

## TIPS TO HELP AVOID A DISCRIMINATION CLAIM

BY JARROD S. BOITNOTT



Jarrod S. Boitnott

In a slowing economy, the last expense a frugal business wants to incur is the cost of litigation over personnel decisions. A few words of advice, then, to employers who are looking for ways to cut costs and who may be thinking that reorganization or laying off employees can help. Too often, the dreaded discrimination lawsuit follows. The recent United States Supreme Court case of *Engquist v. Oregon Dept. of Agriculture* illustrates this point and presents a timely opportunity to reexamine how employers can reduce the frequency and cost of such lawsuits.

When the State of Oregon's Department of Agriculture found itself financially distressed due to budget reductions, the agency decided to reorganize and eliminate a position. The eliminated employee later sued for discrimination, alleging that she was treated differently than other similarly situated employees. The jury awarded her \$425,000 in damages. On appeal, the Supreme Court reversed the ruling and found in favor of the employer. Although the employer ended up winning the case, there is little doubt that the litigation expenses exceeded any attempted budget reductions. What could the employer have done differently to avoid these costs?

Obviously, the best way to minimize litigation costs is to avoid lawsuits. The most common reason employees sue is because they feel they have been personally wronged and treated unfairly. In theory, employers understand this and typically do an excellent job of working with their attorneys to create policies that are fair and reasonable. However, problems often arise when the policies are not followed in practice. Consider an employer who makes exceptions for one employee who is regularly late to work, but then terminates another employee for the same reason. Even if the terminated employee was less productive, that employee will perceive the termination to be unfair and may allege discrimination. Simply stated, employers who are conscientious about treating all employees fairly and reasonably will reduce the likelihood of being sued.

Since no employer can satisfy every employee and eliminate every lawsuit, an employer should also focus on mitigating costs of potential lawsuits. The least expensive lawsuits are those won by the employer on summary judgment. How can an

employer increase its chances of winning on summary judgment and avoid a time consuming (and expensive) trial? Before this question can be answered, a basic understanding of what the court is looking for in the typical discrimination lawsuit is helpful.

On a motion for summary judgment, a judge is guided by a three-step framework. In the first step, the judge looks at the employee's claim to see whether the employee's evidence meets the legal definition of a discrimination claim. If there is sufficient evidence, the judge then looks to see what the employer's defenses are. The employer must present a nondiscriminatory reason for why it treated the employee as it did. In the third step, the judge asks whether the employee can show the employer's reason has been fabricated to attempt to disguise discrimination.

When practicable, a smart employer takes an adverse employment action only when it (1) has a nondiscriminatory reason for doing so, and (2) has not given the potential plaintiff any ammunition to argue otherwise. Consider again the employer who fired an employee for coming to work late. If the plaintiff knows (and you can be sure they all do) that other employees are routinely late for work and are not terminated, the third step of the summary judgment framework will be met and the judge will not grant the motion.

There are several cost effective ways for employers to avoid the above situation. As stated, employers should first establish and FOLLOW their written policies. When employers start to make exceptions for some employees but not others, they open the door for the judge (and later the jury) to conclude discrimination was a motivating factor. Second, documentation is critical. When an employer and employee disagree as to the motive for an allegedly unfair employment action, there is nothing more persuasive than having the employer's written records documenting that the employer had non-discriminatory reasons for terminating one employee and not the other.

It has been stated that it is not the business of the courts to sit as super-personnel departments, second-guessing the wisdom of employers' personnel decisions. However, it is incumbent upon employers to avoid making their personnel issues the business of the courts by implementing and following policies that are grounded in common sense and fairness.

**BAYLOR, EVNEN,  
CURTISS, GRIMIT & WITT, LLP**

WELLS FARGO CENTER

1248 "O" STREET, SUITE 600

LINCOLN, NEBRASKA 68508

PHONE: 402.475.1075

FAX: 402.475.9515

EMAIL: [INFO@BAYLOREVNEN.COM](mailto:INFO@BAYLOREVNEN.COM)

[WWW.BAYLOREVNEN.COM](http://WWW.BAYLOREVNEN.COM)

# DEFENSES AN EMPLOYER CAN RAISE TO LIMIT A WORKERS' COMPENSATION CLAIM

BY BRENDA S. SPILKER



Brenda S. Spilker

This is the last in a four part series discussing work accidents in Nebraska and how they impact employers. An employer can raise several defenses to resist a workers' compensation award. These defenses protect against an award of benefits, irrespective of whether there was an accident which arose out of and occurred in the course and scope of employment.

