

ANATOMY OF A LAWSUIT WITH 20/20 HINDSIGHT: WHAT WENT WRONG?

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PRACTICE AREAS

- Employment Law Counseling
- Employment Law Litigation
- Alternative Dispute Resolution:
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CRISIS
JUST AHEAD

LITIGATION = A LOSE-LOSE SITUATION

- Organizational and personal liability
- Loss of productivity in the workplace
- Disruption to the business caused by litigation
- Loss of team/employee morale
- Employee turnover
- Reputational damage



AGENDA

1. Ignorance of the law is no excuse
2. Remember the basics and the exceptions to the rules
3. Proving employees' receipt and acceptance of policies
4. Conduct a reality check: inaccurate job descriptions
5. Avoid the "ostrich approach"
6. Consistency is key
7. Don't ignore bad behavior
8. The importance of good documentation
9. Accurate performance evaluations
10. Avoiding retaliation
11. What you don't know may hurt you

IGNORANCE OF THE LAW IS NO EXCUSE

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IGNORANCE OF THE LAW IS NO EXCUSE

Colston v. Boston Market Corporation

2018 WL 1397862 (E.D. Mich. 2018)

“The law is replete with instance which firmly establish that ignorance of the law, despite a litigant's *pro se* status, is no excuse for failure to follow legal requirements.”

Lesson learned: If a litigant representing himself will be held responsible for knowing the law, then so will you.

KNOW WHICH RULES APPLY TO YOU

Employment laws consist of:

- Federal laws and regulations
- State laws and regulations
- Local ordinances
- Private employer vs. public employer?
- Contract or collective bargaining agreement?

KNOW WHICH RULES APPLY TO YOU

Application of these laws will depend on and may be impacted by:

- how many employees the employer has
- where the employer is located
- where the employer is recruiting/interviewing
- where the employee at issue is located (remote work?)
- where the employer is doing business (multiple jurisdictions?)

REMEMBER THE BASICS AND THE EXCEPTIONS TO THE RULES

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THE BASICS ON “AT-WILL” EMPLOYMENT

Under Nebraska law, absent an employment contract or other guarantee of employment, individuals are employed “at will,” meaning either the employer or the employee may terminate the employment relationship at any time, with or without cause or notice.

EXCEPTIONS TO “AT-WILL” EMPLOYMENT

- Express written contracts, oral contracts, implied contracts, and collective bargaining agreements
- No termination in violation of discrimination, harassment, or retaliation laws
- No termination in violation of public policy:
 - Filing a worker’s compensation claim
 - Refusing to engage in illegal conduct
 - Refusing to take a lie detector test
 - Taking time off for jury duty

EQUAL EMPLOYMENT OPPORTUNITY

EEO laws apply to all aspects of employment – not *just termination*:

- Hiring and recruiting
- Evaluation and promotion
- Demotion and discipline
- Compensation and benefits
- Working conditions
- Termination



**SIGNED, SEALED, AND DELIVERED:
PROVING EMPLOYEES' RECEIPT AND
ACCEPTANCE**

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PROVING EMPLOYEE'S RECEIPT AND ACCEPTANCE



"Your Honor, I just know Plaintiff signed the contract!"

PROVING EMPLOYEES' RECEIPT AND ACCEPTANCE

Weiss v. Macy's Retail Holdings, Inc.

741 Fed. App'x 24 (2d Cir. 2018)

- A former employee sued for disability discrimination, and the former employer moved to compel the case to arbitration.
- The former employer failed to show that the former employee received mailings allowing him to “opt out” of mandatory arbitration.
- The Court of Appeals held that the employee could not be bound by a contract that he did not receive and remanded the case to resolve whether the former employee actually received the mailings.

PROVING EMPLOYEES' RECEIPT AND ACCEPTANCE

- Distribution of handbook and periodic changes to all:
 - On-site/off-site employees?
 - Hard copy or electronic form?
- Acceptance of handbook and periodic changes:
 - Execution of paper acknowledgment
 - Electronic confirmation
- Maintaining record/proof of acceptance – what will be your *Exhibit A*?

**CONDUCT A REALITY CHECK:
AUDIT AND UPDATE JOB DESCRIPTIONS**

CONDUCT A REALITY CHECK: INACCURATE JOB DESCRIPTIONS

Inaccurate job descriptions can be potentially damaging to employers on several fronts:

- Disability discrimination claims in proving the essential functions of a job
- Discrimination claims in failing to differentiate different categories of workers
- FLSA wage/hour claims on an employee's primary job duties for determining exempt/non-exempt status

CONDUCT A REALITY CHECK: INACCURATE JOB DESCRIPTIONS

Noel v. Wal-Mart Stores,

764 Fed. App'x 17 (2d Cir. 2019)

- A pharmacy manager who suffered from “needle phobia” sought an accommodation not to provide immunizations to customers.
- He sued his former employer alleging disability discrimination.
- The Court of Appeals rejected the employer’s argument that giving immunizations by injections was an essential job function for a pharmacist, because the job description had not yet been updated at the time of the pharmacist’s constructive discharge to include this function.

