

SPECIAL REPORT SERIES

DISCIPLINE & TERMINATION

“When firmness is sufficient, harshness is unnecessary”

Napoleon Bonaparte

Employees Can Be Your Greatest Asset...Or Your Worst Nightmare!

Ask any business owner or manager and they will tell you that the responsibility they enjoy least when it comes to managing employees is discipline and termination. Precisely because of the unpleasant nature of these tasks, many business owners or managers will tend to *ignore, bury or deny* any inappropriate or unproductive employee behavior. The purpose of this report is to provide a reference that can be used to minimize the emotional and legal aspects of these thankless tasks, as well as maintain employee productivity in the process. The guidelines that will follow should be adjusted to meet your own unique circumstances.

The Wrong Employee Is...

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|---|--|
| <ul style="list-style-type: none">• Under-qualified• Close-minded• Prone to error• Reckless• Absent, late or lazy | <ul style="list-style-type: none">• Untrustworthy• Addicted• Violent• Unethical• Unhealthy |
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The Wrong Employee Will...

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| <ul style="list-style-type: none">• Create negative energies• Harass or discriminate against co-employees• Turn off customers or vendors• Quit at the drop of a hat• Sue your company• Cause your company to be sued by a third party• Create bad press• Use up every day of sick leave• Steal company trade secrets or other confidential information• Take business opportunities for his/her own• File for unemployment or workers' compensation |
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No doubt that you can add to this list. The point is, how you manage employee behavior will greatly determine the success or failure of your business.

Is It The System?

One of the great all-time business thinkers was Dr. W. Edwards Deming, known as the father of the Total Quality Management (TQM) Movement. Dr. Deming was of the considered opinion that nine times out of ten employee failure is due to a system error as opposed to the willingness of an employee to do a good job. The experience of many an employment law attorney leads to a similar conclusion. The first part of your system that must be considered is your *hiring process*. For example, if a typist is not producing at the expected level, you may ask what typing speed was required for this position and did we test for it? A typist who is expected to replace productivity of someone who types 90 wpm can never satisfy management expectations if they come into the position only typing 60-wpm. This does not mean that the employee does not want to a good job. It means that the company did not have a sound hiring process, which set out a specific need requirement that was both communicated and tested for. As stated in the 1932 *Johnson & Johnson Employee Manual*, “If workers are carefully selected, the problems of discipline will be negligible”.

The second part of your management system, which must be considered, is whether you have actually *identified and communicated performance expectations*. This includes not only a list of [Sample Prohibited Activities \(Standards of Conduct\)](#) but also identifying proper behavior including a company [Sample Code of Ethics](#) and [How To Be An Excellent Employee](#). Having standards means very little unless they are communicated and understood. That is why they should be published in an Employee Handbook, which has been acknowledged by all employees. These standards of conduct and expectations of proper behavior should be revisited on an annual basis at the minimum.

The third part of having a strong management system relates to the *training of managers*. Many times non-productivity or insubordination are the result of a poor quality relationship between supervisor and subordinate. Many supervisors have been placed in a management role without any associated training. Just because they are good at product or service delivery does not mean they are good at managing other people. If you want your managers to be skilled when it comes to handling conflict, as well as motivating proper behavior, you have to train them to increase their chances of success.

Discipline

Discipline can be defined as “the practice of requiring employees to obey rules and punishing them when they do not”. Interestingly, the word discipline has its roots in the *Latin* word “*disciplina*” which means to *teach* or *learn*. However, given our current usage, that definition of the word discipline has become obsolete. It is important to remember that the whole point of disciplinary action is not merely to punish or memorialize poor performance but to turn that employee into a star performer.

