



## II. LIVE FROM THE FIRING LINE: THE PRACTICE OF MANAGEMENT

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# Avoiding a “Pounding” in Employment Litigation: A Few Ounces of Prevention

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The article provides trial lawyers’ insights into common workplace management issues that may stimulate avoidable complaints or become obstacles in defending an employer in litigation. It reviews and provides examples of problems in performance evaluation, inconsistent application of workplace conduct policies in diverse work environments, documentation of training and receipt of policies, and management of inappropriate behavior that can help or hinder a company’s defense against inevitable employee claims. The importance of proper investigation practices is examined as it relates to fact finding, claim prevention and litigation appearance. These subjects are illustrated with examples of the authors’ actual trial experiences in defending employers in various employment litigation contexts. Recommendations are provided on how to avoid these common management pitfalls and increase the employer’s credibility and chances of prevailing when facing disgruntled employees in court.

The role of the Human Resource (HR) professional today too often resembles that of the frenetic plate spinners who regularly appeared on the Ed Sullivan Show. These acrobatic artists would start a plate spinning at the end of a swaying and flexible wooden stick, gradually increasing the number of simultaneously rotating plates to some staggering number. The trick was to run from plate to spinning plate to reenergize their rotations, lest they lose momentum and crash to the floor in an ignominious and shattering failure. Although HR professionals do not need nearly the foot speed or hand-eye coordination of these dervishes of the small screen, they

nevertheless have much on their plates, and often far too many plates, period. This brief article will discuss a few thoughts on how to limit the number of plates by some basic but useful ideas on how to avoid avoidable problems and how to position the employer to defend successfully against problems that invariably occur. Though stated as ideas for HR Professionals, these recommendations will also be relevant to psychologists with managerial or supervisory responsibilities.

As lawyers who have defended employment lawsuits for many years, the authors have seen certain types of problems recur. There are lessons to be learned from these experiences, and this article will attempt to share some of those lessons with the reader. Naturally, there is an essential disclaimer: the real world is never neat or orderly—and not nearly as predictable as the influence of gravity on spinning plates. Nevertheless, some general observations of the sort that follow may assist the reader in grappling with diverse problems and in developing responses that help achieve positive outcomes.

#### THE PROBLEM OF APPROPRIATE PERFORMANCE MANAGEMENT AND EVALUATION

If there is any one theme that pervades employment litigation, it is surely that an overly charitable performance evaluation will come back to haunt you. When coupled with supervisory neglect of daily, routine performance issues, it is a double dose of poison and a recipe for liability. Here's a common scenario: Jane has been employed in one of many mid-management positions at Widgets, Inc., for eight years. Her performance has consistently been no better than average, but she is friendly and personally well liked by both of her past supervisors, Steve and Bob, who always rated her performance as "exceeding" expectations. Now, Widget must reduce force in order to remain competitive in its markets, and directs its managers to evaluate carefully all positions and the employees in them in order to determine where reductions can most feasibly be made. Jane's new manager, Floyd, has just completed his first evaluation of her, and has rated her as "average" on most categories, and "below average" on some critical categories. Jane confronts Floyd and accuses him of sex discrimination. Steve and Bob both thought she was great, she says, and nothing about her performance has changed, so there is no other explanation. Floyd is flabbergasted because in his mind, he could have been even more critical of Jane's performance, and he refuses to change his evaluation. Aware that a force reduction is on the horizon, Jane immediately files sexual discrimination charges with the EEOC and the California Department of Fair Employment and Housing (DFEH). Her charge features the eight years of outstanding performance evaluations, and the claim that Floyd, a male, is the first manager to rate her "negatively."

Widget proceeds with its force reduction program, and Jane is an obvious candidate not only because of her performance, but because of her position. But the company hesitates, aware of her charges of discrimination. In discussions about whether Jane's job should be spared to avoid the appearance of retaliation, management discusses the merits of her claim. They know that Floyd has a spotless reputation and has given glowing performance evaluations to several female employees. They also know that both Steve and Bob have been counseled by their own supervisors about being too soft on performance management issues and seem to avoid giving employee feedback that could cause discomfort or hurt feelings. So, the company decides that the right thing to do is follow the objective force reduction plan, which happens to call for elimination of Jane's position.

