Perkins Coie

Employment Law Briefings

2005–2006

Three Strikes and You're Out: Discipline and Discharge of Employees

Lynnwood, WA: Wednesday, September 21, 2005
Tacoma, WA: Thursday, September 22, 2005
Seattle, WA: Wednesday, September 28, 2005
Bellevue, WA: Thursday, September 29, 2005

Pacific Northwest Labor and
Employment Law Departments

The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
425.635.1400

1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
503.727.2000

1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
206.359.8000

www.perkinscoie.com

Seattle, Washington

This briefing handout is not intended to be and should not be used as a substitute for specific legal advice, since legal opinions may be given only in response to inquiries regarding specific factual situations. Subsequent legal developments after the date of specific briefings may affect some of the legal standards and principles discussed. If legal advice is required, the services of counsel should be sought.

Nancy Williams, a partner in the Seattle office, has been with Perkins Coie LLP for nearly 25 years. Her practice is primarily devoted to litigating employment discrimination and wrongful discharge cases, as well as advising employers on related issues. Before becoming a lawyer, Nancy worked for the U.S. Department of Labor and served with the Peace Corps in Colombia. She obtained her undergraduate degree from Northwestern University and her law degree from the University of Michigan.

Andrew Greene is an associate in the Seattle office, where he divides his time between construction law and labor and employment litigation and counseling. Andrew obtained an undergraduate degree in Business Administration from the University of Washington, along with his law degree. In addition to his full-time practice with Perkins Coie, Andrew is a Pro Bono Attorney with the King County Housing Justice Project and is a Big Brother volunteer with the Boys & Girls Clubs of King County.

CONTENTS

THREE STRIKES AND YOU'RE OUT: DISCIPLINE AND DISCHARGE OF EMPLOYEES

by

Nancy Williams and Andrew Greene

I. INTRODUCTION: WHY WE'RE HERE

Approximately 80,000 charges of discrimination or retaliation are filed each year with the Equal Employment Opportunity Commission. Thousands more are filed with the Washington State Human Rights Commission and similar agencies. Many charges develop into lawsuits, and there are, of course, many other theories besides discrimination on which a present or former employee may base a claim.

More often than not, charges or lawsuits by former employees raise allegations that the claimant has been discharged wrongfully or unfairly. Discharge, sometimes labeled as the "capital punishment of the workplace," often is preceded by disciplinary action that may also be attacked as unfair. Thus, most employers want to be sure that their decision to discipline or discharge an employee is well-justified and fairly carried out—if only to protect themselves from legal liability. There are many other reasons for sound disciplinary practices. Such practices advise employees of the employer's expectations, provide guidance and incentive for improved performance and/or conduct, and demonstrate to other employees that poor performance and misconduct will be addressed. Consistent, fair discipline and discharge practices will not only help avoid or defend legal claims, they can also make the work environment better for all.

II. VARIOUS THEORIES FOR CHALLENGING DISCIPLINE/DISCHARGE

A. General Presumption of Employment at Will

The general presumption in Washington is that an employment relationship of indefinite duration is terminable at the will of the employer. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219 (1984). In *Thompson*, the Washington Supreme Court also rejected the idea that termination of employment should be subject to a covenant of good faith and fair dealing. *Id.* at 227.

> [T]o imply into each employment contract a duty to terminate in good faith would . . . subject each discharge to judicial incursions into the amorphous concept of bad faith.

Id. In other words, in the absence of an unlawful motive or breach of an employment agreement, an employer may discharge an employee for any reason or no reason at all.

B. Laws Against Discrimination

Title VII protects employees from discrimination because of race, color, sex, national origin and religion. The Age Discrimination in Employment Act bars discrimination against workers over 40 years of age because of their age. The Americans with Disabilities Act bars discrimination against workers because of disability.

