

Avoiding Legal Pitfalls When Addressing Employee Behavior & Performance Issues

Presented by:

William E. Mason, Kathy D. Aslinger, and Ashley N. Trotto

Kennerly, Montgomery & Finley, P.C.

Recipe for Trouble:

Difficult Employee + Protected Class + Unpreparedness

Types of Difficult Employees

- ▶ The Victim
- ▶ The Hisser
- ▶ The Negative Nellie
- ▶ The Ghost
- ▶ The Squeaky Wheel
- ▶ The Slacker
- ▶ The Rebel

Who is in a Protected Class?

- ▶ A protected class is a characteristic of a person which cannot be targeted for discrimination
- ▶ Some common protected classes include:
 - ▶ Race
 - ▶ Religion
 - ▶ National Origin
 - ▶ Age (over 40)
 - ▶ Sex
 - ▶ Pregnancy
 - ▶ Disability
 - ▶ Workers' Compensation History/Status
 - ▶ FMLA History/Status
 - ▶ Marital Status
 - ▶ Health & Safety complainants
 - ▶ Collective Bargaining Status
 - ▶ Benefit Claimant
 - ▶ Jury Duty
 - ▶ Veteran Status
 - ▶ Tennessee Public Protection Act
- ▶ You must treat members of a protected class the same way you would treat other employees
- ▶ Why do we bother to say employees are hired “at will” in Tennessee?

Be Prepared: Policies, Procedures & Best Practices

Be Patient

- ▶ Timing matters
- ▶ Don't be too hasty
- ▶ No short cuts
- ▶ Build the case
- ▶ Understand the issues involved

Be Brave

- ▶ Let go of guilt
- ▶ Do not delay taking action when necessary
- ▶ Be prepared for common employee responses
- ▶ Being brave does not mean going it alone

Communicate

- ▶ Listen
- ▶ Be objective
- ▶ Give clear feedback
- ▶ Make sure that you understand the facts
- ▶ Manage your self-talk
- ▶ Don't poison the well
- ▶ Limit communication to advisors and the employee

Document

- ▶ Create a record
- ▶ No detail is too small
- ▶ Be complete
- ▶ Investigate
- ▶ Document meetings, communications, incidents
- ▶ Include date, time, those involved, issue discussed/details of the incident
- ▶ Avoid “color” words; be objective

Consider Alternatives

- ▶ Not all employment issues are best handled with formal action
- ▶ EAP
- ▶ Offer to transfer or resign
- ▶ Disability
- ▶ Retirement
- ▶ ADA accommodations

Follow “The Process”

- ▶ Employee handbook
 - ▶ At Will Employment Statement
 - ▶ Acknowledgment of Receipt
 - ▶ Comprehensive and Tailored to your business
 - ▶ Disciplinary Procedure
 - ▶ List of offenses
 - ▶ Procedure to be followed in administering corrective or disciplinary action
- ▶ Legal requirements
- ▶ Management policies & procedures
- ▶ Process is not a handicap – take advantage

Be Consistent

- ▶ Consistency is always an issue
- ▶ Don't waffle – just follow the procedure
- ▶ Treat all similarly situated employees the same
- ▶ Self Audit

Apply Your Policies & Procedures

The Case

- ▶ You call and tell us:
 - ▶ You have a problem employee – she is often absent, non productive and is creating a hostile work environment
 - ▶ She recently got into a verbal altercation with a customer
 - ▶ You want to terminate her
 - ▶ The employee also has a mental disability

Thinking Like a Lawyer

- ▶ Potential litigation should be on your mind
- ▶ Are there special steps that need to be taken based on the particular protected class in question?
 - ▶ Statutes, regulations, case law
- ▶ Consider standards of proof
- ▶ Evidence
 - ▶ Preservation
 - ▶ Availability
 - ▶ Quality
- ▶ Sympathy of the jury, judge, arbitrator, mediator

Analysis

- ▶ Have you complied with the ADA?
- ▶ Review 7 pillars
 - ▶ Are you being impatient?
 - ▶ Being too hasty could be costly
 - ▶ Are you being brave?
 - ▶ Unnecessary delays can be as harmful as hastiness
 - ▶ Did you communicate?
 - ▶ What, when, where, how?

