WRONGFUL TERMINATION: WHAT IT MEANS AND HOW TO AVOID IT

by Hillary Arrow Booth

The concept of wrongful termination is often misunderstood. Most people believe that an employer must have good cause to terminate someone’s employment. However, most employment relationships are “at will,” which means that an employee may be fired at any time, for any reason or for no reason at all. The only requirement is that the termination cannot be for a reason that violates the law. In order to avoid such violations, it is important for employers to recognize the restrictions on their right to terminate employment.

Violations of Public Policy

It is illegal to violate public policy when terminating employment. The policy in question must be well established and substantial, and it must be based on either a statute or constitutional provision. Some of the most common violations of public policy committed by employers are: wrongful firing as a form of sexual harassment; wrongful firing in violation of state and federal anti-discrimination laws; wrongful firing in violation of whistle blowing laws; wrongful firing in retaliation for exercising other legal rights; and wrongful firing in violation of collective bargaining laws. Many state and federal laws have specified employment-related actions that clearly violate public policy, such as firing an employee for:

- Disclosing or complaining about a company practice that violates wage and hour laws,
- Taking time off work to serve on a jury,
- Taking time off work to vote,
- Serving in the military or National Guard, or
- Notifying authorities about some wrongdoing harmful to the public (whistle-blowing).

Discrimination

Employers may not terminate employees because of their race, color, national origin, gender, religion, age, disability, sexual preferences (in many states) or genetic information. An employee who has been terminated, or suffered a detrimental job action, because of discriminatory reasons may allege claims for wrongful termination and also for discrimination.

Retaliation

Employers are forbidden from retaliating against employees who have engaged in certain legally protected activities, or asserted their legal rights. To assert a claim for retaliation, an employee must establish: (1) that he or she engaged in a legally protected activity, such as filing a complaint with an agency or internally complaining about harassment or discrimination; (2) that such activity prompted the employer to act, and (3) that the employer's action had adverse consequences for the employee (termination, denied a promotion, demoted, or given a negative performance review that was unwarranted). An employee who has been terminated, or suffered a detrimental job action, in retaliation for protected activity may allege claims for wrongful termination and also for retaliation. The retaliation claim may be successful even if the action which prompted the employee’s initial complaint was not wrongful.

Written or Implied Promises

Most written employment contracts contain provisions requiring good cause for termination, which must be
complied with for the termination to be proper. Even without a written contract, other statements that promise job security, or set forth limited conditions that would justify termination, may take an employee out of the at-will category. For example, an offer letter, employee handbook, or other written document that makes promises about continued employment may be enforceable in court. The existence of an implied employment contract is another way that employees may be taken out of the at-will category. An implied agreement may be found based on things an employer says and does, and have been found where employers promised “permanent employment” or employment for a specific period of time, or where employers set forth specific forms of progressive discipline in an employee manual.

Avoidance of Claims

The best way to avoid wrongful termination claims is to educate all employees, particularly management level employees, and maintain a consistent policy of respect towards all individuals in the workplace. While it is legally permissible to terminate employment for no reason, this rarely happens. Therefore, to protect themselves, employers should maintain personnel files that contain any warnings given to employees, notes regarding poor performance or problems with the employee, records of absences or tardiness, and any other relevant information. As an additional safeguard for staffing agencies, and in recognition of the joint employer responsibility, they should also ensure that the companies where the employees are placed maintain proper files and provide copies of the relevant documents to the staffing agency.

When employees are placed by staffing agencies, and the placement company decides to terminate the employment, the staffing agency should obtain a writing explaining the reasons why the placement company no longer wants to retain the employee. As the staffing agency does not usually make the decision, this document will provide protection if a claim is later made. If the reason given appears suspicious, or to be in violation of public policy, the staffing agency can protect itself by counseling its customer regarding proper reasons and ways to terminate employees.

Hillary Arrow Booth is a partner in the Booth LLP law firm. She represents employers throughout California in cases alleging wrongful termination, harassment, discrimination, wage and hour complaints, and ADA issues. Ms. Booth also prepares employee handbooks and policies, and advises employers. Ms. Booth can be reached at 310-641-1800 or by email at HBooth@BoothLLP.com.

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