Setting Standards

Before you can discipline someone you have to make sure you have effectively communicated your expectations. Employees who do not understand your objectives are quick to externalize the situation and look for ulterior motives on your part. A well-drafted Employee Handbook should include at the minimum an outline of desired employee conduct, undesirable employee conduct, what form of disciplinary process the company will follow and how an employee can grieve what they perceive to be unfair conduct. Since in the words of Rev. Norman Vincent Peale “you get what you focus on”, we advise that you emphasize what you consider to be excellent employee conduct. Once that has been defined, don’t just relegate it to an Employee Handbook - - post it on your intranet and paste it on the walls.

It is important to identify undesirable conduct but not limit yourself to a predefined list. When it comes to drafting a disciplinary process many employers keep a “loose” procedure so they do not get pinned into handling a particular set of problems in a particular way. Other employers prefer a very regimented process, which has the effect of clearly defining appropriate management conduct. The downside to a very regimented approach is that it leaves room for employees to argue they were not treated fairly when that approach is not followed to the letter.

Lastly, we suggest some form of grievance process so that you can catch improper managerial conduct and maintain employee loyalty. It is not safe to assume that management “has it right” all the time. There will be managers who will be ill-will motivate, with personal vendettas or discriminatory intent. Giving an employee the opportunity to grieve what they perceive to be unfair conduct not only helps to eliminate lawsuits but also provides a check and balance against unwanted managerial discretion.

Attack The Conduct - Not The Person

One of the biggest mistakes we make whether at work or home is to attack the person as opposed to the inappropriate conduct. Any time someone feels they are under personal attack they will either shut down completely or come out fighting. You can focus on the conduct by using “I” words instead of “you” words. A good phrase to remember is: When someone...I feel...because...For example, “When someone shows up to work late on a regular basis, I feel they have a lack of commitment to this company and it’s employees, because committed team members are there when they are needed.” You can also add an analogy such as, “What do you think would be the effect on a team if one of its players showed up late for an important game?” Lastly, you can ask the employee if they’ve ever experienced similar conduct. For example, “Have you ever worked someplace where one of the employees was frequently late? What effect did that conduct have on their coworkers?” as opposed to “You are obviously irresponsible and not a team player”.

Three Strikes and You're Out!

Whether it emanates from the national past time or some other source, we Americans firmly believe in a “three strikes and you’re out” rule. This goes for employees and jurors alike. Unless the circumstances warrant an immediate dismissal (criminal activity, intentional destruction of property, etc.) you should begin by issuing a *verbal warning*. You can use the [Notice of Verbal Warning](#) to document it. If the conduct continues the next step is to give a written warning. Please see the [Notice of Disciplinary Action](#). In that written warning you should indicate that you gave a prior verbal warning. You should also indicate that there will be no additional warnings and that the next step is termination. The third and final step is termination itself. It makes no sense to give employees repeated warnings about their activities. If they don’t “get it” after being warned twice and actually do it a third time, then *they should be fired!* They should not be warned a fourth, fifth or sixth time.

Employee Ownership of Problems

Business owners and managers have to make an effort to *avoid power struggles*. The first way to avoid a power struggle is to decide what your standards are. For example, “I will not accept tardiness except under extreme circumstances”, “I will not accept spelling mistakes”, “I will not accept people coming to meetings unprepared.” Then when dealing with the employee ask “what” and “how” questions: “Explain to me how we can run a business if our employees do not show up to work on time?” “What is the effect on other team members when you are not here to man your station?” “What was our agreement about what happens when we show up unprepared for meetings”?

It seems as if the concept of taking personal responsibility is falling by the wayside. Many of today’s poor performers prefer to play *victim*. We are not responsible for our circumstances – they are the doings of others. In order to engage in positive discipline an employee has to “own” their problems. Unfortunately, where they want to put most of their problems is on your back. One way to get employees to own up to their problems is to have them identify possible solutions by using the [Employee Correction Form](#). If the employee does not “get it” have them complete the form over and over again until they do. Today’s owner/manager operates under the paradox that “the less you control, the more you can do”. This means you cannot control or own other people’s problems. What you can do is attempt to lead them in the right direction without engaging in micro-management. Besides, as we have learned from raising children, the only way for us to mature is by taking responsibility for our circumstances. Blame or justification is no substitute for personal responsibility.

