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Richard O. Parry

Treena L. Gillespie

Sharon Segrest
ssegrest@mail.usf.edu

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THE BEST DEFENSE IS A GOOD OFFENSE: USING HUMAN RESOURCE MANAGEMENT PROACTIVELY TO MINIMIZE THE THREAT OF LITIGATION FROM WRONGFUL TERMINATION CASES

Richard O. Parry
California State University, Fullerton
Treena L. Gillespie
University of South Alabama
Sharon L. Segrest
University of South Florida, St. Petersburg

ABSTRACT: When it comes to employment-related litigation, human resource (HR) professionals are a business organization's first line of defense. Lawsuits by employees alleging wrongful termination, harassment or discrimination constitute a significant threat to a business. Although many employees are at-will meaning that they can be terminated at any time for any reason, exceptions exist which create the basis for wrongful termination claims. These exceptions also raise the business' risk to be sued for termination decisions. In this article, we briefly review the exceptions to employment-at-will which create the basis for wrongful termination claims. In their quest for documenting "good cause" for terminations, HR professionals must navigate the implications of employment-at-will to avoid inadvertently exposing their company to litigation. We offer suggestions for helping HR practitioners reduce this exposure.

INTRODUCTION

Normally, either the employer or the employee can terminate the employment relationship at any time and for any reason or for no reason at all. Employees may terminate the employment relationship for any reason or no reason at all, so why should employers not have the same privilege? Employment is presumed to be an at-will relationship as long as there is no other method of termination to which the parties have agreed in a contract and as long as the employment is not for a fixed length of time. Although courts tend to trumpet employment-at-will as the "law of the land" (e.g., Foley v. Interactive Data Corp. 47 Cal. 3d 654 680-81 (1988)) and state law confirms that (e.g., California Labor Code Section 2922), exceptions exist. Employment-at-will may no longer apply when: 1. an explicit or implicit contract exists (e.g., a collective bargaining agreement); 2.an employee is protected from termination by law (e.g., non-discrimination laws, protection for participating in lawful union activity); or 3.the termination of the employee is contrary to public policy, such as exercising a legal right or fulfilling a legal duty (e.g., jury duty).

In an ironic catch-22, an employer that approaches discipline and termination issues with an interest in assuring that all such decisions are fairly reached is more likely to convince a court that it has abandoned employment-at-will. While enhancing employees' perceptions of the fairness of an employer's decision-making process likely reduces the probability of an employee filing a lawsuit in the first place (Gillespie & Parry, 2006), the employer simultaneously raises potential exceptions to the employment-at-will doctrine. For instance, many employers establish a system to ensure that adverse employment actions are fair. The employer may require an investigation of the issue, there may be a hierarchy of decision-making that is dependent on the employee's tenure or rank, and there may be a progressive discipline system. The implication is that the employer's decisions are not arbitrary and capricious, but are careful and concerned, with an emphasis on fairness and acting responsibly for good reason. Thus, it may appear to a court that an employer no longer treats the employment relationship as "at-will" and now requires "good cause" in order to terminate an employee.

If the employment relationship has changed into one in which both the employer and the employee(s) agree that there will be no discharge without good cause, the employment-at-will doctrine may no longer control. For example, when a company's employee handbook states that employees will be fired only for certain specified violations of work rules, or that the firm will follow a specified procedure when disciplining an employee, it may give rise to a terminated employee's argument to a court that the handbook became a part of the terminated employee's contract with the company. An increasing number of courts accept this argument (e.g. Guz v. Bechtel National, Inc. 24 Cal 4th 317 (2000).

It is reasonably easy for a plaintiff to establish an implied-in-fact "for-cause" employment relationship which means that it is likely the plaintiff's case will be heard by a jury. Juries decide questions of fact, whereas judges decide questions of law. Whether there is sufficient cause to terminate is likely to be a question of fact for a jury. Since there is rarely direct evidence on the issue of decision-making, circumstantial evidence with all the attendant speculation that goes along with it, may be critical (e.g., Coltran v. Rollins Hudig Hall International, 17 Cal. 4th, 93, (1998)). The expense of defending a lawsuit through trial and possible appeal, and the uncertainty that accompanies a jury's decision, increases the settlement value of such a lawsuit. Well-intentioned HR professionals may find themselves in court as a result of a wrongful termination lawsuit defending their company's practices that were established to promote fairness in the workplace.

