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### ***THE COURTHOUSE PERSONNEL DEPARTMENT***

**THE TRUTH IS ALWAYS A DEFENSE . . .**

**EXCEPT WHEN STATED WITH MALICE**

Employers should not publicly discuss terminations even when terminations are justified as a result of a violation of, as an example, a company's expense account policy. A misstatement of fact by the employer, or a statement with ill intent, could have unintended consequences, as Staples, Inc. ("Staples") recently learned.

#### **Background**

Alan S. Noonan ("Noonan") was a Staples sales director who traveled extensively for business and had to compile expense reports to be reimbursed for travel, food, and other business-related expenses. Staples had a travel and expense policy requiring employees to, among other things, submit receipts for all expenses over \$75 and for all meals regardless of price. In connection with a routine investigation, Staples' internal auditors discovered certain irregularities, including an expense report in which Noonan requested \$1,622 in excess of what he actually spent.

These irregularities caused Staples to assemble a special team, composed of certified accountants and a former police investigator, to look further into Noonan's past expense reports. Noonan admitted to the team that he often "pre-populated" his reports before a given trip – that is, he estimated what his expenses would be in advance, and submitted the report with these estimates, but with (Noonan claimed) the intention to amend the report later to the extent the actual expenses differed from the estimates. The team found that Noonan had failed to enter such adjustments on a number of expense reports and discovered other anomalies, such as entries where the amount claimed was exactly \$100 more than what the item actually cost, and entries where decimal points had been shifted two places to the right (resulting, for example, in an \$1,129 meal at an airport McDonald's, instead of \$11.29). Noonan admitted he had been careless but denied willful misconduct.

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Based on its findings, the team unanimously concluded that Noonan had deliberately falsified the audited expense reports and, as a result, Staples fired him. It sent him a letter stating that he had been terminated “for cause” for violating the travel and expense policy and the company’s Code of Ethics, and that he was consequently ineligible for severance benefits. The following day, the Executive Vice-President of Staples sent an e-mail to all of the employees in Staples’ North American Division, a group that totaled somewhere around 1,500 people, which stated as follows:

It is with sincere regret that I must inform you of the termination of Alan Noonan’s employment with Staples. A thorough investigation determined that Alan was not in compliance with our [travel and expenses] policies. As always, our policies are consistently applied to everyone and compliance is mandatory on everyone’s part. It is incumbent on all managers to understand Staples[’] policies and to consistently communicate, educate and monitor compliance every single day. Compliance with company policies is not subject to personal discretion and is not optional. In addition to ensuring compliance, the approver’s responsibility to monitor and question is a critical factor in effective management of this and all policies.

If you have any questions about Staples[’] policies or Code of Ethics, call the Ethics Hotline ... or ask your human resources manager.

Over the course of Noonan’s employment, he and Staples entered into two stock option agreements. The pertinent language in the 1992 Stock Option Agreement provided as follows:

[I]f [Noonan’s] relationship with Staples is terminated by Staples for “cause” (as defined below) ... the right to exercise this option with respect to any shares not previously exercised shall terminate immediately....

“Cause” shall mean willful misconduct by [Noonan] or willful failure to perform his or her responsibilities in the best interests of Staples (including, without limitation, breach by [Noonan] of any provision of any employment, consulting, advisory, nondisclosure, non-competition or other similar agreement between [Noonan] and Staples), *as determined by Staples*, which determination shall be conclusive. (Emphasis added.)

One of the stock option agreements contained this language, and added other grounds constituting “cause,” including “violation by [Noonan] of the Code of Ethics or an attempt by [Noonan] to secure any improper personal profit in connection with the business of Staples.” Staples did not allow Noonan to exercise the stock options.

Noonan also had a severance agreement with Staples which stated that Staples would not be required to pay benefits if Noonan was terminated “for ‘[c]ause’ ” – that is, if Noonan “willfully fail[ed] to substantially perform [his] duties with Staples,” “violate[d] the Code of Ethics or attempt[ed] to secure any improper personal profit,” or “engage[d] in misconduct which is demonstrably and materially injurious to Staples....” On these grounds, Staples did not give Noonan severance benefits.

## **Noonan's Complaint**

Noonan denied any willful misconduct or any other behavior that justified his firing. He filed suit against Staples alleging (1) libel based on the Staples e-mail; (2) breach of the two stock option agreements; and (3) breach of the severance agreement.

