MANAGING THE TERMINATION
OF EMPLOYMENT TO AVOID LITIGATION

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I. INTRODUCTION

There are few situations more fraught with anxiety and discomfort than being confronted by the need to terminate an employee. No matter how experienced, the manager with the responsibility for making the decision and conveying it will be uncomfortable in carrying out the task, and her discomfort will almost certainly be reflected in the way the job is done.

One of the major factors leading to that discomfort is the increasing likelihood that the terminated employee will file a legal action of some sort alleging that the termination violated any one of half a dozen legal theories. As the managers know all too well, there are substantial costs, both economic and personal, associated with defending such legal actions. Indeed, the anxiety associated with making a decision to terminate and then carrying it out feeds on itself, making the likelihood of a law suit a self-fulfilling prophecy.

There is ample evidence in the pages of court reporters, employment law services and case books that termination-related litigation must now be treated as a cost of doing any kind of business. The groves of academe enjoy no immunity from these claims. Indeed, an educational insuror reports that far and away the largest category of claims made against institutions of higher education are employment-related claims, often stemming from termination.¹

If we accept the proposition that termination-related litigation has become an unavoidable cost of running a college or university, a necessary corollary is that it is a cost which must be managed. We will suggest that the risks of termination-related litigation can be dealt with by many of the same techniques used to obtain control of other risk exposures. This paper looks at ways to risk manage the process of termination so as to reduce the potential for unexpected losses; but it must begin with a reiteration of the first proposition - that the current statutory and legal environment makes it

¹ 1994 United Educators Risk Retention Group Annual Report p. 3.
impossible to avoid litigation altogether. As a consequence, we will also look at techniques for risk managing a termination where litigation is unavoidable, and the most that can be done is to prevent a bad situation from getting worse.

II. NAMING THE THINGS WE ARE TRYING TO AVOID

As will be well known to employment relations aficionados, the employee who is about to be terminated has a formidable arsenal of state and federal statutes which can be used to fight back and/or get revenge. It is not possible to include a listing of all those acts and regulations in a paper of this length, so we will list the main federal acts and leave the reader to the many competent source books for information about particular state statutes.

To give some structure to a brief account of the principal weapons available to an employee to contest a termination, they have been grouped into six categories: Discrimination Claims; Harassment Claims; Retaliation Claims; Whistleblower Claims; Due Process Claims; and Contractual/Common Law Claims. Of these, the Big Four Discrimination Claims - Age, Handicap, Race and Sex - are probably the most familiar. Harassment Claims are the least frequently encountered in the context of termination-related litigation. Retaliation Claims are theoretically the most preventible, but theory rarely equates to reality. Whistleblower Claims are the really big ticket item because of the emergence of qui tam and False Claims Act suits, which offer huge monetary returns to employees suing "on behalf of" the government. Due Process Claims must often involve tenured faculty members. And, last but not least, the oldest category - Contractual/Common Law Claims has been having a bit of a renaissance, recently, as a result of the discovery of an implied warranty of good faith and fair dealing in employment contracts.

A. DISCRIMINATION CLAIMS

1. Age Discrimination

Age is the great common denominator, and everyone knows it. It is also the case that longevity makes workers more expensive, so employers regularly try to get rid of their older workers. As a result, judges and juries react with unsurprising sympathy to the employee who complains that
the reason for a termination was a desire to replace an older person with someone younger.

The Age Discrimination in Employment Act\(^2\) ("ADEA") is one of the simplest and most direct anti-discrimination laws on the federal books. The ADEA covers all institutions of higher education, making it illegal to use age as a factor in employment decisions for any employees over the age of forty.

2. **Handicap Discrimination**

Institutions of higher education are prohibited from discriminating against persons who are handicapped by the Americans With Disabilities Act\(^3\) ("ADA") and \$504 of Title V of the Rehabilitation Act of 1973\(^4\) ("\$504"). These very similar laws make it illegal to adversely affect the employment opportunities of "an otherwise qualified individual" on the basis of a handicap. The ADA and \$504 are less likely to be raised as a defense to termination than they are to be the basis for a claim alleging failure to hire or promote, but both statutes and their regulations offer numerous hooks on which the creative employee can hang an allegation of improper motive or failure to provide accommodation to attack termination.

3. **Race Discrimination**

Discrimination on the basis of race and national origin is prohibited by Title VII of the Civil Rights Act of 1964,\(^5\) ("Title VII") which has covered institutions of higher education since 1972. Neither race nor national origin may be used as a factor in employment decision making. Even though the corpus of decisions on Title VII is now very large, the Supreme Court has recently been engaged on what some scholars believe is a rethinking of the theoretical underpinnings of race discrimination cases. Certainly, the whole concept of affirmative action has been stood on its head in the past year; and there is a, probably misguided, sense that some of the rigor of the original enforcement of Title

\(^2\) 29 USC §§621 et seq. (1967)

\(^3\) 42 USC §§12101 et seq. (1990)

\(^4\) 29 USC §794 et seq. (1973)

\(^5\) 42 USC §2000 e et seq. (1964)
VII may have been blunted by recent opinions of the Court. Nonetheless, the manager responsible for a termination will want to ensure that there is no taint of race discrimination in any of the proceedings.

4.  **Sex Discrimination**

Title VII of the Civil Rights Act of 1964 also prohibits institutions which receive federal funds from discriminating in employment on the basis of sex. Title IX of the Education Amendments of 1972\(^8\) ("Title IX") contains a nearly identical prohibition of sex discrimination as a limitation on access to federally funded educational programs, which has been held to include employment. Because large numbers of women are involved in higher education and a very large body of law on sex discrimination has developed over the years, it is perhaps somewhat less likely today that an employee will need to protest sex discrimination than it was ten years ago, but it is still very typical for a claim of sex discrimination to be thrown into the mix of protests that greet a termination.

