

Legal Briefs

Discipline and Termination

Participant Desk Reference

Legal Briefs
Employment Law Training Series

*Discipline and Termination:
Improving Performance and Reducing Liability*

Participant's Desk Reference

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FOR
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INTRODUCTION

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

This desk reference contains critical information on the things you need to be aware of in terms of how disciplining and terminating employees may impact you as a manager. It provides a complete review of the key information covered in the course, along with supplemental information regarding discipline and termination. Please keep this desk reference in your office as a permanent resource for information on discipline and termination.

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PRE-ASSESSMENT

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
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

KEY CONCEPTS & DEFINITIONS

1. Avoiding Discipline

One of the most difficult issues for managers to face is the employee that doesn't meet job expectations and doesn't take feedback well. Instead of facing the situation head on managers will avoid dealing with the situation in a number of ways. Managers will:

- Assign work to other employees
- Transfer the difficult employee
- Delegate discipline problems up and down
- Use the layoff excuse

In all of these situations, the manager's actions are putting his or her organization at risk and jeopardizing his or her own career. 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 are unsure of what actions to take, consult with your human resources department or senior management for help with this issue.

2. Inconsistent Discipline

One of the easiest ways to land in hot water is to be inconsistent in how you use progressive discipline. There are a number of ways discipline may be inconsistent. Occasionally, managers may make exceptions for certain employees because they know the employee has unique personal circumstances. For example, if you know an employee is taking care of a terminally ill parent, the manager may choose not to notice if the employee comes in 20 minutes late. On the other hand, you may get on a male employee for being late because you know his wife is a stay at home mom who is taking care of the kids. In either of these situations, you are running the risk of committing discrimination and ending up with a costly court case. Make sure to always be professional, even-handed, and consistent.

3. Documenting Correctly

Managers often struggle with how much information they should document regarding an employee's performance. If you document too frequently, or in too much detail, it leads to the argument that you are setting the employee up. A manager should definitely document chronic issues—even if that means a lot of documentation. However, daily or weekly reports are usually not necessary. Something else managers should consider is not keeping the documentation too long. Courts generally find that any documentation on a performance problem over a year old is stale. Managers may want to consider adopting a policy that says documentation will be removed from an employee's file if there's no repetition of the matter for a year.

Another documentation problem is under-documentation. Either a manager just doesn't document at all or they don't keep track of the right kind of information.

Appropriate Documentation

Documentation should include:

- Identifying a specific problem
- Listing specific actions for improvement
- Noting specific deadlines for improvement
- Stating specific consequences

4. Avoiding Termination

When managers are dealing with an employee they think is likely to sue, they may avoid terminating the employee. But failing to take action can get managers into trouble in a couple of ways. Let's say an employee files a discrimination claim and you start avoiding the employee. This could be considered unlawful retaliation. Even if the employee's discrimination claim lacks merit, the manager is put in a position where it would look like he or she fired the employee in retaliation for filing the claim.

Avoiding termination can also expose you to a negligent retention lawsuit. A negligent retention lawsuit means that if you have an employee who you know, or should have known, is prone to criminal behavior, abuse, or violence and someone ends up getting hurt ...the manager and the organization could be sued.

5. Lack of Preparation for the Termination Meeting

Even if managers have sat through multiple termination meetings in the past, all managers need to prepare. If managers don't take time to prepare, it's easy for them to say or do something inappropriate in a termination that causes problems. Terminations are stressful events and the best way to avoid saying or doing something that can get you into trouble is to be prepared.

Many managers choose to use a checklist during the termination. The checklist is a great tool to help managers gather their thoughts, work through the emotional issues, and prepare a plan of action so that they go into the termination situation knowing exactly what they are going to say and do...and more importantly...what they are not going to say and do.

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THE THREE ACTIONS

There are three action steps to help make sure you stay out of trouble regarding discipline and termination.

1. Be Sure You Discipline Consistently

Regardless of the employee's status or your personal relationship with them, 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. Don't fall into the trap of arguing about personality or attitude issues.

3. Be Specific

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. And avoid opinions about an employee's motives or attitude.

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FAQS ABOUT DISCIPLINE AND TERMINATION

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.*

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.

NOTES

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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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POST-ASSESSMENT

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True or False
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True or False
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True or False

CERTIFICATION OF TRAINING

I understand the information presented in the course, *Discipline and Termination: Improving Performance and Reducing Liability*. I have also completed the post-assessment for this course and reviewed the correct answers with my session facilitator or manager.

Employee's Signature

Date

Facilitator's or Manager's Signature

Date

This Certification of Training may be included in your personnel file as a record of having successfully completed this training.