Should employees receive a warning before termination?

Have you ever flat-out fired an employee for poor performance without any warning? If employees are “at-will,” you can fire them for any reason or no reason at all, as long as it’s not for a discriminatory or illegal reason. Does that allow you to drop the guillotine without guilt? As a new court ruling shows, supervisors should resist that urge (and give the person a chance to shape up) if that employee recently voiced a complaint about discrimination.

Case in Point: Michael Bruno worked as the director of hospitality for a Mississippi casino for 11 years. Bruno had been looking to hire a buffet manager and eventually located someone who he thought was highly qualified. Bruno told his supervisor, who immediately rejected the applicant as “too old,” saying the casino didn’t need “another squatter,” referring to a 50-year-old employee the supervisor deemed as unproductive.

Bruno argued that it “wasn’t right” to reject the candidate solely on age, noting that the candidate was “very qualified.” Regardless, his supervisor tossed the application back at Bruno shouting “too bad."

Within less than two weeks of his complaint, Bruno was fired without warning. He was only given vague reasons, including that he had “substandard” kitchen cleanliness and managerial performance. Despite the fact that the casino had a progressive disciplinary policy, it was ignored in Bruno’s case. He wasn’t given any chance to correct his supposed mistakes.

Bruno shot off a retaliation lawsuit under the federal Age Discrimination in Employment Act (ADEA) and state law. He claimed his firing was in retaliation for opposing his supervisor’s discriminatory hiring decision. The casino, however, argued that it had a nondiscriminatory right to fire Bruno for poor performance. (*Bruno v. RIH Acquisitions MS 1 LLC d/b/a Bally’s Resorts*, N.D. Miss 1/14/08).

How did this case end…and what lessons can be learned?

Proving a retaliation claim under the ADEA is similar to proving one under the other main federal anti-discrimination law (Title VII of the 1964 Civil Rights Act). An employee must show that he engaged in activity protected by the ADEA, that he suffered an adverse employment action, and that a causal connection existed between the two. The closer the two events, the more it stinks of actionable retaliation.

In this case, the court agreed to send the case along to trial. Reason: the proximity between Bruno’s age-discrimination complaint and his termination. The judge said, “This close time proximity in the context of a lengthy employment at Bally’s, serves to create doubt whether his poor work performance was the real reason for his termination.”

3 Lessons Learned … Without Having to go to Court

1. **Conduct timely performance reviews.** Why fire employees without first trying to help them correct their performance problems? Quick-trigger firings are especially dangerous if the employee JUST OPPOSED ILLEGAL CONDUCT! The court said the casino’s vague reasoning and lack of documentation could support

a reasonable jury's conclusion that Bruno's complaint of discrimination illegally "motivated" the termination decision. Short of a crime or workplace violence, supervisors should coach employees, in real time, to improve performance. Keep a written record of your efforts.

2. **Following your written disciplinary policy.** Your employee handbook can be a shield against liability or it can stab you in the back. In this case, because the company elected to include a progressive disciplinary policy in its handbook but then failed to follow the process, it contributed to its own credibility and legal problems.

3. **Watch your calendars, watches and sundials.** Courts look to see the amount of time that passes between when an employee exercises their rights under the law and when you whack them. Counting "one-one thousand, two-one thousand" … just won't be enough to keep you out of court for retaliation.

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