5 Ways Employers Make Plaintiffs' Lawyers Very, Very Happy

Posted by **Robin E. Shea** on March 25, 2011

John Gallagher, a plaintiffs' lawyer, had a good posting last week on TLNT entitled "Can an Employee Be Terminated for Simply Surfing the Internet?"

The point of the article was that, although this seems to be a legitimate ground for termination on its face, it really isn't because everybody surfs the internet at work. Therefore, terminations for this reason make John very happy because he can argue that his client was singled out for a discriminatory or retaliatory reason.

I have to admit that I've never heard of a real-life employer who terminated an employee simply for surfing the internet. In my experience, what they get terminated for is looking at porn on the internet, or gambling on the internet, or doing illegal downloads on the internet -- in other words, they are engaged in some type of "aggravated" internet misconduct that *not* everyone else does.

Be that as it may. John's post got me thinking about the things that employers do that bring joy to the hearts of plaintiffs' attorneys. I'm going to avoid the blatantly obvious ones, like "telling your subordinate to sleep with you or be fired," because this is a blog for grown-ups. Here are five mistakes that even good employers sometimes make:

5. Having "zero tolerance" for anything. Since I'm going in no particular order, I might as well start by riffing on John's post. You have a "zero-tolerance" rule against internet surfing at work. *What, are you kidding?* Even the CEO surfs the internet to check his stock prices or to see whether the weather will allow him to take his yacht out this weekend at Martha's Vineyard. A more prudent policy would be to ban excessive, immoral, or illegal use of the internet at work. "Zero tolerance" policies always result in injustices, which in turn result in lawsuits and big jury verdicts or, at least, humiliating news stories. (Remember those little kindergarten boys who got suspended or even expelled for "sexual harassment" when they kissed little girls? Do you want to be the butt of everyone's jokes like those schools were?)

One might say that I have zero tolerance for zero tolerance policies. Te-he.

4. Telling an employee you're "eliminating her job" when you're really firing her. I blogged about this a couple of weeks ago. First, it's wrong because it's dishonest and cowardly. Although you don't have to give her every gory detail about why she doesn't have a job any more, you owe her at least a brief explanation that is true. But even if you don't care about doing the right thing (and I know you do), you should care because plaintiff's lawyers will be all over you if you lie. Once you get caught in a lie like this, the door is open for the plaintiff's attorney to claim that your real motive was an illegal one . . . even if the termination was perfectly legitimate and you lied only to avoid hurting her feelings.

PS - It's ok to call a firing a "job elimination" if you and the employee agree in writing that this is what you are both going to call it. But you still need to give *her* the true reason.

3. Assuming you're complying with the wage and hour laws because you pay your folks just like everyone else, and you've done it this way for years. *Noooooooooooo . . .* First, the law in this area is so complex that the chances are very good that your peers are violating it. That means you're in trouble if you're just doing whatever they do. Second, the chances are even better that whatever you've been doing "for years" is at least partly wrong. It's no news that class and collective action litigation under state wage and hour laws and the Fair Labor Standards Act has been smokin' hot.

It's definitely a good idea to have a wage and hour audit so that you can fix any mistakes (and, believe me, there *will* be mistakes) before you become the target of a lawsuit or government investigation.

And, by the way, your chances of being targeted have increased dramatically now that the American Bar Association and the U.S. Department of Labor have formed a ~~diabolical~~ strategic alliance in which the ABA finds plaintiffs' lawyers who will take on the wage-hour cases that the DOL doesn't want to pursue.

2. Engaging in blatant reverse discrimination. Most employers know that "regular" discrimination is illegal and wrong, and they work very hard to avoid it. But what about the opposite? Not nearly as good, because many employers don't even know this is against the law. In fact, many believe they are required to sometimes discriminate against whites and males to satisfy their affirmative action obligations.

Admittedly, the law on reverse discrimination is confusing. The current Supreme Court standard in *Ricci* is convoluted and difficult to apply. That said, unless your company is under a consent decree to correct past discrimination, your best "legal" bet is actually to choose the most qualified person for the job (or terminate the least qualified), regardless of race, sex, national origin, color, religion, age, disability, etc. Who'da thought?

1. Er, um, like, letting your training slip through the cracks. Foregoing training in areas like harassment or discrimination has never been a good idea, but with the Supreme Court's recent "cat's paw" decision, it just got worse. Now employers can be liable for employment decisions that were

influenced by a lower-level manager with a discriminatory motive. This decision makes it essential that all levels of management understand their legal obligations.

Make sure your "paws" know the laws.

These are my five -- you probably have some of your own. Please add to my list!