Upon learning that she is to be terminated, Jane files new charges with the agencies contending that she has been retaliated against for having engaged in the "protected activity" of making charges of discrimination. The agencies issue "right to sue" letters to Jane, who hires one of the top employment lawyers in town and files suit against Widget for sex discrimination and retaliation. Because of the proximity in time between Jane's discrimination complaint and her termination, and the fact that her complaint was discussed when termination decisions were made, even though it was not the basis of the termination decision, there is an automatic suggestion of retaliation, so the judge allows the case to go to trial. Lots of money is spent on the case. Employee morale goes down as rumors about the case circulate. Other performance-deficient or force-reduced employees get ideas about the potential for their own cases. And the list goes on.

Some variation on the above scenario happens every day. Certainly Jane could bring charges even without the history of favorable performance evaluations, but the credibility of her claims is significantly strengthened by those inflated evaluations. The fact is that Jane's performance had not changed—it was always marginal. What changed was her manager. Floyd was the first manager to evaluate her objectively. Prior managers had given her undeserved positive evaluations because she was nice, and because they wanted to be popular rather than effective supervisors.

This dynamic of inflated performance evaluations is very human and understandable, but very dangerous from a risk management standpoint. There are many reasons this occurs. A manager may lack the courage to deliver bad news to an employee with whom he or she wishes to remain "friendly." The manager may believe that by giving a more positive evaluation than is justified, he or she can better motivate the employee. Or the manager may be influenced by understandable—but ultimately irrelevant—considerations such as trying to get the employee the highest possible raise because of special personal needs of the employee. Whatever the reason, inflated performance evaluations are *always* ill-advised. When Jane's lawyer is constructing his case, he will feature the prior evaluations. He will argue that Jane's performance did not change (true), but all of a sudden, she is "inexplicably" downgraded by the company. And, he will argue that once Jane was brave enough

to challenge Floyd's obviously biased evaluation, the company responded by firing her—a clear act of retaliation.

No matter how tenuous such a case, juries are comprised of people who work (or have worked) for a living. It is rare to find a group of prospective jurors that does not include a number of persons who feel that they themselves were the victims of unfair treatment at work, and such individuals are, no matter what they say during the jury selection process, assumed to be predisposed to side with the underdog—*i.e.*, someone like them. And, if Widget does not settle with Jane and loses at trial, the expenses can be enormous, not to mention the adverse effect such matters can have on the workplace.

All good HR professionals and psychologist-managers know the importance of giving and training supervisors to give objective and accurate performance evaluations, and most sophisticated companies have specific, objective guidelines. Nevertheless, these problems persist—indeed they are pandemic. So what to do? One technique that can be useful is to have training sessions in which role playing is used to illustrate the pitfalls of the overly charitable evaluation. In this manner, a company can demonstrate forcefully and realistically that the road to litigation hell is paved with good intentions. It has been our experience that once a manager participates as a witness in actual employment litigation, he or she learns indelibly these hard lessons. By including realistic role-playing in management training, an employer can attempt to change these practices and thereby help avoid the costs of learning the hard way.

### THE PROBLEM OF INCONSISTENT ENFORCEMENT OF POLICIES

A related problem is the inconsistent enforcement of employment policies. Just as inconsistency in managing performance evaluations is a formula for litigation, so too is the inconsistent enforcement of employment policies generally. A fair disciplinary policy will usually allow for a case-by-case evaluation of misconduct to avoid unjustly harsh applications of any strict rule. But often the exceptions begin to swallow the rule until the rule itself ceases to exist.

This is difficult to manage, particularly in workplaces with a variety of work environments. For example, some companies have both industrial facilities and professional offices in one location, where the standards of courtesy and social interaction can be very different. It would not be uncommon for such a company to have one standard policy governing all employees regarding acceptable workplace behavior. But often its application to an issue such as the management of workplace banter between coworkers is very different depending on whether the employee is a member of a maintenance crew in the industrial section of the facility or an office worker in the administration building. What passes for acceptable in the welding

yard might not go over so well at the fax machine. Right or wrong, that is usually true, until someone gets a bad performance review, or has a conflict with a supervisor or a coworker, or is reprimanded for misconduct, and starts to feel adversarially toward the company. Then the office worker disciplined for telling potentially offensive jokes complains that he has been subjected to disparate treatment, as evidenced by the permissive view taken of far more questionable talk in the field. Or an industrial worker facing discipline for attendance problems suddenly develops a sensitivity to rough talk and goes on stress disability, claiming to have been traumatized by years of offensive language (which, rest assured, some other employee will corroborate). In both scenarios, the company's position is harmed by having allowed different standards for application of one policy to exist. In practice, it is not necessarily realistic to expect employees in such different work environments to behave uniformly. But it is reasonable to expect management to respond to policy violations consistently, no matter who the offender.