5.  **Discrimination On The Basis Of Religion**

While not as common as other charges of discrimination filed to protest a termination notice, there are nonetheless sufficient opinions on the application of Title VII’s prohibition of discrimination on the basis of religion to make it essential good management to ensure that no religious discrimination exists in the work place. Persons likely to file such claims are perhaps more easily identified than others in the work force, so that extra care can be taken to avoid confrontations which could give rise to a claim of religious discrimination.

B. **HARASSMENT CLAIMS**

Title VII contains a powerful prohibition of racial and sexual harassment, and Title IX enhances the arsenal of deterrents to sexual harassment at educational institutions. In the context of termination-related litigation, sexual harassment claims generally allege that the termination was a part of a campaign of quid pro quo harassment, in which sexual favors were demanded and termination followed from their denial. Racial harassment complaints, and the parallel complaints of a sexually harassing environment in the work place, are based on allegations that the complainant is being fired

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\(^8\) 20 USC §1681(a)(1972)
for having sought to protest the existence of an hostile environment.

C. RETALIATION CLAIMS

At first blush, retaliation claims may look like their first cousins, harassment claims. Both arise under Title VII\(^7\) and both allege that a termination flowed from an employee’s protest against an improper act of the employer. The reason for the separate listing here is analytical. Harassment claims are theoretically free standing, although an hostile environment/termination claim usually involves alleged retaliation for protesting. The pure retaliation claim arises after an employee files a claim with an anti-discrimination agency like the EEOC. Any action by the employer which adversely affects an employee’s terms or conditions of employment after the employer learns (or comes to believe) that the employee has filed a complaint or taken actions in support of another’s complaint will constitute an independent count of prohibited retaliation. Because it ought to be possible to make sure that an employee who has filed a complaint of discrimination is handled with the utmost care, retaliation is theoretically easy to avoid. In practice, of course, it is a very common post-termination allegation. It is worth preventing, even at great cost, because its status as an independent violation can extend an otherwise lapsed statute of limitations.

D. WHISTLEBLOWER CLAIMS

The category of whistleblower claims is really so specialized that it needs a separate forum of its own. Here, it is enough to identify the fact that, as government contractors, institutions of higher education find themselves under the cover of The False Claims Act\(^6\) and the various state and federal Whistleblower Protection Acts.\(^8\) These acts provide statutory protection for an employee who identifies false claims or illegal practices on the part of other employees or the employer itself. Such an employee has a right of action to retain his or her employment and to obtain back and front pay where appropriate. Attorneys fees may also be awarded. A particularly serious wrinkle to the anti-

\(^7\) 42 USC §2000 e-3(a)

\(^6\) 31 USC §§3729-30, 3734

\(^8\) 7 USC §1201 et seq. (1989)
retaliation-like prohibitions of the whistleblower protection acts is the *qui tam* provision contained in the federal False Claims Act. This provision awards a whistleblower up to 25% of the damages awarded to the government as a result of the prosecution of the false claims action as well as attorneys fees, thereby providing a powerful incentive to avoiding such an action - even if such avoidance means dropping a proposed termination. It is obvious why a claim to whistleblower status is understood to be a very big stick for an employee who smells a termination in the wind and wants to fight.

E. DUE PROCESS CLAIMS

Allegations of a constitutional deprivation of due process most usually involve public employers. However, the prudent administrator will recognize that there are "due process" clauses in state constitutions and that they may apply to private employers as well.

There are two bases for due process claims – procedural and substantive. Due process is required when it is alleged that some constitutionally protected right has been adversely affected. These rights, as delineated by the 5th and 14th Amendments to the U.S. Constitution, are "life, liberty, and property." In the employment context, the key rights are property (i.e. employment) and liberty (i.e. reputation). The amount of due process varies with the interest which is at stake.

"Tenure" in either the public or private sector is nothing more than an expectation of continuing employment, absent some justifiable cause for removal. In order to remove that property right (i.e. the right to be employed) the law mandates that certain procedures be followed (i.e. "procedural" due process) and that the removal must be based on actual cause (i.e. "substantive" due process). Further, the law recognizes that the potential for damage to an employee's reputation may trigger at least the procedural due process protections.

In higher education, the procedures for the removal of an employee are most often set forth in an employee handbook, thereby, becoming part of the contract between employer and employee. If there is a violation of those procedures, the complaint usually alleges that there has been an unconstitutional deprivation of rights, as well as a breach of contract.
F. CONTRACTUAL AND COMMON LAW CLAIMS

There are a broad spectrum of contractual and common law grounds on which a termination may be protested. A partial list would include at least the following types of breaches of contract:

1. Failure to adhere to an explicit term of a written contract.
2. Breach of an express or implied covenant not to terminate without cause.
3. Breach of a common law warranty of good faith and fair dealing.
4. Breach of a common law prohibition of outrageousness (intentional or negligent infliction of mental distress).
5. Invalidity of termination by virtue of public policy (a common law version of retaliation).

III. TECHNIQUES FOR MANAGING THE RISKS OF TERMINATION-RELATED LITIGATION

A. OPERATE UNDER A GOOD EMPLOYMENT MANAGEMENT SYSTEM

The most fundamental principle of risk management is to operate under a management system that incorporates in its design an understanding of the risks to be managed and includes avoidance of those risks in its objectives. This is so obvious as to be a platitude, but a quarter century or so of practicing college and university law does not suggest that the advice is accepted very broadly. Therefore, at the risk of boring those who have already gotten the message, there follows a short refresher on the essentials of a good employment management system.

