BIG LIES: "The check's in the mail," and "I can fire you for a good, bad, or no reason"

By Robin E. Shea on November 30, 2010

 "This is an employment-at-will state, and I can fire you for a good reason, a bad reason, or no reason at all." Technically, this is true in most states, but in effect it is a lie which employers rely on at their peril.

Suzanne Lucas of *The Evil HR Lady* has a post about an individual (sex not specified) whose employer offered him/her a different position in the company. When the employee declined the position, his/her "voluntary resignation" was demanded. In other words, the boss had tried to get rid of this employee by way of a transfer, and when that failed, forced the employee's resignation. According to the employee, he/she had never been warned of any job-related issues.

Suzanne prefaced her recommendations by pointing out that such a termination, while unfair, was perfectly legal in an employment-at-will state.

She has correctly stated the law, and she has made some excellent recommendations for employees in this position. From the employer's standpoint, she aptly (and bluntly) notes, "I wish managers would stop being so freaking lazy and wimpy and actually talk to employees about problems." However, I'd like to go a step further and note the very real possibility of a lawsuit against an employer who terminates an employee in this manner.

Why? Because even if you live in an "employment-at-will state," you do not *really* live in an employment-at-will state.

First, the employment-at-will rule does not apply to terminations that are conducted for *unlawful* reasons. And, as we all know, the list of "unlawful" grounds for termination is ever-growing. A termination because of race, sex, national origin, religion, color, age, disability, or, now, genetic information, or retaliation for related protected activity, violates federal law and many state laws.

According to the National Labor Relations Board, termination for posting a comment on Facebook calling your boss an "[expletive deleted]" is illegal.

Under some state and local laws, ancestry and sexual orientation are also unlawful considerations. In some jurisdictions, including the District of Columbia, appearance discrimination is unlawful. In some states, termination in violation of the procedures set forth in an employee handbook is unlawful. And even in states that are considered more "employer-friendly," terminated employees can usually assert claims for public policy wrongful discharge, retaliatory discharge, and negligence.

So, now you may be thinking: Well, ok, but I'm not terminating this person for any of these reasons. I'm terminating him because I just can't stand him. Doesn't that fall under employment at will?

The answer is yes and no. Yes, because that is a facially lawful reason in an employment-at-will state. But also no, because an employee who is terminated for an arbitrary or unfair reason will have a much easier time claiming -- and possibly persuading an agency, judge, or jury -- that the stated reason is false and that the employer's real reason was an illegal one (for example, "Sure, he couldn't stand me because I'm 53, and he couldn't stand anyone over the age of 50, and that's age discrimination!").

So, even in an employment-at-will state, an employer should make sure that termination decisions are fair (which would usually include specifically warning a sub-standard employee about her deficiencies and giving her an opportunity to improve), well-documented, and conducted in a manner that is consistent with the employer's policies and procedures.

PS-"Right to work" is often confused with "employment-at-will" but actually means something completely different. Right-to-work states prohibit unions and employers from requiring union membership as a condition of employment.