706:Million-dollar Misconceptions: Ten Employment Law Mistakes that Can Cost Your Company a Fortune

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Recent representations include representation of companies in entertainment, insurance, gaming, uniform rental, hospitality, and retail industries in wage and hour class actions; high profile sexual harassment investigations in the entertainment industry; representation of a large health care company in collective action before the DOL; representation of employers in several industries including medical devices, beverage, retail, oil, financial, entertainment, and education in discrimination and wrongful termination cases.

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Prior to joining Smurfit-Stone, Ms. Manley was employed as an associate in the labor and employment law department of Blackwell Sanders Peper Martin LLP. Upon graduating from law school, Ms. Manley served as a judicial clerk to the Honorable Carol E. Jackson in the U.S. District Court for the eastern district of Missouri.

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MILLION DOLLAR MISCONCEPTIONS: TEN EMPLOYMENT LAW MISTAKES THAT CAN COST YOUR COMPANY A FORTUNE

I. INTRODUCTION

The number of employment-related lawsuits has increased substantially. They now constitute more than 25% of all civil lawsuits and the cost to defend an average employment lawsuit can run anywhere from $50,000 to $100,000 or more *before* the case ever proceeds to trial. The phonebook, the media, and especially the internet are filled with advertisements by lawyers eager to find disgruntled employees, or classes of employees, on whose behalf they can bring legal actions. Unfortunately, too many employers make it very easy for these lawyers to not only make a living, but to prosper.

Every day, in companies throughout the country, employers are doing things that violate the employment laws or otherwise expose to substantial liability. Some of these actions are deliberate attempts to skirt legal requirements, or even knowing violations of them. More often, however, they are mistakes resulting from ignorance or misunderstanding of what is permissible or required under the law, or from failure to appreciate the consequences of certain actions or omissions.

Counsel must be vigilant to ensure that these problems are not occurring in his or her company. Right now, in your company, it is almost certain that some manager or supervisor is at least contemplating an act or decision that could land your company in hot water, possibly resulting in imposition of fines, penalties, or large monetary awards. Prevention requires a proactive approach to identify problems before they mushroom into legal problems. What follows are some of the common errors companies and managers make that lead to significant liability.

II. TEN COMMON EMPLOYER MISTAKES

A. MISTAKE ONE – CLASSIFYING EMPLOYEES AS "INDEPENDENT CONTRACTORS"

A lot of business people love "independent contractors" or "consultants." What's not to love? They are not included in headcount, so the budget looks great. The company does not have to provide benefits or other perks, so the budget looks great. The company is not paying FICA or unemployment for them, so the budget looks great. When we do not need them anymore, we can just cut them loose and need not pay severance, so the budget looks great. In general, the budget looks great.

Many workers also like being "consultants." The most obvious advantage is that, often, the worker's pay is higher than it would be if she were an employee, precisely because the employer is saving money on benefits, taxes, and similar items. *Ergo*, the consultant's budget looks great.

Everything is swell, except for the fact that many, if not most, of the workers identified as "consultants" or "independent contractors" are in reality, by any reasonable legal definition, employees. This usually comes to light, moreover, only after the individual is disgruntled about something, *i.e.*, when the budget no longer looks so great. She has been fired, and decides she wants to collect unemployment, or believes she has been discriminated against. The company employee working right next to the consultant has made a bundle on company-provided stock options; the individual now very much regrets his decision to be a "consultant" and, therefore, ineligible for such benefits. Even better, the consultant suddenly discovers that, instead of paying half the FICA cost, he now owes the full amount.

When this happens, and the individual finds an attorney or governmental agency with a sympathetic ear, the whole thing can come crashing down, as companies like Microsoft have found to their chagrin. Treating employees as independent contractors may provide a short-term benefit; some companies may even get away with it forever. When it goes wrong, however, it goes very wrong. Counsel must ensure that the risks are eliminated or at least minimized.

1. Determining Independent Contractor Status

The starting point is to know whether the worker is an employee or is an independent contractor. Although no single test exists for making such a determination, common law agency principles and tests utilized by the Internal Revenue Service are helpful in providing the necessary guidance. It also is critical to note that an individual can be considered an employee for some purposes, but an independent contractor for others. That is, applying the test used by the Internal Revenue Service, an individual may qualify as an independent contractor, but the same individual – doing the same work for the same company under the same circumstances – might be considered an employee for the purposes of the state unemployment compensation law.

a. The Economic Realities Test.

Is the worker economically dependent on the company or is the worker in business for herself? If the worker's sole source of business is the company, she probably is an employee. If the worker is in business for herself, she is not an employee. Bartells v. Birmingham, 332 U.S. 126 (1947).

b. The Common Law Test.

Under traditional common law agency principles, a servant or employee is defined as:

> …a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control. Restatement (Second) of Agency, § 220(1), comment H (1958).

The key to determining whether a particular worker is an employee or an independent contractor is **control**. If the right to control the means and manner of the worker's work performance does not rest with the worker himself, the worker is likely to be considered an employee. It is the right to control, rather than its exercise, that is material to the common law employment test. Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

Courts use a multi-factor employment test to distinguish between independent contractors and employees. There is "no shorthand formula or magic phrase that can be applied to find the answer, …all incidents of the relationship must be assessed with no one factor being decisive." Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992); NLRB v. United States Insurance Co. of America, 390 U.S. 254 (1968). The factors that are relevant to this inquiry include:

(1) the extent of the worker's right to control when, where, and how the job is performed;

(2) the extent to which the tools, materials, equipment, and work location are furnished by the worker or the hiring party;

(3) the length of the relationship between the parties;

(4) the extent of the hiring party's right to assign additional projects to the worker;

(5) the extent of the worker's right to determine when and how long to work;

(6) the degree of skill or expertise required;

(7) the worker's role in hiring and paying assistants;

(8) whether the work is part of the regular business of the hiring party;

(9) whether the hiring party itself is in the same business;

(10) whether the worker is engaged in his or her own distinct occupation or business;

(11) whether and to what extent the hiring party has a right to fire the worker;

(12) whether the worker is provided employee benefits;

(13) the method of payment; and

(14) the tax treatment of the worker.

Darden, 503 U.S. at 323-24; Kurdyla v. Pinkerton Security, 197 F.R.D. 128 (D. N.J. 2000). This list is not exhaustive and not all, or even a majority, of the listed criteria need be met.

c. Internal Revenue Service Test.

In determining whether an individual is an employee for tax purposes, the Internal Revenue Service (IRS) looks to the extent of the company's right of control and utilizes a 20-factor test that identifies as relevant criteria:

(1) whether the worker is required to follow instructions;

(2) whether the worker is required to undergo training;

(3) whether the worker's services are integrated into the employer's business;

(4) whether the worker is required to perform the services personally;

(5) whether the worker hires, supervises or pays assistants;

(6) whether there is a continuing relationship between the worker and the employer;

(7) whether the employer sets definite work hours;

(8) whether the worker is required to devote substantially all of his or her time to the employer;

(9) whether the worker does most of his or her work on the employer's premises;

(10) whether the worker performs his or her work according to a sequence established by the employer;

(11) whether the worker submits regular or written reports to the employer;

(12) whether the worker is paid on a periodic basis (i.e., hourly, daily, weekly);

(13) whether the worker is reimbursed for expenses;

(14) whether the employer provides the worker's tools and materials;

(15) whether the employer places a significant investment in the worker;

(16) whether the worker can realize a profit or loss;

(17) whether the worker can perform services for more than one entity at one time;

(18) whether the worker makes his or her services available to the general public;

(19) whether the employer has the ability to discharge the worker; and

(20) whether the worker has a right to terminate the relationship.

Rev. Ruling 87-41, 1987-1 Cum. Bull. 296.

The right to control an individual in the performance of his or her work remains the most significant factor in determining whether an employee-employer relationship exists. Furthermore, Treasury Regulations, like court decisions, hold that it is the existence of the right to control, rather than its exercise, that is material to the determination. Treasury Reg. §§31.3121(d) - (1)(c)(2); 31.3306(i).

d. The "Relative Nature of the Work Test."

This has been applied in the Workers Compensation setting where the "control test" is not dispositive, usually because the highly specialized or professional nature of the services rendered by the individual are not susceptible to regular control, regardless of whether the person is an employee or an independent contractor. *See, e.g.*, Pitts v. Shell Oil Co., 463 F.2d 331 (5th Cir. 1972); Auletta v. Bergen Center for Child Development, 338 N.J. Super 464 (App. Div. 2001); Stamp v. Dept. of Consumer and Bus. Services, 169 Or.App. 354, 9 P.3d 729 (2000); Munson v. D.C. Dept. of Employment Services, 721 A.2d 623 (D.C. App. 1998). The test is:

* Whether the work performed was an integral part of the regular business of the company; and

* Whether the individual demonstrated "substantial economic dependence" on the company.

