

The How To Do It Right Track: So We Won't Have To Go To Court Fact Pattern

Nu-Foods Corporation, a large privately-held company, manufactures a variety of food products, with 15 manufacturing and distribution facilities located throughout the United States. Just a few weeks ago, Jennifer Cutler, one of the senior managers in the Human Resources Department who has responsibility for labor and employee relations, approached the Associate General Counsel for Labor and Employment, Jack Stanton, to report several problems that she was encountering with the Senior Vice President of Human Resources, Mark Hardy. First, she explained that in the course of discussing a reduction-in-force that they had implemented two months ago, Hardy made several comments that signaled a "mandate" to eliminate older workers from the Company. He allegedly made the following comments: "This Company doesn't invest in old plants, old equipment, and old people;" and "as the average age of our employees goes up, our profit margins go down." In the ensuing RIF, 180 employees were laid off, approximately 60% of whom were 40 and above. Of this affected group, 130 employees were bargaining unit employees and 50 were salaried employees. Cutler claims that, very occasionally, she continues to hear Hardy make similar ageist comments. Hardy is 45 years of age, and Cutler is 38. Cutler has been with the Company for 8 years; and Hardy joined the Company 18 months ago.

Cutler then became very upset, and proceeded to describe a situation that arose six months ago when Hardy and she were traveling out-of-state to visit with prospective employee benefit companies to explore new options for the Company's employee benefits packages for its salaried workforce. She alleges that, on one night on the trip after dinner, they began a sexual relationship. Although she claims she never wanted to be involved with him, she consented to the affair because of her "fear of repercussions." The affair continued for approximately three months, when she finally decided to end it. As she expected, Hardy began a campaign to "win her back," that began with casual requests for dinner to which she acceded twice. During the second dinner, he asked her to resume the relationship. However, when she indicated she was not interested, his requests became more insistent, and he then began to engage in "stalking-like behavior" and threats of retaliation. In support of her claims, she tells Stanton that several Company executives witnessed Hardy's behavior at a corporate off-site national sales meeting just last month. She further alleges that Hardy sent her e-mails from his home computer and his office computer, asking her to "pick up where they left off" with their relationship. She states that she simply can no longer work with him.

At the same time, the Company has been preparing for its collective bargaining negotiations for a new contract for the production and maintenance workers at five plants in neighboring states. The Union has made it clear that it is very disturbed about the manner in which the layoffs were handled, and that it intends to make job security one of its primary goals during this round of negotiations. As leverage, the Union contends that the WARN notices sent out prior to the RIF may have been deficient and that selection decisions may have been tainted by considerations of age and the "high cost" of older employees. It is uncertain whether the Union is aware of the comments attributed to Hardy by Cutler regarding possible age bias. The Union also complains that, as a result of the layoffs, adequate staffing levels are no longer being maintained, thereby jeopardizing worker safety. Moreover, as a result of possible food contamination of one of its major products, Nu-Foods has received anonymous threats of sabotage to its plants, and the Union is very concerned about the welfare of the workers in light of these threats. To make matters worse, the Union has filed a Section (8(a)(5) charge, claiming the Company failed to bargain over the decision and the effects of the workforce reduction.

To compound Nu-Foods' problems, the Local's Business Agent, Will Stewart, has advised the Company's Office of Public Relations that he has information indicating that Hardy has some "serious problems" that he believes the Company should be addressing. He will not give any more information, except to say that Hardy's presence within the Company poses "real risks." He indicates that he will not go public for a "brief, but unspecified" period of time to allow the Company the opportunity to address these issues. Nu-Foods' Public Relations Officer mentions this to Stanton.

Stanton understandably wants additional information regarding Stewart's allegation. To this end, he just sent an information request to the Union for (1) any notes of any conversations the Business Agent or the Union steward had with Cutler in the last six months and any internal communications within the Union about any such conversations, and (2) any information the Union has about any risks to the Company. The Union declines to comply with the request. Stanton contemplates whether the Company should file a charge and ask the National Labor Relations Board to seek an injunction ordering the Union to produce the information immediately.

Stanton undertook an investigation in which he interviewed: (i) Hardy; (ii) Stewart, (iii) 2 employees who allegedly witnessed the so-called stalking behavior at the national sales meeting; (iv) another HR Department manager who is a good friend of Cutler; and (v) Hardy's immediate supervisor. Stanton concluded that Hardy and Cutler were involved in an intimate relationship that Hardy, rather than Cutler, chose

to end. According to Hardy, it was Cutler who consistently implored him not to terminate the relationship. Hardy rather convincingly asserted that Cutler has shown up at executive level meetings to which she was not invited and occasionally has engaged in disruptive conduct in the workplace. Moreover, he claimed that her business focus is no longer as strong as he would like it to be.

No employee other than Cutler with whom Stanton spoke had anything negative to say about Hardy, except that his attendance is somewhat erratic for an executive at his level.

After completing his investigation, Stanton advised Cutler that he could not corroborate her allegations with third-party witnesses. He told her that she must continue in her current position reporting to Hardy, or if she wished to voluntarily resign, the Company would provide her a reasonable severance package.

Following her discussion with Stanton, Cutler filed a charge of sexual harassment and retaliation with the EEOC. She also corresponded with Nu-Foods' Chairman, and informed the Chairman that the investigation was tainted because it was conducted by Nu-Foods' in-house counsel, who was biased. She claimed that the Company was negligent in the manner in which it conducted the investigation because: (i) Stanton did not interview Hardy's wife as Cutler had requested; (ii) Stanton did not review information on Hardy's computer which would have shown his efforts to resume their relationship against her will, and (iii) in the course of interviewing third parties, Stanton defamed her by asking questions regarding her workplace attire and her behavior at off-site meetings and happy hours.

The Company's Chairman has demanded a full report on the situation and further investigation by "someone outside the Company." He ended his call to Stanton wanting to know "what is going on with the Union?"

Nu-Foods, through Stanton, recently retained outside counsel to investigate Cutler's claims and to evaluate the manner in which the initial investigation was conducted. Soon after he retained outside counsel, Stanton received a Notice of Charge from the EEOC requesting an on-site investigation and the production of numerous personnel documents. The NLRB has issued similar requests.