

Employee Lawsuits: Learn How to Prevent Them

by Diana Lomont

One of any company's most valuable assets is its employees. Yet too often, dissatisfied employees become expensive liabilities.

An employee who is let go for poor performance may feel he has been wrongfully fired. He may have little basis on which to bring suit, but as everyone knows, any lawsuit can be a headache and expense for the defendant.

Labor attorney John Knoreck, of Torkildson, Katz, Jossem, Fonseca, Jaffe & Moore, has seen an "explosion" of labor-related lawsuits in the past five years. He attributes that increase in litigation to recent court decisions that favor the rights of employees.

Public Policy: The Employee's Weapon

Until recently, hiring and firing of employees followed the "employment at will" practice, under which an employer dismissed employees as he wished without fear of recourse.

But in 1982, the case *Parnar vs. Americana Hotels Inc.* introduced the role of public policy. The Hawaii Supreme Court determined that an employee may bring an action for wrongful discharge against an employer when the discharge violates a "clear mandate of public policy."

In *Parnar vs. Americana Hotels*, the plaintiff claimed that she was fired to prevent her from testifying in an antitrust action against her employer. She also claimed that her termination breached an employment contract.

A jury found *Americana Hotels* guilty of both wrongful discharge and breach of contract. *Parnar* was awarded \$300,000 in lost wages, \$275,000 for emotional distress and \$1.5 million in punitive damages.

Knoreck said "public policy" includes areas covered by law or court decisions. Examples of situations involving public policy are: an employee who files for worker's compensation, an employee who demands protection required under worker safety laws, an employee who takes time off to vote, or an employee

who insists on following proper book-keeping procedures.

When an employee claims that any of these situations led to his being fired, the courts will consider his claim seriously, said Knoreck. The employee may have actually been dismissed for legitimate reasons such as poor performance or absenteeism.

One form of public policy currently in question is the Department of Labor's regulation forbidding investigation of a potential employee's arrest and court record. The state Legislature last session passed a law that allows condominium associations to investigate potential employees who would have access to association funds or work in a security capacity.

But Knoreck pointed out that the law is in conflict with the Department of Labor's Hawaii Employment Practices Law.

"Right now we don't know what the Department of Labor's position will be on reconciling their restrictions with this new law that gives condominium associations the right to inquire of an applicant's prior arrest and court record," said Knoreck. "Certainly you'd want to know if somebody's been arrested for embezzlement if you're going to hire them as a bookkeeper for an association."

Avoid Liability Through Good Management

Despite how right an employer may think he is, the cost of defending oneself in court these days runs high. A 1988 Rand survey found that in a recent five-year period in Los Angeles, the average defense cost in wrongful discharge suits was \$80,000. On top of that came the average jury verdict - a hefty \$250,000.

The survey found that it would often have been cheaper for the employer to settle out of court because employee plaintiffs had demanded an average of \$80,000 in compensation.

"When it comes down to having a jury of 12 people decide who's telling the truth and who's lying," commented Knoreck, "more often than



Attorney John Knoreck: "More often than not, the jury's going to sympathize with the employee, and not with the rich employer."

not the jury's going to sympathize with the plaintiff and not with the rich employer."

However prudent it may be to settle out of court, it is far wiser to prevent any employee lawsuits in the first place. How? Knoreck offered the following points of advice:

- *Provide detailed job descriptions.* Inform employees of their duties and what is expected of them in terms of job performance. Job descriptions should include a "fair and reasonable performance standard."

- *Give notice of unsatisfactory job performance.* If an employee is not living up to the performance standard, inform him or her of the problem.

"If employees are aware that they're having poor performance problems, when it comes down to taking some kind of action against them, they're not taken by surprise," said Knoreck. "It's the ambush kind of discharge that creates a lot of ill will and generates lawsuits."

- *Do a fair investigation.* Find out what is causing a work-related problem. That means listening to the employee's explanation for his or her behavior. Before taking any action, an employer must insist on proof of the improper conduct. The best evidence is from first-hand observation by competent and reliable witnesses.

- *Discipline according to the severity of offense.* An employee caught taking illegal drugs at work may be fired on the spot. An employee who is late to work should probably receive a warning before any disciplinary action is taken. Whenever an employee is disciplined, he should be told the reason for the action taken.

