75 WAYS FOR MANAGERS to HIRE, DEVELOP AND KEEP GREAT EMPLOYEES

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& 101 TOUGH CONVERSATIONS TO HAVE WITH EMPLOYEES

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Library of Congress Cataloging-in-Publication Data

Names: Falcone, Paul, author.
Title: 75 ways for managers to hire, develop, and keep great employees / Paul Falcone.
Other titles: Seventy five ways for managers to hire, develop, and keep great employees
Description: New York : American Management Association, [2016] | Includes bibliographical references and index.
Identifiers: LCCN 2015042137 (print) | LCCN 2015045222 (ebook) | ISBN 9780814436691 (pbk.) | ISBN 9780814436707 (e-book)
Subjects: LCSH: Employee selection. | Employee retention. | Personnel management. | Leadership.
Classification: LCC HF5549.5.S38 F36 2016 (print) | LCC HF5549.5.S38 (ebook) | DDC 658.3—dc23
LC record available at http://lccn.loc.gov/2015042137

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Printing number

10 9 8 7 6 5 4 3 2 1

4 Avoiding Litigation Land Mines

LEADERSHIP DEFENSE is a topic that sometimes gets short shrift amidst all the media content relating to motivating and inspiring employees so that they experience total satisfaction and engagement in the workplace. While these sorts of seminars, books, and articles typically offer great ideas for improving employee morale and gaining stronger buy-in from the troops, the truth lurking beneath the surface can be less than pretty. Some employees are professional plaintiffs, looking for a reason to sue so that they can make enough money to get by without having to work. Union "salts" are still very real—posing as job applicants and getting hired by a company, only to identify and exploit leadership weaknesses that can then lead to union organizing efforts. Still others thrive on drama and will look for new ways of stirring the proverbial pot to alienate others, engage in power plays, and generally cause angst and tension in insidious ways.

As much as we tend to think that we hire the best and brightest, we can't X-ray candidates to see what's in their hearts. And while thorough interview rounds, pre-employment testing, criminal background checks, and, most importantly, reference checks, all play a critical role in making "high probability hires," there's still no guarantee that every person who joins your team will have altruistic and selfless motives to help you as their leader and the company overall to grow and thrive in a positive, healthy direction. Of course, not all problematic workers come from external hires. Managers sometimes inherit problematic performers via internal transfers or layoffs in other departments, and sometimes entitlement mentalities and victim syndromes simply develop on their own among legacy employees.

The point is, any employee at any given time may be facing severe personal problems or simply dislike working in your group or with certain members of your team. A perfectly successful worker from another department may resent the new challenges your department presents or have difficulty getting over past hurts or current perceived indignities. Whatever way such problems find their way into the workplace, you'll no doubt be required to deal with them at some point in your career. The goal, of course, isn't to judge anyone—it's simply to observe the situation and then remedy it professionally and respectfully. However, if an employee refuses to reinvent himself and his relationship to you and the rest of your team, then the leadership defense strategies discussed in this chapter should help in addressing the situation constructively and directly.

This chapter focuses on concrete, hard-core, practical leadership land mines that may await even the most well meaning or otherwise successful managers. Be sure to rely on these guiding principles so that you don't get caught in a snare that you didn't see coming. This isn't meant to make you a paranoid leader—it's meant to raise your awareness so that you come to rely more fully on your gut or that internal guidance system that we all have, often known as our intuition or sixth sense. You've got to make sure that you know how to follow these internal pulses when they tell you that something may be going wrong. Equally as important, you need to know when, how, and to whom to disclose your concerns so that you build successful alliances within your company and create the proper record when problematic employee performance or conduct may occur in your group. Consider this chapter *Visceral Leadership 101*, and make every effort to master these best practices in leadership defense strategies to protect both you and your company.

37 *A Brief Employment Law History Primer to Show Why Documentation is Critical—Even for At-Will Workers*

One nagging issue remains unresolved in the world of leadership and management: Why do we have to provide documented corrective action when workers are employed at will? First, understand that in the

United States, employment "at will" means a company may terminate an employee without incurring legal liability at any time and for any reason—except an illegal one. Likewise, an employee is free to leave a job at any time for any reason or for no reason without any type of adverse legal consequences. In many other countries, employers can dismiss employees only for cause. It's this interplay between "with cause," "without cause," and "illegal reasons" that causes much of the confusion surrounding the employment-at-will relationship and its consequences in the workplace.

Understanding the legal dichotomy between employment-at-will and its opposite, the termination-for-just-cause-only standard, will shed light on how these mutually exclusive concepts apply in a court of law. Understand, however, that the concept of employment-at-will only exists in the courtroom—not in the workplace. So trying to terminate someone at work by arguing that she's employed at will is completely out of sync with reality; instead, any arguments that someone was terminated due to her employment-at-will status will only occur at the hearing stage of the litigation process, as we'll soon see.

There are three factors in U.S. employment history that will shed light on this: (1) the 18th-century employment principles of England, which our forefathers relied on during the nation's founding; (2) the Great Depression of the 1930s and the subsequent creation of the employment-at-will legal concept; and (3) the 1980 California court case that introduced limitations and exceptions to employment-at-will theory. Let's briefly discuss these three critical factors for a broad overview of how we got where we are today.

In the 18th century, at the time of our nation's founding, the "job as property doctrine" stated that the right to work was so fundamental to U.S. citizens that it shouldn't be taken away arbitrarily or without just cause, as later codified in the 14th Amendment to the Constitution. This "termination for just cause only" standard was borrowed from English law and basically made working a "property right" of all American citizens.

That all changed, however, at the time of the Great Depression in the 1930s, when capitalism and free enterprise were deemed to be at

risk. Congress passed a series of drastic measures that resulted in severely limiting U.S. workers' rights and gave companies the power to terminate workers "at whim" in order to keep their doors open. In the Great Depression, hundreds of unemployed workers would line up outside a factory door waiting for a plant employee to be injured or to make a mistake and get fired, thus creating an opening for a new worker. It was workplace mayhem, plain and simple, but "employment at will" became the law of the land in the 1930s, and as a result, a fundamental shift occurred where employers' rights to terminate at whim replaced workers' right to due process. In essence, a fundamental shift occurred where working became the "property right" of employers, not of workers.

When World War II began, the employment-at-will debate was sidelined. It wasn't coincidental, however, that labor unions saw their massive rise from the late 1940s, when the war ended, through the 1970s. Why? Because union organizers could sell prospective member workers on the idea that if you're represented by a union, then your employment would not be at will; the collective bargaining agreement would revert to the "termination for just cause only standard" that was established in the 18th century. Workers flocked to unions as a result, if only to have a modicum of job security and be given advanced notice if their positions were in jeopardy prior to being terminated. (The right to collectively bargain for wages and benefits was another big reason to join unions, but that was typically secondary to the advantages that greater job security offered by not being held to the employment-at-will standard.)

But wait; there's more. Employment-at-will took a major turn in 1980, when a California court ruled that there could be exceptions to the employment-at-will doctrine. California Chief Justice Rose Bird ruled in *Tameny vs. Atlantic Richfield Co.* that a long-term employee couldn't be fired under the employment-at-will affirmative defense for refusing to engage in unlawful activities (in this case, price fixing) on the employer's behalf. Once the employment-at-will veil was pierced, the public policy exception was born, and tort law became part of the legal landscape.

