

**AVOIDING ALLEGATIONS OF DISCRIMINATION
The Importance of Precedent and Consistency**

By

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A. PROVIDING NOTICE AND DOCUMENTING PERFORMANCE ISSUES.

Documenting job performance is an onerous task. No one likes to. But everyone must. Human resource professionals can cite many benefits in documenting performance and behavior issues, and the evaluation of job performance. We are concerned here with some of the legal benefits.

1. *Establishing the Legitimate Non-discriminatory Reason.*

A defense in almost any type of employment lawsuit is that there were legitimate reasons for the employer's action. In the context of discrimination cases, while technically not an affirmative defense, the employer should administer its human resource program as if it bears the burden of proof, being conscious always of the need for evidence.

To prove a matter in a lawsuit, one must have evidence. There is no better evidence than a writing, contemporaneous with the event, which reflects the issue of behavior or performance, and the effort by the employer to correct the issue.

Nowhere is this more important than in the case of age discrimination. In evaluating the potential claim of an older employee who has many years of service, the employer must review the past record of performance evaluation, pay raises and bonuses, and disciplinary action. Often, the employment record lacks documentation of past violations of policies and standards, and the employer's efforts at corrective action. This raises a strong inference that the employer did not have a non-discriminatory motive for discharge, discipline or job reassignment.

In *Meyer v. United Parcel Service, Inc.*, 174 Ohio App. 3d 339, 2007 Ohio 7063, 2007 Ohio App. LEXIS 6290 (App. Ohio, Hamilton County 2007), the plaintiff claimed that he was discharged because of his age and in retaliation for filing a workers' compensation claim. The court of appeals sustained the jury's verdict for the employee. The court's words in respect to the age discrimination finding are instructive:

Meyer had over 24 years of experience performing his assigned tasks for UPS without serious disciplinary problems. After Meyer had returned from a two-month injury leave, UPS disciplined Meyer on his second day at work. Genuine issues remained concerning whether Meyer

was provided with sufficient training on his new route and whether he had been given training on a new computer tracking system. Meyer had been replaced by a 23-or 24-year old employee. In light of comments made by Meyer's managers to others regarding Meyer's veteran status at UPS and the advantages of terminating older employees, Meyer established a prima facie case of age discrimination, and genuine issues of material fact remained concerning whether UPS's proffered justification for Meyer's discharge was a pretext.

UPS made many mistakes in this case. The one pertinent to this discussion is the documentation of the legitimate non-discriminatory reasons for his discharge.

a. Documentation must be contemporaneous.

Most employees don't develop problems justifying their discharge over night. Especially with long term employees, there is a progression of declining performance or unacceptable behavior. While it is important to give employees the benefit of the doubt, it is also important to begin the documentation process when a pattern begins to develop. A sudden change in documentation suggests that the employer is insincerely "papering the file", and, as was the case in *Meyer*, the jury and court might find this to be an indication that the reason proffered is a pretext.

b. Documentation must be detailed.

It is not enough for the employer to briefly note that there is a problem, particularly in the case of a long-term employee. The documentation should disclose the **problem**, the **intervention**, the proposed **course of action**, the **time** for correction or follow up, the **understanding** of the employee of what is expected, the **review** of the employee's progress, and the **end result** of the corrective action process (**PICTURE**).

c. Documentation must be accurate.

Performance documentation, if it is not to be regarded as a pretext, needs to present the proof of

the problem. For example, a salesperson's repeated failure to meet sales quotas should be set forth in a spreadsheet, prepared at the time of corrective action, showing the failure to perform. Nothing says pretext quite so well as a problem that cannot be proven, or for which the proof suggests there is no problem at all.

2. *Establishing Consistency of Treatment.*

Discrimination claims are, by definition, comparative claims. That is, one person compares how he was treated to how someone else was treated, and then asserts that the varying treatment was due to some immutable characteristic such as race or gender. While it is not the burden of the employer to prove consistency of treatment to rebut a claim of discrimination, being able to do so can lead to the early dismissal of a charge of discrimination, or to summary judgment in a lawsuit.

