

# How to Terminate an Employee Lawfully

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# Goals

- Issue Spotting
- Overview of basic law
- Important sources of law
- Practical pointers on termination process

# Hypothetical

- Carl the Client called today (November 3, 2007). He has decided to fire Thelma, a secretary in his office, but he is worried that there might be “issues”
- According to Carl, Thelma is a 54 year old hispanic-american who had a history of attendance problems

- Thelma started working for Carl in March. In April, Thelma was injured in a freak stapler accident and was off work for two weeks
- After she got back, Thelma missed a day of work at least once every three weeks from May through September.
- In July, Thelma started complaining about being called racial epithets by another employee
- Thelma was gone for six days from September 27 through October 6 for something called the Feast of the Tabernacles
- When she got back, Thelma once again started calling in sick about once every other week. When Carl asked about it, he found out that Thelma had been going to the doctor for migraine headaches which she has suffered for years

- Thelma was out all of last week “with a migraine”
- Carl went through a very expensive lawsuit last year and he is very concerned about any financial implications, including his unemployment rates, from firing Thelma
- Carl is worried that his employee handbook describes a “progressive discipline” system of write-ups ... and he has talked to Thelma about the attendance, but he has never written her up

Carl says he cannot take it anymore and but does not want to lose any money over firing Thelma

# At-Will Doctrine

- "Under Missouri's employment at will doctrine an employer can discharge -- **for cause or without cause** -- an at will employee who does not otherwise fall within the protective reach of a contrary statutory provision and still not be subject to liability for wrongful discharge." Dake v. Tuell, 687 S.W.2d 191, 193 (Mo. banc 1985)(emphasis added)
- There are a few exceptions

# Exceptions to the At Will Doctrine

- Contract for definite term
- Collective bargaining
- Common law exceptions
- Statutory protections

# Contract for a Definite Term

- RSMo. sec. 290.130: Any such servant or employee whose employment is for a definite period of time, and who is discharged without cause before the expiration of such time, may, in addition to the penalty prescribed by this law, have an action against any such employer for any damages he may have sustained by reason of such wrongful discharge, and such action may be joined with an action for unpaid wages and penalty.

# Collective Bargaining Agreement

- When an employee is a member of a labor union, that employee's relationship to the employer is defined in an agreement called a Collective Bargaining Agreement ("CBA")
- Most CBAs have a "just cause" standard for termination
- Aggrieved employees must go through the CBAs grievance and arbitration system
- See, e.g., Schweiss v. Chrysler Motors Corp., 782 F. Supp. 88, 90 (E.D. Mo. 1992)

# Common Law Exceptions

- The public policy exception is stated to protect at-will employees from being discharged for "(1) refusing to violate a statute, (2) reporting violations of the law by employers or fellow employees, or (3) asserting a legal right." See Luethans v. Washington Univ., 894 S.W.2d 169 (Mo. 1995)(internal citations omitted)

# Whistleblowing

- Internal whistleblowing
- External whistleblowing
- Sarbanes-Oxley Act. 18 U.S.C. sec. 1514A

# Most Important Statutes

- Missouri Human Rights Act. RSMo. ch. 213
- Title VII. 42 U.S.C. sec. 2000e-2(a)
- Family Medical Leave Act. 29 U.S.C. sec. 2601
- 42 U.S.C. sec. 1981 (race and alienage)
- Americans with Disabilities Act. 42 U.S.C. sec. 12112
- Age Discrimination in Employment Act. 29 U.S.C. sec. 621

# Why Was the Decision Made

- Simple, but ultimate, question
- Federal Courts use “motivating factor” test
- Missouri Court recently clarified to use “contributing factor” test. See Daugherty v. City of Maryland Heights, 2007 Mo. LEXIS 130 (Mo. August 7, 2007)

# Title VII / ADA / ADEA Section 1981 / MHRA

- These statutes protect against discrimination on the basis of race, color, sex, ancestry, religion, national origin, age, disability
- Direct evidence versus circumstantial evidence. Compare McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) versus Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

# The Prima Facie Case

- “[I]n order for an employee to make out a prima facie case for employment discrimination in the absence of direct or circumstantial proof, the employee must establish the following four elements: (1) that the employee is a member of a protected group; (2) that the employee met the legitimate expectations of his or her employer; (3) that the employee suffered an adverse action; and (4) that circumstances exist which give rise to an inference of discrimination. Furthermore, many federal courts recognize that the proof required to establish a prima facie case varies in different factual situations. Young v. Am. Airlines, Inc., 182 S.W.3d 647, 652-53 (Mo.App. E.D. 2005)(citations omitted)

# Workers' Compensation Retaliation

- No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer. RSMo. sec. 287.780.
- Exclusive causation **required**. See Kummer v. Royal Gage Dodge, Inc., 983 S.W.2d 568, 570 (Mo. Ct. App. 1998)

# Discrimination - Retaliation

- To make a prima facie case of unlawful retaliation an employee must show that: (1) she engaged in statutorily protected conduct; (2) she suffered an adverse employment action; and (3) a causal connection exists between the two. See Chesewalla v. Rand & Son Constr. Co., 415 F.3d 847, 851 (8th Cir. 2005)

# Employee Does Not Have to Be Right for it to be Retaliation

- The anti-retaliation statutes protect both “participation” in an investigation or discrimination case and “opposition” to discriminatory practices
- Opposition is the broader of the two
- It is not necessary that the practice the employee opposes actually be unlawful. Rather, the test is whether the employee “sincerely believed” there was discrimination. See Theiss v. John Fabick Tractor Co., 532 F. Supp. 453, 459 (E.D. Mo. 1982)

