

An Employment Law Primer— What the Business Advisor Needs to Know

{ *Representing the Ongoing Business Deskbook Series*

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The Premise for Our 60
Minutes Together:
*Practical Employment Law
Questions Your Clients
May Ask You, The
Business Advisor*

1. Liability Prevention 101, or, what does an employment discrimination claim look like?
2. An employee has told me about a disability that's making work difficult—now what?
3. I've identified an awful situation where sexual harassment might be occurring—what's the law on that?
4. I've got to fire an employee—how do I tell her?
5. Something has gone wrong at my client's workplace and we need to investigate—what shall we do?
6. An employee just told his manager he thinks we're acting illegally but we think he's wrong—can we fire him?

Our 60 Minutes Together



{ *Primer: an elementary textbook that serves as an introduction to a subject of study*

When in doubt, refer it out.

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Your Client's Question:

I need some "Liability Prevention 101," so in other words, what does an employment discrimination claim look like?

State and Federal Anti-Discrimination Law

Title VII and the Minnesota Human Rights Act collectively protect:

- ⊗ Race
- ⊗ Color
- ⊗ Creed*
- ⊗ Religion
- ⊗ National origin
- ⊗ Sex
- ⊗ Marital status*
- ⊗ Status with regard to public assistance*
- ⊗ Familial status*
- ⊗ Membership or activity in a local commission*
- ⊗ Disability
- ⊗ Age*
- ⊗ Sexual orientation*
 - ⊗ sex stereotyping under Title VII
 - ⊗ transgender discrimination/harassment

State and Federal Anti-Discrimination Law

Title VII and the Minnesota Human Rights Act collectively protect:

- ⊗ Both protect employees for engaging in “protected conduct”
 - ⊗ Opposing a practice forbidden under the Title VII/MHRA
 - ⊗ Filed an administrative charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII/MHRA
 - ⊗ Associating with a protected class
 - ⊗ Seeking an accommodation for a disability

- ⊗ Adverse employment action
 - ⊗ Discharge
 - ⊗ Demote
 - ⊗ Refuse to hire/re-hire
 - ⊗ Transfer to a less desirable position
 - ⊗ Engage in verbal or physical abuse
 - ⊗ Increase scrutiny

State and Federal Anti-Discrimination Law

What Does A
Claim Look
Like?

State and Federal
Anti-
Discrimination
Law

Example 1:

Employee B has been an employee of Sprocket Corp. for 35 Years. He is 62. Sprocket Corp. is in dire financial straits and needs to layoff 500 employees. 100 of these employees must be laid off in B’s department. In making the decision on who to layoff, Sprocket Corp’s Chief Financial Officer sends an e-mail and says “we need to maintain those employees who will ensure vitality in operations moving forward. We need to make sure our employees have the energy and enthusiasm to keep this business alive.” B is selected for layoff. Of the 200 employees in B’s department, 50 are over the age of 40. 35 of the 50 employees over 40 in B’s department are selected for layoff.

What Does A
Claim Look
Like?

State and Federal
Anti-
Discrimination
Law

Example 2:

Employee J has received favorable performance reviews at Widget Enterprises for the last 5 years. In 2015, however, her sales numbers decreased dramatically. She explained to her supervisor that her sales slumped because she was recently diagnosed with a serious chronic pain issue that has interfered with her ability to work her scheduled hours. She requests that she change her hours to a later sales shift, from 12 pm to 8 pm, when her pain is more manageable. 2 months later, after asking to work a later shift, J is fired by Widget Enterprises. Widget Enterprises cites Employee J's drastically decreased sales numbers.

How Is A Claim
Established?

State and Federal
Anti-
Discrimination
Law

↳ Direct Evidence

- ⌘ specific link between some discriminatory/retaliatory animus and the decision at issue.
- ⌘ conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory/retaliatory attitude
- ⌘ sufficient to support an inference that discriminatory/retaliatory attitude more likely than not was a motivating factor. *Schierhoff v. GlaxoSmithKline*, 444 F. 3d 961, 966 (8th Cir. 2006)

How Is A Claim
Established?

