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Reply to Minneapolis Office

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Mr. Vincent R. Sandusky
Chief Executive Officer
Finishing Contractors Association
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Dear Vince:

You have requested our opinion regarding the potential exposure of those contractors that elect to terminate employees for cause, rather than to lay them off for lack of work. This issue is significant, as the Top Workplace Performance Plan incorporated into the Model Collective Bargaining Agreement for the Finishing Industries contemplates that employees discharged for cause may have their referral rights restricted. This program is important, in terms of insuring that the industry has a pool of qualified and productive employees for referral.

The Association is aware that, in some cases, contractors have been releasing employees with performance or behavior problems, and labeling the reason for their separation as a "layoff," rather than a discharge. Presumably, the contractor is operating under the assumption that it is less risky to layoff such an employee, rather than to discharge the employee for cause. However, the decision to characterize the release of an employee as a "layoff" where there is just cause for discharge obviously undermines the effectiveness of the Top Workplace Performance Plan. Moreover, the perceived benefits from a legal standpoint of laying-off employees, rather than discharging them, are, for the most part, illusory.

Article VI of Model Collective Bargaining Agreement – the "Function of Management" clause – states that the contractor <u>has</u> the right to discipline or discharge employees for "just cause." Article VI of the labor agreement provides that just cause for discharge includes, but is not limited to, the following conduct:

- incompetence
- insubordination
- habitual tardiness or absenteeism
- safety violations
- participating in an unauthorized work stoppage or slowdown

It is important to note that, while the labor agreement specifically identifies the above-listed behaviors as constituting just cause for discharge, Article VI expressly states that this list is not all inclusive. Thus, there will be other circumstances in which a contractor may discharge an employee and satisfy the just cause standard, even if the employee's misconduct does not neatly fit into one of the above-listed categories.

Under Article XII, Section 7, employees terminated for just cause may have their referral privileges suspended for periods of time ranging from two weeks, to indefinitely, depending upon the number of times they have been discharged.

Obviously, if contractors lay-off poor employees, rather than discharge them for just cause where that is warranted, those employees will continue to be recycled through the hiring hall to the detriment of all contractors using the referral system. If, on the other hand, contractors are more diligent about discharging employees where warranted, the result will be a reduction in the number of individuals with performance issues that are referred-out.

POTENTIAL CONTRACTUAL CLAIMS

In the event that a contractor releases an employee, the employee – regardless of whether the action is characterized as a "layoff" for lack of work, or a discharge for just cause – has the right to file a grievance under the dispute resolution procedures set forth in the labor agreement (Article XI). In this connection, it is noteworthy that, under Article XI, all grievances and disputes between an employee and the contractor concerning the interpretation or application of the labor agreement (such as whether the layoff or discharge of an employee is permitted under Article VI) shall be submitted to the Joint Trade Board for final and binding resolution. If the Joint Trade Board deadlocks, or otherwise fails to decide the issue, then the matter proceeds to final and binding arbitration before a neutral arbitrator, chosen from a list of arbitrators provided either by the Federal Mediation and Conciliation Service (FMCS), or the American Arbitration Association (AAA). It warrants mention that the Joint Trade Board and the arbitrator enjoy immunity while performing their roles under the Dispute Resolution procedure.

All disputes concerning the interpretation or the application of the labor agreement are subject to final and binding resolution by the Joint Trade Board, or by an arbitrator. Insofar as Article VI addresses the ability of a contractor to lay-off employees for lack of work, any employee that is nominally laid-off for lack of work may still challenge that action through the grievance/arbitration procedures of the contract.

In this context, it is clear that there are instances where laying off an employee may actually backfire. For example, if the contractor hired additional employees immediately after releasing the employee under the guise of a layoff, this would support the employee's claim that he was, in reality, discharged rather than laid-off – *i.e.*, that the contractor's layoff claim was pretextual, and designed to hide the real reason for severing the employee. Furthermore, such a separation is on its face, inconsistent with a contract provision permitting layoff for lack of work.

Once it is determined that the contractor attempted to conceal the real reason for releasing the employee, it will be very difficult for the contractor to later establish that the discharge was justified under the just cause standard. If, on the other hand, the contractor is up front, and labels the action as a discharge from the very beginning, it will be far easier to sustain that action in the face of a challenge.

It is also important to consider the context in which any challenge to the discharge decision will be decided. Presumably, the contractor will elect to discharge an employee for cause in an area where the local union has previously adopted the Top Workplace Performance Plan. Such being the case, the local union leadership, as well as rank and file members, will have previously endorsed a philosophy that only qualified, productive individuals should be employed in the finishing trades. That necessarily means that any contractual claim by an employee will be viewed, and potentially resolved, by individuals that have recognized that the employer has a legitimate right to establish reasonable standards of on-the-job conduct.

