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Documenting performance issues can save employers headaches

One of the biggest traps an employer can fall into is failure to document employee performance issues. If an employee who has been demoted, disciplined or fired decides to sue you, claiming that you were motivated by impermissible prejudice, or that you acted in retaliation for something they did that is protected by the law, it will be very difficult to defend yourself without a solid, consistent record of all the legitimate problems the employee caused.

Strong documentation can save an employer from lengthy litigation and potentially costly judgments, and some recent cases bear this out.

One example is a retaliation case brought in federal court by an employee of an engineering company in Wisconsin. Employee Laura Rozumalski reported sexual harassment by her direct supervisor. The allegations were quickly investigated and the supervisor was fired. But when Rozumalski was fired two years later, allegedly for performance issues, she claimed the company did so in retaliation for her harassment complaint two years earlier.

The trial judge found that she had no claim and issued a judgment for the employer. When Rozumalski appealed, the 7th U.S. Circuit Court of Appeals upheld the lower court's judgment.

Although the court acknowledged that workplace harassment can hinder a victim's ability to succeed years after the incident, the record didn't show this to be the case. Specifically, the court pointed to the long period of time between Rozumalski's complaints and her dismissal, and it was

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particularly convinced by a lengthy, detailed record the employer had compiled of the employee's struggles to meet work standards, her consistent tardiness and her failure to comply with an employee improvement plan mandating that she keep regular office hours and inform her manager if she were to leave for reasons other than a normal lunch break.

Had the company not consistently documented the issues, the case potentially could have come before a jury, putting the employer in an unpredictable spot.

Another case, in Tennessee, shows that it's important to not only keep a

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Worker's comp bar not always impossible barrier

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If your employee is hurt at work, he or she typically can't bring a personal injury suit against your company in court. That's because of the "worker's comp bar." In other words, the employee needs to file a claim in the worker's compensation system, where the payments obtained may be less than the damages that might have been recovered from a jury or in a settlement.

But don't assume you're safe from all suits for workplace injuries, because there are exceptions in which workers can file suit.

For example, in most states, workers can file a lawsuit if their employer intentionally caused their injuries. This happened recently in Michigan, when an electrical worker was hurt while on an elevated aerial lift transferring live power lines from an old wooden pole to a new one. After a supervisor left the job site, the worker made contact with the electrical distribution line and was electrified, suffering severe permanent injuries.

The worker, Kyle Scheuneman, filed a personal injury claim against his employer, saying the company knowingly failed to provide him with necessary safety training and equipment, that the supervisor left without informing him the work was being done improperly and that the company had a history of similar violations.

A trial judge dismissed the case, but the Michigan Court of Appeals reversed, finding that putting the worker in a situation where injury was inevitable was equivalent enough to intentional harm for the worker's claim to move forward.

Most states also let workers sue a third party (someone other than their employer) responsible for their workplace injury. In North Carolina, a janitor in a manufacturing plant was severely burned when a machine exploded. He sought to hold the plant accountable. The plant argued that worker's comp was his exclusive remedy. But the janitor argued that he actually worked for the temp agency that assigned him to the plant, entitling him to collect a worker's comp claim from the agency and bring a personal injury suit against the manufacturer. The manufacturer, apparently realizing the risk that a jury would agree, opted to settle the case out of court for a significant amount.

'Long-shift' workers could recover for unpaid 'sleep time'


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If you're an employee who works long shifts (for example, seven days on and seven days off, in which you're technically always on duty), or if you're an employer with such workers, it's important to know that sleep time must be compensated. Federal regulations allow for certain arrangements under which sleep time is unpaid, but the regulations can be complicated, which is why employers need to run their policies by an employment attorney to make sure they're not wading in dangerous waters.

A recent decision from the 1st U.S. Circuit Court of Appeals makes that clear. In the case, employees of a nonprofit organization that runs group homes for developmentally disabled adults maintained long-term staff to care for its residents. These workers pulled seven-day-on/seven-day-off shifts from Thursday to Thursday. Workers' shifts included four unpaid four-hour breaks each week, and eight unpaid hours of nightly sleep time.

A group of workers took the employer to court seeking unpaid back wages, arguing that the sleep time should have been compensated under the Federal Labor Standards Act.

The employer argued that a Department of Labor regulation provided that a worker residing on his or her employer's premises on a permanent basis for an extended period of time can enter into any "reasonable agreement" about payment for sleep time. Under the same set of regulations, the employer argued, an "extended period of time" was defined as living there for at least 120 hours in a workweek.

