

Is Your Employee Handbook Making Unintended Promises?

By Tina Aiken

Although you may intend that management have the authority to use discretion when administering discipline to employees and making other personnel-related decisions, the language in your employee handbook may unintentionally promise specific treatment to employees in specific situations. A simple choice of words can make all of the difference in the world. A Washington employer recently learned this when a lawsuit filed by three former employees was remanded for trial because the employee handbook contained the word “will” instead of “may.” In *Korslund v. Dybcopr Tri-Cities Svcs., Inc.*, 2004 Wash App. LEXIS 752 (2004), the court ruled that an employer’s decision to use language in their handbook indicating mandatory action, rather than words suggesting the use of discretion, created a question of fact as to whether the employer intended a promise of specific action.

Background. Policy documents issued by employers, including employee handbooks, may create enforceable obligations on the part of the employer that may modify an at-will employment relationship. Such obligations open the door to employee lawsuits based on breach of contract or written promise.

Although employers usually intend that a handbook serve as a general statement of company policy and that it not guarantee any rights to an employee, a handbook that is not carefully drafted can inadvertently become an employee’s strongest weapon against his employer. Language inserted into a handbook in an attempt to create an environment of trust and security can backfire on an employer, such as the one in *Korslund*.

Lesson from *Korslund*. In *Korslund*, the employee handbook, as well as policy documents separately disseminated to employees, contained provisions encouraging employees to come forward and report any employment-related concerns, and stated that any person who retaliated against the complaining employee “will be subject to appropriate corrective measures.” Although the employer argued that it retained for itself the discretion to determine the appropriate corrective measures, the court’s focus was that the policy expressly stated that some corrective measure *would be taken*. Specifically, the court stated, “the policy does not use language suggesting discretion, such as ‘should,’ or ‘make every effort.’ The document uses the word ‘will,’ which indicates disciplinary action is mandatory.” The court ruled that because of this language, there was a factual question whether the employer intended a promise of specific action in specific situations.

The court also made clear that statements in employee handbooks regarding employee discipline should be carefully drafted. When a handbook requires that an employee receive at least one warning prior to being dismissed, a question of fact arises as to the existence of a promise of progressive discipline. In contrast, where a handbook gives the employer discretion in applying the discipline procedures, the handbook does not provide a promise of specific treatment in a specific circumstance. Again, words such as “should” and “may” are deemed advisory, and therefore, acceptable language. Further, where a handbook specifically states the employer retains the discretion to dismiss an employee without prior discipline, the policy is not an enforceable promise.

Employee Handbook: Friend or Enemy? Decisions like *Korslund* may make an employer wonder whether they are better off without a handbook. When a simple word choice makes the difference between a generalized statement and a binding promise, it is no wonder that employers may hesitate to put anything in writing. However, with a carefully drafted handbook, an employer can provide necessary information to employees, create a positive atmosphere, and provide valuable protection from wrongful discharge claims. To avoid handbook mistakes like the ones found in *Korslund*, consider the following tips:

- ✓ Use language that suggests discretion, such as “should,” “may,” or “make every effort.”
- ✓ Do not use language indicating mandatory action, such as “will” or “shall” unless you really mean it.
- ✓ Specifically state that the employer retains the discretion to dismiss an employee without prior discipline.
- ✓ If the handbook contains a progressive discipline policy, specifically state that the policy permits discipline to begin at any level, and dismissal is permitted without prior disciplinary action.
- ✓ Include a conspicuous disclaimer that nothing contained in the handbook is intended to be part of the employment relationship, and that the handbook simply contains general statements of company policy.
- ✓ Have your handbook carefully reviewed to ensure that it does not contain unintended promises.

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