**Fundamentals of Discipline**

**About At-Will Employment**

* North Carolina is an ‘Employment-at-Will’ State.
* The term ‘Employment-at-Will’ simply means that unless there is a specific law to protect employees or there is an employment contract providing otherwise, then the employer can discharge an employee at the will of the employer for any reason or no reason at all.
* The most common exceptions to employment-at-will are federal and state regulations affecting the employment relationship such as those that protect an employee's civil rights based on age, race, sex, religion, national origin, color, disability [including the Americans with Disability Act (ADA)], or pregnancy.
* If an individual believes he has been discriminated against with respect to an employment decision, he/she must file a complaint with the Equal Employment Opportunity Commission (EEOC) or the state counterpart thereof before he/she can file a lawsuit alleging that an employer violated those laws.

While there is no absolute way to prevent a terminated employee from filing an EEOC charge, there are actions an employer can take to minimize the chances that such a complaint will be filed. Moreover, there are basic safeguards an employer can take to put itself in a better position to respond to the EEOC, if and when a charge is filed.

**Basic Safeguards**

Simply put, it is important for employers to communicate with employees as performance and/or work-related issues arise. An employer should document every important communication and every relevant workplace event as it occurs, including the termination meeting.

* Each time a manager or someone in a supervisory position has to communicate with an employee about a significant performance or work-related issue, whether orally or in writing, it should be thoroughly documented and included in the employee's personnel file.
* If the communication is oral, the manager or supervisor should ideally have a witness present when he or she is speaking with the employee about the issue. If it is in writing, it should be signed by the employee. Additionally, an employer should enforce its policies and procedures uniformly and consistently.
* While it is critical to respect confidentiality, it is often advisable to find a ‘partner’ in the HR field to bounce various scenarios around. An obvious choice for Catapult members is the Advice team. They have dozens of years of experience handling thousands of employee disciplinary situations. It only makes sense to draw from their experiences.

None of these basic safeguards guarantee that an employee will not file an EEOC charge or guarantee a successful defense or favorable outcome if an EEOC charge is filed. But if done correctly, they do provide important protection to the employer.

**Next-level Safeguards: The Use of Severance Packages**

With respect to attempting to resolve a dispute with an employee regarding termination of employment--including any potential discrimination claims--employers sometimes offer severance packages. These packages provide some form of consideration (typically, payment of a particular amount) in exchange for a release by the employee, requiring the employee to agree to release and waive any and all claims arising out of the employment relationship between the employee and the employer.

Note, however, that even if the employee signs the release and accepts the consideration, this does not absolutely preclude the employee from filing a charge with the EEOC, although it does prevent them from recovering any monetary damages. However, the EEOC is not bound by the release, and thus, under certain circumstances, the EEOC can take action upon the charge, if it is believed that a discriminatory act had occurred.

If an employer offers a severance package to an employee who is over age 40, and the employee is asked to sign a release, specific requirements must be met in order to comply with the Older Worker's Benefit Protection Act (OWBPA), which amended the Age Discrimination in Employment Act of 1967 (ADEA), in order for the employee's waiver of rights to be valid.

Among other requirements, the release must include a 21-day review period (or 45-day review period for a group RIF) as well as a seven-day revocation period; the language of the release must be understandable to the average protected employee; and the employee must be advised in writing that she has the right to consult an attorney prior to signing the release.

**Why is getting it right is so important?**

1. **Financial Cost:**
The cost of claims of wrongful terminations can be devastating to the employer.

For example, a recent study of closed claims reported by small- to- medium-sized enterprises (SMEs) with fewer than 500 employees showed that 19% of employment charges resulted in defense and settlement costs averaging a total of $125,000.

On average, those matters took 275 days to resolve.

Most employment matters don’t end up in court, but for those that do, the damages can be substantial. The median judgment is approximately $200,000, which is in addition to the cost of defense.\*

About 25% of cases result in a judgment of $500,000 or more.

*\*Employment Practice Liability: Jury Award Trends and Statistics*
2. **Damage to Employment Brand**

Equally as harmful as the financial cost, is the damage that can be exacted on your employment brand. Employers who harshly deal with employees or generally mishandle the termination process inadvertently send a message to the remaining staff that the organization’s employees are not valued and that this could happen to them.

Such behavior violates the spirit of trust between the employer and employee. There is an expectation that the employee will be treated fairly, with respect, and dignity. When that falls apart, employee loyalty begins to fade. The result is that your remaining staff may rethink their standing within the company.

On a broader scale, terminated employees often look to ‘trash’ their employers on social media sites (such as LinkedIn, Facebook, and Glassdoor.

While some of that type of behavior is largely unavoidable, handling the termination process in a professional and respectful manner, goes a long way in mitigating hurt feelings.

While an occasional bad review is not an issue, repeatedly receiving bad reviews can have a negative impact.

**Main Categories of Involuntary Termination**

**Performance**

* High absenteeism rate
* Being late too often
* Performing tasks slowly and with errors
* Unable to complete assigned tasks
* Sub-standard results vs. goals
* Failing to ‘graduate’ from a PIP

**Behavior**

* Workplace violence
* Inconsistent and unreliable work behaviors
* Refusing to follow directions and simple management requests
* Inability to get along with others
* Drugs or alcohol use (job-related)
* Being dishonest, fraud and/or theft
* Conducting personal business at work
* Lying on the employment application
* Violation of an important company policy

**Staff Reductions**

Reduction in Force (RIF) via Downsizing or Organizational restructuring

**Gross Misconduct**

In general, gross misconduct in the workplace is characterized as an objectionable action that is willful and cannot be described as a mistake or an act of negligence. Gross misconduct is the most serious level of misconduct in the workplace and affords an employer the opportunity to dismiss an employee on a summary basis without notice or pay in lieu of notice, as the conduct is such that it has destroyed the employer/employee relationship and it cannot continue.

