6 Magic Words Are All You Need To Terminate An Employee

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There invariably will be workplace conflicts as firms grow and become more diverse relative to ideas, gender, race, ethnicity, etc. The intrinsically discordant nature of human beings, coupled with litigious tendencies and the passage of empowering legislation like Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act of 1990, and others, has created a volatile claim environment. Legislative changes coupled with high damage awards and lofty settlements have empowered and emboldened employees. While diversity and inclusion are now an integral and valued component of the corporate best practice portfolio and culture, the increase of complaints and the complexity of workplace disputes are as predictable as a consequence of diverse perspectives.

According to the U.S. Equal Employment Opportunity Commission, there were 89,385 charges filed in 2015. Based on the research of our firm, that number could have been as much as 40 percent higher when you factor in confidential settlements, internal firm or governmental agency complaints, and employees who contemplate suits and charges, but decide not to file. It is also important to note that the New York State Division for Human Rights reported that employment complaints accounted for 83 percent of all complaints filed in 2014 to 2015. This article is an examination of the consequences to employers when managers artificially create a paper trail as a basis for the termination of employees despite the fact that it is not required by the at-will doctrine.

The workplace complaint dynamic, relative to the management side, is best summed up in a single word: reactive. This reactive posture will always result in management side, in-house and outside counsel being on the defensive, e.g. investigating internal complaints, responding to EEOC charges, responding to pleadings, etc. The challenges for in-house staff are many and include: (1) ascertaining the facts, (2) managing the conflict, (3) strategically intervening so as not to disrupt the business operations, (4) mitigating risk, (5) monitoring employment practice liability insurance (EPLI) retention expenses, and (6) defending the client.

Vice presidents of human resources and general counsels must rely on the internal communications and information presented by management, which is often incomplete and sometimes contradicted by verbal representations. The reality is that managers and senior staff are not trained as to the efficiency of termination vis-à-vis the at-will doctrine. Ironically, many employees, especially those at the higher levels, are regularly advised to maintain diaries or records, save emails or consequences, etc., in anticipation of the possibility of a lawsuit. Companies are also challenged by the employee perception that the internal complaint reporting infrastructures are biased in favor of management. It is the employee

perception that causes the proliferation of suits, agency charges and complaints.

Consider this frequently occurring workplace scenario. Diligent Dan has been employed by “The Firm” for 10 years. He has consistently received either high evaluations or positive feedback for 10 years. He has had the same management reporting structure for 10 years. There is a reorganization and Dan now has to report to a new manager. Dan’s first evaluation from his new manager conveys that he "does not meet expectations." Recognizing that a new manager may have different expectations, Dan asks for “specifics.” As a result of his request, he is placed on a performance improvement plan (PIP) that is, at best, very vague. Dan files a complaint with HR, then with an external agency, and ultimately attempts to negotiate a severance package after filing suit. This is a regular fact pattern, industry notwithstanding. There are about 10 such repeated and predictable workplace fact patterns that can be regularly anticipated via employment practice audits. It is important to note that if the phenomena can be predicted, then it can be effectively prevented, resolved or mitigated.

The language of the at-will doctrine is unequivocal, i.e., an employee may be terminated for any or no reason, except those reasons delineated by federal and state statutes. Consequently, the doctrine does not require documentation or even a rationale for termination. As the worker is employed at the will of the employer, then all that is required are the six magic words, i.e., “Your services are no longer needed.” It should be noted that the utterance of the magic words do not include either the words “fired or terminated.” Those words usually evoke a visceral and personal response from the employee that is fraught with implications for employers that include complaints, public relations, media and social consequences, and the risk for workplace violence.

In light of the plain language of the doctrine, the question becomes why do so many middle managers and senior managers feel compelled to manufacture a written basis for termination when it is not required? The answer is three-fold: (1) many employers and line managers, even at the highest levels, do not really understand the at-will doctrine, (2) the idea of summarily terminating someone from their livelihood is subjectively perceived as harsh, (3) most firms do not provide any training on the doctrine and the application thereof and (4) when a new employee is hired, management does not anticipate the need for termination.

In many cases, the triggering event for an employment discrimination claim, charge or suit is the often used "warning letter," or PIP, which delineates the employee's alleged transgressions and establishes a 30- to 60-day period during which the employee’s compliance with the stated PIP goals must be achieved or all consequences "up to and including termination" will ensue. In situations where the employee is a chronically bad actor, the creation of a conclusory warning letter bereft of any connection to the employee leads to a slippery slope for management. That slippery slope is exponentially compounded when the employee has, objectively, been a competent employee who has added value.

This author has observed more than 25 separate cases where the integrity and the bona

fides of the warning letter have been zealously rebutted by good lawyering. In one case, an employee received a review where a salary increase was recommended. One week later, she was fired for "performance issues." In another situation, in a department staffed by lawyers, an employee was presented with 15 company violations in a warning letter. Once again, good prelitigation lawyering established that all of the performance standards articulated in the letter had been exceeded by the employee. In both instances, considerable settlements were negotiated.

As companies struggle with the at-will doctrine, there has to be a collective effort among in-house counsel, human resources executives and senior management to provide the necessary dispute resolution systems and training to convey an understanding of the "paper trail" and the implications thereof. Companies must regularly document, memorialize and chronicle workplace performance as a matter of course. This would eliminate the need or the tendency to artificially create a paper trail.

The absence of training, the need for effective and consistent performance tracking, and the lack of internal dispute resolution infrastructure will contribute to more claims and, consequently, a paper trail that results in complaints, charges and pleadings in pursuit of the "paper chase" in court.

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