Document, Document, Document – A Mantra Revisited

Labor & Employment Law Update

on August 27, 2015

Failure to document performance or conduct problems is a common mistake employers make. Typically, employee handbooks contain provisions requiring periodic performance reviews. Similarly, handbooks contain discipline provisions that include procedures dealing with the issuance of warnings related to the violation of work rules. How employers use and apply these provisions can make the difference in successfully defending claims.

A recent decision out of the United States Court of Appeals for the District of Columbia illustrates how critical it is to properly document an employee's behavior and performance issues. This decision also underscores the importance of making sure that the reasons for termination are clearly and consistently stated throughout the life of a claim. In *Giles v. Transit Employees Federal Credit Union*, 2015 WL 4217787 (July 14, 2015), an employee suffering from multiple sclerosis (MS) sued her former employer alleging wrongful termination in violation of the American with Disabilities Act (ADA) and the Employee Retirement Income Security Act (ERISA).

Prior to her termination, the employee was involved in a couple of altercations with customers. In one instance, the employee was engaged in an argument with a customer over a pen. The employee was given a verbal warning. On another occasion, the employee improperly confronted a customer for entering the building through the wrong door. In response, the employee was issued a written warning with a two day suspension. The employee was then assigned to a different position. As for performance, the employee was given a combination of satisfactory and poor ratings in the two positions she held. When a leadership change occurred, the new CEO terminated the employee.

Because premiums for the health insurance plan increased 57% over a period of two years during her tenure, the employee sued claiming that the cost of treating her MS caused premiums to increase and that she was dismissed to reduce the employer's health care costs. As the employee's case moved from administrative proceedings before the EEOC to the action in district court, the employee also attacked the employer's "shifting and inconsistent justifications for her termination." Initially, the employer stated that the employee was terminated based on the employee's performance ratings and her altercations with customers. Later, her termination was the result of a “general organizational review” made for “business reasons.” Finally, the employer reverted to poor performance and added that substandard employees were being eliminated as part of a business strategy to cut costs and restore profitability. Fortunately for the employer, the appellate court affirmed the trial court’s finding of summary judgment in favor of the employer because there was no evidence supporting a claim that the cost of insuring plaintiff was a motivating factor in the termination decision. However, inconsistencies or shifting justifications for employment action often give employees a successful argument that the reasons given for termination were pretextual in nature.

Here are five simple and practical lessons from the *Giles* case:

1. Behavior issues should always be documented, even if they only involve a verbal warning.
2. Periodic reviews should clearly identify any deficiencies in employee performance.
3. The basis of a termination decision should be clearly stated to the employee.
4. Employee files should be clear and concise so even a change in management will not affect employment decisions.
5. The basis of the termination decision should be consistent – shifting reasons may impact the outcome of litigation.