EMPLOYEE DISCHARGE AND DOCUMENTATION IN OKLAHOMA: FMLA Overview &

FMLA Litigation

Prepared and Presented By:

Tracy A. Cinocca, J.D./M.B.A.
Tracy A. Cinocca, P.C.
9710 E. 55th Place
Tulsa, Oklahoma 74146

Telephone: (918) 488-9117
Facsimile: (918) 488-9198
Email: TracyCinocca@aol.com

Employee Discharge and Documentation in Oklahoma: Overview

I. Discrimination

Congress enacted a series of statutes in the 1960's through the early 1990's to control the pervasive problem of employment discrimination. These statutes include Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967 (ADEA), the Rehabilitation Act of 1973, and the American with Disabilities Act of 1990 (ADA), among others.

The main purpose of Title VII is to influence primary conduct and avoid harm not to simply provide provide redress. Title VII prohibits discrimination in employment on the basis of race, sex, color, religion, or natural origin. "It shall be an unlawful employment practice for an employer—

> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, term, conditions, or privilege of employment, because of such individual's race. color, religion, sex, or national origin; or
>
> (2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII is applied to all employers who have 15 or more workers and covers both private and public employment.

Congress has amended Title VII several times, but the most significant amendment occurred in 1978 to clarify that sexual discrimination may involve those for harassment or pregnancy Sexual harassment does not extend to sexual orientation.

Religious discrimination includes failure to make reasonable accommodation to allow an employee's religious practices. Title VII prohibits religious discrimination whether it is intentional (the result of conscious decision to discriminate), or whether it is the outcome of the unintended, causing a disparate impact on a protected group when a neutral criterion is applied to that group. However, Congress exempted the religious organizations, especially churches and educational institutions, 42 U.S.C.S. § 2000e-1. In other words, bona fide religious organizations may require employees of a particular faith to perform services for them. 42 U.S.C.S. § 2000e-1." Similarly, other organizations may require a person to be of a particular religion, sex, or national origin (but not race or color) if religion, sex, or national origin is a "bona fide" occupational qualification reasonably necessary to the normal operation of the particular business or enterprise

Congress adopted the Age Discrimination in Employment Act, also known as the ADEA three years after Title VII and addressed age discrimination. " *It shall be unlawful for an employer*—

> 1. To fail or refused to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditional, or privilege of employment, because of such and individual's age; or
>
> 2. To limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such and individual's age…

ADEA is applied to public and private employers with twenty (20) or more employees. In order to qualify for the protection of the ADEA an employee must be forty (40) years of age or older.

> Congress passed The Americans with Disabilities Act, or "ADA," to prevent the discrimination of qualified individuals with disabilities. This statute is applied to public and private employers with fifteen or more employees. The ADA provides that: No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

A distinction in this statute in comparison with other statutes designed to guard against discrimination is that the test to establish membership in the protected class is extensive. To claim protection under statute an employee must be a qualified individual with a disability as defined by §3(2) of 42 U.S.C. § 11102(2) which states:

> (A) A physical or mental impairment that substantially limits one or more of the major life activities of…[an] individual;
>
> (B) A record of such an impairment; or
>
> (C) Being regarded as having an impairment

A qualified individual is "an individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires." This a person can be protected by the statute even if they can not do all the functions of the job so long as they can perform the essential functions, and this is true even if performing the essential function is only possible with reasonable accommodation.

II. Wrongful Discharge

"The doctrine of employment-at-will is firmly embedded in the common law of Oklahoma. Under this doctrine, an employee with an employment contract of indefinite duration is at liberty to leave his or her employment for any reason or no reason without incurring liability to the employer. Notions of fundamental fairness underlie the concept of mutuality that extends a corresponding freedom to the employer. Thus, under the

employment-at-will doctrine an employer is also at liberty to fire an at-will employee for any reason or no reason, without incurring liability to the employee."

However, Oklahoma courts did fashion a common law solution when employers attempt to disregard the letter and purpose of the law. In *Burk v. K-Mart Corp., 1998 OK 22*, the Supreme Court of Oklahoma held that, "An employer may be held liable when a termination violates a clear mandate of public policy. Courts determine what a clear mandate of public policy is. Then, a jury determines if an employer violated it. The letter or purpose of a constitutional, statutory, or other regulatory provision or scheme is considered. Prior judicial decisions may also establish the relevant public policy. Yet, courts should proceed cautiously if called upon to declare public policy absent some clear legislative or judicial expression on the subject. If there exists a federal law that sufficiently protects the interest of an Oklahoma public policy, a common law remedy is unnecessary. Accordingly, the circumstances which present an actionable claim for wrongful termination against public policy is one where either 1. An employee is discharged for refusing to act in violation of an established and well-defined public policy or 2. For performing an act consistent with a clear and compelling public policy."

