



TIP #4: CONSISTENT APPLICATION OF EMPLOYMENT POLICIES Murphy Austin Adams Schoenfeld LLP Labor & Employment Law Team

Develop and Maintain a Thorough Policy Handbook and Apply Policies Consistently in Like Situations.

Although not specifically required to do so by law, many employers wisely choose to draft and implement workplace policies for the benefit of their employees and supervisors. Indeed, it is not uncommon for employers to spend large amounts of time and money to ensure that they have the most up-to-date, thorough and clear policies possible in their handbook. Initially, it would seem that this is time and money well spent. A well drafted handbook can give employees notice of everything from employer expectations to disciplinary procedures. It also allows employers and supervisors to point to one central authority when justifying employment decisions. In fact, these policies can be invaluable when defending against employee claims of unlawful conduct. Employers often times defeat claims of discrimination and retaliation by noting that the contentious employment action was required by a neutral handbook policy which is consistently applied in like situations. Many court decisions demonstrate the effectiveness of this defense.

Ashley v. Southern Tool Shows that Consistent Policy Application Protects Employer Practices.

In *Ashley v. Southern Tool, Inc.* (N.D. Ala. 2002) 201 F.Supp.2d 1158 a 61 year old employee was fired for excess absenteeism. Pursuant to the employer's policies, the employee then appealed the termination decision. However, that appeal was later denied after being considered by a single supervisor. Thereafter, the employee sued for age discrimination and alleged that the employer's assertion that it was simply following policy was pretextual since her appeal should have been considered by a committee instead of a single person. Yet the Court rejected this argument because the employer consistently allowed one person to grant and/or deny appeals under its policy. Accordingly, the fact that the appeal was considered by a single supervisor did not demonstrate that the termination decision was motivated by the employee's age.

Griesbaum v. Aventis Shows How Consistency Protects Against Wrongful Termination Claims.

Another demonstrative case is *Griesbaum v. Aventis Pharmaceuticals* (3rd Cir. 2007) 2007 WL 4480624. There, the employee initiated a leave of absence after he was injured in a car accident. Thereafter, the employee filed a



Employment Policy Effectiveness can only be achieved through Uniform Policy Application.

workers compensation claim. However, after a year of leave, the employee was fired pursuant to an employment policy which did not allow absences for more than 365 consecutive days. The employee then filed a lawsuit and alleged that his employer subjected him to unlawful retaliation since he had filed the workers compensation claim. The Court once again rejected this claim because the employer consistently terminated the employment of workers who violated this policy.

Periodic Application of Policies Makes Employers Vulnerable to Claims of Selective Enforcement.

Each of these cases demonstrates how a uniformly applied policy can be used to successfully defeat employee lawsuits. However, the opposite can often prove to be true when a policy is only periodically applied. In these circumstances, the employee is able to argue that the policy was only selectively enforced when the employer wanted to disguise its unlawful motive. In other



MURPHY AUSTIN
ADAMS SCHOENFELD LLP

304 "S" Street
Sacramento, CA 95811
916/446-2300
Facsimile: 916/503-4000
murphyaustin.com

Please be assured that we make every effort to make certain that the information contained in this article is current at the time the article was prepared. Because laws and legislation are constantly changing, please contact us if you are unsure whether this material is still current. Nothing contained herein is meant to be legal advice. Please contact us to answer any questions you may have.

words, "pretext can be shown by the inconsistent application of employer policy." *Trent v. Valley Elec. Assn.* (9th Cir. 1997) 111 F.3d 138 [unpublished table decision].

Curry v. Menard Demonstrates How Inconsistent Policy Application is Problematic for Employers.

In *Curry v. Menard, Inc.* (7th Cir. 2001) 270 F.3d 473 the employer had a policy which said that cashiers would be terminated if the money in their register varied from the master computer amount on three separate occasions. Pursuant to this policy, a black employee had her employment terminated but then filed a lawsuit for race discrimination. The employer argued that it was simply following company policy. However, the Court rejected the employer's defense since the evidence indicated that at least two other non-black employees violated this policy and were not terminated.

Greenway v. Buffalo Hilton Underscores the Idea that Inconsistently Applied Policies Make Employers Vulnerable to Lawsuits.

The employee in *Greenway v. Buffalo Hilton Hotel* (2nd Cir. 1998) 143 F.3d 47 was fired after he received four disciplinary acts while working as a bartender. He later alleged in his lawsuit that he was being subjected to disability discrimination since he had HIV. On the other hand, the employer noted that under its employment policies, employees with four disciplinary acts were to be fired. However, the evidence demonstrated that similarly situated employees with upwards of 11 disciplinary acts were not terminated despite the policy. Accordingly, the jury rejected the employer's argument and awarded the employee \$1.4 million (although later reduced on appeal).

Employment Policy Effectiveness can *only* be achieved through Uniform Policy Application.

As the foregoing discussion indicates, employment policies can be used by employers as a shield in litigation if consistently applied. However, when the employer periodically ignores their policies or only selectively applies them, the only beneficiary is the employee/plaintiff.

Therefore, the effectiveness and true value of employment policies can only be realized if the employer consistently and uniformly applies them. It is only then that the employer can correctly say that it was just following policy.

Update Policies Regularly to Reflect Recent Law Changes such as the Family and Medical Leave Act.

Finally, employers who consistently follow their own policies still risk liability if they are applying out-of-date rules. Employment law can often change from year to year and therefore make employment policies ineffective or even unlawful. It is therefore essential for employers to regularly update their policies. For instance, leave policies should be updated to reflect the recent changes made to the Family and Medical Leave Act. Under that statute, qualifying employers are now required in certain circumstances to provide employees up to 26 weeks of leave to care for family members in the military who are suffering from a serious injury or illness. The law has also been change to allow qualified employees 12 weeks of leave when certain family members are deployed for military purposes. Employers making changes such as these to their policies ensure that their rules remain relevant and effective.

Accordingly, when drafting and/or reviewing you employment policies, keep the following factors in mind:

- Policies should be neutral and not distinguish between groups (i.e. race, sex, religion).
- Consistently apply all policies to all employees.
- Make sure that policies reflect current law.

If you have any further questions or seek assistance in applying your employment policies, please feel free to contact the Murphy Austin Adams Schoenfeld LLP Labor Department.



MURPHY AUSTIN
ADAMS SCHOENFELD LLP

304 "S" Street
Sacramento, CA 95811
916/446-2300
Facsimile: 916/503-4000
murphyaustin.com

Please be assured that we make every effort to make certain that the information contained in this article is current at the time the article was prepared. Because laws and legislation are constantly changing, please contact us if you are unsure whether this material is still current. Nothing contained herein is meant to be legal advice. Please contact us to answer any questions you may have.