

InfoPAKSM

Managing and Motivating Difficult Employees

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Managing and Motivating Difficult Employees

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As a manager, you're expected to deal with a difficult employee proactively and effectively. If you're unable to manage a difficult employee adequately, then you may be viewed as part of the problem or an ineffective manager – labels that can be hard to escape and can have a lasting impact on your career. This InfoPAKSM examines, in part, strategies and suggestions for dealing with difficult employees.

This InfoPAK should not be construed as legal advice or legal opinion on specific facts or representative of the views of ACC or any of its lawyers unless so stated. This InfoPAK is not intended as a definitive statement on managing employees, but instead a resource that provides practical information for the reader.

This material was compiled by WeComply, Inc., at the direction of Association of Corporate Counsel. For more information on WeComply, visit <http://www.wecomply.com>

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I. Introduction

It's probably fair to say that all employees (and all people, employed or not) can be difficult to deal with sometimes. The stresses of home and/or work can make even the most pleasant and even-tempered employee unpleasant and short-tempered once in a while.

On the other hand, some employees (and some people, employed or not) are difficult to deal with most or all the time. According to many psychologists, these people are generally unhappy, insecure, and have low self-esteem. Like all human beings, these people want to be loved and accepted, but they use inappropriate ways to get what they want. Maybe they're engaging in difficult behavior because it has worked for them in the past, or maybe they simply don't know any other behavior.

It's estimated that only about three to five percent of all employees are in the latter category – that is, difficult most or all the time. (It may seem like more because difficult employees tend to create a much higher percentage of workplace problems.) They may be some of the most productive (e.g., competing in cut-throat ways for power and promotion) or least productive (e.g., undermining and blaming coworkers to hide their own mistakes or ineptitude) employees in the workplace.

As you think about who in your workplace is in which category and why, don't forget to look in the mirror. Is it possible that *you* are a difficult person to work with or for, and thus part of the problem?

This InfoPAK will address the following topics:

- The toll of *not* dealing with difficult employees;
- The many types of behaviors that make some employees difficult;
- How the law (at least US federal law) applies to dealings with difficult employees;
- Strategies and suggestions for dealing with difficult employees; and
- What you can do to ensure that you're not the problem, or part of the problem.

II. Difficult Employees: The Toll

A. Morale

One employee's difficult behavior can have a ripple effect that extends well beyond that employee and negatively impacts his coworkers and manager. Coworkers may feel resentful if a difficult employee appears to get away with absenteeism, tardiness, or breaking other workplace rules. They may feel underappreciated for having "carried the load" of a difficult employee's substandard performance. They may be intimidated by a difficult employee's abusive behavior. Some employees might even emulate the misbehavior of a difficult employee in order to "get even."

As a manager, you're expected to deal with a difficult employee proactively and effectively, but it's entirely possible that your "people skills" were not the main reason you were promoted to a management position. If you're unable to manage a difficult employee adequately, then you may be viewed as part of the problem or an ineffective manager – labels that can be hard to escape and can have lasting impact on your career.

A difficult employee can infect employee morale in several ways, including:

- Reduced job satisfaction among coworkers and the employee's manager;
- Uncertainties and imbalances in coworkers' job duties;
- Stress on the mental health of coworkers and the manager;
- Strained interpersonal communication; and
- Encouragement of similar behaviors in others.

In the end, an employee's difficult nature or behaviors can outweigh her positive contributions as a result of the negative effects elsewhere in the workplace.

B. Revenue

By bringing down workplace morale, difficult employees compromise the productivity and energy of those around them – including an organization's customers or clients. In most cases, an organization's image is only as good as its employees when it comes to forging successful relationships with customers or clients.

Imagine walking into a meeting with a team whose morale and cohesion have deteriorated; it would be clear to most clients meeting with this team that something was wrong. Of course, there are many factors that a client considers in choosing an organization to work with, some of which probably have nothing to do with personal interactions. But poor morale and strained communication within a client-facing team can make the organization as a whole seem dysfunctional.

Even on an individual level, an employee who doesn't deal effectively with the organization's clients or customers can have a direct, negative impact on the organization's success. Employees

who are difficult for coworkers and management to deal with may well be just as difficult with clients or customers, too.

Even an employee who is perfectly pleasant and easy-going with his coworkers and manager may not deal effectively with difficult customers or clients. For example, a highly principled employee may be unable to set aside his own beliefs and accept the notion that “the customer’s always right” when a customer’s behavior or demands are at odds with the employee’s principles.

C. Employee Retention

If allowed to fester, difficult behaviors by one employee may cause other employees to look elsewhere for work. No matter how well-paid or satisfying a job may be in other ways, people don’t want to spend their days in a work environment fraught with difficult behaviors that make work more arduous and stressful than necessary. The combined effect of having such behaviors spread to other employees and losing those who cannot tolerate the difficult employee can lead quickly to a work environment filled with abuse, obnoxiousness, absenteeism, and other undesirable qualities.

Employee turnover is disruptive and costly. The US Department of Labor estimates that replacing an employee costs employers roughly one-third of a new employee’s salary, and the cost of replacing managers is even higher.¹ Taking the time and making the effort to deal with difficult employees is thus very cost-effective.

D. Lawsuits

There are many legal implications of how your organization deals (or fails to deal) with difficult employees. An employee’s difficult behavior may, in fact, be unlawful – if, for example, it amounts to certain types of harassment, discrimination, or retaliation, or even assault, battery, or defamation. A lawsuit stemming from misconduct by one or more difficult employees can have huge consequences for, and even a devastating impact on, an organization. For example, in 2010 a federal court ordered Novartis AG to pay a whopping \$250 million in punitive damages in a gender-discrimination class-action suit.² Smaller verdicts and settlements in employment cases have effectively wiped out smaller organizations.³

Moreover, the laws prohibiting employee misconduct are ever-expanding. As will be discussed, many states and localities have extended the scope of federal (Title VII) prohibitions on workplace harassment, discrimination, and retaliation to include a broad range of “protected characteristics.” And there is a fast-growing movement to legislate against workplace *bullying*, which is essentially “equal-opportunity” harassment that is unrelated to its victims’ gender, religion, or any other protected characteristic.

Finally, legal issues can arise in many other contexts, including wrongful termination, violations of privacy, workplace violence, and workplace health and safety, as will be addressed in this InfoPAK.

III. Framing the Issues

A. Types of Difficult Employees

Difficult employees come in many shapes and sizes, including so-called “idiots, whiners, slackers and other workplace demons.” Here are some types of difficult employees you may have encountered.

1. Bad Attitude

- *One Tough Babe/Dude*: A workplace bully who is always acting tough and coming on strong.
- *A Serious Threat*: An employee who appears to pose a serious threat, perhaps due to being mentally unstable, physically powerful, part of a culture of violence, or having criminal connections.
- *Prima Donna*: A previously well-performing employee who is suddenly thrust into a supervisory or management position and becomes intoxicated with his new-found power.
- *The Arrogant A**Hole*: A good employee who knows she is good and repeatedly lets other people know it – often in an arrogant, abrasive, and obnoxious manner.
- *Across a Cultural Chasm*: An employee who can't fit into the culture with the rest of the employees, thus creating tension in the office.
- *Negative Nelly/Ned*: An employee with a negative attitude who is always looking for what's wrong or what could go wrong in a situation, and is constantly whining and complaining.
- *The Bean-Spiller*: An employee who can't keep a secret and either stirs up other employees with the information he shares or breaches the confidence of customer records.

2. Incompetent

- *The Impossible Intern*: An employee who is just getting her feet wet and doesn't know how to conform to the rigors and restrictions of the workplace.
- *Damaged Goods*: An employee who is a problem for everyone and gets passed on from manager to manager.
- *Getting It Wrong*: An employee who, while well-meaning and eager to please, doesn't have the skills or aptitude to do the job right – and may be clueless about that fact.

- *Friends Forever*: An employee who is hired because of a relationship with a friend or family member but turns out to be incompetent, socially maladapted, or both.
- *Protected by the Big Boss*: An employee whom you hire because your boss wants you to, and who turns out to be someone you shouldn't have hired.
- *Last To Know*: A difficult employee who remains on the job for months because his coworkers don't want to be the ones to tell the boss and get that person fired.

3. Personal Issues

- *The Sensitive Soul*: An employee who is overly sensitive when it comes to taking any criticism and reacts to it as if taking a blow to the heart, thus making it difficult for you to give her any real feedback.
- *One Problem After Another*: An employee who is going through a difficult time and has lots of problems. You show compassion for a while, but eventually you need to put the needs of the business first.
- *Too Much, Too Soon*: An employee who seems to have all the right stuff on paper but, in the trenches with many tasks and responsibilities, can't handle the multitasking and stress of his position.
- *Got Drugs?/In the Drink*: An employee who has turned to drugs and/or alcohol, leading to problems such as tardiness, absenteeism, mistakes on the job, and greater susceptibility to accidents.
- *Sick and Tired*: An employee who calls in sick a lot, whether because she is really sick or possibly doesn't like the job, is bored, has something more interesting to do, or is looking for another job.
- *Scary*: An employee with major personal problems that you are unaware of, because either he keeps those problems hidden or other employees don't tell you about them.
- *A Handful of Sex Problems*: Employees who are uncomfortable working together due to sexual tensions in the workplace – possibly arising from suggestive comments, staring, groping, or an actual sexual relationship.

4. Trust and Honesty

- *Liar, Liar*: An employee who is loose with the truth, occasionally so artfully that her lies aren't caught until some Big Lie is revealed, leaving coworkers and management feeling like fools.
- *It's the Little Things*: An employee who takes advantage of gaps in the system or his manager's good nature to get away with an increasing number of "little things" that may add up and implicitly encourage other employees to do the same.

