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When All Else Fails: Dismissing Public School Employees

Being terminated from a job can be one of the most traumatic events in a person's life. For public school officials, the dismissal of superintendents, principals, and other employees for poor performance or misconduct is an unfortunate but necessary duty – especially given today's standards for school accountability and quality.

In light of these divergent viewpoints, it is not surprising that terminations of public school employees generate a substantial number of claims and lawsuits. While some disputes are inevitable, good management practices can promote fairness and reduce the possibility of successful legal challenges.

United Educators' Claims Experience

Employee allegations of breach of contract, due process violations, or wrongful termination are among the most common types of employment claims brought against educational institutions. Together these claims comprise 28 percent of all employment-related claims filed against United Educators' (UE) members. While these figures are for all types of educational institutions, termination-related claims are certainly a top concern for K-12 public schools.

Disputes involving employee terminations can be costly to resolve, as employees may seek lost pay, benefits, and other types of damages. Six-figure settlements or awards against public school systems are not uncommon.

Governing Laws, Contracts, and Procedures

A broad array of state and federal laws, collective bargaining agreements, and administrative procedures govern the terminations of public school employees. State laws authorize school districts to enter into agreements for employment with various types of employees—managers, clerical and administrative staff, teachers, maintenance workers, and bus drivers, among others. State laws also describe the permissible causes and general procedures for public employee

termination. Teachers must comply with state licensure requirements to be hired and retain their positions, and the federal law known as No Child Left Behind requires that all teachers be certified as “highly qualified.”

Public school employees may also be represented by a labor union. If the employee and the labor union are in a state with a public sector bargaining law, then a collective bargaining agreement will typically be negotiated to include provisions relating to the grounds and procedure for discipline, performance reviews, and termination.

Federal and state anti-discrimination laws also have an impact on employee termination. Permissible employment actions and protections for certain groups of employees are controlled by federal laws such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. State and local laws may contain even more expansive protections for employees.

Under federal and state laws, public employees generally may not be terminated on the basis of their age, race, color, sex, pregnancy, religion, national origin, disability, or marital status. Other impermissible actions include terminations based on an employee’s membership or activity in a union, service as a juror, response to a summons, or in retaliation for filing a worker’s compensation claim or exercising any other protected right.

Public school employees like other citizens have a right to free speech that is guaranteed by the First Amendment to the U.S. Constitution. Discipline or dismissal of school employees based on their speech, expression, or off-duty conduct must be carefully justified.

Discharge Procedure Varies by Type of Employee

Employees may be divided into three broad categories in terms of school districts’ discharge procedures. Generally, federal and state anti-discrimination statutes and other workplace laws apply to all types of employees. A description of the three categories of employees and associated discharge procedures follows:

- 1. “At-Will” Employees.** A worker who lacks a contract specifying the time or duration of employment is considered an at-will employee. Often, the at-will status will be specifically stated in the letter hiring the employee. Food service workers, custodians, and some administrative staff members are often employed at will. State statutes may prescribe that the superintendent, principal, or other school official is responsible for the decision to terminate at-will employees. Some laws may also require certain due process protections, such as the right to a hearing or administrative appeal.

2. Employees with a Non-Renewing Contract. Employees such as superintendents, school bus drivers, coaches, and substitute teachers often work under contracts that do not automatically renew after a stated time period. A school district's non-renewal of a contract after it expires generally does not require a statement of reasons or other specific procedures. Nevertheless, it may be advisable to provide written notice to employees who will not be considered for contract renewal so as to avoid creating an expectation of re-employment. A discharge *during* the term of the contract, however, requires that due process procedures be followed. Unless specific procedures are stated in a collective bargaining agreement, contract, or statute, mid-term discharge procedures may require schools or districts to give notice to an employee, provide a statement of reasons, and offer an opportunity for a hearing.

3. Employees with Tenure. Teachers and other employees who have successfully completed their probationary period are in most states granted an indefinite employment status, or tenure. Once tenure has been granted, the employee is generally entitled to full due process rights prior to termination. These rights may include specific notice of the charges, a right of access to evidence, the right to confront witnesses, an opportunity for a hearing, a decision by the school board or other impartial decision maker, as well as appeal rights. Further, the permissible grounds for termination are usually identified under state law. Grounds for dismissal commonly include neglect of duty, insubordination, substantial inability to perform teaching duties, incompetence, the failure to maintain a required license or certification, the conviction of certain criminal offenses such as sex-related crimes, reductions in force, and the catch-all category — good or just cause.

Good Management Practices

In addition to legal and contractual requirements, good management practices should be followed whenever an employee is being considered for discharge. A summary of key practices follows:

1. Comply with Employee Handbooks and Internal Procedures. Many school districts have employee handbooks and other internal policies or procedures addressing such matters as discipline, standards of behavior, and termination of employment. These books and procedures should be consistent with applicable laws as well as employee and union contracts. Great care should be taken to comply with them to avoid employee claims of unfair or inconsistent treatment. Handbooks should include a disclaimer stating that they are intended as a guide to the employer's policies and are not a contract. Each employee should acknowledge in writing that he or she has received the handbook. While handbooks are intended as a guide, they should not contain anything that the school district does not intend to fulfill. If certain policies are not followed, they should not be included in the employee handbook or other internal procedures.