Proof of consistency involves several elements:

a. *Similarity of job duties.*

A comparison is valid only if the jobs are the same or at least similar.

b. *Similarity of compensation methods.*

A difference in methods of compensation, such as salary versus hourly, or salary versus commission, can establish that the comparison of workers is not valid.

c. *Similarity in level of responsibility.*

A supervisor who oversees a significantly larger number of employees may not be a valid comparator. A person who must keep the books as well as oversee the work of others may not be a valid comparator for someone who just oversees the work of others.

d. *Similarity in management oversight.*

An employee at one location, working under the supervision of a manager whose standards are

exacting, may not be able to use as a comparator an employee at a different location whose supervisor is less demanding. When both workers have the same supervisor, however, there is a good argument that they are sufficiently similar to justify comparison.

e. Similarity in tenure.

The long-term employee will get more of the benefit of the doubt than the short-term employee.

When these and myriad other factors establish sufficient similarity to justify comparison, then the question will be whether the documentation of job performance and discipline show substantial, but not complete, consistency in treatment. The careful employer will review the employment records of similarly-situated employees to see that a proposed course of action either is consistent with past conduct, or that the inconsistency can be justified by a reason that can be documented and readily explained.

Proof of a process of careful documentation and comparison with past practice will aid the employer in rebutting the assertion that treatment was inconsistent, or that the inconsistency of treatment is not justified.

3. *Showing the Lack of a Retaliatory Motive.*

Retaliation arises when an employee has engaged in some type of activity that is protected by the law (such as filing a charge of discrimination or a workers' compensation claim), the employer takes adverse action, and the employee can establish that the adverse action was due to the employee's protected activity. Where discrimination requires a comparison of how others have been treated, retaliation focuses only on how the employee in question was treated after he engaged in protected activity.

Documentation of problems prior to the protected activity can rebut the assertion that the employer's intent was retaliatory. The employer did a good job of this in *Leslie v. Ohio Department of Development*, 171 Ohio App 3d 55, 2007 Ohio 1170, 869 N.E. 2d 687, 2007 Ohio App. LEXIS 1063. The plaintiff was a lawyer who made repeated calls to the home telephone number of a co-worker, sent her e-mail messages at her home, and went to her apartment complex. The employer documented its investigation of the co-worker's complaints, and of its warnings to the lawyer to stop attempting to contact her outside of the workplace. The lawyer

persisted in contacting his co-worker. When discharged for insubordination, the lawyer asserted that his termination was based on his communications to his employer that certain lending activities were contrary to law. The court found that the well-documented pattern of misconduct and refusal to comply with the employer's directives justified the termination.

Compare this to the *Meyers* case, where the only documentation of poor job performance came after the protected activity of taking leave for an occupational injury. Compare the *Leslie* decision also with *Buehler v. Ampam Commercial Midwest*, 2007 Ohio 4708, 2007 Ohio App. LEXIS 4226, 261.E.R. Cas. (BNA) 1122 (unreported, App. Hamilton County, Ohio September 14, 2007), where the employer asserted that the employee was not terminated for filing a workers' compensation claim, but for violating the three-day no call, no show policy. The employer could not document that it provided notice to the employee required to trigger the policy, and also testified that it was not certain that the policy even applied to plaintiff.

To successfully rebut the allegation of discriminatory intent, the employer's documentation should:

a. Plainly state the policy, and show its applicability to the plaintiff.

If the employer representative cannot testify at trial that a policy upon which it relied to terminate employment applied to the plaintiff, how could the employer reasonably expect the employee to understand that he had engaged in a violation of the policy?

b. Reflect the employer's communication of the policy violation.

Evidence of multiple warnings to the employee in *Leslie* saved the day for the employer.

c. Reflect a consistent pattern of conduct.

In *Meyers*, the employer waited until after the employee engaged in protected activity, and then tried to document several alleged instances of policy violation in the span of a few days. This was ineffective and unpersuasive. Compare this to

Young v. Stelter & Brinck, Ltd., 174 Ohio App. 3d 221, 2007 Ohio 6510, 2007 Ohio App. LEXIS 5688 (App. Hamilton County, Ohio 2007), where the employer documented misconduct four months before the employee's injury, establishing that the employer did not act with retaliatory intent when it discharged the employee.

B. DEVELOPING INSTITUTIONAL MEMORY.

Turnover is the bane of consistency. Most Gen Xer's and Millenials have considerably less loyalty to a single employer, preferring to gain valuable experience early, and to then move on. See "*From Traditionals to Millenials*". Levy, C.J., *BizVoice*, January/February 2004. Reductions in force, reorganizations, mergers and acquisitions, and bankruptcies all seem more common place today than the halcyon days of yore. The consequence is that an employer cannot rely on the 30-year employee to know and understand how problems have been dealt with in the past.

