7 Important Things I Have Learned about Discipline and Discharge

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SEVEN IMPORTANT THINGS I HAVE LEARNED
ABOUT DISCIPLINE AND DISCHARGE

Table of Contents

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Number One: Get the Facts Right – Investigate before Acting.

A. **The Problem: Ready, fire, aim!** Sometimes, in the haste to take action, employers do not adequately investigate the situation.

B. **Importance: Why it matters.**

1. **Make the Correct Decision.** A thorough investigation helps ensure the employer has the full story and makes the correct decision.

2. **Builds the Case.** If discipline or termination is warranted, the investigation creates and assembles the evidence that will be critical to supporting the decision and defending it should litigation ensue.

3. **Sets Expectations.** The investigation may help prepare the employee for discipline or termination and avoid angering the employee by denying the employee the opportunity to tell his/her side of the story.

4. **Establish Legitimacy and Fairness.** By investigating, the employer employs a more thoughtful process. The investigation helps ensure that the process was fair and the resulting decision legitimate.

5. **Establishes Defenses.** A thorough investigation may establish key defenses, such as the employer took prompt and appropriate remedial action, acted in good faith, or is entitled to a qualified privilege.

a. For example, a defense to a defamation claim is "qualified privilege."

> "[A] communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved, before there can be a recovery, and in the absence of such proof the plaintiff cannot recover."

Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 256-57 (Minn. 1980) (citation omitted).

b. Failure to investigate, or adequately investigate, makes the privilege unavailable.

> We believe that an employer who takes no steps to investigate but relies entirely on accusations either made by employees who may be biased or on second-hand hearsay with no identification of sources, has not acted as a reasonably prudent person and lacks probable or reasonable grounds for making a potentially defamatory statement. Therefore, we hold as a matter of law that Kinney did not enjoy a qualified privilege.

Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990).

C. Investigation Guidelines.

1. Conduct a Neutral Investigation. Be fair and impartial; do not predict an outcome. Do not prejudge the outcome. Keep an open mind to avoid overlooking evidence or compromising the investigation.

2. Be Thorough. The breadth or scope of the investigation will depend on the facts of each case and the factors listed above.

3. Be Discreet and Trustworthy. Discuss the investigation only with other individuals who have a need-to-know. The investigator should not, however, promise confidentiality.

4. Be Sensitive. The employer and the investigator should be sensitive to the legal implications of the underlying conduct, the investigation, and the concerns of investigation participants.

5. Document. The investigator should carefully and factually document the investigation and keep the documentation in a separate, confidential investigation file (and not, for example, in the employee's personnel file).

6. Interview Key Witnesses.

a. In almost all cases, investigation includes, at a minimum, talking to the complainant and the accused.

b. It is particularly important to get the accused's side of the story.

(1) The accused may provide key evidence that causes the employer not to terminate.

(2) The accused may provide evidence that supports the termination.

(3) It will seem unfair to the accused and others if the employer does not get the accused's side of the story.

c. The employer may want or need to talk to other witnesses and consider hiring an outside investigator, if:

(1) The alleged behavior is serious.

(2) The facts are inconsistent or incomplete.

(3) The behavior may result in termination.

(4) There is a significant risk of litigation.

d. The employer should review other available evidence, including documents, electronic data, etc.

e. Breadth. The breadth or scope of the investigation will depend on the facts of each case and the factors listed above.

Number Two: Document, Document, Document.

A. The Problem.

1. If it's Important, Document it. A big problem for many employers is they simply do not document performance and discipline issues. If it is important, particularly if it could lead to further discipline or termination, document it.

2. Surprise! Surprised employees sue.

3. Proof. Most lawsuits arise out of terminations where the employee claims he or she was fired for unlawful, discriminatory, or retaliatory reasons and the employer claims the employee was fired because of performance or disciplinary problems. The employer should have documentation to prove its position and support its testimony.

4. Jury Distrust. Juries distrust employers and expect employers to document performance and discipline problems. A survey by Dispute Dynamics Inc. reported:

a. Seventy-four percent surveyed thought that employers must give fair warning before firing an employee, ensure the employee understands the policy or rule violated, and work with the employee to correct the problem or poor performance.

b. Fifty-seven percent agreed or strongly agreed that the best evidence of an employee's work performance is the employee's performance evaluations.

c. Ninety percent believed that the company is negligent if it does not properly document an employee's performance problems.

