



ZASHIN & RICH

EPIC FAILS! Top HR Errors for Management to Avoid

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Brad E. Bennett

- 20 years of experience as an employment lawyer and human resources professional.
- Represents clients in litigation, collective bargaining, arbitrations, and administrative proceedings before the EEOC, OCRC, SERB, SPBR.
- Assists clients with HR compliance, including day-to-day issues, discipline, handbook policies, job descriptions, investigations, leave issues, FLSA compliance, salary surveys, and internal HR audits.
- OSBA Certified Specialist in Labor and Employment Law.
- Selected to "Super Lawyers" each year since 2015.
- Listed in Best Lawyers in America for Employment Law- Management.



OSBA Certified Specialist
in Labor and Employment Law



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IMPACT OF GOOD MANAGEMENT PRACTICES

- Less discipline and other "HR" issues will arise
- When such "HR" issues do arise, good management practices ensure that:
 - the basis for the issue is well documented,
 - "just cause" and/or "legitimate business reason" is established.



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**TOP FAIL #1–
Errors in Performance Evaluations**

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Errors in Performance Evaluations**

- **TOP SUPERVISOR EVALUATION ERRORS:**
 - Not taking it serious.
 - Not making it a year-round process (“Employee surprise!”)
 - Not taking notes of the “good, bad, and ugly” in the year
 - Grading the person NOT the position
 - Doing evaluations late or sporadically
 - Thinking it is just an “HR tool”
 - Committing “Rater Errors”
 - Management Misspeak

Performance Evaluation Systems

- A performance evaluation system is made up of the following:
 - **Job Description** (HR tool)
 - **Continual Management Feedback** (Supervisor role)
 - **Discipline/Coaching** (Supervisor role)
 - **The Performance Evaluation** (HR Tool)

Most Common Evaluation Errors

- **Supervisor/Rater Errors**

- a) Primacy/Recency
- b) Leniency
- c) Central Tendency
- d) Halo/Horns
- e) Be Like Me/"Minnie-Me" Effect
- f) Inflation
- g) Length of Service Bias
- h) Morally Malignant



Most Common Evaluation Errors

- **Management Misspeak**

*Clear, Direct, and Positive
COMMUNICATON
is
ESSENTIAL!*



Miscommunication of Performance



Reducing Supervisor Evaluation Errors

Use a **check-and-balance system** that provides a second eye to review the proposed evaluation for rater error

- i.e. HR or other supervisor or department head



**The Best Protection
Against Rater Errors is
Rater Training!!**



TOP FAIL #2 – Interview and Selection errors



- **How many received “interview training” prior to conducting first interview?**
 - Not a good thing to learn through “trial and error”




TOP FAIL #2 – Interview and Selection errors

- **Top Fails:**
 - Not using structured questions/format
 - Hiring based upon “like-ability” instead of “Ability”
 - Failure to document decision/rational/ranking
 - Delving into protected/illegal areas
 - Failure to consider accommodation requirements
 - ADA/Religion/Pregnancy
 - Making promises that cant be fulfilled
 - Not valuing the “P.R.” aspect (late arrival/interruption)
 - Misuse of Social Media (electronic stored communications act)
 - Not knowing policies/CBA/job description



Basic Interview Format


- **Tier one questions:** Those asked to all applicants for the position.
- **Tier two questions:** These are “behavioral” or “situational” interview questions.
- **Tier three questions:** Those questions specific to each applicant (resume and “power words”)



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Social Media During Selection


- **How It Is Being Used by Supervisors.**
 - “Show me your social media profile”
 - “Friend me”
 - Google searching . . .
- **Challenges**
 - Discrimination?
 - Invasion of privacy?
 - Electronic Stored Communications Act?



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TOP FAIL #2– Case Examples

Discriminatory Interview Questions by One Member of a Panel Taints the Whole Process
 † *Barbano v. Madison County, 922 F.2d 139 (1990)*



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TOP FAIL #2– Case Examples

Never a good idea to say, “We can’t hire you, your pregnant”
↳ *EEOC v. High Speed Inc. (2011)*



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TOP FAIL #3 – Discipline Errors




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- **Failure to document.**
 - Attendance issues never addressed before they are problems
 - “Attitude” problems (lack of follow-up)
 - Performance issues – were they ever discussed and documented in the evaluations?
- **HR Answer:**
 - If it isn’t documented – IT DIDN’T HAPPEN!
- **Just as Bad –**
 - Using words in discipline notice that actually help an employee’s case!
 - *“When we met today I explained that your report of harassment was unfounded. You then became upset and I didn’t appreciate your tone. You are hereby suspended for your behavior.”*



