

Poor performer has complained? Read this before firing!

Employers usually don't have a problem terminating an employee for poor performance if the employee has never raised any kind of discrimination claim. But somehow, as soon as an employee goes to the EEOC (or even just HR) with a complaint, the same employer doesn't know what to do.

Should you terminate the employee and face a potential retaliation suit? Or do you keep the employee, hoping that will keep her from suing?

Because of the specter of a retaliation claim, employers often feel hamstrung and seldom take the action necessary to rid themselves of a problem employee.

Are you being set up?

Consider the possibility that the employee's complaint is a setup.

Indeed, when problem employees see the writing on the wall, they often will complain about bogus incidents of alleged discrimination in an attempt to bulletproof themselves from an adverse action like demotion or termination. Employees believe that the mere threat of retaliation liability will protect their jobs.

It's understandable that the threat of litigation sometimes paralyzes employers—no matter how baseless the retaliation threat might be. Don't let that happen to your organization.

The following case sends the right message to employees: that a meritless complaint will not protect a poor performer.

And it's welcome relief from fear of a retaliation lawsuit.

7-year run of poor reviews

Daniel Galeski was an acoustics engineer at the Ford Community and Performing Arts Center in Dearborn, Mich. During his seven-year tenure at the theater, Galeski compiled a history of well-documented performance problems.

Two months before the date when he would finally be fired, Galeski complained that his male supervisor had been sexually harassing him. After complaining, Galeski's performance problems continued, for which he received reprimands and written warnings.

After he failed to improve—and despite his harassment complaint—the city terminated him.

The court agreed with the city that Galeski's long history of performance problems, many of which predated his harassment complaints, were fatal to his retaliation claim:

"Galeski has a history of violating the City's policies and being insubordinate.... It appears that the issues that led to Galeski's termination were inevitable once a more strict supervisor arrived at the Theater.... His job was in danger regardless of his sexual harassment complaints. In light of his repeated issues with failing to wear his uniform and his reaction to his employer revoking his privilege to use the gym, there is no indication in the record that the city of Dearborn's legitimate reasons for discharging Galeski were pretextual or otherwise invalid." (*Galeski v. City of Dearborn*, No. 10-1256, 6th Cir., 2011)

Lessons for employers

The case provides several important lessons for employers that may have hesitated before disciplining an employee who has made an internal or other complaint. These include:

- **Don't wait to terminate.** Galeski did not become an insubordinate employee overnight. His performance issues predated his termination by seven years. Yet, a long line of weak and nonconfrontational supervisors refused to do anything about it.

I'm not saying you should fire an employee at the first sign of trouble, but there is a broad line between fair warning and years of capitulation. The former will put you in good stead defending a lawsuit. The latter could result in a judge or a jury asking why you waited so long—and then looked for an illegitimate reason for the late-in-the-game termination. Just because this scenario worked out for the city of Dearborn does not mean that it will work out well for every employer in every case.

- **Document, document, document.** Few terminations can survive scrutiny without proper documentation. Your odds as an employer go down exponentially if you pair a lack of documentation with a termination on the heels of protected activity.

As the *Galeski* case illustrates, a poor performer is a poor performer, regardless of complaints about harassment or other protected conduct. Without a legitimate paper trail, however, you will find yourself without the ammunition to do anything about it.

- **Do investigate the employee's complaint.** While you don't have to withhold discipline just because the employee complained about alleged discrimination, neither should you ignore the complaint. It is, after all, possible that someone is experiencing sexual harassment *and* is a poor performer. Regardless, you don't want to give a judge or jury a chance to decide that you allowed sexual harassment or discrimination to exist. Remember, the employee can win a hostile environment case if he really was harassed, even if he loses a retaliation claim.