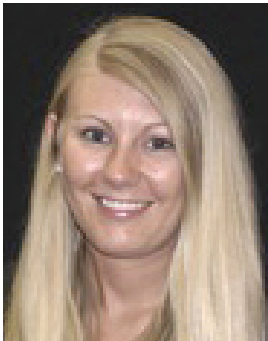




VOLKSWAGEN SUPPORTS UNION IN CHATTANOOGA, BUT UNION LOSES ANYWAY



Ashley Griffith

"Volkswagen [agreed] not to oppose the union and indeed granted the union exclusive access to the plant to conduct meetings with workers to encourage them to vote for the union."

In a stinging defeat for organized labor, particularly in the South, Volkswagen workers in Chattanooga, Tennessee rejected representation by the United Auto Workers on February 14 by a vote of 712-626. Unions have long desired to organize workers in the South, especially to gain a footing in the Southern auto industry, particularly since their union membership in the industry had been decimated in Detroit. German auto companies in the South seem to offer the unions the best opportunity for organization, since German auto companies are almost exclusively union. Indeed, German labor laws require large companies to have worker councils at each job site to represent employees in discussions with management about work conditions. Volkswagen reportedly has some 103 production locations worldwide, and just three do not have such worker councils, one in Chattanooga, and two in China. German unions used their influence and Volkswagen apparently agreed to encourage UAW organization of its Chattanooga plant.

An interesting agreement was reached between Volkswagen and the UAW. Significantly, Volkswagen did not agree to a "card-check," in which the union would have been recognized if the union produced authorization cards signed by more than 50% of production workers. Volkswagen did agree, however, not to oppose the union and indeed granted the union exclusive access to the plant to conduct meetings with workers to encourage them to vote for the union. Anti-union workers were denied similar access to speak to workers. A UAW official publicly stated, "The company has no obligation to give them access." This comment is particularly interesting, inasmuch as unions have been clamoring for access to plants for organizational purposes for years, and yet did not support the right of non-union workers for the same access.

One of the issues in the campaign related to an argument that the "deal" between Volkswagen and the UAW was portrayed as "they had already negotiated a deal behind their backs." The "deal" included a provision that the parties agreed to "maintaining and where possible enhancing the cost advantages and other competitive advantages that [Volkswagen] enjoys relative to its competitors in the United States and North America." New hourly workers at Volkswagen start at \$14.50 an hour, and rise to \$19.50 over three years. In comparison, those at the "Big Three" unionized companies (General Motors, Ford and Chrysler) start at \$15.78 and rise to \$19.28. The "Big Three" have a two-tier pay system, in which only senior workers make big wages, and those workers have not gotten a raise since 2005. One worker opposed to the union stated, "What the UAW is offering, we can already do without them."

After the union's lost, it began blaming State and local politicians and community groups for interfering with the election. The union filed election objections with the NLRB, contending that there was a "coordinated and widely-publicized coercive campaign" by politicians and community groups to deprive Volkswagen employees of their Federally protected right to join a union "free of coercion, intimidation, threats and interference." The UAW particularly blames former Chattanooga mayor and current U.S. Senator Bob Corker, as well as Gov. Bill Haslam, for making statements indicating what UAW considered a threatened loss of State financial incentives and/or benefits to the workers should they select union representation. Senator Corker published an article in the March 4, 2014 Wall Street Journal, headed "*Now the Auto Union Wants to Muzzle Public Officials.*" Senator Corker

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stated, “If the UAW came into our community, attracting suppliers and other prospective companies would be far more difficult. Additionally, there was a misconception about the future of a second Volkswagen line coming to Chattanooga. Since last June and through the election, the UAW tried to press the narrative that any future expansion of the plant would be contingent upon the UAW organizing the employees. To counter these purposely inaccurate assertions, and based on years of experience and relationships with the company, I sought to assure the workers that Chattanooga would be Volkswagen’s first choice for the new SUV line even if they did not choose to have the UAW represent them.”

On April 21, 2014, the UAW unexpectedly announced that it was dropping its appeal to obtain a new unionization vote. It is likely that the UAW dropped its appeal in order to hold another unionization vote sooner rather than later. If the UAW pursued the appeal, it could take years before the National Labor Relations Board rendered a decision on whether a new election would even take place. In fact, Bob King, UAW’s President, stated that the union was withdrawing its appeal because the labor board’s adjudication process would take too long. Under federal law, the UAW has a one-year waiting period before it can hold another secret ballot election. 29 USCA §159(c)(3).