Don't Promise What You Can't Deliver

An employer's liability can begin even before an employee is hired. This happens when the employer promises benefits he later doesn't deliver.

"Now that the job market is so tight, or that the employee pool is so small, employers are saying a lot of things they probably shouldn't say to entice employees to come to work for them," explained Knoreck.

In 1983, the Hawaii Supreme Court ruled in favor of a former Honolulu police officer who quit his position in Honolulu to take a job with the Hawaii County police department. After offering Benjamin Revelo the job, the department rescinded its offer and said the job was not available. Revelo sued the department, and the Hawaii Supreme Court ruled in his favor, saying that the Hawaii County police department violated an implied contract.

Knoreck urged employers to review their employee handbooks or house rules. Nowhere should they say that employees will be dismissed for "just cause" because that is an ambiguous term. Employers should also include a disclaimer in their employee handbooks that says the policies stated should not be interpreted as contractual.

Also, employers should refrain from mentioning to potential employees job security, employment for a definite time, or employment for "as long as you do your job satisfactorily," said Knoreck.

Neither should employers use the term "probationary period" because employees may interpret the term as a guarantee that employment after the probationary period will be permanent, or that they will receive additional benefits. Knoreck recommends using the term "introductory period."

The Importance of Employee Evaluations

One important step an employer can take to protect himself from litigation is to conduct regular employee evaluations.

Evaluations should be done at the end of an employee's introductory period and as frequently thereafter as necessary to reflect any changes in the employee's performance.

Knoreck recommends that an

employer explain a work performance evaluation to the employee in an appraisal interview.

At such an interview, the employer should state job performance standards and expectations, and identify any performance problems. The employer, with the input of the employee, should identify the causes of any problems and establish a timetable for correcting them, plus a future course of action if the improvements are not made.

The employee should be allowed to comment in writing on the evaluation

form. He should also be required to sign the evaluation.

Documentation is critical for any employee evaluation, disciplinary action or dismissal. An employer should also document the reasons for a disciplinary action or dismissal. Employees who resign should be asked their reasons for leaving, which should also be recorded.

An exit interview should be conducted for all terminating employees to determine the employee's perceptions and to correct any misconceptions about the termination. □

A Proposal to Limit Employee Claims

Employee lawsuits claiming wrongful discharge cost employers millions each year throughout the country. Most of these awards are not for back pay, but for pain and suffering, emotional distress, defamation, compensatory damages and punitive damages.

All these are areas in which a jury has great flexibility in determining the appropriate awards. Often, employers find the awards unreasonably high.

But an attempt is being made to legally curtail the amounts of wrongful discharge awards. The Chicago-based National Conference of Commissioners on Uniform State Laws has drafted an Employment Termination Act that would preempt individual state laws. A first reading of the draft is scheduled during the national conference's annual meeting in Hawaii in July 1989.

Under the proposal, any claims of wrongful discharge would be settled through an arbitration process. The law would not apply to union members covered under a collective bargaining agreement or individuals having a written employment contract of a specified duration.

The arbitrator would be empowered to sustain the termination, reinstate the employee, require full or partial back pay for the former employee, or award several other forms of redress. These would include:

- If reinstatement is not awarded, a severance payment

equal to a continuation of the employee's pre-termination pay at the rate paid immediately preceding the termination for a period not to exceed two years beyond the date of the award;

- Additional liquidated damages in an amount not to exceed the amount of back pay awarded;
- Reasonable attorney fees and costs to a prevailing employee.

Most appealing to employers, the proposal would forbid awards for pain and suffering, emotional distress, defamation, compensatory damages or punitive damages.

In addition, if the arbitrator finds the plaintiff's complaint to be frivolous, unreasonable or without foundation, the plaintiff could be ordered to pay the employer's attorney fees and costs.

The arbitrator could order either the employee or employer to pay for arbitration fees if he finds that the employee's resort to arbitration or the employer's defense in arbitration is "vexatious and lacking in good faith."

The law would include reasonable protections for employees. An employee could not be terminated in violation of public policy, if an employer fails to follow its own written policies, or if the employer does not believe that the termination is required by a legitimate business interest.

It would also be unlawful for an employer to fire an employee without just cause if the individual is employed for more than one year.

