

TRICKY TERMINATIONS

What Happens When the Termination Goes Wrong

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Aviles v. Cornell Forge

Aviles files EEOC complaint for national origin discrimination.

Several days later, he is suspended but refuses to leave the premises. Has argument with supervisor, and threatens to kill himself and others with a gun. CF calls the police and has him removed.

Later, an employee reports that Aviles is sitting in his car right outside the gate. Calls the police, who ask if he is armed (they knew he had made threats and had been escorted out). Employee said he did not know.

Police show up in force and take him into custody. He is unarmed and said that he was just there to get his final paycheck.

Aviles sues saying that having him arrested was retaliation for EEOC claim.

Aviles v. Cornell Forge

7th Circuit court said:

“If an employer had to face Title VII liability for truthfully reporting to the police that a disgruntled employee had threatened a supervisor and could be armed, we might discourage employers from taking the most prudent action to protect themselves and others in the workplace.”

but:

“If the employer knew Aviles was just there to pick up his check, and that he was unarmed, then there would be a basis for finding that Cornell Forge retaliated against Aviles.”

It is a tightrope, but courts understand that

Terrible Terminations

2010: Terminated Kraft Foods employee escorted out, returns to shoot 3 co-workers, killing 2 before being captured

2010: beer distributor employee resigns rather than be fired for theft, opens fire while being escorted out and kills 9 co-workers – pistol in lunchbox

2010: Atlanta Penske employee laid off 6 months earlier returns and shoots 5, killing 2 – survivor sues Penske for \$20 million

2012: terminated employee kills co-worker and shoots 8 others outside Empire State Building

Many more examples...

“General Duty” Clause of Occupation Safety and Health Act

Section 5(a) of the Occupational Safety and Health Act, *29 USC 654*, requires that each employer:

(1) shall furnish to each of his employees employment and a place of employment which are **free from recognized hazards that are causing or are likely to cause death or serious physical harm** to his employees; and

(2) shall comply with occupational safety and health standards promulgated under this Act.

California Statutes Addressing Workplace Violence

Labor Code section 6400(a): Every employer shall furnish employment and a place of employment that is **safe and healthful** for the employees therein.

Labor Code section 6401: Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. **Every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees.**

California Statutes Addressing Workplace Violence

Labor Code section 6402: No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful.

Labor Code section 6404: No employer shall occupy or maintain any place of employment that is not safe and healthful.

California Statutes Addressing Workplace Violence

Labor Code section 6403: No employer shall fail or neglect to do any of the following:

(a) To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe.

(b) To **adopt and use methods and processes** reasonably adequate to render the employment and place of employment safe.

(c) **To do every other thing reasonably necessary to protect the life, safety, and health of employees.**

California Statutes Addressing Workplace Violence

Code of Civil Procedure section 527.8(a): Any employer, whose employee has **suffered unlawful violence or a credible threat of violence** from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, **may seek a temporary restraining order and an injunction on behalf of the employee** and, at the discretion of the court, any number of other employees at the workplace, and, if appropriate, other employees at other workplaces of the employer.

California Statutes Addressing Workplace Violence

One California court has said that:

“Labor Code section 6400 et seq. and Code of Civil Procedure section 527.8, when read together, establish an explicit public policy requiring employers to provide a safe and secure workplace, including a requirement that an employer take reasonable steps to address credible threats of violence in the workplace.”

California Statutes Addressing Workplace Violence

On the other hand, another California court has said that there is:

No “obligation to automatically fire any employee who makes a threat of violence regardless of the employee’s intent in uttering it and the actual risk to workplace safety,” however, the employer “might be required to summarily place an employee on administrative leave to fulfill its duty of providing a safe workplace where the [employer] has reasonable proof that an employee has made a credible threat of violence against a coworker....”

Tough spot for employers – what is a “credible threat of violence?”

