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DON'T DO THAT!

Common Mistakes That Lead to Litigation

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EMPLOYMENT LITIGATION

Employers cannot prevent every lawsuit that may occur. However, many claims can be prevented or steps can be taken to ensure that the employer's defenses are strong. Regardless of the size of the employer, there are several common mistakes made by most employers that can lead to lengthy and costly litigation, and ultimately make defending a claim much more difficult. Some of these common mistakes are outlined and discussed in the following pages.

The Equal Employment Opportunity Commission's ("EEOC") website also provides great resources for making employment decisions such as making policies, training, conducting evaluations, disciplining employees, and more.[1]

A. Examples of Common Mistakes Frequently Made by Employers

1. Dishonesty or Attempting to Cover Up

Employers must be honest with their employees and in paperwork about the true reasons for all employment decisions. Testimony or documentation that is dishonest or does not include all important details is subject to skepticism and criticism.

An easy mistake to make after an employee has filed a charge or a lawsuit is trying to cover up or lessen the truthfulness of the employee's claim. Credibility is easily lost if an employer's decision for an adverse employment action changes or the employer attempts to cover up the situation.

The following case is an extreme example of what can happen when employers behave this way.

The Case of Chipotle Mexican Grill[2]

A minor employee's mother brought suit against the minor's supervisor, chain restaurant's manager, and chain restaurant employer for sexual assault. The minor began working at Chipotle when she was 16 years old. She began dating her 26-year-old supervisor and a physical relationship ensued.

Relevant here, the general manager of this location had told the minor's mother lies about where her minor daughter was.[3] The general manager told the mother that a female co-worker had driven the minor home, when in reality the general manager knew the minor was with her 26-year-old supervisor. The general manager then called the employee to inform him to take the minor home as her mother was actively looking for her.

Eventually, the mother learned of the illicit relationship. The mother returned to Chipotle and accused the general manager of covering up the relationship. The mother filed the lawsuit. The jury would eventually award $2.29 million in actual damages and more than $2.9 million for sexual harassment, before the trial

[1] https://www.eeoc.gov/employers/small-business/making-employment-decision

[2] S.V.Z., (Individually) and As Next Next Friend of A.Z. v. Solis, No. 2014-69341, 2016 WL 7655406 (Tex.Dist. Dec. 05, 2016), reversed and remanded, Solis v. S.V.Z., 566 S.W.3d 82 (Tex. App. 2018).

[3] See Solis v. S.V.Z., 566 S.W.3d 82, 88 (Tex. App. 2018).

court lessened the award.[4]

The Court of Appeals of Texas, 14th District, did eventually reverse and remand portions of the case. Most importantly, the court entered judgment in favor of the general manager who allegedly "covered" for the 26-year-old supervisor. The court noted that there was no cause of action, for aiding and abetting, under Texas law and thus no basis for liability.[5]

No employer wants to admit that it may have handled a situation incorrectly. It is important that employers remain honest and direct in these situations as the consequences can far outweigh the quick responses to potential lawsuits. Once credibility is lost, it cannot be built back.

2. Letting Emotions Get the Best of You and Worse Yet, Retaliating

The potential threat of litigation can be extremely stressful. There is an emotional component, for each party, to resolving employment disputes. However, it can be costly for the employer who does not follow company policy and procedure when faced with an employee complaint (or lawsuit).

According to the EEOC, retaliation is the most alleged form of discrimination.[6]

a. COVID-19 Pandemic

The EEOC also states that the COVID-19 pandemic has "new situations and additional challenges." Employers must balance employees' rights with the necessity to provide a health and safe work environment. On November 17, 2021, the EEOC updated its COVID-19 technical assistance to include information about employer retaliation in pandemic-related employment situations. These updates include, but are not limited to:

i. Job applicants and current and former employees are protected from retaliation by employers for asserting their rights under any of the EEOC-enforced anti-discrimination laws.

ii. Protected activity can take many forms, including filing a charge of discrimination; complaining to a supervisor about coworker harassment; or requesting accommodation of a disability or a religious belief, practice, or observance, regardless of whether the request is granted or denied.

iii. Additionally, the ADA prohibits not only retaliation for protected EEO activity, but also "interference" with an individual's exercise of ADA rights.[7]

b. Emotional Responses Leading to Retaliation

Take the example of a jury awarding an employee $1.3 million damage award for a retaliatory termination

[4] https://setexasrecord.com/stories/511641873-chipotle-granted-new-trial-in-statutory-rape-lawsuit-jurors-were-not-allowed-to-hear-that-16-year-old-girl-consented

[5] See Solis v. S.V.Z., 566 S.W.3d 82, 87 (Tex. App. 2018).