↳ Circumstantial Evidence

⌘ *Prima facie* case; *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)

- ⌘ member of a protected class or engaged in protected conduct;
- ⌘ met employer's legitimate expectations;
- ⌘ suffered an adverse employment action; and
- ⌘ circumstances create a causal connection between the protected conduct/protected class and the adverse employment action
 - ⌘ Temporal proximity alone?

State and Federal
Anti-
Discrimination
Law

Your Client's Question:

An employee has told me about an impairment that's making work difficult and asked for help—now what?

Disability
Accommodations

The Simple Answer:

State and federal laws require employers to offer reasonable accommodations to qualified disabled workers that enable disabled employees to complete the essential functions of his or her job.

∞ 42 U.S.C. § 12111(10); Minn. Stat. § 363A.08, Subd. 6

Disability Accommodations

Step One: Is my client's employee a qualified disabled worker?

∞ Qualified?

∞ Probably—because the person is hired to do the job already.

∞ Job Candidate—the test under narrower Minnesota law is: could this person perform the essential functions of the job “with an accommodation?” *See* Minn. Stat. § 363A.03, Subd. 36 and page 2-22 of our chapter for some nuance.

Disability Accommodations

Step One: Is my client's employee a qualified disabled worker?

⊗ Disabled?

- ⊗ (1) has a physical or mental impairment that substantially limits (for ADA) or materially limits (for MHRA) one or more major life activities;
- ⊗ (2) has a record of a substantially limiting impairments; or
- ⊗ (3) is regarded as if they have a substantially limiting impairment
 - ⊗ 42 U.S.C. § 12102; 29 C.F.R. § 1615.103; Minn. Stat. § 363A.03, Subd. 12.

Disability Accommodations

Step Two: The employer's obligations to the qualified disabled employee who asked for help.

- ⊗ Engage in the "Interactive Process" (document it!); and then
- ⊗ Offer an Accommodation, or
- ⊗ Decline an Unreasonable Accommodation

Disability Accommodations

Your Client's Question:

I've identified an awful situation where sexual harassment might be occurring—what's the law on that?

Sexual Harassment Law

Harassment/
Hostile Work
Environment
Claims Under
Title VII and
MHRA

Sexual
Harassment Law

⊗ Harassment/Hostile Work Environment

- ∅ belongs to a protected group (usually, race-or gender-related);
- ∅ subjected to unwelcome harassment;
- ∅ the harassment was based on a protected class;
- ∅ the harassment affected a term, condition, or privilege of employment; and
- ∅ the employer knew or should have known of the harassment and failed to take proper remedial action

<p>What Does A Claim Look Like?</p>	<p><u>Example 1:</u></p>
<p>Sexual Harassment Law</p>	<p>Employee D works at a restaurant and begins dating Employee R, a non-supervisor. After several months, D breaks up with R. R continues pursuing D. He would catch her in the walk-in cooler in the back of the restaurant and corner her, telling her how much he loves her. He would touch her shoulder and waist area constantly without invitation during the workday. He would constantly make sexual remarks to her and go into graphic detail. This continued for 4 to 5 months. D went to her supervisor, but only said she felt uncomfortable about working with R. No one else knew about the conduct.</p>

<p>What Does A Claim Look Like?</p>	<p><u>Example 2:</u></p>
<p>Sexual Harassment Law</p>	<p>Z is an African American woman who began working at a prestigious trading firm as a head trader. Right after she began, her direct supervisor, D, began commenting on how he hated political correctness. He said he should be able to argue that America was founded on "European" values. This obviously made Z very uncomfortable but she wanted to make a good impression and did not say or report anything. Over six weeks, D would repeatedly talk about how he thought those of European descent are superior. He would constantly use racial epithets and even called her racially offensive names three or four times when she made a couple of mistakes at work. Z resigned after 2 months.</p>

Your Client's Question:

I've got to fire an employee—how do I tell her?

