



**TOP TEN MISTAKES EMPLOYERS MAKE
AND HOW TO AVOID THEM**

Presented by

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Top Ten Mistakes Employers Make And How To Avoid Them

I. Not Training Managers On Compliance With The Basic Requirements Of Employment Laws

- A. Untrained managers are more likely to violate the law (by accident or intentionally).
 - 1. Sometimes, unlawful conduct is not entirely obvious, so simply relying on “instinct” is not a good method for ensuring legal compliance.
 - 2. For example, what a manager may consider to be “horseplay” can constitute unlawful harassment; a termination based on certain types of absences can be the basis for a FMLA violation; and wanting to hire a “trainable” or “young tiger” employee can be proof of age discrimination, etc. Or, the ever present “retaliation” (especially post-employment retaliation) trap.
- B. Ignorance of the law is no defense – in fact, it compounds liability.
 - 1. If a company’s managers are ignorant of the employment laws, that is proof that the company willfully violated the laws by not training its managers to comply with them.
 - 2. As the Seventh Circuit Court of Appeals held in affirming a liquidated damages award under the ADEA, “[the defendant-employer’s] general manager did testify that he was not aware that it was illegal to discriminate on the basis of age, but as this circuit has held, leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an ‘extraordinary mistake’ for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference.” *Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771, 778 (7th Cir. 2001).
 - 3. And, in a sexual harassment case where the employer had failed to train its managers, one judge wrote, “[t]he Court is equally appalled by the failure of a company as large as SSS to take steps to address workplace sexual harassment issues more generally. . . . SSS failed to train its management staff to investigate and handle allegations of sexual harassment or to advise its supervisors that its disabled clients were capable of engaging in sexual harassment. This utter failure of SSS to address sexual harassment at the workplace constitutes discrimination under Title VII.” *Van Horn v. Specialized Support Servs., Inc.*, 241 F. Supp. 2d 994, 1012 (S.D. Iowa 2003).

- C. Training managers and employees helps avoid liability and punitive damages, and wins over jurors.
1. Proof of training can be used as part of the company's defense against certain types of harassment claims under the well known *Ellerth/Faragher* affirmative defense. *See, e.g., Casiano v. AT&T Corp.*, 213 F.3d 278, 286 (5th Cir. 2000) (fact that employer trained the plaintiff on its EEO and harassment complaint procedures supported its entitlement to summary judgment under *Ellerth/Faragher* against his "same sex" harassment claim); *Holly D. v. California Inst. of Technology*, 339 F.3d 1158, 1177-78 (9th Cir. 2003) (finding that the employer fulfilled the first element of the *Ellerth/Faragher* defense as a matter of law when it transferred alleged harasser to another department and reminded him of its sexual harassment policy).
 2. Proof of training can assist the company in avoiding liability for punitive damages under *Kolstad v. American Dental Assn.*, 119 S. Ct. 2118, 2129 (1999) (holding that "an employer may not be held vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'"); *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477 (5th Cir. 2002) (fact that company gave training on sexual harassment allowed it to successfully invoke the *Kolstad* defense to punitive damages).
 3. Proof of training on HR issues shows jurors that the company "puts it money where its mouth is." Conversely, lack of HR training arguably demonstrates that the company is not truly committed to implementing its EEO policies, but instead is merely paying "lip service" to the idea.
- D. Some employment laws provide for *individual* liability (are you paying attention now!).
1. 42 U.S.C. § 1981. *See Foley v. University of Houston System*, 355 F.3d 333, 337-38 (5th Cir. 2003).
 2. Fair Labor Standards Act. *See Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999).
 3. Family and Medical Leave Act. *See* Ann K. Wooster, J.D., INDIVIDUAL LIABILITY UNDER FAMILY AND MEDICAL LEAVE ACT, 170 A.L.R. Fed. 561(2001 & 2004 Supp.).
 4. It is a common tactic for plaintiffs lawyers to sue individual managers. Plaintiffs lawyers do this for many reasons, including: (a) to try to keep the case in state court, rather than federal court (where employers generally have a better chance of winning); (b) to ensure someone at the

company “takes ownership” of the case and has a motive to settle it; and (c) to try to cause tension between the individual manager and the company, which may work to plaintiff’s favor.

II. Not Filing A First Report Of Injury Or Illness When It Should Be Filed

- A. Texas Labor Code Section 409.005(a)(1) provides in relevant part, that “[a]n employer shall report to the employer’s insurance carrier if . . . an injury results in the absence of an employee of that employer from work more than one day.” The report must be made within eight days.
- B. Employers that fail to comply with this law, and ultimately terminate the injured employee, often lose workers’ compensation retaliation cases. *See, e.g., Glass v. Amber*, 2002 WL 31430097 (Tex. App.-Houston [1 Dist.] Oct 31, 2002, pet. denied); *Wal-Mart Stores, Inc. v. Holland*, 956 S.W.2d 590 (Tex. App.-Tyler Jul. 31, 1997), *partially reversed on other grounds*, 1 S.W.3d 91 (Tex. 1999).
- C. On the other hand, employers that comply with this law often win them. As the Fifth Circuit observed in affirming summary judgment against a workers’ compensation retaliation case brought against the City of Nacogdoches, “. . . the City, not Burch, filed the [workers’ compensation] claim. It would seem highly irregular, to say the least, if the City then determined to terminate Burch for filing a claim when the City itself had filed it.” *Burch v. City of Nacogdoches*, 174 F.3d 615, 623 (5th Cir. 1999).
- D. Thus, you should always be sure to file this form in a timely fashion. Doing so allows you to start the story out right – “we immediately did the right thing, and never stopped doing so – that’s just what we do here at XYZ company,” sounds a lot better than “from the very start, XYZ company shirked their legal responsibilities and showed a naked hostility towards employees whose only crime was to get injured while working for them.”
- E. Extra tip – send flowers and a “get well” card at the same time you file the first report of injury or illness. Jurors love the “human touch.” Indeed, it is good practice to do at least one “extra” nice thing for any employee before they are terminated. A kind gesture towards even the most belligerent employee will often show jurors that the company really is a decent bunch of people, and was not “out to get” the plaintiff.

III. Disasters In Documentation

- A. Desk files a/k/a the “unauthorized secret file that Manager X covertly created in a surreptitious and sinister attempt to destroy my client’s career.” Generally, the creation of “desk files” is not a good idea because: (1) no notice to the employee or opportunity to improve; (2) inconsistent with performance management system; (3) easy to portray as an attempt to “build a file” rather than validly address a performance issue; and (4) often contested as to when the file was truly

created (*i.e.*, before or after termination). A sample quote, “[t]he evidence indicates that if The Gap were genuinely concerned about Laxton’s asserted performance-related problems, it would have permitted Laxton the opportunity to explain or to improve her conduct, but it did not do so. . . . Laxton did not even receive a copy of the Final Written Warning until Saturday, August 14, just one working day before her discharge.” *Laxton v. Gap Inc.*, 333 F.3d 572, 581 (5th Cir. 2003).

- B. No documentation to prove the basis for the employee’s termination. Example: The Gap fires a manager allegedly based on employee complaints. “Yet, at trial, [The] Gap produced no contemporaneous written documentation of any employee complaints, despite testimony that the corporation abides by rigorous record-keeping policies.” *Laxton v. Gap Inc.*, 333 F.3d 572, 580 (5th Cir. 2003). This lack of documentation (and other problems) caused the Fifth Circuit to reverse a judgment as a matter of law that had been entered for The Gap. Rule of thumb: “if it wasn’t documented, it wasn’t done.” The plaintiff’s lawyer will be arguing that very point, and many jurors expect companies to have documentation to back up their claims against a terminated employee. Even the Fifth Circuit has held that a jury may infer discrimination when an employer terminates an employee for alleged “poor performance,” but has no documents to prove the alleged poor performance. *See Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1190 (5th Cir. 1992). In that case, the Court observed:

Through Lloyd’s immediate supervisors, Tom Marshall and Edward Schmitt, and two other Georgia Gulf executives, Henry Lloyd and Dennis Chorba, Georgia Gulf attempted to show that Lloyd was terminated because of consistently poor performance. These four men testified to numerous examples of Lloyd’s poor performance. Marshall testified that he terminated Lloyd because he had lost confidence in Lloyd’s ability, and that his doubts had persisted for months before he finally decided to fire Lloyd. Ultimately, Marshall felt that the job could be done better, and that it would benefit the company to replace Lloyd.

Lloyd presented the jury with a number of matters which, taken together, could lead to the inference that Georgia Gulf did not fire him because his work was unsatisfactory. Despite the extensive testimony regarding Lloyd’s unsatisfactory performance, Georgia Gulf failed to produce a single document to show that Lloyd’s supervisors were unsatisfied with his work. At the time of his termination, nothing in Lloyd’s employment file reflected negatively upon his performance. Georgia Gulf admits to the lack of documentation, but argues that it was Marshall’s philosophy not to generate written reprimands, warnings, and the like for management level employees.

We have very recently held that, when an employer's stated motivation for an adverse employment decision involves the employee's performance, but there is no supporting documentation, a jury can reasonably infer pretext. *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 124 (5th Cir. 1992). *See also Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1465 (5th Cir. 1989) ("where the only evidence of intent is oral testimony, a jury could always choose to discredit it.") (quoting *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 262 (3d Cir. 1987), *cert. denied*, 488 U.S. 1004, 109 S.Ct. 782, 102 L.Ed.2d 774 (1989)); *Guthrie v. J.C. Penney Co.*, 803 F.2d 202, 207 (5th Cir. 1986). The jury heard a great deal of testimony regarding Lloyd's performance problems, but concluded that he was terminated in violation of the LADEA. This conclusion is reasonable in light of the complete lack of documentation to support Georgia Gulf's assertion that Lloyd's performance was unsatisfactory.

Id. at 1194-95.

- C. Padded performance reviews – I'm great, I said you're great, but now I want to fire you for poor performance after you have: filed a workers' compensation claim, filed an EEOC charge, made an internal complaint of discrimination or harassment, etc. [or fill in the blank with other protected activity]. *See Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 43 (5th Cir. 1992 ("We find it surprising that suddenly, after Shirley filed her EEOC complaint, problems with her work surfaced."). Ironically, very often the reason the employer lacks documents to prove the basis for its termination is because it has padded the employee's performance reviews over the years. In those cases, the employer is then put in the unenviable position of arguing that it "exaggerated" the quality of the employee's performance out of kindness and a general philosophy of not being overly harsh with its workers. Jurors and judges often do not buy that argument. *See, e.g., Lloyd*, 961 F.2d at 1194-95.
- D. Mean spirited memos. Picture your memo blown up in front of a jury. Does it show care, compassion, calmness, and commitment to your company's core values? Or, is it a vision of venom, dripping with disgust and a desire to deep six the alleged dirt bag employee? If the latter, rewrite – and remember, jurors like Mr. ☺. In fact, a big tip to follow is: don't terminate an employee unless you have first done something "extra" nice for them. At trial, jurors often don't respond well to a case that consists entirely of attacking the plaintiff. However, jurors do respond favorably to the company when the company has done something "special" or "nice" for the employee. So, always do something nice – consider it insurance against an adverse jury verdict.
- E. EEOC Position Papers/TWC Hearings: The fire next time (*i.e.*, the lawsuit), and how you can pour fuel, rather than water, on it by presenting inaccurate or

incomplete information. See *McInnis v. Alamo Comm. College Dist.*, 207 F.3d 276, 283 (5th Cir. 2000) (reversing summary judgment that had been entered for the employer partially because the employer's report to the EEOC "contained false statements . . ."); *Aust v. Conroe Indep. Sch. Dist.*, 153 S.W.3d 222 (Tex. App. – Beaumont 2004, no pet.) (shifting explanations given by the employer for its decision to terminate the plaintiff established a fact issue over whether its decision was motivated by unlawful discrimination); *Bowen v. El Paso Elec. Corp.*, 49 S.W.3d 902 (Tex. App. – El Paso 2001, no pet.) (reversing summary judgment that had been entered for the employer because the evidence showed that the employer gave Bowen some reasons for her termination, but then it gave additional and different reasons during a TWC unemployment hearing).

