

DEALING WITH PROBLEM EMPLOYEES:

Helping People Know When It's Time to Leave

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This outline is intended solely for use and reference in conjunction with a presentation to the Ohio Government Finance Officers Association in September 2009. It is not intended to be all inclusive and does not constitute the giving of legal advice. For particular situations, attendees should consult legal counsel.

I. Introduction.

- A. Many of us in human resources and labor relations find that we spend more than 80% of our time dealing with less than 5% of our employees and the problems they generate.
1. Some of these are employees who are simply not competent for the tasks and expectations we have for them. These cases are, in some ways, more difficult to deal with because these are the sad cases – not bad actors.
 2. Others are highly manipulative and dysfunctional employees who, if not addressed and confronted, can become cancers in your workplace.
- B. Today, I'm going to talk about each of them, and how best to encourage employees like this to leave under their own power, and with a minimum of drama.

II. Let's start with the more pathological type first, not because they are most common but because they are so incredibly destructive of efficiency and morale in any workplace. They also pose the greatest liability risk.

- A. Almost every manager has experienced the frustration of dealing with an employee who seems bent on agitating the workplace, resisting authority, avoiding work, and creating problems wherever and whenever possible. My shorthand for this type of employee is "the employee from hell." At least before the current economic crisis, many of us felt that the number of such employees was increasing. Some theories of why this may be so:
1. We are in a time of constant change and the resulting uncertainty.
 - a. Government jobs were once seen as low demand and high security.
 - (1) But competitive pressures are forcing us to demand more of our employees, often at the same time as resources are limited and declining.
 - (2) Layoffs (and the euphemism "downsizing") were once unknown in the public sector – but not any more.
 - (3) The expectations of the public and of elected officials have changed, and that means what we expect of employees has changed as well.
 - b. External changes have stressed many employees.
 - (1) In the economy generally, the workplace has been fundamentally transformed.

- (a) Technology changes have transformed the workplace in a way that is completely foreign to some employees.
 - (b) Having a college degree (or a generation ago, a high school degree) with reasonably hard work would have once guaranteed success. That is no longer always true.
 - i) To some, particularly white males, this feels like a “broken contract.”
 - ii) Women and minorities might have a very different view of what the contract was.
 - (c) Enormous cultural changes continue to buffet the workforce. The increased diversity of the workforce, the changing roles of women employees, and the need to work with people from very different backgrounds and life experiences causes resentment from some workers who long for the “simpler” days – when they were free to be more narrow-minded.
2. Add to that the pressure of stagnant or declining government revenues, along with increasing resistance to any new taxes in the electorate, and you have a real pressure cooker on most public-sector employers – and employees.
 3. Generational changes add more stress to the mix. At the risk of generational stereotyping, it does seem to be true that younger workers stress autonomy and may value defying authority more than older workers.
 4. At all levels, acceptance of personal responsibility seems to be on the decline.

III. Recognizing the True “Employee from Hell” Who May Pose Real Risks.¹

- A. What are the characteristics of the really far-gone “employee from hell”? Generally, this is someone who:
 1. Wants to avoid being held accountable for his or her actions.
 2. Blames any work problems on a lack of training, or a supervisor’s mistake, or on discrimination, or on co-workers who supposedly “have it better.”
 3. Has a rampant and false sense of entitlement.

¹Some of the contents of this presentation, particularly in sections II and III, are drawn from a presentation given by Charles Goldstein, Esq. of the Los Angeles firm of Goldstein, Kennedy & Petito at the 1997 Annual Training Conference of the National Public Employer Labor Relations Association (NPELRA). The talk was over a decade ago, but the insights remain as valid today. The speaker thanks Mr. Goldstein for his permission to use these materials.

4. Resists and resents all authority.
5. Sees every act by the employer as part of an on-going conspiracy and weaves events together, even when unrelated, to support the theory. Tends to demonize those who disagree with him or her as part of the conspiracy.
6. Sees every attempt to hold him or her accountable as an act of retaliation. So the employee attacks the manager with charges of discrimination, unfairness, or incompetence when confronted with being held accountable.
7. Expresses the employee's exaggerated sense of (or need for?) power through filing baseless appeals, grievances, complaints, charges of discrimination, or lawsuits, or threatening to expose the agency to negative press exposure.
8. Hordes documents and writes lengthy letters and responses on even minor matters because the employee believes that he or she is being set up to fail.
9. May resort to claiming health problems because of the perceived protection from discipline or termination based on disability status or medical leave.
10. Quickly alienates their own lawyers or union representatives and may even file complaints or lawsuits against them.
11. Will not give up until totally defeated in every forum – or realizes that he or she will not win.

