hedrick Humphries, was fired one week after complaining of unlawful discrimination against himself and at least one other African-American co-worker. His employer claimed that he was fired for failing to make sure that the safe door was closed on his shift. Humphries showed that a similarly situated manager who was not in a protected group also left the safe door open but was not fired. Humphries claims that his act of leaving the safe door open was only a pretext for his being fired. He asserts that the real reason was due to his protesting unlawful discrimination against him and other African Americans. The plaintiff's lawsuit alleged claims under both Title VII and Section 1981. The district court dismissed the Title VII claims on procedural grounds and granted summary Judgment in favor of the employer as to the Section 1981 claims.

The Seventh Circuit, has dealt with this issue somewhat inconsistently in the past. In this case the court specifically over-ruled its previous holding in the case of *Hart v Transit Management of Racine, Inc.* (426 F.3d 823) wherein it held that retaliation could not be maintained under Section 1981. (White employee discharged for supporting his co-worker's charge of discrimination.) The court indicated that it relied solely on *Little v United Technologies Carrier Transicold, Inc*. (103 F.3d 956, 11th Cir. 1997) Incidentally, even the Eleventh Circuit seems to be confused on this matter. The Eleventh Circuit admits that it's holding in the Little case may conflict with its subsequent holding in *Jackson v. Motel 6 Multipurpose, Inc*. (130 F.3rd 999, 11th Cir. 1997)

Thus, the Supreme Court is being asked to resolve the issue for all circuits by making a straightforward decision as to whether a plaintiff can attach a claim of retaliation on a post formation basis to a claim of race discrimination under Section 1981.

3. **What Are the Parameters of Admissible Supporting Testimony?** In the case of *Sprint/United Management Co. v. Mendelsohn*, U.S. 06-1221, the Supreme Court will review a decision by the Tenth Circuit which would have allowed the testimony of five fellow workers over the age of 40 as admissible evidence to bolster the claim *of* age discrimination by the plaintiff, Ellen

Mendelsohn, with respect to a RIF carried out by Sprint/United. Prior to trial Sprint/United filed a Motion In Limine seeking to preclude any evidence of Sprint's alleged discriminatory treatment of other employees. The motion was granted in part by the trial court, which in substance limited the testimony to those "similarly situated" employees who were supervised by the same supervisor as Mendelsohn. Thus, the issue at the trial court level was whether the co-workers in question were similarly situated since each of them worked in other departments and under a different supervisor than the plaintiff, notwithstanding the fact that each of the co-workers had been terminated in the same RIF along with the plaintiff. Given the trial court's order, the testimony of the five employees pertaining to the RIF who worked in other departments than the Plaintiff's was excluded. At the conclusion of the case a jury found in favor of Sprint/United, whereupon Mendelsohn appealed.

In reversing and finding for Mendelsohn, the Tenth Circuit held that "the testimonial evidence Mendelsohn sought to introduce was relevant to Sprint's discriminatory animus toward older workers, and that the exclusion of such evidence unfairly inhibited Mendelsohn from presenting her case to the jury."

Thus, the Supreme Court will be asked to define who is similarly situated with respect to an individual charge of discrimination where other employees also alleged discrimination of a similar nature but not by the same supervisor, or not in the same department or by the same authority. In the process the Court must necessarily describe the boundaries of admissible testimony which would be relevant under those circumstances.

<u>An Eleventh Circuit Case The Supreme Court Decided not to Review.</u>

While there is always a great deal of interest in those cases the Supreme Court accepts for review, there is seldom the same concern for those cases the Supreme Court declines to review, although perhaps there should be. At least one case decided by the Eleventh Circuit which the Supreme Court declined to review can be summarized as follows:

Crawford v City of Fairburn, Georgia In this case the issue upon appeal to the Supreme Court would have been whether a plaintiff who alleges retaliation is required to rebut all of the reasons offered by a defendant employer to justify its actions or only one which is intended to show that all of the other reasons offered were a pretext. Daniel Crawford who had been hired to conduct investigations and make improvements in the operation of the City of Fairburn, Georgia's Police Department alleged that he was fired because he investigated internal charges of sexual harassment and found in favor of the policewomen who made the charge. He produced evidence to show that he was severely criticized for making such a favorable report and was terminated one month later. He filed a charge with the EEOC and later sued the city for retaliation. At trial Crawford produced evidence which the court conceded made out a prima facie case of retaliation. However, to counter his allegations of retaliation the City of Fairburn offered evidence that Crawford was terminated for five other non-discriminatory reasons which Crawford did not rebut.

