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FORUM***WORKPLACE CONDUCT: ONE COMPANY'S NO-NONSENSE APPROACH
TO HATE-RELATED BEHAVIOR***

Richard P. Theokas

One morning a first-year student class was delayed when the instructor entered the classroom and discovered swastikas and race-related hate messages scrawled on some butcher paper that covered the class's easel. It had not been there before the end of the previous work day, and the room was generally open to use by various groups after hours. The messages were observed by some of the students and created a pall of unease and concern for the next several class sessions. How could such conduct occur at an open University that, on its face, celebrated diversity? What would happen to the people or person who left these messages? The instructor pondered further: what consequences might occur if this same conduct occurred in the work place?

Diversity seems to be one of those issues we salute when it passes close by, but otherwise we put it out of our sight and mind. If we aren't affected by someone's reaction to our color, race, religion, profile, (in other words, if we're white, Anglo-Saxon, protestant) then we obligingly pay the subject lip service and move on. Moving on generally means we occasionally engage in behavior that some people find objectionable, hostile, and, in law, actionable.

One company has established a set of rules related to the workplace environment. They embodied these rules in a document called Employee Behavior policy. One rule in particular, Rule 32, as amended by the company in March, 2002, is the subject of this article. This example is particularly relevant; graduates from institutions that service the aeronautical community may be subject to these or similar rules.

Three cases brought before arbitration boards serve to illustrate the serious approach to harassing and hate-related employee behavior taken by American Airlines. The cases include remarks made by senior captains and junior first officers about race, sex and religion of other employees both on and off duty. It is also important to note that two of the comments were made in emails in a union challenge-and-response on-line forum. The board found that the normal protections afforded speech were not appropriate in these fora. In each case the board considered the application of Rule 32, the use of just cause in considering all factors and circumstances of each case and the application of relevant articles of the airline's contract with its pilots' union. The issue for the board in each case was whether the termination of the employee was for just cause, and if not, what should be the remedy, or, in the first case, was it in

accord with the Collective Bargaining Agreement. (AA-APA, Feb 20, 2006, p. 2; AA-APA, Feb 22, 2006, p. 4; AA-APA, March 25, 2005, p. 3). The first case involves a senior captain who allowed himself to make racially derogatory remarks in the work place.

The facts of the case are briefly summarized as follows. The grievant was a nineteen-year captain with American airlines. During the incident in question the aircraft would not properly engage the external power. The captain approached the station general manager, a woman of color, to ask for an early departure (an "early out") because he had military personnel as passengers and wanted to arrive at their next destination early to ease their transition to their follow-on aircraft. The conversation turned to political issues when the station manager stated her objections to the president and his policy on the war in Iraq. (AA-APA, Feb 20, 2006, pp. 3-12)

The hate-related conduct at issue was use of a derogatory term in speech, the term "spear chucker," and took place on the 28th of September, 2004. At one point during the conversation the general manager was alleged to have said that if it weren't for President Bush they (the military passengers) wouldn't have to be going over to Iraq anyway. Both parties went outside the office to the airplane to examine the external power receptacle. The captain testified that at that point he was upset and angry and that he had said that he respected the president as commander in chief. He went out to the nose of the aircraft, where the external unit was attached, with several people following, including the complainant. At one point the captain testified that he asked an aircraft mechanic about the power source, and then turned to the general manager and said "You can

Workplace Conduct

thank Bush the (sic) spear chuckers having a job.” Subsequently, the station general manager filed the complaint. (AA-APA, Feb 20, 2006, p. 8)

The airline’s chief pilots considered the complaint and referred it to management. (AA-APA, Feb 20, 2006, p. 9) Airline management considered the complaint, assessed that it fell within the purview of Rule 32’s hate-related behavior. It determined that the only discipline for violation of the rule was immediate termination. The captain was terminated in December, 2004. (AA-APA, Feb 20, 2006, p. 10) The arbitration board heard the captain’s grievance in June, 2005.

When the arbitration board considered the captain’s grievance, it reviewed Rule 32 and the company’s contract with the Allied Pilot’s Association, the union that represented the airline’s pilots. The parties agreed on the issue to be decided by the Board as follows: Was the termination of the captain from American Airlines on December 15, 2004 for just cause and in accord with the May 2003 Collective Bargaining Agreement? It is useful to examine the rules and definitions the board used in its deliberation.