"[I]t is not sufficient to expound a public policy. One must show that the propounded public policy is articulated by constitutional, statutory, or decisional law." Specifically, the Oklahoma legislature has generally adopted discrimination statutes. 25 O.S. § 1101(A), states:

> The general purposes of this act are to provide for execution within the state of the policies embodied in the federal Civil Rights Act of 1964, the federal Age Discrimination in Employment Act of 1967, and Section 504 of the federal Rehabilitation Act of 1973 to make uniform the law of those

> states which enact this act, and to provide rights and remedies substantially equivalent to those granted under the federal Fair Housing Law.

In addition, Oklahoma has adopted the Americans with Disabilities Act by forbidding discrimination on the basis of handicap. See 25 O.S. § 1901. See generally 25 O.S. § 1102 – 1801. Other discriminatory practices under Oklahoma laws include:

> It is a discriminatory practice for a person, or for two or more persons to conspire,
>
> (1) to retaliate or discriminate against a person because he has opposed a discriminatory practice, or because he has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act;
>
> (2) to aid, abet, incite, or coerce a person to engage in a discriminatory practice;
>
> (3) willfully to interfere with the performance of a duty or the exercise of a power by the Commission or one of its members or representatives; or
>
> (4) willfully to obstruct or prevent a person from complying with the provisions of this act or an order issued thereunder.

III. Family Medical Leave Act of 1993

As previously stated, the general rule in Oklahoma is that: "An employment contract is terminable at will, which means that either the employer or the employee has the right to terminate the employment at any time for any reason or no reason at all without liability to the other for doing so." OUJI 2d Instr. No. 21.1 (rev. 2002). "As a general rule, an employee is not entitled to recover for lost time where there is no agreement to that effect, or where the contract of employment allows compensation only for the days the employee works." 30 C.J.S. Employer—Employee § 135 (2005). State and federally defined exceptions to the employment-at-will doctrine and include the statutory mandates of the FMLA. The FMLA modifies this rule in that covered

employers may not terminate a person who provides notice of need for leave, which qualifies under the FMLA.

"The Family and Medical Leave Act entitles employees to a total of twelve (12) workweeks of leave during any twelve (12) month period for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a seriou health condition. The leave granted may consist of unpaid leave, and if an employers provides paid leave for fewer than twelve (12) workweeks, the additional weeks of leave necessary to attain the twelve (12) workweeks of leave may be provided without compensation." 30 C.J.S. Employer—Employee § 135. "An eligible employee who takes leave under the FMLA, is entitled to be restored to the same or an equivalent position upon returning from leave. But, to be entitled to be restored to his or her former position, the employee must be able to perform the essential functions of that position. *Id.*

An employee's health condition must be serious enough that he or she is unable to perform the functions of his or her position. 29 U.S.C. § 2612(a)(1). FMLA leave requests for a new child must be continuous. However, FMLA leave requests pursuant to serious medical conditions may be taken intermittently or affected through a reduced leave schedule. When this is foreseeable, the employer may require such employee to transfer temporarily to an available alternative position at equal pay and benefits that may better accommodate the schedule. 29 U.S.C. §2612(b)(2).

Forseeable leave requires thirty days notice to an employer or otherwise as practicable for adoptions or birth. 29 U.S.C. §2612(e)(1). This same rule applies to leave requests for serious health conditions, however, an employee must additionally attempt to

schedule medical treatment so as not to disrupt the operations of the employer. 29 U.S.C. § 2612(e)(2). An employer who employs spouses may only allow twelve weeks of leave to be shared by both when the leave request is to care for a sick parent or new child. 29 U.S.C. § 2612(f).

One of the most contested areas of litigation under the FMLA (similarly under the ADA) involves what constitutes a serious health condition as contemplated for leave. An employer may request certification of the conditions from a health care provider and the employee must timely respond to the request. 29 U.S.C. §2613(a). Another heavily contested area in litigation concerns whether the serious health condition described by the physician or health care provider actually makes the employee unable to perform the functions of the job. A health care provider may be required to certify that it does. 29 U.S.C. §2613(B). However, a great deal of problems can arise in this area. An employer may require at its own expense a second opinion from a health care provider not regularly employed by the employer. 29 U.S.C. § 2613(c). If the two opinions conflict, the employer may require and pay the expense for a third opinion from a mutually accepted provider whose opinion shall be final and binding. 29 U.S.C. §2613(d). An employer may even require subsequent recertification a reasonable basis. 19 U.S.C. §1613(e). See also FMLA Article attached.

