

**University Employee Misconduct Scenario:
PRE-COMPLAINT ACTIVITY IN A
WRONGFUL DISCHARGE CLAIM:
A PLAINTIFF ATTORNEY'S PROSPECTIVE**

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PRE-COMPLAINT ACTIVITY IN A WRONGFUL DISCHARGE CLAIM
A PLAINTIFF ATTORNEY'S PROSPECTIVE

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PRE-COMPLAINT ACTIVITY
IN A WRONGFUL DISCHARGE CLAIM
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By: Joseph A. Golden

I. INTRODUCTION

A large percentage of the workers across the country seeking counsel in wrongful discharge matters are making contact with the legal profession for the first time. Some of these individuals are apprehensive, some trusting; most are wary. But these workers have no choice. The evolving body of law known as "Employee Rights" has given them a handle to the door of damages, and the plaintiff's attorneys hold the key.

This opportunity for professional growth, self-satisfaction and just compensation carries with it a monstrous responsibility to potential clients with employee rights' claims. Discharged employees have already been subjected to a wound which will heal slowly, if ever. And litigation of the issue will only serve as a continuous reminder of the fateful employment relationship. If evaluation of the available evidence establishes that the potential client's wound was self-inflicted, the victim must be the first to know.

However painful an attorney's declination of representation may be to a discharged employee, it far outweighs the extreme anxiety, expense and feeling of futility often times associated with a losing effort.

Unfortunately, few cases offer a clear indication of success or failure at the pre-complaint stage. Most require, at least, some discovery before a true evaluation can take place.

The purpose of this paper is not to offer any short cuts to the evaluation process, but to assist the practitioner in effectively accumulating and analyzing all available information at the earliest possible stage of the attorney-client relationship.

Even with this compilation completed, the practitioner will still have to make a decision to either accept or reject the case on something less than half the story.

II. PRE-INTERVIEW COMMUNICATION

Considerable time and effort can be saved by initially interviewing a potential client by telephone. We have found that upwards to half of the individuals seeking an appointment with us do not need our services immediately, if at all. Numerous inquiries concern the actions of a collective bargaining agent during the grievance process. Although an attorney may be helpful in pushing the grievance through the various levels of the grievance chain, unions rarely allow the worker to have his own representative during the grievance procedure.

Many inquiries surround claims for unpaid wages and benefits or unemployment compensation which can be claimed by the individual through federal or state agencies without the assistance of an attorney. If the claim is later contested, then the individual needs representation.

For the callers who require immediate attention, we try to do a mini-client interview. We ask the potential client what writings were associated with his employment and to round up as much documentation as possible for our initial interview. If the caller lacks access to certain documentation, often times a former fellow employee can secure the materials.

If no writings were made part of the employment relationship and the potential client is relying on his best recollection of events of harassment or unfair treatment, we ask the caller to prepare a chronological narrative.

Sometimes, the potential client's story in his own handwriting is the only basis available for deciding whether to accept or reject the case. At that point, your decision may well rest on the credibility of the story teller.

Whether the potential case rests upon written evidence or the plaintiff's testimony, the initial interview provides a sizing up exercise for both parties.

III. CLIENT INTERVIEW

A sample interview sheet in wrongful discharge matters has been included. It does provide for some answers needed to assess the viability of the potential case. It also serves as a jumping off point for further inquiry.

We make it clear to all interviewees that their case will ultimately have to withstand the scrutiny of cross examination. Better sooner than later.

Many interviews are enhanced by the presence of the potential client's spouse or a close friend. If the employee's problems have gone on for any length of time at all, he has most likely discussed them with someone close to him.

We have found on several occasions that the injured party has been so distressed by his fate that he is unable to piece together the whole story of what got him to us. A friend or spouse helps to refresh the worker's recollection. Most narratives written by married persons are a collaboration between the spouses.

Further, most Plaintiffs need moral support. Getting a feel for the spouse's attitude might help the practitioner in evaluating a potential client's willingness to engage in extensive litigation.

