Those “WRONGFUL DISCHARGE” LAWSUITS

The Old “You’re Fired” Privileges of Yesterday Are Now Dangerous as Employees Look to the Law Courts For Relief

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“Y”ou’re fired!”

These words can mark the beginning of lengthy legal problems for contractors deciding to terminate even unsatisfactory employees. Why? First, many of today’s employees have no qualms about initiating a lawsuit if they believe their employer is in the wrong. Second, employers may not realize the consequences their actions can have under federal, state or local employment laws.

The trend toward increased litigation makes it critically important for wall and ceiling contractors to familiarize themselves with the problem and to take the necessary steps to make certain that they and their members aren’t heading for trouble.

This Special Report will help you understand “wrongful discharge” litigation by giving you a brief history of employment laws, an analysis of important cases, and guidelines which you and your branch offices should follow.

A Brief History

“Wrongful discharge” cases are usually based on one or more of the following laws:

• federal, state or local anti-discrimination or “fair employment practices” statutes;
• federal or state labor relations laws;
• state common law actions for “wrongful discharge” based on tort or contract theories.

Until recently, the majority of “wrongful discharge” damage suits were filed by individuals who were protected by union rules or written contracts. “At will” employees—those working without union affiliation or contracts—rarely filed such suits because they had no legal grounds upon which to base such action.

In effect for almost a century, the “employment at will” rule states that, in the absence of an agreement fixing the term of employment, the employee is free to quit and the employer is free
to dismiss the employee at any time and for any reason. The “at will” rule does not apply if there is (1) a collective bargaining agreement specifying disciplinary procedures, (2) a contract specifying a definite period of employment or (3) a statute explicitly prohibiting discharge for particular reasons.

The “at will” rule has, however, been subjected to more and more exceptions, due in part to liberal interpretations of the National Labor Relations Act and the Equal Employment Opportunity Act, as well as the application of “common law” theories of tort or contract law.

The National Labor Relations Act gives employees the right to engage in collective bargaining. Such agreements always contain strict procedures for handling disciplinary and discharge cases. Over the years, a standard of “just cause” has become the accepted rule. Essential to this standard is “due process”: that an employer must provide an employee with certain rights of notice, investigation and hearing before any disciplinary action or discharge can take place. Countless interpretations of National Labor Relations Act cases and contracts have resulted in a rather detailed and precise contact for these otherwise vague concepts.

The Equal Employment Opportunity Act (part of Title VII of the Civil Rights Act of 1964) makes it illegal to discriminate against individuals on the basis of race, color, religion, sex or national origin. This same law also makes it illegal to discriminate against an employee for exercising any right (such as filing a charge, testifying on an issue or participating in an investigation) under the law.

The field of “wrongful discharge” law has evolved in large part as a result of the concepts and legal tests used to determine (1) what constitutes “legitimate” business reasons for personnel decisions, (2) what is “arbitrary,” “discriminatory” or “pretextual,” and (3) when action taken against an employee is “retaliatory.”

Passage of equal employment opportunity laws has itself contributed at least indirectly to the development of “wrongful discharge” law in at least two important respects: first, by enacting into law the idea that some reasons for dismissing employees (e.g., race, sex and exercise of statutory rights) where not acceptable, and second, by enacting into the law the concept that “retaliatory” or “abusive” discharge (i.e., firing someone in revenge for exercising a right given him by law) was
Incidentally, it should be noted that prohibitions against discrimination or discharge for exercising statutory rights are also found in a few dozen other federal statutes, including the Fair Labor Standards Act and the Occupational Safety and Health Act.

**Retaliation Cited . . .**

The “retaliation” provisions in these Acts are cited in many suits arguing that similar provisions should be implied in statutes (such as antitrust and state regulatory laws) which contain no such explicit language. As already noted, such provisions are now commonly included in newly-enacted laws.

Although employers win more wrongful discharge cases than they lose, they may find that a discharged employee is persistent in trying to win—often trying different theories or tribunals when they fail on the first try.

Contractors should carefully review the outcome of lawsuits in states and cities where they do business in order to learn the types of situations that may arise.

The most popular grounds for wrongful discharge suits based on “common law” are:

1. that the discharge was contrary to the public policy of the state. See *Wiskotoni v. Michigan National Bank-West* and *Novosel v. Nationwide Insurance Co.*, as discussed in this Special Report.
2. that the discharge was contrary to rights and procedures guaranteed to the employee in a company manual, handbook or policy statement. See *Weiner v. McGraw-Hill* as discussed in this Special Report.
3. that the discharge violated an implied agreement between the employer and employee that each will deal with the other fairly and in good faith. See *Vandergrift v. American Brands Corporation* as discussed in this Special Report.

Courts today seem to be telling employers they cannot fire someone if the employee was ever told or led to believe that his job was somehow “secured” or “guaranteed” as a matter of “company policy.” Does this mean that employment law in the United States is quickly reaching the point where an employee can remain on the payroll until he or she quits, retires or dies?