A Note About The Americans With Disabilities Act

The Americans with Disabilities Act (ADA) was originally designed to accommodate people with physical handicaps. However, it quickly became a battle about the mind. It now takes the EEOC 56 pages to define what constitutes “a mental disability”! Unfortunately, the ADA has given many a poor performing employee, as well as their attorney, an excuse to blame

someone else for their circumstances. ADA lawsuits continue to be filed in record numbers despite the fact that more than 80% of them are dismissed without merit by the EEOC. If a poor performing employee indicates that they are being affected by a disability then give them a copy of the [Disability Accommodation Request](#). If you can reasonably accommodate the employee then do so. However, the employee still has to be able to perform their job with or given an accommodation. That is why it is so important to focus on the person's conduct, or performance, as opposed to who they are. Should you find yourself faced with a potential ADA issue, there is a great deal of information available from the EEOC's web page (www.eeoc.gov) as well as from the Job Accommodation Network (<http://janweb.icdi.wvu.edu/>) (800) 526-7234. If you would like further assistance please give us a call. Lastly, consider referring a poor performing employee to your employee assistance program (EAP) if you have one. If you do not, and would like to establish one, please give us a call and we will help you find a resource to do so.

Making the Termination Decision

“It's not the people you fire who make your life miserable, it's the people you don't fire.”

Harvey Mackey, Swim With the Sharks

In our experience, far more business owners and managers regret not firing soon enough as opposed to firing too soon. Once you have gone through the process of determining whether or not your system is at fault and you have engaged in positive discipline, you will reach a point where some employees “just don't get it”. These employees are a cancer to the work place and should be terminated. As Marianne Williamson once said, “*I can unconditionally love a person, but that does not mean I have to have an unconditional relationship with them.*” Disciplining or terminating an employee is not about the need to dislike or hate somebody. It's not about being uncaring. It's not about guilt. It's about being in a relationship that benefits both parties. If an employee is not fulfilling your needs, then you should find someone who does.

Avoid Knee-jerk Terminations

While as a general rule, most employers fire “too slow”, there are plenty of circumstances where an owner or a manager engages in a “knee-jerk” termination. Not surprisingly, many of these terminations end up as lawsuits. Conflict is the breakdown of communication coupled with an emotional override. This *emotional override* can result in poor decision making. That is why it is important to watch your emotional states when making such critical decisions. Rather firing an employee during a heated argument, *take five* and go for a walk to cool off. Then, get a *second opinion* about the circumstances to make sure that you are not missing a critical viewpoint. This time out will also allow you to check your management system to make sure that it's not just about someone who “doesn't get it.”

Lastly, knee-jerk terminations often violate the terms of a company's disciplinary procedure making room for arguments by a savvy Plaintiff's counsel. If you have a procedure – follow it.

At-Will vs. Good Cause Termination

Your ability to terminate an employee without legal repercussions depends greatly on that employee's legal status. While it is certainly the general rule that an employee may be fired "at-will" (for any reason at any time, with or without cause, and with or without notice), many employees have successfully made the argument that they have an "implied contract" only to be terminated for "good cause" reasons. This is a very common provision in executive contracts and also a common argument made by long-term employees. "Good cause" termination is also required in most collective bargaining and civil service settings. Note also that just because you can fire an employee "at-will" does not mean that you can violate statutory authority in doing so.

Documentation of poor performance is important for two reasons. The first is to guard against claims of ulterior motives such as harassment or discrimination. The second is to defend against claims of wrongful termination and breach of contract. Documentation is important whether you are dealing with an executive or rank and file employee. Again, we strongly encourage you to use the [Disciplinary Leave Notice](#), [Employee Correction Form](#) and if necessary place the employee on disciplinary leave so they can consider exactly how much they want their job.

