

HR Compliance Law Bulletin

Practical and Effective HR Management Advice

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Spotlight

Managerial emails: What is said can hurt you

by Maureen Minehan

A female employee with two children sues your organization for sex discrimination, claiming she was not promoted because her manager believed she could not perform the new job and be a mother at the same time. You feel confident you will win the case because the manager has a strong track record of supporting women; no one under his command has ever even hinted at sex-related bias.

Mark Neuberger, an attorney at Foley & Lardner LLP in Miami, would tell you not to be so sure until you have reviewed the manager’s emails. It is all too common for email exchanges between managers and subordinates to provide fodder for employment claims. If the employee produces an email in which the manager referred or alluded to her parental status as a driver of the promotion decision, all bets are off.

“I never know what my case is until I look at all the emails. The client may appear to be a great employer that tries to do all the right things, but there could be a smoking gun email out there that completely undermines their case,” Neuberger says.

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fodder for employment claims. If the employee produces an email in which the manager referred or alluded to her parental status as a driver of the promotion decision, all bets are off.

Zan Blue, a partner at Constangy, Brooks & Smith LLP in Nashville, Tennessee, says the informality—and permanence—of email is often what creates “smoking guns.” “People think of email as a substitute for a phone call. They don’t think of email as an information retention system. So people write in emails much like they talk on the phone. In ordinary conversation people say things without thinking them through, engage in banter back and forth and generally don’t pay careful attention to what they say and how it could be misinterpreted. People do the same thing in emails.”

Should there be a ban?

One solution is to limit managers’ use of email when discussing employment actions with employees, but neither Neuberger nor Blue thinks an outright ban is likely to be effective.

“Email has become so prevalent that it isn’t realistic to tell folks not

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to use it for discussion of employment matters,” Blue says.

“I wouldn’t ban the use. Instead, companies need to train people how to use email as an effective performance management tool,” Neuberger says.

Steps to take

“Employers should try to educate managers and supervisors about email. It is the same as writing a formal memorandum and should be approached with the same level of care. Actually, it should be approached with more care, because email can be and is transmitted widely and immediately,” Blue says.

Neuberger recommends employers specifically review with employees past experiences where email has caused problems in litigation. An Internet search or conversation with legal counsel can easily yield examples of cases where email missteps by managers created liability.

He also counsels employers to “train employees to limit their communications to that which is truly essential and train them to deliver ‘bad news’ verbally.”

“Email should never be used for formal discipline or terminations. In addition to potential legal issues, it can make employees feel disrespected, which in turn can lead to litigation,” Neuberger says.

Jane Volk, an attorney at Pittsburgh-based Meyer, Unkovic & Scott, says clarity and confidentiality are two more reasons to direct managers away from email when taking employment actions. “Performance criticisms should be communicated in person to ensure that the employee understands the message, permit the employee to respond, and perhaps most important, to ensure the confidentiality of the communication.”

“Emails are frequently misunderstood and only when face-to-face can a manager observe whether the employee understands the communication and appreciates the seriousness of it,” Volk says.

To protect confidentiality and limit potential exposure, Blue also recommends limiting managers’ use of “reply all.” [“T]he ‘reply to all’ button should be disabled. It is the source of much mischief.”

The bottom line

Losing an otherwise winnable case due to an errant or ill-conceived email is frustrating for employers and their legal counsel. By training managers on the do’s and do not’s of email contact with subordinates, employers can reduce their risk of injury from a “smoking gun” when defending themselves in an employment-related lawsuit.

Maureen Minehan is a Washington, D.C.-based freelance business writer specializing in human resource management.

Action Plan: Educate all managers and supervisors on the legal weight that emails hold: They are written communications that can be subject to scrutiny just as closely as hard-copy memorandums. Review any past employment-related claims to see how emails sent from your supervisors may have been used to damage your defense in those cases. Do not use email for formal discipline or terminations. Also, disable the “reply all” feature if possible, so you maintain confidentiality at all times.