Setting aside the question of whether reliance on past experience is a best practice from an economic perspective, knowing how employees have been treated in the past has legal significance. Consider the following:

1. Compliance with Anti-discrimination Statutes.

As noted in the prior discussion, consistency of treatment, or the justification for inconsistent treatment, can aid in rebutting an allegation of discrimination. A new manager taking over the supervision of an established work force can look to carefully documented human resource records to see how problems have been dealt with in the past, and, if beneficial to the employer, to formulate a rationale for changing past practice to meet current needs.

2. Compliance with the Pregnancy Discrimination Act.

This federal statute, 42 USC Section 2000e(k), does not require that an employer provide leave benefits to pregnant employees, but it does require that the employer provide such leave as has been granted to similarly-situated men who have suffered serious medical conditions.

Documentation of past treatment of men with serious medical conditions can serve as the employer's memory when long-term managers are no longer there to provide their personal recollections.

3. *Interpretation of Policies.*

Employment policies can be ambiguous. Past practice can clarify matters. For example, an employer may not have a written policy setting a limit on accrual of unused paid time off, but past payroll practices may disclose this.

4. *Compliance with the Equal Pay Act.*

This federal statute, *29 USC Section 206(d)*, requires that the employer provide equal pay for equal work. There are several factors to consider in establishing equivalence of work. Job duties, number of persons supervised, hours required to perform the work, working conditions, and level of discretion and authority all are part of the process of comparing positions. A system of record keeping which provides the basis for such comparisons is especially important when those who know the reasons for pay discrepancies are no longer available to the company.

5. *Compliance with the Americans with Disabilities Act.*

This federal statute, found at *42 USC Sections 12101 et. seq.* and its state law equivalent, *Ohio Revised Code Section 4112.02*, require that the employer accommodate disabilities, including the provision of leave time and restructuring jobs. The employer must weigh the cost and feasibility of a requested accommodation. When there is precedent for allowing additional time off or the reassignment of duties to accommodate the injuries or medical conditions of past employees, this will argue against an employer's assertion that a requested accommodation poses an undue burden.

C. INTEGRATING POLICY WITH PRACTICE TO IMPROVE CONSISTENCY.

Surprisingly often, direct line managers fail to consult and following the employer's published policies. Of course, this inhibits efforts to be consistent, for one of the principal purposes of an employee handbook is to ensure that similar situations are treated similarly. It can also result in the unsuccessful defense of an employment claim, such as the case in the *Buehler v. Ampam Commercial* case discussed above, where the employer representatives who testified at trial stated that they did not know if the policy which they relied on to justify the plaintiff's

termination applied to the plaintiff. For an employment policy to be effective in the workplace and as a defense to an employment claim, the employer needs to follow these steps:

1. *Communicate the Policy.*

A policy that sits in a binder on a shelf in the supervisor's office is of little use. The employer should distribute the policy, secure written acknowledgments of receipt, provide timely updates that are distributed in a like manner, and post the most current policies on the company intranet or perhaps on the Internet.

The U.S. Supreme Court acknowledged the importance of the distribution of employment policies in *Burlington Industries, Inc., v. Ellerth*, 118 S. Ct. 2257 (1998) and in *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). In those cases, the court created a defense based on the failure of an employee to follow an employer's policy regarding complaints about sexual harassment. The EEOC has provided guidance as to what an employer should do to assure that employees are informed of such a policy:

An employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. The policy and complaint procedure should be written in a way that will be understood by all employees in the employer's workforce. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and incorporating them into employee handbooks. If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities. "Vicarious Employer Liability for Unlawful Harassment by Supervisors", Equal Employment Opportunity Commission, June 18, 1999.

While intended to provide guidance in respect to sexual harassment policies and complaint procedures, these principles apply generally to any employer who wants to assure that managers know and implement company policy.

2. *Update the Policy.*

Laws change. Most recently, two significant changes in laws and regulations expanded the rights of members of the military and their families. Both changes require that employers communicate the new rights to their employees.

Technology changes. Ten years ago, there were few employers concerned about dissemination of confidential proprietary information through blogs. Monitoring employee e-mail use is now common, and a whole set of federal and state statutes and common law precedent set the ground rules for doing so.

If a policy is to be effective in assuring consistent, fair treatment of employees, it must be made current with changing circumstances.

