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# ONLY THE PRACTICAL: LESSONS FROM LITIGATION TO HELP AVOID LIABILITY FOR EMPLOYMENT CLAIMS

*By Robert B. Worley, Jr. and Rebecca G. Gottsegen*

State and federal labor and employment laws define what conduct is proscribed, such as employment discrimination based on certain protected classifications, but these laws and regulations generally do not offer guidance on ways employers can avoid liability for legal claims. The information contained in this and following *Tip Sheets* is designed to offer practical guidance for employers to avoid, or at least minimize, the risk of liability, by discussing the facts of various employment cases and the lessons that have been learned.

## 1. Consider Fairness of Actions

How many times have parents preached to their children, "the world is not always fair"? Even in the courtroom, judges instruct juries that, when they deliberate, they are **not** to consider the fairness of the employer's actions but, rather, whether the employer's actions were illegal or discriminatory. Nevertheless, it is a known fact that juries often tend to inject fairness in deliberating whether an employer violated the law. This is because every juror can identify with an employee. As such, jurors generally find it difficult to disregard evidence which, although not indicative of illegal or discriminatory conduct, tends to show poor business judgment or mistakes on the part of supervisors or employers.

While it is not be possible to be "fair" to everyone all of the time, it is wise to consider the following "fairness" questions before taking adverse employment actions. Not only may this exercise thwart a lawsuit, but it will strengthen employee morale.

- Was the employee forewarned of the possible consequences of the misconduct? The exception being in cases of misconduct so serious that any employee reasonably should expect it may result in discharge, such as gross insubordination, theft, sabotage, etc.?
- Is the employer's rule or requirement fair and reasonably related to the orderly and efficient operation of the business?

- Did the employer conduct a thorough, objective, and fair investigation, and was the employee permitted to explain his or her side of the story?

- Is the evidence against the employee substantial?

- Is the employer applying the applicable rule or requirement evenhandedly without discrimination?

- Is the discharge reasonably related to the seriousness of the offense or performance in view of the employee's prior record with the employer?

## 2. Treat Similarly Situated Employees the Same

Most managers and supervisors understand that employers are prohibited from discriminating against employees in the terms and conditions of their employment based on certain factors such as race, sex, religion, color, national origin, age, and disability, in addition to other factors that may be prohibited under local laws. But what does this really mean? Everyone should understand that an employer is prohibited from failing to hire an applicant because of his or her race and from denying an employee a promotion because of his or her gender and may not terminate someone because of their age or religion, to name a few examples. Is that all there is to it? What does it really mean to discriminate in the workplace?

Employers should treat similarly situated employees the same to avoid "discriminating" against them. This principle applies even when there may be good grounds to discipline a particular employee. For example, suppose that two employees of the same race (does not matter which race, as the laws apply to all races) are involved in a fight in the workplace. There are witnesses to the fight and only one of the employees was the instigator or aggressor. That employee admits that he picked the fight and that he got the better of the victim. Management terminates the aggressor and keeps the victim as one of its employees. Fighting such as this violates company policy and, indeed, violates the criminal laws of that particular state (battery). Yet, the aggressor files a lawsuit (or EEOC charge) claiming racial discrimination. Management is perplexed. How can he claim racial discrimination? There were only two employees involved in that altercation, and they were both of the same race. The innocent victim was retained as an employee. Should management have considered anything else before deciding the discipline to impose?

The answer is, yes. The laws of discrimination do not prohibit employers from disciplining or taking other adverse action against employees absent some form of discrimination. By definition, discrimination means treating some different from others. Therefore, before an employer disciplines an employee, the

employer should always consider how other employees have been treated under the same circumstances (how were "similarly situated" employees treated?). Do not react too quickly even though discipline may seem justified, such as in the case of a violation of company policy. If others in the past have been given more lenient treatment, the employer may be committing unlawful discrimination by treating someone of another classification differently for the same offense. In this hypothetical about the fight of two employees of the same race, the employer should have considered whether employees of a race different from the two in the most recent fight were ever disciplined. Thus, if two employees were in a fight previously, and they were of a race different from the two in the more recent fight, and the ones in the past were merely suspended rather than terminated, the employer likely is committing unlawful discrimination by terminating the aggressor in our hypothetical.