- *Over a Barrel*: An employee who has been given increased responsibility and uses the new position of power to demand even more, including increased compensation.
- *Con Job*: An employee who is a con artist – a master of charm and smooth talking, but little substance.
- *Pay or Play*: An employee who appears to be trying to scam you by using government regulations, complaints to regulatory agencies, or the threat of a complaint or lawsuit to force a monetary settlement.
- *A Favor Backfires*: An employee hired as a favor to a friend or on a friend’s referral without the usual checks.
- *On the Side*: An employee who is moonlighting and doesn’t know where to draw the line for acceptable second-job activities, both during the workday and beyond.
- *Social Networker*: An employee who is not productive due to use of Facebook, Twitter, and other social-networking sites during work hours.
- *Backstabber*: An employee who takes credit for work others have done.
- *Blame Game*: An employee who refuses to take responsibility for poor work or mistakes, and places the blame on others.

5. Communication

- *Communication Breakdown*: An employee with whom you think you’re communicating, and who claims to understand what you’re saying, but who ultimately does assigned tasks incorrectly – or not at all.
- *What Are You Talking About?!*: An employee who does specialized work and speaks a kind of “techno-babble” that you simply don’t understand, and who uses that language to conceal and misdirect when she does something wrong.
- *Silence is Golden*: An inarticulate, hard-to-talk-to employee in a position where being a team player and/or good communicator is important.
- *Who’s in Charge Here?!*: A difficult employee who is able to hide within a complex chain of command and avoid detection, supervision, and/or accountability.
- *When the Cat’s Away*: An employee who is entrusted with supervising coworkers while a regular manager is out of the office and who does so irresponsibly and/or ineffectively – and sometimes conceals critical information about problems that occurred during the manager’s absence.
- *Putting the Customer First*: An employee who embraces the “putting the customer first” ethic but takes it too far, such as running up costs in the name of customer service, to the detriment of the business.
- *Cold and Non-communicative*: An employee who does not participate in meetings or provide management and coworkers with updates on assignments.

Viewing difficult employees by these and other “types” can be useful. As a manager, you may find it somewhat comforting to know that certain difficult behaviors aren’t unique to the employees you supervise. In addition, if you’re encountering several difficulties in a particular classification—say, with “communication” issues—you may want to re-examine your communication skills to assess whether you may be part of the problem. Finally, different types of difficult behavior will call for different responses and strategies, and you may find it helpful to tailor your approach (and/or seek additional guidance from others) specific to the type of difficulty you’re facing.

B. Labeling and the “Pygmalion Effect”

If you’ve had experience dealing with one or more of these “workplace demons,” you may be inclined to judge your current employees based on those prior experiences. For example, if your first impression of a new employee is that she is “stubborn,” like some employees you’ve managed in the past, you may be more likely to see stubbornness in other dealings with her simply because of that label. As a result, you may grow more frustrated with the employee, and she more frustrated with you if she feels that she is being judged unfairly.

In a study about teachers’ expectations and students’ performance, researchers assigned student participants to different classrooms randomly, but told the teacher-participants that some of the students were slow learners and that some were abnormally bright, even though there was in reality no truth to these labels.⁴ The teachers knew which kids had which label, but they had no idea that the labels were given randomly and had no basis in fact.

The results were quite telling. When the researchers measured how the students performed, the students labeled “slow” did poorly, and the students labeled “bright” did well. The study found that the teachers treated the students differently based on their labels (read: expectations), and the students responded accordingly: The teachers expected more from the bright-labeled students and less from slow-labeled students, and the students performed according to the teachers’ expectations. The teachers also experienced more behavioral problems from the slow-labeled students. This sort of self-fulfilling prophecy became known as the “Pygmalion Effect.”

The study also has implications for how we deal with people of other races and genders. Aside from the practical benefits of not labeling people, having high expectations of others can help us avoid unlawful discriminatory behavior.

C. Practical Questions

As a manager “in the trenches” with difficult employees and difficult behaviors, you may find that the people and problems you’re dealing with are too complex and nuanced to fall neatly into types and categories. You may find it more practical to frame the issues in these terms instead.

Performance: Is the employee failing to deliver services effectively and/or to produce a satisfactory work product? If so, is he a “difficult employee” or simply an “employee having a bad day”?

Misconduct: Has the employee engaged in misconduct? If so, was it a matter of a minor rule violation, or serious misconduct?

Whatever the situation, it's your job as a manager to deal with the issues presented. If you don't, the situation is likely to remain difficult – or get worse. What can you do? What should you do? What must you do?

IV. Legal Overview

As a manager, you represent your organization and have the responsibility to carry out the organization's legal obligations in dealing with difficult employees under your supervision. If your workplace is unionized, you may have additional responsibilities under the collective bargaining agreement.

While you don't need to become an employment-law expert, you must know and understand the basic principles so that you can spot issues as they arise and know how to respond – whether directly or in consultation with your manager, the Human Resources (“HR”) Department, and/or (if your organization has one) the Legal Department.

Because employment law varies greatly by jurisdiction, you need to be familiar with the legal framework of the nation and locality in which you work. An explanation and periodic review of these laws should be a part of regular managerial training.

The following overview addresses the limitations on disciplining or terminating difficult employees.

A. The “At Will” Presumption

Dating back to the 1870s, U.S. law has generally presumed that employees are employed “at will” – that is, that they can be disciplined or fired at any time for any reason (or no reason).¹ Some organizations require employees to sign an “at will” employment contract when they're hired to put this legal presumption into writing.

Over the years, however, employees have gained significant legal leverage – even despite having signed an “at will” contract or where they are not unionized. Accordingly, as a manager, you should discipline or terminate employees only for legitimate business reasons that are fair and well-documented.

B. Duty to Investigate

If you suspect or become aware of harassment, discrimination, safety violations, or other unlawful conduct by an employee (whether or not he/she is an employee you manage), then this triggers your organization's duty to undertake a prompt and thorough investigation. The extent of the investigation required depends on the severity and nature of the conduct involved. You also may need to take immediate action before or during an investigation if the conduct endangers other employees, customers, or third parties.

As a manager, you may be called on to conduct or assist with the investigation in some instances. At other times (perhaps to ensure impartiality and/or because of a need for special expertise), the organization may elect instead to use an outside investigator (e.g., outside counsel), as in the case where:

- No one is in a position to be impartial, perhaps because the accused is an executive;
- The alleged misconduct appears pervasive or is particularly serious – e.g., violent crime or large-scale theft;
- The complaint has been publicized; or
- Outside lawyers or government agencies are involved.

If you conduct the investigation, keep in mind these basic steps:

- Identify the law and/or policy involved, and decide how it applies to the complaint.
- Gather relevant written and electronic evidence, which may involve a comprehensive review of e-mail, financial transactions, personnel files, and the like.
- Collect physical evidence and lock it away in a safe place.
- Conduct interviews of everyone involved. (Note that if your workplace is unionized, you may need to have a union representative present during interviews.) Ask open-ended questions, such as “When did you leave the office?”, rather than “Did you leave the office at 5:15 p.m.?”
- Be sure that everything about the investigation relates to the allegations of the complaint.
- Be professional. Don’t speculate or inject your personal opinion, respect privacy, and don’t veer off the subject.
- Document all aspects of the investigation, including the content of your witness interviews.

Conduct the investigation in such a manner as to protect confidentiality as much as possible, divulging information about the complaint only to those who have a need to know. You may not always be able to protect the confidentiality of an accuser, and you should be careful not to make statements that guarantee it. You can tell an accuser that you will protect his or her confidentiality to the “greatest extent possible.”

C. Limitations on the Right to Discipline or Terminate

I. Express or Implied Contracts Not to Terminate Except for Cause

If your organization signs a contract with an employee stating expressly that her employment cannot be terminated other than for good cause, then the contract overcomes the law’s “at will” presumption. As that employee’s manager, you could not terminate the employee legally unless her difficult behavior rose to the level of “good cause” – a threshold you would want to discuss with HR and/or Legal before taking action.

Although express contracts to this effect are fairly rare in most organizations, there are situations where a termination-only-for-cause promise is implied in the way an employee is hired or treated on the job. For example, you might be so impressed with a prospective employee's credentials and presence at his job interview that you say something like, "As long as you're doing your job, you'll have a place with our company." If the employee turned out to be a difficult employee whom you eventually fired, he might well sue your organization for "wrongful termination," pointing to your statement from the interview as an implied promise that he would not be terminated other than for cause.

Implied promises can lead to problems in a number of scenarios, including:

- Assuring an employee that she will not be fired for non-performance reasons, and then laying her off;
- Setting procedures for discipline and warnings before termination, and then firing an employee without notice;
- Referring to employees as "permanent employees;" or
- Giving an employee a specific set of job duties and then assigning work that goes beyond those duties.

To avoid these types of issues, your organization may require that you refrain from making verbal assurances to applicants during interviews, include in offer letters that the job is "at will" to the extent allowed by law, and/or have new employees sign "at will" agreements at the outset of their employment.

2. Company Policies

When considering how to handle a difficult employee, you should consistently follow your organization's policies on discipline and termination. In some cases, the adversely affected employee might decide to pursue legal action, and courts do not look favorably upon employers who fail to follow their own written policies. In these situations, courts give little credence to the organization's policies, and instead decide whether an employer's actions were justified based on how it handled similar matters in the past. Thus, make sure you abide by established disciplinary procedures if you wish to avoid bigger problems down the road.

3. Termination as Unlawful Harassment/Discrimination

US federal and state laws prohibiting workplace harassment and discrimination have big, sharp teeth. In view of the many multi-million-dollar judgments against employers – and, in some jurisdictions, individual managers – for sexual and other forms of harassment and discrimination, most organizations now require their managers (if not all employees) to take periodic training to recognize, prevent, and report unlawful harassing and discriminatory behavior. A properly trained manager should be familiar with all applicable anti-discrimination laws—including Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967—and know how to handle difficult employees without incurring claims of discrimination and/or harassment.

a. Title VII of the Civil Rights Act of 1964

Signed into law in 1964, Title VII of the Civil Rights Act is the cornerstone of federal anti-discrimination law. Title VII prohibits employers from discriminating against employees because of their race, color, religion, sex, or national origin.⁴ Thus, for example, an employer may not discriminate against a person because of her interracial association with another, such as by an interracial marriage.

