THE TOP 10 LABOR AND EMPLOYMENT LAW MISTAKES THAT EMPLOYERS MAKE

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

- **Untrained managers are more likely to violate the law "unintentionally" – *e.g.*,**
  - **failing to respond to an "informal" complaint of sexual or racial harassment.**
  - **making an inappropriate remark about age or pregnancy during interviews or in a termination meeting.**
  - **Blowing off same sex "horseplay." *See, e.g., EEOC v. Boh Bros. Const. Co.*, 731 F.3d 444 (5th Cir. 2013).**
- **Ignorance of the law is no defense – in fact, it often compounds liability as in the *Mathis v. Phillips Chevrolet* age discrimination case.**

Training Managers Continued

- **Training managers and employees helps avoid liability (*Ellerth*/*Faragher*) and punitive damages (*Kolstad*), and emotionally wins over jurors.**
- **Some employment laws provide for individual liability in certain circumstances (e.g., FMLA, FLSA).**

Training Managers Continued

- A company's HR compliance goes up dramatically when HR is embedded in the entire organization's cultural fabric and is part of each manager's thought process in their day to day activities.

- Training managers helps create that sort of winning HR culture and team attitude between managers and the HR department.

- It also opens managers up to better understand the sometimes tough messages HR has to convey, rather than viewing HR as either the enemy, or as annoying overhead ala the HR department in *The Office*.

Training tips

- **Attendance at training should be recorded.**
- **Training should occur on a regular basis, just like any other issue valued by the company.**

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

Jurors and courts are more likely to retaliation where an employer fails to file a timely first report of injury or illness. *See, e.g., Glass v. Amber*, 2002 WL 31430097 (Tex. App.-Houston [1st Dist.] Oct 31, 2002, pet. denied).

- **It also helps to make an extra effort, like sending flowers to the injured employee.**
- **To juries, the Golden Rule matters more than the At Will Rule ☺**
- **You need to look for ways to humanize the Company, that your lawyers can use in Court should they ever need to.**

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

- Employers that timely file first reports of injury or illness may be able to invoke *Burch v. City of Nacogdoches*.

- There, 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). *See also Adams v. Oncor Electric Delivery* Co., 385 S.W.3d 678, 684 (Tex.App.-Dallas 2012, no pet.) (following *Burch* on this point).

3. Disasters In Documentation

- **Desk files – lots of good reasons not to keep them as a matter of course.**
  - **Easy for a plaintiff's lawyer to spin as a "secret file" intended to created a false paper trail behind the plaintiff's back.**
  - **Also, arguably inconsistent with due process, and the whole "give them notice so they can improve" idea behind progressive discipline that the Fifth Circuit embraced in *Laxton v. Gap*.**
  - **Easy to turn into a swearing match because the plaintiff never signed off on them during their employment.**
  - **Often are not in compliance with Company's office policy or official practice.**
  - **Violates jurors' sense of fairness.**

Disasters In Documentation Continued

- No (or bad) documentation of a harassment investigation and resolution. *See, e.g., Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182, 189 (5th Cir. 2012) (affirming 500k jury verdict in same-sex harassment case, and stating that "[t]he human resource staff's decision not to act because of 'insufficient evidence' could reasonably be interpreted as a failure to take prompt remedial action.").

- E-mails – don't say it unless you want a jury to see it. *See, e.g., Ion v. Chevron*, 731 F.3d 379 (5th Cir. 2013) (holding that an email about "playing games" and "what are our options" arguably demonstrated animus toward a FMLA plaintiff for taking FMLA-protected leave in reversing SJ for the employer).

Disasters In Documentation Continued

- Padded performance reviews. You can't take them back, and trying often makes the problem worse in front of a jury. 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.").

- The opposite problem: Mean-spirited memos – a moment of pleasure, a lifetime of regret.

- Inaccuracies in EEOC position papers/TWC hearings. See *Miller v. Raytheon Co.*, 716 F.3d 138, 144 (5th Cir. 2013) (affirming a jury verdict in an age discrimination case partially because "[a]t trial, Miller presented undisputed evidence that Raytheon made erroneous statements in its EEOC position statement."); *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 238 (5th Cir. 2015) (because it was misleading, "[a] jury would be entitled to find the defendants' proffer to the EEOC disingenuous and evidence of pretext."); *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 . . . .").

