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How to Fire a “Rotten Apple” and Stay Out of Court

Every business needs to follow these four critical steps today to prevent an expensive and painful lesson tomorrow.

Entirely too many discharge cases are going to court today. In most cases the employer is being taught a valuable and very expensive lesson—that you no longer can indiscriminately fire employees unless the employer knows and has protected his rights, and met all of his responsibilities to all of his employees in a fair and consistent manner.

There are dozens of federal laws, compounded by state, county, city and municipal laws which govern the employer-employee relationship in a very strict manner. Some of these laws date back to 1791, 1868 and the 1930s. Therefore, for any employer to plead ignorance in a court of law today is viewed with disbelief by the judge and jury.

Personnel management is not and cannot be a high priority within any small or mid-sized contractor so on-premises, full-time expertise is financially out of the question. How then can an employer have the opportunity to protect himself against these types of problems? These are the four critical steps which can help keep you out of the court room in a discharge:

1. Education . . .

The owner/president, managers and supervisors must be educated on your “company’s rights” and how to handle personnel problems and problem personnel.

There are a number of educational programs (one day seminars) offered throughout the U.S. at various times during the year. These are neither expensive nor are they presented as though only a Philadelphia lawyer can understand that which is said or make it work.

One of your top priorities should be
“You may not turn your head for a twenty year veteran and fire an employee who has been with you only six months when they have both violated the same rule.”

to have all of your key staff educated by mid 1986.


Examine, closely, your hiring practices, because they can come back to haunt you after you fire a bad employee.

“Conditions of employment” are costing employers millions of dollars annually. If you hire a person to drive a truck on Mondays, Wednesdays and Fridays, that becomes a condition of employment and depending upon the state in which that person was hired, you may or may not be able to change their days or hours of employment, legally.

Promises, expressed or implied, by your manager or supervisor can become binding on your company as a condition of employment unless expressly disavowed as part of your Application for Employment and Employee Handbook.

At the time you hire someone you should begin preparing to separate them and defend yourself and your company in court.

If you are using an Application for Employment which has a date before 1985, you are probably using a form that can do you more harm than good. Also, the application itself should define some of your conditions of employment (i.e., physical examinations, reference checks, probationary employment, hours worked, days off, transfers, and most importantly an approved “at-will” clause, etc.)

As the Supreme Court has deemed interviews to be tests, you must be aware of legal and illegal areas of questioning and the fact that there should be hard copy results of these tests. The use of THREE forms becomes critical when being required to defend your company’s selection, of an applicant, in court.  

Continued
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First is the Application for Employment—to help prove only legal questions were asked.

Second, an Applicant Rating Form—ten to twenty traits/characteristics of the applicant which may be scored on a one to ten rating scale. Some traits are: punctuality, stability (on prior jobs), at ease during interview, asked questions about your company (other than time off), maturity in relation to age, attentiveness, thoroughness of answers, job-related skills, etc.

Last is an Applicant Questionnaire. You must be able to prove that the same questions were asked of each applicant. These should be four to eight questions type written and duplicated for you to use with each applicant. Questions such as—Why do you want to work for our company, what did you like most about your last job, least, what goals do you have for your career, etc. are but some of the choices.

At the conclusion of each interview, you should complete the forced ranking on the Applicant Rating Form and complete (in one or two sentences) the answers to the Applicant Questionnaire.

These two valuable documents should be placed with the Application for Employment until all interviews are completed at which time all documents are reviewed by applicant and the highest scoring candidate is chosen.

The forms of the applicants not offered the job must be retained for not less than six months and preferably one year. You are protected only if you can prove, beyond a reasonable doubt, that you chose only the top candidate(s) for your company.

This process takes approximately five minutes after each interview, but if you wait to do the paperwork until three or four applicants have been interviewed, you will lose a great deal of accuracy and may wind up leaving your company vulnerable to action and hiring less than the best.


An employee handbook is becoming a critical component of today’s litigation. Without one, employers are being shown to be irresponsible in defining rules and policies governing the employer-employee relationship.

Conversely, with an employee handbook that is not properly written, employers’ poorly chosen words are allowing the courts to award enormous sums in settlement. Some “former” employees have been reinstated with back pay awards and damages running into the hundreds of thousands of dollars.

The courts and resulting decisions are demanding that all employers, large or small, have their rules in writing. Every juror, judge and businessman knows that every employer has “rules.” These rules must however be job necessitated, job related and known by all.

Further, all employers must prove the following, just to win an unemployment case:

a. The rule was in force and effect prior to the date of infraction,
b. the rule was known by the employee violating that particular rule, and
c. the employee did, in fact, violate the rule.
Without rules, our society would be in total disarray; with unpublished, unknown, or uncommunicated rules, we are no better off.

Rules, benefits and your employment policies must be defined, in writing, in order for you to prove your case. Further, rules must be administered to all employees, all of the time fairly and consistently. You may not turn your head for a twenty year veteran and fire an employee who has been with you only six months when they have both violated the same rule. This practice, discrimination, is frowned upon by jurors nationwide, as proven by the sums awarded “wronged” employees.

Some of a wall and ceiling contractor’s key rules might involve:

- drinking/drug abuse or being under the influence of any mind altering substance
- insubordination
- “borrowing” tools
- possession of a weapon designed to do bodily harm
- attendance and punctuality
- carelessness
- reporting injuries
- security on the job site
- harassment
- personal business on company time

A comprehensive handbook will contain your company’s policies on almost every conceivable situation.

4. Documentation . . .

Dealing with the problem employee properly is critical. To cite one judge, . . . had the employer acted responsibly, in a manner of fair dealing with the employee, this case would not have gone this far.” The case, which cost the employer $71,000 in actual and $950,000 in punitive damages, could have been prevented through responsible, sensitive management.

What most employers lose sight of is their responsibilities to their company, not just the employees. The case cited above is a result of a manager thinking that getting the job done and helping the company make a profit
was his only job. Little did he know that he would bankrupt his company by failing to be attuned to the needs of a single employee. Rather than taking the time to hear what was said and then take corrective action, he chose to forge ahead on the tasks at hand.

Common problems such as tardiness, absenteeism, insubordination, should be dealt with by the supervisor as they occur. However, there are a number of areas which must be recognized by the immediate supervisor, but need to be handled at a higher level (such as harassment, abusive or foul language in front of a customer, reporting or being at work suspected of being under the influence of any mind altering substance.)

It is more cost effective for the small and mid-sized employer to have one person trained to handle the last items above. This minimizes the company’s risk of mishandling a given situation by one of maybe four to ten supervisors.

All problems and certainly all problem employees must be documented, incident to incident. Proper documentation includes, but is not limited to:

- date of warning
- date of the infraction
- statement of the rule
- witnesses (if any)
- statement of what the employee must do to improve
- any comments by the employee, oral or written, (your counseling form should allow for this)
- signature line for the employee*
- signature line for the member of management doing the warning
- signature line for witness (if applicable)

*The actual signature is not necessary, provided you have a witness to attest to the fact that the warning was given, the employee had the right to refute, and the employee refused to sign.

This article is intended to positively impact your bottom-line by making you aware of that which can help keep you out of court.