Today, four key exceptions to the employment-at-will doctrine are generally recognized thanks to the *Tameny* precedent:

1. Public policy exceptions (e.g., in the Tameny case, where whistle blowing or otherwise engaging in protected, concerted activities eliminates a company's ability to terminate at whim under the employment-at-will affirmative defense)
2. Employment contracts (including collective bargaining agreements)
3. Implied contract exceptions and implied covenants of good faith and fair dealing (especially pertaining to potential promises made in employee handbooks)
4. Statutory considerations (e.g., protected classes, like those outlined in Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of sex, race, color, religion, and national origin)

With such broad exceptions to employment at will now in place, you, the employer, can't know without a crystal ball what type of spin a plaintiff's attorney may apply to a particular case if your company gets sued at some point in the future. Therefore, you can't rely on the employment-at-will affirmative defense as an absolute and exclusive measure against a wrongful termination claim—there are just too many exceptions that plaintiffs' attorneys have at their disposal. Instead, you must be able to demonstrate that your company had "good cause" to terminate. Here's why:

When it comes to understanding the freedom to terminate when an employee is hired "at will," you'll need to look at the anatomy of a lawsuit by distinguishing between hearings and trials in the litigation arena. Employment at will only exists at the hearing stage. Your company's defense attorney will argue that the individual was employed at will and that your company did nothing to abrogate the employment-at-will relationship. Therefore, your defense attorney will request a "summary judgment" (i.e., immediate dismissal of the case) using the "employment-at-will affirmative defense." If your company prevails, then the case is dismissed and everyone can go home.

However, the plaintiff's attorney will argue that the case should not be summarily dismissed at the hearing stage and should continue to trial, where it can be judged on its own merits because the company arguably engaged in some form of unlawful activity that justifies an exception to the employment-at-will relationship. If the plaintiff's attorney prevails and the judge agrees to hear the case at trial, then there's no such thing as employment at will anymore. (Remember, employment at will only belongs at the hearing stage.)

Once the case proceeds to the trial stage, then the 18th-century concept of "termination for just cause only" becomes the only standard available, so your company must show that it had good cause to terminate. And most judges and arbitrators will rule that if nothing was written down (i.e., in the form of corrective action), then the performance problems may not have been serious enough to warrant termination. In short, your organization could be left trying to defend its actions without the supporting documentation necessary to prove that it had good reason to terminate the plaintiff.

Unfortunately, you won't know in advance if your defense lawyers will be successful in prevailing at the hearing stage by winning a summary judgment (i.e., immediate dismissal) of the case. Therefore, you'll always want to have progressive discipline in place to defend and justify your company's actions should the case proceed to trial. When it comes to employment at will and corrective action, it's not one or the other—it's *both*. You want to protect the at-will relationship to give your company the greatest chance of winning a summary judgment at the hearing stage, but you'll want to rely on your documented corrective action at the trial stage to prove that the individual was accorded due process and that your company had good cause to terminate.

Progressive discipline is the way a company demonstrates that is has "good cause" to terminate and is therefore a necessary part of performance management, regardless of a worker's employment-at-will status. Relying on employment at will as a sole defense (as opposed to a fallback measure) in terminating workers provides far too many employers with a false sense of security. Don't fall into this trap. Your company should never rely solely on employment at will to make

wrongful termination charges magically disappear. Understanding how the two concepts are actually applied in the courtroom should help to highlight the simultaneous benefits of maintaining an employment-at-will relationship with your workers as well as the necessity for documenting subpar performance prior to termination.

38 *The Fine Art of Playing Employment Defense: Avoid "Pretaliation"*

So what does or should a solid defensive game plan for leadership look like for you as a manager in corporate America today? First and foremost, you should have a greater sense of awareness of how sophisticated workers have become in using the system against their companies. Second, acknowledge that you can't do this alone—you've got an affirmative obligation to disclose certain matters to HR, your boss, the legal department, an ombudsman, or some other compliance officer when certain facts arise that require assistance from a third party, impartial observer, and witness. Third, you need to create a record—both verbally and in writing—to ensure that the company is positioned in the best light possible should litigation later arise.

Let's assume, for this discussion, that all workers may be tempted to sue their employer at some point in their career. Statistically, one in four managers will become involved in some form of employment-related litigation during their careers, and that's an awfully high percentage, especially if you live outside of high litigation states like California or New York. Therefore, your ability to spot problem issues, escalate them appropriately, and resolve them fairly on the spot or prepare the appropriate record for litigation becomes a critical leadership attribute that, once mastered, will benefit you for the rest of your career.

Workers are sophisticated consumers, and whether they figure this out on their own or get tips from plaintiffs' attorneys coaching them on the sidelines, just waiting for the person to get fired so they could initiate litigation, it's your responsibility to spot issues and involve the appropriate internal parties to support you from the very beginning. For example, if workers seek legal counsel to complain of

harassment, discrimination, or retaliation, attorneys might typically ask, "Are you aware of anyone else who's suffering under these same conditions or under that same supervisor?" They'll also ask hourly employees, "By the way, have you ever had to skip breaks or meal periods or work unauthorized overtime?" Clearly this may have nothing to do with the initial claim that brought the prospective plaintiff into their office, but as we'll see in Question 49, class action wage and hour lawsuits are on the rise because of the fees that plaintiffs' attorneys can charge.

But what if a worker is seeking legal counsel because she's afraid she's going to be fired or suspects that her boss is somehow out to get her? Workers have been known to reach out to lawyers under those circumstances where they feel vulnerable just to see if they have any legal protections, and that's where plaintiff lawyers' advice and counsel can get really interesting: "Well, I probably can't help you until the company takes some adverse action against you, like termination, but let me ask you this: Do you know who your internal HR representatives are? Have you spoken with them about your problem, and if so, what did they say?" This question seems fairly straightforward and benign, the assumption being that the employee should try to resolve the matter internally with HR before hiring an attorney to sue the company.

But there's more to this question than meets the eye: In many instances, attorneys instruct a potential plaintiff client (i.e., your employee) to initiate a "preemptive strike" against the supervisor by complaining about the supervisor's conduct *before* the supervisor has a chance to take further punitive action regarding the employee's performance. The result of such "pretaliation" is that workers who are performing poorly can potentially "reverse engineer" the record and put the company on the defensive. With that record in place, it becomes much more difficult for the company to terminate the individual because such actions may appear to be retaliation. Here's what it looks like in chronological form:

1. Employee senses she's about to be disciplined or terminated for substandard job performance reasons and reaches out to an attorney for help.

2. Attorney encourages employee to complain to HR about the supervisor's conduct, specifically using words like *hostile work environment, harassment, intimidation, bullying,* or *retaliation*.
3. Company has a more difficult time terminating the employee due to the recent harassment claim that the employee initiated against the supervisor.
4. The plaintiff's attorney wins either way: If the termination is delayed for the time being, a strong trust builds between the lawyer and the client because the attorney gave great advice that benefited the client; if the termination goes through, the attorney has another arrow in her quiver to shoot back at the company in the litigation phase in the form of retaliation.

The supervisor, of course, may be acting in good faith in disciplining the individual, only to find himself the target of an investigation from HR because of the employee's complaint.

This situation occurs again and again in corporate offices, with managers inadvertently stepping on land mines and not realizing until after the fact that a bomb went off. Here's how you'll know when this situation is at hand: HR receives a employee complaint about a manager's conduct and calls a meeting with the manager and the manager's boss. The HR person opens the meeting by saying, "Joe, we've received a complaint of harassment from one of your employees regarding how you manage them, and we need to explain the nature of the complaint and also to learn your side of the story."

The manager asks who lodged the complaint and is told it was Heidi Jones. He becomes furious and replies, "It was Heidi? You've got to be kidding! I was just about to come to HR to discuss placing her on a final written warning because she's such a poor performer. She comes in late, leaves early, and . . ."

Boom! The land mine just exploded. The employee—either on her own or under an attorney's guidance—figured out that by launching her claim first about her boss's conduct, she could turn the tables on the record that was being created. She engineered a perfect scenario for a retaliation claim later, and the manager didn't even see it coming. The lesson? Don't fall prey to a preemptive strike. When your gut tells you that there's a problem with someone's performance or

you sense the person may be speaking with a lawyer, contact HR right away.

After all, whoever gets to HR first gets the ball rolling in terms of how HR conducts its investigation: If you initiate the matter with HR and focus on your subordinate's substandard *performance*, then HR moves in one direction. But if the employee meets with HR first to complain about your *conduct*, then HR moves in a different direction in terms of the investigation it conducts. Timing, it turns out, is one of the most critical elements in determining what type of record is made in many employment-related situations.

