

ORGANIZATIONAL PSYCHOLOGY

EMPLOYEE TERMINATION - MA 204-1

GENERAL OBJECTIVES OF THE SUBJECT

At the end of the course, Individuals will examine the principles of organizational psychology; apply them within companies; critically reflect emotional behavior within companies and their impact on the development of this.

9. EMPLOYEE TERMINATION

- 9.1 Introduction of Employee Termination
- 9.2 Involuntary Terminations
- 9.3 Documentation
- 9.4 Reviewing a Termination Decision
- 9.5 Resignations
- 9.6 Implied Contracts

9.1 Introduction of Employee Termination

Terminating employees is one of the most unpleasant aspects of a business owner or manager's job duties, but sometimes it is absolutely necessary in order to continue the business of the employer. But if terminating an employee is necessary, then it should be performed in the most ethical, and professional manner possible. Following the proper protocol in conducting the termination softens the blow to the terminated employee (who is very often surprised that they are being terminated); protects the business from potential litigation arising from the termination; and reassures the owner or manager that they did the right thing. Whether the terminated employee was a good worker or a bad worker is irrelevant. The decision to terminate an employee, once made, sets in motion a number of duties of the employer to handle the termination in a professional manner preserving the dignity of the terminated employee and protecting the employer's interests as the employer does not want to see an angry former employee down the road in court.

9.2 Involuntary Terminations

Involuntary terminations typically fall into two categories:

- 1) Terminations resulting from employment problems such as unsatisfactory performance, excessive absenteeism or tardiness, or poor attitude. Employees with such problems are typically not terminated by employers without being given a warning of their performance deficiencies and an opportunity to improve.
- 2) Terminations resulting from more serious types of employee offenses, such as insubordination, dishonesty, misconduct, theft, unethical practices, fraud, and falsification of records. Employees who have committed such offenses generally can be discharged without warning.

For any involuntary termination, it is always easier to defend against a claim of wrongdoing when good cause exists for the action. Good cause for termination of employment can be most easily defined as a behavior or situation that any reasonable person agrees would warrant discharge. There are no hard and fast rules on what constitutes good cause for termination, but the following causes for discharge have been upheld by the courts:

- 1) **Inadequate work performance.** Courts will generally defer to an employer's assessment of an employee's work as long as the employer's standards are applied uniformly and well communicated to employees.
- 2) **Inadequate productivity.** An employer's termination decision can be easily defended if the employer has established standards for quantity of work output and the employee has not met them.
- 3) **Poor attendance.** Chronic absenteeism, tardiness, misuse of excused absences, and not following procedures for either obtaining permission for an absence or not returning from an excused absence are all valid causes for termination.
- 4) **Violation of work rules.** Employers have successfully justified discipline or termination for violating work rules prohibiting such on-the-job conduct as intoxication, sleeping, smoking, conducting personal business, and fighting.
- 5) **Failure to meet legitimate employer expectations under a new policy.** One company successfully defended its decision to terminate a 22-year employee because his work record, which revealed complaints of sexual and racial harassment, did not fit with the employer's new policy for improving employee relations.
- 6) **Dishonesty.** One of the most easily defended causes for dismissal is dishonesty--such as giving false information on an application form.
- 7) **Illegal conduct.** Any employee who engages in illegal conduct on the job may be terminated.
- 8) **Endangerment of health and safety.** Employees whose continued employment endangers the health and safety of other employees, the general public, or themselves may be terminated.
- 9) **Insubordination.** Termination because of an employee's failure to follow a supervisor's reasonable instructions can usually be defended.
- 10) **Personality/attitude problems.** Although personality problems can be successfully defended as cause for discharge, employers must be careful to focus on behaviors, not just subjective conclusions about personal traits. For

instance, a statement that the employee "screamed at a coworker who refused to handle his request immediately" is better than a statement that the employee "is impatient and lacks self-control."

- 11) **Poor interaction with subordinates.** Because employers are liable for the acts of their supervisors, courts usually grant management latitude to fire supervisors who treat subordinates poorly.

However, employers should review their obligations to disabled employees before terminating them for safety-related reasons to ensure that if a disabled employee's condition constitutes a direct threat to the safety of the employee him or herself, coworkers, or the employer's property, the direct threat cannot be eliminated by a reasonable accommodation to the employee's condition.

