What is one definition of “insanity”?  
Doing the same thing over and over and expecting a different result.
Patient: “Doc, it hurts when I do that.”

Doctor: “Then don’t do that.”

• Remember, oftentimes there is a difference between what you legally can do and what you should do under a set of facts.

• “Bad facts make bad law”
Many employee problems arise from what a manager did not do rather than what a manager did do.

**MISTAKE 1**

Not treating your employees the way you want to be treated
MISTAKE 2
Not letting your employees know you appreciate their efforts

MISTAKE 3
Not asking (the right people) for help
Not creating an environment where your employees feel that they can bring their concerns to you

Employees need someone to go to when they have concerns
That person will either be you…

Or, it may be:

• a government agency (EEOC, DOL, etc.)
• a plaintiff’s lawyer
• another employer
• a union
Today’s NLRB:

- Poster
- Social media decisions
- Advice exception removal
- Recent decisions
- Proposal related to expedited elections
- Proposals related to ULP remedies

YOU MAY GET THAT SHOT IF YOU HAVE:

- Promoted and honored the “open door” policy
- A “record” of being approachable, fair and addressing concerns
- Have gotten to know your employees
- Supported HR policies and practices
Expressing your thoughts through emails, text messages, etc.

“I never thought about that”

- Can you make a list of everyone with whom you spoke yesterday?
- Can you recall today everything you said and the other person said yesterday?
- Can you remember the time of day each conversation occurred?
- Can your recollection of the above facts be disputed?
Hypothetical
To: Topmangement@bigcoldwarehouse.com
From: You@bigcoldwarehouse.com
CC: All Managers
Re: Payne N. Ursidé

Do I have to bring Payne back from his leave? I think he is faking his illness. He’s been talking about bringing in a union. Ever since he got cancer (he says) and became religious, he has been asking for time off to go to some phony church “service” and wanting us to let him sit down every 30 minutes when he is here. I say let him go now before it gets worse. This is the problem with hiring old people.

Be Careful About Texting and “Friending” Your Subordinates
Hypothetical

Don't u like me anymore?

Yes

I would love to take you out

ok

BTW, I was thinking about licking chocolate syrup off u!!!!!

LOL

Key Points

Emails, texts, facebook postings, voicemails often constitute “smoking gun” evidence

These electronic fingerprints cannot be deleted, even if you try

Will be one of the first requests made in litigation
Lack of consistency

CONSISTENCY:

- Sets employee expectations
- Decreases need for discipline
- Increases chances of prevailing on UC claims
- Decreases risks of discrimination claims
A typical discrimination claim

- Employee alleges that she was treated adversely (e.g., termed) because of gender
- Further alleges that similarly-situated employee treated better under similar circumstances
- And similarly situated employee not in claimant’s protected class (e.g. male v. female)
- [optional] the decision made negative gender comments

HYPOTHETICAL

- You terminate a receptionist for tardiness. The policy is clear, the schedule is posted and her time cards don’t lie. The termination report says that tardiness is the reason for the termination.
- Six months later the former receptionist files a discrimination claim.
- You are not aware of anyone every doing or saying anything that even suggests discrimination.
- Does an employer have the right to terminate for attendance violations?
- What facts not listed above could suggest discrimination?
Key Points

• Before taking action, ask yourself:
  • Has this happened before?
  • If so, how did we handle?
  • Anything different here?
  • Can we explain different treatment, if any?
  • What would a jury think?

MISTAKE 7

Not recognizing potential discrimination risks
The law in most states is that employees can resign or be terminated for a good reason, bad reason, or no reason at all, without cause or prior notice.

In addition to allowing employers to terminate employees without cause or notice, the at will doctrine allows employers to transfer, promote, demote, and change pay and benefits and other terms and conditions (on a going forward basis).
The Employment-at-Will Doctrine

So, what’s the catch?
The at-will doctrine does not trump the state and federal discrimination laws. Most employment related lawsuits are filed by current or former at-will employees.