It's clear from the example above that management is no longer an individual game: it's a group sport. And you've got to know who's there to support you when a problem arises. In the past, leaders felt that they should be able to handle their own employees without anyone else's help; going to HR was like "taking a matter outside the family," and managers never wanted to see that happen. They reasoned that if they need HR's help, they're not doing their job. That's no longer the case; with preemptive strike incidents drastically on the rise, managers need to know when and how to escalate. Further, they have an *obligation* to disclose matters that they believe may ultimately result in some form of employment-related litigation. As such, your HR representative should be seen as a true business partner who can help you create the right record from the beginning. And the sooner you get to HR, the greater the chances that you'll be able to protect yourself and your company from unnecessary litigation by partnering with an internal resource that can help you establish the appropriate record.

Finally, as I stated in Chapter 3, don't manage by fear of a lawsuit. Lawsuits are part of the cost of doing business in corporate America from time to time, and managing by fear rarely has positive results. Instead, just be sure that if a lawsuit comes your way, you're getting sued on your terms rather than theirs. The most successful way to do this is to act professionally, demonstrate respect for those you supervise, and enlist the services of internal support teams (like HR) that are there to help you through these very types of situations. You'll find that a winning strategy like this will allow you to thrive in your

career without any of the angst, drama, or histrionics that plague certain managers who opt to go it alone.

39 *Policies (the Letter of the Law), Codes of Conduct (the Spirit of the Law), and Past Practices*

Have you ever wondered why companies have so many documents addressing employment in the workplace? Policy and procedure manuals, employee handbooks, business conduct statements, and mission, vision, and value declarations serve different purposes, and it's important that you understand their function. What's more important, however, is to understand that *practice trumps policy*. In other words, what your company actually does with its policies is more significant in a court of law than what a handbook or policy and procedure manual says you're *supposed* to do.

Therefore, don't rely completely on what your handbook or policy and procedure manual tells you that you may do in specific instances. Generally speaking, you have to look at the totality of events involved in any given situation and at your organization's past practices. (You'll generally get that information when escalating the matter to HR or your organization's legal counsel.) For example, if a supervisor complains to you that a team member told him to "f--- off," your first reaction might be to terminate that individual, with no questions asked. But what if the manager used that very same phrase on the employee first? Would you still argue that the subordinate should be fired? Or should they both be fired? And what if everyone on the team uses that expression while kidding around with one another? Is it justifiable to take one instance in isolation and out of context and then terminate someone for gross insubordination?

The lesson is that you've got to look at how your company has handled similar situations in the past. Looking at any one event in isolation—no matter how egregious—could show that you didn't do your homework before reaching a conclusion about the case. Remember that there are two sides to every story, and acting on only one side may leave your company vulnerable and exposed when it comes time to explain the rationale behind your final decision to terminate in light

of the incomplete investigation that your organization conducted, or so reasons the Equal Employment Opportunity Commission (EEOC) or the plaintiff's attorney. Again, bear in mind that the policy exists as a guideline, but it's only valuable if it is consistently enforced across the board.

Workplace policies, in comparison, are important because they prescribe how to go about dealing with particular employee challenges in the office or on the shop floor. Antidiscrimination, overtime, substance abuse, and other policies provide you with the steps necessary to successfully manage problems that arise. As a rule of thumb, though, whenever you sense yourself reaching for the employee handbook or departmental policy and procedure manual, make a quick call to HR, in-house legal counsel, or other similar resource to see how the company has handled similar situations in the past. First, you'll soon realize that you're not alone in experiencing this type of problem and that HR has probably dealt with similar situations in the past. Second, you'll get a quick overview of how your company's past practices have played themselves out so that you're not basing your decision exclusively on what the manual says you're supposed to do. Third, remember that most companies practice the "rules are meant to be broken" adage from time to time under extenuating circumstances, so a quick call to HR is in your and the company's best interests to see how closely your organization has historically followed that particular policy or standard operating procedure.

If policies outline the *letter* of the law, as your company defines it, then codes of conduct, otherwise known as corporate ethics statements, address the *spirit* of the law. Corporate ethics statements are not intended for line-by-line interpretation; instead, they're designed to cast a much broader net that speaks to worker ethics, morals, and appropriate workplace conduct. Such business conduct statements emanated from the passage of the Sarbanes-Oxley Act of 2002, or "SOX," which came out of the "tech bust" financial crisis of 2000, when publicly traded companies knowingly falsified financial statements rather than disclose the falling value of their company stock prices. And while financial compliance, internal controls, and reforms in cor-

porate governance standards make up a majority of SOX initiatives, documented codes of ethics are also a mainstay of the Act.

To comply with the new law, publicly traded companies are required to publish a code of conduct and ethics, often referred to as a business conduct statement. This statement defines and addresses conflicts of interest that are incompatible with, or had the potential of adversely affecting, the organization's financial reporting requirements. From there, the ethics required by SOX spread naturally to other employee behaviors, including nondiscrimination, harassment, retaliation, and the like.

The point to keep in mind is that, unlike with policies, ethics statements cast a much wider net in terms of capturing employee improprieties. The old excuse, "Well, I didn't read that in the handbook" goes out the window in an environment where workers, and especially leaders, are held to much higher behavioral standards. For example, a supervisor who dates a subordinate but fails to disclose that fact could—under a typical business conduct statement—be deemed to be acting outside the course and scope of his employment and could potentially warrant immediate dismissal if the subordinate claims quid pro quo harassment: "I had to sleep with my boss if I wanted to keep my job and I had no choice. I feared retaliation if I said no, but I just can't take it any more."

Similarly, the typical code of conduct stipulates that managers have an obligation to be aware of what's going on in their purview and have an affirmative obligation to escalate and disclose perceived incidents of harassment or retaliation—even if those activities are occurring in someone else's department. Corporate leaders no longer have the discretion to say, "I'm not getting involved." If they knew, or *should have known*, what's been going on and failed to disclose it appropriately, they could be individually disciplined for their lack of discretion and failure to abide by the company's code of conduct.

Likewise, if an employee falsifies his dates of employment on a private record for his own personal benefit, it potentially speaks to character and could likewise result in an immediate dismissal from the company. Falsification of a verification of employment record for

a home loan application might not be addressed specifically in a handbook or policy and procedure manual, but depending on the circumstances, the ethical misjudgment may cast enough doubt on an individual's overall morals to justify a corporate punitive action like termination, even for a first offense. In short, SOX has teeth, so learn and memorize your organization's business conduct statement and be very careful about potentially bending ethical rules.

40 *Differentiating Between Performance and Conduct Issues: A Critical Distinction*

Organizations typically refer to their standards of performance and conduct as a general catchall for their policies, procedures, and workplace expectations and guidelines. But there's a tremendous difference between a performance infraction and a conduct violation, and it's critical that you understand how they are treated in the workplace.

Performance infractions typically refer to substandard productivity in the areas of quality, quantity, speed, customer service, and attendance/tardiness (although many companies don't include attendance in the broader "performance" category in their progressive disciplinary action policies). When problems occur in these areas, companies are expected to provide workplace due process as outlined in their employee handbooks and policy and procedure manuals. Specifically, a progressive system of increased consequences gets documented each time an additional infraction occurs, and each step contains some added element indicating the severity of the situation if it isn't remedied immediately.

After that final written warning is issued, a "clean" final incident will typically justify termination of employment. There can be exceptions, of course. A new hire may be terminated within the first ninety days without prior written documentation or may receive one documented warning just to protect the company before being dismissed. (It depends on the company's tolerance for risk: Some organizations feel that the one written warning will serve as an insurance policy of sorts to keep plaintiffs' attorneys from suing because "Did you ever receive documented corrective action before you were terminated?" is

still one of the first questions that plaintiffs' attorneys ask when considering whether to take on a new case.) On the other hand, a thirty-year employee may be accorded greater workplace due process because of his years of tenure. As an example, the individual may be given a letter of clarification or a decision-making leave as incremental, additional steps that document the problems without escalating the formal corrective action chain that leads to termination.

Whatever the case, when it comes to performance and attendance infractions, the general expectation is that the company follows its policies and accords workplace due process in the form of progressive corrective action notices so that the worker understands what the problem is, what he needs to do to fix the problem, and what the consequences will be if he fails to demonstrate improvement within a reasonable period of time.

