



Counseling Dilemmas: Traps and Pitfalls to Avoid

THE TRAPS ASSOCIATED WITH COUNSELING fall into three categories. First, there are the traps and problems associated with counseling itself. Second are the traps encountered as you move beyond counseling to the warning stage and the likelihood of termination. And third are the legal traps that may be set when disgruntled employees follow through with a threat to sue as a result of termination. Some of these pitfalls have been noted in the earlier chapters in this section on counseling, but they are discussed more fully here because they deserve emphasis.

Counseling Pitfalls

Acceptance of Poor Performance

The biggest mistake that managers can make with problem performers—whether due to poor performance or discipline matters—is to ignore the problem. You may realize that the best step is to get together with the problem performer and discuss the matter and develop an action plan to improve the employee’s performance. Depending on the nature of the problem, such intervention may put the problem performer back on track or even salvage his or her career. And by intervening in this way you will come across to your staff, peers, and boss as someone who is in control of your operation.

But, given the problems that counseling can create and the commitment of time it demands, it is easy to convince yourself that you are too

busy now and can address the problem later (for instance, during the next appraisal review), or that the problem isn't serious enough for you to hold a counseling interview with the employee (you can handle the task that the employee isn't capable of doing or look the other way when he arrives late or leaves early regularly), or that the problem will disappear in time when the employee moves elsewhere in the company or to another firm. But are you only rationalizing your own unwillingness to confront the employee?

Over the years, I've met many managers who procrastinate when it comes to counseling a troublesome worker. Their arguments range from "I need the person"—that is, that the poor worker is indispensable, since the job he or she holds is a hard-to-fill one (better a warm body than no body), to "That would be punishing someone whose work is all right almost all of the time," to my favorite, "Now I'll have to admit to my boss that I have a serious staff problem on my hands." Each is a lousy excuse for not counseling someone, and if counseling doesn't work, for not firing the employee. Poor performers, regardless of their unique skills, never justify their costs. Counseling isn't punishment; it's an opportunity to turn the poor performance around. Enter into the counseling optimistically. If there's no improvement after two or three meetings, you can know that you've done all you could to salvage the individual.

And, as far as clueing your manager into the existence of a problem, think for a minute. In most instances, your boss may not know the exact nature of the performance problem, but he or she will know that there is something wrong with your work group. And the sooner you come to grips with the situation, the better. Level with your boss, review the steps you've taken, and ask your manager for time to undertake counseling—if you haven't begun it already—and together set a timetable for taking action. The last will rule out any unfairness factors like discrimination, in the event that termination is called for.

Do you have a problem right now that demands your attention? Ask yourself:

Do I truly plan to discuss this problem during the next appraisal review?

Is that too long to wait to discuss the problem?

Until the problem is solved, or the employee moves on, do I have the time to do a portion of this employee's work for him?

Is it fair to expect all my other staff members to arrive on time and put in a full day's work for a full day's pay?

Is it fair for me to put another manager, either within this company or outside, in the position of having to address this problem because I didn't?

And, maybe the most important question is: "Who besides me knows about this problem?" Likely, it's your staff members, peers, and boss. Management is the art of getting work done by others, and your performance as a manager will be measured by the performance of your staff—all of them, even your problem performer. Don't apologize for confronting the troublesome or the troubled employee. Your responsibility is to maintain acceptable performance for all your employees.

Failure to Get the Message Through

Often, when employees reach the warning stage, they argue that they had no idea that the problem with their performance was that serious. In some instances, it is an excuse; in others, unfortunately, it is because the employee's manager never made clear the nature of the problem and the consequences of its continuation.

So it is important that, during counseling sessions, you be very specific about the existence of a work problem and its nature, *and*, even more important, the consequences if the employee does nothing about it. Document your counseling sessions and share a copy with your problem performer, including the action plan you both agreed on to address the problem.

Disagreement About the Existence of a Problem

Sometimes an employee will deny the existence of any problem, and the manager will have to prove that one does, indeed, exist. Unless you can point to specific incidents, a discussion with an employee with only a single performance problem can take the form of a "Yes, you did" "No, you didn't, prove it" conversation. This is where those management textbooks are right: You must document employee performance, both good and bad. As I will show later in this chapter, documentation of an employee's performance is important not only to defend in court any decisions you make about an employee but also to support your statements during counseling that there is a serious work problem requiring your attention and the employee's.

