Tips to Minimize the Risk of Employment Practices Liability at Your Veterinary Practice
Eileen Kuo

Discrimination-related lawsuits continue to be the most common employment-related lawsuits that employers find themselves defending—usually, they arise when an employee alleges that they were discriminated against or harassed on the basis of a “protected class” (race, sex, religion, disability, etc.). Employees also frequently allege that they were retaliated against by their employer—in other words, that they were subject to an adverse employment action (termination, demotion, pay cut, reassignment) because they engaged in a protected activity (spoke to their employer about discrimination or harassment of themselves or others). These lawsuits can be costly to defend, and could potentially result in a judgment against the employer. Although the risk of incurring such costs may be impossible to eliminate entirely, by implementing some key policies and procedures into your everyday employment practices, you can better insulate yourself from such employment-related claims.

The Equal Employment Opportunity Commission (“EEOC”) enforces certain federal employment statutes that protect employees against discrimination in the workplace:

- Title VII of the Civil Rights Act of 1964 (“Title VII”)
- Equal Pay Act (“EPA”)
- Family and Medical Leave Act (“FMLA”)
- Age Discrimination in Employment Act (“ADEA”)
- Americans with Disabilities Act (“ADA”) and ADA Amendments Act (“ADAAA”)
- Genetic Information Non-Discrimination Act (“GINA”)

General overview of the EEOC charge process:

Individuals can file charges of discrimination with the EEOC, which bring to the EEOC’s attention the employment practices that the individual believes to be unlawful. The EEOC then investigates the charge, gives the employer an opportunity to respond, and issues a determination. The EEOC may decide to file a lawsuit against the employer on behalf of the complaining individual (“charging party”), or it may issue a notice to the individual that they may file suit on their own. Last year, the EEOC brought 142 such lawsuits, up from 133 the year before. Most of these lawsuits brought claims for alleged violations of Title VII, and many others were for ADA. These charges don’t always result in lawsuits—sometimes, depending on the parties’ wishes, the EEOC may facilitate settlement between the charging party and the employer through mediation or informal settlement discussions.

From October 1, 2014 through September 30, 2015, the breakdown of charges received by the EEOC is as follows:

Retaliation: 39,757 (44.5% of all charges filed)
Race: 31,027 (34.7%)
Disability: 26,968 (30.2%)
Sex: 26,396 (29.5%)
Age: 20,144 (22.5%)
National Origin: 9,438 (10.6%)
Religion: 3,502 (3.9%)
Color: 2,833 (3.2%)
Equal Pay Act: 973 (1.1%)
Genetic Information Non-Discrimination Act: 257 (0.3%)

Source: https://www.eeoc.gov/eeoc/newsroom/release/2-11-16.cfm

The percentages add up to more than 100% because individuals often alleged unlawful employment practices based on more than one basis.

In addition, nearly 28,000 charges filed with the EEOC alleged harassment, or 31%. Harassment, which includes targeted unwelcome treatment against individuals based on any of the protected classes (not just sexual harassment), is a national priority for the EEOC and remains a part of the EEOC’s strategic plan.

Overview of the statutes enforced by the EEOC:

Title VII of the Civil Rights Act of 1964: Prohibits discrimination due to race, color, religion, sex and national original. It also includes the Pregnancy Discrimination Act (PDA), which forbids discrimination based on pregnancy, childbirth or related medical conditions.

Equal Pay Act (EPA): Prohibits gender-based pay discrimination between men and women performing similar roles. This law includes employers who are covered by the federal Fair Labor Standards Act (FLSA).

Family and Medical Leave Act (FMLA): Prohibits discrimination against pregnant women and parents, as well as employees with serious health conditions.

Age Discrimination in Employment Act (ADEA): Prohibits discrimination against employees age 40 and older.

Americans with Disabilities Act (ADA) and ADA Amendments Act (ADAAA): Prohibits discrimination against qualified employees or job applicants due to a disability, association with someone disabled or because the employer sees an employee as disabled, even if he or she actually is not.

Genetic Information Non-Discrimination Act (GINA): Prohibits employers, employment agencies, and labor unions from discriminating employees based on genetic information.

