

Terminating Problem Employees

While an employer's best defense against a wrongful discharge claim often is established through careful employee selection and consistent disciplinary procedures, the manner in which the employee is terminated also is important in protecting against liability. The best methods of minimizing claims associated with termination coincide with those methods dictated by good business judgment and common sense. Be professional and courteous, and treat the employee with dignity and respect during the termination process. Try to be fair. If a lawsuit does result from a termination, a judge and jury will be influenced most favorably by an employer who took safeguards to avoid an unfair decision.

Consistent

Procedures

Should Be

Emphasized

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Deciding to Terminate

Terminations have the potential to turn into million-dollar decisions and should be treated accordingly. No single supervisor should be authorized to terminate an employee. Where immediate action is required, a supervisor's power should be limited to suspension, to allow for a complete review of an employee's performance. If a supervisor, acting alone, terminates an employee, too often management either must accept a marginal decision (with the accompanying risk) or must severely undercut the supervisor's authority and ability to manage by reversing his or her decision.

In reviewing an employee's performance to determine whether termination is appropriate, the employer should

consider its own past practice. Specifically, the employer should consider:

- What incidents have resulted in termination in the past? And do these examples indicate that discharge is appropriate in this situation?
- If past practice indicates that termination is inappropriate, is the current situation *clearly* distinguishable from past incidents?
- If past practice indicates that discharge is inappropriate, have new policies or procedures been announced (well in advance of the current situation) that fairly alerted the affected employee to the em-

- employer's new approach?
- Did the employee to be terminated have a fair chance to learn of the new policies or procedures?
- What will the termination do to the employer's EEO-1 report?

Terminating the Employee


The manner in which termination decisions are communicated to the employee is important. Many times, it is the way a termination has been handled, rather than the termination itself, that has led to litigation. Even individuals who cannot function as satisfactory employees deserve to be treated with respect.

Unceremonious dismissals, with accompanying public embarrassment, are no longer just insensitive: they are now invitations to litigation. The most difficult cases that employment lawyers must defend are those in which an employee has been fired in a callous manner. Juries are more sympathetic and awards are higher when terminated employees have not been treated with honesty and dignity.

The following are guidelines for the termination process:

- Have a witness present at the termination meeting.
- Avoid scheduling a termination meeting before a holiday.
- Give the employee both oral and written—in that order—notice of termination.
- Inform the employee in the oral and written notices of any policies regarding return of property, such as keys.
- Schedule an exit interview, and include the time and place of the interview in the oral and written notices.
- Ensure the employee's presence at the exit interview by notifying him or her that the final paycheck will be given then.
- Notify managers affected by the discharge that the employee has been terminated. Do not inform coworkers or associates who do not have a business "need to know."

Consistency

The importance of consistency in applying disciplinary policies and termination procedures cannot be overemphasized. If, for example, one employee is terminated for a particular type of misconduct after a second offense, and another is terminated for the same type of misconduct after four offenses, the inconsistent application of disciplinary procedures can have a devastating effect on the employer's case in litigation. To ensure consistency, all disciplinary actions, particularly terminations, should be discussed with personnel officials. Written documentation of all facts leading to prior disciplinary actions and terminations must be prepared and maintained in the employee's personnel file. 

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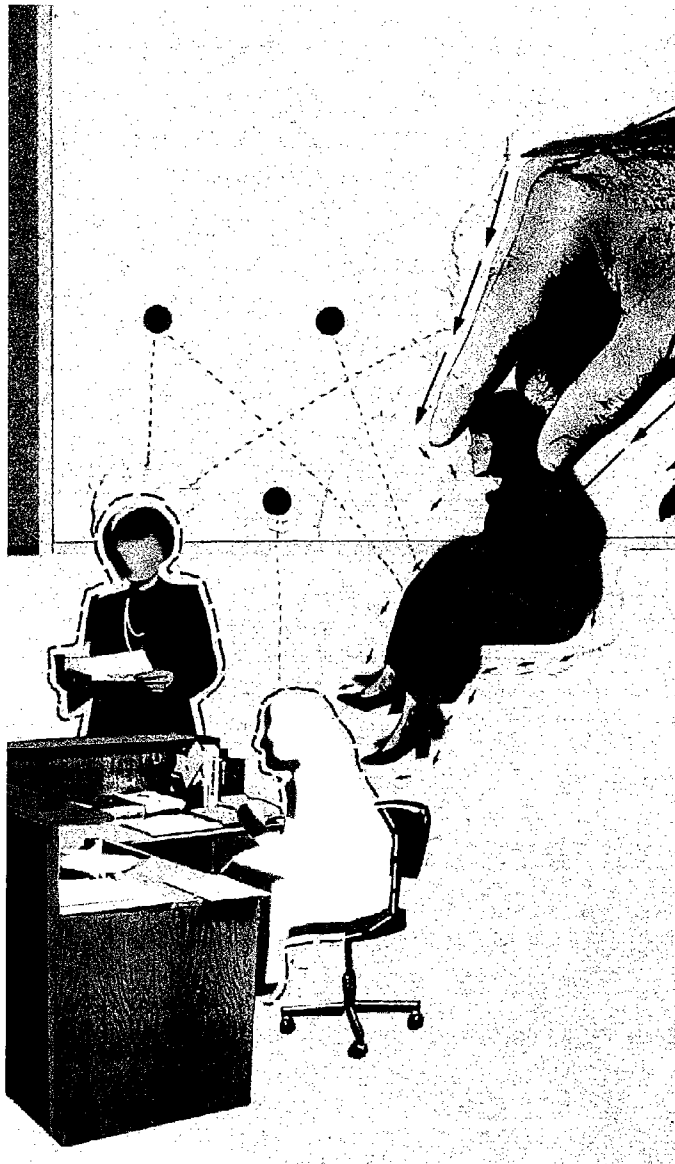


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