- F. Sloppy Docs. Be precise in your language. You will have to live with this document for the rest of your life – including during your cross-examination at trial. Imprecise wording can kill the company in defending its actions. See, e.g., *Southwestern Bell Tel. Co. v. Garza*, 58 S.W.3d 214, 229 (Tex. App. – Corpus Christi 2001), *aff'd in part, rev'd as to punitive damages*, 164 S.W.3d 607 (Tex. 2004). In *Garza*, the court of appeals addressed a claim of workers' compensation retaliation, and stated, in part:

There is no evidence that Southwestern Bell ever demeaned Garza's injury, because the injury, in fact, was so minor that it was a non-issue. However, Southwestern Bell's negative attitude toward medical claims in general and Garza's injury in particular was not only attested to by witnesses, but is chronicled in its own documents. Garza was initially only counseled to work effectively with others on the day of the accident. **Only upon seeking medical attention and causing a worker's compensation claim to be filed, did management find reason to target Garza and to embark upon a discriminatory course of conduct giving rise to an illusory excuse for termination.**

Initial investigations did not recommend serious action against Garza. Gonzalez investigated the entire incident and determined only that both workers should be "placed on a step of positive discipline for effectiveness with others." No discipline was contemplated against Garza for safety violations. To the contrary, Garza was assigned to complete the project he was working on at the time of the accident because he was, according to management, one of the company's most proficient employees, to a fault.

Only after Garza sought medical treatment on October 24, 1994 did management change its attitude. Thereafter, the uncontroverted evidence established Gonzalez's and Rider's animosity to the claim process which they directed towards Garza. Rider immediately rejected Robles' recommendation in his "Flash Report" wherein Robles had indicated that no further investigative

committee would be appointed. Rider summarily changed the “Flash Report” to reflect that the “accident will be investigated....” **Rider first wrote “and if employee contributed to the cause of the accident, disciplinary action will be initiated,” but subsequently crossed out the conditional language, and, in very telling language, decisively stated, “disciplinary action will be administered after investigation.” Thus, it was a foregone conclusion that Garza would be punished, regardless of the outcome of the investigation. Garza was about to be subjected to what management would later admit was pure “window dressing.”**

The investigative committee, which was composed of labor and management, concluded that it could not “determine the exact cause of the accident” because there were conflicting stories and no witnesses. It suggested some measures that could be taken with respect to both employees, but never mentioned disqualification from driving. Neither of the preliminary investigations recommended such a devastating measure, because, clearly Garza was not driving when he was injured.

The negative attitude continued. Rider and Gonzalez undertook a campaign of resurrecting every miniscule incident in Garza’s twenty-year work history, whether related to driving or not, and whether any fault was allocated to Garza. Gonzalez then, at the behest of Rider, hastily singled out Garza for unnecessarily harsh punishment, which was implemented the very next day. Had Garza merely sought first aid or hidden his injury through subterfuge by taking vacation as Hernandez had once done instead of seeking medical attention, the incident would not have been placed in his record. By seeking medical attention, incidents are transformed into “accidents” which may be used as grounds for future discipline, as was done with Garza. The jury was justified in concluding that Southwestern Bell employees are dissuaded from exercising valuable statutory rights under a fear of employment repercussions, including the forfeiting of their employment.

Id. (emphasis added).

- G. E-mails. From foolish creation, to lack of preservation, to (yikes!) spoliation. E-mails often can hurt you in many ways. *See, e.g., Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) and *Zubulake v. UBS Warburg LLC*, 2004 LEXIS 13574 (S.D.N.Y. 2004) (holding that defendant failed to preserve relevant e-mail and concluding that its destruction of the e-mail amounted to spoliation of evidence that justified an adverse jury instruction stating that UBS destroyed relevant documents that would have been helpful to Zubulake’s case). *See*

www.seyfarth.com/firm/news/management for more information. A firm sponsored “Management Alert” dated August 16, 2004, discusses this issue and gives guidance on e-discovery issues. Update: on April 6, 2005, Zubulake’s sex discrimination claim against UBS went to a jury for deliberation, and she was awarded 29.2 million dollars. 20 million dollars of that amount was punitive damages. The court’s jury instruction probably did not help UBS.

- H. Basic Lesson re: E-mails: Do not write it in an e-mail unless you would be proud to have it blown up in front of a jury of strangers who do not like you to begin with. And, if a claim is brewing, preserve, preserve, preserve.
- I. Too subjective. There is nothing *per se* illegal about a subjective employment decision. However, when an employer offers subjective reasons to justify the termination of an employee, it must “articulate in some detail a more specific reason than its own vague and conclusional feeling about the employee.” *Patrick v. Ridge*, 394 F.3d 311, 317 (5th Cir. 2004). For example, the Fifth Circuit has found that “a hiring official’s subjective belief that an individual would not ‘fit in’ or was ‘not sufficiently suited’ for a job is at least as consistent with discriminatory intent as it is with nondiscriminatory intent” *Id.* at 318. Therefore, when making – and documenting – an employment decision, be as objective and fact-based as possible. Documents that recite only subjective rationales for a decision are easily subject to attack, especially if the decision-maker arguably has some underlying motive to want to terminate the employee. *See, e.g., Koettner v. Northrop Grumman Comm. Information Servs., Inc.*, 2005 WL 781708 (N.D. Tex., Apr. 6, 2005) (denying employer’s motion for summary judgment in an age discrimination and retaliation case because the employer’s explanation for its decision to terminate the long-term plaintiff was too vague and seemed suspicious given that one of the decision-makers in his termination was a long-time enemy of his at the company).

IV. Not Following Your Own Company Policies Without A Good Reason

- A. Employers sometimes forget to read their own policies when proceeding with a RIF or an employee termination. This can plant a very problematic seed into that RIF or termination.
- B. For example, in *Tyler v. Unocal Oil Co. of Cal.*, 304 F.3d 379, 396 (5th Cir. 2002), the Fifth Circuit held:

An employer’s conscious, unexplained departure from its usual policies and procedures when conducting a RIF may in appropriate circumstances support an inference of age discrimination if the plaintiff establishes some nexus between employment actions and the plaintiff’s age. *See EEOC v. Texas Instruments*, 100 F.3d 1173, 1182 (5th Cir. 1996); *Moore v. Eli Lilly Co.*, 990 F.2d 812, 819 (5th Cir.), *cert. denied*, 510 U.S. 976, 114 S. Ct. 467, 126 L.Ed.2d 419 (1993). Here, such a nexus was established. Ponville

testified that he based his decisions on performance, yet he testified that he was not familiar with Hough, Earles and Burkett and their job performance. Hough, Earles and Burkett introduced evidence that they had received positive performance appraisals in recent years. *Cf. Risher v. Aldridge*, 889 F.2d 592, 598-99 (5th Cir. 1989) (plaintiff failed to allege a nexus with failure to consider written performance appraisals when employer explained why the written appraisals were unreliable and that decision-maker was personally familiar with plaintiff's performance). Ponville knew that he was supposed to keep documentation of the reasons for adverse employment decisions, yet he did not do so.

Hough, Earles and Burkett's evidence of satisfactory performance, Ponville's failure to keep documentation and his admission that he was not familiar with Hough, Earles and Burkett and their job performance, were sufficient to permit an inference that the performance rationale was a pretext for intentional discrimination in the conduct of the RIF.

- C. In *Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1190, 1195 (5th Cir. 1992), the Fifth Circuit noted problems in this area that caused it to find for the plaintiff.

Underscoring the lack of documentation is the fact that Georgia Gulf apparently failed to follow its own disciplinary procedures. Georgia Gulf's Operating Policy Manual states that problems like poor performance "normally warrant progressive disciplinary steps" before an employee can be terminated for continued violations. Tom Marshall testified that there are exceptions to this policy, and that he felt he had followed the policy by informing Lloyd of some of his performance problems. However, he also testified that utilization of the progressive disciplinary policy is counterproductive, thereby implying that he did not follow the policy. From this, the jury could have reasonably inferred that Marshall would have attempted some progressive disciplinary measures before firing Lloyd if he was truly concerned with Lloyd's performance.

- D. In *Laxton v. Gap Inc.*, 333 F.3d 572, 581 n. 3 (5th Cir. 2003), the Fifth Circuit held:

The district court reduced Laxton's showing of pretext to the argument that Gap violated its own corrective action policy, which calls on supervisors to discuss violations of store policy with the employee. The district court noted, correctly, that an employer's disregard of its policies "does not of itself conclusively establish that ... a nondiscriminatory explanation for an action is pretextual." *EEOC v. Texas Instruments Inc.*, 100 F.3d 1173, 1182 (5th Cir.

1996). Laxton, however, does not assert that Gap's failure to follow its own policy is of itself evidence of pretext. Rather, Gap's failure to discuss alleged violations with a recently-hired general manager of a successful store despite its admission that this makes business sense casts doubt on its proffered reason regardless of Gap's policy in this regard. ***That Gap violated its own policy to that effect is merely icing on the cake.*** (emphasis added).

- E. Even more recently, in *Smith v. Xerox*, 602 F.3d 320 (5th Cir. 2010), the Fifth Circuit upheld a jury verdict in a retaliation case. In an unpublished part of its opinion, the court relied on the fact that the decision-maker in the plaintiff's termination allegedly failed to comply with Xerox's policy regarding progressive discipline and warnings, thus giving rise to an inference that he was on the warpath to fire the plaintiff for her protected activities. *Smith v. Xerox*, No. 08-11115, 2010 WL 1141674, at *3-4 (5th Cir., Mar. 24, 2010).
- F. In *Southwestern Bell Tel. Co. v. Garza*, 58 S.W.3d 214, 229 (Tex. App. – Corpus Christi 2001), *aff'd in part, rev'd as to punitive damages*, 164 S.W.3d 607 (Tex. 2004), the court of appeals affirmed verdict for the plaintiff of more than one million dollars, and stated that “[t]he jury heard evidence relating to Southwestern Bell's inexplicable failure to adhere to its own documented policies.” Again, failure to follow your own policies can and often will blow up in your face. Most employers are not tolerant of employees who violate company policy. In turn, most jurors are not forgiving if the company violates its own policies.
- G. Related point: make sure your employee handbook prohibits all form of illegal harassment (not just sexual harassment), and provides a complaint mechanism for them all. Otherwise, you cannot invoke the *Ellerth/Faragher* defense. See *Walker v. Thompson*, 214 F.3d 615, 627 (5th Cir. 2000) (employer had no policy addressing racial harassment; therefore, the plaintiff's could not be faulted for not making internal complaints of racial harassment before they went to the EEOC). So, read your policies, and if they need to be fixed, fix them.
- H. Another related point: after terminating an employee in a RIF, be very careful about hiring a new employee for the same position. Unless there is an extremely good reason for doing so, this can be used to establish pretext. See, e.g., *Aust v. Conroe Indep. Sch. Dist.*, 153 S.W.3d 222 (Tex. App. – Beaumont 2004, no pet.) (fact that employer hired a new employee to fill plaintiff's position shortly after terminating him pursuant to a purported RIF raised a fact issue regarding the legitimacy of its reason for termination).

