

No Good Deed Goes Unpunished

Helping Mr. Nice Guy Avoid Employment Law Pitfalls

April 4, 2014
Silverton, Oregon

Todd A. Lyon & Tyler J. Volm
Barran Liebman LLP
tlyon@barran.com 503.276.2194



Effective Discipline and Discharge

- Maintaining and Enforcing Effective Policies + Prompt and Consistent Discipline (including termination where appropriate) = Reduced Risk of Employee Lawsuits
- Between the time the employer could have initially disciplined the employee and the second or third instance, the employee may exercise protected rights or assert his/her protected class (e.g., leave law, disability, age discrimination)



Key Elements of Effective D&D

- Investigate Alleged Misconduct
- Evaluate the Evidence
- Determine the Level of Discipline
- Consistent Discipline
- Proper Documentation and Corroboration
- Grievance Processing and Arbitration



Reasons Employer May Decide Not to Discipline or Discharge Employee

- Employer thinks this is “one-time mistake”
- Longevity of service to the company
- Employee is “nice guy” or “office favorite”
- Personal, familial, or friend relationship with employee
- If discharged, no one else is available to fill vacant position
- Other reasons?



Protected Classes

- Race
- Color
- National origin
- Sex (including pregnancy-related conditions)
- Disability
- Religion and religious practices
- Age (over 18 in Oregon)
- Military service
- Domestic violence victims
- Association with a protected class
- Use of protected leave (military, sick, family, legislative, jury)
- Marital status
- Family relationship
- Injured worker
- Sexual orientation
- Gender identity
- Opposition of unlawful practices
- Expunged juvenile record
- Whistleblowing

Transitory Employees

- Remember that an employee who may not have exercised their protected rights or asserted their protected class at the time the employer could have initially disciplined or discharged, may do so in the interim, exposing employer to new liabilities and claims, especially retaliation claims



Good Deeds Going Punished in Recent Decisions and How to Avoid the Mistake

- Racial Discrimination
- Disability Discrimination
- Employee Classification
 - Title VII Applications
 - Wage and Hour Issues
- Investigation/Due Process
- Constitutional Violations
 - 1st Amendment
 - 4th Amendment
 - 14th Amendment
- Retaliation—Title VII



Racial Discrimination

Goncalves v. Plymouth County Sheriff's Dept., 659 F.3d 101 (1st Cir. 2011)

- Black employee who had not worked with a computer for 11 years, applied for an IT position
 - Scored lowest among those testing for position
 - Younger white employees hired over Goncalves
- Good Deed: Allowing non-qualified employee to advance in application process



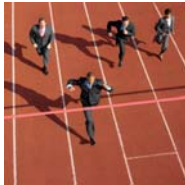
Goncalves

- Punishment: Employee sued for racial discrimination
- The court stated that it was “confusing” that the employer allowed her to interview and test for the job when it was clear she was not qualified, but ultimately dismissed claim



Goncalves

- Take Away: Have clear requirements for applicants, and consistently screen out applicants that are not qualified



Disability Discrimination

Miller v. Illinois Department of Transportation, 643 F.3d 190 (7th Cir. 2011)

- Most of employee's work could be done on the ground, but some required him to work above ground or water
- IL DOT initially accommodated his fear of heights by allowing other members of his team to perform those tasks, but later refused
- IL DOT placed Miller on sick leave and ordered him to submit to a fitness-for-duty examination



Miller

- Miller requested a reasonable accommodation preventing him from working above certain heights, citing previous accommodations, but this request was denied
- Employee was terminated for being threatening to another co-worker: "Sometimes I would like to knock her teeth out" (referring to the personnel manager that denied his request)
- Good Deed: Initial accommodation based on highway bridge employee's fear of heights; not firing other employees for bad behavior



Miller

- Punishment: Employee was allowed to pursue disability claim
- The court found that:
 - (1) employer's past practice of allowing team members to swap tasks to accommodate the skills, abilities, and limitation of team members meant that working at heights was not an essential function of the job; and
 - (2) task swapping could be a reasonable accommodation



Miller

- Additionally, court found that another employee was not disciplined as harshly for making similarly threatening comments to co-workers, and that Miller's termination could have been retaliatory for asserting ADA rights
- **Take Away:** Consistent enforcement of job description requirements and consistent discipline are key



