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Insights

Employers Gain By Noting Discipline Problems As They Occur

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A recent decision of the Seventh Circuit Court of Appeals sensibly finds that an employer's failure to address behavior problems immediately does not necessarily forfeit its right to count those "black marks" on the employee's record when making employment decisions later. The court also confirms that an employer cannot be expected to know that its disability accommodations are insufficient unless the employee communicates that information to the employer. But a word of caution appears between the lines here for employers.

Background. In *Graham v. Arctic Zone Iceplex*, LLC, 930 F.3d 926 (7th Cir. 2019), the court considered the plight of an employee who was a mechanic and Zamboni driver at an Indiana ice rink. The employer contended that he had a poor attitude, was insubordinate, and late on completing his work from the time he was hired in 2014. But the employer did not formally discipline him or write him up for these issues when they occurred.

After an injury on the job, the employee returned to work with a medical restriction that required him to work sitting down. So the employer temporarily gave him skate sharpening job, which it supposed he could perform while seated. The employee later contended he had to stand to perform the skate sharpening job but he never communicated this information to the employer. When he was able to resume full time work, he was assigned to an evening shift, which he dubbed a "demotion." A few months later, he caused a Zamboni accident. The employer fired him, citing his earlier attitude and performance problems as well as the Zamboni accident, which endangered customers and caused loss of revenue while the rink was being repaired.

No Failure to Accommodate upon Failure to Communicate. The court quickly dispensed with the employee's argument that the employer violated the Americans with Disabilities Act (ADA) by failing to accommodate his need for a sitting job. The court noted that *both* the employer and employee must engage in the interactive process to determine appropriate accommodations for disabilities. The employer can't be expected to accommodate the employee who doesn't provide enough information to inform that process.

No Pretext Shown by Refraining from Immediate Discipline. The court also upheld summary judgment against the employee on his disability discrimination claim. To succeed on such a discrimination claim, plaintiffs must prove that a disability was the "but-for" reason for firing him or, on other words, that the employee would have kept his job if he had not had the disability. Employees often prove this by showing that the employer's reasons were false, a pretext for discrimination. The employee here claimed that the employer's reasons must be pretextual because it did not formally discipline him when the misbehavior occurred. The court rejected that argument and found that the failure to take formal action against him did not mean that the behavior went "unnoticed or untallied" and that "even minor grievances can accumulate into a record that justifies termination." The court also rejected his argument that the switch to the night shift was a demotion and his contention that he could fairly be compared to another employee who was not fired after a Zamboni

accident.

Cautionary Takeaways for Employers. Heavy-handed or petty discipline can spoil morale. But when formal discipline is not warranted, detailed and contemporaneous notes of misconduct may later carry the day to show the employer's legitimate reasons for terminating and employee. The court in *Graham v. Arctic Zone* suggests a "tally" and "notes" by the employer, which can be kept internally to create a provable record to justify termination or other adverse employment action. A contemporaneous note in the personnel file or a quick email among HR, management, or supervisors can detail the incidents and explain why it is not being formally written up. Those notes can later refresh memories and track the discipline problem as it developed, dispelling any notion that the employer's reason was pretextual.