Documented observations particularly have the advantage of helping you during counseling to pinpoint both the nature of the problem and the steps to take to correct it. Mike, for instance, had an employee who

did a spectacular job except for her behavior when working with staff from this advertising firm's art department. Carla, his copywriter, refused to accept Mike's statement that she always came into the art department with a chip on her shoulder. As he cited specific incidents he had been witness to, Carla found it harder and harder to deny that her manner made it difficult for the artists to work with her. Mike was then in a better position to find out the reason for her rudeness and come up with ways that she could mend fences.

If you expect the kind of opposition to your assessment of a problem such as Carla first gave Mike, you may want to have your records on the employee with you and to have highlighted those incidents that support your remarks. If the individual's work is bad enough for you to consider putting the person on warning, you should also consult earlier performance reviews in which these issues were discussed. They prove that you have gone over these problems with the employee before. Have them with you when you sit down with the employee.

Disagreement Over Standards

Employees may agree that your assessment is accurate, but then argue that the expectations, standards, goals, or outcomes themselves aren't fair. You can counter this argument in two ways. First, if others who report to you have similar standards and have met them, you can remind the employee of this fact. Alternatively, if that is not the case, you can point out that over the years you and this individual have discussed the performance goals and at no point in the past did she raise this issue, as shown by your documentation of those earlier appraisals. With the appraisals readily available, you can even show the staff member that she signed the appraisal form or other document you use in your company's performance appraisal program agreeing to pursue these goals.

The ADA Excuse

Since passage of the Americans with Disabilities Act (ADA), many managers suddenly discover during a performance appraisal in which their employee is poorly evaluated that that employee has a previously undisclosed disability that is covered by the ADA. For example, after working with Marty for several years and tolerating chronic tardiness, Jack decided to do something about it and brought up the problem with him. Marty didn't deny that he was always late, nor did he argue that other staff members also came in late and that it was unfair to come down on him alone. Rather, he told Jack that he had a sleep disorder, took medica-

tion that made it difficult for him to wake up when his alarm clock rang, and consequently couldn't do anything about being continually late. Jack knew his staff members well and kept his ear tuned to the department grapevine, yet he had never heard anything about Marty having a health problem, so he doubted Marty's claim. Whether he believed him or not, though, he knew he had to hear him out. And if Marty did indeed have a sleeping problem, Jack would have to make *reasonable accommodation* for the situation. But Jack knew that he had the right to ask for confirmation of Marty's allegation, which he did. He asked Marty to bring in a letter from his doctor or to see the company's medical office. If Marty was an insomniac who had to take medication to fall asleep, Jack would accommodate the condition by putting Marty on flextime; Marty could arrive an hour later than his peers, but he would have to work an extra hour after they left. But being protected under the ADA didn't mean that Marty could get a full day's pay for less than a full day's work.

The Emotion Trap

Besides denying either your assessment or the validity of the goals, or coming up with a heretofore unknown illness, employees may respond emotionally to your comments about the need for them to improve their job performance. The responses run the gamut from tears to shouts to threats of violence. Some may show no reaction at all; they may listen quietly, then get up and leave, which can be equally unnerving.

The emotion trap is twofold. First, knowing that your troubled or troubling employee will get emotional when you confront him or her about the need for improving performance may discourage you from ever bringing up the existence of a problem. Some managers would rather tolerate poor performance and even violations of corporate rules than have to stand before an employee who, they know, is likely to sob—or, worse, shout at them or, worse still, threaten to go over their head to personnel or their boss or to take them to court or, worst of all, promise to beat them up. However you expect the problem performer to respond, you can't let this person distract you from your course, which is to get her performance back on track.

Second, should an employee get emotional during a counseling interview, you should not let it sidetrack you from your mission, which is to get agreement with the employee that a problem in performance exists, what the nature of that problem is, and the actions you will have to take should the problem continue. If the employee does cry as you expect, you can offer both compassion and Kleenex.

Let the employee have some time to compose him- or herself; you might even want to reschedule the meeting for later in the day, when the employee is more composed, or excuse yourself for a few minutes while the employee pulls together. Once you return to the room, you can begin by reassuring the employee that you would not want to begin counseling if you did not believe that he or she was capable of improving.

Balance is critical in your discussion with the employee. While you want to communicate your faith in the person's ability, you also want the employee to realize that failure to improve will end in his or her termination. Sometimes, employees show a little improvement and then lapse into poor performance or misbehavior again. They may even say to you, "The problem is no big deal." You have to make clear to your staff member that it *is* a "big deal." For instance, if the problem is attitude and your initial follow-up shows no change in behavior, you may want to give the worker another chance. Meet with him or her to re-emphasize the need for improvement. "Otherwise," you might say, "I'll have no choice but to fire you."

