The Right Way to Fire Employees
The Law of Wrongful Termination

What is Fair?

What is fair? The best definition comes from Judge Conrad Rushing, who said managers must insure that "like cases be treated alike." In other words, be consistent and have a legitimate business reason for everything you do.

"Treat Employees Fairly" is the most important rule for preventing wrongful termination or discharge lawsuits.

It wasn't always this way. The idea that an employer must treat employees fairly wasn't adopted by the courts until the 1980's. Since then, courts or legislatures in all 50 states and the District of Columbia have adopted some form of wrongful termination. There is no federal "wrongful termination law" as such. Rather, employers must be aware of what is considered wrongful termination in each state in which they do business.

Despite the rise of wrongful termination cases in recent years, the basic law still is that most employees are “terminable at will.” The idea of at-will employment comes from old England. In those days, the terms "employer" and "employee" weren't used. Instead, it was "master" and "servant."

A master can be completely arbitrary. He can fire a servant on the slightest whim. Servants don't have employment rights.

The master-servant tradition was adopted by the U. S. colonies when they first codified their laws. It has continued until today. But instead of using the word "servant," most laws declare employees to be "at will."

An at-will employee can be terminated at any time, for any reason, or for no reason at all.

Exceptions to the At-Will Rule

Throughout history, there has always been one exception to the at-will rule. If the employee and employer agree employment will last for a specific period of time, it is not at-will. The employee only can be fired at the end of the contract, unless the employer has "good cause" for termination.

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For example, football coaches typically are hired for one, two or more years. They can't be fired before their contracts are up, unless the team has good cause.

Having good cause to terminate an employee is the same as having a legitimate business reason. For example, poor job performance, chronic tardiness and abuse of sick leave all are examples of misconduct that legally justify firing an employee. See box for more examples.

Good Cause

Here are examples of good cause for termination.
This list is not exhaustive

Unsatisfactory job performance.
Refusing a direct order (insubordination).
Use or possession of alcohol or drugs at work.
Violence towards others at work.
Theft from employees or the company.
Sexual, racial or other harassment.
Possession of weapons on company property.
Not following safety procedures.

Of course, coaches are fired all the time in the middle of losing seasons. But losing usually is not legal good cause for termination, depending on how the contract is written. In those cases, the team still must pay out the contract, keeping the coach on salary until the time is up.

The same is true if your company hires a new CEO or other key player and promises a minimum term of employment. They can be fired without legal good cause ("differences in philosophy"), but you have to pay them off. This is the basis for so-called "golden parachute" or "golden handshake" agreements.

Most employees are not hired for a specific period of time. Usually you don't tell new employees they are being hired for one or two years. You hire them to work indefinitely.

Since most employees are hired for an indefinite period, they are considered at-will under the *statutes* of most states. But in recent years, the *courts* have interpreted these at-will statutes narrowly. The courts have expanded employee rights so that today, there are three new exceptions to the at-will rule.

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These exceptions can be stated as three basic rules for preventing lawsuits:

Keep Your Promises
Treat Employees Fairly
Respect Whistleblowers

These three rules should be followed whenever you terminate an employee. Even if you don't think you're subject to wrongful termination law, you don't want to be the landmark case in your state that says you are.

In most states, these three rules apply only when employees are terminated. As long as you don't fire, lay off or force an employee to quit, technically you don't have to follow these rules. However, in 1995, the California Supreme Court ruled that these concepts may apply to any adverse action, such as demoting, giving poor performance appraisals, transferring or denying training opportunities. Since then, at least one other state has followed this approach. Since California has led the country in the area of wrongful termination cases, it is likely that more and more states will follow their lead. Thus, it is a good idea of follow these rules whenever you take any adverse action.

Values – Policy – Law

Not every state has adopted every form of wrongful termination law. However, many employers by policy prohibit individual managers from taking adverse action at will. These policies not only prevent lawsuits, but also help create respectful workplaces that attract and retain good people.

Rule 1: Keep Your Promises

The very fact that employees work for you means they have contracts with the company. The contracts say they will show up and work. In exchange, the company pays them money. That is the basic employment contract.

But the courts have said that many companies, by their words and actions, have expanded their contracts with their employees. A contract is a promise. If you or your company make promises to your employees, you have to keep those promises.

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There are three kinds of promises or contracts found by courts in wrongful termination cases: written, oral and implied.

It's very easy for courts to enforce written contracts that are entitled, "Employment Agreement." But since few employees have written contracts, the legal battles have been fought over other types of documents.

Employee Handbooks

One of a company's most important legal documents is its employee handbook. Employee handbooks are contracts in at about 40 states. Courts have said employees have a reasonable expectation that if they work at a company with policies, the company is going to follow those policies. So you want to follow them.

Some disciplinary policies require that before being terminated, an employee first must receive three warnings, perhaps first an oral warning, next a written, and then a final written warning. This is called "progressive discipline," because it requires the manager to progress through each disciplinary step.

If the handbook says before being terminated employees "will," "must" or "shall" be given three warnings, then legally, three warnings must be given. If, instead, it says warnings "may" or "could" be given, then you don't necessarily have to follow the policy step by step. This is preferable. You don't want to limit your options. Managers should have the flexibility to skip some of the steps, depending upon the circumstances.

Of course, with flexibility comes responsibility. You still must treat like cases alike.

Read your company's policies carefully. Follow all mandatory procedures.

You Can Change the Rules

Can the company change the handbook? Specifically, can the employment status of employees be changed?

Let's say your current handbook implies that cause is needed in order to terminate employees. Your current employees believe they cannot be fired arbitrarily.

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Now you understand the legal implications of the handbook. You decide to change it. You are going to declare all your employees at-will.

New employees will be hired under the new rules. But current employees were hired under the old rules. Can you change the rules in mid-stream, without the employees' consent?

It depends.

In some instances, a policy change simply can be announced.

Before changing a policy concerning termination or at-will status, you should check with a lawyer. In some cases, a one-time payment ("independent consideration") must be made.

