The Top Ten Employment Law Questions Asked by Local Health Directors

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Our county grievance policy provides for appeal of the health director's employment decisions to the local board of health / board of county commissioners / county manager. Is their decision on appeal binding or does the final decision rest with the health director?

SPA Appeal Process for Local Health Dep'ts

- 1. 25 NCAC 1I.2309 Appeals
 - 15 days "to file an appeal with his agency/county grievance procedure, whichever is applicable An appeal of a final agency decision must be filed within 30 calendar days . . ."
 - Exception for charges of discrimination
- 2. "Final agency decision" may be appealed to OAH in accordance with G.S. 150B-23
 - Recommended decision by Administrative Law Judge (ALJ)

Appeal Process, cont.

- 3. ALJ Decision reviewed by State Personnel Commission (SPC)
 - Must explain any disagreement with ALJ with specificity
- 4. SPC Decision is advisory to local health director
 - If claim is discrimination, SPC decision is binding
- Really final health director decision may be appealed to the Superior Court → NC Court of Appeals → NC Supreme Court

What is the difference between performance

and conduct and why does it matter?

Performance v. Conduct

25 NCAC 1I.2302

"Unsatisfactory job performance is work related performance that fails to satisfactorily meet job requirements as specified in the relevant job description, work plan or as directed by the management of the work unit or agency."

25 NCAC 1I.2304

- "Employees may be dismissed for a current incident of unacceptable personal conduct":
- 1. Conduct for which no reasonable person should expect to receive prior warning;
- 2. Job-related conduct which constitutes a violation of law;
- 3. Conviction of a felony of offense of moral turpitude that is detrimental to the employee's service to the agency;
- 4. Willful violation of known or written work rules;
- 5. Conduct unbecoming an employee that is detrimental to the agency's service:
- Further examples: (6)- (9)

Performance v. Conduct: Examples

□ Barney Boyd



□ John Noble



An employee has complained that another employee is harassing her. We've conducted an investigation, but we can't find any evidence to support her claims. It is a "he said / she said" situation. What should we do?

Employer Liability for Harassment

- ➤ Where the harassment results in a tangible employment action such as discharge, demotion, or undesirable reassignment the employer's liability is absolute.
- ➤ When no tangible employment action has been taken, the employer may escape liability by showing:
 - ✓ it used "reasonable care" to prevent and correct any harassment; <u>and</u>
 - **✓** the employee "unreasonably" failed to complain.

We're about to hire a new nursing coordinator and we want to

double-check on what questions we are not allowed to ask.

Don't Ask That Question!

- 1. Are you married, single, divorced, or what?
- 2. Are you pregnant now or do you expect to get pregnant soon?
- 3. Are you in the reserves? *Or, if applicant is a member of a reserve unit* Do you expect to be deployed (again) any time soon?
- 4. Have you ever been arrested?

Don't Ask That Question Either!

- What medical problems might limit your ability to perform these job duties?
 - Bad Q: the Wal-Mart Special
- □ Can you perform all functions of the job?
 - Question OK
- Will you need a reasonable accommodation to perform any job function? If so, please describe.
 - Bad Q, because the answer must be medical-related

Or That Question!

- Ever filed a workers' comp claim?
 - Bad Q: medical
- □ Taking any prescription drugs?
 - Bad Q: medical
- **■** Ever been treated for drug addiction?
 - Bad Q: past drug addiction is an ADA-covered disability
- □ Do you ever drink alcohol? If so, how many drinks per day? Per week?
 - Current alcoholism is an ADA disability. So the first Q is OK, but the second two are not.

This is a small community and everyone knows that one particular employee in the health department has a drug problem.

Can we force her to take a drug test?



Reasonable, Individualized Suspicion

- **□** Fourth Amendment issue
- **□** Suspicion must be based on specific <u>facts</u>:
 - Direct observations of drug use or possession;
 - Report of observed drug use <u>by reliable</u> and credible source;
 - Direct observation of the physical symptoms of being under the influence of a drug, such as impairment of motor functions or speech;

Reasonable suspicion: Based specific objective facts

• A pattern of

abnormal conduct or erratic behavior



Reasonable suspicion: Based specific objective facts

- □ Arrest or conviction for a drug-related offense, or the identification of employee as the focus of a criminal investigation into illegal drug possession, use or distribution;
- On-the-job accident where evidence indicates drug use played a role;
- Newly discovered evidence that employee tampered with a previous drug test

Safety v. Privacy: When May a Public Employer Require a Drug Test?, Popular Government,

Winter 2003, pp. 5 -16; available online at

http://ncinfo.iog.unc.edu/pubs/electronicversions/pg/pgwin03/article1.pdf

I have an employee who has been out on workers' comp for ten months.

Can I fire him?

Terminating an Employee Receiving Workers' Compensation

- □ Retaliatory Employment Discrimination Act
 - <u>See</u> G.S. §§ 95-240 95-245
- □ Temporary Partial Disability
- □ Permanent Partial Disability
- □ Temporary Total Disability
- □ Permanent and Total Disability



An employee brought in a note from her doctor saying that the employee is suffering from job-induced stress and that the doctor has advised her to stay out of work indefinitely. What should I do?

Can't Come to Work Indefinitely

□ Ascertain whether this qualifies as a serious health condition under the FMLA by using the DOL's FMLA certification form:

http://www.dol.gov/esa/regs/compliance/whd/fmla/wh380.pdf

- □ Serious Health Condition means
 - **inpatient care** or
 - a period of incapacity necessitating absence from work for more than 3 days and requiring treatment by health care provider 2 or more times
- **□** Run sick leave concurrently with FMLA leave
 - See 25 NCAC 1I.2005(5) and 25 NCAC 1I.2304(b)(9)

What should I do when an employee requests FMLA leave just as I am about to fire him?

Restoration of Job After FMLA Leave

- □ 29 CFR 825.216(a):
- "An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment."

My clinic physicians are going to quit if I make them employees rather than independent contractors. Do I have to do it?

Employee v. Independent Contractor

- □ The Right-to-Control Test
 - Does the employer controlled enough of the circumstances of the work to establish employeremployee relationship?
 - Do the physicians spend any money or effort to generate work, hire assistants, or pay for their offices or equipment?
 - Is it a continuing relationship?
 - Do the physicians have an opportunity for profit or loss?

Can they fire me?!?