In very limited situations, Title VII permits discrimination based on a protected trait if it is related to a bona fide occupational qualification (“BFOQ”).⁵ Generally, BFOQs must be reasonably necessary to the operations of a business.⁶ For instance, courts have found mandatory retirement ages for bus drivers and airline pilots to be BFOQs because of safety reasons.⁷

b. Age Discrimination Act

Federal law protects persons over 40 years of age from discrimination; many states go further and protect anyone over 18.⁸ The prohibition against age discrimination applies to any decisions you make with respect to a term, condition, or privilege of employment.⁹ These decisions include hiring, firing, promotions, benefits, training, and compensation.¹⁰

c. Avoiding Legal Liability

In dealing with a difficult employee, you should keep the above anti-discrimination laws in mind, as well as any other applicable federal or state laws. Generally, you will encounter issues of harassment/discrimination in two distinct contexts. First, if what makes the employee “difficult” is that he is harassing coworkers, then you as a manager may have a legal obligation to protect those coworkers and to promote a workplace free of harassing behavior. This is certainly the case if the difficult employee’s conduct is unlawful – that is, if it is unwelcome, severe, pervasive, and based on a protected characteristic.¹¹ If the harassing behavior is *not* based on a protected characteristic – for example, if it is so-called “equal opportunity harassment” in the form of bullying – then you may not have a legal obligation to intervene, but arguably you should still do so in the interest of good management.

Second, and apart from whether the difficult employee is actually engaging in harassing behavior, you must be careful in disciplining the employee to protect yourself and your organization from a claim that *you* engaged in harassment or discrimination. Even if there are many valid reasons for discipline, a disgruntled employee (and clever plaintiff’s attorney) could base a lawsuit on something you said in the course of dealing with the employee that could be construed as discrimination or harassment on some protected basis.

As a general rule, it’s best simply to avoid *any kind* of abusive or inappropriate behavior and not to tolerate such behavior by your employees, either in how they treat you or each other. This, combined with avoiding arbitrary decision-making and having documented legitimate and fair business reasons for all employment decisions (as will be discussed), should help you steer clear of lawsuits in this area.

4. Termination Without Disability Accommodation

US federal and some state laws (as well as the laws of a growing number of other countries) require organizations to provide reasonable accommodation of employees' disabilities. These laws define "disability" broadly, typically including psychological conditions or impairments that may not be obvious.

If you need to terminate a difficult employee for performance reasons but you had earlier failed to accommodate a disability for her, then the employee could cite the disability as the reason for her substandard performance. Thus, while your organization would not want to expend extra time or money on an employee who was clearly on the road to termination, it should nonetheless do so if the need to accommodate arose before the termination process had begun.

Case in Point:

Sean was always complaining. His manager Ben felt that he had "bent over backwards" to fulfill all of Sean's wants and needs. Ben suspected that some of Sean's complaints were just stalling tactics and excuses for his lack of productivity. Finally, Ben placed Sean on probation with a warning that if he didn't fulfill certain goals, he would be fired.

Ben gave Sean six weeks (to the end of the next quarter) to turn things around. Two weeks into his probation, Sean handed in an assignment that was riddled with typos. When Ben approached him about it, Sean explained that there was not enough lighting at his workstation, and he was unable to proofread his work properly. Ben saw that Sean's workstation had just as much lighting as anyone else's and figured it was just another empty excuse.

What to Do:

If Ben ignores the complaint, then Sean could claim that Ben failed to accommodate his "visual impairment" disability. Although it may be arguable whether Sean actually has such a disability, it's not worth taking the chance when the fix of installing an extra lamp is simple. Ben should recognize that it's especially important for the organization to meet its obligations during Sean's probationary period.

5. Family and Medical Leave

In the United States and other countries, employers must allow employees a certain amount of medical leave – not only for themselves, but to care for a parent, child, spouse, and (in some jurisdictions) a partner in a civil union or domestic partnership. It may also include leave to care for a newborn infant regardless of whether biological, adopted, or under foster care.

Special circumstances apply to an employee who is the spouse, son, daughter, parent, or next of kin of a current servicemember or veteran. Instead of the typical 12 workweeks of leave in a 12-

month period, these employees are entitled to 26 workweeks of leave during the same time period.⁶

If an employee is being “difficult” because of tardiness or absenteeism related to protected family or medical issues, then disciplining or terminating the employee on that basis could run afoul of these leave laws.

6. USERRA

US employers are bound by the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), which prohibits (a) discrimination against someone because of his military service; and (b) denial of employment benefits because of military service or application for military service.⁷

USERRA requires employers to make reasonable efforts to assist a returning veteran in becoming qualified for a job. When a returning service member has a disability that impairs her job performance, employers are required to make reasonable accommodations.⁸ If an accommodation would still not qualify the servicemember for the job, then the employer must find another position of equal seniority, status, and pay that the servicemember can perform.⁹

Again, if an employee is being difficult for reasons protected by this law, your right to discipline him for those reasons will be limited.

7. Retaliation

US federal and many state laws specifically prohibit retaliation – that is, taking adverse employment action – against an employee for making a good-faith complaint or cooperating with an investigation of a complaint regarding workplace discrimination/harassment, health and safety conditions, or corporate financial irregularities. Beyond these specific statutory prohibitions, it’s generally considered against public policy to retaliate against an employee for reporting illegal conduct, refusing to do something illegal, or exercising a legal right (e.g., voting, joining a union, filing for workers’ compensation, or taking family leave).

Section 7 of the National Labor Relations Act, for example, protects employees who take part in “concerted activities” for “mutual aid and protection.”¹⁰ Section 7 applies to unionized and non-unionized workplaces alike, and you should consult with HR or Legal before disciplining or firing someone who complains about wages, work hours, or working conditions and may fall under the protection of this law.

In 2006, the US Supreme Court made it easier for employees to sue successfully for retaliation by adopting a broader standard.¹¹ The Court held that an employer’s action was “materially adverse” – that is, that it would dissuade a reasonable worker from making or supporting a complaint, which could include harm to an employee outside the workplace. The case before the Court involved retaliatory action for a discrimination claim, but the Court’s holding may apply in other contexts as well.

D. Discipline, Termination, and Severance

This section discusses a suggested policy of “progressive discipline.” Whatever discipline you decide to impose, be sure you have well-documented, legitimate, business-related reasons for imposing it. The record should show that the discipline was fair, reasonable, and clearly work-related.

I. Termination for Serious Misconduct

How to discipline – and when to go so far as to terminate – an employee can be among the most difficult decisions managers have to make. On the other hand, for acts of serious misconduct, termination may be the only viable decision. Turning a blind eye to serious misconduct could result in liability for “negligent retention” in some jurisdictions.

In most cases, if an investigation shows conclusively that an employee engaged in serious misconduct, then you must terminate the employee. Some serious misconduct (such as violence) that endangers others must be dealt with immediately – even before a full investigation.

Serious misconduct includes the following behaviors:

- Violence and threats of violence, including physical acts against individuals or property, stalking, and threatening conduct, such as inappropriate comments or brandishing weapons.
- Severe and pervasive harassing or discriminatory conduct.
- Possession of weapons in the workplace.
- Theft and fraud, including intellectual property offenses.
- Sabotage.
- Dishonesty or unethical conduct. Of course, minor disingenuousness may slide, but dishonesty about material business issues and the like almost certainly warrants termination.
- Serious health and safety violations. Violations that endanger the violator, coworkers, or the public are a significant liability risk to the organization.
- Illegal drug and alcohol use, including coming to work under the influence or indulging in drugs and alcohol while at work (except for alcohol served during employer-sponsored events). Note that alcoholism and other addictions could require disability accommodation or implicate other laws that protect employees undergoing rehabilitation.

2. Termination for Performance or Conduct Issues

Even absent serious misconduct, there are many sound reasons to consider terminating an employee for shortcomings in her performance or conduct, including the following:

- **Incompetence.** Some employees simply lack the skills that the job requires. Training may be the solution, but certain skills cannot be acquired on the job.
- **Substandard Performance.** Some employees simply may not perform up to expectations, for reasons that might not be altogether clear.
- **Uncooperative Behavior.** A wide variety of behaviors can incense managers and coworkers alike.
- **Absenteeism and Tardiness.** An employee's frequent absences or tardiness can take their toll on morale of coworkers and be a drain on productivity. Of course, some employees have real health issues themselves or with family members, and employers have legal obligations to deal with these situations.
- **Rule Violations.** Whether employees are violating a dress code or smoking ban, it takes time out of your day to enforce these rules. At the same time, letting violators slide encourages others to play "fast and loose" with the rules, too. Consistent enforcement is the key to avoiding accusations of discrimination.

The bottom-line considerations for terminations based on substandard performance or misconduct include the following:

- **Substantial effects.** The substandard performance or misconduct should be significant and affect the functions of the employee or coworkers.
- **Ample notice.** The employee should be given sufficient notice and the opportunity to improve.
- **Consistent treatment.** Treatment should be consistent with how other employees have been or would be treated.

3. Avoiding Pretextual Reasons for Termination

Some managers might be tempted to dilute their performance and behavioral reasons for a termination by including pretextual reasons, such as broken rules. Not only is this dishonest, it leaves the managers even more vulnerable to a wrongful-termination suit.

For example, if you've decided to terminate an employee because of a number of performance-related reasons, none of which has anything to do with tardiness, then don't use tardiness as the primary reason for firing, even if it is clear and provable. It's okay to include tardiness *among* the reasons, but put time and effort into documenting the main reasons for the termination and cite them as the deciding factors.

The risk in citing a pretext for firing is that you would be in a position to treat other employees who break similar rules the same way. And unless you're willing to fire your best employee for a couple of clear violations of a minor rule, then you shouldn't do so for anyone. It's an invitation for a wrongful-termination suit based on anti-discrimination or other laws.