Not so with conduct infractions: Conduct infractions may lead to immediate dismissal even for a first offense where there is no prior corrective action on record. And even if a company opts not to terminate on a first offense, the organization may arguably proceed straight to a final written warning and stop just shy of termination—even for a first offense.

If an employee engages in theft, he would be terminated, even if it is a first offense. In such cases, the issue drives the outcome, meaning that the company doesn't have the discretion not to terminate (even if it wanted to). It simply has to terminate for the sake of the record that's being created and in order to avoid creating an unwanted precedent. After all, if you don't terminate one employee for stealing, how could you justify terminating another employee at some point in the future without looking like a discriminatory employer? The same goes for embezzlement, fraud, egregious cases of sexual harassment, and the like.

This makes sense. If someone stole from the company, he should expect to be fired, so you, as the manager, probably wouldn't have too much trouble justifying termination for someone on your team who took cash out of the till. But what about someone who demonstrates disrespect or contempt for his supervisor or coworkers? What about someone who constantly demonstrates a "bad attitude" and has a

detrimental effect on workplace camaraderie and departmental morale? Many employees mistakenly assume—as do their supervisors—that as long as their performance is acceptable, the company can't do anything to them to address their poor conduct.

Not so! That's a very serious mistaken assumption on the employee's part, and a key blind spot for supervisors who don't realize they have discretion to escalate through the progressive discipline process to address the problem. All employees are responsible for both their performance and conduct; they don't simply get to focus on one and not the other. Everyone is responsible for performing at an acceptable level *and* ensuring that their coworkers feel welcome and comfortable working with them.

Therefore, think of the performance and conduct as two halves of the same whole. You can't have one without the other, and when an investigation reveals that someone is bullying, confrontational, condescending, or otherwise vexing to his supervisor and teammates, remember that you have the discretion to move straight to a final written warning—even for a first offense, if necessary. Again, supervisors often have a lot more discretion than they think and should never feel that they're being held hostage by good performers who otherwise conduct themselves poorly.

In fact, you can explain this simple conduct rule to employees on the back of a napkin: Draw a circle, put a line through its center, and write "Performance" in the top of half of the circle and "Conduct" in the bottom half. Explain that while their performance isn't an issue (i.e., the top half of the circle), the bottom of the circle—their conduct—remains a challenge. And until that's fixed, they're only operating at fifty percent, which is a failing grade since they're only meeting half of their overall expectations. Such a simple visual can go a long way in pointing out a problem and resetting expectations.

41 *Sameness Versus Consistency: Looking at the Totality of Events*

Supervisors and managers often make the mistake of assuming that everyone has to be treated exactly the same when, in fact, it's *consistency* they're looking for. They have more discretion in many circum-

stances than they realize, and simply trying to treat every infraction exactly the same misses the point. Let's look at an example.

Sleeping on the job is a serious infraction in any situation. But does it warrant a first written warning, a final written warning, or outright termination? As with many workplace investigations and employee relations issues, it depends. Has the individual who was caught sleeping at his desk done this before? How long was he asleep? Did his falling asleep cause some negative organizational impact that warrants an immediate termination, on the one hand, or little if any corrective action at all, on the other?

Don't look only at the issue of sleeping: it's also about the conditions and circumstances surrounding the act of sleeping that play an important role in rendering an appropriate decision. Here's how companies have ruled in the past:

1. An insurance claims adjustor caught napping at her desk received a *first written warning* for inappropriate workplace conduct.
2. A charge nurse on the night shift of a hospital's intensive care unit caught sleeping at the nurses' station console was issued a *final written warning*—even though it was a first offense—since patients' safety may have been jeopardized.
3. An anesthesiologist who fell asleep during surgery was *terminated* outright, because the patient's life was endangered by his actions.

As you can see, it's not the sleeping per se that drives the outcome: it's the circumstances surrounding the sleeping that must be considered, and the potential negative organizational consequences typically drive the employer's decision to act in a certain way. So the company in the first incident acted appropriately when it issued a written warning to the claims adjuster. Similarly, issuing a final written warning to the charge nurse in the second incident, and immediately dismissing the anesthesiologist in the third incident were appropriate under the circumstances. Therefore, the sleeping issue in and of itself doesn't drive the company's response: it's the circumstances surrounding the employee's sleeping at work that does.

One size doesn't fit all in the world of workplace investigations and employee relations, so remember to look at the totality of events rather than at isolated behavioral acts. As always, the best way to determine what an appropriate company response should be comes from speaking with HR, the legal department, or the department in your organization that deals with employee issues. Just remember that there may be more to this than meets the eye. Ask employees for their side of the story before rushing to judgment, and get the appropriate internal support before making a termination decision.

42 *Stopping Attitude Problems in Their Tracks*

It is frustrating when certain workers on your team intentionally withhold their best efforts or otherwise work against you by influencing their coworkers to hold back or by instigating negativity and distrust. You need to address this situation swiftly and wisely. When substandard job performers also become bullies, it is time to establish the appropriate written record and verbal communication trail to focus on that individual's performance and conduct problems and eliminate his or her negative influence.

How do you know when you're dealing with bullies who may be launching preemptive strikes to divert attention from their substandard job performance? There are certain signs to look for: Sometimes a loud brash personality dictates "who's really in charge around here" and intimidates others or publicly humiliates them. At other times the threats are veiled, as when individuals imply that they have an attorney or may be otherwise keeping track of any offenses against them in a notebook. And sometimes it's more of a group effort: several senior people on your team appear burned out and constantly frustrated, spewing their discontent openly with anyone who will listen.

Where does that leave you, the organizational leader, in terms of creating a friendly work environment for the team members? Doesn't everyone on the team have a right to work without fear of being sued? And why should it be that everyone on the team has to feel intimidated by this one individual's unwillingness to work cooperatively? When these types of issues arise, it's critical that you take control of

the situation, and the most important way of doing that is by revamping the written record in favor of the company.

When dealing with employees who have a negative attitude, your intervention needs to be swift and definitive, so as to deter your good employees from resigning. You'll want to enlist the services of your HR department (or an objective third party if you don't have an HR department) to conduct an impartial investigation and gather the whole team's feedback. Assuming everyone seems to get along fine with one another except for this one individual, who threatens to sue or otherwise aggressively confronts others who might challenge her, then you've got an excellent opportunity to meet with the individual in a private setting (with the HR investigator) and outline the feedback you received in very objective terms. You don't need to name names in terms of who said what, but you could simply share specific feedback without assigning attribution.

Acknowledge that there are two sides to every story, of course, and explain that you'd like to hear this individual's side of the story as well, but based on the feedback that the investigator received, there's clearly a breakdown in *perception*: "Perception isn't right or wrong, it just is. And right now it appears that you have a serious perception problem on your hands because all fingers are pointing to you. My initial question to you is, Does anything that HR heard from the others on the team appear to warrant merit? Can you see why others may feel that way when working with you?"

Perception is a powerful word to use under circumstances like these, especially when dealing with he-said, she-said issues or with facts and circumstances that are open to interpretation. Perception is reality until proven otherwise, but it's not about judgment: It's about observation because you're simply relaying feedback and facts. And when people feel that they're not being judged and are simply being engaged as adults to participate in solving a problem—even if it's their own problem—they're more likely to listen openly and not feel defensive.