For more information about the EEOC, its procedures, and the laws that it enforces, please go to www.eeoc.gov.

Best practices to reduce the risk of discrimination claims:

Generally speaking, an employee or applicant establishes that they were discriminated against by proving that: 1) they are a member of a protected class; 2) they were qualified for the job
position at issue; 3) they were subject to an adverse employment action; and 4) a similarly-
situated individual outside of the protected class was treated more favorably.

The issue of how a person might prove that they are a member of a protected class may seem
self-explanatory—and often, it is. If the person is alleging race discrimination against African
Americans, they would prove membership in the protected class if they are African American. If
the person is alleging sex discrimination against women, she would prove membership in the
protected class if she is a woman. However, though it can be difficult to prove, reverse
discrimination is also protected, and individuals do occasionally bring claims alleging that they
are being discriminated against as a member of a class that is not typically the minority.
Associational discrimination is also protected—an individual would have to prove that they were
discriminated against for being associated with a member of a protected class.

To prevail on a discrimination claim, an individual must be able to show that they were subjected
to an “adverse employment action”—in other words, that they suffered an action in the
workplace that materially affected any of the terms or conditions of their employment, such as
compensation, position, discipline, and others. Some examples are, but are not limited to, failure
to hire, pay decreases, demotion, and termination.

To establish that a similarly-situated individual was treated better, the claimant would have to
show that someone outside the protected class (for example, not African American, not a
woman, not disabled, etc.) was treated better in that they were not subject to the adverse
employment action. To be “similarly-situated,” the comparator employee would have to be
someone who is similar to the complaining individual in “all relevant aspects”—in other words,
the comparator must have worked under the same supervisor, in the same or similar position,
engaged in the same conduct in question, and subject to the same standards. The complainant
cannot just identify any other employee outside the protected class and compare their treatment.

Even if a claimant can establish all of these factors above, an employer is not necessarily liable,
particularly if it can establish that it made its employment decisions based on “legitimate, non-
discriminatory business reasons.” The employer must be able to show that unlawful factors such
as an individual’s membership in a protected class did not motivate its decisions. Thus, one of
the best ways to insulate your practice from discrimination claims is to make sure that each
employment decision is based on legitimate, non-discriminatory business reasons.

Be objective!
For example, before terminating an employee, be sure that the reason for termination is objective
and well-documented, such as poor attendance or failure to perform job duties. Hopefully you
have made it clear to your employees what their job duties are and what your expectations are for
their work performance. If you’ve done so, you will have a clear basis for pointing out their
failure to meet those clear, objective expectations. Or, as another example, a legitimate, non-
discriminatory reason may be that financial concerns necessitate a reduction in force. Ideally,
assessing whether an individual has met those expectations would be clear to anyone, regardless
of their familiarity with the people involved. A legitimate, non-discriminatory reason should
ideally not be subject to interpretation or opinion.
One “reason” to be cautious with is insubordination. Although you may have a legitimate, non-discriminatory interest in disciplining or terminating an insubordinate employee, be sure that the incidents of insubordination are objective and well-documented. For example, if the individual was involved in an unprofessional outburst, or refused to perform tasks assigned by a manager, such an incident could form the basis of an adverse employment action. Such incidents should be recorded in writing (with dates, times, and if appropriate, statements of witnesses) and placed in the employee’s file. However, be careful not to label mere personality conflicts or minor scuffles as “insubordination,” particularly if the complaining individual has any basis for arguing that these minor tiffs and personality conflicts are evidence of discriminatory animus.

Be consistent!
In addition, be sure that standards in the workplace are applied consistently, and rules are enforced exactly the same between individuals. For instance, if one employee gets away with five unexcused absences, so should others. Ideally, your employment policies should be written in such a way that they can be applied exactly as written; however, if you’ve consistently bent the rules all along, it may appear discriminatory to suddenly enforce them rigidly when you have a problem employee that you would like to terminate. If you become aware of a practice-wide need to revamp enforcement of employment policies where enforcement has become lax, don’t do it right before you use it to discipline someone. Instead, make a general announcement to all affected employees to put them adequately on notice before the change goes into effect.