Analysis Continued

- ▶ Did you document?
 - ▶ How complete is your record?
- ▶ Did you consider alternatives?
- ▶ Did you follow the procedure?
 - ▶ What steps have you taken?
- ▶ Are you being consistent?
 - ▶ Audit your past actions with respect to “similarly situated” employees

Analysis Continued

- ▶ Final Question: If you terminate and the employee sues how strong is your case?
- ▶ If your case is weak:
 - ▶ Disciplinary action needed
 - ▶ Strengthen the record
- ▶ If your case is strong:
 - ▶ Maintain record
 - ▶ Be prepared for litigation

Confrontation

- ▶ Whether for lesser disciplinary action or termination
- ▶ Remain objective
- ▶ Be the manager
- ▶ Have a witness
- ▶ Be prepared
- ▶ Document
 - ▶ Have employee acknowledge the discussion in writing
 - ▶ Does not mean they must sign immediately or agree with the substance of the discussion.

Due Process

- ▶ Be sure employees are receiving due process throughout your disciplinary procedure (prior to termination)
 - ▶ Clearly identify the gap separating the employee's behavior from expected behavior and how the employee can close the gap
 - ▶ Provide adequate time to give the employee a fair opportunity to close the gap
 - ▶ Make sure the employee clearly understands the consequences of failing to close the gap
 - ▶ Ensure that each of these steps is properly (and contemporaneously) documented

Legal Points To Consider

Americans with Disabilities Act (ADA)

- ▶ Prohibits discrimination against applicants and employees who meet the statute's definition of a "qualified individual with a disability"
- ▶ To establish an initial lawsuit against employer, the employee must show:
 - ▶ he is disabled;
 - ▶ he was otherwise qualified for the position, with or without reasonable accommodation;
 - ▶ the employer knew or had reason to know of his disability; and
 - ▶ he suffered an adverse employment action
- ▶ Applies to organizations with 15 or more employees. Public entities are included regardless of employee number
- ▶ Regulated and enforced by the EEOC

Age Discrimination in Employment Act (ADEA)

- ▶ Prohibits discrimination in any way against applicants or employees older than 40 because of their age
- ▶ You cannot intentionally discriminate against those over 40 or put policies in place that have a greater impact on those over 40
- ▶ To establish an initial lawsuit against employer, the employee must show:
 - ▶ he is over 40
 - ▶ there was an adverse employment action, and
 - ▶ age was a motivating factor in the adverse decision (mixed motives would still satisfy)
- ▶ Applies to organizations with 20 or more employees
- ▶ Regulated and enforced by the EEOC

Title VII Claims

- ▶ Title VII of the Civil Rights Act of 1964
- ▶ Prohibits:
 - ▶ discrimination in hiring, firing or pay based on a person's race, religion, sex or national origin
 - ▶ sexual harassment
 - ▶ retaliation because an employee filed a discrimination claim or spoke out against discrimination
- ▶ To establish an initial lawsuit against employer, the employee must show:
 - ▶ he is a member of a protected group
 - ▶ he was subjected to an adverse employment action
 - ▶ he was qualified for the position from which he was fired, and
 - ▶ that he was treated differently than employees outside of the protected class for same or similar conduct
- ▶ Applies to organizations with 15 or more employees
- ▶ Regulated and enforced by the EEOC

Family & Medical Leave Act (FMLA)

- ▶ Employees with at least a year of service can take up to 12 weeks per year of unpaid, job-protected time off for specific enumerated reasons
- ▶ Upon return from FMLA leave, an employee is entitled to return to the same position or to an equivalent position
- ▶ To establish an initial lawsuit against employer, the employee must show:
 - ▶ he availed himself of a protected FMLA right by notifying company of intent to take leave,
 - ▶ he suffered an adverse employment action, and
 - ▶ that there was a causal connection between the exercise of FMLA rights and the adverse employment action
- ▶ Applies to organizations with 50 or more employees
- ▶ Regulated and enforced by the Department of Labor