THE IMPLICATIONS FOR LITIGATION

An employer terminating an employee counter to a contract, in violation of the law, or in violation of public policy may face outcomes spanning from breach of contract to torts, which may result in punitive damages. Accompanying their claim of wrongful termination, the terminated employee may also allege: 1. intentional infliction of emotional distress, 2. fraud, 3. invasion of privacy, and 4. defamation.

Emotional Distress: Intentional infliction of emotional distress generally involves an intentional act that is considered extreme and outrageous conduct causing severe emotional distress to another person (e.g., Ford v. Revlon, Inc., 153 Ariz. 38 (1987)). While emotional injuries arising from employment termination ordinarily are within the employee's regular course and scope of employment, and are thus preempted by the exclusive remedy of workers' compensation, if the employee was discharged for reasons that violate a statute or public policy, the termination is not deemed to be considered part of the normal workers' compensation issue and the employee is free to bring an independent tort claim of intentional infliction of emotional distress, along with the claimed breach of public policy. In addition, if the plaintiff claims a violation of tort law, pain and suffering resulting from the alleged wrongful termination can be recovered.

Fraud: It may not be unusual for a recruiter or an interviewer to downplay negative information that may dissuade a prospective employee or to make promises regarding the duration of employment as well as the likelihood of promotions and pay raises. Realistic job previews (RJPs) commonly are used to provide prospective employees with realistic information about the job that will shape their expectations to better approximate reality; positive outcomes result from these met expectations (Breaugh & Billings, 1988). However, misrepresentations and unfulfilled promises may result not only in increased turnover (e.g., McKay & Avery, 2005), but may give rise to a number of claims, including fraud, negligent misrepresentation, and breach of contract. An allegation of fraud arises when an employee claims that there was no intention on the part of the employer to be bound by a promise to terminate only for "good cause," although other possibilities exist.

This requires that, at the time of hire, material misrepresentations were made by authorized personnel of the employer that the employee would only be terminated for good cause, and the employee reasonably relied upon these misrepresentations. Note also that a misrepresentation that may provide a cause of action for fraud or misrepresentation is not limited to outright falsehoods. Silence may satisfy the requirements when an employer selectively omits certain material facts with an intention of creating a false impression, or failing to correct a prior misrepresentation when advised of its inaccuracy.

Invasion of Privacy: The right of privacy is not specified in either the Constitution or the Bill of Rights. Although the late Justice Louis Brandeis argued in his dissent to Olmstead v. United States, 277 U.S. 438 (1928) that the right of privacy is, "..the most comprehensive of rights and the right most valued by civilized men...." his words went unheeded until 1965. It was not until then, in Griswold v. Connecticut, 381 U.S. 479 (1965), that the Court gave to all Americans, including employees, a right to solitude and privacy. In deciding Griswold, the Court relied, in part, on the Fourth Amendment which states that people should "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" thus implying a right that goes well beyond unreasonable searches and seizures.

Since the U.S. Supreme Court acknowledged a constitutional right of privacy, the laws on the subject have grown. Just a few of the numerous laws that now affect privacy are the Family and Privacy Act of 1974, the Health Insurance Portability and Accountability Act (HIPAA), the 1988 Video Privacy Protection Act , the Communications Privacy Act, the Gramm-Leach-Bliley Act and the Right to Financial Privacy Act of 1978. Privacy rights are also protected under tort law, including, but not limited to causes of action for:

1. Use of a person's name, picture, or other likeness for commercial purposes without authorization;
2. Intrusion on an individual's affairs or seclusion;
3. Publication of information that places someone in a false light;
4. Public disclosure of private facts that a reasonable person would find objectionable.

The issue of privacy in the employment situation is particularly important because of the extensive use of computers and the related growth of electronic communication. For employers, a court's analysis of an employer's eavesdropping on an employee or employee's electronic communication is likely to revolve around the central issue of the employee's expectation of privacy, as noted, for instance, in TBG Insurance Services Corp. v. The Superior Court of Los Angeles, 96 C.A. 4th, 443 (2002).