Beware that you don't get caught up in one follow-up meeting after another and another without any positive change in performance. Based on my conversations with managers, I suspect that one reason—beyond the unpleasantness of having to fire someone—is that no one wants to admit that his or her good-faith efforts have failed.

Also, shouts or threats about going over your head or to a lawyer should be handled professionally. Let the employee vent. If the person is out of control, you might want to suggest that you get together later when the individual has had a chance to regain control and you can talk more calmly. Usually, after giving the issue some thought, the employee will return in a more subdued mood, ready to discuss the problem and set goals for improvement. At this stage, few employees carry through with their threats to go to a lawyer. At worst, they will go to your boss or Human Resources to complain. And if you have kept your boss informed of your situation with Employee X and alerted Human Resources about the need to undertake counseling, the employee will be met only with professional courtesy.

If you have the kind of hotheaded employee who might actually get violent, you may want a second person in the room with you. If the employee does hurl threats or suggest violent acts against you or the company, call security. Even if the situation doesn't escalate to the point that you feel physically threatened, you should report the threats to either Human Resources or your boss. And if you ultimately have to fire

the individual, you should have a second person with you, even a security person nearby, should the worker try to make good on the threats.

Misunderstanding Your Role

Too often in the course of counseling, managers wrongly take on the role of sympathetic parent or professional psychologist. It's critical to maintain your focus as a manager, which is to get the employee to do fully and well the job for which he is paid, and to recognize your professional limitations. Not only are professional counselors better at identifying problems and helping individuals to solve them, they are also better at spotting phony sob stories, as in the following case study.

ALICE: WHEN TOUGH LOVE IS NEEDED

Zack had never been late until his mother was placed in a nursing home. Afterwards, he was late several days a week. Worse, Alice had noticed that he seemed a little confused and groggy when he walked in. She wondered if he were drunk. When she asked Zack to meet with her in her office, she raised the two issues with him. Zack told her about the pressures he felt in working to save the family home and that he had had to visit a doctor for medication to help him cope with anxiety. He denied he was drinking, since the doctor had warned that alcohol and Xanax—the medication he was taking—were a dangerous combination.

Alice believed him. As he sobbed out his story, she also found herself feeling extremely sorry for him. His situation reminded her so much of the stress she and her own brother had experienced when their father was placed in a nursing home. She was tempted to tell Zack that she understood and leave the situation at that, or to tell Zack about her family and advise him to see the same lawyer she and her sibling had used. Fortunately, she fought the temptation. She didn't let herself get so involved in Zack's problem that she was unable to separate her feelings of compassion for the hurt he obviously was experiencing from her management responsibility to ensure that all members of her crew were at work on schedule.

Instead, she stressed how a continuation of his tardiness could lose him his job, which would only add to the pressures on him. She told Zack that she felt he had reason to be upset, but he could not use it to justify his chronic tardiness. She also was worried about the effect of the medication on his ability to work and asked him to visit his doctor

to discuss other medications that would not leave him so drowsy during the day.

Instead of tolerating Zack's situation until he got his act together, as he asked her to do, Alice told him that she expected him to get his act together by Monday of the next week or she would suspend him for a week. She also wanted him to visit the employee-assistance program and said she would make an appointment for him. They could suggest to Zack a financial adviser to help him get through his financial troubles. Alice did give Zack the option of taking some time off to straighten out his problems, but he told her he felt better being at work.

For those of you who wonder what happened to Zack, let me tell you that he was able to find a lawyer who helped to secure the family home; he wasn't forced to sell the house he lived in. The government agreed that the property, while not in his name, was his sole residence and that he had maintained its upkeep since his father's death, when he moved in to keep his aging mother company.

Preconceived Notions

We may think that we know our employees well enough that we don't need to ask them the cause of a performance or disciplinary problem. This is a mistake. We should not enter into counseling sessions with preconceived notions about the cause of a problem because we may be wrong. And if we are, this would mean that the action plan we set with the employee won't work. Besides, asking the employee the reason for a problem demonstrates that we respect his or her opinion and want to hear it.

Poor Counseling Preparation

With both troubling or troubled employees, you will want to have your documentation readily at hand to point to specific instances that necessitate employee counseling. With troubled employees, however, you also should have on tap information about your company's employee-assistance program, if your organization has one, or, if not, community programs that might help the employee.