IV. Workers Compensation

The Workers' Compensation Act, *Okla. Stat. tit. 85, § 1* et seq. (1977), is legislation which abrogates the common-law, creates statutorily exclusive rights in the field it operates, along with remedies and procedures, and is hence, unique. Discharge in

retaliation for filing a workers' compensation claim is strictly prohibited by the Workers' Compensation Act. *Okla. Stat. tit. 85, § 5(A)* (2001). An employee discharged in violation of tit. 85, § 5 is entitled to both actual and punitive damages. *Okla. Stat. tit. 85, § 6* (2001). The remedies provided by *Okla. Stat. tit. 85, §§ 5* and *6* (2001) are independent of remedies provided in a collective bargaining agreement.

"A workers' compensation claim need only be a significant factor for the discharge to violate *85 O.S. 1981 § 5*. Even if legitimate reasons exist which justify the termination, if retaliatory motivations are a significant factor in the decision, the discharge is wrongful." "While an employer may not terminate an employee receiving temporary total disability (TTD) pursuant to the workers' compensation act under Oklahoma Workers' Compensation Act, *Okla. Stat. tit. 85, § 1*, et seq., specifically *Okla. Stat. tit. 85, § 5(B)*, once the employee's TTD healing period has ended, and the employee is determined to suffer some permanent physical disability which prevents the discharge of assigned duties for the employer, the employer bears no *Okla. Stat. tit. 85, § 5* liability for then terminating the employee under *Okla. Stat. tit. 85, § 5(C)*."

"For a worker's compensation retaliatory discharge claim, an employee must demonstrate: 1) employment; 2) a job related injury; 3) medical treatment so that the employer is put on notice or a good faith start of workers' compensation proceedings and; 4) consequent termination." "The Retaliatory Discharge Act, § 5, states that no person, firm, partnership or corporation may discharge any employee because the employee has in good faith filed a claim, or has retained a lawyer to represent him in said claim, instituted or caused to be instituted, in good faith, any proceeding under the provisions of

Title 85 of the Oklahoma Statutes, or has testified or is to testify in any such proceeding. Provided no employer shall be required to rehire or retain any employee who is determined physically unable to perform his assigned duties." The remedies for an employee discharged in violation of the Retaliatory Discharge Act are "reasonable damages," including if appropriate, exemplary or punitive damages, and reinstatement to his/her former position.

V. Employee Handbook

"Oklahoma jurisprudence recognizes that an employee handbook may form the basis of an implied contract between an employer and its employees if four traditional contract requirements exist: 1) competent parties, 2) consent, 3) a legal object, and 4) consideration. Oklahoma case law has established two limitations on the scope of implied contracts through an employee handbook: First, the manual only alters the at-will relationship with respect to accrued benefits. Two, the promises in the employee manual must be in definite terms, not in the form of vague assurances." "… [I]n order to create an implied contract, the promises must be definite. Courts must distinguish between carefully developed employer representations upon which an employee may justifiably rely, and general platitudes, vague assurances, praise, and indefinite promises of permanent continued employment. Only when the promises are definite and, thus, of the sort which may be reasonably or justifiably relied on by the employee, will a contract claim be viable, not when the employee relies on only vague assurances that no reasonable person would justifiably rely upon. There is, thus, an objective component to

the nature of such a contract claim in the form of definite and specific promises by the employer sufficient to substantively restrict the reasons for termination."

Where the handbook provides a specific procedure for terminations, and where the procedure is not followed, the employee may have a claim. Similarly, a claim that an employer would lay off employees "based on seniority" is sufficiently specific to be enforceable. A handbook provision that no employee would be discharged without good cause is enforceable. The at-will relationship may be altered with respect to accrued benefits by a manual without altering the right to terminate. Claims for these benefits can be made under an implied contract theory, even if a wrongful discharge claim cannot be brought.

"The factors that are critical in evaluating whether an implied contract right to job security exists are: (a) evidence of some separate consideration beyond the employee's services to support the implied term, (b) longevity of employment, (c) employer handbooks and policy manuals, (d) detrimental reliance on oral assurances, pre employment interviews, company policy and past practices, and (e) promotions and commendations."