Consider progressive discipline!
If you haven’t already, it may be a good idea to adopt a policy of progressive discipline. Progressive discipline provides several steps between the first of a certain type of infraction and termination, with each step increasing in severity. Typically, the steps are:

- Verbal warning/counseling
- Written warning
- Suspension without pay
- Termination

Of course, not all infractions are appropriate for progressive discipline. For instance, theft or falsification of records may be appropriate bases for immediate termination. You certainly don’t want to give someone three more opportunities to take cash out of the safe. If you do have a progressive discipline policy, make sure your policies are clear as to which infractions subject employees to immediate termination.

When giving someone a verbal warning, it may be appropriate to approach it as more of a counseling session. Meet with the employee one-on-one in an informal manner to communicate the problem. This may be a good opportunity to discuss with the employee what may have been the cause of the problem and identify ways to prevent similar infractions in the future. For instance, if the problem is failure to perform job duties, a verbal warning or counseling session would be a good opportunity to get input from the employee as to whether additional training or other assistance would improve their performance. Let the employee know that further disciplinary action may follow if the problem is not resolved or corrected. Although this first step is technically a “verbal” warning, it may not be a bad idea to make a note in the employee’s
file or send the employee an informal follow-up email. You never know when you may need to prove that this first step took place.

If the problem recurs, a written warning would likely be appropriate. Prepare the disciplinary documentation ahead of time by taking the following steps:

- Note the date and time of the infraction.
- Describe what happened in objective and factual terms. Avoid words that convey judgment, emotion, or generalities.
- State that if the problem is not corrected, the employee would be subject to further discipline, including but not limited to termination.

In a written warning, as with any other employment-related documentation, it is best to stay away from statements that may invite argument, such as words that convey judgment, emotion, or generalities. Additionally, don’t make any assumption or guesses as to anything that you don’t know for sure. This is also not the place to make a legal argument. For instance, a written warning that states the following may invite an unnecessary debate with the employee as to the accuracy of these statements: “Bob has displayed a flippant disregard for his coworkers by being repeatedly late to work, likely due to the fact that he is mentally checked out and can’t be bothered to do his job.” You would be guessing about Bob’s attitude or the reasons for his tardiness, and this statement provides no specifics as to when Bob was late or by how much. Instead, a better statement might be: “On January 15, 2016, Bob was 25 minutes late to his scheduled shift without properly notifying the vet. Previously, on December 30, 2015, Bob was 30 minutes late to his scheduled shift without notice, and was counseled verbally about punctuality. Because Bob was late, the office was short-staffed during a busy time of day. Bob needs to arrive at the office by 7:00 am sharp on the days he is scheduled to work. Continued failure to do so may result in further discipline, up to and including termination.”

When presenting a written warning, again, speak with the employee one-on-one and identify the problem. Advise the employee that further infractions may result in additional discipline, up to and including termination.

If the employee commits the same infraction again following a written warning, a suspension of one to three days may be appropriate, depending on the situation. As with a written warning, prepare written documentation of the reason for the suspension using clear, objective, and fact-based terms. Be sure to record the date of the infraction and describe it with detailed factual specifics.

If after the above steps, the problem continues, termination may be appropriate. Before terminating an employee, make sure all of the previous steps are adequately documented, and that the reason for termination is legitimate, non-discriminatory, and in furtherance of the success of the business, not motivated by any discriminatory or retaliatory animus. When conducting a termination meeting, do give the employee an opportunity to explain his or her actions and provide additional information. Do give consideration to any additional information the employee provides and decide whether any additional actions need to be taken before terminating the employee.
In Tennessee, employers must prepare a Separation Notice specifying the reason for the employee’s termination, along with some additional details regarding their employment. If the employee submits a claim for unemployment benefits, this document may be used to present the employer’s reason for termination to the Department of Labor and Workforce Development in support of a determination as to whether the employee is entitled to benefits. Make sure that whatever is stated on this form is consistent with the documentation in the employee’s file.

Although it is impossible to completely insulate your practice from employment practices liability, these tips will help reduce the risk of receiving claims of discrimination or retaliation. If you make employment decisions based on objective facts and non-discriminatory business reasons, and carefully document the important steps in the employment relationship, you will better position yourself to either avoid such claims or be better able to successfully defend yourself against them.