[6] https://www.eeoc.gov/newsroom/eeoc-updates-covid-19-technical-assistance-cover-retaliation

[7] See id.

after the employee took a vacation to Mexico while on a medical leave of absence from his employer.[8] Essentially, the employee took a leave of absence pursuant to the Family Medical Leave Act for a surgery on his foot to remove a tumor.[9] The employee had previously planned a knee surgery but needed the foot surgery first. After the foot surgery, the employee wished to return to work before exhausting all of his vacation time, which his employer informed him that he would need a note from his surgeon. The employee soon learned that he would not be able to return to work without exhausting his vacation time, so he took his previously scheduled vacation to Mexico, as he did annually.

When the employee received his paycheck, it was not the amount he believed it should be. The employee emailed the human resource director, requesting a corrected paycheck and a copy of the relevant policy. The human resource director forwarded this email to another human resource employee stating, "Is he serious?" to which a reply of "OMG" was sent.

On the same day the employer learned of the employee's vacation to Mexico, it conducted an investigation and recommended the termination of the employee.

The highest court of Massachusetts affirmed the $1.3 million jury award. The court noted that the "shock, outrage and offense" is what drove the employer's decision, not the employee's medical records or request to return to work earlier than planned. This was was driven by the email exchange between the two human resource employees.

What does this jury award, and affirmance, mean for employers? Employers should be extremely cautious in reacting quickly to situations that they may view as unfair or violating certain protocol. It is important to remain calm and take the time to conduct an adequate investigation or allow the employee to explain the situation, which is addressed more thoroughly below.

3. Disregarding company policies

A company policy can be one of the most effective defenses against an employment claim. Written policies contained in an employee handbook help establish clear guidelines and expectations not only for employees, but also the managers and supervisors that may have to enforce those policies. These written policies help ensure that employees are not being treated differently for discipline or arbitrarily being singled out for behavior.

Having a company policy (or multiple), and uniformly following the policy, is of the utmost importance. If an employer has a company policy in place and the employer uniformly enforces it, the employer will be able to show exactly how the employee violated said policy and potentially minimize the threat of litigation (or build a successful defense in litigation). The employer may also be able to show that it has taken similar action(s) in different scenarios if the issue has occurred previously. If policies are not followed uniformly, it may appear the employer is picking and choosing when to enforce policies- which could lead to evidence of unfair treatment.

Another benefit of having a clear and enforced policy is that it allows the employee to be fully aware of the potential consequences, such as termination, if the employee violates the company policy. When employers

[8] https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/employer-makes-million-dollar-fmla-mistake.aspx

[9] DaPrato v. Massachusetts Water Resources Authority, Mass. Sup. Ct., No. SJC-12651, 482 Mass. 375 (June 5, 2019).

follow the company policy, an adverse employment action, therefore, should not be as surprising to the employee and could help defeat future litigation as it could minimize employee shock and resentment.

Another extremely important step is to update the employee policies regularly and consistently with company practice. It is not helpful if policies are out-of-date and do not include any changes the company has made.

However, investigations and/or failing to properly conduct an investigation are another important aspect that goes hand-in-hand with having a company policy. These issues are addressed below.

4. Failing to conduct a thorough and fair investigation.

One of the most important aspects of avoiding, or potentially defending, a lawsuit is conducting a thorough and fair investigation. Every claim should be considered seriously and investigated properly. How the investigation is conducted, such as the completeness and method, is often more important than its findings.

Conducting a thorough and fair investigation can also minimize an employee's emotional response to the situation. An employer should allow the employee to provide an explanation, according to the employee's viewpoint, before any adverse employment action is taken. This provides an opportunity for the employee to admit or deny any misconduct, as well as decrease the risk of any rash decision-making on the employer's side.

What are the consequences of not conducting a thorough and fair investigation? That answer is clear.. . . potentially a $7.4 million verdict. In *Yowan Yang v. ActioNet, Inc.*[10], Mr. Yang was hired to provide technical support to the Federal Aviation Association. This contract was eventually acquired by ActioNet, and Mr. Yang continued his employment, earning strong performance reviews and raises. Eventually, ActioNet hired another individual who was on the same team as Mr. Yang and the two sat near one another. One day in 2012, allegedly after a workplace disagreement, the individual attacked Mr. Yang and choked him. In response, ActioNet terminated the employment of Yang and as well as the other individual. However, ActioNet did not perform an investigation. In response, Mr. Yang sued.