A. The Contractual Relationship

Before hearing or reviewing the chronological history of the employment relationship at issue, we try to focus that narrative on the elements of the potential claim. In wrongful discharge matters, the potential client is asked to concentrate on any verbal or written assurances relating to job security; his knowledge of written or verbal policy statements concerning discipline or termination; and his understanding of consistent disciplinary practices, such as progressive discipline.

The fact that the employer has a policy of "just cause" termination may not be enough to establish the contractual relationship. Unless the employee has knowledge of the existing policy prior to his termination, he cannot reasonably form any legitimate expectations or reliances from the policy. Consequently, a necessary element in the formation of an implied contract of employment is missing.^{1/}

B. Prior Work History

Numerous causes of action in this area of law stem from specific representations made to a potential employee to induce that employee to leave other employment and cast his lot with the solicitor.

^{1/} William Newman v J.C. Penney Co., unpublished opinion (6th Cir, 1984) No. 82-1918.

Evidence of satisfactory performance in a previous job solidifies the potential client's position that he would never have accepted his last employment opportunity unless it offered more potential and security than he was enjoying at the time.

Further, evidence of a long standing successful job record establishes the potential client as a valuable productive worker and may cause the potential defendant a problem in establishing how so good a worker could deteriorate so quickly.

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If a prior work record discloses an inability to maintain employment, the employee's personnel file will have to be scrutinized before any decision is made to accept the case. If the basis for the current loss of employment follows the pattern of past employers, your case just got tougher.

If the job lost was the employee's initial venture into the job market, or first after a long layoff, it may signal an inability to adjust to the changing pace of the work place. Many potential clients have acknowledged that they never understood the technology they were using, and actually feared it.

C. Probation

A period of probation is a feeling out time for both the employer and the employee. Usually, it offers no more than at will employment. We are familiar with only one employer, a Detroit area hospital, where written policy requires just cause for dismissal during probation.

However, successful completion of probation provides a good opportunity for an employer to discuss an employee's future with the company. And, depending upon the employer's policy statement regarding completion of probation, such a policy might produce a partial basis for establishing an implied contract of employment.^{2/}

^{2/} Wiskotoni v Michigan National Bank-West, 716 F2d 378, 386, 144 LRRM 2596, 2602 (6th Cir. 1983), the Court held that the following statement taken from the defendant's employee manual supported an inference that upon completion of the probationary period an employee will not be discharged except for just cause:

(continued...)

D. Wage and Promotion History

Most employees bring to the interview some evidence of their wages during the course of employment. Merit raises indicate the worker is meeting or beating company standards. If performance is the issue in the case, the more merit raises the better.

The practitioner must check the official wage records in the personnel file. We have found that many "merit" raises were actually across-the-board adjustment or cost of living payments, and not reflective of meritorious performance.

Promotions show that the worker was too good to remain in his last job. They also provide an opportune time for the employer to discuss the employee's future with the company.

E. Disciplinary Record

This is one subject of discussion which must be supplemented by written documentation. Assuming that an employment contract exists, a well documented personnel file showing repeated warnings of misconduct or substandard performance is a major deterrent to accepting the case for litigation.

If, however, the basis for dismissal centered around a specific act of wrongdoing not related to the worker's prior disciplinary record, the past record may be kept out of the case as being more prejudicial than probative. Still, the practitioner must consider the documented disciplinary record in assessing the credibility of the potential client.

F. Personal Problems

It is natural for problems at work to affect an employee's personal life, and visa versa. Consequently, a detailed history of

^{2/} (...continued)

You have been selected for a position because it was felt that you have the qualifications which in time will be of benefit both to you and to the Bank. Unless otherwise specified, you will be employed on a probationary basis for a period of three months. If it develops during that period that you are not pleased with your association or are not suited to the work of the Bank, your employment may be terminated, in mutual fairness without any other reason.

all the potential client's personal problems experienced during the employment relationship should be taken.

