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Mishandling terminations can lead to headaches

If you're an employer and you're reading this, chances are you've had to fire an employee for one reason or another. It could have been for cause or for economic reasons. Maybe the worker was simply not a good fit. In most situations, the employee probably left peacefully, although perhaps a bit angry or hurt.

But some workers don't leave quietly and instead come back at their employers with lawsuits, even if there were legally valid reasons for the firing. In those cases, it's often *how* the employer fired the worker and not the job loss itself that triggered the employee's response. However, a little bit of smart strategy can defuse some of the tension in an emotionally fraught situation and potentially head off a lawsuit that could be costly, distracting and stressful, even if you win.

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So how do you keep a legally justifiable termination from backfiring? By handling the termination in a manner that doesn't come across as callous and disrespectful.

One way to accomplish this is through a "fairness-dignity checklist" of factors that should be considered in conducting a termination.

For example, such a checklist would address the amount and type of notice you've given the employee regarding the performance deficiency that's now cost him his job. Was there any previous discipline or counseling, and was it thoughtful and calm? Did you provide notice of the employee's deficiencies in writing? Did you describe the problem, the actions needed to correct it and the potential consequences for failure to do so in a specific manner? Was the employee really given a fair shot to address it? If the answer to any of these questions is "No," you should think hard about whether this is the right time to follow through with the termination.

If it is the right time to proceed, the checklist should address the worker's relationship with the supervisor or key decision-maker who will

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Non-disabled worker can bring action under ADA

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An employer can land in hot water under the Americans with Disabilities Act (ADA) if it discriminates against a worker based on that worker's disability. In other words, an employee can't be fired, denied a promotion or treated negatively because of his or her disability. But did you know that an employer also violates the ADA by mistreating a non-disabled employee whom it *thinks* is disabled?

Take a recent case out of Virginia involving Joseph Cash, who worked as a service director for a car dealership in the town of Lexington. He had worked for the dealership for three years when he took another job in 2013. He returned in 2015, but soon after had to take time off to deal with a bleeding ulcer and chronic anemia. While he was out, he and his wife stayed in touch with a supervisor. When Cash got back, he presented a doctor's note requesting that he be able to work at the dealer's location in Roanoke, which was closer to his home, or to work half days until he was better.

In response, his supervisor immediately replaced him at the Lexington location and cut his salary by a third. The supervisor also complained about Cash's absence several years earlier for hip replacement surgery — an absence that had been covered by the Family and Medical Leave Act.

The dealership allegedly denied Cash's requests to return to the Lexington location and his old salary once his condition improved. He ultimately had to quit because he couldn't make ends meet on the lower salary.

Cash subsequently sued under the ADA. The employer argued that the claim should be thrown out since Cash didn't claim his condition caused a "substantial impairment" of a major life activity and therefore he wasn't actually disabled.

But a federal judge concluded that Cash's communication about his condition to the supervisor and his supervisor's reaction suggested that Cash was "regarded as" disabled by the employer, and an employer who takes an adverse action against an employee based on the perception that the employee is disabled is just as much in violation of the ADA as one who does so based on an actual disability.

As a result, Cash will have the opportunity to convince a jury that he should be compensated for his harm.

Employer couldn't force religious worker to use hand scanner


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Title VII of the federal Civil Rights Act requires employers to make "reasonable accommodations" for their workers' religious beliefs. Employers who disregard this, even when the religious beliefs seem bizarre, run the risk of liability, as a mining company in West Virginia recently learned.

In that case, a coal miner refused to use a new biometric scanner that the employer had installed as an identification device. The miner apparently feared that use of the scanner would give him the "Mark of the Beast," which according to the Book of Revelations would then brand him a follower of the Antichrist. He requested an alternative identification measure as a form of religious accommodation.

The employer denied the request. The employee resigned and sued for religious discrimination under Title VII. A jury found in his favor and a federal appeals court affirmed, rejecting the employer's argument that the scanner neither left any kind of mark nor legitimately conflicted with the employee's religious beliefs.

According to the appellate court, none of this mattered. All that mattered was that the miner's beliefs were sincerely held and, given the fact that the employer had provided alternative identification procedures for employees with hand injuries, the requested accommodation wouldn't have imposed any hardship.

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actually be carrying out the firing. Do they have a good relationship, or at least a neutral one? Do the employee and others in the organization perceive this person as fair? If they don't, might there someone else better equipped to handle the situation?

The checklist should also address how the actual meeting will be handled. For example, can the person running the meeting avoid personal criticisms and loaded terms like "insubordination" and "incompetence?" Can he or she avoid embarrassing the employee through such actions as making her clean out her desk during the workday before being escorted out by security in front of all her co-workers?