Disasters In Documentation Continued

- Sloppy documents – say what you mean or a jury (or Court) may infer the worst. *See Garza v. SW Bell*

- Termination Letters – important to get them 100% correct (and compelling is a plus). A disconnect between the termination letter and later "explanation" can sometimes create a problem sufficient to defeat SJ. *See, e.g., Ion v. Chevron*, 731 F.3d 379, 395-96 (5th Cir. 2013) .

Disasters In Documentation Continued

- No Contemporaneous documentation to prove the basis for the employee's termination.
  - The Gap fired 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, and reinstate the jury's verdict.
  - "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. . . . 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." *Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1190, 1194-95 (5th Cir. 1992).
  - *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224 (5th Cir. 2016) (reversing summary judgment for the employer because the employer's given reasons for termination were: (a) not contemporaneously documented and presented to the employee in real time; and (b) in her deposition, their truth was contested by the plaintiff).

Disasters In Documentation Continued

- *Post-hoc* creation of documentation. In *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222 (5th Cir. 2015), the plaintiff was hurt on the job. Shortly thereafter, the employer decided to fire her. At the time, however, there was little to no documentation to justify the decision to terminate. Thus, the employer created a significant amount of documentation to try to justify its decision. And, as part of doing so, it documented incidents that occurred after the decision had actually been made. The lack of contemporaneous documentation to justify the termination decision, combined with the inclusion of post-decision incidents in the *post hoc* paperwork that was created, caused the Fifth Circuit to excoriate the employer and reverse a summary judgment that had been entered by the trial court in the employer's favor. *See also Evans v. City of Houston*, 246 F.3d 344, 355–56 (5th Cir. 2001).

Disasters In Documentation Continued

- Shifting reasons for termination. An employer's shifting reasons for a termination decision over time may constitute evidence of pretext. *See Caldwell v. KHOU-TV*, 850 F.3d 237, 242 (5th Cir. 2017) (reversing summary judgment for the employer in an ADA and FMLA case, and stating that, "[a]n employer's inconsistent explanations for an employment decision "cast doubt" on the truthfulness of those explanations.").

- *Burton*, 798 F.3d at 238 ("The stories being told to this court and to the EEOC are also inconsistent. . . . Manpower and Freescale peddled Burton's alleged July deficiencies as reasons for her termination only before discovery uncovered the termination decision had been made in June. Now, Burton's alleged failings in July are deemphasized and we are presented with dated performance reviews. The shift is not dramatic but, given the circumstances, it is at least some evidence of pretext.").

Disasters In Documentation Continued

- Too subjective. 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 than 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. Hence, that given reason did not satisfy the employer's burden – light as it is – to articulate a legitimate, nondiscriminatory reason for not hiring the plaintiff.

Disasters In Documentation Continued

Linked-In: new way to screw things up. *See Ulit v. Advocate South Suburban Hosp*, 2009 WL 5174686(N.D. Ill., Dec. 21, 2009) (entering jury verdict for the employee where the employer claimed it terminated the FMLA protected employee for gross misconduct, but her manager gave her a good reference on social network sites and to other potential employers).

Documenting tips

- **Instruct managers on proper documentation.**
- **Maintain uniform forms for documentation, reducing the risk of inappropriate documentation.**
- **Don't nitpick. *See Smith v. Xerox* (5th Cir. 2010).**
- **Require employee signature on documentation.**
- **Be clear, comprehensive, and precise.**
- **Don't start the termination process until it's a 100% done deal. *See Smith v. Xerox* (5th Cir. 2010).**

Documenting tips

- Final point to Reiterate: Termination letters need to pop. They need to tell the story in a concise yet complete way.
  - Be specific, and attach the back-up proof.
  - Make it compelling, not ticky tack.
  - Explain what they did, how that violates policy or standards, and what harm it caused, or could have caused not just the company, but – more importantly – their coworkers, customers, stakeholders, the public, etc.
  - You must justify why the company is taking a job away from this person, and potentially seriously adversely affecting their ability to support their family. That is how a jury will see it, so that is how you should too.