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Prevent Injuries on Your Property; Avoid Checklist Danger Zones

A grease spot in a parking lot. A ditch in a lawn. Water on a sidewalk. All it takes is a step at the wrong angle and someone is hurt.

There are dozens of ways a person's safety can be jeopardized on a property. How safe is your property? The following checklist will help you answer that question. Patrick Conroy, branch manager of risk control company Crawford & Co. in Honolulu, provided the tips. He said most of these problems can be avoided through regular housekeeping.

"If housekeeping is done consistently, constantly," explained Conroy, "many of these problems will not exist or will jump out at you like a lion from a cage because cleanliness allows you to see dirt that you don't normally see or problems that you don't normally see. If you have sloppy housekeeping, it covers things up."

Here, then, are some of the most important danger spots for property/building managers to keep an eye out for on their projects.

Grounds and Sidewalks

- _____ Uneven footing.
- _____ Inadequate lighting at night.
- _____ Debris on sidewalks and stairs.
- _____ Trees or shrubs obstructing sidewalks.
- _____ Coconut trees full of coconuts.
- _____ Poisonous plants or wasp nests.
- _____ Water, or moss growing on sidewalks.
- _____ Sprinkler heads that can be tripped over.
- _____ Uneven lawns, with depressions or ditches.

Driveways and Parking Lots

- _____ Pot holes, depressions, cracks.
- _____ Slippery conditions from oil or water.
- _____ Inadequate lighting. (Lighting should be at least 5 ft-candles at foot level.)
- _____ Lack of speed bumps where needed.
- _____ Lack of traffic control signs where needed.

- _____ Trees, signs or other objects blocking driver's vision when entering street.

Building Exterior

- _____ Entrance stairs in poor condition.
- _____ Unstable stair railings.
- _____ Insufficient number of stair railings. (Stairways less than 44 ins wide must have one handrail; stairways 44 to 88 ins require two handrails; stairways wider than 88 ins require three handrails: left, center, right.)
- _____ Large guardrail openings. (Guardrails must have openings small enough to prevent children from falling through them.)
- _____ Stairs lacking non-skid treads.
- _____ Loose objects such as flower pots on overhead windows.
- _____ Unstable cornices, gutters, downspouts, signs, antennas, awnings, flag poles and other objects that could become loose and fall.

Interior Public Areas

- _____ Slippery floor surface. (Ceramic tile should be coated with non-skid wax.)
- _____ Abrupt changes in floor level caused by ramps or single steps.
- _____ Carpeting on stairs not secure.
- _____ Rugs, runners or mats with turned-up edges or holes.
- _____ Floor areas where water accumulates on rainy days.
- _____ Insecurely fastened fixtures, low beams or low door openings.
- _____ Insufficient lighting in stairwells and hallways.
- _____ Burned out light bulbs or defective lighting fixtures.
- _____ Glass doors not marked for pedestrians.
- _____ Automatic doors without automatic lock-outs to protect persons standing in way of door opening.
- _____ Unstable furniture, or chairs with holes or wiring protruding.

Life Safety

- _____ Building exits inadequate for occupant load.
- _____ Exit doors don't open easily.
- _____ Exit doors locked or chained sometimes.
- _____ Exit path not clearly marked.
- _____ Exit path blocked by obstructions.
- _____ Exit signs not illuminated or of improper size.
- _____ Lack of emergency lighting in the event of a power failure.
- _____ Inadequate portable extinguishing equipment.
- _____ Automatic sprinkler systems not serviced within past six months.
- _____ No emergency evacuation plan posted.

Computer Rooms

- _____ Room walls, floor and ceiling constructed of combustible material.
- _____ Fluorescent light ballast not enclosed.
- _____ Room contains combustible curtains or drapes.
- _____ Flammable materials or solvents improperly stored.
- _____ Room lacks emergency lighting.
- _____ Ceilings not water-tight.
- _____ No halon extinguishing system.

Worker Safety Tips

- _____ Never use an aluminum ladder when changing light bulbs.
- _____ Use the right handtool for the job.
- _____ Wear eye protection when using weed eaters, blowers and other eye-threatening equipment.
- _____ Wear respirators and gloves when dispensing pesticides or other hazardous chemicals.
- _____ Wear work shoes when using lawn mowers and other heavy equipment.
- _____ Be aware of people around work area when trimming trees, pruning hedges and doing other potentially dangerous jobs. □