But a trial judge noted that the employer established a Sunday-to-Sunday work week for payroll purposes while the workers lived there Thursday-to-Thursday. The judge found that this did not comply with the regulations and awarded back pay plus multiple damages. The employer appealed, but the 1st Circuit affirmed.

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record of performance issues, but to stick to your story about why you took the action you did. The employer in the case, also an engineering company, fired employee Rikita Bonner-Gibson for unilaterally altering her work schedule and responding to a supervisor in an "insubordinate" manner.

The employee, who had just returned from maternity leave, claimed the company's reason was a pretext (in other words, a false reason) and that she had actually been fired for complaining about the company allegedly mistreating her during her pregnancy. A federal district court judge decided the case could go forward, pointing out that the employer's stated reason for firing the employee kept shifting.

For example, during an unemployment hearing, an HR rep said the woman had been fired because she forwarded a final written warning email to family members, though it turned out the rep had no personal knowledge that this was the case and admitted to speculating based on a review of the employee's personnel file. Since the email actually had nothing to do with the decision to fire Bonner-Gibson, the court grew skeptical of the company's entire decision-making process.

Meanwhile, after the suit was filed, the employer "piled on," adding reasons for having fired Bonner-Gibson that hadn't actually motivated the firing. The case will proceed to trial, where a jury could hammer the employer with high damages. Had the employer done a better job documenting the worker's issues and stuck to its story instead of creating shifting justifications, it might have found itself in a better place.

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Finally, employers must act quickly once a termination is justified. Otherwise a savvy employee who sees the writing on the wall might make the first move by filing a discrimination, harassment, wage-and-hour or workplace safety charge with the Equal Employment Opportunity Commission, hoping it gains some traction. At that point, if you follow through on your plan to discipline or terminate that worker, you could find yourself facing a retaliation claim. Unless you have a well-documented record of the employee's performance issues and of your efforts to work with that employee, and of the employee's inability to make improvements, you could ultimately face an uphill battle in court.

These are all complicated issues, and no two cases are the same. That's why you should call an employment attorney to review your own evaluation and discipline policies.

Employer unaware of medical condition couldn't be sued

A worker who took opioids for his chronic pain couldn't bring a disability discrimination suit against his employer after being terminated by directors who were allegedly unaware of his medical condition, a federal judge in Rhode Island recently ruled.

Employee David Saad went to work as an assistant marketing manager for a tech company and was soon placed on a "performance plan" with several specific issues that he needed to address.

Within a couple of months, the company's manager of "health and well-being" learned that Saad suffered from chronic pain and had requested an OxyContin dosage increase. The manager met with Saad and asked if he needed an accommodation and he declined one.

Meanwhile, Saad allegedly failed to make the improvements called for in his plan. When he met with directors of marketing and HR to discuss his performance issues, including reports that he had badmouthed management to co-workers, he denied the accusations. The directors decided a week later to terminate him.

Saad brought a disability discrimination suit, but the employer argued that the directors had not heard about his medical condition or his opioid use, so he couldn't show that he had been discriminated against based on his disability. Additionally, the employer argued, the company had a legitimate nondiscriminatory reason to fire him.

The judge agreed and dismissed the claim. Still, plenty of employers find themselves in hot water for not managing the termination process in a smart manner and for wrongly seeking out information on their workers' medical situations. That's why you should talk to an employment attorney to review your policies and training. Otherwise you might not end up as lucky as this employer.

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Have an attorney review your arbitration agreement


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If you're like a lot of employers, you have incorporated arbitration agreements into your hiring process because you like the efficiency they bring when it comes to resolving disputes with your workers. Arbitration is a much cheaper and faster process than going to court, and it's certainly less unpredictable.

But a decision last summer from the National Labor Relations Board suggests that it might be a good idea to have an employment lawyer look over your arbitration agreement to make sure it's not inadvertently running afoul of labor laws.

In that case an employer, Prime Healthcare, had required employees to sign an arbitration agreement that included broad language stating that any dispute that could otherwise be resolved in federal or state court was subject to arbitration.

While the agreement didn't say anything about claims brought under the National Labor Relations Act being subject to arbitration, it didn't directly exclude them from arbitration either. But it did exclude worker's compensation and unemployment claims.

Employees complained to the NLRB, arguing that the language could be read as preventing them from filing charges with the agency, a serious problem under federal labor law.

The NLRB agreed, finding that even if the language was technically neutral, if the provision could potentially make workers think they couldn't file NLRB charges, it had to go. The agency also ruled that the employer had to notify current and former employees that the agreement was no longer in effect.

Can you assume your arbitration agreement is safe? As this case illustrates, it's not safe to make such assumptions at all. The safer bet is to run your agreement by a lawyer.