

**COUNSELLING THE DISCHARGED EMPLOYEE
WHO DOES NOT HAVE A CASE**

**Michael G. Okun
Patterson, Harkavy & Lawrence, LLP**

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This article concerns providing legal counsel to those who have been axed, canned, discharged, dismissed, downsized, dumped, early retired, escorted out, fired, forced out, forced to resign, forced to retire, given the heave-ho, laid off, let go, outplaced, pink-slipped, released, removed, replaced, riffed, right-sized, run off, sacked, separated, s--t canned, shown the door, terminated, told to punch out, or told to resign from their jobs in the private sector in North Carolina but do not “have a case.” It is not about screening out such cases, negotiating with a former employer, or advising about improving severance agreements. Lawyers have invested a great deal of energy devising ways to bring into the office individuals who have potentially lucrative cases and ways to negotiate and litigate on their behalf. Lawyers have spent much less time considering how to help those who do not have a case. This article is not intended primarily for experienced employment lawyers, but for the growing number of lawyers for whom advising discharged workers is becoming one part of their practice.

People who have lost their jobs come from all walks of life and are terminated for all imaginable reasons. Some earned less than minimum wage; others were very handsomely compensated. Some were axed before they even started on their jobs; others were let go after spending an entire working lifetime on the same job for the same employer. Many received no severance pay; others received golden parachutes large enough to make most people incredulous. Some, of course, have viable legal claims. The overwhelming majority does not; either the law provides no cause of action or practical considerations make pursuing a claim virtually impossible.

Most who lose their jobs are reeling; the world spins around them as it does for anyone who receives an unexpected shock that leaves their future uncertain. Many face immediate financial crisis. Job loss can be particularly devastating for older people who know that finding a new job, or certainly a comparable new job, will be extremely difficult. Employees with the “best” jobs are often the most stunned by termination; they assumed their careers would never be interrupted by what they perceive to be arbitrary or unfair treatment by their employer and, in some ways, they have farthest to fall. As “Fats” Domino once said: “A lot of folks have a B.A., M.D., or Ph.D. Unfortunately, they don't have a J.O.B.” For many people, particularly professionals, the job is a great deal more than just a means of making a living: it expresses in large part who they are. Being terminated is a rejection that is personal as well as financial. Some are so angry or so emotional that it is difficult for them even to listen, much less to make rational decisions.

Most people who have been discharged can afford a reasonable fee for legal advice. The most important work in the area of employment law may be in improving the rights of workers through legislation, the courts, and more and stronger unions, in winning relief for those who have been wronged, and in punishing those employers who deserve it. But meeting with terminated workers not only keeps an attorney current with trends in the workplace; it provides a real benefit to those who need an attorney's training and experience in order to help them move forward with their lives. Further, try as one might to screen cases, lawyers seeking to develop an employment law practice will meet with scores of workers whom the lawyer simply cannot help by means of a lawsuit.

A. GENERAL GUIDANCE IN COUNSELING ABOUT THE DISCHARGE.

Most people who have been let go need to be allowed, at least in a limited fashion, to tell their stories. They also need to be given an outline of our employment law and an understanding of where their situations fit into that law. They need to have their questions answered. If nothing is to be done, they need to have explained exactly why either the law is not favorable or why the attorney is not willing to take the case. Frequently they need to be told about issues related to their discharge, such as unemployment benefits. Most importantly, they need to be told how to adopt a strategy to put them where they want to be in the future.

Most people have very little idea of the contours of our employment law. Explaining the reality of our law, even briefly, answers many of their questions. Usually, after an individual has gone through the basics of his or her situation, he or she needs to be given a broad outline of our employment law, which can take only a few minutes. One needs to tell the individual that most people are employed at-will, so that employers are free to terminate as they wish, with three categories of exceptions. The first category is those few employees covered by individual contracts or collective bargaining agreements that remove them from the at-will classification. The second category is those whose discharge violates one of about three dozen federal or state statutes that restrict an employer's ability to fire at-will. (See Appendix.) Third, there are the few cases in which a discharge violates public policy. Depending on the situation, some of the various torts that might conceivably apply to a discharge, such as interference with economic opportunity, defamation, intentional infliction of emotional distress, misrepresentation, or invasion of privacy, might also be discussed. The individual should, of course, also be told of the relevant statutes of limitation.

Examining the individual's situation and answering his or her questions against this background often helps give them a point of reference. If the attorney decides to do nothing for the individual, the attorney needs to explain why. The failure to explain the reason for declining the case is probably the complaint most frequently heard from discharged employees unhappy with their visits to attorneys. Those who are adamant that they have a viable claim can be told that, if they are correct, they are very likely to be able to find another lawyer to help them.

