

# Terminations, Discipline, Reductions in Force and Severance Issues From the Employee's Perspective

*By Louis H. Watson, Jr.*

**H**ave you ever had a client contact you to give legal advice on an employment-related issue from the employee's perspective? If so, the issue is probably related to an outright termination of employment, the administration of severe discipline, a reduction in force or a proposed severance package. Regardless of the circumstances, you need to be in a position to give that client sound legal advice in accordance with the applicable law in the state of Mississippi and applicable federal law. In this recent downward economy, our office has seen a steadfast increase of claims by such people as officers, directors, supervisors and employees directly affected by this unfortunate and unparalleled economy. Today's working conditions have permeated all levels of many organizations and industries. This article is intended to provide a framework to assist you in advising those employee clients with each of these types of situations.

## **Employee Terminations And Discipline**

The individual contacting you for labor and employment advice could be a production worker, a salesperson, a carpenter, an elevator repairman, a train conductor, a casino executive, a doctor, a lawyer, a paralegal, or an accountant, to name a few. When undertaking the representation, you need to find out what you are dealing with and the parameters of applicable state and federal law. There are several questions you need to ask the client to find out what laws apply or could potentially apply.

### **• Does the Employee Have A Written Contract?**

In Mississippi, absent a written contract of employment for a specified term, an employee is considered an employee at will. This means that the employment relationship can be terminated by either party, at any time, for any reason, with or without notice. The majority of the time, the client seeking legal advice does not have a written contract of employment and is subject to our state's long-standing employment at will doctrine. If that is the case, then the employee has no state law "wrongful termination" claim unless you can establish that the employee was: (1) terminated for refusing to commit an illegal act; or (2) was terminated for "blowing the whistle" on the employer. Those are the two common law exceptions to our long-standing employment at will doctrine. For years, attorneys have tried to petition the courts to recognize an exception to the employment at will doctrine for employees terminated as a result of filing a worker's compensation claim. To date, all efforts to petition the courts to recognize this troubling and valid exception have fallen upon deaf ears.

Usually, your prospective labor and employment client will not have a contract of employment, so you will either be restricted by Mississippi's employment at will doctrine or you will have to look to see if an implied contract of employment somehow exists.



- **Check the Employer's Policies for Implied Contractual Rights.**

Even though a formal written contract of employment may not exist, there may be evidence of an "implied contract" of employment. This can be created through an employee handbook, a "pre-hire" letter or even an e-mail in today's modern world of communication. With regard to an employee handbook which may prescribe steps of progressive discipline, it will not be considered a contract of employment if it contains a valid "disclaimer." The typical disclaimer states that "this handbook is not to be considered a contract of employment either express or implied and can be modified by the company at any time, with or without notice." If such a disclaimer exists, you will have a harder time with your breach of contract claim.

One of the most frequent issues that arises with a termination involves compensation for unused vacation pay, sick pay and/or unpaid PTO. Is an employee entitled to such pay? In order to make a convincing case, you will need to establish that the employer is contractually obligated to pay the requested benefits. This obligation can be established in some cases from e-mails, correspondence, written policies, or even the employee handbook itself. If an employee cannot establish a contractual or implied contractual right to payment for those sums, then he/she will face an uphill battle obtaining compensation for those sums.

- **Has Another Employee Committed a Similar Offense and Received Different Discipline?**

Once you have examined the issue of whether any state law claim exists, you must then look to federal law to see if a potential claim exists. In order to establish a federal claim of discrimination, you must have either direct evidence of discrimination or circumstantial evidence; *i.e.*, be able to prove that other similarly situated employees outside the protected category committed a similar offense and were not terminated or received lighter discipline.