> In spite of receiving an investigation report from federal investigators two days after the incident revealing that Yang was a "complete victim," no corrective action was taken by ActioNet to investigate further, to communicate with Yang the findings of the investigation, or to rehire him. In fact, ActioNet ignored Yang's pleas for an explanation as to why he was terminated and his request for reinstatement.[11]

As a result of the above, the jury awarded Mr. Yang $2.4 million in compensatory damages and $5 million in punitive damages.

To avoid the extreme results above, some key points to consider when conducting an investigation are:

a. Preserve all key evidence acquired during the investigation

b. Interview all potential witnesses

[10] No. CV14-00792, 2015 WL 13427600, at *1 (C.D. Ca. Feb. 2, 2015).

[11] https://www.vjamesdesimonelaw.com/workplace-violence-wrongful-termination-case/

c. Reach an informed conclusion after investigating all the evidence

d. Share the results with only the necessary parties

e. Implement any changes that were revealed during the investigation

The Society for Human Resource Management (SHRM) also provides great resources for how to conduct a thorough and fair investigation.[12]

5. Failing to properly document an investigation, misconduct or event.

Regardless of the employment litigation at issue, having adequate document is paramount. An employer cannot defend itself if it does not have any documentation to support the adverse employment decisions.

Any misconduct or event that could potentially lead to an adverse employment action, whether it be discipline or termination, should be documented at the time it occurs. This documentation provides an overview of the employee's history with the employer and may provide the employer with defenses that it acted thoroughly and fairly before implementing an adverse action.

Additionally, documenting an investigation, misconduct, or event also provides the employer with a concrete defense and something tangible it can take to court. Documentation of workplace events also avoids (or at least lessens) the dreaded credibility aspect of deciding whether to believe the employee or the employer.

On the flip side, a paper trail is hard to dispute. Even better is an accurate and detailed paper trail that gives the big picture over the course of the employee's employment that shows each step in the process leading up to the adverse employment action. Proper documentation, therefore, can directly dispute the employee's claims that he or she was wrongfully terminated or disciplined. Further, it would be hard for an employee to dispute documentation showing conversations took place, counseling was given, and expectations were discussed.

6. Misuse of social media or informal communications such as texts or emails.

Employers do not enjoy litigation, especially when it involves a disgruntled employee who feels wronged by an adverse employment action. However, if not properly trained or prepared, employers and managers can face serious consequences in litigation from what seem like minor actions or even actions taken outside of work, in the context of a social media platform, or over drinks at a happy hour.

For example, many employers do not consider that many (if not most) emails can be discoverable in litigation. As discussed above in the case of the Mexico vacation, it was the human resource employees' emails that provided the nail in the coffin. The comments made in those emails, "Is he serious?" and "OMG", were enough proof for a jury to infer discriminatory intent.[13]

To emphasize this importance, the following case is described by the law firm that represented the plaintiffs in

[12] https://www.shrm.org/resourcesandtools/tools-and-samples/how-to-guides/pages/howtoconductaninvestigation.aspx

[13] https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/employer-makes-million-dollar-fmla-mistake.aspx

litigation against their former employer.[14]

a. The PowerPoint Presentation that Ended with a $9,450,000 verdict

In 2013, several employees of a Louisville cable company were terminated for allegedly stealing some of the company's printers. An administrative assistant in charge of office supplies gave the printers to other employees of the company, unaware that it supposedly violated company policy. A human resources investigation commenced, and various employment decisions were recommended: that some employees be terminated while others not be. All employees were eventually terminated. Not long after, a company speaker at an employee conference implied that the fired workers were "thieves." A speaker also referred to the incident as "printergate" and referred to the terminated employees as "people we know and love who made bad choices." This was stated in connection with a discussion about "Operation Greenlight," which involved embezzlement, and "Operation Buzzkill," which involved drug use and trafficking. Another speaker mentioned Pete Rose and OJ Simpson as other people who had made bad choices.

Attendees of the conference clearly recognized the situation and filed a complaint with the company. For whatever reason, the company allegedly did not take any action on this complaint. The plaintiffs sued the company for defamation.

The jury returned a verdict in favor of the plaintiffs. Each plaintiff received $350,000 in compensatory damages and $1,000,000 in punitive damages.

Employers should carefully consider whether to adopt a social media policy. If an employer chooses to adopt a policy, the provisions should be carefully considered. Generally, strong policies should be: (1) Simple and easy to understand; (2) Enforced consistently; (3) Clearly define what constitutes trade secrets or confidential company information; and (4) Provide examples of violations.

When authoring a social media policy, however, employers should avoid the temptation to prohibit discussion regarding job conditions or complaints or to prohibit coworkers from connecting on social media. The National Labor Relations Board has made it clear that such policies can violate federal labor law.[15]

The importance of company policies cannot be understated because a policy regarding social media or informal communications generally can be helpful in the litigation process. The key is to ensure that management members are complying with policies.

