

The Winding Road From Employee to Plaintiff: Psychological Reasons for Wrongful Termination Complaints

My oldest son was born at 12:11 a.m. on New Year's Day, 1995. Because I had gone into labor 22 hours earlier, my ob-gyn had optimistically assumed she would be ringing in the New Year with a glass of champagne and arrive at the hospital in full cocktail attire. As the evening progressed (and my labor did not), she became grumpier and grumpier, at one point frustratingly accusing me of "not trying hard enough" to speed things along. By the time she realized a Caesarian section was a medical necessity, the damage to our relationship had been done.

Up to that point, I felt listened to, respected, and cared for. And yet, seven years later, I still harbor a grudge. Her insensitive behavior at a critical point – a time I felt particularly scared and vulnerable - quickly eradicated any positive history we shared.

Terminated employees feel equally vulnerable. And, how the employer handles the employee, particularly during the termination process, can either significantly reduce the odds that the employee will file a claim or can set the litigation wheels in motion. In this article, we'll examine the psychological and situational reasons that encourage terminated employees to file wrongful termination claims. By identifying the types of managerial behaviors that promote lawsuits, employment law attorneys can advocate preventive steps in changing offending behaviors that are likely to take their toll on a company's bottom line. It can also shed some light on how these same behaviors will be perceived by jurors should an employment lawsuit go to trial.

It Does Matter What People Think

Concerns about litigation are understandable. However, many aspects of organizational life have been adversely affected by efforts to avoid litigation and to assure that litigation, should it arise, will not be successful. Specific policy and supervisory actions might be decided upon not so much because the policy or action is the best one available, but because that policy or action is believed to minimize the perceived likelihood of lawsuits. Inept or problematic employees are kept on, significant information is withheld, and promotions are given for invalid, but easily documented, criteria. The irony is that many of these efforts to control litigation may, in fact, encourage it.

One of the reasons for this is the complicated relationship between employee and employee. People use their membership in organizations not only as a way to earn a living but also as a way of validating their social identity. People who are employed tend to see themselves in terms of their jobs and the organizations to which they belong. As a result, they are extremely attentive to their relationships with their organizations and with its authorities, particularly in terms of how fairly their organization treats them.

Employees' perceptions that their treatment is fair or unfair serve as global evaluation of their relationship with the organization. In particular, they look to such things as whether they are treated politely and with dignity, whether they feel that their views are listened to

and considered, and whether they feel that decisions they care about are being made on a factual, rather than biased, basis. Impressions of fairness seem to be fostered by giving employees a voice in decision-making and allowing them to express their views about organizational outcomes that affect them, even if the organization does not accede to those views.

Perceptions of fairness are also created when employees are given explanations for organizational decisions. If management explains the reasons for treatment that seems unfair (and if the explanation is honest and seen as unbiased decision-making), or if the organization offers an apology or acts quickly and convincingly to remedy the situation, the injured person may feel reassured about his or her standing and any potential claim is likely to die at that point.

Name It, Blame It and Claim It

While I've heard some pretty crummy stories from plaintiffs, I've heard worse from managers and employees who never called a lawyer. It might be nice to think that wrongful termination claims are based solely on their merit or, for the cynics among us, to believe all employment lawsuits are motivated by financial incentives. In reality, we all know the objective validity of an employment claim is not the only one, or even the major determinant, for filing an employment claim. And, as it turns out, money is, at best, a secondary motive.

Psychologically, filing a lawsuit begins when an employee perceives that an event has been injurious. For the claim to progress, however, the potential claimant must then blame someone else for the injury. In deciding whom to blame, the employee is likely to evaluate whether the employer (or the individual manager) **would, could** and **should** have done something differently.

In trying to decide what life would have been like if the employer **would** have something different, the employee is likely to access his or her history of treatment in similar situations, and his or her exposure to how other people within the organization have been treated under similar circumstances. The employee is likely to conclude that the employer **could** have done something differently if the employee believes the manager (or employer) is acting volitionally and had clearly feasible alternatives. Finally, the employer must believe that the injurious behavior violated some ethical principle of interpersonal conduct, i.e., the employer **should** have acted differently.

In many situations, it's the "**should**" that makes the difference in holding the employer accountable. For instance, suppose an employee's performance appraisal ratings were not as high as s/he had hoped. However, the boss treated the employee well during the annual performance review. S/he listened carefully to the employee's viewpoint, gave specific examples to justify his or her ratings, and treated the employee with the utmost sensitivity throughout. How does the employee now feel about his or her supervisor?

If research is any indication, the employee will not feel unfairly treated by his or her supervisor. In fact, s/he may well have a high opinion of his or her manager and remain highly committed to the employer. Yes, the employee knows the manager **could** have been more lenient. Yes, s/he knows s/he **would** have felt better if s/he had been given higher ratings. The missing vote in the unfairness verdict though, involves what the employee believes **should** have transpired. Because the manager treated the employee the way s/he **should** have, the employee feels fairly treated even though the outcome was less than desired.

