LAST CHANCE AGREEMENTS

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By
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I. INTRODUCTION

When an employer makes a decision to hire, it is not with the expectation that a supervisor will spend countless hours trying to coach, counsel, and discipline her employees. Nevertheless, coaching, counseling, training, and discipline are all a part of the supervisor's overall responsibilities when trying to manage the performance of employees. Some would say, "That's why she gets paid the big bucks, right?" While the aforementioned responsibilities are certainly expected to be performed by supervisors, at some point the employer, the union, the courts, and even arbitrators will concede that enough is enough. Knowing just where to draw that line is difficult to determine, but there are occasions when the line is drawn with the use of a Last Chance Agreement (LCA). These agreements are typically designed to clearly set forth the employee's recurring employment problems, to make clear to the employee expectations for continued employment, and to spell out the ramifications (i.e., termination of employment) if the employee fails to conform his/her performance in accordance with the expectations.

LCAs are not fail-safe documents guaranteeing freedom from future claims or suits by employees. However, there are a few decisions that demonstrate that if drafted correctly and used in appropriate circumstances, LCAs can serve as supportive evidence for the employer's decision to terminate an employee.

II. AVOIDING POTENTIAL PITFALLS WITH YOUR LCA

A. LCA As An Implied Contract

Even the intent of a well drafted LCA can be miscontrued by an employee. In the case of *Vice v. Conoco,* 150 F.3d 1286 (10th Cir. 1998), the plaintiff attempted to turn a disciplinary letter, which in essence was an LCA, into a contract for continued employment.

Vice was issued a disciplinary action letter as result of an investigation that determined that he had sexually harassed his secretary. Vice argued that he was wrongfully terminated by Conoco because the disciplinary letter altered his at-will employment relationship with Conoco. The letter, signed by Vice and by a Conoco representative, stated in pertinent part, "Further involvement in any situation of this nature (sexual harassment), substance abuse, or any other type of misconduct, will lead to your immediate discharge. Your compliance with all of the above stipulations will be required as a condition of continued employment." Vice interpreted this letter to mean that he was no longer an at-will employee and that Conoco could only discharge him if he failed to comply with the agreement. The district court and the

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Tenth Circuit rejected this interpretation of the letter. In applying Oklahoma law, the district court held that the letter did not offer any promises of continued employment, and was therefore not an enforceable contract.

Like Vice, other employees may assert that the employer exchanged its right to terminate the employment relationship at will when it entered into the LCA with the employee. For this reason, state law contractual principles must be considered when drafting the LCA. The employer's defense of the LCA is that the employee breached his/her contractual obligation when the employee failed to comply with the terms of the LCA. Additionally, the employer will need to get the trier of fact to focus upon the intent of the parties as is evidenced by the plain language of the document. In other words, make it evident that the parties intended the agreement to be a disciplinary document and not a negotiated agreement for long term future employment.

B. Mean What You Say

The case of *Koerber v. Journey's End, Inc*., 2004 U.S. Dist. LEXIS 5424 (N. D. Ill. March 31, 2004), best demonstrates that an employer must do more than simply put an agreement in writing with the employee. In this case, defendant Journey's End required Ernie Young (a supervisor accused of sexually harassing a subordinate waitress) to sign an LCA. That agreement stated that "the defendant does not condone the harassment of any patron or employee and that any such activity would result in immediate termination." In addition to requiring Young to sign the agreement, the defendant verbally admonished Young concerning his behavior and made it clear that he would not remain employed if his conduct continued.

Despite the written areement and the verbal admonishment, Young's conduct continued. At one point another employee reported Young's conduct to the defendant and the defendant's reply was, "that's Ernie," and no further action was taken by the defendant until plaintiff filed suit. Surprisingly, the defendant attempted to rely on the areement as proof of its opposition to Young's behavior. The court rejected this argument and determined that defendant failed to exercise reasonable care to prevent and promptly correct Young's behavior.

