HOW TO STAY OUT OF LEGAL TROUBLE

CalACT Conference 2011 | Peter Johnson and Tom Brierton

April 21, 2011

Westgate Center for Leadership and Management Development
Who Are We and Why Should You Listen?

- Peter Johnson – Director Westgate Center
- Tom Brierton – Associate Professor of Law
What Do You Hope We Cover?
What’s the Problem With Conflict at Work?

- Increase insurance premiums
- Higher workers comp claims
- Higher number of sick days
- Lost productivity
- Work is not enjoyable and people quit
- Reduces overall quality of employees
- Attorney fees (theirs and yours)
- Could be substantial judgments
Have you ever been sued over an employee issue?

1. Never
2. Once
3. Twice
4. Three
5. My office is at the courthouse
Have you ever fired anyone?

1. Never
2. 1-5
3. 6-10
4. They call me the “hatchet man/woman”
What is the worst employee you can hire?

1. Horrible Employee
2. Below average employee
3. Average employee
4. Great employee
First Step…

- Do your due diligence
- Read between the lines on reference checks
- Have a clear job description with identified skills
- Clearly identify how the employee will be evaluated and what results are expected
- Brush up on your interviewing skills (have to ask right questions to get right answers)
- Implement a real employee orientation that outlines all expectations of employment
Have you ever been fired?

1. Never
2. One time
3. Two times
4. Three or more times
When is the best time to reduce conflict?

1. Before the person is hired
2. During the hiring process
3. During the annual review
4. When things get “ugly”
5. Just before the Judge is about to rule on the case
Is this glass half full or half empty?

1. Half full
2. Half empty
What Impacts Your Employee’s View of the World?
Communication is like…
What Do Employees Want?

They

- want to be treated fairly
- want respect
- want to be informed
- don’t want changes/surprises
- want a safe environment
- don’t want to be harassed
- they want a manager that inspires them
- they want trust in the organization
As a Manager Be Proactive

- Hire the right fit
- Set clear expectations
- Communicate including listening
- When communicating have clear and accurate documentation
- Support employees
- Challenge them
- Stimulate and motivate them
- Build trust between you and the employees
When the Trust is Gone...
Types of Legal Claims

- Discrimination
- Harassment
- Retaliation
- Wrongful Discharge
- Defamation
- Invasion of Privacy
- Breach of Contract
- Wage & Hour
Has the number of employee lawsuits against the employer increased in the past decade?

1. Yes
2. No
As layoffs mount, so do wrongful termination cases

High unemployment means more suits filed, but discrimination is hard to prove, cases can linger for years

KATHY ROBERTSON | STAFF WRITER

As companies continue to cut jobs in the down economy, growing numbers of employees are going to court to get them back—or to recover lost wages while they look for something new.

Wrongful termination lawsuits are on the rise, and plaintiffs attorneys contacted by the Business Journal say allegations range from sexual harassment and discrimination to failure to accommodate an employee’s medical condition, but all fundamentally claim, “You fired me, and you shouldn’t have.”

Sometimes the employees are right. Whether workers will get the payoff they want, however, depends on how well employers can justify a reduction in force and prove it doesn’t unfairly hit a population legally protected on the basis of age, sex, race, disability or national origin.

Classic disagreements over what happened in the workplace that propel termination continue, too. “If the economy is bad, there’s more of a chance that someone will file rather than go get another job since there aren’t that many out there.”

Daniel Covel, attorney

The unemployment rate in the four-county Sacramento area hit 7.3 percent in July, sharply higher than the July 2007 jobless figure of 5.6 percent.

Wage and salary employment dropped by 9,700 jobs in just one month, from June to July. Many were seasonal job cuts in education, but the region is down 9,100 jobs from July 2007 to July 2009, more than 8,000, or half, were construction jobs.

The sheer numbers increase odds of legal action by workers to recover their jobs.

“There’s a tendency to ask, ‘Why me and not the entire work force?’” said Daniel Covel, an attorney who defends employers. “If the economy is bad, there’s more of a chance that someone will file rather than go get another job since there aren’t that many out there.”

Most settle, but it can take years. Between 10 percent and 30 percent of complaints go to binding arbitration, but that can take years, too.

MORE COMPLAINTS HEAD TO COURT

Lawsuits filed in Sacramento Superior Court in recent months allege discrimination, retaliation or other actions by the employer as the motive behind the termination.