This practical advice is grounded in the laws of discrimination. According to the case law, a plaintiff can rebut an employer's articulated nondiscriminatory reason for its actions by showing that similarly situated people were treated differently. Courts have held that "[e]mployees are similarly situated when they 'are involved in or accused of the same offense and are disciplined in different ways.'" *Harvey v. Anheuser Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994) (quoting *Boner v. Board of Commissioners*, 674 F.2d 693, 697 (8th Cir. 1982). Instances of such disparate treatment can establish "pretext," meaning that the employer's stated reason is not worthy of belief; thus, bolstering the discrimination claim.

### 3. Documentation Must Be Accurate and Thorough

a. Document Performance Problems

Employers are always told to document performance problems. Experts and novices in the field of human resources can recount that mantra: document, document, document. Why is this so? Are there laws that require such documentation? And exactly what is to be documented?

The employment laws do not require that performance problems be documented. It is true that some employment laws, such as those pertaining to governmental contractors, require that certain employment records be kept, but those do not pertain to an employee's substandard performance. Practically speaking, however, it is best to document performance problems to verify that the problems occurred in the event the problem employee later claims that he or she was terminated for an unlawful reason, something other than the legiti-

mate reason of poor performance. Therefore, the purpose of documentation is to create evidence that the employer was acting for legitimate reasons, not discriminatory ones.

Courts are more inclined to grant an employer summary judgment and dismiss lawsuits where there is documentation supporting the employer's legitimate, nondiscriminatory reason for taking adverse action against the employee. For example, in a recent case in federal court in Louisiana, an employee sued his former employer, claiming that he was terminated because of his age. The court looked at the undisputed facts and determined that the employee was not discriminated against on the basis of his age, but rather, he was terminated because he repeatedly failed to perform the requirements of the job, as evidenced by the supporting documentation. In light of such documentation, the district judge entered summary judgment in the employer's favor. *Chapman v. Durakon Industries*, Civ. A. No. 97-3979, 1999 WL 10380 (E.D. La. Jan. 8, 1999).

b. Don't Overdo Documentation

On the other hand, there is such a thing as overdoing the documentation. A "paper trail" leading to a person's termination is sometimes as bad as no documentation at all. This is because the employee is being treated differently from other employees; *i.e.*, receiving discriminatory treatment. So, unless an employer has a practice of documenting every little performance problem for every single employee, the "paper trail" may be used against the employer in a lawsuit to show discriminatory treatment.

c. Preserve Documentation

Documentation, be it employee evaluations, investigatory notes, or documentation of employees' job performance, should be typed or neatly written in a clear, concise manner. That does not mean that you must carry a laptop computer with you at all times; however, notes taken on napkins, envelopes, post-it notes, or a doodle pad must be transcribed into a coherent format so that another person reading them, possibly a jury, would understand what took place and understand why the employer acted as it did. The best rule of thumb: only preserve writings that you would not mind having blown up and shown to a jury in a courtroom or quoted in the newspaper.

Documentation of investigations should be kept in separate, confidential files to avoid liability for defamation and/or invasion of privacy. To that end, e-mail should not be used as the medium when conducting investigations or as the method of preserving documentation of investigations. And only those who

"need to know" about the investigation (or performance problem) should be informed.

To be continued . . .

## CLARIFICATION OF "GUST" AMENDMENT EXTENSION

*By Timothy P. Brechtel*

Last month's *Tip Sheet* included an article regarding the extension of the deadline for amending qualified plans to comply with the "GUST" law changes. The article noted that the IRS extended the December 31, 2001 deadline to **February 28, 2002**. The article should also have indicated that any plan on a fiscal (non-calendar) plan year has until the end of the first plan year beginning in 2001 to act, if this is later than February 28, 2002. As noted in the article, plans directly affected by the September 11 terrorist attacks may apply for an even later deadline. We regret the oversight.

*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

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