4. Weingarten Rights

Weingarten Rights are the right of an employee in the United States to have a coworker present during meetings that he reasonably believes could lead to discipline or termination. The rights are enforced by the National Labor Relations Board (“NLRB”). Before 2004, the NLRB applied these rights to all workers, and not just those in unionized workplaces. In 2004, the NLRB reversed itself and held that Weingarten Rights apply only to unionized workplaces.²² The NLRB has changed its position on this issue four times since the rights were first recognized by the US Supreme Court in 1975.²³

5. Questions to Ask Before Terminating Employment

Before terminating an employee, ask yourself the following questions:

- Does the employee have a legitimate explanation for her actions?
- Is termination consistent with previous actions taken by my organization?
- Would a neutral third party think termination was appropriate given the nature of the conduct?
- Would other courses of disciplinary action be more effective?
- Have I followed all pre-termination procedures required by my organization?

If you still think termination is warranted, then make sure you follow all post-termination procedures and retain any documentation that supports your decision.

6. Severance Pay

Employers in the United States are generally not required to pay severance under federal or state law. If an employer, through written or oral statements or past conduct (typically, offering severance previously), creates an expectation of severance pay, however, a terminated employee may have a case for demanding it.

a. Considering Severance Pay

As you may feel that you’ve paid significantly for the terminated employee already, you may be wondering if there is an argument for *ever* offering severance pay. Consider these reasons:

- **To avoid bad feelings.** If you sever the relationship on good terms, then the likelihood of a lawsuit decreases substantially.
- **To make a deal.** In exchange for severance pay, you can ask the employee to sign a release promising not to sue and/or meet other terms.
- **To fulfill an obligation.** As noted, if your organization has paid severance in similar situations in the past, it may be obligated to continue doing so.

- **To help the fired employee.** There may also be instances in which you feel for the employee and simply want to help him transition to a new job.

Because of the possible creation of a legal duty to pay severance, every organization should have a policy that outlines the situations (if any) in which severance will be paid. This puts the organization in control of employees' expectations, and allows it to deny severance pay when there has been misconduct or in other situations in which it would be inappropriate. If the policy indicates that the organization will pay severance on a "case-by-case" basis, then beware of discrimination claims if a pattern emerges that suggests improper motives.

b. ERISA

In the United States, an employer that pays severance is subject to specific mandates under the Employee Retirement Income Security Act ("ERISA") of 1974, which requires that employers inform employees about retirement and severance plans and treat them fairly. Under ERISA, employers should have a plan administrator and file a copy of the plan with the US Department of Labor. Consultation with an attorney is advisable to ensure that your organization is in compliance.

7. Avoiding Legal Liability in the Aftermath of a Termination

After a termination, keep in mind laws concerning defamation, blacklisting, and privacy. Consider how you will handle informing other employees and prospective employers, and choose your words carefully.

a. Defamation

If you say or write something about a terminated employee that is not true, and consequently she suffers some type of damage (e.g., not being able to find another job), then you could be sued for defamation. There are two types of defamation: "slander" is spoken, and "libel" is written. Truth is a defense to defamation; if what you said or wrote is proved to be true, you will not be liable for having said or written it. If your statements were untrue, but you can show a reasonable basis for having believed them to be true when you made them, you could still be liable for defamation but would probably not be ordered to pay punitive damages.

Given these legal principles, honesty is all-important in this context. Don't exaggerate or pass along rumors about a terminated employee (or any employee, for that matter). You don't even need to tell other employees or clients that the employee was "terminated" per se. A simple statement in an outgoing e-mail message that "Bob is no longer with the company; his last day was June 29th" may suffice. Note, however, that there are some instances (as will be discussed) where you may have a duty to reveal the reasons for termination when responding to specific inquiries.

b. Blacklisting

A former employer's deliberate attempt to prevent a terminated employee from getting another job is sometimes known as "blacklisting," and is expressly prohibited in some jurisdictions. As a manager, you may make truthful, verifiable statements in response to questions from a prospective employer about the former employee, but you should not write unsolicited letters or e-mails, or make unsolicited phone calls, to prospective employers.

c. Duty to Inform Prospective Employers

There may be situations in which you have a duty to reveal the reasons for terminating an employee, such as where his employment history reveals something that could pose a danger to others.

Case in Point:

In a California case, a school district wrote a letter of recommendation for a former employee who had been accused of sexual misconduct against several students. The former employee was hired as a vice-principal at another school, and a student at that school accused him of sexual molestation. The student then successfully sued the district that wrote the letter of recommendation for failing to reveal the previous allegations.²⁸

Some organizations make it their policy to have terminated employees sign a written release confirming what information the organizations will reveal to prospective employers, and to respond to all reference requests in writing.

d. What to Tell Coworkers

Naturally, other employees will be curious, or even insecure, about the termination and the reasons behind it. It's important to remain professional and neutral, and to keep in mind the risks of defamation and the terminated employee's privacy. For these reasons, it's best not to go into the reasons for the termination. If a legitimate business reason arises, tell employees or coworkers on a need-to-know basis and emphasize that confidentiality must be respected.

E. Negligent Retention

Under the theory of "negligent retention," an organization can be held legally responsible for keeping an employee on its payroll after it learns (or should have been aware) that the employee poses a potential danger. Thus, if an employee makes violent threats against coworkers or customers, brings an unauthorized weapon to work, or receives several tickets for moving violations, then you must take immediate action. Your failure to prevent foreseeable harm to others could put you in the legal crosshairs.

V. Strategies for Dealing with Difficult Employees

A. Overall Approach

We all bring to the workplace personalities, habits, and coping mechanisms that we developed through years of life experience. These attributes contribute greatly to our ability to work and get along with our coworkers.

No manager or coworker can be expected to change these things in someone else. In turn, the difficult employee may not be able to change them in himself. We must work with what we have and with the employees and coworkers we have chosen – or have been assigned.

1. Focus on Things You Can Control

Rather than getting hung up on things that you can't control, focus on the things that you as a manager *can* control, including:

- Setting expectations – what you expect from employees and yourself;
- Making sure your employees know about those expectations;
- Observing their behavior and monitoring their performance;
- Intervening where the behavior or performance falls short of expectations;
- Setting goals with your employee when behavior or performance falls short; and
- Inviting your employees to let you know if they think you've fallen short of performance or behavioral standards as a manager.

2. Focus on Effects and Results

In dealing with difficult employees, managers can become so wrapped up in rules, attitudes, and negative behaviors that they lose sight of what is really important: *effects and results*. Rules are useful only insofar as they produce desirable effects and results. Thus, your primary focus should be on what the rules are designed to achieve, rather than on the rules themselves.

Likewise, the behaviors that you want to encourage in your employees should be linked to some work-related goal. Keeping the focus on effects and results, instead of behavioral traits, helps to steer clear of judgments about the employee that may not be valid or useful.

3. Get a Second Opinion When Needed

If you're having difficulty with an employee, especially one for whom you've developed a personal dislike, then check with a coworker to see whether your perceptions about that person

have been distorted by judgment. (You simply cannot make this assessment yourself; if your perceptions are distorted, you won't know it because they're *your* perceptions!) When soliciting a second opinion, allow the coworker to give an opinion before you give yours, just to be sure you're getting the coworker's "unvarnished" views.

4. Don't Ignore Problems

Some managers take a passive approach to dealing with difficult employees, hoping that problems will go away if they ignore them long enough. This approach, however, is ineffective and lowers morale in the workplace. Problematic employees are not going to magically turn themselves around or stop causing trouble. By not addressing the situation, you allow it to become progressively worse. Your inaction might cause employees to lose faith in your management skills, or refrain from coming to you in the future with complaints or concerns.

5. Investigate Immediately

Upon receiving complaints or noticing problem behavior, it is important that you immediately investigate to determine the merits of any concerns. Often, the difficult employee is not aware of the detrimental effect of her conduct on coworkers because most people choose to put up with the behavior rather than voice their concerns. First, you should attempt to learn the extent of the problem by observing the employee's interactions with customers and coworkers, and by speaking with other employees who regularly work with her.

After gathering some evidence of the problem behavior, you should speak with the employee privately. Start by describing the unwanted behavior and giving specific examples. If the employee tries to interrupt and/or deny the existence of any issues, keep talking and give her an opportunity to respond after you have finished explaining the allegations. Once you have listened to the employee's side of the story, your goal is to reach a mutual understanding that a problem does or does not exist.

6. Help Difficult Employees Get on Track

If the employee has acknowledged that there is a problem, you should both agree to work on eliminating the negative behavior or performance issues. It's important that you give the employee time to implement more acceptable behaviors; change will not happen overnight. You should monitor the employee's progress and provide regular feedback on his success or failure. Make sure you document all verbal or written comments you provide, as well as any corrective actions you take.

7. Use Termination as the Last Resort

If the employee either continues to deny the existence of a problem or refuses to make an effort in improving the situation, then you need to consider termination. When going this route, maintain all documentation supporting your decision in case the employee pursues legal action.

B. Dealing with Difficult Behaviors in Terms of Effects and Results

Let's take a look at some typical difficult behaviors, focusing on how you can shift the focus from those behaviors to effects and results.

I. Absenteeism and Tardiness

At least for exempt employees, some companies have eliminated the concept of “absenteeism” and “tardiness” altogether by smashing the time clock and limiting mandatory meetings. These Results-Only Work Environment (“ROWE”) policies have yielded higher productivity and improved morale. At Best Buy, for example, voluntary turnover rates fell and productivity increased by 35% in the departments that implemented ROWE.²⁸ Think how much time and energy goes into enforcing schedules, attending meetings, and arguing about time. It takes a toll on everyone's productivity.

That said, most managers have non-exempt hourly employees, and ROWE may not be an option. The challenge in these situations is to spend as little time and energy as possible on issues of absenteeism and tardiness. Where possible, stop worrying about *why* employees are absent or tardy; ultimately, whether they have valid excuses for being absent really doesn't matter. There will come a point where even justified absences become unacceptable.

