

employment alert

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No Documentation = No Options? Not True

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4.2 A manager wants to fire an employee because she is surly and uncooperative with her coworkers. The problem? No written documentation of the issue. Despite repeated admonitions to document performance and behavior issues, many managers skip it only to feel hamstrung later when they want to take action against the offending employees.

“These calls come up all the time,” says Andrew Gould, a partner at Wick Phillips in Dallas. “The manager says it’s been a problem for a year, but there’s only been verbal communication about it and they didn’t feel the need to document.”

Heidi Carpenter, a shareholder at Fafinski Mark & Johnson in Eden Prairie, Minnesota, says lax documentation can make it more risky to fire someone, but does not completely eliminate the possibility. “The reality is you almost never have a lot of documentation unless the manager has been subject to an employee claim before or the HR department at the company has been really insistent.”

Steps to take. Lonnie Giamela, a partner in the Los Angeles office of Fisher & Phillips LLP, says the first step employers should take is to assess what they do have. “Are there objective facts you can point to such as the employee clocking in late three times in the past two weeks?”

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“It’s always easier if the problems are something quantifiable, such as not hitting sales numbers vs. having a bad attitude. Still, while there might not be official documentation, there have usually been less formal attempts to correct the behavior. Employers should look for other ways to show there have been problems. The manager might, for example, be able to provide emails capturing what transpired—‘I see you were late again today’—or have a list of customer complaints,” Carpenter says.

There also may be some safety in numbers. “Talk to more than just the manager who wants to fire the employee to see if others have seen the same problems,” Giamela says.

Past disciplinary actions also must be considered. “Ask whether others have been terminated for similar actions or behavior. If they have, it makes it easier to justify the termination,” Giamela says.

Protected characteristics or recent complaints are another consideration. “Is the employee part of a protected class based on age,

sex, religion, race, known disability? Has the employee recently taken any type of leave—military, medical, family, workers comp? Those statutes all prohibit retaliation,” Carpenter says.

“If the employee has recently filed a complaint or requested leave, the optics won’t look good if termination comes soon after and without documentation. The lack of documentation makes convincing people there’s no link even harder,” Gould says.

Recent praise is also challenging to overcome. “Are there any recent documents indicating the employee’s performance has been good, such as a great recent performance review or winning a company award? Employers need to consider the things that might contradict the manager’s position,” Carpenter says.

Costs vs. benefits. Once employers have the answers to these questions, they can decide whether the benefits of termination outweigh the risks of proceeding. “Each company has to decide how comfortable it is with risk. Some companies are more willing to roll the dice than others,” Gould says.

“Some employers will conclude that termination without documentation is too risky. That’s where you start thinking of less aggressive action that’s more appropriate, such as performance improvement plans, formal discipline letters or reassignment to a different manager,” Carpenter says.

Employers that conclude termination is the best option should consult with legal counsel to ensure the situation is handled in a manner that reduces the odds of a lawsuit. Offering severance pay is one possibility. “It can be a good idea to have a policy or practice of paying severance and obtaining a release to help eliminate risk when terminating with much documentation,” Gould says.

Practically Speaking: If you cannot point to written documentation in support a manager’s desire to terminate an employee, your hands may not be completely tied. The first step is to consider what you *do* have, e.g., objective facts that would lead a reasonable employer to take similar action for policy violations. The more quantifiable the poor conduct, the better for bolstering your reasoning for the firing.