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EMPLOYMENT PRACTICES HOTLINE

Fair Treatment In Firings Avoids Suits

By **Lisa Bee** and **Gerald L. Maatman, Jr.**

This is a new column addressing vexing workplace problems confronted by employers, as well as some strategies that risk managers can consider to control employment practices exposures.

Lexington Insurance and the law firm of Baker & McKenzie handle an employment practices liability hotline service for EPLI insureds, providing human resource risk management and employment law advice on demand.

Aside from changing the names of the companies accessing the EPL hotline, this column uses real-life situations emanating from the hotline calls. The premise of the EPL hotline and this column is that a dollar spent on HR loss control and risk management is better than \$100 spent in the defense of a subsequent employment-related claim that could have been avoided.

The HR risk management and legal counseling in this column illustrates strategies designed to avoid EPL claims, minimize an employer's legal exposure and resolve problems before they mushroom into lawsuits. This column focuses on achieving best workplace practices and maximizing productivity.

• **The Friday Afternoon Firing.**

Management at ABC Company, a California-based software consulting firm, is fed up with Sally Smith, a clerical employee whose performance is deemed to be mediocre. Her manager wants to fire her. She has been on the job for 10 months, and generally takes long lunches, talks incessantly on personal phone calls, and often fails to meet deadlines. Her manager has lost his patience with her, as counseling has not resulted in any improvements in her work.

The department in which she works is overburdened and understaffed, and management wants to fire her this Friday and bring in a replacement on Monday.

The employee is in her early 50s and a member of a protected category group. She received an annual evaluation after six months on the job that indicated her performance was "okay." The employee subsequently received a pay raise. Her personnel file contains no documentation with respect to counseling for unacceptable job performance.

In accessing the hotline, management indicated that numerous meetings have been held with the employee over the past month, but the managers doing the counseling were busy in dealing with customers, and did not document the meetings through a confirming memorandum to the employee or with a note to her personnel file.

• **Hotline Counseling:** Mediocre performance is certainly a sufficient reason to terminate an employee. However, management should proceed prudently, given that the jurisdiction where the firing is to take place is exceedingly "employee friendly" in terms of legal remedies afforded workers.

To lower the risk of an EPL claim, the company needs to consider multiple issues. It should follow a termination check-list to ensure that the proposed firing will not result in a lawsuit or a charge filed with the U.S. Equal Employment Opportunity Commission, and/or the California Department of Fair Employment and Housing.

First, management needs to confirm that the employee has no contractual rights (emanating from an offer letter, employee handbook, or personnel policies) that

would restrict management's discretion or timing in firing the worker for unacceptable job performance.

Given the trend of California courts to recognize express and implied breach of contract claims for wrongful discharge, the existence of "at will" acknowledgments on a job application form and/or in an acknowledgement of receipt of an employee handbook are critical. Management needs to confirm the existence of those signed acknowledgments to clarify exposure to any contract claims.

Second, management must examine if there are any circumstances unique to the employee that might present exposure under a "public policy" tort theory. Management should confirm that the employee has no existing workers' compensation claim and/or recent complaints regarding the terms or conditions of employment. Employees fired in those circumstances can bring claims for retaliatory discharge or wrongful discharge for alleged violation of public policy.

If such circumstances exist with respect to the employee in question, management should reevaluate the strength of the reasons underlying the desire to terminate the worker. Delay and additional job counseling might be in order.

Third, the company should evaluate the potential for exposure due to federal, state and local employment discrimination statutes. An employer need not lower performance standards for an employee protected by these laws, for these laws do not excuse mediocre performance. Management simply needs to make its personnel decision based on a legitimate, non-discriminating reason.



Lisa Bee is director of EPL Risk Management for Lexington Insurance Company in Boston, and Gerald L. Maatman Jr. is a leading employment lawyer with Baker & McKenzie in Chicago.



The employee's mediocre job performance is certainly a valid basis for the firing. To that end, management needs to ascertain how it has treated any other similarly situated employees—for example, have other employees who have demonstrated similar job performance been terminated, disciplined, counseled, afforded more training, etc.?

If the company has not fired other similarly situated employees, it faces heightened exposure to an employment discrimination claim without the existence of strong proof to demonstrate the legitimate, non-discriminatory reasons for its anticipated personnel decision.

Fourth, the company should evaluate the practicalities inherent in the termination of a protected-category employee. While the worker's mediocre performance

is a legitimate, non-discriminatory reason for the firing, employees who lose their jobs often sue, and employers necessarily incur costs in defending such lawsuits.

Likewise, California is one of eight jurisdictions that imply the covenant of good faith and fair dealing as a term of all employment relationships whether or not there is an employment contract. This covenant requires management to have a good reason to terminate the employee.

In this instance, the employer lacks written documentation to substantiate the counseling sessions with the worker or recording the instances of mediocre job performance. The only existing personnel evaluation reflects average performance that was followed up with a pay raise.

If ABC Company is intent on firing the employee, it ought to consider offering the employee a release in return for additional severance pay. Management must weigh the costs and benefits of offering a release to the departing employee. The primary reason to obtain a release is to buy peace of mind and avoid legal claims.

In these circumstances, the release may be a relatively low-cost investment, especially considering the cost to an employer in terms of attorney's fees and the lost opportunity time of management spent in defending a lawsuit.

ABC Company could advise the employee that it has decided to terminate her employment, but that it is willing to assist her in transitioning to a new job by offering her money above and beyond what is owed in her final paycheck. It might also consider funding COBRA

insurance premiums on behalf of the employee for a period of a few months.

In these circumstances, ABC Company should consider an alternative to the proposed Friday afternoon firing. Employers who treat employees with fairness are generally presumed to have acted within the bounds of the law, and employees who receive "workplace due process" are generally unsuccessful in proving any claim for discrimination or wrongful termination.

To make the defense to any such claim as strong as possible (and to dissuade any lawyer visited by the worker from asserting a claim against the employer), the company needs to address the concepts of notice and fairness—in other words, did management warn the employee of her problems (put her "on notice") and did the worker have a sufficient opportunity to improve her performance (was she treated "with fairness").

While it is true that federal, state and local employment discrimination laws do not require employers to be fair in making personnel decisions (the laws simply obligate them to refrain from discrimination), companies that try to be fair are sued less often. Employers who are fair lose those claims less often, too.

Accordingly, ABC Company should consider placing the employee on probation for 30-to-60 days and providing the employee with a fair and reasonable opportunity to improve her performance. Adequate documentation of the evaluation of her performance and interactions with management should be prepared contemporaneously.

(The next EPLI Hotline column is scheduled to appear on April 15.) 

Lexington Insurance Company