THE ART OF A SUCCESSFUL TERMINATION

I. INTRODUCTION

Few activities have the potential for unpleasantness as the termination of an employee. Particularly in economic downtimes, the termination of a worker who has done nothing "wrong," but whose employment the business can no longer sustain, can be a tortuous and stressful decision. The employer may have established a personal relationship with the soon-to-be-unemployed worker, which only makes delivering the bad news more difficult. Even when discharge is mandated by the employee's misconduct, there is often an unsettling uncertainty inherent to the situation, as the employee could react in a number of ways injurious to professional and personal relationships.

One of the many unknowns is whether the terminated employee will sue the company. As may be obvious, termination events often act as triggers for many types of litigation, including lawsuits challenging the termination itself. Indeed, at least 75% of the employment-related litigation handled by the authors commenced on or after an employee's termination. Lean economic times and lack of lateral job opportunities only increase the attractiveness of litigation to an individual with no other means of support. Now more than ever, employers wishing to minimize liability should focus on their termination protocol.

II. "AT WILL" EMPLOYMENT PRESUMED

California has a statutory presumption of "at will" employment. Specifically, Labor Code section 2922 provides that where the duration of an employment relationship is not explicitly set forth, the employment "may be terminated at the will of either party on notice to the other." The upshot of this provision is that either the employee or employer can terminate the employment relationship, at any time, with or without cause.

The presumption of "at will" employment is a bit misleading, however, as the rule is somewhat defined by its exceptions. While an employer may terminate an employee for no reason, this does not mean that an employer may terminate someone "for *any* reason." As an obvious example, an employer could not fire someone because he or she is a member of a racial minority. Thus, employers must ensure both (i) that the termination decision is grounded on a legally-defensible position, and (ii) that there exists sufficient documentation supporting the termination. The first part of that inquiry is the focus of this article.

III. LIMITATIONS OF THE "AT WILL" EMPLOYMENT RELATIONSHIP

Some commentators have suggested (and these authors agree) that the many limitations on an employer's right to end "at will" employment may be viewed as deriving from either statutory, contractual, or public policy concerns.

A. Statutory Limitations

1. Anti-Discrimination Statutes

California's Fair Employment and Housing Act ("FEHA") prohibits employers from basing a termination on any of the following:

- Race, color, national origin, or ancestry;
- Sex (including pregnancy, childbirth, and gender identity);
- Age;
- Physical or mental disability;
- Marital status;
- Sexual orientation;
- Protected medical conditions; or
- Religion.

Federal law prohibits terminations on similar, and in some cases broader, grounds. For example, federal law prohibits firing an employee due to his or her citizenship (or lack thereof), or for participating in unionization or other concerted activity.

Very few employers would be bold (or daft)[1] enough to explicitly justify a termination on the grounds of one of the above protected characteristics. However, employers should be sure that the reason for a termination – i.e., a poor attendance record – is not caused by a protected characteristic of which the employer is, or should be, aware, such as a medical condition. For example, an employer could be exposed to liability for firing an employee for excessive absenteeism if the employer knows the worker to be pregnant and that her absences are related to her pregnancy.

2. Anti-Retaliation Statutes

California also prohibits retaliatory terminations, which is sometimes referred to as "whistleblower" protection. These laws are generally geared toward encouraging employees to report unlawful, discriminatory, or dangerous working conditions to a governmental agency, and do not allow employers to terminate employees for reporting such facts to a relevant authority.

The main whistleblower statute in California is Labor Code section 1102.5, which guarantees an employee's right to "disclos[e] information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." That statute also protects an employee who refuses to participate in an employer's

[1] *But see Badih v. Myers* (1995) 36 Cal.App.4th 1289 (when employee informed boss that she was pregnant, employer told her, "I need an office girl when I need her, not a person that has responsibilities the way you do now. . . . You're going to have to go," and fired her).

unlawful conduct. Other California statutes prohibit retaliatory terminations based on an employee's reporting of discriminatory practices or unsafe working conditions to a government agency.

While whistleblower laws protect employees who report to governmental agencies, other anti-retaliation statutes cover employees who report unlawful conduct directly to the employer. For example, an employee fired for expressing his or her disapproval of the company's discriminatory hiring practices to the employer itself could have a claim for wrongful termination. The Labor Code also protects employees who notify their employer that they want to file a workers' compensation claim for an on-the-job injury.

3. Other Statutory Protections

Various other California statutes provide protection for employees who choose to exercise certain statutory rights. For example, employers may not terminate employees for taking time off of work for any of the following reasons:

- Pregnancy;
- Physical or mental disability;
- Work-related injuries;
- To care for "serious health condition" of the employee or the employee's close family;
- Military service;
- Performance of emergency duty as a volunteer firefighter or reserve peace officer;
- Jury duty; or
- Voting in a statewide election.