Among them, an African-American employee was terminated in May by a steel construction firm alleging he damaged safety equipment and racially hostile environment, court records show.

Another case, a “half white” restaurant worker alleges he was terminated about a “hostile work environment” at an Asian restaurant.

An L.A. woman sued a debt-purchasing firm in July for alleged failure to accommodate her disability to wear a hijab at work, and an employee at a long-term care center alleges she was injured by a co-worker after she filed a workers’ compensation claim.

All of these workers filed a complaint with the California Department of Fair Employment and Housing and were granted the right to sue in court. The agencies are designed to protect residents from discrimination.

Total complaints filed with the agency, often the first step toward a lawsuit, rose 11.4 percent from 2006 to 2007, but they have bounced back from those lows.

Yet the number of Sacramento-area lawsuits dropped 14 percent in 2007 compared with the year before. The impact of lost jobs on smoking, drinking and alcohol use makes the figures hard to isolate, however.

WAVE OF AGE DISCRIMINATION COMPLAINTS ON THE WAY?

Common sense suggests there would be more age discrimination complaints

SACRAMENTO BUSINESS JOURNAL | AUGUST 29, 2008

unemployment on the rise

Rates in the four-county Sacramento area (in July of each year)*

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Sources: California Department of Fair Employment and Housing

*Not seasonally adjusted

Tips for employers

In order to avoid costly litigation following layoffs, employers should:

• Evaluate the statistical makeup of the layoff group to make sure it is not imbalanced or disproportionately weighted toward a particular age group, race or sex
• Create a procedure to analyze the business justifications for specific layoffs
• Consult with the company’s chief financial officer, attorney and supervisors of potential layoff groups

The company’s pre-trial offer was $10,000, Whelan said.

Charlene Roby, a 25-year employee of the company, was terminated after missing 10 days of work without giving the required 24-hour notice of her absence, Whelan said.

She developed a panic disorder. As a result, she had to take the 10 days without warning — and she used sick and vacation time, Whelan said. He sued McKesson in 2001, alleging harassment and discrimination based on Roby’s disability.

The case is now pending review before the California Supreme Court after an appeals court reversed harassment verdicts against the company and Roby’s supervisor. Whelan expects resolution in 2009 or 2010.

Roby said she hasn’t seen a big uptick in wrongful termination cases in the past year, though she does get calls.

“Mixed views,” she said. “The cases I take are the ones I expect to win at trial. My goal is not a quick hit,” she said. “If there are layoffs and a company is bankrupt, you don’t have much of a case.”

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Top 5 Tips: So You Want to Sue Your Boss?

So you want to sue your employer for racial discrimination, sexual harassment, whistleblower retaliation, failure to pay you your last paycheck, what have you. Now what? Here are five tips all clients should keep in mind before they pick up the phone to call a lawyer.

Tip 1: Write it, don’t say it. People think it’s enough to complain, request or report things orally to their employer. They complain about discrimination to HR over the phone. Or they tell their supervisor about a health and safety code violation. Well, what are you going to do when HR or the supervisor denies you ever talked with them? Don’t believe it? Happens all the time. Avoid the “he said, she said” by communicating with your employer by emails or send letters (certified mail, return receipt requested). By doing this, you create a record.

Tip 2: Keep a Journal. Don’t rely on memory, write everything down. The names of witnesses, dates, times, places, what was said, documents involved – the more detailed the better. And be professional about it. Don’t write that your boss is a “@*#%!” in the journal, because the journal could become evidence. Another thing, don’t leave the journal on your desk or in your desk drawer at work where your boss can find it. You might end up fired and your lawsuit dead.

Tip 3: Get witnesses. Emails, memos and letters are one form of key evidence in a lawsuit. Witnesses are the other. When your boss calls you a racial slur, pats you on the rear, or threatens to fire you because you reported him for illegal activity, talk to whoever witnessed it. Confirm whether they saw it. Try to get them on your side. Do this carefully and your case will have just gotten a lot stronger.

Tip 4: Don’t play lawyer. So you went to the internet and learned that “retaliation”, “hostile work environment” and “whistleblowing” are magic words. That doesn’t mean you should go waving those terms around in your emails and conversations at the workplace like your sword and shield. Don’t play lawyer. Chances are, your employer is lawyer will be better at it than you are and if, as is likely, you get it all wrong, you’re the one who could come off looking like the bully, not the employer. Get a lawyer instead.