## Statute of Limitations

An injured employee has two years to file a workers' compensation claim. The two years begins to run from the date the injured employee knew, or reasonably should have known, he had a claim to make for payment of medical or indemnity benefits. If benefits have already been paid regarding the accident, the two years begins from the date of last payment of benefits, either indemnity or medical payments, whichever is later. If no benefits have been paid, then the petition must be filed within two years of the date of accident.

There are certain situations which toll the two year statute of limitations, including failure to file a First Report of Occupational Disease or Injury, when the employee is a minor, under the age of 19, or when the injury is "latent and progressive."

## Notice

An injured employee is required to provide notice to his employer of an injury "as soon as practicable" after the happening thereof. The notice requirement is met when notice of the injury is provided, not merely notice of an accident. Employers have a degree of responsibility to investigate and follow up on information provided by an employee. If an employer has notice or knowledge sufficient to lead a reasonable person to conclude that an employee's injury is potentially compensable, such knowledge is sufficient notice.

## Willful Negligence

If an employee's conduct manifests a reckless disregard for the consequences, coupled with a consciousness that injury will naturally or probably result, the employee may

be found willfully negligent and barred from recovering benefits. Willful negligence consists of (a) deliberate acts; (b) such conduct as evidences reckless indifference to safety; or (c) intoxication at the time of injury, such intoxication being without the consent, knowledge, or acquiescence of the employer or the employer's agent.

## Intoxication

Before intoxication can be used to limit recovery, the employer has the burden to prove that the intoxication caused the accident or injury. This rule also applies to illegal drug use.

## Violation of a Safety Rule

Violation of a safety rule is not an automatic bar to the receipt of benefits. The employer must show the employee's actions were deliberate or intentional. Accidental violation of a safety rule, or even negligence, is not sufficient to prevent an entitlement to workers' compensation benefits. Additionally, the facts must establish: (1) the employer has a reasonable rule designed to protect the health and safety of the employee; (2) the employee has actual notice of the rule; (3) the employee has an understanding of the danger involved in the violation of the rule; (4) the rule is kept alive by bona fide enforcement by the employer; and (5) the employee does not have a bona fide excuse for the rule violation.

## Misrepresentation on Application for Employment

Under certain circumstances, making a false statement in an employment application may disqualify the employee from receiving benefits if: (1) the employee knowingly and willfully made a false representation as to his physical condition; (2) the employer relied upon the false representation and the reliance was a substantial factor in the hiring; and (3) a causal connection is present between the false representation and the injury.



WELLS FARGO CENTER  
1248 "O" STREET, SUITE 600  
LINCOLN, NEBRASKA 68508  
PHONE: 402.475.1075  
FAX: 402.475.9515

EMAIL: [INFO@BAYLOREVNEN.COM](mailto:INFO@BAYLOREVNEN.COM)  
[WWW.BAYLOREVNEN.COM](http://WWW.BAYLOREVNEN.COM)

## Q & A

**Q:** Ari Plane is a non-exempt employee who will be traveling out of the United States (and its territories) for our company. Is he covered by the Fair Labor Standards Act (FLSA) while working outside of the US?

**A:** According to the United States Department of Labor (DOL), hours spent working in a foreign country, traveling from one country to another, or traveling to and from a foreign country are not counted as compensable if there was no work performed in the United States (or its territories) for the entire week. If the employee works outside of the United States for a full work week, the employee would not be subject to the FLSA for that week. If the employee performs work in the US during part of a work week, generally the employee is entitled to the benefits of the FLSA during the whole week. Keep in mind that complications can arise in the timing of a work week because of changes in time zones. The DOL has not issued formal guidance as to which time zone should govern. Employers should adopt a reasonable approach, such as using the time zone in which the employee began the work day.

To find additional newsletter articles, go to our website at [www.bayloreven.com](http://www.bayloreven.com).

This Baylor Evnen publication provides substantive information and reflects the firm's opinions and views on current issues. The content is not legal advice. It cannot replace consultation with an attorney on specific matters, nor does it create an attorney-client relationship.