

From the courtroom: Firing an employee do's and don'ts

The steps to firing an employee are full of legal landmines. Take these four recent court cases that highlight the right way to fire, and the wrong. Whether it's a new employee who isn't working out, or you suspect FMLA abuse, proper documentation is the best thing to have on hand if you end up in court.

New employee just isn't working out? Document specific problems before firing

Sometimes, you discover that an employee you or your predecessor hired simply isn't qualified or capable of doing her job. Before you fire her, possibly triggering a lawsuit, take the time to document why she's not working out.

Did she exaggerate her qualifications? Was she promoted out of necessity because of a sudden vacancy and now doesn't seem to be catching on? These are all good reasons to act—once you have noted the problems and perhaps given her a chance to improve.

Recent case: The EEOC sued on behalf of Magali, who identifies as Hispanic, alleging she had been terminated because of her national origin.

But the employer told the court she was simply an incompetent worker it had inherited when it acquired a housing complex. It explained that when it reviewed records and Magali's performance, it discovered that she had greatly exaggerated her experience.

She also was often late, left early and generally had a poor record for meeting metrics such as reducing rent delinquencies.

The court dismissed the lawsuit, reasoning that the employer had legitimate discharge reasons. The EEOC had nothing to counter the employer's evidence. (*EEOC v. Ryan's Pointe Houston, SD TX, 2019*)

Yes, you can fire workers who take FMLA leave

Some employees incorrectly think that if they take FMLA leave, they cannot be fired. That's just not true.

Certainly, firing an employee after he was just approved for FMLA leave might seem suspicious and prompt a lawsuit. But if you can show a judge the employee's poor disciplinary or performance history, courts will likely toss out the case.

Recent case: Brandon worked as an operations technician at a biomass power generation facility. He took several medical leaves and always returned to work. However, his performance was spotty. His supervisor cited his struggles to interact professionally. His performance reviews noted "needs improvement" and singled out as a problem Brandon's use of "profanity on multiple occasions."

Despite years of training and counseling, Brandon's behavior didn't change. During his last few months with the

company, he repeatedly interrupted safety meetings and was written up. He was warned that he would be terminated the next time he had another confrontation with a co-worker.

Brandon went to his doctor, who noted significantly high blood pressure. Brandon then put in a request for FMLA leave.

Around the same time, he forwarded pictures to HR, purportedly showing a potentially deadly unsafe condition. He had taken the pictures a month earlier, and told a co-worker he considered them “job security.”

HR approved his FMLA request. The next day, the company fired him for failure to reform his behavior and delaying reporting a safety issue.

Brandon sued, alleging retaliation for requesting or taking FMLA leave.

The court tossed out the case. It noted that the company had legitimate reasons to terminate Brandon. He had failed to improve his behavior. Plus, he didn't report the safety problem and instead sat on his “job security” photos. (*Tatum v. Southern Company Services*, 5th Cir., 2019)

Review prior complaints before firing an employee

Before approving any recommendation to terminate a worker, review HR records to see if the worker has filed any discrimination or harassment complaints. Ensure the recommendation wasn't motivated by retaliation.

Recent case: Two black workers were fired for being clocked in and not working. It was their first offense. Earlier, one of the workers had complained to HR about a co-worker who was proselytizing at work.

They sued, alleging race discrimination and retaliation. First, they showed that a Hispanic worker wasn't fired the first time he was caught not working while clocked in. Second, they argued that the earlier religious complaint was protected activity and the real reason for discharge.

Having shown someone else outside their protected class having received more lenient treatment, the judge said both claims could move forward. (*Smith v. Formaspace Logistics*, WD TX, 2019)

Use date-and-time-stamp to document when firing decision was really made

When employees are in trouble at work, they usually know it—especially if you use progressive discipline. Then they know how close they are to getting fired.

In desperation, some grasp for any advantage they can think of by requesting FMLA leave or some kind of disability accommodation, thinking that will delay or prevent termination. Don't let them get away with it!

Go ahead and terminate, but be prepared for a possible lawsuit by having clear documentation of the reason you disciplined them. *Even better:* Place a date-and-time-stamp on the documentation immediately after you write it up. Having proof of exactly when you recorded the need for discipline can be useful if a claim winds up in court.

Recent case: Matthew worked for a telemarketing company that sells aftermarket automobile warranties. He answered customer calls, using a telephone, keyboard, computer and mouse.

The company uses a progressive discipline system to combat tardiness and unexcused absences. The first occurrence nets an oral warning. If there's another event within five weeks, the employee receives a written warning. A third infraction within the following five weeks means a written warning, plus a one-day suspension. Another incident nets either a one-week suspension or a termination.

Matthew was tardy or absent enough to have earned four oral warnings, four written warnings and a one-day suspension. He escaped termination only because he sometimes managed to go five weeks before incurring additional absences or late arrivals. However, he was at the point where he would be fired the next time he missed work or arrived late.

Matthew put in a request for time off for a doctor's appointment the day before it was scheduled. Because another member of his team was already off that day, HR turned down the request.

Even so, Matthew didn't show up for the scheduled shift and instead went to the doctor. He told the doctor he had pain in his hands and arms from using the computer at work. The doctor gave him a note for the absence that included a request for an ergonomic computer desk and equipment.

Meanwhile, his supervisor contacted HR to report the absence and recommended termination under the attendance policy. HR concurred and the supervisor sent a memo to HR confirming that at 9:00 a.m., the employer had decided to terminate Matthew.

He showed up with the doctor's note shortly after, requesting a reasonable accommodation. Instead, he learned he had been fired.

Matthew sued, alleging he had been fired because he was disabled and requested accommodations. He argued that the timing alone was suspicious. He was, after all, fired within minutes of telling his manager he needed a reasonable accommodation and never got a chance to engage in the interactive accommodations process.

But the court noted that by the time Matthew made his accommodation request, he had already been fired. That meant he had no case. Because the employer could show clearly exactly when it made the discharge decision, Matthew was unable to show a connection between requesting an accommodation and his termination. (*Sammartine v. NCWC Dealer Services*, Court of Appeal of California, 2019)