

THREE TOP REASONS WHY EMPLOYEES SUE

By: **Ruth A. Binger**

Employment law does not address every imagined wrong, inequality, meritless promotion, mean act or omission that occurs in the workplace. The employment at will doctrine attempts to strike a balance – admittedly falling more adversely on employees. In many instances, a workplace can be like a sandbox/jungle, with no seemingly credible or impartial mediator overseeing an employee's livelihood and the family's survival. The employee consequently feels "wronged".

When an employee approaches a lawyer to remedy that workplace "wrong", the lawyer is often forced to advise the anguished employee that he or she attended law school, not justice school. Nonetheless, a lawyer's duty to that complaining client is to look for certain acts, suspect classifications and/or factual patterns that evidence illegal animus or unlawful motive. Accordingly, companies should plan for the worst, and attempt to avoid the more common minefields with sound policies and training.

First Reason - Involvement of "love" in the workplace –Sex Harassment Issues. Yes, the workplace can be like high school charged with ever ending dramas that encourage unprofessional interactions. Yet, most love affairs in the workplace do not end happily. Rather, the most likely results are hurt feelings, low productivity, appearance of inequality, and unfortunately, the junior employee being terminated/demoted or placed on the non-performing list. Query, what should companies do to prevent what some people would argue are frailties and inevitabilities of the human condition?

Simply increase the cost of bad choices and promulgate and enforce a strict anti-harassment policy. Companies should promulgate polices that prohibit or strongly discourage supervisor/subordinate or co-worker dating. Polices should require supervisors, on penalty of termination, to disclose such relationships. Failure to disclose should mean loss of the person's livelihood. Companies should further prohibit manager from supervising relatives, spouse or others whom they are having a non-professional relationship. In addition, Companies should promulgate anti-harassment policies, actively and immediately investigate all complaints, and take the appropriate steps to stop the harassment.

Second Reason - Missing the "Forest for the Trees" - Protected Activity. Employees who engage in protected activity cannot be retaliated against by the Company with respect to their terms and conditions of employment. So, what is protected activity? Of course, it is filing an agency charge with the Equal Employment Opportunity Commission, the National Labor Relations Board, the Department of Labor, Occupational Safety & Health Administration or the applicable civil rights state agency. It also arises, however, when an employee requests family and medical leave act, files a worker's compensation claim, files an internal complaint of harassment/discrimination or reports a Sarbanes-Oxley issue.

So, what overall prevention/execution strategy should a wise company use? A company should proceed on two tracks with discipline/discharge decisions. First, human resources should fairly, impartially and thoroughly investigate and determine whether the employee actually did/did not do what is alleged. Secondly, human resources should review the employee's file and determine what protected activity the employee actually engaged in during the last year. If protected activity is an issue, companies must be able to prove (i) that a reasonable rule exists that is consistently enforced in an even handed manner and/or (ii) the company treated other similarly situated employees in the past in a similar manner. If the company cannot meet these tests, the company should stop, back up and reconsider the discipline strategy. Human beings are consistent; the unacceptable behavior will most surely surface again and the company will be better armed with a defense.

Third Reason - Employing all "Chiefs and no Indians." – Exempting Salaried Employees from Overtime. Companies abhor overtime. Yet, employees also hate being called "hourly" because of a perceived lack of prestige. Companies and employees prefer the "salaried designation" and interpret it as "exempt" under the Fair Labor Standards Act. The word "exempt", which is a legal principle allowing an employer to pay no overtime for hours worked over forty, is a simple word that belies its complexity. The exempt regulations, along with those newly issued in April of 2004, are confusing and complicated with respect to how to identify an exempt employee. Many class action lawsuits are filed in this area and employers have paid millions of dollars to remedy incorrect designations. For instance, in the last 36 months, Bank of America paid its employees 4.1 million, Perdue Farms paid its employees 10 million and Starbucks Corporation paid its employees 18 million.

So, what does a company do given the complexity of the issue? All companies should keep time records, whether employees are exempt or not, since the burden of proof rests with the company. Without records, the employee's recollection and set of records trump. Secondly, given the newly issued exempt regulations, companies should carefully review the exempt categories of executive, administrative, professional and outside salesperson to determine if the employee's salary and job duties actually fit those categories. Many job titles and classifications are ancient and have no real relation to the actual job duties performed. Job duties have changed remarkably in the last ten years. Much of the "discretion and independent judgment" that employees exercised in the past, a prerequisite for many exempt categories, has been eliminated through technology.

Many garden variety employee claims fall in one of the three areas above. Think ahead, and avoid the obvious traps by preventive and thoughtful strategies. Or as one wise person stated, "Having done all – stand."

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