



XpertHR Podcast

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Why Zero-Tolerance Policies Are a Bad Idea

David Weisenfeld:

This is XpertHR.com – your “go-to” HR compliance resource for federal, state and municipal law. I’m David Weisenfeld for XpertHR.com, published by Reed Business Information and proudly partnered with LexisNexis.

On this podcast our focus turns to zero-tolerance policies. Many companies trumpet them as evidence of their strong stance against bad behavior in the workplace. But are zero-tolerance discipline policies helpful or harmful? EEOC Commissioner, Chai Feldblum, recently suggested zero tolerance actually might make it harder to fight workplace harassment and at least one prominent employment attorney thinks she’s on to something.

Robin Shea is a partner with Constangy, Brooks, Smith & Prophete, in its Winston-Salem, North Carolina office. She’s also the author of the firm’s Employment & Labor Insider blog and conducts training for HR professionals, management and employees on a host of topics. Robin joins us now to share her thoughts on zero-tolerance policies. Robin, welcome. [0:01:17.5]

Robin Shea:

Thank you, David.

David Weisenfeld:

Always good to have you with us, Robin, and you’ve written that you agree with Commissioner Feldblum that zero-tolerance policies can backfire on employers. How come? [0:01:28.4]

Robin Shea:

Well they’ve got kind of opposite problems. One is they’re way too strict, and the result is that sometimes employers who have zero tolerance policies end up being much easier on employees than they should be.

David Weisenfeld:

Do you think these policies can have a sort of chilling effect where employees are actually less likely to come forward because they know it means someone might be fired? [0:01:54.9]

Robin Shea:

That’s exactly right and that’s what Commissioner Feldblum was talking about as well. The way most employees view a zero-tolerance policy is that if you commit an offense you’re going to be fired--no ifs, ands or buts, no consideration of extenuating circumstances, maybe not even a fair investigation to determine whether you really even engaged in the conduct.

So as a result of that employees may behave in a way that’s not appropriate for the workplace and that they should be talked to

about, or maybe even receive some formal discipline for, but it's probably not severe enough to result in their termination. If that's the case their co-workers are probably going to be reluctant to say anything about it because they're going to think, 'Joe isn't going to get a write-up if I report this, Joe is going to get fired and I don't want Joe to get fired so I'll just keep my mouth shut.'

David Weisenfeld:

Now as you know Robin some situations demand nuance, but there are others like with workplace violence or drugs where perhaps zero tolerance may be appropriate. Is your view still the same there when it comes to these policies? [0:03:05.8]

Robin Shea:

You may not believe this but I don't even like zero tolerance in the context of workplace violence or drug use or dishonesty, any of those things. Let me give you an example. Let's say you have a policy prohibiting theft of company property, and a good employee with a good record takes a couple of pens out of the supply room and takes them home in the evening for some personal use. Well technically she has violated that policy. If you have a zero-tolerance policy where everybody gets fired for any dishonest act, then you're going to have to fire a really good employee who committed, I'd say, a pretty trivial infraction.

So even in cases like that or you may in the violence context when you think who would ever not want zero tolerance of workplace violence, but what if somebody is acting in self-defense? What if somebody is actually a female employee who is defending herself against a sexual harasser who is assaulting her? Are you really going to fire that person for that?

So I think even in those really severe situations the employer has to consider all the circumstances, and consider any mitigating circumstances, and make a fair decision in which the punishment fits the crime.

David Weisenfeld:

So basically a one-size-fits-all approach doesn't always work? [0:04:33.3]

Robin Shea:

In the case of workplace violence maybe 95% of the time it would work. But I would want to have enough flexibility in that 5% of cases to do the right thing.

David Weisenfeld:

Well shifting gears a little bit, the New York Mets have been having a dismal 2018 season on the field, but something they did off the field before the season even started has attracted attention and ties directly into this conversation.