2. Risks of Improper Classification

Many companies call workers "independent contractors" when those individuals are, in fact, employees. If an individual, or some governmental agency, determines that the employees are in fact employees, problems will arise.

a. The Company Could Be Audited.

i. There are several ways to get audited:

(i) Random or (targeted) governmental action;

(ii) An independent contractor is injured and files a claim for workers' compensation benefits;

(iii) The independent contractor files for unemployment benefits after the contract is terminated; or

(iv) The independent contractor is terminated and sues under a civil rights or other, similar employment-protection act.

ii. Entities that may audit your company:

(i) Internal Revenue Service;

(ii) The Immigration and Naturalization Service;

(iii) Department of Labor;

(iv) State Unemployment Division;

(v) State Workers' Compensation Agencies;

(vi) State Tax Agencies;

(vii) State Wage and Hour Divisions;

iii. What happens in an audit:

(i) An auditor will review the company's records, and can go back many years;

(ii) The auditor can interview the independent contractors;

(iii) The company's designation of independent contractors in prior years can be changed, resulting in penalties;

(iv) The company can be liable for back taxes, fines, interest, etc.;

(v) Under Internal Revenue Service Rules, **individuals** who are responsible for collecting and paying employment taxes can have **personal liability** for willfully failing to collect and pay the necessary taxes;

(vi) Under the Fair Labor Standards Act ("FLSA"), mischaracterization of workers can lead to fines of up to $10,000 and six months imprisonment for willful violation.

3. Be careful about reclassifying employees

Under §510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1140, it is unlawful to "discriminate against a participant or beneficiary....for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan...." Consequently, reclassifying existing "employees" as "independent contractors" – thereby making them ineligible for pensions and welfare benefits – may constitute a violation of ERISA.

In Gitliz v. Compagnie Nationale Air France, 129 F.3d 554 (11th Cir. 1997) *reh'g denied*, 141 F.3d 1191 (11th Cir. 1996), the company reclassified its outside sales representatives as independent contractors, but they continued to perform the same work after their reclassification. When the workers sought to obtain early retirement and pension benefits, the company denied them, arguing they were no longer employees and thus not entitled to the benefits. The Court of Appeals found that there were serious questions as to whether the company had reclassified the individuals for the purpose of depriving them of their benefits under ERISA, and required the matter to proceed to trial.

Similarly, in Berger v. AXA Network, LLC, 2003 WL 21530370 (N.D. Ill. 2003), the employer instituted a program whereby insurance agents, who were employed on a salary basis, were changed to "self-employed" status if they failed to meet certain sales goals. In self-employed status they were not eligible for benefits. The court held that this action could constitute a violation of ERISA, as an interference with their rights to benefits. *See also* Potter v. ICI Americas, Inc., 103 F.Supp.2d 1062 (S.D. Ind. 1999).

4. Practical Tips

a. Hiring and using independent contractors.

i. Use carefully crafted contracts that:

(i) Recite that the worker is an independent contractor;

(ii) Recite that the worker has the right to control the manner and means of the work;

(iii) Provide for payment for the project, not on a periodic basis;

(iv) Specify the manner for terminating the relationship:

(v) Require the worker to supply all tools and equipment;

(vi) Require the contractor to be responsible for all costs and expenses;

(vii) Require the contractor to be responsible for herself and her employees;

(viii) Require the contractor to provide workers' compensation for his own employees;

(ix) Recite that the contractor is not entitled to employee benefits;

(x) State definite time limits for completion of the project;

(xi) Allow the worker to perform services for other employers;

(xii) Do not include covenants not to compete;

(xiii) Allow the worker to employ assistance;

(xiv) Allow the contractor to perform services at a place of his or her own choosing;

(xv) Require the contractor to submit invoices for services rendered;

(xvi) Require the contractor to indemnify the employer for liabilities incurred;

(xvii) Require the contractor to maintain insurance.

ii. Contracts alone are not dispositive. The company must not, in fact, exercise control. Thus,

(i) You must allow the worker leeway in performing the work;

(ii) Do not require workers to attend company meetings or functions;

(iii) Set up vendor files for your workers separate from employment files;

(iv) Do not require regular reports;

(v) Never make a payment without an invoice;

(vi) Do not terminate a worker until his contractual term expires;

(vii) If a contractor is dealing with your customers, he or she should handle any complaints they have;

(viii) If the independent contractor is involved in selling your products, he or she should set the sales price. Also, the worker should establish the territory.

(ix) Don't impose quotas, *e.g.*, amounts of work or sales volume.

iii. Make sure contractors act as independent businesses and that they:

(i) Incorporate or adopt fictitious business names;

(ii) Obtain all necessary business licenses;

(iii) Open business bank accounts;

(iv) Pay quarterly taxes;

(v) Obtain all necessary insurance, pay workers' compensation benefits, etc.

iv. Procedures the company should follow:

(i) Submit an IRS form 1099 annually for all amounts paid to independent contractors over $600 and give copies to the contractors;

(ii) Keep copies of the contractor's business licenses;

(iii) Verify that the contractors have insurance;

(iv) Require contractors to submit fictitious name statements.

5. Check Those Benefits Plans!

Make sure company benefit plans explicitly cover only individuals whom the *company designates* as regular, full time employees and exclude independent contractors, temporary employees, consultants, and others. If your plans provide that all "employees" are eligible for benefits, the independent contractors in your workforce may be eligible for benefits – ***even if they have signed contracts explicitly stating that they will not be eligible for benefits***. This is because, under ERISA, the language of the benefit plans themselves control, and supersede any individual agreements the worker may have with the company. *See, e.g.*, Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997) (*en banc*) *cert. denied*, 522 U.S. 1098 (1998); Wolf v. Coca-Cola Company, 200 F.3d 1337 (11th Cir. 2000).

On the other hand, where the plans explicitly include as participants only those workers the company designates as "employees," or specifically excludes workers the company designates as independent contractors or other categories, the workers will not be eligible for benefits, even if they later are determined to actually be employees. *See, e.g.*, MacLachlan v. ExxonMobil Corporation, 350 F.3d 472 (5th Cir. 2003) *cert. denied*, 124 S.Ct. 2413 (2004); Bronk v. Mountain States Telephone and Telegraph, Inc., 140 F.3d 1335 (10th Cir. 1998).

It therefore is critical to examine and, if necessary, amend the benefit plans as part of your company's review of its independent contractor status.

B. MISTAKE TWO – FAILING TO PAY OVERTIME AS REQUIRED

Because the Department of Labor's recent amendments to the overtime regulations have been in the news, people – unfortunately, including your company's employees – are very much aware of the issues. This heightened awareness may lead to even more litigation in what already has been a burgeoning area of the law, wage & hour lawsuits, including massive class and collective actions. The amounts at issue in an overtime collective action, while often quite small to each individual employee, can be staggering in the aggregate. Add to this the imposition of penalties, attorneys' fees, and

costs of defense, and it quickly becomes clear that such actions pose a tremendous threat to the company. Prevention is the best defense.

A dissertation on the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* ("FLSA") is beyond the scope of this presentation. However, the following are some of the more common issues resulting in FLSA violations.

1. Improperly Classifying Employees as Exempt

This is probably the most common problem, and the one for which plaintiffs' attorneys are most on the lookout. Under the FLSA, employees must be paid time-and-a-half for all hours worked over 40 hours in the week, unless they fall within specific exemptions. The *employer* has the burden of proving that the employee meets the standards for the exempt categories. These standards include a "salary basis test" and a "duties test" and the employee must meet both tests for each week in which the employer claims the exemption. Where the exemption applies, the company can pay the individual a salary, and need not give extra compensation for hours worked in excess of 40.

The employees' duties – *i.e.,* what she actually does during the course of the week – will control whether she truly is exempt or not. Merely calling someone a "manager" or "assistant manager" does not make that person eligible for the Executive exemption if she is not truly performing duties that meet the standard of that test. The case law is replete with companies that failed to pay overtime to an individual who had a manager or supervisor title, but failed to meet the duties test set forth by the DOL; in those cases, the employer lost.

Another problem arises from misunderstanding the sometimes confusing or ambiguous definitions in the exemptions. In an example that hits close to home, there is an exemption under the FLSA for individuals employed in a "Professional" capacity or an "Administrative" capacity, the latter covering those whose duties are "directly related to management policies or general business operations" and "relating to the administrative operations of the business as distinguished from production." 29 CFR §541.205(a). In some companies, paralegals have been treated as exempt employees because management has believed, perhaps not unreasonably, that paralegals are professionals and also serve in an administrative capacity. However, on at least two occasions, the DOL has expressly held that paralegals are not exempt employees and must be paid overtime. Wage & Hour Opinion Letter, March 20, 1998 (1998 WL 852667); Wage & Hour Opinion Letter, April 13, 1995 (1995 WL 1032484).

The company needs to audit its pay classifications, particularly in light of the amendments to the DOL's FLSA regulations. This involves review of

the work actually being performed by employees the company has designated as exempt, to ensure that they actually meet the duties tests of the regulations. This is an instance where ignorance is not bliss. It is not a defense that the company was not aware it was violating the law; intent is almost completely irrelevant. In fact, the company can be found liable for liquidated damages (*i.e.*, double the actual damages) even if it did not know it was engaged in wrongdoing. To avoid liquidated damages the company must prove that it reasonably believed it was doing the correct thing – not simply that it did not know it was doing the wrong thing – and must provide evidence of what it reasonably relied on in reaching that conclusion. 29 U.S.C. §260; Williams v. Tri-County Growers, 747 F.3d 121 (3d Cir. 1984).

