THE RESOURCE

A Legal Newsletter for Employers & Human Resource Professionals
By: L. Diane Tindall & Mary M. Williams
Attorneys-at-Law

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Topic: Employee Discipline

By far the most common mistake made by employers is the failure to promptly address and thoroughly document employee performance problems. No one likes to give or receive criticism. It is human nature to want to sweep the problem "under the rug" and hope that it will fix itself. Unfortunately, cases in which a problem employee leaves the job of his own volition or miraculously mends his ways are rare. Problems must be addressed, and should be addressed sooner rather than later. From your attorney's point of view, terminating a problem employee is a simple matter if the employee's personnel file contains a paper trail that documents performance problems, including verbal and written warnings to the employee over a period of time leading up to the termination. More problematic are terminations where the problem behavior has been long overlooked, and never addressed or documented until just prior to the termination. Worst of all are those situations where there is nothing in the file regarding the employee's performance, or where the file contains neutral (or even positive) evaluations that do not address the performance issues. In these latter cases, if the employee files a claim for wrongful termination or a discrimination charge, the employer's explanation of the termination will be suspect and may be characterized as a pretext for an unspoken (and illegal) reason for the termination.

This volume of The Resource will review employer "best practices" when disciplining employees.

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1. Performance Reviews

Most employers recognize the need for periodic employee performance evaluations and many have policies providing for annual reviews. However, more often than not, the employer will not adhere to the review schedule, will review some employees and not others or will use different standards of measuring performance from one department (or reviewer) to another. It is critical for employers to put in place a consistently applied periodic employee review schedule and to stick to it for every employee.

Performance reviews are stressful for both the reviewer and the employee being assessed. Reviewers dislike giving negative feedback; employees hate to receive criticism of their performance. However, an effective evaluation can provide valuable evidence of performance issues that will support later disciplinary action.

Employers should first review their performance evaluation documents to be sure that they are thorough and fair. Be sure that the evaluation assesses performance directly related to the essential functions of the employee's job by comparing it to the applicable job description. Don't allow numbers alone to provide feedback; written comments with specific examples provide the most effective feedback to the employee and the best evidence of any performance problems. Be sure that the employee has the opportunity to review the evaluation and respond. Many employers require employees to sign the evaluation. The employee's signature will provide good evidence that the evaluation was communicated to the employee. If the employee refuses to sign, the evaluator should so note on the evaluation with his/her signature and the date.

The person conducting the evaluation should be trained and well prepared. If the evaluator is not the employee's direct supervisor, the supervisor should have direct input into the evaluation. If the employer is using more than one evaluator, the evaluators should confer to be sure that their standards and procedures are consistent. An employee's good or bad performance review should not depend on whether the evaluator is an "easy grader." Evaluators should also be sure to avoid the "grade inflation syndrome." If your evaluation form includes a numeric component, be sure that the evaluators all assign the same criteria to each number. You will not want a grade of "3" to mean "meets expectations" for one evaluator and "needs improvement" for another.

2. Performance Improvement Plans

If an employee has significant performance problems, before considering termination, you may want to consider a "performance improvement plan." Such a plan can provide powerful incentive for the employee to improve his/her performance, and good evidence of grounds for discipline if the employee's performance does not improve. Start with a written plan that provides specific goals for the employee to meet within a specific timeframe. Make sure that the goals are clearly set out, so there can be no misunderstanding. Give the employee a copy of the performance plan, and have the employee date and sign a copy acknowledging receipt of the plan; be sure to put a copy of the plan and signed acknowledgement in the employee's personnel file.

Be sure that the plan has a start and end date, with interim milestones along the way. If the employee sees that he is not meeting his milestones, he will not be surprised when he does not meet his ultimate performance goals.

Be sure that the goals are attainable and not unreasonable. You need not set the goals lower so that the particular employee can meet them. You only need to set the goals within reasonable expectations for the job. For example, if the employee lacks the skills or work ethic to meet your reasonable goals, you need not lower your standards for that employee. You should be able to show, however, that a skilled and responsible employee in that job would be able to meet the goals you have set. If there are comparable positions, it is helpful to show that other employees are meeting similar goals. You want to avoid a situation where the employee can show that no

reasonable employee could have accomplished the set goals within the required time frame, so that the employee was "set up to fail."

Where goals are expressed in dollars brought in or numbers met or by specific events taking place within a given deadline, it is easier to prove that the employee has missed the mark. Examples include requiring a sales person to close a certain dollar amount of business by a certain date; requiring a technical person to get regulatory approval of a product by a certain date; or requiring a manager to reach positive cash flow in his department by a certain date.