To be effective, the institutional employment management system must include at least the following:

1. **Accurate Job Descriptions**

   If the job description for a position is imprecise, confusing or inaccurate, the likelihood of successful employment is sharply diminished. The chances of misunderstandings about duties and expectations are enormously reduced when the job description is clear and easily understood. It is particularly helpful to be able to point an investigator or judge to a clear and concise job description
as the basis for a showing that the complaining employee didn’t perform the duties of the job. It is impossible to deal with the ADA without accurate job descriptions.

2. Effective Hiring Procedures

Starting off the experience of employment well is obviously far more likely to produce a good relationship than making the hiring process distasteful to the applicant and the prospective supervisor. It is therefore essential to have an effective hiring process which is honest to both the parties to the process of filling a position. While the Human Relations Department may look good when it places a member of an underrepresented group in a previously monochrome department, the chances of a disaster go up exponentially if the recruiters aren’t honest about the credentials of the applicant they’re recommending and/or the expectations of the centuries-out-of-date faculty members the unsuspecting young professional is being sent to work with. There are cases of "negligent hiring" bedeviling employers which would never have arisen if the hiring process had been carefully studied as an element of risk to be managed.

3. An Honest Evaluation System

Once the employment relationship has been established, there must be an honest system of evaluation. While there are encyclopedias written on the subject of employee evaluation, the elements of successful systems are very simple. The employee must know that an evaluation is being performed, and over what time period. The employee must understand what the criteria by which he or she will be evaluated will be. The employee must be given a clear statement of the outcome of the evaluation and a chance to respond. Finally, an evaluation must be a fair assessment of the employee’s performance, measured against the agreed-upon criteria.

If there is one thing of which an employment discrimination lawyer can be sure, it is the certainty that the annual evaluations of virtually every person whose termination she is called upon to defend will praise the employee’s performance -- until the one just before the termination. Of course, it will turn out that the employee was a disaster from day one, but that won’t be what the record shows - and that is why the emphasis on honesty in this comment. The lazy, and dishonest, set of annual evaluations which avoids confronting the hopeless employee with his deficiencies is far worse
in the context of a contested termination than nothing at all.

4. **A Clear Manual, Which Sets Forth The Employer’s Expectations And Procedures**

A good employee manual is worth its weight in gold. It is the source for the supervisors and the employees, and it is the evidence that a court will rely on to decide what the real deal was. Such a manual will also be a work of the employment lawyers’ art, crafted in close cooperation with their colleagues in Human Relations and the workers to whom it will apply. Trying to piece together the steps to take in managing a troubled employment relationship with a muddy manual is an exercise in futility, leading inevitably to expensive legal debates about expectations and procedures, which were entirely avoidable.

5. **Impose Actual Supervisory Responsibility For The Results Of The Employment Management Process**

The final item in this list of essential elements of a good employment management system is probably the only one which isn’t worn out from over-use. The typical institution of higher education spends vast amounts of administrative time trying to train line supervisors how to be better employment managers, but it almost never makes them financially responsible for the end results of their efforts. The department chair who terrorizes the staff and has four EEO complaints pending at all times confidently expects that the General Counsel’s budget or some central administrative fund will cover the cost of the lawyers and back pay that his disastrous management style produces. Think what would happen if some or all of that cost came out of the departmental budget and reduced his raise or his colleagues’ travel budget. Separating the cost of bad management from the bad managers is bad management; but it’s standard operating procedure in most institutions of higher education. Why?

B. **FOCUSSSING ON THE LITIGATION BOTTOM LINE**

The first step in selecting techniques through which to manage the risks of termination-related litigation is to understand how the case will be perceived by a trial court, should it get there. Perhaps surprisingly, this is not a difficult problem because the Supreme Court has been very explicit about how
these cases should proceed, and while the so-called McDonnell Douglas\textsuperscript{10} analysis applies strictly only in Title VII cases and others decided under that format, the analytic technique used by the Court has become so well ingrained in employment law that it has spread beyond the confines in which it originated.

In the first step in the McDonnell Douglas formula, the Court looks to see whether the complaining employee has presented a prima facie case of discrimination, retaliation or harassment. This prima facie case has a formulaic quality all its own in its requirements that the employee must show that he or she fits within one of the classes protected by statute, that the defendant had an open position, that she or he was qualified to fill the open position, that she or he was denied the position, and that it was filled by a person of a non-under-represented group. This prima facie requirement is a deliberately low threshold, but a really good employment management will be able to use it as a protective wall in many cases.

In the second step in the McDonnell Douglas analysis, the court will expect the defendant employer to articulate a credible non-discriminatory reason for the challenged employment action. This step has been defined as a burden of going forward, which means that the defendant which cannot provide a rational explanation for its termination of the complainant cannot force the plaintiff to the additional burden of rebutting it.\textsuperscript{11} There is a very careful distinction between the burden of going forward and the burden of proving that the employer violated the employee's rights. The employee has the ultimate burden of proving the violation at every point in the case. At stage two, the employer only has a burden of keeping the investigation alive by presenting a credible non-discriminatory reason for the termination.\textsuperscript{12}

At stage three in the McDonnell Douglas analysis, the court gives the complaining employee a chance to show that the employer's supposedly non-discriminatory reason was "pre-textual." This

\textsuperscript{10} McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)

\textsuperscript{11} Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)("Burdine")

\textsuperscript{12} St. Mary's Honor Center v. Hicks, - US -, 113 S.Ct. 2742, 2748 (1993)("Hicks")
can be done by showing that the explanation does not jibe with the facts of the case, that it is not credible for the reasons shown in the presentation of the prima facie case, or that it is untruthful.\(^\text{13}\) It is not enough, however, for the employee to merely destroy the credibility of the employer’s proffered explanation. The ultimate burden of convincing the court that there was a violation of rights under the relevant statute remains on the complaining employee.\(^\text{14}\)

Given that a court will be using the \textit{McDonnell Douglas} analysis, an employment manager can focus on those elements which will prevent an employee from meeting the burdens set at the various steps in the analysis. The stage one inquiry focuses on whether the employee was qualified for the position at issue (assuming that there is no dispute about status in a protected class, although this can also be an issue). Here, we can see the importance of accurate job descriptions which spell out the essential elements of the jobs and the expected qualifications. We can also see how an effective hiring process will create records of the applicant’s qualifications as well as those of the person who replaced the claimant, if that is an issue.

