



CAMICO : War Story – Wrongful Termination

Carl Webb, senior partner of Webb, Santo & Co., a mid-sized firm in San Jose, is a friendly man who has a way of putting people at ease. When he and the other three partners of Webb, Santo sit down together in mid-May to evaluate the firm's direction and goals, Carl reluctantly agrees with the other partners that some cuts in the staff would probably be necessary, along with other cost-control measures, in order to maintain the firm's financial health.

Founded in 1988 by a group of alums from one of the largest CPA firms in Silicon Valley, Webb, Santo concentrates on audit and tax work. Over the past year, Webb, Santo had unexpectedly lost three important clients, in one case because of a fairly minor employee error which the client blew out of proportion. In the end, 1994 had been the first really disappointing fiscal year for the firm.

In a series of discussions with the other partners, Carl comes to the conclusion that one of the staff accountants—the person whose error was partially to blame for the loss of the one client—is a “non-performer,” and not contributing to the firm's growth. “We have to get rid of some dead wood,” was the consensus of the group, and Paul Berger seemed a likely candidate for termination.

Paul, a reserved man in his mid-thirties, had never been a real go-getter. His social skills were awkward and he rarely mingled with the rest of the staff. While he had been with the firm for three years, and was never dishonest or insubordinate, the partners agreed that he wasn't a real asset to the firm, either. They had even occasionally been under the impression that clients were uncomfortable dealing with Paul because of his withdrawn personality. Carl Webb agreed to take on the unpleasant task of letting Paul Berger go, and called him into his office one Friday afternoon.

After his meeting with Paul, Carl was relieved at how smoothly it had gone. He had told Paul, as tactfully as he could, that Paul's work was not up to the standard set by the firm, and that they could not afford to keep him on during these leaner times. He explained that Paul would be asked to sign a release stating that he would not bring suit against the firm in consequence of his termination, and that the firm would give him four weeks worth of severance pay. Paul took the news very quietly, agreed to sign the release form, cleaned out his desk, and left the office.

A month later, Paul Berger filed a lawsuit for wrongful termination against Webb, Santo. Carl Webb was stunned to learn from Berger's attorneys that Berger claimed he signed to release under emotional distress, having been led to believe that he would not receive severance pay if he did not sign the release. His suit charged that he had not been fully informed of his rights. “That's not the way I remember our conversation at all,” thought Webb. “But it's my word against his.”

Results

In contacting CAMICO's Claims Department to report the suit, Carl Webb had several discussions with his Claims Specialist regarding Webb, Santo's apparent failure to communicate clearly with Paul Berger. Webb, Santo had no written performance reviews and no employee handbook. In fact, there was almost no written documentation of the personnel procedures, and little information in Paul Berger's personnel file relating to performance issues. Most personnel issues were handled informally at Webb, Santo, primarily because the partners preferred to be more “flexible” in their approach, and didn't want to create a highly structured corporate culture where detailed policies were the rule.

Since Paul Berger had never been given a formal warning, and in fact had every reason to believe his work was acceptable, his termination did not appear to be in good faith. Carl Webb stated that he and other partners had “dropped hints” from time to time, but no one had ever reprimanded Berger. He said they always wanted to “give him a chance.” Additionally, seven months prior to terminating Paul, they had actually given him a routine salary increase on his three-year anniversary with the firm. This could easily be taken as tacit approval of his performance. And while Carl Webb had a strong belief in his own “people skills,” and had felt that he and Paul had reached a good understanding at the termination meeting, Paul's claim that he had been pressured and misinformed showed just how little understanding there really was.

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The claim was settled out of court, with Paul Berger receiving an additional two months severance pay. Webb, Santo is currently in the process of preparing an employee handbook and clarifying personnel procedures.

Loss Prevention Tips:

- Never make a termination decision hastily. Instead, fully investigate incidents giving rise to the proposed termination.
- Ensure that similarly situated employees receive consistent treatment in the termination process, particularly when the employee to be terminated is a member of a protected class (i.e., minority, female, disabled, over 40, etc.)
- Have another supervisor or manager present at the termination meeting of a “problem” employee to serve as a witness to the proceedings.
- Have in place written personnel policies and ensure compliance with them. For example, if your firm’s policy mandates progressive discipline, such discipline should be followed where possible. Of course, in some situations, immediate termination may be necessary.
- Review the personnel file of the employee to be terminated, including the employment application and the performance reviews. Where an employee has consistently received good reviews and raises, basing a termination on poor performance can be problematic. Also, the personnel file may contain documents, such as a letter of employment with specified terms or written assurances of continued employment, that could give rise to a contractual claim. Similarly, be aware that verbal assurances of continued employment can give rise to a contractual claim.
- Poor performance, or lack of meeting the firm’s objectives needs to be documented and communicated to the employee in writing. Also, fully document everything discussed at a termination meeting, regardless of the reason for the termination.
- Never pay severance without an accompanying release of all claims, unless your firm has a policy to pay severance. An employee should be given time to understand his rights, talk to an attorney, and think about whether or not he wishes to sign such a release.