



Avoiding a Termination Lawsuit

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Introduction

Employers face many challenges to effectively run a business and managing employees is one of them. These challenges may include hiring, production, performance reviews, retention and separation. The decision to terminate an employee or lay them off is not always an easy task, but doing what is best for the business must always come first. Employees may react to a separation with shock, fear, anticipation, or even anger. Sometimes these factors will result in an employee looking for ways to pursue legal action against the company. Three areas identified that contribute to reasons in which an employee seeks legal action after separation include: Lack of Communication, Misperception or Bias, and Discrimination. The following will explain the issue of each reason, actions to follow to avoid litigation, and examples of positive resolutions.

Lack of Communication

Lack of communication from a manager during a termination is a common complaint expressed by employees. We often hear that the employee did not understand why they were fired, especially if they had not received any warnings concerning performance. By not clearly communicating the reason for separation, the employee may feel confused, and infer their own conclusion as to why they were terminated.

In addition, lack of communication can affect layoff situations and the perception to other employees. As a result of an unexpected layoff, the employee may be left feeling helpless or worried about their future financial security resulting in legal action against the company. Also, layoffs not only affect the terminated employee, but it impacts the current workforce perceived job security.

Action: Clear Communication

As one prepares for a termination, it is important to have proper documentation in place. Prior to a discharge, a review of current policies and details of previous disciplinary action should be completed. A few things to consider: how was the policy communicated to the employee, is the employee aware they were not meeting expectations, did they know this final action would result in a loss of employment, and is this a violation of the same policy or is this a different violation. The company should have a procedure of the disciplinary steps taken as a result of a violation of policy. An example procedure may include a verbal warning for the initial violation, followed by a written warning, with the final violation resulting in termination. Depending on the violation, this process may be accelerated or may also include disciplinary action such as suspension without pay. During each warning it is important to communicate the goals necessary to meet the employer's expectations. An employee must be made aware that without compliance further disciplinary actions up to and including termination will occur. If this is a different violation, the manager should start a new disciplinary procedure in accordance to the severity of the violation.

When preparing to terminate an employee an exit form should be completed by the manager including the details of the final incident. A manager should perform the termination with someone of higher authority than the terminated employee as a witness. The exit form should be presented

to the employee with a verbal explanation. The employee should be provided an opportunity to make comments. Finally the employee will be asked to sign an acknowledgment of the termination. Following these steps will show, in a court of law, efforts were taken for corrective action.

In the event of a layoff, communicate to the employee as much information as possible regarding the reason for the decision. A note for the file documenting the reason of the layoff, maybe reduction in production or loss of revenue that contributed to the action to eliminate their position. Do not tell an employee they are being laid off if there is no intention of rehiring them if the business improves. If an employee is not meeting expectations, communicate that they are being terminated and not laid off. When preparing for the layoff an exit form should be completed; include the reason for separation and request a signed acknowledgement. Consider providing the employee with information on job placement services, job coaching or resume development firms, and unemployment procedures.

In either situation, additional communication to the employee may include: the process of their final check, vacation balance payout policy, return of company property, and termination of health insurance and other benefits. Once the separation has been finalized, allow the employee time to collect their personal belongings and escort them from the building. Depending on the circumstances you may want to notify the staff of the change to eliminate rumors and maintain a positive environment. Be brief, employees do not need the specifics regarding the separation.

Example:

A company decided to hire a maintenance technician. Upon hire the employee completed new hire orientation, including a review of written policies and on the job training. As part of their job duties the employee is required to complete a list of tasks to have an apartment ready for a tenant to occupy. During training the employee showed they were able to perform the job duties and meet expectations. A couple of months after hire, the manager performed a walk thru to ensure an apartment was ready for occupancy. It was noted that a couple of items on the task list were not completed that the employee signed off on. The manager verbally counseled the employee and demonstrated for them the proper procedures to complete the tasks. The manager documented the date of the meeting and their discussion. A couple of weeks later during another walk thru the manager again noticed that two items were not completed that the employee had signed off on. The manager completed a written warning and required the employee to demonstrate completion of the tasks. On the disciplinary action form the employee commented that they did not have the proper tools to complete the tasks. The manager showed the employee the written policy regarding the employee's responsibility to notify the manager of missing tools and again explained that they cannot sign off on the tasks if they are not completed. It was communicated to the employee the expectations and that further action would result in termination. One week later, the manager noticed a task was not completed during a walk thru that the employee signed off on. The manager decided that with training and corrective actions the situation had not improved and the employee was not meeting expectations. The manager completed the exit interview form with the specific details of the final incident including the tasks not completed during the recent walk thru and the dates of prior warnings. The manager, Human Resources representative, and the employee met to discuss the termination and finalized the exit form. The manager escorted the employee out of the building and informed coworkers the employee would no longer be working for the company. Because the manager followed procedures and documented the corrective actions and clearly communicated the reason for termination, the company is better prepared to deal with any potential unemployment claims or legal action that may arise.

Misperception or Bias

For some terminations, a decision may be made without having all the information. It is pertinent to ask the employee for their explanation on an incident prior to termination, as circumstances may exist that may change your decision. If an employee feels you made a decision without considering both sides of a story, they may be tempted to pursue their rights in a court of law. Taking the time to review the facts may change your initial reaction to terminate the employee. Providing the employee with opportunities to discuss their view of the situation will go a long way in showing your willingness to openly communicate with employees. Ensuring that you obtained the necessary amounts of information to make a decision will assist should legal action take place.