9.3 Documentation

Although there are no laws that require employers to document their dealings with employees, employment lawsuits often focus on the reasons for an employee's termination. The employer's records can constitute important evidence in its defense of a termination decision. Documentation of the termination decision should normally begin well before the employee is discharged and should include the following:

The employer's disciplinary policies and performance standards

- 1) Any eyewitness accounts of employee misconduct
- 2) The supervisor's memos in which performance deficiencies are recorded in objective terms
- 3) Performance evaluations
- 4) Warning memos to the employee

What termination documents do employers need? Termination documentation should show that:

- 1) The employer had a standard or policy governing the behavior in question.
- 2) The employee knew of the standard or policy and of the consequences for violating it.
- 3) The employer applied the standard and policy uniformly.
- 4) The employee violated the policy or failed to meet the standard.
- 5) If the employee was terminated for unsatisfactory performance or for repeated minor violations, documentation showing that the employer counseled the employee and made an effort to improve his performance is also important.

Because of the potential for legal retaliation on the part of a discharged employee, it is generally a good idea for employers to establish review policies for all termination decisions. Generally, it should be the responsibility of the human resources manager to review termination decisions. But if no such position exists in an organization,

termination decisions should be reviewed by a higher-level manager or by the firm's counsel.

9.4 Reviewing a Termination Decision

Regardless of who undertakes the termination review procedure, the following steps should be taken:

- 1) Determine whether there is a valid, job-related reason for terminating the employee, such as a violation of company policy, poor job performance, poor attendance, excessive tardiness, or a problem with the employee's conduct, attitude, or demeanor.
- 2) If the termination recommendation is due to a specific incident, determine whether the incident has been properly investigated and documented in writing. Also determine whether there are any questions that remain unanswered about the incident.
- 3) Make sure that the employee was made aware that his behavior or job performance was unacceptable.
- 4) Ensure that the employee's overall work record has been reviewed.
- 5) Look for extenuating circumstances (such as abusive or unfair treatment by a supervisor) that may have contributed to the employee's unsatisfactory performance.
- 6) Look for any evidence of sexual harassment, racial harassment, or illegal retaliation for an employee's exercise of his legal rights.
- 7) Be sure that the discharge recommendation is not merely the result of a personality conflict with the supervisor.
- 8) Determine whether the termination recommendation is consistent with prior actions where the factual circumstances are similar.
- 9) If step 8 reveals that there are some inconsistencies, check to see whether the manager making the recommendation to terminate the employee has job-related reasons why the decision to terminate should be different under these circumstances.

- 10) Have the recommendation to terminate reviewed by an individual familiar with employment discrimination laws and unjust dismissal theories (such as outside employment counsel), to ensure that there is no legal problem.
- 11) Ensure that the employee has received all rights conferred by company policy, such as a progressive disciplinary procedure.
- 12) Explore alternatives to termination such as transfer, counseling, or demotion before making the final decision.

9.5 Resignations

A resignation is a voluntary termination of the employment relationship initiated by the employee. Except in emergency situations, employers typically encourage employees who are voluntarily resigning to provide written notice of their intentions. No employer, of course, can force an employee to give notice. Normally, nonexempt employees are asked by employers to provide two weeks' written notice, lower-level exempt employees three weeks' written notice, and higher-level exempt employees, such as senior managers, four weeks' written notice.

Some legal experts recommend that an employer not *require* notice, because doing so may undercut the presumption that the employment relationship may be terminated at the will of either party. However, employers can ask employees to give reasonable notice as a courtesy. Many companies have written policies saying that employees absent more than three days without calling in are automatically terminated because they have in effect abandoned their job. This helps to resolve the status of employees who resign without giving any notice.

Soliciting a Resignation

Rather than smudge an employee's employment record by firing him, some employers give the employee an option to submit his resignation. This process is easier on the employee's morale, spares the supervisor from having to fire the employee, and allows an employee to save face. However, some employees who agree to resign under pressure can and do turn around and sue the employer if they later regret the decision. For this reason, many employers who give employees the option to resign, require a waiver and release agreement as the "quid pro quo" or legal consideration for the release.

Constructive Discharge

Sometimes an employee resigns because the supervisor has imposed intolerable conditions on the employee's continued employment that have left the employee little choice but to quit. This is referred to legally as a "constructive discharge." Constructive discharges can have very serious financial consequences if the employee sues. If the supervisor's motive was discriminatory or otherwise illegal, the employer carries the same liability as if the employee had been fired. Moreover, the supervisor and employer

may be liable for both compensatory and punitive damages for intentional infliction of emotional distress.