Related to an employee's expectation of privacy are the numerous laws on the subject. While, for instance the Electronic Communications Privacy Act (18 U.S.C. §§ 2510-2521) specifically prohibits the intentional interception of any wire or electronic communications, as well as the intentional disclosure or use of any information obtained by the interceptions, it contains exceptions. The "business-extension" exception allows an employer to monitor an employee's electronic communications in the ordinary course of business. However, what is arguably the most significant exception, and the one most critical to employers, allows an employer to avoid a violation of the ECPA when employees consent to such monitoring. Other aspects of privacy that tend to arise in the employment

context include: 1. A discharge based on alleged sexual harassment or a claim that the employer disclosed personal information about an employee; or
2. Adverse action taken against an employee based on the results of a drug test.

See, for instance, Paulson v. Ford Motor Co., 612 N.W.2d 450 (Minn. App. 2000), where an employee filed suit as a result of a demotion. And in Flowers v. Southern Regional Physician Services, Inc. 247 F.3d 229 (5th Cir 2001) the plaintiff alleged a hostile work environment in violation of the Americans with Disabilities Act. The plaintiff's immediate supervisor learned that Flowers was infected with the AIDS virus. The plaintiff, who had received excellent performance reviews was suddenly the subject of several negative disciplinary reports and was required to take four drug tests in one week. Her immediate supervisor stopped socializing with the plaintiff, her co-workers began to avoid her and the president of the hospital refused to shake her hand.

Note that although neither the Americans with Disabilities Act (ADA) (42 U.S.C. 12101, et. seq., nor the Rehabilitation Act (29 U.S.C. 703 et. seq. forbids drug testing, the issue of invasion of privacy or defamation is different. Both laws generally protect drug addicts, among others, who are in rehabilitation programs or who have completed a supervised rehabilitation program and who no longer use drugs. There are rare exceptions. See, for instance, Zenor v. El Paso Healthcare System, Ltd. 176 F.3d 847 (5th Cir. 1999) where a pharmacist with an addiction to cocaine was not allowed to return to his job, because of the presence of medical-grade cocaine.

In addition, these laws also extend their protection to persons who are "erroneously regarded" as using illegal drugs, when in fact they do not. Therefore, statements regarding such individuals may rise to the level of defamation and termination may result in a suit for wrongful termination. In Bodah v. Lakeville Motor Express, 663 N.W. 2d 550 (2003), the court used a three part test to determine if there had been an invasion of privacy by an employer: 1. The employer publicized some aspect of the employee's life; 2.The information disclosed was not of a legitimate concern to the public; and 3.The disclosure would be offensive to a reasonable person.

As long as the disclosure by an employer meets these three requirements, the plaintiff probably has sufficient evidence to present his or her case to the jury.

Defamation: Defamation generally is defined as the communication of an untrue statement about an individual that harms the reputation of the individual, exposing the recipient to "hatred, ridicule or contempt." Defamation may be either written (libel) or slander (spoken). The usual examples of defamation in the employment context include an employer knowingly making false statements to one or more employees while attempting to make an example of the terminated employee; or an employer intentionally making false statements to a

prospective employer with the intention of harming the discharged employee. In California this may also violate California Labor Code Sec. 1050 and make the employer liable for treble damages.

The courts tend to treat slander and libel differently. A defamatory spoken statement has a transitory quality, while the same written defamation has permanence to it, although modern communications technology may tend to blur the difference between the two. Because the issue of opinion may be critical in the area of defamation, a court may hold that an opinion is defamatory only if it implies a statement of fact. For instance, in Sagan v. Apple Computer, Inc., 874 F.Supp. 1072 (C.D. Cal. 1994), the plaintiff objected to the code name for a planned computer. In response, the defendant changed the code name from "Carl Sagan" to "Butt Head Astronomer." An offended Sagan then sued. The court found in favor of the defendant, Apple Computer. However, in Flamm v. American Association of University Women, 201 F.3d 144, (2d Cir. 2000), an entry in a directory described one attorney, among other unflattering terms, as an "ambulance chaser." The trial court's dismissal of the lawsuit filed by the attorney was reversed on appeal. The appellate court noted that the phrase "ambulance chaser" was not "rhetorical hyperbole" since it appeared in a purely fact-laden directory. Because the phrase could reasonably be interpreted to imply that the attorney had engaged in unethical solicitation, and such a statement could be proved as either true or false, dismissal was improper.

