

HWH Breakfast Program

Welcome to...

*Simple Employment Practices
That Will Save Your
Dealership Time and Money*



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Simple Employment Practices That Will
Save Your Dealership Time and Money

Best Practices for Employee Discipline and Termination

S. Gordon Hill,
Presenter



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“Can I fire her?”

How to get to “YES”



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GETTING TO “YES”

- **Establish Clear Expectations** – Job Descriptions, Employee Handbook
 - Put in writing what you expect in terms of sales/production standards AND attendance
 - Keep them current
- **Performance Evaluations** – Can come back to haunt you if you want to terminate a highly rated employee for performance



PROACTIVE APPROACHES – PERFORMANCE EVALUATIONS

- **DO Streamline the process** – same grading curve for everyone (e.g., define “meets expectations” vs. “exceeds expectations”)
- **DON’T “Sugarcoat” or inflate** – even if it means someone will get paid less
- **DON’T Wait until the last minute** – address and document problems as they occur



IT'S TIME TO DISCIPLINE – CAN YOU? SHOULD YOU?

- Consider is the employee protected?
 - Race, color, sex, religion, national origin, age, pregnancy, disability, military status, genetic information, marital status
 - Employees under contract
 - Whistle-blowers
 - Leave laws – ADA, FMLA, Worker's Compensation, maybe Pregnancy



IT'S TIME TO DISCIPLINE

- **Complete Investigation** – What proof do you have (witnesses and documents)? Can you rely on the witnesses?
- **Consider The Employee's Track Record** – Not just “the bad”, but “the good” as well. Review old evaluations, discipline notes/records, commendations, awards, raises, promotions, etc.



IT'S TIME TO DISCIPLINE

- **Progressive Discipline:**
Oral → Written → Suspension →
Last Chance/PIP → Termination
- **Double-Check Consistency with “Comparators”** – What have you done to others who have done the same or similar things?



BEST PRACTICES FOR THE TERMINATION MEETING

- Do it in person, in a private place, behind closed doors and maybe even off site (but not *Jerry Maguire*)
- Do it with two people on our side
- Be accurate/honest and DO NOT “sugarcoat” it – e.g., call it a lay off when the employee is really getting fired



BEST PRACTICES FOR THE TERMINATION MEETING

- Document the termination meeting
 - Who said what
 - During or shortly after
 - Document with the thought that someone else (jury) may see it
- Do it at the end of the day
- Notify the employee of all of the basic reason(s)



SEVERANCE AGREEMENTS

- **Pros**

- Release “buys” a certain result and peace of mind
- Saving expensive litigation defense costs – intangible costs (your time and distraction to dealership)
- Prevents lawyers from snooping around
- Charitable - doing a good deed by easing the burden on the employee and family



SEVERANCE AGREEMENTS

- **Cons** – “No good deed goes unpunished”
 - Precedent – slippery slope
 - Do not adopt a uniform policy ... case-by-case basis
 - Confidentiality
 - Could cause employee to see a lawyer
 - Could give the employee the impression (right or wrong) that you’ve done something wrong and/or are worried about a claim



Avoid or Minimize Your Dealership's Liability for Harassment & Retaliation Claims

**Rosalind K. Bak,
Presenter**



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HARASSMENT

Can be based upon:

- Sex (Same sex included)
- Race
- Color
- National Origin
- Religion
- Age
- Disability
- Genetic Information (GINA)



You are on the hook for...

SUPERVISOR HARASSMENT



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CO-WORKER/CUSTOMER/VENDOR HARASSMENT



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HARASSMENT

Can include:

- Propositions
- Jokes
- Suggestive cartoons
- Leers
- Whistles
- Obscene gestures
- Touching
- Listening to crude radio stations



But there is hope...



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NO EMPLOYER LIABILITY IF IT CAN SHOW...

- Employer...
 1. Exercised reasonable care to prevent the harassing behavior.
 2. Corrected promptly any harassing behavior.
 3. Complaining employee has not been subjected to adverse employment action.



PREVENTIVE ACTION

- Handbook in place with anti-discrimination/harassment policies.
- Carefully selected person and a back-up person to receive reports of harassment.
(You can even use a hot-line.)
- Conduct Manager/Supervisor Employment Training at least once a year.



PREVENTIVE ACTION

- Be careful of the environment you create.
- Do not hire or retain employees that have a history of harassing employees.
- Discourage intra-office dating of Managers and subordinates (the serial intra-office dater is a problem).



"All the other women in the office are suing you for sexual harassment. Since you haven't sexually harassed me, I'm suing you for discrimination."



