

BIOGRAPHICAL INFORMATION

- Topic: How to Give Evaluations that Will Improve Performance and Won't Land You in Court
- Lecturer: Robert L. Allman
- Background: Mr. Allman has been a practicing attorney for over 20 years, specializing in employment and corporate law issues. He is experienced in litigation and the counseling of employers in the prevention of employee claims.

SEMINAR OUTLINE

I. INTRODUCTION

A. General Discussion

1. What type of performance evaluation system does your business need?
2. Performance evaluation systems can be an integral component of the employment relationship.
3. A well designed and implemented performance review system can accomplish numerous human resource functions including compensation, promotion, termination, motivation, employee awareness of company goals and general issues effecting the company in the marketplace.
4. How to change an institutionalized evaluation process into a modern and dynamic management tool.
5. Goals of a well planned and implemented performance review system.
 - a. Development of motivated and competent employees.
 - b. Decrease lawsuit exposure and document everything.

II. SUGGESTED EMPLOYEE EVALUATION COMPONENTS

A. Twelve steps towards better performance evaluations

1. Develop written policies that explain the employer's evaluation process and employee expectations. To make the system work, managers and supervisors must receive training.
2. Create an evaluation process that is non-adversarial and enlists employee participation. The goal of any employee performance evaluation is to increase productivity, morale, and to institutionalize company goals.
3. Simplify employee appraisals by developing written job descriptions, checklists, and a good paper trail. Job descriptions can be used as a measure of achievement for performance evaluations or termination decisions. The job descriptions must reflect actual job requirements.
4. Use objective standards. Develop a list of standards and expectations in order to formulate a rating scale. Require employee acknowledgement by signature and provide an open forum to elicit feedback, suggestions and an opportunity for the employee to review the evaluation.
5. Emphasize the importance of detailing and specifying employee goals for improvement within a firm time line. Employers need to use past evaluations and comments to reinforce these employee goals and use the system as a valuable source of information.
6. Eliminate appraisal language that exposes employers to stress, hassle and the expense of a lawsuit.
7. Make necessary changes to your appraisal documentation to ensure the successful future of your business.
8. Educate and train management and human resource professionals on the importance of uniform management.
9. Categorize degrees of misconduct and penalties to ensure uniform application and avoid distinctions. Decisions and comments should always be based on legitimate nondiscriminatory business reasons.
10. Avoid charitable evaluations because honesty, candor and proper documentation is essential when faced with a lawsuit.

11. Institute due process procedures for appeal by dissatisfied employees, be constantly reviewing the performance evaluation process to ensure uniform application, and check possible disparate impact. Employers might desire to implement hearings, peer review panels, and alternative dispute resolution.
12. Protect employee privacy by limiting communication of performance evaluations to those who have a legitimate business reason.

B. Common pitfalls of performance evaluations

1. Unrealistic personnel policies and the failure to follow policies - have some form of central monitoring of the evaluation process.
2. Unrealistic and inflated performance evaluations.
3. Failure to document poor performance.
4. Failure to document employee misconduct and investigate problems.
5. Failure to use specific and objective facts when documenting problems. Human resource professionals must not state conclusions without support and must not let emotions enter the evaluation framework.
6. Failure to get employee's own side of story and document facts.
7. Failure to ensure that a progressive discipline policy is followed. An employee who has performance or discipline problems must be warned quickly of the problem before it mushrooms into something bigger.
8. A performance evaluation system that fails to give employees advance notice of problems and is not followed uniformly.
9. Failure to maintain relevant records and documentation that supports poor performance.
10. Failure to investigate thoroughly and explore other avenues of discipline before discharging an employee such as demotion, transfer or reassignment, final written warnings, voluntary resignation or releases.
11. Giving an unlawful reason for discharge based on race, gender, national origin, religion, pregnancy, age, disability, sexual preference, lawful activities or retaliation.

12. Failure to explore the usefulness of exit interviews.
13. Failure to modernize the appraisal system to keep up with changing business needs.

C. Checklist for discharge based on poor job performance

1. Have job performance problems been documented in recent evaluations or documents?
2. Has the employee been warned in writing of poor performance evaluations and that discharge will occur unless his/her job performance improves?
3. Have the employee's past job performance evaluations been reviewed to ensure they are consistent with the decision to discharge?