The Eleventh Circuit in affirming the trial court's granting of summary judgment in favor of the city stated that " by failing to rebut each of the legitimate, non-discriminatory reasons of the city, Crawford has failed to raise a genuine issue of material fact about whether those reasons were pretext for discrimination." Thus, the Supreme Court found no reason to review the Eleventh Circuit's determination that <u>all</u> of the non-discriminatory reasons proffered by an employer in defense of its actions must be rebutted by a plaintiff, not just some of them.

Please call this office at (205) 323-9267 if you have questions about any of the issues raised in this article or would like some legal assistance with respect to any employment related problem you may be facing.

LMV UPCOMING EVENTS

December 11, 2007 – Webinar – **Affirmative Action Basics**

December 12, 2007 – (Birmingham) **The Effective Supervisor**

For more information about Lehr Middlebrooks & Vreeland, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Maria Derzis at (205) 323-9263 or mderzis@lehrmiddlebrooks.com.

DID YOU KNOW…

…that an employee's adverse reaction to a stray dog entering the work place was the basis for a valid FMLA absence, even though the employer did not know that the employee was under medical care? *Stevenson v. Hyre Electric Company*, (7th Cir. October 16, 2007). The employee was so stunned and upset by the stray dog that she cursed at her supervisor, stating that "f___ ing animals shouldn't be in the workplace" and telling the president of the company that she objected to "f_____ing dogs" threatening her. According to the court, the employer should have realized that this could be an FMLA covered event because of the trauma the employee suffered and the absences caused by that.

…that the United Food and Commercial Workers Union has been sued pursuant to the Racketeering Influenced and Corrupt Organizations Act (RICO) due to its efforts to persuade an employer to agree to voluntary recognition? *Smithfield Foods, Inc. v. UFCW*, (E.D. Va. October 17, 2007). The union was trying to organize employees at Smithfield's Tar Heel, North Carolina The lawsuit claims that the organizing activity was not going well, so the union switched approaches to pressure Smithfield to agree to voluntary recognition. The conspiracy the union engaged in was an effort to put the company out of business, the suit alleges. Examples of the union's behavior include repeatedly frivolous regulatory investigations, publishing false and damaging information about the company, communicating false information to the financial community to adversely affect the company's stock price and interfering with the company's potential business relations. The company alleges that union's conspiracy was to exact voluntary recognition from the employer regardless of whether a majority of the employees supported the union.

…that Staples, Inc. agreed to pay over $38 million to settle overtime claims by assistant store managers? *Williams v. Staples, Inc.* (CA Superior Court, December 2, 2007). The case involves 1700 assistant managers who had been treated as exempt. The managers earned approximately $40,000 and worked 50 hour weeks. They claimed that they had little discretion and authority and that Staples had strict controls over how they were to perform their job, even limiting the type of music they could choose to play in their store. Staples denied wrongdoing and stated that it paid out the $38 million settlement to "avoid further expense and distraction from litigation that has been ongoing for the past eight years."

…that a union's failure to file a grievance over a warning was a breach of its duty of fair representation? *Beck v. UFCW Local 99* (9th Cir. November 1, 2007). The employee was disciplined twice after she allegedly used profanity on the store floor, which Beck denied. The company issued Beck a final warning that continued behavior would result in termination. The union steward was aware of this final warning, but did not grieve it. Three months

thereafter, Beck was terminated after she allegedly used profanity in arguing with a fellow employee. The union notified its attorney that it wanted to take the termination decision to arbitration, but the attorney advised the union that its failure to grieve the final warning would damage its case. The union therefore chose not to proceed to arbitration. The court ruled that the union's failure to even file a grievance over the final warning was "unintentional, irrational, or wholly inexplicable." The decision not to pursue the matter to arbitration, according to the court, was based on the union's failure to grieve the final warning, not based upon the merits of the discharge.

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