Many discharged workers believe they were entitled to some notice before being separated; indeed, many are as upset by the fact that they received no such notice as by the separation itself. Unfortunately, most people working in the private sector are not entitled to any notice, unless they are part of a mass layoff or plant closing covered by the Workers Adjustment and Retraining Act. 29 U.S.C. § 2101. Current employees should be made aware, however, that if an employer does give notice, whether under WARN or otherwise, an employee who does not work until the final date will likely have a difficult time obtaining unemployment benefits. An employee will be able to avoid total disqualification only if he or she is able to prove to the satisfaction of the Employment Security Commission that "it was impractical or unduly burdensome for the employee to work until the announced separation date," and even then the disqualification will only be reduced. N.C.G.S. § 19-14(1).

Perhaps most importantly, an individual should be encouraged to think about where he or she wants to be in a year or two and to develop a strategy to move toward that goal. For example, a resignation is often more valuable than most people appreciate at the time, will not usually affect unemployment benefits, and is often not difficult to arrange. If an individual insults or strikes back at an employer, the option to resign, or even obtain a good reference, will often disappear. The individual might also be told about the downsides – financial, emotional, and practical – of

proceeding with any case, much less a case with small chance of success. The individual should be told about any statutes of limitations of any claims they are even contemplating. Most importantly, the individual might be encouraged to seek a second opinion or be sent to the appropriate agency.

B. OTHER ISSUES.

Individuals often want or need to know about issues collateral to their discharges even if unable to challenge the discharge itself.

1. Compensation.

A frequent issue is what an individual who is discharged is actually entitled to receive in compensation from the employer. The separated employee, of course, is entitled to any wages he or she had earned prior to the separation. These must be paid on or before the next regular pay-day, either through the regular pay channels or by mail if the employee so requests. N.C.G.S. § 95-25.7. Wages that are based on bonuses or commissions must be paid on the first regular pay-day after they become calculable. Such payments may not be forfeited unless employees were notified at the time of hire, in writing or through a notice, posted and maintained in a place accessible to its employees, of the circumstances under which such forfeiture could occur. *Id.* See also N.C.G.S. § 95-25.13. If wages are in dispute and the employer pays the portion that it concedes is due -- and it must pay that portion -- the employee retains any claim to the balance despite acceptance of the partial payment or of any release required as a condition of receipt of that partial payment. N.C.G.S. § 95-25.7A. Further, an employer may not withhold any amount from a final check except under very limited circumstances, such as for a prior overpayment of wages or where the employee has approved the withholding. N.C.G.S. § 95-25.8.

Employers are not required to provide vacation or vacation pay. However, if an employer does provide vacation benefits, it must give all vacation time off or payment in lieu of time off in accordance with the company policy or practice. Thus, if a separated employee has earned vacation that he or she has not used, he or she is entitled to the payment for that unless the policy specifically provides otherwise and the employee was properly notified of that policy. N.C.G.S. § 95-25.12. Employees must also be notified in writing or through posting of any changes in wages.

2. Releases and Covenants Not To Compete

Many separated employees do not understand either the general purpose or the details of releases frequently presented to them at the time of the separation. Explaining both – what a release seeks to accomplish and its specific provisions, particularly those provisions releasing claims, requiring confidentiality, and securing promises not to disparage – is, of course, useful, as is discussing whether the specific consideration offered justifies signing the release.

Many discharged employees also do not understand covenants not to compete that sometimes are in a release but more often were signed at the time of hire or sometime during the employment. Most employees give little thought to signing these covenants and often incorrectly believe such covenants do not apply following a discharge. In addition, many believe such covenants simply will not be enforced if breached. Again, explaining the purpose of these agreements, whether they are reasonable in duration or geographic area, precisely what is prohibited, and the consequences of breach are, of course, worthwhile.

3. COBRA and Retirement and Savings Plans.

Next, those employers who have a group health plan under which an employee was covered usually must advise the employee about the opportunity to continue to be covered under that plan and allow an employee able to pay the cost of coverage to continue unless discharged for “gross misconduct.” 29 U.S.C. § 1161. Employees who worked for employers with fewer than 20 employees and are not covered by COBRA might be covered by state law which provides similar, although more limited, continuation rights. See N.C.G.S. § 58-53. Most larger employers at least do an adequate job of explaining the basics of an employee’s COBRA rights.

Discharged employees usually also have a fairly good understanding of their entitlements under a retirement or savings plan, but do occasionally have questions about the specifics of their plans or early withdrawals.

4. Unemployment Benefits.

Many separated employees are entitled to unemployment benefits, but most know very little about the unemployment process or law. There are several matters that a separated employee may need to know about unemployment, the most important being:

(a) The Process. An individual needs some general understanding of how the procedure works. He or she files a claim and at that time is asked the reason for the separation. The employer is also asked for its view. If there is no dispute that the separation was a purely economic layoff, benefits should follow. If the employer contends that the employee is not entitled to benefits, or if the claimant’s own statement of the reason for the discharge suggests misconduct or fault, an adjudicator in Raleigh makes a determination about whether benefits will be paid and sends a notice to each party. A dissatisfied party may request a de novo hearing before an appeals referee. Appeals from that hearing may be taken to the Employment Security Commission which reviews the record made at the hearing. Claimants need to understand that if the adjudicator rules against them they need to continue filing, for if that decision is reversed, they will only receive benefits for those weeks for which they properly filed and registered for work. On the other hand, if an employee is awarded benefits and begins drawing benefits and that decision is at some later time reversed, the employee will not be required, absent fraud, to repay the benefits already received.