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

- Example – employers sometimes forget to read their own policies when proceeding with a RIF or an employee termination. This can plant a very problematic seed in that RIF or termination. *See Taylor v. Unocal* (5th Cir. 2002).

- Failure to follow your own policy without a good reason can *sometimes* be seen as evidence of pretext. *See Goudeau v. National Oilwell Varco, L.P.*, 793 F.3d 470, 477 (5th Cir. 2015).

Not Following Your Own Company Policies Without A Good Reason

- Can deviate if intentional, documented, and well-reasoned (e.g., *EEOC v. Texas Instruments* RIF).

- To follow Company policies, managers need to be trained on them, and have it ingrained in them to follow the policies. Some examples where managers sometimes "forget" and it is used to prove pretext:

  - Progressive Discipline policies

  - Performance Evaluation policies.

  - RIF or lay-off policies.

5. Failure To Investigate And Conclusively Confirm The Factual Basis For Termination

- Jurors and courts often expect that an employee will not be terminated unless the company has first performed a thorough investigation.

- A significant part of any valid investigation is giving the employee an opportunity to defend themselves – we often recommend in writing. Failure to do so will often inflame a jury or court. *Smith v. Xerox* (5th Cir. 2010). Especially if the employee is a long-term employee or has some other sympathetic feature about them (disability, pregnant, etc). *Id.*; see also *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224 (5th Cir. 2016)

5. Failure To Investigate And Conclusively Confirm The Factual Basis For Termination

- *Ion v. Chevron USA, Inc.*, 731 F.3d 379 (5th Cir. 2013), stating in an FMLA retaliation case:

> Chevron's failure to conduct even the most cursory investigation, confront Ion about Peel's statements, or seek a second opinion under the FMLA calls into doubt Chevron's reasonable reliance and good faith on Peel's statements, and, at the very least, creates a fact issue as to whether it would have terminated Ion despite its retaliatory motive.

* This decision shows that the pro-employer "honest belief" doctrine has limits and is not a total blanket of immunity from liability against allegations of discrimination or retaliation.

6. Violating The ADA By:

- Interactive process missteps (e.g., *Gagliardo*, *Humphrey*,*Giles, Cutrera, and Chevron Phillips*).
  - Failing to recognize that an employee has initiated the interactive process (*Gagliardo*).
  - Giving up on accommodation too soon (*Humphrey*).
  - Responding to the employee with inaccurate information (*Giles*).

Violating The ADA By:

- Terminating An Employee Who Requested Accommodation Before Going Through The Interactive Process (*Cutrera* and *ChevronPhillips*).

- This one is very dangerous given the amended version of the ADA that took effect January 1, 2009.

More Ways To Violate The ADA

- *Barber* – the "full duty" trap. *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.").

Or, Violating the ADA By:

- Denying reasonable accommodation requests because of preexisting disciplinary problems that were caused by the employee's disability (*e.g.*, *Humphrey* and *Riel*).

- What to do when an employee who is about to be terminated suddenly discloses their alleged "disability."

Jumping to conclusions that the employee's disability poses a "direct threat" (e.g, *Rizzo I* and 2007 *DuPont* Case), or renders them unable to perform a job (2016 *Cannon* decision)

- Whether an employee is a direct threat is extremely fact-specific, and cannot be assumed based on the type of condition – *i*.e. epilepsy, diabetes.
- It must be based on current medical knowledge, not myth, fear or stereotype.
- Same goes for the "qualified" analysis. *See Cannon*.

7. FMLA Pitfalls

- Terminating an employee based on an absence that is covered by the FMLA; or

  Question: Do your managers know when an absence is covered by the FMLA? If not, they are likely to do this.

- Not expressly selecting the twelve month FMLA leave period your company will use

- Beware Equitable Estoppel

8. FLSA Noncompliance – Can Someone Say "Collective Action"?

- **Historical inertia does not equal FLSA compliance.**
- **Do an FLSA audit of your workforce before a plaintiff's lawyer sues (and they are suing a lot now – it is easy pickings).**
- **Are your "independent contractors" really "employees"?**

More on FLSA

- Are your job descriptions accurate and consistent with exempt status?
- Remember that the burden to prove exempt status is on the employer. *Dewan v. M-I, L.L.C.*, 858 F.3d 331, 334 (5th Cir. 2017).
- Common mistakes – misclassification of executive assistants, IT employees, office administrators, and employees with important sounding titles such as "analyst," or "coordinator."