The second stage inquiry is the one that the employment manager must focus on most carefully. Here, the employer has the burden of presenting its non-discriminatory reasons for the termination, and there is the double obligation of presenting an explanation which is credible and making it secure enough to survive the employee’s third stage efforts to show that it is a pretext. To meet these tests, the manager will need to be able to document the problems which gave rise to the termination, demonstrate that the problems were real, and show that the employee was not singled out for discipline.

In the Supreme Court’s new formulation, the focal point of the third stage \textit{McDonnell Douglas} inquiry is the ultimate question of discrimination.\(^\text{15}\) Under Justice Scalia’s opinion in \textit{Hicks}, the employee must show, in effect, that the employer’s explanation actually confirms the existence of

\(^{13}\) \textit{Burdine}, 450 US at 256

\(^{14}\) \textit{Hicks} 113 S.Ct. at 2748

\(^{15}\) \textit{Hicks}, 113 S.Ct. at 2753
intentional discrimination.\textsuperscript{16} The employment manager can use this point of focus by ensuring that the employer's records can demonstrate that the termination was entirely in keeping with an established system of employment management and that the reasons for the termination are carefully documented.

Due Process and Contractual Claims will necessarily follow a different pattern than that laid out for discrimination-type claims. The constitutional and common law claims rely upon a showing that the employee had a right under the state or federal constitution or under an enforceable contract and that the employer's action infringed that right. The employee/plaintiff has the initial burden of proving the existence of the contract or the circumstances in which the constitutional right arises. This first stage burden is not very difficult to bear where there are written documents, but oral contracts and implied procedural protections are what make employment at will cases exciting.

The second stage of a Due Process or Contract Claim case requires the employee to show some violation of the right or breach of the contract. In this regard, the manager planning to avoid litigation will be sure to document credible reasons for all adverse actions and precise adherence to procedural provisions of the staff manual.

Keeping in mind the objectives of meeting the \textit{McDonnell Douglas} tests and the corresponding Due Process and Contractual objectives, we can turn to practical steps to manage the risks of termination-related litigation.

\section*{C. \textbf{BUILDING THE CASE FOR EMPLOYEE DISCIPLINE}}

It should be obvious by now that the principal tool for reducing the risk of litigation in the context of a termination is documentation. Contemporaneous records of an employee's career are the best response to the charge that the employer intentionally discriminated.\textsuperscript{17} Documentation is also the best way to prove that the employer has a good EEO record and a diverse work force. It is the only way to show that the employee was not singled out; and it is a sure antidote to the common

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} Unless, of course, they prove the truth of the charge.
problem of the otherwise-acceptable supervisor who will make an unconvincing witness. The discussion which follows suggests ways that good documentation can be prepared.

1. The Evolution Of A Failure

While it may sound heartless to say so, it is a fact of life that a certain percentage of all employment relationships will not work out. Any good employment management system must be as well prepared to deal with potential failure as it is to encourage success. It is also important to remember, in the midst of the sense of doom imposed by the current topic, that a good system will be able to reverse a poor beginning or temporary lapse through skillful intercession.

Therefore, and for present purposes only, we will consider the hopeless case, and the steps to be taken to convince a judge or jury (or a potential plaintiff’s attorney) that our lost cause was treated fairly along the way to a termination.

a. If you hired the person, you owe them a chance to succeed.

Employers will generally be held to the validity of their own judgment. It is hard to claim that your own hiring process is so sloppy that it led to the hiring of a complete dud.\(^\text{18}\) It follows from this common sense rule that the employer needs to demonstrate that it made a good faith effort to help the employee succeed. To make this case, there must be documentation in the file showing what the problems were and that a supportive effort was made to help the employee surmount them.

b. As soon as it is clear that supportive action won’t bring improved performance, begin the process of building the record of failure.

There is nothing to be gained by continuing to struggle with a failing employment relationship - and much to be lost by building frustration and antagonism. After good faith efforts to help the employee have not produced sufficient improvement to save the relationship, it is time to begin building the case for termination. The process requires little more than following the rules for successful employment management that were discussed earlier in this paper. Evaluate the employee effectively, and most importantly, honestly. Be brave enough to write down the failures and be sure to tie them

\(^{18}\) One exception to this rule exists where the employer has a clearly announced and actually enforced probationary period, during which it weeds out new hires that don’t work. A reasonably short period in which no fault terminations can occur provides seems to be acceptable.
to the essential elements listed in the job description.

c. **Make sure the record is balanced.**

   Be balanced in reporting. Document employee accomplishments, even if small. Evidence of balance in the record is an effective antidote to a charge of bias against the individual. The credibility of a record which fails to recognize a major accomplishment is reduced, even if it details the occasions on which the employee was completely unsatisfactory for other reasons.

d. **Record all evaluation interactions.**

   It is important to identify the occasions on which the employee is told about the problems being documented. All too often, an employee makes a good case out of the claim that he was never told about his failings. A secret list of black marks is a very effective boomerang. It conveys bad faith, bias and pretext.

