

## Top Ten Ways to Avoid Employment-Related Problems

Employment-related suits are difficult to deal with. Emotions run high and personal issues of the employer and employee are often brought into play. Even when such suits are meritless, defense costs and the impact on morale and reputation can be significant. The following steps can help reduce employment-related problems in the bank and strengthen the bank's defense if an action is brought.

### 1 Communicate a Zero Tolerance Policy Toward Harassment and Discrimination; Keep Policies Up-to-Date and Disseminate to All Employees

Every employer should have a zero tolerance policy toward harassment and discrimination. It should be clearly communicated to employees that such conduct simply will not be tolerated.

Laws and regulations change, and can vary widely from jurisdiction to jurisdiction. Certain states now offer broader protections against discrimination than federal law, including marital status, sexual orientation, height, or weight.

Review policies annually to ensure compliance with all relevant laws. Also review policies for reasonability and make sure all employees receive a copy of the policies and written notice of any changes to policies.

- » *A bank's policy instructed that complaints of harassment or discrimination be made to the Human Resources (HR) Director. The HR Director was married to the president of the bank. When an employee felt she was being sexually harassed by the president, she was uncomfortable complaining to the HR Director; she quit and filed suit instead. A periodic review of the policy may have revealed the potential conflict and led to the development of a more flexible policy whereby employees could make complaints to any senior manager, rather than just the HR Director.*
- » *A bank printed one copy of its employee manual which was kept on a shelf in the president's office. Employees were aware that it was there, but did not feel comfortable going into the president's office to access the manual when a question arose. Allegations often arise when employees claim that they were unaware of a bank policy for example and did not know how to complain about sexual harassment.*

### 2 Have Senior Level Employees or HR Review All Termination Decisions

Consistency is essential in any decision involving an adverse employment action. Employers should make sure that a neutral third party reviews all such decisions. This helps to ensure both that the emotional component of such decisions is minimized and that the employers' policies and procedures are being applied consistently to all employees.

- » *For many years, the bank's proof department was managed by an employee who did not enforce rules effectively. When she retired, the new manager enforced all rules as set forth in the bank's employee manual. This included disciplining a woman who was consistently late and occasionally brought her children to work with her. The employee became insubordinate and was terminated. She subsequently filed suit for gender discrimination and wrongful termination, and alleged that bank rules were not applied consistently. She pointed to managers in other departments that did not document tardiness or absences and allowed employees to bring their children to work. In addition, she pointed to the stellar reviews she had received from her prior manager and claimed that her new manager's issues with her were based on her gender.*
- » *A thirty-year employee with an excellent employment history was terminated by her manager for a minor incident of insubordination. At the time of the incident, she was dealing with the imminent death of her father from cancer. HR/senior management was informed only after the termination. The employee filed suit for age discrimination. She claimed that younger employees who had engaged in similar insubordination were not terminated. The bank may have ultimately made the same decision if HR/senior management had been consulted. The fact that the manager did not consult with anyone made the decision appear rash and more difficult to justify, particularly given the employee's tenure with the bank.*

### 3

## Train ALL Employees Both Supervisory and Non-Supervisory

Training leads to a better-educated work force, which will hopefully make better decisions.

Train supervisors to always:

- › Take every complaint seriously;
- › Investigate every complaint in a timely and thorough manner;
- › Understand the meanings of the terms discrimination and sexual harassment, and have a general understanding of the various employment-related laws and statutes;
- › Be fair;
- › Be consistent;
- › Document performance issues;
- › Be honest in performance evaluations;
- › Have an open door policy; and
- › Be vigilant to stop conduct that could draw allegations of discrimination or harassment.

Training also breeds consistency among supervisors, increasing the likelihood that similar situations will be handled in the same manner by different supervisors. Inconsistencies often lead to allegations of discrimination.

