

# 10 Most Common Managerial Mistakes That Lead to Litigation

*Adapted from an article written by Maxine Neuhauser for Workforce Management*

It is not illegality that fuels lawsuits, but rather employee anger arising from perceived unfair treatment. Placing a legal label, such as discrimination or retaliation, on the seeming unfairness occurs afterward.

Yes, many states are “at will” employer states. This does not, however, release you from your responsibility of providing a work environment that is grounded in legal and reasonable personnel practices.

Here are 10 common mistakes that can increase the likelihood of employee lawsuits *and financial exposure*. Remember, a lawsuit doesn’t have to have merit for you to end up writing a substantial check to make the situation go away.

## 1. Forget About Training

Everyone is busy and adding one more thing, like training, takes precious time away from more productive activities. It is especially onerous if you do not have thoroughly written and comprehensive procedure manuals. Forgetting or short-cutting proper training is not a smart choice. Correct behaviors prevent lawsuits. Missteps lead to liability. Managers (owners) who are not conversant in company policies (*you know the ones that are all carefully documented?*), including preparing performance appraisals and proper documentation become catalysts for lawsuits.

## 2. Disregard Practice Policies

Policies establish the practice’s “rules of the road”. They set standards and inform employees of management’s expectations. Well drafted policies tied to the practice’s needs provide guidance. If followed, policies help ensure consistent treatment of employees.

Disregarding policies increases the potential for inconsistent treatment. Therefore the increased risk that employees are subjected to harsher action than their co-workers... and the interpretation that the discipline they received was unfair or discriminatory. Ignoring policies also sends the message that the employer believes they are unimportant and gives license to employees to disregard them as well. A employer that fails to follow their own policies not only loses the benefit of having them, but it also sets itself up to be portrayed as mismanaged and uncaring.

## 3. Shoot From the Hip

Firing without notice may sometimes be appropriate, but rarely. Acting without fair warning, or rashly or arbitrarily, invites resentment. Employees who feel ambushed may lead to seek their revenge through litigation.

You can reduce your risk by making employees aware of probable consequences of misconduct. Before disciplining an employee, a practice should be able to state:

- The legitimate business reason for the action
- Whether the action is consistent with other disciplinary actions the practice has taken in similar situations, and if not, why not.

#### 4. Motivate Poor Performers with Raises and Bonuses

The time of performance appraisals, or the beginning of a new year when raises may typically be given, brings with it the temptation to give underperforming employees some amount of increase or bonus. Withholding raises or bonuses is a tough decision. After all, we all like to be liked. However, giving undeserved increases does not motivate a poor performer to improve. In fact, it reinforces poor performance... after all you just gave them a raise that will *guarantee* you will continue to get the same performance you have already gotten.

Terminating someone on the grounds of poor performance, after years of raises and bonuses (even small ones) creates concrete evidence of inconsistency between what an employer says now and what they were saying when they handed out the raise. Furthermore, it raises suspicion of an ulterior motive and provides strong motivation for the affected employee to seek legal counsel.

#### 5. Criticize the Person

It is difficult to be purely objective in evaluating performance, but it is essential. Be sure to relate both criticism and praise to the job and not the person. Measureable performance indicators and well-written job descriptions help. Use of personal characteristics during a discussion of performance may get you in trouble down the road. For example, a person who consistently misses deadlines should not be characterized as “lazy”.

#### 6. Ignore Problems

You are asking for trouble when you ignore problems or complaints. Failing to address performance issues has the practical effect of lowering performance standards. It leads employees to believe that they are performing at satisfactory levels because you have not told them otherwise.

You may be dissatisfied with an employee’s performance, and may truly believe the employee ought to know better. Unless you confront the employee about the performance deficiencies and expressly state what the employee needs to do to meet expectations, change is very unlikely. When, after years of accepting poor performance a manager finally acts, perhaps by terminating the poor performer or passing them over for promotion, the employee may react with surprise, hostility and claims of discrimination.

#### 7. Not Putting It In Writing

Without a written trail documenting an employee’s poor performance, an employer risks the “he said, she said” situation in the event an adverse action is taken. Verbal warnings carry less weight than written warnings with employees, their lawyers and juries.

Employees who have been repeatedly spoken to, but never written up, are likely to discount or even disregard the importance of the counseling. Employers who do not document employment issues leave themselves with little evidence to prove a history of poor performance as the reason for a discharge, instead of, for example, retaliation for taking a medical leave.

#### 8. Understand That Boys Will Be Boys

A hostile work environment, for whatever reason, may arise from either severe or pervasive conduct. Jokes, emails and passing comments when considered individually may be of little consequence. Accumulated and viewed as a whole, however, they can be used to show pervasive misbehavior that has converted a professional workplace into frat house.

That a harassing employee may not intend to harass his co-worker is not a defense and does not create a shield from being sued.

Employers who know of employee misconduct and who fail to take action to stop the conduct, substantially increase their risk of litigation and liability for damages.

#### 9. Lie

When management fails to tell the truth, employee disgruntlement inevitably follows, and with it a fast track to the courthouse and potential liability.

Employers do not protect themselves by telling an older employee that he/she is being discharged because of job elimination when the true reason is poor performance. As soon as someone (younger) is hired to replace the discharged the employee, the practice's lie, even if intended to protect the employee from hurt feelings, will be seen as a pretext to hide discrimination.

#### 10. Cover-Up

Repeatedly, experience shows that a cover-up carries worse consequences than the initial misdeed. Shredding documents, deleting files or throwing items away upon learning of an impending lawsuit call all add up to trouble. When confronted with a bad situation, it remains true that honesty is the best policy.

*Information in this article is intended to provide useful information on the topic covered, but should not be construed as legal advice or a legal opinion. Also remember that state laws may differ from federal laws.*