Two long-time employees of the team, one of whom was the team's public address announcer, were having a friendly conversation and the public address announcer wanted to tell an off-color joke, so he told his co-worker, 'Let's step into this empty office' so nobody else could be disturbed or hear them. But unbeknownst to them a female co-worker in fact could hear them through the wall and recorded them on her cell phone. Both men were fired by HR under the Mets' zero-tolerance policy. Robin, I'm interested to hear your thoughts on that result? [0:05:33.4]

Robin Shea:

Well based on the news article I read about that situation – and that’s all I know really, so I haven’t heard the Mets’ side of it or the side of the employee who made the recording – but based on the news article which was pretty sympathetic to these two employees, I think the treatment was way too harsh.

In my opinion the Mets should have considered the fact one of, I guess it was the announcer who was a 20-year employee in his 50s, according to him it was a PG-13 rated joke. Maybe that’s not true, but at least that’s what he’s claiming. So the mitigating circumstances to me, if I were the Mets organization, would have been number one these are two consenting employees who were engaged in this conversation, so as far as they knew they were not making these inappropriate comments to employees who would be offended by it. They thought they were alone and according to them they were in an area that had not been used by other employees and unbeknownst to them some people were working in cubicles nearby, but they didn’t realize it.

The jokes were allegedly PG-13 rated, which to me says that’s probably not the end of the world, and again we’re talking about a 20-year employee who apparently had no prior issues of any kind. So given all that, yeah, maybe if they said inappropriate things and an employee overheard them and was offended by it, and offended enough to report it to HR, maybe they did need to be reprimanded for that, but I would not fire somebody for something like that with no prior history and no prior issues which apparently was the case.

David Weisenfeld:

Yes. So there’s a whole lot to dissect here, and one of the employees who was fired has said very publicly that he would have been glad to apologize. He admitted that the joke was not something that he would have probably wanted anyone to overhear, and even if he had had to take a short suspension and just had the chance to apologize he would have been ok with that.

But putting that to the side for a moment, I’m curious what you think about what the female employee did recording the men, and just sending it to HR without first confronting them or politely asking them to stop? Was that a problem in your eyes, or was it HR’s reaction that was the problem? [0:07:57.4]

Robin Shea:

Probably both. I can understand why she may have thought she should record it just so there wouldn’t be a fact dispute about what happened and I’m assuming that’s why she saw fit to record it. I’m not an expert on recording conversations, but it’s my understanding that New York is a one-party consent state, which means if you’re going to legally record a conversation one of the parties to the conversation has to agree to that, and she was not a party to that conversation. So I think it may have been an illegal recording.

In addition to that with HR, as far as their role in it, I just keep going back to the same thing. I think maybe the joke was inappropriate, maybe it was something that shouldn’t have been told and apparently the one employee admits that. But a termination offense? I don’t think so based on what was in the news article.

David Weisenfeld: You've blogged about the fact that you never want to use an atomic bomb to kill a gnat, and it sounds like the Mets and what happened there might have been a little along those lines. [0:09:05.1]

Robin Shea: Yeah. Again without having heard the Mets' side of the story, yes, I think it definitely sounds that way.

David Weisenfeld: Right, Well they haven't spoken publicly about it, but certainly a fascinating case to be sure. Again we're speaking with Robin Shea, a partner with Constangy, Brooks, Smith & Prophete in its Winston-Salem, North Carolina office. And Robin with all of these concerns, not just with that case we just talked about but otherwise with zero-tolerance policies, how come so many employers have them? [0:09:35.2]

Robin Shea: I think they want to communicate – and this is good – they want to communicate to their employees this is bad behavior. We don't want this behavior in our workplace, and zero tolerance really gets that point across. So I think their motives are good, they just want to make sure everybody understands you don't do this at our workplace.

The trouble is, the way zero tolerance is sometimes interpreted by employees, if you engage in any harassing behavior we have zero tolerance for that, but that means you may get a write-up. You may get counseling and be told not to ever do that again, you may get a final warning, or you may be fired depending on the circumstances. In a way that's still zero tolerance, but that's not the way anybody really sees it.

So your employees reading that in your policy are going to think if there's any sexual harassment of any kind, I'm fired. And that's what causes the reluctance to report it. But I think that's part of it, it's kind of a nice buzz word to get across we don't want you doing this and employers like to use that language.

The other one, I'm sure there's some fear of liability if that occurs and again they want to get across we don't want you doing this.

