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EMPLOYMENT CONTRACTS

Alert! Time to reexamine your disclaimer statements

by Darryl J. Lee

The Utah Court of Appeals recently overturned a trial court's decision to dismiss a former employee's claims without a trial, finding that the employer's handbook was sufficiently unclear to permit the terminated employee to take his claims to a jury. The court held that the employee presented enough evidence for a jury to conclude that the employer's handbook may have created an implied contract, thus prohibiting the employer from terminating certain employees without cause.

If employers wish to maintain a strong at-will-employment relationship, they should pay particular attention to this case and review—and, when appropriate, revise—their employee handbook and related policies and procedures to ensure they don't find themselves in the same situation as the employer in this case.

Facts

Mitch Tomlinson was employed as a customer engineer at NCR Corporation for approximately 10 years. The court reported that NCR terminated Tomlinson's employment in 2005. Following his termination, the company reported to the Salt Lake City Police Department that Tomlinson had stolen NCR's property and assaulted a manager. Tomlinson disputed the allegations, and apparently, he was never charged with any crime.

In 2009, Tomlinson sued NCR, asserting numerous claims against the company. Before the matter went to trial, the trial court agreed to dismiss the case, and Tomlinson appealed.

The Utah Court of Appeals reversed the trial court's decision on Tomlinson's claims for wrongful discharge and breach of the covenant of good faith and fair dealing. The court determined there were sufficient facts in dispute that required those claims to be tried by a jury.

Implied contract revisited

In dismissing Tomlinson's claims without a trial, the trial court found "there was no implied contract limiting the right of NCR to terminate" him. The trial court concluded that the relationship was at will and that Tomlinson hadn't presented any evidence that he and NCR had entered into an implied or express agreement that his employment could be terminated only for cause.

To prove the existence of an implied contract, an employee must make an affirmative showing that meets the requirements for an offer of a unilateral contract. That requires "a manifestation of the employer's intent that is communicated to the employee and sufficiently definite to operate as a contract provision" to the extent that the employee can reasonably believe the employer is making an offer of employment other than employment at will.

In this case, Tomlinson argued that some of NCR's policies distinguished between different classes of employees because they specifically stated that some groups of employees could be terminated at will. However, the same policies were silent on the matter as it pertained to other classes of employees. Tomlinson noted a policy that distinguished between a "core" workforce and a "workforce buffer."

In making his case, Tomlinson pointed out that the language in "Policy 422" states, "the only at-will employees are the workforce buffer." He then argued that he was a full-time employee and part of the "core" workforce. Because the company's policies talked about at-will employment with respect only to the workforce buffer, he contended that other policies required the company to take certain affirmative actions before it could terminate his "core" employment. He asserted there was sufficient evidence to create a disputed fact that required his claims to be sent to a jury.

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In agreeing with Tomlinson, the court of appeals examined the ambiguous and sometimes contradictory statements in NCR's policies and concluded that its attempt to disclaim any implied contract between it and its employees may very well have failed in some respects. The court looked at NCR's policies that specifically indicated that part-time employees are at will and found that "the Manual expressly designates tactical employees and part-time, core employees as terminable at-will, but it does not include an at-will statement directed at full-time, core employees."

The court concluded that "NCR's limitation of its at-will statement to tactical employees and a subset of core employees raises a reasonable inference that NCR intended to terminate full-time, core employees only for cause."

Progressive discipline revisited

Tomlinson also argued that NCR's policies required it to follow progressive discipline procedures before it could terminate him, even if the termination was for cause. He relied on NCR's own policies, arguing that they contained express language that required the employer to follow the policies without deviation.

For example, an NCR policy titled "Policy Prospective" specifically stated that "employees will be advised of expected levels of job performance and behaviors and will receive notification when results and behaviors fall below acceptable levels." NCR's policies also indicated that "job performance issues such as not achieving objectives, and/or not demonstrating appropriate behaviors, will result in a Performance Improvement Plan (PIP) with stated requirements for improvement."

Even though one of the policies contained a bold-face disclaimer indicating that the guidelines weren't intended to be contractual in nature, the court of appeals found that disclaimer inadequate to modify the language or otherwise create an overriding at-will-employment relationship.

The appellate court also found NCR's disclaimer—which wasn't at the beginning of the manual or, by its language, applicable to all of NCR's policies and procedures—to be inadequate to support a dismissal of Tomlinson's claims without a trial. The court concluded that "the inclusion of at-will statements limited to tactical employees and part-time employees raise[s] a reasonable inference that NCR intended to restrict its right to terminate full-time, core employees only for cause." The court continued, stating:

The Disclaimer could reasonably be interpreted as providing NCR the flexibility to forgo a written warning for severe or frequent misconduct, but affording no discretion with respect to employee performance plans. Even if NCR were free to deviate from both aspects of Policy 210,

nothing in Policy 210 indicates that NCR could also discharge a full-time, core employee who has neither engaged in misconduct nor failed to meet performance expectations.

Under those circumstances, the court ruled that a reasonable jury could find there was a contract limiting NCR's right to terminate Tomlinson based on an at-will relationship.

Covenant of good faith and fair dealing

The court of appeals also reversed the trial court's dismissal of Tomlinson's claim for breach of the covenant of good faith and fair dealing. The appellate court stated that because the good-faith covenant is inherent in any contract, if NCR's handbook is held to create an implied contract, then that implied contract would be subject to the good-faith covenant. Accordingly, Tomlinson's claims for wrongful discharge based on an implied contract and breach of the covenant of good faith were sent back for a jury trial. *Tomlinson v. NCR Corporation*, 2013 UT App. 26, January 31, 2013.

Lessons learned

This case is a stark reminder that employers must be vigilant in creating and maintaining an at-will-employment relationship with all employees. The first and most important defense to a claim of an implied contract between an employer and an employee is a clear, bold, highlighted general disclaimer at the very beginning of the employee handbook or other document. The disclaimer must be broad and all-encompassing and clearly state that nothing in the employee handbook should be construed as creating any type of implied or express contract between the employer and its employees.

In addition to a broad and conspicuous disclaimer, employers must examine the language used in their other policies and procedures, especially ones that address performance, discipline, and termination. Employers must make sure when they differentiate between classes of employees that they aren't creating unintended contract rights.

We believe NCR had no intention of carving out certain sectors of its workforce for exclusion from the general at-will-employment relationship. However, because it wasn't as vigilant as it should have been in drafting and reviewing its policies and procedures, it created distinctions and permitted a disgruntled former employee to rely on those distinctions to fashion a group of employees who might not be subject to the at-will doctrine.

While NCR still may prevail in its litigation with Tomlinson, its failure to closely monitor and refine the language in its employee handbook has (1) prolonged the litigation, (2) allowed Tomlinson to take his claims to a jury, and (3) removed one of the important arguments

that every employer should have in its arsenal when terminating employees.

This case is a clarion call for all employers to get together with their employment counsel and conduct a thorough review of their employee handbooks, manuals, and all related policies and procedures to ensure they don't fall into the same trap that NCR finds itself in now.

➔ *You can catch up on the latest court cases involving at-will employment, the covenant of good faith and fair dealing, or any other employment law topic in the subscribers' area of www.HRHero.com, the website for Utah Employment Law Letter. Just log in and use the HR Answer Engine to search for articles from our 50 Employment Law Letters. Need help? Call customer service at 800-274-6774. ❖*