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CONDUCT AN EFFECTIVE INTERNAL INVESTIGATION IMMEDIATELY

- An immediate response is key.
- Investigation must be thorough.
- Take all complaints seriously. No complaint should be ignored.
- Take intermediate measures if necessary.



- Investigator should be impartial.
- Interview the complaining party, alleged harasser, and all witnesses with knowledge.
- Do not promise that everything will be confidential. Do act with discretion.



- Consider the credibility of the witnesses.
- Document the results of the investigation, including employee interviews and take written statements.
- Inform both the complaining party and alleged harasser in writing of the results of the investigation.



CORRECTIVE ACTION CONSISTS OF 3 ELEMENTS

- 1) Immediately stopping the harassment;
 - 2) Taking appropriate disciplinary action against the alleged harasser; and
 - 3) Taking other actions to minimize the likelihood of further harassment.
- Note: The conclusion and corrective action must be contained within the personnel file.



DISCIPLINE MUST BE TAILORED TO REMEDY THE PROBLEM

- Verbal reprimand
- Written reprimand
- Apology
- Prohibiting visits to victim's office
- Transfer of harasser or victim
- Probation
- Suspension
- Termination
- Harassment training for the wrongdoer
- Company-wide employee education on harassment



NO TANGIBLE ADVERSE EMPLOYMENT ACTION

Adverse Employment can be:

- New and Demeaning Work Assignments
- Transfers to less productive departments
- Demotion
- Reduction in Compensation or Benefits
- Discipline
- Termination
- Failure to include in Company Events or Meetings



FAILURE TO TAKE ALL OF THESE MEASURES

- **Compensatory Damages**
- **Punitive Damages**



ANOTHER DEFENSE...

- Make certain you have a specific reporting procedure outlined in your handbook and it is not outdated.
- If an employee does not take advantage of this process or delays in reporting the claim of harassment, the employer may take advantage of the *Ellerth* defense



APPLICATION OF THESE DEFENSES

Case law:

- **Adams v. O'Reilly Auto, Inc.**, 538 F. 3d 926 (8th Cir. 2008). The Court found the employer successfully established a defense to liability. The employer acted reasonably to prevent harassment by having a zero-tolerance policy in place that was enforced, and the Plaintiff unreasonably failed to report the harassment. **No employer liability.**



RETALIATION

Workers' Retaliation Claims To EEOC Surged 23% in Year

Continued from the prior page late to work, and that she never complained about harassment to the staffing firm. She says Adecco cooperated with the EEOC and is "disappointed" by the lawsuit. She says the company has a "zero tolerance" policy for discrimination and harassment. Ms. Jalpa couldn't be reached.

In the Zachry case, the EEOC is charging only retaliation, not discrimination. The agency says Zachry fired electrician assistant Connie Beseda in New Braunfels, Texas, in April 2008, about three weeks after she complained to the agency that mobile toilets for female workers were less accessible than those for male workers.

According to the EEOC, Zachry says it fired Ms. Beseda for violating its safety policy by wearing ear studs at work. The commission says the company didn't typically enforce the no-jewelry policy and continued to punish Ms. Beseda by refusing to rehire her, despite a policy allowing workers terminated for safety violations to be reinstated after 30 days.

An EEOC spokeswoman says the agency didn't find enough evidence to support a discrimination charge, but declined to discuss the case in more detail.

Zachry spokesman John Horsby declined to comment on the lawsuit but said the company "is strongly committed to fairness and does not discriminate or retaliate in its employment practices."

Ms. Beseda couldn't be

reached for comment.

Retaliation complaints have nearly tripled since 1992, when the EEOC began tracking the data. Official statistics for 2009 aren't yet available, but employment lawyers say the trend is accelerating in the recession, particularly among workers who have been laid off.

The EEOC last month sued Childress Engineering Services Inc. of Richardson, Texas, for allegedly retaliating against a female worker who complained in January 2008 about recurring sexually explicit and hostile remarks from male co-workers. The EEOC alleges that Jennifer Green was selected for layoff the following month because she was a whistleblower.

Burwood Crawford, a partner at Goins, Dunderkoffer, Crawford & Langdon LLP who is representing Childress, says Ms. Green was one of four workers laid off because of a business downturn.

Ms. Green was selected because she was the newest employee in its retail-housing division, not in retaliation for her complaint, Mr. Crawford says, adding that Childress subsequently laid off several other employees.

An EEOC attorney representing Ms. Green says she has been out of work since the layoff.

Mr. Beschboard, the employment lawyer, says layoffs for business reasons generally are more defensible than individual firings, but don't make an employer immune from retaliation suits.