# Religious Accommodation

- “An employer must provide a reasonable accommodation to an employee’s religion unless the “employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” EEOC v. Chemsico, 216 F. Supp. 2d 940, 949 (E.D. Mo. 2002)

# FMLA

- Anytime a an employment decision involves an employee's absence for illness or family issues, the FMLA must be analyzed for issues
- FMLA is highly technical and it is relatively easy for an otherwise innocent employer to violate one of the rules
- Leave is not required to be paid
- [www.dol.gov/esa/whd/fmla/](http://www.dol.gov/esa/whd/fmla/)

# What Employers are Covered by the FMLA

- Employer must be engaged in commerce
- Employer must employ 50 or more employees during each working day at least 20 workweeks in the preceding year. See 29 U.S.C. sec. 2611(4); 29 CFR 825.14
- There is a split of authority as to whether Carl the Client can be held individually liable under the FMLA

# FMLA Eligible Employee

- Employed for at least 12 months
- Worked at least 1,250 hours in the 12-month period immediately preceding the commencement of leave
- Employed at a worksite with at least 50 or more employees within 75 miles of that worksite
- Has leave available
- See 29 U.S.C. sec. 2611(3)

# FMLA Provides 12 Workweeks During any 12-month Period

- Birth of the employee's child, and to care for a newborn
- Placement of a child with the employee for adoption or foster care
- To care for the employee's spouse, son, daughter, or parent with a serious health condition
- Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job
- See 29 CFR 825.200

# Unemployment Compensation

- Administered by the Division of Employment Security
- A terminated employee will be eligible for benefits unless it is found that the employee was terminated for misconduct connected with the work. See RSMo. sec. 288.040.2
- An employee who voluntarily quits will not be eligible unless the employee can show good cause.
- Medical reason unconnected to the work is not good cause. See Duffey v. Labor and Industrial Relations Comm., 556 S.W.2d 195, 198 (Mo. Ct.App. 1977)

# Misconduct

- Misconduct is defined as, “an act of wanton or willful disregard of the employer’s interest, a deliberate violation of the employer’s rules, a disregard of standards of behavior which the employer has the right to expect of his or her employee, or negligence in such degree or recurrence as to manifest culpability, wrongful intent or evil design, or show an intentional and substantial disregard of the employer’s interest or of the employee’s duties and obligations to the employer.” RSMo. sec. 288.030(23)

# Handbook 'Exception'

- An employer's "unilateral act of publishing a handbook [is] not a contractual offer to its employees." A handbook is merely an informational statement of self-imposed policies and will not modify an employee's at will status. See Johnson v. McDonnell Douglas Corp., 745 S.W. 2d 661, 662 (Mo. 1988)
- Handbook can, though, create a binding arbitration agreement. See Berkley v. Dillard's, 450 F.3d 775, 777 (8th Cir. 2006)

# How to Actually Terminate the Employee

- Do not wait
- Be firm, fair, and kind
- Have a witness for the conversation, but do not make it into a more dramatic event than necessary
- Do not wait until the end of the day
- Have all paperwork ready

# Paperwork

- It is best to have the final paycheck available, **dated the same day as the employee is informed of termination**
- If the final check is not available, be sure that it is timely delivered to the employee (pay for the stamp). There are possible penalties for delaying the last paycheck. See RSMo. sec. 290.110
- If the Employee had benefits then have the COBRA and any other documents ready
- Documentation from personnel file
- Severance Agreement

# Double-edged Sword of Documentation

- Consistency is key
- Documentation is not required in Missouri, it is evidence only
- The lack of documentation can sometimes be more damning than its existence

# Severance Agreements

- Typically 1-4 weeks of pay in exchange for mutual release
- Unemployment issues: Either the employer agrees not to contest the claim or the employee agrees not to make it
- Waiving any Age Discrimination claim requires special language

# ADEA Waiver Requirements

- Must be in writing and be understandable
- Must specifically refer to ADEA
- Must advise of right to consult with an attorney
- Employee must be given 21 days to consider the agreement (if the severance agreement is offered to a group, then this is extended to 45 days)
- Agreement must give employee 7 days to revoke the agreement after signing it and does not become effective until those 7 days pass
- See, e.g., Thomforde v. IBM, 406 F.3d 500, 501 (8th Cir. 2005)(finding ADEA waiver non-effective)

# After the Termination

- Service Letter. See RSMo. sec. 290.140
- Unemployment Appeals process
- Be consistent

# Special Rules for Governmental Employees

- Federal Employees. See 5 U.S. C. sec. 7513
- State Employees. See RSMo. sec. 36.150, et seq.
- Local Employees. See RSMo. ch. 79
- School Employees. See MoBar CLE: Employer - Employee Law, Ch. 2-3

# Other Statutory Protections

- National Labor Relations Act: 29 U.S.C. sec. 151, et seq.
- Military Service: 38 U.S.C. sec 4301, et seq.; RSMo. sec. 41.730
- Pregnancy Discrimination Act: 42 U.S.C. sec. 2000e(k)
- Bankruptcy: 11 U.S.C. sec. 525 (b)
- Polygraph: 29 U.S.C. sec. 2002 (3)
- Working on employee's normal day of worship: RSMo. sec. 578.115
- False Claims Act: 31 U.S.C. sec. 3730(h)
- Occupational Safety and Health Act: 29 U.S.C. sec. 651 et seq.
- Federal Mine Safety and Health Act: 30 U.S.C. sec. 815
- Many more ...

Thank you