Failure to Consult Human Resources

There are legal traps in counseling, as you will see later in this chapter. Consequently, it is unwise not to check with the human resources or

personnel department before you schedule your first counseling interview with the troubling employee.

In your meeting with Human Resources, you should ask for a review of your firm's policies and procedures for handling poor employee performance or rule violations to ensure that you follow each step called for in your company's performance management effort. Failure to do so can make both you and your organization liable to a charge of discrimination.

Interviewing Traps

During the counseling interviews, there are other smaller mistakes you can make, like:

- *Dominating the Discussion.* Here's where the 20/80 rule should apply: speak only 20 percent of the time and listen 80 percent of the time. You also don't want to interrupt the employee; by doing so, you can miss some key point that will help you identify the reason for the problem.

To help you monitor how much you are talking, try this trick. During the next one-on-one meeting with an employee, note each time you speak and each time the employee speaks by making a mark in either of two columns on a sheet of paper. Now compare the two. If you have more marks than the employee, you will need to learn to be quiet to give the employee an opportunity to talk. You can check if you frequently interrupt an employee the same way. Mark each time you interrupt the employee, and each time the employee interrupts you, and compare the two records.

- *Shifting Attention from the Employee's Performance Problem to Your Problems or Feelings.* You can point out how the employee's performance is creating problems for the department or organization as a whole, but you don't want to dwell on how his or her continued mistakes are making you look bad. Likewise, while it may be disappointing to have someone you trusted let you down or someone you believe has tremendous potential not use his or her capability, it shouldn't be the subject of the discussion.

- *Overempathizing with the Employee's Problem or Feelings.* You may understand how the situation could have happened—you may even have been in the same boat once yourself—but you have to remain objec-

tive. If an employee senses that you are on his side, you are less likely to get a change in behavior.

- *Dictating What an Employee Should Do.* For an action plan to succeed, the employee must be truly involved in its creation.
- *Moving Too Quickly into the Problem-Solving Phase Without First Discussing the Nature of the Problem.* Doing this is really jumping the gun. As a result, the employee may go through the whole problem-solving process while still not believing that a problem in performance actually exists. As mentioned previously, the sine qua non of successful counseling is to get the employee to admit that there is a problem. Besides, the employee should have an opportunity to share his or her feelings. This will not only let the individual know that you care about him or her as a person but will give you a better idea of how successful your counseling will be. Listen not only to what the employee says but also to what he or she doesn't say; the latter is a "third ear" or counseling gauge, measuring how effective the counseling sessions will be.

Following Through on Your Warnings

Despite the quality of your counseling, not all employees will change their behavior or improve their job performance. At this point, the biggest mistake you can make is not to take the action you told the employee you would have to take if the behavior change did not occur. If you don't act, you will prove not only to the troubling employee but to your entire staff that your warnings are meaningless, and they will act accordingly. Don't fall into the trap of holding one counseling session after another, after another, in the hope that the employee's performance eventually will turn around.

Different companies have different discipline and termination policies. But given today's leanly staffed organizations, it's unfair to you and your staff to counsel an unrepentant employee for more than two months before going to the warning stage. Remember that it only means extra work for you and a staff already carrying a heavy burden.

Even though you are at the warning stage, and the problem employee has acknowledged the existence of a problem, you will encounter some employees who will deny that a problem exists. He or she will look at you dumbfounded, surprised that, despite several counseling sessions, a problem *really* exists. You can avoid any misunderstanding by making clear from the start of counseling that it is one step removed from warn-

ing and that warning is one step removed from the individual being terminated.

Well-documented counseling sessions will enable you to prove to a third party as well as to an employee either in denial or lying that you both have discussed the problem over time. Memos to the employee should describe not only the nature of the performance problem but also the consequences of its continuation—termination—and the performance standards or goals or outcomes that will need to be met to avoid those consequences.

From the first counseling session, you should set, and write down, targets for the employee to reach in terms of both work improvement and the time by which the goal must be achieved. Be very specific in these targets. For instance, you might write about Marge, “By June 12, I expect you to revise the advertising kit.” Or you might reach agreement with Will in customer service that “within two weeks, you will increase the number of callers you handle from ten to fifteen per hour.” Further, because of previous complaints about his discourteous manner to customers, you might want to monitor his incoming calls and add to his target that “there will be no more complaints about being rude to customers.”

