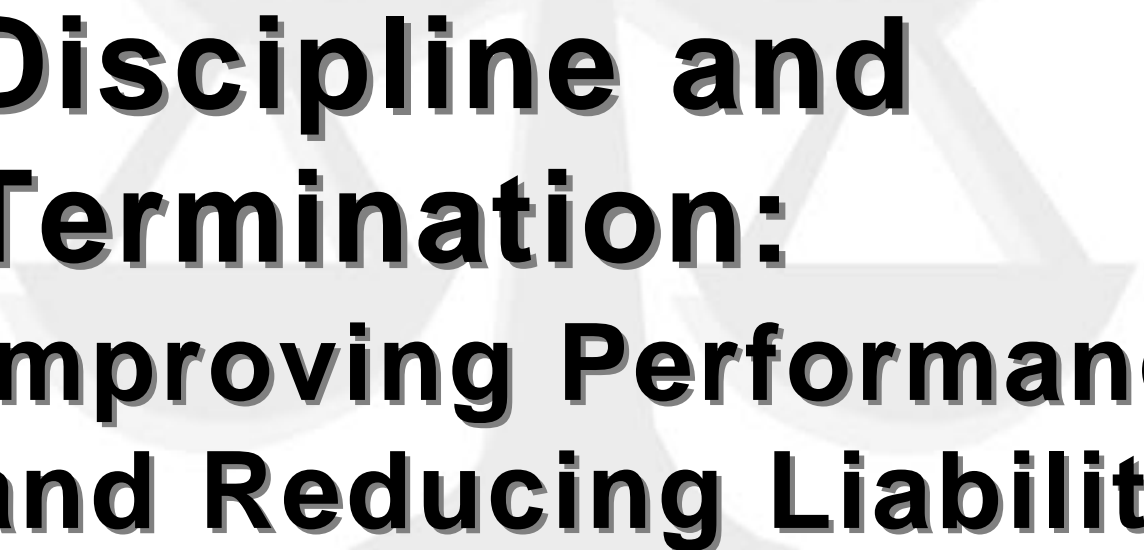


LEGAL BRIEFS

Employment Law Training Series



Discipline and Termination: Improving Performance and Reducing Liability

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Facilitator's Guide

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Introduction

This program is designed to help your managers recognize five of the most common discipline and termination issues managers struggle with and three straightforward actions managers can take to avoid these issues and stay out of court. And, just as important, managers will see how progressive discipline can actually help them keep good people and improve performance.

Discipline and Termination: Improving Performance and Reducing Liability provides answers to several of the most common questions managers struggle with regarding discipline and termination.

- How am I legally liable if I don't address a discipline issue?
- What are the legal consequences of being inconsistent in disciplining employees?
- How should I handle documentation relating to discipline issues?
- Can I be held legally liable if I don't terminate an employee?
- What kinds of things should I do, or not do, in a termination meeting to avoid a potential lawsuit?

This program is designed to cut through the legal jargon to provide clear and concise information in terms that everyone can understand.

Uses

This program may be used in many ways:

- 60 minute training session
- Staff meetings
- Conferences
- New manager orientation
- Self-study/self-directed learning

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Key Learning Points

During the program, participants will learn:

- The definition of unlawful retaliation
- The definition of a negligent retention
- The five common pitfalls of discipline and termination
- The three straightforward actions managers can take to keep themselves and their organizations out of court

Training Materials

Video – The video, *Discipline and Termination: Improving Performance and Reducing Liability* is divided into two segments. The first segment provides the five pitfalls of discipline and termination situations. The second segment provides managers with three action steps to help them and their organizations stay out of court.

Facilitator’s Guide – The facilitation guide contains complete step-by-step directions for conducting this course. With the exception of the session evaluation, the facilitation guide is not reproducible. If additional guides are needed, please contact your vendor.

Participant’s Reference Guide – The participant’s reference guide contains a complete review of the key information covered in this course, along with supplemental information regarding discipline and termination. In addition, it includes a pre-assessment and post-assessment. The post-assessment is removable and designed to be included in the employee’s personnel file, if desired. The participant’s reference guide is not reproducible. If additional copies are needed, please contact your vendor.

Agenda

This program is designed to be presented in a one-hour training session.