> ***Practical pointers:*** If you institute a new employee handbook, and current employees refuse to sign it, do not terminate their employment. Instead, send them a memo: "Your signature is not necessary for the terms of the handbook to be effective. You are expected to abide by all the rules and regulations."
>
> Be sure to highlight any changes in your handbook so employees can't later claim they didn't know about the new rules.

Offer Letters

Offer letters also have been held to be written contracts. The same kinds of statements made in the introductory paragraphs of employee handbooks also sometimes are found in offer letters, with the same effect.

Some experts say that stating the salary to be paid as an annual figure ("the job pays $50,000 per year") implies the employee will be employed for a minimum of one year. However, only one or two cases actually have held that. Most cases hold that annual salary does not create an implied contract. But just to be on the safe side, most experts suggest quoting the salary on a bi-weekly basis. If new employees can't figure out the annual amount, you don't want them anyway.

The offer letter should include a description of benefits. If you are an at-will employer, that should be stated. Offer letters should be signed by employees and kept in their personnel files.

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Oral Promises Are Enforceable

Oral promises made to employees also are enforceable. You may know the saying, reminiscent of Yogi Berra, "Oral contracts aren't worth the paper they're written on." Not in the employment area. Oral contracts are worth a lot.

As a manager, whenever you talk to an applicant or employee, you are a representative of the company. If you make promises, the company is making promises. The company can be sued for not keeping those promises, even if you're no longer employed there.

Don't make promises like these if you can't keep them:

> "Don't worry, you won't be laid off."
> "Next time there's an opening, you will get the promotion."
> "After a year, you will get a raise."

These comments imply employees will have job security, raises and promotions. Maybe they will. But you don't want to be legally bound to it.

Making promises it didn't keep cost a Connecticut company $850,000 in a 2003 decision from that state's supreme court. The employee was told by an executive vice president that if her husband went to work for a competitor "this was not going to be a problem and that [she] was a highly valued employee and there was nothing to worry about." Guess what? When her husband went to work for a competitor the next year, she was fired. The supreme court had no problem finding that the EVP's statements were sufficiently clear and definite to constitute a promise.

Long-term Employees

You don't have an employee handbook. You haven't made any promises. A court still could imply that you must have good cause to fire an employee if the employee has worked at the company for many years.

The courts have said if employees work for a company a long time, they have a reasonable expectation they will continue to work there as long as they are performing well. These courts have found implied contracts as a result of the "longevity" of the employees.

But, it's not just how many years an employee works at the company. It's what the company does during those years. If the company only fires

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people for good cause, other employees can expect that they, too, will only be fired for legitimate business reasons.

If you can't prove you are an at-will employer, you must be able to prove you had good cause for firing the employee.

Rule 2: Treat Employees Fairly

The second rule for preventing wrongful termination lawsuits is Treat Employees Fairly.

The first rule, Keep Your Promises, was based on contract law.

The second rule is based in part on contracts, and in part on tort (personal injury) law.

Historically, just as the courts have implied contracts between employees and companies, they also have implied sections of those contracts.

The courts have said that every contract, including the basic employment contract, contains an implied covenant. A covenant is simply one section of a contract. This section requires the employer to treat the employee fairly. It is called the covenant of good faith and fair dealing.

Once you accept the idea that every employee has a contract, it makes sense to require employers to treat employees fairly. In other contexts, the courts have said that if the parties to a contract are in an unequal bargaining position, the weaker party should be protected from the stronger one.

In the employment area, employees generally are the weaker parties. They have very little say about the amount of pay they receive, the kinds of work they do and their working conditions.

In the past, it was thought that if employees didn't like the working conditions, they could leave to work elsewhere. But in recent years, the courts have recognized that requiring employees to leave creates a hardship for them, particularly as they get older. So gradually the courts have come to the conclusion that employers should treat employees fairly.

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Ideal managers help employees achieve success. They treat the employment relationship as an ongoing process of constant communication, accurate feedback and gentle correction. They give positive reinforcement. They take the time to be good coaches.

Fortunately for those of us humans who become managers, the law does not require us to be ideal. Although there is a lot of language in their opinions about fairness, the courts actually have required fairness only in a few limited situations.

There are four areas where courts have required managers to treat employees fairly:

> evaluating performance,
> investigating complaints,
> disciplining for misconduct, and
> terminating employment.

Evaluating Performance

Performance appraisals are critical documents in every employment lawsuit. They can make or break your case.

Appraisals should tell the story of the employee's life with the company. They should be given regularly to create a complete picture of the employee's job history.

> ***Practical pointers:*** At a minimum, give appraisals after three months, six months, and then yearly on the anniversary of the hire date.

Whether representing employers or employees, lawyers look at the appraisals and ask questions. Do the appraisals show the employee was a good performer for years? Then why the sudden termination? It looks suspect. But if the appraisals show two years of declining performance, the termination looks legitimate.

Sometimes appraisals show years of substandard performance. If the employee continued to receive pay increases, it appears that you condoned it. It will be difficult for you to justify termination for poor performance if you've put up with it for long. If the employee was so bad, why didn't you terminate before?

Appraisals should answer these questions, or better still, never raise them.

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Preparing for Appraisals: Before you do this year's appraisal, look at last year's. If the employee has shown improvement over the year, note that. If performance has deteriorated, say so. If the performance appraisal this year is significantly different from last year's, say why.

If another manager wrote the last performance appraisal, your ratings may be very different. Employees who have worked under the same manager for years learn to do their jobs in a certain manner. When new managers come in, or when current managers take training courses, they often want to change old ways of doing things.

Just note that on the form itself. "Your last manager rated you excellent even though you were 85% of quota. I rate employees excellent only if they reach 125% of quota." As long as you have a legitimate business reason, you can change performance standards.

You also can change employees' job responsibilities. You must inform them clearly of the new job requirements, either in the performance appraisal or other written memo. You must give them time to achieve the new goals. As long as the assignments are achievable by a reasonable person, you can implement your changes--even if your particular employees can't achieve them.

Appraisal Do's and Don'ts: Appraise performance accurately! This seems like common sense, but it's not.