David Weisenfeld: So how can employers better get their point across to make sure that certain conduct understandably they don't want to have happen in the workplace and make that point clear without bringing it to the level of a zero-tolerance policy? [0:11:12.6]

Robin Shea: I think you can just skip the zero tolerance buzz expression. Sexual harassment is strictly prohibited in the workplace, but also go on in the written policy to say if we get a complaint of harassment we'll do an investigation. If we confirm the allegations we will take appropriate action up to and including termination of employment, depending on the circumstances and the employee's prior record and all of that.

Put that in the policy, so that when employees read the policy that's what they're going to see. And I also think it's really good if you're conducting, for example, harassment training for employees to tell them that just because an employee complains that a co-worker is harassing them, we're not going to just automatically fire that employee. We're going to do an investigation, and we're going to find

out to the best of our ability whether this really happened or not. And then, even if we find out that it did happen, if it was a dirty joke we may just give them a reprimand, first-level warning, something like that. On the other hand if it was a severe form of harassment, or we've had issues with this person for a long period of time, then we may take stronger action which could include termination of employment.

But get that across to the employees that we're going to always investigate, we're never going to jump to conclusions about what happened, and we'll always take all the circumstances into account when we decide what to do about it.

David Weisenfeld: In your Employment & Labor Insider blog, Robin, you recently mentioned that these types of policies might cause management or even HR to pull its punches. Why is that? [0:12:58.3]

Robin Shea: The same reason it's a problem with employees. If you have a good employee who committed a minor offense, but one of these really tough rules like a workplace violence rule or a dishonesty rule or a harassment rule, and you know the offense really isn't that severe under the circumstances, if you've got a zero-tolerance policy the path of least resistance is going to be just don't do anything about it. Don't report it, don't follow-up on it, hopefully no harm no foul, and you won't be in a position of having to fire one of your good employees.

David Weisenfeld: Are there any other common mistakes that you see employers making just when it comes to their discipline policies generally? [0:13:42.5]

Robin Shea: That may be too many to list!

David Weisenfeld: If you could boil it down. [0:13:47.6]

Robin Shea: Can I give you my current pet peeve?

David Weisenfeld: Absolutely. [0:13:50.8]

Robin Shea: My current pet peeve is harassment policies that don't tell employees what to do if they're being harassed by somebody very high up in the organization. And this is the result of #MeToo, most pre-MeToo harassment policies don't say anything about that. You need to have something in your policy saying even if it's the CEO of the organization here's what you do. Here are the phone numbers of the members of our board of directors, you can call any one of them or set up an ombudsperson who is outside the organization and they can contact that person.

There needs to be something in that policy telling people what to do if the top dog is the offender.

David Weisenfeld: Yes, that's a big problem because so often these are geared for peer-to-peer or co-worker to co-worker or perhaps a middle management supervisor, but if it's the top dog as you say where do you go? So that really needs to be spelled out. [0:14:51.3]

Robin Shea: Yeah and I think the #MeToo Movement has helped bring that to light.

David Weisenfeld: Well in our final minute, Robin, do you have a last piece of advice that you would like to share with our audience on this whole topic of discipline policies? [0:15:04.9]

Robin Shea: I guess what I would say is by all means prohibit harassment in the workplace, prohibit workplace violence and threats, prohibit dishonesty, but make sure you're always doing a fair investigation as to whether the offense occurred and then considering all the relevant circumstances before you decide what action to take so that your punishment is really going to fit the crime.

David Weisenfeld: Well we'll let that be the last word. Robin Shea practices with Constangy, Brooks, Smith & Prophete in Winston-Salem, North Carolina, and she also authors the very popular Employment & Labor Insider blog. Robin, thanks as always for your insights. [0:15:44.4]

Robin Shea: Thank you very much for having me, David.

David Weisenfeld: I'm David Weisenfeld. We hope you've enjoyed this XpertHR.com podcast. Thanks again for listening. Continue checking our website regularly for more podcasts on key employment topics affecting the world of HR. Recent programs include "Sexual Harassment 2.0 Now What?" And, "Is the Gig Economy More Myth than Reality?"

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