Employment Law IN Brief ™

Human Resources' Non-Biased Termination Decision May Be Unlawful Discrimination

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For years I have coached employers on the advantages of getting the employee's side of the story before deciding whether to terminate. For governmental employers, this is a matter of due process. For others, it may be a matter of contract. For those employing "at will," it is a matter of thoroughness and fairness. Even when employers obtain an employee's story, they sometimes fail to follow-up on an employee's eleventh hour allegations of discrimination, harassment, or retaliation. The U.S. Supreme Court recently gave employers a good reason to do so—the potential to avoid liability under employment discrimination laws.

Imagine the following:

- Supervisor in hospital resents employee's absences for military reserve duties;
- Supervisor schedules employee to work extra shifts without notice to make up the missed time and asks for others' help to get rid of employee;
- Supervisor's supervisor also resents employee's military leave and knows employee's immediate supervisor wants to get rid of employee;
- In a corrective action, supervisor instructs employee to stay in his work area when he is not working with a patient and to report when he has no patients;
- Co-worker complains to hospital's VP of Human Resources and Chief Operating Officer about employee's unavailability and abruptness;
- Chief Operating Officer orders that a plan be put in place to deal with these issues;
- Before plan is put in place, supervisor informs VP of Human Resources that employee violated the corrective action by leaving his work area without informing supervisor;
- VP of Human Resources reviews employee's personnel file, relies on the supervisor's allegations and the report of co-worker, and decides to terminate;
- Employee files a grievance and alleges that supervisor lied because of hostility to his military obligations;
- VP of Human Resources does not follow up on employee's allegations—the decision to terminate stands;
- VP of Human Resources is not accused of anti-military bias in her decision to terminate, rather, employee claims employer should be liable for unlawful discrimination because VP of Human Resources' decision to terminate was influenced by the discriminatory actions of his supervisors.

These essentially are the facts of Staub v. Proctor Hospital, U.S. Supreme Court Case No. 09-400 (2011). Prior to Staub, Indiana employers likely would not be liable for unlawful discrimination under such facts because the VP of Human Resources' non-biased decision to terminate was not based solely on the input of the employee's biased supervisors. In fact, before the case went to the Supreme Court, the U.S. Court of Appeals for the Seventh Circuit (Indiana's circuit) ruled that Proctor Hospital could not be liable.

The U.S. Supreme Court reversed the Court of Appeals. The Supreme Court determined that if a supervisor with a discriminatory bias influences a termination decision made by someone else, the employer may be liable under the federal employment discrimination laws.

Practice Tips for Human Resources:

- When a supervisor or manager comes to you with a recommendation of termination, get as much information as you can from that person, and review all of the documentation relating to the recommendation. Consider comments, timing, etc. for any indication of hostility toward a protected class.

- Before making a decision, get the employee's side of the story. If the employee denies the allegations, ask why the supervisor or manager would have any reason to lie. Document all of the employee's reasons and consider having the employee sign off in agreement that your list is complete.

- If the employee alleges discrimination, harassment, or retaliation, get as many facts as you can. Put the process of termination on hold. Consider suspending the employee while you investigate.

- Try to determine whether the supervisor or manager's recommendation of termination is tainted by hostility based on a protected class. If it is, try to determine whether there is an independent justification for termination. If there is not, consider an alternative to termination.

- I understand this takes time. Just remember that not every employee will allege discrimination, harassment, or retaliation. In the (hopefully) few cases where this comes up, your actions will be placed under a microscope in court. You may as well take the time to do it right at the front end.

- This is yet another area for supervisor and manager training. Even though most supervisors and managers do not have the authority to make termination decisions, their actions in evaluating performance and issuing discipline clearly matter when it comes to liability for termination decisions based on those evaluations and discipline. Supervisors and managers ARE the employer. Their actions ARE the employer's actions. The must be trained on the basics of employment law.

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- Staub is a good case to use for training. One can understand the difficulties supervisors face trying to juggle scheduling and employee morale issues impacted by frequent military leave for reserve duties. Nevertheless, such frustrations cannot be permitted to influence the treatment of an employee taking federally protected leave. Performance evaluation ratings/comments and disciplinary actions that suggest termination may occur should not be motivated, even in part, by hostility toward military leave or any other protected class.

If our labor and employment attorneys can be of assistance in training your managers and supervisors, please let us know.

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