

## Terminating “At-Will” Employment

By Rebecca Boartfield and Tim Twigg

Ouch!

One of your former employees has filed a wrongful termination claim against you. Your response? “How can that be? I’m an ‘at-will’ employer and can do anything I want. I simply exercised my rights!”

No employer ever wants to have to deal with a wrongful termination charge during the course of his/her career. After all, managing a profitable practice is difficult enough without the added burden of fighting lawsuits. Chances are many of you reading this article have unfortunately already gone down the labor board or lawsuit road before, therefore, you know how costly it can be, both financially and emotionally. Even if you win, it feels as though you’ve lost. The amount of time, energy and money spent dealing with this situation could easily have been put to better use elsewhere in the practice.

While it may be true that employment is “at-will,” today, firing simply based on “at-will” can create legal liabilities if the employer is not aware of the federal, state, or sometimes city/county employment laws that supersede “at-will.” “At-will” is a common law principle that allows the employment relationship to be terminated by either party at any time, with or without notice and with or without reason. Naturally, most dentists conclude that they can take any action they choose without any repercussions. This is true provided there is no law or contract to the contrary. Today there are numerous laws that employers must consider. These laws have been put in place to protect employees in the workplace, and set up what is commonly referred to as “protected classes” and limit, in many ways, the “at-will” prerogative.

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On a federal level, the following laws must be taken into consideration:

**Title VII of the Civil Rights Act of 1964:** prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.

**Pregnancy Discrimination Act:** prohibits discrimination against women affected by pregnancy, childbirth, or related medical conditions.

**Age Discrimination in Employment Act:** prohibits discrimination against persons over age 40 and restricts mandatory retirement requirements, except where age is a bona fide occupational qualification.

**American with Disabilities Act:** requires employer accommodations for individuals with disabilities.

State and city/county laws recognize the federal regulations and will often enact additional or stricter laws. For example, several states, cities or counties throughout the U.S. ban discrimination based on sexual orientation. The stricter laws often affect broad numbers of employers. For example, Title VII applies to employers with 15 or more employees, but many states have the same discrimination law which applies to employers with 1 or more employees.

In addition to anti-discrimination laws, employees are protected by other “common-law” exceptions to “at-will.” Public policy is a common-law exception which stipulates that employees who are fulfilling legal obligations or performing actions considered to be socially useful cannot

be fired. Examples of this are serving on jury duty, filing for workers' compensation benefits or whistle-blowing.

Oftentimes dentists will inadvertently and unknowingly undermine their "at-will" prerogative by creating contracts with their employees. An "implied contract" is an agreement that is implied from circumstances even though there may not have been an expressed agreement between the employer and the employee. An example of this is poorly written policy manuals that have progressive discipline policies or promises of termination only for "just cause." Enforceability of a contract is not limited to written documents. Contracts with employees can be created through verbal communication that become "express oral contracts." Telling the employee that "employment will continue as long as the performance is adequate or satisfactory or as long as the employee does the job" are both examples of this type of contract. Furthermore, language such as probationary period, permanent employee, long-term employee, career employee, tenure, etc., both verbally or in writing, may create a contract and undermine "at-will" prerogatives. An employee also has the ability to freely pursue their rights granted by a particular statute and not be retaliated against. For example, if an employee filed a complaint under Title VII, the employer could not take adverse action with that employee based on that reason alone.

The original intention of "at-will" has slowly been eroded by all of the above and an increasingly litigious society. Terminating an employee can open up a floodgate of potential problems. While there is no sure-fire way to eliminate all risks, there are steps that can be taken to significantly reduce exposure. Carefully review your personnel policy manual. Ensure that you have and adhere to an "Equal Opportunity Employer" statement that includes all areas of discrimination laws as mentioned above. This should extend into all areas of the employment relationship, including promotions, wages, benefits, and all other privileges, terms, and conditions of employment. Include an "at-will" statement in all applicable places throughout the manual, and delete all language or policies that restrict or may be implied to restrict your rights to discharge an employee "at-will." The "at-will" language should be clearly outlined in other documents, such as your personnel forms. Check your employment application or other employee agreement documents where it would be pertinent to include "at-will" and equal opportunity employer statements.

If you haven't done so already, create well-written job descriptions for each position in the practice that comply with the requirements of the Americans with Disabilities Act. These job descriptions outline the employee's essential job functions and physical and environmental demands of the job. Job descriptions that are written correctly will help support employment-related decisions that are made.

The bottom line is effective staff management and good documentation. A rule of thumb is that a termination for lack of performance should never come as a surprise to an employee. Adhering to this rule requires communication between doctor and staff.

An essential key for supporting good staff management is performance reviews. Evaluating job performance, providing employees with constructive feedback, and jointly discussing and addressing areas for improvement are essential for a staff person's success. Be factual and honest when writing reviews; a true picture of each person's performance is easier to justify if questioned as to why a certain person was discharged and another was not.

Prior to issuing any disciplinary action or terminating an employee for poor performance, ask yourself if you have given the employee everything s/he needs to be successful. For example: Has the communication about job responsibilities been clear? Did you provide proper training? Was

the training adequate? Were the expectations clearly defined and communicated? If you answered “no” to any of these, re-evaluate how you will move forward. Fill in the missing pieces prior to taking action against an employee for a situation that is beyond his/her control.

When needed, communicate unsatisfactory work performance issues. Furthermore, address these concerns in a timely manner. Many employers will let certain situations go figuring that “it will just resolve itself and go away.” More often than not, the situation festers and gets worse. Employees cannot make necessary improvements unless they know what is expected.

When counseling an employee for performance, it is vital that all communication, whether it is verbal or written, remain objective and purely job-related. Personal attacks and falling prey to arguments provoked by the employee both promote ill-will and can lead to possible claims of discrimination. It’s important that the employee clearly understand that this is entirely work-related and nothing more.

It is very reasonable to start with a verbal employee performance interview to go over a specific problem(s), unless the circumstances are such that it warrants more formal action and/or immediate termination. The employee should walk away from the meeting knowing that failure to improve may result in further disciplinary action. Future steps taken could be written disciplinary action, suspension or termination. This will depend entirely on how the employee responds and performs, but employees should have a reasonable opportunity to improve once the performance problems have been addressed.

Once a claim is filed with the Department of Labor, the burden of proof essentially falls on the employer to demonstrate that his/her actions were legitimate and non-discriminatory. In most cases, it comes down to the employer’s documentation.

**Follow these simple guidelines for better documentation practices:**

- Document events/situations/problems as often as necessary, which may mean daily. Stay on top of the employee’s overall performance in order to correct it and prevent a culmination of events that leads directly to firing.
- Document to manage performance, not just to “gear up” for a termination. The most important motive for documentation is to manage and direct employee conduct.
- Use documentation accumulated throughout the year to assist in writing more accurate performance evaluations.
- Document only truthful, factual and accurate information. Describe behaviors without drawing conclusions. Remove all emotion. Explain the impact on the practice. Avoid inflammatory language, exaggeration, or personal attacks.
- Documentation should be cumulative. Demonstrate through your documentation a pattern of behavior or a failure to improve.
- Document consistently with all employees.

**In Summary**

The financial and emotional impact of fighting a claim or lawsuit is substantial, win or lose. Understand and know the employment laws, and manage your practice being mindful of anything that could be considered discriminatory. Implement policies and procedures that will build a better practice and one in which employees will enjoy working. By doing this, everyone wins.