



McKENNA EMPLOYMENT BULLETIN

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CONSIDERATIONS WHEN TERMINATING AN EMPLOYEE

Because of the state of the economy, employers might find themselves in the position of having to reduce the size of their work force. We suggest the following things be considered when deciding to terminate:

A. Reason For Termination - Ask why is the employee being recommended for termination and what did the employee do or fail to do. Is the reason for termination related to the employee's ability to do the job and to the downturn in business.

B. Investigation - Talk to the supervisor who recommends the termination and the employee's immediate supervisor, if different. Review the employee's personnel file for contracts, prior evaluations, counseling, warnings and notices.

C. Personnel Policy Manual Or Procedures - Review and make sure the method for termination set out in the manual or any other writing is followed.

D. Oral Promise - Review and inquire as to whether any oral representations concerning job security or conditions were made to the employee.

E. Civil Rights Statutes - Review and look for any indication that unlawful discrimination is associated with any recommendation for termination.

F. Supervisor Intent - Make certain that the employee's supervisor is not fabricating a reason for termination simply to get rid of the employee.

G. Termination Interviews - Decide how to tell each employee. You should tell the employee in person rather than in writing. But, a written memorandum should be placed in the employee's personnel file. Tell the employee the correct reason for the employee's termination. If you do not and you must then state the real reason during an EEOC, Illinois Department of Human Rights or Cook County Human Rights

Department investigation, or during suit, "changing" your reason may be viewed as evidence that your reason is false.

You should be as direct and candid as possible in stating the reason for termination. This is because if there is a trial you will need to prove the full business reason for the termination. However, you should avoid being overly specific in explaining the reason for the termination. In the setting of a termination interview, the person terminating may get the specific facts wrong. An employee's lawyer can use that mistake to try and show that the employer did not take the time to correctly analyze the employee's situation.

Your demeanor should be compassionate but not apologetic. Obtain employer documents, materials, keys, credit cards and things of this nature at the termination interview. Have the interview at a time which is least disruptive for both employer and employee. Ask if the employee has any questions and let the employee talk.

Offer outplacement services or direct the employee to employment offices. The sooner the employee finds another job, the better. Starting another job reduces potential economic damages, changes focus from anger at losing their job with you to performing in the new job and reduces potential emotional distress claims.

Think about a release and waiver of claims if you are offering a separation agreement.

Finally, send no letters of reference without Human Resource or General Counsel approval. This is so that any letter of reference does not conflict with the reason given for termination.

RETALIATION CAN OCCUR FOR DENYING MENTORING OPPORTUNITIES

In Jones v. Calvert Group, Ltd., 551 F.3d 297 (4th Cir. 2009), an employee filed a complaint of discrimination against the employer alleging

discrimination on the basis of her race, sex, and age. The complaint was resolved by written agreement. However, shortly thereafter the employee received a negative performance evaluation. She then filed a second formal discrimination charge claiming that, in retaliation for filing the first charge, she had been denied mentoring opportunities and that management scrutinized her performance unduly. The employer then terminated the employee, allegedly for not taking ownership of her work assignments.

The employee sued alleging race and sex discrimination and retaliation for filing her discrimination complaints.

The U. S. Court of Appeals held that the employee's charge with the EEOC failed to allege discrimination on the basis of age, sex or race and affirmed the summary judgment entered in favor of the employer on those charges.

However, the Court reversed entry of summary judgment in favor of the employer on the retaliation charge. The Court ruled that the employee's charge of retaliation based on a pattern of conduct by her employer that included denying her mentoring opportunities, unduly scrutinizing her performance, and giving her a negative performance review adequately alleged a cause of action for retaliation.

EMPLOYEE FAILS TO FILE HER SECOND LAWSUIT ON TIME

In Abraham v. Woods Hole Oceanographic Institute, 2009 WL 140745 (1st Cir. 2009), the employee filed with the state anti-discrimination commission but had no initial communication with the EEOC. After the EEOC sent its notice of the employee's right to sue, the employee did not file suit within ninety days. The employee argued that he never received the EEOC's first dismissal notice. However, the reason the employee gave

for not receiving the notice constituted lack of diligence. The plaintiff moved without filing a change of address with the EEOC. Further, the state commission had provided notice to the plaintiff that his Title VII claim was to be reviewed by the EEOC. The state commission also provided the EEOC's address to the employee. But, the employee never notified the EEOC.

CHARGE OF ANTI-MILITARY DISCRIMINATION NOT SHOWN

In Staub v. Proctor Hospital, No. 08-1316, decided March 25, 2009, the U.S. Court of Appeals for the Seventh Circuit ruled that the record failed to contain sufficient evidence to support the jury's verdict in favor of the plaintiff in an action alleging that the employer terminated the plaintiff on account of his association with the military. The employee's supervisor had uttered anti-military statements arising out of the employee's military obligations that required that the employee periodically be away from the workplace. The decision-maker who terminated the plaintiff held no such anti-military feelings and based the termination decision on a co-worker's complaints about the employee's attitude. The Court ruled that the employee could not rely on the "cat's paw" theory which attributes a supervisor's anti-military bias to the decision-maker. This was because the decision-maker conducted his own independent investigation regarding complaints against the plaintiff even though the supervisor gave the decision-maker some input on the termination decision.

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