If Marge claims that you never discussed the problem, or Will argues that you never suggested this was a serious problem, you will have in writing a summary of your discussion and the final conclusions. Thus if Marge fails to finish the copy for the ad kit on schedule or Will continues to fall short of standard in the number of calls he handles and you have received another call about his brusque manner, you can place the employee on warning. This is the last chance—and you must clearly mean the *last chance* to turn around performance. Once again, you set a specific goal and timetable and put these in writing in a warning memo. And you provide the employee with a copy just as the employee received copies of the counseling reports.

When Termination Is Your Only Recourse

If the individual once again fails to make that objective, termination should not come as a surprise, whatever the person might say. You will have protected yourself. And you should feel justified in terminating the employee. If you have set specific objectives and the employee has done little to achieve those objectives or made only halfhearted efforts toward reaching them, then you need not feel guilty about having to use the

three-word phrase “You are fired.” If your company has an intermediary warning step, you should make clear to the employee that this is his or her final chance to improve. A carefully worded memo to that effect should drive home that point. So should having to meet with you during the targeted period, during which you keep careful records of the individual’s efforts.

Should the goals still not be reached, you will need to meet with the individual to terminate him or her. It’s best to get right to the point. The less said at this stage, the better. Reiterate the nature of the performance problems that made you come to this decision and then send the employee to Human Resources, where he or she will receive information about vacation pay or other benefits forthcoming and his or her legal rights.

Despite the impact that termination of the employee may have on workflow, it is better to have the individual leave immediately after he or she is terminated rather than give the person two weeks’ notice. Keeping the person on-site only opens you up to a fractionalized workforce as your staff members take sides between you and the terminated employee. Some disgruntled employees can also use their last days with the company to sabotage critical work.

There is much written about what the best day or best time of the day is to terminate an employee. Some experts argue against terminating anyone on Friday, since it gives individuals two days to worry before they can contact potential new employers. These writers contend that in a tight job market, with few jobs available, depressed employees may harm themselves or others over the two-day weekend. Other experts write that it doesn’t matter on which day you terminate an employee, but that it’s imperative to do so at the end of the day, when there are few employees around.

I think that, rather than time, it is more important that you treat the employee with respect when you terminate him or her. Keep the fact that you will be firing someone confidential, just as you kept to yourself the fact that he or she was on warning; the news will get out soon enough after your meeting.

During the termination interview itself, don’t try to get even for all those times this individual created problems for you or the team, or you had to do work that he or she was responsible for, and don’t express sorrow that this person is not using the potential you recognize exists. Instead, use this occasion to wish the individual more success in the next job and tell the employee that he or she will personally be missed. Review

in brief what has happened. Don't be long-winded; it can only trigger an emotional response or provide substance for legal action. Tell the employee something like this:

“As you know from our past conversations, we have certain standards in the company that have to be met. I think we approached those standards on a fair and reasonable basis. Over the last few weeks [or months], I have told you that your work has not been up to those standards. I don't believe it is because of lack of effort, but it just hasn't worked out. I don't think that it should come as any surprise to you. We're going to have to terminate you as of today. I really regret this. I had hoped that things would work out just as much as you did, I am sure. Human Resources can review what checks you have coming to you, as well as any unused vacation time. Susan in Human Resources is waiting for you to call to set up an appointment to discuss the situation.”

If there is a security issue involved, you can have the person watched, but marching him or her in lockstep to Human Resources and then to the locker to pick up personal belongings and treating the person like a convicted criminal can prompt him or her to lodge a legal complaint against you and the firm, and this can cause co-workers previously in agreement with your decision to change sides.

Dealing with Repeating Problems

With some employees, you may find that being put on warning is sufficient to turn around their performance over the short term, but that the problem reappears after a few months. Angela was one such person.

NORM: DEALING WITH ANGELA

Angela would sometimes be extremely passive during counseling and yet, on other occasions, become extremely argumentative. When Norm told her during counseling that he would have to put her on warning, suddenly she started making deadlines, was on time in the morning, took only an hour for lunch, and stayed until the end of the workday. But once he took the pressure off her, she returned to her old habits, slipping in after 10:00 A.M., taking ninety-minute lunch breaks, and disappearing by 4:30 P.M.

And forget about meeting deadlines. Angela was apologetic about the situation, but she would also get upset and argue that there were lots of business reasons she was behind in her work. Still, she did nothing

about these conditions that she blamed for her work failures unless Norm, once again, threatened her with the possibility of being placed on warning and terminated.

Norm tolerated the situation longer than he should have because he saw the tremendous potential in Angela. But in the end he had to accept the fact that she was a lost cause, unwilling to use the potential she had if she didn't have to do so. It took longer than usual to terminate Angela because of her performance highs and lows, but maintaining a record of her inconsistent performance over nine months gave Norm sufficient information to make a defensible case for terminating Angela.