The answer to this question is a definite “no.” There are a number of reasons:

First, employees lose far more “wrongful discharge” claims than they win. The complaint is often thrown out on its face after a hearing on the employer’s motion for “summary judgment.” Even when the employee’s complaint survives a motion to dismiss, the complainant has only reached the point where he may go to
trial. Trying a case is very expensive. It can also take years. On top of that, a good number of states still do not recognize any cause of action for “wrongful discharge.” Moreover, those states which do recognize such a cause, usually construe it very narrowly. For example, the employee must cite a specific statute or “public policy” of the state and show how the employer violated it in dismissing him.

Second, the states that do allow suits for “wrongful discharge” based on tort (the employer violated a duty to the employee) do not always allow suits that are based on a contract theory that a statement on an application form or in an employee handbook is the equivalent of a binding contract enforceable against the employer. Both Delaware and Pennsylvania, among other states, have rejected such a legal theory.

Third, several states have held that employees may not bring legal action based on “wrongful discharge” if there is another specific remedy provided by law.

Fourth, and perhaps most important, employers can make it more difficult for a dismissed employee to succeed on a complaint of “wrongful discharge.” There are, however, some very important qualifications: (1) employees have many grounds other than “wrongful discharge” upon which they can base a complaint; (2) employees can, and do, allege almost anything in a complaint (allegation is one thing; proof is another).

**Guidelines to Follow . . .**

Employers should take the following steps to minimize the risk of being hit with a “wrongful discharge,” “unjust dismissal,” “retaliatory discharge,” “abusive discharge” or “bad faith discharge” claim:

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***EXCEPTIONS TO EMPLOYMENT-AT-WILL***

Although state laws change frequently, as of August 1984, the following states had adopted these exceptions to an employer’s right to fire workers under the employment-at-will doctrine:

**Common-Law Employee Rights**

Statements from supervisors, managers or employee manuals are considered as binding as a written contract.


**Good Faith and Fair Dealing**

A company can be sued simply for not being “fair” or “reasonable” in firing.

- Alaska, California, Connecticut, Massachusetts, Montana, New Hampshire

**Political Beliefs, Discrimination, Public Policy**

An employer can be sued for firing workers based on their political beliefs, for discriminatory reasons or because they refused to violate other laws.


**Whistle Blowing**

An employer can be sued for discharging an employee who complains about company activity that is “against the public interest.” Protection covers complaints to company management and complaints to the public.

- Idaho, Illinois, Montana, New Hampshire

1. If you wish to retain the right to fire employees at any time or for any reason (other than for any clearly illegal reason), say so. You can do this by telling an applicant at the time of the interview, or by including a statement to that effect on application forms, in letters confirming employment or in the company handbook/policy manual.

2. Don’t do or say anything inconsistent with your policy of “employment at will.” Let your supervisors and managers know that you expect them to do the same. For example, if your application form states that “applicant understands employment is at will,” you and your managers should never say, “Oh, don’t worry about that. It’s just some legal mumbo-jumbo our lawyers make us put in there so we don’t get sued.” Explain what it means.

3. Know your employees’ rights under the law where you operate your business. This includes federal, state, county and city laws. As a rule, state and local laws are more comprehensive than federal laws. For example, employers are covered by the federal Equal Employment Opportunity Act only if they have 15 or more employees. The Equal Employment Opportunity Commission administers this law, which forbids discrimination on the basis of sex, race, color, religion or national origin. Separate federal laws cover discrimination according to age or pregnancy. But the State of Maryland, to cite but one example, has a “human relations” statute which is broader than the federal law. Individual counties have also enacted such laws in their county codes. Montgomery County (Md.) employers with as few as six employees are covered by such a law, which not only forbids discrimination on the bases stated in federal law, but also on the basis of “ancestry,” “marital status,” and “handicap.”

Employers should also familiarize themselves with the various other laws that regulate employment relationships. These include the Civil Rights Act, the Fair Labor Standards Act, the National Labor Relations Act, the Occupational Safety and Health Act, the Age Discrimination in Employment Act and the Employee Retirement Income Security Act. Most of these federal statutes also have state counterparts.

There are also perhaps two dozen other federal statutes (and state enactments) that contain sections prohibiting discharge or discipline for employees who exercise their rights conferred by statute. Some of these statutes contain no explicit language regarding discharge. Courts have, however, ruled that the statutes imply such protection. Such is the case in Pennsylvania where an employee sued because he was fired for refusing to drive overweight trucks on state roads in violation of the state truck weight limit laws. He was given the opportunity to prove his claim in court. *(Shaw v. Russell Trucking Line, Inc., 542 F.Supp 776 (W.D.Pa., 1982)).*

4. Employers should provide employees with some measure of “due process.” It can include some or all of the following:

   a. The employer will take no action without sufficient evidence. “Evidence” may include eyewitness accounts, employee admissions or circumstantial evidence, for example, when the employee was the only person on the premises at the time something was taken.