Louisiana Employment Law Letter

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Highlights

TERMINATION

It's tough being the boss

Firing an employee can be difficult enough both professionally and personally without the legal concerns that lurk in the background of nearly every adverse employment decision you make. In many situations, the employee is one you know from on-the-job interaction and, in some situations, one you personally like. The employee may be a good person who has genuinely tried to do the job well but has failed in some significant respect or just hasn't performed at the same level as her peers and, consequently, isn't a cost-effective resource.

Adding to the anxiety that most employers feel about such decisions is the knowledge that most employees are usually supporting themselves and others and that in the current economy, jobs can be hard to come by. The economy and other business concerns, however, continue to force employers to make tough personnel decisions, and despite how professionally and personally difficult they might be, you must carry them out with as much dignity to the employee as possible while at the same time trying to minimize the legal risks along the way.

If you struggle to balance your rights and your employees' rights, you're not alone. In fact, our regular readers probably empathize with many of the employers in the cases we report about in this newsletter. Through these cases, we strive to offer you real-life examples of employer-employee disputes so you can learn from other employers' mistakes and successes. A recent case from the U.S. Fifth Circuit Court of Appeals in New Orleans addressed what certainly had to be a difficult employment decision — firing an employee upon her return from maternity leave.

Employer has to make difficult and risky personnel decision

Rosa McLaughlin worked as an accounting clerk. Although she met her supervisor's job expectations overall, she had a few missteps along the way. For example, she received warnings for tardiness, leaving a fax machine unplugged, and excessive personal telephone calls. According to McLaughlin, however, she didn't repeat any of those infractions and didn't feel in danger of losing her job.

According to her employer, however, McLaughlin's infractions weren't limited to those three seemingly minor incidents. The company alleged that she was responsible for an interest expense of nearly $2,000 arising from a loan error. She disputed that allegation and denied receiving the written reprimand the company reportedly sent to her. The company also alleged and McLaughlin admitted that she failed to send out certain checks. She claimed, however, that she was never disciplined for that mistake and again denied receiving the written reprimand the company reportedly sent to her. Finally, McLaughlin admitted that she sent wire instructions to a bank, which was outside the scope of her duties, but stated that she did so at the request of her supervisor and that the company accepted her explanation for her actions.

Of course, there's more to the story. McLaughlin advised her employer that she was pregnant and that she would need maternity leave. According to her, one of her co-workers commented that she shouldn't return from maternity leave because her husband made sufficient money that she didn't need to work. McLaughlin also claimed that another co- worker said she intended to take over her duties when she went on maternity leave. In fact, during her maternity leave, that co-worker and another employee assumed her duties in addition to performing their own.

Upon her return, McLaughlin was informed that her position had been eliminated and that she was fired, even though her direct supervisor didn't recommend her dismissal and felt that she had achieved the expectations of her job. The company explained that it decided to eliminate her position because during her leave, her duties were assigned to two other employees who were able to perform both her duties and their own satisfactorily, thus eliminating the need for a separate position for her.

McLaughlin sued the company, alleging, among other things, that it violated the Pregnancy Discrimination Act by firing her because of her pregnancy. The company denied her allegations and asked the federal trial court in New Orleans to dismiss her claims. The trial court granted the company's request, and McLaughlin appealed to the Fifth Circuit.

Court clears employer of pregnancy discrimination charge

The appellate court explained that McLaughlin hadn't presented "direct" evidence of pregnancy discrimination. Direct evidence of discrimination is evidence that doesn't require any inference to conclude that discrimination has occurred. Rather, she presented circumstantial evidence and argued that discrimination could be inferred from the circumstances. The court reiterated that in a circumstantial evidence case, an employee must first set out an initial case of pregnancy discrimination by proving that she's a female, she was qualified for the job at issue, she was fired, and she was replaced by a person who wasn't pregnant. Although the company disputed whether McLaughlin could prove she was qualified for the job and was replaced by someone who wasn't pregnant, the court disagreed. The court noted that she demonstrated her qualifications for the job and that although she wasn't replaced by one person, her duties were split between two other employees who weren't pregnant.