#### THE PROBLEM OF PROVING EMPLOYEE RECEIPT OF POLICY DOCUMENTS AND TRAINING

Another remarkably common mistake is the failure to document adequately the receipt by an employee of various crucial employment terms and guidelines. By taking some very elemental steps an employer can vastly improve its ability to avoid litigation or at least to maximize its chances of prevailing should litigation be filed. At the head of this list is ensuring, to the extent possible (for example, barring a collective bargaining agreement), that each employee *signs* a document acknowledging that he or she is employed "at will." "At will" means that the employee is not being hired for any specified term, and that the employer retains the right to terminate the employee at any time and for any reason. By the same token, the employee is not committing to the employer for any particular term and may choose to leave at any time, without sanction. This is the default and a dominant form of employment in California (California Labor Code 2005, § 2922), and many employers provide new employees with policy materials so advising them. Better yet is the inclusion of an agreement on the employment application, right above the applicant's signature line, acknowledging that if employment is offered, the applicant understands and agrees that it will be "at will" and that no other arrangement is authorized absent a separate written agreement signed by an officer of the company. In the State of California, for example, such a provision virtually cuts off all claims that the employee has an *implied* employment agreement requiring "good cause" for termination. Yet it is stunning how often employers do not take this simple step or otherwise require that employees sign a form acknowledging receipt and understanding of employment policies. Where such failure occurs, the employee is much freer to claim that he or she was not so advised and that he or she

understood that termination could only occur if there was “good cause”—a much higher legal bar for the employer to overcome in wrongful termination litigation.

A related point concerns company workplace rules or training. Most sophisticated companies have some form of written guidelines given to employees that define accepted workplace behaviors. These may include, for example, guidance on what type of conduct is prohibited by the company’s sexual harassment policy, or what sort of business gratuities are prohibited by the company’s conflict of interest policy, and the like. Often these materials are provided to new employees at the time of hiring, followed by periodic updates as policies evolve. Too, it is common today to have actual classroom or computerized training modules on these subjects. In the event of a lawsuit, it may be crucial for the employer to be able to prove that the employee received certain of these materials or training. Yet all too often, tangible proof of receipt or participation is not there. By the simple expedient of requiring employees to sign an acknowledgment of receipt of such materials or training, the employer can establish important documentation that may be crucial in defending a later claim.

In a recent case defended by the authors (*Kennedy v. Chevron U.S.A., Inc.*, 2003), the plaintiff was a 20-year employee of a major corporation who was fired for accepting personal favors from a contractor doing business with the employer. The plaintiff had become friendly with an employee of the contractor who agreed to bring a piece of heavy equipment to her home on a weekend to help her with a major landscaping project. In the employer’s view, this was a clear violation of the company’s conflict of interest policy and the decision was made, reluctantly, to terminate an otherwise valued employee. At trial, the plaintiff claimed that the employer’s conflict of interest policies had not been communicated to her, and that she thought accepting a favor from a friend away from work and on his own time was permissible. Because the employer had written proof to the contrary, the reasonableness of plaintiff’s account could be challenged. For example, the jury was shown several documents signed by the plaintiff and acknowledging receipt of the conflict of interest policy and its updates and it was further proved that she had attended a training seminar on the subject a short time before her violation. Although she still argued that the policy was unclear and that despite her signature acknowledging receipt and understanding of the policy she had in fact never read it, the jury was not persuaded and returned a verdict for the employer. All trials involve competing accounts of past events but when there are hard documents, the room for “spin” is dramatically reduced.

### A PROBLEM IN DEFINING “HARASSMENT”

Another area for caution with respect to policy training has to do with overstatement of the definitions and potential consequences of such terms as “harassment”

and “hostile environment.” Quite often, to set clear workplace behavioral standards and safeguard itself from claims, an employer will have a “zero tolerance” policy regarding any conduct which could be perceived as “offensive” to others. That may be a prudent policy. However, the law is not that strict and conduct which violates such a policy would not *necessarily* violate the law. Antiharassment laws, such as the Federal Title VII of the Civil Rights Act of 1964 and California’s Fair Employment and Housing Act (FEHA, 2005), require offensive conduct to be either severe or pervasive before a hostile environment is established. Isolated, sporadic or trivial infractions are not a basis for liability under the law, although such conduct may very well be a basis for discipline under the company policy.

This difference between what is punishable under company policy and what is punishable under the law gives the employer a buffer zone in which to catch and address unacceptable workplace conduct before it can become a legal violation; this is desirable. But employee harassment training sessions and materials all too often fail to make this distinction clear, leaving employees with the impression that hearing a single offensive utterance gives them a legal claim against the company. In short, it is wise practice to sensitize employees to the types of conduct which will not be tolerated in the workplace but it should be done in a way that does not cause employees to perceive *legal violations* in every company policy infraction, no matter how small.

