

**WHO'S ON THE FIRING LINE?
TIPS FOR AVOIDING WRONGFUL/RETALIATORY DISCHARGE CLAIMS**

*by
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I. INTRODUCTION

- A. Union members were only 7.2% of the private sector work force in 2009, down from 9.5% in 1999 — and down from a peak of 37% forty years earlier.
- B. As unions have declined, courts and legislatures have dramatically increased their involvement in and regulation of the employer-employee relationship.
- C. Employee can sue employers on one or more of the following grounds:
 - 1. Discrimination based upon
 - a. Race
 - b. Sex
 - c. Religion
 - d. National origin
 - e. Color
 - f. Age
 - g. Disability
 - h. Genetic information
 - i. Pregnancy
 - 2. Can also sue for harassment on any of these bases. Sexual harassment is the most common harassment claim.
 - 3. Can also assert retaliation when discharge follows employee "protected activity" pursuant to laws prohibiting discrimination on above bases.
 - 4. An employer's failure to comply with the Family & Medical Leave Act
 - 5. Breach of oral contract
 - 6. Breach of written contract including claims (based on employee manual or other written policies)

7. Breach of implied covenant of good faith and fair dealing
8. Violation of privacy rights
9. Equal pay
10. Defamation
11. Other intentional torts
12. Unjust discharge causes of action recognized in Ohio
 - a. Breach of express contract (promises contained in employment agreement)
 - b. Breach of implied contract (based upon promises of job security and fairness made in manual or through oral representations)
 - c. Breach of implied contract based upon employee's change in position (employee gives up another secure job to accept job with employer or refuses job offer to stay with employer)
 - d. Intentional infliction of emotional distress
 - e. Violation of public policy (tort)

D. Major federal and Ohio agencies regulating the employment relationship

1. U.S. Department of Labor
2. Equal Employment Opportunity Commission (EEOC)
3. U.S. Immigration and Naturalization Service
4. National Labor Relations Board
5. Pension Benefit and Guaranty Corporation
6. Office of Federal Contract Compliance Programs
7. Occupational Safety and Health Administration
8. Department of Jobs and Family Services
9. Bureau of Workers Compensation/Industrial Commission
10. State Civil Rights Commission (Ohio Civil Rights Commission – OCRC)
11. State Department of Industrial Relations

II. EMPLOYMENT RELATIONSHIPS AND THE TERMINATION DECISION

A. Maintaining employment-at-will relationships

1. Avoid saying or doing anything that creates in the mind of the employee an expectation of continued employment
 - a. Avoid typical probationary period language
 - b. Review employee handbooks and delete language promising job security
 - c. Avoid oral promises of continued employment -- train supervisors
2. Performance evaluations
 - a. Do not promise continued employment if performance keeps up
 - b. Be candid
 - c. Avoid tendency to soften negative language
 - d. Inaccurate or poor evaluation -- devastating at trial
 - e. A proper evaluation is a great tool when an employee is discharged down the line for performance
 - f. Poorly done evaluation is worse than no evaluation at all

B. Discharge decisions

1. Discharges for cause
 - a. Just Cause Checklist is attached as Appendix A
 - b. Do not let the discharge come as a surprise to the employee
 - (1) Employer must communicate rules and performance standards
 - (2) Employer must communicate penalties
 - (3) Severe misconduct may justify immediate discharge

