

Be patient and scrupulously fair when dealing with litigious employee who has complained

Employers will win in the long run if they exercise restraint and use patience when dealing with an employee who clearly is looking for a lawsuit.

It will take work. You may have to document everything relating to the employee's performance. Never reject out of hand his application for a promotion. Instead, treat him just as you would any other candidate. But, if he breaks company rules, take action.

Recent case: Ellis Barber, who is black, worked as an instructor at a truck driver training school. At one point, Barber's wife also went to work for the school. She was terminated during her first year and filed an EEOC discrimination complaint that was eventually dismissed.

Barber then applied for a promotion to campus director. Also throwing her hat in the ring was an employee from another campus. She and Barber both met the minimum requirements for the job and were invited to interview.

At one point, Barber apparently told another supervisor that he would sue the school if he didn't get the promotion. He also claimed that the decision had already been made.

The school made sure interviewers kept careful notes. For Barber's interview, the committee notes showed that Barber brought up his wife's termination in response to a question about overcoming difficulties.

The school didn't promote Barber, and he found himself supervised by the other candidate. The school kept track of immediate conflict that developed between the two. Barber allegedly even went so far as to tell his rival that he didn't have to listen to her or carry out her directives if he felt she was retaliating against him for complaining about discrimination. For example, Barber said it was retaliation when she ordered him to perform drug tests on students alone rather than with a partner. Therefore, he said, he didn't have to follow her instructions.

Barber was counseled about insubordination. Then, after being warned not to transport students to social activities, he was fired when he did so.

He sued, alleging he had been denied the promotion in retaliation for his wife's EEOC complaint and because of race discrimination.

The 8th Circuit Court of Appeals agreed with the lower court that threw out the case. It said Barber hadn't shown that he didn't deserve any of the discipline he received. Employers aren't required to put up with insubordination. Nor can employees refuse to cooperate with a new supervisor chosen instead of them. (*Barber v. CI Truck Driver Training*, No. 10-3570, 8th Cir., 2011)

Final note: Complicating this case was the fact that Barber was an otherwise good employee with excellent past evaluations until his wife's termination. Ordinarily, courts look askance at falling evaluations that come shortly after a protected activity like an EEOC complaint.

But in this case, the school carefully documented the performance it saw, both good and bad. In fact, it gave Barber an award for best performance of the month right after he was turned down for the promotion because he had earned it. Then it tracked instances of poor performance. That went a long way toward justifying Barber's declining performance scores and increasing discipline.