   It is always better to have a record of dates on which the supervisor met with the employee to try to present the problems and ask for improvement. The credibility of a record of the dates of these meetings is enhanced by having the employee sign the record, but this isn’t always possible without making the situation more contentious. It is even better if this record documents adherence to the steps in a system of progressive discipline spelled out in a staff manual.

   Another important ingredient is recording what the employee said during the evaluation interactions. It is not at all infrequent for employees to come up with excuses for their failure which turn into powerful ammunition when they are shown to be inconsistent with claims of discrimination.

e. **Context can be crucial.**

   It only takes a little more effort to include in the documentation of an episode of failure or an interaction with the employee a description of the background events. Having a contemporaneous description of the context within which a seemingly small action occurs makes the documentation much more understandable when read years later. It is also a very useful aid to the memory of witnesses who may have trouble reconstructing what were often very small-scale events.

f. **Document, don’t diagnose.**

   Supervisors are often tempted to "diagnose" an employee’s problem. How often do we see
notes describing an employee as "paranoid" or "acts in a crazy manner." A diagnosis of a mental
condition is not within the expertise of the average supervisor. It is far more useful to write that the
employee "refuses to take responsibility for his errors and blames others for his deficiencies." Or, "At
3:00 p.m. today, Mr. Jones, began screaming at everyone who approached his work station. People
reported they were frightened by this. I spoke Mr. Jones and he refused to acknowledge that he had
done anything out of the ordinary. I informed him that should the behavior continue, we would
consider disciplinary action." Being exposed to a sarcastic cross-examination on psychiatric
qualifications would cure anyone of the desire to diagnose, so maybe a little roleplaying during training
will help here.

g. Comparative data is very persuasive.

Another reason for the documentation process is to be able to provide comparative data. Such
data are essential elements of the employer’s proof that the termination followed standard operating
procedures and did not single the employee out for harsher than normal treatment. It is also a
necessary mirror in which the employment managers and the general counsel can check their handling
of the case.

Although beyond the scope of this paper, it is worth pointing out that comparative data is
worth nothing if it cannot be retrieved in a useful way, when needed. As a result, it is very important
to have a filing system which permits access to discipline cases across the institution, and by job
categories.

h. Keep the process crisp.

The preceding paragraphs make it sound as if the process of case building must take years.
Nothing could be farther from the truth. The best approach is to move with all deliberate speed once
a decision has been made that a particular employee is unlikely to make it. Assuming that an effective
management system has been in place for a few years, it should be possible to move through the steps
leading to termination quite quickly. The longest interval between evaluations comes at the beginning
of the process, when the employee is being given a good faith chance to change. After that has not
happened, the step process can move with ever-shortening intervals.
The danger in not being aggressive is twofold. Once identified as a candidate for termination, the employee will be treated as an outcast, and the risks of improper behavior by supervisors and others in the know becomes much greater. On the other hand, the employee will become more and more affected by his or her failure and is very likely to conclude that its basis is discrimination or poor motives on the part of the employer. Furthermore, the credibility of a record which properly documents serious problems, without corresponding disciplinary action, declines rapidly as the mess is allowed to fester.

2. **It’s Legal To Build A Case**

While recognizing that the process of case building described in the last few paragraphs will confirm the general view of lawyers as unsympathetic cynics, it is worth pointing that there was much that was good in what Machiavelli had to say. Moreover, the courts are realistic enough to recognize that employers have to be allowed to build cases, even when the object is to get rid of an employee who is making trouble. *See, e.g., Keith v. Computer Services Corp.*,\(^\text{19}\) (holding that “there is nothing wrong with an employer’s documenting its position”); *Smith v. Union Oil Co. of California\(^\text{20}\) (even though a supervisor had admitted to "building a file" against an employee, who had filed charges against the company, the court concluded that the file was "merely a prudent assemblage of documentation with respect to the employee" and found no retaliation).

**D. FOLLOW EFFECTIVE TERMINATION PROCEDURES**

The most careful case-building will be for nought, if the procedures followed in the actual termination are not carefully thought out and well executed. Risk management at this stage of the process can be enormously valuable, particularly because firing a fellow employee is so uncomfortable that few managers even want to think about it, let alone spend the time necessary to do it well. More often than not, the job is delegated away from the manager that the employee is most likely to respect, to an immediate supervisor, whom the employee reasonably believes to be the source of all her

\(^\text{19}\) 39 Fair Empl. Prac. Cas. (BNA) 1009, 1015 (N.D.Ga. 1985) aff’d 788 F.2d 1568 (11th Cir. 1986)

\(^\text{20}\) 17 Fair Empl. Prac. Cas. (BNA) 960,988 (N.D.Cal. 1977)
problems. Even more disastrously, the interview is allowed to involve only the two protagonists; and no one keeps a record of what happened. The following paragraphs suggest that there are better ways to do it.

1. **Using Agreements To Reduce The Risk Of Litigation**

   The most effective way to remove the risk of litigation is to obtain a written waiver of the employee’s right to press claims of all sorts against the employer. To be effective, such a waiver must be paid for with some sort of "consideration", which is a legal term "meaning something of value to the employee." Therefore, if the employer thinks that there is a chance that the employee will trade away her rights for a termination payment, or a good recommendation or some other recognizable benefit, it may be able to obtain a definitive solution to the risk of the termination.

