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The GSH 60-Second Memo

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Yes Virginia, There Is Individual Liability

By Marcie Cornfield

Dear Shirley,

Because you are head of Human Resources, I am aware that under company policy I need to run all recommendations for termination decisions by you and receive approval before moving forward. At this time, I would like to move forward with terminating Nick. As you are well aware, Nick is our most vocal employee. He constantly complains about trivial matters. He does not take responsibility for his own actions, and he is consistently finger-pointing at other employees for his mistakes. He knows the rules and knows just how to skate by them. This is especially true with the Company's attendance policy. Nick knows that he has a three-minute grace period before he is considered late. He is consistently two minutes late and then jokes about how he then gets to work two minutes less than everyone else. Also, he is always complaining about something, and he takes the most time away from my other responsibilities since I need to look into all of his complaints and discuss them with you, especially the two previous charges where he is

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alleging racial discrimination because he is the only African-American employee on my team.

I believe that his abuse of the attendance policy grace period and his overall attitude is grounds enough to move forward with termination. I have taken the liberty to gather his attendance records and to forward them to you for review. As soon as you give me the "green light" I will move forward.

Thanks,
Virginia

Dear Virginia,

This situation reminds me of a very recent case that outside legal counsel forwarded to me in their weekly newsletter. The case, [Smith v. Bray](#), was decided by the Seventh Circuit on May 24, 2012. Mr. Smith originally filed discrimination and retaliation claims against four defendants, Equistar (the Company he worked for); its parent affiliate, Lyondell; James Bianchetta (his direct supervisor); and Denise Bray in Human Resources. Mr. Smith voluntarily dismissed his original complaint after Equistar and Lyondell filed for bankruptcy protection. However, Mr. Smith then filed an amended complaint against only Mr. Bianchetta and Ms. Bray alleging race discrimination and retaliation in violation of 42 U.S.C. § 1981. Mr. Bianchetta's motion for summary judgment was actually denied, and Mr. Bianchetta eventually entered into a settlement with Mr. Smith.

Your situation is more similar to Ms. Bray, where the court needed to decide whether Ms. Bray retaliated against Mr. Smith. There were two issues. The first issue was whether Ms. Bray was involved in the termination decision when she gathered the documentation and made the recommendation but was not the ultimate decision-maker. The second issue was whether there was any retaliatory animus on the part of Ms. Bray.

While the court did not find any retaliatory animus on the part of Ms. Bray, the court made it clear that Ms. Bray was involved in the termination decision and that she could be personally liable for retaliation under § 1981. Even though Ms. Bray was not the ultimate decision-maker, the court applied the "cat's paw" theory and held that had she had a retaliatory motive and caused her employer to retaliate against Mr. Smith, she could have been held individually liable under § 1981. Simply put, a subordinate with a retaliatory motive may be individually liable under § 1981 for causing the employer to retaliate against another employee. The court said it best: "Why should the 'hapless cat' (or at least his employer) get burned but not the malicious 'monkey'?" This was the first time the Seventh Circuit had made such a holding.

Your situation is similar to Ms. Bray. You have gathered the documents and are coordinating the termination decision, even though you lack ultimate decision-making authority. And, as you know, under the "cat's paw" theory of liability, I cannot just "rubber stamp" any decision you recommend, but must evaluate whatever evidence you believe supports termination. Moreover, although I have no doubt you have the best intentions, I do want

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to let you know that based on your statements in your email to me about the "complaints" and the charges, a court could very well see such statements as evidence that you had discriminatory motives, exposing you to potential liability. The company will take any and all appropriate and necessary disciplinary actions, including termination, if it is determined (by either us or the court) that you have acted improperly, and you may even need to cover your own legal fees. That said, I appreciate you bringing your concerns to me. Please make sure you have provided me information and documentation on other employees terminated for similar reasons. I will review your recommendation and documentation, and I will follow up with you shortly.

Thank you.
Shirley

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