Thus, employers should take special care in terminating workers who have recently exercised the right to take statutorily-protected leave. While an employer can fire an employee during, or immediately after returning from, a protected leave, the timing of the decision will raise many red flags and may support a claim of retaliatory termination.

Other state laws guarantee a broad spectrum of rights, ranging from the obvious to the obscure. Employees may not be terminated for political activity or affiliation, or for other lawful, off-duty activities away from the workplace. Nor may an employee's disclosure to other workers of his or her wage rate justify a termination, regardless of any employer policy to the contrary. Employers are also prohibited from basing a termination decision on an employee's refusal to work excessive hours or take a polygraph or voice stress analysis test. Additionally, there are a multitude of federal laws that guarantee employees protection for exercising certain rights. Simply put, there are a plethora of these landmine-type laws awaiting the heavy feet of the uninformed employer.

B. Contractual Limitations

Another source of limitations on an employer's ability to terminate workers arises from contract theory – in simple terms, from an agreement of the parties. An explicit, written, signed contract laying out the particulars of an employment relationship can trump the statutory "at will" presumption. For varying reasons, the majority of employers in California choose not to enter into contracts with employees for specified terms, and instead rely on the "at will" presumption discussed earlier. However, the absence of a signed contract does not mean that there are no "contractual" limitations on the business's ability to terminate workers because contractual limitations can come into play when *no written contract exists*. Confused yet?

To take a step back, the term "contract" could be substituted for "agreement." In this sense, a "contract" need not be written, signed, or even explicitly agreed to. To be precise, a terminated employee can claim that, despite the absence of any explicit written agreement, there was actually an "implied-in-fact contract" that governed the terms of his employment. The employee-turned-plaintiff can argue that a contract was created by his interactions with his employer – namely, that the two parties reached an "implied agreement" that the employee could only be terminated for good cause. In order to make such a showing, plaintiffs often rely on personnel policies and practices, the length of time they served the employer, relevant industry practices, and communications from the employer to argue that they were promised everything from pay raises and bonuses, to promotions and continued employment.

While only one or two factors will not generally be sufficient to imply an agreement to terminate only for good cause, the confluence of the circumstances may persuade a court that such an agreement exists. For example, one California case held that a terminated employee stated a cause of action against his employer for breach of contract based on his firing. The plaintiff successfully argued that the employer impliedly promised not to terminate him except for cause. In support of his argument, he stated that (i) the employer orally told him that he would be terminated only for cause; (ii) the employer's manuals stated that terminations would be based on "just cause;" and (iii) the employee received regular promotions and raises during his eight-year employment. The court held that the case could continue on the facts the plaintiff presented.

In another more recent case, a plaintiff successfully argued for a new trial on the theory that an implied agreement not to terminate except for cause existed, *even though* the employee had received "several employee handbooks . . . that described his employment relationship as being at will." The court found that parts of the handbook were conflicting with the concept of "at will" employment, and that the company usually followed a progressive discipline plan prior to terminating an employee. Additionally, the plaintiff had been told that he "would have a job . . . as long as he chose to work" for the company; that his boss said "as long as I'm around you'll always have a job;" and that a supervisor wrote to him, stating that he "looked forward to many years of working together." These comments, when considered in the totality of the circumstances, constituted compelling evidence of an implied contract to terminate only for cause.

While there are ways in which an employer can guard against the establishment of an implied contractual relationship, the above-referenced cases serve as cautionary tales. Written

employment provisions will normally govern in the face of contradictory implied terms, but the inquiry is inherently fact-specific, which increases the unpredictability factor. Employers should also keep in mind that its communications with workers – even if only a simple motivational statement – may contribute to the finding of an implied agreement to terminate only for cause.

C. Public Policy Limitations

An employer's ability to terminate its workers is also limited by fundamental public policies of the state. In other words, if a termination would contravene a public interest, then it may be deemed unlawful. For example, if an employee were terminated for refusing an employer's request to commit a crime, the termination could be deemed to violate public policy. These lawsuits are often referred to as *Tameny* actions, after a landmark California Supreme Court case.[2]

To state a case for wrongful discharge in violation of public policy, a plaintiff must establish that the termination (i) infringed a *fundamental* public policy (ii) that was well-established at the time of discharge, and (iii) that benefits the public at large. "Fundamental" policies include those that are set forth in the state constitution, state statutes, and even statutorily-authorized regulations. A public policy may be well-established if it is set forth in numerous sources. For example, sexual harassment in employment is prohibited by the California Constitution, FEHA, and numerous other laws. A public policy that benefits the public may be distinguished from one that protects only private interests. An example might be an employee's complaining to the employer about the latter's violation of immigration laws that can be viewed as affecting the public as a whole.

