

**Hypothetical: Consulting Track Program: Advanced Discrimination Principles/Counseling, November 9, 2007, 1:00-3:00 p.m.**

The Talk Lots Corporation (“TLC”) is a telephone and internet services provider with retail outlets and service centers located throughout the United States. The technicians who handle service calls are represented by the Good Employee Union (“GEU”). The GEU-TLC collective bargaining agreement provides for a higher wage structure in the three urban centers which was adopted in recognition of higher costs of living in those areas.

TLC decides to restructure its organization and close its three urban technical service centers (located in Miami, Philadelphia and Chicago) and expand its operations in rural Wyoming, Kansas and Minnesota where costs of doing business are cheaper. The employees in the urban center locations are primarily black and Hispanic and the employees in the rural locations are primarily white. The urban center employees complain to the union and to TLC management that the site selection was racially motivated and demand that the urban sites remain open and the rural sites be closed instead. The employees threaten to present a petition to the TLC shareholders meeting challenging the proposed closures. GEU files a grievance challenging the proposed service center closings, arguing that the decision violates the non-discrimination clause set forth in the GEU-TLC collective bargaining agreement.

Soon after TLC management receives the technicians’ letter and the union’s grievance, the company discovers that a network of urban center employees have used their computers to discuss various TLC management practices which they contend are racist and disrespectful to non-white employees. TLC’s internal investigation discloses that at least 25 technicians have exchanged views on these practices, the majority of whom are African American and Hispanic. TLC management also learns that seven of the technicians have argued in external blogs that the company discriminates and that its proposed urban technical center closings are motivated by racism. After evaluating the content of the internal emails, TLC decides to fire 15 employees for violating the company’s policy limiting computer use to business-related topics. TLC’s letter of dismissal also adds an additional ground of employee “disloyalty” to the 7 technicians who participated in outside blogs critical of TLC. After terminating the technicians, TLC is served with notice of the filing of an EEOC charge by one technician challenging the plant closings as racially motivated and also claiming that TLC promotional practices violate Title VII.

**Discussion-- including fair representation issues.**

What advice would you provide the employer as it is conducting its investigation into the email usage? How should the employer respond to the grievance? What should the union do when it learns of the proposed terminations? What if the employees were not fired, but were transferred to the midnight shift? What questions would you ask TLC as

the attorney representing the terminated employees, looking into possible Title VII litigation?

### **Discuss Burlington retaliation issues**

Can the employees pursue a retaliation claim under section 1981? What difference would it make if the EEOC charge had already been filed in response to the plant closures, long before TLC decided to terminate the employees? What is the employer's EEOC position statement going to look like? What are the arguments available to the employer in support of its decision to close the plants?

### **Discuss CBOCS West**

The CEO decided which centers to close. He relied on input from the CFO and the COO. The CFO told the Wyoming manager that he recommended that the urban centers be closed because they were just too "colorful" for his taste. The COO reported that employees working in the urban centers tended to question new policies and changes in work quotas and were always trying to push their way into higher positions before paying their dues. He also complained that urban center employees were more sophisticated about their "so-called rights."

### **Discuss cat's paw issues.**

The company offers severance packages to the affected employees which include broad legal releases. The offer does not include information required by the Older Workers Protection Act, but employees are told that they can call TLC's Human Resources Office or their union representative if they need more information.

The three urban center managers (all over 50 years old and all white) are offered enhanced severance packages. The offers include a provision that the employee will not file a charge with the EEOC or talk to EEOC representatives or plaintiffs attorneys unless subpoenaed. They also contain non disparagement clauses.

### **Discussion including OWBPA, Astra issues and enforcement of non disparagement clauses.**

The Philadelphia Inquirer asks the Philadelphia center assistant manager what she thinks about the employees' accusations that the urban centers were targeted because of the employee demographics. The assistant manager, who did not sign the severance agreement, tells the Inquirer reporter that she believes the employees are right, and adds that she has personally experienced and witnessed sex and race discrimination throughout her career with TLC. She mentions that the CFO "cooked the books" to undervalue the urban stores' earnings. In addition, she says that the CFO has a reputation for using the "N" word and reports that he once referred to her as a "black b---h."

During a board meeting hastily called to discuss the bad press, the CFO denied the allegations and commented: “No one pays any attention to anything she says. She is bipolar. I guess she forgot to take her lithium. She is one of the reasons we are closing down these centers.”

#### **Discussion defamation and ADA confidentiality issues.**

What if the Philadelphia manager had signed the severance agreement and filed an EEOC charge? Can the employer cut off the severance benefits? Board meeting proceedings are generally tape recorded. The CFO asks the TLC General Counsel if the tapes of the meeting can be destroyed to keep them from adding “fuel to the fire.”

#### **Discussion of retaliation issues, preservation of evidence .**

The Philadelphia manager’s EEOC charge alleges that she has been denied numerous promotions and has been under paid for the last 10 years. Some of the technicians who are being laid off file an EEOC charge asserting that they would have accepted a transfer to Minnesota, but it was not offered to them because of their race. They cite hiring and promotional practices dating back several years which suggest that only whites are offered positions in this location.

#### **Discuss Ledbetter issues**

The Miami center manager was offered a transfer to Minot, Minnesota instead of termination, but turned it down and resigned instead, claiming that no reasonable person would accept such a transfer. The Philadelphia assistant manager refuses to accept the severance package and files an EEOC charge asserting constructive discharge based on race.

#### **Discuss constructive discharge issues**