### **Libel Claim**

Noonan argued the e-mail was both defamatory and false, and thus constituted actionable libel. He said the 1,500 recipients of the e-mail could draw the inference that he arrogantly regarded Staples' policies as subject to his personal whim and committed some sort of grave misconduct, especially in light of the fact that the e-mail specifically named Noonan, which was a departure from company policy on employee privacy by specifically referring to Noonan by name. At the very least, Noonan urged, the e-mail reference to the company Code of Ethics could give reasonable readers the impression that Noonan was terminated for illegal or unethical conduct in the reporting of his travel expenses.

Staples countered that the evidence clearly established that Noonan violated the company's travel and expense policy, and that the e-mail was consequently true and no libel action could lie. Although the Court agreed with Staples that the e-mail was true, it stated that, under Massachusetts law, even a true statement can form the basis of a libel action if the plaintiff proves that the defendant acted with "actual malice."

The Court concluded that there was some evidence from which a jury could conclude there was actual malice on the part of Staples. As an example, because previously dismissed Staples employees were not singled out by name, a jury could possibly conclude the Executive Vice President of Staples attempted to humiliate Noonan. On this basis, the Court remanded the case to a lower court for trial on the libel claim, an outcome Staples never anticipated when it terminated Noonan.

### **Breach of Stock Option Agreements**

Noonan argued that Staples breached the two stock option agreements by not allowing him to exercise his options. The language in the agreements provided that Noonan was ineligible for the stock options if Staples determined that his termination was "for cause." Noonan asserted the relevant clauses in the agreements were invalid because they violated public policy because they allowed Staples to be the judge in its own case.

Noonan argued that, while he undoubtedly committed a number of errors on the expense reports audited by Staples' investigation team, these were merely the result of inadvertence or carelessness, and not a willful attempt to defraud Staples. At the very least, Noonan contended, the determination of whether his conduct was willful involved looking into his state of mind, a question ordinarily reserved for the jury.

Staples contended that a court should not attempt to determine if Noonan did act willfully, as the stock option agreements entrusted the decision on what constituted "cause" to Staples, and Staples alone. It argued that a court should only assess whether Staples' assessment that Noonan acted willfully was arbitrary, capricious, or made in bad faith.

The Court agreed with Staples that it was entitled to perform a review of Staples' decision to determine if it was arbitrary, capricious, or made in bad faith. Keeping in mind that courts are not "super personnel departments," and should not ordinarily second-guess employers' business decisions, the Court adopted the definition of "cause" common to both stock option agreements – willful misconduct or willful failure to perform responsibilities in the best interests of Staples. In that connection, the Court noted that it was an experienced and competent team of investigators that looked at not just one or two of his expense reports, but at thirty-seven, spread across 2005. It uncovered dozens of instances in which Noonan claimed more than he was entitled to and determined unanimously that the discrepancies must have been intentional.

Even indulging Noonan all reasonable inferences, the Court could not say that Staples' decision that Noonan engaged in willful misconduct or willfully failed to perform his duties in its best interest was arbitrary, capricious, or made in bad faith. Under the plain terms of the stock option agreements, Staples was thus entitled to determine Noonan ineligible for the stock options. Accordingly, the Court held Staples did not violate the stock option agreements.

### **Breach of Severance Agreement**

Lastly, Noonan contended that Staples violated the severance agreement. The severance agreement provided that Noonan would not receive his severance benefits if Staples terminated him "for '[c]ause.'" Another clause in the agreement provided that "cause," for purposes of the severance agreement, included a violation of Staples' Code of Ethics which contained the following provision:

We expect you to keep accurate records and reports.... All company books, records, and accounts must be maintained in accordance with all applicable regulations and standards and accurately reflect the transactions they record.... We do not permit ... false or misleading entries in the company's books or records for any reason....

The Court was of the opinion that the evidence in the record readily showed that Noonan failed to abide by this clause of the Code of Ethics. The Court agreed with Staples' assertion that, even if all of Noonan's many expense-reporting discrepancies were simply careless mistakes or instances where he forgot to amend pre-populated entries after figuring out what the item actually cost, the mere fact that he deliberately created inaccurate entries through the practice of pre-population transgressed the above provision of the Code of Ethics. Thus, under the plain terms of the severance agreement, Noonan was fired for cause, as that term was defined in the severance agreement. Therefore, Noonan forfeited his entitlement to severance benefits.

### **Conclusion**

Employee terminations should be done discreetly under all circumstances, otherwise employers may expose themselves to employee claims for libel, invasion of privacy and intentional infliction of emotional distress. Please do not hesitate to contact us if you have any questions about this case or any other matter relating to employment issues.

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