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In-House Counsel Seminar Insights: Group Exercise Highlights Tricky Employment Law Issues

February 7, 2020

Hammertime Security is a nationwide cybersecurity firm whose in-house counsel faces a slew of tricky legal problems:

Managers posting unprofessional content on social media
Employees publicly complaining about company working conditions

- An injured worker who keeps seeking more time to recover
- Employees seeking accommodations for physical and psychological conditions

Luckily for the attorneys facing these issues, Hammertime isn't a real company. It's a fictional example of how difficult legal questions can arise from ordinary happenings, such as an executive retreat and casual employee use of personal social media accounts.

The fictional company and its difficulties were the centerpieces of a "live-action roleplaying" session on employment law at Ward and Smith's 2019 In-House Counsel Seminar. It was conducted by Ken Gray, a labor and employment attorney, and Devon Williams, a labor and employment counselor and litigator.

It all started with an annual management retreat to New Orleans during Mardi Gras.

"Several managers posted pictures of the festivities on different social media platforms," Williams explained. That led to non-management employees —not at the event — responding on social media.

One post, in particular, caused an uproar. In a picture taken and posted by an executive, the company's senior vice president of operations, Rod Rogers, had his hand on the face of Kelsey Blake, a mid-level manager considered an up-and-comer in the firm. The executive tagged the photo with "caption this," drawing an array of mostly harmless comments.

One employee, Denise Dinkley, commented, "Your place or mine," apparently insinuating an affair between the two. Several Hammertime employees chastised in the comment for her post. She fires back with, "You don't know what I know."

When the company's founder, Kenneth "'lil Kenny" Hammertime Jr., finds out, he instructs the firm's attorney to make the social media post go away.

Williams challenged the attorneys in the audience to consider the question: "What do you need to do to make this go away? And can you?"

From a legal perspective, Williams and Gray pointed out, the post raises some troubling issues. Denise may have violated the company's social media policy with her post, but there's also the question of whether two employees have an inappropriate relationship.

"I like the question, 'Is Denise's comment enough to investigate whether there is an inappropriate relationship," Gray said. "And if you have to ask that question, the answer's going to be 'Yes!'"

That in turn, of course, could raise questions about what other company policies might be relevant.

National Labor Relations Act Issues

But the situation at Hammertime soon gets worse. In a subsequent post, Denise says the company's human resources department has never taken her complaints seriously. She accuses management of running a "sweatshop" and says that's why the firm is spending lavishly on management retreats she hasn't gotten a raise in three years.

"All of these things start to relate to the terms and conditions of Denise's employment, and she has an issue with it," Williams said. And that changes the legal equation.

"It matters because of the National Labor Relations Act," Gray said. "People say, 'Well, doesn't that just apply to companies that hire union employees?' And the answer is no. It pretty much applies to all private employers."

Federal law says employers can't chill or stifle employees' ability to act together to improve their working conditions, which includes talking about them.

The problems that stemmed from Hammertime's management meeting didn't end there, however.

Worker Injury and Disability Concerns

During the retreat in New Orleans, the management team is bussed to a Pelicans basketball game. But the bus is struck by a tractor-trailer, and several employees were severely injured, including "Roman" who was in a medically induced coma for two days, underwent several spinal surgeries, and required intensive physical therapy.

Following the accident, Roman spends several weeks in the hospital, and then more time at home recovering, per doctor's orders. He is on Family and Medical Leave Act leave, and is nearing the 12-week mark and checking in with Hammertime human resources about his recovery.

But then, "out of the blue, Roman called [the general counsel] directly, the day before his FMLA leave is going to run out," Williams said. He said he needed more time off work to recover.

"His FMLA is up, so can we terminate?" Gray said. "Once FMLA is used up, we put that on the shelf. But then we have to give consideration to the Americans with Disabilities Act."

Often, Gray said, additional time off would be considered a reasonable accommodation under the ADA.

"Anytime someone requests an accommodation under the ADA, the government wants to see that we're entering into an interactive process," Gray said. "That there was a back and forth, and we're trying to see if

we can work something out with the person."

It's a balancing act, Gray said, to determine whether an accommodation is an undue hardship to the company. For a 1,000-plus employee company like Hammertime, a few weeks of time off is likely to be considered reasonable.

After another six weeks off work, Roman calls the general counsel again and says his doctor thinks he should stay out of work for another four weeks. Here again, Williams and Gray said this is likely to be considered a reasonable accommodation.

"What if this keeps happening?" Williams said. "When is enough, enough?"

There's no "bright-line answer" in these situations, Gray said.

"Frankly, this is one of the hardest things that companies have to deal with," he said. The right answer will vary on a case by case basis, according to Gray, but it's important to document the process and the back-and-forth communications between the company and the employee.

"We may say in that third letter, if you're not able to return to work on Dec. 15, which is when you're going back to your doctor and he hopes to release you, then we may have to look at other options," he said. "You're kind of laying the foundation for the termination."

Comfort Animals Coming to Work

The New Orleans bus accident had other victims, too. One of them, Jerry, was particularly distraught after seeing his co-workers injured. "Jerry's performance has been declining ever since the accident," Williams said.

It turns out that Jerry has been suffering psychologically, and now wants to bring an emotional support animal — Sir Noodles, an Australian Bengal cat — to work with him. The company agrees to accommodate his request, at least temporarily.

But this creates a problem for another employee who works in the same office as Jerry. "Emily is allergic to certain types of animal dander, particularly those that are based in Australia," Williams said. "Her fear of having an allergic reaction has caused her to have a very real phobia of Australian mammals. She's adamant that she cannot work with Jerry while he has Sir Noodles."

Assuming Emily's medical records back up her claim about her allergy and phobia, "you're going to have to look at what's a reasonable accommodation for Emily," Williams said. "Is Emily's issue now going to make Jerry's accommodation an undue burden? Probably not."

But, she said, Hammertime will have to look at ways to accommodate Emily. That could involve separating Emily and Jerry, asking Jerry to simply keep his cat away from Emily, or something else.

"All of these scenarios may seem a little far-fetched," Williams said. But, she added, Ward and Smith sees situations like these on a weekly or even daily basis.

"It happens all across the country, every day," Gray said. "Sometimes, there are no bright-line answers."

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