2. Employees Working "Off the Clock"

A number of collective actions have been filed wherein the employees assert that supervisors have directed them not to record their time, or to continue working for no extra pay after they have clocked out. This is a violation of the FLSA, which requires the company to pay the employee for all time its has "permitted or suffered" the employee to work. 29 CFR §785.11. That is, with certain limited exceptions, the company must pay the employee for all hours it knows or should know the employee is working, whether the company expressly authorized the work or not. *Id.*; Newton v. City of Henderson, 47 F.3d 746 (5th Cir. 1995).

Working off the clock appears to be a particular problem in the retail industry, and is seen by supervisors and managers as a way to keep down costs and meet budgets. Some may think that, if there is no record of the employee working, the employee cannot prove the number of hours she worked beyond what is on the clock. Unfortunately, the DOL does not see it that way. It is the employer's burden to keep accurate records, not the employee's. If the employee makes a claim that he worked more hours than are recorded on the employer's records, it is the *company's* burden to prove that he did *not* work those hours. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); Arias v. United States Service Industries, Inc., 80 F.3d 509 (D.C. Cir. 1996).

3. Failing to Include Bonuses In the Calculation of Overtime Pay

Under the FLSA, again, the employee is entitled to receive 1.5 times her "regular rate of pay" for all hours worked in excess of 40 per week. 29 U.S.C. § 207. Most companies calculate the overtime based simply on the employee's base hourly rate. Unfortunately, this does not comply with the FLSA.

The "regular rate" at which an employee is employed includes "all remuneration for employment paid to, or on behalf of, the employee," but shall not include certain specific exclusions which are set forth in the FLSA. 29 U.S.C. § 207(e). Bonuses which are not discretionary "must be totaled in with other earnings to determine the regular rate on which overtime pay must be based." 29 C.F.R. § 778.208. *See* Featsent v. City of Youngstown, 859 F. Supp. 1134, 1136 (N.D. Ohio 1993), *aff'd in part, rev'd in part on other grounds*, 70 F.3d 900 (6th Cir. 1995) ("Non-discretionary bonuses must also be included in the computation of overtime, while discretionary bonuses are excluded.").

"In order for a bonus to qualify for exclusion as a discretionary bonus under section 7(e)(3)(a) the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum, if any, to be paid, as a bonus is determined by the employer without prior promise or agreement. The employee has no contract right, express or implied, to any amount. If the employer promises in advance to pay a bonus, he has abandoned his discretion with regard to it." 29 C.F.R. § 778.211(b). "Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm, are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is to be made and the like are in this category. They must be included in the regular rate of pay." 29 C.F.R. § 778.211(c).

If your company pays performance or other non-discretionary bonuses to non-exempt employees, you should ensure that these bonuses are being included in the underlying "regular rate of pay" when calculating overtime. If your payroll is being handled by an outside payroll company, you should not assume that the payroll company is doing this automatically.

4. Failing to Account for Applicable State Laws

Another mistake companies can make, particularly those that have locations in multiple states, is thinking that the FLSA is the only game in town on the issue of wage & hour law. Many states have their own laws, and many of these provide greater rights and protections to employees than does the federal FLSA. For example, while under the FLSA employees are entitled to overtime pay only after they have worked more than 40 hours in the week, under California law, non-exempt employees become entitled to overtime pay after eight (8) hours *per day*, regardless of how many hours they have worked in the week. Cal. Labor Code §510.

Some states require that employees be given break time, while the FLSA contains no such requirement.

Where the state or local law and the FLSA are different, the employee must be given the benefit of whichever applicable law is more generous or beneficial to the employee. 29 U.S.C. § 218.

This problem is particularly acute in light of the DOL's amendments to the federal FLSA regulations. California will continue to follow its own state laws and regulations. Illinois has passed a law to the effect that it will continue to follow the DOL's FLSA regulations as they existed *before* the recent amendments (except of course those provisions that increased the minimum salary level necessary to be considered "exempt"). 2004 Ill. Legis. Serv. 93-672(West). Other states have not yet formally announced how they will react to the amendments, but have given unofficial indications that they will continue to follow the old, pre-amendment regulations. Therefore, if you have multiple locations, it is necessary to determine what each state will be doing on these laws, and ensure that you are complying with them.

C. MISTAKE THREE – FAILING TO REVIEW, EVALUATE, AND UPDATE POLICIES

Used properly, company policies, handbooks, and other communications to employees can be very beneficial. They are a means to set forth the company's policies in a way that is clear and easily understood by employees. Being in writing, the policies are known, or at least should be known, by all employees, and there should not be room for debate. (*See, contra*, Reynolds v. The Palnut Company, 330 N.J. Super. 162, 748 A.2d 1216 (App. Div. 2000) and Lytle v. Malady, 458 Mich. 153, 579 N.W.2d 906 (1998), both holding that where there was no written policy, the employee could prove an "oral policy" or practice of terminating only for good cause). Further, some policies and practices need to be reduced to writing in order to comply with state or federal lawyer for example, sexual harassment policies, and the company's description of employees' rights under the FMLA.

Where the writings are not effective, however, they can be detrimental to the employer. Carelessly written or ambiguous policies create more problems than they solve. Failing to include specific language in a policy can make the company liable in ways it could not foresee. Some common problems are discussed.

1. Failing to Have an Adequate Disclaimer

Everyone knows by now that employee handbooks and policy books can be construed as implied contracts, binding the employer to actually follow

what is written in the handbook. This is especially problematic where the handbook contains a progressive discipline policy, and the employer wishes to retain its right to discharge employees at will.

Everyone also knows by now that companies can avoid having the handbook being construed as a contract by inserting a disclaimer, which advises the employee that the handbook is not a contract and that the employer retains all rights. However, the requirements to make such a disclaimer effective may vary from state to state. Some may require specific language. Some may have requirements as to how prominent the disclaimer must be, and how prominence will be determined.

What is clear in all states is that burying the disclaimer in the body of the text, and/or using ambiguous language, will not suffice. **The disclaimer must be readily obvious to the reader** (like this), must disclaim any contractual effect, and must reserve to the company the right to change policies and practices unilaterally and without notice.

2. Failing to Update Policies and Delete Those That No Longer Apply

The employer learned this lesson to its chagrin in Jablonski v. American Home Products Corp., Case No. 25-2-0474 (N.J. App. Div., May 9, 2002) *certif. denied*, 174 N.J. 366 (2002). The plaintiff – ironically the company's in-house labor and employment attorney – was discharged shortly after his 65th birthday. He sued, alleging among other things that he had been discriminated against on the basis of age. Specifically, he contended that the company had a policy of involuntarily "retiring" employees after the age of 65. While mandatory retirement is legal when applied to certain executive-level employees under both the federal Age Discrimination in Employment Act and state law, plaintiff Jablonski did not meet the criteria.

The company of course denied that it followed any such practice and asserted that it discharged the plaintiff for legitimate business reasons because his job was redundant.

Unfortunately, the company still had in one of its procedure manuals a policy from the 1970's which stated that "normal retirement age" was 65 and that, "[a]pproval of the Finance Committee is required to extend the term of employment of an employee beyond age 65." While such a procedure may have been permissible when it was written, it was discriminatory as a matter of law in the 80's and 90's. Yet it was still in the book. The policy was presented at the trial – over the objection of the company which termed it an "outdated and defunct employment practice"

– in which the jury awarded $1.9 million, to which was added another $1.5 million in attorneys' fees, costs, and pre-judgment interest.

3. Failing To Include All Relevant Conditions and Qualifiers

Be sure to review your policies to ensure that you are not giving greater rights to employees than they are otherwise entitled to. For example, under the FMLA, an employee may not be entitled to leave, even if they have met the length-of-service and minimum hours requirements, unless he is employed at a location where there are at least 50 other employee within a 75-mile radius. In Thomas v. Pearle Vision, Inc., 251 F.3d 1132 (7th Cir. 2000), the company claimed plaintiff was not eligible for FMLA leave because there were not 50 or more employees within a 75-mile radius from her location. Unfortunately, the company had not vetted its own policy documents. It had issued a Summary Plan Description ("SPD") on its FMLA policies. The SPD stated that "all employees" with the requisite service and hours were entitled leave, and did not mention anything about the number of employees at the site. The Seventh Circuit held that, under Illinois contract law, she was entitled to FMLA rights based on the language of the SPD.

Another common error in written policies also involves the FMLA. Under that law, qualified employees are entitled to 12 weeks of leave every 12 months. However, neither the FMLA nor the implementing regulations specify how the 12-month period will be calculated. It is left up to the employer. The regulations suggest several alternatives. 29 CFR 825.200(b). Be careful, though, because the regulations also state that, "[i]f an employer fails to select one of the[se] options . . . for measuring the 12-month period, the option that provides the most beneficial outcome for the employee will be used." 29 CFR 825.200(e). Thus, for example, if the employee took 12 weeks of leave at the end of one year, he might me entitled to another 12 weeks beginning immediately on January 1 of the following year, if the "calendar year" method were used. It is important to specify in the company's policies what method it intends to use to calculate this period so that your employees, or the DOL, or a court does not end up choosing it for you.