Employer-Retaliation Claims Rise

By CARL TUNA

The Equal Employment Opportunity Commission last week sued Zachry Industrial Inc. for allegedly firing a female worker who complained about unequal access to bathrooms for women employees.

The agency charged the company with retaliating against the employee—even though it didn't back up her discrimination claim.

The case comes amid a surge in complaints of retaliation to the EEOC. Claims including a retaliation charge rose 23% in the year ended Sept. 30, 2008, to 32,690—more than a third of all claims filed with the agency. Claims that didn't involve retaliation rose 12% in the same period. Carolyn Wheeler, an EEOC as-

stant general counsel, says stamping out retaliation is the commission's top priority. Enforcement of antidiscrimination laws "depends totally on people coming to file complaints," she says. "If people don't feel free to do that, these laws don't get enforced."

EEOC officials and employment lawyers give several reasons for the increase. Management-side attorneys say many complaints come from laid-off workers. Moreover, retaliation is often easier to prove than discrimination, particularly since a 2005 Supreme Court decision adopted a broader definition of retaliation than some courts had used.

"Retaliation is really the No. 1 risk for employers today," says Joseph Beschboard, a management-side lawyer at O'Leary, Deadins, Nash, Srouk & Stewart P.C. He says the number of law-

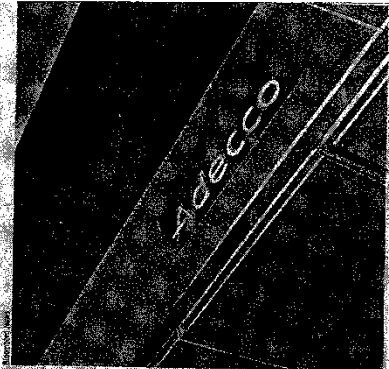
suits handled by his firm that include a retaliation claim jumped 41% so far this year, compared with last year.

Vincent Cino, national director of litigation for Jackson Lewis LLP, says roughly 70% of discrimination suits handled by his firm include a retaliation claim.

To be sure, many EEOC lawsuits charge both discrimination and retaliation. Last month, the agency sued the Adecco USA unit of staffing giant Adecco SA for failing to protect women employees from sexual harassment in a plastic plant to which they were assigned, and for firing a worker who complained to Adecco officials.

Bernadette Kenny, Adecco's chief career officer, says the company ended Veronica Jalpa's contract because she was frequently

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The Equal Employment Opportunity Commission sued Adecco's U.S. unit in 2008 for firing a worker who complained about sexual harassment.

What is Retaliation?

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RETALIATION

How does a person prove retaliation?

- He/she engaged in protective activity;
- The employer subjected him/her to adverse employment action; and
- There is a casual relationship between the protected activity and adverse employment action.



RECOGNIZING PROTECTED ACTIVITY

- Complaining, providing an opinion about, asking questions concerning:
 - Sexual harassment
 - Discrimination
 - Illegal behavior
 - ADA/FMLA/FLSA
- Only a good faith belief is necessary. The employee does not have to be right.

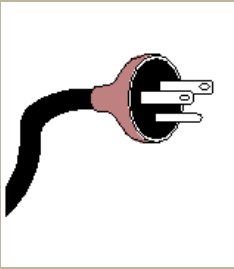


“ADVERSE EMPLOYMENT” ACTION

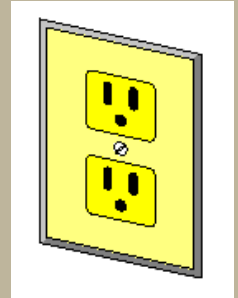


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WHAT IS A SUFFICIENT CAUSAL CONNECTION?



- Generally, less than three (3) months will establish a causal connection. (The closer in time, the more likely there is a connection found.)



DEFENSES?

- Document, document, document.
- All adverse employment actions should be consistent with your ***policies*** and ***previous employment actions***.
- No selective enforcement of your policies and rules.



MEETING THE CHALLENGES OF TODAY'S ECONOMY

Labor Costs are among the most significant ... what can you do?

- Transfer employees to more productive departments
- Reduce hours of work – 4 day workweek, half-days
- Reduce salary, hourly wage
- Switch salaried employees to hourly
- Furloughs
- Lay offs



MEETING THE CHALLENGES OF TODAY'S ECONOMY

- **Potential Traps**
 - Discrimination Claims
 - Wage & Hour issues for exempt employees
 - Sales, parts, service are okay
 - Salary-based, white-collar exemptions – Executives, Administrative
 - Compensation Plans may need to be revised
 - WARN Act implications for large-scale lay offs and furloughs
 - COBRA Notices – including some reductions in hours
 - Severance Agreements



Q & A Session

Please submit any questions you may have on the cards provided.



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