An employer should not enter into an LCA if it is not prepared to enforce the terms of the agreement. As is demonstrated in this case, when the employer does not "pull the trigger" when the employee violates the agreement, the message that is sent to the employee is that the behavior can continue without fear of reprisal. Of course, the employer's lack of diligence could also result in harm to innocent parties, as was the case with Koerber and customers who had to endure Young's behavior. If the employer wants to send a message to the employee but the employer is not prepared to discharge the employee, a better course of action for the employer would be to undertake lesser disciplinary action such as demotion, reduction in pay, or suspension.

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C. Do LCAs Violate Public Policy?

1. ADA

At least two courts have reached different opinions regarding the issue of whether LCAs may be construed to violate the Americans with Disabilities Act. In the case of *Longen v. Waterhous Co*., 347 F.3d 685 (8th Cir. 2003), the Eight Circuit upheld the dismissal of an employee for drinking alcohol during non-work hours in violation of his LCA, while the Third District Court of Appeals in the case of *DePalma v. City of Lima, Ohio*, 155 Ohio Appp. 2d 81, 799 N.E.2d 207 (Ohio 2003), found that termination of an employee who was required to sign an LCA while undergoing rehabilitation violated the ADA.

Longen

Longen was employed by Waterhous for over 25 years, but he endured recurring substance abuse battles over this period of employment. The parties entered into four prior agreements before entering into the fifth and final LCA. The final LCA stated that, "Future use of any mood altering chemicals, including alcohol, or violation of working rules generally related to chemical dependency will result in immediate termination of employment from Waterhous Company." *Longen,* at 687. Four years after entering into the agreement, Longen was arrested for driving while intoxicated and Waterhous terminated Longen for violating the LCA.

Longen asserted two arguments. First, he argued that the LCA violated the ADA because the LCA subjected Longen to employment conditions that were different than conditions imposed upon other Waterhous employees. Pointing out that courts have consistently upheld such agreements, the Eighth Circuit rejected this agrument and refused to render invalid the terms of the voluntarily signed agreement.

Next, Longen argued that the LCA violated the ADA because the ADA does not permit the company to place restrictions upon his conduct outside of the workplace. The court quickly dismissed this claim and held that the ADA placed no limitations on the constraints an individual may place upon himself. Thus, by entering into an LCA that contained restrictions on any "future use of any mood alterning chemicals," the court reasoned that Longen voluntarily placed these restrictions on his own conduct when he signed the LCA.

DePalma

Anthony DePalma was an assistant fire chief employed by the Lima, Ohio Fire Department. DePalma was also a long term employee of more than 20 years. After suffering from kidney stones, DePalma was prescribed various pain medications. He became addicted to the pain medications and eventually began taking heroin. Realizing he had a drug addiction, DePalma voluntarily checked himself into a nationally known addiction treatment center. While receiving treatment, his fire chief

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visited him and informed DePalma that he would have to sign an LCA or face termination. The purpose of the LCA, according to testimony, was to treat DePalma the same as another firefighter who was in recovery from an addiction to crack cocaine. DePalma had no prior incidents to indicate his use of drugs.

DePalma suffered further kidney stone problems and was given prescription pain medication. The hospital, although aware of DePalma's addiction, did not follow up with DePalma to prevent further addiction to the pain killers. When DePalma returned to work and had to submit to a drug test, the test revealed the presence of pain killers in DePalma's system. He was then terminated pursuant to the LCA.

At trial, DePalma argued that the City should not have been permitted to change the terms of his employment based upon his simple volutary act of seeking treatment. The court agreed with DePalma, and reasoned that the LCA was a form of discipline based on DePalma's disability. The City argued that the LCA was not discipline because it did not adversely affect DePalma when he signed it, but the court firmly disagreed with the City.