Similarly, the Washington Law Against Discrimination protects employees from discrimination because of race, creed, color, sex, age, marital status, presence of a disability or use of a dog guide or service animal. Local statutes often provide protection based on some other status.

Employees who are disciplined and/or discharged may challenge the employer's action with the allegation that it was taken *because of* the employee's protected status. Although it is the employee's legal burden to prove that the discipline or discharge was because of discrimination, that burden is much easier if it appears that the employer has acted arbitrarily, capriciously or without a reason that can be understood by average jurors.

C. Wrongful Discharge Claims

1. Tort Claim for Public Policy Violation

Washington also recognizes two types of wrongful discharge claims. The first is a discharge in violation of public policy. *Thompson*, 102 Wn.2d at 232.

> Courts have found contravention of a clear mandate of public policy in four general areas: (1) where the discharge was a result of refusing to commit an illegal act; (2) where the discharge resulted due to the employee performing a public duty or obligation; (3) where the termination resulted because the employee exercised a legal right or privilege; and (4) where the discharge was premised on employee "whistleblowing" activity . . . .

Dicomes v. State of Washington, 113 Wn.2d 612, 618 (1989) (citations omitted).

An employee who is discharged may try to assert that she was discharged for one of these reasons. Again, although it is her burden to prove the wrongful motive, the defending employer is on firmer ground if there is an easily explained reason for its action and apparently fair procedures leading to the discharge.

2. Claim for Breach of Employer's Policies

The second theory of wrongful discharge is based on an employer's failure to follow its own published policies. *Thompson*, 102 Wn.2d at 229. Under this theory, the discharged employee must show that the employer created an atmosphere of job security and fair treatment with promises of specific treatment in specific situations, inducing him to remain on the job and not seek other employment. *Id.* at 230. In such instances, the employer has created an expectation and an obligation to treat employees in accord with its written promises.

An employee who is discharged in violation of published policies may assert a claim on that basis alone, although the potential damages are different and less than those available for a claim of public policy wrongful discharge.

D. Lack of "Cause" Under Bargaining Agreements or Other Contracts

In some situations, most commonly under collective bargaining agreements, the parties agree that employment may be terminated only for "Cause." Some individual employment agreements contain a similar provision. In such instances, employment is not terminable at will, and the burden is on the employer to show that there was Cause for any discharge. Cause may be defined in a particular contract. In the collective bargaining setting, there is a body of law, largely developed in arbitration, as to what constitutes Cause.

Note that even in the absence of an express agreement, an employment relationship may also be terminable only for cause if there is an implied agreement to that effect or the employee has given consideration to the employer in addition to the contemplated service, *Id.* at 233, e.g., financial investment in the business.

E. Standards by Which Decision Is Judged

1. At-Will Employment

Was the decision discriminatory, retaliatory or in violation of public policy? Was it carried out in compliance with the employer's published policies?

2. Implied "Just Cause" Protection

Was the decision to discharge:

(a) not for an arbitrary, capricious or illegal reason,

(b) based on facts supported by substantial evidence, and

(c) reasonably believed by the employer to be true?

3. Express "Just Cause" Protection

This protection arises from a collective bargaining agreement, bilaterally negotiated employment contract, civil service law, tenure protections or similar source.

(a) Decision must be substantively correct;

(b) Decision must be procedurally fair and consistent with past practice; and

(c) Discharge must be reasonable penalty under the circumstances.

III. KEYS TO EFFECTIVE DISCIPLINE

A. Clear Communication

1. Setting the Standard

Tell employees clearly the rules or standards for conduct and performance. This may take the form of written work rules, orientation materials, communications in crew or staff meetings and/or individual one-on-one meetings. Although there are some standards that should be common sense, employers will be on the surest footing where they have let employees know what is expected.

2. Identifying the Deficiency

If discipline is contemplated or undertaken, tell the employee clearly what the problem is. Don't rely on vague terms like "bad attitude." Be specific. For example, if the employee's bad attitude surfaces with disruption of meetings or failure to carry out her share of unpleasant shared tasks, say so.