60-Minute Agenda

Program Introduction	5 minutes
Show and Review Video	20 minutes
Optional Review of Supplemental Info.	30 minutes
Program Debrief	5 minutes

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Facilitator's Checklist

Before Training

- Read through the entire facilitation manual
- Watch the video several times
- Determine the length of your session
- Send out a memo inviting participants to the training
- Locate audio/visual equipment and make sure it works
- Make copies of any exercises needed for the training
- Identify any personal stories that may make the session more meaningful to participants

Day of the Training

- Review your notes
- Check the TV/VCR
- Prepare Flipcharts
- Check the lighting of the room
- Set up the room arrangement. Participants will need to get into small groups during the session

After the training

- Review the post-assessment and session evaluation
- Document the recommended changes to your presentation or materials
- Follow-up with participants on next steps, comments, or action plans, as agreed

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Step-by-Step Facilitation Instructions

Step 1 – Introduce the program.

Communicate the following to participants:

A big part of being a good manager is helping people succeed. One of the most important jobs managers have is giving employees feedback on their performance and helping employees improve their performance. Unfortunately, there are several common pitfalls managers need to be aware of so that they don't inadvertently end up in court.

By the end of this program you should know:

- **The definition of unlawful retaliation**
- **The definition of a negligent retention**
- **The five common pitfalls of discipline and termination**
- **The three straightforward actions managers can take to keep themselves and their organizations out of court**

Before we go any further, let's take a few moments to introduce ourselves.

Step 2 – Introduce yourself and then have participants introduce themselves.

This would be a good time to share a story or personal experience regarding discipline or termination situations that you have encountered. By opening yourself up and sharing something personal, you will give participants permission to do the same.

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Step 3 – Distribute a copy of the Participant’s Reference Guide to each participant.

Communicate the following:

Before we view the video, I’d like you to take a few minutes to complete the pre-assessment in your desk reference guide. This self-assessment is designed to give you a clearer picture of your present understanding of discipline and termination legal pitfalls.

Give participants a few minutes to complete the assessment. When participants are finished, collect assessments for comparison with the post-assessments that will be done at the end of the session.

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Pre-Assessment - Facilitator's Copy

Instructions:

Please read the statements and circle the appropriate response.

1. If an employee doesn't react well to criticism, it is better to just ignore the behavior than to confront it and potentially damage the relationship.

True or False

2. Assigning work to other employees in order to avoid a discipline issue is a disaster waiting to happen, particularly if the problem employee retains his job title and wage rate.

True or False

3. Part of being a good manager is being able to tailor your management style to the unique needs of individuals.

True or False

4. Be sure to document everything and keep it forever. It's the only way you can get rid of poor performers.

True or False

5. When it is appropriate—which is usually the case in a written warning—you should include the phrase "up to and including termination" as one of the consequences.

True or False

6. Over documenting performance problems can lead to claims of "setting the employee up for termination."

True or False

7. Failing to terminate an employee can result in a "negligent retention" lawsuit.

True or False

8. If you are experienced at terminating employees, it is acceptable for you to wing it on occasion, if you haven't had time to prepare.

True or False

9. Regardless of a person's status or your personal relationship, if you've got a performance issue—deal with it immediately; and keep at it until the situation is resolved.

True or False

10. When documenting a employee situation you should focus on the big picture and leave the facts out.

True or False

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Communicate the following:

Now we are going to watch a video that addresses some of the tough questions managers have asked regarding discipline and termination. When we are done we will take a few minutes to review the information the video covers and talk about how those ideas apply within our organization.

Play the video from start to finish.

Step 5 – Review the key points.

Communicate the following:

The three actions you can take to make sure you are staying out of trouble are:

1. Be Sure You Discipline Consistently.

Regardless of the person's status or your personal relationship, if you've got a performance issue—deal with it immediately; and keep at it until the situation is resolved.

2. Keep Your Focus on Behavior.

This is a very critical point—you must always focus your discipline efforts on employee behavior and failure to meet the expectations of the job. It may seem obvious, but a lot of managers fall into the trap of arguing about personality or attitude. Instead, you should focus the discussion on clearly identifying what the employee needs to do to improve, the timeline for seeing improvement, and the consequences for failing to meet expectations.