Definition of “Credible Threat of Violence”

Code of Civil Procedure section 527.8(b)(2) says it is a “**knowing and willful statement or course of conduct** that would place a **reasonable person in fear** for his or her safety, or the safety of his or her immediate family.”

Penal Code section 139(c) says it is “a threat made with the **intent and apparent ability to carry out the threat** so as to make the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.”

Penal Code section 646.9(g) says it is a **verbal or written threat** ... made with the intent ... and ...with the apparent ability to carry out the threat...”

Penal Code section 76(c)(5) says it is a “**verbal or written threat or a threat implied by a pattern of conduct** or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat
....”

How to Fire an Employee

Pre-Termination Questions:

Is the reason for my decision completely and accurately documented, setting forth the facts and details supporting the decision?

Is there a legitimate business reason for the decision that I can fully and easily explain?

Is the decision consistent with established company policies?

Is the employee aware of the company policies?

If the decision regards a performance issue, has the employee been trained on how to perform the task correctly, and have I given the employee a chance to improve his or her performance?

How to Fire an Employee

Pre-Termination Questions:

Have my performance evaluations regarding the employee been thorough and accurate, and have I only rated the employee as good or satisfactory when he or she deserved such a rating?

Have I fully listened to and considered the employee's side of the issue?

Is my decision consistent with any similar decisions in the past, and have I checked with the personnel department and other supervisors to make certain how similar situations have been treated?

Is there any lesser discipline than what I am considering which would accomplish the same goal I am trying to achieve?

How to Fire an Employee

Pre-Termination Questions:

Is the reason for my decision completely and accurately documented, setting forth the facts and details supporting the decision?

Two minute test

How to Fire an Employee

What Should Be Said About the Reasons for Discharge?

Be honest, and make sure the employee understands. The employee may not agree with your rationale, but he or she is more likely to get angry if they think you are lying to them.

Unfortunately, many times, the only performance documentation in the employee's file will be a perfunctory evaluation that says he or she is performing satisfactorily, because the employer did not want to make the employee feel bad by writing up a poor evaluation, or because the employer did not want to take the time to do a proper evaluation.

How to Fire an Employee

Documentation:

Employers should give immediate written notice to an employee of a change in the employment relationship.

No specific form is required for a notice of termination, but the notice should be given to the employee, and a copy should be retained for the employer's records.

When a terminated employee applies for unemployment insurance, an employer should refer to the termination notice to verify the reasons for termination. The notice may serve as evidence to challenge the granting of unemployment insurance benefits.

How to Fire an Employee

Nuts and Bolts:

Have a face to face meeting

Have a witness

Take good notes

Keep it short and sweet

What if it all goes wrong?

Threat Assessment

The goal of threat assessment is to review the credibility and viability of the threat; i.e., is this threat likely to be acted upon, or is it simply “blowing off steam.”

The assessment should evaluate:

1. The exact nature and context of the threat or threatening behavior;
2. The target of the threat, if identifiable;
3. The motivation behind the threat; and
4. The apparent ability to carry out the threat.

Threat Assessment

The assessment should allow the employer to preliminarily designate the threat as either something that requires immediate intervention:

“I’ve got a gun in my locker, I’ll be back” means you **call the police**;

or one that can be dealt with by less immediate measures:

“I can’t believe you’re doing this to me” means you can try to make sure they understand.

Remember your two minute test.

Early Warning Signs of Workplace Violence

Personal Factors

Certain behavior can be seen as an indication of potential violence, including:

- Specific threats
- Increasing belligerence
- Hypersensitivity to criticism
- Fascination with weapons
- Obsession with a co-worker or supervisor
- Angry outbursts
- Extreme disorganization
- Homicidal or suicidal comments

Early Warning Signs of Workplace Violence

Workplace Factors

A number of workplace issues that can lead to increased stress and/or frustration by employees, including:

- Understaffing which leads to compulsory overtime

- Poorly defined job tasks and/or responsibilities

- Impending or recent downsizing or reorganization

- Labor disputes, ongoing collective bargaining, strikes, etc.