» *One manager closely monitored tardiness and issued written warnings after three tardies. Another manager did not. Female employees of the strict manager sued, claiming discrimination based on sex because male employees of the other manager were not treated in the same manner.*

Train non-supervisory employees and obtain a written acknowledgement that they understand:

- › Their status as “at will” employees and what that means;
  - › How to complain if they feel they have been subjected to harassment or discrimination;
  - › What conduct is and is not appropriate in the workplace;
  - › The bank’s policies and procedures; and
  - › The bank’s disciplinary process.
- » *Many employment-related suits stem from behavior categorized as “horseplay” (i.e. jokes about appearance, sex life, etc.). Employees assume that because there are no objections to this type of behavior, everyone is comfortable with it. However, there is often someone in the vicinity who is less than comfortable. When some adverse employment action is taken against that individual, he or she often points to the “horseplay” and takes action against the bank. Training is critical to keep this conduct to a minimum.*

### 4

## Document, Document, Document And Be Honest!

Employment claims often come down to one person’s word against another’s. When an employer maintains detailed documentation that was created close in time to the incidents in question, it has a much stronger defense in any subsequent claim.

Documentation should be clear and concise and should detail the issues with the employee’s performance without emotion. Ideally, the employee should sign the documentation to acknowledge that the performance issue was brought to his or her attention.

Performance evaluations must be done, and done honestly. While managers often would rather avoid a confrontation than do an honest evaluation, confrontation may be unavoidable.

» *A bank hired an African-American management trainee. Performance issues surfaced quickly, as he was habitually late to work and left for blocks of time during the day without notice. He had trouble interacting with many of his co-workers and difficulty grasping some important financial concepts. He was ultimately asked to seek other positions within the bank that may have better suited his skills. He unsuccessfully applied for positions in a variety of areas. When he complained to the president of the bank that he was not offered these positions due to his race, no action was taken. He ultimately filed a charge of discrimination and further alleged that he suffered ill treatment from senior management. After he quit his job, he filed another charge of discrimination alleging retaliation, obtained his right to sue letter and filed suit.*

*While the bank could articulate numerous issues and concerns with this employee’s performance in the management trainee program, there was little or no documentation of the problems. His performance evaluations contained all positive remarks about his work. There was no documentation as to why the other candidates were more qualified and chosen over him. As a result of the lack of documentation, the bank was forced to engage in lengthy litigation.*

» *A woman complained to the president that her supervisor was sexually harassing her. The president met with the individual and he promised to stop. The president did not document his conversation. The behavior continued, and years later, the woman filed suit. It was very difficult for the president to recall the timing of the meeting with the supervisor and exactly what was said. The fact that the president could not even recall whether he had disciplined the supervisor weakened the bank’s defense in the suit.*

## 5

## Watch the Off-Hand Comments and Practical Jokes

"Pregnant again? How many kids do you have, anyway?!"

"You must be older than dirt."

"We need to attract Gen-X-ers to our group because they are the most desirable employees."

"You look really great today. Have you lost weight?"

"Since you're black, what do you think about the O.J. Simpson trial?"

"If you're really that sick all the time, then you shouldn't be working here."

Each of the above comments became the basis for an employment-related lawsuit. Most were intended as harmless. Some were made in jest. Many were made between two employees who regularly bantered back and forth. However, when the employment relationship ended, employees attempted to use these comments to their advantage.

Most people are aware that sexual jokes and comments have no place in the workplace. Employers must be just as careful regarding comments involving any protected status. An employee can bring a harassment or hostile work environment claim if the employee was harassed based on any protected class. Accordingly, all such comments are inappropriate.

- » *A senior vice president responsible for managing the IT department of the bank attended a seminar that discussed attracting and retaining quality employees. Part of the seminar specifically addressed "Gen X" employees and their unique skills. At the next IT department meeting, he shared some of the comments from the seminar. Over the next 18 months, six members of the department were terminated for various performance issues. The terminated employees were between 45 and 68 years old and replaced by younger employees. The six employees filed suit for age discrimination. They alleged they had all been forced out of their positions in order to make room for the more desirable "Gen X" employees. They pointed to the comments made by the SVP as evidence of discriminatory animus. The bank had little or no documentation supporting the performance issues and/or termination decisions.*
- » *A bank had allowed a culture to develop where a great deal of joking occurred. Black balloons were brought in on employees' birthdays, and gag gifts with sexual connotations were given. Over the course of several months, five female tellers were terminated for a variety of performance issues. They each sued the bank for sexual harassment. The atmosphere in the bank made the case difficult to defend.*

## 6

## Take Care in the Pre- and Post-Employment Time Frames

Problem employees are difficult in many ways:

- › They don't do an effective job.
- › They lower the morale of good employees.
- › They take a great deal of management time in dealing with the various issues raised.