3. Expectation for Correction/Improvement

Describe what would demonstrate improved conduct. For example, "don't speak in meetings without raising your hand and waiting to be called on." "When it's your turn to clean out the refrigerator in the crew room, do it without being reminded." Set a time frame for the correction or improvement.

B. Consistency Tempered With Flexibility

Consistency is often the key to showing that discipline has not been discriminatory or retaliatory. If employees in similar situations are treated similarly, regardless of protected status, an employer has a strong defense to claims of discrimination, retaliation or violation of public policy. On the other hand, one instance of misconduct or poor performance may be markedly different in severity from another. Sometimes uniform treatment of situations is not necessarily fair treatment. Although some employers have strict rules that apply regardless, most will temper discipline depending on specific circumstances. In those situations, the reasons for lesser discipline in some situations should be based on a good reason that can easily be explained to and understood by a third party—such as a juror.

C. Progressive Steps as Appropriate

Many deficiencies in performance or conduct may be correctable. Common examples are absenteeism or sloppy workmanship. A generally accepted approach to correcting such problems is progressive discipline. Often, this takes the form of an initial informal discussion with the employee about the issue. If the misbehavior continues to occur, progressive steps impress upon the employee the seriousness of the need to improve. Typical steps include a formal oral warning, followed by a written warning, followed by a suspension if appropriate, followed by discharge. Progressive discipline is not appropriate in all situations. Employers who have a stated policy of progressive discipline should take care to reserve the right to determine when to utilize it. In employment situations where employment is terminable only for "cause," progressive discipline will be expected except where the employee's conduct clearly warrants immediate dismissal.

D. Documentation

It's a good idea to keep a record of every disciplinary action, even informal discussions. This does not mean that a written document must go into the employee personnel file at an informal stage of the disciplinary process. But it is important to have some institutional memory of informal discussions or warnings.

Some employers keep disciplinary logs for notation of discussions and oral warnings. A notation that an oral warning was given also may be placed in the employee's file, if desired. Once discipline advances to the written stage, copies of warnings acknowledged by the employee should be retained in the personnel file. Written documentation should contain a succinct statement of the performance or conduct issue, the expected improvement and time frame for improvement, and the consequences of failure to improve.

E. Human Resources Involvement and Review

Many employers get their human resources professionals involved at every step in the disciplinary process. Others routinely involve human resources only as more severe disciplinary steps, including discharge, are contemplated. The role of human resources generally is to ensure discipline that is warranted by the circumstances and consistency in discipline across the organization. If the employer has written policies on discipline, human resources can assist in ensuring that the policies are followed.

In addition to providing advice on specific situations, human resources should periodically review discipline within the organization. Are there patterns that suggest training would be helpful for particular departments or individuals? Does it appear that members of a particular racial or ethnic group are receiving discipline out of proportion to other segments of the workforce? Do disciplinary actions reflect good understanding of employer policies and documentation requirements? The answers to these questions may indicate steps to be taken by management and human resources personnel to improve the working of the disciplinary process.

IV. GETTING TO DISCHARGE

A. Making the Decision

1. Are all facts recorded?

2. Are all documents assembled?

3. Is the employee aware of the problem?

4. In appropriate cases, have progressive disciplinary steps been taken and documented?

5. Has the employee had an opportunity to tell his or her side of the story?

6. Have you considered past similar situations to be certain your actions are consistent?

7. Have you complied with all internal review procedures or other practices called for by the organization's policies?

B. Logistics of Discharge

1. Communications to Employee

(a) Who will tell the employee;

(b) Who else will be there;

(c) Where and when the meeting will occur; and

(d) What to say.

While some supervisors or managers prefer sugar-coating the explanation, there is no good reason (other than a desire to avoid confrontation) not to tell the employee the reason for termination, in a tactful way. The employer's representative should never give a false reason.