   It is not within the scope of this paper to discuss the limitations of the various forms of separation agreements, releases and waivers, but it is important to point out that the law takes a dim view of coercing employees to give up rights to sue. As a consequence the courts have a bias against such agreements and some statutes make it very difficult to construct valid releases. For instance, the right to file an age discrimination claim cannot be waived unless a detailed formula calling for wait-and-see periods and a lengthy period during which there is a right to revoke is followed.\(^{21}\)

   Needless to say, the possibility of entering into a separation agreement must be carefully considered during the planning for the termination process. If such a possibility is present, counsel must be consulted early in the planning to check out the law and prepare the document for review. Then a strategy for negotiating with the employee must be devised. Where such a possibility exists, the form of the termination meeting will be structured around obtaining agreement.

2. **Obtaining The Necessary Information**

   Assuming that all the procedural steps which must have been accomplished prior to termination have been done, the next thing to do is to assemble a package of information for use at the termination meeting. Whoever will be speaking for the employer needs to be very well informed about the

\(^{21}\) Older Workers Benefits Protection Act; 29 USC §§621-630 (1990).
employee and the history of his career with the institution. Nothing is more likely to make the employee mad enough to sue than being fired by somebody who obviously knew nothing about him and cared less. Instead of having to look dumb, the spokesperson should have the relevant facts at her fingertips. It is important to be familiar with the employee’s career with the institution and to be able to be appropriately appreciative for work done and effort given. The really essential information will involve things like salary due, vacation and sick days accrued, COBRA and benefit continuation, and what the employee can take away. It is far more effective to be able to remove some of the understandable anxiety about these things during the exit interview than to tell the employee to come back a week later to talk to a benefit specialist. Remember, we are trying to reduce the risk of litigation, and what keeps the employee from getting mad or feeling poorly treated reduces that risk.

It will be particularly important to go over the provisions of a covenant not to compete or a confidentiality agreement, where they exist. It is rare that heavy threats have been effective in obtaining compliance with these sorts of agreements from an employee who has been fired. Assuming a rational tone may prove to be more effective; but be sure to have someone else secure the confidential material while the termination interview is taking place.

3. Rehearsal

No one could really expect to perform well in a highly stressed termination interview without a rehearsal. Indeed, the person supervising the institutional representatives who will attend the meeting ought to have a substantial interest in being sure that they are well prepared and can give good performance in their roles.

This is the opportunity to go over the details of the employee’s career, make sure that all the necessary data is to hand and to polish responses to likely questions. The tone of the meeting should be agreed upon, and there should be complete agreement among those who will be present as to who will speak and when. While the main reason for always having two institutional representatives at a termination meeting is substantiation of what happened, a nearly equal value can be found in the possibilities of having two distinct speakers.
4. The Termination Meeting

A great deal of good risk management can be done as late as the termination meeting. The employee needs to know that he is being terminated. (It isn’t always made clear.) He needs to be given a written statement of the grounds for the termination. Failure to provide a reasonable explanation for firing someone is sure to infuriate them and persuade them the reason is illegal. Why else is it not disclosed? Furthermore, a written reason can be adhered to over time, while undisclosed reasons are notoriously changeable. The employee needs to get the most sympathetic send off which is possible in the circumstances. He needs to know that the people in the room care what happens to him.

He should not be invited to make a counter argument; but if one is made, the institutional representatives should be careful to be attentive and to write down what he says. They should absolutely refuse to reply, saying that they will have to look into what he has said. There should be no oral modification, supplementation or alteration of the written statement of reasons. The institutional representatives should not vary from the previously rehearsed script.

Immediately after the meeting, the two institutional representatives should meet, ideally with their supervisor, to debrief. *Immediately* after the debriefing, the two representatives should prepare dated memos recounting the events at the termination meeting. If litigation is underway or threatened, the memoranda should be stamped "confidential lawyer/client communication" and directed to counsel. Even if there is no expectation of litigation, the first draft of the memorandum should be referred to counsel for review, before the final draft is placed in the terminated employee’s personnel file.

5. Post Termination Follow Ups

The effort to manage the risk of litigation should not stop with the termination meeting. People file complaints and sue because they are hurt or mad and cannot find a way out of those feelings. A person who managed to walk into a better job right out of the termination interview would be very unlikely to file a complaint.

To ease some of the hurt and reduce the anger, it is worth keeping in contact with the employee after she leaves. A critical period seems to be around ten days after the firing, when the
full impact of the loss has sunk in and there is a real risk of depression. A sympathetic call to make sure everything is ok and make suggestions for things to do is evidence that the employee has not been totally abandoned. Another effective time to call is around 90 days after the termination, assuming no complaint has been filed. An expression of interest and the offer of some friendly support and perhaps counseling on finding another job, may be all it takes to deflect the employee from filing out of pure frustration with the lack of a job or pent up anger arising from the silence of former colleagues.

IV. USING LAWYERS IN THE TERMINATION PROCESS

Thus far in this discussion, it has been assumed that the work being done was in the hands of Human Relations personnel and the institution’s line supervisors. Lawyers do have to be consulted when litigation is part of the process under consideration, and in this section we will suggest that they have useful roles to play, even before a termination becomes a litigation case.

One such opportunity flows from the fact that, in many states, employees have a right to review the contents of their employment files. This right would typically permit access to all of the types of information we have just suggested documenting as part of the case-building process. There are two ways to accommodate this right of access and do a good job of documentation. The first is to write the entries very carefully, and be prepared to deal with outraged employees by explaining that your system is unusual in that it is honest. This will work once employees become convinced that honest evaluations don’t get them fired. The second solution is to use the process of consultation with counsel to shelter the most sensitive documents from disclosure until after the termination has occurred.

A. USING LAWYERS TO MANAGE DISCOVERY

It has already been pointed out that having a lawyer in the picture is a useful way to obtain confidentiality for very sensitive documents like the memoranda on the termination interview. This confidentiality is derived from the general principle that communications between a lawyer and her clients are entitled to absolute confidentiality. It is to be recalled, however, that that entitlement to
confidentiality can be lost if the documents are shown to persons outside the lawyer/client relationship. It is also important to think carefully before imposing lawyer/client confidentiality on a document which you will ultimately want to show to the court to prove something.

