



Terminating a Difficult Employee

By: Katharine Meyer

One of the most unpleasant duties of being the CEO of a non-profit organization is firing an employee. It is a difficult and stressful task regardless of whether it is the result of downsizing or poor performance. However, it becomes even more unpleasant when you have to fire the “toxic” employee; the one employee that constantly complains, is insubordinate, a gossip, unprofessional, and/or cannot work well with others.

Firing such an employee is sometimes an immediate and emotional decision. However, we have seen many of these “on the spot” firings – where an executive fires a person during a moment of frustration or anger – go wrong. Frequently, these types of firings lead to litigation, and claims of wrongful termination. While most employees are “at will” employees who can be fired at any time, an employee’s termination should never be a rush to judgment. Instead, the termination of an employee should come at the end of a thoughtful, well-documented and transparent process. This article provides guidance as to how to properly fire a difficult employee, in order to reduce the risk of costly litigation.

1. Have a Disciplinary Process – and Follow It. When a CEO tells us that she wants to terminate an employee, our first question is whether the organization has a written disciplinary or termination policy. It is surprising how many CEOs cannot answer this question. If you have a disciplinary process, in most cases, it should be followed.¹ If you do not have a written disciplinary process, you still need to make sure that every employee is treated fairly and consistently. For instance, let’s say you have two employees, Joe and Jane. In January, Joe has three unexcused absences. You speak to Joe, and put a note in his file. In October, Jane also has several unexcused absences. You do not really work well with Jane, so you terminate her based on these absences. There is now a risk that Jane could claim that you discriminated against her, because she

¹ For any association that has progressive disciplinary procedures for employees, we recommend that your Employee Manual clearly state that such procedures will be followed by the association only when appropriate, and that the association has the right to terminate any “at will” employee at any time without following the progressive procedures. This will give the association some flexibility if it is unable to follow the progressive disciplinary procedures, or if, based on an employee’s egregious conduct, it has to terminate him immediately.

is a member of a protected class. You have now left the organization open to this kind of claim.

2. Document, Document, Document. There needs to be evidence to back up any termination. However, many supervisors dislike giving poor performance evaluations. Often times, they are afraid of the repercussions in the workplace if they give an employee a negative review. Therefore, reviews tend to be glowing, or, at worst, neutral, instead of realistic. But a supervisor is doing her association a disservice if she does not give an honest evaluation of every employee. When an employee is terminated for poor work product or conduct, but has only positive performance evaluations, it is more difficult to prove that an employee's performance or conduct was the reason he was terminated. Therefore, make sure to meet with a problem employee early on, and explain what he has done wrong. Explain what you want him to do differently, and how you will measure his performance in the future. Also, let him know what the consequences are if he does not improve. Put a memo in the employee's file, documenting what was said at this meeting.

3. Determine the Risks of Firing the Employee. As stated earlier, while most employees are employees "at will" and can be terminated at any time, for any reason, there are risks involved with firing certain individuals. Therefore, before firing any employee you should check to see if:
 - a. The person is part of a protected class? (e.g., is this person: (i) a minority, (ii) over 40, (iii) disabled; or (iv) a woman?)
 - b. The employee has a medical condition that would affect his work performance, such as a chronic disease or alcohol or drug addiction, which could be covered under the Americans with Disabilities Act?
 - c. The employee has been subject to sexual harassment?
 - d. The employee has been properly classified as exempt or non-exempt under the Fair Labor Standards Act?

If you believe that any of these risks apply to the employee you want to terminate, we strongly recommend that you speak with your legal counsel before firing this individual. There may be ways you can limit your liability risk prior to his termination.

4. Prepare for the Termination Meeting. Once you decide to terminate an employee, it should be done quickly. However, put some time and thought into preparing for the termination meeting. Terminating someone by phone or e-mail should be a last resort.

Ideally you should terminate someone in a neutral office area, like a conference room. You should always have another high level person in the room, to witness the conversation. This conversation should then be transcribed and placed in a file. Calmly and clearly tell the person that they are terminated, and briefly explain why. Explain that they will need to return all company property, such as keycards, laptops, phones, etc. If a release agreement is being provided to the employee, usually in exchange for a severance payment, it should be given and explained to the employee at this time. The employee should then be escorted to his desk to collect his belongings, and then should be escorted out of the office. If possible, schedule this meeting at a time when many people are not in the office. First thing in the morning, the end of the day, or even lunch hour are all good options. Finally, plan ahead and make sure that the employee has no access to the organization's servers, e-mail and computer systems once he leaves the office.

5. Execute a Release. Many companies find that it is helpful to have an employee sign a release agreement at the time of termination. This release usually states that the employee releases the company from any wrongful termination claims, in exchange for a severance payment. Make sure the severance payment is consistent with written policies and organizational practice. In exchange for a few weeks extra pay, the company gets the peace of mind that an employee will not be taking legal action against it for wrongful termination. There is certain language that needs to be included in such a release, especially if the employee you are terminating is over the age of 40. Therefore, consult with your legal counsel if you decide to have an employee sign a release at the time of his termination.

Ultimately, terminating a hostile or toxic employee needs to be done with care. Working with legal counsel and following your policies and procedures will limit the risk of future litigation.

If you are interested in learning more about "Terminating a Difficult Employee," contact Katie Meyer, GKG Law, P.C. at 202.342.6775 or kmeyer@gkglaw.com.