Reasons for Termination

Some Law:

Minnesota employers must provide the truthful reason why an employee was terminated if the employee makes a written request within 15 working days of his or her termination. The employer then has 10 working days to provide a response in writing.

↻ Minn. Stat. § 181.933

Reasons for Termination

Why is that “truthful” reason for termination in writing important?

∅ **Consistent & Plausible** = Not Suspicious, Less Litigation Risk

∅ **Inconsistent & Fishy** = Suspicious and Lots of Litigation Risk

Reasons for Termination

Pretext Pitfalls – Examples to Avoid

⊗ Shifting Reasons for the Termination

⊗ False Reasons for the Termination

⊗ Explanations ranging from “carelessly inaccurate to willfully exaggerated”

Reasons for Termination

Pretext Pitfalls – Examples to Avoid

- ⊗ Reason doesn't comport with employer's own policies—written or otherwise
- ⊗ Beware of performance-based reasons if:
 - ⊗ employee was “set up to fail”
 - ⊗ employee received a favorable review shortly before his or her termination.
- ⊗ “Hot Potato”

Reasons for Termination

Time of Termination:

- ⊗ Counsel Employer Clients to Give One Reason (or limited set of reasons) Consistently
- ⊗ No Minnesota Passive Aggression
- ⊗ No Mealy-Mouthed Explanations
- ⊗ No Made Up Reasons (Obviously)—Because Plaintiff's Counsel Will Come and Get You (and a fun cross-examination it will be!)

Reasons for Termination

Your Client's Question:

Something has gone wrong at my workplace and we need to investigate — what shall we do?

Effective Workplace Investigations

Effective Workplace Investigations

- ⌘ Prepare
 - ⌘ Review personnel files of accused, complainant, and key witnesses
 - ⌘ Identify any notable disciplinary issues
 - ⌘ Review workplace policies applicable to allegations

- ⌘ Consider confidentiality
 - ⌘ Advise all witnesses of confidentiality restrictions
 - ⌘ Destruction of evidence? Fabrication of evidence? Prevent a cover up?

- ⌘ Promptly Investigate
 - ⌘ Cliché but true: keep in mind the “who, what, where, and when”
 - ⌘ Interview the complainant
 - ⌘ Interview the accused

Effective
Workplace
Investigations

- ⌘ Interview immediate supervisors of complainant and accused
- ⌘ Interview any other identified witnesses
- ⌘ Remind all interviewees of confidentiality policies, non-retaliation policies, and cooperation policies
- ⌘ Ascertain legal and personnel implications
- ⌘ Consider corrective action
 - ⌘ Design corrective action to discourage any future improper acts or unlawful acts
- ⌘ Inform complainant of outcome
- ⌘ Don't forget to document!

Your Client's Question:

An employee just told his manager he thinks we're acting illegally but we think he's wrong because he's got his facts mixed up — can we fire him?

Minnesota Whistleblower Act — a primer

The Simple Answer:

Absolutely not.

At least, not without fully understanding the situation as-applied to Minnesota's robust anti-retaliation protection for "whistleblowers."

Minnesota Whistleblower Act—*a primer*

The Minnesota Whistleblower Act (MWA) prohibits employers from discharging employees because the employee, "in good faith," "reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer"

∞ Minn. Stat. § 181.932, Subd. 1(1).

Minnesota Whistleblower Act—*a primer*

The MWA also protects the employee who refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason.

§ Minn. Stat. § 181.932, Subd. 1(3)

Minnesota Whistleblower Act—*a primer*

Key MWA Practice Pointers:

- ⊗ 2013 Amendments – “good faith” and “report”
- ⊗ Good Faith: Not false or in reckless disregard of the truth
- ⊗ Report: actual/suspected/planned – violation of statute, regulation, common law
- ⊗ Pre-2013 Case Law – Lots of Debate

Minnesota Whistleblower Act—*a primer*

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Thank You for Watching