From time to time, managers may have a negative attitude towards or dislike for an employee. Performance issues, personality conflicts, perceived issues, or false information can cause this. As a manager being neutral toward your employees, especially if during an investigation, is paramount. Put aside your personal feelings and review the situation for the facts. If an employee feels as if you are not treating them fairly they may believe they were targeted, treated unfairly or received bad treatment when the decision is made to end their employment. Miscommunication, or perceived opinions as to the reason behind the termination, can result in hurt feelings and anger. If this occurs, an employee can become disgruntled and may seek advice from counsel. Treating your employee with respect, showing loyalty, and expressing fairness, will go a long way, ensuring that the employment relationship is a positive one.

Action: Investigate and positive reinforcement

When faced with the decision of termination for an incident that just occurred, evaluation of the facts is critical. It may be necessary to suspend an employee without pay until an investigation can be completed. When conducting an investigation, you should consider information such as: who reported the situation, who witnessed the incident, what is the employee's explanation, and what other factors that may have contributed to the incident. Be sure to document any conversations and obtain witness statements. Once all the facts have been gathered a decision can be made on their future employment. This not only shows fair treatment to your employees, but also may help the company maintain a valuable employee.

Dealing with developing issues and corrective action can be frustrating and the manager may be tempted to have a negative attitude towards that employee. Negative comments can make an employee believe you are just waiting for them to "screw up" again. If they feel this way, they may see no reason to improve their work and have a despairing impact on other employees. Keeping a positive attitude will deter these feelings and can have additional impacts on other employees. Providing employees with detailed feedback, positive reinforcement and additional resources can contribute to improved performance and a productive workplace.

Example:

A manager received information that an employee had allegedly been threatened by a coworker. The manager's first reaction was to fire the coworker who made the threat, but instead contacted Human Resources to investigate. Human Resources documented the details from the manager regarding initial claim submitted. Following procedures, the employee is contacted to obtain their recollection of the conversation, what was said specifically, and if there were any witnesses. Then the coworker is contacted to get their side of the story. Once the investigation has been completed, Human Resources reviewed the details of the incident with the manager. After review of the facts the manager decided the employee may have interpreted a statement differently than it was intended.

The manager then completed a written disciplinary action with the coworker stating that workplace violence and threats will not be tolerated. In addition, communicated any future comments may result in suspension or termination. The manager also followed up with the employee regarding the completion of the investigation and offered to have others present when working with this coworker. Reviewing the facts, completing a full investigation and clearly documenting the situation will support the company, should a legal issue arise from the action taken.

Discrimination

In 2010 there were 99,922 charges of discrimination filed with the Equal Employment Opportunity Commission (EEOC)¹. Charges of discrimination may include age, race, gender, national origin, religion, disability, sexual orientation, and genetic information. Retaliation has become a common complaint filed along with charges of discrimination. There are two aspects of discrimination that can be involved with terminations. The first is the employee feels they were terminated because of a discriminating factor, because they are of a different race or their religious beliefs, etc. Although the employee has a poor job performance it may appear to them that they were terminated because of their age or other protected classes. The second is the employee had notified the company of discrimination or harassment while being employed and they are being terminated for filing a complaint, called retaliation. Once a complaint has been made, the company must investigate the allegation and take appropriate action. The company must also ensure there is no retaliation against the employee for filing the claim. Proper documentation will not only help support your decision to terminate an employee, but it is also crucial when responding to an EEOC claim.

Action: Equal Treatment

A disgruntled employee will often contact the EEOC if they feel they have been wronged. Filing a complaint is easy, available online, and free. Again we cannot stress enough the importance of utilizing a disciplinary procedure and applying your policies. Consistently following an established a consistent disciplinary and termination procedure to help defend you should an employee lodge a complaint. In the event of a layoff, it is generally accepted for the most recent employee hired in the position to be the first employee to be laid off. If you choose an employee with more seniority it may be perceived as discriminatory because they are older. Clearly communicating to the employee the reason for separation with detailed documentation can eliminate the perception of discrimination.

In the event an employee files a complaint of discrimination with a manager or representative of the company, it is important to take the claim seriously and to contact Human Resources. An investigation must take place to document the specifics of the accusation and should be as confidential as possible. The manager must not take action that would be seen as retaliation against the employee and ensure no further discrimination takes place. Although the employee has filed a complaint, it does not mean the company cannot proceed with disciplinary action including termination for violation of policy. Consistent documentation of warnings and policy implementation is critical to support the decision regarding their employment.

Example:

An employee complained to Human Resources that their manager was making inappropriate comments they felt constituted sexual harassment. Human Resources interviewed the employee and

¹ www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm

documented the details of her complaint. When requested to give specific details, the employee continued to provide a vague explanation of the conversations. After interviewing other witnesses and the manager, it was determined that there was not enough information to prove gross misconduct took place. The manager was advised of conversations that were deemed inappropriate and would not be tolerated going forward. A review of the sexual harassment policy was conducted with all employees.

Prior to the complaint of harassment the employee had a verbal and written disciplinary warning regarding their performance. After the investigation the employee's performance continued to decline and was being considered for termination. The manager reviewed company policies, noted previous actions taken against other employees with similar performance issues and made the decision to terminate the employee. The manager completed the exit form and had a witness present in the termination meeting. Following the separation, the company received a notice from the EEOC of charges filed for sexual harassment and retaliation. The company was able to provide the harassment investigation and disciplinary documentation to prove the decision of termination was based on performance issues and not in retaliation of filing a complaint. The company was also able to prove that action was taken to prevent any further harassment.

Conclusion:

Lack of Communication, Misperception or Bias, and Discrimination are areas that employees may feel they have cause for legal action. Integrating the four action areas of clear communication, investigation, positive reinforcement and equal treatment are essential to defending your decision for employment separation. By creating policies, following them consistently and having thorough documentation you can be confident that you have done your best to reduce your liability of a lawsuit.



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