

### **INFLICTION OF EMOTIONAL DISTRESS**

These cases generally arise when the employer's conduct in discharging the employee is extremely outrageous and causes severe emotional suffering. In such cases, the employee may sue for damages for the intentional infliction of emotional distress. For example, in one case, a cause of action was held to exist for the intentional infliction of emotional distress on a waitress by a restaurant manager who fired the waitresses in alphabetical order in an attempt to find out who was stealing food. This is often a claim in situations where an employee has quit a job and claims constructive discharge due to harassment because of sex or race, etc.

### **DEFAMATION**

An employer that discloses false information that tends to injure an employee's reputation to third parties may be subject to a defamation suit. Employers generally are protected by a qualified privilege with regard to work-related statements about employees, in the absence of proof of malice. Some states hold the employer liable for defamatory discharge if it knew employees would have to give the employer's stated (false) ground for discharge to subsequent employers.

### **INVASION OF PRIVACY**

Courts have held that an employer may invade the privacy of its employees in a number of ways. This claim may arise when the employer inquires into so-called private facts concerning the employee. Alternatively, the employee may file a privacy claim when confidential facts are publicly disclosed.

### **ANTI-DISCRIMINATION LAWS**

As discussed above, the largest exception to the notion of at will employment consists of the state and federal laws that prohibit discrimination or retaliation against employees in a wide variety of protected categories.

## **2. TERMINATION CHECKLIST**

Chapter staff should not attempt to give legal advice if they are consulted by members seeking to fire employees or whose decisions have already been challenged. However, staff should know enough about state law to know when to recommend that a member seek counsel from the chapter attorney. Also, the employer can be told to check its legal exposure by reviewing all discharges as follows:

- Review all discharges to ascertain whether any allegation that the employee is being retaliated against for exercising a legal right (such as accepting jury duty, filing complaints of discrimination, reporting violations by the company, etc.) could be raised because of the timing of the discharge.
- Review all discharges to ascertain whether, because of the timing of the discharge, an allegation could be made that the discharge was motivated by bad faith or malice, such as a desire to terminate an employee before the vesting of pension rights, or because the employee failed to succumb to the sexual advances of a supervisor or another co-worker.

- Carefully document all disciplinary action up to and including discharge.
- Review past similar incidents to maintain consistent discipline and avoid charges of discrimination.
- Do not overstate or understate the basis for disciplinary action. The former could lead to charges of defamation; the latter could result in waiving the right to rely on part of the grounds for termination or could lead to charges of pretext.
- Maintain confidentiality to the extent possible. Disclose facts relating to employee discipline only on a need-to-know basis within the workplace. Consider having only neutral references to prospective employers.
- Determine whether any accommodation of protected rights (e.g., religion, handicap, etc.) is reasonable or necessary.
- Review your employee handbook with labor counsel to ascertain whether it includes loosely drafted provisions that could cause problems.