Try dealing with these issues in a results-oriented way. For example, if an employee's tardiness had direct consequences (e.g., preventing shipments from going out on time or losing business), then it should be treated more seriously than tardiness that was fairly inconsequential as long as the work was done by the end of the day.

Focusing on results and including those results in your documentation for justifying discipline is also important to shield you from claims of unlawful discrimination. You may not have disciplined all employees consistently for tardiness, but if you documented legitimate business reasons for differential treatment (e.g., that tardiness in one case was more critical than others), then you would have a good defense to the claim that your discipline was discriminatory.

Another option to avoid wasted energy over these rules is to offer flex-time where possible. Again, look at effects and results: How important is it for the person in each position to be at a specific location at a scheduled time? If it's practical to allow some employees to come in a half-hour later in the morning and leave a half-hour later at night, allow it. It can be a perk for an employee that doesn't cost the company anything.

Case in Point:

Larry is an attorney at a law firm. One of his legal assistants, Marla, does a great job in most respects, but is often five or ten minutes late in the mornings. Larry doesn't want to lose Marla, but he wants to enforce the rules so that tardiness won't become a chronic issue that spreads to the rest of his team. He also wants to treat everyone fairly.

Marla doesn't need to answer that many calls — especially from 8:30 to 9:00 a.m., her first half-hour of the day, when very few people call. The main consequence of her

tardiness is that Larry finds himself listening to Marla's excuses for why she was late, which range from mass-transit woes to issues having to do with her cat. Larry has heard them all and is never sure what to believe.

What to Do:

Larry could be strict with Marla and give her a written warning stating that a certain number of tardiness violations would lead to a termination. But Marla is a great employee in other respects, and her termination would be a big loss for Larry.

Alternatively, Larry could focus on the results of Marla's tardiness, which mostly concern the rule itself and the fairness of enforcing it. Given that 8:30 to 9:00 a.m. is a slow half-hour, Larry could consider offering a more flexible schedule to his whole team. The flexibility in the rule could be simple: If you're less than a half-hour late, make up for that time at the end of the day. So if Marla were ten minutes late one morning, she could just make up those ten minutes at the end of the day. There would be no need to talk about it, saving Larry time and frustration. Because it would be the rule for the whole team, it would be fair to everyone.

Keep in mind that, in some cases, a deviation from a schedule may be necessary to comply with family and medical-leave laws or for the reasonable accommodation of a disability. For example, a person who every morning takes medication that causes drowsiness may require a work schedule that starts later in the day. If such accommodation were reasonable under the circumstances, it would be required under disability-accommodation laws.

2. Dumping Work on Others

Depending on the nature of the work assignments, employees may not always have (or perceive that they have) the same amount of work to do. If one employee is perceived as not carrying her workload, this could raise thorny issues of fairness and hurt morale. Here are some strategies to deal with this situation:

- **Monitor workloads closely.** You should be prepared to explain to each of your employees the reasons behind your assignments, and workloads should be as fair as possible. Where there is an imbalance, decide whether that imbalance is justified and necessary.
- **If the dispute is serious, have a meeting with the employees involved.** This is not something that you want to allow to fester. Consider sitting down with the affected employees and strategizing with them to find a fair solution.
- **Address systemic issues.** The uneven workloads may be caused by something systemic in the organization. If this is the case, contact upper management and try to resolve the issue.
- **Set tighter controls.** If, after looking into this, it appears that one employee is dumping work on his coworkers, then you may need to set expectations for the amount of work

each employee is expected to carry and enforce them through progressive discipline, as will be discussed.

3. Negativity

Negativity is one of the more contagious difficult behaviors, and one of the toughest to address successfully. Some people simply do not have a positive outlook and tend to complain incessantly. Again, it may not be fruitful to “pigeon-hole” employees as “whiners” or as having an “attitude problem.” If you do, you’ll tend to interpret all of their statements as complaints or other expressions of negativity, even when that is not what they intend. Here are some other ways to deal with negativity:

- **In response to complaints, ask for a solution.** When you hear a complaint, even one that you feel is unjustified, take a deep breath if necessary and ask the person sincerely what she would do differently. Try to make the complaint constructive and turn it into a suggestion. If it’s beneficial to make the change the employee suggests, make it.
- **Consider the ways in which you may be contributing to the negativity.** Look at your own behavior to see if you could be contributing to an atmosphere of negativity. As a manager, you set the tone for the workplace in ways your subordinates don’t. Consider how a negative response to someone else’s negativity can perpetuate itself.
- **Set up solution-based meetings.** As manager, you can set the tone of your meetings by asking your team to follow a simple rule: If you see an issue, consider suggestions and solutions (or at least try to think of these things beforehand) before opening your mouth. This encourages input rather than idle complaining. You’ll want to clarify that some issues, including reporting misconduct (e.g., dishonest accounting, sexual harassment), require only that employees make a report and not also suggest a solution.
- **Don’t stifle complaints.** Although you may be tempted to say something like “I don’t want to hear any complaining,” forbidding complaints is generally not a good idea. Input from your employees can be very valuable, and your attempt to stifle their voices may only encourage them to complain behind your back. This can be corrosive to morale, and create an adversarial relationship between you and your employees. It’s better to turn complaints into suggestions that sprout solutions.

4. Credit-Hounding and Deflecting Blame

Most of today’s work environments are team-oriented. It’s important to impress upon your employees that you’re working together for common goals, though you’ll also want to hold individual employees accountable and give credit where it’s due. As a manager, you have much more control over this issue than most.

By giving credit where it’s due and holding employees accountable, you can stop credit-hounding and blame-deflection. This requires some monitoring and careful attention. You need to consider everyone’s contributions to success and failures – including your own – and the obstacles posed by

clients/customers. You may find that both credit and blame are more diffuse than they seem at first glance.

The guidelines here are fairly simple: Make a conscious effort to be fair, listen to your employees, and don't jump to conclusions.

5. Manipulation

Manipulation can be challenging to deal with; if it's done well, you don't know it's happening! It may have become second nature to the manipulator, such that he is not completely aware of it, either. Effective manipulators find a way to appear to have altruistic motives, while in reality getting what they want at your expense – usually doing so while taking advantage of your weaknesses and vulnerabilities. Here are some tactics for recognizing and dealing with it:

- **Recognize your own vulnerabilities.** If you know that you're prone to feel guilty about certain things, to be affected by flattery, or the like, recognize that manipulative employees may try to take advantage of these vulnerabilities.
- **Beware of the tactics used.** Manipulation can take many forms, such as charming, praising, flattering, shaming, blaming, martyrdom, playing victim, or feigning sympathy/obsequiousness depending on what works best in the situation.
- **Be assertive when you think you're being manipulated.** Try bringing the issue out into the open by saying something like "I feel some manipulation here." Say why you think so, and try to get the conversation on a different track. The manipulator may "play dumb," or sincerely be unaware.

The best defense against manipulation is to develop a "gut-level feel" for it and learn from past experience. In many cases, you may only realize that you've been manipulated when it's too late, and the manipulator has gotten her way by undermining you. Learn from these experiences and be ready the next time.

6. Neglect and Irresponsibility

Neglect and irresponsibility are easier to deal with, because the effects are usually very clear, and it's simply a matter of pointing out what happened and responding with the appropriate remedy. The challenge is that the consequences can be so severe that you'll want to prevent the conduct, rather than dealing with it after it occurs.

The best way to handle this is by testing the employee early on. Give the employee responsibility for something that you can rectify quickly if he fails to take the appropriate action. Then, if that does happen, take it seriously, even where the consequences are minor. It's an exception to the "focusing on the effects and results" rule. The only way you can test an employee safely is by starting small and treating all offenses seriously. Point out to the employee that it is a matter of depending on him, and the minor offense is a bad sign. You can give the employee many chances on minor things, but don't increase the level of responsibility until you know he is ready.

7. Foot-Dragging and Stubbornness

Dealing with some employee resistance is part of every manager's job. How much you can tolerate is up to you. Recognize that sometimes employees may have good reasons for either dragging their feet or digging in their heels. This is where communication is important.

Some employees have a genuine problem with communication, and their stubbornness could have some justification that they're not ready or able to articulate. Talk with your employee first and see what you can accomplish. If stubbornness becomes persistent and communication fails to reveal justifications for it, then consider the progressive-discipline approach outlined later in this section.

C. Dealing with Causes of Misconduct and Underperformance

Every difficult behavior has a cause. Knowing what it is can make it a lot easier to deal with, and may affect how you choose to respond to it. That said, the cause is often buried, so you may need to deal with the behavior before finding the cause. In some situations, you may never get to the bottom of it. Here are some common causes of misconduct and underperformance.

1. Insecurity

Insecurity and fear often are at the root of the most serious forms of misconduct, such as bullying, manipulation, credit-hounding, blame-deflecting, dishonesty, violence, and sabotage. Reassurance, especially from you as a manager, can go a long way in helping reduce an employee's insecurity. It's important to tell employees when they do something right and recognize their accomplishments. Be cautious, however, to reassure in a way that does not create an implied contract, as discussed earlier.

2. Boredom

Boredom can be the cause of low productivity, neglect, and/or irresponsibility. If work is not engaging, employees will begin to focus on other things, such as the Internet (to do a host of non-work-related things), their personal lives, and each other. As a consequence, they may become neglectful and absent-minded.

Communicate with your under-stimulated employees and try to make their work as interesting as possible. (Some positions are more flexible than others in this regard, of course.) You may find that a transfer or promotion might be in order if a low-producing employee is capable of producing high-quality work of a different sort.

3. Unclear Instruction

Sometimes it's *you* who is in the way. Your employees should feel free to speak out when your instructions aren't clear, or your supervision is otherwise ineffective. Your employees are the direct source for making you a better manager. For the less-assertive employees, you may need to be more inquisitive.

