Documenting Poor Employee Performance After Reid v. Google

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Although it has always been a challenge for employers to document poor performance of employees, the California Supreme Court in its Reid v. Google decision (No. S158965) has just made the need for documentation in advance of a termination even more critical. Long before Google, California courts have consistently held that an implied contract requiring good cause for termination can be established due to a "totality of circumstances" in a given case. That may include length of employment, previous commendations or even a lack of a critical evaluation of an employee’s work. Not even the presence of written policies, rules or an employee handbook can completely avoid this troubling result.

Most recently, the recession has forced businesses to lay off and terminate poorly performing employees they might have retained in a different financial environment. As the lesson of the Google case demonstrates, even a stray remark about another employee’s age made by a non-decision-maker can turn a potentially justifiable layoff or termination into expensive litigation. There is no magic formula to prevent an employee from suing his prior employer after being terminated. However, contemporaneous documentation of improper or subpar performance and the consequences of continuing failure to conform to a company’s established standards are critical to justifying an adverse employment decision in an economy where litigation, rather than finding another job, may be deemed a more viable option by the terminated employee.

The consequences of a violation of policy or rule must be documented along with the violations and those consequences must be consistently administered. It is not helpful for an employer to have a handbook or written employee policies if the policies are unevenly enforced or ignored. Putting an employee on notice of performance deficiencies and setting specific guidelines and deadlines for improvement are key elements to documenting and enforcing justifiable discipline or termination. Documentation also puts the employee on notice of potential adverse employment actions.

Evaluation Process

Annual or semi-annual employee reviews, in which an employee is given an accurate reflection of his or her performance based upon the employer’s expectation or standards, are very important. Employees who receive glowing evaluations that are not based upon reality become angry when surprised by a termination that they did not see coming. That anger is often what leads to claims and an attempt to look for a pretext to the termination.

However, candid and accurate employment evaluations are often the Achilles’ heel of employers, who would prefer to avoid the conflict of giving their employees poor reviews. This is particularly true where the employer’s managers have been promoted from within, and are loathe to discipline or honestly evaluate their former co-workers. In order for the evaluation process to be fair, the evaluation form must be objective. It should have provisions to rank the skill sets of each employee being evaluated and to review every
individual performing the job description with the same criteria. In short, all employees performing like jobs should be held to the same standard. Disparate treatment among colleagues can create difficult questions for employers or even litigation.

Each employee’s skills should be examined, based upon the employee’s ability to get the work done in the time allotted. Whenever possible, specific examples of both good and unacceptable work should be mentioned. The more concrete the evaluation process, the less likely that there will be misunderstandings or angry feelings. There should be a place in the evaluation for positive, as well as negative feedback from the employee. Likewise, employees should be allowed to rate themselves on the quality of the job they believe they are doing. The more input an employee has, the less likely that the employee will initiate legal action.

Often, there is a wide disparity between the rating that an employee gives to himself or herself and the rating his or her supervisor gives. This should be a basis for dialogue, not a heated debate. If the discrepancies can be discussed without rancor, it could assist in the employee’s improvement, and create a win-win for all parties. No employee or manager is without flaws, and an evaluation that fails to recognize strengths and weaknesses of an employee or the manager’s supervisory style serves no one’s interests.

**PIP**

However, if an employee’s performance is so poor that disciplinary action or termination is imminent, the performance evaluation should specify the problem areas and set a time frame for improvement. This is best done through a formal Personal Improvement Plan or PIP that sets landmarks, expectations and attainable goals.

The failure to set attainable milestones and reasonable expectations in the PIP may support a litigation claim in and of itself. The PIP also should schedule specific meetings to assess improvement on the established goals over a specified period, which is usually three to six months. For the PIP to work, the affected employee must actively participate in establishing the milestones. It is also important to set the consequences for failure to meet the goals in the PIP, so the employee will know if a termination of employment can be a consequence of failing to complete the PIP. The employee must be told that even if the PIP is completed, this does not guarantee employment for any period of time. It also should be made clear that the employer can terminate both the PIP and employee at any time during the plan period, if it does not appear that significant corrective steps are being taken by the employee to meet the plan’s recognized and agreed-upon goals.

**Discrimination Claims**

The evaluation process, if done candidly and directly, coupled with a PIP, may eliminate the element of surprise or anger in the event the employee faces a disciplinary action or termination. A surprised employee, who is blindsided by losing his or her job, will look for other reasons unrelated to his or her employment as causes for the termination. Some causes of termination in California are legally sustainable. But many are not. For instance, discrimination based on race, sex, age, national origin, sexual orientation, religious or disability are unlawful under California Government Code Section 12900 et. seq.

Discrimination, which is related to one of the categories listed above, can be either direct or indirect. The Google decision took the concept of indirect to a higher level. After Google, if the discrimination is even a stray remark made by another employee and unrelated to the proposed discipline, it may also be considered as part of “the totality of circumstances.” So, when evaluating an employee in any of the suspect classifications that
might implicate discrimination, consistent application of the standards of performance are even more important. A clear and direct evaluation of a poor employee may not override the occasional stray or offensive remark; however, it will go a longer way toward justifying your position than an after-the-fact explanation.

In addition, when preparing or setting up goals for the PIP of an employee in one of the suspect classifications, it is crucial to set attainable milestones. Milestones may not necessarily be geared toward retention of the poor performer in the same job or classification he or she had previously. But transfer to a temporary or transitory position and one for which the employee is not qualified is setting the individual up for failure. A PIP with unattainable goals, unreasonable expectations within a limited period of time or transfer to a position that is slated for elimination could be viewed in the context of the working environment as discrimination or a pretext for termination.

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