Individual Employment Rights (BNA), April 9, 1996, p. 1.

B. Importance.

1. Improves Performance. Documentation improves the likelihood of modifying employee behavior by educating the employee and giving the employee an opportunity to improve.

2. Shapes Expectations. Documentation shapes the employee's expectations to reduce surprise.

3. Stresses Importance. Documentation impresses upon the employee the importance of the issue.

4. Foundation. Documentation lays the foundation for a potential termination.

5. Evidence. Documentation creates evidence that helps the employer defend itself from a legal claim.

6. Decreases Litigation Risk. Documentation decreases the likelihood of litigation.

7. Wins Lawsuits. Documentation increases the employer's chances of winning if the employee sues for wrongful discharge.

a. Example: In Ziegler v. Beverly Enterprises-Minnesota, Inc., a terminated 26-year employee and former top administrator sued for age discrimination under the ADEA and the MHRA. The district court granted the employer summary judgment and the Eighth Circuit Court of Appeals affirmed. 133 F.3d 671 (8th Cir. 1998). The Court recounted in detail the plaintiff's deteriorating performance evaluations from 1984 to 1993. The Court quoted numerous performance evaluations and cited numerical ratings, particularly beginning in 1990 when the employer noted a "slippage from prior evaluations." The Court also quoted at length memoranda given to the plaintiff describing her need for improvement and setting forth the employer's expectations. Id. at 672-74. In the end, the Court dismissed the plaintiff's claim.

> The District Court correctly determined that there was no genuine issue of material fact as to whether Ziegler failed to perform her job at a level that met Beverly's legitimate expectations. Ziegler contends that because she was rated favorably overall in her 1988 and 1989 evaluations, and continually received high marks for her financial management skills, as evidenced in particular by the E-Awards [for excellence], she satisfied Beverly's legitimate expectations. We disagree. Ziegler's evaluations are replete with comments directed towards Beverly's dissatisfaction with Ziegler's leadership and interpersonal skills. Financial management is an important skill for an administrator, but an employer may legitimately place equal or greater importance on leadership and people skills.

Id. at 675.

b. Example. In Lippman v. Sholom Home, Inc., a former employee sued his employer under the Americans with Disabilities Act. 945 F. Supp. 188 (D. Minn. 1996). The district court granted the employer summary judgment holding that the employer did not know of the former employee's attention deficit disorder prior to terminating him. The court also addressed whether the employer's reason for termination was pretextual. The court found that it was not and stated "[t]he evidence reveals that Lippman had ongoing performance problems and was given numerous warnings, as well as a suspension prior to termination." Id. at 192. The documented performance problems included falsification of time records, tardiness, sleeping on the job, and calling in late. The court further stated that "[t]he record reflects that Sholom Home used progressive discipline and only terminated Lippman after he failed to meet explicit performance standards." Id. at 192.

C. Qualities of Good Documentation. Good documentation is:

1. Accurate.

2. Timely. Delayed documentation is less likely to be accurate and more likely to be viewed with suspicion.

3. Factual. It tells the history and the story, including the impact of the performance or behavior issue. Factual descriptions help the primary audience of the documentation (i.e., the employee) and the secondary audiences (e.g., the employee's lawyer, governmental agencies, the judge or jury) visualize what happened and form their own opinions and conclusions about the employee's behavior. This means describing

factually who was involved, what happened, when and where it happened, and why it matters.

4. **Avoids Labels.** Documentation should void labels, such as accusing the employee of "gross misconduct," "dishonesty," "theft," or "sexual harassment." There are numerous problems with labeling the employee's conduct. Labels, judgments, and conclusions do not persuade as effectively as factual descriptions that allow the reader to form his or her own conclusions. Compounding the problem, courts will sometimes give "greater scrutiny" to subjective reasons or labels – such as claims that an employee is not a "team player" – because they are "easily fabricated." See Zacharias v. Guardsmark, LLC, 2013 U.S. Dist. LEXIS 3787 at *18 (cite omitted). Labels also may result in defamation claims. See, e.g., Lewis v. Equitable Life Assur. Soc., 389 N.W.2d 876 (Minn. 1986)(employer told employees they were being terminated for "gross insubordination"); Weissman v. Sri Lanka Curry House, 469 N.W.2d 471 (Minn. App. 1991) (statement someone is "dishonest" is actionable because it "implies the commission of specific acts of dishonesty and may have deterred prospective employers from hiring her").