D. Steps that should be taken before an employee is discharged

1. Identify the supervisor who is making the decision and complete all the documentation and support first.
2. Review the employer's handbook and all relevant policies.
3. Interview and document all witnesses and individuals involved in the employee's performance evaluation to ensure that discharge is proper.
4. Consider all alternatives to discharge and make sure there is ample written notice to employee because a performance evaluation is only effective if the employee has advance notice and the system is followed.
5. Do not make rash decisions because supervisors usually have one chance to get it right.

E. Suggested steps to take when informing an employee that he/she is being discharged

1. Human resources manager, performance evaluation manager and the ultimate decision maker should be present.
2. Be prepared to provide written documentation and reasons for termination.

3. Be prepared to be honest in discussing the documented support for termination.
4. Be firm and do not sympathize with employee and change the termination decision. (Delay if you must, but do not make a risky situation worse by debating the decision in front of the employee.)
5. Prepare the proper termination papers in advance and cover all aspects of benefits.
6. Document the termination interview and remind the employee of any trade secret or intellectual property issues.

III. COLORADO LAW

Employers can be exposed to numerous state law claims including negligence, contract misrepresentation, misrepresentation, invasion of privacy, promissory estoppel, defamation, lawful activities and outrageous conduct when implementing employee evaluation systems.

A. Defamation

1. Common law tort based on the alleged publication of false or derogatory statements about a person.
2. Defamation is a potential risk in employee performance evaluations, job references, and statements to co-workers about an employee's termination.
3. Statements from a performance evaluation process will generally not expose an employer to liability for defamation under a qualified privilege.
4. The employer must have a legitimate interest in the subject of the statements, the statements can only be made to others having an interest in the subject, and the statements must be without malice and in good faith. The privilege can be lost if abused.
5. A qualified privilege protects any statement made during a review process if the statement is made in good faith and some confidentiality is maintained; however, this is subject to numerous evidentiary exceptions. (What you say will be used against you.)
6. Employers need to institute guidelines on giving references for former employees. References can open the door for lawsuits under

numerous theories including retaliation, invasion of privacy, and tortious interference of contract.

7. Employers can limit references to the confirmation of the employee's past or present employment, position and dates of employment. The safest option for an employer is to give a neutral reference and explain the company's policy or have the former employee authorize what information can be disclosed in writing.

Price v. Conoco, Inc., 748 P.2d 349 (Colo.App. 1987). Employee brought defamation action against employer and supervisors, arising out of written evaluation by supervisors of his work performance. Court held that employers and employees share a common interest in information concerning the work performance and status of personnel. The qualified privilege is lost if the employee shows that the privilege has been abused.

Williams v. Continental Airlines, Inc., 943 P.2d 10 (Colo.App. 1997). Employee pilot sued flight attendant, flight attendant supervisors, and airline for defamatory statements accusing pilot of attempted rape and for negligent internal investigation of the complaint. The court held that damages for mental or emotional suffering are not recoverable under a claim for contract breach, unless the evidence demonstrates that there was intentional breach involving willful, wanton or insulting conduct and without any legal justification or excuse. Also, the court held that there was insufficient evidence to hold Continental liable for the various defamatory statements under either respondeat superior or a claim of inadequate supervision because a qualified privilege exists and mere negligence cannot supply the malice requirement for a defamation claim.

B. Discrimination

1. Colorado Anti-Discrimination Act ("CADA"), C.R.S. §24-34-401-406, 1997.
 - a. Colorado's counterpart to Title VII.
 - b. Purpose is to provide a mechanism by which Colorado can eradicate the underlying causes of discrimination and practices.
 - c. The Act requires the Colorado Civil Rights Commission (CCRC) to "investigate and study the existence, character, causes, and extent of unfair or discriminatory practices" and to formulate plans, promote goodwill to eliminate unfair practices, recommend policies and legislation and "to cooperate...with other agencies and organizations... in the planning and conducting of educational programs designed to eliminate racial, religious, cultural, age and intergroup tensions."

- d. Act contains limitations in terms of remedies, jurisdiction, statutes of limitations, administrative procedures and other proof related factors that restrict the Act's applicability.
2. Disparate treatment and protected characteristics such as race, sex, national origin, religion, and disability.
3. Elements of a prima facie case of discrimination are:
 - (1) that the complainant belongs to a protected class;
 - (2) that the complainant was qualified for the job at issue;
 - (3) that the complainant suffered an adverse employment decision (e.g., failure to hire, failure to promote, discharge, or demotion) despite his or her qualifications; and
 - (4) that the circumstances gave rise to an inference of unlawful discrimination.
4. Employment decisions and application of performance evaluation systems.