If the employee has received counseling, either medical or otherwise, during the employment relationship, it will be necessary to obtain written statements from the counselors involved.

Specifically, the statements should explain the cause of the employee's emotional difficulties. A cause which runs independent of the work environment could sustain the employer's decision to discharge. And even if the emotional distress was job related, that alone does not establish a valid wrongful discharge claim. It might, however, offer the potential of a worker's compensation claim.

G. Performance Evaluations

In a potential case where the basis for dismissal is poor performance, nothing is more pivotal to the pre-complaint investigation than a thorough review of the evaluation documents themselves. A history of marginal or substandard performance can rarely be overcome in a courtroom.

On the other hand, a series of above standard evaluations followed by a sudden drop in performance rating raises additional questions. Was there a change in supervision? Was there a change in the performance standards while the potential client's performance remained constant? Did something happen to the potential client which affected his ability to meet the standards of the job?

If your analysis of all available evidence fails to establish a rational basis for the employer's decision to fire and you believe that a contract of employment can be established, we would consider accepting the case for litigation.

H. Subsequent Employment or Employment Potential

Good liability goes nowhere without damages. And no client wants to invest in you if she can do just as well on her own. That makes the discharged employee's potential for new employment a significant factor in the practitioner's decision to accept or reject a good liability case. The client should be made to explore all potential job offers or opportunities before the attorney considers accepting the case.

Although subsequent employment will reduce the damage claim, it does not necessarily eliminate it completely. If a disparity in wages and benefits remains, that differential provides the base for calculating future damages.

Cases of good liability with subsequent employment and calculable future damages offer the best prospects of settlement without litigation.

IV. DOCUMENTS

After the completion of the client interview, the practitioner is better able to focus on the specific written documents needed to completely evaluate the case. Rarely will you get all that you need at this point in time. Hopefully you will get enough additional information to supplement or verify your potential client's story.

The following discussion on written documents is not meant to be exhaustive, but should give the plaintiff's attorney some idea of what to look for and where to look.

A. Employee Personnel File

A growing number of states have enacted legislation which provides an employee with access to his personnel file.^{3/} Public employees enjoy the same right under the Federal Freedom of Information Act. Consequently, the practitioner should review the potential client's personnel file before deciding to accept or decline representation.

A review of the personnel file should give you a client history of wages, performance and disciplinary action, if any. Look for patterns, either of growth or deficiency.

A long standing problem which eventually forms the basis for dismissal spells problems for the discharged employee. On the other hand, an admirable record which is inexplicably marred by a substandard performance evaluation calls into question the employer's evaluation procedure and the reasonable conduct of the evaluator. Both issues put pressure on the employer to sustain its burden of just cause for dismissal.

Because many large companies state their "at will" conditions of employment on their job applications, the personnel file will also tell you something about the employer's defense to any potential claim of wrongful discharge. If such "at will" language is present, the practitioner's evaluation of the case must focus on

^{3/} See Bullard-Plawecki Right to Know Act, MCLA §423.501 et seq.

whether subsequent writings or verbal assurances to the client neutralized the language of the job application.^{4/}

If the language has been neutralized and, therefore, a fact issue created as to the "real" policy of the employer, your lawsuit will get to the jury on the issue of contract formation, and damages. Otherwise, your client's at will status will bar recovery.

B. Policy, Practices and procedures

The best evidence in a wrongful discharge case is a company authored writing which mirrors the current case law in your jurisdiction. Generally, however, the practitioner should look for documents which 1) set out specific acts of misconduct with corresponding discipline; 2) contain language acknowledging the employer's commitment to "reasonableness" and "fairness"; and 3) indicate a career or future with the company. for those employees who "meet the standards of the job" or "do their job".

Employers differ on the issue of employee access to company policies. If the written policy is available, but was not part of the potential client's personnel file, it most likely can be acquired from a current employee of the company.

C. Records of Administrative Agencies

It is always advantageous to couple a claim for breach of an employment contract with viable tort actions which provide additional grounds for recovery, specifically damages for emotional distress. In Michigan, and other jurisdictions, the joining of such tort actions provides the only means of securing any damages outside of lost wages and benefits.

