APERMA ANNUAL FALL CONFERENCE

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"CAN I FIRE HIM NOW?"

Presented by:
Ralph C. Ohm
Attorney at Law
P.O. Box 1558
Hot Springs, AR 71901
(501) 624-7555
(501) 624-7575 Fax
e-mail: ralphohm@aol.com

"CAN I FIRE HIM NOW?"

There are two types of employers:

Those who have problem employees, and

Those who **will** have problem employees.

It goes without saying that if you are an employer, ultimately you are going to have an employee who simply, for whatever reason, does not seem to march to the drum that you are beating. Usually, as an elected official, you inherit your employees. Although most of the time employees are very competent, qualified, and a pleasure to be around, invariably there will be one or more employees who seem to create problems, chaos, and have the innate ability to stir up controversy in areas that you would never dream imaginable.

The question, since the beginning of time, is, "How do I terminate an employee without getting sued?" The answer is, "You don't!" You should expect to get sued every time you terminate an employee. Then, if you are in fact sued, you will not be disappointed. Likewise, if you are not sued, you will be pleasantly surprised. The first rule of all

employment terminations is **expect to be sued no matter what the reason for the termination might be.**

Arkansas is generally described as an "at-will" state. **Do not fall for this trick.** Allegedly, in Arkansas, an employee can terminate the employment relationship for any reason or for no reason at all. This is supposed to be true for the employer, as well. However, when you call and ask, "Can I fire him now?," the first question you will be asked is, "Why?" Although the law states that you can terminate an employee for "no reason at all," this simply is not correct.

According to the Arkansas Supreme Court:

> In Arkansas, the general rule is that an employer or an employee may terminate an employment relationship at will. There are two basic exceptions to the at-will doctrine:
>
> (1) where an employee relies upon a personnel manual that contains an expressed agreement against termination except for cause; and
>
> (2) where the employment agreement contains a provision that the employee will not be discharged except for cause, even if the agreement has an unspecified term.

Ball vs. Arkansas Dept. of Community Punishment, 340 Ark. 424, 10 S.W. 3d 873 (2000).

Therefore, in theory, an employee can be terminated for any reason at all so long as the employee is not the recipient of a personnel manual that contains an expressed agreement providing termination for cause or there is an employment agreement that indicates a for-cause termination only.

In addition to the exception to at-will employment dealing with personnel policies and manuals, the Arkansas Supreme Court has also established another exception to the at-will employment doctrine dealing with "public policy." The Arkansas Supreme Court has further indicated that:

> Because Ball was an at-will employee, she could have been fired for any reason, no reason, or even a morally wrong reason. Thus, the question of malice on the part of her employer is irrelevant.
>
> Ball also attempts to bring herself within one other narrow exception to the employment at-will doctrine - the public policy exception. This exception was established in Sterling Drug, Inc. vs. Oxford, 294 Ark. 239, 743 S.W. 2d 380 (1988). In that case, this court held that an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state. The public policy of a state is found in its constitution and statutes . . .

Ball, id.

In addition to the personnel manual or policy manual, there is the public policy exception which the Supreme Court has defined as a "narrow exception;" however, this exception has practically "eaten" the rule. Therefore, it is important to keep in mind the difference between at-will employment and permanent employment.

Most county and city employees are considered to be at-will employees. Likewise, in theory, county employees can be terminated for any reason or for no reason at all. Whereas some employees may be permanent employees, those employees can only be removed "for cause." Examples of for-cause conduct include the following:

1. Misrepresentation, dishonesty, or self-dealing conduct;
2. Insubordination;
3. Failure or refusal to follow orders from supervisors;
4. Negligent, reckless, or intentional destruction of county or city-owned property;
5. Excessive absences or general inability to perform duties and responsibilities associated with the job;

6. Conduct generally unbecoming and inappropriate for a county or city official; and

7. Using a governmental position to gain an advantage in a personal relationship.

These are but a few of the for-cause exceptions. In order to terminate an employee for cause, the employer must have sufficient evidence to demonstrate that an employee has, in fact, engaged in conduct that warrants termination. This same rule allegedly does not apply to at-will employees.

As previously noted, when asked, "Can I fire him now?," the first response to that question will always be, "Why?" Therefore, regardless of whether an employee is at-will or permanent, you need to determine the reasons for the termination decision. Although the law indicates that employees are at-will and can be terminated for any reason or for no reason at all, the realities of the situation do not substantiate this conclusion.

When making a decision to terminate an employee, there are several things that must be considered. To begin with, you must keep in mind that **jobs are important**. Jobs create people's self esteem, provide financial stability, provide independence, provide a livelihood, and provide an all around identity for employees. Most employees work to live, not live to work. A job is a critical component of any person's successful livelihood. Therefore, when you make the decision to terminate an employee, you should keep in mind that not only are you terminating an employee, you are going to create a major life change and cause major stress to that employee. Do not take this decision lightly. I can assure you that the employee will not.

Next, you must keep in mind that every time you terminate an employee, you will, in all likelihood, be sued. Furthermore, as it turns out, almost all members of the jury will either be employees or retired employees. Rarely are employers on jury panels. Since most people are employees instead of employers, it only stands to reason that the largest number of jurors constitutes employees. Therefore, they are naturally going to be sympathetic with the employee.

The next thing you should keep in mind is timing. **Timing is everything**. As we all know, there is a time to live and a time to die, a time to laugh and a time to cry, a **time to hire** and a **time to fire**. Make sure that timing is considered. If you have just assumed office on January 1, it is usually not a good idea to terminate employees on January 2. This has problems. Likewise, if an employee has just filed an EEOC claim against you, the day following receipt of the Complaint is also not a good time to terminate an employee. You have to view the timing of a termination notice in conjunction with all other factors effecting the employee. Keep this in mind.

Next, you should reduce all problems to **writing.** Keep in mind the rule of the jail, "If it is not written down, it did not happen." Therefore, you should document all problems and, in fact, have a counseling session documented, as well. Ultimately, you will reach a point where it is obvious that the employee is not going to be able to meet your expectations. In those circumstances, you should always provide a

"final warning" letter and instruct the employee that if there continue to be problems, you will be left with no alternative but to terminate. Then when the improper conduct occurs, you will be in a position to have warned of the impending termination prior to fulfilling your promise. Juries like to see written documentation and counseling prior to termination.

Lastly, **grievance hearings** are important. You should welcome the opportunity to explain your decision. Furthermore, grievance hearings provide the employee with an opportunity to make sure you have made an informed decision. The most important thing in a grievance hearing is to insure that the employee is afforded the opportunity to voice his/her concerns. Generally speaking, once an employee has had the opportunity to express his/her concerns, I have found that usually those cases do not proceed to trial. Most of the time, the employee had some unresolved issues that need to be expressed and this form provides that opportunity for them. Furthermore, it allows them

to understand or at least to see the reasons for their termination. Most of the time, once an employee has participated in a grievance proceeding, usually the employee does not initiate litigation.

Although the law says that you can terminate an employee for any reason or no reason at all, there are multiple exceptions to this rule. Therefore, you should only terminate employees when you have valid reasons for doing so. Likewise, if there is ever a situation in which you need an opinion or wish to discuss a proposed termination, you should feel free to contact your County Attorney, City Attorney, legal advisor, or myself for purposes of discussion.

Remember, as we started, if you have no problem employees now, you will. Be prepared to deal with those employees when necessary.