RECOMMENDATIONS FOR HR PRACTICE

Safeguards exist for avoiding the aforementioned issues. For example, HR professionals may work in tandem with their legal counsel to ensure that the employee handbook contains no language that can be used to establish the existence of a contractual employment relationship. Policies on discussions of employee performance and letters of reference can be created and circulated to all employees to limit the propensity for defamation. Adverse employment actions can be reviewed to ensure that terminations are not at odds with employment law or public policy, thus minimizing the potential for wrongful termination as well as additional charges related to emotional distress. This legal-centric approach has gained popularity in organizations that wish to protect their interests and minimize uncertainty created by erosion of the employment-at-will doctrine (Roehling & Wright, 2004). However, making at-will policies more salient and adopting a legal-centric approach may be inconsistent with the organization's mission and values, may negatively impact applicants' perceptions of the workplace and negatively affect recruitment initiatives, and may be viewed particularly by minority candidates as the organization reserving its right to discriminate in termination decisions since employment is "at will" (Roehling & Wright, 2004).

We feel that legal safeguards are useful, but that a more effective approach, and one which produces fewer negative perceptions, is to create an environment of involvement and fairness in the organization. Reducing the likelihood that an employer will need to terminate an employee reduces the likelihood that an employer will be sued for wrongful termination. Furthermore, while an employer that shows a concern with fairness in the discipline/termination process may be viewed by a court as having abandoned employment-at-will, employees' perceptions of fairness may be a significant factor affecting an employee's likelihood of filing a lawsuit (Gillespie & Parry, 2006). We offer examples of two areas in which employers can promote more positive employee perceptions: (1) dealing with infractions through progressive discipline and/or positive discipline so as to change behavior and minimize the likelihood that termination will be necessary; and (2) creating a positive and supportive work environment. Both involve carefully managing the psychological contract between the employee and the employer.

Psychological Contract: Employees and employers each hold beliefs of the employment relationship known as the psychological contract (Robinson & Rousseau, 1994). This contract is an unwritten agreement that specifies the contributions that employees believe they owe their employer and the outcomes they perceive the employer owes them in return (Rousseau, 2004). Both parties create, modify, and interpret the contract based on the other's implied or expressed promises (Rousseau, 2004). Furthermore, as part of the psychological contract, individual employees may establish with their employers unique arrangements known as idiosyncratic deals or i-deals (Rousseau, Ho, & Greenberg, 2006). I-deals are ideal to the employee because his or her needs are met, such as an engineering employee given additional work time to pursue personal engineering projects, while the arrangement may be ideal to the employer in that the employee who is coveted for her unique knowledge or difficult-to-replace skill set is more easily attracted and retained and is less likely to turnover.

Psychological contracts with shared mutual expectations result in more positive attitudes and better performance (Rousseau, 2004). However, a violation of this implied contract may result in negative employee attitudes (e.g., anger) and behaviors, including turnover (Rousseau, 2004). Thus, in responding to inappropriate workplace behavior with discipline or in cultivating a positive workplace environment, organizational members can be better able to circumvent negative outcomes by attending to employees' expectations of the psychological contract.

Progressive Discipline: Hiring an employee "at-will" causes managers a great deal of confusion since it typically does not allow exactly what it implies: That managers can terminate employees at any time without reason or prior notice. Working "at-will" also may confuse employees since they may be unclear as to

when they can be terminated. When there's a wrongful discharge lawsuit, the company's defense attorneys may argue the "at-will affirmative defense," however there are many exceptions to the at-will employment rule that a plaintiff attorney can argue that the company terminated or imposed a lesser punishment for any of the following reasons:

1. Discrimination against the employee on the based on one the Title VII of the Civil Rights Act of 1964 (age, race, sex, sexual orientation, or national origin)
2. Public policy exceptions: The company retaliated against an employee who filed a workers' compensation claim, for whistle-blowing, for refusing to commit an unlawful act on the employer's behalf, or for protesting unsafe working conditions.
3. The company discharged a long-term employee who was due some type of financial benefit such as vesting or pension plan. This goes to the issue of an implied covenant of good faith and fair dealing.
4. The company failed to follow documented verbal promises made during the interview or promises made in the employee handbook. These are implied contract exceptions.
5. Attendance in, or completion of, an alcohol or drug abuse rehabilitation program.
6. Union Membership, organizational activities, or other "protected, concerted activities.
7. Disclosure of illiteracy
8. Refusal to submit to a polygraph test
9. Military service
10. Pregnancy, childbirth, or related medical conditions
11. Wage garnishment
12. Filing a petition for bankruptcy
13. Infection with the HIV virus or the development of AIDS-related symptoms

