New case shows legal risks of 'papering' fired employee's file

When preparing to terminate a worker, you want to be able to produce the most solid documentation to defend a potential lawsuit. Just make sure supervisors know to document employee performance and behavior *at the time it occurs*—not just before or after the employee leaves the building.

Unless you have a consistent, pre-existing paper trail showing poor performance *before* the complaint, going back to create one (or hastily creating one before a termination) is legally dangerous.

Recent case: A North Carolina trucking company fired one if its drivers for allegedly refusing to work for four weeks after complaining about racial harassment.

The driver, who is black, said he heard daily racist taunts. Managers and employees frequently used the N-word, plus terms like "lawn jockey," "coon" and "tar baby" when referring to blacks. Nooses were often seen hanging from rafters.

The employee says he was fired soon after he failed to complete a delivery. The employee said he was sick, but the company argued that he never told anyone about the illness. It said he was terminated for this and other allegedly poor work.

The EEOC, however, offered testimony from other employees. One claimed that she had been told, after the fact, to create paper records showing "a pattern of laziness" about the employee. When the court looked at those records, it found that the discipline didn't match up with other payroll and attendance records, making them highly suspect.

The EEOC also pointed out that white employees apparently got frequent second chances that black employees did not.

Taken together, the court concluded there was enough evidence of race bias and it sent the case to trial. (*EEOC v. A.C. Widenhouse*, No. 1:11-CV-498, MD NC, 2012)

6 ways to avoid 'overdocumenting' employees' files

Most managers have heard the mantra "document, document, document." But it's also possible to overdocument, especially when it occurs right before a firing.

Courts will be able to see through a rush of disciplinary actions in the days before a termination (or written after the firing). That's why it's best to keep an ongoing performance log for each employee. Also, avoid these six "don'ts" that courts can interpret as overdocumentation:

1. **Don't suddenly increase the frequency of documentation after an employee complains** about

discrimination, receives a poor evaluation or violates company policy. It's a big red flag.

2. **Don't include comments that you ignore in other employees.** Inconsistency in documenting performance and behavior is an easy target for lawyers.
3. **Don't document only negative performance** of employees who may end up being fired. Give a complete view of the person's work.
4. **Don't back-date documents** or write formal warnings long after policy violations. Such delays and misrepresentation can cause a jury to doubt the accuracy of all documents.
5. **Don't fail to notify employees that written warnings will be placed in their files.** You don't want employees testifying that they never knew about warnings.
6. **Don't include entries unrelated to an employee's performance** or qualifications. Never refer directly or indirectly to an employee's private life, race, sex, religion or political beliefs.

Remember that many states allow employees to review their personnel files (See list at "Access to Personnel Files: 50 State Laws.") Smart employees, especially those with legal assistance, can spot discrepancies and inconsistencies.