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Common Mistakes When Terminating Employees For Theft, Part 1

By Ed Harold (New Orleans)

Employee theft is an issue besetting retailers every day. A 2005 survey by the University of Florida puts the cost at $17.6 billion, and concludes that employee theft accounts for 47% of inventory shrinkage.

Responses to this epidemic range from low tech (like rewards for employees turning in thieves) to high tech (such as computer monitoring of transactions to reveal issues that would normally go undetected by managers). Yet unscrupulous employees remain undeterred and continue to try to beat the system. What is even more upsetting is that catching an employee red-handed on video sliding groceries will not prevent the employee from bringing some form of wrongful termination claim. Many individuals, even guilty ones, feel compelled to try to clear their name. Even though the employer will likely eventually win such a suit, the expense and time involved can cost hundreds of times the amount of the theft.

Employers usually have no choice but to terminate employees who engage in dishonest or even suspicious behavior. But mistakes are sometimes made and you could find yourself not only facing a lawsuit, but finding that your mistakes created potential liability to an individual who stole from your company.

In this issue, we'll look at some common mistakes that have resulted in what should be unassailable terminations going south in court.

The Investigation

In virtually every employment lawsuit arising out of termination for wrongdoing, the first step of the termination process, the investigation, becomes the most critical years later in front of a jury. This is even more important when theft is involved. An allegation of theft is a powerful accusation and one that should never be taken lightly. While an employer ordinarily bears no burden of proof at trial, the jury will look for the employer to prove an accusation of theft beyond a reasonable doubt. The employee's first tack in a trial will be to attack the quality of the investigation.

There are many important missteps to avoid. First, there should be at least two individuals involved in the investigation, and optimally, one should not personally know the subject. This will help avoid claims of a conclusion being trumped up against an employee because of hostility by the investigator toward the accused. For example, an employee might claim that the manager framed her for theft for refusing his sexual advances.

If the company has a protocol for investigations, it must be followed to the letter. Juries demand that employers follow written procedures; failure to do so can also serve as evidence of pretext used to defeat summary judgment. Witnesses should write their own statements in their own handwriting. Nothing tanks the credibility of a witness faster than when on the stand, he does not know what some of the words in his statement mean.

Employees being investigated must be allowed to tell their story and have it included as part of the record of the investigation. Otherwise, a jury may think that the employee was railroaded. The investigation must be thorough and an investigator should never limit the investigation to the witnesses identified by the accused if other individuals might have relevant knowledge.

Catching The Thief

The method used to catch thieves can also result in liability. Case law suggests that retail managers are fond of hiding baby monitors in break rooms to try to catch the employees talking about stealing. While the idea seems perfectly logical, it is also illegal under federal anti-wiretapping laws. Having the employee in a position where he cannot leave an investigatory meeting without going through a person leads to false imprisonment claims. Digging in an employee's purse without consent can generate invasion-of-privacy claims. Federal laws also regulate the use of lie detectors in investigations of monetary loss.

Because of factors like these, it's important that an employer take several steps. First, all employees should sign an acknowledgement that they understand they have no privacy rights in items they choose to bring on the premises. While not required by federal laws, employees should also acknowledge that they are under video surveillance, and consent to it. Make employees aware that participating in investigations being conducted by the employer is mandatory and that refusal may result in termination. Finally, expressly advise employees that if they violate policies pertaining to the protection of company assets, they may be terminated without any finding of any intentional wrongdoing on their part.

The Termination Meeting

The termination meeting should not be the first time an accused learns that he or she is suspected of malfeasance. If there is a benefit to the investigation from not letting on to the employee that they are under suspicion, and termination is an almost foregone conclusion at the time of the interview, the decision to terminate should still not be made or communicated during the first interview. It is far better to suspend the employee pending the outcome. Many employees will not return for a follow-up meeting and can be terminated as having abandoned their job. There are far fewer facts to argue about when an employee is terminated for these grounds.

How the termination meeting will be conducted depends heavily on how strong the evidence appears. If all the evidence points to theft, but is not conclusive, an employee should not be told he is being terminated for "theft" or "dishonesty" or even "suspicion of theft." This does not mean the employee should not be terminated. But accusing an individual of a crime is *per se* defamatory in many jurisdictions and can result in the employer being practically forced to prove that the employee in fact stole. Using language centering on your lack of trust in the employee, i.e., loss of confidence, is much less likely to be defamatory.