So, what does that mean in plain English?
The law prohibits you from making employment decisions based on the following:
Protected Categories

- Race/Color
- Sex
- Pregnancy
- National Origin
- Military Status
- FMLA users
- Whistleblowers
- Religion
- Citizenship Status
- Age
- Disability
- Union supporter
- Sexual Orientation
- Genetic Information
- Other state specific protections

- Discrimination is defined as treating someone favorably or unfavorably compared to others
- Unlawful discrimination can occur in hiring, promotion, pay, benefits, transfers, work assignments, overall treatment, discipline and discharge.
- Discharge most common claim
- Lack of consistency often cornerstone of claim
HYPOTHETICAL

Spatts Domino, your oldest checker, is constantly late for work. Starting time is 7:30 but he never gets to work before 7:45. His work is mediocre at best but you can tell he really tries. You and Spatts go way back together and you actually recruited and hired him. For these reasons you have not taken any formal disciplinary action. Instead, you have been trying to talk him into retiring so you can avoid the confrontation.

◆ What is the starting time?
◆ Are you stuck with this reality forever?
◆ Any risks with your retirement approach?

HYPOTHETICAL

You need a dock foreman and would like to promote one of your current employees. You have 7 candidates in your warehouse. Four are white males; one is Asian; one is a Hispanic female and one is a African American male. Three over age of 40.

Who gets the job and why?
MISTAKE

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Not taking disciplinary action

Your failure to act at the right time could:
• create a negative precedent
• lower performance standards for all
• limits your ability to take needed action
The reality is: “If you don’t document it, it didn’t happen!”
Your failure to document may create a credibility contest and the “judges” may be a jury of the employee’s peers.

**DISCIPLINARY ACTION**

**EXAMPLE:** Counseling for tardiness

- You are required to start work at 8:30 a.m.
- In the last X weeks/months you have been late Y times, arriving at these times on these dates.
- I counseled you on February 2 about tardiness and again on March 3 in writing.
- This is your final warning. Your failure to report on time again will subject you to further disciplinary action up to and including immediate discharge.
Fail to terminate an employee who needs to be fired

Your failure to act at the right time could:
- create a negative precedent
- lower performance standards for all
- limits your ability to take needed action
TERMINATION

- Do you have to give the employee a reason for your decision to terminate?
  - No

TERMINATION

If **you** don’t provide a reason for the termination decision, who gets to do that?
The former employee, a judge, a jury, a government agency or an arbitrator
TERMINATION

- Manager: “I am terminating you today.”
- Employee: “Why?”
- Manager:
  - “It’s not working out”
  - “We are going in a different direction”
  - “Your position was eliminated”
  - “We’re laying you off”
  - “We decided to make some changes”
  - Did the manager answer the question?

TERMINATION

If this third party believes you were not telling the truth about the reason for termination or are trying to hide something, it is allowed to conclude the real reason was unlawful.

If you can’t tell the employee the real reason, better rethink the decision to terminate.
Not complying with harassment policy obligations

Typical harassment-related mistakes:

- Manager violates policy
- Manager does not enforce the policy
- Manager handles problem on his/her own without guidance
- Manager retaliates against complainer
The elements of a retaliation claim:
1. Protected activity by employee
2. Employee thereafter suffers an adverse employment action
3. Evidence that No. 1 was the cause of No. 2
4. The employee must show that if #1 had not happened, #2 would not have happened.
Hypothetical

- In July, Frosty complains about inappropriate comments and employees viewing porn at work.
- On September 5, the Company terminates Frosty for excessive absences.
- Frosty claims retaliation
- What facts, if any, would be good for Frosty?
- What facts do the Company need to refute the claim?
Pay Employees Improperly or Use Their Paycheck to Manage Them

MISTAKE 14

Timekeeping

You must maintain records of hours worked for all non-exempt employees.
You cannot avoid your obligations under the FLSA simply by paying a salary or calling someone an independent contractor.
FLSA
You just learned from payroll that one of your employees worked overtime again last week without permission. You tell payroll not to pay her for the unauthorized overtime. You plan to meet with the employee and tell her that if she can’t get her work done in 8 hours, she should punch out at 8 and then finish her work.

Problem handled?

TIMEKEEPING
Your employee feels so bad that she volunteers to work “off the clock” to get her work done and do you a favor. She even puts in writing that she wants no pay. Do we have to pay her for the volunteer work?
Yes. If an employee provides any services that benefit the employer, that work is compensable time and must be recorded. The employee cannot waive his rights or the employer’s obligations under wage and hour law.

[INSTRUCTOR MATERIALS ONLY]