5. **States Expectations.** If the employer is writing disciplinary documentation, the document should describe the employer's expectations.

6. **States Consequences.** If the employer is writing disciplinary documentation, the documentations should explain to the employee the consequences of not meeting expectations. Typically, this means warning the employee that further issues may result in further action, up to and including termination.

Number Three: When Considering Termination, Forget At-Will Employment. Really.

A. The Problem.

1. **The "At-Will" Doctrine.** The at-will doctrine is a presumption that the employment relationship may be terminated by either party at any time, for any or no reason.

   a. **Indefinite Term.** Minnesota recognizes the "employment at-will" doctrine, meaning that when an employee is hired for an indefinite term, "the employer can summarily dismiss the employee for any reason or no reason, and … the employee, on the other hand, is under no obligation to remain on the job." Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983). Promises to the employee of "permanent" or "life-time" employment will not change the at-will nature of the hiring unless there is "some kind of additional consideration supplied by the employee which is

uncharacteristic of the employment relationship itself." Id., citing Bussard v. College of St. Thomas, 294 Minn. 215, 200 N.W.2d 155 (1972).

b. Only a Contractual Rule of Construction. The Minnesota Supreme Court has described "employment at-will" as a "rule of contract construction" that "[w]hen a contract is for an indefinite duration, the duration is not set, and … either party may then terminate it at any time for any reason." Pine River, 333 N.W.2d at 628. Put another way, "at-will" is an inference that "may be rebutted by specific terms of the agreement." Id. citing Restatement (Second) of Agency, § 442, comment a.

2. If it Seems Too Good to be True…. Because of the at-will doctrine, employers sometimes think they can easily terminate an employee or they do not need a compelling, well-documented reason for termination.

B. The Solution: When Considering Termination, Forget About At-Will.

1. "At-Will" Affords Only Limited Protection. Technically, it is true that a Minnesota employer can terminate an "at-will" employee at any time, for any reason or for no reason at all. The reality, however, is that the at-will doctrine is riddled with exceptions that limit the employer's right to terminate employees.

a. Contract Defense Only. The at-will doctrine only protects the employer against a breach of contract lawsuit. It does not protect the employer against a host of other legal claims, including discrimination, defamation, and whistleblower retaliation.

b. But Not an Illegal Reason. Therefore, even though an at-will employee can be terminated for any reason or no reason, he or she cannot be terminated for an unlawful reason. And you can bet the terminated employee will claim he/she was terminated for an unlawful reason.

c. Employer Defenses Require a Reason. Most lawsuits arise out of terminations where the employee claims he or she was fired for unlawful or discriminatory reasons and the employer claims he or she was fired because of performance or disciplinary problems. The employer must be prepared to prove its reason.

d. There was Some Reason. The employee (and a judge or jury) will not accept that the employer terminated an employee for no reason, and may infer an illegal reason if the employer cannot prove a compelling lawful reason.

2. **Instead, Follow Good H.R. Practices.** Instead of relying on "at will" to protect the employer from litigation, the employer should protect itself by following sound H.R. practices including:

a. Train Supervisors.

b. Adopt and Consistently Apply Policies.

c. Investigate Before Taking Action.

d. Document.

e. Terminate prudently.

Number Four: In Employment Law as in Comedy, Bad Timing Kills.

A. The Problem.

1. **Timing is Everything.** In employment, timing is critical.

2. **Two Problems.** There are two primary problems:

a. Terminating too soon; and

b. Terminating too late.

3. **Acting Too Soon.** Examples of acting too soon include:

a. Terminating abruptly without investigating or getting the employee's side of the story creates the risk of a legal challenge and undermines the employer's defenses.

b. Terminating without first coaching the employee and documenting the employee's performance or behavior problems leads to employee surprise and anger, and fails to create a foundation and evidence for the termination.

c. Terminating shortly after an employee engages in protected activity or announces his or her intention to engage in protected activity, creates the inference of retaliation. For example, terminating shortly after the employee:

(1) Requests or returns from Family and Medical Leave Act leave, Minnesota Parenting Leave Act leave, or other protected leave.

(2) Reports suspected discriminatory or harassing behavior (whether or not meritorious) or participates in an investigation of such behavior.

(3) Reports other suspected unlawful behavior (whether or not meritorious) or participates in an investigation of such behavior.