> ***Practical pointers:*** When you write appraisals, give specific, legitimate reasons for every criticism.
>
> Appraisals sometimes are conclusory, rating on attributes like attitude, leadership and initiative. These are admirable characteristics and can be rated. But you must give the facts to back up your conclusions in these categories.
>
> Find the good, and praise it.
>
> Avoid the "halo effect." This is where you rate highly employees who you like, and fail to see their weaknesses. The opposite of that -- the "devil effect" -- means you rate employees lower than deserved in all areas because of poor performance in one, or because you don't like them.

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Don't emphasize areas that aren't legitimate job requirements. For example, leadership skills should be recognized no matter who has them. But non-managers shouldn't be penalized for not having leadership ability.

Employees should never be rated "must improve" in the same category year after year. If they're that bad, get rid of them. Of course, if there are major problems, you shouldn't wait until performance appraisal time. You should give warnings, and then terminate.

Appraisal Forms Should Be Fair

For appraisals to be accurate, the form itself must be fair. There are companies with 6-page forms, manuals of definitions, and lists of codes. To complete the form is a major expenditure of time. Managers dread doing it, so when they do, they make mistakes.

A good performance appraisal documents your management efforts for the employee over the year. It summarizes the results of the past year, and plans for the next.

If your company's appraisal form has a numerical rating, you should rate most employees in the middle of the scale. The middle is average. That's where most people should be by definition. It's more accurate.

If the numerical rating scale is expressed in words, look closely at the words used. They can skew results.

If an overall rating is given, you should not just average the scores of the different categories. You should weight the relative importance of the various categories to different jobs. For example, Initiative is very important for a manager, whereas good Work Habits are almost assumed. The relative importance of these categories might be the opposite for an assembler.

Employee Self-Appraisal

Some managers like to have employees fill out the appraisal themselves, to see their self-evaluation. Considering the employee's point of view is a good way to show you treat employees fairly. It also is useful in deciding how to rate the employee.

If you do accept employee self-appraisals, keep them with yours in the personnel file.

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This does not mean you have to accept the employee's version of the facts. If the employee is accurate, acknowledge that. But don't back down from a poor review if one is warranted.

In an article written for Women Organized for Employment, the author advises employees:

"Remember that your boss may be reluctant to fill out your review because he may not be the type to criticize another. Firms do not generally train their managers in how to evaluate an employee. You can turn this to your advantage by taking the initiative and covering yourself in advance. Pull out of your boss any praise for the work you have done."

Don't allow this to happen to you.

Investigating Complaints

After performance appraisals, the second area where courts have required fairness is in investigating complaints against employees. These may be complaints brought by one employee against another, or your own complaints about the employee's behavior or performance.

Whenever you first learn of a problem with an employee, you hear only one piece of the story. You need more information before you can take action. Even if you think you saw everything, something could have happened before you got there that would put the situation in an entirely different light.

As an opposing lawyer once said, "No matter how thin the pancake, there are always two sides."

You need to do an investigation to learn all of the facts. Most importantly, you need to hear the accused employee's side of the story.

Although not all employees legally have due process rights, as a matter of fairness they should be told of the charges against them, and be allowed to respond to those charges.

However, they should not be allowed to confront their accusers. In fact, it's usually best to keep the name of the person who complained confidential, if possible.

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How do you keep the complainant's name confidential if you are required to tell the accused of the charges? Approach the investigation interview with the accused like a conversation. Don't begin with an accusation, like "Chris complained that you . . ." Not only does this reveal the name of the person who complained, it also will put the accused on the defensive, and is not likely to result in you obtaining much useful information.

Instead, start off with a general statement like, "I heard there was a problem yesterday. What happened?" You could have heard about it from a witness. Even if no one witnessed the incident, you could have heard about it from someone who heard about it from the complaining person.

If the accused demands to know how you heard about it, you can say, "I can't reveal that information." If the accused asks, "What did you hear," you can respond, "I'd rather hear it from you."

If a general statement doesn't work, you can get slightly more specific, "I heard you and Chris had words. Tell me what happened." If the accused still denies, then get very specific, "I heard you called Chris a . . .Is that true?"

In conducting an investigation, you must be scrupulously fair. Anything you say or do that appears to be biased or prejudiced can be used against you later.

Generally, an investigation should include not only talking to the accused, but also talking to witnesses, reviewing documents and going back to the complaining employee for more information.

Investigations Can Be Wrong

The benefit of conducting an investigation is that it may protect you from a wrongful termination lawsuit, even if the results of your investigation are wrong. An influential opinion by the Oregon Supreme Court held that an investigation could protect the company.

In that case, two women were accused of making violent threats against a co-worker.

An investigation was conducted. Witnesses were questioned. Then, the accused employees were told of the charges against them. The employees gave their side of the story. They denied making threats. After

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listening to them, the company decided to believe the other employees, and fired the two women.

They sued for wrongful termination. They said they didn't make threats, and they could prove it. But the court said their proof was irrelevant.

The court ruled that even assuming the investigation turned up the wrong result, the company still could not be sued for wrongful termination. As long as the company conducted an investigation, it acted fairly. It's irrelevant they came to the wrong conclusion.

In most states, your investigation doesn't have to be right, just fair.

Counseling and Discipline

The third area where fairness is required is in counseling and disciplining before firing.

Employees who are poor performers should never be surprised about being fired. They should know they're going to be fired, and they should know why, long in advance.

The law assumes if you warn employees, they will improve. So you should counsel them before firing them. You should give them the opportunity to improve.

Avoiding lawsuits is only one reason you don't want to fire employees, unless it is absolutely necessary. It's expensive to hire a new employee. Do you want to go through the process of writing up the job description, buying an ad, receiving a bunch of resumes, screening them, interviewing people and training a new person? Or would you rather have one counseling session with your problem employee? If the employee improves, you don't have a problem.

Although everyone agrees employees should be counseled and disciplined, they disagree about how to do it. The continuum runs from the gentle approach to kick-em-in-the-pants.