2. Security Issues

(a) Take necessary security precautions prior to discharge meeting.

(b) Escort from premises if appropriate.

(c) Retrieve or protect confidential information (including computer codes and programs).

(d) Retrieve other employer property, including identification and keys.

(e) Consider changing locks or security codes.

3. Option to Resign

There may be situations where an employer offers to permit the employee to resign in lieu of discharge. This may be a compassionate gesture for employees whose discharge is warranted but who have not engaged in willful misconduct or otherwise acted in bad faith or in derogation of the employer's interests.

C. Separation Agreements

Many employers consider offering a separation agreement to a discharged employee. Sometimes a separation agreement is viewed as a constructive way to end the employment of an employee whose deficiencies are not intentional. Some

employers offer a separation agreement on almost all involuntary terminations of employment. The reason is simple: a separation agreement generally includes a release of all claims arising out of the employment or the termination of employment. A valid and enforceable release is the strongest protection against potential employee charges or lawsuits. Releases raise several issues.

1. Form

For a general release of claims under Washington law, no particular form is required. The format may vary from an informal letter agreement to a highly formal separation agreement. There are particular requirements, however, for a valid release of claims under the federal Age Discrimination in Employment Act (ADEA). A binding release of claims of age discrimination under federal law requires the following substantive and procedural elements:

(a) The employee must receive additional consideration, i.e., something more than she is already entitled to receive;

(b) The release must expressly recite that it is a waiver of claims under the ADEA;

(c) The employee must be advised to seek her own attorney;

(d) The employee must be given at least 21 days to consider the agreement; and

(e) The employee must be given at least seven days after signing the release to revoke acceptance.

2. Purposes

Why does the employer want a release from this employee? The release must be carefully drafted to accomplish an effective bar to this employee's potential claims.

3. Presentation

Give careful thought to how to present the concept of a separation agreement and release. If the employee does not accept the offered release, it may be put before a jury as evidence of the employer's "guilty conscience." *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338 (9th Cir. 1987). Therefore, the approach to raising the idea must be carefully planned.

V. AFTER THE DISCHARGE

A. Communications About the Discharge

1. Co-Workers

Co-workers will have substantial interest in the termination of a co-employee. Anticipate that the rumor mill will be in high gear.

2. Customers and Suppliers

Customers and suppliers with whom the employee dealt—particularly if the employee had contracting or check-signing authority—will have to be informed.

3. References

Potential employers will likely attempt to contact the employee's former supervisor or co-workers. In July 2005, a new Washington statute took effect that is designed to protect employers who give honest references on former employees. It provides:

> An employer who discloses information about a former or current employee to a prospective employer . . . at the specific request of that individual employer . . . is presumed to be acting in good faith and is immune from civil and criminal liability for such disclosure or its consequences if the disclosed information relates to: (a) The employee's ability to perform his or her job; (b) the diligence, skill, or reliability with which the employee carried out the duties of his or her job; or (c) any illegal or wrongful act committed by the employee when related to the duties of his or her job.

RCW 4.24.730 (1).

The statute recommends that employers providing references keep a record of the identity of the person to whom information is disclosed. The former employee has a right to review the record. If there is clear and convincing evidence that an employer gave a reference that was knowingly false, deliberately misleading or made with reckless disregard for the truth, the presumption of good faith may be lost.

4. Liability

The new Washington statute protects employers who give references at the request of a prospective employer or employment agency. Generally

speaking, however, employers should in other situations treat confidentially information about a former employee and the reasons for termination of the employment relationship. If such information is volunteered outside the context of a protected request, there could be potential claims by the former employee for defamation, blacklisting or interference with contract. Any statements concerning the employee should be truthful, and limited to objective facts.

5. Authorization

Many employers ask departing employees to execute an authorization for references. Such authorizations may supplement the protection provided by the new Washington statute.