George v. Ute Water Conservancy District, 950 P.2d 1195 (Colo.App. 1997). The defendant, since the early 1980s, had supplied its employees with an employee handbook. The handbook provided that employment was "at will", which it defined as the ability of "either the District or an employee [to] terminate the employment relationship at any time and for any reason." Employee supervisors were also given a supervisor's handbook which set forth certain policies and procedures concerning discipline and termination. In 1993, when George refused to resign and was terminated, George filed suit alleging under the CADA that the defendant had terminated him because of his age. George also asserted a breach of contract and promissory estoppel claim alleging that the discipline procedures set forth in the supervisor's handbook constituted an agreement or promise of continuing employment.

The Court held that George failed to allege a prima facie case under CADA because the replacement employee was two years and nine months younger than George and other than a "belief" that age was a factor in his termination, George submitted no evidence of discrimination in response to defendant's motion for summary judgment. The Court also recognized that statements in an employee handbook could modify an "at-will" employment relationship but held that the disclaimers in both handbooks were sufficiently clear to inform employees that the defendant intended to maintain at-will employment regardless of other procedures in the handbooks. Further, the court determined that the discipline procedure was not set forth as a prerequisite to termination, and the handbook did not require that the discipline procedure be used in all situations, but only "generally", and the

handbook acknowledged that under some circumstances the discipline procedure for termination "may not be appropriate", and advised that the supervisor or manager can "decide on the appropriate course of action."

Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997). Court ruled that if a plaintiff asserts a prima facie case, the burden of proof shifts to the employer to articulate some legitimate nondiscriminatory reason for the employment decision. In this case there was evidence that a white employee committed comparable time-clock violations and was not fired. This fact was enough to create the inference that employer's asserted legitimate reason for terminating an African-American employee, who performed the same infraction of company policy, was discriminatory and motivated by race. No other evidence was needed to infer intentional discrimination.

Williams v. Colorado Department of Corrections, 926 P.2d 110 (Colo. App. 1996). Williams was terminated by the _____ of a corrections facility based on three performance reviews and three reports alleging violations of Department rules. Williams then filed a complaint with the Colorado Civil Rights Division that agreed with his allegation that his discharge was the result of racial discrimination.

Williams was hired for a one-year probationary period to work as a corrections officer. Williams' employee performance was evaluated once every three months. His supervisors rated this performance "good" on his first two reviews, but on his third review Williams received a rating of "good" in four categories and a rating of "needs improvement" in four others, specifically: "Occupational/Professional Competence, Problem Analysis and Decision Making, Interpersonal Relations, and Security and Miscellaneous." Williams was terminated because of this third review.

The court found no evidence of racial discrimination and held that the administrative regulations were not applicable to probationary employees who receive acceptable reviews on their first and second evaluations but who fail to perform satisfactorily in the third and more stringent procedural standards. Due process was not required for a probationary employee to be terminated from state employment.

Brook v. Restaurant Services, Inc., 881 P.2d 409 (Colo.App. 1994) rev'd 906 P.2d 66 (Colo. 1995). The Colorado Supreme Court held that the CADA did not offer an exclusive remedy and that a private right of action by statute does not bar common law claims of sexual harassment claims unless the legislature clearly expresses such an intent. The court held if an employee is subject to verbal or physical abuse in the workplace on the basis of gender, but is not hired, fired, promoted, demoted, or compensated on that basis, the Act provides no recourse and administrative remedies of the Act only need to be exhausted for claims filed pursuant to the Act.

Saint Luke's Hospital v. Colorado Civil Rights Commission, 702 P.2d 758 (Colo.App. 1985). The court found that there was substantial evidence in the record to support the Commission's finding of racial discrimination. The employee presented evidence that he

was treated differently than other employees similarly situated and that a disproportionate number of blacks had been terminated by the Hospital. The Commission found that the employee was a model employee who had received good work evaluations and that the Hospital's evidence in support of termination was "very weak" and that the Hospital's response to the situation "bordered on paranoia".

- C. Breach of contract/wrongful termination caused by performance evaluation systems
 - 1. Public employers/teachers.
 - a. Application of the Colorado Teacher Employment Compensation, and Dismissal Act (TECDA), C.R.S. § 22-63-203.
 - b. Contract by operation of law.
 - c. Specific non-renewal language.
 - 2. Application of the Colorado Certified Personnel Performance Act (Evaluation Act), C.R.S. § 22-9-101.
 - a. No private right of action because Act provides a specific remedy.