Al Neuharth, founder of USA Today, says in his *Confessions of an SOB*, "Too often CEOs act more like politicians than like bosses. Employees do not want to be wooed. They don't want soft soap. They like plain talk. And as Gannett CEO I delivered plenty of it--in writing. I called my memos on peach-colored paper Love Letters whether they were tender or tough.

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. . . Sure, I sometimes used tough language and I got pretty personal. . . .I wasn't trying to win a popularity contest. What I wanted was results."

Mary Kay Ash, founder of Mary Kay Cosmetics, has a different approach. In *Mary Kay on People Management*, she says, "Never giving criticism without praise is a strict rule for me. No matter what you are criticizing, you must find something good to say--both before and after. This is what's known as the 'sandwich technique.' Criticize the act, not the person. And try to praise in the beginning and then again after discussing the problem. Also strive to end on a friendly note. By handling the problem this way, you don't subject people to harsh criticism or provoke anger."

Legally, both of these approaches are fine. Most managers will probably use something between these two extremes, and that's fine, too. As Andy Grove, Intel CEO, says in his book, be straightforward and direct.

According to personnel expert George Tansill, one of the biggest mistakes a manager can make is waiting to warn. We silently let little things slide by until we're so mad, we want to fire the employee.

Don't wait. A quick verbal counseling, with a note in your documentation, may solve the problem. If not, you have prepared the record for firing the employee.

If you have a problem employee, don't try to avoid a one-on-one counseling session by making a general announcement at a meeting. It's ineffective. You don't get the employee's feedback. And if everyone knows you are really talking to that one person, the employee could claim public humiliation because you singled him or her out for discipline in front of everyone else.

Almost more important than what you say, is how you treat employees in their counseling sessions. Listen to them. Ask questions. Find out their reactions.

When people feel listened to, they feel they've been treated fairly.

Listening was mentioned in the Investigation section, and it will come up again later. Listening is one of the most important skills a manager can have.

The Effective Listening Checklist below is a brief overview of essential listening skills.

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Effective Listening Checklist

- Don't Use Roadblocks that stop people from talking:

  ADVICE: "You should speak to your boss about it."
  WHY QUESTIONS: "Why did you do that?"
  REASSURE: "You'll feel better about it tomorrow."
  CRITICIZE: "If you hadn't procrastinated,…"
  INTERRUPT: "That's nothing. Listen to this…"
  RELATED STORIES: "I had the same experience last year."

- Ask "open-ended" questions to get the whole story.

  "What happened next?"
  "What was your reaction?"

- Summarize employees' statements so they know you've heard them.

  "So you believe that…?"
  "What you are saying is…"

- Ask "what next" questions so they discover their own answers:

  "What have you done to resolve the problem?"
  "What else do you think could be done?"
  "What have others tried in similar situations?"

How to Write a Disciplinary Memo

Once you've verbally warned an employee, prepare written documentation. If this is the first mention to the employee ("heads up!") your documentation might consist of a few words jotted down in your calendar.

An "oral warning" is more formal. You should at least write a memo to file. Some companies require "documented oral warnings" or "written orals." Calling them "oral" is just a throwback to the old days, before documentation was necessary.

Written warnings typically are given as the second and third steps before termination.

You should cover the following areas:

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Date: All of your documentation should be dated, particularly warning forms. And don't forget the year!

Policy: State what policy has been violated. Even if there is no written policy, you can write, "It is a violation of company policy to . . ."

Problem Behavior: This is where you list the objective, verifiable facts that created the problem. This should be specific and narrowly written to put the employee on notice of the exact problem.

Desired Outcome: Whereas the *Problem Behavior* section is written narrowly, *Desired Outcome* should be written both narrowly and expansively. It should include not only the behavior that led to the warning, but any other behavior that's related. It should give both what not to do, and what to do.

Intended Improvement - Employee Comments: This is where employees state what they'll do to improve. This might include taking classes, obtaining counseling, or simply promising to change. This section is recommended to get the employee to buy into the need for change.

Timetable: This is the period of time the employee is given to show improvement. You should use a timetable only in cases of poor performance, not misconduct. "Misconduct" refers to breaking company rules, while "poor performance" is job related.

When employees don't perform, they must be given an opportunity to improve. The amount of time they should get is a "reasonable time." What is reasonable depends on how long the employee has worked at the company, how long poor performance has been tolerated, the kinds of mistakes being made and how quickly a reasonable person could be expected to improve.

In contrast, in the case of misconduct, you want "immediate and sustained improvement." Don't give a timetable in misconduct cases.

It also is important not to have a timetable in poor attendance and tardiness cases. It is amazing how some employees are able to achieve perfect attendance during whatever period of time they're given, and the day after they are off the timetable, they call in sick.

Consequences: No one should be surprised about being terminated. If an employee is surprised, you haven't done a good job of warning. To prevent surprise, you should tell the employee about the consequences of not improving. The consequences are the next level of discipline: written

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warning, final warning, disciplinary probation, suspension or immediate termination.

It's only fair to warn of the consequences, but at the same time, you don't want to limit your options. Describe consequences this way: "If there is no improvement I will take further disciplinary action, up to and including immediate termination."

Employee Signature: Many managers find it is more difficult to get the employee to sign the form than anything else in the process.

You want employees to sign it so you can prove they saw it. If they refuse to sign, you can ask them to write "I disagree" or "I refuse to sign." About half the time, they'll be glad to write and sign that.

If they still refuse to sign, bring in a personnel representative or another manager to witness. They should say to the employee, "Have you read this warning?" When the employee says, "Yes," the manager should write on the warning form, "Employee has read but refuses to sign," and sign off on it.

What if you don't have a company policy requiring warnings? A court still may imply that it is only fair for you to give warnings before terminating. Not warning employees could be seen as trying to set them up to be fired, particularly if they're fired for violating an unwritten rule.

Termination

The final area where courts have required fairness is in actually terminating employees.

You must be consistent when it comes to disciplining and firing employees. You must give the same level of discipline for the same type of misconduct. You can't fire one employee for poor attendance if other employees with worse attendance aren't dismissed.

Another example of unfairness is where the supervisor encourages employees to break a rule. The supervisor can't turn around and fire them for that.

