

## Managing Risks In Employment Terminations

### The Issue Of Pretext In Employment Litigation

**Steven C. Filipowski, J.D.**

Shaheen, Novoselsky, Staat, Filipowski & Eccleston, P.C.

Copyright 2005 by Shaheen, Novoselsky, Staat, Filipowski & Eccleston, P.C. All rights reserved.

---

---

---

---

---

---

---

---

## Common Risks

- Employer's legitimate reasons for termination may be disregarded by judge or jury
- Unlawful discrimination lawsuits are frequently decided upon litigation that the employer's articulated reasons were pretext for unlawful discrimination

Copyright 2005 by Shaheen, Novoselsky, Staat, Filipowski & Eccleston, P.C. All rights reserved.

2

---

---

---

---

---

---

---

---

## Risk Management

- Employer actions determine whether employer can overcome pretext claim
  - Before termination process
  - During termination process
  - After termination process

Copyright 2005 by Shaheen, Novoselsky, Staat, Filipowski & Eccleston, P.C. All rights reserved.

3

---

---

---

---

---

---

---

---

### What Mistakes By Employers Lay A Foundation For Claims Of Pretext?

- Articulating implausible reasons for termination
- Articulating inconsistent reasons for termination
- Articulating contradictory reasons for termination
- Inadequately documenting performance history so that the written record fails to support the articulated reasons for termination

---

---

---

---

---

---

---

---

### Before Termination: What Can Be Done To Avoid The Most Common Pitfalls?

- Train managers to perform meaningful and accurate performance appraisals

---

---

---

---

---

---

---

---

### Before Termination: What Can Be Done To Avoid The Most Common Pitfalls?

- Managers must be realistic
  - No employee should receive all “excellent” or “very good” ratings
  - Shortcomings should be described with specificity in a narrative portion of the review
  - Reviews should include specific goals for improvement
  - There should be quarterly or mid-year follow up reviews

---

---

---

---

---

---

---

---

### Improve Your Review Process

- Pre-rank like employees in the same department before completing reviews
- If review doesn't match preview ranking, examine:
  - The ranking
  - The review
  - The approach taken by the person performing the review
- Do it over

---

---

---

---

---

---

---

---

### Improve Your Review Process

- Document every review and every incident report
- Discuss all reviews and reports with the employee
- Solicit the employee's comments on the review or report form

---

---

---

---

---

---

---

---

### Improve Your Review Process

- The employee and the person completing the review or incident report should date and sign the document
- Give a copy of the review or incident report to the employee and note that fact on the document

---

---

---

---

---

---

---

---

### The Termination Conference

- Attended by the company spokesperson and one company witness
- One spokesperson will speak for the employer
  - Solely responsible for articulating the employer's reasons for the termination
  - Selected for credibility as a witness
  - Witness notes what is said by employee subject to termination

---

---

---

---

---

---

---

---

### The Termination

- Spokesperson uses and follows a prepared script
- Script must be consistent with performance reviews and incident reports
- Use performance reviews to support
- Escort the employee from the building immediately after

---

---

---

---

---

---

---

---

### Post Termination

- No one other than the spokesperson is authorized to speak for the company
- All questions referred to the spokesperson, or to counsel

---

---

---

---

---

---

---

---

## Conclusion

- Managing pre-termination, termination and post termination processes reduce risk of loss

---

---

---

---

---

---

---

---

## Questions

?

NOTICE: The Internal Revenue Service requires us to state that advice contained in this document is not intended or written by the writer to be used, and cannot be used by the reader, for the purpose of avoiding penalties under the Internal Revenue Code.

---

---

---

---

---

---

---

---

## Thank You

Steven C. Filipowski  
S**F**ilipowski@snsfe-law.com

312.621.4400  
www.SNSFE-law.com  
www.FinancialCounsel.com

---

---

---

---

---

---

---

---