

# THE DIRTY DOZEN: TOP TWELVE CASE CRUSHING EMPLOYER MISTAKES AND HOW TO COUNSEL YOUR CLIENT 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.
  - Blowing off same sex “horseplay.” See, e.g., *EEOC v. Boh Bros. Const. Co.*, 731 F.3d 444 (5<sup>th</sup> Cir. 2013).
- **Ignorance of the law is no defense – in fact, it often 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 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 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.**
- **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.**

### 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 flip as a “secret file” intended to created a false paper trail behind the plaintiff's back.
  - Also, arguably unfair and inconsistent with due process, and the whole “give them notice so they can improve” idea behind progressive discipline.
  - Easy to turn into a swearing match.
- No documentation to prove the basis for the employee's termination. See, e.g., *Vaughn v. Woodforest Bank*, 665 F.3d 632, 638 (5th Cir. 2011) (reversing summary judgment for employer in reverse-race discrimination case partially because of this problem).

# 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 (5<sup>th</sup> 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**
- **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*, 716 F.3d 138 (5<sup>th</sup> Cir. 2013) (affirming large verdict for the plaintiff partly because of the employer’s position statement to the EEOC contained inaccurate information); *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222 (5th Cir. 2015) (reversing summary judgment in part for same reason).**

# 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* (5<sup>th</sup> Cir. 2013).**

## 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* (5<sup>th</sup> 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* (5<sup>th</sup> 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* (5<sup>th</sup> Cir. 2002).**
- **Failure to follow your own policy without a good reason can sometimes be seen as evidence of pretext. See *Smith v. Xerox* (5<sup>th</sup> Cir., Mar. 24, 2010).**

# **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 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. *Smith v. Xerox* (5<sup>th</sup> Cir. 2010). Especially if the employee is a long-term employee or has some other sympathetic feature about them (disability, pregnant, etc). *Id.*

## 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 “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 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 and 2013 Jones and Carter decision out of Houston*).
- Facebook rants and other social media statements? (*Hispanics United of Buffalo, Inc.*)

## 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: Suspend or put on LOA, 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. 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).

## 12. 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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