3. *Avoid Institutional Inertia.*

As important as consistency and precedent may be, an employer must be willing to change a policy or practice that does not work. “We’ve always done it that way” does not make for effective business practice, and it certainly does not excuse the violation of the law. Remember, however, that it is important to document the need for changing the policy or practice so that there will be a defense to a claim made by an employee adversely affected by the change. An example would be an employer which discontinues the practice of providing unpaid leaves of absence to those who have exhausted their paid leave and who are not eligible for Family and Medical Leave Act leave. The first employee who is denied unpaid leave may cry foul, so it is important to establish the new policy, justify it, and communicate it to all employees in advance of implementing it.

4. *Keep it Simple.*

A good policy makes a direct and simple statement. It is short. It is stated broadly enough to encompass most of the situations it is intended to address.

A good policy: “Do not sign another employee’s time sheet.”

A bad policy: “It is the general practice of ABC Company that one employee is not authorized to sign on behalf of another employee said other employee’s time sheet, unless there are exceptional circumstances, such as serious injury or casualty to the company facility which would make such signing necessary and expedient for the employer.”

D. RECONCILING CONFLICTING LEGAL REQUIREMENTS.

Complying with the requirements of one law may result in violation of other laws. To avoid employment claims, the employer must survey all potentially applicable laws, identify the requirements of each of the laws, then decide on a course that complies with all requirements.

1. *Pregnancy Leave.*

a. *Pregnancy Discrimination Act, 42 USC 2000e(k).*
While it does not require that an employer provide leave and benefits to pregnant employees, it does require that the employer not discriminate against pregnant employees in the provision of leave or benefits. This requires that the employer look at the provision of leave and benefits in the past. If an employee who had cancer, for example, received 20 weeks of leave, the employer might violate the PDA if it provided only 12 weeks of leave to a pregnant employee pursuant to the ***Family and Medical Leave Act, 29 USC 2601***, when the employee could establish the medical necessity of additional leave.

b. *Family and Medical Leave Act, 29 USC 2601.*
This law requires that the employee be granted up to 12 weeks of unpaid leave for pregnancy, pregnancy-related illness and childbirth. It does not permit the employee on leave due to the birth of a child to take leave intermittently, unless there is a serious medical condition that would justify intermittent leave. Only an employee who has worked for the company for 1250 hours in the 12 months before the request for leave, and who works for an employer with 50 or more employees within a 75 mile radius of the employee’s place of employment is eligible for leave. Consider, however, the potential for a claim of discrimination that may arise because a man who works at a location with 50 or more employees is granted leave

whereas a pregnant woman is denied leave because she works for a small and remote office of the company.

c. *Ohio Civil Rights Commission Pregnancy Leave Regulation.* A regulation adopted by the Ohio Civil Rights Commission requires that all employers accord to all pregnant employees a reasonable amount of time to return to work after pregnancy or childbirth. What is reasonable is determined by what is medically necessary. See *Ohio Administrative Code Section 4112-5-05*. As a consequence, if a pregnant employee is not eligible for FMLA leave because of lack of time in service or the size of the employer, the Ohio employer must still provide reasonable leave. If the employee needs more than 12 weeks of leave, the employer, even the employer whose pregnant employee is covered by the FMLA, must provide more leave time.

2. *The Rights of the Ill, Injured and Disabled.*

An employee may have a serious health condition and a disability, a serious health condition without a disability, or a disability without a serious health condition. Setting aside the further overlay of workers' compensation disability definitions, an employer faced with an injured, ill or disabled employee must reconcile the requirements of the FMLA and the *Americans with Disabilities Act, 42 USC Section 12101*.

a. *Disability.* The ADA defines a disability as an impairment that substantially limits a major life activity, a record of having had such a condition, or being perceived as having such a condition. The condition must be severe enough to cause a substantial limitation, and it must be sufficiently long-term to be more than a temporary incapacitation. *Definition of Disability Under the ADA, A Practical Overview and Update, Duston, S.D. and Bruyere, S.M., Employment and Disability Institute Collection, Cornell University, September, 2001.*

b. *Serious Health Condition.* A serious health condition under the FMLA means an illness, injury, impairment, or physical or mental condition that involves:

Any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility; or

A period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or

Any period of incapacity due to pregnancy, or for prenatal care; or

Any period of incapacity (or treatment therefor) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.); or

A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal disease, etc.); or

Any absences to receive multiple treatments (including any period of recovery that follows) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.).

c. *Leave entitlement.* A person with a serious health condition who is also disabled is entitled to up to 12 weeks of unpaid leave, including intermittent leave, if a physician states this is necessary. This leave must be provided, even if it is not necessary as a reasonable accommodation of the employee's disability. For example, an employee who has suffered a soft tissue neck injury in an automobile accident may not be disabled under the ADA, and the employer therefore would have no obligation to reasonably accommodate, but the employee would be entitled to FMLA leave if the injury is a serious health condition.