As a part of the performance plan, the employee should be advised of the consequences if he fails to meet the set goals. This is necessary both to instill in the employee a sense of urgency and to prepare the employee for possible demotion or termination. An employee is less likely to contest disciplinary action if he can see it coming, and the result is within his control.

Meet with the employee periodically to assess his progress. Again, the employee is more likely to contest a decision if it comes as a surprise, and he has no opportunity to influence the outcome. Written documentation is critical. You need to not only document the terms of the plan itself, but also the employee's progress over the course of the plan. Be evenhanded in your documentation. Don't just document failures, as this can create the impression that the employee has no chance to succeed and has been "set up to fail." Be sure to also document your meetings with the employee in which you assess his progress.

It is hard to be critical. The biggest mistake that employers make is to "pull their punches" in addressing and documenting poor employee performance. Don't be afraid to be honest. If the employee makes a mistake, misses a deadline or loses a customer, tell the employee there is a problem. Also tell the employee that the company has the right to expect that employees adhere to certain standards and that unacceptable performance will not be tolerated. You shouldn't feel guilty about discussing employee shortcomings. Employees know (but may not want to accept) that their poor performance will have consequences.

Part of the employer's responsibility in setting up a performance plan is to allow the employee the opportunity to meet the set goals and succeed. Be supportive, but firm. If the employee asks for guidance and support, it should be freely given within reason. This does not mean, however, that the employer should lower its standards or, in effect, do the employee's job for him.

If the plan provides for termination if the employee does not meet stated goals, be sure to follow through with the termination. Giving second and third chances will set a dangerous precedent and make the plan worthless. "Trying hard" or meeting "some" goals should not be sufficient. If the goals were legitimate and reasonable and the employee fails to achieve them, he should be ready to face the consequences.

3. Progressive Discipline

Many employers have instituted "progressive discipline plans" that set out progressively more severe disciplinary action for repeated performance problems or other unacceptable workplace behavior. Typically, such plans will list examples of unacceptable employee behaviors and provide for a verbal warning for a first offense, a written warning for a second offense, a final warning for the third offense, with termination as the final disciplinary action for a fourth offense. Other plans will set out one set of employee behaviors that will result in a first level of

discipline, another set of behaviors warranted more severe discipline, and a third list of behaviors calling for immediate dismissal. Still other plans are a combination of warning levels and grades of offenses. Such plans can be effective, but only if they are well drafted and consistently applied.

First, the policy must clearly state that the listing of employee behavior warranting discipline are examples only, and not an exhaustive list. This will give the employer flexibility where an employee's behavior warrants discipline, but does not fit within the examples on the list. Second, the policy should state that the employer may repeat or skip any of the progressive steps in its sole and absolute discretion, depending on the circumstances.

Once a progressive discipline policy is in place, the employer should strive to apply it uniformly to all employee misconduct. If the policy is applied inconsistently, an employee may be able to claim discrimination. In addition, in some states (not North Carolina), courts have held that an employee has a contract right in the employer's use of the progressive discipline policy, and disciplinary action outside of the policy constitutes a breach of contract.

4. Termination

Termination is a necessary, if unpleasant, part of the employment relationship. While there is no way to prevent an employee from making a claim for wrongful termination or discrimination, there are steps you can take to minimize the risk of a claim and to limit exposure if a claim is filed.

Employment at will is the common law in most states, including North Carolina: unless an employee has a contract for employment for a definite term, the employee's employment may be terminated at any time for any reason, or for no reason. However, over the past several decades, federal and state governments, as well as the courts, have made many exceptions to the employment at will doctrine by adopting laws prohibiting discriminatory employment practices that affect the hiring and firing process. The principal federal nondiscrimination statutes are: Title VII of the Civil Rights Act of 1964 ("Title VII"); the Age Discrimination in Employment Act of 1967 (the "ADEA"); and the Americans with Disabilities Act of 1990 (the "ADA"). There are also many state statutes, other federal statutes and court-created exceptions to employment at will, which are outside the scope of these materials.

Employment termination is the most common trigger for employment litigation. If handled poorly, a termination may lead to a discrimination charge or other claim, even if the terminated employee was considered to be employed "at will." Therefore, employers are well advised to carefully prepare for and document all employee terminations. Although terminating employees is never a pleasant task, careful planning and forethought will make the process much easier and will pay off in limiting the company's exposure to litigation.