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3. Be Specific When You're Documenting Performance Issues.

You should focus on the specific facts...the who, what, where, when and how of the situation.

Step 6 – Discuss the case study.

Communicate the following:

In order to gain some perspective on the information covered in the video, let's take a few minutes to discuss a hypothetical situation that you might face as a manager.

For the last six years, you have had to deal with Bob. Bob is a veteran employee who has been with the company for 12 years. Bob has shifted from one department to the next because none of the managers want to deal with him. Bob's overall personality is a little hostile and gruff. He is constantly late and constantly complaining about everything. He has been with the company so long no one wants to take responsibility for terminating him. None of his previous managers have kept records on Bob. Now, Bob is on a major project in your department and he is running behind, missing deadlines, complaining and bringing the morale of the team down. You have also found out that Bob was just diagnosed with Type A Diabetes. In order to hit these deadlines you need Bob to step up to the plate and get his work done. What are you going to do?

Q. What should the manager avoid doing?

A. Don't try to get Bob transferred or assign his work to other employees. In addition to the morale problems, you could face a lawsuit brought by one of the other employees for unfair or discriminatory employment practices.

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Q. What should the manager do about the fact that no one in the past has confronted Bob about his behavior?

A. The manager should confront Bob regarding his behavior at work, focusing on specific inappropriate job-related behavior. The manager should be professional, even-handed and consistent. Although it can be uncomfortable or even unpleasant at times, you have a responsibility to take corrective or disciplinary action when the situation warrants it. If you're unsure of what action to take, consult with your human resources area, legal department or senior management for help on where to begin.

Q. What exactly should the manager document regarding Bob's situation?

A. Bob's manager should document the specific job-related problem, list specific actions Bob needs to take for improvement, note the expectations for specific deadlines that Bob needs to meet for improvement and state specific consequences if the expectations are not met.

Q. Should the manager avoid terminating Bob because he is covered under the ADA?

A. No. You need to be well prepared and work with your human resource or legal department to make sure that you are following all the appropriate steps in the event that Bob's behavior doesn't change. You also need to realize that Bob could choose to change his behavior to keep his job and you may end up with a great employee who has many years of knowledge about the company at his fingertips.

Step 7 – Complete the post-assessment.

Ask participants to complete the post-assessment in their Participant Reference Guide. Then take a few minutes to review the correct answers with the participants.

Ask the participants to sign and date the Certification of Training, then remove it from the back of the reference guide. The certification should be turned in at the end of the session.

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Post-Assessment - Facilitator's Copy

Instructions: Read the statements and circle the appropriate response.

1. If an employee doesn't react well to criticism, it is better to just ignore the behavior than to confront it and potentially damage the relationship.

True or False (False – Avoiding discipline can result in a variety of legal problems.)

2. Assigning work to other employees in order to avoid a discipline issue is a disaster waiting to happen; particularly if the problem employee retains his job title and wage rate.

True or False (True)

3. Part of being a good manager is being able to tailor your management style to the unique needs of individuals.

True or False (True)

4. Be sure to document everything and keep it forever. It's the only way you can get rid of poor performers.

True or False (False – Retaining documentation for too long can actually become a liability. The best advice is to remove the documentation if there's no repetition of the performance issue for over a year.)

5. When it is appropriate—which is usually the case in a written warning—you should include the phrase "up to and including termination" as one of the consequences.

True or False (True)

6. Over documenting performance problems can lead to claims of "setting the employee up for termination."

True or False (True)

7. Failing to terminate an employee can result in a "negligent retention" lawsuit.

True or False (True)

8. If you are experienced at terminating employees, it is acceptable for you to wing it on occasion, if you haven't had time to prepare.

True or False (False – Being unprepared can result in saying or doing something that could lead to a lawsuit.)

9. Regardless of a person's status or your personal relationship, if you've got a performance issue—deal with it immediately; and keep at it until the situation is resolved.

True or False (True)

10. When documenting a employee situation you should focus on the big picture and leave the facts out.

True or False (False – While you don't want to over-document, your documentation should include a sufficient level of detail to enable a "reasonable person" to conclude that you treated the employee fairly.)

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Step 8 - Wrap up the session.