Although the existence of an implied contract generally presents an issue of fact, if the alleged promises are nothing more than vague assurances the issue can be decided as a matter of law. An implied contract must be based on definite promises. While an employer may disclaim any intent to make the provisions of an employee handbook part of the employment relationship, the disclaimer must be clear. Inconsistent conduct by the employer may negate the disclaimer's effect.

VI. Policies

Complaint Policy

Your policy should outline the prohibited conduct, with examples so that employees can understand under what circumstances they can make a complaint. The policy should tell an employee how to make a complaint, and explain the process associated with the administration and investigation of the complaint. The person responsible for the investigation of the complaint should be provided. Your complaint policy should assure employees that no retaliation will occur against them for reports made in good faith.

The policy should clearly state prohibited conduct in simple terms for employees and by example. Other policies maybe referred to or cited in the policy. And a general catchall phrase to include any and all other complaints should be stated.

Further, it should be clear how an employee is to make their complaint. They may be a victim or a witness. Management should be required to report violations of company rules or forwarding complaints they hear. Usually a person's supervisor, a human resource person and one other person may be designated to receive complaints. If an employee is being harassed or mistreated by his or her own supervisor, this allows the worker to complain to one not part of the complaint. It can also help an employee's comfort level by reporting a complaint to one not making employment decisions about him or her. Include a confidentiality of information statement, and that corrective action will be taken.

Open-Door Policy

"An open-door policy can be very informal; indeed, adopting a friendly, informal tone will help encourage your employees to come forward with their concerns and ideas." Written Open Door policies should provide statements on the following:

1. Purpose
    a. Describe the reasons for the open-door policy. Examples, are to facilitate communication between employees and management, to encourage employees to report work related concerns, to find out what employees think.
2. Appropriate topics
    a. Explain issues that may be raised. Examples may be included, such as problems with a coworkers or a supervisor, ideas for the company, or topics for company meetings.
3. Whose door is open:
    a. Tell employees to whom they should speak. Examples include a supervisor or manager, the company president or CEO, a company officer, or the human resource department.
4. Encouragement
    a. Tell them the Company is eager to hear concerns. Otherwise, employees may not use the open door policy and it will be of any benefit.

If you facilitate a company environment that is open and receptive for discussions, many problems can be identified and resolved before they reach a critical level.

Antidiscrimination Policy

A Company's antidiscrimination policy should make it clear their commitment to Equal Opportunity for all. The policy provisions should be applied the same to all. The Complaint policy should be identified clearly, so employees know what to do in the event they believe they have a discrimination complaint. As always, employees should know retaliation is not permitted. Managers must report discriminatory conduct and the policy should state the employer will take corrective action.

Antiharassment Policy

Like the other policies, the same procedures should be followed, along with a description of what harassment is and that it should be reported and will not be tolerated.

Antiviolence Policy

The policy should clearly state that violence, threats of violence or comments about violence will not be tolerated, should be reported and corrective action taken. No weapons should be allowed on premises. If weapons are required for the job, then some modification may be necessary. Otherwise, the policy should state retaliation is not permitted and corrective action will be taken.

VII. Employment Agreement

Implied or express employment agreements may govern an employment relationship. "Under the American common-law rule, when the length of the

master/servant relationship is unspecified by contract, either the employer or employee can terminate the employment without liability. In some states this doctrine has been modified by exceptions that restrict the grounds on which an at-will employee may be discharged. The exceptions generally rest on three distinct theories: (a) Public policy tort, (b) Tortious breach of an implied covenant of good faith and fair dealing and (c) Implied contract that restricts the employer's power to discharge." Also, there may be a written employment contract restricting the right to terminate instead of an at-will employment arrangement by operation of law.

The Oklahoma Supreme Court has stated that the parties to an employment contract may restrict the employer's power to discharge an employee at-will through either their express or implied agreement. *Hinson v. Cameron*, 742 P.2d 549, 554 (Okla. 1987). The Oklahoma Supreme Court stated in *Hinson* that various factors, including statements in employer handbooks and an employee's detrimental reliance on the employer's past practices, may be considered to determine whether an implied contract right to job security exists. *Id*. It has also held, though, that an implied obligation of good faith and fair dealing is not applicable to the termination of employment contracts. Therefore, implied or express agreements may be allowed as a matter of law based on the particular facts in any situation to modify an employer's ability to terminate at will.