



TOP LEGAL LANDMINES EVERY MANAGER NEEDS TO AVOID

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Today's Agenda

- Employment Law Basics
- Danger Zones
 - Harassment
 - Medical Conditions
 - SOGI Discrimination
- Effective Discipline & Documentation

Story of Dale and Donna

THE
BEATLES



- Donna worked in dining area of assisted living facility
 - Started in 2002
- Dale years later as a coworker
 - The two are friendly, often discussing musical interests
- Dale eventually became Donna's boss
- Once Dale in leadership role, performance problems start

Story of Dale and Donna

- Dale has verbal meetings with Donna re performance
- Nothing well-documented
- Performance reviews suggest adequate performance
- Donna's daughter/friends work there, have good things to say about her performance

Story of Dale and Donna

- Donna eventually goes out on FMLA leave
- Requests light duty/reduced schedule
 - Claims she was picked on upon return, given bucket in corner to sit on
- Performance problems continue, written up 6 months after return from leave
 - Issued Final Warning, no previous write ups
- Terminated a few months later for performance reasons
- Donna sues, alleging FMLA retaliation, disability discrimination, and harassment

Employment At-Will

- General provisions
 - Employee not bound to employment
 - Employer not bound to employing employee
 - Discharge for any reason
 - Discharge for no reason
 - Employer can change terms of employment

Limits to Employment At-Will

- Discrimination
 - Age (>40)
 - Race, Color
 - Creed (Religion)
 - Sex
 - Sexual Orientation
 - Gender Identity
 - National Origin
 - Disability (including those with work-related injuries)
 - Ancestry
 - Results of Genetic Testing
 - Military Service, Veteran Status

Limits to Employment At-Will

- Retaliation for engaging in protected conduct
 - Complaints about discriminatory treatment
 - Complaints about sexual harassment
 - Complaints about criminal conduct
 - Complaints protected by statute
 - OSHA, NLRA, Whistleblowing

Organization's Defense

- Legitimate, non-discriminatory reason for taking action:
 - Rules violation or series of rules violations
 - Misconduct
 - Insubordination
 - Performance issues
- Proper and thorough documentation

Employee Gets the “Last Word”

- “Your reason is a smoke screen (pretext) for discrimination”
 - Inaccurate statements in personnel file or administrative filings
 - Rules not consistently applied
 - Comparators treated different
 - Stray remarks
 - Given reason factually false
 - Lack of adequate documentation

Danger Zones for Supervisors

Preventing Harassment



Hostile Work Environment

- Unwanted/unwelcome
- Severe or pervasive
 - Can be one egregious actions/remark; or series of less severe incidents that occur over time
- Alters terms and conditions of employment

Hostile Work Environment

- Not all “harassment” is illegal
- Harassment or discrimination on the basis of membership in a protected classification
- Examples:
 - Age, race, color, national origin, religion
 - Disability, veteran status, military service
 - Sexual orientation, genetic information

Problems with boss “acting like a jerk”?



Who Is Liable?

- The Harasser
- The Employer
 - Automatically liable harassment by a manager/supervisor
 - Can include constructive discharge
 - Non-supervisor: liable for hostile work environment harassment, subject to an affirmative defense

Affirmative Defense to Non-Supervisor Harassment

- Did the employer exercise reasonable care to prevent and correct?
 - Take prompt + remedial action
 - "It may not always be within an employer's power to guarantee an environment free from all [harassment]. He cannot change the personal beliefs of his employees; he can let it be known, however, that racial harassment will not be tolerated, and he can take all reasonable measures to enforce this policy." Walker v. City of Holyoke, 523 F. Supp. 2d 86, 107 (D. Mass. 2007)
 - ***What happens if supervisor does not report?***

If You Receive a Complaint

- Take the issue seriously
- Listen
- Contact appropriate person so investigation can commence
 - Know and follow your company policy
- What if you don't observe it directly?
 - Can you still take action?
- Follow-up

Handling Medical Conditions



Has This Ever Happened to You?

- Employee asks for leave of absence
- Employee asks for accommodations
- Employee says her poor performance is related to medical condition
- Employee wants time off to care for sick child
- Challenges?

What May Apply

- ADA
- State anti-discrimination law
- Sick Time Laws
- Family/Medical Leave Laws
- Workers' Compensation
- PLUS Company policies governing leaves of absence

What Leaders Need to Know

- General knowledge of all leave laws
- Employee does not specifically need to ask for medical leave in order to trigger employer's obligations
- Involve others when learning about medical conditions
- Read your emails and texts TWICE before sending
- **NO RETALIATION!**

Special Problems Presented by Mental Illness

- Employees reluctant to ask for help – stress of non-disclosure
- Symptoms harder to identify
- Accommodations more difficult
- Irregular nature of illness results in inconsistent performance
- Side effects of medication
- Malingering and exaggeration more difficult to prove

Mental Health

- Situation #1 – Depressed employee wants time off
- Employer faced with request for accommodation may request medical documentation of
 - nature
 - severity
 - duration, and
 - extent of psychological impairment
- Be mindful of the source: the clinician is the employee/patient's advocate