The case didn't end there, however. The company was given the opportunity to offer legitimate, nondiscriminatory reasons for its employment action. It explained that it fired McLaughlin because it discovered during her maternity leave that the other employees could perform both their duties and hers better and with fewer errors than McLaughlin alone. McLaughlin argued that the company's stated reason for her discharge was a pretext for pregnancy discrimination,

contending that the company had wavered between "job elimination" and "discharge for cause" as so-called explanations for her job loss.

The court didn't quite see it that way. Rather, the court pointed out, the company maintained its position that McLaughlin's job was eliminated because the other employees could perform her duties better and with fewer errors. McLaughlin argued that while she admitted to three infractions (tardiness, leaving the fax machine unplugged, and excessive personal telephone calls), nothing in her personnel file justified dismissal. The court, however, reiterated that even if that was the case, she failed to show that the company's stated reason for her discharge was false — namely, that the other employees could perform her job in addition to their own with fewer errors.

Finally, the court wasn't persuaded by McLaughlin's claim that her co-worker's remarks indicated a bias toward pregnant employees and, thus, that the company fired her because of her pregnancy. The court pointed out that the statements weren't made by individuals with the authority to fire or influence the decision to fire McLaughlin. Thus, the court upheld the dismissal of her pregnancy discrimination claim against the company. McLaughlin v. W&T Offshore, Inc., 2003 U.S. App. LEXIS 20914 (5th Cir. October 15, 2003).

Tips for making and defending tough decisions

This case reaffirms that an employee who's pregnant or whose status is otherwise protected under the law need not be treated better than anyone else — only equally. The employer in this case made what must have been a tough call in firing an employee returning from maternity leave, but in the end, its legitimate reasons stood up in court against her accusation of pregnancy discrimination.

One of the ways you can evaluate the legal risks involved in discharging an employee is to examine whether the employee has engaged in protected activity (e.g., complaining of alleged harassment or discrimination), whether you're treating the employee the same as others in similar situations, and whether under the circumstances it could appear that any improper factor (e.g., race, gender, age, disability, or pregnancy) is playing a role in the decision. But can you ever fire an employee who has engaged in protected activity or has exercised some other legal right under employment laws, such as asking for a reasonable accommodation or seeking workers' compensation benefits? Should you be more concerned about firing an older, black female than you would be about firing a younger, white male under the same set of circumstances?

You should always ask yourself what the legitimate (i.e., nondiscriminatory and nonretaliatory) reason for making any employment decision is. Consider whether the person making the decision and anyone else involved have or could be viewed as having an improper motive for the decision. If so, consider removing those people from the process to avoid even the suggestion of impropriety. You might implement another, independent level of review to ensure that decisions are supported by legitimate business reasons.

The answer to the first question is "yes," you can fire employees in protected classes or those who have engaged in protected activity provided you have a lawful reason for doing so. But that may not be enough. You should also make sure your decision is supported by objective, thorough, accurate, consistent, and fair documentation of those reasons. While the law doesn't demand that you treat employees fairly, juries and courts do. And remember, employees who feel they've been treated fairly are less likely to sue you in the first place, so fair treatment can help you not only defend against a lawsuit but also prevent one to begin with. Treating

employees fairly means, at a minimum, telling them what's expected of them, advising them when they fail to achieve those expectations, giving them a reasonable opportunity and assistance to improve (except for egregious violations that require immediate discharge), and treating them with dignity and respect if you have to take an adverse employment action.

As for whether you should be more concerned about firing one employee over another, we suggest you take each decision seriously and focus on your legitimate, nondiscriminatory, nonretaliatory business reasons for the decision. Concentrate your efforts on making sure your policies and practices are uniformly applied, you're treating your employees equally, and you're communicating with them about their performance and conduct and documenting your communications and efforts. Keeping your eye on the ball will keep you out of trouble if a disgruntled former employee decides to challenge your decision.

You can find out more about terminations in the subscribers' area of HRhero.com, which is the website for Louisiana Employment Law Letter. You have access to an in-depth HR Special Report on the subject: "How to Fire Without Getting Burned." Simply log in and scroll down to the link for all the Special Report titles. If you need help or have lost your password, call customer service at (800) 274-6774.