Assuming the individual will acknowledge at least partial responsibility for the problem at hand (as most will if the informational findings are shared appropriately), you can move forward with this

intervention as planned. Of course, if the individual denies all culpability despite all fingers being pointed at her from the group, you'll want to adjust your approach as outlined below. Now is the time to reset expectations in this private setting so that the individual has a chance to reinvent herself and start over. You might want to try a discussion like this:

> First, you're no longer allowed to threaten coworkers with a lawsuit. While you have every right to file a lawsuit against anyone you want at any time, you're not to threaten anyone because you may be creating a hostile work environment, which violates company policy.
>
> Second, you're not allowed to carry around your "little black book" that others have come to understand as a record you're keeping against them should you ever choose to sue them in the future. You can keep a book like that if you want, but you're not allowed to show it to others or keep it out in the open where others can see it. That may be creating a hostile work environment, and we can't allow employees to engage in such conduct.
>
> Third, as a result of the ongoing behavioral concerns we've learned of, you'll be receiving corrective action in the form of a final written warning for what we consider egregious misconduct. This is serious and your position will be in immediate jeopardy if any type of behavior or conduct like this occurs again.
>
> Finally, I want to hold a group meeting tomorrow to reset expectations regarding how we treat each other, how to escalate complaints and use internal resources appropriately—whether that's HR or our department or division head—should this type of behavior occur in the future from anyone on the team. I want you to be part of that meeting and support this new turn in direction from this point forward.
>
> If there's anything you need that will help you be more successful in this role, let me know. But right now all fingers are pointing to you, Michelle, and I'm planning on treating you respectfully and holding you fully accountable for your own perception management. Does that sound like a fair approach, and do you have any questions or recommendations at this point?
>
> [Yes.]

With that problematic individual's advanced buy-in, you're now at liberty to address the entire team. You can reset your expectations verbally with the group and allow the healing process to begin. You're no longer going to be held hostage because you've got the right disciplinary record in place regarding Michelle's behavior and you've reset verbal expectations for the rest of the group.

In my experience, the outcome of these types of interventions is that the team feels re-energized, satisfied, and motivated because the matter is being proactively acknowledged and addressed. The bullying employee or negative influencer often behaves for several months and then quietly resigns once she's found other employment. And that's okay: Some people really do thrive on drama and chaos, and once you've taken the wind out of their sails, they'll likely want to pursue opportunities elsewhere. The victory, however, lies in the fact that you've addressed the matter constructively and confidently and avoided potential turnover and even lawsuits. "Let them be successful elsewhere" is a healthy strategic approach toward workers who opt not to participate in your team's newfound success.

43 *Performance Appraisal Bombshells: Delivering Bad News for the First Time During the Annual Performance Review*

One of the biggest mistakes that managers at all levels make is inflating annual performance reviews. To minimize hard feelings in the office, many managers give "meets expectations" scores to underachievers or workers with poor behavior records. But that score will most likely preclude terminating the employee for cause, should the need arise.

Why so? Well, as a supervisor and leader in your company, you'll have created a written record for one or more years documenting that the employee's overall performance was acceptable. With no other progressive disciplinary documentation on file to break that chain of positive performance evaluations, you likely won't be able to demonstrate cause should you be sued for wrongful termination. Therefore, as a general rule, if you expect to terminate someone in the upcoming year, only give a performance review with a final grade of "does not meet expectations." That baseline foundational review will very likely provide you with a lot more discretion to terminate at some point in the future.

And don't make the mistake that too many managers make in the performance review process. They give one employee on the team lower *relative* scores in individual performance categories than everyone else. Still, if the *overall score* at the very end of the review states

that the individual "meets expectations," then employees have little reason to believe that their employment is in serious jeopardy of being lost (or so argue their attorneys). This isn't a game of relativity; it's a game of absolutes. It's not how employees rank relative to their peers; it's the final grade at the end of the review that counts.

When you suspect that substandard job performance or inappropriate workplace conduct may preclude a long-term employment relationship with an employee of yours, call in HR as soon as possible. Many HR departments will have the resources to help you construct an annual performance review or progressive disciplinary warning that documents substandard work. HR can also help you document a performance improvement plan, the company's expectations, and "consequence" language that is clear and incontestable in its intent. In certain cases, HR will also be able to coach the employee or offer outside training services that help your company demonstrate its willingness to rehabilitate flagging performers.

Documenting new, negative information at the time of the annual review should always be the exception, not the rule, because you don't want your employees to feel blindsided at the time they receive their annual feedback, merit increase, and bonus. But sometimes you'll have to share negative information for the first time at the annual review. When that's the case, be sure to assume responsibility for your shortcoming as a leader in not sharing this negative feedback earlier. Here's what it might sound like both verbally and on paper:

> Roger, I recognize that we haven't formally discussed over the past year the problems you have in getting along with the other team members, but I felt it appropriate to bring this issue to your attention during the annual performance review because it's so serious and such a critical aspect of your overall contribution to the department. In fact, it could have a significant impact on your career potential if it's left unaddressed.
>
> I also owe you an apology: I realize that I should have shared this with you at the time these incidents occurred, but I was guilty of avoiding the confrontation myself and hoping the problem would simply fix itself, and that wasn't fair to you. That being said, I can't avoid the issue any longer. This performance review window is the ideal place to discuss my concerns—even though I realize that you may feel blindsided by my doing so.

> Specifically, I believe you're suffering from a perception management problem: Regardless of your intentions, people tend to avoid you. You come across as being angry much of the time, confrontational, and condescending, and other team members—myself included—tend to cut a wide swath around you and do the work themselves rather than come to you for help. That's damaging the overall morale and camaraderie in our department, Roger, and you're responsible for creating a friendly and inclusive work environment, just like I am and everyone else on our team is. In short, your behavior is negating your overall performance contributions.
>
> I'll make a commitment to you now to bring these matters to your attention immediately whenever I notice them in the future, but my main message to you in this performance review is that you're not meeting company expectations overall because of this significant detriment. Again, I apologize for not addressing the matter on the spot in the past, and I'll commit to you that I'll bring this to your attention whenever I see it from now on. But it's significant enough to formally document now and to reset expectations going forward.

Remember that annual performance reviews carry an awful lot of weight in the eyes of the law. Disciplinary measures aside, if you pass someone with an overall score of "meeting expectations," you'll end up validating their entire year's performance—despite any documented corrective action that you may have issued during the performance year. And when it comes to making a clean record of workers being accorded due process, your corrective action documentation and your annual performance review must be in sync. Remember, it's all about alignment of the overall documented performance record, and in areas where employees received mixed messages—for example, where acceptable performance reviews follow final written warnings—any ambiguity will be interpreted against you in court. Avoid this very common mistake to remain two steps ahead of the game in terms of evading litigation land mines.

44 *"If I Can't Fire Someone, Can I Lay Him Off Instead?"*

Managers who want to avoid the confrontation associated with progressive discipline and termination often opt for a no-fault layoff because it seems to provide a quicker solution to ending employment. However, there are certain guidelines that you will need to follow

when considering a layoff. Specifically, you'll need to consider how long you'll have to wait before you can refill the position, and what could happen if you were legally challenged for having improperly laid someone off.

First, keep in mind that you eliminate positions, not people. In other words, your written records must reflect that a position needs to be eliminated because of a lack of work or other financial constraints, and the individual who currently fills that position will now be impacted because there's no longer a job to report to. If removing a problem performer is your goal, then eliminating that individual's job may be a big mistake. After all, you'll still need to get the work done.

Second, it can be difficult to determine which employee should be separated once you've established that there is a legitimate business need to eliminate a position. Remember, you can't arbitrarily select someone for a layoff simply because she is your weakest performer or because she happens to be sitting in the seat that's being eliminated. Instead, you must identify the least qualified person in that classification or role to assume the remaining duties. The least qualified person on paper, however, may end up being your best (albeit newest) performer.

Let's look at an example to clarify these concepts. Let's say you're looking to eliminate one of three secretarial positions in your marketing department. Since there are three individuals that currently fill the role of administrative assistant in marketing, you've now got a selection pool to choose from, and your company will be required to conduct a "peer group analysis" to see which of the three current individuals is the least qualified to assume the remaining job responsibilities once the position is eliminated.

To do so, first develop a list of all employees in that group with similar titles or responsibilities. This would include the three administrative assistants in marketing but might also include an office manager, an administrative specialist, an office coordinator, or even other administrative assistants outside of marketing. Second, review the nature of the remaining work to be done after the position is eliminated. For example, if the secretarial position that supports market research is being considered for elimination, then document the responsibilities

that will remain in the unit after the reduction in force. (Job descriptions can be very helpful for such comparisons.) In this case, answering a heavy volume of phone calls, coordinating travel arrangements, supporting data collection, and developing PowerPoint presentations that focus on new products may be the key tasks left to be done after the reduction in force.