V. Failure To Investigate And Conclusively Confirm The Factual Basis For Termination, Especially When Dealing With A “High Risk” Termination Decision

- A. Technically, an employer is under no specific legal duty to investigate before terminating an employee. See *Texas Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 609 (Tex. 2002).

- B. And, standing alone, a failure to investigate, or a sloppy investigation, does not prove that a termination was a pretext for discrimination. See *Wal-Mart Stores v. Canchola*, 121 S.W.3d 735, 740 (Tex. 2003) (imperfect investigation does not prove discrimination); *Waggoner v. City of Garland, Tex.*, 987 F.2d 1160, 1165-66 (5th Cir. 1993) (“[T]he inquiry is limited to whether the employer believed the allegation in good faith and whether the decision to discharge the employee was based on that belief.”); *Jones v. Flagship Int’l.*, 793 F.2d 714, 729 (5th Cir. 1986) (holding that a termination decision is not pretextual if the employer “had reasonable grounds [for the decision], or in good faith thought it did”); *Nawrot v. CPC Intern.*, 277 F.3d 896, 906 (7th Cir. 2002) (“But pretext requires more than a showing that the decision was ‘mistaken, ill considered or foolish, [and] so long as [the employer] honestly believed those reasons, pretext has not been shown.’”) (citing *Jordan v. Summers*, 205 F.3d 337, 343 (7th Cir. 2000); *O’Connor v. DePaul University*, 123 F.3d 665, 671 (7th Cir. 1997) (“On the issue of pretext, our only concern is the honesty of the employer’s explanation....”)).
- C. However, a failure to investigate, or sloppy investigation, can in many circumstances give rise to an inference of discrimination, when combined with other “bad facts.”
- D. For example, in *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 308 (5th Cir. 2004), an HR manager investigated the plaintiff for altering time-cards. She found that he had done so. Therefore, “without further investigation,” the plaintiff was fired. *Id.* Rachid sued for age discrimination, claiming that his time card “alterations” were merely his good faith attempts to correctly submit payroll by deleting incorrect and inflated time entries. In reversing a summary judgment that had been entered for the employer, the Fifth Circuit seemed to find it suspicious that the employer “did not make any investigation to determine whether those deletions [by Rachid] were accurate.” *Id.* at 314 n. 13. In other words, by failing to fully investigate, it looked like the company was just “looking for a reason” to fire Rachid, no matter how trivial it might have been. This was especially the case because Rachid’s manager had been calling him “too old” in the months before his termination.
- E. In addition, in *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589-90 (5th Cir. 1998), *rehearing en banc granted, opinion vacated*, 169 F.3d 215 (5th Cir. 1999), *and opinion reinstated on rehearing*, 182 F.3d 333 (5th Cir. 1999), the white female plaintiff alleged that she was terminated for marrying an African-American coworker the day before her termination. On the other hand, the company contended that she was actually fired for “shopping on the clock.” The Fifth Circuit sided with the plaintiff, partially because of the company’s failure to investigate. As the court stated:

Prior to December 1993, Deffenbaugh had received favorable performance reviews, promotions, and pay increases. In fact, Gipson, who terminated her, testified that he did not have problems with the way Deffenbaugh was running the jewelry department.

As discussed, Deffenbaugh testified that, on 14 January 1994, she gave Williams [her new husband of one day] her discount card, because he wanted to purchase a VCR. While he made this purchase in the electronics department, Deffenbaugh returned to the jewelry department and then to the front of the store to clock out.

When Gipson told Deffenbaugh that she was terminated for “shopping on the clock”, she explained that the VCR had been purchased by Williams, not her; and that Gipson could verify this by asking a fellow employee who had seen Williams make the purchase. Deffenbaugh testified that Gipson told her that his “mind [was] made up”. He did not interview possible witnesses to the sale, even after Williams approached him and told him that he had made the purchase; did not interview the cashier; and did not check to see if there was a videotape of the incident. Instead, Gipson relied on the cashier’s handwritten report that Deffenbaugh had been present when Williams made the purchase, and that store records reflected the card’s being used three minutes before Deffenbaugh checked out. *But, Gipson testified that handing a discount card to one’s spouse before clocking out would not be a violation of Wal-Mart policy.* And, Deffenbaugh testified that she did not deal with the cashier who conducted the VCR transaction.

Moreover, even if Deffenbaugh was technically “shopping on the clock”, the evidence was sufficient for a reasonable jury to find that it was not the motivating reason for Wal-Mart firing her. For example, Deffenbaugh testified that she observed other employees buying items at the end of their shifts without being disciplined, and had never heard of anyone else being terminated from Wal-Mart for “shopping on the clock”. **Gipson failed to investigate, even when confronted by Williams’ corroboration of Deffenbaugh’s version of events.** And, Deffenbaugh had positive performance evaluations prior to the time her supervisors, including Gipson, became aware of her interracial relationship.

Id. (first emphasis in original, second added).

- F. Most jurors expect that an employee will not be terminated unless the company has first performed a thorough investigation in good faith. This is especially true if the employee has worked for the employer a long time, or has some other very sympathetic feature about them.
- G. Any valid investigation must give the employee notice of the charges against them, and an opportunity to defend themselves. Failure to at least provide that basic due process will often inflame a court or a jury. *See, e.g., Laxton v. Gap Inc.*, 333 F.3d 572, 581 (5th Cir. 2003). (“[t]he evidence indicates that if The Gap

were genuinely concerned about Laxton’s asserted performance-related problems, it would have permitted Laxton the opportunity to explain or to improve her conduct, but it did not do so. . . . Laxton did not even receive a copy of the Final Written Warning until Saturday, August 14, just one working day before her discharge.”). Too often employers reach a conclusion and simply fire the employee without getting their “side of the story.” Jurors often do not like that, especially if the employee’s story is a good one (and often, by the time their lawyer has prepared them, it is a very compelling story).

- H. Likewise, in *Smith v. Xerox*, No. 08-11115, 2010 WL 1141674, at *3-4 (5th Cir., Mar. 24, 2010), the Fifth Circuit affirmed a jury verdict where the decision-maker wrote a “letter of concern” regarding the plaintiff’s supposed misconduct without even talking to the plaintiff first to get her side of the story. As it turned out, she had a perfectly plausible explanation that refuted the claim of misconduct. The Fifth Circuit found this evidence especially probative because the manager did this to a long-term employee, who had a prior history of successful performance, and who had filed an EEOC charge claiming discrimination by him very shortly before the manager issued the “letter of concern.” In short, by failing to get the employee’s side of the story, the decision-maker provided evidence to the plaintiff that he was on the warpath to terminate her because of her recent EEOC charge.
- I. The *Smith v. Xerox* case teaches that the issue of “nailing down” all the details becomes even more important when dealing with a “high risk” termination. A high risk termination is one: (1) that is likely to lead to litigation; (2) the employee is sympathetic for some reason (illness, long tenure, etc.); (3) the employee has received awards or outstanding performance reviews; (4) the employee has recently complained of discrimination or harassment, been injured on the job, filed a workers’ compensation claim, complained about their pay, asked for an ADA accommodation, or sought or taken FMLA leave; (5) prior promises or representations of continued employment have been made; (6) the decision-maker’s anger is a possible motivation for the termination; (7) the termination is on-the-spot; (8) the decision to terminate is made by a new or inexperienced supervisor or manager; (9) there has been a recent geographic relocation; or (10) there are imminent bonuses, vesting, or commissions coming to the employee. In these circumstances you must be extra vigilant to ensure that your grounds for termination are rock solid. One way to do so is to use a termination checklist, that asks:
- ✓ Was the rule or standard which was violated published?
 - ✓ Did the employee ever receive a personal, written copy of the rule violated (i.e., employee handbook)? An additional safeguard is to have the new employee sign a form attesting that they have read the handbook or rule.
 - ✓ If other employees have violated this rule or order, did they receive the same disciplinary action as this employee?

- ✓ Are you consistent and unbiased in applying rules and standards?
- ✓ Do you have factual records on all your employees covering all violations of this rule or order?
- ✓ Does this employee have the worst record of all employees who violated this rule or order?
- ✓ Has this employee been warned previously for violation of this rule or order?
- ✓ Has the employee ever received a previous written warning of the violation of this rule or order?
- ✓ Has the employee ever received a final warning for the violation of this or any other published rule or order?
- ✓ What is the employee's warning record during the last twelve months?
- ✓ Would a failure to terminate raise questions of consistency of application of your policy?
- ✓ How long has the employee been employed; positions held?
- ✓ If performance is an issue, has there been any counseling? If not, why?
- ✓ What do prior written performance reviews look like?
- ✓ Was the incident which triggered the final warning or discharge carefully investigated prior to taking serious or final disciplinary action?
- ✓ Does your evidence include names of witnesses, dates, time, places, and other pertinent factors on all past violations, including the last one?
- ✓ Have you heard the employee's version?
- ✓ Was the degree of discipline imposed on this employee related to: the seriousness of the proven offense; the employee's past record; the employee's length of service?
- ✓ Has the employee filed a charge with the EEOC or otherwise raised a claim of discrimination or unfair treatment?
- ✓ Consider a possible delay if necessary so you can prove to a jury, should the need arise, that you were fair. This may mean the employee should get one final warning or counseling session before you terminate him or her.

VI. Violating The ADA By: (A) Interactive Process Missteps; (B) Denying Reasonable Accommodation Requests Because Of Preexisting Disciplinary Problems That Were Caused By The Employee’s Disability; Or (C) Jumping To Unsupported Conclusions That The Employee’s Disability Poses A “Direct Threat”

A. Interactive Process Missteps: Failing To Recognize That An Employee Has Initiated The Interactive Process, Responding To The Employee With Inaccurate Information, Or Terminating The Employee Instead Of Engaging In The Process With Them First

1. *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565 (3d Cir. 2002)

Gagliardo was a customer service representative. A “special project” she handled was military orders from her company. For many years she was a good employee with no performance problems. After she developed Multiple Sclerosis (MS), however, she began making mistakes at work. Gagliardo told her supervisor and a manager of human resources - who was herself a MS sufferer - that taking away the military orders from her job duties would reduce her MS symptoms and thus improve her performance. The company agreed with this assertion, but never acted on it. Rather, Gagliardo was written up and then fired for poor performance.

