

# Prevent Lawsuits: Implement Good Employment Policies and Gather Evidence Supporting Terminations

## Labor & Employment Law Update

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A recent federal appellate court decision underscores the importance of strong employment policies to establish the company's expectations and potentially save the company from protracted and expensive litigation.

In *Tsegay v. Amalgamated Transit Union, 1235*, the court found that a union refusing to arbitrate a grievance did not breach its duty of fair representation to a union member terminated for using a mobile device while operating a passenger vehicle. No. 15-6102 (6th Cir. Apr. 27, 2016).

After passenger complaints of texting-while-driving, employer Metropolitan Nashville-Davidson County Transit ("MTA") investigated driver Tsegay's conduct, including video footage. MTA concluded that Tsegay looked at an electronic device in his lap several times in violation of company policy, and committed other moving violations which could be separate bases for termination. MTA suspended Tsegay without pay, and then terminated him following a meeting with his union representative for misconduct as well as dishonesty.

The union proceeded through the first two stages of the grievance process: filing a written grievance, and an in-person meeting with MTA, the union president, and Tsegay. The union presented the evidence (video, passenger's letter, and MTA policy regarding cell phones) to its members, who voted not to proceed to arbitration. Instead of appealing this decision, Tsegay sued his union for breach of the duty of fair representation.

Tsegay claimed that the union acted arbitrarily by not going to arbitration. He argued that his cell phone records demonstrated that he was not using his phone while he was driving. However, the appellate court noted that there are many uses of a mobile device that may not appear in cell phone records, such as reading old messages, browsing the internet, and playing games. The appellate court found that the union's decision to not arbitrate was reasonable because it was based on the union members having viewed the evidence.

This case demonstrates how employment policies and gathering the right evidence help avoid lawsuits. In this case MTA demonstrated:

- A written policy prohibiting mobile device use while working and driving;
- Complaints leading to an investigation, and
- A proper investigation showing the likelihood of a violation.

Employment policies should be written to convey several messages including, outlining appropriate conduct, company expectations, and safety considerations. The policies should:

- Communicate clearly to multiple audiences (employees, managers, others working on behalf of the company, and any reviewing administrative agency or jury) of varying education and language fluency; and
- Provide a clear understanding of what constitutes appropriate and acceptable conduct.

Enforcing reasonable and effective policies will provide a legitimate, nondiscriminatory basis for discipline, avoid discrimination/retaliation lawsuits, and help employers successfully protest unemployment benefits. Policies should be reviewed by attorneys to ensure legal compliance.

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