(4) Reveals protected class information such as disability, pregnancy, or sexual orientation.

d. A short interval between a plaintiff's protected activity and an adverse employment action raises an inference of causation, although, in general, more than a temporal connection is required. Freeman v. Ace Telephone Ass'n, 467 F.3d 695 (8th Cir. 2006) (holding termination less than a month after protected activity was insufficient to establish causal connection); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 445 (Minn. 1983) (holding termination two days after receipt of discrimination complaint established prima facie causal connection).

4. Acting Too Late.

a. Making the decision to terminate but then waiting to implement the decision increases the chance that intervening developments will make it appear that the employer retaliated against the employee. The timing creates the cause-and-effect inference that the employer retaliated against the employee because of the employee's protected action or disclosure of protected class status.

b. A host of bad things (and virtually no good things) can happen if the employer delays the date of a planned termination.

(1) The employee may learn of the employer's plans and try to manipulate the situation to protect the employee's job.

(2) Intervening events may occur, even without manipulation, that increase the risk of terminating the employee.

(3) Examples of things that could go wrong:

(a) The employee may seek FMLA or medical leave.

(b) The employee may file a workers' compensation claim.

(c) The employee may engage in protected conduct such as reporting suspected discrimination or unlawful conduct.

(d) The employee may become protected or disclose that he or she is in a protected class (e.g., pregnant, disabled, sexual orientation).

(e) Retaining the employee may lead to negligent supervision or negligent retention claims.

c. Waiting undercuts the validity of the reasons the employer has for terminating. The reason for terminating seems less compelling if the employer kept the employee around.

B. The Solution.

1. Investigate. Always investigate before taking action. If immediate action is necessary, place the employee on an administrative leave during the investigation.

2. Take Necessary Time to Decide. An employer should take the time necessary to decide whether to terminate so it is confident it is making the right decision.

3. But Once Decided, Implement Promptly. Once the employer decides to terminate, however, it should terminate as soon as possible. As a general rule, only bad things happen if the employer delays implementing the termination.

Number Five: Do Not Wing It; Plan the Termination.

A. The Problem. A hasty, or poorly-planned, termination meeting may create legal liability and business problems.

B. Solution: Plan the Termination.

1. Script. Know what you are going to say during the termination meeting.

a. Be truthful but circumspect.

b. Take particular care deciding what you will say about reasons. This may end up being the theory by which the employee sues the employer and the employer defends itself.

c. As a general rule, keep the reason factual, accurate, brief, and high-level. (For example: "We continue to be dissatisfied with your performance.")

d. If there are multiple reasons, be careful not to foreclose reasons.

e. Avoid legal conclusions. (For example: "Based on the results of our investigation, we have decided to terminate your employment." Not: "We are firing you for sexual harassment." Not: "We are firing you for theft.")

f. Know how much, if any, detail you will provide.

g. Be prepared to end the debate. (For example: "The decision has been made. Let's discuss where we go from here.")

2. Participants/Witnesses. Include at least one appropriate management witness. Decide who will do the talking.

3. Decide Meeting Logistics. Decide on a safe, private location and a time.

4. Prepare Precautions. Decide what precautions should be taken to protect others and company property.

a. Security.

b. Computer access, including remote access.

c. Laptops and devices.

d. Access to employees or company property.

e. Agreements containing post-employment restrictions (e.g., noncompetition and confidentiality agreements) and reminder letter.

5. Prepare Employee Final Pay.

a. Deductions from pay are regulated by state and federal law.

(1) The employer cannot deduct from an employee's pay for "lost or stolen property, damage to property, or to recover any other claimed indebtedness" unless the employee has given a written, voluntary authorization after the debt has arisen, or a court has held the employee liable for the debt. Minn. Stat. § 181.79, subd. 1. If the employer unlawfully deducts, the employee can sue for two times the amount of an unauthorized deduction. Minn. Stat. § 181.79, subd. 2.

(2) In the case of a loan or purchase from an employer, the employer may also deduct if, before the loan or purchase, the employee voluntarily authorized in writing the deduction from wages at regular payroll intervals or upon termination of employment. Minn. Stat. § 181.79, subd. 1.

b. Payment of final wages.

