

Employment Agreements

Strategies and Pitfalls from Hiring to Termination

by Michelle H. McGinnis, Brian S. Dicker, and Veronica Getskow

Editor's Note: The information in this article is intended as general practical advice based upon legal considerations. It is **NOT** intended as legal advice. Applicable laws vary from state to state. Consult with a lawyer for your specific legal needs. For more information, go to ChildCareCompliance.com and register free of charge. *Exchange* readers may access sample forms and create customized forms for their organizations. **Register now** and you will be alerted when the updated childcare law information is posted and webinars are scheduled.

All had been going well for Barbara and Sonia, the owners of Whiz Kidz Preschool. Then, just before the new school year began, their best teacher, Debbie, quit in order to move to a distant town where her husband had just landed a job. The owners scrambled to find a replacement and, after a whirlwind of disappointing applicants and interviews, they settled for an inexperienced candidate named Amy. Amy would not have been better than a fifth choice under less trying conditions, but she was a young African American woman (a good fit at a preschool with many African American children), and seemed at ease with very young children. Perhaps most importantly, she expressed an eagerness to learn.

Three weeks into the school year, Barbara and Sonia were somewhat satisfied with their new hire and felt, perhaps, that she had a future at the preschool. Naomi, the senior teacher on staff, the self-appointed 'mother hen' of the faculty, disagreed. She wasn't keen on having someone so inexperienced on staff. Naomi had never taken kindly to inexperienced hires like Amy, so it was no surprise

when Amy asked for a private meeting with Ms. Barbara.

"She's on me all the time for nothing. I think she's out to get me," said Amy to Barbara.

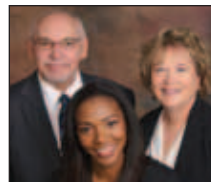
"Don't worry, Amy," said a reassuring Barbara. "Ms. Naomi's bark is worse than her bite and she has no power over personnel decisions anyway. You just keep doing a good job and you'll have nothing to worry about."

Two weeks later, Barbara and Sonia were sitting in their cramped office trying to catch their breath during a busy day when they heard shouting from the employee lunchroom.

Barbara went to investigate and there they were, Amy and Naomi, standing across the lunch table from each other, Naomi pointing fingers, Amy pointing back with the business end of a fork, and both trying to talk over each other with ever-rising crescendo.

She was unpleasantly surprised to say the least.

"Stop it and sit down!" Barbara ordered. The room became quiet and all eyes were on Barbara, wondering what she would do next. "Okay," Barbara said, "that's better. Now let's see if we can calmly get to the bottom of this." Three other teachers, who had no part in the fray, began to gather their coffee and lunch bags, but Barbara said, "No, you all stay. We may as well have everybody in on this." Barbara conducted an informal 'air-clearing' staff meeting which, she would say, went reasonably well. The meeting ended, coincidentally, with the end of the employee lunch break and everyone went back to work.



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The next day Amy asked for another private meeting with Barbara.

“I know we were supposed to be honest in that meeting and I told you in front of Naomi that I can’t stand her constant nitpicking, but what I *didn’t* say in her presence is that she has said some things to me that make it pretty clear that the white lady doesn’t like me because I’m black. I think this is all about race discrimination on her part.” Barbara was concerned. She asked several questions (and Amy’s responses seemed to support Amy’s theory), took some notes, and thanked her for being so forthcoming.

That evening, Barbara received, coincidentally, a call from the star teacher she was so sad to lose just weeks earlier. Her husband lost his new job, and she inquired as to whether she could have her job back. Barbara and Sophia met late that night to discuss the recent developments and decided that rehiring her would be best all around. The next day, they both dismissed Amy, telling her she had been replaced by the woman who originally occupied the position, rehiring their favorite former staff member.

Amy’s Termination

At first glance, it might appear that the preschool owners scored a double knockout, ridding themselves of a marginal employee who was not exactly getting along with the rest and welcoming back a teacher they cherished, but state labor laws may well dash their dream solution.

Absent an employment contract (written or oral) or the protections of a union collective bargaining agreement, all employees are ‘at will’ and may be terminated at any time without the need for cause. When they hired Amy, the preschool owners had her sign an employment agreement that clearly

stated in several places that Amy was an ‘at will’ employee and properly defined ‘at will.’

Despite the language in the employment agreement, Amy may well argue that she had an ‘implied’ employment agreement. An implied employment agreement may come about when the employer, through words or actions, leads an employee to reasonably believe he or she has an assurance or guarantee of continuing employment so long as he or she does not engage in significant misconduct. Amy (through the attorney she hired to sue the preschool) will argue that when, at their first private meeting, Barbara said, “You just keep doing a good job and you’ll have nothing to worry about,” Barbara implied that Amy had job security, especially since the assurance came from her supervisor, someone with the ability to hire and fire as she pleased. If a judge or jury finds that Amy’s belief about her job security was a reasonable reaction to what Barbara said, an implied employment contract comes into being and Amy’s dismissal, having been for convenience instead of cause, would then be a violation of that implied agreement.