Regardless of whether the UAW continues its unionization efforts in Chattanooga, the UAW is likely to continue its effort to organize Southern auto plants. There are at least four large auto plants in Tennessee, and others in South Carolina, Georgia, and Mississippi. Victory at Volkswagen in Chattanooga would have marked the first time the union has been able to organize a foreign-owned auto plant in a Southern U.S. state. AFL-CIO President Richard Trumka announced after the vote, “We continue on. That was just round one.”

Legality of Union-Management “Deals” Like at Volkswagen: The “neutrality agreement” negotiated between Volkswagen and the United Auto Workers in Chattanooga is not unusual. Unions have turned to such agreements as an easier and more effective way to organize. As an example, Hyatt Hotels and UNITE HERE recently negotiated such an agreement after a four-year campaign of workplace disruptions, rallies, pickets, short strikes and a global boycott of the brand by overseas unions. The most contentious issue was the union demand for neutrality for organizing campaigns. The agreement provides for a card check at several unorganized Hyatts.

Recently, such agreements have drawn legal attack. The Supreme Court was expected to issue a ruling this year in a case involving UNITE HERE and Hollywood Greyhound Track, Inc., doing business as Mardi Gras Gaming, in Hallandale Beach, Florida. In the negotiated agreement between management and the union, the union won access to the premises and other assistance in organizing, and in turn agreed to back a local ballot initiative to expand casino gambling, and to spend over \$100,000.00 campaigning for it. A worker at the company got help from the National Right to Work Foundation, and sued the employer and union jointly, for violating a clause in the 1947 Taft-Hartley Act that states an employer cannot provide a union a “thing of value.” This prohibition was passed to prohibit employer “gifts” to a union, and was designed to prevent labor leaders from being bought out or self-dealing rather than promoting worker interests. The union argues that such deals do not meet the purposes of the Federal prohibition, arguing that both employers and unions find such agreements helpful to create a good environment for collecting bargaining. Ultimately, the Supreme Court declined to rule on the case, even though the Circuit Courts are in conflict on this issue. For instance, the Eleventh Circuit held that “organizing assistance can be a thing of value” and thus prohibited by the Taft-Hartley provisions. But other Circuit Courts have held to the contrary, stating that similar provisions by an employer to assist a union’s organizing campaign fall outside the scope of § 302. See *Adcock v. Freightliner LLC*, 550 F.3d 369 (4th Cir. 2008); and *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC* 390 F.3d 206 (3d Cir. 2004).

This is an interesting issue for employers to follow, and it actually has broader ramifications. For instance, an issue might arise if an employer pays union officials or stewards for job-related benefits or pay even though they seem to be working for the union rather than the employer. There is an exception for payments to unions under the law where the payments are “by reason of” service as employees or former employees, but bright-line rules are difficult to draw. For example, last year, the Seventh Circuit Court of Appeals found a Section 302(a) violation against an employer’s paying union officials full-time salaries while on a leave of absence, although it would have allowed such payments for fringe benefits. *Titan Tire Corp. of Freeport, Inc. v. United Steelworkers of America*, 197 LRRM 2401 (C.A. 7, Nov. 1, 2013).



KNOW YOUR ATTORNEY

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JEFFREY G. JONES is Regional Managing Member of the Cookeville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC. His practice includes an emphasis on commercial transactions, governmental law and creditors' rights, as well as insurance defense. Jeff received his Bachelor of Science degree in History, graduating magna cum laude in 1984 from Tennessee Technological University. Jeff received his law degree from the University of Tennessee in 1987. Jeff is a member of the Putnam County Bar Association, Tennessee and American Bar Associations. In addition to being a member of the Upper Cumberland Trial Lawyers Association, Jeff was a District Representative for the

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IMPORTANT NEW HEALTHCARE CHANGES: DELAYS AND UPDATES



Catherine Shuck..

"In addition ... a package of limited transition rules that applied to 2014 has now been extended to 2015 under the Final Regulations."

There has been a long string of announcements by the Obama Administration delaying implementation of the Affordable Care Act (ACA). The Administration had previously delayed the application of the employer responsibility provisions (the employer mandate) from January 2014 to 2015. More recently, the Administration gave employers with between 50 and 99 employees an additional year, until January 2016, to comply, subject to certain conditions. The Administration also announced additional relief for large employers with 100 or more employees.

