

Louisiana Employment Law Letter

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EMPLOYMENT RECORDS

Firing 'tips': Inconsistency and poor documentation send employer to trial

Many of you have a formal or informal process you follow when making and carrying out the decision to fire an employee. But is your process designed to minimize the possibility of employment discrimination lawsuits and liability? Do you even have such a process in place?

When an employee violates a work rule, you should always look beyond the circumstances of the immediate conduct to determine the appropriate disciplinary action unless unique or particularly egregious circumstances require an immediate discharge. The following case shows how important it is to be evenhanded when you dole out discipline or fire an employee and to accurately document the grounds for discipline or discharge.

Waitress fired for stirring the pot

A popular seafood restaurant chain fired a Hispanic waitress for engaging in workplace misconduct. Her manager prepared a contemporaneous report documenting two specific reasons for the discharge:

1. she had been "working behind the scenes attempting to lure fellow employees to leave" the restaurant; and
2. she was "spreading rumors about a manager being fired for calling in sick."

The alleged subterfuge and rumors, however, weren't the waitress' first infractions. She'd received disciplinary reports on two previous occasions, but they weren't mentioned in the documentation as the reasons for her discharge.

The plot (or should we say 'pot'?) thickens

Under every good plot, there's usually an even better subplot, and this case was no exception. A white restaurant employee had also allegedly offered to use her connections at a competing

restaurant chain to obtain jobs for herself and her co-workers. The same manager who fired the Hispanic waitress was aware of the white employee's conduct but didn't take any action against her.

The Hispanic waitress sued her employer for national origin discrimination, claiming she was fired in violation of Title VII of the Civil Rights Act of 1964. The trial court dismissed the case before trial, reasoning that she couldn't show that the restaurant's reasons for discharging her were false or that the action was really motivated by discriminatory intent. She challenged the court's ruling in the U.S. Fifth Circuit Court of Appeals in New Orleans.

Court scrutinizes restaurant's story

To win the appeal, the waitress had to raise a question about or rebut each of the restaurant's stated reasons for firing her. In response to the first reason (*i.e.*, she conspired with others to "lure fellow employees to leave" the restaurant), she pointed to the white restaurant employee who had engaged in similar conduct but was never disciplined. Specifically, she submitted sworn statements from two other restaurant employees who testified that the white employee had used her connections at the competing restaurant to obtain job offers for co-workers.

The restaurant, on the other hand, tried to distinguish the two employees' misconduct. It argued that it was justified in treating the white employee more leniently because the Hispanic waitress' conduct was more damaging to the business. According to the restaurant, the waitress had "attempted to facilitate a coordinated departure of employees" while the white co-worker had merely tried to help others get new jobs.

Although several restaurant employees said they believed the Hispanic waitress was planning to stage a "coordinated" walkout during a shift, the Fifth Circuit ruled that the restaurant couldn't rely on their statements. The reason for the court's ruling in that regard is something every one of you should know. The court noted that *the waitress' discharge report referred only to an attempt to "lure fellow employees to leave" the restaurant, not a "coordinated" walkout.*

As a result, the court viewed the white employee's conduct to be virtually identical to the waitress' conduct. And by showing that a similarly situated white employee was arguably treated more leniently than the Hispanic waitress was treated under nearly identical circumstances, the latter had effectively rebutted the restaurant's first nondiscriminatory reason for her firing.

The waitress also raised a question about the restaurant's second reason for letting her go. In the discharge report, the restaurant accused her of "spreading rumors about a manager being fired for calling in sick." The manager who fired the waitress and prepared the discharge report adamantly maintained that fellow co-workers had reported the rumor to him. But he ultimately couldn't support his story.

Additionally, the report failed to provide any details about the alleged rumor, such as the identity of the manager who had supposedly been fired. The waitress offered evidence showing that the manager in question wasn't absent from work and was actually on duty the day that she supposedly spread the rumor. Thus, she rebutted the restaurant's second reason for her discharge by showing that the rumor-spreading allegation arguably wasn't the real reason she was fired.

The restaurant also argued it fired the waitress in part because she received two previous disciplinary reports (the white employee hadn't received a single disciplinary report). Company

policy allowed the discharge of any employee who received two or more disciplinary reports. Thus, the restaurant argued it was justified in treating the waitress and her white co-worker differently.

The Fifth Circuit, however, rejected that argument because *the restaurant didn't rely on the waitress' disciplinary history in the report documenting her discharge*. Thus, the appellate court reinstated the waitress' case. *Ramirez v. Landry's Seafood Inn & Oyster Bar*, 280 F.3d 576 (5th Cir. 2002).

Ask yourself the tough questions, and tell it like it is

Before you fire an employee, ask yourself the following questions:

- Have I consistently and fairly applied the company's policies and procedures?
- Have any similarly situated employees behaved similarly, and what were the consequences?
- Have I thoroughly investigated the incident? Have I been objective and gathered all the facts?
- Is progressive discipline warranted under my company's policies, and have I consistently followed that process under similar circumstances?
- Have I given the accused an opportunity to present her side of the story and followed up on any leads or conflicts that arose?
- Does the discipline match the infraction, and am I being fair and objective?

"Similarly situated employees" are generally those who hold similar jobs at a comparable level in the organization, usually in the same department or under the same supervisor, and are subject to the same work rules and engage in the same conduct under nearly identical circumstances. Once you determine that employees are similarly situated, you need to ask yourself if you've treated them differently under nearly identical circumstances.

For example, if you fire a white employee for stealing but merely issue a disciplinary action to a black co-worker who stole a comparable amount of money, had the same supervisor, held a similar job at a comparable level in the organization, and was subject to the same work rules, you've likely opened yourself up to a race discrimination claim by the white employee. So make sure you're treating similarly situated employees in an evenhanded fashion before you take an adverse employment action (*e.g.*, refusal to hire, demotion, pay cut, or discharge).

More important, this case should teach us an important lesson about documentation. The restaurant probably had several solid grounds to discharge the Hispanic waitress. The restaurant's manager, however, neglected to note her disciplinary history in the termination report and failed to accurately characterize the nature of her infraction (*i.e.*, attempting to stage a coordinated walkout during a shift).

As a result, the Fifth Circuit didn't consider the disciplinary record as a reason for the waitress' discharge (despite the restaurant's claim to the contrary) and concluded that the Hispanic and

white employees' infractions were similar for the purpose of the waitress' discrimination claim. That meant the difference between the lawsuit's dismissal and a trial for the restaurant.

If you choose to document the reasons for a discharge in a report *and* craft those reasons in a specific rather than general fashion, your report must scrupulously articulate each and every reason you intend to rely on for the firing. If you don't, your hands will be tied and you won't be able to rely on valid but undocumented grounds for discharge to avoid trial or, worse, liability.

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