In order to avoid the difficulty and potential monetary damages arising from a claim such as Amy’s, the employer must take precautions to always preserve the ‘at will’ relationship. Aside from emphasizing the ‘at will’ nature of employment in the employment contract, the employer should not make statements to the employee that could be construed as a promise of continuing employment. Some courts have even held that repeated praise of an employee with no balancing criticism may create an implied promise of continuing employment. On this latter point, balanced employee evaluation forms should be updated regularly by the employer. Rarely is an employee deserving of just praise and no criticism. Even if the legal system denies Amy’s claim of an implied employment contract, there is another potential difficulty with

her termination, given its coincidence with her complaint about racial discrimination.

It is generally understood that an ‘at will’ employee may be terminated at any time for any reason or for no reason at all, but that is not always the case. Terminating an employee in retaliation for registering certain types of complaints is unlawful. An employee who complains about general work conditions (too hot; too cold; too many kids in my class) or myriad other things is not protected in any sense. But an employee, even an ‘at will’ employee, who lodges a complaint about discrimination based upon race, gender, age, and a handful of other categories, or who complains about sexual harassment, cannot be terminated in retaliation for making the complaint.

When an employer receives a complaint such as that made by Amy, the employer must conduct a thorough investigation; it is often recommended that the investigation be conducted by an attorney or other person unconnected to the employer. If the investigation substantiates the existence of a problem, the employer must take reasonable steps to remedy the situation or else face damages for allowing a hostile work environment to persist. Whatever the employer must or should do about the problem, the employer cannot terminate the employee in retaliation for making the complaint.

Given that her termination took place almost immediately after she registered this particular complaint, Amy could rightly feel that her termination was retaliatory. Of course, the preschool would argue that the unexpected call from the revered former staffer was at the heart of the dual decisions, explaining the history of Amy’s employment as a replacement for her, and arguing that Amy would have been terminated even had she made no complaint. A judge or jury would decide.

There is nothing a school can do to alter the timing of events; all it can do is to be

aware that a termination for cause or no cause that is temporal with the lodging of a protected complaint will likely be suspect. Regularly evaluating employees, documenting all complaints about an employee, and documenting misconduct warnings in the employee's personnel file are some of the proactive steps an employer may take to set up the best defense to a complaint of retaliatory termination.

The Lunch Break Meeting

Another labor law issue raised by our scenario is Barbara's conversion of the employee meal break into a staff meeting.

Employers are *required* to give a meal break (as well as rest breaks) to full-time employees. These breaks are intended to be times for the employee to relax and recharge without the imposition of work-related duties. These breaks may be waived by the employee under certain limited circumstances that are beyond the scope of this article, but which are discussed in our article in an earlier issue of *Exchange* ("Field trips: Liability issues and best practices," March/April 2011).

The employee meal break is generally an unpaid time period ranging between 30 to 60 minutes. Where the meal break is unpaid, the employee clocks out or otherwise notes the commencement of the lunch break, and completes the documentation upon returning to work. Whatever system the employer establishes to keep track of employee work time and meal breaks, the employer must ensure that the employee complies with the system; if ever a claim arises that an employee did not take a meal break and is therefore entitled to overtime pay, the burden will be on the employer to produce records demonstrating otherwise.

In the case of the lunchroom fracas, the five employees were presumably off the clock and free from workplace duties.

That two of them chose to engage in a workplace dispute into quiet time is obviously beyond the employer's control. However, when Barbara turned the situation into a mandatory meeting, she was clearly interrupting the meal break with work-related duties. As such, the employees were forced to 'work' during a portion of their meal break, which subtracts that time from the meal break period and adds it to the hours worked. The school could be subjected to fines and penalties for failing to allow a meal break to take place in its entirety and for failing to pay overtime if the school did not pay the employees for the time they spent meeting during their supposed meal break.

Although she had to act with haste to defuse an escalating situation, the best course of action for Barbara to have taken would have been to allow the employees to continue their meal break and to then schedule the staff meeting for a later time. If that was not practical, she could have had the employees clock in before conducting the meeting so that they were properly compensated for their time (albeit not permitted their full meal break).

This article covers only tiny snippets of labor law. Labor laws are numerous and complex, and most employers engage in minor violations on a regular basis without even knowing it. The best way to avoid labor law claims is to know as much of the law as you can, to rely upon the advice of a knowledgeable attorney, and to document every aspect of the workday.

For more information on all labor law forms designed for the childcare industry, as well as the very latest legal compliance guidelines and strategies associated with Childcare and Family Law, please visit ChildCareCompliance.com.