

management matters

Employee Handbooks Can Result in Contractual Liability

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While they are useful tools for communicating company policies and standards of conduct, employee handbooks can give rise to liability to employees who rely on certain provisions.

Of particular concern are provisions that require employees to report wrongdoings (e.g., financial improprieties or illegal activities) and promise no retaliation against employees as a result of the reporting. An employee who makes a report and is later discharged for an unrelated reason might be able to claim breach of contract, alleging that making the report caused the firing. In addition, disciplinary procedures in a handbook can form the basis for a contractual claim. It is important, therefore, to draft handbook provisions carefully and with the knowledge that certain provisions can sometimes support a breach of contract claim.

Employment-at-Will Doctrine and Contract Exception

It is well established in New York that where employment is not for a fixed term (e.g., six months, one year, etc.), the employment relationship is "at will" and may be terminated at any time for any reason, except in contrary to statute (e.g., discrimination) or violation of the terms of an employment contract.

In *Weiner v. McGraw-Hill, Inc.* (1982),

however, New York's highest court recognized a breach of contract cause of action arising from a personnel handbook containing an express limitation on the right of discharge. In more recent cases, New York courts have focused on the element of reliance and refused to dismiss breach of contract claims where the plaintiff showed that he or she had relied on an express limitation on the right to discharge at will.

Recent Cases Uphold Breach of Contract Claims

In *Finkelstein v. Dormitory Authority of the State of New York*, the plaintiff received an employee handbook after he began his employment which promised that no employee who reported misconduct at the Dormitory Authority would be retaliated against. The plaintiff reported alleged corruption to the Authority's inspector general and was discharged shortly thereafter. The court denied the Authority's motion to set aside the jury verdict in *Finkelstein's* favor, holding that the plaintiff justifiably relied upon the promise of no retaliation in deciding to report the misconduct.

In *Schwartz v. Sephardic Community Center*, the court denied the defendant's motion for summary judgment regarding the plaintiff's breach of contract action, which was based on the center's personnel code. The code set forth specific

procedures to follow in connection with employee discipline and discharge and provided for probationary periods at the commencement of employment and after warnings regarding deficient performance. When the center discharged Schwartz, he commenced an action for breach of contract, alleging that his firing was contrary to the personnel code, pointing specifically to provisions regarding probationary periods following unsatisfactory evaluations and the use of "due process," including the need for "cumulative evidence" and hearing procedures before employment termination. Despite the fact that the personnel code did not expressly limit discharge to just cause only, the court 1) stated that the personnel manual inferentially created a procedure that the center must follow to effectuate the discharge of an employee, and 2) queried why the center created a probationary period if employment is at will.

Tips on Drafting Handbooks

In light of court decisions such as *Finkelstein* and *Schwartz*, employers should consider the following guidance when preparing employee handbooks:

- All written handbooks and policies should contain a clear disclaimer that unequivocally states that employment is at will and that nothing contained therein establishes an enforceable contract or abrogates the employer's right

to discharge at any time for any reason.

- Unless an employer is prepared to live with a contractual obligation, none of the employment policies should promise that discharge will be for just cause only.
- Any written disciplinary procedure should be flexible and should not promise that the employer will take specific steps prior to termination of employment.
- Employers should abandon the use of probationary periods of a fixed duration. Employees who are disciplined should simply be advised of the need for improvement and of the company's intention to scrutinize performance on an ongoing basis. As the court noted in *Schwartz*, probationary periods may be inconsistent with employment-at-will status: Not only do they arguably represent a fixed period of time during which employees are guaranteed their jobs, but their use implies that an employee somehow gains more job security after the probationary period ends.
- While employers may want to encourage or require employees to report wrongdoings and guarantee no retaliation for doing so (presumably, the firm's antiharassment policy has a no-retaliation provision), it is important to recognize that such a guarantee may result in contractual liability. ▀