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DOCUMENT, DOCUMENT DOCUMENT!!!

A few years ago I was presenting at a legal seminar and discussing the need for good documentation in all aspects of employment. One audience member did not seem to appreciate my focus on the need for creating a documentary trail of evidence prior to the dismissal of an employee. In fact, at one point he raised his hand, and when called upon for a question, instead took that opportunity to loudly declare to everyone within earshot that, "It is my company's policy that we never write anything down, that way none of it can come back to haunt me!"

This comment elicited a few chuckles from the audience, and even a few nods of approval. But, I have to tell you, that guy was just plain wrong. Documentation is the life's blood of employment law.

There are two primary reasons why. First, between the moment an employee is terminated, and the day his or her case is heard by a jury, years of time may pass. During that period of time, memories fade, witnesses come and go, policies change and convictions soften. Timely documentation of the reasons for a disciplinary action acts as a snap-shot of time, preserving the who, what, where and when that are so very critical to later defending this action.

Second, in my experience juries rarely decide cases purely on the law. Instead, they are more often motivated by what they perceive to be fair. In an employment law case, juries usually do not find it to be fair that an employee was terminated for something that they were not previously warned about. Therefore, being able to prove that your company has a policy that an employee read and understood, then subsequently violated and was warned about, before ultimately being terminated for that offense, goes a long way towards giving an employer the upper hand in the eyes of a juror.

It is not enough to just document, though. You must commit to thorough, accurate and timely documentation. Don't wait a week to write it down, rather do it when it is fresh in your memory. Always sign and date your documents so years later there is not a squabble about who wrote it or when it was authored. And, for goodness sakes, use good penmanship and proper grammar. Nothing is worse than "Exhibit A" to your case being an illegible hand-written note, filled with poor grammar, scrawled on the back of a file folder. Remember that what you write down today is more than a hasty chronology of events; it may very well be the key to winning the case.

As for the audience member that doubted the wisdom of my instructions to be sure to write things down, I ran into him about a year later. He told me that his company had been sued for discrimination. After lamenting the fact that his best witness had moved away and could not be found to provide testimony, and that although the plaintiff had been repeatedly warned to refrain from the conduct which ultimately led to his discharge the company did not have any written disciplinary actions to prove it, my former seminar participant begrudgingly admitted,

"maybe you are on to something with that whole documentation thing." I have to admit, I think he was right. Which is why I chose to write it down.