

STEPS EMPLOYERS SHOULD TAKE TO LIMIT EMPLOYMENT LIABILITY

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GOAL: LIMIT THE RISK

- ▶ You may not be able to avoid lawsuits but you can increase the likelihood that you will win them.
- ▶ Employment issues are amenable to risk management.



WHAT IS THE RISK?

Under Federal Law

- ▶ Federal Civil Rights Violations under Title VII, 42 U.S.C. §1983
- ▶ FMLA –(Federal Family & Medical Leave Act)
- ▶ ADAAA –(Americans with Disabilities Act)
- ▶ ADEA–(Age Discrimination in Employment Act)
- ▶ FLSA–(Fair Labor Standards Act)



WHAT IS THE RISK?

- ▶ National origin discrimination
- ▶ Race discrimination
- ▶ Age discrimination
- ▶ Disparate treatment in terms/conditions of employment
- ▶ Marital status discrimination
- ▶ Religious discrimination
- ▶ Pregnancy discrimination



WHAT IS THE RISK?

Under State Law

- ▶ Failure to accommodate disability
- ▶ Sex discrimination
- ▶ Sexual Orientation discrimination
- ▶ Disability discrimination
- ▶ Wrongful discharge (constructive)
- ▶ Discharge in violation of public policy
- ▶ Whistleblower– RCW 42.40
- ▶ Retaliation – RCW 49.60.210
- ▶ Defamation



HOW TO GET INTO TROUBLE

- ▶ Andrew & Sue hold identical positions as accounting clerks. Andrew is much more productive than Sue. Sue makes numerous mistakes in her work. Bob has told Sue many times to improve her performance. Bob abhors confrontation and believes Sue's failures reflect negatively on his own performance. So he never sends Sue a written warning, makes a record of her poor performance, and only fills out her annual evaluation by marking the box "meeting expectations." Sue's mistakes come to the attention of Bob's superiors and he musters up the courage to fire her. Sue immediately files a claim with EEOC claiming Bob discriminated against her because she is a woman.



MAKE IT LESS ATTRACTIVE TO SUE

TIP: Develop a Meaningful Written Employee Evaluation Procedure

TIP: Train Managers to Use it

- Prevents surprises that can be interpreted as retaliation
- Document honestly, but objectively
- Monitor for improvement – CHECK IN
- Discipline (if necessary)



MAKE IT LESS ATTRACTIVE TO SUE

TIP: A prudent manager will first ask whether the employer can prove the real reasons for termination.

TIP: Review employment file carefully before terminating

- ▶ Any disciplinary notices?
- ▶ Told that she needed to improve?
- ▶ And if yes, what happens if she doesn't?
- ▶ Decision maker have any bias?



HOW TO GET INTO TROUBLE



▶ **TIP:** Do not turn a termination case into a defamation case.



MAKE IT LESS ATTRACTIVE TO SUE

- ▶ **Defamation:** Communication of a false statement that harms the reputation of an individual. Made to someone other than the person defamed.
- ▶ **TIP:** Publicize the reasons for terminating an employee on a need to know basis only!



HOW TO GET INTO TROUBLE



Sexual Harassment Defined

The Federal Equal Employment Opportunity Commission defines sexual harassment as:

- unwelcome sexual advances,
- requests for sexual favors, and/or
- other verbal or physical conduct of a sexual nature

AND any one of following three criteria are present:



SEXUAL HARASSMENT DEFINED

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.
2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
3. Such behavior has the purpose or effect of unreasonably interfering with an individual's work performance creating an intimidating, hostile, or offensive work environment.



Liability: Sexual Harassment

- ▶ Conduct imputed to the employer when owner, manager, partner, or officer personally participates in the harassment.
- ▶ Employer is strictly liable for quid pro quo harassment committed by supervisory personnel who have actual or apparent authority to make employment decisions.



Liability: Hostile Work Environment Harassment

Even if the supervisor does not actually engage in the harassment, the employer will be held liable if the supervisor:

- authorized,
- knew, **or**
- should have known of the harassment, **and**
- failed to take prompt and adequate corrective action



MAKE IT LESS ATTRACTIVE TO SUE

TIPS:

- ▶ Be proactive
- ▶ Listen & document the complaint
- ▶ Take objective notes
- ▶ Enforce policy
- ▶ Investigate – don't forget her side of the story
- ▶ Investigator should be disinterested
- ▶ Take prompt and adequate corrective action!
- ▶ Commit to regular training on policy



HOW TO GET INTO TROUBLE

- ▶ Failing to recognize and count certain hours worked as compensable hours.



Fair Labor Standards Act (FLSA)

- ▶ Workers must be paid the minimum wage for all "hours worked" (with some exemptions)
- ▶ Hours worked includes preparation time, opening and closing the business, and required meetings and training
- ▶ Any time spent by an employee in the performance of these duties must be recorded and paid



MAKE IT LESS ATTRACTIVE TO SUE

- TIP:** Review pay procedures regularly
- ▶ PDF reflect work being performed?
 - ▶ Revise PDF and actual duties in light of applicable exemptions to OT requirements, and
 - ▶ Develop clear policies identifying when bonuses and on-call pay are earned, rest and meal periods, etc.
 - ▶ Record time worked accurately
 - ▶ Pay for all time worked.



HOW TO GET INTO TROUBLE

Michelle worked for Fred Meyer Stores as a wine steward. Michelle suffers from a vision impairment that affects her ability to safely drive and walk outside after dark. In fall 2005, Fred Meyer granted her request to a modified schedule so that she could minimize driving after dark. However in the fall of 2006 Fred Meyer denied Michelle's request for a modified schedule despite experiencing no hardship the year prior. In fact Michelle was credited with increasing wine sales and improving the stores ranking while working under the previous modified schedule. The next day Michelle refused to work her assigned shift and Fred Meyer fired her.



MAKE IT LESS ATTRACTIVE TO SUE

- ▶ **TIP:** Make reasonable shift changes in order to accommodate a disabled employee's disability related to difficulties getting to work.
- ▶ **TIP:** Do not deny a request without providing meaningful dialogue or explanation of the decision. You need to interact in good faith.



MISCELLANEOUS TIPS

- Avoid form over substance
- Prudent documentation
- Smart hiring practices - do reference check
- Juries will look to see if you were "fair"
- ACT NOW!



HELPFUL RESOURCES

- ▶ <http://hr.wa.gov>
- ▶ <http://www.hum.wa.gov/>
- ▶ www.lni.wa.gov
- ▶ <http://www.perc.wa.gov>
- ▶ <https://fortress.wa.gov/dop/prb/>
- ▶ <http://www.nlr.gov/>
- ▶ www.eeoc.gov/policy/documents/accommodation.html

U. S. Department of Labor

- ❖ <http://www.dol.gov/whd/flsa/>
- ❖ <http://www.dol.gov/whd/fmla/>
- ❖ www.dol.gov


