



THE VOGEL LAW FIRM PRESENTS



## Ten Employer Phrases That Predict Disaster

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- Wage and Hour/Compliance
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- Employment Mediation – Qualified Neutral



### Governor’s Workforce and HR Conference



It's time to *Find the Good Life in North Dakota.*




## Employer Phrases That Predict Disaster



### Leslie Bakken Oliver



- Represents ND employers
- Discrimination (Title VII, ADEA, ADA, FMLA and NDHRA )
- Discipline - discharge
- Handbooks
- Wage and hour
- Whistleblower issues



### When those “ah ha” moments . . .




Become "oh no" moments . . .



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"I haven't 'formally'  
documented it, but . . ."

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They never even saw it coming . . .



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"Everyone knows . . . \_\_\_\_\_"

- Everyone knows the employee is a poor performer, always late, etc.
- But, there is no documentation
- Like none
- Really



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But, forewarned is forearmed . . .



How to avoid disasters . . . Before they hit!

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But, the Boss Wants to Terminate . . .

- A minority
- Who is over 40
- Who recently filed an OSHA claim
- On the Friday afternoon
- Before Bison Game Day!



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## No Documentation

- Human Nature – supervisors avoid conflict; don't want to write up employees
- Result is no documentation of poor performance; even worse say employees are average or good performers
- Leaves company – open to lawsuits; no evidence that the “real” reason wasn't discriminatory

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## The Solution

- Document, document, document
- Train supervisors
- Don't fire in haste (and repent at leisure!)



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# 2

“Performance appraisal?  
Let me check on that.”

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## Performance Management 101

- Establish a benchmark
- identify strengths + weakness
- Set goals for improvement
- Employee see their role in the bigger picture
- Promotes teamwork



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### Common Roadblocks

- Addressing performance problems is not comfortable for most people
- Fears of
  - being considered judge and jury
  - Being viewed as an adversary
- Common problem - key issues get buried in a candy coating



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### 3

“They [insert EEOC or other agency] can’t make us do that . . .”

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### Practical implications

- Candy coated performance reviews
  - ignore or minimize serious problems
  - less than honest account of the employee's performance
  - Deny employee opportunity to improve
  - Increased liability risk if lawsuit filed.

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Even if “they” can’t make you do it . . .

- They can probably make you wish that you had!!!!



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### Basic Rules of Managing Performance

-  - tell the truth
- Acknowledge bias and conflicts of interest (+ or -)
- Evaluate performance, not individual
- Avoid ambush
- Stay calm and be kind
- Train everyone

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### Scary Facts

400

91

?

• Does include attorney fees



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### And that's just one agency!




### What can "You" do?

- Know the law, or at least when to get help, or act at your own peril!
- Employment at Will v. Right to Work
- What is a protected class?
- When do you have to pay overtime?




### So, Who are "They"?

- EEOC
- North Dakota Dept. of Labor & Human Rights
- US Dept. of Labor
- OSHA
- JSND, WSI, IRS, OFCCP




### Or at least know where to go for help . . .



- [www.dol.gov/](http://www.dol.gov/) - U.S. Department of Labor
- [www.eeoc.gov/](http://www.eeoc.gov/) - U.S. Equal Employment Opportunity Commission
- [www.nd.gov/labor/](http://www.nd.gov/labor/) - North Dakota Department of Labor and Human Rights



### What can "They" do?

- Significant enforcement authority
- Administrative charges, subpoenas, injunctions, lawsuits and fines
- Increased compliance activity




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"We just fired someone and to got to wondering . . ."





I have this nagging feeling that I forgot to do something ... but what???

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### Risk management – former employees

- Retaliation against former employees  
*Robinson v. Shell Oil Company*, 519 U.S. 337 (1997)  
Held: Prohibition against retaliation against complaining employees extended to former employees.
- Negative recommendation
- Defamatory comments after former employee filed EEOC complaint

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### Post-termination risk management

- Protection of confidential business property
- Disable all remote accessibility to workplace server through former employee’s personal electronic devices.



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“I’d rather pay our lawyers than see that @\$%! get a dime!”

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### Risk management – former employees



Run an IT inspection of workplace electronic devices – external storage devices

Provide written notice to former employee about continuing obligation to protect confidential and proprietary information.



