

The Metropolitan Corporate Counsel®

www.metrocorpcounsel.com

Volume 11, No. 11

© 2003 The Metropolitan Corporate Counsel, Inc.

November 2003

Preventing Employment Claims: Practical Solutions

The Editor interviews Sandra A. Girifalco, Partner in the Employment Law Practice of Stradley, Ronon, Stevens & Young, LLP.

Editor: Describe the influences that led you to change from being a personnel administrator to an employment lawyer.

Girifalco: Since I was 12 years old, I wanted to be a lawyer. Having done my senior thesis on personnel practices of the United Nations Secretariat and needing some income, I took a position in personnel administration after college, although my plan all along was to go to law school. Stradley Ronon steered me toward employment law after my summer clerkship 23 years ago because of the belief, and a valid one, that the practical experience I had gained would add value for our clients.

Editor: Much of your practice has to do with preventing litigation by counseling corporations in ways in which they can avoid being sued. What are the procedures you would ask a new client to follow who had not had prior employment counseling?

Girifalco: With a new client I would spend some time on the basics, such as the job application, the employment handbook, the hiring process, the evaluation process and the disciplinary and termination processes. After focusing on those areas, the main areas in which problems occur, we would need to make sure the new client was in compliance with applicable law (the Fair Labor Standards Act is often troublesome) and was also following best practices. To the extent that any improvements could be made, we would make them at that time. Then we would talk about ways in which an employment lawyer can assist human resource folks with a "sticky" problem. A lot of my clients like to call whenever they have an unusual or contentious disciplinary or termination issue. That is where I spend a lot of time counseling.

Editor: You are also a litigator. How does your experience litigating and trying cases intersect with your role as a counselor?

Girifalco: Because I litigate cases, I know how the company's actions are going to be attacked. Part of the counseling process is to prepare the client to be in the best position possible should



Sandra A. Girifalco

the attack come. For that reason, I will review not only policies, but disciplinary notices, performance evaluations, termination memos and letters and the like, to identify vulnerable areas that can be addressed before, not after, the fact.

Editor: Is there any particular area that you think corporations should have an employment litigator review?

Girifalco: Most companies are getting advice when it comes to the difficult employee. Employment contracts and executive compensation programs and plans, like special incentives, change-in-control agreements, and supplemental retirement plans, are too often overlooked. It can be quite valuable to have someone who litigates employment related cases review contracts before they are signed and certain types of compensation arrangements before they are implemented. Litigators can identify areas of potential dispute, because their practice focuses on disputes. I've seen too many instances where the compensation plan wasn't clear, or the employment agreement was ambiguous (even though everyone probably knew what they meant at the time), giving an ex-employee a basis for a lawsuit. This is where an ounce of prevention is worth a pound of cure.

Editor: Do you have a retainer arrangement with most of your clients?

Girifalco: We have retainers with some clients while others use us on an hourly as-needed basis. They will call when they think a particular employee is litigious or is going to create some problems for them. Then there are more creative fee arrangements. It depends on the client's needs and preferences.

Editor: Do you find there are some industries that require more of your time in this counseling area than others?

Girifalco: I think it depends more on the size of the client and the capacity of its human resource department. Companies whose workforce is primarily non-exempt tend to have more day-to-day issues. Problems with professionals are less frequent, but when they come, they are usually bigger because the level of compensation is higher.

Editor: Do you advise using the employee handbook as a kind of bible of what is permitted within a company?

Girifalco: The employee handbook can be a valuable tool because it makes clear what the policies and practices of the employer are and what benefits an employee can expect. It must be written properly and reviewed by experienced employment counsel. What you are trying to achieve is consistency in application among all employees. The employee handbook can serve as a guide for supervisors and managers, and it also lets employees know what they can expect and what is expected of them. And it further gives the employer something to rely upon, if it is written well, to justify actions they might want to take.

Editor: Has Sarbanes-Oxley changed the way employers treat employees in view of its protection of whistleblowers? Are employers more conscious of what can happen if they have a disgruntled employee?

Girifalco: Sarbanes-Oxley prohibits discrimination and retaliation against employees who provide information or otherwise assist in an investigation of conduct that the employee rea-

Please e-mail the interviewee at sgirifalco@stradley.com with questions about this interview.

sonably believes to be a securities law violation, or who participates in a proceeding relating to a violation. Many employment laws also have anti-retaliation provisions, so the concept is something companies are used to. Like other employment laws, potential relief includes reinstatement, back pay, special damages, attorneys fees and costs. Unlike other employment laws, however, there is also the potential for fines and imprisonment of up to 10 years. So the stakes are pretty high. Companies have been putting policies, practices and procedures in place to address Sarbanes-Oxley, which include protections for whistleblowers.

Editor: How would you describe the ideal employer?

