



Bringing a Knife to a Gunfight: *The Problem of Under-trained Supervisors*

By A. Kevin Troutman (Houston)

In a culture of empowerment, where so many employers strive for a leaner, flatter management hierarchy, supervisors are increasingly called upon to make risky, potentially costly personnel decisions. This is an especially dicey responsibility during tough economic times, when disgruntled former employees are having a more difficult time finding work. Unless they have enough training to know when and how to seek assistance, these supervisors are flirting with disaster.

The Law Does Not Always Mesh With “Common Sense”

Don't conclude that it's enough for supervisors to understand that they cannot base employment decisions on race, age, gender or another protected characteristic. That may be common sense, but consider just how counter-intuitive other laws can be. For example, an employee who is *not* disabled can bring a viable claim under the Americans with Disabilities Act (ADA).

In addition, an otherwise ineligible worker can successfully sue to enforce rights under the Family and Medical Leave Act (FMLA). And an employee in a union-free workplace can show that his employer committed an unfair labor practice. Many new wage and hour lawsuits are also cropping up and unions are working hard to organize healthcare workers. To top it off, new standards from the Joint Commission on Accreditation of Healthcare Organizations will make it more important than ever to deal with rude language or hostile behavior in the workplace. This reality is sobering indeed.

With these and other challenges in mind, supervisors obviously need at least enough training to help them identify potential problems at an early stage. In fact, allowing them to go into the fray under-trained is a bit like sending them into battle without the weapons they need.

Training Should Emphasize The Supervisor's Role As A Leader

Besides providing vital substantive knowledge, training strengthens supervisors in another important way. It emphasizes their role in shaping the work of others. Without training, the vast majority of supervisors do not consider personnel decisions to be among their highest priorities. Nurses focus primarily on delivery of patient care, as they should. But supervisors and managers need to recognize that their actions send messages even when they do nothing. A common example occurs when supervisors fail to address poor or disruptive behavior in the workplace. This inaction demoralizes other workers.

Supervisors also need to understand that the mere absence of “bad intentions” is insufficient keep them out of hot water. Many do learn this lesson the hard way, when they are forced to deal with a stressful and costly EEOC charge or a lawsuit. Supervisors also need knowledge and skills when it comes to initially assessing complaints or problems. We've found over the years that the actual facts often don't match initial reports; yet busy managers can find it awfully tempting to act solely upon the first report they receive.

Almost all supervisors understand that documentation is critical, but without training, they may create a documentation trail that actually does more harm than good. None of these skills come naturally. They must be developed through training.

Do Not Let Supervisors Get Blindsided By Tricky Issues

During training, a manager can learn how a perfectly healthy, able-bodied employee can still bring a viable ADA claim by proving that he was “regarded as” disabled. Of course unguarded, off-the-cuff workplace remarks about an employee being “sick,” “crazy” or “disabled” could be powerful evidence to support such a claim. Well-informed supervisors not only avoid making such comments – they help ensure that no one else in their department does either.

The FMLA is also tricky in that an otherwise ineligible employee may bring a Family Medical Leave claim based solely upon an employer's mistaken representation that he was eligible. With changes to the ADA and FMLA looming on the horizon, training in these areas is likely to

become even more important.

Further, training can help a supervisor understand why it violates the National Labor Relations to flatly prohibit employees from discussing salaries among themselves. They may also learn several reasons why it would be a mistake to terminate a pair of nurses who refuse to report to work until the hospital does something about a physician who has been acting abusively in a patient-care area.

Even more importantly, training helps supervisors recognize what they **can and should** say and do in these situations. It also emphasizes the need to call upon a human resources or other qualified representative when personnel issues begin to get complicated.

There Is No Time Like The Present To Get Started

After this year's elections, more workplace legislative changes are likely. These changes will probably make it even more bewildering for untrained supervisors and managers to navigate through the burgeoning maze of federal and state employment laws. In fact, one change could make it far easier for unions to organize workers and there even appears to be some support for lifting the statutory cap on damages in Title VII cases. In other words, there is no time like the present to begin assessing your supervisors' training needs and planning to address them.