D. MISTAKE FOUR – FAILING TO PROPERLY DOCUMENT PERFORMANCE ISSUES

We have all been there before. Human Resources or a line manager tell you that they believe a certain employee needs to be discharged because of poor performance. You ask some background questions about the problems, and they seem to form a legitimate basis for discharge. When you ask to see the performance evaluations and the written warnings, you get blank stares. Not only

are there no documented warnings, but when you review the last few evaluations – assuming there are any – they indicate that the employee is meeting expectations or better.

In approaching the termination of an employee for poor performance, it is important to keep in mind that a court, or a jury, or an arbitrator evaluating the company's decision will want to ensure, first and foremost, that the employer truly believes that the employee has performed poorly and that the basis on which that determination was made is reasonable. While it is not strictly a legal obligation, a jury may also think it appropriate that the employee be given notice of deficient performance and an opportunity to correct it. A sudden discharge after positive performance evaluations and no prior warnings may lead the person or persons deciding your case to conclude that, at a minimum, the termination was unfair, which may lead to the conclusion that it was unlawful.

1. The Performance Evaluation Process

If the company wants to support a decision to terminate an employee for poor performance, it must create and maintain a system of evaluating performance that is fair, accurate, provides meaningful information for business purposes, and results in useful information for future litigation. Such a system, along with proper supervisor training, will ensure consistency. The worst evidence in a discharge lawsuit (especially a discrimination lawsuit) is a document that contradicts either what your manager or another document says. *See, e.g.*, Roberts v. Separators, Inc., 172 F.3d 448 (7th Cir. 1999) (evidence of a positive performance review and a sizable raise shortly before termination would be highly relevant to showing pretext for discrimination when employer fired employee for "bad attitude" and work problems); Garrett v. Hewlett-Packard Corp., 305 F.3d 1210 (10th Cir. 2002) (inconsistencies and contradictions between earlier and later performance evaluations was strong evidence of discrimination). *Cf.,* Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994) (plaintiff's burden in discrimination case is to show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons").

For this reason, it is very important to train supervisors on how to conduct performance appraisals and how to document performance issues, good and bad. These should include:

a. Be honest and accurate. Supervisors often are afraid to say that the employee is performing poorly. Reasons for this include human nature, fear that criticism will lead to even worse performance,

inflating reviews to make the supervisor look better, etc. What inevitably happens is that either: (1) the supervisor decides one day that she no longer can stand the employee's poor performance and has to get rid of him immediately; or (2) a new manager comes in and provides honest evaluation of the employee's performance and determines that the employee must go. In either case, the evaluations come back to haunt everybody.

In one published case, supervisors deliberately avoided confronting an African-American female employee about her poor performance – and "deliberately overstated" her performance evaluations in order to avoid starting a process that might lead to termination. When the employer reduced force, however, the employee was identified as one who could be fired to meet cost-cutting goals. The court held that the company had discriminated against the employee because, by not being honest with her, they failed to give her the same opportunity to improve her performance that it gave white employees, which may have led to her discharge. Vaughn v. Edel, 918 F.2d 517 (5th Cir. 1990).

b. Make written comments on the evaluation, and give specific examples of both good and bad performance. Avoid systems where the supervisor simply checks off boxes or chooses a number rating. Requiring specific examples helps both the employee and the company, and will be useful in any future litigation. For example, even if an employee meets expectations overall in a given year, there may be specific areas where she needs to improve. If the employee fails to improve in those areas, she may receive a "Below Expectations" the next year – after, inevitably, she has informed the company that she is pregnant or has an alcohol problem, or has complained about nefarious doings at the company, etc. Without the comments from the previous year, the sudden change in rating could look discriminatory. Requiring written comments also limits – though it cannot eliminate – the tendency to rate everybody as "meets expectations."

c. Provide specific information about objectively-measured performance, not simply subjective analysis like, "Jane is a good employee," or "Bob has a poor attitude." The supervisor should give specific examples of Bob's conduct that demonstrate his poor attitude.

d. Supervisors should keep notes during the course of the year about employee performance or conduct, for use in preparing annual or semi-annual performance appraisals. Otherwise, the last thing that happens will govern the whole evaluation. However: (1) monitor

what the supervisor is keeping in those notes – there could be a time-bomb ticking away!; and (2) the supervisor should keep notes about all of his or her subordinates, not just one or a few, or it will look like the supervisor is picking on those employees. *See, e.g.*, In re Novartis Nutrition Corporation, 331 NLRB No. 161, 171 LRRM (BNA) 1281 (August 28, 2000) *review denied, enforcement granted*, 23 Fed. Appx. 1 (D.C. Cir. 2001). (National Labor Relations Board found evidence of anti-union discrimination where supervisor kept notes only about pro-union employee who was vocal in complaints about management and did not keep notes about other employees).

e. The employee should be required to sign the performance evaluation, acknowledging receipt and review, if not agreement with it.

f. The employee should be given an opportunity to respond in writing to the evaluation, preferably on the form itself. Allowing the employee to have the opportunity to respond demonstrates the overall fairness of the process.

2. Documenting Disciplinary Action

When the employer has set up a disciplinary procedure, whether or not it is published to the employees, the employer should document each step of the disciplinary process. Accurate documentation of employee discipline is one of the most useful tools in defending subsequent litigation. Therefore, the disciplinary records should factually describe why the employee was disciplined and the nature of the discipline imposed.

a. Ideally, the disciplined employee should be required to sign an acknowledgement of receipt of the discipline. This will ensure that the employee has received notification of discipline and cannot subsequently deny it in litigation.

b. Additionally, it is important to explain (and document the explanation) to the employee the exact meaning of the discipline he or she has received. If, for instance, under the disciplinary procedures there is a difference between an "oral warning" and a "written warning," the difference between the two disciplinary actions should be explained to the employee, and the significance of the discipline imposed also should be explained.

c. If follow-up action is required by the disciplinary procedure, the employer should establish a reminder system or a "tickler." For example, if under the disciplinary system, the employer is to

remove a warning from the employee's file after a specified period of time, this system will remind the responsible person to investigate the situation at the appropriate time and remove the warning. If a finite period of probation is imposed, this system should remind the responsible person to make certain that a conscious decision is made as to whether the employee has completed the period of probation successfully.

E. MISTAKE FIVE – FAILING TO PROVIDE TRAINING ON DISCRIMINATION AND WORKPLACE HARASSMENT

Discrimination and hostile work environment cases continue to be among the most riskiest and most costly cases for companies. The availability not only of damages for lost wages and traditional tort injuries, but also the potential for punitive damages and attorneys' fees – which fees often exceed the amount of damages awarded – make the potential losses in such a case huge.

Obviously, prevention is the best defense. If the company can educate its workforce on these issues, many problems can be avoided. Even if a lawsuit is filed, the company can limit the damages, or even completely avoid liability, by showing that it had in place policies and procedures designed to prevent and remedy discrimination. *See, e.g.*, Faragher v. Boca Raton, 524 U.S. 775 (1998) (employer can avoid liability for sexual harassment if plaintiff unreasonably failed to take advantage of available complaint mechanisms); Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) (employer may avoid vicarious liability for discriminatory employment decisions of managerial agents, for purposes of imposing punitive damages, when those decisions are contrary to employer's good-faith efforts to comply with Title VII).

Merely having an EEO policy or a workplace harassment policy is not enough, however. "[M]ere promulgation of such a policy may well fail to satisfy the employer's burden." Brown v. Perry, 184 F3d 388 (4th Cir. 1999). *See also* Harrison v. Eddy Potash, 248 F.3d 1014 (10th Cir. 2001) (jury verdict for plaintiff affirmed, even though company had harassment policy, where evidence showed policy was not widely disseminated). The company must affirmative publicize and publish its policy. It must train its workforce on the issues, and it must enforce the policy.

Training, or the lack of training, is becoming a focus of the courts in evaluating employer's defenses to discrimination and harassment cases. Ignorance is not bliss. "[L]eaving managers in ignorance of the basic features of the discrimination laws is an 'extraordinary mistake' for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference [for the purposes of imposing punitive damages]." Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771 (7th Cir. 2001). "[A]n employer must at least adopt

antidiscrimination policies and make a good faith effort to educate its employees about these policies and the statutory prohibitions. Cadena v. Pacesetter Corp., 224 F.3d 1203 (10th Cir. 2000). "A dearth of antidiscrimination training during the time period at issue in [the] lawsuit could actually lead a jury to infer that [the defendant] did not, in fact, make a good faith effort to enforce such policies." Greene v. Coach, Inc., 218 F.Supp.2d 404, 414 (S.D.N.Y.2002). In an Americans With Disabilities Act ("ADA") case, the Tenth Circuit upheld punitive damages, finding an almost complete lack of training on the ADA and reasonable accommodation obligations:

> Wal-Mart's assertion of a generalized policy of equality and respect for the individual does not demonstrate an implemented good faith policy of educating employees on the Act's accommodation and nondiscrimination requirements. The evidence demonstrates a broad failure on the part of Wal-Mart to educate its employees, especially its supervisors, on the requirements of the ADA, and to prevent discrimination in the workplace

EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241 (10th Cir. 1999).