Retaliation Claims

- ▶ Burden of proof:
 - ▶ Plaintiff must present evidence from which a reasonable jury could conclude that the plaintiff suffered an adverse employment action under circumstances that give rise to an inference of unlawful discrimination
 - ▶ Plaintiff must then show:
 - ▶ He engaged in protected activity
 - ▶ Action under FMLA, ACA, FLSA, ERISA, etc.
 - ▶ He suffered an adverse employment action
 - ▶ A causal connection existed between the adverse employment action and the protected activity
 - ▶ If Plaintiff shows these things, the defendant (employer) must introduce evidence of a legitimate, non-discriminatory cause for the adverse employment action
 - ▶ Plaintiff must then show that the employer's proffered reasoning is simply pretext for discrimination

Additional Information on the Firm

Kennerly Montgomery is a general practice law firm that has provided legal advice to clients for 100 years. KM attorneys practice in a variety of areas, representing private employers, non-profits, and municipal clients, including local governments, agencies and public utilities.

Bill Mason, Kathy Aslinger, and Ashley Trotto practice extensively in employment and employee benefits law, which includes advising employers on individual employee issues, employment contracts, employee handbooks, as well as design, documentation, administration, audit, litigation, termination and qualification of employee health and welfare and pension plans for public, tax-exempt and private employers. They represent clients before various agencies regulating employment issues and employee benefits.

A Little About Your Presenters

Bill Mason received his law degree from Harvard Law School in 1974, and has been practicing more than 40 years, most of that time in employment and employee benefits for employers. He worked for the Tennessee Valley Authority from 1974 – 1986, Wagner Myers & Sanger PC, from 1986 – 1988, and William E. Mason PC from 1988 – 2009. Bill joined Kennerly Montgomery in 2009. He serves on the Board of Directors for the Legacy Park Foundation and the Education Subcommittee for the United Way of Greater Knoxville. He is the past Chair of the Hillcrest Healthcare Board of Directors. In 2016, the US Treasury Department appointed him as the IRS Taxpayer Advocacy Panel (TAP) representative for Tennessee.

As a leader of Kennerly Montgomery's employee benefits practice, Kathy Aslinger focuses on advising fiduciaries for the benefit of participants, assisting both private and governmental clients in the design, implementation and maintenance of their employee benefit plans, including 401(k), pension, cafeteria, and health plans. She commonly assists clients in maneuvering through the complex world of audits, fiduciary liability issues, DOL and IRS compliance, HIPAA, COBRA, ERISA and state law obligations, as well as Affordable Care Act compliance. Kathy has been practicing law for over 17 years and has been with Kennerly Montgomery since January 2010. In addition, Kathy serves on the Board of Directors for Uplands Village, a continuing care retirement community in Pleasant Hill, Tennessee.

Ashley Trotto joined Kennerly Montgomery as a law clerk in 2012 and as an associate attorney in the Firm's employment law and employee benefits practice in 2013. Ashley concentrates on the Affordable Care Act and has been a frequent speaker on Affordable Care Act issues. Ashley serves on the Board of Directors for the Smoky Mountain Animal Care Foundation, a 501(c)(3) Non-profit organization established to introduce and promote programs to improve animal welfare in Blount County, Tennessee and the surrounding areas of the Great Smoky Mountains. She is also a member of the East Tennessee Benefits and Compensation Association, serves on the Hunger and Poverty Relief Committee of the Knoxville Bar Association and is a member of the United Way Health and Basic Needs Investment Committee. She's also the energy behind the Firm's on-going kindergarten book project at Christenberry Elementary.

This presentation was created with the assistance of Alexandria Hull, law clerk and second-year law student at the University of Tennessee.

Bill Mason: wemason@kmfpc.com

Kathy D. Aslinger: kaslinger@kmfpc.com

Ashley N. Trotto: atrotto@kmfpc.com

KENNERLY, MONTGOMERY & FINLEY, P.C.

550 MAIN STREET, FOURTH FLOOR | KNOXVILLE, TN 37902

P.O. BOX 442 | KNOXVILLE, TN 37901

PH (865) 546-7311 | FX (865) 524-1773 | WWW.KMFPC.COM

©2017 Kennerly, Montgomery & Finley, P.C. This publication is intended for general information purposes only and does not constitute legal advice or a legal opinion and is not an adequate substitute for the advice of legal counsel. Please consult with a Kennerly Montgomery attorney to determine how laws, suggestions, and illustrations apply to specific situations.