Gagliardo sued under the ADA. At trial the jury ruled in Gagliardo’s favor and awarded her \$2,000,000.00 in compensatory damages and \$500,000.00 in punitive damages. The Third Circuit affirmed, holding that any amounts awarded over the ADA’s caps could still be recovered by Gagliardo under the Pennsylvania Human Relations Act, which is akin to the Texas Commission on Human Rights Act. The court affirmed the award of \$500,000.00 in punitive damages based largely on the fact that Gagliardo had repeatedly requested a reasonable accommodation (removal of the military orders from her job duties) but the company simply ignored her requests and disciplined then terminated her.

2. *Humphrey v. Memorial Hospital Assoc.*, 239 F.3d 1128 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1592 (2002)

Ms. Humphrey was a medical transcriptionist. Her performance was always very highly rated. However, in 1989 she began engaging in a series of obsessive rituals in the morning (such as washing her hair repeatedly for three hours) that caused her to be tardy or absent very frequently. The company wrote Ms. Humphrey up for her tardiness many times, which only caused her morning rituals to become worse.

In 1995 Humphrey was watching an episode of the *Oprah Winfrey Show* on obsessive compulsive disorder (OCD). Humphrey concluded she suffered from OCD and soon received medical confirmation of that fact from her doctor. Her doctor wrote a letter to the company specifically stating that Humphrey suffered from OCD and that her tardiness and absenteeism was caused by OCD. The doctor also explained in the letter that the OCD was a “disability” under the ADA and that a short leave of absence might help him treat Humphrey’s OCD and “get the symptoms better under control.”

Humphrey met with her supervisor about her doctor's letter. The two arranged for Humphrey to have a flexible starting time as an accommodation. Nonetheless, Humphrey continued to miss work and also to be late even under a flex time arrangement. Her supervisor warned her about her continuing absenteeism and tardiness. In response, Humphrey sent her supervisor an e-mail asking for a new accommodation: that she be allowed to work at home. In reply, her supervisor summarily denied her request on the grounds that "work at home" is only permitted for employees who, unlike Humphrey, had clean disciplinary records. Shortly thereafter, Humphrey was absent two more times, and was fired.

Humphrey sued under the ADA. In reversing a summary judgment that had been entered for the company - and rendering judgment in Humphrey's favor - the Ninth Circuit held that as a matter of law the company violated its duty to engage in the interactive process once Humphrey asked for the "work at home" accommodation. *Id.* at 1139. The court also found that since Humphrey's termination was linked to absenteeism and tardiness that was caused by her disability (her OCD) that she was entitled to a jury trial on the question of whether she was terminated "because of her disability," and, thus, in violation of the ADA.

Finally, in rejecting the company's rationale for denying Humphrey's request to work at home - that she had prior discipline on her record - the court held, "[i]t would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated. Thus, Humphrey's disciplinary record does not constitute an appropriate basis for denying her a work-at-home accommodation." *Id.* at 11347.

3. *Giles v. General Electric Co.*, 245 F.3d 474 (5th Cir. 2001)

Giles sued under the ADA and the Fifth Circuit upheld a jury verdict in his favor. Although the court reduced Giles' compensatory damages award, he still recovered over \$400,000.00.

Giles was a Class A Machinist. He injured his back and had surgery. In attempting to determine whether Giles could continue working as a machinist GE sought input from Giles' doctor. However, GE sent Giles' doctor a job description for a welder, which was a more physically demanding job than a machinist position. Based on that inaccurate job description, Giles doctor concluded he was unfit to continue working for GE as a machinist. Thus, GE refused to allow Giles to return to work. Giles then filed claims for LTD and a disability pension, both of which GE approved. Giles also filed for SSA benefits, which were denied on the (ironic) grounds that the SSA found he was still able to work as a machinist.

Giles sued GE under the ADA, claiming that had GE reasonably accommodated him, he would have been able to continue working as a machinist. The court rejected GE's judicial estoppel argument. The court also found that Giles was a "qualified individual with a disability" despite the doctor's conclusion to the contrary because that conclusion was based upon "an incorrect job description provided to [the doctor] by GE." *Id.* at 486. *See also Barber v. Nabors Drilling, U.S.A., Inc.*, 130 F.3d 702 (5th Cir. 1997) (affirming jury verdict for the plaintiff in an ADA case because the employer refused to allow an employee to return to work because he could not obtain a "full medical release" even though he could perform all the essential functions

of his job). *See also Wright v. Middle Tenn. Elec. Membership Corp.*, M.D. Tenn., No. 3:05-cv-00969 (Dec. 07, 2006) (“While an employer is not required to create a light duty position where none exists and the ADA permits job requirements that are job-related and consistent with business necessity, a ‘100 percent healed’ or ‘fully-healed’ policy is a per se violation of the ADA.”).

4. *E.E.O.C. v. Chevron Phillips Chemical Co., LP*, 570 F.3d 606 (5th Cir. 2009)

Here, the employee allegedly sought an accommodation by presenting a doctors note. *Id.* at 621. The employer argued that the note was insufficient notice, and the district court agreed. However, the Fifth Circuit rejected that finding based on the fact that the employer had long been on notice of the employee’s medical condition (Chronic Fatigue Syndrome), and the note clearly related to that condition. *Id.* Once an employer receives a request for accommodation, the employer “is required to engage in the interactive process so that *together* they can determine what reasonable accommodations might be available.” *Id.* (italics in original). Here, there was substantial evidence that the employer failed to engage in the interactive process, and instead set about to find a reason to terminate the plaintiff. *Id.* at 621-32. Accordingly, the district court’s summary judgment was reversed and the case was remanded.

5. *Cutrera v. Board of Supervisors of Louisiana State Univ.*, 429 F.3d 108 (5th Cir. 2005)

In this case, the plaintiff had Stargardt’s disease, which is a form of macular degeneration. Her condition that substantially limited her ability to see. Because of her condition, Cutrera was having problems performing her job. Cutrera testified that she set up a meeting with the school’s ADA Coordinator for August 3, 1998, to discuss possible accommodations for her condition. At the meeting, however, the ADA Coordinator terminated Cutrera and refused to discuss accommodation issues. In reversing the district court’s grant of summary judgment, the Fifth Circuit held that “[a]n employer may not stymie the interactive process of identifying a reasonable accommodation for an employee’s disability by preemptively terminating the employee before an accommodation can be considered or recommended.” *Id.* at 113.

B. Denying a Request For A Reasonable Accommodation On The Basis Of Preexisting Performance Problems That Were Caused By The Employee’s Disability

1. *Humphrey v. Memorial Hospital Assoc.*, 239 F.3d 1128 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1592 (2002)

See above.

2. *Riel v. Electronic Data Systems Corp.*, 99 F.3d 678 (5th Cir. 1996)

Riel was a systems engineer for EDS. Because of his diabetic condition, he experienced vision and renal system health problems. These problems caused severe fatigue, which

periodically interfered with his job performance. As part of his job, he had “milestone deadlines” and “final deadlines” for each project. While Riel sometimes missed milestone deadlines, he never missed a final deadline on any project.

EDS ultimately fired Riel for missing 13 milestone deadlines. Riel sued under the ADA, and the district court granted summary judgment in EDS’s favor, finding that Riel was not a “qualified individual with a disability” because he could not perform the essential function of meeting milestone deadlines, with or without an accommodation. The Fifth Circuit reversed.

The Fifth Circuit noted that a “qualified individual with a disability” is someone who can perform the essential functions of the employment position with or without a reasonable accommodation. The evidence conflicted regarding whether meeting milestone deadlines was an essential function. Since it may not have been, it is possible that a jury could conclude that Riel’s failure to meet the milestone deadlines did not render him “unqualified.”

Moreover, the court held that Riel proposed two potentially reasonable accommodations to EDS: (1) further adjustment of the milestone deadlines; and (2) transfer to a position without milestone deadlines. In response to EDS’s argument that transfer was not possible because of its policy against transferring employees with poor ratings, the court concluded that EDS was attempting to impose an improper burden on Riel. The court stated:

EDS contends that a relaxation of milestone deadlines would cause disruption in its working structure, but this is for the trier of fact. EDS also argues that it could not transfer Riel because of its policy against transferring employees on PIPs or whose ratings were “below average.” This contention turns the focus upon Riel’s specific circumstances. In so doing, it mistakes the burdens of proof allocated to the parties; Riel need only show an accommodation reasonable “in the run of cases.” The evidence of reasonableness “in the run of cases” and undue hardship will often be overlapping and resist neat compartmentalization. Nonetheless, they remain distinct inquiries even if asked of similar evidence.

EDS legally enjoys the affirmative defense of “undue hardship.” But as EDS did not plead “undue hardship” and conceded below that it was not defending on those grounds at the summary judgment stage, our focus is limited to whether Riel has identified accommodations reasonable “in the run of cases.” . . . EDS may not place the burden of proof of undue hardship on Riel merely by refusing to plead the affirmative defense and then attacking his proposed accommodations as unreasonable in his specific circumstance; Congress’ intent was to place that burden on the employer. Rather, if EDS wishes to refute Riel’s proposed accommodations as unreasonable in his specific circumstances, it must plead the defense and offer evidence to support it.

Id. at 684.

C. Jumping To The Conclusion That An Employee Is A “Direct Threat” And Thus Unprotected By The ADA

1. *Rizzo v. Children’s World Learning Centers, Inc.*, 84 F.3d 758 (5th Cir. 1996)(“*Rizzo I*”)

Rizzo was a teacher’s aide for Children’s World Learning Centers, which operates a daycare center. Her duties included driving children in the Children’s World van. In 1993, a parent complained to Rizzo’s boss about her being left alone with children. Because of Rizzo’s hearing impairment, the parent was concerned about whether she would be able to hear a choking child in the back of the van. Rizzo’s supervisor confronted her with this concern and asked her to bring a report from her audiologist stating that it was safe for her to drive the van. Shortly thereafter, Rizzo brought a report from her audiologist which said she could hear emergency vehicles. However, the report did not discuss whether Rizzo could hear a child choking at the back of the van. Since it did not, Children’s World removed Rizzo from her driving duties and assigned her to work in the kitchen on a split shift (early mornings and late afternoons), which resulted in a significant reduction in her hours of work. Ultimately, Rizzo resigned and filed an ADA lawsuit.

The district court granted Children’s World’s motion for summary judgment on the grounds that Rizzo posed a direct threat to the children, in that she may not be able to hear a choking child due to her disability. The Fifth Circuit reversed the summary judgment, concluding that, “[w]hether a person who can hear emergency vehicles, but cannot hear a choking child, is a direct threat is question of fact.” *Id.* at 764. The employer subsequently tried this case to a jury and lost.