CONDUCT A REALITY CHECK: AUDIT AND UPDATE JOB DESCRIPTIONS

- Audit job descriptions on a routine or as-needed basis.
- Does it list the essential functions of the job?
- Does it align with the employee's actual, primary job duties?
- Do other employer documents support the function – handbook policies, disciplinary action?
- Has the employee's supervisor reviewed the job description?
- Does the employee understand what the job requires?

CONDUCT A REALITY CHECK: ACCURATE JOB DESCRIPTIONS

Higgins v. Union Pacific Railroad Co.

931 F.3d 664 (8th Cir. July 24, 2019)

- The Eighth Circuit rejected locomotive engineer's failure to accommodate claim under the ADA because attendance was an essential function of the job.
- The Court considered the job description, Union Pacific's attendance policy, and repeated warnings to the employee about poor attendance to determine that attendance was an essential function of the particular position.
- The Eighth Circuit has consistently found that regular and reliable attendance is a necessary element of most jobs.
- Under the ADA, employers generally are not required to excuse employees from performing essential functions of their job.

JOB DESCRIPTION CHECKLIST

- The employer is an equal opportunity employer;
- The applicant's at-will employment status;
- Job title and classification (exempt or non-exempt; full or part-time);
- Duties and responsibilities of the position: the essential functions that an individual must be able to perform, with or without reasonable accommodation;
- The required qualifications:
 - Education level;
 - Any professional or other required licenses or certifications;
 - Prior work experience;
 - Skills, such as proficiency in computer software or operation of a machine; or
 - Traits, such as attention to detail or the ability to manage deadlines;
- Physical requirements, such as requirement to stand, sit, or lift, and the physical work environment, such as a workplace that is outside or cold; and
- Any other additional information regarding the position, travel requirements, working hours or location.

AVOID THE “OSTRICH APPROACH”

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AVOID THE “OSTRICH APPROACH

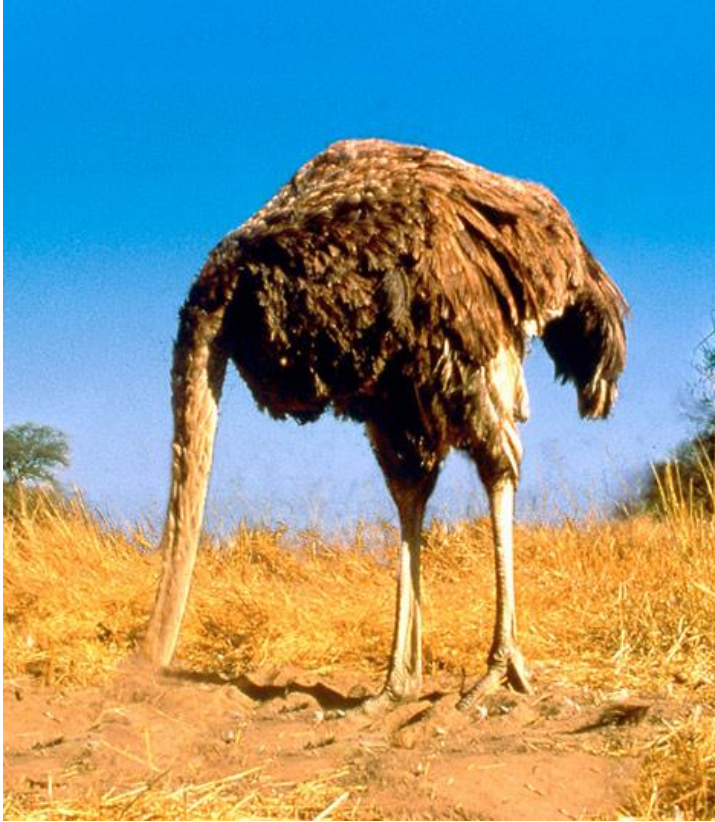
Ridout v. JBS USA, LLC

716 F.3d 1079 (8th Cir. 2013)

In reviewing an employee’s appeal of the dismissal of his age discrimination claim, the Court of Appeals reversed the district court’s judgment and remanded the case to the district court to determine whether the employee’s termination for declining performance was a mere pretext for age discrimination.

Pretext can be demonstrated in several ways, including showing that the employer’s proffered reason for termination is “unworthy of credence.”