Regarding those employers with at least 50 but fewer than 100 full-time employees, the tax penalty for failing to comply with the employer mandate generally will not apply until 2016, if the employer provides an appropriate certification as described in the rules.

For those employers of 100 or more full-time employees, there is an additional break dealing with the permanent rule requiring that these employers must provide coverage for 95% of their employees. The transition rule for 2015 indicates that employers must only offer coverage to at least 70% of full-time employees as one of the conditions for avoiding the tax penalty, rather than 95%, which will begin now in 2016. Further, for 2015 only, the \$2,000.00 penalty for each full-time employee will exempt the first 80 full-time employees instead of 30.

In addition to the above two forms of transition relief for 2015, a package of limited transition rules that applied to 2014 has now been extended to 2015 under the Final Regulations. Employers with plan years that do not start on January 1 will be able to begin compliance at the start of their plan years in 2015 rather than on January 1, 2015, and the conditions for this relief

are expanded to include more plan sponsors. The requirement that employers offer coverage to their full-time employees' dependents will not apply in 2015 to employers that are taking steps to arrange for such coverage to begin in 2016.

Note that the proposed Regulations defined "dependents" for purposes of offering dependent coverage to eligible employees as children only, including natural, adopted, foster, and step-children. In other words, spouses were excluded. The Final Regulations, issued in February, continue to exclude spouses, but revise the definition of dependent children to mean only natural and adopted children up to age 26. Thus, to be in compliance, a covered employer need not offer spousal coverage, or coverage for foster children, step-children, or children who are not U.S. citizens or nationals, with limited exceptions. Of course, an employer may elect to offer such health insurance coverage.

One final important delay was announced by the administration in January. Under the healthcare law, an employer that has a fully-insured health plan that discriminates in favor of high-paid executives faces a potential penalty of as much as \$100.00 per day for each individual affected negatively, similar to the non-discrimination rules that currently apply to self-insured plans. Tax officials have indicated that they would not enforce this provision during 2014 because they have yet to issue Regulations for employers to follow.

To discuss how these transitional rules may apply to your organization, please contact your Wimberly Lawson attorney.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AS A TAG-ALONG TO RETALIATORY DISCHARGE IN TENNESSEE



Bob E. Lype

"Tennessee law regarding NIED claims is complicated, to say the least."

The Tennessee Court of Appeals has decided a case which may open the door to (or which, at a minimum clarifies the standards for) a plaintiff to include a claim for "negligent infliction of emotional distress" (NIED) as a tag-along to a claim for retaliatory discharge from employment. The case, decided February 14, 2014 by the Court of Appeals, Western Section, is *Coleman v. Humane Society of Memphis*. In this case, the Court ruled that the trial court had correctly denied summary judgment for the employer on the plaintiff's retaliatory discharge claim, and found that the grant of summary judgment to the employer on the NIED claim was not proper, at least on the grounds relied upon by the trial court.

Tennessee law regarding NIED claims is complicated, to say the least. Tennessee authorities have distinguished claims based in negligence from claims based on intentional conduct, and in order to avoid trivial claims based upon negligence, Tennessee has required medical or scientific proof of a serious emotional injury in cases involving NIED claims ... *except* that in cases where NIED is a "parasitic" claim, rather than a "stand alone" claim, no medical or scientific proof is required. So, what claims are "parasitic" and what claims are "stand alone?" (To answer that question would require considerably more discussion that can be presented here).

In the *Coleman* case, the employer argued that the plaintiff's NIED claim was necessarily a stand-alone claim requiring expert proof, because the plaintiff had not alleged any "physical injury," but had only alleged economic losses. The employer also argued that a negligence claim cannot be "parasitic to" a claim based upon intentional conduct. The Court of Appeals disagreed, holding that the NIED claim "flowed from the retaliatory discharge," despite the fact that no physical injuries were alleged. Therefore, the NIED claim was "parasitic," and the plaintiff did not have to offer expert medical or scientific evidence of a serious emotional injury.

For Tennessee employers and employment lawyers, *Coleman* means that a plaintiff who alleges severe emotional harm in connection with a claim of retaliatory discharge can very likely maintain a claim for NIED. Given that courts generally allow a plaintiff to seek recovery for the same damages in retaliatory discharge cases, it appears that at least in most cases, *Coleman* will not have a great deal of practical impact in retaliatory discharge cases.



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