On the other hand, an employee who would be entitled to 12 weeks of leave under the FMLA may be entitled to more leave time as a reasonable accommodation of a disability. An employee who is undergoing chemotherapy and who has depleted all FMLA leave may still be entitled to return to work after more than 12 weeks of leave if the additional leave is a reasonable accommodation of the employee's disability.

d. Return to work. An employee who takes leave under the FMLA for a serious health condition is entitled to return to an equivalent position. An employee returning from leave as a reasonable accommodation under the ADA is entitled to return to the same position.

e. Medical certification. An employee seeking leave under the FMLA must provide medical certification of the need for leave if requested by the employer. An employee with a disability need not provide a physician's certification of the existence of the disabling condition.

E. THE IMPORTANCE OF TRAINING.

Three kinds of training are an important part of the employer's effort to avoid liability for discrimination and other employment claims. They are training in respect to job duties, training in respect to general policies, and training in respect to the requirements of employment laws and regulations.

1. Job Training.

Although there is no explicit obligation of an employer to provide training to its employees, an employer is well-advised to do so and to document the effort if it takes adverse action against an employee in a protected class based on poor job performance. In *Meyer*, discussed above, the employer's reason for discharge was regarded as a pretext because it did not adequately train the employee on his new route and the new computer system for tracking his customer visits before disciplining him.

An example of how training and documentation can defeat an allegation of retaliatory discharge comes from the case of *Cunningham v. The Kroger Co.*, 2006 Ohio 5900, 2006 Ohio App. LEXIS 5844 (unreported, App. Hamilton County November 9, 2006). The plaintiff was terminated because of her violation of safety policies. She claimed workers' compensation retaliation. In granting summary judgment for the employer, the court summarized the employer's safety training efforts:

As a Kroger forklift operator, Cunningham had been required to complete both computer-based and hands-on training before operating a forklift. Throughout Cunningham's employment, she had

received numerous safety-related circulars outlining Kroger's rules and policies promoting safety in the workplace. Cunningham had also attended training sessions regarding proper forklift operation on Kroger's loading docks. Each day Cunningham attended startup safety meetings, and on the morning of the accident she had participated in a calibration-safety training process where Kroger employees observed each other and commented on the safety of their actions. Id. at Para. 5.

While this level of training and its documentation may exceed what might be required of an employer, it illustrates the point that, if a policy and practice is so important that its violation justifies termination, then the employer should be prepared to demonstrate the lengths to which it went to assure that the employee in question was well-schooled on the policy.

2. *Training in Respect to General Employment Policies.*

The need for this type of training is best illustrated by the ***Buehler*** decision. There, a dispute arose over whether the employee understood that he had to comply with a policy requiring that he call in regarding his anticipated absence from work while he was considering the employer's offer to allow him to return to a light duty assignment as he recovered from an occupational injury. Because the employee testified that he did not know the no call, no show policy applied to him in such a situation, and because the employer's representative also testified that she did not know that the policy applied to the plaintiff, the employer could not rely on the policy to justify the employee's termination.

Had the employer documented its review and interpretation of the policy, and then notified the employee in writing that he was required to abide by the policy pending the offer to return to light duty work, the employer would have been in a much better position to point to the failure to abide by the policy as a basis for discharge.

3. *Training in Respect to Employment Laws and Regulations.*

As noted in the above discussion of the need to communicate policies, an employer must train employees in respect to sexual harassment reporting procedures if it hopes to rely on the defense that an employee failed to resort to remedies offered by the employer.

Training also is relevant to the issue of whether an employer has taken prompt and appropriate remedial measures to prevent harassment, discrimination and retaliation. When it is evident that an employer has a policy prohibiting these activities, that it has trained its employees in respect to the policies, that it has investigated allegations of violation promptly, and that it has taken corrective action to prevent further violations, then the employer will likely be able to defend itself against such a charge. *“Policy Guidance on Current Issues of Sexual Harassment”, Equal Employment Opportunity Commission, March 19, 1990.*