- (4) If the misconduct is not severe, progressive discipline must be used [attendance, tardiness, poor performance]
 - (5) Create a paper trail
 - (a) Self-contained, self-serving memo to employee and file
 - (b) List what rules were broken; what employee's response was; what corrective action the employee was told to take; what will happen if employee fails to take corrective action; how long the employee has to improve
- c. Was the rule reasonable?
- (1) How does the rule or standard relate to operation of the organization?
 - (2) How does failure to abide by the rule, or meet the standard, hurt operations of the business?
 - (3) Be able to explain any unreasonable aspects of the rule
 - (4) Include the foregoing explanations in your memo if they are not apparent
- d. Was a fair investigation conducted?
- (1) Designate an impartial investigator
 - (2) Conduct investigation *before* discharging
 - (3) Get both sides of the story
 - (4) Be able to explain why you believed one side of the story and not the other
- e. Make sure discipline is consistent with what has been done in the past
- (1) Any inconsistencies in discipline for similar offenses
 - (2) How do you explain difference in treatment? Avoid subjective evaluations such as "attitude." Give examples of bad "attitude"
- f. Is discipline fair in this case?
- (1) How serious is the misconduct?

- (2) Was the misconduct intentional or unintentional?
- (3) What excuse did the employee give?
- (4) Be able to explain why employee's "excuses" do not justify his actions
- (5) Did employer consider alternatives to discharge?
 - (a) Suspension with final warning
 - (b) Disciplinary probation
 - (c) Last-chance agreement
 - (d) Leave of absence
 - (e) Transfer
- (6) Be able to explain why you rejected alternatives

2. Employment Retaliation/Retaliatory Discharge

- a. Fast-growing category of EEOC charges and lawsuits.
- b. Retaliation claims can survive even when accompanying discrimination claim is dismissed on summary judgment.
- c. Retaliation claims more likely to survive summary judgment and to produce verdict for plaintiff than discrimination claims.
- d. Retaliation claim arises when employee engages in "protected activity" and is later subjected to adverse action because of the protected activity.
- e. Two types of "protected activity:"
 - (1) Participation activity -- employee asserts protected rights (files an EEOC/OCRC charge, etc.)
 - (2) Opposition activity -- employee opposes unlawful discrimination.
 - (a) To be protected, must be based upon employee's good-faith belief that what they're opposing is unlawful; and
 - (b) Must be reasonable.

- (c) Recent Supreme Court decision and related case law has expanded scope of protected opposition activity. See *Crawford v. Metro. Govt. of Nashville* (2009), 129 S. Ct. 846.
 - f. Recent case law substantially expands the types of actions that will qualify as being "materially adverse" for purposes of retaliation claim.
 - (1) Key question: Would adverse action dissuade a reasonable person from engaging in protected activity in the future?
 - (2) Less rigorous standard than for proving discrimination.
 - (3) See *Burlington Northern & Santa Fe Rwy. Co. v. White* (2006), 126 S. Ct. 2405.
 - g. Key factors to consider regarding causation element include temporal proximity (closeness in time) between employers' knowledge of protected activity and adverse action; and disparate treatment.
 - (1) Temporal proximity alone can demonstrate causation to a court.
 - (2) Disparate treatment issues include both: treatment of the employee after protected activity that is different than previous treatment of the same employee; and treating the employee who complained differently than others who haven't complained.
- 3. Discharges for economic reasons
 - a. Establish what criteria you are going to use
 - (1) Seniority is the safest
 - (2) Other performance-related factors
 - (3) Ability to do remaining jobs
 - b. Compare individually, and as a group, employees who are going with those staying, as to:
 - (1) Age
 - (2) Sex
 - (3) Race
 - (4) National origin

- (5) Disability
 - (6) Other protected categories or prior protected activity (filing charges, workers comp claims, etc.)
- c. Be able to produce objective evidence to explain why you chose one individual or group over the others

III. THE DISCHARGE AND AFTERWARD

A. Exit interview procedure

1. Before the exit interview

a. Interview must be conducted coolly and calmly

- (1) Choose the company representative carefully
- (2) A person who has not been in conflict with employee is best

b. Choose the right words

- (1) Rehearse what you will say and how you will say it
- (2) It provides an opportunity to review the evidence once more