Peer v. F5 Networks, Inc., Case No. C11-0879 (W.D. Wash. 2012)

- Peer was diagnosed with major depression, and thereafter had her shift changed to an earlier one starting at 6AM
- Peer emailed her supervisor explaining that the shift was "exhausting" and "really stressing" her out
- The next day Peer sent another message to her supervisor apologizing and explained that she was crying all day, and all she does at work is dream up ways to kill herself



Peer

- The employer put Peer on leave to meet with her physician and refused to allow her to return until she presented a valid return to work
- After not receiving what the employer considered ample evidence from Peer's doctor that she did not present a threat to herself or to others, the employer terminated her
- **Good Deed:** Paternalistic tendencies of employer; believing that the employer has a medical degree and knows best



Peer

- **Punishment:** Employee sued under ADA
- On summary judgment, the court rejected the employer's arguments that:
 - (1) there was no obligation to accommodate Peer because she posed a threat to herself; and
 - (2) Peer failed to engage in the interactive process with the employer



Peer

- **Take Away:** Employers must have a good faith basis to request an employee to submit to a medical exam (at the time of the request) and must be interactive in accommodation talks



Arnold v. Pfizer 2013 WL 4828737 (D. Or. 2013)

- Arnold had a long history of disability leave
- Arnold survived a mass lay off that eliminated 15 of the 20 positions in her department, but later Pfizer ultimately made the decision to terminate based on concerns of "very serious" noncompliance with company policies
- Before the employer followed through on the termination, plaintiff was diagnosed with ADD and requested an accommodation (dr.'s note opined that ADD played a significant role in her workplace deficiencies, but that it would improve with treatment)
- **Good Deed:** Not terminating immediately following actions that employer claimed constituted "serious noncompliance"

Arnold

- **Punishment:** Arnold sued under the ADA and the Oregon Rehabilitation Act, FMLA, and for retaliation for filing a workers' comp claim



Arnold

- Court denied summary judgment on ADA claim determining that there were genuine issues of material fact as to whether, despite the intervening round of layoffs, Arnold's request for an accommodation was causally linked to her termination and whether medical leave was a negative factor in termination
- **Take Away:** If grounds exist for termination, be sure to act swiftly in executing termination



Chaney v. Providence 295 P.3d 728 (Wash. 2013)

- Chaney was a hospital worker who was reported by another colleague to appear fatigued and incoherent
- Employer ordered him to report for drug testing and he tested positive for methadone, which he had been prescribed for back injury
- Chaney's physician said he was fit for duty, but the employer's physician disagreed citing his prescription medication



Chaney

- Defendant immediately and unilaterally placed Chaney on leave as of July 16th, and informed him that his leave would expire on August 27th, and if he did not return to work he would be terminated
- Good Deed: Initial concern for employee's wellbeing, then overzealous enforcement of anti-drug policy (arguably for the protection of patients and hospital staff)



Chaney

- Chaney's physician filled out the leave certification, recommending two to four weeks of leave, but also noted that Chaney "is ok to work as soon as Employer allows"
- Employer interpreted the certification as a recommendation for two to four weeks of additional leave from that date
- Employer concluded that Chaney was not able to timely return to work and terminated him once his FMLA leave expired



Chaney

- Punishment: Chaney filed suit, claiming that his physician had authorized him to return to work, but the employer refused to allow him to return to his position.
- The Washington Supreme Court held that the employer violated FMLA, finding the physician's statement amounted to a statement of the employee's ability to return to work as required by the FMLA



Chaney

- To the extent Chaney's physician's certificate was ambiguous, the employer had a duty to seek clarification
- **Take Away:** Employers have a duty to clarify any ambiguity in any medical releases before taking adverse action; employers should not act like they have a medical degree



EEOC v. Old Dominion Freight Line Inc. 2013 WL 3230670 (W.D. Ark. 2013)

- Defendant trucking firm had an unwritten policy that any driver who disclosed an alcohol problem could never return to a driver position even if the driver completed a substance abuse treatment policy
- **Good Deed:** Attempting to keep those with admitted alcohol problems from operating 80,000 pound commercial vehicles



