Updated: New Laws and Court Decisions!

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Safe Hiring, Managing & Firing Practices To Keep You & Your Company Out of Court

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Safe Firing Practices

Once upon a time, you could fire anyone you wanted, anytime you wanted, for virtually any reason or for no reason at all. U.S. employers took their freedom to discharge employees (the doctrine of employment/termination at will) as a matter of law rather than as what it is: a labor-management philosophy that most courts recognized as an implied contract favoring the rights of employers.

The Freedom to Discharge Employees

Employment at will presumes that employers hire and fire people for and at their own convenience. The theory allows employers, in the absence of a written agreement, to hire someone for an unspecified period of time and fire him or her with or without cause, with or without notice—in short, to employ and terminate at will. Of course, the philosophy assumes that the employee has the equal right of quitting at any time, with or without cause, with or without notice.

However, times are changing. Society, through contract law and public policy, constrains managers in many new ways. Organizations themselves, by publishing employee handbooks, constrain them in still other ways. Employees constrain managers by becoming more aware of their own rights and by attacking the at-will notion of employment in many courts that are friendly to the plaintiff.

To reduce the risk of legal challenges to your personnel decisions, you need to have a clear sense of what employment (or termination) at will means and how the doctrine is being attacked. In

this introductory chapter, I will look at the definitions of key terms that underlie many of the issues related to disciplining and firing employees. In the chapters that follow, I will spell out what you cannot and can do with regard to safely disciplining or terminating employees, including issues related to public policy and age discrimination.

Definitions of Key Terms

contract An agreement in which one party promises to do something or provide something for another, in return for consideration—something of value, which may or may not be tangible (e.g., money). In an employment contract, the promise to pay someone for his or her labor is consideration.

explicit contract A written or oral agreement that offers consideration and spells out the terms and conditions of employment. An employment agreement is a bilateral contract.

bilateral contract An agreement in which *both* parties knowingly offer to participate in some endeavor and to provide something of value in return for something of value—e.g., to give money in return for services.

unilateral contract An agreement in which only *one* party offers something of value. The other party may *not know* that the contract exists or that an offer has been made. For example, if you make a specific promise (even orally)—an offer—when someone accepts a position, that offer can, in some states, bind you. Promising *not* to fire someone "unless [he or she] screws up badly" could come back to haunt you in court.[1]

implicit (implied) contract Any statements you make, oral or written, that an ordinary, reasonable person can interpret to set specific terms and conditions of employment could possibly be construed as an implied, binding, usually unilateral contract.

Various state courts often differ as to the nature of an implied contract or how binding one is. The Pennsylvania Supreme Court, in 1974, ruled that the absence of an explicit contract does *not* mean that an employee handbook or a personnel guide creates an implied contract.[2] Employment is at will.

Some courts agree with Pennsylvania's, but, in 1980, when an employee challenged his firing by saying that the company promised not to discharge anyone without just cause, the Michigan courts called the promise a contract. The company, the courts said, had to, but did not, show cause when it fired him. In so saying, the Michigan courts recognized the existence of implied contracts in employee manuals. They also held that, in the absence of explicit contracts or specific disclaimers, circumstances can dictate that an implied contract *supersedes* written policies.[3,4] Now, some courts agree with Michigan's. Where do your state's courts stand? It's hard to tell without a scorecard.*

good faith, fair dealing A special case of implied contract. The covenant of good faith and fair dealing, although poorly defined, has been adopted by several states, notably Alaska, California, Connecticut, Massachusetts, and Montana. This doctrine imposes contractual constraints on promises made in employment relations by recognizing the importance of trust in negotiated agreements. For example, discharging a salesperson to avoid paying a large commission is a bad-faith action that violates the covenant because the salesperson trusts you to make good on your promise to pay what you agreed to pay.[5] Some courts have extended the covenant to include making exaggerated claims and promises when recruiting employees and the failure to follow internal grievance procedures, to employ reasonable appraisal procedures, or to keep explicit promises prior to terminating someone.[6,7,8,9,11]

outrageous conduct Conduct any reasonable person would consider exceeds the limits of socially acceptable employer practices. Has been added by some states to the standards for breach of contract. The complaint of severe mental and emotional harm often accompanies this charge and, in some

*See Thomas J. Condon, Esq., *Fire Me and I'll Sue, a Manager's Survival Guide to Employee Rights* (New York: Alexander Hamilton Institute, 1988), for a state-by-state list of current positions taken by the courts and legislatures.

cases, actually defines the outrageous conduct. This, among other claims, was the situation in Oregon when a company security officer denied an employee suspected of violating company rules her right to remain silent and threatened her with arrest.[10]

disclaimer An explicit statement declaring employment at will as company policy; this statement usually safeguards the employer's position. A well-written disclaimer, which I will provide later, can prevent an employee handbook from creating an implicit contract.

constructive discharge A type of wrongful discharge exemplified when an employer intentionally or unintentionally creates or allows conditions to exist that lead an employee to believe he or she has only two options: (1) to accept a personally adverse situation or (2) to resign.

waiver A signed document in which a terminated employee agrees not to sue the organization in return for a sum of money not required by law or contract, e.g., a month's extra severance pay, an immediate severance payment, and an official statement or reason for firing the employee.

