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Involuntary termination of an employee is certainly one of the more sensitive legal issues that an employer may face. By far, most lawsuits against employers arise in the context of employee discharge. Comparatively few lawsuits arise out of a failure to hire or from a claim of discriminatory working conditions. Since they so frequently lead to lawsuits against employers, involuntary termination proceedings must be conducted with a great degree of care.

CLEARLY UNLAWFUL REASONS FOR TERMINATION

Employees certainly can be legitimately discharged for business-related reasons. For example, employees can be terminated for absenteeism, tardiness, rule violations, and insubordination. However, there are certain factors that clearly cannot be involved in the termination decision.

These include: race, color, religion, sex, pregnancy, national origin, age (above 40), disability, whistleblowing, military duty, union activity, wage garnishment, political activities or opinions, free speech (public sector employers), involvement in workers' compensation proceedings, in violation of contract, mass layoffs or plant closures without notice, and bankruptcy. Therefore, in making a termination decision, an employer should first ask whether one of the above reasons enters into the decision. Also, a wise employer should consider whether the employee can reasonably argue that one of the above reasons entered into the decision. If so, legal counsel should be consulted prior to termination.

TERMINATION PROCEDURE REQUIRES THOUGHT

The process is always difficult. However, there are a few guidelines which can help insulate the employer from a lawsuit arising out of a discharge. Unless the conduct calls for immediate dismissal, it is a good idea to first suspend the employee and obtain all of the facts. Next, the employer should check to ensure that there is a rule or policy that applies to the conduct in question. After that, the employer should ensure that the rule or policy has been applied evenly. If the employee is in a protected category (minority, female, or disabled), the employer should be especially cautious in ensuring that the rule relied upon has been equally applied to other employees. It is very wise to document all of the facts and consider taking informal statements from witnesses. Lawsuits often arise years after a discharge actually took place and it is extremely difficult to remember what actually happened without having thorough documentation in a personnel file.

It is important that, prior to making the decision, an employer allow an employee to tell his or her side of the story. It is also a good idea to have two management people present in the discharge interview. Many lawsuits have been won or lost based on what was said during this session. Management should be careful to avoid ridiculing the employee. Often employees feel extremely belittled as a result of the way a discharge was handled and file a lawsuit in an attempt to retaliate against their employer. On the other hand, management should take equal care not to cause the employee to believe the discharge decision is unjustified. Statements such as "the boss decided to let

you go but I agree with you” can cause the employee to feel his or her rights have been violated unnecessarily. Also, employers should always avoid discussing the situation with outsiders and those who do not need to know. Many slander cases have been filed against employers who talk “out of school” about the shortcomings of a former employee.

Employers should always take care to give consistent reasons for discharge. For example, when filling out unemployment forms the true reasons should be given. If one reason is put in the personnel file and another asserted when the discharge is challenged, it will look as if the employer is attempting to cover up some unlawful reason.

The employer should also consider severance pay. If the employee is offered severance in addition to anything he or she is entitled to by company policy, the severance agreement should include a release of liability from the employee in favor of the employer. Properly drafted releases should provide absolute protection against any claims a discharged employee might bring.

Another consideration is trade secrets and confidential information. The employee should not be allowed to remove files or computer records without review. Consideration should be given to including language in any severance agreement prohibiting the employee from revealing or taking confidential information.

If the employee files for unemployment, the employer may want to challenge any entitlement and attend the unemployment hearing. In sticky situations, the employer should bring an attorney. Sworn testimony is taken at unemployment hearings and employees often make admissions which are very helpful in subsequent litigation.

FAIRNESS

The bottom line in many termination cases is fairness. Although South Carolina still observes the “employment at-will rule”, creative plaintiffs' lawyers are able to turn an unfair discharge into an illegal one by asserting that the discharge is motivated by one of the clearly unlawful reasons discussed above. A discharge carried out pursuant to the above guidelines will not only be fair but should also be lawful.