

Business Brief

Business and Client Advisory



TERMINATION FOR INSUBORDINATION MAY SUBJECT AN EMPLOYER TO LIABILITY FOR WRONGFUL TERMINATION

A mid-level manager (the “Manager”) in a cosmetic company (the “Company”) was directed by her supervisor (the “Supervisor”) to terminate an employee because the Supervisor did not find the employee sufficiently attractive. Although she did not offer an explanation to her Supervisor, the Manager refused to carry out the directive, based on her belief that the directive was gender-discriminatory. As a result, the Supervisor fabricated and solicited negative information as a pretext to termination of the Manager. When the Manager was fired, she sued the Company for wrongful termination on the basis of discrimination.

At trial, the Company argued that the Manager’s conduct was not protected because she did not raise a complaint of discrimination, but merely demanded justification for the termination. The Company also argued that Manager, herself, was not the victim of any discrimination.

The California Supreme Court ruled in favor of the Manager, stating that discrimination was “inferred.” The Court reasoned that “...when the circumstances surrounding an employee’s conduct are sufficient to establish that an employer knew that an employee’s refusal to comply...was based on the employee’s reasonable belief that the order is discriminatory, an employer may not avoid the reach of the Fair Employment and Housing Act’s (FEHA) anti-retaliation (rules and regulations).” The Court noted that the Manager sufficiently and adequately conveyed to the Company that she believed the directive to be discriminatory when she repeatedly sought justification for her termination and in the Court’s view, the Manager had been subject to actions “reasonably likely to deter [her] from engaging in protected activities.”

The message to employers is this: employees are seen to owe a greater duty to carrying out the law than to following the directives of employers. Employers may not terminate employees who have refused to carry out directives in the believe that such directives may be in violation of the law. To avoid defending a wrongful termination action, we recommend that employers carefully review their policies and procedures with respect to anti-discrimination and anti-retaliation laws and seek legal counsel prior to terminating employees. Vogt & Resnick has successfully provided these services to its clients for many years and would be happy to share its expertise with you.

BEWARE OF INADVERTANT PROMISES OF CONTINUED EMPLOYMENT

In California, the general rule is that of employment “at-will.” An employee may quit whenever he or she wants, without reason. Likewise, the employer may terminate the employee whenever it wants, with or without cause.

This general rule of employment at-will is countered by two primary exceptions. The first is found in state and federal statutes (i.e. “anti-discrimination” and “whistle-blower” laws). The second is grounded in contract, whereby an employer waives the right to fire the employee at-will by guaranteeing employment for a specific period of time, so long as the employee is not terminated for misconduct. Many people believe that contracts are binding only if they are written. This is not so. Contracts may be oral or implied from facts and circumstances.

Assuming there is no written employment contract nor violation of statute, employers who strongly desire to maintain the at-will nature of an employment relationship must be very careful to maintain that flexibility. As mentioned earlier, contracts may be based on oral agreements or even implied from the facts and circumstances surrounding the relationship of the parties. In the context of employment, this most often occurs where *oral or implied promises* have been made to the employee which suggest that he or she is not subject to termination by the employer at any time or for any reason. When this occurs, a terminated employee may assert a claim for breach of employment contract.

It is surprisingly easy to create this type of situation. Oral statements like: “stay with us and your career will prosper; we want you to be with us forever; you won't ever have to look for a job again” and “keep up the good work and you'll be with us for the long haul;” may be enough to take the employment relationship out of at-will status and provide the terminated employee with grounds to claim that an employee contract was breached. This may be the case even after the employer specifically states that employment is at-will in its employee manual. Even if the employer successfully defends a breach of employment contract claim asserted by a former employee, it inevitably comes at great expense to the employer in terms of time, energy and money.

Therefore, in order to preserve the tremendous advantage and flexibility provided by at-will employment, employers must make sure no one in the company makes any statements to an employee, oral or written, that can be construed as a promise of continued employment. It is possible to reduce the risk of employment lawsuits by implementing carefully worded policies and procedures and by having employees execute written acknowledgments of at-will employment status.

At Vogt & Resnick, our experience in litigating employment matters provides us with particular insight when offering advice and counsel to California employers who are seeking to avoid costly litigation. As the old saying suggests: “an ounce of prevention is worth a pound of cure.” Please feel free to contact us with any questions you may have regarding at-will employment.

AVOID UNEMPLOYMENT INSURANCE - LET THEM QUIT!

Employers are commonly faced with dissatisfied, poorly-performing employees. Often, both the employer and the employee desire to end the relationship. How can the employer avoid paying unemployment benefits in matters like these? Let them quit.

Under California law, an employee is not entitled to unemployment benefits if he or she resigns from employment. However, if the employee is terminated, the employer's unemployment insurance reserve account will be charged, unless the termination was for employee misconduct. Not surprisingly, "misconduct" has been interpreted narrowly, in favor of the employee. "Misconduct" has been defined as a substantial breach, by the employee, of an important duty or obligation owed the employer that is willful and wanton in character and results in injury to the employer. Mere inefficiency, unsatisfactory conduct, poor performance and isolated incidents of oversight or errors in judgment are not considered to be "misconduct." In fact, even an offensive remark to the employer is not considered misconduct, so long as it is a single incident attributed to the heat of the moment. Moreover, the employer has the burden of proving misconduct. In other words, the discharged employee need not prove that his or her conduct qualifies him or her for unemployment insurance benefits. Rather, the employer must prove that the employee is not eligible for the benefits.

In light of the above, employers should avoid having to terminate an employee. The best way for employers to avoid the time, hassle and expense of contesting an application for unemployment insurance benefits and paying such benefits, is for the parties to reach an agreement through which the employee resigns. For the employer, it is usually well worth a few weeks of severance pay to obtain a voluntary resignation from the employee. This also provides the employee with the benefit of being able to say that he or she "resigned," as opposed to having been "fired," when seeking future employment. Finally, if the employee is pleased with the manner in which the employer agrees to sever the relationship, he or she will most likely be obliged to sign an all-encompassing release of claims.

Thus, in many cases, by confronting the issue with the employee in a polite, professional manner, offering severance compensation and obtaining an employee release, the employer saves not only valuable time and resources, but enjoys the peace of mind in knowing that the former employee cannot assert claims against the employer, including, but not limited to a claim for unemployment insurance benefits.

At Vogt & Resnick, have considerable experience counseling employers with respect to anticipated employment terminations and we can assist in constructing exit strategies that are beneficial to both the employer and the employee. In our experience, carefully planning for employee termination is likely to pay enormous dividends. Please feel free to contact us with any questions or concerns you may have regarding termination of employment.

EMPLOYEE SURVEILLANCE

Recent advances in technology have made it possible for employers to monitor many aspects of their employees' jobs. For example, vehicle navigational systems are now being used by employers to track the whereabouts of employees, such as outside sales personnel. Naturally, many employers and employees want to know their legal rights with respect to such activities.

There are federal and state regulations which limit an employer's ability to monitor employees. In most cases, the "reasonable expectation of the employee" is the determining factor. Generally speaking, if an employer has notified employees, in advance, that monitoring will be conducted during the course of their employment and said monitoring is conducted within the guidelines of the law, employees should not have any reasonable expectation of privacy. Therefore, it is critical for the employer to notify employees that data, whether business or personal in nature, which is placed on company-owned computers or devices, belongs to the employer and is subject to monitoring and inspection.

The most effective way for an employer to notify employees of its monitoring practices is through an employee handbook, a written memorandum, or within a union contract, if applicable. For more information on this topic or for assistance with updating your employee handbook, company communications or contracts in this regard, please contact our offices.

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