Terminating employees fairly means terminating them only for legitimate business reasons. You should not fire employees for what they do or say away from work, unless it affects their performance or their co-workers.

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For example, a salesman was owed commissions by his employer. He kept on the job and performed well. But he filed a lawsuit against the company. As a result, he was terminated. He sued for wrongful termination and won. The court said any time an employee is terminated for a reason not directly related to the job, that is a factor extraneous (or outside) the employment contract. Firing for a reason outside the contract is not fair and it's a wrongful termination.

Tell the truth about termination

If you have written accurate performance appraisals, counseled to improve, investigated fairly and given discipline, on the fateful day it should be obvious to the employee that termination is inevitable, and why. You will say, "As you know, you were told to improve. You haven't improved, so you are being terminated today."

As easy and obvious as that approach is, some managers choke when it comes to looking employees in the eyes and firing them. Some managers want to let employees (and themselves) down easy. Or maybe the manager legitimately is concerned about the employee's welfare. The manager knows if the employee is fired, he or she may not be eligible for unemployment benefits from the state.

In those situations, it's tempting for managers to give employees false reasons, rather than the real reasons for their terminations. For example, the manager says, "We've decided to reorganize the department, and your job was eliminated." In fact, the employee is being dismissed for poor performance.

This can backfire. If you tell employees they are being laid off, and they later discover they were replaced, they begin to wonder what other lies you told them. They are more likely to go to an attorney if they believe you lied to them.

Courts have held it isn't fair to the employee to give an untrue reason for termination. It is particularly unfair if, as a result, the employee loses out on the protections of the employee handbook. If your company has a mandatory progressive discipline program, you must follow it to dismiss a poor performer. If instead of following the policy you concoct a layoff, you have violated the employee's contract. Worse, you have acted as if there was no contract.

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How to Terminate

Harvey Mackay, author of *Swim With the Sharks Without Being Eaten Alive*, says, "It's not the people you fire who make your life miserable, it's the people you don't fire." I agree.

In an interview, Mackay admitted that firing "sometimes is the toughest thing I have to do. I know it's right and that I should do it, but I still have a problem."

Like any other management skill, it takes practice to perfect the art of terminating employees.

If you have followed progressive discipline, it will be relatively easy to tell the employee, "I've decided to let you go." But there are a number of other items you should consider. Although these may not be required by a court of law in all instances, following these steps help you look more fair.

First, decide if the employee can remain for a transition period. Letting employees stay on for a few weeks, and allowing them to look for other jobs while training their replacements, is a very humane approach. It's usually the least disruptive. But sometimes you can't afford to do it.

Always alert Security before firing. An officer usually needn't be in the room, or even in the building. But someone on call nearby (even a fellow manager) can prevent disaster.

Once you decide to tell employees they're fired, do it quickly. It shouldn't take more than 10 minutes. Do it privately, in their office or in a conference room, not your office. This allows you to cut off the meeting even if they don't want to.

If you do give the employee some advance notice, you may want to give an exit interview on the actual last day of work. Although the personnel department gives a separate exit interview, you may learn some useful information from departing employees.

Even if you don't learn anything useful, it gives employees the chance to vent their feelings of hostility against you. After they've let off some steam, they may feel better and be less likely to seek other ways of getting back at you.

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When should you tell employees they're fired? Most managers do it on Friday afternoons, having put off the unpleasant task all week. This is the worst day for employees to be fired. It gives them an entire weekend to nurture revenge fantasies, with no opportunity to do something constructive until Monday.

Instead, do it first thing the morning their final warning period expires. The employee can immediately go out, get a newspaper, prepare a resume and start a new job search.

And keep the reasons for termination confidential. Only other managers, supervisors and employees who have a legitimate need to know should be told. In a 2002 case in Florida, a store manager told other employees that a 20-year worker had been fired for dishonesty. (He was on disability leave from his first job, but continued to work at a light-duty second job.) The terminated worker sued for defamation and won $200,000. At trial, the company was unable to bear its burden of proving he had been dishonest, which is different from proving they had a legitimate business reason for firing him.

You should never fire an employee on the spot, in a fit of anger. At most, you should immediately suspend them, and order them to leave the premises. Think about it overnight. Do an investigation. Hear the employee's side. If after all that, you decide to fire, you can turn the suspension into a termination.

Another lesson in how <u>not</u> to terminate an employee came from Colorado in 2002. A branch manager was out on sick leave for a heart condition when he was fired, after 22 years on the job. Now that's not illegal by itself. But what this company did was to send two supervisors to the house where the manager was resting in bed, where they walked in uninvited, went into the spare bedroom, and announced they had his termination papers, which he needed to initial. They never even asked him how he was feeling or if he was fit to discuss work matters. The VP who had ordered the firing told the supervisors:" I don't give a shit if [he] is on his deathbed, if I tell you to fire him, that's what you will do, or I'll get somebody who will." The manager tried to commit suicide that night. Are you surprised that a jury awarded him punitive damages?

If you can, help employees get new jobs. This keeps down their potential damages. Attorneys generally won't take cases if the actual amount of pay lost by employees is minimal. Even if you terminate employees wrongfully, if they get jobs the next day, they don't have any actual or out-of-pocket losses. The case will be less attractive to a plaintiff's attorney.

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Consider taking these steps:

--allow employees to use the office, phone and secretarial assistance for a few weeks so they appear to be currently employed.
--refuse to discuss them on the phone with potential employers, so you don't accidentally reveal negative information.
--pay the final paycheck, accrued vacation and commission checks when due.
--provide salary continuation or severance pay while they are unemployed.
--don't contest their applications for unemployment benefits and
--offer outplacement services.

Yes, some of these are expensive. But they're cheaper than hiring a lawyer.

Consider Alternatives to Termination

A wrongful termination lawsuit can be avoided almost completely if you don't fire the employee at all. Consider these alternatives to terminating employees to avoid lawsuits:

--restructure employees' jobs.
--change their reporting relationships.
--move their work stations.
--transfer within the company.
--call an executive recruiter to find a position for them outside the company.
--give them time off to look for work.
--give them counseling or therapy from an outside professional.
--offer them leaves of absence.
--place them on disability leave.
--agree with them that they will leave at a later date.

