

## **10 Things An Employment Lawyer Never Wants To Hear**

By [Robin E. Shea](#) on December 02, 2011

**UPDATE:** [Daniel Schwartz of Connecticut Employer Law Blog](#) has made some excellent additions to the list below. We could go on like this all day! Check it out.

My friend and employee/plaintiff's lawyer, Lee Smith of Atlanta (who does not have a web page, and who neither blogs nor tweets!), has been corresponding with me about the words that no employee's lawyer ever wants to hear from a client. I thought it would make a great blog post, and I'll follow with five from the employer's side.

Here are Lee's top (or should I say, "bottom"?) five from the plaintiff's perspective, with his commentary:

**5. (A call from out of town) "I'm calling you because all the lawyers here are in my employer's pocket."** I usually translate this as, "I have shopped this case all over, and nobody thinks I can win."

**4. "My supervisor hates me and is nasty to me. I am miserable at work."** I can sympathize with those afflicted with abusive bosses, but personal animus is not actionable under the law, although I once had a case where the supervisor, motivated by dislike for the employee, harassed her into multiple epileptic seizures, and we did get paid on that.

**3. "I have this letter from the EEOC from a couple of months ago, and it says I have ninety days to file a suit."** Again, that might be a case of shopping around and not finding a lawyer, or it might be a lack of attention. Either way, it's bad news getting caught two weeks away from the time bar.

**2. "My employer will never let this go to court."** Oh, yes, he will. In a cocaine heartbeat. No employer will permit itself to be blackmailed (unless the employer is [Herman Cain](#)). Employers know that if they give in to one, there will be a line from now to [Saint Swithin's Day](#) of unhappy employees with hands like first basemen's mitts that are out.

**1. "I don't care about the money, I just don't want this to happen to anyone else."** Translated: "I know I have a bad case, but I just want to cause the employer some grief." Being plaintiff in a lawsuit is hard work, and these people will bail on their lawyer. Try getting them to work with you on interrogatory responses or preparing them for a deposition.



Thanks, Lee! In an effort to be ["fair and balanced,"](#) here are the top five things an employer's lawyer hates to hear (list and comments that follow are mine):

**5. (In a harassment case) "Err . . . when did we last have harassment training? We haven't been quite as good about that as we should have."** Employers, please don't let your harassment training slip through the cracks. We know the economy is bad and many of you are fighting to survive. Even so, harassment training is a good investment -- not only will it flush out and allow you to informally resolve issues, but it will also earn you points with the EEOC or in court just for having done the training. Of course, it's also required by law in some states.

**4. "We have an internal grievance procedure, and our decisions have been upheld every time."** Sounds great, huh? Well, no. Not every employment decision is fair, even when the employer tries to do the right thing. Nobody's perfect. Therefore, some overturned employment decisions is actually the sign of an effective internal grievance procedure. Otherwise, it just looks like a rubber stamp for management.

**3. "How does the employee know the rule? Trust me. *He knows.*"** I love this one. In defense of the employer, it's probably true more often than not. However, you will never be able to get the employee to admit that he knew it if the rule isn't in writing. And if you don't have it in writing, you won't be able to defend yourself if the employee "forgets" what he "knew."

PS-If your workforce speaks a language other than English, be sure your rules are communicated in the employees' language. A rule published only in English where your workforce is non-English-speaking immigrants (legal, of course!) from [Ubeki-beki-beki-beki-stan-stan](#) is not going to help you much.

**2. "Well, no, nothing is documented, but *she knows.* If I've told her once, I've told her a million times."** This is related to No. 3, but No. 3 relates to communicating employer expectations, and No. 2 relates to communicating that the employee has committed a specific violation of a standard. Informal counseling is swell. But after the 299th informal counseling, please do yourself a favor and start some documented progressive discipline. You know you will (rightfully) become fed up by occurrence no. 301 or so, and if you haven't documented, you will have no evidence that you ever addressed the issue with the employee before you fired her.

**1. "No, we didn't think about how we treated 'similarly situated' employees. Each employee stands on his own."** This is my worst nightmare, and unfortunately, it is a nightmare that occasionally comes true. Any time an employee is disciplined (or "coached") about poor performance or disciplined for a rule violation or bad behavior, HR 101 teaches that the decisionmaker should make sure that the employee is being treated essentially\* the same as other employees who committed similar violations. (In the labor world, this is known as "following past practice.") ["That which we call a rose/By any other name would smell as sweet"](#) -- whatever you call it, it ensures that you are being consistent, which will help you defeat a claim of discriminatory or retaliatory treatment. The same principle should apply to compensation decisions, by the way.

*\*Sometimes an exception to the rule is justified, but the best way to make an exception is (1) to know beforehand that you're making one, and (2) to document why you made it.*

**BONUS -- EMPLOYER DISHONORABLE MENTION: "Don't we have employment at will in this state? Doesn't that mean we can fire an employee for any reason?"** No, it doesn't. I've harped on this [enough](#) in the past, so I'll let this one go.

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