Rule 32 reads as follows:

Behavior that violates the Company’s Work Environment policy, even if intended as a joke, is absolutely prohibited and will be grounds for severe corrective action, up to and including termination of employment. This includes, but is not limited to, threatening, intimidating, interfering with or abusive, demeaning, or violent behavior toward, another employee, contractor, or vendor, while either on or off duty. *Behavior that is hate-related will result in immediate termination regardless of length of service and prior employment record.* (italics added). (AA-APA, Feb 20, 2006, p. 3, 20)

According to the Company’s Work Environment Policy Hate-related behavior is any action or statement that suggests hatred for or hostility toward a person or group because of their race, sex, sexual orientation, religion, or other protected characteristic. This includes, but is no way limited to, bigoted slurs, drawings, and symbols such as a hangman’s noose, a swastika, or graffiti. (See Co. Ex. 7) (AA-APA, Feb 20, 2006, p. 20)

The relevant parts of the contract between American Airlines and the APA follow:

Collective Bargaining Agreement Section 21: Discipline, Grievances, Hearings and Appeals

A. Discipline

1 Disciplinary Program

(f) The purpose of any Company discipline is to correct a pilot’s behavior and/or performance. (AA-APA, Feb 20, 2006, p. 3)

Just cause is defined in Black’s Law Dictionary (page 863, 1991 edition, published by West Publishing Company, St Paul, Minnesota) as a cause outside legal cause, which must be based on reasonable grounds, and there must be a fair and honest cause or reason, regulated by good faith; fair, adequate, reasonable cause.

In supporting the captain in his appeal the union cited a previously decided case. This case established the principle that three elements are needed to establish hate-related conduct: one, an action or statement; two, conduct that suggests hatred or hostility against a person; three, because of a protected characteristic such as race, religion, color, or national origin.

Witnesses offered testimony considered by the arbitration board that suggested the captain was noted for his fairness and kind and benevolent treatment of all customers and employees. The conduct alleged in this incident was not characteristic of his nature or previously observed behavior even though the captain admitted to the board that he made alleged comments.

The captain had numerous letters of congratulations and appreciation in his personnel file. (AA-APA, Feb 20, 2006, p. 18) Further, the comments that precipitated the complaint came at the conclusion of a heated political discussion from which the captain was observed to be trying to disengage. To the witnesses, the comments did not seem directed at the station’s general manager or anyone else in particular.

The arbitration board concluded that a rule that arbitrarily and automatically terminated an employee would fail in a case where decision makers did not consider all the circumstances and the context in which the words were uttered. (AA-APA, Feb 20, 2006, p. 33)

The arbitrator found that the zero tolerance policy, while a good one, in this case violated the specific terms of the party’s contract and that it did not properly balance the spirit of the contract and its embrace of the just cause requirement as the required norm in such a situation. In the board’s judgment, management did not adequately consider the requirements of its contract with the union regarding the

application of just cause, that is, management failed to consider all the circumstances of the case. The captain was reinstated, but was denied his request for back pay. (AA-APA, Feb 20, 2006, pp. 32-33)

Labor and management can both take something from this case. First, hate-related speech, even that made in the heat of an argument, can cause the most dire of consequences. The captain's use of the term "spear chucker" was offensive and inappropriate under any circumstances. Second, any disciplinary process must include elements of contractually required items, such as in this case, the captain's reputation for care and concern of fellow employees and customers.

The second case differs in several ways from the first, but still reflects the airline's position on hate-related employee behavior. Here, a first officer was discharged following his posting of a highly derogatory message in a union challenge-and-response on-line chat room concerning another pilot. The message referred to the other pilot who was also a union official as a little girl and the called him a variety of highly offensive and viciously homophobic names. (AA-APA, Feb 22, 2006, pp. 1-3) He was fired for violating Employee Behavior Rule 32 and the work employment policy.

In the grievance, the union argued that the comments were made in a union context which is typically protected, it was off duty and off premises and that it did not have an adverse affect on company business or operations. The issue for the board was whether the language used was "hate-related behavior," and if it was, should it nevertheless be considered beyond the reach of the Company's work rules because it was conducted in a union chat room. (AA-APA, Feb 22, 2006, p. 6)

The board found that the language clearly indicated the speaker had engaged in hate-related behavior and stated in its finding that hateful epithets do not become less offensive or more tolerable by their having arisen in the course of intra-Union saber rattling. (AA-APA, Feb 22, 2006, pp. 6-7)

