



EMPLOYER DEALS WITH WORK STOPPAGE Of Non-Union Hispanic Employees



Jeff Jones

...these type work protests are likely to arise again in the future and the strategy in dealing with such protests are so important and sensitive...

On June 30, the NLRB issued an interesting ruling that the employer did not violate the Labor Act when it discharged 83 non-union employees who refused to leave the employer's parking lot where they engaged in a peaceful

work stoppage. Quietflex Manufacturing Co. LP 344 NLRB No. 130. The work stoppage arose over protests by Hispanic employees that the employer's Vietnamese workers were treated better. Because these type

work protests are likely to arise again in the future and the strategy in dealing with such protests are so important and sensitive, the facts of this case are discussed below at some length.

BACKGROUND Facts

The relevant facts, as more fully set forth in the judge's decision, establish that 83 of the employer's employees gathered in the parking lot at 7:00 a.m. on January 10, 2000, to press their complaints to management. The 83 Hispanic-surnamed employees congregated because, among other things, they were concerned that their Vietnamese co-workers were being paid and treated better by the employer. The 83 employees sought from management a pay raise, improved vacation and holiday pay and better working conditions.

At 7:25 a.m. the employer's Vice President, Pete Crane, instructed the 83 employees to return to work. They refused and instead presented Crane with a letter listing their demands. At 8:30 a.m. the Human Resources Manager, Steve Conaway, invited several of the assembled employees to go inside and speak to a manager. They declined, stating that they wanted to communicate as a group.

At 11:00 a.m. the employer's President, Dan Daniel, addressed the 83 employees. He told them that he had reviewed their letter and had already met one of their demands by hiring someone to clean the lunch and restrooms. Daniel also stated that while he was not able to grant their requested wage increase, other issues they had raised were open for discussion. In addition, Daniel offered to meet with employees by shift to discuss their demands. The employees refused. They also refused Daniel's offer to meet with delegates of the group. Daniel concluded his comments by notifying the 83 employees that they must either return to work or leave the premises. The employees responded that they would do neither until all their demands were met.

At 6:15 p.m., Daniel again spoke to the 83 employees in the parking lot. He renewed his offer to meet with delegates of the group or with shifts of employees. His offers were refused. The employees reiterated that they would not leave the premises until all of their demands

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KNOW YOUR ATTORNEY

Stacye L. Choate



Stacye is an associate of the Cookeville, Tennessee, office of the firm, which she joined in 2004. Her law practice includes an emphasis in workers' compensation defense. She received her Bachelor of Science degree in Agriculture with an Environmental Science concentration from Tennessee Technology University, and her law degree from Nashville School of Law. Stacye is a member of the Upper Cumberland Trial Lawyers Association and of the Putnam County, Tennessee, Bar Association. In the community, Stacye is a member of Business Networking and the Cookeville Business and Professional Women's Association and a volunteer with Putnam County Habitat for Humanity.

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were met. Daniel then read a written statement that culminated in the announcement that employees had to leave the premises by 7:00 p.m. or face discharge. Daniel stated that the discharge would not be for refusing to work, but for refusing to leave the property. A Spanish-speaking supervisor then translated Daniel's statement to the employees. In the translated version, the employees were told that they had to leave the premises by 7:00 p.m. or the police would be called. They were not, however, told that they would be discharged if they failed to leave the property by 7:00 p.m.

The 83 employees remained in the parking lot and the employer summoned the police at 7:00 p.m. At 7:15 p.m. a sheriff's deputy arrived and spoke with the employees and all 83 promptly left.

When the 83 employees attempted to return to work on January 13, they were told that they had been fired. The employer subsequently learned that the employees may have misunderstood its final January 10 instructions to leave or be fired. On January 21, President Daniel sent a letter to each employee offering reinstatement. All 83 employees returned to work on January 24.

NLRB CRITERIA REGARDING On-Site Work Stoppages



Factors that the Board has considered in determining which party's rights should prevail in the context of an on-site work stoppage include:

- (1) the reason the employees have stopped working;
- (2) whether the work stoppage was peaceful;
- (3) whether the work stoppage interfered with production or deprived the employer access to its property;
- (4) whether employees had adequate opportunity to present grievances to management;
- (5) whether employees were given any warning that they must leave the premises or face discharge;
- (6) the duration of the work stoppage;
- (7) whether employees were represented or had an established grievance procedure;
- (8) whether employees remained on the premises beyond their shift;
- (9) whether the employees attempted to seize the employer's property; and
- (10) the reason for which the employees were ultimately discharged.

Fred Bissinger
... determining which party's rights should prevail ...

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NLRB UPHOLDS DISCHARGES FOR On-Site Work Stoppage



Kelly Campbell
... the employees made it clear that they would not leave the premises until all of their demands were met...