Great care should be taken in the hiring process in order to avoid hiring a problem employee. Have every employee fill out an application. Do background and reference checks. Thoroughly interview every candidate.

Once an employment relationship has ended, care must still be taken. Employers must be aware of whether they are obligated to provide a copy of the employee's personnel file to that employee if requested. Calls for references should be handled by one person and should be handled in a consistent manner. No information about the employees' termination should be shared with other employees or customers.

- » *The executive vice president of the bank's mortgage lending department earned a very high salary that was largely commission-based. At some point, the bank became concerned about the high number of loans being made. It directed its auditor to perform an audit of the mortgage loans. The EVP made every attempt to avoid cooperating with the auditor. When the auditor was finally able to review the files, she discovered numerous troubling issues. The EVP was placed on administrative leave and the matter was investigated further. Due to the irregularities discovered, he was terminated.*

*During the course of the investigation, two female employees came forward and made allegations that the EVP had sexually harassed them. The bank began an investigation into these allegations. The bank ultimately concluded that it was unable to substantiate the allegations and informed the women that they should notify the bank immediately if there were any further problems. When the decision to terminate the EVP was announced, the bank president came to the mortgage lending department to inform the staff in person. He informed the group that the EVP had been terminated and that "off the record" it was because he had sexually harassed numerous co-workers and customers. Apparently some of the employees informed various customers that this was the reason for the termination. This information got back to the EVP and he filed suit for wrongful termination, breach of contract and defamation. The bank president's "off the record" statements made for a difficult defense to the defamation claim.*

## 7

**Regulate Internet and E-mail Use**

Many employees now have e-mail and Internet access. Employers must be vigilant to ensure that these tools are used in an appropriate manner.

Employers should use blocking software and have a policy prohibiting the access of pornographic or inappropriate Websites.

- » *E-mail should be used for work only. Employees should be told that e-mail is not their personal property, but the property of the employer and can be reviewed at any time. E-mails are a permanent record and generally must be produced during the discovery phase of litigation (if requested).*
- » *An IT employee rigged several female employees' computers to pull up a porn site automatically when they logged on in the morning. The bank apologized profusely for the incident, but is concerned that if it takes any adverse employment action against any of these women, a complaint may follow.*
- » *The bank hired an entry-level accounting clerk who reported directly to the CFO. After one year of employment, the clerk approached the president of the bank. She told him that the CFO had been pursuing a romantic relationship with her, sent her inappropriate e-mails, accessed inappropriate internet sites on her computer for her to see, made comments about her appearance and asked her out on dates. When she continued to refuse his advances, she claimed that he began telling other employees that they were having an affair. She wanted his conduct to stop immediately. The president promised her that he would personally investigate this matter.*

*The president met with the CFO immediately. The CFO stated that he had been involved in an affair with the female employee for the past six months, dating back to an out-of-town training seminar. After the affair was broken off by the clerk, the CFO admitted to sending multiple e-mails pleading for her to reconsider. The president instructed the CFO to immediately stop contacting her.*

*Three months later, the employee again met with the president, demanding a promotion and raise. Her request was denied because she was not qualified for the position requested. She quit her job and filed suit. Hundreds of e-mails from the CFO to the employee, many of which were very graphic, figured prominently in her case.*

## 8

**Be Aware of Workplace Violence Issues  
Be Safety Conscious**

Unfortunately, workplace violence issues have become more commonplace. Employers must be vigilant and have a zero tolerance policy in place for dealing with such issues. The employer has an obligation to provide a safe workplace to employees and to take reasonable steps to ensure those employees' safety.

- » *An antique handgun was kept in a box in an overhead cabinet in the CFO's office. No one really knew if the gun was loaded.*

*The CFO and controller were working on a loan report for the regulators and disagreed over its content. In a misguided attempt at a joke, the CFO attempted to lighten the mood by putting the gun in the waistband of his pants. He entered the controller's office, pulled back his jacket to reveal the gun and asked, "Do you want to talk about that report now?" He then indicated that he was trying to lighten the mood and left her office. The controller was very upset by the confrontation and immediately notified the president of the bank. She refused to return to work and went out on a disability leave. When her disability time ran out, she quit and filed suit. She alleged discrimination and harassment based on her sex, false imprisonment, and assault. The situation could have been avoided entirely if firearms were not on the premises.*