Finally, is it possible to minimize hardship to the employee? For instance, do you plan on challenging his or her claim for unemployment benefits? If so, you'd better be able to definitively prove misconduct, which includes showing that any misconduct wasn't justifiable as a result of poor working conditions. Could the employee perhaps be given an opportunity to resign instead of getting fired? Could she receive some salary or benefits as severance?

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It all really boils down to this: If it was you or a loved one being terminated in the manner you have in mind, would you be OK with it?

If you're doing things right, you should be answering most of these questions with a "Yes." In addition to potentially heading off a lawsuit, this approach can promote morale in your workplace, because in the age of social media your other employees will inevitably learn the circumstances of the firing. But this is a complicated area and these tips are just a start, so talk to an employment lawyer to learn more.

Supervisor can be sued individually for violating the FMLA

The Family and Medical Leave Act entitles employees who've been employed for at least 12 months by a company with at least 50 or more employees within a 75-mile radius to take up to three months of unpaid leave during any 12-month period in order to deal with a medical problem, care for a new child or care for a close relative with a health condition. Employers who fail to abide by the FMLA's requirements or who retaliate against a worker for taking FMLA leave risk serious legal liability.

Further, according to a recent case out of Massachusetts any supervisor or manager who violates the FMLA can be sued individually too.

In that case, employee Elliott Eichenholz was on disability leave from security services giant Brinks, Inc., when his supervisor Gordon Campbell issued him a performance improvement plan ("PIP") letter containing a bunch of demands he'd have to meet in the next 90 days to keep his job.

Eichenholz — who claims Campbell had already mistreated him for requesting FMLA leave in the first place — filed an Equal Employment Opportunity Commission (EEOC) intake questionnaire accusing Campbell of violating the FMLA by sending the letter while he was on leave.

When Eichenholz did return to work, Campbell emailed him stating that now that he was back, he'd have to address the demands in the PIP letter.

Eichenholz then gave two weeks' notice, allegedly to ensure he was no longer subjected to a "hostile work environment." He was terminated the next day.

The employee filed an official complaint with the EEOC and after an unsuccessful mediation sued Brink's and Campbell for FMLA retaliation and discrimination in federal court.

Campbell tried to get the case against him dismissed, arguing that the FMLA only allowed "employers" to be sued, and that individual supervisors don't count as "employers."

But a U.S. District Court judge disagreed.

Specifically, the judge pointed out that supervisors can be sued individually under the federal Fair Labor Standards Act (FLSA) for wage-and-hour violations, and that because the FMLA defines "employer" the same way that the FLSA does, supervisors can be sued under the FMLA as well.

So why does this matter to employers? It matters because it makes a claim under the FMLA tougher to defend by giving the employee's lawyer the opportunity to exploit a divided and therefore weakened opponent. This is particularly true if the supervisor has gone on to work for someone else by the time trial rolls around.

Further, if there's a conflict between the supervisor and the employer that requires them to have separate counsel, for strategic reasons the supervisor's attorney is likely to encourage him to turn on the employer.

That's why it's critical to make sure *all* employees and supervisors are trained on the FMLA's requirements. If you just put an FMLA policy in your handbook and call it a day, it could come back to haunt you later.

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Illinois case highlights importance of taking harassment complaints seriously

A recent case from Illinois demonstrates just how critical it is for employers to conduct a legitimate investigation of all complaints of sexual harassment in the workplace.

In that case, Maria Gracia, a female assembly line supervisor at electronics manufacturing services provider Sigma Tron, complained to human resources that her manager had been sending her graphic email photos, calling her late at night, repeatedly asking her on dates and sending her unwanted text messages. She repeatedly turned him down, but one day, after receiving yet another "No," the manager allegedly suspended her for two days, claiming it was for excessive tardiness.


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The HR rep brought Gracia to meet with a company vice president, who, instead of ordering a thorough investigation of the complaints, invited the alleged harasser and retaliator into the meeting to help "sort things out." After hearing both "sides of the story," the HR rep and the VP told Gracia to shake hands with the manager and "work together" with him to "solve their disputes."

Rankled by the experience, Garcia filed a sexual harassment charge against the company with the EEOC. Within a few weeks, the company put itself into hotter water by firing her over a disputed "performance issue."

The case ultimately went to trial and a jury awarded Gracia substantial damages, which were upheld on appeal.

If you're looking for a lesson from this, it's this: Don't try to solve potentially serious complaints by ordering employees to work out their differences and get along better. Conduct an immediate, thorough investigation and, if the investigation reveals potential violations, take strong steps to address them, including disciplinary measures and additional training. After all, if your kid was being bullied at school, you wouldn't be OK with the principal telling him to shake hands with the bully and "get along better." Your employees are entitled to expect the same protection from you in the workplace.