

Louisiana Employment Law Letter

H. Mark Adams, Editor; Alan F. Kansas and Jennifer L. Anderson, Associate Editors

February 2003

Vol. 11, No. 11

Highlights

- Cyberslander: Employee's e-mail lands him and his employer in court
- 'Use it or lose it' — supreme court approves it
- Court affirms high bar to recover for hurt feelings
- Race discrimination claim goes up in smoke
- Lagniappe
- Light-duty job need not be made permanent
- HR Trends

DEFAMATION

Cyberslander: Employee's e-mail lands him and his employer in court

We all know by now that employees' harassing or offensive e-mails — just like other types of misbehavior — can create potential liability for your company. One employer recently found out that all kinds of e-mails can lead to litigation. And the employee found out that he could be sued personally for writing and sending those e-mails. Although the employer and employee ultimately escaped liability, this case is your wake-up call that it's not just the dirty e-mails that should worry you.

Employee's e-mail creates mess for himself and employer

A group of insurance company employees went to a local seafood restaurant for lunch. By the time they returned to work, several had become ill. Another employee, Anthony Sims, didn't attend the lunch but learned of his co-workers' illness. Later that day, he sent an e-mail from the company's computer to his personal friends outside the company to give them the scoop. The e-mail read:

Hey Guys, Got word today that a particular unit from [the company] went to the [seafood restaurant] for a unit lunch. By the time they got back to work they were all vomiting and one passed out. An ambulance had to come pick up several of them and take them to the ER. A manager of one of the divisions told us that it takes at the very least two to three hours for the very worst food poisoning to take that kind of effect. They think someone intentionally poisoned the food. Just wanted to make you guys aware. If you've heard anything else let me know!! Thanks Anthony.

When Sims' managers learned he sent the e-mail, they suggested he send another e-mail retracting the original message and that he write an apology letter to the seafood restaurant. He did as requested, but according to the restaurant, the damage had already been done. Despite the apology, the restaurant filed suit against the employee and his employer.

Restaurant disputes that 'any press is good press'

The restaurant filed suit in a Louisiana state court, arguing that Sims' e-mail was defamatory and the employer was liable for his actions. The employer asked the court to dismiss the case, arguing that it couldn't be held responsible for the employee's personal actions that weren't related to his job. The trial court granted the employer's request for dismissal, but the restaurant took the decision to a Louisiana appeals court.

The appeals court reviewed the legal requirements for proving a defamation claim: (1) defamatory words, (2) publication to a person other than the one defamed, (3) falsity, (4) malice, and (5) injury. Considering those factors, the court found the statements in Sims' e-mail weren't defamatory under the law.

In the e-mail, Sims expressed his "opinion" that the reported illness wasn't food poisoning but that "some" person intentionally poisoned the food. He didn't state or imply that anyone affiliated with the restaurant poisoned the food. The statements were just too subjective and nonspecific. Therefore, the appeals court found that they weren't defamatory and neither Sims nor the employer could be liable to the restaurant.

Because the appeals court concluded that the underlying statements weren't defamatory, the employer and Sims were released from the lawsuit, and it didn't address whether the employer could be liable for Sims' conduct under the facts of the case. *Catfish Cabin of Monroe, Inc. v. State Farm*, 2002 La. App. LEXIS 3793 (La. App. 2nd Cir. 12/11/02).

Potential liability for employees' e-mails

There are many areas of concern when it comes to your employees' use of the company e-mail or other electronic systems. Traditionally, employers' main concern has been offensive and unwelcome e-mail messages between employees leading to the creation of a hostile work environment, whether based on sex, race, religion, or some other protected classification. This case demonstrates yet another area of concern — potential liability for defamation based on the contents of your employees' e-mails.

Because of the increasing use of e-mail and the Internet in the workplace, many of you are taking steps to reduce your risk of exposure for cyberconduct. Many of you have created and implemented clear e-mail and Internet policies to eliminate employees' expectations of privacy in their use of the company's e-mail and Internet systems. In that manner, you can monitor cyberconduct to ensure quality assurance, compliance with workplace rules, security, and so forth. In other words, employees are increasingly aware that their e-mails and Internet usage may be monitored at any time — with or without notice — and that your workplace rules apply to cyberconduct as well.

Many of you are also setting clear boundaries for employees' conduct with respect to electronic communications. Your policies should explain that e-mail and computer equipment is to be used primarily — if not exclusively — for business purposes and clearly prohibit the creation and transmission of inappropriate, offensive, or defamatory materials. Some of you may allow employees to use your e-mail and Internet systems for certain personal business during breaks, such as online banking transactions or bill payments, provided it doesn't interfere with their job or adversely affect their productivity. Whatever your policy, however, be sure that before you severely discipline an employee for violating the policy, you're not singling out one employee when you know others are equally guilty.

You also need to make sure your employees understand the practical realities of e-mail communication in our litigious society. Time after time, attorneys find the most explosive evidence in offhand, informal e-mails. Employees should always remember that e-mails are just as permanent as documents and they're easily distributed around the world with a few mouse clicks. Employees should be cautioned not to put anything in an e-mail that they wouldn't want to have broadcast on the six o'clock news. Communicating and consistently enforcing your policies is your best cyberdefense.

Copyright 2003 M. Lee Smith Publishers LLC

LOUISIANA EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in Louisiana employment law. Questions about individual problems should be addressed to the employment law attorney of your choice. The State Bar of Louisiana does not designate attorneys as board certified in labor law.