

Don't let fear prevent firing of whistle-blower: Your complete records will back you up

Few employment law problems are more frightening than facing backlash from an employee whistle-blower. He or she can significantly harm your organization's reputation even if it turns out the allegations were wrong.

To make matters worse, some whistle-blowing employees think they can't be disciplined if they report alleged wrongdoing to authorities or upper management. That's not true.

Employers can always discipline employees who break rules or perform poorly. The key is fairness and equal treatment. Don't discipline a whistle-blower unless you would discipline every employee for the same conduct or poor work. But don't withhold discipline, either.

Recent case: Debra Johnson worked for Stein Mart as a merchandise planner. Her job was to predict customer preferences based on past sales and then order enough specific merchandise to fit that anticipated need.

Johnson worked with a higher-level executive to set purchase goals and parameters. The two would agree on a strategy and then Johnson carried out the plan. However, Johnson often came to her own conclusions and deviated from the agreed-upon plan. As a result, one season she badly under-ordered perfumes, and chain ran out of a high-demand product.

Johnson was placed on a performance improvement plan. She was eventually fired when her work didn't improve.

Johnson sued, alleging she was a whistle-blower under two laws. The first was the federal Sarbanes-Oxley Act (SOX) and the second was the Florida Whistleblower Act (FWA).

It seems that before her move into merchandise planning, she had complained to managers that the company allegedly incorrectly accounted for merchandise and changed season codes on older inventory, among other things.

Stein Mart said it had every right to fire Johnson for poor performance and failing to meet expectations.

The court agreed. It pointed out that under SOX, employers have to show that they would have taken the same personnel action even if the employee had not complained about alleged company misconduct if the employee has first shown that she engaged in protected activity. That's a higher standard than usual in employment law cases.

The court was convinced Stein Mart had shown that Johnson would have been terminated for poor performance even if she had not complained.

Plus, under the FWA, employers have to show that they had a legitimate reason for an employment action. Then it's up to the employee to show the reason was nothing more than a pretext to retaliate for whistle-blowing. The court said Stein Mart had also met that standard, since it had already shown it met the higher-proof standard

under SOX.

The court dismissed Johnson's case. (*Johnson v. Stein Mart*, No. 10-13434, 11th Cir., 2011)

Advice: Treat every discharge or other serious employment action as if it will cause a lawsuit. Document everything at the time it happens, in as much detail as practical. Be ready to prove you would have done the same thing no matter who the employee was or what protected classification she belonged to. Keep meticulous, dated records—even if you don't think you will need them.