



Retail Industry Update

Common Mistakes When Terminating Employees For Theft, Part 1

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Employee theft is an issue besetting retailers every day. A 2005 survey by the University of Florida puts the cost at \$17.6 billion, and concludes that employee theft accounts for 47% of inventory shrinkage.

Responses to this epidemic range from low tech (like rewards for employees turning in thieves) to high tech (such as computer monitoring of transactions to reveal issues that would normally go undetected by managers). Yet unscrupulous employees remain undeterred and continue to try to beat the system. What is even more upsetting is that catching an employee red-handed on video sliding groceries will not prevent the employee from bringing some form of wrongful termination claim. Many individuals, even guilty ones, feel compelled to try to clear their name. Even though the employer will likely eventually win such a suit, the expense and time involved can cost hundreds of times the amount of the theft.

Employers usually have no choice but to terminate employees who engage in dishonest or even suspicious behavior. But mistakes are sometimes made and you could find yourself not only facing a lawsuit, but finding that your mistakes created potential liability to an individual who stole from your company.

In this issue, we'll look at some common mistakes that have resulted in what should be unassailable terminations going south in court.

The Investigation

In virtually every employment lawsuit arising out of termination for wrongdoing, the first step of the termination process, the investigation, becomes the most critical years later in front of a jury.

This is even more important when theft is involved. An allegation of theft is a powerful accusation and one that should never be taken lightly. While an employer ordinarily bears no burden of proof at trial, the jury will look for the employer to prove an accusation of theft beyond a reasonable doubt. The employee's first tack in a trial will be to attack the quality of the investigation.

There are many important missteps to avoid. First, there should be at least two individuals involved in the investigation, and optimally, one should not personally know the subject. This will help avoid claims of a conclusion being trumped up against an employee because of hostility by the investigator toward the accused. For example, an employee might claim that the manager framed her for theft for refusing his sexual advances.

If the company has a protocol for investigations, it must be followed to the letter. Juries demand that employers follow written procedures; failure to do so can also serve as evidence of pretext used to defeat summary judgment. Witnesses should write their own statements in their own handwriting. Nothing tanks the credibility of a witness faster than when on the stand, he does not know what some of the words in his statement mean.

Employees being investigated must be allowed to tell their story and have it included as part of the record of the investigation. Otherwise, a jury may think that the employee was railroaded. The investigation must be thorough and an investigator should never limit the investigation to the witnesses identified by the accused if other individuals might have relevant knowledge.

Catching The Thief

The method used to catch thieves can also result in liability. Case law suggests that retail managers are fond of hiding baby monitors in break rooms to try to catch the employees talking about stealing. While the idea seems perfectly logical, it is also illegal under federal anti-wiretapping laws. Having the employee in a position where he cannot leave an investigatory meeting without going through a person leads to false imprisonment claims. Digging in an employee's purse without consent can generate invasion-of-privacy claims. Federal laws also regulate the use of lie detectors in investigations of monetary loss.

Because of factors like these, it's important that an employer take several steps. First, all employees should sign an acknowledgement that they understand they have no privacy rights in items they choose to bring on the premises. While not required by federal laws, employees should also acknowledge that they are under video surveillance, and consent to it. Make employees aware that participating in investigations being conducted by the employer is mandatory and that refusal may result in termination. Finally, expressly advise employees that if they violate policies pertaining to the protection of company assets, they may be terminated without any finding of any intentional wrongdoing on their part.

The Termination Meeting

The termination meeting should not be the first time an accused learns that he or she is suspected of malfeasance. If there is a benefit to the investigation from not letting on to the employee that

they are under suspicion, and termination is an almost foregone conclusion at the time of the interview, the decision to terminate should still not be made or communicated during the first interview. It is far better to suspend the employee pending the outcome. Many employees will not return for a follow-up meeting and can be terminated as having abandoned their job. There are far fewer facts to argue about when an employee is terminated for these grounds.

How the termination meeting will be conducted depends heavily on how strong the evidence appears. If all the evidence points to theft, but is not conclusive, an employee should not be told he is being terminated for "theft" or "dishonesty" or even "suspicion of theft." This does not mean the employee should not be terminated. But accusing an individual of a crime is *per se* defamatory in many jurisdictions and can result in the employer being practically forced to prove that the employee in fact stole. Using language centering on your lack of trust in the employee, i.e., loss of confidence, is much less likely to be defamatory.

Another possibility, where the employee, while not proven guilty, may bear responsibility for the loss under the employer's policies, is to connect the termination to the policy violation, not to a crime. In this scenario, the employee should also be told that no conclusion has been reached as to their culpability for a crime, but that he or she is being terminated because proper store procedures were not followed.

Terminating employees for these stated reasons may not prevent the employee from securing unemployment compensation, but as discussed in Part 2 of this article, fighting unemployment compensation is overrated. In the next issue of Retail Sales Update, we'll also look at other problem areas in terminating for theft, including when – and when not – to call in the police.

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