This rule is equally true in cases governed by state law. The New Jersey Supreme Court has ruled that an employer was not insulated from liability for sexual harassment, even though it had a well-publicized harassment policy, because the employer failed to provide training to supervisors and "failed to employ a meaningful sensing and monitoring mechanism to assess the soundness of its anti-harassment policy." Gaines v. Bellino, 173 N.J. 301, 801 A.2d 321 (2002). The Court stated that, for a sexual harassment policy to be considered effective enough to protect the employer from liability, it must include: (1) sexual harassment training, which must be *mandatory* for supervisors and managers and must be *offered* to all members of the organization; and (2) "effective sensing or monitoring mechanisms" to check the trustworthiness of the prevention and remedial structures available to employees in the workplace.

A number of states, moreover, hold employer's strictly liable for the discrimination and harassment committed by supervisors, so the preventative aspects of training are even more critical. *See, e.g.*, State Dept. of Health Services v. Superior Court, 31 Cal.4th 1026, 79 P.3d 556 (2003); Myrick v. GTE Main Street, Inc., 73 F.supp.2d 94 (D. Mass. 1999); Geise v. The Phoenix Company of Chicago, Inc., 159 Ill.2d 507, 639 N.E.2d 1273 (1994).

1. Training For Supervisors

a. Basic Concepts

Supervisor training should include at least basic coverage of the discrimination and other laws governing the workplace, so the supervisors at least know enough to know when they need to ask questions. What may be obvious to you may not be obvious to managers in your organization, even on very basic issues. *See, e.g.*, Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771 (7th Cir. 2001) (hiring manager did not know it was unlawful to discriminate against persons over the age of 40). When it comes to more complex issues, your line managers and supervisors will be even more ignorant of what is required. In EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241 (10th Cir. 1999), for example, the store manager, who had near-total control of hiring and firing, did not know the company had an obligation to reasonably accommodate disabilities of employees.

It also is important to train supervisors on unique aspects of applicable state law, for example, those that prohibit discrimination on marital status or sexual preference.

A primer on retaliation would also be wise so that, as discussed in Section G, *infra.*, the supervisor does not create a lawsuit by saying or doing something stupid.

b. Harassment Training

Managers and supervisors should receive the same basic harassment training that all employees receive – what it is, what not to do, what the company's policy is, what to do if you believe you have been harassed, etc. In addition, though, managers and supervisors also need to be trained on how to respond when employees complain to them, and what to do when they observe harassing behavior, even though no one has complained about it.

Where it applies, it also may be worthwhile to point out to the supervisors that many state civil rights laws permit individual supervisors to be held personally liable if they knew about harassment and did nothing to stop it – even though the actual harasser cannot be held liable. That often gets their attention.

c. General Management Training

It is amazing how many individuals are promoted to supervisory and management positions but never receive any training on how to be a

supervisor. From the standpoint of defending future litigation, these supervisory personnel should be trained on how to keep records and document things (including what not to put in writing), how to deal with disciplinary issues, how to fire people, what to say or not say in given situations. This will help the company by not only avoiding litigation, but by providing a strong source of evidence if it is unavoidable.

2. General Workforce Training

Obviously, the rank-and-file do not need such training. What is important, however, is training on workplace harassment. The training ideally should be done at or soon after hire, then on a periodic basis thereafter. If there is an incident, the company should consider refresher training, at least in the department where the harassment occurred.

a. What the Training Should Entail

* Review of the company anti-harassment policy;

* Examples of conduct that may constitute prohibited harassment;

* Examples of conduct that does not constitute unlawful harassment

* Ramifications of workplace dating;

* Responsibilities under the policy;

* What the company will do in response to a complaint of harassment or discrimination;

* Description of how to report harassment;

* Identification of the person or persons to whom harassment should be reported – including where to go if the designated person is the problem;

* What actions the company may take against those it determines have harassed others;

* Confidentiality;

* Anti-retaliation provisions.

b. Create Your Evidence Now

i. Document each employee's participation in the training, preferably by signed acknowledgement.

ii. Retain copies of the training materials for use as evidence in litigation.

F. MISTAKE SIX – FAILING TO PROPERLY INVESTIGATE AND REMEDY EMPLOYEE COMPLAINTS

As discussed above, the employer can limit its exposure for liability and/or damages by having an effective policy to prevent and eliminate discriminatory and unlawful practices. We already have seen how training is an integral part of such a policy. Equally important is that the employer actually must enforce the policy, and respond meaningfully to complaints lodged by employees. "The good-faith-compliance standard requires the employer to make 'good faith efforts to enforce an antidiscrimination policy.'" Cadena v, Pacesetter Corp., 224 F.3d 1203 (10th Cir. 2000).

This means that, when a complaint is lodged, the company must be prepared to investigate it, determine if a problem exists, take steps to remedy it and, just as importantly, document everything to preserve it for use in future litigation. Unfortunately, too often companies do not respond promptly or effectively. They may assign as investigators individuals who are ill-equipped – by training, experience, or temperament – to conduct a serious investigation. The individual may not have the skills to question witnesses well, may not understand the critical nature of documentation (or even realize that documents created in the course of such an investigation may someday be discoverable) or the importance of preserving it. Once the investigation is complete, companies often stumble when trying to remedy the situation, doing too much or too little, or in effect punishing the victim.

To avoid these common errors, which can escalate the potential liability of a case, companies need to take care in preparing for and executing these investigations.

1. Choose The Investigator Wisely

In 2003, a federal jury awarded $500,000 to a woman who was sexually harassed while working for the man primarily responsible for investigating incidents of harassment within the county government. Roberts v. Cook County, 2003 WL 23283054 (N.D. Ill. Jan. 21, 2003). Do not make the same mistake.

a. Ideally, the investigator should be experienced and be trained in conducting investigations.

b. The investigator should be a neutral "third-party," *e.g.*, someone from outside the company or, at least, from outside the department in which the employee works.

c. The investigator likely will be a witness in future litigation. Therefore, in selecting the investigator, you need to consider carefully how well the individual might perform as a witness and how credible he or she will be.

d. Will he/she be a decision maker on the discharge, or simply presenting the conclusions of the investigation to the decision makers? It is strongly recommended that the investigator NOT be a decision maker, if at all possible. The decision maker will have to evaluate the investigation and the investigator at some point, when determining whether good grounds for discharge exist.

e. Warning – If you choose yourself or another attorney as the investigator, the communications with the investigator might not be privileged. *See, e.g.*, Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 691 A.2d 321 (1997) (materials relating to sexual harassment investigation are not necessarily privileged simply because an attorney conducted investigation); Peterson v. Wallace Computer Services, Inc., 984 F. Supp. 821 (D. Vt. 1997) (employer waived attorney-client privilege by defending sexual harassment claim on ground that the investigation was adequate); Brooms v. Regal Tube Co., 1986 WL 8971 (N.D. Ill. 1986) (same). *But see* EEOC v. Lutheran Social Services, 186 F.3d 959 (D.C. Cir. 1999) (attorney notes not discoverable when investigation was conducted in anticipation of litigation, and therefore qualified for work-product privilege).

2. Conducting The Investigation

It is critical for the investigator to keep an open mind in the process, and to avoid an adversarial or prosecutorial attitude. He or she should consider any excuses or alibis the accused employee identifies, and interview any witness the employee identifies. He or she should treat the accuser in the same way. This may require more than one interview, with each person, depending upon whether there are significant differences in their stories. The investigator ultimately will have to gauge the truthfulness and credibility of everyone, and determine what their biases are.

a. Note: If the employee is not a supervisor, and demands the right to have a co-worker sit in on the meeting with him, the investigator may have to comply. This is referred to as the employee's "Weingarten" right, after NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), with held that unionized employees have the right under the National Labor Relations Act, 29 U.S.C. §151 ("NLRA") *et. seq*. to have a representative present for any interview the employee may reasonably believe might lead to disciplinary action. The NLRB extended the right to non-union employees in Epilepsy Foundation of Northeast Ohio, 331 NLRB 92 (2000), and this was upheld in Epilepsy Foundation of Northeast Ohio v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 904 (2002). The NLRB recently reversed its position on this again – holding that non-union employees do not have such a right, IBM Corp., 341 NLRB 148 (June 9, 2004) – but it is not clear what the continuing effect of the Sixth Circuit's decision will be.

i. Under the rule, if the company denies the employee's request to have someone present, the company may be guilty of an "unfair labor practice" in violation of the NLRA, 29 U.S.C. §§157, 158(a)i.

ii. However, this right extends only to "employees," as defined by the NLRA, and consequently, "supervisors" do not have this right, because they are not considered "employees" under the NLRA. A "supervisor" is defined as "any individual having authority…to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action.…" 29 U.S.C. §152(9).

b. Review All Documents That May Be Relevant. This may seem basic, but document review is hard work and the investigator may believe he has gotten what he needs through the witness interviews. Attorneys know, however, that documents can lead to new questions, or may show that there is more to the situation than comes across in the initial interviews. Remember, the plaintiff's attorney is going to be looking at documents in any future litigation, so your investigator should be looking at them now.

c. Prepare a Written Report or Summary. Bear in mind that this will be a trial exhibit and the investigator may have to rely upon it in testifying in deposition or at trial. Therefore, the report

should be clear and easily understandable. You may want to consider a user-friendly matrix or similar device in lieu of, or in addition to, a narrative report.

d. Ensure The Investigation Is Fair. Throughout the investigation, the investigator and the company must work to ensure that the process is fair. Perhaps even more importantly, it must appear fair to the participants and to any judge or jury that may later be reviewing the facts. The amount of time spent with witnesses, and ensuring that each witness was given a full opportunity to say his or her piece, will weigh on whether the process appears fair and whether employees trust the process. Without trust, the process – and therefore the policy – will be useless.

