Difficult Conversations With Your Difficult Employees

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Difficult Conversations With Your “Problem” Employees

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Today, Instead of Our Usual Focus on Legal Compliance, We Discuss Challenging Employees and Situations

Our focus is best practices to address some of the most challenging employee relations concerns, including:
• Employees with hygiene issues or with conditions that are exacerbated by scents, perfumes, cleaning substances, etc.

• Employees who engage in anti-team or bullying behavior which negatively impacts the workplace.

• Employees with substance abuse issues.

• Employees who engage in inappropriate relationships that cross boundaries and negatively impact the workplace.

• Employees whose religious beliefs are in conflict with the beliefs or behaviors of others.

• Employees whose poor performance has historically not been managed properly, and whose managers now insist upon termination.
• Employees who may have engaged in protected conduct to secure whistleblower status and for whom a retaliation claim is a likelihood.

• Employees who are suspected of abusing sick leave, PTO, or related policies, and who pose a challenge under intermittent FMLA leave rules.

• Employees who exhibit or display angry, unprofessional, and potentially violent behavior.

Best Practices for Managing and Ultimately Terminating “Untouchable” Employees

• Consistent documentation.

• Performance-based management.

• Rely upon well-publicized complaint procedures.

• Managerial training.

• Culture of compliance.

• Apply same standards and have comparative data.
Best Practices to Deal with Chronic Complainers/Issue Creators

- On a case-by-case basis.
- Important to remain calm and listen to the employee’s complaints, even if they are irrational.
- Escalate only legitimate complaints and explain that those concerns which have no factual basis will not be elevated.
- Ask for a written statement every time.
- Do not “pathologize” bad behavior or poor performance as the ADA and other EEO laws do not excuse bad behavior or poor performance.
- Always focus on performance and how behaviors impact the workplace.

Best Practices for Managers

- Deal with complaints and problems.
- Remember the goal is to prevent, resolve, and avoid issues—not to “win.”
- Meet challenges head-on, which means documenting and providing training when necessary.
- Be a positive force/influence and a person who communicates effectively while upholding performance standards.
- Model appropriate workplace conduct.
- Filter issues to determine what needs to be raised with HR or senior management.
Best Practices to Deal With Bullies and Toxic Employees

• Do not be afraid to address amorphous behavior.

• Do not describe the behavior as “a bad attitude,” but focus on the results and impact on others, such as the creation of an unprofessional or uncomfortable work environment for another.

• Make it an element of every job description and a requirement of every employee to contribute to a workplace of dignity and respect.

• Make failure to comply with this workplace environment a terminable offense.

• Focus on the new “buzz words”: disrespectful interactions with others; anti-team behavior that undermines the goals of the company or the team; toxic behavior that creates an uncomfortable and unacceptable environment for co-workers; and if relevant, failure to comply with EEO regulations and policies.

Scenario No. 1 – The Bible Belt

As a side gig, Julie is an enormously successful Bible sales person for the Old Time Bible Company (OTBC). She and her partner, Suzanne, frequently post on Facebook about Suzanne’s business “Jesus Loves All,” which promotes the interests of the gay, lesbian, and transgender community. Both Suzanne and Julie often debate local officials about these issues, and frequently post negative comments about Donald Trump.

What are your concerns when (i) your biggest client demands that Julie be removed from its account because of her social media activities and political activities (ii) co-workers refuse to work with her, citing her “heathen” beliefs?
Analysis and Best Practices:

• So-called First Amendment rights.
• Issues of professionalism and tolerance in the workplace.
• The role of customer preference in discrimination cases.
• The impact of social media in the workplace.
• Expressions of political belief, and consideration of this activity as “concerted” under the NLRA.

Scenario No. 2 – Key West Hurricane

Jason and Jessica are long-time associates at the Key Law Firm. Last month, Jason went to Human Resources and submitted a statement that several regular clients have referred to him as “gay,” or a “fairy,” and/or demeaned him because he is bi-racial. He gave examples of being called “Polka Dot,” “Mocha Latte,” and “Oreo.” He also reported that Jessica stood up for him and told the clients they were out of line, but a partner, Tim, who they both regard as subversive and a bully, was seen encouraging the clients to harass Jason.

When the clients complain and the Managing Partner attempts to speak to Jessica, she becomes angry, telling him: “No, you shut the ____ up and listen to me, you racist Trump-loving idiot.” The Managing Partner fires her on the spot. Tim then approaches the Managing Partner, stating: “Hey, I tried to resolve this issue. You know me, always trying to create harmony, but the clients are right. Jason shouldn’t work here.”
Analysis and Best Practices:

- Protected activity by both Jason and Jessica?
- Concerns about retaliation?
- Issues of customer preference and customer service.
- Solid basis for terminating Jessica apart from her legally protected conduct?
- What about Tim’s unsolicited intervention and remarks about Jason?

