

Firing An Employee? Avoid Litigation By Carefully Reviewing The Issues

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Many times before proceeding with a termination, an employer will call on its counsel and explain the rationale for the decision to avoid potential legal issues if it should follow through on firing an employee. As labor and employment attorneys, this is what we would call “best practices”: Having a third-party neutral review the decision for the termination, play devil’s advocate, and determine if there may be some other reason for the decision that could lead to a claim of discrimination or retaliation. Other times, an employer will simply proceed with the termination and face the consequences later. This is what occurred in [Donathan v. Oakley Grain, Inc.](#) Since August 2010, Shana Donathan worked for Oakley Grain and did a variety of things for the organization at two different facilities. At all times, there were never any issues with her performance. In January 2014, Donathan learned that she never received certain bonuses that other employees received as well as newer employees were being paid at higher rates even though she trained these individuals. Donathan decided to write the owner of Oakley Grain and complained about this issue. In her written complaint, Donathan stated she felt she was not given these bonuses or higher rates because she is a female. Unbeknownst to Donathan, within hours, her email was circulated to three different men – two of whom had no supervisory role over her and generally did not work with her. Additionally, within 10 minutes of receiving the email, the owner met with the manager of the facilities at which Donathan worked to discuss the letter. At that time, the manager raised the issue of a layoff, which now included Donathan. The purported purpose of the layoff was due to a work slowdown; however, Donathan had never been laid off during prior work slowdowns. Eight days later, Donathan was informed that she and four other employees were terminated effective immediately due to a lack of work. Upon receiving the termination notice, Donathan left for the balance of the day. Three days after firing Donathan, the company re-hired three of the employees and hired a replacement for Donathan, who did not have similar experience or was licensed to weigh and grade grain. Further, Donathan’s replacement issued grain receipts under Donathan’s name, including forging her signature. The company justified the decision to not re-hire Donathan because she chose to leave work on the day she was informed her employment was terminated effective immediately. Donathan brought suit, alleging wage discrimination and retaliation in violation of the Equal Pay Act, Title VII and the Arkansas Civil Rights Act. While the lower court granted summary judgment in favor of Oakley Grain on all claims, the Eighth Circuit Court of Appeals reversed. In its reversal, the Eighth Circuit found that Donathan established a *prima facie* case of discrimination and retaliation and then picked apart the company’s proffered justifications for its decision. In doing so, the Eighth Circuit found the company’s explanations about the timing of the layoff decision, the inclusion of Donathan in the layoff even though she never was previously included, the re-hiring of some employees but not Donathan, and the hiring of a long-term replacement of Donathan. In each instance, the Eighth Circuit reverted back to the timing of the termination decision and emphasized the “[t]emporal proximity . . . is *more*

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meaningful in a case such as the present one where it is impossible to infer timing issues arise from an employee's calculated or strategic engagement in protected conduct." The lesson to be learned from the *Donathan* decision? Spend the time and resources **before** the termination by having a third-party review the decision— be it an attorney, consultant or Human Resources. That third-party should point out the potential issues with proceeding with the termination and identify ways to manage those issues. Candid questions should include whether there have been any complaints by the employee, the timing and nature of the complaints, documented performance issues, and any leave of absences that might be protected. It is much less expensive to spend time and resources prior to a firing than defending litigation which could result in protracted litigation.