Under the Older Workers Benefit Protection Act of 1990, in a buyout or mass layoff, older employees have up to forty-five days to consider the waiver and seven days afterwards to reconsider a decision to sign. Executives responsible for producing personnel policies should be familiar with this legislation, which makes it illegal to deny older workers benefits at least the equal of those for younger employees. Unless carefully crafted, the wording of a waiver could be self-invalidating, as a major case working its way through the court system since November 1993 may prove.*

arbitration A neutral forum for handling complaints that can often prevent large damage awards associated with jury trials. Courts have ruled that in exchange for a signed waiver of the right to sue, the company *must* provide mandatory

*See "Lawsuit against [Giant Retailer] Claims Discrimination in Severance Program," *St. Louis Post-Dispatch* (November 26, 1993).; David Israel and Greg McConnell, "New Law Protects Older Workers," *HRMazagine* (March 1991), pp. 77–78; also Junda Woo, "Ex-Workers Hit Back with Age-Bias Suits," *The Wall Street Journal* (December 9, 1992), p. B1.

arbitration of disputes.[12] Before implementing arbitration agreements, it's advisable to train managers in preventive measures.

separation agreement A document that identifies the employee's last day of employment and includes provisions for:

- Unused vacation pay
- Bonuses
- Commissions and other compensation due
- Savings or profit-sharing entitlement
- Insurance coverage conversion plans and procedures
- A plan for repaying outstanding advances
- Tax consequences of the severance settlement
- Reemployment rights

Severance policies covered by ERISA may be better left unpublished, although they are embodied in what is called a Summary Plan Description (SPD) and distributed to all employees. The plan should cover the benefits formula(s), methods of payment, eligibility, severance triggers, a description of waivers, and settlement rights.*

service letter A letter required by at least six states (maybe more by the time you read this) describing an ex-employee's work history and, in some cases (e.g., Minnesota and Missouri), a reason for dismissal. Check to see if your state requires a service letter. A possible trap: A written statement of termination for cause can be used in a "self-defamation" lawsuit. Make sure the letter states only the facts and states them in a manner that cannot be construed as a deliberate of malicious attempt to prevent the ex-employee from future employment.

letter of understanding A letter written by a former employee identifying his or her understanding of why he or she was fired and requesting that you sign the letter or correct the

*See also Robert J. Nobile, "The Law of Severance Pay," *Personnel*, 67: 11 (November 1990), p. 15; August Bequai, *Every Manager's Guide to Firing* (Homewood, Ill.: Business One Irwin, 1991).

reason stated in the letter. You are not under a legal obligation to sign or respond to this document. The same possible "self-defamation" trap exists here that exists in a service letter.

Our review of essentials of wrongful discharge should help you grasp many of the things you can and cannot do with respect to disciplining and firing employees. It should also help you examine your own organization's stance via-á-vis employment-at-will issues and help you understand how employment at will is being attacked.

Cases

1. 779 F.2d 101, 121, L.R.R.M. (BNA) 2169 (2d Cir. 1985).
2. 456 Pa. 171, 319 A.2d 174 (1974).
3. 408 Mich. 579, 292 N.W.2d 880 (1980).
4. 495 F. Supp. 344, 117 L.R.R.M. (BNA) 2702 (Mich. 1980).
5. 373 Mass. 96, 364 N.E.2d 1251, 115 L.R.R.M. (BNA) 4658 (1977).
6. 181 Cal. App. 3d 813, 226 Cal. Rptr. 570 (Cal. Ct. App. 4th Dist. 1986).
7. 226 Mont. 69, 733 P.2d 1292 (1987).
8. 666 P.2d 1000, 115 L.R.R.M. (BNA) 4254 (1983).
9. See also 393 Mass. 231, 471 N.E.2d 47, 118 L.R.R.M. (BNA) 2406 (Mass. Sup. Ct. 1984).
10. 63 Or. App. 1423, 664, P.2d 1119, 118 L.R.R.M. (BNA) 3019 (Or. App. 1983).
11. No. 92-7506 (2d Cir.)
12. No. 88-1591 (4th Cir. 1990); 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991).

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Safe Discipline and Firing Practices

Economic and political winds create new or different judicial tides that ebb and flow over time and with the economy and state of the nation. During periods of high unemployment, for example, people are reluctant to quit in a fit of pique and go to court. Likewise, newly elected judges or new federal court appointments take the tides on still another turn; what direction they will take is often anyone's guess. All I can say is that the eddies in these legal tides have weakened the foundations of the employment-at-will doctrine.

