TOP TEN MISTAKES EMPLOYERS MAKE, AND HOW TO AVOID THEM

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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.**
- **Ignorance of the law is no defense – in fact, it compounds liability.**

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 (e.g., FMLA, FLSA).**

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 are more likely to find discrimination where an employer fails to file a timely first report of injury.

- **It also helps to make an extra effort, like sending flowers to the injured employee.**
- **General Rule: Don't terminate unless you've done something "extra nice" for the employee.**

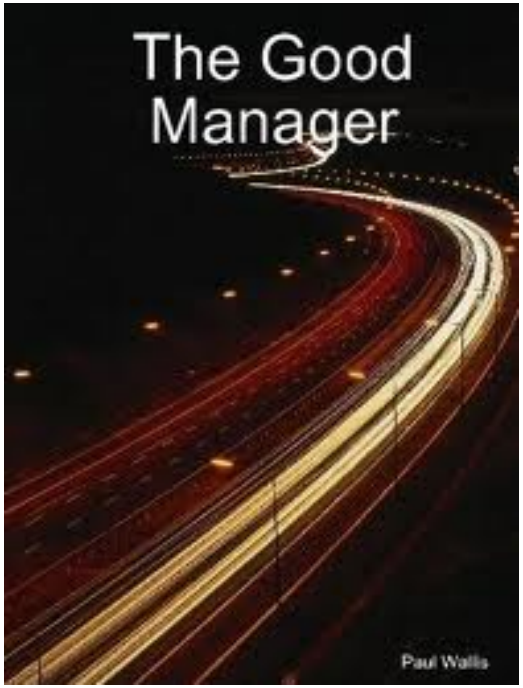
3. Disasters In Documentation

- **Desk files**
- **No documentation to prove the basis for the employee's termination**
- **No (or bad) documentation of a harassment investigation and resolution**
- **Padded performance reviews – you can't take them back**
- **Mean-spirited memos – a moment of pleasure, a lifetime of regret**
- **Inaccuracies in EEOC position papers/TWC hearings**
- **Sloppy documents – say what you mean or a jury may infer the worst**
- **E-mails – don't say it unless you want a jury to see it**

Disasters In Documentation

Linked-In: new way to screw things up. *See Ulit v. Advocate South Suburban Hosp*, (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.**
- **Develop, communicate and enforce an e-mail policy.**
- **Don't start the termination process until it's a 100% done deal. *See Smith v. Xerox* (5th Cir. 2010).**

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

- **Example – employers often 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 Smith v. Xerox* (5th Cir., Mar. 24, 2010).**

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

- Jurors 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 – in writing. Failure to provide that basic due process will often inflame a jury. *Smith v. Xerox* (5th Cir. 2010). Especially if the employee is a long-term employee or has some other sympathetic feature about them. *Id.*

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*), or**
  - **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 new 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 March 2007 *DuPont* Case).

- **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.**

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.**
- **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*).**

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

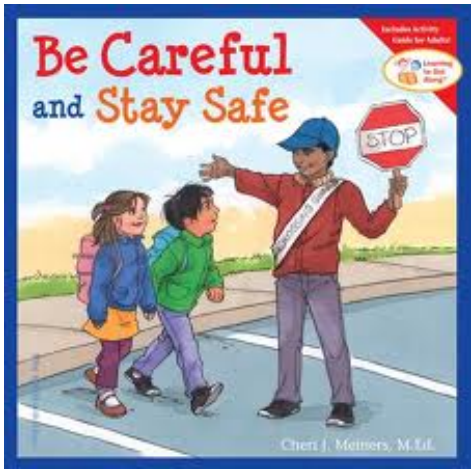
- **Avoid dangerous "group think" as well as internal politics that sometimes lead to bad decisions.**
- **Regardless of what some managers or execs think, the good old "at will" defense is rarely – if ever - a winner with juries.**
- **An ounce of prevention is worth a pound of cure (tired but true).**

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 often offends juries and makes the company look callous or uncaring.**

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

- **Tip: Suspend, investigate, then decide.**
- **Plus, early HR/Legal involvement helps avoid the "smoking gun" statement by a well meaning but inarticulate manager (e.g. *Weaver v. Amoco*).**



11. TWO BONUS TIPS: No. 1 -Terminate with compassion

- **Remember When you fire, be nice – the "golden rule." what 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 you must.**
- **Give a reason. Not giving a reason ticks people off and offends most people (including judges and jurors – e.g., *Miller v. Raytheon* 17 Million Dollar Verdict in July 2010 in Dallas).**

12. TWO BONUS TIPS: No. 2 -

- **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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