3 guidelines & a checklist

Avoiding employment lawsuits

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EEOC

- 2020 charges: 67,448
- Retaliation charges: the highest percentage of charges
- Race, gender, disability, and age claims were substantial
- EEOC has authority to collect fines from employers

Incurred and settled

- $113,251 incurred-$55,000 settled
- $30,000 incurred-$10,000 settled
- $80,000 incurred-$55,000 settled
- $81,858 incurred-$75,000 settled
- $39,520 incurred-$38,500 settled

Incurred and settled

- $73,682 incurred-still pending
- $49,320 incurred-$14,000 settled
- $40,481 incurred-summary judgment granted
- $28,823 incurred-dismissed by ALJ

Litigation is only fun for the lawyers

- Expensive
- Takes time, effort, worry & stress
- So…..
  - How do you avoid litigation?

Avoiding litigation

- Document all disciplinary interactions with employees as specifically as possible
  - Positive, specific, measurable, & measured performance goals
  - Safely preserve the documentation
- Comply with the ADA
  - Interactive process for reasonable accommodations

3 guidelines

- Treat people consistently
- Timing is everything
- Involve a neutral third-party in factual disputes between supervisor & employee

Avoiding litigation

- A checklist before firing

Emotions are involved

- We are not just talking about lawsuits
- Because you want to be fair
- Employees want to be treated fairly
- Perceptions are important

You can't make this up

- Based on real cases
- Someone didn't get the memo

Guideline #1
Treat people consistently

- You fired or disciplined me but not _____
  - Race & color
  - Religion
  - National origin
  - Age & gender
  - Disability & pregnancy
  - Veteran

Treat people consistently

- You fired or disciplined me but not _____ for:
  - Wearing provocative clothing
  - Late paperwork
  - Leaving work early
  - Tardiness
  - Making offensive remarks to others

Treat people consistently

- You fired or disciplined me but not _____ for:
  - Using sick time
  - Faulty time records
  - Using the fax machine for personal reasons
  - Taking my name off the on call list
  - Breaching confidentiality

Treat people consistently

- Others searched clients the same way I did but they were not fired.
- Males laid off in the reduction in force received severance packages, but I didn't
- Others violated the same policy without being disciplined

Treat people consistently

- You replaced me with people who were:
  - Younger
  - White
  - Not pregnant
  - Different gender

Treat people consistently

- Discipline log/spreadsheet:
  - Date of events
  - Factual description
  - Protected category
  - Discipline imposed

Guideline #2
Timing is everything

- Chronological juxtaposition of 2 events implies unlawful treatment
  - For example: a complaint and a demotion
- Often cited by EEOC

Timing is everything

- You fired, demoted, gave me bad evaluations or changed my job for the worse right after:
  - The doctor gave you a disability slip
  - I was released from the hospital
  - I complained to the state agency
  - Returning from medical leave

Timing is everything

- You fired, demoted, gave me bad evaluations, treated me differently or changed my job for the worse after:
  - I complained to the CEO
  - I told supervisor I was pregnant
  - We agreed on a reasonable accommodation
  - The supervisor said she preferred males

Timing is everything

- You hired younger people the day after you fired me.
- You had a reduction in force and then 2 days later you rehired the young person

Timing is everything

- Supervisor requests or creates documentation of misdeeds only after a complaint is filed.
  - Supervisor says only verbal counseling needed before the complaint
  - How does this look even if it's true?

Timing is everything

- History of reprimands or poor performance but the employee is terminated only after a complaint is filed
- Fired while on medical leave

Guideline #3
Neutral Third-Party

- Investigate and document both sides fully
  - Claim of a faulty time clock not investigated
- Give equal time and credibility to both sides without preconceptions

Neutral Third-Party

- Terminations for clear reasons mostly don't result in lawsuits
  - Sexual misconduct

Neutral Third-Party

- Lawsuits often involve terminations for fuzzy reasons -
  - Insubordination
  - Negative attitude
  - Detracting from the cohesion of the unit
  - Didn’t cooperate
  - Disrespectful comments
  - Poor morale
  - Not a team player
  - Unprofessional

Neutral Third-Party

- Involve a neutral for objectivity
  - A neutral can understand different interpretations of the same events
    - “I can’t accommodate another pregnancy. Get an abortion”
    - “Your last pregnancy was difficult physically and financially. Consider an abortion.”