(1) When a Minnesota employer discharges an employee, all wages or commissions actually earned and unpaid "are immediately due and payable upon demand of the employee." Minn. Stat. § 181.13(a). If the employer fails to pay the discharged employee within 24 hours of demand, the employer is liable for (1) the wages or commissions actually earned and unpaid, (2) a penalty equal to the amount of the employee's average daily earnings at the employee's regular rate of pay or the rate required by law, whichever rate is greater, for each day up to 15 days that the employer is in default, and (3) attorneys' fees. The employee must make the demand for wages in writing, but need not specify the exact amount of unpaid wages. Minn. Stat. §§ 181.13(a), 181.171.

(2) When a Minnesota employee quits, all wages or commissions actually earned and unpaid must "be paid in full not later than the first regularly scheduled payday following the employee's final day of employment…. If the first regularly scheduled payday is less than five calendar days following the employee's final day of employment, full payment may be delayed until the second regularly scheduled payday but shall not exceed a total of 20 calendar days following the employee's final day of employment." Minn. Stat. § 181.14. If the employer fails to pay the discharged employee within 24 hours of demand following the required time period, the employer is liable for (1) the unpaid wages or commissions, (2) a penalty equal to the employee's regular rate of pay or the rate required by law, whichever rate is greater, for each day up to 15 days that the employer is in default and (3) attorneys' fees. The employee must make the demand for wages in writing, but need not specify the exact amount of unpaid wages. Minn. Stat. §§ 181.14, 181.171.

(3) Where the employee was entrusted with the collection, disbursement, or handling of the employer's property or money, the employer has 10 calendar days to "audit and adjust the accounts of the employee" before the wages must be paid. Minn. Stat. § 181.14, subd. 4. However, beware the strict restrictions on deductions contained in Minn. Stat. 181.79.

(4) The employer may be obligated to pay for earned, unused vacation, depending upon its contract with the employee.

In Lee v. Fresenius Medical Care, Inc., the Minnesota Supreme Court held that vacation constitutes wages, but that the employer's contract with the employee determines whether and under what circumstances the employer must pay out accrued unused vacation upon termination of employment. 741 N.W.2d 117 (2007).

Number Six: Be Fair, Look Fair (aka, "Don't Act Like Goliath, Nobody Likes Goliath").

A. The Problem. Not being fair causes the employee to sue. Not looking like the employer acted fairly causes the employer to lose the lawsuit.

1. Poor Treatment Leads to Claims. Employees who feel they have been treated shabbily are more likely to sue.

2. Some Things Just Plain Look Bad. If possible, an employer should avoid adding insult to injury. Here are some examples of employer actions that look bad to employee and jury alike and increase the risk of a lawsuit:

a. Firing long-term employees without coaching or documentation.

b. Firing before a holiday or during a holiday season.

c. Hiring a replacement behind the employee's back or, worse yet, having the unwitting soon-to-be former employee train his or her replacement.

d. Escorting the employee out, especially if not necessary, or doing so in an obvious or heavy-handed manner.

e. Not letting the employee collect his or her personal belongings, or boxing up his/her belongings without first discussing it with the employee.

f. Not considering how the employee will react.

g. Not treating the employee compassionately or, at a minimum, professionally.

h. Lying to the employee.

i. Firing the employee when he or she is experiencing a crisis.

j. Not giving the employee a chance to tell his or her side of the story when investigating allegations that could result in termination.

k. Discussing unnecessarily, especially with co-workers, the reasons for termination.

l. Badmouthing the employee to other employees or references.

B. Solution. Be fair, and also think about the "optics" of looking like you were fair.

1. Golden Rule. As a general rule, treat the employee how you would like to be treated. Put yourself in the employee's shoes.

2. Follow Good Personnel Practices. Follow good personnel practices, including coaching and documentation, especially with long-time employees and employees in protected classes.

3. Investigate. Investigate allegations of wrongdoing, especially if they could result in termination, and give the employee a genuine opportunity to tell his or her side of the story.

4. Review Circumstances. Review extenuating circumstances before terminating. Were the employee's actions excusable or misunderstood? Was the employer or supervisor in some way responsible? Are there circumstances that may create legal liability, such as discrimination or whistle-blowing?

5. Consider Reactions. Consider how the employee will view and react to the termination and take steps to soften the blow, such as:

a. Personally deliver the news versus impersonal or group notice.

b. Do not lie or sugar coat the reasons, but do not rub them in either.

c. Do not tell the employee this is difficult for you, too. He or she would gladly trade places.

d. Do not tell the employee the decision is for the best.

e. Consider paying severance (in exchange for a release of claims).

f. Consider offering outplacement. The employee gets help finding a new job and the employer gets an employee who is focused on his/her future rather than avenging his/her past.

g. Avoid badmouthing, defaming, or generally airing the employee's dirty laundry.