B. Why do these employees make your life miserable? Because they want what you cannot give them. They want:

1. Someone to fix all the problems in their lives.
2. Power without accountability, and recognition without achievement or competence. If you won't give that, they will seek to force that through the litigation and arbitration process, where someone will finally tell them that it's not their fault that the world doesn't "get" how unfairly they have been treated.
3. Someone to listen to them, because the bottom-line problem is a lack of self-worth, and the only way to get power and attention is to fight with you.
4. To validate their own view of the world as filled with enemies and people who are "out to get them."

IV. What Are the Best Strategies to Cope?

A. The first is obvious – don't hire a person like this in the first place. If the employee is really this bad, the behavior is not new, and other employers have seen it.

1. Interview applicants carefully with questions that force the person to talk about their past employment experiences and what they have actually done in previous jobs – not general questions with obvious answers that allow the applicant to tell you what you want to hear.
 2. Check references carefully, and ask listed references for other possible references that the candidate may not have provided you. Ask the right questions, and listen!
- B. Once you have hired someone, use the probationary period!
1. Remember, skills can be learned and tasks can be mastered, but basic personality types and approaches to life are very unlikely to change. If someone is belligerent and resistant to authority during probation, or can't get along with co-workers, how is he or she likely to be once the employee feels settled, secure – and entitled?
 2. Remember this cardinal principle when hiring: **Hire for attitude, and train for skills.**
- C. So, the problem employee got through the selection process, everyone lied to you in the references, he held it together long enough to survive probation – and now “you're stuck.” What do you do?
1. You need to set out on a campaign designed to show the employee that the old way of manipulating the work environment is a dead-end that will no longer work. That means you must mount a lawful but relentless and persistent “full court press.” It is a common myth – or an easy way out – that it is impossible to fire someone under civil service or a union contract and make it stick.
 2. But it is not easy. Done correctly, you have the right to expect one of three outcomes – but you have to be willing to live with any of the three:
 - a. The employee will continue to flout legitimate expectations and rules, and you will build a progressive discipline case that will be sustained in an agency or court or before an arbitrator; or
 - b. The employee feels the heat and he decides to seek greener pastures; or
 - c. The employee is scared enough of the very real prospect of unemployment that she changes her ways and becomes a productive and cooperative employee (the rarest but occasional outcome).
 3. Many managers, including human resources managers, are too timid or lazy to do this.
 - a. There is no easy path (unless the employee is an at-will employee, and even then there are risks such as discrimination suits). The problem

employee has to believe that your persistence and determination will outlast his or her resistance and guerrilla tactics.

- b. The problem employee will exploit *any* sign of timidity, weakness, wavering of resolve, or exhaustion. This is a battle of wills.

4. What are the steps?

- a. At the outset, have an honest, direct, respectful and controlled – but blunt – conversation with the problem employee. I call this the “come to the Lord” talk. It goes like this: “Your conduct is completely unacceptable. If it continues, we will be proceeding with the steps necessary to remove you from employment.”

- (1) If the employee responds with threats of litigation or “public exposure,” you need to disarm the threat: “You’ll have to do what you have to do, but no threat will deter us from doing what we have to do to stop this unacceptable performance. We have made our decision, and the only decision left is yours – either your performance will improve to acceptable standards, or you will be removed from this job. That choice is yours. But make no mistake – things will change one way or another.”

- (2) With surprisingly frequency, the problem employee simply folds or goes away if you deliver this message convincingly and he or she believes “the game is up.” Bullies often respect being bullied or seek the path of least resistance, and when faced with determination, back down or run away.

- b. The problem employee must be given a very explicit series of expectations for improvement, in writing, with express measurement standards and time lines. Even better is something like a performance action plan signed off by the employee.

- (1) If the employee raises issues or obstacles, ask what the employee would need to meet the expectations. Throw the problem back onto the employee to solve.

- (a) But don’t get hung up on constantly moving objections and reasons why “you’re wrong.”

- (b) The key to dealing with negative employees is:

- i) Not letting them hand the problem off to you, but insisting that they solve it. Not playing that game defuses the diversion, and the negativity is no longer the shield that they want it to be.

