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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

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The Sound of Silence: Seventh Circuit Holds That Undocumented Misconduct is Still Misconduct

If you've had occasion to converse with a management-side employment lawyer (and somehow survived it), it seems the edict of documenting performance issues is tattooed on his/her forehead. I must confess in my own supervisor training I have warned that, in essence, "if it's not in writing, it did not happen" (at least for purposes of trying to get a case dismissed on a motion for summary judgment). I still believe that documentation is always the safest course, but can an employer still fire an employee for a series of undocumented incidents and avoid having to go to trial when the employee disputes them? The Seventh Circuit has answered this question in the affirmative.

In what has been an oppressive summer of heat and humidity, it is only fitting that at least some breath of a cool breeze lands on our desks. And, quite fortunately, that breeze has come from the Midwest in the case of *Graham v. Arctic Zone Iceplex, LLC*. The facts in Graham are straightforward and are very briefly summarized as follows. Mr. Graham was the head mechanic and maintenance supervisor at an ice skating rink operated by the defendants. Mr. Graham had a history of displaying a poor attitude and engaging in insubordinate conduct, some of which arose out of the employer's efforts to accommodate his workplace injury. These incidents were not, however, documented in writing. Mr. Graham was ultimately terminated after he caused a Zamboni accident, which placed customers at a safety risk.

Mr. Graham brought a lawsuit against his employer alleging, among other things, that his termination constituted disability discrimination under the Americans with Disabilities Act. When confronted with the employer's reasons for his termination, Mr. Graham made the argument that causes employment lawyers to reach for the Pepcid (or grain alcohol where available): the undocumented incidents simply do not count. In language that I'm sure to be quoting in future cases, the Seventh Circuit rejected Mr. Graham's argument:

> To start, Graham asserts that the behavioral problems cited by the notice [of termination] – his apparent bad attitude, inability to complete work on time, and insubordination – could not be legitimate bases for his termination because he had received no written notice or discipline for them before the Zamboni accident. His premise seems to be that by not addressing the issues earlier, Arctic Zone somehow forfeited its right to count these problems as black marks on his record. Not so. Arctic's decision to let something slide without a formal response does not mean that it went unnoticed or untallied. And even minor grievances can accumulate into a record that justifies termination. A reasonable jury could not conclude that Arctic Zone was lying about the impact of these violations solely because Arctic Zone held its tongue when they occurred.

The foregoing reasoning is a welcome nod to the pragmatics of running a workplace. Nothing kills morale on both sides of workplace issues quite like having to formally write up every picayune infraction. I often hear while conducting training that supervisors do not want to quash the enthusiasm of employees, particularly new employees, by formally documenting every issue that comes up. The *Graham* decision goes a long way towards making the good deed of letting some things slide go unpunished.

I do, however, feel compelled to note that as welcome as the *Graham* decision is, it should not be viewed as a panacea. It is still important to document performance issues. There is a common sense compromise between the need to document performance and the concern about being overbearing and too "big-brotherish."

Take for example an employee who has a single instance of giving some back-talk to a supervisor. The supervisor knows that the employee is having some personal problems and wants to cut the employee some slack here without any formal write-up. My suggestion in this situation is to document the incident, but just not in a write-up to the employee. The supervisor can either write a contemporaneous memo to the file or a short email to HR or another supervisor confirming exactly what happened and stating clearly why it is not being formally written up as a disciplinary matter. If the employee is terminated down the road and this incident is one of many that has led to the termination, the employee would be hard pressed to claim that reference to this prior incident was pretextual.

The *Graham* decision is a welcome monument to pragmatism. Workplaces need not be a gulag of write-ups and incremental discipline. Supervisors ought to have the discretion to give someone a break when circumstances warrant, without having to be worried about being bitten in the backside down the road for a simple act of kindness. It is still suggested that there at least be some internal documentation of such gestures, even if only in the form of a two-second email.

If you have any questions about this Information Memo, please contact Howard M. Miller, any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

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