The first inquiry an employer should make when considering an employment termination is whether there is a contract that governs the employment relationship. An employment agreement may provide for a specific term of employment and/or that an employee can only be terminated for "cause" or "good reason." Even an employee "at will" may have a contractual right to severance if he/she is terminated without cause. "Cause" or "good reason" will generally be defined within the contract.

If an employee can be terminated only for cause or if a not-for cause termination will result in a severance payment, the employer should carefully consider the reasons for the termination and whether or not there is sufficient evidence of "cause" under the contract definition. If the employer's reasons for the termination are largely subjective or if there is little documentation of performance problems, the employer will have a difficult task in showing sufficient "cause" exists for the termination.

Before considering any termination, an employer should carefully review its employee handbook and any other written personnel policies. Does the handbook give examples of behavior warranting immediate termination? How does the conduct of this particular employee compare with those examples? If employees are to be given warnings or notice prior to termination or if your policies call for "staged" disciplinary measures (for example, one or more verbal warnings, followed one or more written warnings, followed by termination), the employer should make sure those policies are followed. In some states (although not in North Carolina as of the date of this article), written policies found in employee handbooks have been found to be contractual commitments by employers to follow those procedures. If the policy handbook does not give the employer unilateral authority to terminate at any time for any or no reason, the employer should consider a revision of its policies.

An employer should carefully review the employee's file before conducting the termination. Is there any evidence that could be used to support a claim that the termination is retaliatory for the employee's reporting of unsafe working conditions, taking protected leave or filing a workers' compensation claim? Are there performance reviews or other notices of performance or disciplinary problems? It is much easier to defend a wrongful termination claim if there are documented performance problems that have been communicated to the employee. If the employee's file is silent or if the performance reviews are neutral or positive, the employer should consider whether there is a clear and articulable business justification for the termination. Employers should avoid "loading up" the file just prior to termination. The EEOC or a court will view belated attempts to "paper" the file as evidence of an ulterior motive.

An employer should always look beyond just the particular employee being terminated. Is there a pattern to terminations over the past months or years which could be evidence of bias against a protected class of employees? If the termination involves more than one employee, are the employees disproportionately of one or another protected class? Is the termination of this employee consistent with the way other similarly situated employees have been treated? The termination of one employee and not another for the same or similar conduct could open the door to a claim of discrimination. Also, if a large group of employees is being terminated within a short period of time (such as in a "mass layoff " or "plant closing") there may be statutory requirements relating to the terminations under the Worker Adjustment and Retraining Notification Act ("WARN") or comparable state laws.

If an employee is to be terminated for unacceptable performance or behavior, an employer should act swiftly once the necessary facts are available. The longer the time between a terminable offense and the termination, the less credible the cause and effect relationship will seem. Giving an employee second, third and fourth chances also will give him/her the impression that the poor performance or offensive conduct is acceptable or will be overlooked.

Do not attempt to make the termination easier by "sugar-coating" the facts. If the employee is being terminated for performance issues, state so and give one or two recent examples. If you do not give the real reasons for termination, or if you put a more positive spin on the facts during the

exit interview, the true reasons for the termination will seem pretextual or false if you are required later to explain the employee's termination. Do not give a positive letter of reference, especially if the employee was terminated for performance problems. That letter of reference may later turn up as "Exhibit A" in the employee's EEOC file as evidence that the employee was terminated for an unstated illegal reason.

The employer should retain all records relating to the employee and the termination. In general, an employee has 180 days after the taking of adverse action against him/her to file a charge with the EEOC. However, many state law claims have statutes of limitations that allow the employee to file his/her claim three years or more after the termination. Records of personnel actions, including terminations, may also be needed to establish employment practices and procedures over a period of time. In addition, federal and state wage and hour laws require employers to retain employment records for specified periods, as long as three years or more. Although storing large amounts of personnel data may be inconvenient, the benefits far outweigh the disadvantages.

To avoid sticky employment situations, employers should conduct regular and honest evaluations. If the company has a progressive discipline policy, for example, verbal followed by written warnings, be sure that supervisors *follow the policy!* Employers should also communicate promptly with employees about any performance problems. The employee should know what the employer's expectations are and how he/she is not meeting them. An employer's chances of winding up before the EEOC and/or in court are much greater if the employee is surprised by disciplinary action. It is important to carefully document both the problems and all communications with the employee about the problem, and place the information in the employee's personnel file.

Don't wait until the situation becomes so dire as to warrant termination to address and document a performance problem. By then it will be too late.

Wyrick Robbins Yates & Ponton LLP
4101 Lake Boone Trail, Suite 300, Raleigh, NC 27607-7506
(919) 781-4000
www.wyrick.com