A Guide to Terminating a Problem Employee

BY DIANA LASSETER DRAKE

Unless you’re Donald Trump, it’s the conversation that most employers dread having: telling an employee that he or she is fired.

Or perhaps that employer is looking forward to the day when he can let a problem employee go. Whatever the case – particularly when an employee transgression is related to ongoing job performance – employers should take certain important steps before firing someone. Do it the wrong way, and you could find yourself embroiled in a nasty wrongful termination lawsuit, New Jersey’s top employment lawyers say.

Employers should first understand that New Jersey is an at-will employment state. “That means you can terminate an employee for a good reason, bad reason or no reason at all,” said David A. Rapuano, a partner in the labor and employment department of Archer & Greiner in Haddonfield.

“On the other hand, you cannot terminate them for an illegal reason. So, if you terminate an employee and he or she says, ‘Look, the real reason [you] did this was because of my race or my gender or my sexual orientation,’ then the employer is going to want to be able to prove that the real reason had to do with employee conduct. A potential jury is the other audience for an employer’s actions. You need to be able to convince the other audience that what you’re doing is fair.”

Consistency is the primary safeguard. How you respond to employee misconduct or poor performance is based in part on the culture of the company and in part on the severity of the issue.

“You’re not necessarily going to (discipline) somebody who is chronically late for work the same way you would (discipline) someone who is verbally abusive to a co-worker. There is a question of degree,” said W. Raymond Felton, co-managing partner with Greenbaum, Rowe, Smith & Davis in Woodbridge. “Part of the key to that is to try to do an apples-to-apples comparison so that similar situations are treated similarly or in an identical manner.”

In a wrongful termination case, courts will explore what is known as the employer’s “consistent application of known rules,” Rapuano said.

“The rules can be described to the employee in handbooks or during evaluations. They may not be exact rules, but rather what the employer expects of an employee,” he said. “The rules themselves should reflect some sort of flexibility and should be guidelines. If the employee has any questions on the guidelines, he or she should be directed to discuss them with a supervisor.”

Employers who suspect that they might end up firing an employee for performance-based issues should be deliberate about creating a path from transgression to termination – namely documenting past behaviors and warnings.

“By the time clients come to us, they want to let some-one go right away, but they haven’t done anything to prepare for it,” said Christopher S. Mayer, employment partner with McCarter & English in Newark. “Document the performance problems well in advance and talk to the employee so that this doesn’t come out of left field. You don’t want to spring this on employees, because that is when they tend to sue.”

More specifically, Felton added, “Record the warning in their personnel file so you have a record on [a particular] date that there was a problem. Make sure they know that continuing to commit the transgression will result in termination of employment.” Additionally, noted Rapuano, warn them as soon after the misconduct as possible.

When the day of the firing arrives, don’t let your emotions get the best of you. While that employee who is late to yet another meeting or missing still another important deadline may push you over the edge, you need to proceed professionally. “Employers make missteps in this type of situation when they react emotionally and in the heat of the moment,” Felton said. “That’s when there is more of a tendency to say and do the wrong thing. If you bite your tongue or count to 10 or sleep on it and wait for the next day, you can approach it with more ration and reason.”

Be Honest, Be Direct, Be Brief and Have a Witness

What is the right way to terminate an employee? Employment lawyers in New Jersey offer this advice:

❖ Be honest. “You never want to hide the real reason for termination from an employee,” said David A. Rapuano, a partner in the labor and employment department of Archer & Greiner in Haddonfield. “A lot of employers say an employee has been terrible for X number of years, but [to reduce tension] they tell the employee that they are eliminating their position entirely. Later, if the employee claims you terminated them because of race or gender, they are able to demonstrate that you did not eliminate their position, and now you’re a liar. The jury is going to believe them, not you.”

❖ Be direct. “Don’t get hung up in any sort of side discussions with the employee,” said Christopher S. Mayer, employment partner with McCarter & English in Newark. “The termination meeting needs to be very targeted and focused. Be as positive as you can and don’t condescend to the employee. Stay on the main points. And if you can, end it on a very positive note.”

❖ Be brief. “We advise employers not to get into details,” said W. Raymond Felton, a co-managing partner with Greenbaum, Rowe, Smith & Davis in Woodbridge. “Rehashing what has happened in detail gives the employee a chance to say, ‘I didn’t say that, I didn’t mean that, I didn’t really do that, you misunderstood me and shouldn’t fire me.’”

❖ Have a witness. “It’s important to have two people present so that the employee can’t twist around what was said,” Mayer said. “In addition, as soon as the termination meeting is over, go back and type up a memo to include in the employee’s file about everything that was discussed.”