Until fairly recently, the creed of employment at will seemed impregnable, a ready-made defense against employee retaliation for unfair or outrageous treatment. But the growth in human rights, especially since the turn of the century, has generated a new legal climate in the United States that not only produced the civil rights laws of 1964 but has also produced frequent judicial reviews of the at-will defense, especially where legal rights are involved. Inspired by the human rights movement, employees now look to their own interests under the common laws of contract.

Workers defend themselves in court against breach of contract or wrongful discharge more frequently than before, and the courts have sided with employees in almost any kind of personnel decision a manager might possibly make. No longer merely bitter and resentful, resigned to their fate when they feel improperly treated in compensation or promotion or when fired, employees don't just get angry, they get even.

The days when employers could treat employees however they wished have become a relic of history. Pressures created by

the labor movement have stayed the employer's free hand. Managers today must pause before punishing or discharging an employee, whether or not they believe they have just cause. Both common law and statute law, including the various EEO laws I have already discussed, have balanced the employer-employee relationship; *how* one goes about disciplining or discharging an employee, the subjects of this chapter, can become a court matter.

Does your organization reserve the right to fire someone with or without cause, with or without notice? Has it published an employee handbook that spells out terms or conditions of employment that could lead to lawsuits? Has it trained you and other managers how to administer its policies and how to avoid making loose promises or implied threats? You should be prepared to deal with the changes time has wrought.

What You Cannot Do

Managers' hands have been stayed in two broad areas: discipline and policy administration.

Discriminatory Discipline

You cannot administer disciplinary policies and procedures that could in themselves have "a meaningful adverse effect on an employee's working conditions."[1] Reprimands, especially if filed in a personnel jacket, may affect an employee's future promotion opportunities and have a permanent impact on his or her ongoing work life. This in turn could affect the employee's daily life and psychological well-being. When a disciplinary action affects the person's terms or conditions of employment, it could have a discriminatory effect if the person's status places him or her in a protected group.

Let's take wage garnishment, which minority employees given their social conditions) experience more frequently than do others, as an example. A policy that would discipline an employee for numerous garnishments could have a disparate impact on minorities, and that policy, even if it results in just a reprimand, may constitute an unlawful employment practice because of the disparate impact.[2–5] Personnel policies and decisions should have a clearly defined business basis and should not have an adverse impact on people whose social status makes them especially vulnerable.

Provisions of the Employee Handbook

You cannot ignore the provisions of an employee handbook *if* the employee can show that:

1. The employee handbook has become a part of an employment contract
2. The job security provisions in an employee handbook are enforceable
3. A summary dismissal is a breach of an employment contract[6]

Personnel handbook provisions can form a *unilateral contract* and therefore become enforceable as an employment contract if they are distributed to the general population of employees, or if they are used for any purpose other than as a guide for supervisors, or if they are not delimited by a disclaimer that can prevent a printed policy manual from suggesting promises you do not intend to keep. Policy statements should then be used only as a general guide for *managing supervisory behavior.*

You cannot promise job security. Phrases such as "career situation" or "job security" might not form the basis of a contract, but specific job security provisions in an employee handbook, disseminated to all the employees, can be so construed. Those provisions could then override a terminable-at-will construction of an employment contract. Check your manual to see if a job security provision could affect your ability to fire someone, and if so, call the situation to your personnel officer's attention.

Replacing or amending the old manual presents you with another situation. A second employee handbook or an amendment does not necessarily usurp the earlier one. In a 1987 case, a federal court ruled that a company's at-will revisions of its original employee manual did not *automatically* supersede the termination-for-

cause contractual relationship embodied in the handbook's earlier version.[7]

For the court to accept the revisions, you must show that an employee contesting an at-will discharge had accepted the new handbook as his or her amended contract. If, at the time you issue the second handbook, you require employees to sign an acknowledgment that they have read it, that they understand the terms that affect the conditions of employment, and that they are willing to work according to those terms, you are on safer ground.

If your employee handbook promises that certain procedures will be followed before an employee is discharged, then your disciplinary policy contains sufficiently *definite language* to form an offer of a *unilateral contract*. Under those circumstances, according to some courts, a summary dismissal can constitute a breach of contract. Check out the key words in one specific policy statement that lost in court:[6] "If an employee has violated a company policy, the following procedure *will apply* [*italics added*]."

That this policy with those words was distributed to all employees nailed down the contract. In this case, the court held that the employer's argument that employees are at will was without merit because the termination procedures were contractually binding.

