

7TH CIRCUIT NATIONAL CORPORATE NEWS BY REGION

ILLINOIS, INDIANA, WISCONSIN

Unusual Defamation Suit Puts Employers On Guard

BY ADELE NICHOLAS

IN HIS 16 YEARS as an in-house lawyer with CNA Financial Corp., Dan Popko had a spotless record. He started out as an attorney with Continental Insurance Co. in 1983 and remained with the company when it merged with CNA in 1995. He eventually became a trial specialist in the company's Downers Grove, Ill., office. His performance reviews were consistently glowing.

The one thing that marred Popko's career was a personal feud with his direct supervisor, Steven Tefft. In 1998 CNA put the squeeze on the legal department's budget, and made plans to eliminate some attorneys. Rumors circulated that Tefft's position would be one of those eliminated. Around that time, Tefft conducted Popko's annual performance review, and gave him a significantly worse review than any he had received in the past. Regardless of the tense situation, Popko left on his long-planned two-week honeymoon in early July 1999.

But as soon as Popko returned to the office, he was unceremoniously fired with no severance pay and a litany of embarrassing allegations in his HR file. Tefft alleged that Popko had cursed, challenged his authority, insulted him and had become belligerent during the performance review. Tefft wrote a memo to his supervisor, David Izzo, repeating these allegations and recommending Popko be fired. Izzo signed off on it, and sent it to his supervisor, who subsequently signed off on it and sent it to HR for final approval to terminate Popko. Although Popko disputed the allegations, he

was given no opportunity to clear his name.

Meanwhile, Tefft avoided the downsizing by taking over Popko's desk, case file and title. But Tefft didn't get the last laugh.

Watch Your Mouth

Shortly after being fired, Popko filed suit against CNA, Tefft and Izzo for defamation. He argued the company should be held liable because the termination memo contained untrue and defamatory statements that were "published" throughout the company.

It was an unusual theory. Most companies operate under the assumption that intracorporate documents are privileged and therefore outside the scope of defamation law. But on Jan. 21, the jury disagreed. Not only did Popko win his case against CNA, but the jury also assessed punitive damages against Tefft and Izzo individually. All in all, the jury awarded Popko \$300,000.

The decision upends a long-held belief that documents a company distributes internally and only to those employees that need to see them cannot be brought before a court in a lawsuit such as Popko's.

"Just because a document is internal doesn't mean that will be the end of the inquiry," says Paul Bateman, a partner at Littler Mendelson in Chicago. "This decision gives a clear signal that not all internal communications are going to be immune from defamation claims. Employers who were working under that assumption have been given a big wake-up call."

Popko's attorney in the trial court, Gerald Zansitis, thinks the ruling won't change the way defamation law operates in Illinois.



An unusual case filed in Illinois against CNA Financial brings the contents of employees' HR files, performance reviews and intraoffice memos under the scope of defamation law.

"All this decision says is that companies can't commit torts against anyone—including their at-will employees," Zansitis says. "Your boss can't punch you in the face because you're an employee at-will. And your employer can't spread a bunch of lies about you and then hide behind this corporate veil."

Michael Rath sack, who represented Popko on his appeal, believes the decision leaves the corporate privilege intact while extending defamation law to an area where it's sorely needed. He argues that if employees in a situation such as Popko's aren't allowed to sue for defamation, false information could follow them for the rest of their careers.

"Our argument was that if there's anywhere you need the protection of the right to sue for defamation, it's within your place of work," Rath sack says. "If you come up with 15 scenarios in which someone calls you a thief—one at work and 14 outside of work—I'm sure that the most damaging one is inside the work context. There is a corporate privilege, but it's qualified."

Investigate First

Although this ruling may initially put Illinois employers on edge, experts believe companies easily can avoid the issue simply by using a little common sense. Even the vindicated plaintiff's lawyers believe this lawsuit was a waste of time.

"All employers need to know is that where there's reason to have doubts about the story—check it out before you fire anyone," Rath sack says. "[Popko] had a great work record, and Tefft was worried about losing his job. The bottom line is if the supervisor could have brought these guys in and worked it out, this never would have resulted in a lawsuit."

The decision may embolden more employees to bring defamation claims against their employers, but companies can

take simple steps to protect themselves from such claims. Experts agree the key is showing that you acted in good faith by investigating any negative allegations before acting on them.

"If there's something in a report in a personnel file that raises your eyebrows, investigate it before you communicate it to anyone," Bateman says. "Be able to demonstrate that you verified the truth of

All this decision says is that companies can't commit torts against anyone—including their at-will employees. Your boss can't punch you in the face because you're an employee at-will.

—Gerald Zansitis

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Illinois Bans Sexual-Orientation Discrimination

Gov. Rod Blagojevich signed a law Jan. 21 banning discrimination on the basis of an individual's sexual orientation. The law expands the Illinois Human Rights Act (IHRA) to prohibit employers from discriminating against anyone because of his or her, "actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity."

This amendment to the IHRA makes

Illinois the 15th state to ban workplace discrimination against gay, lesbian and bisexual people, and the fifth state to offer protection for transgendered people against workplace discrimination.

The amendment bans sexual orientation discrimination in the areas of employment, real estate transactions, availability of public accommodations, and access to credit.

—Adele Nicholas

Aon Settles With Illinois AG

Chicago-based insurance brokerage Aon Corp. reached a \$190 million settlement agreement March 4 with the state attorneys general of Illinois, Connecticut and New York. Aon agreed to return \$190 million to its customers and stop accepting secret kickback payments from insurers to which Aon directed business.

Illinois Attorney General Lisa Madigan, New York Attorney General Eliot Spitzer and Connecticut Attorney General Richard Blumenthal launched investigations of

the nation's second largest brokerage late last year and filed a lawsuit on the same day the settlement was announced. At press time the suit was expected to be formally dismissed within the month. Aon CEO Pat Ryan has announced his plans to step down from his position.

This settlement comes on the heels of Spitzer's \$850 million agreement with the nation's largest brokerage, Marsh & McLennan Cos., to settle bid-rigging charges.

—Adele Nicholas