Scenario No. 3 – Breaking Bad

Rob, a senior partner, is waiting at your door when you arrive this morning and tells you there will probably be a media story about him which might be embarrassing to the Firm. He tells you: “I fell asleep in the parking lot of a fast food restaurant last night and police officers knocked on my window about 2:00 a.m. They searched my car and found prescription bottles of Xanax and opioids I had been taking for my bad back. You may remember I was injured at work last year, filed a worker’s comp claim, and have been seeing a medical doctor and a chiropractor ever since. I also have a prescription for Suboxone, which is to help me to get off the opioids. I think I am addicted to both of these drugs and have decided to get some help.”

He goes on to tell you that he is willing to sign a “last chance agreement,” and will do anything to preserve his job, but when you start digging, you are going to find he has abused his Firm credit card privileges and has rolled up a large tab for a gambling trip to Las Vegas. He asks for forgiveness and for the Firm’s support.
Analysis and Best Practices:

• Impact of state and local laws regarding substance abuse issues, including possible drug testing which might be required by a last chance agreement.

• The wisdom and content of a last chance agreement.

• ADA requirements and issues with ongoing substance abuse concerns.

• Company’s obligations to fund treatments.

• Necessity of forgiveness of financial impropriety?

• Impact on worker’s comp experience?

Scenario No. 4 – Charity Starts at Home

David is a Senior Partner at the Firm, and has a substantial “book of business.” His job description requires him to manage 10 junior associates who also have business development goals. HR receives two anonymous complaints about David, the first that he hoards all client interaction and takes credit for clients who associates help bring in, effectively keeping the associates from meeting their goals and earning bonuses.

The second anonymous complaint focuses on David’s requirement that the associates exercise with him and engage in community outreach with him. The complaint notes that most associates are not sufficiently fit to engage in these athletic pursuits and do not want to give up their weekends supporting the United Way, Red Cross, and other service organizations that David assists.

Are you more concerned if the anonymous note confirms one associate was injured training for a marathon with David, and that David called him a “lightweight” when this happened?
Analysis and Best Practices:

• Employee relations concerns and particularly claims of favoritism.
• David’s competence as a manager.
• Bullying and boundary issues.
• Other risks and potential liabilities faced by the Firm.
• Possible worker’s comp issue?
• Protected, concerted activity under NLRA?

Scenario No. 5 – Dirty Documentation

The head of operations approaches you about a strategy to eliminate the position of Padma, a billing supervisor with 10 years of experience. She is one of only two women in the Billing Department of approximately 15 and is of Indian ancestry. The white male senior manager acknowledges that Padma’s performance, at least on paper, has been excellent, and that all of her evaluations meet or exceed expectations. In most years of employment, she has received a raise and/or incentive compensation. He tells you, however, he has been afraid to manage her properly; has likely missed documentation opportunities; and is uncomfortable managing an Indian woman. He suggests a job elimination of three people from the department including Padma, but notes that the other two, both males will be qualified to bid on open positions and likely will not be expected to lose their jobs.
Analysis and Best Practices:

- Integrity of evaluation system.
- Training of managers and supervisors to complete a performance evaluation accurately.
- The risks of a RIF of one.
- How to manage and resist lazy supervisors who do not timely document disciplinary issues.
- Basics of proper documentation.
- Concerns about lack of comfort in managing Padma.

Scenario No. 6 – Social Media Gone Crazy

Delilah and Jennifer are legal assistants. They belong to a Facebook group of legal assistants who regularly communicate about issues at work. Delilah was reluctant to make her Facebook account public, but did so only because the Firm permits assistants to switch schedules using the Facebook group. Delilah now says she had good relationships with all co-workers until they started reading her previously private Facebook page.

Jennifer then told her she did not approve of Delilah’s husband being a Pentecostal minister. Jennifer also stated she was not in agreement with some of the beliefs of Delilah and her husband, including beliefs related to gay marriage, abortion, and other controversial issues. She also stated she was not in agreement with the political views Delilah and her husband express or the activities of their church. Delilah now feels isolated from her peers and complains to you that no co-workers will switch schedules with her or show her the most basic courtesies. She believes she is being treated unfairly and is the subject of “retaliation” by her peers because of her religious and cultural views. She also feels this would not have happened if she had not been “compelled” to join the Facebook scheduling group.
Analysis and Best Practices:

• Discussion of social media and possible negative impact in the workplace.