AVOID THE “OSTRICH APPROACH”



- The issue of whether the employer’s reason for termination is “worthy of credence” often comes up in criticizing the employer’s failure to properly investigate the employee’s alleged conduct.
- A thorough investigation is essential to defending an employer’s actions and legitimate, non-discriminatory decisions.

AVOID THE “OSTRICH APPROACH”

Before taking disciplinary action, consider the following:

- What occurred - what evidence exists to corroborate the incident?
- What standard or policy was violated?
- What is the nature of the conduct at issue?
- **What evidence *refutes* or calls the incident into question?**
- Have prior warnings been given?
- Have you consulted with HR/Legal?

If you don't answer these questions during the investigative stage, you may be answering them in a deposition.

HALFTIME BREAK FOR Q&A

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CONSISTENCY IS KEY

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"We have testimony that you walk like a duck and you quack like a duck. Tell the court—are you a duck?"

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CONSISTENCY IS KEY

Rooney v. Rock-Tenn Converting Co.

878 F.3d 1111 (8th Cir. 2018)

- The Court of Appeals held in the employer's favor, finding that the employer's elaboration at trial on its reasons for terminating the plaintiff was not evidence of pretext.
- Employers are not obligated to articulate *all the reasons* for termination at the time of termination, so long as their later-stated reasons are consistent with prior position.

CONSISTENCY IS KEY

“Consistent” does not always mean “identical.”

But, you must be able to articulate distinctions.

- What occurred?
- What standard/policy was violated?
- Have prior warnings been given?
- Are there any mitigating circumstances?
- How have other similarly-situated employees in similar situations been treated?
- Can you defend your decision?

DON'T IGNORE BAD BEHAVIOR

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DON'T IGNORE BAD BEHAVIOR

Ortiz v. School Board of Broward County, Florida

2019 WL 3027097 (11th Cir. July 11, 2019)

- Supervisor made near-daily offensive comments about Puerto Ricans over a two-year period.
- Employee objected to his supervisor and complained to management.
- The Eleventh Circuit found that near-daily comments over a two-year period supported a hostile work environment claim.
- “[T]here is no magic number of racial or ethnic insults that a plaintiff must prove,” especially where comments “permeate” the workplace.

DOCUMENTATION: THE GOOD, THE BAD, AND THE UGLY

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THE IMPORTANCE OF GOOD DOCUMENTATION

- Communicates expectations to employees.
- Aids employees in understanding what they need to improve upon to keep their job.
- Demonstrates what the employer has done to notify the employee of performance issues.
- Supports an employer's position on the legitimate, non-discriminatory reasons for action/termination.
- Memorializes key facts and evidence.

THE IMPORTANCE OF GOOD DOCUMENTATION: ORTIZ V. CHIPOTLE MEXICAN GRILL

- In 2015, Chipotle fired Ortiz, a 14-year employee, claiming she stole \$636 from a company safe.
- Ortiz denied the allegations, claimed she was fired for her prior workers' compensation claim, and sued Chipotle for wrongful termination.
- Chipotle claimed it had a video of Ortiz taking the money from the safe, fanning the bills, and looking over her shoulder to make sure no one was watching, but **it lost the video by taping over it.**
- Chipotle also claimed **it accidentally deleted text messages and lost notes** about the reasons for firing Ortiz.

THE IMPORTANCE OF GOOD DOCUMENTATION: ORTIZ V. CHIPOTLE MEXICAN GRILL

- Prior to termination, Ortiz made \$72,000 per year.
- When Ortiz was fired, she had received consistently positive reviews and was up for promotion with a \$100,000 salary.
- Chipotle initially offered Ortiz \$1,000 to settle.
- The jury awarded Ortiz over **\$7 million** in damages, including **\$4 million** for mental suffering and **\$1.9 million** in lost past and future earnings.

PROPER DOCUMENTATION

- Document promptly and contemporaneously.
- Focus on job duties and performance categories.
- Be factual, accurate, and concise.
- Avoid emotions or inflammatory terms.
- Avoid subjective opinions.
- Where appropriate, include key documents as objective evidence.
- Preserve electronic evidence: text messages, emails, videos, etc.
- When in doubt, talk to HR/Legal.

PROPER DOCUMENTATION

- Does it state the “who,” “what,” “when,” “where,” and “how”?
- Author of the documentation
- Date of incident and date of documentation
- Policy or expectation violated
- Consequences of further violations/deficiencies
- Acknowledged by implicated employee
- Witnessed by HR or another supervisor

(IM)PROPER DOCUMENTATION

Example:

Yesterday Bob was caught making nasty remarks to a lady in the breakroom. She tattled on him and got pretty hysterical. We yelled at Bob to knock that stuff off, and that was the end of it.

Is this helpful, or not?

