

parting ways with an employee

Every decision to terminate an employee carries some risk for the employer. At a minimum, there are unemployment concerns. Further, the reasons employees can sue seem to expand. However, an employer should not be deterred by possible litigation if it is going to effectively manage its employees and business. What follows are a few tips on employee terminations.

Evaluating performance

In many cases, the key to a successful termination begins long before the actual termination. An important part of this effort is the employee evaluation. Used properly, the performance evaluation alerts employees to problems, allows them to attempt to improve, and eliminates possible surprises if termination is necessary. In comparison, an employee who is confronted with performance issues after supposedly satisfactory reviews (called “sugarcoating” the review) becomes suspicious and more likely to sue.

Performance evaluations are also helpful if litigation results. As a general rule, juries tend to believe and remember what they can see. Many times, the best evidence of an employee’s performance is the written performance evaluation. If it’s not on paper, jurors are less likely to believe the employer.

Documenting discipline

Many employers follow some variation of progressive discipline, such as a verbal warning for a first offense, written if the problem continues, a final written warning, and eventually termination. It is important to remember that while employers generally are *not* required to follow a progressive discipline

plan (in the absence of a contract or a collective bargaining agreement), most jurors believe progressive discipline is a matter of fairness. Documentation of discipline should be placed in the employee’s file—jurors believe what they see.

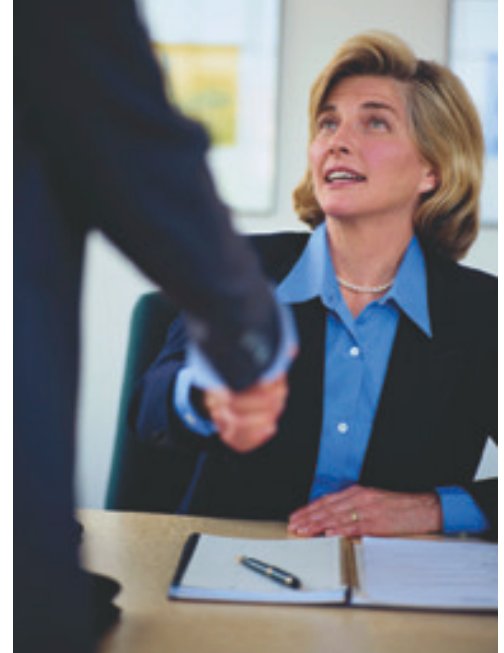
It is important, then, that when discipline is given, the employee be clearly notified about the problem, given an opportunity to correct the problem, and notified of the consequences of not changing. *This last point is particularly important in unemployment compensation cases.* Many times the judge specifically wants to know whether the employee disciplined was told that his or her job was “in jeopardy.”

As to discipline in general, it should be applied consistently as to all employees. Failure to do so is more likely to result in an employee lawsuit.

Taking action

If it is necessary to terminate an employee, it should be done sooner, rather than later. This accomplishes several purposes. The problem employee is no longer around and this may improve morale. It is a good idea to have a conference with the remaining employees (or at least those in the particular area where the former employee worked) and generally explain the employment decision. You want to avoid employees wondering, “Who’s next?”

Ending the employee relationship also frees up the employer’s time and energy to run the business. Many employers I talk to wish they had taken the employment action sooner than they had. Further, if a claim is



made by the employee, the fact-finder (judge, jury or investigator) often wants to know why the employer didn’t act sooner if the employee’s performance was as poor as the employer claims. In other words, the longer problem behavior is tolerated, the less likely a fact-finder is to believe that the employee was terminated for the reasons offered by the employer.

Finally, it should be kept in mind that certain employees are in “protected” classes. Thus, employers cannot discriminate in firing or employment decisions because of a person’s age, race, sex, ethnic origin, etc. If the employee does fall into one of these classes, the employer must be prepared to document that there was a legitimate business reason for the termination decision.

Information provided by: Attorneys from Moen Sheehan Meyer, Ltd. For more information, call (608) 784-8310.



Another day, another dollar. Many of us are familiar with that expression. Whether you're earning the dollar, or paying it out, there are rights and obligations that go along with any employment relationship. Take the 1897 case of a La Crosse County man who sued his employer, a local plow company, for reducing his annual salary from \$1,500 to \$1,200 after six years of service. The employee won his case, and the employer learned the importance of "putting it in writing" when it comes to changing the terms of employment.

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