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LESSONS LEARNED FROM LITIGATION TO HELP YOU AVOID EMPLOYMENT CLAIMS: PART II

By H. Mark Adams, Robert B. Worley, Jr. and Rebecca G. Gottsegen

In the January 2002 issue of Jones Walker's *Labor and Employment Tip Sheet*, we continue our series on practical points that can help you avoid employment litigation and bolster your defenses if (when) you are sued. In our December issue, we discussed the importance of: 1) Fairness; 2) Consistency; and 3) Documentation. The following points are equally important.

4. Use Progressive Discipline Except When Immediate Termination Is Justified

The law does not require you to give your employees progressive discipline—a second or third chance before termination. Nevertheless, when you get a charge of discrimination, the Equal Employment Opportunity Commission (EEOC)—or when you get sued, your employee's attorney—always wants to know whether you've been fair and even-handed with your employees. They want to know if progressive discipline was provided.

Not only is a progressive discipline policy a good strategy for showing you are fair and even-handed, rather than arbitrary and discriminatory, it also fosters positive employee relations. To err is human. Even some of the best employers have had to learn this lesson the hard way, and most agree that, depending on the nature of the offense, progressive discipline is usually the best practice. For example, if your employee is lackadaisical in his job performance, termination may not necessarily be the most appropriate response (it certainly won't motivate him to improve), even though the law does not prohibit termination based on laziness. A good counseling session or two may be all you need to correct the problem. That still leaves room for immediate termination when the offense is something more serious, like threats of violence against coworkers, insubordination, embezzlement, or drug use.

Implementing a practice of progressive discipline doesn't mean you have to adopt a rigid, multistep discipline process. Leave yourself some leeway to discharge immediately when the situation calls for it, rather than bind yourself to a verbal warning for a first offense, a written warning for the second offense, suspension for the third offense, and so on. A good progressive discipline system simply involves giving your employees a reasonable opportunity to correct

most performance problems and saving the ultimate penalty of immediate discharge for repeat offenders and more serious offenses.

5. <u>Avoid Prior Inconsistent Statements. They Almost Always Come Back to Haunt You</u>

Most lawsuits involve credibility determinations. Each side presents a different account of what happened, and it's left to the finder of fact, whether judge or jury, to determine who's telling the truth. For this reason, your credibility is paramount in defending yourself against employment discrimination claims. So it's critical that you act consistently in dealing with employment problems to minimize your risk of being sued and to increase your chances of winning when you are.

- ***Don't "inflate" performance evaluations***

Too often, your supervisors are guilty of "grade inflation" when filling out performance evaluations. When an employee is terminated for poor performance but his written evaluations show his performance to be satisfactory or better, it makes the case very difficult to defend. Your articulated reason for terminating your employee looks like a sham to hide a possible discriminatory motive, and you're left to explain why your evaluators didn't do their jobs. How are you going to win that one? Write this down and memorize it: It's far better not to do employment evaluations at all than to have evaluations that aren't filled out accurately.

- ***Don't "Sugarcoat" Your Reasons for Discharge***

Many employers ask, "Do I have to give a reason for discharge?" The answer is "No," but that's not the question you should be asking. The question you should be asking is, "Should I give a reason?" and the answer is, "Absolutely, and it better be the real one." All too often, employers make the mistake of "sugarcoating" their true reasons for disciplining an employee. Big mistake. It's always best to tell your employee "straight up" what the problem is rather than resorting to some contrivance like "job elimination" or "restructuring" in an effort to soften the blow or let your employee down easily. You may have the best intentions, but if your employee makes a discrimination claim, you'll have to come clean with the real reason and explain why the reason you gave your employee was false. You never come off looking good in that scenario. More than likely, the jury's reaction will be, "Yeah, right."