2. During the exit interview

a. Have a witness who can later accurately recount what happened

b. Be honest and factual

- (1) Give the real reasons for discharge
- (2) There should be no conflict between what you tell the employee about reasons and what you tell a jury later about reasons

c. Listen to employee's "side" so you cannot legitimately be accused of failing to provide the employee the opportunity to be heard

d. Don't apologize

- e. Provide benefits and severance pay information

- 3. After the exit interview

- a. Prepare a file memo

- (1) It can be used as evidence later

- (2) Provides details you will otherwise forget

- b. Discharged employees have legal rights which protect privacy and good name

- (1) Share information about the discharge only with other employees who *need* to know

- (2) Provide prospective employers with a neutral reference

- B. Releases

- 1. Situations where releases are appropriate

- a. Reduction in force or other layoff which is not for cause

- b. In a "for cause" discharge where you expect to be sued and are willing to give employee something extra in order to obtain the release and avoid a lawsuit

- 2. Situations where releases are usually inappropriate

- a. Most discharges for just cause

- b. Voluntary quits

- 3. An employee must be given a meaningful chance to consult with a lawyer before he signs. (If over forty, must give twenty-one days to think about it and seven days after signing to change mind.) If group termination (more than one person let go for the same reason) need 45 days for age release, with special information on who's affected and who is not.

APPENDIX A

JUST CAUSE/DISCRIMINATION CHECKLIST

1. Did the employer obtain the employee's side of the story *before* making the termination decision?
2. What is the employee's age, sex, race and other minority group status? Does the employee have a disability?
3. Has the employee recently complained about safety or the legality of the employer's practices (i.e. is he a "whistle-blower")?
4. Has the employee recently exercised a legal right such as filing an OSHA complaint, filing a Workers' Compensation claim or EEOC charge, or serving on a jury, etc. . . ?
5. Are the employee's pension rights due to vest shortly?
6. Did the employee know the discharge was coming?
7. Was the rule the employee violated, or the standards he failed to meet, reasonable?
8. Is the employee's improper conduct or failure to respond to corrective suggestions documented?
9. If the discharge is for performance, can the supervisor identify specific tasks or responsibilities that were not properly carried out?
10. How complete and fair was your investigation and decision-making process?
11. Was the discipline imposed consistent with what you have done in the past for similar offenses?
12. Was the discipline reasonable in light of the seriousness of the employee's offense and his record and service with the employer?
13. Has the employer considered mitigating factors such as the employee's length of service, good prior record, or personal problems that might have contributed to the work problem?
14. Has the employer considered alternatives to discharge, such as suspensions, final warning, or a transfer?

15. Is there any evidence that the employee's protected status or protected conduct is the real reason for the discharge?

CHECKLIST OF DO'S AND DON'TS FOR ALL EMPLOYMENT RELATIONSHIPS

DO'S

1. Adopt uniform work rules and disciplinary grounds and procedures
2. Make sure rules are communicated to all employees and impartially and consistently applied
3. Use progressive discipline for minor infractions and for performance-related problems
4. Make sure employees know what is expected of them
5. Evaluate employee performance regularly, fairly, and objectively
6. Have an open door for problems, complaints, suggestions
7. Respond to problems and complaints even if they seem trivial or the events seem unlikely to have occurred.
8. Treat employees fairly and humanely, including especially the ones you decide to discharge
9. Investigate all complaints and keep documentation of investigation.

DON'TS

1. Allow supervisors to evaluate employees subjectively so that favoritism or bias can affect results
2. Allow supervisors to soften evaluations in order to avoid conflicts
3. Adopt unreasonable work rules
4. Adopt rules that are unrelated to smooth or efficient operation
5. Apply rules unevenly or inconsistently – if you are changing a rule or going to start enforcing more strictly, let employees know
6. Fail to communicate rules to employees or grounds for discipline
7. Fail to let employees know that they are in trouble
8. Refuse to let employees give their side of the story

9. Fail to fully and truthfully explain reasons for discharge
10. Ignore complaints about sexual harassment or other misconduct.