10 HR mistakes your employee's lawyer will try to exploit

If you’re ever hauled into court to testify in a lawsuit against your organization, what you say, and how you say it, can sink your defense—or help you win. Don’t forget: More than your credibility may be on trial; you could be held personally liable for some discriminatory acts.

The good news: You can ward off an opposing attorney’s attempts to discredit you. But first you must know the weak points your employee’s lawyer will seek to exploit. Here are the 10 weaknesses you must be prepared to defend:

1. **Being unfamiliar with your policies and procedures.** A jury will view your ignorance as uncaring and lax, at best; purposeful and negligent, at worst. How can you enforce policies that you don’t even know yourself?

2. **Sloppy documentation.** Most discrimination cases aren’t won with “smoking gun” evidence. They’re proven circumstantially, with documents or statements made before the lawsuit is filed. You would never directly admit bias, but your documents—particularly emails—can help an employee’s lawyer show discriminatory intent.

3. **Dishonest appraisals.** Performance reviews are often key evidence, but inflated employee ratings have sunk many employers’ cases. That’s because past glowing appraisals make it difficult to argue that poor performance led to discipline or a termination. At the least, they can make your credibility look shaky.

4. **Inconsistent statements.** Cases that start with an EEOC or state agency complaint often require you to submit position statements or affidavits. You can bet the employee’s attorney will review those statements and introduce them at trial, especially if your story has changed. Keep it consistent.

5. **Not taking complaints seriously.** Turning a blind eye to any complaints of unfairness or perceived illegal actions will kill credibility.

6. **Poor interviewing techniques.** It’s easy to answer, “Why did you hire the person you did?” But can you explain specifically why you rejected another candidate? Too few rejection decisions are well documented, which makes it hard to recall the reasons later on. Juries may view this as “selective amnesia,” an attempt to cover up bias.

7. **Changing rationales over time.** Whenever a plaintiff can show that your reasons for making an adverse employment decision change midstream, your credibility is shot. Smart attorneys will argue that your reasons are just pretext for discrimination.

8. **Lack of employment law knowledge.** Would you trust a brain surgeon who didn’t stay current on developments in the field? Well, juries expect (and the plaintiff’s lawyer will encourage them to expect) that you’re staying abreast of developments in employment law.
9. **Overdocumenting.** The HR mantra is, “Document, document, document.” But a flurry of documentation *after* someone has been fired can look suspiciously like you’re covering your backside for some reason.

10. **Failing to work with an employee before firing.** Juries are predisposed to sympathize with employees who have lost their jobs and self-esteem. An organization that fires without first trying to improve performance will appear insensitive and mean-spirited. For that reason alone, it’s worth counseling an employee before firing him or her.

**Advice:** Share this information with your organization’s managers. Their testimony can make or break a lawsuit defense just as much as yours can.