2. *See also E.E.O.C. v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724 (5th Cir. 2007)

In *E.I. Du Pont de Nemours & Co* the Fifth Circuit found the evidence was sufficient to support a determination that a “regarded as” disabled employee, who was substantially limited in walking, was not a “direct threat” to herself or her coworkers, within the meaning of the Americans with Disabilities Act (ADA), in the event of an emergency evacuation; despite the employee’s medical restriction from walking, she was able to safely ambulate the evacuation route without assistance, and testimony presented at trial showed that she could evacuate without threatening others’ safety); *Branham v. Snow*, 392 F.3d 896 (7th Cir. 2000) (whether insulin dependant diabetic was a “direct threat” in a position of IRS criminal investigator was for the jury, and it was up to the employer to prove the “direct threat” defense); *Verzeni v. Potter*, 2004 WL 1946513 (3d Cir. 2004) (employer’s conclusion that employee with chronic paranoid schizophrenia was a “direct threat” to safety of others due to perception he was violent had to be based on current medical knowledge, not myth, fear, or stereotype); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001) (whether epileptic posed a “direct threat” was for a jury to decide).

These ADA issues are all the more important given the amendments to the ADA that took effect January 1, 2009, and which dramatically broaden the protections of the law. The

Texas Labor Code was modified to incorporate those same amendments effective September 1, 2009.

VII. FMLA Pitfalls: (A) Terminating An Employee Based On An Absence That Is Covered By The FMLA; And (B) Not Expressly Selecting The Twelve Month FMLA Leave Period Your Company Will Use

- A. Terminating an employee based on an absence that is covered by the FMLA.
1. You cannot terminate or take any other adverse action against an employee based on an absence that is covered by the FMLA. *See, e.g., Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001); *Smith v. BellSouth Telecommunications, Inc.*, 273 F.3d 1303, 1314 (11th Cir. 2001) (finding a fact issue as to whether employer refused to rehire the plaintiff because of his FMLA absences; evidence showed that in HR manager's notes on her conversation with [the plaintiff's] supervisor about why [the plaintiff's] file was marked "Not eligible for rehire," the HR manager included "took a lot of FMLA" along with other reasons." Accordingly, "[a] reasonable jury could conclude that BellSouth impermissibly counted Smith's past use of FMLA leave against him in its decision not to rehire him.").
 2. As the FMLA regulations state: "[a]n employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. **By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.**" 29 C.F.R. § 825.220(c) (emphasis added). *See also* 29 U.S.C. § 2652(b) ("The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.").
 3. It is not always obvious that an absence is covered by the FMLA, and an employee does not expressly have to say "I am taking this absence under the FMLA" to be protected from termination based on that absence. *See Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995). Rather, the employee merely needs to advise their employer of enough information "to reasonably apprise it of the employee's request to take time off for a serious health condition." *Id.*
 4. In *Manuel*, the Fifth Circuit held that there was a fact issue regarding whether the employee had imparted sufficient information to trigger FMLA protection when she informed her supervisor that she was taking

an extended amount of time off work for medical treatment associated with an ingrown toenail. The plaintiff never mentioned the FMLA by name, and did not even know the FMLA existed.

5. *Austin v. Haaker*, 76 F.Supp.2d 1213, 1222 (D. Kan. 1999), is a very simple example of how things can easily go wrong. As the court stated:

On September 9, 1996, plaintiff missed work due to illness and defendant disciplined him under its Rules of Conduct on the same day. Fifteen days later, plaintiff took FMLA leave. On October 1, the day he returned from leave, defendant issued further discipline for the September 9 absence, suspending plaintiff under its Attendance Policy. Plaintiff points out that this was the first occasion in several years of employment that defendant disciplined him under its Attendance Policy. The temporal proximity between the FMLA leave and the suspension, the fact that defendant disciplined plaintiff on two occasions for the same absence, and defendant's somewhat unusual exercise of the Attendance Policy suggest a causal connection. *See Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir. 1996) (“[P]rotected conduct closely followed by adverse action may justify an inference of retaliatory motive.”).

Moreover, the wording of the March 1998 Last Chance Agreement, issued the day plaintiff returned from STD leave, suggests that the Agreement is causally connected to plaintiff's exercise of his FMLA rights. The letter reads in pertinent part, “Your attendance record has been unacceptable Currently, you have no available sick days and you have used all of your Family Medical Leave for a 12 month period If you are absent, tardy or leave early in the next twelve (12) months it will result in termination.” A trier of fact could reasonably interpret the agreement to suggest that plaintiff was not entitled to FMLA leave; such a suggestion violates the FMLA's prohibition against interference. See 29 U.S.C. § 2615(a)(1). **Moreover, a trier of fact could interpret the wording of the letter to suggest that plaintiff's record is unacceptable because he had taken FMLA leave--also a violation of § 2615(a)(1).**

- B. Not expressly selecting the twelve month FMLA leave period your company will use.
 1. The FMLA's “leave year” regulation, 29 C.F.R. § 825.200, allows employers, at their option, to calculate the twelve-month period in which

an employee is limited to twelve weeks of protected leave by one of four methods. Under the two fixed-year methods, the employee could use up to twelve weeks of leave at any time during the twelve-month period selected by the employer. 29 C.F.R. § 825.200(c). For example, an employee whose employer had adopted the calendar year method could, consistently with the Act, “take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year.” *Id.* On January 1, this employee would be entitled to a full bank of FMLA-protected leave, no matter how recently, or how much, she had exercised her entitlement to protected leave the previous year.

2. The calculating method based on the employee’s first leave request is a hybrid method, unique to each employee. *See* 29 C.F.R. § 825.200(c) (“Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period.”).
3. Under the rolling method, “each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months.” *Id.* Thus, if an employee used her full allotment of twelve weeks of FMLA leave starting on February 1, she would be entitled to no additional days of FMLA leave until February 1 of the following year.
4. The FMLA “leave year” regulation, while allowing employers flexibility in deciding how to comply with the Act, also includes various safeguards for employees.
5. First, the employer must apply its chosen calculating method consistently to all employees. 29 C.F.R. § 825.200(d)(1).
6. Second, if the employer has failed to select a calculating method, the regulations state that the method **“that provides the most beneficial outcome for the employee will be used.”** 29 C.F.R. § 825.200(e); *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001) (emphasis added) (following regulation and ruling as a matter of law for the employee).
7. Finally, in a related vein, the Fifth Circuit has held that sloppily worded “promises” of FMLA entitlement may estop an employer from later asserting that the employee was not entitled to FMLA leave, even if the employer is not even large enough to be covered by the FMLA in the first place. *See Minyard v. ITC Deltacom Comm., Inc.*, 447 F.3d 352 (5th Cir. 2006).

VIII. FLSA Noncompliance – Can Someone Say “Collective Action”?

The following are the top 15 issues that seem to arise for most employers as they conduct FLSA audits and thus are the primary issues to be wary of in FLSA litigation. Being aware of these issues can obviously help defense counsel and employers should DOL investigate or should an employee (or former employee) sue. One additional issue that has implications on FLSA liability as well as liability under many other laws: misclassification of a worker as an “independent contractor” instead of an “employee.” We recommend workplace audits be conducted to verify proper classification and avoid lawsuits based on misclassification of workers.

A. The Big No-No: Assuming That Job Descriptions Establish Exempt Status.

Many employers mistakenly believe that FLSA exempt status reviews can be effectively conducted solely by looking at job descriptions. The FLSA, however, requires an individualized analysis of the actual duties performed by the employee. Job descriptions are often very helpful and, in some cases (particularly the ones that are very clearly exempt or non-exempt and not really close calls), they may provide enough information to make an exempt status decision regarding an employee’s duties. In most cases, the job descriptions should be reviewed with the assistance or input of a human resources professional or manager who has some first hand familiarity with the actual job duties and can provide guidance on interpreting the job description and assessing whether it reflects reality. In many cases, follow up interviews with the employees’ supervisors, review of documentation such as job postings, performance reviews or work product, or other actions are required to accurately assess the exempt status of the positions.

In fact, the failure to conduct the proper level of review – which may mean looking beyond the job description – could be extremely costly, as an employer in the Midwest discovered to its chagrin on August 23, 2004 – the day the new regulations became effective. On that day, a federal appeals court ruled that this employer had improperly classified a computer employee as exempt and, further, that the employer was subject to liquidated (double) damages because, among other things, it had previously failed to investigate statements made on the job description. In short, the court determined that the job description was insufficient to clearly identify the employee’s primary duty and, to show good faith (and thereby avoid liquidated damages), the employer “need[ed] more information” than was on the job description and had a duty to “seek it out.” *Martin v. Indiana Mich. Power Co.*, 2004 U.S. App. LEXIS 17837 (6th Cir. August 23, 2004). Employers should try to avoid this result by ensuring that their audits are defensible as solid factual inquiries and are more than superficial.

B. Part-time Employees and the \$23,660 Salary Level Test.

Alternative work schedules which permit employees to work a part time or reduced schedule, with a commensurate reduction in salary, are increasingly common in the 21st century workforce. This sometimes means, however, that some otherwise exempt employees will be making less than the new salary level test (*e.g.*, a manager who works full time in a position that pays \$50,000/year reduces his schedule to two days per week and his salary is reduced to \$20,000/year). The DOL does not permit employers to prorate their part-time-schedule

employees' salaries to meet the \$23,660/year (or \$455/week) threshold. In many cases, this may not be a problem, as such employees do not work overtime. However, in some situations, there may be periods when the employee does work overtime, for instance, a tax accountant who works overtime during the weeks prior to April 15. In that case, even though the employee might otherwise be exempt, if she makes less than \$455 per week during that time, she does not meet the salary level requirement. The solution is either to monitor that person's hours and pay them overtime when required, or increase their salary to the new minimum (assuming they meet the other requirements for an exemption).¹

C. Too Many Masters – Supervision and the Executive Exemption.

Many employers assume that if their employees are “managers,” if their job description says they supervise employees, or if they are listed as having “organizational chart supervision” over other employees, then they are exempt executives. This can be a costly mistake. The executive exemption duties test requires, among other things, that the employee customarily and regularly direct the work of at least two other employees. Occasional supervision is not enough. It must be regular, and the employee must have sole responsibility for at least the equivalent of two full time employees. In many cases, we have found that a job description or an organizational chart will list the same three managers as having supervisory responsibilities for the same group of employees. Employers need to be very careful in such cases to avoid double-counting the supervisees and to correlate them correctly with the manager who is truly supervising them.

D. Hire or Fire: Real Power or Job Description Fantasy?

Under the new executive exemption, the employee must have the power to hire or fire (or whose suggestions regarding such matters are given particular weight). Too often job descriptions list a litany of duties, including hiring and firing of subordinates. In some cases, however, these duties exist only there – in the fantasy world of the job description – and it is just assumed that the person does have the power to hire or fire. It is important to ask specifically whether the employee truly does have the power to hire or fire (or make recommendations). This may even require asking when was the last time he or she hired or fired (or her recommendation was given particular weight) and, if there is doubt, reviewing documentation which will reflect this individual's role in a recent hiring or firing decision.

E. Help Desk Personnel and Computer Techies.

Many human resources professionals give a “free pass” to computer personnel, particularly when the job descriptions and performance reviews refer to duties and computer systems that sound like they come from *Star Trek*. However, just because it sounds technical, does not mean the position is exempt. Employers must go beyond the terminology and assess whether the employee truly does programming, high level systems analysis, regularly makes

¹ It is important to distinguish an employee who works a part-time schedule from an employee who works only part of the year. An employee who is hired and paid an *annual* salary of \$50,000, receives gross pay each week of \$961. Even if she terminates employment after three months (and thereby makes a total salary of less than \$12,000), she still meets the salary level test because, while she was employed, she made at least \$455/week.

recommendations regarding significant matters, and the like. Help desk personnel who respond to user inquiries and fix crashes, and network support folks who back up the server and install software patches and updated virus definitions at the direction of others or pursuant to a routine schedule, are rarely exempt. Also, it is important to be especially inquisitive when reviewing job descriptions that use terms such as “systems analysis” and “network administration.” Remember too, that just because someone saves the day by recovering your corrupted document does not mean they are exempt.