Axtell v. Park School District R-3, 1998 WL 45186 (Colo.App. 1998). Court held that termination procedures found in an employee handbook or manual could create an implied employment contract. However, the court ruled that the School District's evaluation policy had a clear disclaimer that created no employment contractual rights.

Hopwood v. Boulder County Department of Social Services, 613 P.2d 346 (Colo.App. 1980). Hopwood appealed a judgment of the district court affirming the final agency action by the Merit System Council of the State Department of Social Services terminating his employment. The Court of Appeals held that the notice to Hopwood informing him of his termination might have satisfied due process requirements, but when a state agency has regulations governing a manner of discharge more stringent than due process would require, that agency must strictly comply with those rules. In this case the termination notice to Hopwood stated a conclusion that his performance was substandard but did not indicate what action or inaction by Hopwood led to his termination.

- b. Private employers.
 - 1. Statements made in an employee handbook may form a basis for breach of implied contract and promissory estoppel.

2. Employers must clearly and conspicuously disclaim any intent to enter into an employment contract.
3. Disclaimers must be sufficiently clear to inform employees that the employer intended to maintain at-will employment regardless of procedures and policies in a personnel manual or otherwise.
4. Ex-employees will find it difficult to prevail on claims for breach of contract and promissory estoppel, where in addition to language affirming an at-will relationship, the following circumstances are present.
 - a. Disclaimer is separated and distinguishable in employee handbook.
 - b. Employee should sign an acknowledgment form or additional document that contains the handbook disclaimer and the fact the employee is at-will.
 - c. Employees should sign an acknowledgment form that they have read the employee handbook and understand the employer's performance evaluation process.
 - d. The employee handbook's explanation of the evaluation process should contain no progressive discipline requirements or require a finding of just cause to terminate an employee.
5. Performance evaluation managers should not make any assurances of continued employment or any other promises during the evaluation process.

Continental Airlines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987). The court ruled that generally an employee hired for an indefinite period is an "at-will" employee whose employment may be terminated without cause or notice and whose termination does not give rise to a cause of action. The court recognized that "at-will" employment can be eroded by language in an employee handbook or an unilateral manifestation by the employer because under certain circumstances these statements could constitute an amendment to an otherwise at-will employment relationship.

The court recognized that an employee may be entitled to relief under ordinary contract principles if he/she can demonstrate that the employer, in promulgating the termination procedures, was making an offer to the employee and was willing to enter into a bargain to justify the employee in understanding that his assent to the bargain was invited by the employer. Also, even if the prerequisites for the formation of a contract are not found, an employee could be entitled to enforce the termination procedures under a theory of promissory estoppel if he/she can demonstrate that the employer should reasonably have expected the employee to consider the employee manual as a commitment from the employer to follow the termination procedures, that the employee reasonably relied on the termination procedures to his/her detriment, and that injustice can be avoided only by enforcement of the termination procedures.

Fair v. Red Lion Inn, 920 P.2d 820 (Colo.App. 1995). Fair brought a breach of employment contract alleging that Red Lion breached an implied contract not to discharge her if she complied with the terms of Red Lion's medical leave policy. The court recognized that an employee may prove that an explicit term of the employment contract restricts the employer's right to discharge (such as an undertaking to discharge only for cause) or that an employer's policy statement restricting such right has been properly accepted as a modification of that contract.

In this case the Court held that the parties' execution of the written medical leave of absence form, combined with the assurances given by the Human Resources director and Fair's supervisor that the presentation of a full medical release by a specified date would be acceptable, could be determined by a reasonable fact finder to be a modification of Fair's at-will employment status.

As a result, the words and actions by the employer could manifest to a reasonable person an offer to be bound by the special promises contained in the medical leave of absence form and in the supervisor's oral assurances despite any disclaimer in the employee handbook.

Salimi v. Farmers Insurance Group, 684 P.2d 264 (Colo.App. 1984). The court held that an employer can become contractually bound to comply with termination procedures in a handbook when those procedures are relied on by the employee and supported by the consideration of continued service.