The first officer argued there could have been no hate crime so long as he was personally unacquainted with the victim and unaware of the victims of sexual preferences. He wrote it in the sanctity of his own home. It was sent via a medium available to thousands of coworkers and invited them to forward the message in their own words. (AA-APA, Feb 22, 2006, p. 7) But, the definition of hateful, defamatory and demeaning behavior has never required personal knowledge of the victim. (Footnote, AA-APA, Feb 22, 2006, p. 7)

Offensive homophobic slurs, while clearly warranting discipline, must be reviewed in the context of the facts surrounding their offerings. Are they somehow immunized by virtue of their having been published off duty on a restricted union web site? Only when management can demonstrate, clearly and convincingly, that workplace concerns are meaningfully threatened by actions outside the workplace may it take actions against an employee. (AA-APA, Feb 22, 2006, p. 8)

The union claimed there are four exceptions to the general rule that employers may not punish employees for misconduct off duty and outside the workplace: first, the off-duty behavior harms the company's reputation or product; the off-duty behavior renders the employee unable to perform his duties or appear at work; third, the behavior leads to refusal, reluctance or inability of an employee to work with one another; and fourth, the behavior undermines the ability of the employer to direct the work force. The arbitrators felt that the significant question in this case was whether the first officer's conduct had a meaningful connection to the airline's business. (AA-APA, Feb 22, 2006, p. 10)

What is the demonstrated adverse effect on the employers operations or legitimate business interests? If behavior, albeit off duty, may be found to present a serious threat to coexistence in the workplace, the employer has legitimate cause for concern. Providing a harassment free workplace may well be compromised by conduct that occurs off premises and off duty. To be short, one must guard against the specter of an employer impermissibly extending its reach into off duty zones. Much as management might desire employees who think and behave impeccably off the job, there are simply limits beyond which they cannot go. (AA-APA, Feb 22, 2006, p. 11)

There are limits to the company's control of employee behavior off duty. However, when misbehavior challenges the employment relationship, it follows the employer has a justifiable interest in that conduct and may respond appropriately. (AA-APA, Feb 22, 2006, p. 12) Whether considered in terms of particularized interest in crew coordination in the cockpit or the more general interest in avoiding hate-based activity in the workplace, the company could reasonably be profoundly concerned about the hateful language in this case. (AA-APA, Feb 22, 2006, p. 13)

Rules regarding employer intrusion into the union "virtual" workplace almost totally exclude the company's right to discipline employees for comments made in that environment. The purpose of those rules, however, is to prevent union leadership from using its disciplinary powers

Workplace Conduct

to suppress criticism and punish dissent. Nothing in statute or case law suggests that, whatever immunity exists with respect to union discipline, an employer should be proscribed from imposing sanctions where, as in this case, an employee's activity breaches its rules. (AA-APA, Feb 22, 2006, p. 16)

As a result of his egregious behavior, the finding of the Rule 32 deliberation committee and the confirmation of the arbitration board, the first officer was terminated from employment with American Airlines.

The lessons of this case are clear and simple. First, vicious homophobic speech will be characterized as hate-related when it reaches adversely to the relationships among employees. Second, even ordinarily protected forums will not shield such conduct when the effects of the conduct could have a profound negative effect on the company and its business.

Our third case arose when the company received reports from three crew members alleging that a captain spoke to his first officer in terms that derogatorily referred to his religion. The captain initially made his comments in a cockpit, then again at a bar in a downtown hotel. The questions before the board were whether management established, by a fair preponderance of the evidence, that the captain engaged in the alleged conduct, and if so, was his discharge justified under expanded Rule 32 and "traditional notions" of just cause. (AA-APA, Mar 25, 2005, p. 8) He was terminated by his chief pilot for engaging in hate-related behavior, a decision that was upheld by the arbitration board.

In this case, the arbitration board used the new, amended Rule 32:

Hate-related behavior is [1] any action or statement that [2] suggests hatred for or hostility toward a person or group [3] because of his or her race, sexual orientation, religion, or other protected characteristic, including, but in no way limited to, bigoted slurs, drawings, and symbols such as a hangman's noose, a swastika, or graffiti. (AA-APA, Mar 25, 2005, p. 8)

The incident occurred in the cockpit, on duty, during which time the first officer entered a conversation with the captain about the captain's non-membership in the union. The captain made egregiously disparaging remarks about Jews, a class of subject, religion, protected by law. The captain repeated the comments in front of two other first officers later that evening during crew rest, off duty, in a hotel bar.

