

# GARDNER, WILLIS, SWEAT & HANDELMAN, LLP

## Employment Law Update

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### Breaking Up Is Hard To Do: How To Fire Someone

Most litigation in employment law arises from the termination of an employee. Below are a few practical suggestions to help you avoid litigation the next time you terminate an employee.

1. **Warn Employees:** Always issue warnings to employees who are being considered for termination because of poor performance. You may want to follow the warning with a probationary period and progress reports, and give the employee a reasonable opportunity to improve. Reviews should focus on performance expectations the employee failed to meet and specific work deficiencies. If you warn an employee in advance about the possibility of termination, the employee may even pursue other employment before you are forced to fire him or her, which also helps you avoid unemployment claims, as well.
2. **Keep Records:** Document every action taken with respect to an employee. In particular, keep written records of all reviews. Written reports should outline exactly what needs to be improved and provide a time frame for meeting those expectations. As a safeguard, ask workers to sign a corrective-action notice form acknowledging that they received the warning.
3. **Explain the Reason for the Termination:** When corrective actions fail to fix the problem and you have decided to fire the worker, be clear about why you are ending the employment. Tell the employee specifically what the deficiency is, and be sure to include every reason you are dissatisfied with the worker's performance, conduct, or attendance. Although you may sympathize with the employee, you should not apologize or send mixed messages. Prior to the termination meeting, prepare all paperwork addressing issues such as vacation pay, health insurance, and any applicable severance. Also, be certain another witness is in the termination meeting with you.

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Gardner, Willis, Sweat & Handelman, LLP hopes you find the information in this newsletter helpful. This information is intended to be general in nature and is not a substitute for competent legal advice. Because every employment law issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

Gardner, Willis, Sweat & Handelman, LLP  
P. O. Drawer 71788  
Albany, GA 31708  
Phone: 229-883-2441  
Fax: 229-888-8148  
gwsh@gwsh-law.com

## Sexual Harassment Policies: Why Just Having The Policy Isn't Enough

In June of 1998, the U.S. Supreme Court directly addressed employer liability for the harassing conduct of a supervisor. Issuing two decisions on the same day regarding this issue, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court significantly changed the standard for employer liability for sexual harassment. Specifically, the Court addressed an employer's liability for a hostile work environment, holding that an employer is vicariously liable for an abusive environment created by a supervisor.

However, the Court also provided employers an affirmative defense. Under this defense, an employer may prevail by demonstrating by a preponderance of the evidence that (1) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

The impact of these cases on employer liability was great. Previously, employers successfully argued that, notwithstanding the existence of a hostile environment, the employer was not liable because it neither knew nor should have known of the hostile environment. Now, employers are liable for hostile environments even if they do not have actual knowledge. The only defense is to show affirmatively that the company exercised reasonable care to prevent and correct any harassing conduct. Furthermore, the employer must demonstrate that the plaintiff behaved unreasonably in not reporting or complaining about the harassment.

It is not uncommon for companies to develop sexual harassment policies, but fail to publish them to employees. If an employer does not *publish* its harassment policy, it will not be able to raise this affirmative defense created by the Supreme Court. Employers should consider having periodic training sessions to ensure that employees, particularly supervisors, are familiar with their harassment policy.

It is also important to analyze policies to ensure that they address all forms of harassment, not just sexual harassment. Many employers adopted their harassment policies years ago when sexual harassment first became a hot topic. However, employees can assert claims for harassment based on other protected categories, such as race, and if the policy does not address that particular type of harassment effectively, the affirmative defense may be lost.

### Common Misconceptions in Human Resources

***Misconception: "I don't have to worry about discrimination claims because I have fewer than 15 employees."***

Typically, employees sue for discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e. Title VII applies only to employers with at least 15 employees, and there are limits on the potential damages. However, there is at least one way that employers with fewer than 15 employees can be sued for discrimination. Under the Civil Rights Act of 1866, 42 U.S.C. § 1981, an employee can sue for certain types of discrimination, regardless of the employer's size. Also, there are advantages to an employee bringing

a discrimination claim under § 1981, rather than suing under Title VII of the Civil Rights Act. These include more liberal statutes of limitations and the absence of caps on damages. As such, all employers have exposure for potential discrimination claims, not just those with 15 or more employees.

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## Handling Workers' Compensation Claims in Light of the ADA and FMLA

Employees who take a leave of absence as a result of their workers' compensation injury are often covered by the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601, as well as the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101. Employers dealing with injured workers sometimes forget that workers' compensation is not an isolated arena and that the FMLA and ADA may affect the injured employee's rights, as well.

The ADA prohibits employers with at least 15 employees from discriminating on the basis of physical or mental disability so long as the disabled person can perform the essential functions of the job, with or without reasonable accommodations. The employer has an affirmative obligation to provide reasonable accommodations that do not cause undue business hardship or pose a direct threat to anyone's safety. Reasonable accommodations include job restructuring or equipment and facility modifications that allow a disabled person to perform the essential functions of the job.

The FMLA requires employers of 50 or more employees to provide up to 12 weeks of unpaid leave during any 12 month period for: the birth of a child; the adoption of a child or the placement of a foster child; a serious health condition of a spouse, child or parent; or the employee's own serious health condition.

Any eligible employee who takes family or medical leave must be returned to the same position held prior to the leave or an equivalent position. The employer must also maintain group health coverage for the employee during the leave period just as though the employee had continued working.

The overlap of these three laws - workers' compensation, ADA and FMLA - can often be complex. For example, if an employee on workers' compensation leave is eligible for FMLA leave, the employer is required to continue health insurance coverage (at the employee's expense) during the period covered by the FMLA. This is not required by Georgia's workers' compensation laws.

Moreover, the workers' compensation injury may have caused a disability covered under the ADA. In such a case, continued leave beyond the 12 weeks required by the FMLA may be a reasonable accommodation. In addition, the employer may be required to provide certain accommodations to the employee so that he or she can return to work and perform the essential functions of his or her job.

Employees who are eligible under FMLA may remain on leave rather than accepting light-duty assignments provided by their employer. In other words, an employer cannot force an FMLA eligible employee with a workers' compensation injury to return to work in a light duty position. Notably, however, if the employee chooses continued leave, workers' compensation income payments normally cease because of the availability of work.

When handling workers' compensation claims, particularly those which involve periods of absence from work, employers should consistently analyze the impact of the FMLA and the ADA on employees' rights before taking any adverse action against them.

## **Does Your General Release Protect You from Age Discrimination Claims?**

In 1990, Congress amended the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, by enacting the Older Worker Benefit Protection Act (OWBPA), 29 U.S.C. § 621. The OWBPA addresses waivers of rights and claims under the ADEA and specifies that an employee may not waive any right or claim under the ADEA unless the waiver is knowing and voluntary.

Under the regulations, 29 C.F.R. § 1625 (2004), an employer seeking a waiver of age discrimination claims must take several

affirmative steps that are not typically part of a general release. In the case of an individual termination, the employee must be provided with at least 21 days to consider the agreement and a seven day period following execution to revoke the agreement. In the case of a group of employees (two or more), they must be given 45 days to consider the agreement, as well as the seven day revocation period. In all cases, employees must be advised to consult with an attorney before signing the release.

The ADEA applies to all employees 40 years-of-age or older. As such, employers should be certain to include these provisions in any general release pertaining to any employee who falls within that age group.

**Gardner, Willis, Sweat & Handelman, LLP**  
2408 Westgate Drive  
P. O. Drawer 71788  
Albany, Georgia 31708-1788

32-143.606

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