Read your policy manual carefully. Ask your personnel officer to check the state's legal precedents in cases such as these. A goodly number of states agree with these decisions.[8–16]

How you administer policies is as important as the policies themselves. If you have a personnel policy that creates enforceable contract rights, it is essential to follow it to the letter; failure to do so can be seen by the courts as a breach of contract.[17]

Let's say your organization's employee handbook prescribes a five-step progressive disciplinary procedure. The first two steps call for counseling, the third for a written reprimand, the fourth for a three-day suspension, and the fifth for discharge if another incident occurs. The handbook also includes statements that promise fair and objective consideration for employees with job-related problems, and that you, the employer, will adhere to a policy of progressive discipline tempered by the seriousness of the offense. Let's also say that your organization has published these statements but has not trained your managers in the proper application of the rules or monitored your *management performance.*

All those policy statements could form the basis of a contract that supersedes employment at will, or so the Wyoming Supreme Court concluded. If under the circumstances I outlined you follow all the steps but discharge the employee even though he or she did not commit another offense warranting discipline, which violates the rule of the fifth step ("if another incident occurs"), you probably will be sued and lose.

Substantial compliance with the discipline procedure is an insufficient defense. In the court's opinion, *strict* compliance can be the only standard by which the procedures can be judged. You cannot follow most, but not all, of the steps. You must follow *all* of them. The failure to do so is a breach of contract for which the wrongfully discharged employee could possibly receive damages.

The little things are important as well, especially if an employment contract has been reduced to writing. The following language can cause you much trouble if you fail to adhere to it closely:

> Unless you or the company give written notice of termination, this agreement will be automatically extended on December 31 of each year.

If the contract calls for *written* notice, the courts have said, oral notice is not enough.[18] If you have any doubts as to how your personnel policies commit you and the other managers, ask your personnel officer to get a professional opinion from an attorney who specializes in employee relations in your state (opinions will differ from state to state). You might also ask that the attorney conduct a seminar for you and your fellow managers. In the meantime, there are things you can do personally to improve your safety.

What You Can Do

That the courts have come to recognize employee contract rights as well as civil rights is not an occasion for management handwringing. The courts also recognize employer rights as long as policy books are properly written and policies properly administered. In

what follows, I try to show you some ways in which you can protect yourself with well-written disclaimers and policy statements that have withstood many court challenges.[19–42]

Protect Your Right to Fire

If your organization has published an employee handbook, check to see if it contains language that specifically reserves to you your right to employ at will or to modify the organization's employment rules. If the handbook says there is no employment contract, then you cannot breach any contract.[43]

Even though courts in different states, at different times, disagree with the Pennsylvania Supreme Court, that court's basic outline of what constitutes the at-will doctrine provides a clear statement of what to consider when looking at your own organization's published rules under which employees can be discharged:

1. If the employer publishes a handbook, the at-will policy is preserved if the book includes specific language that assumes the employer's unilateral right to modify its policies. That reservation of rights precludes the possibility of creating a just-cause contract.
2. The at-will policy is further protected if the employer states that published reasons for discharge are merely illustrations, not exclusive causes. That claim then gives the employer the right to decide on a case-by-case basis what constitutes just cause or to ignore just cause altogether.
3. If, when they receive the handbook, employees are required to sign an acknowledgment that they received it, they give up their right to being discharged for only just cause.

Publish Disclaimers

Well-written disclaimers and policy statements offer some protection against lawsuits. Check out your organization's job application or handbook to make sure the disclaimers do the following:

1. Uphold the idea of employment at will.
2. Explain that employment is for no specific duration.
3. Explain that either party can end the relationship at any time, with or without cause, with or without notice.
4. Explain that no one but the highest management authority in the group can alter the terms described in the organization's documents.

Check any written policy manuals that have been distributed to any of the nonmanagement employees for language that does the following:

1. Clearly spells out the limitations on employment.
2. Explains to both managers and employees that the personnel policies in the manual act as guidelines for conduct, not as a contract.

Finally, make sure that if your organization has published disclaimers and policies, the employees have also acknowledged by their signatures that they have read and understood them. If your managers rewrite anything that could materially change the conditions or terms of employment, ask that they have the employees sign a written acknowledgment of having read and understood the revisions as well, and ascertain that they are willing to work under the new terms and conditions.

The recommended disclaimer and acknowledgment shown in Figures 12-1 and 12-2 have been modeled after several that have passed court tests, and should in most cases hold up if ever challenged. Even if you use them verbatim, have a labor attorney check the statement for consistency with what has been upheld in your state. Local precedent is the only valid test, although favorable precedents are not guarantees that you will win in court.

Because organizational needs vary widely from group to group, each organization has to write its own personnel policies and procedures accordingly.

Effectively Written Policies and Procedures

If your organization has or develops a personnel manual, your personnel officer should distribute it to each manager in your organization and ask for a signed acknowledgment that the manager has

Figure 12-1. Recommended disclaimer for employee handbook.