(b) The Amount the Claimant Can Receive. A separated employee can receive one-half of his or her weekly wage, but with a cap of two-thirds of the average weekly insured wage, for a maximum usually of 26 weeks. The maximum weekly amount that any employee can currently receive is just over \$416. An estimate of the weekly amount and the number of weeks to which an individual is entitled can be obtained by entering the individual’s name and Social Security number under the “Individual Services” and “Benefits Estimate” headings of the Employment Security Commission’s website (www.ncesc.com).

(c) The Waiting Week. Claimants usually will not be able to receive benefits for the first week after filing, unless already laid off during the previous year.

(d) Severance Pay. If a separated employee receives any vacation pay, severance pay, or the like, his or her unemployment benefits will be delayed until those benefits have been exhausted. N.C.G.S. § 96-8(10)c. For example, if an employee is given a combination of severance pay and vacation pay totaling 8 weeks pay, the employee will not be eligible to receive

benefits for 8 weeks (plus an additional week waiting period). The former employee may use both if he or she attends Commission approved educational programs or retraining.

(e) **Quitting Work.** If an employee quits work, he or she normally will not be entitled to benefits unless that leaving was "for good cause attributable to the employer." N.C.G.S. §§ 96-14(1); 96-14(1)A. "Good cause" under the statute means that which would be deemed by reasonable men and women "valid and not indicative of an unwillingness to work." In re Watson, 273 N.C. 629, 639, 161 S.E.2d 1, 10 (1968); Huggins v. Precision Concrete Forming, 70 N.C. App. 571, 320 S.E.2d 416 (1984). "Cause" is "attributable to the employer" if "produced, created as is the result of actions by the employers." In re Vinson, 42 N.C. App. 28, 31, 255 S.E.2d 644, 646 (1979). This includes two situations addressed in the statute -- leaving because of a permanent reduction in hours or rate of pay. N.C.G.S. §§ 96-14(1B)(1C).

A recurring consideration is whether a resignation is for such "good cause attributable to the employer." Until 1989, the statute required that leaving not only be for good cause attributable to the employer, but also "voluntary" to be disqualifying, a provision that clearly allowed benefits to those who resigned when given the choice of a resignation or discharge. Matter of Warner, 44 N.C. App. 723, 263 S.E.2d 4 (1980). The Commission continues to treat a resignation offered in lieu of termination as a constructive discharge and examines whether the employee was given the choice because he or she was guilty of misconduct or substantial fault connected with the work, as discussed below. However, employees who resign in order to avoid an impending discharge, In re Vinson, n.16 *supra*, or for their own reasons resign but then attempt to withdraw their resignations, Whicker v. High Point Public Schools, 56 N.C. App. 253, 287 S.E.2d 439 (1982), may well be disqualified.

The statute also sets out a number of other specific situations in which the leaving of work will not disqualify the employee even though not "attributable to the employer." One is a leaving due to a disability or for some health problem which prohibits him or her from working at that facility but not another, or due to the health condition or disability of an immediate family member. N.C.G.S. § 96-14(1). Another is that in which an employee leaves work to accompany a spouse who is moving to another location too far away to continue his or her previous work, in which case he or she will be disqualified, but only for two weeks. N.C.G.S. § 96-14(1d). Another is where a claimant who has been adjudged an aggrieved party as the result of domestic violence committed against the claimant or a minor child within the claimant's custody leaves work to avoid that violence. N.C.G.S. § 96-14(1f). Another is where a claimant is unable to accept work during a particular shift as a result of an undue family hardship, defined as an inability to obtain care for a child, an elderly parent, or a disabled member of the immediate family. N.C.G.S. § 96-14(1g). Finally, if a claimant leaves work for good reason, but not one attributable to the employer, a petition to the Commission seeking reduction in the period of disqualification may be filed. N.C.G.S. § 96-14(10).

(f) **The Two Types of Disqualifications.** One disqualification following termination is for conduct that rises to the level of "misconduct" and which totally disqualifies the employee from receiving benefits. N.C.G.S. § 96-14(2). The other is for "substantial fault", which disqualifies the employee for only between 4 and 13 weeks. N.C.G.S. § 96-14(2A). Occasionally, an employer will agree to stipulate to facts that would support a finding of "substantial fault" because such a finding would not result in its account being charged.

CONCLUSION

People who have been unlawfully discharged need our help setting things right. Those whose discharges were not unlawful may need our help even more, for there is little to be done to set things right. If we can help them understand why they do not have a case, particularly where the discharge was unfair, and advise them how to move forward, we have provided a service that is important and usually appreciated.