Another possibility, where the employee, while not proven guilty, may bear responsibility for the loss under the employer's policies, is to connect the termination to the policy violation, not to a crime. In this scenario, the employee should also be told that no conclusion has been reached as to their culpability for a crime, but that he or she is being terminated because proper store procedures were not followed.

Terminating employees for these stated reasons may not prevent the employee from securing unemployment compensation, but as discussed in Part 2 of this article, fighting unemployment compensation is overrated. In the next issue of Retail Sales Update, we'll also look at other problem areas in terminating for theft, including when – and when not – to call in the police.

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Better Double Check Your Use Of Credit Checks

By Alva Cross (Tampa)

Colorado, Maryland and Pennsylvania are the latest to join a growing number of states that have taken steps to limit an employer's ability to perform credit checks on its employees. So far, only four states have actually enacted laws limiting use of credit checks for employment purposes. But approximately 10 others have introduced similar legislation aimed at prohibiting employers from using information contained in an employee's credit history to deny employment, or basing employment decisions (such as transfers, reassignments, promotions or terminations) on such information. Additionally, at least two states already prohibit the use of credit checks for non-financial jobs.

EEOC Renews Interest In Disparate Impact Theory

The current push by states to limit credit checks for employment purposes comes on the heels of the Equal Employment Opportunity Commission's (EEOC) focus on the possibility that using credit histories in the employment context could have a disparate impact on protected groups, such as African-Americans, Hispanics, women, and those with disabilities.

Last October, the commission held an informal review to scrutinize use of credit checks in the hiring and promotion process. During the public meeting, the commission heard comments from several stakeholders, including the National Consumer Law Center, National Council of Negro Women, Society for Human Resource Management (SHRM) and U.S. Chamber of Commerce. A mere two months later, a more aggressive EEOC filed suit against Kaplan Higher Education Corporation claiming that Kaplan "engaged in a pattern and practice of unlawful discrimination by refusing to hire a class of black job applicants nationwide."

Similar lawsuits have also been filed by individuals who claim that they have been discriminated against on the basis of race or national origin because of a prospective employer's use of credit checks. Specifically, in November 2010, an applicant who was not offered a job sued the University of Miami claiming that the university unlawfully rejected job applicants because of their credit histories.

The plaintiff, who filed suit on behalf of herself and other applicants who were rejected, relied heavily on statistics to indicate that African-Americans and Hispanics had lower credit scores, and claimed that the university's use of an applicant's credit history was not essential to determining whether the applicant was qualified for the job.

Be Careful About Who Gets Checked . . .

This is not to say that you cannot – or should not – use credit checks in making employment decisions. Title VII permits an employer to use credit checks and other screening tools if they are job-related and consistent with business necessity. Thus, you may use checks, but exercise caution because doing so can result in increased scrutiny by the EEOC or a possible violation of a newly-enacted state law.

The best way to minimize risks associated with using credit checks for employment purposes is to review the requirements of a particular job and determine whether a credit check is really necessary for that position. Historically, employers have conducted credit checks for positions with financial responsibility, including access to company funds or other large amounts of cash or with access to confidential financial information. Courts have generally affirmed such credit checks.

For this reason, credit checks are most commonly used in the banking, finance and retail industries. Similar to other background screening processes, such as criminal history reports – which the EEOC previously took issue with – employers can argue that a credit report presents them with a snapshot that indicates whether an employee is productive, reliable, responsible and trustworthy.

. . . and Why

In light of the EEOC's recent focus on credit checks in employment, if you use a candidate's credit history to make employment decisions make sure that this is only being done when the nature of the job requires it. Here are some tips to keep in mind:

- Ensure that guidelines are in place detailing when to use credit checks. Generally speaking, you should not be using credit checks for every position you are filling.
- Determine whether the particular position for which you are hiring is a position involving the handling of money or whether the person will have access to customers' financial information (e.g., is it a cashier position at the front register, or is it a credit department position reviewing customer financing applications?).
- Determine whether it is necessary to run a candidate's credit history before making an offer. Generally, you should not use credit checks as a screening mechanism prior to interviewing a candidate.
- If negative information appears on the applicant's credit history, ask about the information before removing them from the candidate pool. There may be an explanation, such as identity theft, for the negative information.

If you do find it necessary to use credit checks, use them consistently. In other words, do not run credit checks only on certain candidates. That's exactly what the EEOC and the new state laws are trying to prohibit.

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