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It's true that most employees are employed "at will," meaning you don't need a reason—you can even have a bad reason—to terminate their employment so long as your reason is not unlawful, such as race, sex, age, religion, retaliation, etc. But when an employee sues you for discrimination, you can't defend yourself on the ground that the employee was "at-will" and, therefore, you didn't need a reason. You have to be able to articulate a legitimate, non-discriminatory reason to support the firing. If you can't, you lose. And if it's not the reason you gave your employee when you fired him, you'll still probably lose.

- ***Don't Give a Letter of Recommendation to an Employee You Fired for Cause***

Whether it's because you're motivated by a misplaced sense of humanitarianism or because you think it will reduce your chances of being sued, it's a mistake to try to appease an employee you've just fired for cause by giving him a letter of recommendation he doesn't deserve. Unless your employee has signed a release of claims and the recommendation letter is part of the deal, chances are your letter will show up as Exhibit A when the employee sues you for discrimination. Picture yourself squirming on the witness stand when your employee's attorney asks, "Why would you give my client such a glowing recommendation if you fired her for poor performance?" or, "Do you always reward your employees for their faithful and loyal service and consistent good performance by firing them?" These are questions you don't want to have to answer, especially in a courtroom.

Here's another reason not to give out gratuitous recommendations for bad employees: Let's say you've just fired an employee for showing up drunk or fighting with a coworker, but you feel sorry for his family so you give him a letter of recommendation to help him find another job. It works. He gets hired by your competition down the street based on your recommendation. Then he shows up drunk again and hits a coworker over the head with a tire iron. Guess what happens next? Your competitor sues you for negligent referral. Get the picture?

6. <u>Always Rely on Objective Criteria When Making Employment Decisions</u>

When making hiring or promotion decisions or selecting employees for layoff, rely on objective criteria such as work experience, education, scores on preemployment tests, performance evaluations, or attendance records. Otherwise, your decision may appear suspect to the disappointed employee or appli-

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cant and to a judge or jury if the employee asserts a claim for discrimination. When you rely on clearly articulated objective criteria, even the most disappointed employee is less likely to challenge your decision. And a judge or jury is more likely to rule in your favor if you're sued.

In our next issue of Jones Walker's *Labor and Employment Tip Sheet*, we'll focus on the perils of loose talk, the pitfalls of employment contracts, avoiding defamation claims, guidelines for conducting an effective investigation, and the importance of supervisor training. Stay tuned.

NEW SAVER'S CREDIT HELPS LOWER-INCOME EMPLOYEES AND (MAYBE) THEIR HIGHER-INCOME COWORKERS

By Timothy Brechtel

Are your lower-income employees reluctant to make 401(k) plan contributions? If so, it can be a problem for your higher-income employees, since the amount they can save is largely dependent on the amount lower-income employees save (due to nondiscrimination rules). Starting in 2002, the Saver's Credit will provide a major incentive for lower-income employees to contribute. Qualifying individuals will get a tax credit of 10-50% of the first $2,000 they contribute to a 401(k) plan, and the amount contributed is deducted from their taxable income. The 50% credit is available to married individuals with up to $30,000 of adjusted gross income and single individuals with up to $15,000 of adjusted gross income. The credit percentage decreases as income increases. Married couples making more than $50,000 and singles making more than $25,000 are ineligible for the credit.

Example: A married couple earning $34,000 per year elects to contribute $2,000 each to their respective employer's plan, reducing their adjusted gross income to $30,000. The deferral alone results in a $600 tax savings (15% of $4,000), and the Saver's Credit reduces their remaining tax bill by another $2,000 (50% of $4,000).

If employees who take advantage of the Saver's Credit previously did not contribute, their contributions will increase the average deferral percentage for your nonhighly compensated employees, making it easier for your plan to pass nondiscrimination testing and perhaps allowing your more highly compensated employees to save more.

The Saver's Credit has not received the attention it deserves, so you may want to publicize it to your employees. The IRS has provided a sample notice—see IRS Announcement 2001-106—that can be used to explain the credits. You can download copies of the notice from the IRS's website: http://ftp.fedworld.gov/pub/irs-drop/a-01-106.pdf.

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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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