Legal Restrictions on Termination

Almost two-thirds of the U.S. work force is employed on an at-will basis. In the past, an employer's right to terminate employees who were not hired for a specific duration or who were not represented by a labor union was curtailed only by certain legislative restrictions. These restrictions included, for example, laws prohibiting the discharge of employees based on unlawful discrimination against classes of employees protected from such discrimination. Recently, however, the courts have imposed a number of additional limitations on an employer's right to terminate. In fact, more than half of the states now recognize some court-created exception to the employment-at-will rule.

During the 1960s and 1970s, numerous federal statutes and regulations were enacted that place further restrictions on an employer's right to terminate employees at will. As a result of this legislation, the following practices are prohibited, including but not limited to:

- Discrimination (including unlawful termination) on the basis of race, color, sex, religion, or national origin in accordance with Title VII of the Civil Rights Act of 1964 (Title VII).
- Discrimination (including unlawful termination) on the basis of age against people 40 years of age and older in accordance with the Age Discrimination in Employment Act.
- Discrimination (including unlawful termination) on the basis of disability in accordance with the Americans with Disabilities Act of 1990 (ADA).
- Discharge of a participant in an employee benefit plan for exercising any rights under the plan or for the purpose of interfering with the individual's attainment of any right under the plan (e.g., termination of an employee to prevent him from vesting in a pension plan) in accordance with the Employee Retirement Income Security Act of 1974 (ERISA).
- Discharge of an employee for a single wage garnishment in accordance with the Consumer Credit Protection Act.
- Discharge of an employee for performing jury service in a federal court in accordance with the Jury System Improvement Act of 1974.
- Discharge of any employee who has filed for personal bankruptcy or who has been adjudicated as bankrupt in accordance with the U.S. Bankruptcy Code.
- Retaliation (including unlawful termination) for an employee's reporting employer violations of statutory safety and environmental standards and for filing a claim for any benefits they may be entitled to receive under the respective act in accordance with numerous statutes, including but not limited to workers' compensation.

9.6 Implied Contracts

Often, specific sections in employee handbooks and in policies and procedures manuals are the source of implied contracts:

- a) **Probationary Periods for New Hires:** such periods often lead employees to believe that they have a "heightened sense of job security" when the probationary period is successfully completed.
- b) **How to prevent:** Avoid reference to such periods in these documents; or, alternatively, change the name to "Introductory" or "Orientation" period and include a disclaimer such as "The successful completion of this period is not a guarantee of employment for any specific duration."
- c) **Rules and Regulations:** employees are often led to believe that they can be terminated only for an offense listed in the rules and regulations.
- d) **How to prevent:** Be sure to inform employees that the list of rules is not "all inclusive" and that the company may discipline or terminate an employee for offenses or infractions not set forth in the rules. Also, avoid setting forth specific penalties that will be administered if a rule is violated. For example, "Employees will receive a written warning for violating the company's smoking policy." If, indeed the company desires to terminate an employee for a smoking policy violation (e.g., employee smoking near flammable liquids, which is extremely hazardous), the company may be unable to do so because this may breach an implied contract not to terminate for a smoking offense.
- e) **Progressive Disciplinary Procedure:** courts often find implied contract violations where such procedures are not followed.
- f) **How to prevent:** do not include a specific procedure that must be followed before an employee may be terminated. If such a procedure is included, however, make sure that a disclaimer is included in the procedure clearly informing employees that the company reserves the right to "bypass any or all steps in the procedure at its discretion, and terminate an employee without prior warning or notice, in those circumstances where the company deems such action appropriate."

Public Policy

The following are examples involving public policy where courts have found for employees:

- Discharge for refusal to engage in illegal activities
- Discharge in violation of freedom of speech
- Discharge for reporting wrongdoing by others

- Discharge for performing a statutory duty (e.g., jury duty)
- Discharge in retaliation for an employee's filing workers' compensation claims
- Discharge after filing sexual harassment charges
- Discharge for accusation of negligent criminal conduct
- Discharge for protesting company policy
- Discharge for filing a lawsuit against the employer

The Termination Interview

Terminating an employee can be the most difficult task a supervisor faces. Unfortunately, some supervisors feel such emotional conflict about firing a subordinate that they handle the matter badly. This can cause problems for a number of reasons, but most notably because employees whose termination has been poorly managed are the ones most likely to take legal action against the employer as a result of the termination.

The way an employee is informed about his or her termination can influence such matters as whether the employee will sue for wrongful discharge and whether he or she will be able to win the suit. The following steps are recommended:

- *Make it clear that the employee is discharged.* The supervisor should make it clear that the termination decision is final and should underscore this point by informing the employee of his or her last day of employment.
- *Avoid personal references or accusations that cannot be proven.* The supervisor should maintain a business-like tone in disclosing the termination decision to an employee. In most states, an employer is not required to disclose the reason for discharge. If the employer does choose to disclose the reasons, however, it should be described in terms of behavior and no references to the employee's personal character, or to misconduct that is suspected but cannot be proven, should be given.
- *Be prepared for the employee's reaction.* No matter how much an employee may suspect that it is inevitable, termination of employment is a traumatic event. The employee may respond with anger or tears. The supervisor should concentrate on listening and avoid defensive comments or counterattacks to an angry employee.
- *Reassure the employee--but not to the extent that the terminating decision seems inconsistent.* A fired employee may need reassurance that he or she is still employable. The supervisor can point out the employee's strengths but should avoid being over complimentary or the employee--and perhaps a jury--may have difficulty understanding why he or she is being fired.
- *Give the employee time to collect his or her thoughts.* Discussions about severance pay and benefits should be postponed until after the employee has had time to adjust to the termination decision. Alternatively, severance pay and benefits can be addressed during the termination discussion, with the employee's

receiving a written summary of his or her severance and other benefit entitlements after the discussion. Some employers include this information in the employee's release agreement.

Dealing With A Difficult Former Employee

Occasionally, an employee who has been terminated will refuse to comply with the employer's decision and will continue to report to work. What steps can the employer take to get the employee out, without leaving itself open to a false arrest, assault, battery, invasion of privacy, or defamation claim? Here are some recommendations based on interviews with private security professionals:

- 1) **Give the former employee written notice.** The employee who refuses to leave the premises, or who shows up for work the next day after being told he or she is dismissed and told to vacate the office, should be notified again in writing that he or she has been dismissed and is expected to vacate the office or workplace by a certain time. This notice should be given orally (perhaps by reading the contents of the written notice to the employee), and the written notice should be presented to the employee.
- 2) **Allow a reasonable time for departure.** The employee should be given a reasonable time within which to leave, at least several hours, perhaps 24 hours. Understandably, in some cases an employer may not want the employee to remain on the premises for any period after the termination notice is given (e.g., where there is a concern regarding possible vandalism or sabotage of company equipment), or may not even want the termination interview conducted on company property (e.g., fear of violence). In these instances, thought should be given to terminating the employee by telephone or by letter.
- 3) **Prohibit the use of company property.** The written notice of dismissal and order to leave the workplace should also advise the employee that he or she is not to take any company property with him or her and that he or she is not to make any personal, unauthorized use of company property, such as telephones for long-distance calls or the photocopy machine.
- 4) **Notify the former employee that the police may be called.** The written notice should further advise the employee that if he or she is not gone by the deadline, the company's security officers will be called to escort him or her from the premises. If there are no private security personnel, the employee should be advised that municipal or county police will be asked to render assistance.
- 5) **Do not touch the departing person.** If it becomes necessary to have security personnel physically escort the employee out, it is very important that they be able to do this peaceably. Private security personnel should not physically touch the employee in any way, even gently on the shoulder. Technically, any unauthorized touching is battery, for which the company may be liable. If an employee should still refuse to budge, the municipal or county police should be

called.

- 6) **Evacuate other personnel.** If it appears that the dismissed employee will leave only under escort, it may be wise to clear the immediate area of all other personnel.
- 7) **Use security or police as a last resort.** Calling private security or public police to remove an employee who refuses to leave otherwise is a drastic remedy that should be resorted to after other, less visible and quieter means have failed.
- 8) **Isolate the former employee.** The employee who refuses to leave may be isolated so that in a very short time, even he or she will likely see it is foolish to remain. This may be accomplished by unplugging or disconnecting telephones in his office, by moving his or her secretary, by telling his or her callers that he or she is no longer employed by the company, by refusing to bring him or her his mail, etc. The employer may have to bring in movers to remove furniture in the office or workspace.
- 9) **Change locks, if necessary.** It may be necessary to change the locks on the employee's office door, or the main entrance to the workplace, if that is feasible. It is not necessary to wait until the employee has left to change the locks; this may be done while the employee is still on the premises. Then, as soon as the employee leaves the office or building, as he or she must sooner or later, he or she is prevented from re-entering.
- 10) **Warn the former employee.** Whatever steps are taken, it is advisable to tell the employee in advance what the next move will be before making it. This is a very important step. This gives the employee time to make up his or her own mind to leave of his or her own accord; bespeaks professionalism on the employer's part; conveys the message that the employer knows what to do and is in charge of the situation; and it may actually spare the company some effort, since the mere warning of intent to take a subsequent step may be sufficient to accomplish its purpose.
- 11) **Be patient.** The employer must be patient. In rare, exceptional cases, it may take one or two days to physically remove an employee who is determined to stay. In such situations, the employer does not want any force to be used by or against the employee. The disruption caused by a dismissed employee's temporary refusal to leave is a lesser evil than the liability that can attach as a result of any physical force used on the employee, especially if coworkers are present to observe it.