Tip 5: Don’t get mad, get even (or turn the other cheek). You’re being treated outrageously by your co-workers, your supervisors or the owners of your company, or maybe all of them. You’re depressed, scared and . . . spitting mad! To quote Al Pacino in Scent of a Woman, you want to take a flamethrower to the place! That’s fine if you want to end up in jail and without a lawsuit. Otherwise, take a deep breath, follow tips 1 to 4, and call an attorney. That momentary lapse where you curse your boss out like a sailor in front of your entire office could mean you no longer have a case.

More tips to come, but if you follow these five, you will be way ahead of the game. And your lawyer will thank you for it.
Employment discrimination charges filed with the EEOC has increased by what percentage since the year 2000?

1. 10%
2. 20%
3. 25%
4. 45%
# Employee Charges Filed with EEOC

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- **From 2000 to 2010**
  - Discrimination Charges are up: 25%
  - Retaliation Charges are up: 67%
Initial Intake from Employee

Add Appointment
STEP 1: Do You Meet the Requirements?

1. Is this about unlawful discrimination in employment?
   - [ ] Yes
   - [X] No

2. Have you been discriminated against by being terminated, denied a promotion, denied employment, harassed, denied leave, or other such adverse employment action?
   - [ ] Yes
   - [X] No

3. Do you think the discrimination happened because of your:
   - [ ] Race
   - [ ] Color
   - [ ] Ancestry
   - [ ] Religion
   - [ ] Age (40 and above)
   - [ ] Sex/Gender
   - [ ] Pregnancy
   - [ ] Sexual Orientation
   - [ ] Marital Status
   - [ ] National Origin (including language use restrictions)
   - [ ] Disability (mental, physical, including HIV and AIDS)
   - [ ] Medical Condition (cancer/genetic characteristics)
   - [ ] Denial of Family Care or Medical Leave
   - [ ] Retaliation for reporting patient abuse by health facilities
   - [ ] Retaliation because you filed a complaint, asserted your rights, or participated in a discrimination investigation
   - [ ] Yes
   - [X] No

4. Are you filing a complaint against the federal government?
   - [ ] Yes
   - [X] No

5. Does the employer have at least 5 employees, or, if your issue involves harassment, at least 1 employee? You may count employees at other facilities.
   - [ ] Yes
   - [X] No

[Continue] [Back]
Locations

Office Locations

Department of Fair Employment & Housing
Contact Center ☏ (800) 986-1684
Videophone for the DEAF ☏ (816) 726-5285
email: contact.center@dfeh.ca.gov

HEADQUARTERS
2218 Kause Drive
Suite 100
Elk Grove, CA 95758
☎ (916) 478-7251

OFFICES
BAKERSFIELD
4800 Stockdale Highway
Suite 215
Bakersfield, CA 93309
☎ (661) 365-0728

FRESNO
1277 E. Alluvial Avenue
Suite 101
Fresno, CA 93720
☎ (559) 244-4788

LOS ANGELES
1055 West 7th Street
Suite 1400
Los Angeles, CA 90017
☎ (213) 439-0759

OAKLAND
1515 Clay Street
Suite 701
Oakland, CA 94612
☎ (510) 208-3451

SAN JOSE
2570 N. First Street
Suite 480
San Jose, CA 95131
☎ (408) 325-9341
In a wrongful termination lawsuit the plaintiff must first file with the DFEH

1. True
2. False
Wrongful Termination

- Plaintiff does not have to file with the EEOC or the DFEH but can still allege discrimination, harassment or retaliation.

- Retaliation lawsuit does not require proof of a protected class being involved only that a protected activity was involved and an adverse employment action.
In an employment lawsuit the plaintiff must prove their case by which of the following burdens of proof?

1. Beyond a shadow of doubt
2. Beyond a reasonable doubt
3. By clear and convincing evidence
4. Preponderance of evidence
Take the case of Halloran vs. Pilkington
Some Ways to Avoid Excessive Damage Awards

- Win the Lawsuit
- Exit Interviews
- Severance Package
- Arbitration
Wrap-up

- One tool or idea you will use at work
- Questions & Answers
- Evaluations

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