Girifalco: The ideal employer fosters a work environment in which employees are treated consistently and with respect and dignity, where they are encouraged, mentored and allowed to reach their full potential in their positions. The employer makes clear what its expectations are and holds employees to high standards. That sounds "Pollyanna-ish," but I find there are fewer problems arising out of companies where employees feel they are listened to, they are dealt with fairly and they like their jobs. Of course, you can be a great employer and still have lawsuits. I am making a distinction between lawsuits and *problem* lawsuits because everyone has lawsuits. But the *problem* lawsuits arise out of situations where there has been a failure to follow procedure, there has been an abusive supervisor, there have been promises that have gone unfulfilled or where people have been mistreated.

Editor: What kinds of insurance claims are you involved in resolving? Are they on behalf of the insurance company or the employer?

Girifalco: Some employers have employer practices liability insurance. If an employee makes a covered claim, the insurer hires us to represent the employer. Many employers who have this coverage make sure they have the right to choose counsel even though that may cost a little more. Employment cases are different from general liability claims because they can be very personal and disruptive. They can also have a significant impact on the workplace and on the people involved who have an emotional stake in the matter. There is also a concern about how the resolution of the matter impacts on precedent.

Editor: Do you find that arbitration is often used in these cases?

Girifalco: Arbitration provisions are often found in employment contracts for highly compensated individuals, and in those cases, most disputes are arbitrated. The more difficult issue today is the enforceability of arbitration provisions found in handbooks, employment applica-

tions or employer policies. There has been much litigation over whether employees can be required to bring their claims to arbitration. The courts favor arbitration, and many companies are putting together arbitration programs, but they definitely have to meet certain criteria in order for them to be upheld. That said, the majority of run-of-the-mill employment disputes are discrimination cases. The Equal Employment Opportunity Commission takes the position that mandating binding arbitration of discrimination claims as a condition of employment is contrary to the fundamental principles of discrimination laws. So it would not be unusual to be in a situation where even if there is an arbitration agreement, the matter is first handled at the Commission level.

Editor: You mention discrimination cases. In a slow growth environment are employers willing to practice diversity?

Girifalco: What the slow growth environment has done is reduce the number of jobs, which means there is less hiring. But I believe companies are still looking to increase the diversity of their workforces. Many employers have affirmative action plans or internal plans to encourage diversity within the workforce and actively seek candidates who are under-represented in their employee population.

Editor: What ways are most effective for disciplining an employee, short of firing?

Girifalco: First deal with the problem as soon as it happens. Too often I have seen situations that have been allowed to fester and by the time the supervisor brings it to the attention of HR or some other decision-maker, they are at the end of their rope. That is the worst time to deal with a problem. Supervisors and managers need to be trained in how to manage their people, including coaching and disciplining. Most people respond best to constructive as opposed to negative criticism. You want to make sure the manager is developing the individual within the job for which he or she has been hired. Assuming that has all happened and there is still a problem, the manager needs to stay on top of it and discuss it with the employee. Many employers will put the employee on probation. One method I find effective is to ask the employee to come up with an action plan that is going to solve the problems that have been identified. That does two things. It makes the employee think about the issues, but it also helps the employer down the road, because the employee was given an opportunity to actively participate in correcting the situation. Then you set a time period to reexamine with the employee whether the agreed upon action has indeed taken place, and establish a consequence if it has not. If that doesn't work, you need to let the employee know that the plan isn't being met and go to the next step.

Editor: And you would need a paper trail?

Girifalco: Absolutely. Every step should be documented, including conversations. It is also a good idea to keep samples of the employee's work because the employee will dispute the employer's view that the work was deficient. You want to have examples of the employee's work that led to the action plan, as well as samples of work the employee did during the action plan. Lastly, make sure to cover all your bases and keep samples of the employee's work done between the time you determined the action plan was not being met and termination.

Editor: What are the cardinal principles to be used in Reductions in Force?

Girifalco: You cannot do a Reduction in Force without first doing an analysis of the impact the reduction will have on people in protected classifications, i.e., minorities, women, older workers, people with disabilities, etc. There are specific requirements under the Age Discrimination in Employment Act that, under certain circumstances, require employers to provide RIFed employees with information on the ages of who is being RIFed.

Usually managers will be asked to identify employees who will be subject to lay-off. Once they do, you want to see what the big picture looks like — what percentage of the people that have been chosen are 40 or over, what percentage are women, what percentage are African-American, etc. You do this to identify if there are any potential problems. Next you need to be comfortable with the reasons the individual has been chosen to be RIFed and need to make sure the reasons can be supported.

It's easy if people are chosen based on least seniority, but that is not usually the way decisions are made, except in union settings. It is often based upon job functions and individual capabilities. Make sure the record is clear. If you choose someone for a layoff because that person is the worst performer in the group, we hope you have the documentation that will show that person is the worst performer in the group.

Editor: If you had to identify one area that is a common pitfall for employers, what would it be?

Girifalco: The Evaluation. All employment lawyers will tell you that over and over again they see situations in which an employee has been terminated for performance and the evaluations do not support that decision. There is a basic human reason for that - there are too many people who don't like to say negative things to the people they work with and they will give them satisfactory evaluations. In the eyes of the manager, satisfactory might not be very good, but in the eyes of the world - the judge, the jury and a human relations commission - satisfactory means acceptable. So it is important that managers be trained on doing evaluations and that they be evaluated on how well they do evaluations.