About this Handbook

This handbook spells out the goals, standards, values, attitudes, beliefs, and benefits that [*company name*] believes are important and that management encourages. The standards of conduct govern all employees, including management personnel, and are intended to help us all get along in a friendly and productive atmosphere. [*company name*]'s policies are also designed to promote your personal productivity and career advancement.

At the same time, this handbook serves only as a general guide to what we can reasonably expect from each other in the conduct of our business. Therefore, neither this handbook nor any of its provisions constitute an employment agreement or contract of any kind or a guarantee to continued employment. Because circumstances and situations change, we will have to change or amend these guidelines from time to time. We will notify you in writing when we do.

Figure 12-2. Recommended acknowledgment by employee.

Acknowledgment

I have read the *Employment Handbook* and understand and agree that it is only a general guide that does not constitute an employment contract or guarantee of continued employment. I also understand and agree that my employment is for no definite period; that my employment and compensation can be terminated with or without cause, with or without notice, at any time, at the option of either [*company name*] or myself; that no representative of the organization other than [*name of person heading organization*] has any authority to enter into any agreement for employment for any specified period of time or make any agreement contrary to the foregoing.

received and read it. A seminar on how to read, interpret, and use the manual would be a very good idea.

The manual should identify a set of guidelines with regard to goals and objectives (policies) and procedures or rules. It should explain the values the organization holds and what work-related values and conduct it expects of employees. It also should detail

for managers what they are supposed to do in the event an employee does not follow the rules. If your organization does not distribute such a manual, you should discuss the matter with your personnel officer; there may be a good reason for not doing so. Then, again, there may not be.

The sample antiharassment policy statement that appears in Chapter 9 on sex discrimination (Figure 9-1) illustrates what a well-written and complete policy and procedures statement should look like. If your organization publishes policies and procedures, you can use the guidance that follows to measure just how well written and complete they are (or aren't).

At the same time, each new employee should receive a copy of an employee handbook that distills information from the personnel manual. This abridged version of the personnel manual should consist primarily of policy statements (the goals and objectives) hedged in disclaimers, some procedures, and the organization's values, expectations, and basic rules of conduct.

Policy Statements

A policy by itself is a guideline for thinking or for making decisions, not necessarily a guide to specific actions, and it should not make any promise that can be construed as establishing a contractual obligation. Check your organization's policy statements to see if they meet the criteria described below.

A complete policy should follow a format that includes separate sections for each part of the policy:

Policy:	The policy statement itself
Procedures:	Steps used to apply or implement the policy
Management responsibilities:	What managers are expected to do, methods for monitoring or controlling how the policy statement is implemented
Consequences:	Statements concerning what will happen in the event the policy is not enforced, as well as statements concerning consequences if policies are not followed; pos-

itive statements related to the value of following the policy would be helpful (e.g., "To ensure the cooperation of all employees, this policy. . . .")

References: Quotes or summaries of specific legal documents if legislation or common law is involved

A policy should be:

- *Broad,* in the manner of a goal statement, and leave room for discretion and interpretation, making application flexible but under the direction of the policy. It could start with "It is our [organization's name] intent to. . . ."
- *Comprehensive,* covering every aspect of the relevant personnel activities. Words such as "all cases of this kind," "in no circumstance can anyone authorize a contract other than. . . ." should be prominent.
- *Livable,* fitting the realities of both the organization and the world around it. For example, a policy statement can begin with "Given the ratio of minority employees to majority employees in [*organization's name*]. . . ."
- *Inviolate,* allowing no exceptions unless the policy itself fails to apply in special circumstances. In some cases, the policy might read, "This policy does not apply to employees on an unpaid leave of absence."
- *Authoritative* (though not authoritarian), identifying responsibilities, accountabilities, and both positive and negative consequences of decisions made within the context of the policy. For example:

> If you are a first-line supervisor, you will be held responsible for the daily attendance of the employees reporting directly to you. Failure to take timely corrective action for unexcused absences could result in disciplinary action for you as well as for the employee. If you report 100 percent attendance for the quarter, you will receive one day's time off in the quarter immediately following the quarter in which the 100 percent attendance occurred.

- *Applicable,* used frequently by managers to ensure that their decisions are fair, consistent, and in line with executive management's thinking and wishes. A policy might deny a supervisor the right to offer full-time permanent employment to an applicant without the agreement of human resources: "To prevent the appearance of contractually obligating the organization to any one applicant, you must discuss all decisions to hire with the vice president of human resources, and an agreement to extend an offer to that person must be reached."

Even if the policy statements are broad and comprehensive, they could still fail to communicate their intent to everyone because either they do not say what they mean or they are expressed badly. Figure 12-3 lists the right way and the wrong way to write policy statements. In which column would you say your organization's policy statements fall?