- ii) At some point, conclude the discussion: “These are our expectations and it is your job to meet them. If you are not willing to meet them, you may wish to look for another job, but we are not asking your permission to give you assignments. We expect you to meet these assignments as directed.”
 - iii) It's worth asking why is it so hard to have these conversations. Is it because we want to be “nice” or “kind”? Consider the teaching of the Three Gates.
 - (c) Even if the employee doesn't agree to the plan, issue the final plan as a directive, incorporating the discussion.
- (2) Make the expectations realistic and achievable. Obvious set-ups or impossible expectations will destroy your legal case. Don't get greedy.
 - (a) Remember: you win cases before arbitrators, courts, or civil service commissions by being the “reasonable party.”
 - (b) Let the other side make the silly arguments.
- (3) Don't fall for the “you're singling me out” argument.
 - (a) Disparate discipline is treating similarly situated employees differently. It is not disparate discipline to treat differently situated employees differently.
 - (b) The key is the reasonableness of your expectations. Would a competent employee be able to achieve what you've set forth in the time allotted?
 - (c) Be honest. When the employee says, “why doesn't _____ have to do this?” say, “Because _____ is a hard-working employee who is not failing to do her job the way you are. You are not performing at an even minimally satisfactory way, and you are under closer supervision because of that.”

- (4) At each step, the plan should be specific about the discipline that will be imposed if the expectation is not met.
 - (a) Don't use the vague phrase: "may result in further disciplinary action."
 - (b) Far better: "Failure to meet these expectations will result in disciplinary action, starting at a minimum of a ten-day suspension without pay, though the penalty may be up to and including termination."
 - (c) When you're at that last step before firing, tell the employee that, in writing, and not sugar-coated or fudged. "If this happens again, you will be fired."
- c. When the employee fails to meet the standards within the time allotted, document the failure and issue the appropriate discipline.
- d. Will the discipline be defensible? The following is a paraphrase of the seven-part test for just cause in discipline developed by Arbitrator Daugherty in *Enterprise Wire*, 46 LA 359 (1966). Many arbitrators will use this test to assess whether or not discipline was for "just cause." A "no" answer to any of these generally means that the discipline will not be upheld – so use this test yourself before acting. Share it with your managers.
 - (1) Did the employer give the employee forewarning of the possible or probable disciplinary consequences of the employee's actions?
 - (2) Was the employer's rule or managerial order reasonably related to:
 - (a) the orderly, efficient, and safe operation of the office or agency?
 - (b) the performance that the employer might properly expect of the employee?
 - (3) Did the employer, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
 - (4) Was the employer's investigation conducted fairly and objectively?

- (5) At the investigation did the employer obtain substantial evidence or proof that the employee committed the offense as charged?
- (6) Has the employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?
- (7) Was the degree of discipline administered by the employer in a particular case reasonably related to:
 - (a) the seriousness of the employee's proven offense, and
 - (b) the record of the employee in his or her service to the employer?

V. What about the employee who is not willfully disruptive but simply cannot meet the demands of the job?

A. The process is not all that different, but the tone is quite different.

- 1. You are not attempting to show your strength and resolve in the face of a bully who is used to people backing down rather than face a conflict.
- 2. But you are still confronting a sense of denial.
 - a. The person may have been allowed to perform at a sub-par level for a long time, with impunity – again, a sin of “kindness.”
 - b. Your task will be to help this person see that this is no longer acceptable and possible.

B. The first step is still the “come to the Lord” meeting.

- 1. You speak in kinder tones, but you still must be very direct and unambiguous.
 - a. “Your performance is not meeting the minimally acceptable standards for this position. While that has been allowed for some time, we can no longer accept paying you for a position you are not adequately performing.”
 - b. “We have decided this situation will change. We intend to set our minimal expectations. They are the same standards that your co-workers must meet. If you meet them, we will be happy to see that improvement and to continue working with you. But if you don’t, we will be proceeding with disciplinary action that will end in your removal.”

- c. “If you can’t or won’t do the job to these expectations, you may wish to choose to find another job. If so, let us know and we’ll work with you on an agreed period of time to do that.”
 - d. “But we won’t negotiate with you or debate these expectations. You will either have to meet them or you will have to leave.”
2. Again, you will need to prepare for the defenses.
- a. “It’s not fair that you’re changing this job.” Answers:
 - (1) “The job isn’t changing. What is changing is that we are not willing any more to tolerate sub-par performance. We expect you to do what this job calls for, and what your co-workers are doing. Things change, here and everywhere, and that’s a fact of life. We expect our employees to adapt to changes.”
 - (2) “What isn’t fair is for you to do less work or poorer work than your co-workers and hold the same position at the same pay.”
 - b. “I’ll have to talk with my lawyer.” You have to handle this defense the same as you would the dysfunctional employee: “You should do what you have to do, but no lawyer or threat of litigation will deter us from insisting on this minimally acceptable level of performance.”
3. What are the differences?
- a. Here, you want to use as much kindness as you can with your firmness. You need to be clear that you *will* act. But you obviously want to help the person leave with as little damage as possible to his or her reputation and self-esteem.
 - b. Remember the Peter Principle: there may be something this person can do very well, maybe even within your agency.
 - c. You may want to negotiate a time frame for the person to leave on his or her own, because here you don’t suspect the person will sabotage your operations or wreak havoc in your workplace.
 - d. Often, this person will be relieved that people have recognized that he or she is not a good fit for the job. The employee may welcome the opportunity to “climb down” – if handled with sensitivity and dignity.

C. Use of Last-Chance Agreements.

1. When an employee is in the terminal-stage disciplinary process, last-chance agreements can be very useful.
 - a. Such an agreement provides that in lieu of termination, the employer agrees to retain the employee, with the condition that any further disciplinary offense will result in termination from employment.
 - b. The agreement also provides either that:
 - (1) The termination is not grievable at all (rare); or
 - (2) That in any grievance arbitration, the arbitrator's jurisdiction is limited to determining whether or not the violation occurred, but he or she cannot reduce the penalty.
 - (3) Sample language (specific to offense, in this case, a "joke" that resulted in an injury to a co-worker):

Mr. Thomas fully accepts the responsibility for and consequences of his misconduct as set forth in the notice of predisciplinary hearing. Mr. Thomas and the Union understand that this suspension is imposed in lieu of harsher discipline, up to and including discharge, and that he is on **FINAL WARNING STATUS**. Accordingly, if Mr. Thomas again is involved with any act or threat of injury or violence to a co-worker supervisor, customer, or any other person while on duty as a City of Lincoln employee, he will be immediately discharged from employment. Further, the parties expressly agree that in any future disciplinary action against Mr. Thomas as set forth in this section, the jurisdiction of the arbitrator shall be limited to determining whether or not such an offense as described above occurred, and if the arbitrator finds that such a violation was committed, the arbitrator lacks any jurisdiction to modify the discharge to a lesser penalty. The provisions of this last-chance agreement will remain in place for the duration of Mr. Thomas's employment.

- (4) Sample language – this would be triggered by any disciplinary violation:

Ms. Kinder and the Union understand that this penalty is imposed in lieu of discharge, and that Ms. Kinder is now on **FINAL WARNING STATUS** regarding any further disciplinary infractions. Accordingly, if Ms. Kinder again fails to perform her work duties; fails to comply with the directions of her supervisors or managers; commits any other violation of

agency rules or procedures; or commits any other disciplinary infraction of any kind, she will be immediately discharged from employment. Further, the parties expressly agree that in any future disciplinary action against Ms. Kinder as set forth in this section, the jurisdiction of the arbitrator shall be limited to determining whether or not such an offense as described above occurred, and if the arbitrator finds that such a violation was committed, the arbitrator lacks any jurisdiction to modify the discharge to a lesser penalty. The provisions of this last-chance agreement will remain in place for a period of three years from the last date of the suspension served [OR for the duration of Ms. Kinder's employment].

- VI. Help your managers and department heads to remember the key points of any termination discussion by sharing these tips:
- A. Have a mental (and if necessary, written) script. Say what you have to say, and when you are done, *shut up!* Don't fill the "dead space" with babble, or worse, comfort and reassurance.
 - B. It is all right to listen, and it is all right to be sensitive, but you cannot be the terminated employee's friend or counselor. You neither can nor should try to "take care" of this person or make him or her "feel better." You need to accept your role as the "bad guy" – you just fired this person!
 - C. If necessary, steer the conversation back to the fact that the decision is made and will not change. When you are done, close the conversation and steer the employee toward the door.
 - D. Never meet alone with the employee, and be aware of possible risks, including a violent reaction. Leave yourself a way out – and trust your instincts and "sixth senses."