One final tip. Before you begin training, review your employee handbooks to ensure that policies are up-to-date and that they accurately reflect your organization's current practices. And, of course, call us if you have any questions.

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Exempt or Non-Exempt?

The Answer Isn't Always Easy

By Karen Gieselman (Columbia)

Since 2001, the Labor Department's Wage and Hour Division has recovered over \$1.25 billion in back wages. That's not a typo. Last year alone, the Department recovered \$220,613,703 in back wages, a record, which represented a nearly 70% increase in back wage recovery since 2001.

The past few years have also seen a dramatic increase in employee lawsuits under state and federal wage and hour laws. Employees are filing individual and collective (class) actions in record numbers and many are recovering large monetary awards. Given the current state of affairs, all employers should be aware of the fundamental provisions of federal and state wage and hour laws.

Professional Exemptions Not Always Easy To Identify

The Fair Labor Standards Act (FLSA) requires employers to compensate employees at one and one-half times their "regular rate" of pay for all hours worked in excess of forty hours in a workweek. Several exemptions exist, but they are narrowly tailored. For example, an employer is not required to pay overtime to any employee employed in a bona fide executive, administrative or professional capacity, among others. Healthcare employers often make use of the professional exemption for several classifications of employees.

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To qualify for the professional exemption, employees must be paid at least \$455/week on a salary basis and their primary duty must be the performance of work "[r]equiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." A recent case in Pennsylvania illustrates the risk of classifying any employee as exempt without verifying the job requirements and the employee's duties. *Chatfield v. Children's Services, Inc.*

Stephen Chatfield was a truancy case manager who performed duties akin to that of a social worker. He assessed the needs of children and their families, recommended treatment, and testified in court proceedings. Chatfield argued that he did not exercise independent discretion and judgment because he was accountable to a supervisor.

The court rejected his argument, relying on a three-part test contained in the federal regulations: 1) work requiring advanced knowledge; 2) customarily acquired by a prolonged course of specialized intellectual instruction; 3) in a field of science or learning.

The court determined that Chatfield's job indeed required advanced knowledge, because he exercised discretion to determine the proper treatment for a child and was responsible for ensuring that each child and their family received proper resources. The court accepted his supervisor's testimony that "90% of the time" case managers used their own discretion to make a complete assessment of a child's needs. The supervisor almost always agreed with the case manager's assessment.

So the decision turned on whether Children's Services met the requirement that the advanced knowledge be obtained through a "prolonged course of specialized intellectual instruction." The company required case managers to possess a bachelor's degree in social work, human services, or a related field, plus three years of work experience providing community-based social support, or alternatively seven years of work experience providing community-based social support.

Chatfield argued that since he was "only required to have a bachelor's degree, and not an advanced degree, and the degree could be in a 'related field,' and not a specific field, the position [was] not exempt." And in fact, a DOL Opinion Letter had concluded that an employer who required case workers to possess a bachelor's degree in a "social sciences" field could not classify such employees as exempt.

But in this case, the court rejected Chatfield's argument because Children's Services required case managers to possess a bachelor's degree in social work, human services, or a related field. That's more narrow than "social sciences" which can include history, political science, etc.

This case demonstrates the importance of regularly auditing your job descriptions and classification of employees to ensure compliance with the law. Slight variances in job duties, organizational structure or job descriptions/requirements can mean the difference between proper classification and a visit from the DOL.

The good news is that the federal regulations have largely taken the guess work out of determining whether some healthcare employees are considered exempt professionals. For example, they provide that registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. Similar provisions address certain dental hygienists and physician assistants, as well as some registered or certified medical technologists.

Whether radiology technologists, emergency medical technicians, paramedics or social workers can be exempt, professional, employees is not always clear. As the *Chatfield* case showed, even though all of these employees generally exercise some discretion and judgment and are required to possess specialized education/training there is no simple, one size fits all answer. For these positions and others, employers must conduct a thorough, job-specific analysis to determine whether its employees are properly classified. If you need help with the analysis, give us a call.

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Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters