

PUBLICATION

When Failure is Not An Option...Fire

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One of the riskiest things you do as an employer is terminate employees. Another one of the riskiest things you do as an employer is NOT terminate employees. And the latter can actually be riskier than the former.

Underperforming employees and those who do not follow your rules and policies can be a drain on your entire organization. They can damage morale (because their co-workers see them getting away with bad behavior and emulate them); they can hurt your reputation (because of poor customer service); and they can undermine your middle managers (who may feel challenged and unsupported by a senior management reluctant to act). More importantly, allowing one employee to flaunt your rules or to consistently perform in an unsatisfactory manner sets a bad precedent: it's hard to discipline one employee when you don't discipline another, without giving the disciplined employee a reason to allege discrimination.

But how do you terminate without risking a lawsuit? You can't – employees can always sue. But there are ways to set yourself up for success, so employees will be less likely to sue, and if they sue, you are more likely to win. The steps you should take depend on the reason for the termination.

Terminating for Performance Issues

There are generally two reasons to discharge an employee: poor performance, or violation of a rule/policy. Performance terminations are trickier because performance is generally subjective. But they can be defensible as long as you have built a record that shows that you counseled the employee (ideally, on multiple occasions) and made clear to the employee that failure to improve would result in his or her discharge. If you're planning to terminate an employee for performance issues, oral counseling probably isn't sufficient. You want a written record – something that shows an outsider (like, say, the EEOC or a jury) that you told the employee how his performance was substandard, you told him how it had to improve, and you warned him of the consequences if it didn't. Employers frequently indicate that, despite having no written discipline in an employee's personnel file, that the employee "knew" that his performance was bad. That may very well be true, but if there's nothing in writing, that employee is going to selectively forget the 15 very stern but undocumented discussions you had with him and claim he was terminated with no warning.

Avoid these difficulties by making sure that before you terminate an employee, you have written documentation indicating that you counseled the employee, that the employee acknowledged the counseling (i.e., have the employee sign the counseling statement), and that the last written counseling clearly communicated to the employee that continued lack of improvement would result in termination. Should a lawsuit make it that far, what you want to present to a jury is that you clearly communicated to the employee the expectations for his job, that you clearly communicated his failings in the job, that you clearly communicated the need to improve, and that the employee did not seize the opportunity to do so within a reasonable time. Thus, for a performance-based termination, documentation is key.

Terminating for Rules Violations

Successfully terminating for a rule/policy violation requires making sure you've conducted a thorough investigation into the incident without pre-judging the result. Let's say you own a hotel, and your front desk clerk/night auditor was reportedly asleep when a guest came to the desk to ask for towels. Would you fire the employee based solely on the guest's accusation? Of course not – instead, you'd investigate the situation. You'd pull footage from the security cameras to see if the desk clerk was asleep, or if the cameras weren't focused on the desk clerk, to see if other cameras picked up areas where the desk clerk should have been patrolling and wasn't. You'd speak to other employees on the same shift. You'd check the desk clerk logbook to see if there are long periods of no entries where you would expect to see some entries. And you would talk to the desk clerk himself and ask him if he was asleep. Sometimes an employee will make a damning admission and sometimes he will tell such a fantastical story that he cannot be believed, but either way, asking the accused employee for his side of the story is always desirable and often helpful.

Let's say at the end of the investigation, you still aren't sure, but you strongly feel that the desk clerk was asleep. The desk clerk didn't admit to being asleep, and the camera over the front desk was broken. You can still reach a reasonable conclusion that he was asleep based on other factors, but you need to be able to articulate why it is you credited the hotel guest's story over the employee's. That way, if you ever have to explain (to a jury, for example) why you terminated, your reasoning makes sense. In the hotel story, you might explain:

The hotel guest who reported the desk clerk asleep was well known to us; he stays with us regularly and has on several occasions been a reliable witness to incidents with other guests and other employees. He said the desk clerk was asleep when he came into the hotel at 1:24 a.m. Although the video camera over the desk that night was broken, footage from other cameras in the lobby show no sign of the desk clerk between 12:30 and 1:40 a.m., and he is supposed to walk to other areas to do checks during those hours. When I asked the desk clerk if he was sleeping, he said he was not, but stated that he may have 'closed his eyes' for a few minutes because he had a headache that night. The front desk log had no entries between 12:15 and 1:40, and that was the only period when there were no entries on an otherwise very busy night.

A solid investigation and a well-reasoned decision will go a long way toward a defense for wrongful termination.

In addition to conducting an investigation that includes talking to the accused employee, make sure that termination is consistently imposed for the infraction. If you terminate for sleeping on the job only on some occasions and not on all, you're going to have a hard time explaining to the jury why it was a terminable offense in this case but not in others.

And finally, if you're going to terminate for a rule/policy violation, that means that the violation was, by definition, serious. A serious violation warrants immediate action. You cannot allow someone to violate a rule that you believe is a terminable offense and not act for two weeks while you're trying to fill their position. If it's serious enough to warrant termination, then you should carry out the termination swiftly. Don't forget that you can always put the offending employee on a paid leave while you're investigating – that way, even if it takes you a few days to investigate, the employee who is accused of, say, molesting a hotel guest isn't given the opportunity to continue the misconduct or to intimidate a potential witness while you investigate.

Terminating an employee is never pleasant but making these simple, but important, steps a consistent part of your policies and procedures can minimize your legal risk if you are ever sued after a termination, whatever the reason.