Asserting a federal claim of discrimination makes your case removable to fed-

eral court. Personally, I now find myself in federal court on just about every case I have because Mississippi is an employment-at-will state and the most viable claims usually are federal question claims. I file most of my clients' complaints in state court; but, since they contain federal question claims of which the state court has concurrent jurisdiction, I wind up in federal court due to removal of the federal question claims. Actually, federal court can be very comfortable for someone representing the employee. The process is organized and prompt. The federal judiciary is tough but fair. The process is extremely organized, it is efficient and you know what you are dealing with. The court is understanding, but not forgiving. Yet, you have to be on top of your game to survive in federal court. If not, you will be dealt with promptly and harshly. It is not for the faint of heart. From my experience, if you are electronically literate and on top of your legal game, federal court can be very rewarding.

- **Is the Company's Documentation Incomplete?**

The best way to establish a claim of discrimination is to look back at the company documents contained in the employee's personnel file to see if the purported reasons the company has articulated for the discharge are legitimate. Relevant documentation are the employee's application, the employee's performance appraisals, the employee's personnel file, and any and all other correspondence relating to that employee.

Once at the lawsuit stage, you need to obtain an official copy of the EEOC file in order to review the company's Position Statement presented to the EEOC. Inconsistencies in these documents are key to winning a claim of discrimination.

- **Are There Inconsistencies in Performance Reviews?**

Inconsistencies between what performance appraisals show and what the employer articulates as the reason for discharge are usually vast. These documents are the fertile ground for a discrimination claim. When interviewing a prospective

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client, be sure to inquire as to recent evaluations which are prepared by and maintained by the company. Supervisory employees are typically reluctant to write negative things about an employee prior to termination.

## Severance Agreements

Severance Agreements are absolutely the most under-utilized tool available to Mississippi employers to avoid unnecessary lawsuits over separations of employment. Today, however, we are seeing an increased number of severance packages following terminations purportedly for economic reasons. As noted, Mississippi is an employment at will state. Whatever the claim, the onus is still on the employer to articulate a legitimate non-discriminatory reason for the discharge. If the discharge is truly for economic reasons, the employer still needs to be prepared to present evidence of a legitimate non-discriminatory reason for the discharge.

Failure to do so can result in viable discrimination claims.

An absolute way for an employer to avoid a lawsuit following a termination is to present and get an employee to agree to

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a severance package. Although severance is only required under a contractual obligation to do so, it benefits an employer by obtaining a release of any and all legal claims against the employer while, at the same time, providing the employee with

severance benefits to hopefully tide them over until they are able to secure other employment. In my opinion, severance packages are a must for all employers. They provide insurance that the employer will not face litigation following a separation of employment.

As an attorney, I am often called upon to review a proposed severance agreement prepared by an employer's counsel. Unless the employee has a contractual right to severance benefits or has a valid claim of race, sex, religious, natural origin, age or disability discrimination, the employee's better course of action is to negotiate the best severance package he/she can negotiate. Typically, six to twelve months of severance is considered to be generous. If I am able to increase that as an attorney, I have done a good day's work. In representing an individual, I want to be sure that I maximize the severance benefits paid; have the employee's health insurance benefits paid for as long as I can; obtain a positive or neutral refer-

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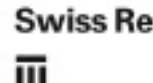
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ence; have the separation described as a voluntary resignation for a specified reason so that, when my client applies for future employment, he/she is able to list a satisfactory reason for the separation; and to have the employee qualify for unemployment benefits. Pulling all of that off would be a victory.

### Layoffs

Since layoffs generally involve numerous individuals, that brings into question multiple laws such as the Fair Labor Standards Act of 1938 (as amended), the Age Discrimination in Employment Act of 1967, COBRA, and the Workers Adjustment and Retraining Notification Act (WARN). Typically, if one worker has a claim, an entire class of workers has a claim. That is where significant liability can quickly add up. As such, any adverse employment action should be carefully evaluated to see if any violation of federal law has occurred.

### Conclusion

In summation, a termination of employment is never a good thing for an employee or an employer. The way that an employer handles it makes all the difference in the world. That is exactly why an employer needs knowledgeable labor and employment counsel on hand to handle the situation and give sage advice, and why the employee needs competent labor and employment counsel as well. Many lawsuits that I handle on a daily basis could have been easily avoided with simple adherence to the above labor and employment advice. ■

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