Performance improvement documentation

- State a problem specifically
  - General examples:
    - The employee is having difficulty reporting to work on time.
    - The employee did not act professionally with a patient and his mother.
  - Specific examples:
    - The employee reported to work 10 minutes late on April 8, 2017
    - On April 8, 2017 the employee was observed by his coworker, John Smith, yelling at patient Susan Jones.

Performance improvement documentation

- Goals should be positive, specific and measurable & measured
  - Defensible when not achieved
  - Reduces risk of employee feelings of being treated unfairly

Performance improvement documentation

- General examples:
  - Problem/concern 16: failure to demonstrate ability to work collaboratively within and across the agency. This score resulted from numerous complaints and concerns identified in regards to employee's ability to work collaboratively..

Performance improvement documentation

- General:
  - The employee will work on improving reporting to work on time.
  - The employee will act professionally with all patients.
- Specific:
  - The employee will report to work on time each day.
  - The employee will speak to all patients, their relatives and coworkers in a calm, normal voice.

Performance improvement documentation

- Document from the very first disciplinary interaction
  - Coaching
  - Counseling
  - Verbal contact
- Use a standard form with examples of how to be positive, specific, & measurable

ADA reasonable accommodation requests

- The employer is required to provide reasonable accommodations to qualified individuals with disabilities who are employees unless to do so would cause undue hardship.

ADA reasonable accommodation requests

- Sometimes:
  - Missing documentation
  - Inadequate response to a request
  - Misunderstanding of requirements

ADA reasonable accommodation requests

- No specific language required to request an accommodation
- Employee just requests an adjustment or change at work for a reason related to a disability

ADA reasonable accommodation requests

- "interactive process" required in response to a request
  - Informal interaction with the employee to determine limitations created by the disability and how best to respond
  - Analyze essential job functions, consult with employee about specific limitations, identify accommodations and analyze effectiveness & select & test accommodation
- Document receipt of the request with copy to employee – use a form

ADA reasonable accommodation requests

- Determine if the employee has a disability
  - A physical or mental impairment that substantially limits one or more major life activities
  - Mental impairments include such matters as intellectual disability, organic brain syndrome, emotional or mental illness, and learning disabilities
    - Major depressive disorder - OCD
    - Bipolar disorder - schizophrenia
    - PTSD
  - Current illegal drug use excluded

ADA reasonable accommodation requests

- Employers may not discriminate against individuals:
  - Have a record of a disabling impairment
    - A person who has recovered from cancer or mental illness
  - Regarded as having a disabling impairment
    - Even if not disabled

ADA reasonable accommodation requests

- The employer may ask for reasonable documentation about the disability and functional limitations
  - Request for documentation limited to that needed to establish the disability and need for accommodation
  - Employer pays costs of documentation

ADA reasonable accommodation requests

- Accommodations must be reasonable (feasible – plausible) and effective in meeting the needs of the individual to perform the essential functions of the position
- Employer may choose among reasonable accommodations

ADA reasonable accommodation requests

- Document interactive process discussions and final determination

ADA reasonable accommodation requests

- Leave is a form of reasonable accommodation when necessitated by an employee's disability
  - Examples: leave to obtain medical treatment, rehabilitation services, physical therapy, recuperating from an illness
  - No specific limit – undue hardship
  - Do not count leave taken under the FMLA and the ADA as unexcused absence

ADA reasonable accommodation requests

- Leave:
  - Terminating an employee right after returning from FMLA or ADA leave could be interpreted as illegal retaliation for taking the leave.

EEOC May 9, 2016 guidance related to leave

- As to form letters to employees relating to a maximum leave policy:
  - "Employers who use…form letters may wish to modify them to let employees know that if an employee needs additional unpaid leave as a reasonable accommodation for a disability, the employee should ask for it as soon as possible so that the employer may consider whether it can grant an extension without causing undue hardship."