Third, determine which of the three secretaries in marketing is the least qualified to assume these remaining duties. In essence, you'll be comparing all three employees' essential job responsibilities, skills, knowledge, and abilities. In addition, consider the employees' annual performance reviews, tenure, and history of progressive discipline in creating an appropriate written record. It would also make sense to review their work experience prior to joining your organization so that tenure alone doesn't outweigh other considerations.

Finally, once you have documented the comparison of the three employees who could potentially qualify to perform the remaining work, then it's time to determine who is the least qualified individual. If that individual is the person you originally targeted for the layoff because of her ongoing performance problems, then it may be safe to end her employment. But it's rare that it works out that way. It's more often the case that the underperforming employee is arguably not the least qualified individual (based on your review of all relevant criteria, including performance evaluations and other written records). Since your records don't support separating the problematic employee in question, then you'd have to lay off one of the other two secretaries. Of course, that would mean that a layoff would no longer be a viable alternative for you since you can't use it to separate the one administrative assistant who's causing all the problems. Therefore, you'd have to revert to managing that individual's performance via documented progressive discipline.

It's a bit different if the person you select for layoff is in an individual contributor role where there is no comparison pool. In such cases, the layoff option would likely be easier to justify, especially in the case of straightforward position elimination. However, if you are *repurposing* the job (for example, downgrading from director to manager or focusing on, say, government affairs rather than community

relations for a public relations director), then you may want to permit the laid off individual to apply for the new role. Check with HR or with legal counsel to determine if permitting the impacted individual to apply for the repurposed role might be a wiser strategy or make for a better record than not allowing the individual to apply.

There is yet another key consideration when determining if a layoff is the appropriate employer action when dealing with underperforming employees. Courts and juries have certain expectations about employers' responsibilities when eliminating positions and laying off workers. The logic is simply this: If a company has a legitimate business reason to eliminate a position, then it probably shouldn't have a need to re-create that position in the near future. If the company were to do that, it could appear to a judge or jury that the company's original action was a pretext. In other words, the court could be persuaded that the so-called "layoff" was really a termination for cause in disguise. This could damage the company's credibility during litigation.

How long does the position need to remain unfilled? That depends on state law. There is usually a one- or two-year statute of limitations on wrongful termination claims, so filling that position in less time becomes legally risky unless you have a legal release from the ex-worker that precludes a lawsuit for wrongful termination. What if an employer were willing to gamble and fill the position after, say, six months? Well, if the ex-employee learned that his previous position was filled and he then engaged the services of an attorney to pursue the matter, the damages sought would be similar to those in a wrongful termination claim. If you were held to a for-cause standard of termination, you could be burdened with providing documentation to show that you had reason to terminate the employee because of substandard job performance, inappropriate workplace conduct, or excessive absenteeism. And that's not an easy threshold to meet if you laid off someone who has no corrective action on file.

As a result, an out-of-court settlement would probably need to be reached. Damages could include reimbursement for lost wages, compensation for emotional distress, attorneys' fees, and, in egregious cases of employer misconduct, punitive damages. Thus, progressive disci-

pline is the optimal way to deal with substandard job performance or inappropriate workplace behavior. A layoff may seem easier to implement, but it could leave your company vulnerable to litigation. So don't look at the layoff option as an easy way out. While it may indeed be viable under certain circumstances, it tends to be an undisciplined way of conducting business and exercising leadership because it short cuts the due process system.

If there's a performance issue with an employee, address it. Don't tiptoe around it by trying to lay the person off after eliminating his position. It may have initial appeal because it appears to be a tidy and efficient way of separating someone from the company, but you owe your employees more than that. Hold yourself to the highest leadership standards and address critical performance or conduct issues head on. That's how the system was designed, and it's what great leaders do when faced with adverse employee performance situations. It's also healthier for your organization overall because it's honest and transparent, and employees respect their companies more when they feel that matters are treated above board, especially in difficult situations like these.

45 *"If I Can't Fire Someone, Can I Give Him a Separation Package Instead?"*

"Separation packages" typically mimic severance packages in terms of the structure of the offer—two weeks of pay for each full year of service, for example. However, with a separation package, there's no position elimination involved. Instead, the company simply opts to give a separation package to an employee to entice the individual to leave the company. A release is signed, and the company is held harmless to move forward with hiring someone else for the position.

It sounds like a tidy solution, but much like the layoff option, it poses a number of challenges that aren't necessarily evident at the outset. First, let's assume you've got a director of finance who continues to have ongoing performance problems. A recent error was so significant that it had to be escalated all the way to the CEO, causing

embarrassment to both the vice president of finance and the chief financial officer. These executives then make their way to HR to request a "package" to move this individual out of the organization, since the proverbial straw has now been broken on the camel's back.

Unfortunately, HR soon discovers that none of the problematic performance issues were brought to the director's attention over the past five years since he joined the company. Performance review scores met or exceeded expectations, and no corrective action was to be found on file. The request to separate the individual now with a separation package therefore poses two significant challenges for the HR team:

1. What if the employee refuses to accept your offer?
   If your company offers three months of lump-sum salary in exchange for his signing a release, for example, and he demands six months, you'll be betting against yourself. Since you have no leverage in this negotiation other than an intense desire to have the person leave, you have little choice but to meet his demands for a six-month separation package if you want him to sign and go.
2. What if the company threatens to fire the individual if he doesn't accept the release package?
   You certainly have the discretion to make it a take-it-or-leave-it offer, threatening termination if the employee doesn't accept the package and sign the release. However, many sophisticated consumers will reach out to an attorney to find out if the "deal" you're offering is better than what they could get in litigation. And if the attorney senses that there is a potential case not only for wrongful termination but also for other causes of action like harassment and discrimination that carry punitive damage potential, then you may find yourself in court with little if any defense. (After all, you won't be able to demonstrate cause for the separation.)

As far as the finance director is concerned at this point, either he gets six months or he won't sign the release agreement. And now you're in a quandary because he's holding all the cards and you need that release agreement to avoid some form of post-termination legal

action. Since you can't know upfront whether someone will sign a release according to the initial terms that you've outlined, this may not be an optimal strategy.

Further, if he refuses to sign and you opt not to terminate at that point, you've now "showed your hand" and revealed your intention to remove the individual from the workplace. Therefore, as soon as you take legitimate action steps to document the director's substandard performance in the future, your actions will likely be interpreted as retaliation by an attorney who could argue, "Once he didn't voluntarily accept your severance package, you made up reasons to terminate him for cause." You can logically expect the attorney to argue that reasons for your progressive discipline were either based on pretext or were downright bogus.

Yet there's a practical solution here as well: Don't begin separation negotiations or offer any type of separation package without having leverage in the game. And you guessed it—that leverage comes in the form of documented corrective action that places the individual's job at risk. Here's what it might look like in reality: Depending on the nature of the infraction above, a significant performance error may result in a written or even final written warning (especially if it included negligence or exceptional carelessness on the executive's part). Assuming you opt to issue a written warning for the recent infraction, you can have the following "negotiation" discussion with the individual:

> Pete, this issue is serious, and something on par in significance with this in the future could result in your receiving a final written warning or even being terminated outright. I know that's not what you want to have on your record, whether you remain with the organization or look elsewhere. You've worked too hard over the past five years to get to a point where your job could be in jeopardy, and it may make sense to look at some options.
>
> I just want to make sure that you've got some choices and flexibility at this point, but make no mistake—this is strictly up to you. I'll need to prepare the written warning on my end, but this could have just as easily been a final written warning. There was some significant debate about the level of corrective action in light of the severity of the issue. If you want me to look into some sort of separation package for you, I can do that. I can't make any promises,

> of course, but if that would help you transition out of the organization with your head held high and your dignity and self-respect in tact, then it may be something that I could convince senior leadership to consider.
>
> I'll only go ahead and ask about that if you want me to, and I know they don't do this frequently, but I'm guessing I could ask for a three-month separation package in exchange for your signing a release. You can sleep on it and let me know what you think, but just make sure you're looking at this clearly so you're making the right overall career move for yourself in light of these recent challenges. I'm here to discuss this whenever you're ready, so can you get back to me by the end of the week?
>
> [Yes]

The beauty of this negotiation is two-fold: First, the pending written warning serves as a leverage point because the finance director realizes that his job may be in jeopardy. Second, you've now set up the negotiation so that *he's asking you* for the package, and you're offering to look into it to help him. No guarantees and no promises, but you now have him asking for your help because it's for his own good. And even if he doesn't want to pursue the package option right now, you'll have quietly established that escape option should the need arise in the future.