3. Take Appropriate Action Based On the Results of the Investigation

Once the investigation is complete, the company must act based on what it has discovered. Be very careful about a "rush to judgment," because you may be creating other issues. Griffin v. MDK Food Serv., Inc.,155 Ohio App.3d 698, 803 N.E.2d 834 (2004) (affirming $600,000 verdict for African-American restaurant manager fired for allegedly harassing teenage employees, where he offered evidence that defendant paid these women to fabricate the allegations against him).

a. Remedial Action If the Complaint Is True

If the company determines that there has been discrimination or unlawful treatment, it must take steps to correct the problem and ensure that it does not happen again. Courts consider "several factors in assessing the reasonableness of an employer's remedial measures: the temporal proximity between the notice and remedial action, the disciplinary or preventive measures taken, and whether the measures ended the harassment." Meriwether v. Caraustar Packaging Co., 326 F.3d 990 (8th Cir. 2003).

i. While discharge of the wrongdoer is an option, it is not required in every case. In Woodford v. Federal Express, 2004 WL 234396 (D. Minn. 2004), the court granted summary judgment to the company, despite finding that plaintiff had been subjected to hostile environment harassment by a co-worker, and even though it had not terminated the harasser. "Defendant's actions in reprimanding [the harasser],

placing a letter in his file, ordering him to avoid contact with plaintiff, and requiring him to attend additional diversity training, were sufficiently remedial, and the Court finds that no reasonable jury could conclude otherwise." However, you should be sure that whatever action you do take is sufficient to ensure that similar conduct does not happen again.

ii. Report back to the complaining party what steps you are taking to prevent any reoccurrence, so that he or she will know that the company has responded. You do not want the employee going to a lawyer or agency because of a mistaken belief that the company has done nothing.

iii. Consider providing additional training or changing policies to ensure that others do not engage in the same conduct in the future.

iv. Follow up with the complaining employee thereafter to make sure things are still okay.

v. Warn managers and supervisors about retaliation, and monitor the situation to make sure there is none. (see Section II.E). Be very skeptical if a proposal to discipline or discharge the individual is brought to your attention, or if the employee's performance evaluations suddenly take a downturn.

b. What To Do If You Believe the Complaint to Be Untrue

If as a result of the investigation, you believe the employee's complaint is unfounded, you should report this back to the complaining employee, as well as to anyone who was implicated by the complaint.

The threat of retaliation is probably even greater where the employee's complaint has proved wrong. Those accused understandably will be angry that a false allegation was made against them. You need to monitor the situation to be sure that liability is not created where it would not otherwise exist. (See Section II.E).

In all of this, the company should respond to employees' complaints promptly. What is "prompt" will depend on the specifics of the issue and the difficulty

involved in investigating it. A relatively simple, localized matter might be resolved in a few days' time. A complex issue, or one that involves numerous witnesses scattered among distant locations, on the other hand, may take months to investigate, evaluate, and resolve. The longer the investigation, however, the more important it is to remind those involved – particularly the complaining employee – that the investigation is proceeding.

G. MISTAKE SEVEN – FAILING TO PREVENT RETALIATION CLAIMS

The jury returned a verdict for the defendants on plaintiff's claims of sexual harassment and sex discrimination. So why do the defendants have to pay the plaintiff over $816,000.00 – including $225,000.00 in punitive damages and $315,000.00 in attorneys fees? Because the jury found that defendants had retaliated against the plaintiff for making complaints about the very alleged discrimination the jury found had not occurred! Kluczyk v. Tropicana Products, Inc., 368 N.J.Super. 479, 847 A.2d 23 (App. Div. 2004); *see also* White v. Burlington Northern & Santa Fe Railway Co., 364 F.3d 789 (6th Cir. 2004) (jury returned verdict for plaintiff on retaliation claim, and awarded punitive damages, even though it found for the defendant on the underlying sexual harassment claim).

Retaliation claims are more and more prevalent, and employees have an increasing number of legal bases on which to base them. Employees may be complaining about alleged discrimination, about alleged safety issues, about alleged financial irregularities, or any of myriad other things. An employee who makes a complaint essentially enters a protected category, and the company must approach any proposed job actions affecting such a person (*e.g.*, discharge, job transfer, suspension, warning, or even performance appraisal) the same way it would approach one affecting any other person in a protected category. Employee who make complaints are considered "heroes" in the public mind, and even approach an exalted status, to wit, *Time Magazine's* 2002 "Persons of the Year" were the "whistleblowers" from Enron, Tyco, and other companies.

Often, the most dangerous situation is where the employee has made a complaint or objection that is obviously incorrect, or even potentially false. Managers will see no problem in ridding the workplace of such an individual, either because the manager has been found by investigation to have done nothing wrong, or because the manager is angry at having been falsely accused. However, almost all of the applicable laws require only that the employee had a "reasonable belief" regarding the matter about which she complained; she does not have to have been correct in her beliefs in order have protection under these laws.

Consequently, an important, but often overlooked area of inquiry in approaching a proposed disciplinary action is whether the individual has made any complaints or protestations about things at the company. If so, the situation must be assessed to

determine if the complaint is something that is protected under the law of the applicable jurisdiction, and then to determine how to proceed in light of that. While making a complaint should not render an employee "bullet proof," it may change the way you approach the matter, including who you involve in the decision making process.

2. Sources of Protection From Retaliation

Federal and state laws protect employees from retaliation for engaging in certain activities,:

a. Engaging In "Concerted Protected Activity."

National Labor Relations Act, 29 U.S.C. § 157, § 158(a)(1) & (3) ("NLRA"). Many people make the mistake of believing that the NLRA covers only employees or activities relating to unions, or trying to form a union. This is not true, as the NLRA protects all employees from engaging in concerted protected activity. A classic example is that the employer may not discipline employees for complaining among themselves about their pay, even if the employer has a policy requiring employees to keep salary information confidential.

b. Making Safety Complaints.

Occupational Safety and Health Act, 29 U.S.C. §§ 651, 660.

c. Complaining About Or Opposing Commission Of Fraud And Financial Irregularities In Connection With Publicly-Traded Companies.

Sarbanes-Oxley Act, 18 U.S.C. §1514A.

d. Making Complaints About Wage And Hour Law Violations

Fair Labor Standards Act, 29 U.S.C. §201, 215(a)(3) and various state law equivalents.

e. Taking Medical Or Family Leave

Family & Medical Leave Act, 29 U.S.C. §2601 *et seq.*; Cal. Gov't. Code § 12945.2; District of Columbia Code §32-501 *et seq.*; *N.J.S.A.* 34:11B-1 *et seq.*

f. Filing Workers' Compensation Claims

Nearly every state prohibits retaliation against an employee for filing a worker's compensation claim. Some states even protect employees who make *false* workers compensation claims. Fla. Stat. Ann. §440.205; Mo. Stat. Ann. §287.780; W.Va Code §23-5A-1; Minn. State. Ann. §176.82.

g. "Whistleblowing"

See, e.g., New Jersey Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 *et seq.*; Cal. Labor Code § 1102.5; Fla. St.. Ch. 448.101 *et seq.*; Missouri St. Ann. §197.285 *et seq.*; N.Y. Labor Law § 740.

(i) There also is a substantial body of common law in most states that prohibits termination of an employee who complains about, or refuses to participate in, actions of the employer that are unlawful or violative of a clearly defined public policy. One of the seminal cases in this area is Peterman v. Teamsters Local, 174 Ca. App. 2d 184, 344 P.2d 25 (1959) where the court held that an employee had a cause of action for wrongful discharge when he was discharged for refusing to commit perjury in testifying before the Legislature.

(ii) Some states have expanded the theory even further, beyond situations involving "whistleblowing," to cases in which the circumstances of the termination itself are deemed to violate a fundamental public policy. For example, the New Jersey Supreme Court has held that an employee may state a claim for wrongful discharge if he or she is terminated for refusing to submit to random drug testing where the employee does not occupy a safety-sensitive position. Hennessey v. Eagle Coastal Refining, 129 N.J. 81, 609 A.2d 11 (1992).

2. Determining Whether the Employee Has Engaged in Protected Activity

a. Has the Employee Complained About Something the Law Protects?

This, of course, will depend upon what law is applicable, and this often is a function of state law. For example, the New York statute protects an employee from retaliation only where he has reported or objected to activity that "is in violation of law, rule or regulation *which violation creates and presents a substantial and specific danger to the public health or safety*." N.Y. Lab. Law § 740(2) (emphasis added). On the other hand, the New Jersey "Conscientious Employee Protection Act" (commonly referred to as "CEPA"), applies where the activity is one the employee "*reasonably believes*: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law … ; or (2) is *fraudulent* or criminal; or (3) is *incompatible with a clear mandate of public policy concerning the public* health, safety *or welfare* or protection of the environment." N.J.S.A. 34:19-3 (emphasis added) Thus, unlike a New York employee, a New Jersey employee is protected from retaliation even if his disclosure or objection does not relate to a substantial and specific danger to the public health or safety. *Cf.* Arizona Employment Protection Act, Ariz. Rev. Stat. § 23-1501(c) (protecting *inter alia*, employees who disclose or refuse to commit a violation of the Constitution of Arizona or the statutes of this state); Conn. Gen. Stat. § 31-51m(b) (employee who reports suspected violation of any state or federal law or regulation or any municipal ordinance or regulation to a public body; Fla. St. at ch. 448.102 ("violation of a law, rule, or regulation").

b. Must The Employee "Complain" or Merely "Refuse to Participate"?