If the tort claim concerns discriminatory action, an agency decision, or better yet an agency's investigative file could give the practitioner valuable insight into the nature and potential of a client's wrongful discharge claim. Look for witness statements or some indication as to the willingness of potential witnesses to come forward. Scrutinize the employer's position to consider how a jury would react to the employer's decision to terminate. And finally, although you have used the fruits of the agency's investigation don't be influenced by the decision of the agency. Make up your own mind.

^{4/} Schipani v Ford Motor Company, 102 Mich App 606 (1981); 302 NW2d 307.

Another excellent source of information is the unemployment compensation hearing. Universally, the burden of proving disqualifying conduct rests upon the employer. As a result, the employer's basis for firing is usually outlined in its case before the state agency responsible for unemployment compensation. The ability of the practitioner to review the transcript of those proceedings as part of his evaluation procedure, or better yet to be personally involved in the hearing itself, provides an invaluable tool for judging the employer's defense and potential witnesses.

V. PRE-COMPLAINT DEMAND LETTER

Retainer letters to employers should be designed to let them know that you have investigated the matter before accepting the claim. Further, that your evaluation of the available facts discloses viable claims against the employer, and possibly agents of the employer.

We have found it both expeditious and fruitful to welcome pre-complaint meetings between opposing counsel. It gives us an opportunity to learn more about the employer's position, gather previously unavailable written material, and judge the interest of the employer in settling the matter short of litigation.

And if this meeting or series of meetings does not resolve the matter, we are better able to formulate our complaint and represent the interests of our client.

JAG\920907

INITIAL CLIENT INTERVIEW

Date:
Attorney:
Referred by:

GENERAL BACKGROUND INFORMATION

Name _____
Address _____

Telephone No. _____
Date of Birth _____
Social Security No. _____
Present Employer _____

Date of Hire _____ Salary at Hire _____
Current Salary _____

CLIENT'S COMPLAINT

Against:

Employer _____
Address _____

Telephone No. _____
Date of Hire _____
Starting Position _____ Starting Salary _____
Current Position _____ Current Salary _____
Current Status with Employer (ie, employed, discharged,
retired) _____
Nature of Dispute (client's view) _____

QUESTIONS PRESENTED TO CLIENT

Are/were you a permanent or probationary employee?

Are/were you a member of a collective bargaining unit? If yes, did you exhaust your Union remedies?

Evaluations

Does the employer have a policy or practice of giving performance evaluations?

If yes: are the evaluations randomly administered or at regular intervals;
who administers the evaluation;
are they oral or written;
is a conference scheduled to review the evaluations;
are suggestions made to improve your potential or are warnings given if poor performance is indicated.

What grading did you receive on all of your evaluations during your employment? (Excellent, Good, Fair, Poor)

Were any verbal assurances given to you regarding job security if you perform your job satisfactorily? If yes:

by whom _____
when _____

Raises/Bonuses

Have you ever received raises or bonuses? If yes, were they:

- _____ 1) as a result of evaluations (merit);
- _____ 2) across-the-board raises for all employees in your classification; or
- _____ 3) negotiated through collective bargaining

Demotions/Promotions

Were you ever passed up for promotion? If yes, state:

When _____
Classification _____
Reason _____

Were you ever promoted? If yes, state:

When _____
Classification _____
Did you receive a raise _____
Amount of raise _____

Discipline

Does the employer have a policy or practice of progressive discipline?

If yes: Do you have a copy of the policy manual?

If yes - please provide us with a copy;
If no - request a copy from your employer.

Have you ever been disciplined (reprimanded, warned, suspended, or probation)? If yes:

When _____
By whom _____
Reason _____
Outcome _____
Was it written or oral _____

(State each incident separately).

