Court Decision Highlights Value of At-Will Provisions

By Jessica Summers

A recent decision by the Fourth Circuit Court of Appeals overturning a $555,000 jury verdict has reemphasized the importance and effectiveness of including “at-will” language in employee handbooks and other employment documents. The decision in *Scott v. Merck & Company, Inc.* (found here), may help to reassure wary employers that an at-will provision is still one of their most valuable tools.

The *Scott* case centered on a breach of contract claim brought by a Merck employee who was terminated after reporting her direct supervisor to the company’s Office of Ethics. The employee asserted that her termination violated Merck policy which stated that an employee could not be terminated for raising good faith concerns. Merck countered this claim by referring to the at-will language contained in both the employee’s employment application and Merck’s policies. These at-will provisions emphasized that all employees were at-will and that no company policies or practices were to be construed to alter at-will status. Despite the at-will provisions, the District Court concluded that the non-retaliation policy created an enforceable contract under Maryland law.

The Fourth Circuit overturned the jury verdict, concluding that the District Court had not properly accounted for Merck’s use of clear at-will language. The Court emphasized that, under Maryland law, in order to sustain a breach of contract claim based on an employer’s policy statement, an employee must show both that the policy limited the employer’s ability to terminate the employee AND that the employee justifiably relied on the policy. The Fourth Circuit concluded that the presence of Merck’s clear at-will language precluded the employee from proving justifiable reliance. In rendering its decision, the Fourth Circuit went so far as to state that a clear at-will disclaimer will render moot “any claim that the employer’s discretion was otherwise limited by a policy statement.”

A recent series of cases and statements by the National Labor Relations Board (NLRB) have suggested that overly restrictive “at-will” language, particularly those that do not leave room for any modifications to at-will status, may run afoul of the National Labor Relations Act (NLRA) (see our earlier blog post for more on the NLRB’s actions). This has caused some employers to wonder whether at-will provisions are more trouble than they are worth.

The *Scott* decision, however, offers a persuasive answer to this question. Until there is further guidance from the NLRB, employers would be well advised to continue to use at-will language in their applications, employment handbooks and policy documents. Pursuant to the NLRB’s current position, employers should not simply state that at will status “cannot be modified.” At-will provisions should, instead, contain language that at-will status “can be modified provided it is done so in writing signed by the President.” By utilizing carefully drafted at-will provisions, employers can likely avoid NLRB scrutiny while continuing to ensure that their policies will not be construed to impose contractual obligations on them.