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### Sad Fact

- Sometimes you end up doing both
- You pay your lawyers and you end up paying your former employee, applicant, etc. in the end



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## Employment Lawsuits

- Employees who are subjected to unlawful discrimination, harassment, retaliation, wage and hour claims, etc. can and frequently do bring claims against their employers
- Can be awarded significant damages, including lost wages and benefits, future wage losses, punitive damages, and attorney fees



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## The Solution

- Avoid claims in the first place through effective policies and management
- Consider an in-house grievance policy to resolve disputes
- Look to mediation and ADR when a lawsuit or claim occurs



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## Employment Lawsuits



- Very disruptive and generally stressful for everyone involved, managers, supervisors, co-workers, etc.
- May take years to resolve
- Lost productivity, bad public relations

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## Parting Thought

- Before fighting over the “principle” of the issue, think about how much “principal” it will cost



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## And most people just don't like spending time with lawyers . . .



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# 6

“I don't understand this EEOC charge, that employee LOVED us . . . !

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## Dealing with the unexpected Discrimination Claim

### Step One

- a. Take a very few minutes and feel dismayed, indignant, shocked, confused and disappointed.
- b. Get over it.
- c. Get to work.



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“We are covered. This is  
an employment at will  
state.”

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## Unexpected Discrimination Claim

- Step Two:
  - Evaluate merits of charge
  - Review personnel file
  - Investigate
  - Take appropriate action to address and correct harassment, discrimination or any other policy violations.



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## Basic Concepts



- Employment at will
  - Why worry about employment claims at all if employment is “at will”?

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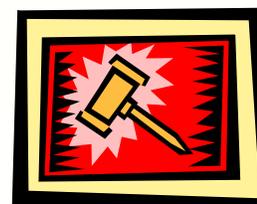
## Critical review of complaint process

- Was the charge really unexpected?
- Was a complaint missed? Ignored? Overlooked? Buried?
- Communication breakdown – when and where?
- Address and correct problems in complaint process.
- Train everyone

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## Employment at Will

- Employer can terminate an employee for:
  - A good reason;
  - A bad reason; or
  - No reason at all.
  - As long as . . .



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## Not an *unlawful* reason . . .



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## “At Will” v. “Right to Work”

- Is there a difference?
- Impress your friends and neighbors if you know!



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## Exceptions to Employment At Will



Traps to Avoid

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“But we have always done it that way . . .”

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## Exceptions to At Will

- Discrimination claims
- Retaliation or “whistleblower” claims
- Other statutes – medical leave, etc.
- Contract claims or collective bargaining agreements
- Tort claims



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## Dilbert on Change.



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### If it's not broke, don't fix it

- What overtime? Everyone here is salaried.
- Our employees would rather have “comp” time instead of overtime pay – why is that a problem?
- We don't have employees. We have independent contractors ... and they like it that way.

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## “How do we get around . . .”

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### Risks of having it your way

- Wage and hour
  - failure to properly classify employees as non-exempt may result in hefty penalties, paying overtime (x2 or x3) and attorney fees.
  - Misclassified independent contractors may wind up costing an employer big - overtime at inflated IC wages (x2 or x3), and WSI premiums and penalties.

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### How Do We Get Around . . .

- Usually a red flag
- How do we get around . . . almost always spells trouble
- Tempting because compliance with regulations can be time consuming, expensive and burdensome



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### Getting it right.

- HR audit of exempt positions under FLSA regulations
- Review timekeeping practices – particularly for non-exempt employees
- Determine validity of independent contractors through ND Department of Labor and Human Rights.

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### Compliance is Costly

- But not complying can be even more costly
- Common issues
  - Independent contractor status
  - Wage and hour issues
  - Safety compliance
  - And on and on . . .



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## The Solution

- Cultivate a culture of compliance, from the top down
- Regulations can be burdensome, but work for creative solutions to comply that work for your company
- Enlist the help of professionals and, gulp, even regulatory agencies to come up with cost-effective solutions!



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## Everybody's doing it .....



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## Practice makes Perfect

- Develop consistent policies
- Train your supervisors
- Follow your own policies
- Get help when you need it!



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## But everybody's doing it

- None of my competitors pay overtime so why should I?
- None of my competitors make their employees take a 30 minute lunch break so why can't I?
- I pay my employees really well – they'd be crazy to turn me in.

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“Everyone else is doing it . . .”

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I do what I want when I want because I'm the boss.



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Thank You!

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Questions & Answers



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