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CORPORATE RESTRUCTURING: RISK MANAGEMENT TIPS FOR MANAGERS/SUPERVISORS

Kimberly J. Korando
Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P.
Raleigh, North Carolina
919.821.6671
kkorando@smithlaw.com

I. Courts continue to be willing to dismiss claims before trial when management can justify its decisions with certain types of proof.

A. Presenting proof that will allow the court to dismiss the claim is especially important because claims that proceed to trial most often result in a judgment against management. These judgments often are not based on a violation of law but rather sympathy for the individual who lost his or her job.

B. Remedies can be significant and interfere with future personnel decisions.

1. Monetary Awards: Example – A Wake County jury awarded \$1.3 million to an employee terminated in a corporate reorganization.

2. Reinstatement: Preferred remedy in federal courts.

3. Injunctions and other court orders mandating court supervision of future personnel decisions.

C. These remarks should not discourage you from making the decisions which you believe are the right ones; rather, they are offered to help you make the decisions in a way that will maximize the likelihood of you defending them successfully in subsequent legal challenges – and minimize the chance that a court will undo them and interfere with future personnel decisions.

II. Things to know about litigation arising out of reorganizations.

A. The company will be required to identify the decision-maker(s).

1. This individual almost always becomes the focus or target of the plaintiff's case. In some cases, he or she may be named as a defendant.

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2. Once the focus is on the decision-maker, then the scope of inquiry can go beyond the specific decision being challenged to all past and present personnel decisions made by this individual.
 3. All of the decision-maker's records, files and other documents relating to personnel decisions; past personnel decisions; and comments and other workplace demeanor become fair game. The plaintiff will look for things he or she can argue are evidence of a pattern/bias.
- B. Once the company establishes a staffing process, the court expects you to know about it, understand it and follow it.
1. Deviations from a company policy, practice or procedure such as the staffing process can serve as evidence of discriminatory intent.
 2. Such deviations can be especially damaging to the defense of a manager who is named as a defendant.
 3. Situations may arise where following the process may not be appropriate. In these cases, the deviations should be authorized in advance by the appropriate level of higher management – not the decision-maker. The reasons justifying the deviation and approval should be documented carefully.
- C. The company will be required to articulate a reason for each staffing decision and present proof to support it.
1. Preparing for cross-examination: The importance of the decision-maker relying on personal observation, when possible.
 - a. When personal observation is not possible, consult with individuals who have first-hand information.
 - b. Always consult with the immediate supervisor(s). Failure to do so has led to judgments against the company.
 2. After leaving the staffing workshop, always verify the information on which the selections were made.
 3. The importance of historical documentation.

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- a. Consistent documentation.
 - b. Inconsistent documentation/evaluation inflation.
 - i. Using the ranking process to minimize the impact of bad past documentation.
- D. The plaintiff's case may target your weighting of specific selection criteria.
- 1. Check your weighting of selection criteria against job descriptions, accountabilities and expectations.
 - 2. Positions with skill set changes, etc. are especially vulnerable to these challenges – be sure the changes are reflected in a new job description prepared before the decision is challenged.
- E. Challenges often come from individuals who were not considered for the position. Be sure that all individuals who are at least minimally qualified are considered.
- F. Decisions cannot be influenced by race, gender, age, health conditions, etc.
- 1. Nevertheless, too many companies are defending cases because of unfortunate comments by decision-makers, e.g., “new blood,” “fresh ideas,” “old dogs,” etc.
 - 2. Everyone in this room is a potential witness.
 - 3. Limit comments to selection criteria – skills, ability, demonstrated performance and not protected class attributes or family matters.
- G. Significant changes in pre- and post-reorganization workforce demographics can serve as evidence of discrimination.

III. Documentation

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A. All documentation is subject to disclosure in a lawsuit. Recent changes in the rules governing civil litigation may require the company to disclose documents that previously may have been protected.

B. All documentation should be prepared only after careful consideration of its impact on the defensibility of your staffing decisions.

C. Do not prepare any document purporting to set forth the reasons for any staffing decision unless it is a letter or memorandum to your lawyer asking for legal advice based on those facts.

D. Once prepared, documents should not be destroyed unless the destruction is consistent with a corporate document retention policy.

1. The destruction of documents used in staffing decisions can raise a presumption that the documents in question contained evidence favorable to the plaintiff's case.

IV. Affirmative Action Plans (federal contractors only)

A. Each department is covered by an affirmative action plan (AAP) which has goals set by the department manager.

B. In making the staffing decisions, remember the AAP. Although you may decline to make a staffing decision favoring a minority or female employee because he or she is not the best qualified candidate, you must be able to testify truthfully that the AAP was considered.