F. Analysts, Coordinators, Specialists, and Associates – Job Titles that Sound Impressive But Say Little.

These are often the most difficult to classify. The titles sound fancy and the person’s responsibilities may be technical and difficult for human resources professionals to fully understand (see item 5 regarding computer techies). However, more often than not, employers give these types of titles to employees when they are not sure where the employee fits on the hierarchy between support staff and management. These employees are often performing more than ministerial or clerical work, but they are not managing or making significant decisions requiring extensive independent judgment or discretion. These titles are also often present as a “status” factor – they make the position sound sophisticated. Additionally, in some cases, employees with these kinds of titles are paid very well, are highly intelligent, perform complex and technical work that is very important and have college degrees. Unless they meet the requirements of one of the exemptions, however, they are not exempt. Keep in mind, also, that simply because the work is technical and complex does not mean that it is necessarily “professional” under the regulations, or requires that the employee regularly make judgment calls to satisfy the administrative exemption duties test.

G. Ignoring State Law Requirements.

Because the new federal regulations have generated so much attention, employers often neglect to consider state law requirements. This is particularly the case with employers who have employees working in several states. While compliance with the federal overtime exemptions will mean the employer is also in compliance with the laws of many states, there are some states which have substantially different rules (for example, California). Compliance with federal law will not guarantee compliance with state laws, so employers must also consider where their employees are located when conducting their wage and hour self audit. For employers who have the same or similar job descriptions and titles applicable to employees located in several states, this can be particularly troublesome. It is also important to keep in mind that the two employees with the same job description may be classified differently under the exempt status regulations depending on their actual duties (see item 1 on this list).

H. Status Quo and the “Status” of Being Exempt.

Another hot topic surfacing in FLSA audits is the effect that reclassification as non-exempt will have on employee morale. Many workplace cultures prize exempt status. (It is also important not to forget that some employees who want to be characterized as exempt today for the status reasons, may forget status tomorrow when they sue for unpaid overtime and allege they were improperly classified.) In many instances, managers will inflate their subordinates’

responsibilities in response to audit questions in order to preserve exempt status. Employers should be careful not to let the weight of the status quo and the status associated with being exempt prevent them from properly classifying their workforces.

I. Executive Assistants – Internal Politics Versus FLSA Reality.

Trust us, most senior managers will tell you that they cannot function without their executive assistants and, therefore, the position must be exempt. (Oftentimes, too, the executive assistant regularly works overtime to go the extra mile for the boss.) However, executive assistants must be viewed with particular scrutiny. Unless they have been delegated authority to make significant decisions (not planning travel itinerary and not what type of filing system to use) and function relatively independently on substantive matters, they are usually not going to be exempt. In assessing the exempt status of persons in this role (as well as other employees), it may be helpful to ask the manager or supervisor to describe the employee's typical day from beginning to end.

J. When In Doubt??? Remember Whose Burden Exempt Status Is.

If an employee's exempt status is challenged (*e.g.*, the employee files a lawsuit alleging he or she is nonexempt and is entitled to unpaid overtime, or the DOL conducts an audit), it is well established law that the employer bears the burden of clearly demonstrating that the employee falls within the exemption. During exempt status self audits, however, employers find that some of their employees are borderline or "close to the line." In other words, plausible arguments can be made both to assert that the employee is exempt and is non-exempt. Employers must pay particular attention to these close calls and should remember that it is the employer – not the employee – who will bear the burden of proving exempt status later on. When it is a doubtful question now – during an internal self audit – it is unlikely, in most cases, to become any less doubtful – *at least in the employer's favor* -- once the employee sues or the DOL investigates.

K. Requiring A College Degree – Enough to Be A Learned Professional?

Generally, the learned professional exemption requires, among other things, that the person regularly use knowledge that is typically acquired through coursework to obtain an advanced specialized degree in a field of science or learning. A general four year degree in Liberal Arts, English, Political Science, etc., will usually not suffice. (There are a few industries where a four year degree is specialized – such as engineering – and this may meet the requirements of the exemption if the other factors are met). Many times, however, employers will assume that a person with a college degree is a professional. While they may be "professionals" as that term is commonly used, the degree does not make them "professional" for purposes of the DOL's learned professional exemption. Also, keep in mind that an advanced, specialized degree does not guarantee exempt status. The employee must use the knowledge that is gained through that degree in order to do his or her job. Thus, a lawyer with a J.D. but working as a paralegal, or an accountant with a degree in accounting but working as a senior bookkeeper, would usually not qualify for the professional exemption.

L. Inside Sales Employees – Practice Versus FLSA Reality.

The only explicit exemption for sales employees contained in the white collar exemptions is for *outside* sales employees. Employees who make sales from their employer's office, their homes, on the internet, or from some other fixed place of business are not generally going to be exempt. (There is a special exemption for certain high-commission paid employees of retail and service establishments.) Typically, an inside sales employee will not be exempt. Surprisingly, many employers incorrectly assess their inside sales employees as exempt (sometimes this may be a result of the fact that these employees often display substantial personal initiative). Note however that some senior employees in the sales field may be developing overall marketing and sales plans and strategies for the employer, or may be responsible for advanced account management requiring regular consultation with clients and requiring that they make significant, independent judgment calls. These individuals may, in appropriate circumstances fit within the administrative exemption. However, in those cases, the making of individual sales will not, in reality, be their primary duty, even though they might be technically located within the sales department or have some sales functions.

M. Failing To Appreciate Discretion and Independent Judgment.

This most qualitative of the exemption duties tests is also the one most commonly misapplied. All of us exercise discretion and independent judgment on a daily basis. The receptionist who decides to leave a written message for a manager instead of sending an email may be exercising discretion and independent judgment. The technician who decides to clean and add paper to the office printer before installing new memory in a laptop, or who decides to install 64 mbs of memory instead of 96 mbs, is exercising discretion and independent judgment. Or, the document analyst consults a procedures manual to determine what data to enter to generate a routine financial report. However, in most cases, these are not the types of "judgment calls" regarding "matters of significance" related to the operation, direction, or functioning of the business that the regulations require. Employers need to look carefully at the significance of the decisions being made, how much independence the employee has to make decisions without being told what to do either by supervisors, procedures, manuals, or specific rules, and whether those decisions are the type that require the employee to make a choice between one or more courses of action when the "right" answer may not be apparent.

N. Salary Basis: Failure to Consider.

Salary basis requirements are often very technical and require a thorough review not only of the employer's payroll practices, but also of memoranda, handbooks, and policies which discuss payroll issues, hours recording, docking, and similar matters. Because many employers are focused on the new salary level and duties tests, they neglect to consider salary basis rules fully.

O. Proper Training of Managers.

Employers should not underestimate the importance of ensuring that their human resources professionals and managers are properly educated regarding the FLSA's requirements. Many have incorrect understandings of the requirements, and fail to consider all relevant factors. Proper training now can ensure that the your workforces are properly classified and save you money later.

IX. Overlooking The NLRA And Punishing Employees For Engaging In “Protected Concerted Activities.”

A. Your Employees Are Protected by the National Labor Relations Act Even If They Are Not Represented by a Union and Even If They Do Not Engage Directly in Union Activities

As its name suggests, the National Labor Relations Act (NLRA or Act) is the federal law that regulates the relations between employers and unions. However, the Act’s reach goes far beyond labor-management relations and often has a dramatic impact upon non-union employers. The principal reasons for this broad reach emanate from the NLRA’s Section 7 and its interplay with the Act’s Section 8(a)(1) which describes certain prohibited employer conduct (unfair labor practices).

Protections accorded employees under Section 7 extend far beyond the right to join or assist labor organizations or to engage in other lawful union/collective bargaining-related activities. Section 7 also grants employees the right “. . . to engage in other concerted activities for the purpose of . . . other mutual aid or protection . . .” N.L.R.A. § 7, 29 U.S.C. § 157. Thus, by its plain wording, the ambit of Section 7 is extremely broad, protecting all lawful activities that are “concerted” and for the purposes of “mutual [employee] aid or protection” – even though those activities have absolutely nothing to do with labor-management relations, unions, union membership or union-related activities.

B. What Does it Take to Make Activities “Concerted” Within the Meaning of Section 7?

The National Labor Relations Board (NLRB or Board) has interpreted Section 7 as protecting joint employee action; that is employee conduct that is linked to group action or protection. Thus, in order for activities to be deemed concerted they must be undertaken by two or more employees or by one on behalf of others. The lead decision on this point is *Meyers Industries, Inc. (Meyers II)*, 281 NLRB No. 882 (1986). There, the Board explained that in order for activity to be “concerted,” it must be engaged in, with or on the authority of other employees and not solely on behalf of or for the protection of an individual employee. In *Meyers II*, the Board further held that activity may be deemed “concerted” when it “encompasses those circumstances where individual employees seek to initiate or to induce or prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers II*, 281 NLRB at 887.

In *Meyers II*, the Board also held that the link between an employee’s actions and the activities of other employees may be too remote to qualify them for protection under the NLRA. In this regard, a worker’s actions taken in furtherance of common or joint contract rights enjoyed by other employees and/or complaints about the treatment of other workers may be more likely to be protected concerted activity than actions regarding individual statutory rights or general public policy concerns.

C. Why Do Non-Union Employers Need to Be Concerned about Protected Concerted Activities?

NLRA Section 8(a)(1) makes it an unfair labor practice for an employer “to *interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7,*” including those that have nothing to do with unions or union-related activities. Section 10 of the NLRA, 29 U.S.C. § 160(c), empowers the Board to prevent persons from engaging in unfair labor practices as well as to take “such affirmative action . . . as will effectuate the policies of the Act.”

An employer who disciplines or otherwise takes adverse action against an employee who has engaged in protected concerted activity may be charged with a violation of Section 8(a)(1). If that charge is sustained, the Board may order the employer to cease and desist the practice, to post a notice of the Board’s order for all employees to see, and to make the employee whole for any loss of employment, earnings, or benefits. This could include reinstating a terminated employee with backpay and benefits, paying a suspended employee, or taking other action as the Board deems appropriate to effectuate the policies of the Act.

In deciding such unfair labor practice cases, the employer’s motive is irrelevant to fixing liability. Thus, an employer need not know that an employee’s conduct is concerted or that it qualifies for protection under the law. Likewise, an employer need not be acting with the intent of interfering with Section 7 rights or be successful in causing actual coercion. According to the NLRB, it is enough that an employer’s actions have the natural tendency of interfering with Section 7 rights. Consequently, an 8(a)(1) violation will be found to exist where an employee’s conduct qualifies as concerted activity and an employer’s adverse action is shown to be caused by or is the result of those protected activities.