(1) Be careful what you say and train others to do the same.

(2) Be stingy with personnel information: discuss and distribute on a need-to-know basis only. Do not discuss the

former employee or the circumstances surrounding his or her termination. Train others to do the same.

(3) Be factual. Use objective observations and avoid conclusory language.

(4) Adopt a reference policy that (i) requires that all employment reference requests be directed to Human Resources, and (ii) limits the information provided to position, dates of employment, and pay unless the former employee provides a legally-compliant reference authorization and release.

Number Seven: Consider the Strategic Use of a Severance Agreement and Release.

A. **The Problem.** There is no law requiring Minnesota employers to pay severance to terminated employees. Thus, absent an employment agreement or severance policy or plan, an employer need not pay severance to a terminated employee. So, then why should an employer consider offering severance pay or benefits?

1. **Desperate Employees Sue.**

2. **Corollary: Fired Employees are Desperate. And angry, to boot.**

3. **Why Not Sue?**

a. The former employee needs money.

b. The former employee may crave vindication or revenge.

c. The former employee has nothing to lose by suing or filing a charge.

d. The former employee has read headlines about large employee verdicts.

e. The former employee's lawyer knows many cases settle.

B. **The Solution.**

1. **Consider the Strategic Use of Severance and Release.** Depending on the circumstances, employers should seriously consider offering terminated employees severance in exchange for a full release of claims.

2. **Reasons**. There are a number of compelling reasons that employers should, when terminating an employee, seriously consider offering severance pay/benefits in exchange for a severance agreement.

a. The employer may already plan to offer severance pay (or severance benefits) for reasons such as loyalty, custom, or making the company an attractive place to work. If the employer already plans to provide severance, it should consider obtaining the protection of a severance agreement in exchange.

b. To Avoid Litigation. A severance agreement is, in a sense, similar to purchasing an insurance policy. The severance pay is like a premium paid in exchange for protection against litigation because a legally-compliant release will bar most, though not all, possible legal claims.

c. To Avoid the Threat of Greater Costs/Losses. If the employee does sue, the employer has no upside but will face significant potential downside risk and costs, plus the disruption of substantial time spent by the employer and its employees defending against the claim.

d. Makes the Employee Less Desperate. There is a practical, financial aspect to employment lawsuits. Desperate former employees sue. Offering severance provides a "soft landing" so the former employee can meet basic financial needs while seeking employment. Thus, there is less of a financial incentive to sue.

e. Lessens the Financial Incentive to Sue. If the employer terminates the employee without severance, the employee has nothing to lose by seeing an attorney, filing a lawsuit, or filing a charge. If the employer offers severance, the employee will feel less of a need to sue and, in fact, may not want to pay an attorney and potentially eat into the severance pay the employee has been offered.

f. Makes the Employee Less Angry. There is a psychological aspect to employment lawsuits. Angry former employees sue. Severance may make the employee feel more like he/she is "getting a fair shake" and may blunt the employee's anger.

g. Closure. Severance and releases can give both sides legal and psychological closure.

h. Win-Win Outcome. Both sides get something (the employee gets severance, the employer gets closure and reduced legal risk), so both sides win.

i. Almost All Problematic Potential Claims can be Released. The following claims can be released as part of a valid severance agreement and release:

(1) Discrimination lawsuits. Pilion v. University of Minnesota, 710 F.2d 466 (8th Cir.1983), ADA claims (Kujawski v. U.S. Filter Wastewater Group, Inc., 2001 U.S. Dist. LEXIS 17578 (D. Minn. Aug. 7, 2001)), ADEA claims (Warnebold v. Union Pacific Railroad, 963 F.2d 222 (8th Cir. 1992)), and MHRA claims (Somora v. Marriott Corp., 812 F. Supp. 917 (D. Minn. 1993)).

(2) Discrimination charge damages. EEOC Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) enforced statutes (Apr. 10, 1997), citing EEOC v. Cosmair, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987) (although an employee cannot waive the right to file a charge with the EEOC, employee can waive the right to recover in his/her own lawsuit as well as the right to recover in a lawsuit brought by the EEOC on the employee's behalf).

(3) FMLA. Paylor v. Hartford Fire Ins. Co., 748 F.3d 117, (11th Cir. 2014).