Recognize that people have different skills. For some, verbal instruction is better than written; for others, it may be the other way around. Figuring out what's best for whom involves communication as well as trial and error.

4. Workplace Stress

An over-full workload, deadlines that are too tight, and unpredictable work hours can add undue stress to a job. These factors also can lead to mistakes and burnout. Where possible, limit the stress by staying aware of and managing these issues. The situation may call for consultation with upper management.

Check in with your employees from time to time to see if one or more of these factors are getting to them. There may be small changes you can make to alleviate some of the pressure. You may also find that by easing up a little, your employees become more productive and make fewer mistakes.

5. Personal Issues

Personal issues become employment issues when they start to interfere with the employee's work. It's your job as a manager to decide when an employee's personal issue is worthy of your attention, and how to deal with that issue without impinging unnecessarily on your employee's privacy.

If the employee doesn't approach you about the issue, then you can broach the subject in an open-ended and supportive way, such as "I'm concerned about you. Are you okay? I'd like to offer my support." This opens the door for the employee without prying, accusing, or judging.

The employee may decide to tell you about a divorce, the death of a family member or friend, a health issue, a child-rearing matter, or similar non-work source of stress. If that's the case, you can offer support and, if needed, help her devise a strategy for maintaining employment, taking leave, or another coping step.

Again, obligations under disability-accommodation laws, or family and medical leave laws, may apply. Remember that psychological disorders, illnesses, and addictions may be considered disabilities.

If you believe that an employee has a personal issue that is encroaching on his performance, then you should tell the employee of how and to what extent performance has been compromised, and the consequences if his performance does not improve. You don't need to inquire about the employee's personal life. Once you've told him about the performance issues, it's up to the employee to decide how to handle it – with or without you.

D. Performance Evaluations

If you're a manager who is prone to getting caught up in your job, or otherwise falling out of communication with your employees, then consider giving regular performance evaluations. Performance evaluations can provide structure for your communications with employees and an opportunity to look at the big picture, rather than addressing a particular project, crisis, or mishap.

Performance evaluations have these additional advantages:

- The evaluations can motivate employees to improve;
- They create a record upon which you can make decisions, which may be particularly useful if you manage a lot of people;
- As circumstances change, evaluations give you the opportunity to alter employees' jobs to meet new challenges and put employees on notice of the changes;
- Evaluations stimulate input from employees, which helps to ensure fairness, boost morale, and enable you to find out more about your employees' strengths so that you can put them to good use; and
- If done carefully, evaluations create a legally defensible record in case of a claim of discrimination or harassment.

Use performance evaluations as a way to collaborate and strategize with your employees. This will allow them to have a sense of responsibility and control over their work, and it will reinforce the notion that you're on their side – that you want them to succeed and make career advances.

E. Discipline

At some point in your dealings with a difficult employee, you may decide to impose discipline of some sort. For some managers, the word "discipline" connotes punishment and coercion, but it's more useful to think of it as:

- Promoting communication and collaboration between your organization and its employees;
- Encouraging productivity, cooperation, and fairness; and
- Avoiding acrimony and lawsuits.

Put another way, acrimony and lawsuits are not unavoidable byproducts of imposing discipline. In fact, an effective discipline policy can be used to *improve* your relationship with difficult employees and, in so doing, lessen the likelihood of lawsuits.

For a variety of reasons, difficult employees have failed to grasp the organization's expectations of their behavior and/or performance. These expectations should have been spelled out at the outset of employment, and reiterated during regular meetings and in performance evaluations. If an employee still hasn't gotten the message, then imposing some form of discipline is a good way to turn up the volume before "throwing in the towel." (Keep in mind that if your workplace is unionized, your organization will need to conform its discipline policy to the provisions of the collective bargaining agreement.)

Progressive discipline involves addressing employees' inappropriate behavior or unsatisfactory performance from the first time it shows itself, and responding with measured degrees of

disapproval along these lines, such as:

- **Informal verbal reminders** for minor transgressions (either a minor performance or misconduct issue).
- **Written warnings** for a major transgression or after one or more informal verbal reminders have not produced results within a reasonable timeframe. The written warnings should refer to past, unheeded informal verbal reminders. Some transgressions may warrant a counseling session or two.
- **Suspension and/or probation** for one incident of egregious misconduct, or after one or more written warnings.
- **Termination** for extreme misconduct, or after all of these disciplinary measures have failed.

Include documentation of each action you take in the employee's personnel file.

F. Encouraging Cooperation

I. Civil Workplace Standards

As a manager, you're in a position to set the tone and encourage civility in the workplace. Not everyone agrees on what it means to be civil or respectful. Depending on the person, the parameters may be broad or narrow. For some workplaces, this type of behavior may not be an issue. If it is, or if you start to get complaints from employees about their coworkers or even your own behavior, then you can set the boundaries for your team by implementing a set of minimal standards.

When we talk about things like "respect" and "dignity," some people tend to roll their eyes and think of these things as "warm and fuzzy" concepts that don't merit attention in the business world. This was true of sexual harassment before multi-million-dollar lawsuits became a reality. Putting lawsuits aside, if your employees don't have respect for and/or don't cooperate with each other, then the workplace becomes dysfunctional, work life turns miserable, and managing a successful business can become nearly impossible. Incivility and disrespect should not be considered professional or acceptable; they should be taken seriously as issues central to conducting effective business.

By implementing – and, more importantly, enforcing – standards of civility, you take these principles out of the "warm and fuzzy" realm and into concrete performance standards that demand attention. These standards should apply to you as well as your employees, and they should be enforced through progressive discipline as described earlier.

Here is an example that you may tailor to fit your workplace:

Civil Workplace Standards

Every member of the organization, regardless of position, deserves to be treated with civility, dignity, and respect. The following types of behavior, done for any reason, do *not* conform to this principle:

- Harassment, bullying, or any kind of hostile or abusive behavior;
- Demeaning conduct – verbal attacks, comments, or body language that belittles others;
- Intimidation tactics such as yelling, getting in people’s faces, or otherwise threatening through speech or action;
- Rudeness; or
- Any other similar behavior that contributes to a hostile or uncivil work environment.

Misconduct should be reported to your manager, and every report will be taken seriously. Persistent violations of these standards will affect an employee’s performance evaluations, and a prolonged pattern of violations could result in discipline up to and including termination. Managers are bound by these standards as well.

Having standards also can protect organizations and managers from discrimination claims, assuming the standards are enforced consistently.

Case in Point: Bullying

Maria is a manager who supervises four employees: Caroline, Rajat, Paul, and Giselle. Her team works well together except for Caroline. Although Caroline is smart and very productive, no one likes to work with her. She continually makes snide remarks about her teammates, and tries to make them appear foolish, including Maria at times.

Some of her troublesome behavior is more subtle. She sighs audibly during meetings when she is impatient with what others are saying, and she often rolls her eyes, ticks her tongue, and sneers.

On a particularly bad day, she’ll mock the target of her displeasure by imitating his or her voice; she offended Rajat by mimicking his Indian accent. When working on projects with others, she will typically object that she’s not getting credit for her contributions and will use tactics of intimidation (e.g., yelling, getting in others’ faces, and even pounding on tables) to get her way.

Maria has tolerated Caroline's behavior for a year, and she's even had to replace one employee in part because of it. She tolerates Caroline because her work is outstanding and she doesn't want to lose Caroline's expertise. Maria is also under pressure to retain Caroline by members of upper management, who have no direct contact with Caroline and thus no first-hand experience of her difficult manner.

But each of Maria's other team members has complained, and the effects are readily apparent: Caroline can bring Giselle to tears, Rajat won't speak to her, and rumor has it that Paul sought therapy because of her. Snide comments are becoming more commonplace as Giselle, Rajat, and Paul attempt to fight back. Obviously, morale and team cohesion have broken down.

Maria commiserates with the other team members and assures them that Caroline treats her similarly. She encourages them to develop "thick skins" and reminds them of how valuable of a resource Caroline is. Maria has confronted Caroline and informed her of her coworkers' complaints, but Caroline just scoffed and called them "babies" and "whiners."

What to Do:

Maria should take action immediately and recognize this as a *performance issue* concerning Caroline that has gone unaddressed. Maria should also acknowledge that she has a different power dynamic with Caroline, and for her to put up with Caroline's behavior is different from her other employees having to do so.

Maria should also recognize just how damaging Caroline's behavior has become. Caroline's imitation of Rajat's accent could be used as fodder for a hostile work environment racial-harassment case against the organization. In an anti-bullying jurisdiction, Caroline's tactics of intimidation could be considered bullying.

It's not up to Maria or the rest of her team to adapt to Caroline's uncooperative and abusive behavior; instead, the burden is on Caroline to adapt to a civil and cooperative work environment, and for Maria to impress this on Caroline. Maria should do the following.

- **Address the complaints** – Respond to the complaints of Giselle, Paul, and Rajat by apologizing for her previous inaction and assure them that things are about to change.
- **Set written standards** – Keeping the abusive behavior in mind, Maria should set standards of conduct that encourage civility and specify behaviors that are inappropriate.
- **Implement Standards** – Have a meeting with the entire team, distribute these standards, and tell the employees that adhering to these standards from now on will be a part of their performance reviews. There is no need to single out Caroline or to hold the previous conduct against her; that behavior was tolerated, and in fairness to Caroline that tolerance was a

“green” (or at least a “yellow”) – light for her to engage in that behavior. Also, Caroline will likely see things differently, and a lot of energy would be wasted arguing over past unaddressed conduct.

- **Demonstrate commitment** – Maria should tell the team that she will abide by the standards herself, and that it is appropriate for team members to call any of her own violations to her attention.
- **Inform upper management and HR** –Upper management and HR alike should be informed of this plan. Maria also should insist that failure to meet the standards must have consequences that include termination in the worst cases, even if that means losing someone like Caroline. If she has trouble convincing upper management and HR of this, then she should cite the past complaints, Caroline’s history, and its negative consequences.
- **Document misconduct** – Everyone should realize that the new standards have teeth. Take all complaints seriously, document them, and make them part of performance evaluations. The consequences should also be clear. For example, a failure to meet civil-workplace standards for three successive quarters could be grounds for termination, even if all other aspects of performance are satisfactory or better.

