

FEDS IN COURT

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WRONGFUL TERMINATIONS

by Attorney Josh Bowers

Attorney Joshua F. Bowers has represented federal employees for nearly 20 years, including seven as an attorney in the national office of the National Federation of Federal Employees. Named Lawyer of the Year in 2002 by the Metropolitan Washington Employment Lawyers Association, Bowers has testified before Congress on federal employee issues, and represented his clients before the numerous administrative forums available to federal employees.

FIC asked Bowers to answer a few questions about wrongful terminations.

What are the most common causes of wrongful termination?

Federal employees may be terminated for wrongful conduct, failure to perform their duties or failure to maintain requirements of their positions such as a security clearance or driver license. Now that many employees have *access* to the Internet, there has been a significant increase in misconduct charges for misuse of the Internet such as operating a business from a federal office, shopping on-line, sending abusive e-mails and accessing pornography.

Are there any specific kinds of termination that are particularly difficult—or easy—to appeal?

An employee may have a "good" case if the employee engages in misconduct on a single day, but as a mitigating factor can demonstrate a long history of meaningful contributions to the workplace. If this was the first incident of misconduct, and the agency imposes overly-severe discipline, mitigation of the penalty may be obtainable on appeal.

The most difficult cases concern an employee's termination based, on charges of performance failure. If an employee was given a legitimate opportunity to improve during a Performance Improvement Period,

the standard of review is only whether the agency's termination decision was "reasonable." Performance-based removals are rarely overturned by the Merit Systems Protection Board (MSPB). If an employee has access to the arbitration process through a union-agency collective bargaining agreement, then arbitration is the far superior forum for challenging a performance-based termination.

There is a disturbing trend of federal agencies referring allegations of misconduct to their offices responsible for issuing security clearances. If the employee's job requires a security clearance, and the security clearance is revoked, the employee's appeal rights are extremely limited.

What are some of the things that commonly are considered mitigating or aggravating factors in a wrongful termination lawsuit?

In the landmark decision of *Douglas v. Veterans Administration*, [5 MSPB 313 (1981)], the MSPB set out factors that may support the mitigation of a penalty. An employee seeking mitigation of overly-severe discipline should be prepared to demonstrate as many of the following factors as possible: a history of positive performance appraisals, cash awards, absence of prior discipline and acceptance of responsibility for the misconduct.

Submission of letters of support from fellow federal employees, supervisors and members of the community is helpful to demonstrate good character. If a medical or psychological condition was a contributing factor to the employee's misconduct, provide documentation showing the condition has been favorably resolved.

The most common fatal error in a wrongful termination lawsuit is inconsistent statements during the course of the litigation. If an employee or manager cannot keep his or her story straight, an arbitrator or administrative judge is unlikely to take the witness seriously.

What advice would you give to a federal employee who believes he or she has been wrongfully terminated?

First, fully utilize the opportunity to respond to a termination proposal. Nonprobationary employees are entitled to the documents relied upon by the agency and an opportunity to make both written and oral replies to the proposed termination. A thoroughly prepared response to a termination proposal may be effective and eliminate the need for long and expensive litigation.

Second, if an employee is removed, the employee should carefully consider where to challenge the termination. This is a complex decision. If the termination constituted wrongful discrimination based on an employee's race, color, religion, sex, age, national origin or a disability, the employee may challenge the removal through the agency's EEO procedure.

For many federal employees, an appeal may be possible through the MSPB or a grievance/arbitration procedure in a collective bargaining agreement. The correct forum choice is critical to a successful appeal, and the decision must be made quickly.

because the time frames for filing appeals are exceptionally short. A consultation with an experienced advocate familiar with the forums available to federal employees is recommended.

Bowers is a graduate of Antioch College, in Ohio, and holds a master's in legal studies and a Juris Doctorate from the Antioch School of Law, Washington, D.C. For more information, visit www.JoshBowersLaw.com.