

Presented by:

Tim M. Keegan

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**Ogletree
Deakins**



Tim M. Keegan

Shareholder

tim.keegan@ogletree.com

801.658.6002

Licensed in California (2007);
Utah (2022); Idaho (2022)

About the Firm

Ogletree Deakins is one of the largest labor and employment law firms representing management in all types of employment-related legal matters.

The firm has more than 1,000 attorneys located in 57 offices across the United States and in Europe, Canada, and Mexico.

We represent a diverse range of clients, from small businesses to Fortune 50 companies.



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Getting sued can be fun, right ...?

Martinez v. So Cal Edison

- Jury awarded two former So Cal Edison employees a total of **\$460 million** based on allegations they were forced out after reporting repeated sexual and racial harassment.

Diaz v. Tesla

- Jury award of **\$137 million** based on allegations of race discrimination and harassment.

Rudnicki v. Farmers Insurance Exchange

- Jury awarded **\$155 million** based on allegations the employer retaliated against an employee who was set to testify in an equal pay lawsuit.

Gratton v. United Parcel Service

- Jury awarded African American UPS driver **\$237 million** based on claims of race discrimination and retaliation after employee made complaints.

US Equal Employment Opportunity Commission Charge Statistics

- Around 23,000 employment cases were filed in federal district courts in 2023—a 9% increase from the prior year!
- Largest increase was cases filed alleging violations of the Americans with Disabilities Act—a 21% increase from the prior year.
- This is *only* federal court. Many times more filed in state courts across the country.

Federal Court Employment Lawsuits

In 2023, the EEOC received **81,055** new charges of discrimination. Up over 10% from 2022 (73,485).

- Retaliation: **46,047**
- Disability: **29,160**
- Race: **27,505**
- Sex: **25,473**
- Age: **14,144**

Tip 1: Make Sure Policies and Handbooks Are Up To Date ...

...And make sure your managers, supervisors, and HR staff are trained on the updates.

- Audit and update handbooks. We recommend annually.
 - Keep up to date with legal updates.
 - www.ogletree.com
- Inform employees of updates and include (required) acknowledgment of the new version.

Tip 1: Make Sure Policies and Handbooks Are Up To Date

Recent Legal Updates ... is your handbook up to date?

- Pregnant Workers Fairness Act Regulations
- PUMP Act
- EEOC Guidance on Harassment in the Workplace
- AI Policies
- Remote Work Policies
- Religious Accommodations

Tip 2: Document, Document, Document



Tip 2: Document, Document, Document

Personnel Files

- Application/Resume
- Performance Reviews
- Employment Contracts
- Corrective action memos
- Signed employee acknowledgement

Tip 2: Document, Document, Document

Memorialize Key Conversations

- Verbal conversations, when appropriate, should be followed by written memorialization of what was discussed.
- This applies to performance issues, coaching, and requests for accommodation or leave.
- Train supervisors to follow up and make HR available to help.
- BUT—be careful not to over-document. Consistency is key.

Tip 2: Document, Document, Document Employee Performance

Don't Sugarcoat Employee Performance!



Tip 2: Document, Document, Document Employee Performance

Typical Scenario

- Supervisor gives Employee positive “meets” or “exceeds” expectations reviews for several years. In reality, Employee’s performance had been mediocre.
- Employee’s performance starts suffering so much even Supervisor can’t ignore it anymore. Supervisor starts *verbally* coming down on Employee.

Tip 2: Document, Document, Document Employee Performance

Typical Scenario (continued)

- Employee takes a three week leave of absence to recover from a surgery.
- When Employee returns, performance problems continue for two more months until Supervisor is at her wits end. Supervisor —Employer decides to fire employee.
- No performance improvement plan. Poor performance not documented by supervisor.

Tip 2: Document, Document, Document Employee Performance

Typical Scenario (continued)

- Employee sues claiming disability discrimination and retaliation for taking a protected leave of absence.
- Employer's defense is employee had long-time mediocre/poor performance.
- But the poor performance is poorly documented.

Tip 2: Document, Document, Document Employee Performance

Solution

- Train supervisors and managers: honest feedback is key. Not sugarcoated.
- Set clear expectations, in writing. Make employees aware of the standard they are expected to meet.
- Apply standards consistently!

Tip 3: Adequately & Promptly Investigate Employee Complaints



Tip 3: Adequately & Promptly Investigate Employee Complaints

Typical Scenario

- Employee with a history of mediocre/poor performance sees the writing on the wall and emails HR and complains about some form of discrimination, harassment or retaliation by her supervisor.
- Employer does one of two things in response to Employee's complaint:
 - (a) Ignores the complaint and fails to investigate.
 - (b) Conducts an inadequate investigation.