The timing of the LCA, coupled with the absence of any prior work violations or performance issues, made it easier for the court to infer that the City was disciplining DePalma for his status as a recovering addict rather than for any work related behavior. It is not clear from the opinion what more the court would have liked to have seen the City demonstrate, but is apparent that the court believed that the City missed one or more important steps.

<u>Conclusion</u>

Although they reach different results, the decisions of the Eighth Circuit and the Ohio Third Court of Appeals are reconcilable. The lessons learned from these cases are that an employer should not immediately discipline an employee based upon the first indication of substance abuse if there is no corresponding work related performance issue. However, once an employee has demonstrated a work related performance issue or violation of a work rule, the employer may impose discipline against that employee, even if the performance issues stem from substance abuse. Moreover, the employer may require the employee to impose more restrictive workplace and off duty requirements upon himself in exchange for continued employment without running afoul of the ADA.

2. CBAs

The use of LCAs has historically been popular in unionized employment settings. While the substance of the underlying agreement is likely the same irrespective of the employment setting, the parties involved in the LCA can impact the enforcement of the agreement. In the non-union setting where the aggrieved employee finds herself in court, the likelihood of her prevailing on her claim of wrongful termination or discrimination is lessened because courts, already overburneded with heavy dockets,

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typically strictly adhere to contract principles in evaluating the employer's termination decision. However, in a unionized setting, the arbitrator views the circumstances through a different set of lenses. The arbitrator's view of the world is one where progressive discipline and just cause dictate the outcome. In the view of the arbitrator, the employee always has more than one bite at the apple. Thus, in a unionzed setting, the use of the term "last" when referring to a last chance agreement can be a bit of misnomer. As has been demonstrated with the cases referenced in this paper, employees working in union settings are typically given multiple opportunities to challenge the LCA, and may even enter into several iterations of an LCA. For this reason, employers in a unionized setting have to be wise in their construciton of the agreement and then tenacious and resilient in their efforts to enforce the terms of the LCA.

The case of *Boise Cascade Corporation v. Paper Allied-Industrial, Chemical and Energy Workers (PACE), Local 7-0159*, 309 F.3d 1075 (8th Cir. 2002), is a good one to examine both for a lesson in agreement construction for employers and as a guide to abitrators. Nancy Burmeister, the employee at issue in the *Boise* case, failed to call in or to report for work, and she missed 45 days of work in a 13 month period. She was placed on six months probation and required to sign a last chance agreement. Burmeister did not grieve either the LCA or the written warnings that preceded it. She satisfied the conditions of the LCA and successfully completed the probationary period. Less than one year later, however, Burmeister reported to work and a manager noticed that her breath smelled of alcohol, her speech was slurred, and her mannerisms were different. A urine test showed that her blood alcohol content was 0.28, or nearly three times the legal limit for operating a motor vehicle in Minnesota. Boise could have terminated Burmeister immediately for this violation of the company's drug and alcohol policy, but instead agreed to place Burmeister on another LCA.

This second LCA required Burmeister to enroll in and complete a counseling program through Boise's Employee Assistance Plan ("EAP"), and subjected Burmeister to two years of random drug and alcohol testing after completion of the program. The LCA provided:

> "You must understand that it is your responsibility and obligation to follow all published policies and procedures. Further violation of any mill rules and/or failure to comply with the Terms and Conditions of this Letter could result in your immediate termination. . . . Nancy, the Company's expectations are clear. . .your future with Boise Cascade is in your hands." *Id.* at 1078.

Burmeister and her Union representative read the LCA and conferred privately about the contents of the agreement. Burmeister had no questions about the LCA and fully understood what was required of her under it, and she told Boise that she was "fine" with it. Burmeister, her supervisor, and her Union representative all signed the LCA.