Procedures

A procedure is a sequence of steps to be performed and, in this context, usually describes how to implement a policy. Policies usu-

Figure 12-3. Rights and wrongs of policy statements.

Right Way	*Wrong Way*
Short sentences that use an economy of language	Technical jargon or other language that might not be readily understood by everyone
A friendly, responsive tone	Legalistic language, even when talking about the law
Personal pronouns (e.g., *you*) rather than impersonal words (e.g., *managers*) to allow readers to see how the policy applies to them	A choppy or abrupt style
Clear, ordinary language that says what the organization really means	Ambiguity or fuzziness that allows managers to make inappropriate or improper decisions by implication
Action-oriented language expressed by active verbs	Overuse of lists or outlines

ally evolve slowly, but procedures are subject to frequent, sometimes sweeping, changes or amendments. Whereas a policy statement is a broad statement of intent (a goal), procedures are specific and action-oriented. They explain how a rule of conduct (which is a requirement for action or inaction) is enforced and how managers are supposed to use their authority or exercise their control. For example, a procedure related to hiring policies might say, "If an applicant does not fill out all relevant blanks in the application for employment (e.g., a gap appears between employments), you should ask the person what happened during those years between employments."

Miscellaneous Items

Other materials can be added to a personnel manual to help managers understand what they cannot or can do. For example, the manual should include a section in the back that contains summaries of relevant pieces of legislation or common law concepts (such as those in this book). That and other devices can help an organization protect itself, its managers, and its line employees from wrongful discharge suits.

Conclusion

Employees have found their voice through the courts and other government agencies, a voice long reserved for employers. On the bright side, the new balance struck by the courts between employee and employer rights, if maintained, will help you develop effective management standards and practices that will benefit all concerned. You and your organization can help yourselves if you follow these suggestions.

Use and follow progressive disciplinary procedures whenever possible. When you do have to fire someone, make sure you have backup documentation that you have shared with higher management before making your final decision. In short, do not get caught "building a file," which can lead to an assessment of damages.

Check your policy manual to see if it lists clearly stated offenses for which immediate discharge is possible. Make sure the list is accompanied by a disclaimer saying that the list only illustrates the types of offenses that could result in immediate discharge, that it is not exclusive of other possibilities. The list coupled with a well-written disclaimer makes employment at will an organizational policy; discharge for cause is not necessary and is not restricted to rules of conduct spelled out in a policy manual.

Decide whether you have been given appropriate guidelines about what to say to other people once you have discharged an employee. If you fire someone for cause—e.g., theft, destruction of property—you need merely mention the incident in brief, neutral, matter-of-fact terms to those employees who have a need to know (e.g., immediate co-workers). Firing someone for poor performance can be acknowledged merely by saying that the organization and the employee agreed to disagree and separate. Both ways of explaining things should help you avoid charges of defamation.

But written policies are not enough. Your organization should train you and your co-managers in how to enforce company codes of conduct and how to follow the guidelines for avoiding litigation when hiring, appraising, promoting, or firing employees. If the organization does not offer the training, ask for it.

You can discipline or fire an employee. No one says you cannot. But, if you do, you have to ensure that in the process you have not breached a contract, explicit or implicit, or violated public policy (which I will discuss in the next chapter), and that the action is not illegal under other laws.

At issue is the balance between employer and employee rights, rights governed by laws of contract as well as civil rights laws. As employer, you have the right to dismiss any employee you want, for whatever reason you want, and with whatever notice you want to give as long as you do not have a definite employment contract limiting your actions.

On the other hand, where no definite employment contract exists, you should be prepared to defend yourself against any charges an employee you dismiss brings against you or your organization. Although no law requires your organization to publish specific personnel policies, they are still good protections against lawsuits. However, they can also be the source of lawsuits, if those policies, as you have read, produce disparate treatment or adverse impact—or, more likely, if they are not carefully implemented.

CASEBOOK

Although I could produce many volumes with breach of contract cases, I will include only a few illustrative samples through which you can test your own awareness and against which you can test your organization's disciplining and firing policies.

How Can You Preserve Your Right to Fire?

When Barbara Price ran her "for sale" ad in the newspaper published by her employer's competitor, she had no idea she would lose her job over it. In court, she claimed that the language of the employee handbook created a contract that limited employee discharge to "just cause," i.e., actions that violate very specific rules or expectations: "The following actions violate the standards of conduct of the *Tribune* and therefore represent cause for disciplinary action." The handbook then listed eleven separate actions common to most handbooks: dishonesty, possession of intoxicants or illegal substances, unexcused absences, and so on.