Because it's impossible to know what angle the plaintiff attorney may pursue in a particular wrongful termination case at some point in the future, it is important to be prepared to show "good cause" regardless of the existence of an at-will employment relationship. And since, "for cause" termination is the opposite of employment at-will in that employers must show a good reason for termination, in addition an employer must demonstrate that the employee received "due process".

A key component of due process is a progressive discipline system. Progressive discipline is a series of attempts employers make to improve the under-performing employees via verbal and written warnings. A good progressive discipline system can be seen as a part of successful performance management system and may be viewed as a means for providing employees with fair treatment. Although it seems that we have a dichotomy between employment-at-will and progressive discipline, it is actually not one or the

other—it is both. Conservatively and proactively, assuming the judge throws out the employment-at-will defense, an employer may then demonstrate good cause for a termination. Using a documented progressive discipline system is a critical component that human resources professionals can utilize to proactively minimize litigation related to wrongful termination cases.

Organizations should outline the types of behaviors that are considered egregious conduct infractions that are not subject to progressive discipline. For example stealing, embezzling, or workplace violence would not require three warnings before termination is justified (Falcone, 2002). In general, progressive discipline policies and practices in companies should include the following three steps: 1. a verbal correction meeting, 2. a written warning, and 3. a final written warning before termination.

Human resource professionals can proactively minimize the likelihood of a wrongful termination lawsuit by training managers to properly utilize progressive discipline techniques. Paterson and Deblieux (2000) recommend training managers to use the EFOSA (Expectations, Facts, Objectives, Solutions, and Action) method for documenting employee performance and discipline issues. First an organization should clarify employee expectations via a rule, policy, or performance standard. Expectations can be communicated via employee handbooks, meeting notes, safety training, e-mails, website information, and posted signs. Second, the facts of situation need to be documented. Facts can include Rudyard Kipling's 5Ws and 1H: the what, when why, who, where, and how of a situation. These should not include emotions, suppositions, or assumptions. Instead clear, objective facts should be documented via a method such as a critical incidents diary. Before taking disciplinary action five basic kinds of facts should be considered: 1. The employee's specific actions or behaviors such as high absenteeism, tardiness, missing deadlines, etc. 2. Prior related company actions such as training, coaching, prior discipline, established performance standards/rule. 3. Any significant effects of the employee's behavior on the company such as customer complaints. 4. Statements from third-parties such as customer complaints or police reports. 5. Responses from the employee when confronted about performance (behaviors).

After compiling information on these five basic kinds of facts, then the supervisor should communicate specific objectives, solutions, and actions needed to improve. Specifically, properly written objectives specifically identifying what the employee needs to do in measurable terms are important. Statements such as "your performance must improve immediately" are not specific enough. Specific objectives help to insure that the employee understands exactly what is expected. Next, the supervisor should document solutions that employees can use to achieve the objectives set by the supervisor. This gives the employee a specific way to meet the performance objective and demonstrates that the supervisor is trying to provide a clear path for the employee to succeed. This helps to position

the manager as trainer or coach who is proactively trying to help subordinates to improve performance. Solutions can include training at a local community college along with tuition reimbursement or providing specific resources such as an instruction manual or useful equipment such as a tape recorder.

Finally, actions need to be documented. The employee needs to be told what the supervisor is doing about the performance problem and what the consequences of not meeting the objectives will be. An action could be stated as follows: "If you fail to meet listed performance objectives within a specified period of time, you will be subject to further disciplinary action up to and including termination. This is a written warning that will be placed in your personnel file." (Deblieux, 2003)

Other components of progressive discipline may include coaching/counseling; verbal reprimand/reminder; written reprimand/reminder, time off with/without pay, or probation; and termination. In addition, employees should be given an opportunity to respond. Each employee should get the chance to tell her side of the story before disciplinary action is taken.