Caroline’s behavior is not something that Maria or anyone else can control; it’s something that only *Caroline* can control. As a manager, it’s not Maria’s responsibility to change anyone’s behavior, but it is her responsibility to make it clear to her team what behavior is and is not acceptable, and what the consequences are for unacceptable behavior. It’s up to Caroline to live by those rules if she so chooses. It’s on Caroline’s shoulders – not Maria’s or anyone else’s.

Caroline will likely test the rules or simply fall back onto old habits. If that happens, it’s up to her teammates to report her misconduct, and it’s Maria’s responsibility to follow through and make the consequences of unacceptable behavior a reality.

2. Expect Cooperation and Be Cooperative

There are many viewpoints on what the business world is or should be like. Some people may feel that a cut-throat environment is necessary for a company to be competitive; however, this mindset can lead to a workplace weighted down with office politics, back-stabbing, distrust, and even hatred.

A cut-throat environment can make employees less effective by inhibiting communication; taking time and energy away from the organization’s mission, and possibly even driving out honest, cooperative; and hard-working employees. If such an environment is allowed to take hold, it may perpetuate itself, leaving you with a dysfunctional team of individuals who cannot work with one another.

Use your position as manager to impress upon your employees that cooperation is encouraged in some or all of these ways:

- **Recognizing common goals** – Remind your employees of the organization’s mission, whether it’s serving clients/customers or making some kind of product. It may seem self-evident, but not everyone recognizes or appreciates this. Spell out the mission and tell your employees that if anything seems out of synch with that mission, something is wrong. This should impress upon your team that they need to work together, and that uncooperative behavior inhibits the greater mission.
- **Enthusiasm** – Be as enthusiastic about your job as possible. Promote enthusiasm by offering projects about which your employees can get excited. When employees feel passionate about their jobs, they are more likely to do their work with greater ease and attention.
- **Availability** – Be as available to your employees as you would like them to be to you. Not having their manager available for questions and assistance can get in the way of your employees’ ability to do their jobs. Keep the door to your office open as much as possible, and encourage your employees to contact you.
- **Volunteering** – Encourage your employees to “pitch in” and volunteer for projects, rather than waiting to be assigned. Employees are more likely to feel enthusiastic and be able to take ownership over something they’ve chosen for themselves.
- **Communicating effectively** – Cooperation is impossible without effective communication, and it’s one of the keys to being a successful manager. If you feel that you’re not getting through to your team, then do what you can to develop better communication skills.
- **Constructive suggestions** – Always be as constructive as possible in making suggestions to your team, and expect the same from them.
- **Attentiveness** – Expect your employees to be attentive to your needs, as well as those of other team members and the team as a whole, and reassure them that you’ll be attentive to their needs, too.
- **Humility** – Finally, a good dose of humility can help bring people together by acknowledging that you can’t do your job without them, and they can’t do the job alone.

3. Collaborate with Your Team

Being a manager is more than just ensuring productivity; it’s also about maintaining an effective workforce. The successes of you and your employees are interdependent, and your employees should feel that the successes of everyone else on the team are synonymous with their own.

Once that mindset is secure, you will have fewer difficulties with your employees, because cooperating with and respecting you are in their interest in more ways than simply collecting a paycheck. If you’re a collaborator instead of a dictator, you can become an integral part of their success within the organization, and in their further career development. Here are some ways to be

a collaborator:

- **Coach your team.** Consider yourself a coach, mentor, and helper to your employees, rather than someone of higher rank or worth.
- **Be approachable and available.** It's important for employees to know that they can come to you with questions and/or for advice, and that they should feel free to share their opinions.
- **Make decisions by consensus.** Whenever practical, make decisions by consensus and avoid arbitrary decision-making.
- **Improve the work environment.** Think of ways to make the work environment as pleasant and rewarding as possible.
- **Trust your employees.** As discussed, the Pygmalion Effect can be powerful; use it to your advantage and expect that your employees will perform well and act professionally. This doesn't mean putting blinders on to negative things that you need to address, but give employees the benefit of the doubt and look at the positive ways they contribute, rather than dwelling on what goes wrong.
- **Make commitments and expect the same in return.** Make sure employees know that you're as committed to helping them as you want them to be committed to helping you. Carry through on your commitments and expect the same from them.
- **Be loyal to your team.** You know the employees on your team better than upper management does, and you are the liaison between your employees and your manager. You should be ready to defend why you want to keep your employees. If you're having difficulties, on the other hand, it should be clear to upper management what you're doing to address those issues.
- **Keep your ego in check.** As a manager, you may be tempted to play up your own authority, but you'll earn a lot more respect from your employees if you refrain from doing that. Some managers make the mistake of assuming that respect is bestowed by a position or a title; to the contrary, respect is earned by acting responsibly, being accountable, and working with integrity. In today's workforce you also may be working with employees who have higher degrees or specialized skills and knowledge that you don't have. Consider these people assets to your team, not threats to your authority.

In sum, by being a collaborator, you can prevent difficult behaviors in your employees and enable your team to produce higher quality work. If your employees see you as a helper instead of an enemy, you're off on the right foot.

G. Professionalism

Professionalism is often viewed as creating a particular image, wearing the right clothes, talking a certain way, and similar actions. Depending on your position and field, clients, customers, or whomever you are serving expect an image that you generally need to conform to in order to be accepted and trusted.

But professionalism is much more than just image. It's about having fundamental qualities of integrity, dependability, and dedication such that others trust your ability to perform your job. Professionalism also can help you avoid difficulties with your employees. You should encourage your employees to be professional, but above all make sure that *you* are professional as a manager.

1. Remain Unbiased

Showing bias toward one or more of your employees can be disquieting for the others, and it can lead to accusations of unlawful discrimination. Of course, you may enjoy the company of some of your employees more than others, but try not to let this show or affect your judgment. You may also have close social, religious, or political leanings that you share with certain employees but not others. Consider it a part of being a professional to keep a little distance from your employees and maintain a solid work-related relationship.

If you become romantically involved with one of your subordinates, you have a duty to reveal the situation to the organization (ordinarily to HR), and a transfer may be necessary. If you find yourself smitten with one of your employees but that feeling is not reciprocated, remember your duty to keep a certain distance and to treat others fairly. If feelings become too strong, you may need to bring it up with HR and work out a solution.

2. Delegate Responsibly

Delegation is one of your most important tasks. Delegating professionally means acting responsibly and effectively, while putting personal feelings aside. Never delegate in order to retaliate or otherwise punish an employee; delegate fairly with practical, work-related criteria in mind.

3. Set a Good Example

Setting a good example is central to professionalism as a manager. It lays a strong foundation for your whole team. Here are some important ways to do it:

- **Avoid rumors and gossip.** If you're participating in office gossip or, worse, taking sides, then your employees could see you as untrustworthy or biased. Something you've said when engaging in gossip also can come back to haunt you if you later have to justify a decision you've made that concerns the subject of that gossip. Discourage gossip, and stay out of it yourself.
- **Be respectful.** If you want your employees to show you and each other respect, showing them respect is one of the key ways of achieving this. Disrespectful managers who demand respect from their employees pay for their hypocrisy. Their employees may seem compliant but may be exacting revenge in other ways.

4. Take Responsibility and Be Accountable

Irresponsible managers render the whole team ineffective; you become an obstacle to the team's success. You may need to fill in for an absent employee or take action during a crisis. Being responsible and accountable means living up to the following ideals:

- **Leading as necessary.** In emergency situations, you should take the lead by doing whatever is necessary in service to your team. For example, if an employee is injured, then make sure that she gets medical attention if needed. You should know your organization's disaster-preparedness and emergency-evacuation plans, and be prepared to take the lead during all such incidents.
- **Taking the heat.** As far as your team goes, the buck stops with you. When something goes wrong, take at least part of the blame for what happened, even when an employee is at fault. Although the employee may have taken the direct action, you are in charge of delegating, hiring, and retaining employees. There are exceptions, such as in the case of malicious conduct you could not have seen coming.

H. Communication, Instruction, and Training

I. Effective Communication

Most conflict originates with a misunderstanding. When two people misunderstand each other's words or have misconceptions about each other's position, they may well not get along. Sooner or later, effective communication breaks down, and talking is futile until the misunderstandings and/or misconceptions are resolved.

Effective communication is all-important in dealing with difficult employees. Here are some tips for engaging in useful dialogue:

- **Conscious breathing.** The simple act of conscious breathing can help you clear your mind of thoughts of a painful history with an employee, and get you to a place where you can actually listen instead of being wrapped up in negative judgments about him.
- **Nonverbal communication.** Keep in mind that body language can be an important part of establishing rapport. Sometimes the way you position yourself can speak louder than words; crossing your arms, for example, puts distance between you and the person with whom you're dealing. Relax yourself before approaching a meeting with a challenging employee.
- **Listen actively.** Once you've taken a few conscious breaths and relaxed, you're ready to listen actively. Instead of thinking about what you'll say next, you really hear and contemplate what the employee is saying to you. When the employee is done, repeat back what you thought she said. This assures the employee that you have made an attempt to listen, and it gives her the opportunity to correct you if you've misunderstood.