DISCRIMINATION CLAIMS

It should also be considered that employees may challenge their separation from employment by means outside of the contract. For example, in many circumstances, an employee may assert that his separation from employment was based upon unlawful discrimination. This is equally true regardless of whether the contractor labels the action as a layoff, or a discharge. In order to establish a prima facie case of discrimination, all the employee need show is that he or she was a member of a protected class, and that he or she suffered adverse action at the hands of the employer. Obviously, the adverse action requirement may be satisfied by either a layoff, or discharge for cause. Once that element has been established, the employer may justify its actions by demonstrating that there was a legitimate, nondiscriminatory reason for its action. Once the employer has come forth with such a basis for its actions, the former employee may show that the asserted reason was a mere pretext for discrimination. Therein lies the danger of laying an individual off for lack of work when the real reason for separation was misconduct. If the reviewing court or agency determines that the employee was not, in fact, laid-off for lack of work, the agency may conclude that the reasons asserted for the separation where "pretextual," and part of an attempt to hide a discriminatory or retaliatory motive. Such a finding may significantly increase the chances that the reviewing court or agency will find that the separation of the employee was unlawful.

DEFAMATION CLAIMS

If an employee is terminated, rather than nominally laid-off for lack of work, some might argue that it is also more likely that the employee will pursue a defamation claim against the contractor. The possibility of a defamation claim should not, however, be the factor that causes a contractor to lay-off an employee, rather than discharge him from employment. When a contractor communicates the reason for the termination to the Joint Trust Board or the arbitrator, that communication generally is subject to a qualified "privilege." In addition, when a contractor

communicates to the employee the reason for the employee's termination, this communication is also subject to the same type of qualified privilege. If the contractor has conducted an adequate and fair investigation, its reasons for discharging the employee will enjoy significant protection from defamation claims, because of these notions of privilege.

Attainment of the objectives of the Top Workplace Performance Plan necessitates that contractors communicate their discharge decisions to the union in writing. In some areas, contractors have been reluctant to do so, primarily because of concerns of potential defamation claims. However, it should be recognized that the qualified privileges discussed in this letter attach to written communications as well. Consequently, those contractors that communicate the accurate, job related reasons for the discharge of an employee should not be unduly concerned about the possibility of a defamation action by that individual. Furthermore, it is much more difficult for a former employee to distort the reasons for his or her discharge in any type of legal proceeding, if those reasons were reduced to writing.

MISCELLANEOUS STATE REGULATIONS

It should also be noted that some states, such as Minnesota, have adopted statutes that require the employer to provide an employee with the truthful reasons for that employee's separation from employment. In turn, the statute provide protection for the employer that provides such information pursuant to state law. That protection generally evaporates, however, if the reasons provided by the employer are untruthful. It can readily be seen that if an employee is laid-off for lack work, in the context where the employer has then immediately hired a replacement employee, the employer's actions in characterizing the separation as a lay-off may actually result in a violation of the statutory provision. In such a circumstance, the potential for liability is actually greater than if the employer had provided the truthful reasons why the individual was discharged in the first place.

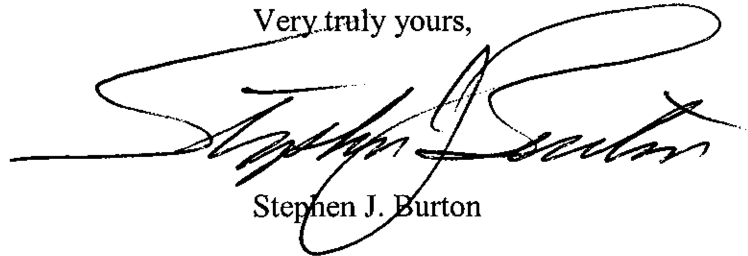
CONCLUSION

The unfortunate reality is that in most states, the termination of an employee for any reason – including layoff – carries some level of risk. However, it is erroneous to assume that that risk can be eliminated merely by stylizing an individual's separation from employment as a lay-off, rather than a discharge, where cause for discharge exists.

Further, labeling the release of an employee as a layoff in circumstances where discharge is warranted hinders the ability of the union to supply, and the contractors to obtain, truly qualified employees through the hiring hall. The labor agreement calls for the suspension of referral privileges for employees discharged with just cause, and all contractors would benefit from diligent efforts to properly discharge such employees, rather than allow them to be recycled through the hiring hall.

I hope that this information is responsive to the questions posed. If I can be of any further assistance, please do not hesitate to contact me.

Very truly yours,



Stephen J. Burton

SJB/cmn