Distribute the session evaluation and give the participants a few minutes to complete it.

Communicate the following:

When it comes to discipline and termination, it is worth your time to step back and do it right. You may be saving yourself a lot of trouble and time in the long run. Even more important, you may be developing an employee that will turn into a great success.

Your desk reference guide contains answers to more frequently asked questions regarding discipline and termination, as well as a list of additional resources available to you.

I encourage you to take the time to review the information, and keep the booklet in a handy place for future reference.

Thanks for your time.

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Session Evaluation

Instructions:

Please answer the following questions. Your answers will help assess the effectiveness of this training and identify areas for improvement.

As a result of this training, are you better able to:

1. Explain why avoiding discipline is an ineffective and potentially illegal way to deal with discipline problems?

Yes No Not Sure

2. Explain how progressive discipline can actually help you keep good people and improve performance?

Yes No Not Sure

3. Explain why it is important for managers to be professional, even-handed and consistent?

Yes No Not Sure

4. Document the appropriate information regarding an employee's behavior?

Yes No Not Sure

5. Identify three specific actions to take to stay out of legal trouble?

Yes No Not Sure

6. My overall rating of this presentation is:

a. Excellent b. Good c. Satisfactory d. Needs Improvement e. Unsatisfactory

Comments for Presenter:

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Supplemental Reference - Facilitator's Copy

The following supplemental reference information is contained in the Participant's Reference Guide.

Q. What is progressive discipline?

- A. *Progressive discipline lets the employee know that there is a problem and that something must be done in order to correct the problem. There are several steps to progressive discipline. Some companies choose to use all the steps and others only two or three. Progressive discipline is usually made up of training, coaching, a verbal warning, a written warning, and then finally termination.*

Q. Do I have to complete all of the steps of progressive discipline?

- A. *No. Organizations may choose to use the above options in any combination. The important thing to remember is that if your organization has a policy on progressive discipline, then you need to follow it.*

Q. Can I ever just terminate someone on the spot?

- A. *Yes. In cases of gross insubordination it is acceptable to terminate someone immediately without following the steps of progressive discipline. For example, some reasons to terminate an employee on the spot are: if the employee becomes violent, or threatens another employee, if the employee is caught abusing an illegal substance on the job, or if the employee is caught stealing.*

Q. Do I have to give a terminated employee a severance package?

- A. *It depends. The law does not require you to give severance packages to employees that you terminate. However, if you ever promised the employee a severance package, you should deliver that promise. And if you ever signed a contract with an employee in which you agreed to provide a severance package, then you must honor that contract.*

Q. What do I tell prospective employers who call me for a reference for an employee that I terminated?

- A. *Sometimes, you might be willing to give a terminated employee a positive reference. If an employee wasn't a good fit in your organization that doesn't mean that he or she won't do well somewhere else. If you can say positive things about the employee, then say them.*

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If you cannot give a positive reference, then you shouldn't say anything at all. If a prospective employer calls, tell them that you can only provide or confirm dates of employment and job responsibilities and no more. Make sure that you never bad mouth a former employee to a potential employer because then you will leave yourself open for a defamation suit from the former employee.

Q. What do I tell other employees about my reasons for terminating one of their co-workers?

- A. *You must be extremely careful about what you tell your other employees about your reasons for terminating someone. If you say too much, you risk a defamation lawsuit from the terminated employee. You also risk giving that employee ammunition for a wrongful termination lawsuit.*

Because of these risks, employers should not explain their actions to their other employees. Simply tell them that you must respect the terminated employee's privacy and not discuss the reasons behind the employee's exit from the organization.

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For Further Information

Here are some sources for additional information on discipline and termination:

Web Sites

The U.S. Equal Employment Opportunity Commission Home Page—
<http://www.eeoc.gov/>

Findlaw.com labor and employment law links—
<http://guide.biz.findlaw.com/01topics/27labor/index.html>

Telephone Numbers

Equal Employment Opportunity Commission
1-800-669-4000

Equal Rights Advocates
1-800-839-7372

National Job Problem Hotline
1-800-522-0925

Addresses for Discipline and Termination Information

U.S. Equal Employment Opportunity Commission
1801 L Street, NW
Washington, DC 20590

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