**TOP FAIL #4 –
“You’ve Got a Friend in Me . . .”**

- **The Boss as “my buddy”**
 - Keep relationships professional
 - Results in favoritism allegations
 - Results in disparate treatment claims
 - Reduces chances of coworkers “complaining” about the Boss’ buddy for fear of retaliation
 - Decreases moral of other staff.
- **Avoid off-duty conduct with staff**
 - A boss and an employee go into a bar . . .
- **Avoid romantic relationships!!!**
 - Harassment





**TOP FAIL #5 –
NOT INVESTIGATING COMPLAINTS!**




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- **HARASSMENT COMPLAINTS**
 - Require “prompt, remedial action” by manager/employer once alleged.
 - No “magic words” required.
 - Does not have to be in writing.
 - Follow policy (contact HR Counsel!)
- **What if the employee says “just telling you in confidence” and doesn’t want you to do anything??**





**TOP FAIL #5 –
NOT INVESTIGATING COMPLAINTS!**

- **Investigate Workplace Bullying too**
 - Even if no “policy” – should be investigated under the harassment policy.
 - Even if behavior does not violate harassment law – it may still violate policy.
- **Do not permit/allow harassing or retaliatory behavior**
 - Inappropriate jokes/kidding
 - Do not “welcome” harassment
 - Retaliation is a separate infraction!



**TOP FAIL #5 –
NOT INVESTIGATING COMPLAINTS!**

- **Includes off-duty behavior!**
- **Includes statements/actions over social media!**

HARASSMENT QUIZ

Do any of the following constitute harassment? ANSWER – DEPENDS.

- Another employee telling a sexually explicit joke?
- An employee putting his hand on another employee’s shoulder?
- An employee asking another employee out on a date?
- Fact-based inquiry
- Welcomed/encouraged?
- Told to stop?
- Frequency/severity

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**TOP FAIL #6 –
NOT PROVIDING REASONABLE ACCOMMODATIONS!**

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- **Required to supply a “reasonable accommodation” to enable an employee to perform the “essential functions” of the job.**
 - ADA
 - Title VII (Religion, Pregnancy)
- **Must engage in an interactive process in order to determine “reasonableness”**



**THE INTERACTIVE PROCESS
IN 8 STEPS**

1. **Employee requests** accommodation
2. Employer **examines** the job and determines essential functions
3. Employer consults with employee to **learn about physical/mental abilities** as they relate to the essential functions
4. Employer makes individualized determination whether employee poses **direct threat**, and if threat can be removed by reasonable accommodation

THE INTERACTIVE PROCESS IN 8 STEPS

5. Employer and employee identify potential accommodations (**interact**)
6. Employer considers whether the accommodation would impose an **undue hardship**, and other alternatives must be considered.
7. If reasonable accommodation is available, **employer provides** it in a timely manner.
8. Be sure to **follow-up** to ensure accommodation is working.


FOLLOW ACCOMMODATION POLICY!


TOP FAIL #6– Case Example

Consider Religious Accommodations During the Interview Process

✦ *EEOC v. Abercrombie and Fitch*, 789 F.Supp.2d 1272 (2015)





HIJAB DISCRIMINATION




TOP FAIL #6 CASE EXAMPLE

Is a one-eyed firefighter protected under the ADA?



**FIRE DEPARTMENT
CASE**

- Firefighter of 9 years has off-duty accident that blinds his right eye. His doctor and city physician clear him to RTW without restrictions.
- Chief called city physician and convinced him to switch his opinion partially due to National Fire Protection Association (NFPA) guidelines making the operation of fire vehicles in an emergency mode with lights and sirens an “essential function.” – city physician says not cleared now.
- Firefighter requests to RTW without having to drive or, alternatively, switched to fire inspector duties.
- City declines both and terminates his employment.





**FIRE DEPARTMENT
CASE**

- Were the national guidelines adopted? Employee said “no” – City supplied nothing in writing to verify.
- Is driving an emergency vehicle an essential function for a firefighter? Here, the job description said “may” operate emergency vehicles – not “shall.”
- Is having binocular eyesight an essential function for Firefighters?
- **Rorrer v. City of Stow**, 743 F.3d 1025 (6th Cir. 2014)

**FAIL #7 (TOP EPIC FAIL!)
OUT OF DATE HANDBOOKS AND JOB DESCRIPTIONS!**

- Having updated policies and job descriptions is crucial!
 - Misapplying (or not applying) policies and not capturing essential functions in job descriptions may result in discipline being overturned OR litigation!

THANK YOU!

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