Rule 3: Respect Whistle Blowers

The third type of wrongful termination lawsuit protects employees who complain about unlawful actions by their employers. Employees who "blow the whistle" are protected because they are attempting to uphold a public policy of the state. These cases can be expensive and disruptive, as demonstrated by a 2003 settlement with a Los Alamos National Laboratory investigator who had blown the whistle on mismanagement and alleged fraud. No only was the investigator paid $930,000 to settle

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his retaliation claim, but there was a Congressional inquiry and, after Cabinet-level review, 18 top lab managers were fired, reassigned or quit.

For example, you can't fire an employee who reports to the State Water Quality Board that your company is dumping toxic wastes in the river. The purpose of a clean water board is to protect the public. Reporting a violation is a public duty. It would be ridiculous for the state to encourage employees to report violations, but then allow them to get fired as a result.

Another example: employees who believe they should be paid overtime, when you think they're exempt from the overtime laws. If they complain to the Labor Department, you can't fire them in retaliation.

Even if the employee only complains to you and not to a government agency, the employee still may be protected from being fired. In one case, a respiratory therapist refused to work with another who, she said, was a danger to the patients. She was fired. She sued and won. The court said the law requires medical workers to give good patient care. She was allowed to do anything to convince the employer that she was serious about preventing the dangerous co-worker from working.

A new trend is lawsuits against government contractors for fraud. When employees discover their employers are defrauding the government, they can file "qui tam" actions. Qui tam is Latin for "he who." These are the first two words of a phrase that basically means, "He who digs up the dirt gets the money."

Employees who file qui tam actions are protected from retaliation, discrimination and wrongful termination. They also are entitled to a finder's fee because they dug up the fraud. This fee can range from 10% to 30% of the defrauded amount. Since some of the fraud involves billions of dollars, the employees in these cases stand to make hundreds of millions.

A potential pitfall managers should be aware of is that the National Labor Relations Board, the federal agency that regulates unionized workplaces, also has jurisdiction over non-union employers. Under Section 7 of the National Labor Relations Act, all employees, whether unionized or not:

> "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,

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> and shall also have the right to refrain from any or all such activities…"(emphasis added)

For instance, non-union workers have the right to strike. In a 2007 case, a group of non-union employees met in the warehouse, discussed their unhappiness over not getting a raise, perceived favoritism, and racial prejudice, and walked out. They waited in the parking lot for the supervisor to come out and speak with them, but the supervisor fired them all instead. The NLRB found that the workers had been engaged in protected "concerted activity", and ordered their reinstatement with full back pay.

Employees also engage in protected concerted activity under the NLRA when they present complaints or grievances about wages, benefits and working conditions. In a 2005 federal appeals case, a senior financial consultant was fired after he had discussed issues about the company's commission structure with his colleagues, and then raised the group's concerns with management. The court found that he had been engaged in protected activity on behalf of the group, and rejected the employer's defense that he was a "troublemaker" and not a "team player" because of his criticism of management. He too was reinstated with back pay.

See box for more examples of protected whistleblowing.

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Protected Whistleblowing

Employees in many states can't be fired for:

- reporting government fraud
- questioning the safety of consumer goods
- complaining about unsafe working conditions
- reporting tax code violations of the employer
- refusing to take a lie detector test (except in security positions)
- taking time off for military duty
- entering an alcohol or drug treatment program
- complaining about illegal harassment or discrimination
- organizing for a union
- reporting accounting or financial irregularities raising overtime or minimum wage issues expressing their political beliefs
- serving on a jury or as a witness
- refusing to commit perjury for the employer
- receiving one wage attachment or garnishment
- refusing to serve unsafe food
- refusing to support political candidates/issues supported by the employer
- filing a claim for Workers' Compensation

What is a public policy?

There is a split among the courts about whether employees are protected only when they complain about violations of specific statutes.

Some courts will protect any public policy that can be implied from existing laws or found in court opinions. Other courts have said there must be a specific statute prohibiting the conduct.

In some states, a whistleblower doesn't even have to be right to be protected. The law in those states is that, as long as the employee has a reasonable belief that the employer has violated the law, the employer can't retaliate, even if it turns out that there was no violation, after all.

Even if there is a specific statute, a court still may not find a case. The California Supreme Court, for example, ruled that the employee must be blowing the whistle to protect the public, not to protect a private interest. This ruling was made in 1988 in the case of Daniel Foley, a branch

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manager of Interactive Data Corporation, a computer information service.

Foley learned that his new boss was under investigation by the FBI for embezzling money from his former employer. Foley immediately informed top management. He was told to forget what he heard.

A few weeks later, the new boss fired Foley, supposedly for performance reasons. Foley had worked there for over six years and had an excellent performance record.

Six months later, the new boss pled guilty to embezzling from his former company.

On the surface, it would seem that Foley's termination was a violation of public policy. After all, he blew the whistle on his new boss. He did so in order to protect the interest of the company.

But the court said the company's interest is a private one; in other words, only a few people will benefit if the company doesn't hire an embezzler. The public at large will not benefit. Thus, Foley was not acting in the public interest. Therefore, he couldn't claim whistleblower protection. (He won on contract grounds.)

The result in the Foley case would have been different if he worked in a bank. Then, embezzling would have endangered people's money. His whistleblowing would have been protected in the public interest.

Circumstantial Evidence Can Prove Retaliation

You may have no intention of retaliating against whistleblowers. But if they are not performing, you may want to terminate them. Unfortunately, if it appears you did not begin disciplinary proceedings until after the employee filed a complaint, the "circumstantial evidence" tends to prove you retaliated.

Circumstantial evidence does not prove a fact, but facts can be inferred from the circumstances. For example, if you have been in a windowless room all day, you don't know what the weather is like outside. If I come into the room wearing a raincoat, dripping wet and shaking my umbrella, the circumstances would lead you to believe that it's raining outside.

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Similarly, if an employee who has received outstanding performance appraisals complains about a problem, and the next day is fired without warning, the circumstances would lead one to believe the reason for termination was the complaint.