Consistent treatment of employees using theses guidelines is important. However, the discipline needs to appropriate to the offense. And, a caveat should include recognizing the idiosyncratic deals that employees make with their employer. This is especially true for employees who have knowledge, skills, or experience that are highly valued by the organization. Employers may integrate the expectations of due process and progressive discipline into employees' psychological contracts so that expectations will be met in the event that performance issues are encountered. The met expectations will decrease the likelihood of termination resulting in a wrongful termination suit.

An alternative to progressive discipline is positive discipline. Positive discipline is a process in which the employee takes ownership of the problem and engages in problem solving with the supervisor in order to resolve the problem (Redeker, 1985). Rather than punishment, positive discipline uses encouragement as a method for helping the employee resolve problems encountered early. As with progressive discipline, we recognize that these expectations should be communicated to employees so that they become a part of the psychological contract and are not surprising to the employee. Furthermore, we expect that employees who are given an opportunity to solve their performance problems would be less likely to feel that they had been treated unfairly and thus less likely to file a wrongful termination claim should their performance fail to improve and they are terminated.

Supportive Work Environment: Although we recognize the need for legal-centric verbiage and fair processes for addressing employee discipline issues, we support the old adage that an ounce of prevention is worth a pound of cure. In

particular, we assert that creating a positive, supportive work environment may help the employer avoid some of the mistrust and negative behaviors that result in termination and wrongful termination suits. Thus, we suggest that proactively implementing employee-centered initiatives can help to create a positive environment.

Research substantiates the benefits of creating a supportive work environment. Perceived organizational support (POS) is an employee's perception that the organization cares about his or her well-being and values his or her work (Eisenberger, Huntington, Hutchison, & Sowa, 1986). Employees with positive POS tend to feel more obligated to the organization, identify more strongly with the organization, and feel that performance is rewarded. Furthermore, they tend to have more positive attitudes about the organization, be more committed, and perform at a higher level (Rhoades & Eisenberger, 2002).

Three categories of variables affect POS: fairness, supervisor support, and organizational rewards and job conditions (Rhoades & Eisenberger, 2002). Fairness in processes, such as those we identified in progressive discipline earlier (e.g., formal rules, employee participation) increase POS (Rhoades & Eisenberger, 2002). Furthermore, HR practices that offer rewards (e.g., recognition, pay, promotions), and that improve job conditions (e.g., training opportunities) increase POS (Rhoades & Eisenberger, 2002). Additionally growth opportunities (Allen, Shore, & Griffeth, 2003), skill development (Tansky & Cohen, 2001), and career development (Meyer & Smith, 2000) correlate positively with POS. A key consideration is the extent to which the practice is viewed as discretionary; HR practices are important for developing individual POS to the extent that the practices signal that the employer is investing in the employee or recognizing employee contributions (Allen et al., 2003). This conceptualization fits well with the concept of i-deals (Rousseau et al., 2006). In addition to processes and initiatives, the interaction with the supervisor and the perceived support received from him / her should not be underestimated. Interestingly, retention efforts designed to decrease voluntary turnover may fit into the category of "organizational rewards and job conditions" and do double duty not only for increasing retention, but in cultivating POS and decreasing the likelihood of termination and subsequent wrongful termination claims. In essence, these initiatives may provide the HR profession with an effective "offense" against wrongful termination cases.

According to one Society of Human Resource Management (SHRM) survey which included HR professionals from 473 organizations, the top reasons for voluntary turnover and the percentage of organizations citing the reason were: pursuit of career opportunities elsewhere (78%), better pay and benefits package (65%), poor management (21%), relocation spouse/partner (18%), return to school (15%), retirement (14%), job security fears (10%), poor relationships with coworkers (10%), child care issues (8%), and perceived discriminatory treatment

(5%) (SHRM, 2000). Survey respondents named higher salaries elsewhere, lack of career development opportunities, and the rising acceptability of job hopping as the biggest threats to employee retention. Attention to supportive work practices likely would have stymied some of this voluntary turnover.

Table 1 illustrates the effectiveness and usage of retention initiatives used by surveyed companies (SHRM, 2000), Interestingly, some of the more effective initiatives are those that are discretionary and could be integrated into an i-deal; this supports the POS research suggesting that discretionary practices that are more individualized and supportive promote perceptions of organizational support for individuals (Allen et al., 2003).

