



Difficult Conversations: Employee Discipline and Termination

Boise - Carl Ericson

ICRMP Risk Management Legal Counsel

Coeur d'Alene - John Cafferty

Hawley Troxell

Idaho Falls - Randy Fife

City Attorney—Idaho Falls





At-Will vs. For-Cause Employment

WHY DOES IT MATTER?

At-Will vs. For-Cause Employment

- Status of the employee as at-will or for-cause forms the basis for ultimate procedures that are required for discipline and/or termination
- Adoption of status is usually the duty of the governing board, *i.e.* commissioners, city council, trustees, *etc.*

For-Cause and Due Process

- Creates constitutionally protected property right in continued employment
- Property right raises procedural due process protection for the for-cause employee
 - Due process required for dollar-related discipline, demotion with reduction in pay and termination
 - Not always easy to craft procedure that will satisfy the demands of due process

For-Cause and Due Process

- What is required?
 - Pre-termination/discipline notice of the cause for the action
 - Pre-termination/discipline opportunity to be heard
 - Unbiased decision-maker

For-Cause—How Much is Enough

- For cause termination/discipline requires sufficient cause for the action taken
- Decision-maker has burden to balance all factors to make this determination
- Some factors to consider
 - Severity of action leading to termination/discipline
 - Clarity of rules prohibiting conduct
 - Response to same issue with other employees
 - Employee history of discipline
 - Likelihood of remediation/improvement by employee

At-Will Employment

- Basic Rule
 - The employment can be terminated by either the employer or the employee at any time and for any reason that is not unlawful
 - May not be based on any discriminatory or retaliatory purpose or in contravention of constitutional or statutory protections
 - Employment attorneys are developing expertise and almost always now know how to allege discrimination or retaliation

At-Will Employment

- No procedural due process requirement which appears to make the termination/discipline process easier
- Personnel policy should not have any procedural rights provided to employees
- However, because jurors look for fairness from employers, good idea to give employee a pre-termination opportunity to be heard in many circumstances

Discipline

Documentation

- Single most important factor to protect against later made claims
 - Remember--**91%** of jurors think an employer is negligent if it does not properly document an employee's performance issues
 - If it's not documented, it didn't happen in jurors minds

Discipline

Documentation

- Oral counsellings
 - Follow-up with a note to your file about what was discussed and the employee's apparent understanding of it
 - Good to have employee sign the notes acknowledging that it was done

Discipline

Documentation

- Accurate performance evaluations
 - Don't ignore issues already addressed orally
 - Note deficiencies and plans to correct them
 - Also note positive traits/work performance

Discipline

Documentation

- Training documentation also critical
 - Some employees respond to discipline in performance with claim that they were not properly trained
 - Document training not only on specific job responsibilities, but also on personnel policy and issues in policy such as discrimination, retaliation and harassment

Discipline Documentation

- Important even for at-will employees
 - May not discipline for illegal reasons, *i.e.* discrimination, retaliation, whistleblower
 - Employees often know that discipline is coming and will raise these types of claims when notice of the discipline is given to them

Discipline

Probation—At-Will Employment

- Probation is contrary to at-will status
 - At-will employees are technically always on probation
 - Personnel policy should not contain an introductory or probationary period on initial employment
 - Some courts have interpreted probation in at-will employment as implying that at the end, the status will change in some way

Discipline

Probation—For-Cause Employment

- Often helps correct behavior, but not always long-term
- Infers that “tally sheet” has been wiped clean at end of probation period
- Often better to just use straight discipline
- If continuing problem and not ready to terminate, give last chance notice

Discipline

Probation—For-Cause Employment

- Often includes notice that during the probationary period, the employee is at-will and subject to termination for any reason
 - Only the governing body has power to set employment status
 - If the governing body does not grant that power to supervisors as part of the discipline process, the supervisor may not change the status
 - If status not changed, may not proceed with discipline and/or termination as if an at-will employee

Discipline

What's Appropriate?

- Personnel policy requirements, *i.e.* progressive discipline
- How other employees have been treated for similar behavior
- Employee's history of discipline and behavior
- Seriousness of the behavior/performance issues
- Consideration of employment-related laws, *i.e.* FMLA, ADA, etc.
- Consideration of employment-related rights, *i.e.* first amendment—speech, exercise of religion, *etc.*
- Disruption in the workplace



Termination

- Has many of the same issues as discipline
- The stakes of a correct decision are higher
- Very little litigation over discipline, but increasing for terminations
- Increasing number of attorneys specializing in representing employees in wrongful termination cases

Termination

Shall we pull the plug?

- Personnel policy requirements, *i.e.* progressive discipline
- How other employees have been treated for similar behavior
- Employee's history of discipline and behavior
- Seriousness of the behavior/performance issues
- Consideration of employment-related laws, *i.e.* FMLA, ADA, etc.
- Consideration of employment-related rights, *i.e.* first amendment—speech, exercise of religion, *etc.*
- Disruption in the workplace

Termination

Proper Notice

- Notice must have sufficient detail so employee knows what he did to be terminated
 - Don't just tell them that they screwed up
 - Specific detail so that they understand and have opportunity to refute
 - Detail also helps protect against claims of discrimination, retaliation and harassment

Termination

Suspension Pending Final Decision

- Once notice given, suspend so that the employee doesn't remain around to sow discord and compromise system/information
- Usually with pay, but may be without pay in particularly egregious situations with no dispute as to the allegations, *i.e.* criminal acts
- Let IT know immediately so it can cut-off employee access to email and system

Termination

Opportunity to be Heard

- Procedural due process requirement for for-cause employees
- Recommended in most circumstances for at-will employees
 - Helps with the fairness concerns of jurors
 - Helps focus on the documentation and justification for the decision

Termination

- As with discipline, employees often raise issues of harassment, retaliation or discrimination
- Sometimes valid so need to consider them carefully and make decision that is best for the situation
- Sometimes best to delay with discipline and statement of clear expectations
- Not unusual for them to quickly revert to the behaviors that led to decision in the first place

Termination

- Special consideration when termination based on FMLA and ADA issues
- Regardless of the protections of these statutes, employee must still comply with the duties imposed by them
- Timing is often everything—move with caution when disciplining after NOTC or other workplace allegations

Termination

Caution

- Because of possibility of legally being taped by employees, be careful when discussing employment issues with employees that are on the edge of being terminated

Post-Termination/Substantive Due Process

- Applies to both at-will and for-cause employment
- Required when termination/discipline based on facts that can harm the employee's future employment opportunities
 - Dishonesty
 - Immorality
 - Illegal conduct

Don't Go it Alone

- Never hurts to get more eyes on a situation
- Always call your attorney for assistance
- Always call ICRMP