Additionally, some of these laws protect not only employees who "blow the whistle" (*i.e.*, report or threaten to report an employer's unlawful activity to an outsider) but also those who merely refuse to participate in, or even merely object to, unlawful activity. *See, e.g.*, Fla. Stat. ch. 448.102(3); N.Y. Lab. Law § 740(2); N.J.S.A. 34:19-3(c).

In other states, the employee has no protection unless she has reported or threatened to report the activity to a law enforcement agency or other governmental entity. One feature these laws do have in common is a requirement that the employee notify the employer of the alleged unlawful activity, and give the employer an opportunity to correct it, *before* she reports it to an outside agency. *See, e.g.*, Conn. (Conn. Gen. Stat. § 31-51m(b)); California (Cal. Lab. Code § 1102.5); Colorado (Co. Rev. Stat. § 8-2.5-101); Hawaii (Haw. Rev. Stat § 378-62); Michigan (Mich. Comp.

Laws Ann. § 15.362). If the employee makes a report to an outside agency without first affording the employer notice and an opportunity to cure, the employee may have no protection from retaliatory discharge under the statute.

c. Has the Employee Raised the Complaint in a Reasonable Manner?

Though the company does not necessarily want to hang its hat on the proposition, an employee who complains or objects to an employer's allegedly unlawful practices generally must do so in a reasonable manner. An employee who is violent in his protests, damages property, or otherwise acts in an inappropriate manner in opposing the employer's practices may not enjoy the protection of these laws. Laughlin v. Metropolitan Washington Airports Auth., 149 F.3d 253, 259 (4th Cir. 1998) (when an employee's accusation is disruptive, disorderly, or insubordinate, it exceeds the scope of protected opposition activity). A complaint is protected "only if it is reasonable in view of the employer's interest in maintaining a harmonious and efficient operation." O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 763 (9th Cir. 1996). *See also* Olivares v. NASA, 934 F. Supp. 698, 705 (D. Md.) ("the fact that an employee may have [engaged in protected activity] gives him no license to vilify supervisors or co-workers or indeed to make every response of theirs to such vilification the basis of a claim for retaliation"), *aff'd in unpublished op.*, 114 F.3d 1176 (4th Cir. 1997); Kiel v. Select Artificials, Inc., 169 F.3d 1131 (8th Cir. 1999) (en banc) (affirming summary judgment against deaf employee who claimed he was discharged in retaliation for requesting an accommodation for his handicap, because he acted insubordinately when his request was denied).

d. Has the Employee Made a Legitimate Complaint?

As noted previously, this can be the most dangerous evaluation. The employee is entitled to protection from retaliation under all of these laws, even if she is incorrect, as long as she reasonably and in good faith believed she was making a legitimate complaint. On the other hand, the employee may not immunize himself from discipline for legitimate reasons by raising a complaint of discrimination. "Actions for retaliatory discharge will not be successful where allegations of employer misconduct are obviously raised as a 'smokescreen in challenge to the supervisor's legitimate criticism,' rather than voiced in good faith opposition to perceived employer misconduct." Porta v. Rollins Envt'l Servs., Inc., 654 F. Supp. 1275, 1284 (D.N.J. 1987), *aff'd* , 845 F.2d 1014 (3d Cir. 1988); Hanlon v. Chambers, 464 S.E.2d 741, 754 (W. Va. 1995) ("The employee's opposition must be . . . more than a cover for troublemaking"). *see also* Shallal v. Catholic Social Servs., 566 N.W.2d 571, 579 (Mich.

1997) (affirming summary judgment against plaintiff who claimed she was discharged in retaliation for threatening to report a matter of public concern, because her primary goal in making the threat was to protect herself from being discharged for a legitimate reason); Wolcott v. Champion Int'l Corp., 691 F. Supp. 1052, 1058-89 (W.D. Mich. 1987) (affirming summary judgment against plaintiff on his retaliation claim where he engaged in protected activity as an "attempted act of extortion" against employer to shield himself from termination).

This is a fine line, and the company needs to be very certain of the facts before it concludes the employee has knowingly made a false complaint. A miscalculation can result in substantial liability.

3. Should We Discipline/Discharge The Employee Anyway?

Again, the mere fact that the employee has made a complaint, even a legitimate one, does not insulate him or her from appropriate discipline for legitimate business reasons unrelated to the complaint. The shifting burdens of proof and persuasion are similar to those employed in a discrimination claim. At the end of the day, the question will be whether the company took the disciplinary action for the stated reasons or whether those are merely a pretext for discrimination.

The timing of when the disciplinary action is taken in relation to when the employee engaged in the protected activity will be a critical factor. If the employee is being disciplined for performance or conduct, the manner in which the company treated similarly-situated employees will be relevant; if the employee is receiving a harsher punishment than others, such conduct may be evidence of retaliation unless otherwise explained. Do we have the evidence to support the state reasons for our actions (*i.e.*, performance evaluations, disciplinary warnings, investigative reports, etc.)?

The company needs to be prepared to litigate the matter, and to present its evidence.

H. MISTAKE EIGHT – FAILING TO ENGAGE IN THE INTERACTIVE PROCESS WHEN CONSIDERING REASONABLE ACCOMODATIONS

The Americans With Disabilities Act and state civil rights laws require employers to reasonably accommodate the disabilities or handicaps of employees. "In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. §1630.2(o). The most common type of accommodation is one that allows the employee to perform the essential

functions of the job, despite his or her handicap. However, under the ADA and some state laws, "reasonable accommodation" may include allowing the employee to take unpaid leave, even beyond the amount of leave permitted under the Family and Medical Leave Act.

1. When Reasonable Accommodation Must be Provided

The employer must provide a reasonable accommodation if: (1) The employee is suffering from a "disability" and this fact is known to the employer; (2) the accommodation is necessary to provide the employee with equal employment opportunity; (3) it does not impose an "undue hardship" on the employer.

Please note that the employer need not grant any particular accommodation requested by an employee, so long as the employer can provide an alternative accommodation that is effective. EEOC Interpretive Guidance on 29 C.F.R.§1630.9; Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278 (11th Cir. 1997); Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1996); Gile v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996).

2. The Interactive Process

In determining the appropriate accommodation for an individual, the employer must engage in what the EEOC terms an "interactive process." "The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability." EEOC Interpretive Guidance to 29 C.F.R.§1630.9. "The interactive process requires communication and good faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process." Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 (9th Cir. 2001), *cert. denied*, 535 U.S. 1011 (2002); Beck v. University of Wisconsin Bd. Of Regents, 75 F.3d 1130 (7th Cir. 1996).

"Employers who fail to engage in the interactive process in good faith face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible." Humphrey, 239 F.3d at 1137-8.

3. Providing Alternative Accommodations If the First Is Not Effective

If the employer's proposed accommodation does not turn out to be effective, it must consider other alternatives, unless and until it determines that no reasonable accommodation is possible without undue hardship. *See* EEOC Enforcement Guidance on Reasonable Accommodation, Question No. 31. "Thus, the employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation *or where the employer is aware that the initial accommodation is*

failing and further accommodation is needed. This rule fosters the framework of cooperative problem-solving contemplated by the ADA, by encouraging employers to seek to find accommodations that really work, and by avoiding the creation of a perverse incentive for employees to request the most drastic and burdensome accommodation out of a fear that a lesser accommodation might be ineffective." Humphrey, 239 F.3d at 1138 (emphasis added). In Humphrey, the employer had offered flexible start time as an accommodation to a medical transcriptionist with obsessive compulsive disorder. When this proved to be ineffective, the employer was not permitted to simply discharge the employee. Instead it had an "affirmative duty" to explore other options, including allowing the employee to work from home or granting a leave of absence.

4. Do Not Automatically Assume A Proposed Accommodation Constitutes An Undue Hardship

An employer does not need to provide a reasonable accommodation if doing so would cause an "undue hardship." However, determination of undue hardship must be based on an *individualized* assessment of current circumstances that show that a specific reasonable accommodation would cause *significant* difficulty or expense. 29 C.F.R. §1630.15(d). The employer bears the burden of proving that the accommodation constitutes an "undue hardship." Flemmings v. Howard University, 198 F.3d 857 (D.C. Cir. 1999); Svarnas v. AT&T Communications, 326 N.J.Super. 59 (App. Div. 1999).

Nor is it necessarily sufficient to say that the cost of the accommodation outweighs the benefit of having the employee do the job, at least according to the EEOC, which takes the position that a "cost-benefit analysis" is not appropriate. "Whether the cost of a reasonable accommodation imposes an undue hardship depends on the employer's resources, not on the individual's salary, position, or status." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, Question No. 43 (March 1999). *But see* Borkowski v. Valley Central School District, 63 F.3d 131 (2d Cir. 1995) (where the court held that *plaintiff* bears the initial burden of proving that a proposed accommodation is "reasonable," and an accommodation will be reasonable "only if its costs are not clearly disproportionate to the benefits that it will produce"); *Accord* Gaul v. Lucent Technologies, Inc., 134 F.3d 576 (3d Cir. 1998).