Old Dominion

- **Punishment:** Employee sued arguing that the company's "no return" policy violated the ADA
- While the court acknowledged the legitimate safety concerns, it cannot be justified either on public safety concerns or business necessity considerations, and violates the ADA as a matter of law because it failed to even consider an accommodation



Old Dominion

- **Take Away:** Employers must be sure that all policies are: (1) written and disseminated; (2) not overly broad; and (3) enforced with an interactive process (especially under ADA accommodation analysis)



Employee Classification

Bryson v. Middlefield Volunteer Fire Dept., 656 F.3d 348 (6th Cir. 2011)

- Bryson became a firefighter-member in 1991, and an administrative assistant in 1997
- She sued the department and its chief, alleging sexual harassment and retaliation under Title VII
- Fire Dept. claimed it did not meet 15 employee threshold for Title VII because members were not employees
- **Good Deed:** Providing volunteers with workers' compensation coverage, insurance coverage, and training and access to an emergency fund



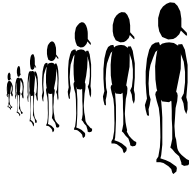
Bryson

- **Punishment:** Bryson allowed to proceed with lawsuit
- Court concluded volunteers could be employees based on the common law theory of agency and their receipt of the benefits, bringing the Fire Dept. above 15 employees
- Receipt of significant remuneration was not required to classify volunteers as employees



Bryson

- **Take Away:** Proper classification of employees is important, and beware of employee who asks to be treated as independent contractor (not his call!)
- Also, see Barran Liebman's electronic alert from January 31, 2012, "We Didn't Start the Fire", discussing this issue: <http://www.barran.com/display-alert.asp?AlertID=127>



Investigation/Due Process

North Clackamas Education Assn v. North Clackamas School District (White, 2012)

- Four high school girls complained that their probationary teacher touched their breasts, buttocks, and legs
- Police investigated and teacher confessed and later recanted
- Teacher terminated in April 2010
- November sex abuse trial resulted in acquittal
- **Good Deed:** Relying on police investigation's conclusions in dismissing perceived threat to student safety



North Clackamas

- **Punishment:** Arbitrator found in favor of terminated teacher finding lack of just cause
 - Employer's investigation was unfair because the employer relied exclusively upon police investigation
 - Rules against touching, and obstructing windows and doors, were unclear and inconsistently enforced



North Clackamas

- **Take Away:** Employers must perform their own investigation and cannot exclusively rely on outside investigative forces; must apply rules and policies consistently to all employees



Robinson v. Cent. Point Sch. Dist. 6, 2012 WL 6131521 (D. Or. 2012)

- Employee made error when developing school district's budget, which overstated the budget shortfall by \$1.5M
- The superintendent conducted an investigation, interviewed the employee, and made a formal recommendation to the School Board that the employee be terminated
- Before the employee had the opportunity to present her side to the Board, a Board member told her "the decision was already made and that it was above him"
- **Good Deed:** Attempting to discharge an employee trusted to properly account for taxpayer dollars for a major violation after a proper investigation and evaluation

Robinson

- **Punishment:** Employee sued claiming that she did not have a meaningful opportunity to respond to the allegations
- The court concluded that a reasonable jury could find that plaintiff was effectively terminated before her hearing



Robinson


- **Take Away:** Employers should avoid prematurely stating their conclusions



1st Amendment/Free Speech

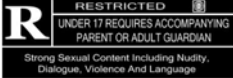
Richerson v. Beckon, 2008 WL 833076 (W.D. Wash. 2008)

- Richerson, a school curriculum director, wrote certain inflammatory comments in her blog
- Comments discussed her replacement taking over her former responsibilities (“Mighty White Boy looks like he’s going to crash and burn”) and regarding the lead union negotiator (“what I wouldn’t give to draw a little Hitler mustache of the chief negotiator”)
- Good Deed: Reprimanding, and then reassigning teacher, instead of terminating for inappropriate and damaging comments



Richerson

- Punishment: Richerson sued claiming her reprimand and reassignment were in violation of her free speech
- The court rejected the claim because of her “racist, sexist, and border[line] vulgar” comments are not a matter of public concern



