

No Good Deed Goes Unpunished

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Over the years, I've become somewhat skeptical in my employment law practice from seeing case after case where employment claims were entirely preventable, if only the employer would have properly managed its employees, including terminating when it was evident that the employee's performance or behavior warranted it. I therefore train my clients that "no good deed goes unpunished," and "every employee is a potential plaintiff." Is this cynical? Probably, yes. Is it necessary? Absolutely! The following is one example of just such a case.

The client is an auto dealership. About eight years earlier, it terminated a salesperson (male, African American) for poor performance. Fast forward eight years and that salesperson comes to the dealership, looking for his job back. It turns out he had just gotten out of federal prison after serving five years for armed bank robbery, and he needed a job to remain on parole. Rather than saying "no," which the dealership could have done based on the prior performance issues alone (to terminate based on the criminal record would have required a specific analysis of, among other things, the crime itself and the job duties, which still would have resulted in the ability to opt not to hire), the dealership decided to give the former employee a "second chance in life" (their words).

Over about 10 months, the salesperson's performance was poor, he was belligerent and combative with co-workers, and he was chronically tardy. Finally, the dealership terminated him. After the termination, they also discovered that he had lied to some customers when he promised certain add-ons that he did not have authority to offer.

A few weeks later, the former employee returned and begged for his job back. Again, rather than saying "no" based on all of his performance issues, tardiness and lying, they decide to give him yet another chance. This time, they made him sign a document promising to not be late or lie to customers (neither of which should have been necessary in this at-will employment state).

You can pretty much figure out what happened next. One day, after his scheduled start time, he called his manager and asked for someone to give him a ride to work, because his car ran out of gas. (Incidentally, he had no driver's license, because of his conviction and was therefore not given a demonstrator vehicle like other salespersons.) The manager refused, and the employee became belligerent (on the phone and in text messages). Thusly, the manager terminated the salesperson's employment on the spot.

Under the circumstances, that should have been the end of that. But in spite of all the leniency shown and chances given to this employee, the dealership found itself

on the wrong end of an EEOC charge of discrimination. The allegations were that the salesperson was discriminated against based on his race and gender, because non-Black and female employees were not made to sign agreements promising not to be tardy or lie to customers, and because they were given rides to work (which in reality was that they were given demo cars, because they had driver's licenses).

As a result, the dealership had to retain a lawyer to defend it, including conducting an investigation and drafting a position statement. The punch line of the story is that the charge was ultimately dismissed, not on its merits, but because the complainant stopped communicating with the EEOC. Why? He was back in prison for parole violations (such as carrying a gun) and had been indicted in a major undercover drug bust.

Beyond the punch line, however, is the moral of the story. Some may look at these facts in hindsight and say that the dealership was foolish, and that they would never employ managers who would make such poor hiring decisions. Truthfully, however, this dealership wasn't much different than any others. It had managers who had never received formal training in how to manage employees, which is all too common. It had managers who made decisions solely based on their hearts and not their heads, which is equally common. It had an employee handbook in place, but it wasn't followed, which again is common. The bottom line is that with proper training of managers on how to hire, fire, promote, demote, write up, commend and generally manage other employees, cases such as this, and even those less extreme, can be easily prevented.