You can rebut circumstantial evidence with direct evidence that shows the employee's poor performance. You can terminate any employee who does not perform, even a whistleblower, if you are consistent, have a legitimate business reason for the termination and document it.

Handling Layoffs

So far, we've covered involuntary terminations due to firing. There is another type of involuntary termination: the layoff due to reorganization, plant closing or reduction in force (RIF).

In some states and at some companies, the term "layoff" means the company is required to reinstate employees if their positions come open later. A "reduction in force" refers to a permanent loss of employment with no opportunity for reinstatement. With that one exception, the terms will be used interchangeably here.

If your company has a layoff policy requiring reinstatement, like all policies it must be followed.

Courts rarely second-guess a company's decision to have a layoff, RIF or other reorganization. Even if as a result of the reorganization, the company loses money, the courts don't question it. After all, a company has the right to run itself into the ground. As a result, wrongful termination cases rarely arise out of layoffs.

The three areas that can lead to cases are:

1. whether the layoff in fact was legitimate,
2. the criteria used to select employees for layoff, and
3. the impact on groups protected under discrimination laws.

What is a Legitimate Layoff?

One guideline: If a laid off employee is replaced within 6 months, the RIF looks suspicious. Companies sometimes try to make the layoff look legitimate by waiting longer to hire a replacement, or by giving the new employee a different job title.

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These subterfuges rarely work. One advantage laid-off employees usually have is friends back at the company who tell them exactly what is going on.

What if you have a legitimate RIF and then later your budget is restored? Even if it's been six months since the layoff, the former employee still may be unemployed. Most people would be delighted to go back to work. And you as a manager in most cases will benefit from rehiring an experienced employee.

You may have decided to restructure the job. Perhaps you want to strengthen an area the laid off employee was weak in. You can change job requirements, for legitimate business reasons. But you still should interview laid off employees.

Even if you're sure they can't fulfill your new requirements, as a matter of fairness, it's best to interview them. Maybe they have talents you are unaware of. If not, at least you treated them fairly.

What if you don't want the former employee back? Maybe you used the layoff to get rid of a non-performing employee. You can use a legitimate layoff to get rid of a non-performer. But it's best if you have documentation to back you up.

Establishing RIF Criteria

Some companies have written policies that establish criteria for selecting employees for layoff. Typical criteria include:

seniority: employees are laid off in order of reverse seniority ("last hired, first fired")
job titles: certain job classifications or departments are eliminated
skill sets: employees with the least number of skills and abilities are let go
merit: poor performers are laid off

All of these are appropriate as long as they are applied consistently, and are backed by documentation.

Some companies leave RIFs up to the managers. They allow managers to use their discretion. Managers establish their own criteria.

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This is dangerous. One court found a RIF to be discriminatory where the company did not have written criteria for evaluation, layoff and recall to guide the managers.

Criteria must be based on legitimate business reasons, and should be in writing. If your company leaves the decision up to you, write down your own criteria. And make sure to use the criteria you or the company established. In a 2003 federal appeals case, an employer claimed it used a spreadsheet with six merit-based categories as the basis for deciding who to RIF. But a RIF'd employee proved at trial that the decision had been made by a committee that considered seniority and job performance, two items not on the spreadsheet, and was awarded back pay and $250,000 in punitive damages.

The Adverse Impact of Layoffs

One obvious criterion for layoff is salary. If you want to cut costs, it makes economic sense to RIF the highest-paid people in each job group.

But if you do, the RIF might include a lot of older workers. That's because salaries tend to increase with age. If you terminate highly-paid people, chances are they will be older than the average employee.

If a RIF has an adverse impact like this, it may be age discrimination. According to a 2005 U.S. Supreme Court decision, the employer must be able to justify its decision by a "reasonable factor other than age". In that case, a city gave raises based on seniority and rank to all its police officers, in an attempt to bring their salaries up to the regional average. Officers with less than 5 years' service got proportionally greater raises than those with more seniority and, not surprisingly, most officers over 40 had more than 5 years' service. The Court ruled that because the city showed that it needed to raise the salaries of junior officers more to make them competitive with the salaries offered by surrounding towns, the city's use of seniority and rank were reasonable.

Seniority is a criterion that could have an impact on women and minorities. By laying off in order of reverse seniority, the last hired are the first fired. If women and minorities have been hired recently, they will be adversely impacted by a layoff.

But this adverse impact is *not* illegal. Federal and state statutes specifically exempt seniority systems from the discrimination laws. The one exception is for organizations under court-mandated affirmative action requirements.

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Whatever criteria you use, once the layoff list is assembled, review it for adverse impact on any protected groups.

> ***Practical pointers:*** Although not required by law, it's a good idea to act compassionately. If people feel good about the way the layoff is handled, they are less likely to go to an attorney.

There is one technical requirement for layoffs: Under the WARN Act, the company must give 60 days advance notice of a mass layoff or plant closing. The law applies only to companies with 100 or more employees, and only to certain types of layoffs.

If you don't give advance notice, you must pay employees one day's pay for every day less than sixty days of notice.

Wrongful Termination Lawsuit Time Limits

Unlike a discrimination claim, a wrongful termination case cannot be brought to any government agency. It's begun by filing a lawsuit in court.

Since wrongful termination cases are based on contract, tort and public policy, the time for suing or statute of limitations varies from state to state, and also according to the circumstances. In California for example, the time to file an action based on an oral contract is two years, and four years if based on a written contract. In many other states, an employee may have up to six years to sue for breach of contract.

A tort (or personal injury) claim based on fairness must be filed within one year. Whistleblower cases in California can be filed within three years, unless the case is based on a statute which contains a different limitations period.

Check with a local employment lawyer to find out the time deadlines in your state. But generally, if it's been two years since you fired someone, you can rest easy.

The Fairness Factor

Wrongful termination law covers the entire employment relationship from beginning to end.

It comes down to one word: fairness. Have you been fair? If you have, you probably won't get sued. If you're sued, you probably will win.

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And no matter what happens, you'll feel good about yourself for treating people fairly.