Gross misconduct in the workplace may include:

* wanton disregard for the safety of others
* deliberate acts of violence or hostility
* attempts to financially defraud a company
* significant levels of insubordination
* dishonesty through falsification of documents or other forms of misrepresentation

***A Word to the Wise***

One of the most common misuses of gross misconduct is employers think dismissal can be immediate and instant. This is not the case and regardless of the seriousness of the conduct involved an employee is always entitled to due process before a decision to terminate is taken.

Once the relevant investigation and hearing have taken place, then the dismissal without notice can be effected.  It will often be appropriate to suspend an employee suspected of gross misconduct pending an investigation or disciplinary hearing but in this circumstance suspension is not a sanction and should always be paid.

Gross misconduct only covers serious matters that do not warrant an employee being given another chance or an opportunity to improve their behavior. It is important to specify examples of gross misconduct behavior in the disciplinary policy and to give employees a clear indication of what types of behavior will be classified as gross misconduct.

Matters such as general poor work performance, time keeping issues and absenteeism should be treated as less serious offences with increasing disciplinary sanctions applying on a staged basis if required standards are not achieved. As with all dismissals, due process and fairness is always required and the following will help ensure that a decision to dismiss for gross misconduct will not be overturned:

* Conducting a thorough investigation into the alleged misconduct
* Allowing the employee to respond fully to allegations
* Providing adequate notice of investigation and disciplinary meetings
* Considering if other sanctions short of summary dismissal would be appropriate

**Common Mistakes to Avoid**

Firing an employee is stressful process for all parties Even though you have repeatedly shared your performance concerns with the employee, they generally don’t believe that they will actually get fired.

You can make the experience easier to digest by using an effective, supportive approach.

Here are the top ‘don'ts’ when you do decide to fire an employee.

1. **Firing an Employee Without a Face-to-Face Meeting**
If at all possible, do not fire an employee using any electronic method (i.e. emails, voice mails, or phone calls). Even a letter is inappropriate when you fire an employee. When you fire an employee give them the courtesy you would extend to any human being. They deserve a face-to-face meeting. Nothing else works. The fired employee will remember and your other employees have even longer memories.

A common sense exception to a face-to-face meeting occurs when you are dealing with a hostile employee who has already been removed from the facility. No need to bring them back in.
2. **Firing an Employee without Warning** (for anything not deemed gross misconduct)
Nothing makes an employee angrier than feeling blind-sided when fired. Unless an immediate, egregious act occurs, the employee should experience coaching and performance feedback over time. Before you fire an employee, try to determine what is causing the employee to fail.

If you decide the employee is able to improve her performance, provide whatever assistance is needed to encourage and support the employee. Document each step. If you are confident the employee can improve, and the employee's role allows, a performance improvement plan (PIP) may show the employee specific, measurable improvement requirements.
3. **Firing an Employee without a Witness**
The best practice is to include a second employee in the termination meeting when you fire an employee. This witness should be the HR staff member. HR professionals have more experience, than the average manager, in firing employees, so they can also help keep the discussion on track and moving to completion. The HR professional can also help pick up the slack if the terminating manager runs out of words or is unsure what to say or do next.
4. **Supplying Lengthy Rationale and Examples for Why You Are Firing the Employee**
If you have coached and documented an employee’s performance issues over time and provided frequent feedback, there is no point in rehashing your dissatisfaction when you fire the employee. It accomplishes nothing. Instead, sum up the high points and have ‘talking points’ prepared that correctly summarize the situation without unnecessary detail or placing blame.

You want the employee to maintain his/her dignity during an employment termination. So, you might say,
“We’ve already discussed your performance issues. We are terminating your employment because your performance does not meet the standards we expect from this position. We wish you well and trust you will locate a position that is a better fit for you.”
5. **Letting the Employee Believe That the Decision Is Not Final**
Because employees don’t believe that you will actually fire them in the first place, don’t allow the employee to believe that there is any opportunity to affect your decision. Approach the employee with kindness, concern, and respect, but your words should be straightforward. Being ‘wishy-washy’ only complicates the issue for all parties, especially if the employee believes he/she has one last chance to affect your decision.

In fact, tell the employee that the purpose of the meeting is to inform him/her of your decision, which is final. This is kinder than misleading the employee.
6. **Firing an Employee without a Checklist in Hand**
An employment termination checklist can keep you organized and on track when you need to terminate an employee. The employment termination checklist ensures that you cover all appropriate topics during what can be a stressful meeting for all participants. In addition, the employment termination checklist provides guidance about informing the employee of what he/she can expect from your company upon her employment termination.

**Wrap-up**

Prudent HR leaders understand that taking care to properly execute the fundamentals of coaching, feedback, progressive discipline, and terminations is the best defense against costly claims of wrongful termination. They also understand that there is no ‘one size fits all’ approach to terminations. Most importantly, they recognize the value in finding a partner, such as Catapult Advice Team, when making difficult employee termination decisions.

Written by a Catapult Advisor.