(IM)PROPER DOCUMENTATION

What's unhelpful:

- Yesterday *[precise date?]* Bob *[last name?]* was caught *[by who? how?]* making nasty *[what specifically was said?]* remarks to a lady *[name?]* in the breakroom.
- She tattled *[poor depiction]* on him and was hysterical *[avoid inflammatory terms]*.
- We yelled at *[“counseled”]* Bob to knock that stuff off *[more accurate description?]*, and that was the end of it *[follow-up with other employee? Did Bob acknowledge misconduct? discussion of anti-retaliation? reminder of company’s policies?]*.

**ACCURATE PERFORMANCE EVALUATIONS:
“YOU LIKE ME! YOU *REALLY* LIKE ME!”**

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PERFORMANCE EVALUATIONS

They must be ACCURATE!

If the performance evaluation is not going to be completed in an accurate manner that actually represents the employee's performance, you are better off not doing the evaluation at all.

PERFORMANCE EVALUATIONS

Performance evaluations must EXIST in some tangible form!

If you want to terminate an employee, particularly after they have engaged in protected activity, and you contend there is a “loooooong record of poor performance” that justifies termination, this should be objectively supported by tangible documentation or evidence.

AVOIDING RETALIATION

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AVOIDING RETALIATION



Protected activity
does not forever insulate employees from
discipline or termination.

But, proceed with caution before discipline or
termination following an employee's
engagement in protected activity.

AVOIDING RETALIATION

Coleman v. Donahoe

667 F.3d 835 (7th Cir. 2012)

- A black employee complained that her white supervisor was discriminating against her.
- While on a leave of absence, the employee told her psychiatrist that she had “homicidal thoughts” toward the supervisor and “fantasized about killing her.” The psychiatrist reported this threat to the supervisor, who reported it to the police and the company.
- In the meantime, the employee filed two EEOC complaints against her supervisor, but was later terminated for violating policy against making threats of violence.
- The Court of Appeals remanded the case for trial, noting that other white employees engaged in similar threatening behavior but were not terminated, and that the plaintiff’s protected activities were close in time to her subsequent termination.

CAN YOU DISCIPLINE EMPLOYEES FOLLOWING A WORKPLACE COMPLAINT?

You are about to discipline an employee for conduct, and then they make a workplace complaint. What do you do?

1. Step back. Evaluate. Discuss.
2. Did the employee engage in the conduct for which discipline was to be given?
3. Is there documentation of your discussion/decision to discipline *prior to* the complaint?
4. What is the discipline?

DISCIPLINE FOLLOWING A WORKPLACE COMPLAINT?

- If the discipline/termination decision has already been made, pause and ask yourself two questions:
 1. Does the employee's complaint relate to the underlying conduct for which the employee is being disciplined/terminated?
 2. Is the witness/information source for the conduct implicated?
- If you answer "yes" to both of the above questions, put discipline/termination on hold and investigate the complaint.
- If you answer "yes" to only one, still consider pausing discipline/termination.

DISCIPLINE FOLLOWING A WORKPLACE COMPLAINT?

Example 1:

Employee routinely fails to set up systems and equipment in a timely manner for company events, despite being counseled to do so. It is an essential function of the job, and Employee is capable of performing it. Many witnesses report the same concern. The company decides to terminate his employment. At the termination meeting, Employee complains that his supervisor is targeting him because of his age.

Should you continue with the termination?

DISCIPLINE FOLLOWING A WORKPLACE COMPLAINT?

Example 2:

Employee has had terrible attendance, not showing up to work. Supervisor reports the problem, and the decision to end employment is made. At the meeting, however, Employee indicates that she can't bring herself to come into work recently because she is being sexually harassed by her supervisor and she felt she had no way to report the conduct.

Should you continue with the termination?

WHAT YOU DON'T KNOW MAY HURT YOU

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FAILURE TO ENGAGE IN THE INTERACTIVE PROCESS

Garrison v. Dolgencorp, LLC

939 F.3d 937 (8th Cir. 2019)

- When an employee asked for a leave of absence because of her medical condition, the supervisor simply told her to “read the employee handbook.”
- In reviewing the employee’s disability discrimination claim, the Court of Appeals held that the employer failed in its duty to engage in the interactive process.
- The Court held that once the interactive process was triggered, the employer had an obligation to “take some initiative” and identify a reasonable accommodation.

TRAIN YOUR MANAGERS HOW TO RESPOND TO REQUESTS

1. Listen to employees.
2. Be alert to employees' requests for help, even indirect ones.
3. When in doubt on how to respond in the moment, you can state the following:
 - a. Thank you for bringing this to my attention.
 - b. I'm sorry to hear you're dealing with this.
 - c. How can we help you?
4. Connect with HR/Legal.
5. If you can easily give an accommodation, just do it!
6. Document what was requested and what was done.

QUESTIONS?

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