Tip 3: Adequately & Promptly Investigate Employee Complaints

Typical Scenario (continued)

- Several months later, Employee's performance issues persist. Supervisor works with HR and terminates Employee.
- Employee sues and points to the inadequate investigation/ignored complaint.
- Employee tells judge/jury they should *infer* Employer's poor performance reason for termination was a lie ("pretext"), and real reason was retaliation for Employee's complaint.

Tip 3: Adequately & Promptly Investigate Employee Complaints

Solution: Part One

- Recognize which complaints trigger your obligation to investigate.
- Dirty dishes left in the break room v. my boss is sexually harassing me.
- But—no magic words required.

Tip 3: Adequately & Promptly Investigate Employee Complaints

Solution: Part Two

- Begin your investigation . . .
PROMPTLY!

Tip 3: Adequately & Promptly Investigate Employee Complaints

Solution: Part Three

- Who conducts the investigation?
 - HR or Counsel.
 - Investigator should be unbiased.
 - Go in to the investigation to gather the facts. Set aside pre-conceived judgments.

Tip 3: Adequately & Promptly Investigate Employee Complaints

Solution: Part Three (continued)

From: HR Director
To: Department Manager
Subject: Jane's Complaint

Dear Department Manager,

Jane emailed HR a complaint that her Supervisor is harassing her because she takes time to test her blood sugar due to her diabetes. I know this is not true and need you to send me information to discredit her complaint.

Tip 3: Adequately & Promptly Investigate Employee Complaints

Solution: Part Three (continued)

- Consider attorney-client privilege issues.
- Just because a lawyer is present doesn't mean the privilege will automatically attach.
- The lawyer must be acting in his/her capacity as a lawyer, not in a business role.
- Investigation will likely be discoverable in litigation.

Tip 3: Adequately & Promptly Investigate Employee Complaints

Solution: Part Four—How to Conduct the Investigation

- **Document everything.**
- Interview Employee/Complainant and obtain from Employee *all* supporting documents *and* witnesses.
- Interview *all* witnesses identified by Employee. Obtain supporting documentation from witnesses.
- Follow up with Employee after speaking with witnesses and reviewing all documents.

Tip 3: Adequately & Promptly Investigate Employee Complaints

Solution: Part Five—Reach a Conclusion

- Reach a conclusion, in writing. Did discrimination/harassment take place?
- Justify your findings—explain the “why” of how you reached the conclusion.
- In your written conclusion, do not ignore or gloss over facts that point the other way. Show you considered *all* facts—supports the credibility of the investigation.

Tip 4: Understand the Interactive Process



Tip 4: Understand the Interactive Process

Americans with Disabilities Act Basics

- 15 or more employees.
- Americans with Disabilities Act defines a person with a disability as: a person who has a physical or mental impairment that *substantially* limits one or more major life activities.
- Must make accommodations that allow employee to perform essential functions unless “undue hardship” or “direct threat.”

Tip 4: Understand the Interactive Process

Americans with Disabilities Act Basics (Continued)

- **Undue Hardship:** action requiring significant difficulty or expense. This is a high bar!
- **Direct Threat:** A direct threat is a significant risk of substantial harm to the health or safety of that employee or others, which cannot be eliminated or reduced by a reasonable accommodation.

Tip 4: Understand the Interactive Process

When is an Interactive Process Necessary

- What triggers interactive process? Whenever Employer knows *or should know* an employee may need an accommodation to perform the essential functions of her job.
- This includes times in which the Employee does not request an accommodation, but Employer observes a possible need for accommodation.

Tip 4: Understand the Interactive Process

What is an Interactive Process?

- Don't over-complicate it. It's a discussion/dialogue.
- Discussions go two-ways, not just one.

Tip 4: Understand the Interactive Process

Steps of the Interactive Process: Step One

- Discuss with the employee his/her limitations.
- How do the limitations impact the employee's ability to perform essential functions of his/her job.

Tip 4: Understand the Interactive Process

Steps of the Interactive Process: Step One

- Have written job description at the ready. Include employee's supervisor in discussion about essential functions.
- Request information about limitations . . . BUT only so much as necessary to determine limitations.
- Document every meeting with the employee with follow-up emails memorializing conversation.

Tip 4: Understand the Interactive Process

Steps of the Interactive Process: Step Two

If Employer can make the accommodation—
good news.

You're done!