- **Use “I” messages.** Using sentences with “I” as the subject instead of “you” are best for conveying your message and keeping the employee from becoming defensive. It’s also less likely to sound accusatory. Instead of declaring, “*You* were really out of line when *you* said...,” you might share, “I felt a little hurt after we spoke...” The first sentence is an accusation that would prompt the employee to defend his words; the second lets the employee know how you feel and opens the door to constructive dialogue, rather than conflict.
- **Diffuse tension.** You can diffuse tension by acknowledging the employee’s feelings. You’re not necessarily agreeing with the employee’s position; you’re just summing up the situation. You can even be sorry that the employee is upset without conceding that she is right. A simple statement that “I can see you’re upset, and I’m sorry we haven’t yet resolved this...” at least lets the employee know that she has gotten through to you on some level.
- **Email with care.** When you’re having difficulties with an employee, email is not a good medium for venting anger or conveying harsh criticism. Words may seem innocuous when tempered with facial expressions or voice inflections, but they can hit like a sledgehammer when reduced to writing. Humor is also easily misunderstood. If you feel angry, it may be helpful to write down your feelings with no intention of sharing them with anyone. When you’ve had a chance to calm down, you can reconsider your words. You might be surprised by what you wrote in the heat of the moment.

In sum, instead of trying to prove yourself right and the other person wrong during a discussion, it can be your mission to make yourself understood and to understand the other person.

2. Instruction and Training

Next to delegation, instruction and training are some of the most important things you do as a manager. Put thought, time, and energy into instruction and training, and you’ll save time, energy, and headaches in the long run. Here are some pointers to keep in mind:

- **Be flexible.** Employees process information and learn things in a wide variety of ways. Change your approach if something doesn’t seem to be working, and invite input from your employees to make sure you’re applying the most effective means.
- **Follow up.** Until you can trust an employee to do the job well, you should follow up and check on his work for quality assurance. As you find mistakes, think of it as an opportunity to train further and instruct, rather than simply to point out faults.
- **Allow for questions.** Input and questions are most important with instruction and training. Especially when it comes to giving instructions, some managers make the mistake of rushing through them without allowing interruptions for questions. If you do not want to risk losing your train of thought, be sure to allow for question-and-answer breaks. It can help shape the rest of your instructions, and you may find the questions so astute that you can cut down the amount of instruction needed for some or all employees.

I. Dealing with Conflict

Even if you have followed all sensible managerial techniques and have communicated effectively, you may still have unresolved disputes. In an effort to avoid the expense of litigation, many organizations have turned to various forms of alternative dispute resolution (“ADR”). Here are some common forms of ADR.

- **Open-Door Policy.** These policies allow employees to go straight to their managers, HR, or upper management. It’s an inexpensive, no-fuss form of ADR.
- **Ombudsperson.** An ombudsperson is the one to go to for all complaints or input. Whoever is designated should be distant enough from operations so as not to be (or appear to be) biased.
- **Peer Review.** This involves having a panel made up of management and rank-and-file employees alike to address complaints.
- **Formal Grievance Procedures.** Often used in unionized workplaces, these are more structured than other forms of ADR. They typically involve an escalation process that begins with the manager and ends with an outside decision-making body.
- **Mediation.** Mediation involves using a neutral person (mediator) to resolve a dispute. Rather than imposing a solution, the mediator tries to bring all parties to a win-win agreement. Mediation tends to be a flexible, informal, open-ended way to resolve disputes; because all parties must come to agreement, however, there is the possibility of inconclusive results.
- **Arbitration.** This is a formal process that mimics the trial court system. Some organizations have employees sign an agreement to resolve all employment-related disputes through arbitration rather than court.

VI. Conclusion

While this InfoPAK outlines the law pertaining to disciplining and terminating difficult employees, it also recognizes that the best way for managers to deal with their employees is to be reasonable, respectful, and fair to all of them. If you as a manager engage in the same type of cooperative, thoughtful, and responsible behavior you want from your employees, then you’ll lay the foundation for a civil and productive workplace.

VII. Additional Resources

A. ACC Resources

“Affirmative Action Compliance,” ACC InfoPAK (September 2011), *available at* <http://www.acc.com/legalresources/resource.cfm?show=700885>.

John W. Bencivenga and Linda Bond Edwards, “Beyond Harassment — Taming the Workplace Bully,” *ACC Docket* 30, no. 6 (July 2012) 80, *available at* <http://www.acc.com/legalresources/resource.cfm?show=1313400>.

Alice E. Conway, “(Un)Friendled: Using Social Media in Hiring and Firing Decisions,” *ACC Docket* 31, no. 3 (April 2013) 26, *available at* <http://www.acc.com/legalresources/resource.cfm?show=1334002>.

“General Counsel Executive Summary of Employment Law in the US,” ACC InfoPAK (January 2011), *available at* <http://www.acc.com/legalresources/resource.cfm?show=136557>.

“Internal Investigations: Asia, the EU and the United States,” ACC InfoPAK (August 2012), *available at* <http://www.acc.com/legalresources/resource.cfm?show=19675>.

“Managing Family and Medical Leaves of Absence: Statutory Entitlements, Employer Commitments, and Reasonable Accommodations,” ACC InfoPAK

(September 2012), *available at* <http://www.acc.com/legalresources/resource.cfm?show=679215>.

“Recruiting and Retaining In-House Counsel,” ACC InfoPAK (August 2008), *available at* <http://www.acc.com/legalresources/resource.cfm?show=19663>.

“Responding To EEO Agency Charges Of Discrimination,” ACC InfoPAK (May 2011), *available at* <http://www.acc.com/legalresources/resource.cfm?show=700831>.

“Top Ten Tips for Conducting Effective Internal Investigations,” ACC Top Ten (Nov. 2010), *available at* <http://www.acc.com/legalresources/publications/topten/internalinvestigations.cfm>.

B. Other

Society for Human Resource Management, www.shrm.org.

Work911, www.work911.com.

Mediation Training Institute International, www.mediationworks.com.

Neutralizing Verbal Attacks, www.anitamorgan.com/vp/default.aspx.

The American Arbitration Association, www.adr.org.

VIII. About WeComply

WeComply is a leading provider of ethics and compliance training for employees in all industries and offers more than 100 courses that are easily customized and available in multiple languages both online and offline. Companies can host courses in their own LMS or use WeComply's patented system, which provides centralized administration, custom reporting, and other advanced features. WeComply is the exclusive compliance training partner of Proskauer and the ACC Alliance. For more information, visit www.wecomply.com.

IX. Endnotes

¹ J.D. White & Associates, Inc., *The Cost of Turnover* (Aug. 16, 2010), available at <http://jdwhite.net/2010/08/the-cost-of-turnover/>.

² *Novartis Fined \$250 Million in Sex Discrimination Suit*, N.Y. TIMES, May 19, 2010, at B3, available at http://www.nytimes.com/2010/05/20/business/20drug.html?_r=0.

³ *\$3.6 Million in Damages Awarded in Employment Discrimination Case*, LAWYERSANDSETTLEMENTS.COM, available at http://www.lawyersandsettlements.com/settlements/14626/employment-discrimination.html#.UVnv9L_dG18 (last visited April 1, 2013).

⁴ Tresa Baldas, *States Take Aim at 'Bully Bosses'*, THE NAT'L L. J., April 16, 2007, available at <http://www.law.com/jsp/article.jsp?id=1176455053664>.

⁵ Gini Graham Scott, *A Survival Guide to Managing Employees from Hell* (AMA 2007). The types of difficult employees that follow were adapted from this excellent book.

⁶ Stephen W. Draper, *The Hawthorne, Pygmalion, Placebo and other effects of expectation*, UNIV. OF GLASGOW, <http://www.psy.gla.ac.uk/~steve/hawth.html> (last updated June 22, 2013).

⁷ The sole exception is Montana, which protects employees who have completed an initial "probationary period" from being fired without cause.

⁸ 42 U.S.C. § 2000e-2 (2012), available at <http://www.eeoc.gov/laws/statutes/titlevii.cfm>.

⁹ Robert A. Rhodes, *Legal Discrimination in Four Letters: BFOQ*, CONN. EMPLOYMENT LAW LETTER (March 2002), available at http://www.hr.com/en/communities/legal/legal-discrimination-in-four-letters-bfoq_eacylj3d.html.

¹⁰ *Id.*

¹¹ *Id.*

¹² Brian McCaffrey, *Age Discrimination*, GPSOLO MAGAZINE (July/August 2008), available at https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/agediscrimination.html.

¹³ *Facts About Age Discrimination*, EEOC, available at <http://www.eeoc.gov/facts/age.html> (last updated Sept. 8, 2008).

¹⁴ *Id.*

¹⁵ The following characteristics are protected by US federal law:

- Race
- Color
- Religion
- Sex/gender
- National origin
- Age
- Veteran/military status
- Pregnancy
- Citizenship
- Disability

The following are prohibited by some states and localities in the United States:

- Marital or familial status
- Sexual orientation
- Size (height and weight)
- Genetic predisposition
- Gender identity
- Physical appearance
- Familial responsibilities
- HIV status
- Ancestry

The bases for unlawful discrimination and harassment under the laws of other countries vary greatly. Eric Quinn, *Preventing Discrimination and Harassment in the Workplace*, ACC, Aug. 26, 2010, <http://www.acc.com/legalresources/quickcounsel/pdahitw.cfm>.

¹⁶ *Family and Medical Leave Act*, U.S. DEP'T OF LABOR, available at <http://www.dol.gov/whd/fmla/> (last visited May 13, 2013).

¹⁷ *VETS USERRA Fact Sheet 3*, U.S. DEP'T OF LABOR, available at http://www.dol.gov/vets/programs/userra/userra_fs.htm (last visited May 14, 2013).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 29 U.S.C. § 157 (2012), available at <http://www.law.cornell.edu/uscode/text/29/157>.

²¹ *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 2412-15 (2006).

²² *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 676 (2000), enforced, in relevant part, 268 F.3d 1095 (D.C. Cir. 2001), cert. denied, 122 S. Ct. 2356 (2002); *IBM Corporation*, 341 NLRB No. 148 (2004).

²³ *NLRB v. Weingarten*, 420 U.S. 251 (1975).

²⁴ *Randi W. v. Muroc Joint Unified School District*, 14 Cal.4th 1066 (1997).

²⁵ Michelle Conlin, *Smashing the Clock*, BLOOMBERG BUSINESSWEEK, Dec. 10, 2006, available at <http://www.businessweek.com/stories/2006-12-10/smashing-the-clock>.