

An Organized Approach to Safely Firing an Employee

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By following this step-by-step analysis, which covers most of the major federal and state employment laws, a practice can greatly minimize the risk of lawsuit when firing an employee. Keep in mind that practices may be sued, even when a firing is justified. When acting well within the law, you also want to avoid the *appearance* of victimization, and taking self-protective steps will help you do so. Always remember, however, that the thumbnail sketch provided by this article is not meant to be a substitute for consulting with an attorney.

For the sake of this discussion, let us assume that a laboratory technician employed by the practice has not been performing at an acceptable level for the past six months. The technician has been given both verbal and written warnings, and you are now thinking about termination. While each situation must be evaluated individually, a number of factors always should be considered systematically before any action is taken.

EMPLOYMENT HANDBOOK AND CONTRACT

First, consider whether there is any document that sets forth the terms and conditions of employment, such as an employment handbook or an employment contract. If so, then be sure that the action planned will not violate your obligations as employer that are set out in these documents. Specifically, you want to determine whether an employee can *only* be terminated for 'just cause' or whether the handbook affords a clear and distinct disclaimer that the employment is 'at-will.'

While employment 'at-will' does mean that employment can be terminated without notice and without 'just cause', this doctrine has been so severely eroded by the courts and recent legislation as to make it virtually ineffective, so, even though an employment relationship is 'at-will', this is not the end of the analysis, but, in fact, only the beginning.

If employment is not 'at will', but rather requires that you have a just cause to fire an employee, then be *sure* that the reason for the termination falls within one of the 'just cause' categories and that the cause can be supported and documented. If employment is 'at-will', or the documented reason falls within the 'just cause' provision of the handbook or contract, then this analysis can move forward.

PAST TREATMENT OF EMPLOYEES

You must next consider how the practice has handled past terminations. Specifically, have you fired other employees for the same unsatisfactory performance as the laboratory technician's? If you have not terminated employees before, despite their having committed these same infractions, then you should be able to demonstrate a legitimate business reason for treating this laboratory technician differently. For example, was the previous employee with the practice for a longer time, or is the present infraction one in a long line of other problems caused by the laboratory technician? If the situations are virtually identical between the laboratory technician and the previous employees who

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were not fired, and if you cannot convincingly justify treating this laboratory technician differently, then termination should not go forward until you can justify this diversion from past practice.

DISCRIMINATION

Next, you must determine if the laboratory technician falls within one of the protected categories set forth in the federal and the state antidiscrimination laws. If so, there are additional considerations. In general, the categories protecting New Jersey employees are race, age, gender, disability, national origin, religion, marital status, sexual preference, and atypical hereditary blood disorder. The most frequently applied antidiscrimination statutory laws governing these protected categories are embodied in the New Jersey Law against Discrimination (NJLAD), which covers all of the protected categories for all employees. For larger practices the following federal laws may also be applicable:

- Title VII of the federal Civil Rights Act, which covers the protected categories in practices with fifteen or more employees;
- the federal Americans with Disabilities Act (ADA) protects employees with a disabling condition, which is defined as a condition that interferes with a major life function (conditions such as arthritis, as opposed to injuries such as a broken leg, which eventually heal);
- the federal Age Discrimination in Employment Act (ADEA) protects employees who are age forty and over. Those employed by practices with fifteen or more employees are covered; and
- the federal Pregnancy Discrimination Act, which, of course, covers pregnancy-related conditions and is applicable to practices with fifteen or more employees.

However, since there is no minimum number of employees required for coverage by the NJLAD, all practices are vulnerable to claims of discriminatory motivation.