The publication's attorney argued that the employer had the right to terminate anyone at any time, with or without cause, or to determine what other than the eleven items listed could be called "just cause." To bolster the employer's case, the defendant read into the record two other excerpts from the handbook:

> **[The eleven separate actions] enumerat[ed] here [are] by way of illustration and shall not be deemed to exclude any other just causes.**
> **It must be remembered that as circumstances change, rules often must change. Therefore, the *Tribune* may from time to time amend some rules to meet changing needs.**

Does your organization list reasons for discharge? How does the employee manual protect your freedom to discharge someone?

At-Will Supported

The Pennsylvania courts provide the basic outline of what constitutes the at-will doctrine. The Pennsylvania Superior Court decided for the defendant, refusing to undermine the at-will employment doctrine prevalent in that state. According to the court, without a clear statement of the *employer's* intent to agree to any other arrangement, at will must prevail.

In this case, because the handbook's language specifically reserved the right to modify the employment *rules* (not at-will employment), the employer's right to discharge at will held.[43] Discharging the employee was not in breach of contract because *no such contract existed,* either implicitly or explicitly. Additionally, because the employee signed an acknowledgment, the employer had protected itself completely.

To sum up, the substance of the employment-at-will doctrine consists of the employers' right to hire and fire people for and at their own convenience. In the absence of a written agreement, an employer may hire someone for an unspecified period of time and fire him or her with or without reason (cause), with or without notice. But, don't forget, the employee has the equal right of quitting at any time, with or without cause, with or without notice.

How Can Your Procedure Manual Interfere With Your Decision to Lay Off a Worker?

The managers of a major airline carrier thought they had produced a good procedure for their reduction in force, one that provided guidelines and instructions to all managers for carrying out their responsibilities. However, one employee in Colorado, finding himself on the street, cried foul. "The procedures manual's a binding contract that spells out the steps management has to take before firing someone. They were not followed in my case," he told the court.

"No," the airline argued. "The manual explains management guidelines and does not have the intent or the force of a contract."

With which argument do you think the federal court agreed? Have you checked your own manual lately?

A Manual as a Contract

Often the individual's rights win against employer rights, as in this case where the court ruled on behalf of the plaintiff and against the

traditional doctrine of termination at will because without *written agreements* to say differently, this employee manual had given rise to *implied* contract rights that govern laying off people. The company more than failed to follow its own rules. It ignored them and thereby violated the contract established in its own manual.[44]

As in many recent cases, this court reinforces the employees' awareness that common laws of contract protect them from what they see as arbitrary management decisions harmful to themselves, that those laws protect them from wrongful discharge. Many courts, as in this case, have adopted the philosophy of entitlement in the workplace as well as in social and political arenas. Employees as well as employers are entitled to equal protection under the law.

Can Your Disciplinary Procedures Form a Contract?

Peter Strauss had worked as a loan officer for State Bank for a year and half when a routine audit uncovered a number of technical exceptions in its loan portfolio. Without a hearing, he was fired.

In turn, he took the bank to court, claiming that it breached his employment contract by dismissing him without cause and in violation of the bank's prescribed disciplinary procedures. To bolster his case, he cited three provisions of the employee handbook that the bank had adopted and distributed to the employees while Strauss was employed but that it did not follow when it discharged him: performance review, job security, and a four-stage disciplinary action procedure. The first provision said:

> All employees want to know "where they stand." Our performance evaluation program is designed to help you to determine where you are, where you are going, and how to get there. Factual and objective appraisals of you and your work performance should serve as aids to your future advancement.

The second citation, "Job Security," extolled the stability of employment in the banking industry.

> Employment in the banking industry is very stable. It does not fluctuate up and down sharply in good times and bad. . . . We have no seasonal layoffs and we never hire a lot of people when business is booming only to release them when things are not as active.
>
> The job security offered by [*State*] Bank is one reason why so many of our employees have five or more years of service. In return for this, management expects job security from you, that is, the security that you will perform the duties of your position with diligence, cooperation, dependability, and a sense of responsibility.

The third provision described a four-stage "disciplinary policy."

> In the interest of fairness to all employees, the company establishes reasonable standards of conduct for all employees to follow. . . . [They] are not intended to place unreasonable restrictions on you but are considered necessary for us to conduct our business in an orderly and efficient manner. If an employee has violated a company policy, the following procedure will apply:
>
> 1. An oral reprimand by the immediate supervisor for the first offense, with a written notice sent to the executive vice-president
> 2. A written reprimand for the second offense
> 3. A written reprimand and a meeting with the executive vice-president and possible suspension from work without pay for five days
> 4. Discharge from employment for an employee whose conduct does not improve as a result of the previous action taken

State Bank's attorney argued that all three provisions were irrelevant inasmuch as Strauss was employed at will.

A jury awarded Strauss $27,675 in damages for being termi-

nated in breach of contract and without good cause. The bank took its case to the state supreme court.

What has your organization published with respect to performance appraisal, job security, and disciplinary procedures? If it lost a case before a jury, how could your state supreme court possibly rule?