No, this won't provide you with the ultimate solution you were hoping for: separating the individual immediately. But you also have to assume partial responsibility for not necessarily having managed the situation appropriately in the past. After all, if Pete is such a problematic performer that you wish he would simply disappear from the workplace, there were likely opportunities in the past where you could have documented those issues formally on performance reviews or in the form of corrective action warnings.

As in all successful negotiations, the transaction must be a win-win for both sides. But you've got to have some form of leverage to rely on. Corrective action documentation will save you every time—whether it comes to justifying who gets laid off when a position gets eliminated or how to leverage a separation package if need be. Keep your documentation tight and avoid recommendations that attempt to make people magically disappear overnight. Those typically won't

work because you have very little control of the outcome, and you won't want to expose your organization to unnecessary liability under circumstances that are otherwise within your control. Besides, you owe your people more than that.

46 *Whistle Blowers Versus Character Assassins: Dealing Appropriately with Anonymous and Mean-Spirited Employee Complaints That May Lack Merit*

Most companies grant their employees the discretion to escalate matters anonymously, and well they should. Whether the company is publicly traded (i.e., where a SOX code of ethics is required) or privately held, organizations want employees to have immediate and direct access to senior leadership, often including the board of directors or heads of the organization in most instances. After all, if the company isn't aware of a problem because an employee doesn't know how to escalate a claim and bring it senior management's attention, then the C-level (e.g., CEOs, CFOs, and COOs) won't learn of a problem until it's potentially too late. That's why many privately held companies ascribe to the code of conduct mantra, even though they're not legally required to. It just makes good business sense.

But there can be a downside to such openness and transparency. Allowing employees to complain about managers and supervisors anonymously may inadvertently open a Pandora's box of unfounded allegations that allows workers to engage in character assassination with apparent impunity. Likewise, because employees have become savvy about the whistleblower protections contained in many companies' written policies, they have figured out that engaging in the proverbial preemptive strike—"I'll complain about my boss's *conduct* before she has a chance to complain about my job *performance*"—can provide them with a cloak of protection in the form of a retaliation charge against the company should the organization later come back and attempt to dismiss, lay off, or otherwise discipline them after filing a complaint.

So how do you, as a responsible corporate leader, handle it when you suspect that the nameless voice behind an anonymous complaint is actually engaging in character assassination against a targeted supervisor? How do you appropriately respond to an unknown member of your team who is spouting unfounded rumors and gossip? It's a fine line between the individual privacy rights of complainants and mean-spirited slander toward the alleged wrongdoer (often the supervisor). This fine line places every department head and HR executive in an ethical quandary and places the company in a compromising legal position. Attacking workplace problems like this directly and appropriately poses exceptional challenges to even the strongest companies and most confident leaders alike, so an approach that combines both legal guidance and common sense will work best.

For instance, a workplace escalation matter that alleges that someone is engaging in embezzlement of company funds or timecard fraud is fairly simple to investigate and verify. But what about an anonymous letter that alleges that Supervisor X is sleeping with his subordinate? And what if that anonymous complaint appears in the ombudsman's mailbox at the same time that the supervisor's wife receives an anonymous text message alleging that her husband is sleeping with that same subordinate? That's when things can get ugly and personal, and the targeted supervisor will often feel he's being attacked at work at the same time that he's attempting desperately to repair his relationship with his wife. It's a classic situation of the gun being pointed at the employer's head from two different directions—from the anonymous complainant who may be alleging discrimination, harassment, and potential retaliation and from the supervisor who's threatening a defamation lawsuit.

To resolve these types of character assassination attempts, first ask the anonymous complainant (who typically makes the company aware of the problem via email from a made-up address) to make himself known so that you can work on finding a solution together. If that doesn't work, follow up by asking who should be interviewed to verify the allegations. At the initial stage of the investigation, the anonymous complainant is clearly calling the shots, but your attempt to

involve the person is both the right thing to do and the most practical solution from a legal standpoint.

What happens next depends on your initial findings. If you can identify little if any corroborating evidence to substantiate the initial anonymous complaint, it might make the most sense to conclude the investigation quietly. Notify the complainant via the same email address that was used to initiate the complaint that you've completed an initial investigation and can't find merit to the claim, so after checking with the HR, Legal, and Operations departments, you're opting to conclude the investigation with a "no findings call." That is, unless the individual opts to emerge from the shadows and provide you with additional information.

But even if you're unable to corroborate or find any merit to claims that attack someone's character, it's important that you address the matter, take appropriate action, and close the loop—both for the sake of the legal record and for the employees' right to know. As is often the case in these types investigations, the claims raised can be exaggerated, taken out of context, or appear to assign some form of ill intent to the supervisor's actions when there was none. When a claim appears to have little if any merit, don't ignore it once you've concluded your investigation and found no merit. It makes more sense to address the matter openly so that it can be resolved.

Consider addressing the matter as follows: First, ask in-house or outside counsel for legal advice in phrasing your findings and your conclusion. Second, ensure that the wronged supervisor supports your intentions of addressing the matter openly with the rest of the team in the supervisor's presence. You could then set the stage for a group "investigational wrap-up" meeting with HR and a member of the senior leadership team present as follows:

> While I'm not planning on going into detail about the investigation that HR has been conducting for the past two days, I want you all to know that we've fulfilled our commitment as a responsible employer to conduct a thorough investigation in a timely manner and to reach a reasonable conclusion.
>
> However, I'm not comfortable just closing out this investigation without addressing the issue. We don't know who filed the original allegation, and that's

> fine. But I want to remind you all that real damage can be done to someone's career and personal life when anonymous complaints are made behind the scenes with apparent impunity.
>
> I'm very disappointed in how this matter was escalated: The allegations appear to have been grossly exaggerated, the witnesses couldn't support the allegations, and this felt like a very personal attack against John. In addition, I've invited the anonymous complainant multiple times to disclose him- or herself and work with me and with HR to get to provide more details, but to no avail: the anonymous complainant did not come forward. What he or she said about John was unjustified and mean spirited, which is why I invited John to this meeting. John, I want to apologize to you on behalf of the team for what occurred here. I think you deserve to hear that publicly, and I'm very sorry.
>
> As for the rest of the team, if you have legitimate issues and concerns, feel free to raise them openly or file your complaints anonymously—but please remember that there are real people whose careers may be placed at risk, and I expect you all to act in a more responsible manner in the future. This investigation is officially concluded. But I have higher expectations of you as a team than you've displayed here, and I hope you all take the time to consider how this might have felt to John and other members of the team.

With this public apology to the wronged supervisor in place and an opportunity to reset group expectations, you stand the greatest chance of healing the wound while enforcing your company's escalation policy and whistleblower protections. Addressing the matter openly and honestly will provide a healing touch that will go a long way in preventing future mean-spirited and anonymous attacks while allowing your team to rebuild fractured relationships and reinstitute a healthy sense of camaraderie.