Tip 4: Understand the Interactive Process

Steps of the Interactive Process: Step Three

If Employer cannot make the accommodation, then have a dialogue with the Employee.

- Ask Employee for his/her ideas.
- But remember Employer has more information than the Employee.
- **Document *all* conversations.**

Tip 4: Understand the Interactive Process

Steps of the Interactive Process: Step Four

Consider Reassignment

- If you determine no accommodation can be made that will allow employee to perform essential functions, explore reassignment to an open (or coming open) position.
- Information is in the control of the Employer. Cannot simply point Employee to job board.

Tip 4: Understand the Interactive Process

Steps of the Interactive Process: Step Five

Consider Finite Leave of Absence

- If no open position that will accommodate employee, consider finite extended leave of absence.
- Find out how much time Employee needs. Do not have to accommodate into perpetuity.
- Use undue hardship analysis.

Tip 4: Understand the Interactive Process

Potential Land Mines

- Be consistent.
- Treat all accommodation requests the same. If Employee A and Employee B both work in the same department under the same job description, be consistent in how you treat requests for accommodation.

Tip 4: Understand the Interactive Process

Potential Land Mines (Continued)

Be aware of other protected characteristics/protected activity!!!

- Very common to see race, gender, age, etc. cases also involve accommodation issues.
- Employee will say that Employer accommodated Employee A who was a male, but refused to accommodate Employee B who was female. So now you are facing a lawsuit with two separate legal theories: disability discrimination/failure to accommodation, and race/gender discrimination.

Tip 5: Understand the Interplay Between the ADA and Leave Laws



Tip 5: Understand the Interplay Between the ADA and Leave Laws

FMLA Basics

- 50 or more employees within 75 miles.
One year of employment.
1,250 hours over past twelve months.
Twelve weeks of leave in a twelve-month period.
- “Serious Health Conditions”: an illness, injury, impairment, or physical or mental condition that involves either inpatient care or continuing care by a health care provider.

Tip 5: Understand the Interplay Between the ADA and Leave Laws

FMLA Basics: Notice to Employee

- When Employee first requests leave for a reason that may qualify for FMLA leave, Employer must notify Employee whether he/she is eligible for FMLA leave. Can request certification from health care provider.
- If Employee is eligible, Employer must notify Employee in writing about Employee rights and responsibilities under the FMLA.
- Once the Employer has enough information to know whether a leave request qualifies as FMLA leave, Employer must notify Employee in writing whether Employee's time off from work will be designated FMLA leave, and the amount of time that will count against Employee's FMLA entitlement.

Tip 5: Understand the Interplay Between the ADA and Leave Laws

Interplay Between FMLA/ADA

- If employee runs out of FMLA, or isn't eligible for FMLA, don't immediately assume you can fire employee.
- Need to do the analysis under the ADA. Consider finite, extended leave as an accommodation under the ADA.

Tip 5: Understand the Interplay Between the ADA and Leave Laws

Don't Forget About Workers' Comp.

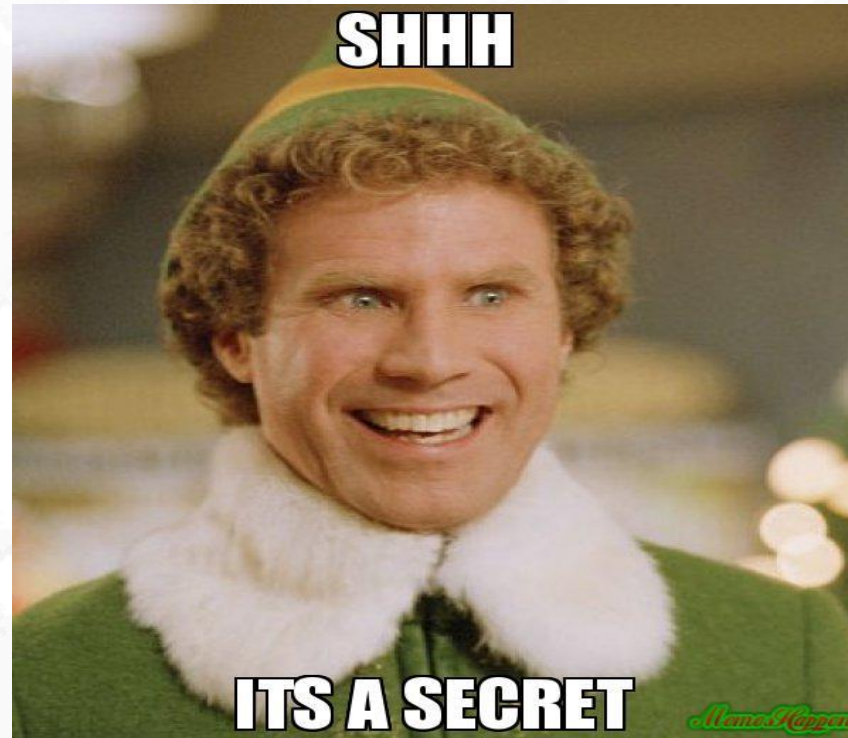
- Employees with work-related injuries often also need accommodations and/or leaves of absence.
- Under workers' comp., an employee may be entitled to "light duty." This means possible, temporary elimination of essential functions. Example: a modified lifting restriction.

