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DECEMBER 2007

### ***THE COURTHOUSE PERSONNEL DEPARTMENT***

#### **DOCUMENT EMPLOYEE PERFORMANCE ISSUES**

As you know from prior issues of *The Courthouse Personnel Department*, we are continually advising employers of the importance of documenting employee performance issues prior to termination. The importance of comprehensive documentation was once again made apparent by the Appellate Court's opinion in the recent case of *Abdulnour v. Campbell Soup Supply Company*.

In *Abdulnour*, Sarmad Abdulnour ("Abdulnour"), an Iraqi, was hired by Campbell Soup Supply Company ("Campbell") to supervise 30 employees. After Abdulnour began his employment, Campbell began receiving complaints from female employees that Abdulnour "demeaned" them. After an investigation, Campbell terminated Abdulnour, advising him he "wasn't working out" due to his "management style or personality." A Campbell's manager, however, also advised Abdulnour that: "The people of Northwest Ohio have a problem with you." Abdulnour filed suit, alleging national origin discrimination.

While the trial court dismissed Abdulnour's suit because he was unable to identify any specific anti-Iraqi comments made by Campbell employees, the Appellate Court stated in its opinion that it was skeptical of the reason offered by Campbell for Abdulnour termination because Campbell failed to document Abdulnour's performance issues.

Campbell could have avoided the Appellate Court's skepticism by documenting Abdulnour's performance issues. Such documentation should be prepared keeping in mind the following suggestions:

1. Include positive and negative behaviors in performance documentation to avoid the appearance of "papering" the employee's personnel file.
2. Include only observed behaviors and not assumptions about the reasons for such behaviors or judgments about the employee's character.
3. Avoid making reference to the employee's age, sex, race, disability, national origin, marital status, religion or sexual orientation in performance documentation.
4. Be specific when identifying how an employee failed to meet his or her performance expectations or criteria. Do not merely state that the employee's performance was "poor" or "substandard."

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Rieck and Crotty, P.C. publishes *THE COURTHOUSE PERSONNEL DEPARTMENT* bi-monthly to keep employers and employees advised of current issues and decisions throughout the United States relating to employment law matters which may impact our readers. If you desire additional information concerning any of the articles, please telephone a member of the firm.

## SAFE-HARBOR PROCEDURES FOR “NO-MATCH” LETTERS

Most employers are aware of the Immigration Reform and Control Act’s (“Act”) requirement that employers verify the employment eligibility of new employees by identification documentation provided by the employee when completing the I-9 form required by the Act. Thereafter, an employer may receive a “no-match” letter requesting the employer resolve a difference between the employee’s social security number (“SSN”) obtained from the I-9 form and submitted to the Social Security Administration (“SSA”) by the employer on the employee’s W-2 form and the SSN contained in the records of the SSA or the Department of Home Land Security (“DHS”).

To avoid potential fines of up to \$10,000 per violation, DHS issued regulations which provide employers with a safe-harbor procedure for handling such letters. While a federal court has recently enjoined the enforcement of the regulations, employers should be prepared to implement such procedures to comply with the regulations if the injunction is lifted.

The DHS regulations provide as follows:

1. Upon receiving a no-match letter or having the I-9 discrepancy revealed in a DHS audit, the employer must check whether the disputed SSN resulted from an employer clerical error and, if so, correct the error with the appropriate agency.
2. If the disputed SSN is not the result of an employer’s clerical error, the employer must ask the employee to confirm the information in the employer’s records is correct.
3. If the employee confirms the employer’s records are correct, the *employee* must contact the SSA to resolve the disputed SSN. These first three steps should be completed within 30 days of receiving a no-match letter.
4. Within 90 days of the employer’s receipt of the no-match letter, the employee must resolve the disputed SSN with the SSA and provide the correct information to the employer.
5. If the disputed SSN is not resolved after 90 days, the employer has three days to obtain a new I-9 form with proof of identity which does not contain the disputed SSN.
6. If the employee fails to provide identification with a valid SSN, then the employer must assume the person is not eligible for employment.
7. If the employee is not eligible for employment, the employee must be terminated to avoid potential fines specified in DHS regulations.

Whether the regulations are upheld or not, employers should confirm that employee personnel files contain accurate SSN documentation and that I-9 forms are properly maintained.

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Be sure to visit our website at [www.riECKcrotty.com](http://www.riECKcrotty.com) to read prior issues of *The Courthouse Personnel Department* and *A Potpourri*.