This was a concern for Norm. One reason that he had not moved more aggressively to rid himself of her was that he was afraid she might sue for discrimination. She was over forty-nine, suffered from diabetes, and had had a poor performance record over several years before she began to report to Norm, but nothing had been done about it. Norm thought he would be walking into a legal minefield. Fortunately for Norm, Angela recognized the rightness of his decision and never went to a lawyer. But not all managers are so lucky.

Post-Termination Pitfalls

If an employee is terminated for cause but the employee decides to sue, charging discrimination, then you may find yourself in court defending your decision. There are four pieces of legislation that are often the basis for court cases:

1. *Title VII of the Civil Rights Act*. This act makes it illegal for an employer to discriminate against an employee because of the individual's race, color, sex, creed, or national origin. In 1991, this act was strengthened to allow plaintiffs to have jury trials and to sue not only for back pay but also for compensatory and punitive damages.

2. *The Age Discrimination in Employment Act*. This act protects employees and applicants more than forty years of age against discrimination. In 1990, this act was amended to require employers to recommend that an employee over the age of forty seek legal counsel before signing a waiver of employee rights and gave the employee twenty-one days to consider the waiver.

3. *The Vietnam Era Veterans Readjustment Assistance Act.* Under this act, companies with contracts of \$10,000 or more with the government must take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era.

4. *The Americans with Disabilities Act.* The ADA makes it illegal to discriminate against people in hiring, in job assignments, and in the treatment of employees because of a disability. In 1997, coverage was extended beyond wheelchair users, the seeing- and hearing-impaired, and drug and alcohol users to include the mentally challenged.

These laws were enacted to prevent discrimination, however, not to force managers to accept poor job performance from an employee in a protected group. For instance, under the ADA, an employer is required to provide, unless it is a financial hardship, *reasonable accommodation*, such as an oversize doorway to a cubicle or an access ramp for a wheelchair-bound employee or a Braille keyboard for a blind word processor. However, if the individual does not do his or her job despite the accommodation, then discipline and ultimately termination are within the law. Likewise, under the ADA, alcohol and drug users are considered disabled. But if such workers are found to be using drugs or alcohol while on the job or come to work under the influence of an illegal substance, you are within the law to take disciplinary steps leading to termination.

Some managers are so frightened of the repercussions of taking action against a poor worker within a protected group that they either ignore the existence of the performance problem entirely or go through counseling session after counseling session, hurling threats at the employee who over time comes to recognize how empty the manager's words are. But, in truth, managers only create a further problem for themselves when they do nothing: Co-workers who do their jobs resent one of their own getting away with chronic tardiness or excessive absenteeism, too much socializing, or missed deadlines, or whatever the job problem is. Actually, they see the failure to take action as a form of discrimination *against them*, since they expect you, as their manager, to respond with fair, understanding, and firm measures to correct poor on-the-job performance.

Left untreated, a problem employee's performance can cause you to be judged negatively by staff members, can set a bad example that others on staff will emulate, and over time can become a topic of conversation between you and your own boss. Then it becomes a problem with *your* performance, which can affect your career, if not threaten your job.

It's unfortunate that such situations occur. You should have little fear of legal reprisal *provided*:

- You have adhered to your company's policies and procedures, which in most instances means its performance appraisal program.
- You can demonstrate that you have applied the same criteria in assessing this employee as you have with your other staff members.
- You can prove that the standards or other measurements you are using to make performance management decisions about an employee are realistic and are based on the actual needs of the job.
- You have documentation to support your evaluations and final decision to terminate the employee.

When you allow a busy work schedule to keep you from conducting an appraisal of a problem employee, when you seem to be tougher on some employees than others, and those on whom you are tougher fall into a protected group based on race, color, sex, and the like, or when you don't keep careful records of both positive and negative performance, you weaken your company's and your own defense against a charge of unfair termination. Let's look at each of these traps in greater detail.

Failure to Adhere to Corporate Procedures

It doesn't matter how busy you are, you must closely follow the steps set forth in your company's appraisal program. If you treat one employee differently from another, you may open yourself and your organization to a discrimination charge. For instance, suppose the company's policy may call for performance evaluations every three months, but you neglect to review one employee once out of the mandatory four times during the year. After all, you had to get that business plan completed prior to closure of the budget period, or you had to attend a meeting with visitors from another organization with which you are forming a joint venture, or you were invited to participate in a brainstorming session about a new product.