Another type of confidentiality arises from the lawyer's work product rule. In general, materials which are prepared by or at the direction of a lawyer in preparation for a litigation are entitled to be treated as work product which need not be disclosed. This rule can be used to advantage when it is important to investigate an allegation, and there may be a smoking gun to be uncovered. If the lawyer directs the investigation, the work papers and conclusions are work product. If an administrator carries out the investigation on his own, there is no protection. It is therefore important to think carefully about using lawyers to manage the investigative process so that confidentiality can be used to the best effect.

A few words of caution are in order, because the attorney/client privilege may be an endangered species. Many in-house counsel have other titles -- Vice President, Assistant to the President, etc. -- and other functions within the university, including the management of various university components. The attorney/client privilege applies only when the hats being worn are those of lawyer and client. When two people communicate as fellow administrators, the privilege arguably does not apply. The careful in-house counsel will therefore adopt the practice of captioning documents to which the privilege is intended to attach with the words: "confidential - lawyer/client communication"; or "attorney work product - prepared in anticipation of litigation."

As professionals we are, or should be, at the cutting edge of office technology. Rather than send a memo marked "confidential" through inter-office mail of the U.S. Postal Service, we zap it instantaneously, via e-mail. E-Mail has proved to be fast, accurate, reliable and susceptible to intrusions. The sender cannot know who might have access to the screen of the receiver, or whether some hacker may already have invaded the privacy of the system. Keep in mind that, even if you erase a communication from your server, there may be a copy maintained (and, thus available) in a central server or in what is called "trash." As a general rule, we'd all like to think that something we intend to be confidential is confidential; but, if we chose a potentially insecure method for
transmission, are we protected?

The question is easy to ask and hard to answer. Is there a reasonable expectation of confidentiality on cellular telephones? The internet? Fax machines (which may be in a central mailroom)? The problem is that if it can be inferred that the attorney knew or should have known that the mode of communication was not confidential, the privilege may have been waived.

There is not much guidance from the courts on this topic. In National Employment Service Corp. v/ Liberty Mutual Insurance Co.,\textsuperscript{22} it was held that e-mail communications between corporate counsel and employees could be privileged if the communication involved legal advice. \textit{See also, State of West Virginia ex rel. United States Fidelity and Guarantee v. Canady.}\textsuperscript{23} \textit{But see, United States v. Keystone Sanitation Company, Inc.,}\textsuperscript{24} (inadvertent disclosure of electronic mail messages waived at least a portion of the attorney-client privilege.)

According to a recent \textit{ABA Journal} article,\textsuperscript{26} it’s only a matter of time before attorney-client mail is intercepted. And, while a recent law review article found no cases holding that failure to encode or scramble e-mail messages or cellular phone conversations constitutes professional negligence, its author concludes that the growing availability of encryption technology may lead to that finding in the future.\textsuperscript{28} So, it is increasingly important to know how to protect lawyer/client confidentiality and to follow the appropriate guidelines very carefully.

B. USING LAWYERS TO REVIEW THE DECISION TO TERMINATE

Once a decision to terminate has been tentatively reached, it is very important to have the file reviewed by counsel to evaluate the possibility of successful litigation by the employee. This legal review will look at the file from the standpoint of the \textit{McDonnell Douglas} analysis discussed above.

\textsuperscript{22} No. 93-2528-G (Mass. Sup. Ct. Dec. 21, 1994)

\textsuperscript{23} 460 S.E. 2d 677 (W.V. Sup. Ct. App. 1995)

\textsuperscript{24} 885 F.Supp. 672 (D.Pa. 1994)

\textsuperscript{26} Vandagriff, David P. \textit{Who’s Been Reading Your E-Mail?}, 81 ABA Journal 98(1), May, 1995

\textsuperscript{28} Froemkin, A. Michael, \textit{The Metaphor is the Key: Cryptography, the Clipper Chip, and the Constitution}, 143 U. Pa. L. Rev. 709-897, Jan. 1995
The first question will be whether the employee will be able to make a prima facia case of discrimination. Here, counsel is looking to see whether the employee will be able to cross the relatively low threshold of showing minority status and qualification for the job. Finding a carefully worded job description describing the essential elements of the position and detailed documentation of the employee's lack of some of the skills needed will be very encouraging.

The second question will be whether there is a credible non-discriminatory grounds for termination. This part of the review consists of checking to see a) that the reasons being given for the termination are ones which a judge and jury would accept as reasons to fire someone, and b) that there are documents and/or witnesses to support the necessary facts.

Finally, the review will seek to determine whether there are any prohibited grounds mixed in with the non-discriminatory basis for the termination. This aspect of the review includes determining whether there is any evidence of retaliation. A good example of the need for this check can be found in Mathis v. Jack Brown Buick, where the court was prepared to accept that the employer had a valid reason to fire the employee, but was "troubled" by the timing of the firing.

The court finds more than mere coincidence in the fact that the plaintiff’s first written criticism in nearly three years of employment came less than thirty days after he had filed his initial EEOC complaint.

If the file passes this review, the managers can proceed with planning for the termination meeting. If problems are identified, counsel can work with the managers to supplement the record through additional case building or other steps. It may be necessary to make a very difficult decision at this point, because sometimes counsel will point out that the record is bad, while, at the same time, conceding that there are too many job-related risks to delay the termination long enough to fix up the record. This scenario is discussed in the next section.