A case graphically demonstrating this point is *Albertson’s Inc. v. NLRB*, 323 NLRB No. 1 (1997), *enforced*, 161 F.3d 1231 (10th Cir. 1998). Employees who painted objects on a plastic line arrived at work on a hot summer day to find the temperature in the paint-spraying booths to be between 107 and 110 degrees. Indeed, the temperature in the workplace was so high that the prior shift had been let out of work early.

Three employees on the later shift began to complain to one another about the heat. They discussed leaving early and selected one employee to approach the foreman about the suggestion. Although accounts of the discussion with the foreman differed, they left believing they had permission to leave. When the manager learned that the three employees had walked off the job, she immediately fired them. Because the manager testified that she knew the employees were leaving because of the heat but had fired them for leaving without obtaining the proper permission, the Board held that the employees had been engaged in protected concerted activity when they left work and had been illegally discharged, in violation of the Act. Therefore, the Board ordered reinstatement of the terminated employees with back pay and benefits and directed the employer to cease and desist its unlawful practices and to post notice of the violations and order.

D. Examples of Non-Union Employees Engaged in Protected Concerted Activities

1. Employees' right to protest a poor manager

- *Trompler, Inc.*, 335 NLRB No. 41 (2001). Six second-shift employees walked off the job in protest over the performance of their shift leadman, and were fired. Specifically, they had expressed three major concerns about him: (1) he failed to adequately address the harassment of one employee on the line by another employee; (2) he inappropriately handled an employee's drug problem; and (3) he was not adequately trained to handle the computerized numeric control machines, so that when an employee had a problem operating his or her machine, the leadman would have to call on another employee to help, thereby causing that employee not to be able to do his or her work. All of these factors affected the employees' conditions of work, and created turmoil. The six workers had conveyed their concerns previously to management but without success. In finding their walkout to be protected concerted activity, the Board held that "if employees are protesting working conditions, whether caused by a supervisor or by higher management action, those employees can protest by any legitimate means, including striking. The fact that some lesser means of protest could have been used is immaterial. We would not second-guess the employees' choice of means of protest."
- *Arrow Elec. Co., Inc. v. NLRB*, 155 F.3d 762 (6th Cir. 1998). Four employees walked off the job to protest their supervisor's "belligerent attitude, his disrespectful and demeaning words to the employees, and specific instances of threatening to hold over a paycheck and 'sneaking' around on the site to eye employees and comment negatively on how they were doing their jobs." The employees left the job site to find their supervisor's supervisor, who had told them to approach him with any problems regarding the supervisor. The employees instead found the personnel director and her supervisor and explained to them the impact their supervisor's attitude problems were having on their productivity. The employees were terminated for leaving the job site without notice.

The court held that the employees' activity was protected because the employees' unhappiness with their supervisor affected their productivity, work conditions, and even safety. The employer had notice of the problems because the supervisor's supervisor held two meetings to discuss them. Thus, the court held that the connection between the supervisor's behavior and the terms and conditions of employment were made before, during, and after the walkout. The employer's actions in terminating the employees

were held to be an unfair labor practice because the employer could not show that it would have terminated the employees in the absence of the protected concerted activity.

- *But see Bob Evans Farms, Inc. v. NLRB*, 163 F.3d 1012 (7th Cir. 1998) (in cases involving concerted employee conduct to protest a supervisor's conduct, selection, or discharge, the court considers not only whether the supervisor's conduct has an impact on employees' work conditions, but also whether the means of the employee protest was "an appropriate means of protest, the legitimacy of the employees' grievance notwithstanding." Where the employees' protest regarding a supervisor causes a disruption that would be detrimental to business, the court has found that the activity will not be protected).

2. Expressing group concerns and/or acting with the endorsement of other workers

- *Compuware Corp. v. NLRB*, 134 F.3d 1285 (6th Cir. 1998), *cert. denied*, 523 U.S. 1123 (1998). An employee of a computer company that was training state employees in an updated computer system on contract had spoken with other co-workers about work-related problems. The employee facilitated discussions with managers, and trainers and when co-workers attended the discussions, they manifested their interest in obtaining a resolution to their grievances. At one such meeting the employee threatened that if nothing satisfactory was done about the employees' complaints, he would complain to the state about the work-related concerns. He was then terminated. The court held that the employee had engaged in concerted activity because he expressed group concerns to his co-workers and management and because other employees endorsed the activities and, by showing support, demonstrated that the employee was acting on behalf of the group.
- *Timekeeping Sys., Inc.*, 323 NLRB No. 244 (1997). An employee sent an e-mail to the Chief Operational Officer of a small company responding to officer's e-mail regarding proposed changes in the company's vacation policy. The employee criticized the employer's proposal and copied co-workers in an attempt to arouse support for his own decision to oppose the proposal. The employee was terminated when he refused to draft an e-mail containing an apology that explained why his previous e-mail was inappropriate to the extent that it failed to treat others with courtesy and respect, how sending such e-mail hurts the company, and how the matter should have been handled. The Board found the e-mail to constitute protected concerted activity, even though the employee's "object of inducing group action [was not]

express.” In addition, the Board held that the employee’s use of arrogant, sarcastic language that was offensive to the employer was not enough to remove the employee’s actions from the coverage of the Act, or from the scope of “protected” activity, because the behavior did not render the employee “unfit for further service,” nor was the employee truly insubordinate or disruptive to work processes.

3. Actions regarding work hours, wages, terms of pay, and other work conditions

- The Board has held that “there can be no doubt that there is no more vital term and condition of employment than one’s wages, and employee complaints in this regard clearly constitute protected activity.” *Cal-Walts, Inc.*, 258 N.L.R.B. 974, 979 (1981).
- *North Am. Dismantling Corp. v. NLRB*, 2002 U.S. App. LEXIS 7143 (6th Cir. Apr. 12, 2002) (unpublished). On April 12, 2002, the Sixth Circuit ruled in favor of two unionized construction workers who complained about receiving nonunion wages at a job site. When the workers complained to the on-site superintendent about the wages, alleging saying that if “they weren’t going to get union wages, they were walking,” the superintendent allegedly told them that if they did not like the wages, they should “go home and find another job.” The workers sought to return to work two weeks later, but were told that they were no longer employees. In holding that the workers were entitled to reinstatement, the appeals court found that the workers were engaged in an economic strike by refusing to return to work after being told to either work for nonunion wage or go home. The employees also reasonably believed they were being terminated when the superintendent told them to go home. Although an employer may replace an economic striker, it cannot fire an economic striker, and thus, the terminations were unlawful.
- *Tradesmen Int’l. v. NLRB*, 275 F.3d 1137 (D.C. Cir. 2002). A nonunion leasing firm did not violate the National Labor Relations Act by refusing to hire a union organizer who had months earlier reported the company for failure to post a bond required by local ordinance, ruled the D.C. Court of Appeals on January 15, 2002. The NLRB found that in reporting the company and also testifying against it, the organizer was engaged in protected concerted activities intended to protect local unionized companies and their job opportunities, similar to area standards picketing. Thus the company could not refuse to hire him because of his conduct. Disagreeing, the appeals court said the organizer’s conduct was not an effort to improve any union or nonunion employees’ working

conditions, but was solely an effort to raise the leasing company's costs. The NLRB's "sweeping and unprecedented expansion" of the definition of protected concerted activity "effectively erases any line between acceptable and unacceptable activity directed toward an employer's economic health," said the court.

- *Union Carbide Corp. v. NLRB*, 2001 U.S. App. LEXIS 26594 (4th Cir. Dec. 14, 2001) (unpub). The National Labor Relations Act covered an employee's aggressive attempts to determine whether he was eligible to take leave during his probationary period, the Fourth Circuit ruled on December 14, 2001 in an unpublished opinion. The employer argued that the employee's abusive manner in pursuing the issue took him out of the protections of the Act in that he repeatedly asked various individuals about the status of his request though he knew it was being investigated and swore at one supervisor. The court found that because the employee was inquiring about a particular date on which he wanted leave and because his conduct did not meet the standard of flagrant, egregious, or abusive conduct needed to take his actions out of the rubric of the Act, it was illegal under the NLRA to fire him based on this conduct.
- *NLRB v. Caval Tool Div.*, 262 F.3d 184 (2d Cir. 2001). Because the employee's speech constituted concerted activity, on August 21, 2001 the Second Circuit upheld a Board ruling that the employer committed an unfair labor practice by disciplining an employee after her remarks at a company meeting. At a meeting discussing the company's new break policy, the employee verbalized her disgust with the new policy and management, and was subsequently placed on probation. The Board found, and the court agreed, that the employee's speech was concerted because it was engaged in the effort to initiate or induce group activity, and that she was acting in the interests of all employees at the meeting.
- *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531 (6th Cir. 2000). When Mary Craig was hired as a dietary aide by the non-union Main Street Terrace Care Center, she was told by her manager not to tell anyone how much money she would be making to prevent hard feelings among her co-workers. Nearly a year later, Craig's daughter was hired by Main Street and also was told not to discuss her paycheck with anyone. During 1997, Craig assisted several dietary department workers with wage-related problems, involving overtime and wage rates. **The Sixth Circuit ruled, in a case of first impression, that promulgating a rule prohibiting employees from discussing wages with one another is unlawful, even if the rule is unwritten and rarely enforced.** The court also held that the plaintiff engaged in protected concerted activity by

assisting other co-workers with wage-related problems. The court noted that an orally promulgated rule is no different from a written rule and further observed that a statement's ability to coerce is more important than the actual effect of the statement when analyzing an 8(a)(1) claim.

- *NLRB v. Mike Yurosek & Son*, 53 F.3d 261 (9th Cir. 1995). Four employees, spontaneously and without any discussion amongst themselves about any sort of group protest, refused to follow a foreman's request to work overtime after a manager implemented a strict 36-hour per week work schedule. The employees were terminated for insubordination. The walkout was held to be a protected concerted activity because the employees had initially protested the change to a 36-hour week on the basis that there would not be enough time to complete tasks. The employees testified that they refused to stay simply to follow the new schedule, not to protest. The court held that their refusal nonetheless was concerted activity because it was a logical outgrowth of their prior protests, because the employees punched out in each other's presence, and because they were long-time employees whose failure to work longer hours was unprecedented. The court further held that the activity was protected because it could reasonably be seen as affecting the terms or conditions of employment.
- *Tri-County Transportation, Inc.*, 331 NLRB No. 152 (2000), *settled by, judgment entered*, 2001 U.S. App. LEXIS 18839 (6th Cir. Aug. 14, 2001). Three non-union employees worked as drivers for an agency providing several counties with transportation services for students with disabilities. Short-term layoffs during summer months were customary. The employer had unsuccessfully opposed awards of unemployment for one driver, Croskey, for three consecutive summers. Prior to the fourth summer, Croskey encouraged two other drivers to join him in filing a claim. The drivers agreed to meet at the unemployment office and help each other complete the forms. A few days after receiving notice of the filings, the employer fired all three employees. The Board held that the filing of applications for unemployment was "concerted action" protected under the NLRA.
- *Bethany Med. Ctr.*, 328 N.L.R.B. No. 161 (1999). Non-union employees of a cardiac catheterization laboratory of an acute care facility walked off the job when meetings with management regarding nursing support, patient scheduling procedures and work load levels did not bring about changes. Due to the walkout, one doctor was unable to receive emergency care for a patient and had to transfer the patient to another hospital to perform the heart

catheterization. The employees were terminated for patient abandonment, refusing to provide patient care, and endangering the life of patients. The activity was held to be concerted and protected because of the group coordination of the walkout, the subjects prompting the walkout, and because the employees did not create any risk of harm to patients in their actions. No patients required attention when the employees walked out, and the only consequence of the walkout was that procedures were either delayed or patients were transferred to other hospitals, results which frequently occurred when doctors became unavailable.