Consider Alternatives

Termination is certainly one answer, but not the only one. You can restructure someone's job so that they are working in their highest and best use. You can move that person to another department or location or you can demote the employee to a lower position on a temporary or permanent basis. Note that many employees have filed lawsuits not just for wrongful termination but also wrongful demotion, etc.

Consider giving the employee leave without pay so that they can think over whether or not they want to continue working for your company. See [Disciplinary Leave Notice](#). We suggest however, that you not just give the employee a few days off without having some homework to do. If they want to return to work for your company they should do so with a well thought out [Employee Correction Form](#), etc. Simply suspending someone without pay, without doing more, does not have the employee "own" their problem.

No matter what decision you make you must make sure that any action you take is consistent with how the company has treated other employees under similar circumstances.

Layoffs and Downsizing

In our [Special Report: Layoffs, Reductions in Force and Downsizing](#), it recommends that companies consider alternatives prior to losing their intellectual capital. For example, it may be that a new marketing campaign will boost revenues and eliminate the need for the layoff. Please also see the [Pre-Layoff Checklist](#). If after considering the alternatives you've made the decision that a layoff or downsizing is inevitable, then it is highly recommended that you follow some form of uniform process. First, check to see if you have already identified such a process in your employee handbook or personnel policies and procedures manual. One of the biggest issues lately is the role of seniority in any layoffs or downsizing. Lastly, if you are involved in any large downsizing you may consider hiring a statistician who will inform you whether or not your layoff criteria will have an adverse impact on any particular protected group.

Note: pursuant to the Worker Adjustment and Reemployment Notification Act (WARN) - if you are laying off more than 100 employees, you must meet various legal requirements. We strongly suggest that you seek the advice of counsel to avoid this very litigious area.

When and Where to Fire

Being terminated is a very emotional experience. Studies have found that employees who recover the quickest are those who get focused on pursuing new opportunities as opposed to dwelling on their past circumstances. As a result of these studies, the consensus opinion is that employees should be terminated on a Tuesday or Wednesday so that they don't have the whole weekend to dwell on their misfortune. It is also suggested that the termination decision be done in the morning when everyone is less tired and has the energy necessary to deal with such a decision. Lastly, it is recommended that you seek "neutral grounds" for communicating the termination decision. A conference room that is private, or even an offsite location is preferred over the owner or managers office.

Delivering the Bad News

The first suggestion is that more than one person be present during the termination interview. Very often it is easier for an employee to receive the bad news from someone who is not his or her supervisor as a personal animosity may have developed. The interview should be short, but sweet. *Do not get into long conversations* about why the decision was made. This is not the time to start an argument. If you have properly documented your file and the employee has been sufficiently warned, then there is very little left to communicate. You are advised to prepare for the termination meeting including any questions that may be raised by the employee. It is okay to empathize with the employee, but do so without guilt.

Have Your Paperwork Ready

In most states, an employer is required to give an employee their final paycheck at the time of termination. This includes all accrued vacation pay, sick pay, commissions and other benefits. Depending on the size of your company and the state you are in you are also required to give a [COBRA Notice](#) for continued medical coverage, an unemployment insurance benefits notice, as well as information on transferring their health insurance and any 401K plans. Lastly, if you are considering offering any form of severance and release that should also be presented at the time of the termination meeting. Explain to the employee that they will not be required to sign it immediately, that they have the opportunity to speak with an attorney of their choosing, but that you request a response no later than seven calendar days from the date of termination. Since the terms of a severance and release are very important we suggest that you start by reviewing our [Sample General Release Agreement](#) incorporate some of the terms and conditions you wish to consider and then have the document reviewed by your attorney before presenting it to the employee.