But let's assume that this one employee whose appraisal you don't get to is behind in his work. His performance continues to deteriorate. He spends all his time socializing with his co-workers, distracting them

from their own tasks. He comes in late at least once a week. And he even talks back to you in front of other staff members. You meet with him and try to create an action plan to turn his performance around, but he denies the existence of a problem, blames you for demanding more from him than from the rest of the staff, and does not seem to care about meeting the goals you both had set at the start of the year. You put him on warning, but his performance still does not change. Ultimately, you have to fire him.

You conducted three of the four evaluations with him and have met on several occasions to discuss his declining performance, his behavior's impact on the work of the entire department, and the rudeness and disrespect he has shown you. Yet he charges you with discrimination because he, unlike his peers, missed out on that first quarterly assessment. His lawyer argues that he would have met the work goals if the problem had been caught sooner. He would have achieved his goals and behaved more properly if his situation had been given attention at the start. His lawyer tells the jury that you didn't give him the attention you gave his peers, not because you were too busy that week but because you didn't want to help him; the oversight was deliberate and attributable to a personal animosity or an age, race, gender, or other bias.

Even if the problem doesn't go so far as to lead to termination, you might find yourself in a court case. Let's just assume that the employee received a poor rating and no raise. He might go to the Human Resources Department to complain or take the case over your head to your own boss. Finally, if he still doesn't get a raise, he might take his complaint to a lawyer and together they might take you and your company to court, charging that you deliberately discriminated against him.

Non-Job-Related Standards or Unrealistic Expectations

When you sit down with an employee and together agree on the standards or goals or outcomes by which her performance will be measured, you must set standards that are based on the actual needs of the job. This is required under the Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection. They require that standards be "valid" or "job-related."

A big mistake is to hound a talented employee who fails to use all her abilities. You may know that the person is capable of much more than the outcomes on which you've agreed, and it may be frustrating to see this individual not using her full potential, but so long as the em-

ployee is achieving the outcomes you both set, then the person is doing her job. An assessment that reflects your frustrations can wind up in court and lead to a judgment against you at considerable cost to your employer.

Inconsistency in the Application of Standards

Just as failure consistently to follow your firm's policies and procedures can weaken your defense of a negative assessment of an employee, so too can evidence that one employee was allowed to get away with an infraction that another employee was not.

Let's say that an African-American employee was late three out of five workdays every week during the year. Despite your counseling and putting him on warning, he did nothing about his tardiness. In the end you terminated him, as you had several other workers of various races, genders, and ages—*except* for one white employee who is chronically late yet has not been terminated. The terminated employee's lawyer could claim that the employee might not have been terminated had he been white. And the plaintiff might well win his case.

Poor Documentation

You need to keep careful records of your employee's performance. When you can't point to specific incidents to justify a decision to pass over an employee for promotion or not to give her a raise, or to terminate her, the employee may charge you with discrimination and take your company to court.

Given your current responsibilities, asking that you document not only negative situations but also employees' accomplishments may seem too much to demand. In termination cases especially, it would seem to be enough to document negative incidents, but the courts question managers who can produce documentation only about poor performance or have only bad things to say about an employee. Critical incidents, good and bad alike, should be documented for all workers—poor, average, and outstanding workers.

That a manager has good documentation will discourage a lawyer from initiating a frivolous lawsuit. What is good documentation? Certainly, it is not a notebook filled with empty phrases like "The employee was unable to follow instructions," or "The employee lacks motivation to do the work." These lend themselves easily to contest. The disagreement can land you in court, where you will be expected to prove your

case by citing specific incidents in which the employee failed to perform to standard or didn't meet objectives.

Whether coaching, counseling, or, yes, mentoring, documentation is important. Yes, you are busy but documentation is valuable evidence about actions you and the other party have agreed to take, whether it is after a coaching, a mentoring, or a counseling session. When it comes to documenting a counseling session, keep in mind that you should document the nature of the problem, not your impression of the employee's state of mind. This includes statements that the employee "willfully," "purposely," or "maliciously" did this or that. You may think that such phrases strengthen your record, but in truth it only gives the employee's lawyer an opportunity to claim that you were discriminating against the employee.

For the same reason, avoid exaggerating the consequences of an employee's behavior. Your intent, again, may be to play up the shortcoming or violation to pressure the employee about the need to change his or her behavior. In court, however, you may be asked how such and such offense lost the company an order or how an employee's repeated lateness stalled all deliveries for the day. Better to be realistic about the impact of the misbehavior or poor performance in both the counseling and documentation.

