



# The GSH

## 60-Second Memo

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### Top Ten Things Managers Do That Lead to a Probable Cause Finding

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It is bound to happen in every HR Professional's life - learning that a manager has done something which puts the company at risk. Here is a list of the top ten things managers do that lead to a finding that there is probable cause for a discrimination complaint.

1. Not Maintaining Confidentiality

A manager's failure to maintain confidentiality regarding an employee's complaint can lead to a probable cause finding in the retaliation arena. For example, if a popular manager informs employees that a fellow co-worker has lodged a complaint, these employees may let their negative feelings impact their treatment of this co-worker. Worse yet, the manager may say something regarding the complaint to the employee directly and alter the terms and conditions of the employee's employment. In either

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event, a retaliation claim may ensue.

The failure to maintain confidentiality has other pitfalls. Knowing that a manager has loose lips may make employees feel uncomfortable bringing complaints of harassment. While the company may be able to prevail by asserting an affirmative defense that the employee did not avail him or herself of internal reporting procedures, the defense will be seriously undermined if the employee can show confidentiality problems with those procedures.

## 2. Not Engaging in the Interactive Process

Managers need to engage in an "interactive process" when an employee asks for an accommodation for a disability. The failure to promptly do so could lead to a violation of the Americans with Disabilities Act ("ADA"). Alternatively, managers need to communicate with Human Resources when medical documentation is provided or when an accommodation is requested so that Human Resources can address these issues expeditiously.

Another potential pitfall is when an employee submits medical documentation that states something to the effect of "not able to work." Managers still need to follow up. In some states, such as Wisconsin, a temporary leave of absence may be found to be a reasonable accommodation, and an employer's failure to consider such a response may lead to a probable cause determination. In other words, managers cannot act hastily.

## 3. Being Inconsistent

Managers cannot make exceptions. For instance, if your company has a no-fault attendance policy (notwithstanding potential ADA and FML issues which is an article in and of itself), managers need to be consistent. How often have we heard a manager say something to the effect of, "Oh, I decided not to discipline her. Her dog ran away, and I know how hard that can be." This will become a problem when another employee is disciplined for conduct that is similar or less serious.

Consistency is also important when addressing performance issues. Managers need to address performance consistently and apply the same performance standards across the board.

## 4. Ignoring the Problem

How often have we seen a manager let bad performance go on for years because the manager does not want to address the problem? To an investigator, giving second chances and even third chances may look incredibly generous and work in the company's favor. However, when there has been a poor performer for *years* and the manager has not done anything about it, an investigator may wonder why performance became an issue all of a sudden. In short, the company may not be able to successfully argue that the employee did not meet legitimate expectations when for years the poor performance continued, seemingly without being problematic.

## 5. Documentation Issues

Documentation issues arise in several areas, particularly where managers do not document. Often, managers will have verbal conversations where performance or conduct issues are addressed. These conversations must be documented. A year later, when an administrative charge is finally brought and investigated, it is helpful if there is a written account of the conversation, so that the manager remembers the conversation. It may also be helpful if this type of documentation is provided to the employee at the time of the conversation as proof that the employee knew what the issue was. It may also be helpful to have the employee *sign* a receipt of the discussion.

What's worse than not documenting? Losing documentation! Managers cannot lose documentation, as important comparator information could potentially be lost. Of a more practical concern, local fair employment agencies are small. In order to maintain credibility, it is best to be able to have a sterling reputation. Here's a common example: Claire states that she turned in medical documentation indicating she had a disability and was never accommodated. In reality, Claire never turned in such documentation. If your company has a good reputation with the agency, your company has more credibility when arguing that there is a solid procedure in place for the maintenance of such records, and Claire never provided it. However, if your company has a history of losing documentation and the agency knows it, you lose some credibility, and possibly, your defense.

What is the worst pitfall in the documentation arena? Bad documentation! Often, unprofessional emails circulate stating something to the effect of, "I never thought she could be so stupid." Managers need to remain professional in all documentation. At best, rude or offensive documentation looks petty. At worst, it may lead to a finding of pretext.

## 6. Being Too Nice

When it comes to annual reviews, managers often like to give the benefit of the doubt and often do not mention performance problems. This can be problematic if the employee is ever disciplined or terminated for poor performance, as it will be difficult to assert that the employee was not meeting legitimate expectations when the performance evaluation made no mention of poor performance.

## 7. Being Too Mean

I've discussed it before - [the office bully](#). Managers need to stop the bad behavior of subordinates toward co-workers. While a company may be able to prevail by asserting the "equal opportunity harasser" defense, the company's credibility before an agency will be eroded. The next time an administrative charge is filed, the agency may wonder what other bad behavior the company allows.

## 8. "I Quit! No I Don't!"

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A manager may not want to accept someone's resignation on the spot or may think follow up is not necessary. Think again. Manager - I say take it and run! If a problem employee hastily quits, accept the resignation. It will save you problems later on. Do not wait for the employee to follow up with an "I didn't mean it." Follow up immediately with a correspondence.

9. Honesty is the Best Policy

Managers sometimes think that during an investigation, they need to say what you want to hear, even if it is untrue. Managers need to know that honesty is always the best policy. It is those innocuous lies - such as dates, times - that may become a problem, as the investigator may think that if the manager is willing to lie about a small issue, then certainly, the manager will lie about larger issues as well. Train your managers to tell the truth - both to you and to an investigator. It will save you problems down the line.

10. Failing to Think It Through

Final termination decisions should be well thought. Managers need to ask themselves the following:

- "How will this look?"
- "Do I have the appropriate documentation?"
- "Have I been consistent?"

Managers should make sure that the documentation is in order before the final termination decision is made. How often have you found documentation missing only after it is too late?

So now you have it - my top ten things managers do that lead to a finding of probable cause. Let's make this interactive. Submit the top mistake you have experienced to [marcie\\_cornfield@gshllp.com](mailto:marcie_cornfield@gshllp.com), and we can share the wealth of knowledge in a subsequent article.

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