If the laboratory technician falls within any protected category, you must determine whether or not she is being treated in the same manner as others

not in the protected category. This would be most apparent if an individual of a different race, for example, was not fired for the same infraction as that committed by this laboratory technician in very similar circumstances. You must also determine whether the termination of the laboratory technician will have an adverse impact on the diversity of your practice's employee population. For example, will her firing leave you with no individuals of a particular racial, ethnic, or age group once the laboratory technician has left? If there is an "adverse impact" upon the diversity of the remaining employees, then you should be prepared to explain why there is limited diversity. It is legitimate for you to argue that there are, for example, no women applying for certain jobs, or that your practice is located in an area that is not of interest to certain minority groups, or that the work required is not of interest to those over the age of forty. However, to make this explanation credible, you must be able to show that you have advertised extensively in publications that target a variety of different groups. If you can make this showing even though the applications you receive represent only a certain type of person, then be sure to keep all documentation of this fact. Keep copies of the advertisements, the publications in which they were placed, and the applications received for at least two years, which will cover the applicable statute of limitations governing the anti-discrimination laws. If you do not have a large turn-over of employees, and it is not unduly burdensome, it is a good idea to maintain the records for five years, which will cover the statute of limitations for most claims. On the other hand, if you did interview a diverse group of people, but only a certain segment of the population was qualified, then maintain the résumés and applications of all those interviewed so that you can verify that you consistently chose the best qualified in a discrimination-free fashion. When hiring, should there be a fine line of distinction between applicants, and one applicant is a member of an under-represented group, then, choose the applicant who will provide some much needed diversity.

Once this analysis has been successfully

completed, you should consider who the technician's replacement will be. In so doing you may be able to minimize, if not eliminate, any claims of discriminatory motivation. One way of showing discriminatory motivation is to see if the replacement is someone younger, of a different gender, race, or the like. Keep this in mind when choosing a replacement, and always be conscious of the adequacy of your documentation.

REASONABLE ACCOMMODATION

Should the laboratory technician be deemed a "disabled" employee, then you must determine whether reasonable accommodation requirements have been met. For example, if the poor performance is a direct result of her disabling condition, then would a reasonable accommodation help her overcome any obstacles? Can you allow the employee more latitude in work hours, or permit rest time during the day, or reasonably provide some unique piece of equipment that would allow her to perform better? If the issue of reasonable accommodation has not been considered, or if there is no showing of a give-and-take as to what the employee needs or wants for an accommodation as compared to what the practice can afford to offer, then additional information must be gathered. On the other hand, if you can show that there was a sincere give-and-take, and yet there are no grounds on which you can agree, then you can confidently argue that you have complied with the ADA requirements.

RETALIATION

Another thing to be considered is whether or not there are circumstances that could support a claim that the laboratory technician is being fired in retaliation. Has she recently claimed to be a victim of wrongdoing, such as sexual harassment? Has she applied for a disability leave, or workers' compensation benefits, or family leave? Could she be deemed a whistleblower? If you can answer "yes"

to any of these questions, then you might be vulnerable to a claim of retaliation. Studies have shown that claims for retaliation have been among the fastest growing group of claims made by employees, and they are the most difficult for a practice to have quickly dismissed by a court. Accordingly, it is important that there be no connection between the laboratory technician's having recently made a report or request of the type mentioned above and a subsequent threat of termination. If an apparent connection cannot be overcome by a convincing argument of a legitimate business decision to support termination, then additional documentation must be collected.

EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

Finally, you should consider whether the laboratory technician is close to becoming vested in a pension plan or other such benefit. This may raise questions as to whether the practice was engaging in cost-saving measures that would have an adverse impact on a certain group of employees. This consideration is commonly applicable to those employees approaching retirement, who find that, shortly before they see the fruits of their labor in the form of pension benefits, they are terminated. This would constitute a violation of ERISA and leave you vulnerable to a lawsuit.

CONCLUSION

Bear in mind that each employee brings a unique set of facts and circumstances to the workplace. While the above analysis provides a model for evaluating most employment situations, do not discount something not mentioned in this article. It is always prudent to consult your employment attorney. However, your attorney will assuredly rely on your documentation and the logic of your organized thoughts on the situation. *NJM*