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Shortly after signing the LCA, Burmeister began to call in and request immediate vacation just before her shift began. After one such occasion in October 1999, Burmeister and her Union president met with Bumeister's supervisor. At this meeting, Burmeister admitted that she had violated Boise's unwritten rule requiring employees to notify the company of absences at least two hours prior to the start of a shift, and that her supervisors had showed leniency by not enforcing the LCA and terminating her for this violation of an unwritten attendance rule. In February 2000, Burmeister failed to report to work. Boise learned from her EAP counselor that her absence was due to her intoxication. After reviewing the situation with the Union representative, Boise terminated Burmeister for breach of the LCA, and the Union filed a grievance protesting the termination. The grievance was denied, and the Union appealed the matter to arbitration.

The arbitrator, construing the LCA, held that the agreement permitted termination only for violation of Boise's written rules, and ordered that Burmeister be reinstated with full back pay. Boise appealed, and the district court voided the award, holding that the plain language of the LCA didn't support the arbitrator's decision. The court also ruled that the arbitrator had ignored Boise and Burmeister's intentions when they entered into the agreement. Burmeister, through her Union, appealed to the Eighth Circuit.

The court of appeals, citing *Bureau of Engraving, Inc. v. Graphic Communications Int'l Union, Local 1B,* 164 F.3d 427, 429 (8th Cir. 1999), held that the arbitrator's paramount obligation is to apply the parties' agreement in a way that gives effect to their intent. Further, the court of appeals in *Boise* held that there was abundant evidence that the arbitrator's decision did not consider the parties' intent, and that there was other language in the decision that suggested that the arbitrator was "motivated to dispense his own brand of industrial justice." *Boise,* at 1085. Because Burmeister understood that she was not to violate any of the mill rules again, when the arbitrator ruled that the LCA applied only to written agreements, he was, in effect, ruling directly against the intent of both Boise and the employee. The court, therefore, affirmed the district court's decision.

It is not clear from the facts of this case why the first LCA was for a six month period. Most employers will seek to establish an indefinite term for performance improvement, particularly when the performance issue is something like tardiness or attendance. Had language such as, "following successful completion of the probationary period, you are expected to maintain continued and sustained improvement in your attendance," there may not have been a need for a second LCA.

Another lesson from the Boise case for employers is to document all so called "well known but unwritten rules." Because the second LCA left out clear reference to compliance with these well known rules, the employer left open for interpretation which mill rules were at issue. This left some room for the arbitrator to find that the language of the LCA was ambiguous. Of course, in the view of the appellate court the arbitrator overstepped his boundaries in this case.

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III. ELEMENTS OF A GOOD LCA

An LCA should not be reduced to a list of guidelines or simple platitudes. The Agreement should serve as a flashing neon sign in the eyes of the employee indicating that the employee can be fired today, and if the employee fails to comply with the Agreement at any point in the future, the employee will lose his/her job. There are many things that can be covered in an LCA, but here my suggestions on the elements of a good LCA:

i. Make it clear in the agreement that the employer has grounds to terminate now but is agreeing to forego that right in exchange for the employee's commitment to abide by the terms of the LCA.

ii. Even where the reason for the LCA stems from substance abuse, the terms of the LCA should be focused upon the performance deficiency and correcting that behavior. Thus, the LCA should identify the specific performance deficiencies.

iii. Include dates of the prior communications with the employee concerning the recurring performance deficiencies.

iv. Provide a clear description of the employer's expectations for improved performance.

v. Make it clear that compliance with all workplace rules is mandatory.

vi. Plainly indicate that improved performance must be continued and sustained, and that any violation of the terms of the LCA will result in immediate termination.

vii. If substance abuse is at issue, provide instructions regarding the frequency and type of substance abuse testing. Also, make it evident that the employee will agree to undergo drug testing as a condition of continued employment when he or she returns from leave.

viii. If the union is a party to the LCA, or at least advising the employee, the employer should try to get the union to agree not to pursue a grievance if the employee violates any condition of the LCA.

ix. In a non-unionzed setting, and where state and local law will allow, make it clear in the agreement that the employee remains an employee at will at all times.

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