The Labor Board applies the above factors and finds the employer's discharges lawful in that most of the factors favored the employer's property interests. The 12-hour work stoppage by employees, both on and off-duty, far exceeded the limited duration of other on-site work stoppages found protected by the Board. Although the work stoppage here occurred in the outside area of the employer's property rather than in the plant itself, the Board finds applicable the

principle that employees are entitled to persist in their protest for a reasonable period of time, after which the employer is entitled to assert its rights as to its entire premises. It finds that the 12-hour duration of the employees' action here was unreasonable, particularly in view of the employer's attempts to respond to their concerns.

Further, although the employer did not have an established grievance procedure, the employer provided the employees multiple opportunities to present their complaints to management. Vice President Crane accepted the letter detailing the employees' demands, and offered to meet with representatives from the group or with all of them by shift. The employer also made a reasonable effort to respond to the issues raised in the employees' letter. Daniel immediately agreed to correct one of the problems cited and expressed his willingness to discuss others. However, the employees made it clear that they would not leave the premises until all of their demands were met, including a wage increase that Daniel informed them the employer could not grant at that time.

Finally, the employees were not discharged for engaging in protected activity on the employer's premises. Rather, they were discharged for their refusal to leave the property after 12 hours of protest and notice of the employer's demand that they leave by 7:00 p.m.

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DEVELOPMENTS IN COMPETITIVE Employee Benefits



Mary Moffatt Helms
That is, more companies are making higher-paid employees pick up a greater share of premiums...

The Society for Human Resource Management (SHRM) has released its 2005 benefit survey, tracking recent benefit trends.

Coverage appears to remain about the same in 2005 from the prior year and the following is a brief overview:

- dependent care flexible spending accounts increased from 73% to 79% in 2005
- HMO coverage increased from 51% to 53%; employer-funded health reimbursement accounts dropped from 18% to 17%
- domestic benefits for same-sex partners increased to 32% from 27%, while opposite-sex partner benefits at 33% remained about the same
- vision insurance increased from 71% to 80%
- prescription drug coverage remained at 97%
- on-site vaccinations fell to 56% from 60%, which was anticipated following last autumn's flu vaccine debacle

For more information visit www.shrm.org.

Kiplinger reports that health insurance premiums tied to pay are becoming more common. That is, more companies are making higher-paid employees pick up a greater share of premiums than lower-paid employees. This doesn't save the employer any money, it is designed to keep more employees in health care coverage.

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LESSON TO BE Learned



Jerry Pinn

The employer was found not to have violated the Labor Act because...

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violated the Labor Act because the employer discharged the employees for refusing to vacate the employer's property. Discharging the employees for refusing to return to work

Many employers mistakenly assume that the Labor Act does not apply to non-union employees. However, the Labor Act protects not only union activity but other concerted activity for 'mutual aid or protection,' including concerted work stoppages of the type discussed in this case. The employer was found not to have

would have been a violation of the protected work stoppage or 'strike.'

The employer in the present case did a pretty good job in handling the situation. It wisely gave the employee plenty of opportunities to leave and made every effort to resolve the matter without taking stronger action. Even after terminating the workers, the employer sent a letter to each employee offering reinstatement perhaps partially because the employees may have misunderstood the translation to them of the warning of discharge. In any event, the employer may have realized that losing 83 good employees is not something to be taken lightly if the matter can otherwise be resolved.

ELECTRONIC RECORD KEEPING NOW COMPLETE WITH Changes Allowing Electronic I-9's



Mike Jones.....

Although it would appear legal for employers to keep their records in electronic form, further issues arise...

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now allowed to store I-9 forms electronically.

Many federal laws expressly allow electronic records, including the Fair Labor Standards Act, the Occupational Safety and Health Act, and the Family and Medical Leave

A bill passed Congress on October 30, 2004, which authorizes the use of electronic signatures on I-9 forms which hitherto had been required to bear original signatures.

The bill provided that it would take effect on the earlier of when implementing regulations were adopted or after 180 days. The latter expired on May 1, 2005, so employers are

Act. Title VII and ERISA are silent on electronic record keeping but electronic record keeping would appear to be appropriate if readily accessible and capable of reproduction in appropriate form and complete with the necessary information.

Although it would appear legal for employers to keep their records in electronic form, further issues arise because in addition to meeting the requirements of the law, paperless personnel records must be admissible in court for an employer to use them as a defense against employee claims. Fortunately, the Federal Rules of Evidence allow the use of electronic records in court. Despite their legal admissibility, courts and juries may question the authenticity of certain documents and proving signatures on important agreements will raise particularly significant issues.

CHANGES IN POSITIVE WORKPLACE Drug Tests Reported

The overall incidence of positive drug tests in the workplace remains relatively flat; remained unchanged at 4.5% in 2004. Marijuana is still the leading cause of positive drug tests, accounting for almost 55% in 2004. Cocaine is the second most detected drug that year at

almost 15%. Amphetamines overtook opiates in 2001, as the third most detected drug. Positive tests from amphetamines have grown from 5% of all positive tests in 2000 to approximately 10% of all positive drug tests in 2004.