5. Document Your Accommodation Efforts

It is important for the company to document its efforts to accommodate a disability. This should include: identification of the accommodations considered; the reasons for rejecting proposed accommodation or trying others first; the employee's experience with the accommodation; the company's follow-up with the employee to make sure the accommodation is effective; and what actions were taken if it was not effective.
You may need that documentation in litigation.

I. MISTAKE NINE – FAILING TO MONITOR AND CONTROL EMPLOYEE'S USE OF ELECTRONIC COMMUNICATIONS

With the increasing reliance on computers and electronic communication in the workplace, these provide vehicles for employee mischief and company liability. E-mails, the internet, electronic bulletin boards, and other materials created on company computers are sources for potential harassment claims. For an extreme application of this rule, see Blakey v. Continental Airlines, Inc., 164 N.J. 38, 751 A.2d 538 (2000) (although electronic bulletin board might not have physical location within employer's facilities, it might nonetheless have been so closely related to workplace environment, and beneficial to employer, that continuation of harassment on forum should be regarded as part of workplace, and if employer had notice that co-employees were engaged on such work-related forum in pattern of retaliatory harassment directed at employee, employer would have a duty to remedy that harassment).

As discussed in Section J, *infra.*, electronic documents and communications are readily discoverable in litigation. Many are unaware that a skilled computer forensics expert can retrieve and recreate even "deleted" emails and documents.

Computer technology also makes it easy for employees to take and disseminate confidential and proprietary information and trade secrets of their employers. The employee can surreptitiously copy critical business information and download it to a disc, CD, or home computer, or simply attach it to an email and send it out. Depending on your company's "backup" procedures, if the employee takes such action and immediately deletes it, you may have a difficult time tracking what has been done.

Because of this, the company needs to monitor and control its employees' use of computers and electronic communications.

This may implicate privacy concerns, however, since some courts extend employees privacy rights even in company-owned computers, unless the employer reserves the right to monitor and control them. In United States v. Slanina, 283 F.3d 670 (5th Cir. 2002), *vacated on other grounds,* 537 U.S. 802 (2002), the Fifth Circuit concluded that the employee had a reasonable expectation of privacy in the information he stored on his employer-owned computer. The court reached that conclusion based on the evidence that the employer had *not* disseminated a policy notifying employees that their computer or Internet use would be monitored, and thus that nothing stored on their computers should be considered private. Further, the plaintiff had password-protected his computer, and he always closed and locked his office door when he left the office. *See also* Leventhal v. Krepnak, 266 F.3d 64 (2d Cir. 2001)

(employee had legitimate expectation of privacy in the contents of his office computer in the absence of a policy explicitly limiting the scope of privacy in the computer).

On the other hand, in Muick v. Glenayre Elecs., 280 F.3d 741 (7th Cir. 2002), the employer had announced to its employees that it reserved the right to inspect company-owned computers at any time, The Seventh Circuit held that the employee had no reasonable expectation of privacy in the information contained on his company-owned computer. The court wrote:

> The laptops were [the company's] property and it could attach whatever conditions to their use it wanted to. They didn't have to be reasonable conditions; but the abuse of access to workplace computers is so common (workers being prone to use them as media of gossip, titillation, and other entertainment and distraction) that reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible.

Id. at 743. Similarly, in United States v. Angevine, 281 F.3d 1130 (10th Cir. 2002), the court held that a university professor had no reasonable expectation of privacy in the content of his university-owned computer, because the university had given notice, in several different ways, that he could not expect privacy in any information stored on his computer.

1. Best Practices For Electronic Monitoring Of The Workplace

In today's employment environment every employer should establish and maintain policies dealing with use of the company's electronic communication equipment and services providing as follows:

a. Clearly state that all electronic communications (e-mail, Internet usage, telephone, and voice mail) are subject to monitoring and that the employee consents to having his or her communications monitored.

b. There is no expectation of privacy in such communications.

c. The equipment and internet services are supplied by the employer for business purposes.

d. Any communications that take place using such services are the property of the company.

e. The use of personal passwords does not make a communication confidential.

f. Violation is subject to termination.

g. The policy should be acknowledged by signature.

An effective electronic communications policy should be the subject of training on a regular basis. It is also a good practice to implement "banner type" disclaimers reminding employees of the policy when they log on to their computers each day.

3. Actually Monitor Computer and Email Use

As with anything else, a policy is only as good as the enforcement. Obviously, if the company receives complaints about offensive emails or communications, it must take action to stop them, eliminate them from the system, and to discipline the transgressors. Similarly, employees surfing the internet at work and viewing inappropriate sites should be dealt with immediately. If there is unusual activity from an employee's computer, it should be reviewed and a determination made as to whether the activity is business-related and appropriate, or whether it is a sign of something else.

4. Protect The Company From Departing Employees

If an employee leaves, particularly to go to a competitor, most companies immediately shut the individual off from computer and email access. That is good, but it does not go far enough. Additional steps to protect the company should involve:

a. Having your IS Department review the individual's computer activity over the months and weeks leading up to the departure;

b. Having the IS Department examine the hard drive on any laptop the employee had access to, to determine if anything was downloaded or deleted;

c. As part of the exit process, directly ask the employee whether he has copied or downloaded *anything*, even if he or she thinks it's "personal information" that was copied;

d. Have the individual acknowledge in writing that she has copied and taken nothing, and has no discs, CDs, memory sticks, or similar information;

e. Inventory what the employee walks out with, to ensure there are no data storage devices.

> Even if you do all those things, you will not necessarily prevent the theft of company data by a determined and wily individual. However, if you do subsequently discover that she took confidential information, you will be in a better position to prosecute trade secret litigation by: (1) establishing that you had reasonable procedures to protect your confidential information; and (2) that the now-former employee is an untrustworthy and potentially dishonest individual who took and kept the information, and denied having done so when directly questioned about it (thereby limiting the former employee's ability to rely on the "Oops!" defense).

The computers and the data on them are the company's. Be sure your company treats them that way and takes all necessary steps to protect itself from employees' misuse.

J. MISTAKE TEN – FAILING TO PRESERVE AND RETAIN ELECTRONIC FILES AND EMAIL

A burgeoning area of dispute in litigation is the retention and discovery of computer records. As workers increasingly communicate electronically, and records are stored electronically, so too are attorneys increasingly seeking discovery of electronic records. Computer forensics experts can recover even deleted files and emails from computers, if the conditions are right. On the flip side, companies may be required to preserve records pending a lawsuit, and to prevent them from being automatically deleted or overwritten by users or the system itself; failing to preserve these records may lead to a charge of "spoliation of evidence," which could have dire consequences in a lawsuit.

A good example is the recent case of Wiginton v. CB Richard Ellis, 2003 WL 22438965 (N.D. Ill. October 27, 2003). In this class-action sexual harassment case, the plaintiff's counsel sent a letter to the defendant company's general counsel, asking that defendant preserve all documents – including computer data, emails, and even voicemails – relating to the subject matter of the litigation or which is likely to lead to the discovery of admissible evidence.

Upon receipt of the letter, an email communication was sent to employees, but it told them only to preserve all documents relating to the named plaintiff, and did not deal with anything else. The company continued to follow its normal document retention and destruction policies until several months later, when the court entered a preservation order. By that time, email backup tapes had been destroyed, and former employees' hard drives had not been saved, all of which was standard operating procedure. The plaintiff's counsel contended that the company's actions amounted to spoliation of evidence, and sought sanctions, including the suppression of defendant's Answer.

While the court did not impose that drastic sanction, it did find that the company had acted in bad faith, even though it simply followed its normal procedures, where it knew the information being destroyed in the normal course was sought by plaintiff:

> However, once a party is on notice that specific relevant documents are scheduled to be destroyed according to a routine document retention policy, and the party does not act to prevent that destruction, at some point it has crossed the line between negligence and bad faith. . . . [Defendant's] failure to change its normal document retention policy, knowing that relevant documents would be destroyed if it did not act to preserve these documents, is evidence of bad faith.

2003 WL 22439865, at 7. Further, this obligation arose even before the plaintiff's counsel sent the request to preserve records. The court found it had arisen as soon as the original EEOC charge was filed many months before. *See also* Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) (employer had duty to preserve backup tapes containing potentially relevant emails from key employees, and this duty attached when the relevant employees *reasonably anticipated litigation*, even though the employee had not yet requested tapes or even filed a complaint). [NOTE: In a more recent decision, the District Court Judge in Zubulake ordered that an adverse inference charge be read to the jury at trial because of the continued failure by employees of the company to preserve electronic data. Zubulake v. UBS Warburg LLC, 2004 WL 1620866 (S.D.N.Y. July 20, 2004)].

Thus, the failure to preserve electronic records and communications may not only harm the company – by destroying information that could support the company's case – but may actually put a sword in the hands of the plaintiff's counsel by allowing her to argue that the systematic destruction or overwriting of the data constitutes spoliation of evidence.