Some months ago, I sat in a staff meeting, and heard a manager discount the value of documentation since his company practiced employment-at-will. You can imagine the surprise on his face when he learned otherwise. While such corporate policy does allow a manager to terminate without cause, a disgruntled employee may choose to take the situation to court rather than accept severance or some other package offered to him or her to give up such rights. The employee will charge the company with discrimination—age, gender, race, whatever—and documentation about any performance difficulties with the employee will help justify the termination decision in the eyes of the court.

Documentation should be such that a third party reading the record will be able to come to the same conclusion you have. This individual will come to that conclusion by reading your description of what happened, not by reading your opinion of the situation. Besides, at the time of the year-end appraisal, will you know why you wrote, "Barbara did a great job on accumulating customer records," or, more pertinent to the need for counseling or justifying a poor rating or termination decision, "Dan did a poor job in investigating competitive vendors to help us purchase our new office copier," or "Nan never coordinated the new

format for company invoices with marketing,” or similar entries? Would you remember that Barbara spent long hours in the office making phone calls to more than one hundred customers to get e-mail and fax numbers, or that Dan interviewed only two competitive firms rather than the five you asked him to consider prior to purchase of the new office equipment, or that Nan’s failure to keep in touch with marketing led to several errors on the invoices as well as some omissions? You want documentation that will support your case, so you should base it on your personal observations or, if the employee works with other managers as well, on these managers’ observations too (think *matrix management* or *team participant*).

Likewise, comments from customers or vendors will also help. What if a manager or customer complains about one of your staff members yet refuses to go on record about your employee’s poor performance? Unfortunately, you can’t include the complaint in making your assessment of the individual’s performance at the end-of-year evaluation and, consequently, in any documentation; actually, if the person sharing the negative observation refuses to be credited with it, its inclusion in the final assessment or any documentation can invalidate that assessment or documentation. Think that this is unlikely to happen? It happened to Karl.

KARL’S STORY

Karl was a manager in a Midwestern financial services firm. Alison was always complaining about Shari, a member of Karl’s marketing department, but because Alison refused to let Karl document her complaints about Alison’s lack of cooperation in a team Alison led, Shari’s team participation never formed a part of her appraisals.

Based on Alison’s reports, Karl felt that Shari deserved a rating of 2 (poor) or 3 (average), but because Alison refused to let Karl put her observations of Shari on paper, Alison received a 4 (outstanding). Without Alison’s support, all Karl had was hearsay. And hearsay is not defensible. Even your own opinions aren’t valid under the law. You may think that a person on your staff is a sloppy dresser, with unkempt hair and nails, but you can’t write that in your critical incident report. On the other hand, you can describe that person’s clothes and general appearance, point out that an important part of an employee’s job is meeting with the public, and recount any comments from customers about the person’s appearance that suggest how the individual’s ap-

pearance is affecting customers' impressions of your organization or the person's ability to do her job well.

To avoid the documentation trap, it's best to keep two kinds of documentation: (1) incident reports that document specific events, the actions taken by the employee, the results, and the consequences; and (2) progress reports that evaluate the employee's problems and successes as he or she works on assignments or a team project. Training can also be included in the progress reports, as can incidents that over time show a shift (either for good or for bad) in work behavior. You can keep the critical incident records in a notebook that you update weekly, or you can create a computer file to maintain employee records, regularly backing up the record either on your company's network or on a disk.

Here are some other rules concerning documentation to follow:

1. Document all counseling sessions, describing the behavior that prompted the meeting, the decisions reached, and the date for follow-up to discuss employee improvement.
2. Give a copy of all counseling reports to the employee and place one in his personnel file. Should there be no improvement in the employee's performance, issue a warning memo that describes exactly the nature of the performance problem, past discussions about the performance, and the actions you expect from the employee and the time frame by which an improvement must be evident.
3. As with the counseling summaries, unless your firm has a special form it uses, you can use a standard memo format for warning memos.

Following these rules can ensure that your assessments of employees are fair and that you aren't accused of discrimination or arbitrary or capricious decisions about an employee, from giving the individual a particular rating to recommending him or her for promotion, to that tough decision to terminate an employee.

Counseling may be next to the toughest task that a manager has, with terminating an employee the hardest of all. But many managers may be able to avoid the need for counseling, and maybe even the need for coaching an employee, if they begin early by mentoring for performance management their average and better-than-average staff members. The third and final section of this book should help to get you started on this important task.