• Need to investigate issues that have been raised by Delilah?

• Possible counseling and professionalism solutions for the group.

• Proper understanding of retaliation, and distinction between supervisor action and peer action.

Scenario No. 7 – Failure to Disclose

A new paralegal, Larry, reveals he is a Seventh Day Adventist and can no longer work on Saturdays, if needed. He mentioned this to his direct manager yesterday, who then said to him: “Why didn’t you tell me this, Larry, when you applied? Didn’t you know your schedule could include Saturdays, particularly if the firm is under tight deadlines? If you had told me then, I could have done something about it. We can’t let you have all Saturdays off. Everyone will then want all Saturdays off, and we all know we are gearing up for a huge national class action. It won’t be fair to everyone else. So I will do my best, but there are no guarantees.”

He tells you he is upset and anxious following this interaction with his manager, and because he suffered PTSD while fighting in Iraq in the mid-90s, he is certain he will require time-off to deal with anxiety and depression from time-to-time. He acknowledges he has no FMLA entitlement.
Analysis and Best Practices:

• Religious accommodation.

• Management attitude that accommodation should have been sought in advance.

• Impact of co-worker discontent in connection with ADA or Title VII reasonable accommodations.

• Absences of FMLA coverage and possibility of time-off as ADA reasonable accommodation.

• Interactive process under the ADA and best practices associated with reasonable accommodations.

• Possible issues with intermittent leave.

Scenario No. 8 – Fragrant Blossoms

Anne and Steve are file clerks. They work in cubicles. The file room has over 20 such cubicles. They report the person next to them, Evelyn, not only wears very heavy perfume, but has plug-in air fresheners throughout her cubicle area. According to Anne and Steve, it is virtually impossible for them to work in their cubicles as they both suffer headaches and nausea because of the excessive perfume in air fresheners. They report they have tried to handle this on their own, but Evelyn tells them it is none of their business and that she needs these fragrances to help deal with her depression. Anne and Steve ask for a transfer to another location and for removal of the sources of scent. Both bring in a note from a local chiropractor noting their sensitivity to various smells, and stating further that noxious chemicals are stored in the kitchen of the office and used to clean the restroom facilities, and that unless something is done, they are contacting OSHA.
Analysis and Best Practices:

- Various ADA issues involving Anne, Steve, and Evelyn.
- Notes on interactive process.
- OSHA rules and regulations and concerns.
- Workplace of dignity and respect.

Scenario No. 9 – Family Affair

Christie and Ed are attorneys at the Firm. Almost all of their co-workers know they have been engaged in a long-term affair. Both are married and have three children each. Their adult children work at the Firm also. Just recently, Ed has been promoted to senior partner. He and Christie asked that she not be assigned to his practice group so they will not be working together. Simultaneous with these events, Christie’s son and Ed’s daughter, both of whom work at the Firm, have an argument in the breakroom, which results in a fist fight. As a result, co-workers of come to HR, claiming they are in fear for their safety; know that Christie’s son has a gun collection; and remind you that the workplace is one of the most dangerous environments in America.
Analysis and Best Practices:

• Conflict resolution tips.
• Genuine concerns about workplace safety.
• Ed’s new status as a supervisor and how this impacts the apparent consensual relationship.
• Impact of relationship on co-workers.
• Discipline or other steps to deal with conflict between Christie’s son and Ed’s daughter.

Scenario No. 10 – Loose Lips

Your Firm’s interview process involves multiple meetings with various department heads. A participant in an interview tells you that Larry, the Managing Partner, made several age-related comments during a recent interview, referring to “old guys like us,” and commented on the fact the candidate graduated from high school in 1969. Larry hogged the conversation with anecdotes about the late 60s, and asked the candidate how old he was in 1969 during Woodstock.

Larry also made jokes about Woodstock, and refers to the benefits of sex with strangers, use of illegal drugs, and other questionable activities. When the candidate is not selected for the position, he files a charge with the EEOC alleging age discrimination with the EEOC. Bob, one of Larry’s direct reports, was in the room during the interview and has been heard publicly commenting that Larry has negative stereotypes about age, sex, and race, and that it is a shame the Firm lets him be in a decision-making role.
Analysis and Best Practices:

• Best practices regarding interviewing and onboarding.
• Training managers and supervisors who participate in interviews.
• Sufficient to state an age-claim?
• Issues of professionalism.
• What is the duty to investigate, particularly in light of the allegation involving Bob and the suggestion of stereotypical views on a more comprehensive level?

Thank You

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Your opinion matters!

Please take a moment now to complete the evaluation.

Thank You!