THE
NATIONAL LAW REVIEW

New Jersey Federal Court Cautions Employers When Responding to Even Routine Demand Letters

Article By
Robert H. Bernstein
Michael J. Slocum
Greenberg Traurig, LLP
L&E Blog

- Litigation / Trial Practice
- Labor & Employment

- 3rd Circuit (incl. bankruptcy)
- New Jersey

Sunday, March 10, 2013

Though it has long been a common practice for in-house counsel to respond to routine (and not so routine) demand letters, a recent New Jersey District Court decision should cause in-house counsel serious concern when doing so in the future. In **Bourhill v. Sprint Nextel Corp.**, **the Court allowed into evidence a portion of a letter written by an in-house attorney,** prior to the action's commencement, explaining why counsel's position was factually meritless, but offering to entertain counsel's invitation to resolve the matter so as to avoid litigation (the Court opinion is attached for your convenience). And this decision affects in-house counsel's exchanges not only in the employment context, but also extends to all litigation.

Briefly, in Bourhill, approximately five months after plaintiff's termination, Sprint received a letter from plaintiff's counsel setting forth the reasons he believed plaintiff's termination was unlawful. Counsel's letter expressed that plaintiff would "prefer to resolve this situation informally, by means of an adequate compensatory settlement."

Sprint's in-house counsel responded with a two paragraph letter, which included the phrase "Confidential/For Settlement Purposes Only" on the subject line ("Response Letter"). The first paragraph explains the facts surrounding plaintiff's termination

and why it was lawful. The second paragraph inquires into specific relief plaintiff sought and invites further discussion.

Counsel's exchanges did not lead to resolution, so plaintiff brought suit against Sprint advancing various violations of New Jersey's Law Against Discrimination. Subsequently, on cross-motions for summary judgment, plaintiff appended, and relied upon, Sprint's Response Letter. Citing Federal Rule of Evidence 408, Sprint moved to strike plaintiff's summary judgment motion and his opposition to Sprint's application to the extent it relied upon this letter. Rule 408 generally bars admission into evidence of settlement communications.

The District Court struck the second paragraph of the Response Letter, concluding that it implicates Rule 408 because it "contains an invitation to Bourhill to make a settlement proposal." The Court, however, allowed plaintiff to rely upon and otherwise introduce the first paragraph of the Response Letter, finding that it does not "contain an actual compromise or a suggestion of a genuine willingness to resolve a dispute."

Among other arguments, Sprint maintained that the first paragraph of the Response Letter should be struck because it "set[s] up, involve[s], or tie[s] into the invitation for a specific offer in the second paragraph." Sprint further argued that "the purpose of that paragraph was to lay the foundation for Sprint's position that Bourhill should expect little compensation in exchange for foregoing his claims." The Court disagreed, determining that "the two paragraphs of the [Response Letter] are not logically connected," and that "the letter reads as Sprint's response to Bourhill's demand letter and the merits articulated in Bourhill's demand letter about ... the plaintiff's claims and separately, [responds to] a request from Bourhill to make a specific settlement offer." Notably, though, without citing any Third Circuit or N.J. District Court cases, the Court opined that "federal courts routinely hold that demand letters and responses to such letters are not within the scope of Rule 408."

Take Away

In-house counsel should be cautious in drafting responses to demand letters, always with an eye toward the letter's potential use by opposing counsel if litigation ensues. Specifically, make certain that each paragraph explicitly incorporates, or directly depends upon, language respecting settlement. It is also always prudent to make sure such letters do not contain any facts or admissions you do not want resurfacing in litigation, as such letters may now find their way into the case. And though apparently not an issue in Bourhill, if such counsel letters are permissible in litigation, it follows that depositions of in-house counsel and other nettlesome discovery devices by plaintiffs will follow.