- » *An employee of the bank was a "cutter." She would bring knives and razor blades to work with her, and if she was feeling stressed out, she would go into the bathroom and cut her skin. She informed several other employees about what she was doing. These employees informed management. There were concerns with sharp objects being brought into work and with her bleeding excessively. She was warned not to bring any such objects to work again and was encouraged to make use of the bank's psychological counseling program. Several weeks later, she told co-workers she had a razor blade in her purse. When confronted by her manager, she admitted to having the razor blade. While her subsequent termination led to her filing a suit for disability discrimination, the bank acted properly to avert a potentially dangerous situation—or at least a situation perceived as potentially dangerous—in the interest of protecting employees.*

## 9 Accommodate Disabilities or Explain and Document Decisions Not To

The Americans with Disabilities Act requires employers to make reasonable accommodation to employees with disabilities. Accordingly, employers must be proactive in addressing such issues. Employees are not entitled to their choice of accommodation, but employers must be prepared to engage in a dialogue in order to reach a satisfactory resolution.

- » *A long-term employee of the bank, with no college degree or formal banking training, worked her way up from a part-time teller position to a loan officer.*

*The loan officer had problems with absenteeism. Since she was an exempt employee, the bank did not keep strict tabs on her comings and goings. Health issues often caused her to be out sick or at doctor's appointments. She also had a daughter with a drug addiction and was often dealing with treatment or legal issues arising from this situation. She would often breakdown in tears at work. When management asked how she was doing or if she needed anything, she would typically respond that she was fine and was taking things one day at a time. She sometimes stated that she was just "really depressed" about the situation.*

*When absenteeism became excessive, her manager decided to address the situation, and informed her that her position was being changed to a non-exempt loan administrator. Her salary would not be changed, but she would only be paid for hours worked. She quit immediately. She then filed suit for disability discrimination, FMLA violations, gender discrimination, Equal Pay Act violations, and breach of implied contract.*

*The employee alleged that she was disabled because she suffered from depression. She alleged that the bank never made any effort to accommodate her disability. There was some indication that the bank knew that she was suffering from depression. The bank had never documented her absenteeism, which made the case more difficult. Had the bank been more proactive in its dealings with her, it would have been more successful in the litigation.*

- » *Lawsuits occasionally arise from habitually tardy employees who claim to be suffering from chronic fatigue syndrome. These employees often request modified work hours due to their "disability." Banks can refuse to modify the work hours, stating that the hours are a requirement of the job. In these cases, the bank should be able to point to job descriptions requiring certain hours, and business needs that dictated coverage at those hours.*
- » *Another recent source of lawsuits stems from employees who claim to be suffering from attention deficit disorder. These claims typically involve tellers having trouble with balancing or CSRs having trouble with some of their duties. They claim that they should not have responsibility for all duties because of their "disability." Most banks have successfully defended these claims with job descriptions which specify that employees must be able to perform the essential functions of the job.*

## 10 Review Exempt and Non-Exempt Status of Employees

The Fair Labor Standards Act requires that employees be properly categorized as exempt or non-exempt employees. Employers must be able to justify the various classifications with detailed job descriptions and duties. All positions should be regularly reviewed to ensure that there have not been any changes that justify a reclassification.

- » *An exempt employee will often add a cause of action for violations of the Fair Labor Standards Act. The employee will argue that he should have been classified as a non-exempt employee for the years of his employment and therefore, entitled to overtime pay for all hours worked in excess of 40 hours per week. Given the tenure of some employees, this can be a substantial amount of money.*

These cases are often class actions with an entire class of employees filing suit and claiming that they were miscategorized. In these cases, the settlements and/or judgments can be many millions of dollars. Bear in mind that these actions are not typically covered under the bank's Employment Practices Liability Insurance Policy.



**Laura Simmons**  
Assistant Claims Manager  
Employment Claims Supervisor

Laura joined Progressive in 1992 after receiving her law degree cum laude from Case Western Reserve University School of Law. She received her bachelor's degree in English and political science from Wittenberg University. Laura deals primarily with employment-related claims and was involved in the development of Progressive's Employment Practices Liability Insurance Policy. She is a frequent speaker on employment-related topics.



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