Giving References

Getting references is essential for preventing negligent hiring suits. It also makes good practical sense. But these days, it's almost impossible to get references. Why? Because giving references for former employees can get you into trouble.

Before we can talk about getting references, let's see why you should be careful about giving references for your former employees.

The basic rule is that you can't tell lies about former employees. Of course most employers don't lie. But companies also are sued for giving out truthful information. Even though more than half the states have laws that attempt to protect reference-giving employers if they provide true information in good faith, most major employers severely limit the people who are authorized to give references and the types of information they can disclose. These reference-shield statutes aren't bulletproof, though. In a 2003 appellate decision in Wisconsin, an employee was awarded $283,000—including $250,000 in punitive damages—after his former employer maliciously gave him bad references. Among other things, a former supervisor claimed that the employee's paperwork "needed help like you wouldn't believe", despite the absence of any documentation in the worker's file showing reprimands or counseling about poor paperwork. Some states, including Maine, Minnesota, Nebraska, and Nevada, require employers to give the employee a written statement of the reasons for termination, if the employee asks for it.

The problem arises when the employee's version of the truth is different than your's. You say the employee was fired for stealing. The employee denies it and sues you for defamation.

Defamation is an untrue statement made about someone that hurts their work reputation. Nothing hurts a reputation more than giving out negative references.

So the employee sues you, claiming it's not true. Do you really want to hire lawyers to go to court to prove it? Do you have enough evidence? Do you have enough time and money? The answer is "NO."

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What you can say

To avoid a lawsuit, lawyers recommend you say as little as possible about former employees. Many companies only give out dates of employment and job title; sometimes they will confirm final salary. That's it.

Some employers believe it is their moral, if not legal, duty to warn other employers about bad employees. You do have a duty to give references if another manager at your company requests them. Internal references are "privileged" which means they can't be the subject of a lawsuit even if what you say is untrue. That's because the law allows companies to protect themselves from passing around their bad apples.

Some companies hope if they give references to outside companies they also will be able to get references when they're hiring. Your company cannot prohibit you from giving references for former employees who worked for you at other companies. But you still could be sued personally for giving negative information.

If you give references, here are some steps you can take to decrease your risk of being sued.

Your former employee should sign a release allowing you to give out reference information. A release can be signed by your employees when leaving your employment. Or they may apply at a company that uses an application form with a release. If a company calls you for a reference, ask them for a copy of their release before you talk.

If you are called for a reference, make a note of the name of the caller, the company name, and the date and time of the call. If you don't know the caller personally, ask to call back later. If the caller hedges about you returning the call, watch out! Attorneys and investigators posing as employers routinely call former employers to find out if bad references are being given. Typically, they won't want to leave phone numbers.

Once you start talking, explain to the person calling that you are giving out confidential information. The caller should promise that anything you say will not be revealed to your former employee. This promise may not be enforceable, but it keeps most people from telling the applicant about your bad reference. (Some states prohibit keeping such information confidential from employees. Check with an expert before you agree to keep a reference confidential.)

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When giving references, stick to the facts:

- attendance record (don't say good or bad, just "missed 5 days in 6 months")
- tardiness record ("more than 30 minutes late on 5 of the last 20 days of work")
- production record ("met quota 65% of the time")
- completion record ("completed eight out of ten goals last review period")

The more negative the information about the employee, the more objectively verifiable and documented it should be.

The following areas are dangerous ones to talk about to prospective employers of your former employees:

- employee's attitude
- reason for leaving
- whether the employee is eligible for re-hire
- whether employee was fired or quit
- employee's weaknesses

In these danger zones your perception is probably different than the employee's.

Finally, how to get references

If employers follow the advice of most lawyers, you won't be able to get references for your new hires. Here are two techniques that may help you get more information.

Ask the applicant to bring copies of performance appraisals, letters of recommendation, completed projects and other proof of good performance. Make sure these materials don't reveal any trade secrets.

Ask the applicant for the names of former co-workers and subordinates. They probably have not been told about the dangers of giving references. They are more likely to give you information. Since they aren't acting as managers, their comments generally do not bind their companies. And in many ways, their assessments may be more accurate than the supervisor's.

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AT&T's Harry B. Thayer said,

> "It is easy to fool yourself. It is possible to fool the people you work for. It is more difficult to fool the people you work with. But it is almost impossible to fool the people who work under you."

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Investigation Checklist

- o all conversations must be in private
- o listen
- o take good notes
- o ask for names of people who saw or heard this or similar incidents
- o ask if there are any notes or a diary of the events, and if so, ask to see
- o tell the person who complained that you intend to talk to the accused and other witnesses
- o make a date for a follow-up meeting within one week
- o decide whether you can impartially investigate; if not, call in someone who can make an appointment with the accused
- o tell the accused in general the nature of the complaint and ask for response
- o if accused denies knowledge, tell specific instances and ask for response
- o if accused denies everything, ask if there is any reason or motive why anyone would lie and make up charges; if so, obtain all facts and witness names
- o make a follow-up appointment with the accused
- o talk to witnesses
- o for all witnesses, determine if they have any bias against either person involved, and interpret their version of the facts in that light
- o review any relevant documents, including the personnel file of the accused and, if appropriate, the person who complained, and other witnesses
- o meet separately with the accused and the person who complained at the agreed times, whether or not you have reached a conclusion
- o inform them generally of your actions
- o ask them to explain any contrary information you've received from others
- o make follow-up meeting appointments to inform them of result
- o decide if you have enough information to reach a conclusion
- o if you can't determine what happened, bring in someone else to conduct another investigation
- o decide the appropriate action to take -- ranging from disciplining the accused, to disciplining the complainant if you can prove the complaint was a lie
- o prepare all necessary paperwork such as disciplinary forms and final paycheck and obtain necessary approvals
- o meet with the person who complained and inform that action taken; maintain the privacy of the accused by not revealing the specific actions taken
- o meet with the accused to take appropriate action: fire, discipline, counsel or clear the record.
- o if the accused and the person who complained remain employed, counsel them not to retaliate against each other. Monitor their relationship.

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