Names of persons similarly situated who were not disciplined for same offense. _____

Names of persons similarly situated who were disciplined for same offense. _____

Termination

Fired:

When were you notified _____
In writing/oral _____
By whom (who was present and who spoke, state their position with the company) _____

Reason given _____

Had you ever filed:

(1) a grievance against the employer? _____ If yes:

When _____
Reason _____

Outcome _____

(2) a complaint about your immediate supervisor? ____ If yes:

When _____
Reason _____

Outcome _____

(3) a complaint with:

Michigan Civil Rights Commission _____
Equal Employment Opportunity Commission _____
Department of Labor _____
National Labor Relations Board _____

If yes:

When _____
Reason _____

Outcome _____

(4) a worker's compensation claim? _____ If yes:

When _____
Reason _____

Outcome _____

(5) an unemployment compensation claim? _____ If yes:

When _____
Reason _____

Outcome _____

Do you currently have any claims pending against the employer? If yes:

Where _____
Status of Complaint _____

Have you spoken/written to anyone regarding your termination? If yes:

When _____
Who _____
Title, if applicable _____
Details of communication _____

Documents

Do you have records of:

- _____ salary (from hire to termination)
- _____ evaluations/correspondence re: your performance
- _____ discipline correspondence
- _____ grievance claims
- _____ complaints filed with MCDR, EEOC, DL, NLRB, MESC, LUC
- _____ termination correspondence
- _____ description of employee benefits
- _____ rule/regulations of employer
- _____ employee handbook
- _____ personnel policies/procedures manual
- _____ union contract (if applicable)

If yes, please provide us with a copy. Please request a copy of your personnel file and forward it to this office.

Possible Witnesses (include name, address, phone number)

Damages

Have you sought employment since your termination? _____

If yes:

Name of company _____

Position sought _____

Outcome _____

Have you obtained new employment? _____

If yes:

When _____

With whom (name, address) _____

Position _____

Salary _____

Benefits _____

Have you lost benefits under your new employer which you previously had prior to termination? _____ If yes, please list those benefits.

- pension _____
- profit sharing _____
- medical _____
- dental _____
- optical _____
- life insurance _____
- disability insurance _____
- holiday pay _____
- overtime pay _____
- vacation pay _____
- severance pay _____
- other _____

Are there any other financial or monetary losses? _____

Have you sought medical or psychological treatment/counseling as a result of this claim? _____ If yes:

When (first time) _____
With whom (name, address, telephone) _____

Reason _____

Medical _____ Psychological _____

Had you sought medical/psychological treatment prior to the event(s) which triggered this claim? _____ If yes, was it for problems unrelated to the claim? _____

Obtain resume or ask re: previous employment history

Marital Status _____

Number of dependents and ages _____

Was your spouse employed at the time of termination? _____

Is your spouse currently employed? _____

Possible Nature of Claim

Contract Claim:

- Wrongful discharge - Breach of Implied Contract
- Promissory Estoppel - Breach of Express Contract
- Wrongful Demotion
- Constructive Discharge
- Retaliatory Discharge

Statutory Protection:

- Title VII
- Age Discrimination in Employment Act
- Equal Pay Act
- Handicapper's Rehabilitation Act
- Teacher Tenure Act
- National Labor Relations Act
- Occupational Safety and Health Act
- Employee Retirement Income Security Act
- Railroad Safety & Liability Act
- Environmental Statutes
- Fair Labor Standards Act
- Consumer Credit Protection Act
- Unemployment Security Commission

Union Claim:

- Failure of Fair Representation
- Breach of Contract of Employment (Express/Implied)
- Discriminatory Discharge

Tort Theories:

- Intentional Interference with a Contractual Relation
- Intentional Infliction of Emotional Distress
- Loss of Consortium
- Innocent Misrepresentation
- Defamation
- Invasion of Privacy

Constitution Theories

- First Amendment
- Due Process

Recommended Action _____

Request for Narrative by Client
o Date Due _____

Time-frame attorney will get back to client regarding
acceptance/rejection of case _____

Retention Agreement
o Hourly or Contingent (%) _____