Richerson

- **Take Away:** Employers should have clear policies regarding public statements about the employer, but must ensure that discipline does not violate the Constitution (free speech, unreasonable search and seizure, etc.) or restrict rights granted to employees by NLRA (discussing terms of employment with other employees)



Webber v. First Student, Inc. 35 IER Cases 221 (D. Or. 2013)

- Contractor terminated employee when he refused to remove confederate flag from his truck which was parked on school property (after school district asked contractor to have the flag removed)
- **Good Deed:** Contractor's attempt to avoid conflict with school district and public by asking employee to remove inciting flag



Webber

- **Punishment:** Employee brought suit against contractor alleging that his First Amendment rights of free speech were violated by the termination
- The Court noted that in *Kirtley v. Rainey*, 326 F.3d 1088 (9th Cir. 2003), the Ninth Circuit uses four approaches to determine whether private conduct is attributable to the state: "(1) public function; (2) joint action; (3) government compulsion or coercion; and (4) governmental nexus."



Webber

- The court found that the mere request by the school district to the contractor did not satisfy any of those four approaches
- Take Away: In situations where employers are working closely with public entities, both parties are wise to identify the roles of each party in the relationship and its potential effect on employees or sub-contractors



4th Amendment/Search and Seizure

City of Ontario, Cal. v. Quon 560 U.S. 746, 130 S.Ct. 2619 (2010)

- City police officer brought §1983 action alleging that the police department's review of his text messages on a device the city provided to him violated his Fourth Amendment right to be free from illegal searches and seizures
- Review of the text showed that many of them were not work related, and some were sexually explicit
- Quon was disciplined for violating the department's rules
- Good Deed: Attempting to discipline employee for clear violation of text messaging policy



Quon

- **Punishment:** Employee sued for violation of his Fourth Amendment rights (and asserted a claim under the Stored Communications Act)
- The Ninth Circuit held that the employee had a reasonable expectation of privacy in his text messages and that the search was not reasonable, partly because the city waited for three months before taking action
- The Supreme Court reversed, holding that the city's review of the text messages was reasonable because it was motivated by a work-related purpose, and because it was not excessive in scope

Quon

- **Take Away:** Consistent enforcement of policies and swift action likely would have prevented the Ninth Circuit from concluding that Quon had a reasonable expectation of privacy (dismissing the case much earlier in the process)



Retaliation

Thompson v. North American Stainless, LP, 131 S.Ct. 863 (2011)

- Male employee alleged that he was terminated because his fiancée filed a discrimination charge against their employer
- **Good Deed:** Failing to terminate certain employees for good cause because they are related to other current employees



Thompson

- **Punishment:** Employee filed a lawsuit for retaliation based on his fiancée's filing of a discrimination charge against employer
- Statute prohibits discrimination against an employee "because he has made a [Title VII] charge," and permits a "person claiming to be aggrieved...by [an] alleged employment practice" to file suit



Thompson

- The Supreme Court held that the "person aggrieved" reached to include injuries to third parties that were part and parcel of the retaliatory act against the complaining employee
- **Take Away:** Employers must ensure that their actions do not violate the Constitution or other laws and must discipline and discharge consistently and promptly



Weaver v. Netflix, Inc.
2011 WL 4625697 and 4625693
(D. Or. 2011)

- Weaver was a mid-level supervisor who was terminated by the employer, who cited performance reasons
- The employer had terminated three other supervisors at the same time for the same reason
- Good Deed: Keeping an employee with sub-par performance on the payroll longer than necessary/failure to promptly terminate



Weaver

- Punishment: Weaver brought a claim for FMLA retaliation, arguing that the company terminated her because she took protected medical leave to cope with the effects of neck surgery
- The court denied the employer's summary judgment motion, reasoning that the short period of time between the leave request and the termination (14 days), as well as the company's shifting reasons for her termination, created a question of fact on the causation element



Weaver

- Take Away: If an employer has good reasons for terminating an employee (especially when it relates to sub-par performance), the employer should promptly take action and be clear and consistent regarding the reasons for termination



Thank you



Todd A. Lyon
Barran Liebman LLP
tlyon@barran.com | 503.276.2194