



Just when you thought you were finished with difficult Dan . . .

By James H. Kizziar, Jr. and Amber K. Dodds

Difficult Dan has been an employee long enough—his poor performance, adverse attitude and carelessness have finally resulted in termination. Good riddance and nothing to worry about, right? Unfortunately, you may not be done with Dan just yet.

Employment discrimination laws, along with many additional state laws, apply to former employees. Claims can be based on employer activities that occur after employees cease employment. For example, an employee who complained of harassment before resigning pursued a successful claim for retaliation when her employer refused to rehire her based on her prior complaint.^[1]

Similarly, an employee who was terminated and filed an employment discrimination charge pursued a retaliation claim when his employer gave a negative reference to a potential employer based on the filing of the charge.^[2] Another employee brought a claim against his former employer under the Americans with Disabilities Act because the employer disclosed information about the individual's medical condition to a potential employer who called for a reference.^[3] State-law claims such as defamation, breach of contract and infliction of emotional distress may also be based on post-employment actions.

Employers should use just as much caution not to violate employment laws with former employees as they do with current employees or applicants. Fortunately, liability for many post-employment claims can be reduced through consistently applied post-employment policies. In particular, employers should carefully draft and consistently apply policies on references, eligibility for rehire and access to personnel files.

Giving references

Employment references should be provided only by designated officials (preferably those with a Human Resources expertise). By centralizing the individuals who provide references, and training managers and supervisors to direct reference requests to the designated individuals, employers can ensure that they are providing consistent and objective references. Representatives who provide references should be trained to provide the same information for each individual, such as confirming the dates of employment and position held.

Many employers choose to give only a neutral reference to prevent allegations of discriminatory negative references. In Texas, employers are protected from suit by Section 103 of the Texas Labor Code for providing truthful information about a former employee's job performance.^[4] However, many Texas employers find the benefit of consistently providing the same neutral reference information, and the resulting reduction in potential liability for defamation, a better policy than attempting to provide truthful information that is specific to each former



employee.

Rehire eligibility policies

Another issue for which employers should have a consistently applied policy is determining eligibility for rehire. Many employers maintain an “ineligible for rehire” list of former employees who were terminated for violations of policies, rules or procedures. Employers should notify employees of such a policy in the employee handbook. By notifying employees of the policy during employment, they may be less likely to assume that being on the ineligible for rehire list is “personal.”

The determination of who is ineligible for rehire should be made by the same individual(s) for all former employees. Consistency is key—all employees with similar circumstances should be treated in the same manner regarding eligibility for rehire. Employers should consider maintaining an ineligible for rehire log, which compiles information on who is ineligible for rehire and the reason(s) for that action. This log can both help employers to consistently apply their policy and serve as evidence of consistent application if needed.

Access to personnel files

Finally, employers should also maintain and consistently apply a policy on employee and former employee access to personnel files. Although federal law does not require access to personnel files, 17 states require access for employees and/or former employees. Most specify that access must occur within a certain period of time or in a certain manner. Texas law does not require current or former employees be given access to their personnel files. Employers should consider what level of access they are willing to provide to employees (including evaluating state law in the states where they operate) and consistently apply the policy.

Ultimately, employers should remember that former-employee Difficult Dan is protected by many laws for actions that occur after the end of his employment. By setting policies for issues such as references, eligibility for rehire decisions and access to personnel files, and treating former employees with the same respect with which they treat current employees, employers can significantly reduce liability for post-employment decisions.

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[1] *Templeton v. First Tennessee Bank, N.A.*, 424 Fed. Appx. 249 (4th Cir. 2011) (finding potential retaliation even though two years elapsed between employee’s resignation and employer’s decision not to rehire).

[2] *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

[3] *Equal Employment Opportunity Commission v. Thrivent Financial for Lutherans*, 700 F.3d 1044 (7th Cir. 2012).

[4] Tex. Lab. Code chapter 103. Texas law provides that employers are not required to provide any reference for former employees.