Got 'Em, Follow 'Em

The Minnesota Supreme Court ruled in favor of the plaintiff on all three counts and provided me with the answers to the three broad questions I discussed in the text: (1) Can an employee handbook become a part of an employment contract? (2) Can job security provisions in an employee handbook be enforced? (3) Can a summary dismissal, as in this case, breach an employment contract? The court answered yes to all three.[16]

First, personnel handbook provisions can form a *unilateral contract* and may therefore become enforceable as an employment contract if they are distributed to the general population of employees, or if they are used for any purpose other than as a guide for supervisors, or if they are not delimited in some manner (e.g., with a disclaimer).

Second, phrases such as "career situation" and "job security" might not form the basis of a contract, but job security provisions in an employee handbook, disseminated to all the employees, can be so construed. The job security provisions in the employment contract would then override a terminable-at-will construction of the contract.

Third, a disciplinary policy is binding when it contains sufficiently *definite language* to form an offer of a *unilateral contract* promising that certain procedures will be followed before an employee is discharged. The phrase "If an employee has violated a company policy, the following procedure will apply" is definite language in this case.

Cases

1. 707 F.2d 1274, 32 F.E.P. Cases (BNA) 142 (11th Cir. 1983).
2. 99 Lab. Cas. (CCH) Section 10,639 (N.W. Ohio 1983).

3. 99 Lab. Cas. (CCH) ¶10,640 (D. Mass. 1983).
4. 122 L.R.R.M. 2344 (E.D. Miss. 1986).
5. Reported in *Resource*, The Journal of the American Society for Personnel Administration, 8:1 (January 1989).
6. (Minn. Sup. Ct. April 29, 1983).
7. 753 F. Supp. 871 (E.D. Va. 1987).

Examples of Employee Manuals as the Basis of Enforceable Contracts

8. No. 84-2554 (1st Dist. Ill. September 15, 1985).
9. 708 P.2d 110 (Ariz. Ct. App. 1985); see also 141 Ariz. 544, 688 P.2d 170 (1984).
10. No. 49592-1 (Wash. Sup. Ct. July 5, 1984).
11. 215 Neb. 677, 340 N.W.2d 388 (Neb. 1983).
12. 672 P.2d 629 (Nev. 1983).
13. No. 84-CA-1508-MR (Ky. Ct. App. April 12, 1985).
14. 486 A.2d 798 (Md. Ct. App. 1985).
15. No. WD 36426 (Mo. Ct. App. April 9, 1985).
16. No. A-98-82 (May 9, 1985).
17. 704 P.2d 702 (Wyo. 1985).
18. 609 F. Supp. 627 (N.D. Ill. 1985).

Cases Upholding a Disclaimer or Other Employee Manual Procedures

19. 100 Lab. Cas. ¶10,793 (Ala. Sup. Ct. 1983).
20. 474 So. 2d 1069 (Ala. 1985).
21. 495 So. 2d 1381 (Ala. 1986).
22. 199 Cal. Rptr. 613 (Cal. App. 2d Dist. 1984).
23. 113 Idaho 581, 746 P.2d 1040 (Idaho App. 1987).
24. 2 I.E.R. Cases 1568 (Ill. App. Ct. 1987).
25. No. 87-1622 (Ill. App. Ct. June 24, 1988).
26. 738 S.W.2d 824 (Ky. Ct. App. 1987).
27. No. 84-824 (La. Ct. App. Dec. 12, 1985).
28. 495 F. Supp. 344 (E.D. Mich. 1980).
29. C.A. No. 81-73233 (E.D. Mich. October 18, 1982).
30. N.W.2d 529 (Mich. App. 1984).
31. No. 71,773 (Mich. Ct. App. Nov. 4, 1985).
32. No. 76,014 (Mich. Ct. App. 1985).
33. 122 L.R.R.M. 2153 (6th Cir. 1986).
34. 417 N.W.2d 496 (Mich. Ct. App. 1987).
35. 413 N.W.2d 146 (Minn. App. 1987).
36. 2 I.E.R. Cases 1799 (Mo. 1988).
37. 220 N.J. Super. Ct. 135, 531 A.2d 757 (N.J. Super. Ct. 1987).
38. 356 S.E.2d 357, 2 I.E.R. Cases 269 (1987).
39. No. 49,770 (Ohio Ct. App. December 5, 1985).
40. 1 I.E.R. 476 (Pa. 1986).
41. 715 S.W.2d 60 (Tex. Ct. App. 1986).
42. 116 L.R.R.M. (BNA) 3092 (Wis. Ct. App. 1984).
43. 354 Pa. Super. 199, 511 A.2d 830, 1 I.E.R. 476 (Pa. 1986).
44. 574 F. Supp. 805 (D. Colo. 1983).

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