47 *Vetting the Record Before Recommending Termination: The Importance of a "Clean Final Incident"*

Terminating an employee is necessary occasionally. Before doing so, make sure that you're accounting for the key issues that any plaintiff's attorney will consider in evaluating a case and determining whether to bring suit against your organization. In terms of the individual being considered for termination, review the following before recommending any termination action:

Termination Checklist

- Date of hire
- Length of tenure
- Age (there are key protections for employees of ages 40 and above)
- Ethnicity
- Gender
- Corrective action history
- Most recent performance review score and overall performance review history
- Open workers' compensation claim(s)
- Open intermittent Family and Medical Leave Act (FMLA) claim(s)
- Disability status: for example, is the company currently engaging in the Americans with Disabilities Act (ADA) "interactive process" with this individual or otherwise granting some form of protected leave or reasonable accommodation?
- Pregnancy
- Possibility of a retaliation charge for having lodged a good faith complaint against the organization ("whistleblower" protection)
- Supervisor's age, ethnicity, and gender (to counter any potential claims of discrimination)
- How long has the supervisor managed this employee?
- Did the supervisor originally hire the employee? (If so, a discrimination claim may be more difficult to prove)
- Specifics regarding the final / most recent incident that could justify termination

Armed with this short list of guidelines to practical workplace investigations, you can then objectively determine whether a "clean final incident" justifies a termination for cause. The nature of the final incident that triggers termination is exceptionally important. The more specific and concrete the violation, the stronger the justification to terminate. For example, if the newest incident clearly violates the terms of a final written warning, you should be safe to terminate. Similarly, if the incident stems from some form of egregious misconduct like theft, embezzlement, or fraud, you should likewise be safe to terminate as a "summary offense" (meaning that no prior corrective

action is warranted because the one-time occurrence justifies outright dismissal).

In comparison, avoid *de minimis* (i.e., minimal) final incidents that could appear insubstantial or otherwise appear to lack objectivity. For example, if the record you're relying on to justify a termination appears as if you were looking for a reason to fire the person, then your credibility could be challenged. So could the validity of your decision to terminate the individual. The best yardstick: Ask yourself, "If one of our best employees engaged in a similar infraction, would discipline be warranted?" If the answer is no, then the final incident may not be substantial enough to warrant dismissal. But if the answer is yes, you can feel more confident that you're being consistent in the application of your own rules and that the termination decision will withstand legal scrutiny. When in doubt, check with qualified legal counsel. With HR's or your attorney's review and approval, you'll be much better prepared to address exceptional situations not only with the confidence that comes from knowledge but also with the wisdom that comes from experience.

48 *Don't Rush to Judgment: Learn All Sides of the Story First*

Line managers often mistakenly insist that a termination decision be made without asking for the accused person's input: "It doesn't matter what they say—there's nothing they can say to undo the damage that was done" goes their logic. And that may be true—but you won't know until you ask.

Let's assume it was reported that $200 in cash was missing from the petty cash drawer. The video camera footage shows that the branch manager took this money last night at the close of his shift. Should you terminate at that point strictly based on the video footage? While taking money without authorization is tantamount to theft, and theft is a "summary offense" (meaning that it's not subject to corrective action—termination for a first offense is warranted), you have an obligation to hear the individual's side of the story. What if the employee admits it and states that his regional manager gave him prior authorization to take the cash to buy office supplies? Would that be a termi-

nable offense? What if the employee admits that he took the funds but states that he only needed it overnight to buy milk and sundry items for his newborn baby? In fact, he put an I.O.U. note in the safe stating that if anyone opened the safe that night, there would be $200 missing that he would return promptly in the morning before the branch opens. Is that a terminable offense?

The point is, you can't know if there were any extenuating circumstances unless and until you ask. Even if the individual in the example above left an I.O.U. note, you would probably still move to termination. But at least you'd have a better understanding of his motives and would be more informed about your recommendation. In short, you should always learn both sides of the story before moving to termination. That's a fundamental element of workplace due process, and it's a fair and objective practice that doesn't limit your discretion in any way; it simply helps you make more well-informed decisions and maintain positive employee relations while protecting your company legally.

49 *Wage and Hour Quagmires: Employee Classification and Overtime Considerations*

No discussion of litigation land mines in the workplace would be complete without addressing wage and hour challenges. Managing overtime properly can be quite a daunting task for managers who may not be aware of some of the intricacies and traps that await them on this issue. There are a number of interesting twists and turns in this particular area of employment law, and you can't be armed well enough in terms of protecting your company from wage and hour liability because of its class action potential.

Exemption status will always be your first hurdle. It's your company's responsibility to pay overtime to nonexempt workers for hours worked in excess of forty a week (or in some states like California, in excess of eight hours a day), and it all begins with classifying your employees properly. Most companies don't have any problems identifying their CEOs and vice presidents as "exempt" from the protections of the Fair Labor Standards Act (FLSA) of 1938, which established

overtime during the Great Depression as a penalty to employers for "stretching out" their existing clerical or manufacturing workforce and not adding new employees to the payroll. Employers understand that clerks, receptionists, and laborers are indeed nonexempt. In other words, they're paid for their time, protected by the FLSA, and docked when they come in late but paid overtime for hours worked in excess of forty a week.

But where this gets dicey is with "wobbler" job categories like coordinators, analysts, specialists, and administrators (and, in some cases, assistant managers). Some companies classify these paraprofessional and junior management positions upward into the exempt category, while others place them downward into the nonexempt, overtime-eligible category. The decision is up to you and your company, but just understand that if you're ever audited, the government will expect you to pay overtime whenever there is any doubt as to an employee's classification.

If you choose not to pay overtime and instead opt to classify these wobblers upward into the exempt category, then the burden will be on you and your company to prove or otherwise demonstrate that they're indeed exempt from overtime pay. And if you're wrong, you could end up with a massive back wages tab on your hands that governs the entire class of workers. Remember, all else being equal, the government wants companies to pay overtime whenever possible so that workers aren't exploited or otherwise denied the additional overtime pay.

In terms of paying overtime correctly, it's important to understand that overtime premiums must be paid for all overtime worked, including unapproved overtime. In fact, you're allowed to discipline an employee for working unapproved overtime, but you're not allowed to withhold the overtime pay. That would be a classic wage and hour violation.

Reciprocally, you have the right to instruct employees to work overtime as the workload demands. That's a basic right of any supervisor, and employees who fail to make themselves available could likewise be in violation of workplace conduct standards. Of course, before proceeding to disciplining someone formally for insubordina-

tion (i.e., failure to follow a reasonable workplace directive), be sure to look at more practical issues like the reasonability of your request, the amount of notice you've given the employee, and how you would treat any and all similarly situated employees under the same circumstances. This will avoid perceptions of favoritism, bias, and potentially discrimination in the workplace.

The problem with wage and hour violations is that they lend themselves to class-action lawsuits. In fact, plaintiffs' attorneys often question prospective nonexempt clients who come in looking for representation to pursue discrimination and wrongful termination claims to see whether they worked unpaid overtime hours or skipped lunches and breaks without pay on a frequent basis. If the answer is, "Yes, it was expected of us," you could very well see a class-action wage and hour claim attached to your ex-employees' other legal charges. And costs add up quickly. Calculations typically go back several years, and it's not uncommon for damages resulting from unpaid overtime plus attorneys' fees to reach the seven- to eight-figure range, depending on the size of your company and the number of workers in the class.

The lesson here? Don't panic if one of your nonexempt employees misses a break or lunch period on occasion. However, don't become known as a company where skipped meals and breaks become the norm or where working unpaid overtime occurs on an "expected" basis. If you steer clear of developing that type of reputation by respecting the law and treating your nonexempt workers fairly, then occasional, nonsystemic lapses probably won't pose much of a serious legal threat.

That being said, you should encourage your nonexempt team members to get away from the office (or at least their desk) during lunch and rest periods. If taking lunch at the desk becomes the norm or expectation, it will be assumed that your hourly staffers were expected to pick up the phone if it rang, keep an eye on email, or attend to other matters of business. And that, unfortunately, violates the definition of a true rest or meal period. After all, courts will generally rule that if *any* work was conducted, the entire meal period was invalidated. Oh, and if you and your employees don't have a record of all

the times they skipped their breaks and meal periods, then the courts or the Department of Labor will gladly share their calculation tools and tell you how much your company owes in back wages and attorneys' fees based on their estimates. Just remember that for nonexempt, hourly employees, breaks and lunches are for breaks and lunches—not for work. There's no need to surprise your organization with a class-action wage and hour lawsuit because you failed to adhere to the law in this very fundamental respect.