As breach of many laws that can give rise to a *Tameny* action are already independently actionable, the inquisitive employer may ask: what's the point? The answer, as is so often the case, is money. A "wrongful termination in violation of public policy" claim arises in tort – that is, a civil wrong. A plaintiff in a tort case can recover ***punitive damages***, which can greatly increase the value of the lawsuit, and punitive damages are not always available under the various statutes. Furthermore, a *Tameny* action may provide a more favorable statute of limitations than the statutory action, giving the plaintiff a longer time to decide to sue.

IV. RECOMMENDATIONS

Although there is an inherent risk of legal exposure with any termination, there are a number of ways that an employer can structure the process to avoid wrongful termination claims.

A. Emphasize An At-Will Policy

The most obvious precaution that an employer can take is to stress the at-will nature of employment. A declaration of the at-will status can and should be included, at the very least, in the employment application, any written offer of employment, and the employee manual. Additionally, the employer can have its employees sign a separate "Acknowledgement of At-Will Employment" form to be kept in the employee's file. The language should be drafted to

[2] *See Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167 (1980).

make clear that the at-will policy supersedes any prior or subsequent oral representations by any company executive, and that the at-will nature of employment can only be altered in writing by the president or chief executive of the company.

B. Avoid Unintentionally Undermining The At-Will Arrangement

Employers should be wary of sounding too optimistic in communications with new employees. As cynical as this may sound, courts have found that language included in an offer letter such as "We look forward to a long, pleasant, and mutually satisfactory relationship with you" to support the existence of an agreement to terminate only for good cause. Thus, employers must avoid making statements – whether oral or written – that can be construed as a guarantee of future employment, as these statements can undermine the existence of an at-will agreement. Unfortunately, kind words, like good deeds, rarely go unpunished.

C. Use Extra Caution In Drafting Discipline Policies

As alluded to earlier, employers can also run into trouble by implementing a rigid progressive discipline program. These programs usually begin with a verbal warning for the first offense, within increasingly serious reprimands for further offenses – written warnings, suspensions, etc. – finally culminating in termination. While these programs have the compelling benefit of encouraging the employer to document an employee's transgressions while providing an employee the opportunity to remedy their problems, the policy provisions must clearly indicate that the employer has the right to forgo the steps of progressive discipline and proceed directly to termination. Such language will help to ensure that the system does not undermine the at-will nature of employment.

D. Beware High-Risk Terminations

With all terminations, employers should take time to review the file to ensure that documentation exists to corroborate the reasons for termination, and that the termination complies with applicable federal and state provisions, as well as the employer's internal policies. However, a business would be well-served in taking additional time to review certain "high risk" terminations which are more likely to result in litigation. High risk terminations include those where the employee:

- Is a member of a protected group;
- Has recently complained about an activity he or she believes to be unfair, unsafe, or unlawful;
- Has recently engaged in other statutorily-protected activity, such as taking disability or family leave or filing a workers' compensation claim;
- Has filed an administrative charge with the Department of Fair Employment and Housing or Equal Employment Opportunity Commission; or
- Has recently complained about allegedly unpaid wages.

With individuals in these groups, the legal standard almost gives them a head start on an unlawful termination claim, thus requiring the employer to put in additional time and expense rebutting the claim. As such, the presence of one or more of the above factors justifies taking additional steps to ensure that the termination is fully justified and well documented.

E. When In Doubt, Consult An Attorney

When facing a difficult termination situation, a few minutes with seasoned employment counsel can be a valuable investment. An attorney can review the termination and supporting documentation and, if necessary or appropriate, help create a severance package where the employee will receive an additional one-time payment of money in exchange for a release of claims and a promise not to sue. Additionally, as the employer's written policies and other documents are often the best defense to a claim of wrongful termination, companies should be sure to have their policies vetted by an attorney sooner rather than later.

V. CONCLUSION

Terminations can be frightening events for multiple reasons, not least of which is the realistic possibility that the employee will respond to the bad news by bringing a lawsuit. Well worded employment policies and thorough documentation are strong defenses against these claims, but employers must ensure they do not undermine these defenses by words or other conduct. While there is no foolproof method of preventing an embittered ex-employee from filing a lawsuit, with well-drafted policies, proper documentation, and an awareness of high-risk situations, the employer can effectively minimize the time and expense of responding to such claims.

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