- High employee injury rates

- Poor management style, such as arbitrary or unexplained orders, discipline in public, inconsistent enforcement or work rules, etc.

Early Warning Signs of Workplace Violence

Domestic Violence

The following behavior may suggest possible domestic violence:

Unexplained tardiness or absences, or frequent unplanned leave

Unexplained changes in job performance, lack of concentration, anxiety

Disruptive phone calls or e-mail, or disruptive visits

Unexplained requests to be moved from public areas of the workplace

Unexplained injuries or bruises

Noticeable changes in make-up (to cover injuries/bruises)

Inappropriate clothing, such as sunglasses indoors, or a turtleneck sweater in summer

Emergency Action Plan

Many (most) employers have no on-staff security officers who are trained to properly evaluate the employer's violence risk factors. Fortunately, there are professional security experts who will evaluate your facility and recommend changes to physical layout, evacuation routes, and other security measures. Likewise, there are psychologists and counselors who are trained to help employees deal with the aftermath of an incident of workplace violence.

Most local police departments and/or fire and emergency rescue personnel will have personnel on staff who can help with an assessment of your facility and help plan for potential violence. Most agencies will even do so free of charge.

Once an employer has consulted with the appropriate experts, whether in regard to physical plant security, or otherwise, it is imperative to put a plan into place and make certain that the employees are aware of the plan. The following is a list of items that should be addressed in each such plan:

Emergency Action Plan
(Developed with Visalia Police Department)

A designated employee should have a copy of the building floor plan(s) in a secure location **outside** of the building, either in a car, a lockbox, etc., so that the police/firefighter/rescue personnel can enter the building with advance knowledge of the layout.

Make certain that at least one employee will have keys to all doors in the building, and that those keys will be available **outside** of the building in case of an emergency.

Have designated employees responsible for knowing the location of all utility shut-off valves in their area, and how to operate the valves. Those valves should also appear on the floor plan(s).

Emergency Action Plan
(Developed with Visalia Police Department)

Require all visitors to enter the premises through a designated entry point, and have them sign in and out. Never let visitors into the facility unescorted. Instruct employees to report any unescorted visitors to their supervisor.

Require employees to have some form of company identification that is plainly visible.

The employees should have a designated assembly area outside of the facility.

There should be designated personnel who are responsible for knowing who is at work on any given day and who is absent. Those people should not be required to keep track of more than approximately 10-15 employees. Obviously, existing supervisors are ideal for this, but if a particular supervisor oversees more employees than that, the employees should be broken down into smaller groups with another person who is required to know who, in that smaller group, is present.

Emergency Action Plan ***(Developed with Visalia Police Department)***

Designate a company official to make contact with arriving police, fire, or other emergency personnel. That person should be able to provide the building floor plan, the keys, and a report of any missing employees.

Instruct employees that once they have gathered outside of the building, they should not discuss the facts, as the police may well want to interview them and get their version of what happened without that version being influenced by another employee's account.

Take all threats seriously. If an employee says that he or she has been threatened, the employer ***must*** take reasonable steps to address the situation.

Do a periodic security audit of the facility, with a view toward how people could get into the facility and how the employees would get out of the facility if need be. Most local police and fire departments have personnel who are trained to help with such an audit, and as mentioned above, will do so free of charge.

Emergency Action Plan
(Developed with Visalia Police Department)

Once an employer has considered these items, and come up with an appropriate plan for the particular facility, **it is absolutely imperative to practice**, and to continue practicing the procedure on an ongoing basis. If the first time the employees attempt to evacuate the building is in the midst of an actual emergency, the likelihood of a successful evacuation is virtually non-existent. With some advance thought, planning and practice, however, an employer may well be able to help protect its employees in an emergency.

Practice

PRACTICE

PRACTICE

Questions?