- *But see Alldata Corp.*, 327 NLRB 127 (1998), *enforcement denied*, 245 F.3d 803 (D.C.Cir. 2001). A divided Board held that an employer violated the law when it discharged a salesperson because the discharge was motivated, at least in part, by his protected concerted activity of complaining, along with his fellow sales persons, about compensation, expense reimbursement, and other working conditions. Dissenting Member Hurtgen agreed that the activities were protected and concerted, but found no evidence that the discharge was motivated by any employer hostility to such actions. On appeal, the D.C. Circuit refused to enforce the Board's order, agreeing with Chairman Hurtgen that there was no evidence that the company ever manifested any hostility to the employee's protected activity. Rather, "the Board just flatly ignored the obvious superseding (and benign) explanation for the abruptness of [the employee's] discharge [the employee sent a certain highly controversial communication only days before his discharge] and instead fixed on an unsupported cause."

X. Not Contacting Legal Counsel Or Experienced HR Managers Before Making A High Risk Termination Decision

- A. Have you ever read about a huge verdict against an employer, read about the horrible facts, and then asked yourself how the company allowed itself to make such a bad series of decisions? Often, the answer is in the very nature of a large corporate organization. Large organizations have built into them some dynamics that can sometimes contribute to poor decisionmaking when it comes to termination decisions. These may include:
1. "Group think."
 2. Politics (go along with the boss because I don't want to ruffle feathers).
 3. Time (sometimes, employers act before thinking all the way through a situation). Plus, managers often don't appreciate the fact that a termination decision should be carefully considered, not made rashly.

Many managers cling to the notion that “at will” employment means “low risk” in all terminations, which is not true.

- B. An ounce of prevention is worth a pound of cure. Translated: paying an experience employment lawyer \$2,500.00 to thoroughly review a termination decision before it is made is a lot better than spending \$50,000.00+ to defend it after it is done (plus a lot more if you lose).
- C. Often, suspending the employee for a week with pay while everyone reviews the situation carefully is better than rushing into a bad or risky termination decision.
- D. Also, following an objective process, rather than making a snap decision, impresses judges and juries and shows the company cares about “getting it right.”
- E. Conversely, when HR “approves” a termination decision with very little review, it is easier for the plaintiff’s lawyer to portray HR’s review as a “rubber stamp,” rather than a legitimate analysis of the merits of the proposed termination. At trial, this can make HR appear as though its function is really simply to try to give false legitimacy to any decision made by management (*i.e.*, to “cover management”).
- F. Indeed, surveys show that many front-line workers believe that HR’s role is in fact to “cover management,” rather than to follow and apply company policies objectively and fairly. This well known bias against HR largely explains why retaliation claims are often successful at trial.
- G. The anti-HR bias can be particularly problematic at trial if the HR manager who “approved” the termination did not review or know many of the facts that the plaintiff’s lawyer relies on to prove discrimination or retaliation. In cross-examination is not uncommon for plaintiff’s counsel to recite numerous facts about the case to the HR manager who approved the decision and, after each one, ask: (1) did you know that fact at the time you approved the decision to terminate my client?; and (2) if not, would that have made a difference in your decision if you had known it? Answering “yes,” to number 2 is often deadly. Answering “no” can also be problematic, because in some circumstances it can make the Company appear as though it was so set on firing the plaintiff that no fact – no matter how important – would have mattered. In addition, answering “no” to that question can make the Company appear stubborn and unwilling to admit a mistake in its zeal to defend itself. If jurors believe that is happening, they will often want to “send a message” to the company through their verdict (which is not a good thing).

- H. Finally, HR’s involvement can decrease the likelihood that a manager will say or do something in the termination meeting that hurts the company, such as making an age related remark or offering the employee a severance package under suspicious circumstances. *See, e.g., Weaver v. Amoco Production Co.*, 66 F.3d 85 (5th Cir. 1995); *Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1190, 1195 (5th Cir. 1992) (“Georgia Gulf’s demand that, as part of the retirement package, Lloyd sign a waiver promising not to sue Georgia Gulf could also have raised some doubt in the minds of the jury about the proffered reasons for Lloyd’s termination.”). In the *Weaver* case, Weaver introduced a secretly taped conversation he had with his supervisor, Phil Henigan (“Henigan”), in which Weaver was informed of his dismissal. Weaver also introduced a transcript of an enhanced version of the tape that contained the following exchange between Weaver and Henigan:

WEAVER: “Well, I know they are looking at the future.”

HENIGAN: “And--and that’s, you know, that’s a big part of it, that”

WEAVER: “And a guy who is my age doesn’t have much future left.”

HENIGAN: “**Yeah**, that’s a hell of a note to have to ... have that stuck in your face, **but I guess in full assessment you’re right**. That’s a--thing of it is it’s ... Uh, it will be a cold--a cold reality you know when I say this. We think it’s--we think it is time. If I were in your position and--we have got other people who are, who are going to be faced with the same thing.”

WEAVER: “What kind of options are we talking about? And how long is it going to affect me and affect what we are looking at?”

HENIGAN: “You’ll have to--**you’ll have to retire.**”

- I. Based on the taped conversation, the Fifth Circuit upheld a jury verdict against Amoco that included \$105,000 in back pay, \$105,000 in liquidated damages, \$52,862.50 in attorneys’ fees, \$3,569.90 in costs and postjudgment interest at the rate of 5.31%. It remanded for further consideration the court’s front pay award of \$280,000.

XI. Two Bonus Tips: Terminate With Compassion, And After The Termination, Shhhhhhhhh!!!!!!! (Remember, Loose Lips Sink Ships – And Sometimes Employers Too).

- A. Don’t humiliate the employee by terminating them in front of coworkers or by unnecessarily calling “security” to have them escorted from the premises in front of other employees. This type of humiliation is a huge motivation for the employee to become very angry and seek a lawyer to sue the company.

- B. After terminating an employee, managers generally should not broadcast the reason for termination.
- C. Although a qualified privilege protects communications about the termination among those with a “need to know,” the privilege can be lost if the speaker doubts the veracity of their statements, or makes the statements to those who do not have a need to know.
- D. There are numerous examples of employees who sued for defamation after their employer fired them, and then told other persons about the (allegedly false) basis for their termination. *See Shearson Lehmen Hutton, Inc. v. Tucker*, 806 S.W.2d 914, 924 (Tex. App. – Corpus Christi 1991, writ dis’d w.o.j.) (affirming liability against employer because the plaintiff’s supervisor recklessly told others that the plaintiff would lose his stockbroker’s license); *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612 (Tex. App. – Houston [14th Dist] 1984, writ ref’d n.r.e.) (affirming large plaintiff’s verdict where ex-employer referred to plaintiff as a “crook,” in a conversation with plaintiff’s undercover investigator who was posing as a “prospective employer”); *Ramos v. Henry C. Beck Co.*, 711 S.W.3d 331 (Tex. App. – Dallas 1986, no writ) (finding a fact issue as to plaintiff’s defamation claim against his employer based on his employer’s statement that he had been caught stealing a power tool).
- E. In early 2005, a Texas jury found for a former manager of Lowe’s Home Improvement in a workers’ compensation retaliation and defamation case. The jury awarded the plaintiff 4.6 million dollars. Here is the press release from the plaintiff’s law firm’s website, that was taken from the Kerrville Daily Times:

Lowe’s ordered to pay \$4.6M

By Gerard MacCrossan

The Daily Times

Published March 03, 2005

A San Antonio jury has ordered Lowe’s Home Improvement Corp. to pay millions of dollars in damages for the wrongful dismissal and defamation of character of Jana Smith of Kerrville.

Attorney Matthew Pearson said Wednesday the jury’s \$4.6 million verdict in favor of Smith came in U.S. Federal Judge Xavier Rodriguez’ court following four hours of deliberation.

According to Pearson, speaking on Smith’s behalf, the Kerrville woman worked as an assistant manager at Lowe’s in Kerrville from January 2002 until her dismissal on Aug. 25, 2003, **the day she returned from a two-month medical absence.**

T.J. Coleman, a spokesman for Smith's attorneys, Gravelly and Pearson law firm of San Antonio, said Smith injured her knee working at Lowe's in February 2003 and submitted a workers' compensation claim. She continued working until June 2003, when she was required to have arthoscopic surgery on her injured knee, Coleman said.

"Upon returning to work, Ms. Smith was terminated by the Lowe's store manager," Coleman said in a statement. **"After wrongfully terminating Ms. Smith, Lowe's management defamed her by telling co-workers and third parties that she was terminated for theft, stealing or other unlawful conduct."**

Pearson, who argued Smith's case, said he believes Lowe's fabricated a story for a loss prevention case against Smith, who still lives in the Kerrville area. He said an attempt to claim more than \$500 from Smith using a debt collection was abandoned by Lowe's after the lawsuit was filed in November 2003.

Lowe's spokeswoman Chris Ahearn said Wednesday she had no record of the alleged debt collection against Smith. She said prior to Smith's dismissal, however, that Smith admitted violating company policy by using her employee discount to buy a ride-on lawnmower for her husband's employer, and also violated policy by handling a return of the equipment after it was used.

"Violation of the policy can result in disciplinary action up to termination," Ahearn said, adding that she couldn't say if that was the sole reason given for Smith's dismissal by former Kerrville Lowe's manager Richard LeMoine.

Pearson said LeMoine wasn't named personally in the suit, but that he did testify during last week's trial. According to Ahearn, LeMoine now manages a Lowe's store in Corpus Christi.

Connolly brushed off the alleged violation of the employee discount policy responding: "The jury's verdict speaks volumes to Mrs. Smith's reputation and personal integrity."

According to Pearson, the claim filed against Lowe's sought \$1.3 million for Smith.

"(The claim) was based on her lost wages — she was earning a substantial amount as a manager — and egregious statements about her conduct," he said. "She had applied to a number of different retailers in the Kerrville area and could not get an interview."

While Smith has since found employment, she is not earning at the salary level she was making at Lowe's, Pearson said.

Ahearn said Lowe's is disappointed at the verdict.

"Our attorneys are reviewing it and evaluating the company's options at this time," she said. "We will be making a decision in the near future as to the company's future action."

Pearson said the Lowe's management engaged in a pattern and practice of "retaliation over workers' compensation claims." Three other former Kerrville employees — David Mata, Norman Morris and Bryan Morey — are being represented in wrongful dismissal claims against the home improvement warehouse chain.

"They had workers' comp. claims and were either fired for bogus reasons or put in menial positions until they quit," Pearson said.

All three cases are set for trial later this year.

Ahearn said Lowe's plans to "vigorously" fight those claims.