Decker v. Browning Ferris Industries of Colorado, Inc., 931 P.2d 436 (Colo. 1997); see also, Decker v. Browning Ferris Industries of Colorado, Inc., 947 P.2d 937 (Colo. 1997). The Supreme Court held, in part, that an employer's promise to treat the employees fairly, when taken in the context of a progressive disciplinary policy, could be seen as a contractual obligation to act fairly, subjecting the employer to a claim of bad faith contractual performance. This case has implications which could seriously impact the quality of employer/employee conversations, particularly with regard to job performance.

D. Negligent hiring and/or supervision

1. Recovery of workers compensation benefits is an employees exclusive remedy against an employer for tortuous actions resulting in personal injury.

Popovich v. Irlando, 811 P.2d 379 (Colo. 1991). The court ruled that the exclusive remedy provisions of the workers compensation act will bar an employee's tort claim against an employer for negligently hiring and supervising a co-employee when the tortious conduct occurs within the scope of employment. In this case an employee instituted a tort action against an co-employee for intentional infliction of emotional distress due to sexual harassment after accepting payment of medical expenses and counseling bills in compromise of worker's compensation claims.

The held that the rule of co-employee immunity does not extend to a co-employee's intentional tort when the tortious conduct did not arise out of and in the course of the tortfeasor's employment, even though the injury to the victim might have occurred within the scope of the victim's employment. As a result, the court determined that those elements of Popovich's damages that have not been satisfied by the worker's compensation settlement may properly be included in her claim and as part of any judgment against Irlando.

Hoffsetz v. Jefferson County School No. District R-1, 757 P.2d 155 (Colo.App. 1988). (Worker's compensation does not preclude an award of damages for mental suffering caused by willful or wanton breach of contract.)

IV. FEDERAL LAW

- A. Application of Title VII of Civil Rights Right Act of 1964§ 701, as amended, 42 U.S.C. § 2000e (1994)
 1. Employee must sue employer in Title VII action either by naming supervisory employees as agents of the employer or by naming the employer directly.
 2. Elements of a prima facie case.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In this case the United States Supreme Court set forth the order and allocation of proof required for employment discrimination claims filed pursuant to Title VII. The Court held that the complainant carries the initial burden of establishing a prima facie case of discrimination. If the complainant establishes a prima facie case of discrimination, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the rejection." Once the employer meets its burden, the complainant must then "be given a

full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). In this case the Supreme Court clarified the effect of rejecting an employer's asserted nondiscriminatory reason for its employment decision by stating:

The fact finder's disbelief of the reasons put forward by the defendant...may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and...upon such rejection, "no additional proof of discrimination is required.

The Supreme Court held that a prima facie case of discrimination can be found when a prima facie case of discrimination is established and that the reasons given for discharge were a pretext for discrimination. As a result, an employee alleging discrimination must prove that the employer's articulated reasons for its actions are false and those reasons are a pretext for discrimination.

Raddle v. City of Aurora, 69 F.3d 441 (10th Cir. 1995). The Court held that a showing of pretext is evidence which could allow a jury to infer discriminatory intent on the part of an employer.

- B. Other federal statutes that provide litigation exposure when instituting employee performance evaluation systems
 - 1. ADA, ADEA, OSHA, ERISA, NLRA.
- C. Colorado federal cases upholding employment at-will
 - 1. Most recent cases in Colorado construing the effects of handbook disclaimers have been federal cases.
 - 2. Employment at-will is still alive but employers need clear and prominent disclaimers.
 - 3. Employers must carefully draft evaluation policies and handbooks so as to disclaim any intent to alter employees' at-will status.
 - 4. It is extremely important that an employee sign a separate agreement acknowledging disclaimers and the fact that performance evaluations do not alter the employee's at-will status.

V. CONCLUSION

- A. Be fair
- B. Be consistent
- C. When in doubt, warn, don't terminate
- D. Use the paper trail constructively

VI. QUESTION AND ANSWER SESSION

BIBLIOGRAPHY

Collision, Madeline, Preventing and Defending Sexual Harassment Claims in Colorado, National Business Institute, Inc. (1995).

Employment Law Issues in the 90's, Co-sponsored by the Labor Law Forum Committee of Colorado Bar Association (1994).

Holloway, William J., Employee Termination: Rights and Remedies, Bureau of National Affairs (1993).

Hubbards, John M., How to Avoid Legal Pitfalls In Hiring and Firing in Colorado, Colorado Employment Law Letter (1995).

Pompey, Stuart H., Wrongful Termination Claims: A Preventive Approach, Practicing Law Institute (1991).

Termination and Discipline of Employees, Continuing Legal Education in Colorado (1997).