ADA reasonable accommodation requests

- Undue hardship
  - Individualized assessment required
  - “undue hardship” means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation

EEOC May 9, 2016 guidance related to leave

- Factors related to possible undue hardship concerning leave:
  - The amount and length of the required leave
  - The frequency of leave
  - Whether intermittent leave on specific dates is predictable or unpredictable
  - The impact of the employee's absence on coworkers
  - Whether specific job duties are being performed in an appropriate and timely manner
  - The skills of the employee on leave and other employees
  - The impact on the employer's operations and its ability to serve its clients

ADA reasonable accommodation requests

- Employers need not accommodate nondisabled employees under the ADA
  - Employee spouse disabled
- Job Accommodation Network
  - 800-526-7234

A checklist before firing

- 29 factors to consider
- Why “before firing”?

A checklist before firing

- 1- Were similarly situated employees treated the same?
  - discipline, benefits
- 2- Is there something unusual about the timing?
  - Is there an appearance of retaliation?
- 3 - Were the employee's allegations investigated fully by a neutral?

A checklist before firing

- 4 - Are the reasons for terminating clear or fuzzy?
- 5 - Was the relationship between the supervisor and the employee highly emotional?

A checklist before firing

- 6 - Have there been emotional, high-impact statements?
  - “Old people can’t do their jobs.”
  - “I am targeting old and fat people who are making too much money.”
  - “Get an abortion.”
  - “Women can’t handle some situations.”
  - I prefer a male staff.

A checklist before firing

- 7- Have there been emotional, high-impact events?
  - A supervisor inappropriately touched an employee
- 8 - Are there prior similar complaints from other employees?

A checklist before firing

- 9 - Are there other credible people who will support the employee's version?
  - Especially former employees
  - Employees will testify that the supervisor falsified records
- 10 - Is the accused person credible?
  - Does the accused say, "I didn't do it" or "I don't remember doing it."

A checklist before firing

- 11 - Are witnesses consistent?
- 12 - Does the person make a good appearance?

A checklist before firing

- 13 - Are there records?
  - Employee fired for inaccurate timesheets but there are no payroll records
- 14 - Are the records inconsistent with the supervisor's position?

A checklist before firing

- 15 - “Documentation is the key to defending cases.”
  - Missing contemporaneous documentation of verbal counseling & coaching
    - Use a form to document
    - He said, she said without it
  - Supervisor notes secured?
  - Missing documentation of responses to disability requests for accommodation
  - Any after the fact documentation?

A checklist before firing

- 16 - Do credible written records support the supervisor's position?
  - Is there a long history of glowing performance evaluations with changes after a protected event?
  - Have you tolerated poor performance for years?

A checklist before firing

- Do credible written records support the supervisor's position?
  - Are the evaluations consistent with the decision to fire?
  - Missing evaluations?

A checklist before firing

- 17 - Are the versions of events susceptible of different interpretations?
- 18 - What would a jury think even if the termination technically follows policy?
  - Employee fired when she did not timely submit a return to work note
  - Employee asked doctor to fax the note
  - Jury composition

A checklist before firing

- 19 - Will a jury agree with your interpretation of your policy?
  - Is unbuttoning a top button “disrobing”
- 20 - Will the jury think there is an “ick” factor?
  - Workplace romance between supervisor & employee with a breakup
  - Medicaid fraud allegations
    - Even if only slightly related to employee

A checklist before firing

- 21 - Is the employee's complaint based on a protected category?
  - The supervisor is trying to eliminate me as competition
- 22- Are you confident about believing the supervisor's version?

A checklist before firing

- 23 – Did the employee fail to comply with a positive, specific and measurable performance goal?
- 24 – Is there a recent salary increase that communicates or implies positive performance evaluation?

A checklist before firing

- 25 - Is employment termination the best alternative?
- 26- Should we incur a small cost to avoid a greater expense?
  - 1 year of COBRA funding in return for a release
  - Buy new cleaning supplies as an accommodation

A checklist before firing

- 27 - How large are possible damages?
  - High salary employee?
- 28 - Should we consider mediation?

A checklist before firing

- 29 - Have we notified the insurance company of a possible claim?
  - Advice
  - Help from a lawyer

Summary

- Avoid expense, stress & worry
- 3 guidelines
- checklist

Questions & Comments