

# 10 Sins of Termination (#1 Time to Prevent Lawsuits)

Here are our 10 sins of termination:

## Sin #1. Terminating Rashly in a Fit of Anger

*Boss: That's the last straw, you're out of here—and I mean now!*

There are at least three things wrong with an on-the-spot termination:

- People don't make good decisions this way.
- There are many factors to be considered before terminating.
- Being disrespectful encourages people to sue.

Bottom line, wait until you talk to HR.

## Sin #2. Terminating in Public, Especially in a Humiliating Way

*Boss: [in front of many employees] Johnny, you're a little too slow and a little too lazy to stay in this job. I'm making an example of you—you're fired.*

Public humiliation is a lawsuit magnet. There's no good reason to treat people this way, and a host of reasons to avoid it. Another similar problem is the “perp walk,” that is, very publicly marching someone to the door carrying a box of belongings with a security escort.

## Sin #3. Terminating Without Checking with HR

*Boss: HR's going to take forever on this—I want this nut job gone today.*

*Boss: Your last day is today—I'll talk to HR to manage the administrative details.*

HR needs to be able to evaluate a number of factors before there is any termination:

- **Consistency.** Have other similarly-situated employees been fired? If not, there's a lawsuit brewing.
- **Appropriateness.** Is this a significant enough infraction that termination is reasonable?
- **Contract.** Is there a contract or agreement that terminating would violate? Or maybe an implied contract of good faith and fair dealing?
- **Special circumstance.** Perhaps the whole department is going to be let go, or maybe there's some situation of which the manager is not aware, for example, a complaint filed.

## Sin #4. Termination that Looks Like Retaliation

*Boss: I don't care if you just filed a suit, you're fired.*

*Boss: You think you can complain about me to management and keep this job?*

*Boss: Well, you are fired for your performance, and I'll just add that you're not much of a team player, having complained to my boss and then gone to the government agencies.*

Whenever a termination closely follows a protected act, there will be an obvious suggestion of retaliation. That's a tough one to defend, unless there is very strong documentation. It's best to do a thorough evaluation in these situations. Frustrating as it is, people who file complaints do have, at least to some extent, an “umbrella of protection” over them.



What's "closely follows"? Of course, it's a grey area, but most experts agree that "weeks" is close and "months" not so close. However, if there is any other evidence linking the two acts, all bets are off, no matter how great the time difference.

### **Sin #5. Offering a False Basis for a Termination**

*Boss: I'm very sorry to tell you this, John, but we have severe budget cuts and I have to let you go. [Thinking: The budget cuts aren't all that severe, but I don't want to tell him his performance was poor—it's bad enough he gets fired.]*

Managers often want to soften the blow of a termination by blaming it on "budget cuts," or "department reorganizations," or "the company is going in a different direction."

The problem comes when you rehire, and the former employee finds out about it. He or she will assume that since the given reason was false, the termination was because of discrimination or retaliation. The jury needs to ponder, Was the manager lying then, or is the manager lying now? Either way, the manager's a liar.

### **Sin #6. Terminating Without a Reason on the Basis of "At-Will"**

*Boss: I don't have to give you any reason why I'm firing you--you're "at will."*

It's true that unless there's a formal contract of some kind, most employees are employees at will, and that means they can be terminated at any time for any reason or for no reason. And the flip side is that they can leave at any time.

But here's a news flash—people don't like to be fired, and they're not going to blame themselves. They typically have no reason to think their performance is subpar; so the reason must be because of their protected status—that is, their race, sex, age, or disability. Now your company is in trouble; you have to begin your defense by proving that, yes, your managers are so stupid that they fire employees for no reason. And then you have to explain why "no reason" is more likely than the illegal reason. It's not going to go well.

### **Sin #7. Terminating Without Proper Documentation**

*Boss: Documentation, schmockumentation; this guy's a poor performer and I want him gone today.*

The trouble with this scenario—terminating with no backup evidence of poor performance—is that there is usually documentation that shows *good* performance. Typically, since the person hasn't been terminated before, his or her performance reviews read "good" or "satisfactory."

Now, this is like the "offering a false reason" problem—you are essentially saying to the jury, "Trust me when I say that I lied on the performance reviews."

### **Sin #8. Not giving the employee a chance to explain**

*Boss: You're fired—that's the third time you're late.*

*Employee: I know I was late, but ...*

*Boss [interrupting]: It doesn't matter why; the time for excuses is gone—you're out of here*

REPLAY

*Boss: You're fired—that's the third time you're late.*

*Employee: I know I was late, but I just found out my 4-year-old daughter has bone cancer and I had to ...*

True, there's no legal requirement to give employees a chance to explain, but juries will view it as a basic element of fairness. In a situation like the one in the scenario, the jury's sympathies are not going to be with the manager.

Here's another scenario. A young woman transferred into a new position at her company. She was late the first few mornings and the new boss wanted to fire her. HR suggested he talk to the employee. Come to find out, she was actually coming in an hour early to train her replacement at her old job and then rushing to the new one.

### **Sin #9. Terminating on Your Own**

*Boss: I don't need to check with anyone—it's a termination offense and that's it.*

It's generally better to have a group involved in deciding on a termination, for a number of reasons:

- There may be other people on the team (like the HR manager) in a better position to judge the appropriateness of the termination.
- A group decision shows that careful consideration was given to the matter.
- Since litigation can go on for years, and since managers can come and go, it's in the organization's best interest to have several managers familiar with the case.

### **Sin #10. Terminating Without Preparation**

*Boss: I don't care about checklists and benefits, I want this person gone, now.*

*Boss: [floundering] Well, I guess we need to talk ... ah ... well, it's like this ... ah ... you see ... sometimes we wish ...ah...*

Let's face it, terminations prompt many lawsuits, and experience suggests that the decision of whether to sue is often influenced by how the person was treated during the termination. So take the time to be prepared. Know what you are going to say. This enables whoever is handling the termination to better control the conversation and keep it from becoming too long, too emotional, or unclear in delivery and message. Also determine who is going to do what, what documents need to be available, what procedures need to be followed, what references will be given, final pay, and so on.