Mental Health

- Situation #2 – Sobbing at desk for no apparent reason
- Caring professional: act at your own risk (or at risk of liability for company!)
- Tips:
 - Focus on business/performance issues
 - Deal with problems on business level
 - Describe impact on workplace
 - Inform employee about what needs to change
- Major concerns can lead to fitness-for-duty examinations

Mental Health

- Situation #3 – Employee misconduct, claims related to mental health
- Disability not an excuse for misconduct
- Ex: Employee with diagnosed anxiety disorder walks off job without notice
- Not an excuse for misconduct
- Employee may not be “qualified” if cannot perform essential functions
- Concerns can lead to employer inquiry

Sexual Orientation and Gender Identity (SOGI) Discrimination

- Protected by state and federal law
 - Bostock v. Clayton County:
 - *“Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”*
- Common issues for employers
 - Dress code issues
 - Equal access to bathroom, locker room, or shower that corresponds to the employee’s gender identity
 - Comments/behavior by customers

SOGL Discrimination

- Effectiveness of “didn’t know” defense
 - Pro tip: MCAD/EEOC doesn’t care
- Case of Sergeant Keith Wildhaber
 - Police officer allegedly passed over for promotions because of sexual orientation
 - Clean record, strong reviews
 - Wildhaber also asserted a member of the Board of Police Commissioners told him he would have to “tone down [his] gayness” if he wanted to receive a promotion to lieutenant
 - Complained, after complaint transferred from day to night shift
 - EEOC Charge included retaliation claim

SOGL Discrimination

- Case of Sergeant Keith Wildhaber: The verdict
 - On the sexual orientation discrimination claim, the jury found for Wildhaber and awarded him:
 - \$1,980,000 in actual damages, and
 - \$10,000,000 in punitive damages
 - On the retaliation claim, the jury found for Wildhaber and awarded him:
 - \$990,000 in actual damages, and
 - \$7,000,000 in punitive damages
 - After the judgment, the jury foreperson stated the jury wanted the verdict to “send a message” that “[i]f you discriminate you are going to pay a big price.”

Effective Discipline & Documentation



Appropriate Discipline

- The Four Basics
 - Fair
 - Consistent
 - Business-based reasons
 - Documentation

Keys to Effective Documentation

- Why Document?
 - Review of personnel files by potential counsel
 - Administrative agencies
 - Performance on the witness stand
 - Access to jury deliberations

Documentation

- Disciplinary documentation
 - Identify unacceptable behavior/performance
 - Include examples (with dates, including the year)
 - Set forth the expected behavior/performance
 - Consequences of additional behavior/performance issues
 - Signatures

Honesty is the Best Policy

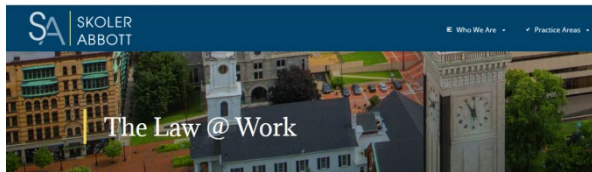
- Honesty is the **ONLY** policy
- Accurate Performance Evaluations
- Record of discipline
- Communicate expectations

Best Friend or Worst Enemy

- Consistent, thorough documentation supports employer's version of events
- Inconsistent, vague documentation, or none at all, raises questions about employer's motives

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WAGE/HOUR

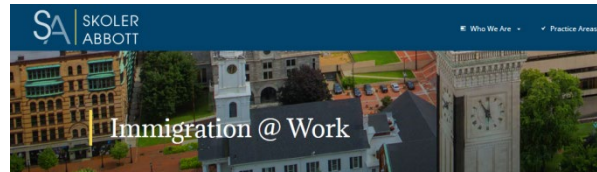
DOL Announces New Program to Encourage Voluntary Identification and Correction of Wage/Hour Violations

MARCH 13, 2018

NATIONAL LABOR RELATIONS BOARD, UNIONS

NLRB Reverses Obama-Era Decision Regarding Scope of Bargaining Units

MARCH 9, 2018



DACA, I-9, LEGAL DEVELOPMENTS, VISA

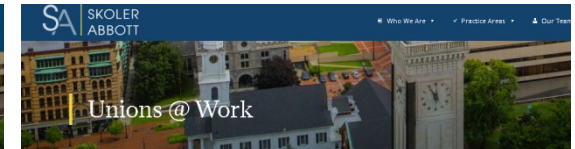
Spouses, Dreamers, and TPS

MARCH 9, 2018

H-1B, IMMIGRATION COMPLIANCE

Employment of H-4 Workers, H-1B Workers at Third-Party Sites in Jeopardy

FEBRUARY 26, 2018



UNIONS @ WORK

The State of Unions: Glass Half-Empty or Half-Full?

APRIL 29, 2018

COLLECTIVE BARGAINING AGREEMENTS, CONTRACT NEGOTIATIONS, UNIONS @ WORK

Are Union Fee Payers Still Paying After Janus?

APRIL 17, 2018

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