The arbitration board considered the circumstances of the alleged offense and concluded that management had correctly applied the concept of just cause to this incident

where no person can categorize mere words as violating rules 32 outside of the context in which the words were uttered. It stated that management may regulate any speech or conduct that has a discernible affect on the workplace and productivity. (AA-APA, Mar 25, 2005, p. 10)

The arbitration board stated that any determination of just cause required two separate considerations: (1) whether the employee was guilty of misconduct and (2) assuming guilt, whether the discipline imposed was a reasonable penalty under the circumstances of the case. (AA-APA, Mar 25, 2005, p. 13) The evidentiary standard established by numerous arbitration boards in discipline and discharge cases is that the Company is required to establish the facts giving rise to the discharge by a clear preponderance of the evidence. Its intent is to require some sort of process before taking an action in response. (AA-APA, Mar 25, 2005, p. 8)

Given that the captain made his comments both on duty in the cockpit of the aircraft and again while in crew rest in a hotel bar, the board also considered that protected free speech away from work is not necessarily protected free speech at work. The law recognizes that employers regulate speech and conduct at work that contributes to a racially or sexually hostile work environment. Where such conduct creates a hostile environment, the employer has a duty to intervene when such speech interferes with the operation of the business. (AA-APA, Mar 25, 2005, p. 13)

The purpose of Rule 32 isn't just to protect individuals; it addresses the work environment itself where one finds a poisoning of the atmosphere resulting from hate-related speech. The board affirmed the action of the captain's chief pilot to terminate him for violating the company's work policy and Rule 32.

The lessons of this case are similar to the previous two cases. Where conduct towards a religious or ethnic group can be characterized as hate-related and can create a hostile work environment that can or does affect the operation of the company, termination (in American Airlines) is the likely result. The effects of such conduct can be addressed whether it occurs on duty or not.

We must take something from these cases that we can pass to our students and colleagues who teach them. Business, in these cases American Airlines, will not tolerate employee behavior that detracts from its ability to service its customers. Behavior that can or does create an environment that could be considered as hostile by one or more employees is unacceptable.

When management can show their decision to terminate an employee for hate-related behavior is based on careful consideration of all the circumstances surrounding an event, arbitration boards will typically uphold it.

Employee rights are protected by the requirement to show just cause for a termination and by the applicable parts of the management-union contract. However, no place is sanctuary where the organization's work place environment is poisoned by egregious and hate-related behavior, whether on or off duty.

Not long ago, this University implemented a mandatory mass education program for diversity training. The goal of the training was to sensitize employees to their unspoken, but often acted on, feelings about people of different color, national origins, religions, sexual orientations and disabilities. One of the attendees broke down and cried relating the story of his brother who could not hide his dislike of people of color. Less than six months

later, this same person stood up in the operations dispatch area of a flight program where he worked and yelled across the room that faggots and queers had no place in aviation. He was terminated from his position that day.

Whatever our personal dispositions towards persons of color, different religions, national origins, sexual orientation or disabilities that may otherwise be protected by law, our observed behavior must be consistent with company rules, the law, and good, common courtesy.

When faculty, lecturers or speakers make comments or engage in acts that demean a protected group, they set an inappropriate example for their students, one that, when emulated in the work place, can result in serious repercussions, not only for employees and the company that employs them but also for the reputation of the academic institution that produced them.

Richard P. Theokas graduated from Union College, Schenectady, NY, in 1968 with a bachelor's degree in languages and was commissioned in the USAF as a second lieutenant. During his 27-year career on active duty, he flew C-130 and KC-135 aircraft as aircrew commander, instructor and evaluator pilot, served in various Air Force and joint headquarters as staff officer, and he commanded both support and operational organizations. He retired to attend Mercer University Law School, and he served as an intern with his county's district attorney. In late 1999 he came to Embry-Riddle Aeronautical University's Daytona Beach, Florida, Campus as Chairman of its Flight Training Department, until he accepted a position on the faculty of the Aeronautical Science Department in May, 2005. While at Embry-Riddle, he chaired the Daytona Campus' Diversity Committee. He is currently an adjunct professor of business law, leadership and political science at Gardner-Webb University in Boiling Springs, North Carolina. In his teaching career, Professor Theokas has taught labor law, aviation law, aviation history and basic aeronautics. In addition to his bachelor and law degrees, he has a master's degree in Political Science and Government from Webster University in St. Louis, Missouri.

Workplace Conduct

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