Release Agreements

When an employer terminates an employee for cause or separates an employee under an early retirement or some other voluntary separation program, it is common to ask the employee to enter into a written separation agreement. Under such an agreement,

known as a release agreement, the employee agrees to waive all claims against the employer and its officers, directors, and other employees in return for certain financial and other consideration.

The purpose of seeking a waiver and release agreement is to prevent a departing employee from filing a lawsuit against the company. Although such agreements involve a payment from the employer in exchange for the employee's waiver, they are usually far less expensive than litigating a claim brought by an aggrieved former employee. Employers must proceed with caution when entering into release agreements because administrative agencies and the courts frown on releases that are not executed under proper conditions or that do not provide sufficient financial or other benefits to the individual in exchange for the waiver of his or her right to sue.

Giving References

Employers must be cautious in providing information to other organizations concerning current or former employees. Equal employment opportunity (EEO) laws, the laws on defamation of character, and the employee's right to privacy may be implicated when giving references. Certain information may be given in response to inquiries from other organizations, but a balance should be sought between providing whatever information may be helpful to a prospective employer and the potential liabilities that may arise in connection with the release of information. The majority of employers are reluctant or unwilling to give references for employees who deserve negative references for fear that the employee may sue for defamation. Defamation is the publication of a false oral or written statement that harms the reputation of another person.

Generally under the law of defamation, an employer may provide information to a prospective employer (or other third party) about a current or former employee, provided the information affects an "important interest" of the prospective employer and giving the information helps the prospective employer protect that interest. An important interest involves one's own affairs or a duty to speak for legal or moral reasons. Interests that the courts have found justifiable include defending one's own reputation, warning others about an individual's misconduct, protecting one's business interests against unfair competition, and protecting the interests of a third person. An employer's option to communicate truthful but unflattering information about a former employee is a "qualified privilege." Under certain circumstances, this privilege may be lost and a cause of action for defamation may be found to exist.

When should an employer not speak? An employer should not communicate truthful but negative information about a person under the following circumstances:

- The employer does not believe the truth of what it is saying
- The employer believes the truth of the information but has no reasonable grounds for this belief
- The information is given to a person who does not have a need to know it
- The information is not responsive to the third party's inquiry
- The information is disclosed by the employee, and the employer could have

anticipated that this would happen (this is known as "compelled self-publication")
• The information is given out of malice, and not for a legitimate purpose.

(Employers should understand that the term "malice" in the context of defamation law means not only ill will, hatred, vindictiveness or animosity, but also recklessness, lack of belief or reasonable grounds for belief in the truth of the defamatory remark, an improper motive for providing the information, an absence of good faith, or repetition of the information without reason or necessity).

To achieve a balance between providing useful information to prospective employers and avoiding liability, employers might consider providing limited information in response to a reference inquiry, such as the following:

- ❖ Verification that the individual worked for the company as a full- or part-time employee and for the period actually worked;
- ❖ Verification of the position(s) held by the individual during his tenure of employment; and
- ❖ Verification of the individual's final salary.

Although it is not unlawful to provide the reason for the individual's having left the company, it is often problematic to do so. For example, differences of opinion between an employer and former employee may arise about whether the separation was voluntary or involuntary. Moreover, employers often are unaware of promises that may have been made to a departing employee by his department supervisor. For instance, although an individual's record may reflect that he was terminated, a manager may have promised the individual (typically against company policy) that the company would provide a favorable or neutral reference. If this promise is broken, the company could find itself in the midst of senseless litigation.

Before adopting a policy of providing no references whatsoever, an employer should check state law. Many states require employers to give employees who quit or are fired service letters or letters of reference. Although the content of such letters varies from state to state, state laws may require inclusion of the employee's tenure of employment, occupational classification, wage rates, and reason for termination. Most states that have service letter laws require employers to provide service letters **only at the employee's request.**