Tip 5: Understand the Interplay Between the ADA and Leave Laws

Don't Forget About Workers' Comp.

- FMLA leave and workers' comp. leave run concurrently.
- But you *must* inform the employee his/her leave is an FMLA leave.

Tip 6: Beware of the National Labor Relations Act



Tip 6: Beware of the National Labor Relations Act

- NLRA does not apply to “managerial employees”: those “who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer’s established policy.”

Tip 7: Treat Terminable Offenses Consistently



Tip 7: Treat Terminable Offenses Consistently

Not Treating Terminable Offenses with Consistency

- Our best defense when faced with a wrongful termination lawsuit is to show—with **documentation** and credible witness testimony—that the termination was for legitimate, non-discriminatory reasons.

Tip 7: Treat Terminable Offenses Consistently

Importance of “Comparator” Evidence

- In response to our defense of legitimate non-discriminatory reasons, the employee will say those reasons are a lie—pretext—because another employee did the same thing/had the same performance issues, and was *not* fired.

Tip 7: Treat Terminable Offenses Consistently

Importance of “Comparator” Evidence

- Example: Female Employee misses her numbers for Q1 and Q2, regularly shows up tardy, and has a poor attitude affecting department morale.
- Employer does not document well, and fires Employee for missing Q1 and Q2 numbers. Employee sues and says another employee—a male—also missed Q1 and Q2 numbers and was *not* fired, so her firing was discriminatory based on her gender.

Tip 7: Treat Terminable Offenses Consistently

Practical Solutions

- 1. Treat terminable offenses consistently. For objectively measurable standards, apply them consistently across the given class of employees.
- 2. HR: before termination, inquire of supervisor whether other employees in the department have committed same offenses and *not* been fired.

Tip 7: Treat Terminable Offenses Consistently

Practical Solutions

- 3. Document *all* the reasons for termination and communicate them to the employee. In the example above, do not just fire the employee for missing her numbers, also site her tardiness and poor attitude.
- 4. Should be a **documented** history of all reasons for termination.

Tip 8: Review Exempt/Non-Exempt Classifications



Tip 8: Review Exempt/Non-Exempt Classifications

DOL Salary Threshold Increase for White Collar Exemptions

- New final rule promulgated by Department of Labor significantly raising the minimum salary threshold to qualify for white collar exemptions under the Fair Labor Standards Act
- **May significantly increase number of employees entitled to overtime compensation**

Tip 8: Review Exempt/Non-Exempt Classifications

White Collar Exemptions – Primary Duties Test

- **Administrative**
 - Primarily perform administrative duties, regularly exercise discretion and independent judgment
- **Executive**
 - Management of the enterprise or department or subdivision; customarily and regularly direct the work of at least two employees; authority to hire or fire
- **Professional**
 - Advanced knowledge; examples: law, medicine, technology, accounting, engineering, and creative professionals such as musicians, actors, artists

Tip 8: Review Exempt/Non-Exempt Classifications

White Collar Exemptions – Salary Test

- **July 1, 2024:** Increase the minimum weekly salary to \$844 per week, equivalent to **\$43,888** per year.
- **January 1, 2025:** Increase to \$1,128 per week, equivalent to **\$58,656** per year.
- Based on the 35th percentile of salary in the lowest-wage census region.

Tip 8: Review Exempt/Non-Exempt Classifications

Highly Compensated Employees Exemption

- **July 1, 2024:** Increase the HCE exemption total annual compensation to **\$132,964** per year.
- **January 1, 2025:** Increase to **\$151,164**.
 - Equivalent to the 85th percentile of full-time salaried workers nationally.

Tip 8: Review Exempt/Non-Exempt Classifications

Takeaways

- **Audit of your current employees**
 - Any employees below the \$58,656 threshold will no longer be exempt as of January 1, 2025
- Important implications for:
 - Timekeeping practices
 - Recordkeeping practices



Questions?

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Thank you!

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