7. Failing to preserve all relevant evidence

Litigation can be made exponentially harder when employers fail to preserve all relevant evidence. Relevant evidence can include photographs, videos, physical documents (such as employee discipline records, hiring documents, etc.), and electronically stored information (ESI).

It is extremely important that employers retain all relevant evidence, and in fact employers are under a duty to do so, in the face of a potential lawsuit. Some examples of when this duty can be assumed to kick in is when a

[14] https://www.carroll-turner.com/blog/2018/05/carroll-turner-wins-multimillion-dollar-verdict-in-defamation-case/

[15] https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/the-nlrb-and-social-media

workplace accident occurs or any adverse employment actions such as termination, demotion, or suspension.

One consequence of failing to preserve relevant evidence is spoliation, which in many states can be a separate legally cognizable theory of liability. Spoliation of evidence is essentially the failure to preserve evidence by a party that has a duty or obligation to do so. Spoliation of evidence can be done either intentionally or neglectfully, for example by destruction, losing, or damaging the evidence.

Another important adverse consequence of failing to preserve relevant evidence is that the judge can instruct the jury on a missing evidence instruction. Essentially, the court will inform jurors that they may assume the lost or destroyed evidence was unfavorable to the employer. Furthermore, the court may impose sanctions on the employer, which could include dismissal of the employer's arguments and defenses.

Of course, intentionally destroying relevant evidence should never be encouraged (and therefore hopefully never occur). However, sloppy documentation retrieval and preservation can be equally damaging in the throes of litigation.

8. Providing a vague reason for terminations or employment decisions.

Another common mistake that employers make is not providing a specific reason for an adverse employment action. The reasons for a decision should be clear, concise, and consistent. Another important rationale for keeping the decision consistent is that inconsistent reasons, or no reason given at all, leave room for the employee to question the adverse employment action. If it is not consistent, an employee could be left wondering why such an adverse action was taken and could seek future legal advice if the action is severe, such as termination. Additionally, the employee could wonder if there was an ulterior motive to the adverse action. Avoid statements like "things are just not working out" or "we have decided to go in a different direction." These reasons are difficult to defend.

The employer must remember to consider its burden- that is, a legitimate, nondiscriminatory reason for termination. If there is no reason given, or if it is vague, it may be hard later down the road to articulate the legitimate employment decision. However, if it is clear and consistent, it will not be difficult in the event of future litigation to clearly articulate why, and how, such decisions were made.

9. Rewarding poor performers with raises or positive reviews.

One of the worst things an employer can do is reward an employee that does not meet the qualifications of the reward being given. After a history of raises or positive reviews, an adverse employment action following this pattern is inconsistent and difficult to defend. Instead, it may appear that the employer is actually going against their previous decisions. It is also harder to defend actions that do not accurately reflect the employer's view.

Because reviews and/or any positive employment decision, such as a raise, will likely be the focus of employment litigation, it is imperative that these reviews or decisions be accurate and reflect the employer's viewpoint. It is hard to convince a jury that an employee was terminated for poor performance when every review states the employee met or exceeded expectations.

Although uncomfortable, it is imperative that the reviews be truthful and reflect the employee's performance. The following concepts may help improve employee reviews that are more meaningful and avoid the risk of

future litigation issues:[16]

a. **Select an impartial reviewer**: there should not be individuals reviewing family members or those with close, personal relationships.

b. **Frequency of reviews**: reviews should be performed consistently and employees with the same classifications should be reviewed within the same time period of one another.

c. **Self-assessments**: allowing employees the opportunity to assess themselves provides the employer and employee to agree on areas that may need improvement, making it easier to set mutual goals and allow each party to understand performance plans.

d. **Objectionability**: provide objective goals and performance standards so as avoid individualized expectations that may not be uniform with all employees within the same classification

10. Failing to involve inhouse (or outside) counsel or ignoring their advice.

Another important tool to avoid litigation is not waiting until it is too late to contact an attorney. Lawyers do not always give the answer(s) that employers want to hear, and it can be hard to digest the actions or suggestion a lawyer is providing. However, it is imperative to remember that lawyers are experienced professionals in handling uncomfortable situations such as adverse employment actions. If you have inhouse counsel, take advantage of the expertise of the legally trained team member. If inhouse counsel is not an option, it can be much more cost efficient to contact an attorney before an employment decision is made, either for advice on how to handle the situation or simply to confirm the decision to be made is correct, before waiting until the employee threatens a lawsuit. Taking this initiative can also be important in preserving evidence in the event of future litigation.

[16] https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/reduce-the-legal-risks-of-performance-reviews.aspx