

# Does “at-will” really mean anything?

HR procedures that support, not undermine,  
your at-will agreements and policy



# What you'll learn

- Things you should do to protect your school from discrimination or unemployment liability
- What you'll need to prove to avoid liability
- Language you can use to make your case and to make the job easier

# The goal: Pay people who work, not people who don't

- Facing discrimination claims or paying unemployment will mean less money for your school.
- This presentation will focus on unemployment.
  - Procedures that protect against unemployment claims also protect against discrimination.
- Unemployment is supposed to be for people who do not work “through no fault of their own.”
  - But if you have any fault, you'll lose, even if the employee is 99 percent at fault.
  - It's not the employee's fault he's lousy; it's your fault for hiring a lousy employee.

# How to protect your at-will employer status

- Even perfect policies will not protect you from poor practices or procedures.
- To terminate employment without liability, you'll need to show that the employee:
  - Did something bad enough to warrant termination
  - Knew that the action would result in termination
  - Was completely responsible for the action
- It is easier to terminate for violating policy or breaking rules, and very hard to terminate for poor performance.



# Severity

- This can be very subjective. What's a big deal to you might not seem like a big deal to a judge.
- Schools are often hurt here by reluctance to take action mid-year. You'll lose claims if you wait until June to end employment and cite actions from February. (Example of an art show.)
- The severity of behavior must be the same for all employees. You can't terminate one teacher for being late if you allow other late teachers to remain.



# Knowledge

- Employees must know that their actions could lead to their termination.
- The only thing that will save you here is clear documentation that includes the “threat” of termination.
  - Need more than a sentence in the employee handbook
  - Specific actions, tied to a specific consequence for a specific individual
  - Need employees’ signature (or of a witness) to show knowledge



# Culpability

- Only actions that are completely within employee's control are valid reasons for termination.
- That can make it hard to terminate teachers
  - Is student behavior within teachers' control?
  - What about student achievement?
  - Any action regarding employee discipline should focus exclusively on the employee's behavior. "Ms. Teacher failed to correct behavior according to policy" instead of "Her students are constantly noisy in class."
- Resignation example



# What the DWS recommends

- Screen applicants to be sure they are properly suited for the work.
- Have clear written policy and rules concerning employee conduct at work.
- Monitor new employees' progress carefully, especially during their probationary period. **An employer will be liable for benefit costs of an employee who was separated because he was unable to perform the necessary work and meet minimum job performance standards.**
- Keep accurate records of attendance, tardiness and all warnings given. (LF: with their signature)
- Do not condone violations of rules. Be consistent in taking disciplinary actions against employees who violate your work rules.
- Be specific in providing separation explanations .



# Documentation

- Any time you talk about an action that, if continued, could lead to discipline, formalize it.
  - Develop a standard form, if you haven't already
  - Be specific. Cite specific examples of specific behavior that violate specific policy and has specific consequences for the school.
  - Reestablish the standard and get commitment from employee to meet it completely.
  - Name specific consequences, including termination of employment.



# Examples

- From DWS:
  - “Employee was absent on May 2 and May 3, and did not call in, and was aware of company policy on reporting time off. By his failing to report for work we were left shorthanded and had to find additional help to meet our production goals on those days,” rather than merely reporting “absenteeism.” Make sure you put down all the facts.



# My example

## **Description of Infraction:**

Over the course of the last three days, Mr. Teacher has made inappropriate physical contact with students and has used inappropriate language in violation of school policy. (See section 5.2a of Employee Handbook and Mr. Teacher's signed acknowledgement of receipt.) On 10/17 He pulled one student out of class by the ear; On 10/18 he poked another student in the chest; He also used profanity audible to students in class. Such behavior interferes with the learning process and undermines parent and student confidence in Charter Academy.

## **Plan for Improvement:**

Mr. Teacher will:

- Refrain from using physical contact when disciplining students or managing behavior
- Refrain from using profanity in students' presence
- While at school or school sponsored events, treat all students consistently and professionally.

## **Consequences of Further Incidents:**

Further incidents of this kind may result in any or all of the following:

- Unpaid suspension from work
- Change in assignment
- Other disciplinary action up to and including termination of employment



# Language—how it can hurt

- Be careful that the language you use (in conversation or in writing) does not open you to claims or liability
  - Never create an expectation of continued employment (“Next year we expect your performance to improve.”)
  - Never apologize or make excuses (“I’m sorry this isn’t working out.” or “Although teacher has several IEP students, her performance needs to improve.”)
  - Focus on the specific behavior, not reasons for it. You need to show Severity—damage to the school—and whether someone is always late because they are lazy, have a drinking problem, or an ailing mother, the effect on the school is the same.



# Language—how it can help

- Language in early documentation can help show employee responsibility and ease the difficulty of the situation. Some suggestions:
  - “This is now your chance to show how well you can handle situations like this.”
  - “I’ve written all this down so we can all be sure that there is no misunderstanding. Here you know exactly what the school expects of you, and this is an opportunity for you to rise to the occasion.”
  - “We need to see some changes in your classroom. This is your chance to make those changes. If you aren’t able to make those changes, then the school will need to make a change.”



# Wrapping up

- To protect your school from unemployment or discrimination liability, you'll need:
  - Solid written rules or policy
  - A trail of documentation that shows an employee knew that the bad thing she did could result in termination
  - Consistency in how you treat employees and infractions
  - Language that protects the school