Casting a Safety Net

Even after deciding to terminate an employee you can take steps to reduce your liability and exposures. The first step is to conduct an [Exit Interview Form](#). Someone other than their supervisor should perform the exit interview so that they can get an unfettered response. A promptly conducted exit interview cannot only disclose potential claims of harassment or discrimination, but also other non-legal blockages to productivity and workflow. The second way to reduce your exposures is to afford the employee a way to grieve or mediate their termination. If you do not give them this outlet then their only other alternatives are to file claims with an agency or see an attorney. Lastly, make sure that the employee returns all property, keys, etc. by using the [Termination Checklist](#).

Watch for the Hot Spots

The majority of employee lawsuits filed every year in this country are the result of a termination decision. In every one of these cases the employee argues an ulterior motive on the part of the employer and that the proper reason for termination was merely a “*pretext*”. The most common claims are those for age, race and sex discrimination and wrongful termination. One of the fastest growing areas is that of *retaliation*. You should be particularly sensitive to this type of claim when an employee has complained about some form of legal, ethical or statutory violation on the part of the company.

When discussing an employee’s termination you should limit your communications to those people with a “need to know”. For example, there is no need to broadcast to your customers that you terminated an employee for poor performance. Instead, use the approach of focusing on the value of your new employee. An employer certainly has the privileged area for its communications. However, once the communication goes beyond the scope of that privilege

or the person acts with malicious intent, the company can be exposed to slander and defamation type claims.

Also of concern is the need to protect against *the propensity for violence*. An emotionally unstable employee, an employee known to use drugs, or an employee who has threatened coworkers and supervisors are employees who should be closely monitored during the termination process. If necessary, a security guard should be near by, if not present, during the termination meeting. If an employee is particularly upset about their termination consider referring them to an employee assistance program (EAP) if you have one. You can also consider informing them that there are peer groups set up to help other employees in similar circumstances. Depending on the circumstances you may want to have the termination meeting or exit interview at an off-site location.

Also, consider other *security concerns* such as computer sabotage, the destruction of files, treating or embarrassing e-mails to clients or employees, security access, etc. Lastly, if the employee was involved with the company's trade secrets, patents, etc., make clear to the employee their obligation to maintain their confidences and understand that this property is a "work for hire" and owned exclusively by the company.

Easing the Transition

The separation of almost any relationship is accompanied by emotional upheaval. Understand that the employee, even if they are at "fault" for their termination, will be facing uncertainly, fear, anger, resentment, and a whole host of other emotions. Anything that you can do to ease the transition will not only reduce your liability exposures but also send a message to the rest of the workforce that you really do care. Our first suggestion is to offer the departing employee some form of *outplacement assistance*. As with any other benefit offer a lot has to do with whether the employee was being let go due to a change in management or due to insubordination, etc. An outplacement agency can help the employee prepare a new resume, give them emotional support counseling, find employment, etc. We have also suggested to our clients that they use *temporary employment firms* in the role of an outplacement firm, especially where the employee is not being terminated for poor performance but rather a change in operations, etc. These agencies are always looking for good people and can help with resume writing and finding both interim and permanent jobs.

Lastly, is the issue of *references*. We suggest that you have the departing employee sign the [Employee Reference Request](#) if they want you to provide anything other than a name, rank and serial number response. You are also cautioned to be very careful about giving positive references unless you want to be bound by them. In one notorious case, a school was sued by another school because they gave a positive letter of reference to an employee that was terminated under allegations of sexual harassment. The second school hired the teacher knowing nothing about the allegations. The teacher then committed a sexual assault on one of his students resulting in a lawsuit against the teacher and the school. The second school sued the first school claiming that had it been honest about its reference it would not have hired the teacher in the first place.

Conclusion

This is a complex area of personnel management. What we have just shared is the wide range of issues that arise in the disciplinary and termination arenas. There are certainly more issues than these and we can discuss them with you should the need arise. In the [Discipline and Termination Module](#) is a review quiz, applicable forms and a compliance audit. Should you have any questions regarding this delicate subject matter please do not hesitate to give us a call.