Table 1. Retention Initiatives: Usage and Effectiveness

		Offer the Initiative?		
	Effectiveness Average	**Yes**	**No**	**Plan to**
1. Health care benefits	1.96	94%	3%	----
2. Competitive salaries	2.02	83%	8%	5%
3. Competitive salary increases	2.05	75%	15%	6%
4. Competitive vacation/holidays	2.09	92%	4%	1%
5. Regular salary reviews	2.11	89%	6%	4%
6. Defined contribution retirement	2.21	73%	21%	2%
7. Paid personal time off	2.21	75%	20%	2%
8. Flexible work schedules	2.25	60%	32%	4%
9. Training and development	2.26	88%	4%	4%
10. Open door policy	2.32	93%	3%	2%
11. New hire orientation	2.32	92%	2%	3%
12. Defined benefit plan	2.32	52%	41%	2%
13. Child care paid/on site	2.4	3%	89%	5%
14. Early eligibility for benefits	2.41	40%	54%	2%
15. Workplace location	2.41	59%	23%	----
16. Tuition reimbursement	2.42	77%	17%	3%
17. Retention bonuses	2.43	22%	71%	4%
18. Child care subsidies	2.46	8%	84%	4%
19. Spot cash	2.48	43%	47%	6%
20. Stock options	2.53	27%	66%	3%
21. Succession planning	2.54	32%	46%	16%
22. Non- or low-cash rewards	2.56	63%	25%	8%
23. Casual dress	2.59	76%	18%	1%
24. 360 degree feedback	2.6	31%	51%	14%
25. On-site parking	2.64	86%	10%	1%
26. Domestic partner benefits	2.66	12%	74%	4%
27. Eldercare subsidies	2.66	4%	89%	2%
28. Attitude surveys/focus groups	2.67	46%	41%	10%
29. Alternative dispute resolution	2.67	31%	60%	5%
30. Transportation subsidies	2.74	16%	75%	4%

31. Fitness facilities	2.75	26%	62%	8%
32. Severance package	2.77	56%	38%	1%
33. Sabbaticals	2.78	12%	82%	2%
34. Telecommuting	2.79	26%	64%	7%
35. Non-compete agreements	2.84	46%	48%	----
36. Concierge services	2.92	5%	87%	4%

*Scale: 1=very effective; 5= not effective at all **Data in rows may not add up to 100% due to missing data*** SHRM, Retention Practices Survey (2000); Heneman & Judge (2006)

Other surveys provide consistent results with those found in the SHRM survey. For example, a World at Work Survey of HR professionals in 2,554 organizations indicated the top 10 retention initiatives based on percentage used were (Parus & Handel, 2000) the following: market adjustment/base salary increase (62%); hiring bonus (60%); work environment (flexible work schedules, compressed work weeks, telecommuting, relaxed dress code (49%); retention bonus (28%) ; promotion and career development opportunities (27%); paying above market (24%); Special training and education opportunities (22%); individual spot bonuses (22%); stock programs (19%); and project milestone completion bonuses (15%).

Furthermore, one source that human resource professionals can utilize is the Fortune magazine report on the "The Best 100 Companies to Work For". Organizations are scored based on employees' responses to the Great Place to Work Trust Index survey. Comments indicate what make organizations stand out to employees. Some comments have included the following: good pay, good retirement (employer matching), beliefs by employees that they are respected, and beliefs in management honesty. This is an excellent way for human resource professionals to proactively seek out positive role models. Other studies have identified the effectiveness of commitment-oriented staffing practices including programs that foster employee participation, affiliation or social relationships, clear organizational communication, attitude assessments, validated selection strategies, formal job analysis procedures, incentive compensation, and training programs in reducing turnover (Arthur, 1994; Huselid, 1995).

CONCLUSION

Human resource professionals can proactively minimize the threat of litigation from wrongful termination cases by documenting a fair, progressive discipline. A good progressive discipline system provides constructive guidance to employees so that they can improve and it gives some protection to the organization in the event someone does need to be terminated and tries to file a wrongful termination suit. Initiatives for creating a supportive work environment

can also be used by HR professionals to proactively appeal to employees and demonstrate a concern with satisfying and retaining employees.

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