NOVEMBER 03, 2012

SET UP TO FAIL? – EMPLOYER'S PLAN BACKFIRES

ONE LAST CHANCE OR SET UP TO FAIL?

Faced with an underperforming employee, an employer will often give the employee a chance to prove himself one last time before termination. Sometimes that approach can backfire if not done carefully – especially if the employee can claim some legal protection – like using FMLA.

POOR PERFORMANCE . . . POOR HEALTH . . . POOR TIMING . . . POOR OUTCOME

A sales account manager for a company making corrugated packaging suffered chest pains and heavy breathing and was admitted to the hospital where he learned that he had a heart blockage and would have to undergo an angioplasty procedure. For that he was put on intermittent FMLA leave by his employer.

Five days before the scheduled procedure, his boss called him to go over his year-to-date sales figures. During the call, his boss also pointed out that for at least two years the account manager's sales volume had been declining and that if it didn't improve he would be fired. The account manager was surprised because he had not been disciplined or warned about his performance previously. Then, on the day of the scheduled angioplasty procedure, his boss called again and said he would be in town the next day to observe his sales technique in a "ride around." Normally a sales account manager needs at least a week to set up sales calls and prepare for them. Nevertheless, the account manager did arrange for one call and did one cold call with his boss. The sales calls did not go well. Even the account manager agreed that it could have gone better. Ten days later the account manager was fired for "poor performance."

THE JURY WILL DECIDE IF THIS WAS A SETUP

The account manager sued for FMLA interference and retaliation, but he lost at the lower court on the company's motion for summary judgment. The lower court held that the stated reason was a legitimate reason and the account manager had failed to raise any objection with his boss when he was given only one day to set up the calls. He appealed, claiming that the stated reason for his discharge was a pretext and that he was **set up to fail** because the one day he was given to schedule sales calls "guaranteed" poor performance. This time the account manager won – at least he will get to try to convince a jury that he was set up to fail by his employer in retaliation for going on FMLA leave.

The appeals court in ruling for the account manager and setting it for a jury trial said several important things that all employers should understand:

- Nothing requires an employee to object to perceived unfairness by their employer;
- In this case, the failure to object didn't change the inference that the boss's request for a ride along was "suspicious";
- Although the employer argued that there were independent reasons besides the poor ride around performance to fire the account manager, the account manager disputed that argument with evidence that those "other reasons" were inaccurate and were even admitted to be by his boss;
- Finally, if the account manager's prior performance was so bad, as the employer argued, his commissions would have declined, but they did not.
- Because of these "suspicious" actions and explanations by the employer, the jury will have to figure all this out.

Now all of this doesn't mean that the employee will ultimately win or the employer ultimately lose this case. That will be up to the jury to decide when they hear all the evidence and decide if the account manager was fired for poor performance or was set up to fail in an attempt to hide the real reason – his use of FMLA.

THE LESSON

The lesson here for employers is to avoid a setup – or even the appearance of a setup. If it looks "suspicious," it's likely the jury will think so,

THIS IS AN ADVERTISEMENT
© 2002-2024. Hall, Render, Killian, Heath & Lyman, P.C. All Rights Reserved.

too. As always, be able to articulate the honest reasons for the action and back those reasons up with contemporaneous documentation.

If you have any questions, please contact Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney.

THIS IS AN ADVERTISEMENT
© 2002-2024. Hall, Render, Killian, Heath & Lyman, P.C. All Rights Reserved.