

TRANSCRIPT OF CARMEN'S INTERVIEW WITH WFBL'S BILL COLLEY

On January 10, 2006, Peter D. Carmen, Labor Law attorney and partner at Mackenzie Hughes LLP, made a guest appearance on WFBL-AM 1390's Bill Colley Show to discuss employee absences. The interview preceded a seminar called "Labor Law Review", a monthly seminar for Human Resource Professionals sponsored by Mackenzie Hughes LLP.



Bill Colley: Many of those listening this morning who are small business owners –even larger businesses as well, have dealt with this. You have some employees who you can count on – they are at work everyday, they may not have missed a day for twenty years, they show up early and they are willing sometimes to stay late. Then on the other extreme, you have those workers who a hang nail keeps them home for a day and they miss time often – one, two, sometimes three days a week, or have an absence nearly every week. We are joined today by Peter Carmen, he's a labor lawyer with the Mackenzie Hughes Law Firm and he's doing a program, a breakfast, a little later this morning at Drumlins in Syracuse to talk about this. Good morning sir, welcome back to the program.

Pete Carmen: Good morning, Bill

Bill Colley: Where do you start with this? If someone is frequently calling in sick you can't just fire them can you?

Pete Carmen: Well, you proceed at your own risk if you do. Because, as we've talked about in previous months, there are so many statutes that an employer, who is acting really with the best motives in mind, might not be aware of that can end up costing the employer a lot of legal fees and liability if they are not careful. So you really need to be a little bit wary in terms of why is the employee absent, what reason they are giving, what reason are you going to rely upon to terminate the employee and then most importantly, how have you treated other employees in this same situation.

Bill Colley: I know that there are people out there who would think that they are susceptible for picking up, for instance, ear infections, and some people obviously pick up more than others or they have problems, every virus catches up with them, or maybe they have an ongoing situation you know or just a low blood count. These things obviously you have to understand, I guess, and you have to realize that not every employee has a great physical constitution and you have to make, I'm sure, some exceptions.

Pete Carmen: Right, and here's the problem: take the employee that you are describing and the employer wants to make a quick decision, the employer, not having a medical degree, as to whether or not the employee legitimately has medical issues or if the employee is a malingerer in either way, whatever decisions the employer makes you are implicating several statutes. If the employee, for example, legitimately does have the medical issues and as a result is missing a lot of work, at some point, on the one hand you need to make the decision as to whether or not the employee can perform the legitimate functions of the position. On the other hand, if you are going to start making the decision that maybe the employee cannot, you are going to have to grapple with FMLA and Americans with Disabilities Act issues.

Bill Colley: I had a boss, when I was working a part time job when I was in college, and I went to him with some advance notice and I told him that I couldn't work on the following Sunday. I think I gave him about six days notice and said "look I've got some obligations and I cannot be here." He was understanding and, of course, when he ran into me in the parking lot at Rich Stadium the following Sunday, it sort of altered that whole discussion later after that. And I think that, you know, if you see an employee who is out golfing after they have called in sick, do you have any rights there?

Pete Carmen: Well, it obviously puts the employer on better footing. But, I'll tell you, I had a case one time where an employee wanted July 3rd or July 5th off and the employee family had a summer camp. Well, for this employer, July 4th was a very big weekend. It was the tourism industry. The employer thought that something smelled rotten, and the employee showed up to work as directed, but an hour into the shift complained of back pain, and went home for back pain reasons. It just smelled bad. The employer hired a private investigator to follow the employee and sure enough saw him up at the parent's camp and on the boat, etc. The employer fired the employee. Well, the employee had produced a note from a physician saying that the employee should have bed rest as needed. The employer, the company, didn't have a medical opinion to say that what the employee was doing was inconsistent with the physician's report that he needed bed rest. That employer ended up having liability.

Bill Colley: We hear about these stories and I remember working in a TV station a few years ago. We had an individual who, whenever she was scheduled to work a major holiday, would call in sick. It did not make her very popular with the other staffers who would come in and cover for her and give up their own family holidays repeatedly. They felt that to be fair you should be on a rotation. She quit eventually on her own. It was getting to the point where I know management was looking to make the change, but you really need to have a lot of detailed information before you do that.

Pete Carmen: That's right Bill, and the other key is, and one of the things that we are going to talk about is, from my prospective, the threshold is having a very good, thoughtful policy in place that anticipates a lot of the situations that we just know from experience happen in work places. The situation that you are describing, for example, where there is an employee who is habitually absent the day before or the day after a long vacation or holiday. A lot of employers

in that circumstance will say that the employee does not get holiday pay if they are absent the day before or after a holiday. Some work places have a policy that says if you are absent the day before or the day after a holiday that you need a physician's note to return to work. These are the types of thoughtful policies that can help address some of these absenteeism problems.

Bill Colley: I imagine that there are some people who would come forward and say that I did not get a promotion because I have been sick a lot, and this is retribution. But an employer cannot make, in some cases much of a judgment about your ability if you are not there very often.

Pete Carmen: That's right, and there are some aspects of some of the statutes that help an employer. For example, under the Family and Medical Leave Act, granted that it applies to employees who have 50 or more employees within a 75 mile radius, but in that statute, the employer does not need to accrue or continue to attribute seniority to an employee during their leave time. So, that can be helpful to the extent that the employer's policy in which they do reviews or bonuses based on a year of actual work, you don't have to count the FMLA time in doing that.

Bill Colley: Peter Carmen is a lawyer with the Mackenzie Hughes law firm and he is conducting a program at Drumlins this morning. Peter, if folks would like to attend, what do they have to do?

Pete Carmen: Well, this morning, they can just come on over to Drumlins, 8:30-9:30. We always promise to keep it to an hour, and we have yet to fulfill that promise, but we will do our best. And, in the future if people want to attend, this is really geared toward employers, they can call Mackenzie Hughes at 474-7571.

Bill Colley: You know, you talked a little bit about some of the decisions an employer has to make and I know from talking to small business owners that they feel that the law is really stacked against them and that it is costing them a lot of money.

Pete Carmen: Yeah, we hear that a lot and it certainly is difficult to conduct a small business because you practically need to be a lawyer to understand all of the different statutes, regulations, and then the case law that applies to a business whether you are the size of Wal-Mart or a two or three person owner shop. It becomes very frustrating for small businesses.

Bill Colley: I guess the statutes; the arguments put in place were protecting the workers with some of these laws were that letting one person go if it is unfair hurts everybody. Is that the type of argument that is being made there?

Pete Carmen: Yes, I always think that is part of the issue when there is a problem in a particular work place. Some legislatures feel the need to legislate throughout the entire state. It becomes very difficult because you paint with such a very broad brush. And you just add these burdens onto employers about having to learn the new requirements, and I should point out that with virtually every one of these statutes, there is record keeping that goes with it. In filing, in postings, and what not, it becomes very difficult. There are some solutions for employers. There are a lot of employee leasing companies, there are a lot of

HR consultants that can help with that, but the ultimate responsibility is still with the employer.

Bill Colley: Well Peter Carmen, thank you for your time, and best of luck this morning.

Pete Carmen: Thank you it was a pleasure.

Bill Colley: Take care sir. Peter Carmen with the Mackenzie Hughes Law Firm joining us this morning talking about what you as a business owner need to know about employee absenteeism, especially when it becomes excessive. Of course, a lot of New York businesses say that they look at all this paper work and the bureaucracy involved in it and they just say ah, North Carolina.