### SOME PROBLEMS WITH WORKPLACE INVESTIGATIONS

One of the most crucial and tricky areas in avoiding litigation is the workplace investigation of employee complaints. These may be triggered in a variety of ways ranging from a direct complaint to a manager, an employee “hotline,” or the HR Department itself, or in response to charges filed by the employee with a governmental agency. No two situations are identical, but some generalizations apply.

First, the investigatory process must be conducted with an eye towards determining the truth rather than placating the complaining employee or protecting the charged party. This perhaps sounds obvious but many regard these investigations as defensive in nature—that is, an effort to support the employer’s side or just protect the company’s reputation. Such a view misses the essential point that the employer’s interests are best served by identifying and putting a stop to unacceptable workplace behaviors as soon as possible. The costs of not doing so can be staggering.

Second, it is vital that the person(s) conducting the investigation have no stake in the outcome. In other words, they must not be implicated in any sense by the charges. In today’s world, it is not uncommon for members of the HR department themselves to become the object of charges by disgruntled employees who may

view them as “skills” for management. In such cases, consideration should be given to bringing in investigators from other parts of the company, or, if necessary, from the outside. By so doing, an employer can preserve both the fact and appearance of objectivity.

Third, it is important that the investigator obtain, whenever possible, the claimant’s agreement with the scope of the investigation and input as to potential sources of evidence. For example, the investigator may conduct an initial interview with the claimant to identify the issues and potential witnesses. Before embarking on the investigation, the investigator should write out his or her understanding of the charges and show that to the claimant for confirmation that the investigator has captured the issues correctly and completely. The investigator should encourage the claimant to submit his or her own written statement of the issue if desired and, where practicable, obtain the claimant’s signature on the description of the scope of the complaint. In this manner, the investigator can head off a later argument by the claimant that the investigator missed the point or skewed what he or she was told by the claimant. By using this simple technique, the investigator will establish credibility with the claimant and, should there later be litigation, with the jury. This task has to be handled with finesse, so as not to intimidate or discourage employees from coming forward or proceeding with investigations. But the more proof of the claimant’s agreement with the scope of the complaint, the better for avoiding the inevitable attempts to expand the claim if the matter ends up in litigation.

Fourth, it is crucial that there be consistency of the investigatory process. No two investigations are identical and to some extent the process must be adapted to the circumstances. It would be unrealistic to suggest, for example, that every investigation shall include at least five interviews or any other such formulaic approach. However, the more uniform the approach, the easier it will be to defend against later charges that the investigation was inadequate. Thus, the employer should develop a standard but adaptable protocol to guide investigations of employee complaints. This is particularly important when inquiries are conducted by members of management who are not necessarily trained in investigation techniques.

Under federal and state employment laws, such as Title VII of the Civil Rights Act of 1964 and California’s FEHA (2005), courts routinely hold that an employee who unreasonably fails to provide his or her employer with notice of the claim and an opportunity to investigate limits his or her rights to recover. But that crucial defense for the employer will only apply where the employer’s investigatory practices are reasonable. In other words, the law does not require an employee to give the employer an opportunity to investigate unless there is evidence that the employer would have conducted a reasonable investigation if given the chance.

Fifth, although perhaps a truism, it is worth stating that each step of the investigator’s process should be fully documented. Notes should be taken during interviews of witnesses and documentation of the witness’ agreement with the accuracy of the content of the notes can be invaluable in dealing with flawed memories and





After the meeting, the employer should provide the employee with a written response reflecting the employer's conclusions (but not the details of witness interviews) to avoid any possible misunderstanding and to preempt any claim by the employee that the employer was vague or under-communicative regarding its determination.

## CONCLUSION

In today's workplace, there are many who seek to disrupt the spinning plates referred to earlier. Those whose job it is to keep the plates spinning without apparent effort have a much greater ability to do so by following some of the very basic concepts discussed above. The Ed Sullivan Show and similar variety programs are parts of history but the challenges of employer-employee relations are here to stay.

## REFERENCES

- California Labor Code § 2922 (2005). Retrieved June 16, 2005, from <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=lab&group=02001-03000&file=2920-2929>
- Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e et seq.
- Fair Employment and Housing Act, California Government Code § 12940 et seq. (2005)
- Kennedy v. Chevron U.S.A., Inc.*, Contra Costa Superior Court Case No. C01-03963. (2003)

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