B. Compensation and Benefits

1. Final Paycheck

An employee is entitled to be paid by the end of the regular pay period. RCW 49.48.010.

2. Commissions and Bonuses

Commissions and regularly accrued bonuses are "wages," which must be paid according to the terms of the applicable policy or plan.

3. Withholding From Final Paycheck

It is unlawful to withhold any part of wages to repay or offset employee debt to an employer, without express prior authorization from the employee. RCW 49.48.010. Illegal withholding risks double damages and attorneys' fees. RCW 49.48.030; RCW 49.52.070.

4. Vacation/Sick Leave

If accrued, and not subject to forfeiture upon termination, vacation is generally treated as part of compensation and paid out upon termination. If an employer wants to limit the obligation to pay out vacation time, its policy should be clearly stated to employees (e.g., with a policy that unused vacation is lost or that the maximum payout upon termination of employment will be a certain number of days or hours). In the absence of a written policy, an employer's practice should be consistent and any departure from standard practice should be justified. Generally speaking, accrued, unused sick leave need not be paid out upon termination of

employment. *Teamsters, Local 117 v. Northwest Beverages, Inc.*, 95 Wn. App. 767 (1999).

5. COBRA/Medical Insurance Continuation

a. For covered employers, all employees are entitled to COBRA coverage, unless discharged for "gross misconduct."

b. Continuation of medical insurance at the employee's expense is available for up to 18 months, or until the employee becomes covered under another group insurance plan.

c. The employee can be charged no more than 102% of the employer's per employee cost.

d. The employer must notify the employee of COBRA continuation rights within 30 days of termination, and the employee has 60 days to elect coverage.

C. Unemployment Claims

1. Questionnaire

If the employer responds to the initial inquiry with the suggestion of a discharge for misconduct or a voluntary quit, the Employment Security Department responds with standard questionnaires. These should be answered with extreme care. Inconsistent statements will suggest pretext or other fault.

2. Presumption of Receipt of Benefits

Unemployment compensation provides benefits to any person unemployed through no fault of his or her own. RCW 50.01.010. Poor job performance is not "fault."

3. Disqualification for Misconduct

If terminated for "misconduct," the employee will be disqualified. The burden is on the employer to prove:

(a) the employer has established a rule or policy that is reasonable under the circumstances of the work;

(b) the employee's conduct is connected with the work; and

(c) the employee's conduct violates the rule.

Macey v. Dept. of Employment Sec., 110 Wn.2d 308 (1988).

4. Off-Duty Misconduct

If the employee's actions were off-duty the employer must also prove:

(a) that the conduct has some nexus to the employee's work;

(b) that the conduct results in some harm to the employer's interest; and

(c) the employee acted with the intent or knowledge that the employer's interest would suffer.

5. Inadmissibility of Determination

The results of any Employment Security Department proceedings are inadmissible in any other proceedings. RCW 50.32.097. Testimony may be used, however, as discovery, or for impeachment. Thus,

(a) Examination of the employee is valuable, but

(b) Any employer witnesses must be carefully prepared, particularly because hearsay is admissible in the hearing.

D. Service Letter

Within ten days of a written request from the former employee, the employer must provide a statement of the reasons for discharge. WAC 296-126-050(3).

E. Review of Personnel File

1. Review Rights

Washington law gives employees the right to an annual review of their personnel file, and the ability to insert rebuttal material in the file. RCW 49.12.250 et seq. Former employees retain rebuttal rights for two years after termination. RCW 49.12.250(3).

2. Denial of Review?

A technical legal argument can be made that the former employee only has the right to insert rebuttal material into the file, but doesn't have the right to

review the contents of the file. This conclusion is not certain, however; why force an employee to sue to get the file through discovery?

3. What Is a "Personnel File"?

The statute offers no definition or other guidance. Thus, care must be taken to not include documents in the personnel file to which the employee would not be entitled, such as correspondence with counsel or memos memorializing conversations with counsel.