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Richard D. Alaniz • Apr. 17, 2019

You're fired! Those are words that no employee ever wants to hear and that employers' hope they rarely have to utter. In a period of more-than-full employment such as we are currently in, with a slightly under 4% unemployment rate, it is particularly problematic to lose an employee, especially by having to discharge them. The costs of taking such action are both emotional and financial. However, no matter the cost of replacing an employee, at times employers must make the tough decision to show an employee the door.

The decision to fire or terminate an employee, especially when reluctantly made, generally creates anxiety, sometimes substantial, in the employer forced to take such action. That is not meant to minimize the devastating impact on the employee that is

losing his/her livelihood. However, employers are often reluctant to make that

these reasons, employers always seek to have "good cause", or "just cause", or some similar basis for making the decision to fire an employee. Even though a "just cause" termination can nonetheless be challenged, it provides the employer at least some measure of confidence that they acted properly.

What is "At Will Employment"

While "cause" should always be the basis for a termination decision, it is not necessary if the employment relationship is "at will". All but one state recognize "at will employment" as the standard employer-employee relationship in every non-union workplace. The state of Montana is the sole exception, requiring "good cause" for discharging an employee. Contractual employment relationships are governed by the specific terms of the employment contract.

Under "at will employment" an employer may fire an employee for good cause, no cause, or even bad cause as long as no statutory protections are violated. Similarly, an employee may quit his/her employment at any time without consequence. Most states require notice to employees of their "at will" status. Some even have specific requirements regarding how notice is to be provided. Some states go so far as to require a certain size type for any written notice of such status.

The Basics of "Just Cause" Termination

The concept of "just cause" or "good cause" for a decision to terminate an employee grew out of collective bargaining. Protection from unfair or arbitrary termination has always been one of the fundamental protections for employees that are contained in a collective bargaining agreement between an employer and a union. If a termination is challenged by the employee and union by way of a grievance, an employer may ultimately be required to convince a neutral arbitrator that it had "just cause" or "good cause" for its action. If an arbitrator finds that there was lack of

sufficient cause to discharge the employee, they may order full reinstatement and the

sides attorney's fees.

Notice of Rule Violated

Proving just or good cause, whether in the collective bargaining setting or in some other forum, involves more than whether the misconduct occurred. No matter who the neutral fact-finder may be, judge, jury, or arbitrator, the employer must also demonstrate that it has effectively publicized the rule that was violated and that the employee was aware, or should have been aware, of the rule and the penalty for violation. This concept of "notice" is fundamental in our society. It is unacceptable to almost everyone to punish someone for failing to follow a rule of which they were unaware. Would you consider it fair for a police officer to cite you for failing to stop at an intersection where no stop light or stop sign was present? Other examples of "notice" are ubiquitous in our society.

Notice of what is expected by the employer is usually provided through rules and obligations set out in an employee handbook. They can also be posted on an employee bulletin board, electronic or otherwise, as well as communicated by verbal announcement. In addition to having an employee handbook most employers review all major rules, as well as the penalties for violation, with new employees at orientation. Many republish and post their rules and any changes on an annual basis. More frequently today, employers periodically train employees on significant work rules such as those related to unlawful harassment and discrimination. Such training has become mandatory in several states. However, proving that reasonable notice was provided is not sufficient.

Rule Consistently Applied

Uniform and consistent application of the rule at issue is also critical in supporting a "good cause" termination. While it is understandable that the circumstances in any given case may be unique, if the rule was knowingly violated, the punishment should

generally be the same as in all prior instances of violation. If an exception is to be

performance? While there is some workplace conduct that is sufficiently serious to warrant discharge on only a single incident, such as theft, fighting, sexual or other serious harassment, insubordination and similar egregious misconduct, the use of progressively more serious discipline must almost always be demonstrated. It is what every neutral fact-finder, be it an arbitrator, investigatory agency, judge, or jury requires if they are to support an employee's termination. It satisfies our inherent need to confirm that the termination was "fair".

The most common progressive discipline steps are: (1) Counselling or verbal warning; (2) Written warning; (3) Disciplinary suspension; and (4) Termination. The counselling or verbal warning stage is usually preceded by other informal verbal efforts by management to have the employee conform to expectations. Disciplinary suspensions can be for any period of time, but more commonly are for three work days. However, some employers sometimes impose disciplinary suspensions of one week or more. It is often referred to as "decision-making leave". A few employers even pay employees during their decision-making leave as a way of underscoring what they risk losing if they don't mend their ways. In addition, in order to show that they have gone the extra mile, it has become increasingly popular in recent years for employers to use "last chance agreements" as one final step in lieu of termination. This is usually done in conjunction with requiring the employee to successfully complete a Performance Improvement Plan (PIP) as a condition of the agreement.

The progressive discipline aspect of a just cause termination also serves to satisfy, at least to some extent, any procedural "due process" considerations that many consider necessary for an action as significant as termination. If a proper and unbiased investigation of the misconduct is conducted, and if the employee is permitted, as is almost always the case, to present their side of the story, adequate due process will normally have been provided.

Supporting Documentation

Finally, documentation to support the just cause termination is crucial in any

employer to show that the individual was aware of the rule or standard violated, was given every opportunity to correct the unacceptable behavior or performance, and failed to do so. The employee's failure to improve after being given multiple opportunities to do so, created circumstances that made it untenable for the person to remain in the workplace. Simply, there was "just cause" to discharge the employee.

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