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Client Alert

A report for clients and friends of the Firm

August 2007

Personal Liability Workplace Decisions

Recently, there has been a lot of press about an alarming trend in employment law cases: executives, managers, and other decision-makers are being sued personally for their workplace decisions. This Client Alert explores some of the conduct that has landed management in hot water and offers tips and suggestions for (i) minimizing the likelihood of being named as a party to a lawsuit; (ii) assisting in a lawsuit's defense; and (iii) protecting personal assets.

1. Be Consistent:

There is rarely "smoking gun" evidence of discrimination. Rather, most claims involve allegations that an employee was treated differently than his/her peers due to his/her protected status. *See Goodwin v. Bd. of Trustees, Univ. of Ill.*, 442 F.3d 611, 619 (7th Cir. 2006) (reversing grant of summary judgment where two employees engaged in similar conduct, but only the plaintiff, who was a member of a protected class, was demoted for the misconduct). Executives should thus strive for consistency in employment-related decisions. For example, executives should endeavor to use the same processes and objectives when hiring, firing, training, promoting and demoting employees, particularly when there are multiple employees holding the same position and performing the same functions. One way to assess consistency is to ask: "have any other employees engaged in the same conduct as is at issue here?" If the answer is "yes," then assess how that employee was treated or disciplined. If the discipline was different, then make sure that there is a legitimate explanation for the difference.

2. Delegate:

Too often executives and managers find themselves embroiled in litigation because they involved themselves in decisions that simply did not require their attention. Executives can insulate themselves from these circumstances by delegating responsibilities to subordinates. *See Cardenas v. Prudential Ins. Co. of Am.*, Nos. Civ. 99-1421, Civ. 99-1422, Civ. 99-1736, 2003 WL 21293757, at *1-2 (D. Minn. May 16, 2003) (quashing subpoena to depose executives where plaintiff failed to establish that the executives had "unique" knowledge that could not be obtained from lower ranking employees).

3. Explain:

Many wrongful discharge complaints set forth that the employee was never apprised of the rationale for an adverse decision. Complaints often thus leap to the conclusion that the adverse decision must have been motivated by improper reasons, such as discrimination or retaliation for protected conduct. Explaining the decision-making process that led to an adverse employment decision may avoid the festering of ill will that seems to accompany unexplained decisions.

4. Witness:

Many lawsuits are replete with differing accounts of conversations, including those where explanations as described above are provided. Having witnesses attend important meetings can add credibility to a decision-maker's testimony.

5. Document:

Real-time documentation of the rationale for employment decisions helps refute challenges that decisions were created after-the-fact to cover up an illegal motivation. Indeed, courts recognize contemporaneous documentation as persuasive evidence of the actual motivation of the decision-making process. *See, e.g., Velasquez v. Goldwater Memorial Hosp.*, 88 F. Supp. 2d 257, 261 (S.D.N.Y. 2000) (finding that the plaintiff's "well documented disciplinary problems" provided non-discriminatory reason for her termination). In addition, as many litigations do not begin until a year or more after the events in question, timely documentation can assist with recalling events and refreshing recollection.

6. Proceed with Caution:

While it is important to provide a record of your good decision-making process, it is also important to avoid providing a record of a bad decision-making process. This is most often discovered in workplace or personal email accounts. *See Machinchick v. PB Power, Inc.*, 398 F.3d 345, 352-53 (5th Cir. 2005) (prima facie case of discrimination created where employee's supervisor sent emails to several other employees discussing his intent to go forward with plan to "strategically hire some younger engineers and designers" and that companywide business plan was to hire employees whose mindset resided in the "21st Century.").

7. Perspective:

Keep in mind that there is a significant power disparity between executives and the employees they oversee. Comments or jokes that might otherwise go unnoticed between co-workers often take on added significance when the source is an executive. Indeed, comments and jokes are often presented as evidence of an executive's bias or prejudice towards an employee who is a member of a protected class which was the subject of a "joke." *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (overturning summary judgment for employer where supervisor with actual decision-making power made comments that plaintiff "was so old [he] must have come over on the Mayflower").

8. Audit:

Conduct regular employment audits of your employee handbooks, policies, applications, and performance appraisals to make sure that they cover all the necessary topics and, equally important, that they do not delve into inappropriate topics. Forms and processes that request inappropriate information (such as race, religion or age on an employment application) may put an executive on constructive notice of information which can lead to claims of biased processes and thereby expose the executive and the company to liability.

9. Disseminate and Train:

Courts in some jurisdictions have looked favorably on employers – particularly in the sexual harassment context – where effective policies and procedures are widely disseminated and training has been provided. *See, e.g.*, *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811-12 (7th Cir. 1999) (concluding that employer exercised reasonable care to prevent sexual harassment where employer adopted an anti-harassment policy which it distributed to each of its employees, each employee was required as a condition of employment to read and comply with the policy, employer regularly trained managers regarding the policy, and supervisors were not isolated from higher management).

10. Indemnification:

Indemnification is not available for all executive conduct that is challenged in court. To the extent it is available, however, executives should make sure that the company's Directors and Officers ("D & O") liability insurance policies are up to date and provide for the maximum available protection, and that the company's certificate of incorporation and bylaws provide for indemnification.

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