2. Properly Document Disciplinary Actions. Workplace-conduct problems should be documented and discussed with the employee. The documentation should identify the applicable rule or standard and state how the rule was communicated to the employee. It is useful to identify previous steps taken in progressive discipline involving the employee and to state the effect of the misconduct as well as the school's expectations for the future, including the consequences of subsequent violations. The disciplinary notice should be signed by the employee and placed in the employee's personnel file. An employer should not destroy any disciplinary notes, even if the conduct ceases.

3. Conduct Honest Performance Evaluations. Candid, consistent, and concise evaluations are necessary for evaluating and documenting an employee's work performance. Like disciplinary notices, performance evaluations should be factual and specific. Descriptive examples that illustrate behaviors, dates, times, numbers, or other information that clearly supports the bases of the evaluation should be included. The document should describe employee behaviors and supervisor observations, not simply state conclusions. The performance evaluations should be objective: Not every employee is "above average" or "exceeds expectations." Honest evaluations are essential in giving an employee warning that his or her performance is not acceptable.

4. Conduct Training on Employment Practices and School Policies. Employees should be informed about school policies and how to pursue internal complaints. Supervisors and managers need ongoing support and training on such topics as observing institutional policies, evaluating employee performance, intervening early and appropriately in problem situations, handling complaints and potential legal issues that may come to their attention, and finding help from resource people within the school district. All groups of employees need to be informed about the employer's policies prohibiting discrimination and harassment at the workplace.

5. Obtain Human Resources and Legal Advice to Head Off Employment Disputes. Before terminating an employee, the supervisor or manager should review the matter with the school's human resources representative to ensure that all applicable policies and procedures have been followed. An HR professional and the school's legal counsel, as appropriate, can also review what potential claims the employee might bring and how the school can defend against them. For example, if an employee is terminated for unsatisfactory work performance, and the employee is in a "protected category" (that is, a category that is protected from unlawful discrimination by federal law, such as being over 40 years of age or having a disability), the school should determine whether other employees who are not in the protected category have been discharged for similar reasons.

6. Treat Employees Properly During Discharge. It is critical that managers and administrators handle the discharge process with great care. The

termination meeting should be conducted with maximum privacy, and the discharged employee should be treated with dignity and respect. There is no obligation to inform an at-will employee of the reason for termination, but the school system may choose to provide the employee with a reason, recognizing that most employees want to know “why.” It is advisable to document the substance of the meeting in a concise memorandum prepared in advance. The memorandum may serve as a guide to the discussion. Stick to the facts regarding the unsatisfactory performance or misconduct. Avoid characterizing the reasons for an employee’s work problem. That is, don’t use terms like *laziness*, *lack of intelligence*, or *motivation*, and refrain from discussing the employee’s personal problems, home life, or other factors not directly raised by work performance. Finally, be sure that the reasons given for the termination are consistent with the employee’s personnel file and related documentation.

An employee’s perception of fairness is typically an important factor in whether he or she decides to bring a claim against the school district. If the employee receives adequate notice that his or her performance or actions do not meet the school’s expectations, and is given an opportunity to correct the deficiencies, the employee is less likely to file a claim challenging the termination.

An employee’s termination is often the last resort after progressive discipline and efforts to improve performance have failed. Ideally, it should not come as a surprise to the employee.

Resources

Articles

“Commentary: Employment Issues in Private and Public Schools,” West’s Education Law Reporter, by R. Mawdsley, Ph.D., J.D., 1989.

“Commentary: The Use of Hearing Officers in Public Educator Termination Actions,” West’s Education Law Reporter, 1995, by C. Lopez, Ph.D. and D. Sperry, Ph.D, 1995.

“An Employer’s Guide to Termination Without Litigation,” *UE Employment Action*, Winter 1999, available in the Members Only Library at <http://www.ue.org/membersonly/GetDocument.asp?id=35>.

“Employment Disputes are Nasty, Brutish, and Long,” by A. Franke, Esq., United Educators, presented at the September 2000 annual conference of the University Risk Management and Insurance Association, available to URMIA members at http://www.urmia.org/2000/Session_5/Employment_Practices_Liability.htm.

“Employment Liability: Eight Mistakes You Should Avoid,” New Hampshire Risk Management Exchange, prepared by Flygare, Schwarz & Closson, March 2001.

“Fourteen Points of Employee Dismissal,” by the Indiana School Boards Association, <http://www.isba-ind.org/Legal/14Points.htm>.

“Properly Documenting Employee Disciplinary Actions,” *UE Reason & Risk*, Winter 2000, available in the Members Only Library at <http://www.ue.org/membersonly/GetDocument.asp?id=143>.

Books and Guides

“Avoiding Litigation Landmines: A Survival Guide for Managers,” a participant’s guide and video, Coastal Human Resources, 1997. A user’s guide is available in the Members Only Library at: <http://www.ue.org/membersonly/GetDocument.asp?id=240>

“Teacher Dismissal,” a chapter in *The Principal’s Legal Handbook*, by D. Van Berkum, M. Richardson, and K. Broe, to be published by the Education Law Association in 2004.

“Termination of School Employees: Legal Issues and Techniques,” National School Board Association Council of School Employees, 1997.

Reports and Surveys

“Summary of State Teacher Tenure Laws from ‘The Changing Face of Teacher Tenure’,” American Federation of Teachers, available at <http://www.aft.org/research/reports/tenure/Laruetab.htm>

“Teacher Dismissal Survey,” American Federation of Teachers, available at <http://www.aft.org/research/reports/tenure/Aftsrvy.htm>.

“Under-Managed Risk: Employment Claims Drive Rising ELL Occurrences and Costs,” Tillinghast-Towers Perrin, 1997.