9. Overlooking The NLRA And Punishing Employees For Engaging In "Protected Concerted Activities"

- 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.

Examples of Protected Concerted Activities

- Employees' right to protest a poor manager (*Trompler*).
- Expressing group concerns and/or acting with the endorsement of other workers (*Timekeeping Sys., Inc.*).
- Actions regarding work hours, wages, terms of pay, and other work conditions (*Main Street* and 2013 *Jones and Carter* decision out of Houston).

Examples of Protected Concerted Activities

- Facebook rants and other social media statements. (*Hispanics United of Buffalo, Inc.*).

- Recently, in *NLRB v Pier Sixty, LLC*, 855 F.3d 115 (2nd Cir. 2017), the court upheld the NLRB's finding that the employer violated the NLRA by firing an employee in a non-union workplace who posted the following on Facebook about his supervisor, Bob, right before an election over whether to unionize or not:

- "Bob is such a NASTY MOTHER F@CKER, F@ck his mother and his entire f@cking family!!!!!" His brief post ended with "Vote YES for the UNION!!!!!!!"

Examples of Protected Concerted Activities

- Right to fraternize so as to discuss terms and conditions of employment.

  See Guardsmark LLC v. NLRB, No. 05-1216 (D.C., Feb. 02, 2007) (employer's work rule prohibiting coworker fraternization violated Section 7 of the NLRA because employees would reasonably believe the rule prohibited employees from discussing the terms and conditions of employment).

10. Not Contacting Legal Counsel Or HR Before Making A High Risk Termination Decision

- Avoid dangerous "group think" as well as internal politics that sometimes lead to bad decisions.
- Regardless of what some managers or execs think, the good old "at will" defense is rarely – if ever - a winner with juries.
- An ounce of prevention is worth a pound of cure (tired but true).

More on going to HR or Legal Before a high risk termination . . .

- Juries will appreciate diligent efforts made to do the right thing, even if you end up making a mistake.
- On the other hand, a hastily made or "rubber stamped" decision may offend juries and can make the company look callous or uncaring.

More on going to HR or Legal Before a high risk termination . . .

- Tip: Put on LOA, investigate, then decide.

- Plus, early HR/Legal involvement helps avoid the "smoking gun" statement by a well meaning but inarticulate manager. See *Weaver v. Amoco Production* Co., 66 F.3d 85 (5th Cir. 1995) (after employee said on secret audio recording that his age must be the reason he was being let go, the manager said "[y]eah, 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."

11. Bonus Mistake: Not Considering The Cat's Paw Doctrine And How It Might Taint An Otherwise Unbiased Termination Decision

- Supreme Court recognizes the cat's paw doctrine in *Staub. v. Proctor Hosp.*, 562 U.S. 411, 131 S. Ct. 1186 (2011).

- Fifth Circuit extends the doctrine to animus originating with a non-supervisory coworker in the bizarre case of *Fisher v. Lufkin Industries, Inc.*, 847 F.3d 752 (5th Cir. 2017).

- Given the acceptance – and extension – of the cat's paw doctrine, employers really need to scrub out a termination decision for any signs of discriminatory or retaliatory taint before executing the termination. Otherwise, there is always the potential for a cat's paw type situation.

Tip: Terminate with compassion

- Remember When you fire, be nice. As Mom said – manners matter.
- Don't fire employee in front of others.
- Don't humiliate the employee – that's asking for a lawsuit.
- Terminate with resolve but compassion.
- Don't "call security" unless it makes sense to.
- Give a (good) reason. Not legally required in Texas, but not giving a reason ticks people off and offends most people (including judges and jurors – e.g., *Miller v. Raytheon* $17 Million Verdict in July 2010 in Dallas, later affirmed for a somewhat lower amount, but ultimately still seven-figures).

Bonus Tip: Keep It Quiet

- Ex-employees often bring claims for defamation for statements made after termination -- it's a dangerous script (e.g., *Smith v. Lowe's*).
- There is a qualified privilege, but it can be lost. Share information on a need-to-know basis only.
- Remember – you may be tape recorded – it's perfectly legal in Texas and many other states.

THE END

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