



Handling Difficult Employees: Policy Reference Guide, Part I

By Philip Dickey, MPH, PHR

While the attorneys and employers are arguing about the employment-at-will rule, the jury will be considering the golden rule — was this employee treated fairly?

Discharge or termination of employment is justifiably referred to as the capital punishment of the workplace. Unfortunately, it has become a necessary evil among some medical practices when building a staff. The disruptive impact a disciplinary termination can have on employees and physicians may be determined by how it is handled. Don't put one bad decision (wrongful discharge) on top of another (the hiring).

The employment-at-will rule is alive in many states. Basically, it says an employer can fire an employee for good cause, for bad cause, or for no cause at all. However, this absolute authority to do as one likes is eroding. This is due in part to courts ruling in favor of employees because legislation has created exceptions to the rule — these exceptions include issues of public interest, discrimination, implied covenant of good faith and fair dealing, and contractual agreements (intended and unintended). Wrongful discharge is one of the hottest types of employment lawsuits. Today, employees realize just about anyone can file a lawsuit. If a governmental agency becomes involved, then the employee gets a free ride, as he or she has third-party representation at no cost. So, must you retain employees that do not meet your expectations? No, and here's how!

WHAT TO DO?

First, practices that devote substantial time and attention to the hiring process have fewer employee problems. Employers that do it right from the start spend much less time worrying about discrimination, wrongful dis-

charge and other employment-related lawsuits. Hire smart!

Establish the employment-at-will relationship early. Applications, employee handbooks, offer letters, etc., should clearly state that employment is at will. If you can establish that an employee was working on an at-will basis, you can help prevent an employment lawsuit from occurring or help win an employment lawsuit if one is filed.

Once you have an employee on board, a progressive disciplinary system is best to make firing less problematic. Use it from day one! Any delay in addressing a problem only works against you. Don't be afraid to act, but remember to have a plan and be consistent. This approach shows juries an employee was given fair notice of what conduct will not be tolerated and what consequences will result from poor performance. On-the-spot terminations should be rare.

Also, don't forget the golden rule. Most employment lawsuits today are decided by juries and juries are typically interested in the golden rule, although lawyers and employers may be arguing about the employment-at-will rule. At some point in the trial, most juries will ask: Was the employee treated fairly by the employer? Therefore, whether the employee was treated the way most people would want to be treated becomes important. And this makes other questions important:

- Was the employee given a warning?
- Did the employer make it clear to the employee what he or she was doing wrong?
- How much counseling was given the employee?
- Was the employee treated differently from other employees?

- Was the employee fired without being told why?
- Is the employer now giving a reason different from what the employee was told?
- Were written procedures followed?
- Does the documentation support the reason for discharge?

The way a termination looks is important. When it looks like the practice followed the golden rule, a jury may be more likely to follow the employment-at-will rule.

There is no magic that can protect a practice from potential litigation. Terminated employees who leave feeling angry and unfairly treated are ripe for filing a lawsuit. Just about every termination has risk, some more than others. Even winning a lawsuit costs money, time, employee morale, and public relations. The objective is to achieve the staff you want while eliminating or reducing potential problems. The guidelines we've mentioned will help and allow everyone to rest a little easier. Our next visit will address developing a disciplinary action policy.

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