One final thought about using lawyers. No matter how useful the lawyer may be in helping the supervisor prepare the file, or in reviewing the sufficiency of the file in anticipation of threatened

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27 Mathis v. Jack Brown Buick, 61 FEP Cas. 1088 (N.D. Ill. 1993)

28 Id. 61 FEP Cas. at 1091
litigation, care should be taken in involving the lawyer in the face-to-face meeting with the employee. Like it or not, the presence of lawyers tends to "raise the ante." One lawyer begets another, etc. and so forth. Pretty soon, what ought to be, and really is, an academic (or human relations) matter, becomes an legal one. Form supersedes substance and the academy suffers. We emphasize that this does not mean that the attorney should not be in the forefront of the decision making and review process. But, lawyers must be used judiciously. Of course, if the employee makes it clear that he plans to bring a lawyer to what will be a termination meeting, your lawyer should also be present.

V. RISK MANAGING A TERMINATION

Let us suppose that instead of being a part of an effective employment management system, you find yourself an outsider in a general counsel’s office. The phone rings and you are told that a department head has got to fire somebody, and it seems certain that there will be a claim of discrimination that could get very messy. There is no way to slow the process down to build a case; you are brought in only to advise about the termination interview. Is there anything you can do?

While the situation is bleak, this is probably the most familiar termination scenario that college lawyers face; and the answer is yes! There are things that can be done to manage the risk of litigation, even at this late date.

The first thing to do is get the process under control. One qualified person has to be given the final authority to manage this event. If you are really successful, that person will be someone who listens when you talk. If you find that no one is listening to you, you’ll be better off going on vacation.

The next thing to do is review the file to see how many of the holes you can repair. If your review reveals obvious or potential discrimination issues, make sure that the appropriate people know about that risk. Where you are faced with this kind of a smoking gun, suggest trying to get a termination agreement and point out that it will be worth it to offer some pretty good consideration in exchange for a release. Try to delay the termination process long enough to see if you can negotiate such a separation agreement.

Do your utmost to persuade the players to follow the steps described above in preparing for
the termination meeting. It is even more important to risk manage that meeting when a solid case has not been built than when the file is in good shape.

One of the most important things to do in this situation is to set up damage control. This will involve the obvious effort to prepare a press release, designate a single spokesperson for the institution and make sure that people know that no one else should attempt to offer comments or explanations. It will also involve getting the word around to the employee’s co-workers in a coordinated fashion, so that they will get the institution’s perspective, before there is a public announcement.

Damage control also involves looking very carefully for points of institutional vulnerability. Will a claim of retaliation affect a funding source? Will the employee’s story adversely impact delicate community relations? Where vulnerabilities are identified, make sure that there is a strategy in place to protect them before the story breaks.

Another element of damage control is to reach out to the individuals who will be identified in the terminated employee’s complaint. They should be interviewed, evaluated as potential witnesses (or liabilities) and given appropriate counsel as to how to deal with the likely reaction to the story as it breaks. As time goes on, and the case matures, it is essential that sufficient time is spent on the care and comfort of the witnesses to make sure that they will still be eager to support the institution in depositions and at trial. This means being sure that they don’t disappear from the institution’s work force without your knowledge.

Also under the heading of damage control is careful research into the complaining employee’s background. There was a brief period in which defendants were able to escape from bad terminations if they were lucky enough to come up with an after-the-fact reason to replace the faulty one used at the time of termination. The courts were never terribly happy denying the plaintiff a recovery for an illegal termination on the ground that the employer dug deeply into the employee’s background and uncovered something which would have prevented the employee from being hired in the first place or gotten her fired in the employer had known about it. Not surprisingly, therefore, the use of after-acquired reasons for termination has been curtailed by the Supreme Court’s opinion in McKennon v.
Nashville Banner Pub. Co.\(^{28}\) In that opinion, the Court held that purely after-acquired evidence of wrongdoing cannot deprive an employee of a remedy for an otherwise illegal employment action.\(^{30}\) But the Court made it clear that after-acquired evidence of improper conduct can be a basis for eliminating some aspects of the damages which an employee can collect. Proof of conduct which would have lead to termination upon discovery eliminates the right to reinstatement and front pay.\(^{31}\) The Court left to a case-by-case analysis the impact of after-acquired evidence of improper conduct on the right to back pay.\(^{32}\) Recognizing that the likelihood of being exposed to employer fishing expeditions into their past lives will deter employees from seeking redress for undesirable discrimination, the Court took some comfort from the fact that the ability to use this type of after-acquired escape hatch is limited. The employer:

\[
\text{must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.}\(^{33}\)
\]

The Court also pointed out that the employee’s right to seek attorneys fees was a deterrent to employer overreaching.\(^{34}\) An unhappy EEOC recently issued an Enforcement Guidance\(^{36}\) in which it announced that an employer’s aggressive attempts to dig into an employee’s past in response to a charge would be treated as a form of retaliation. The document also indicates that the Commission is unwilling to permit after-acquired evidence to offset an employee’s rights to damages in more than a few very specific instances.

As the law stands, therefore, it is probably worthwhile to follow up on any hint that the

\(^{28}\) US, 115 S.Ct. 879 (1995)

\(^{30}\) Id. at 885

\(^{31}\) Id. at 886. "It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds."

\(^{32}\) Id. at 886.

\(^{33}\) Id. at 886-7

\(^{34}\) Id.


26
complaining employee was untruthful in some way before or during the employment relationship. Such an effort may produce information which can substantially reduce damages; but be careful of the danger that it could be treated as retaliation and remember that spending a lot of discovery time on a fruitless search can result in additional attorneys fees being awarded to the employee.

Finally, damage control also includes running a post mortem on the case after the termination, in which, hopefully, you get everyone to promise that they will do it right, next time.

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