Of course, even if the employee believes the employee **would, could** and **should** have behaved differently, the potential claimant must possess the will, the means, and the know-how to pursue the claim. Contrary to popular belief, however, it's not the money that drives the claim. In fact, when researchers attempted to predict claiming actions from either the actual or perceived outcomes, only a small proportion of the variance in behavior is explained. Only when one adds non-economic factors, such as judgments of wrongdoing, responsibility, and injustice, to the equation does one begin to explain much claiming behavior. Additional support comes from the fact that more than 50% of people who file claims for personal injuries get the idea of claiming from someone else.

Rodney Dangerfield was Right

Employees who “get no respect” are future plaintiffs. The most commonly reported experiences of injustice that lead to wrongful termination claims involve some form of disrespectful treatment, **especially at the time of termination**. In fact, the results of structured interviews with 996 recently fired or laid-off workers (*Administrative Science Quarterly, September 2000*) found that the way a terminated employee was treated at the time of termination had nearly twice as much effect as any other variable in predicting who would consider suing and who would not. 0.4 percent of the respondents who felt they had been treated with “very much dignity” at their time of dismissal reported filing claims, whereas of those who said they had “not at all” received respectful and dignified treatment at the time of termination, 15 percent reported filing claims.

Similarly, whereas claims were filed by less than 1/50th of those who felt they were given an honest and accurate explanation for the termination, claims were filed by nearly 1/5 of those who reported being given no explanation at all. In fact, an honest account for the termination of employment and practices that assure dismissal with dignity substantially reduced the likelihood that a terminated employee will consider claiming. Apparently, these psychological factors get the litigation ball rolling, i.e., they stimulate people to think about the possibility of suing their former employees.

Of course, to ask employees what acts they consider disrespectful is, basically, to ask them what they consider people to be entitled to from others. It appears that employee's sense of entitlement at work comes down to two broad requirements. The first requirement is interpersonal sensitivity; employees believe they are entitled to polite and respectful treatment from others. The second requirement is accountability. People think

they are entitled to truthful explanations and accounts for any actions that have personal consequences for them.

Research has consistently shown that people who are treated with dignity emerge from experiences, even from experiences that entail a substantial negative outcome, with a feeling of fairness. In fact, factors traditionally thought to be essential to perceived fairness – equitable allocations or formally unbiased procedures – don't influence fairness judgments as much as the patterning of everyday social interactions. In a termination meeting, the likelihood of claiming will be significantly enhanced if the person feels that she or he has been denied dignified treatment, if his or her views and needs seem to have been ignored, or if the employees feels that decisions and decision-makers have not been neutral.

So, apparently, do jurors. In my experience, jurors in employment lawsuits are much more motivated to punish an employer whom they believe has violated social norms than they are moved to compensate a victim. They are also more likely to forgive a plaintiff's behavior – such as a verbal outburst or hostile response – if they view these actions as retaliation for a slight or insult. In fact, jurors don't have to like, respect, or empathize with a plaintiff if they feel indignant about how an employer handled a termination, layoff or discipline decision. This is similar to examples in tort litigation of the apparent willingness of some juries to overlook plaintiff's failures to prove causation in cases where the defendants appear to have acted unreasonably.

On the other hand, employers who treat employees fairly throughout the employment process and foster the belief that the organization concerned about fair treatment have a great advantage not only in terms of reducing the likelihood of employees filing claims, but in defending the ones that are filed. Giving employees a voice in decision making, allowing them to express their views about organizational outcomes (even if the organization does not accede to those views) and providing clear and consistent explanations for executive decisions can also increase employee retention.

Loading the Gun During Layoffs

Layoffs are not the time for quick thinking. *Cameron et. al* (1991) found that in the majority of cases where managers had implemented a downsizing strategy, they had done so under heavy time pressure. In another study, *Feldman and Lenea* (1989) who interviewed employees who had been laid-off, found that fewer than 50% of the employees had received any advance notification of the impending layoffs, while a majority of the remaining 50% found out less than one week prior to the cuts.

One reaction managers have to time pressure is to lose their ability to be objective. During crises, managers are much more likely to choose employees with whom they are comfortable and familiar without objectively considering layoff criteria. Another common reaction to time pressure is to break the communication lines with their subordinates. Managers often have trouble coming to terms with having to lay people off and, as a result, may choose to avoid the subject of layoffs with subordinates until it can't

be avoided. Unfortunately, it is when employees are kept in the dark that their reactions are most severe; in fact, when employees are given short notice, they inevitably feel that the process surrounding the lay-off decisions is procedurally unfair.

The Bottom Line

In their role as employer-employee liaison, human resource professionals can err by focusing solely on documentation and adherence to formal policies and procedures as a buffer and defense against wrongful termination claims. While these are important, the lesson from claiming research indicates that if one wants to avoid litigation, one must both be fair and be seen as fair, particularly during terminations and layoffs.

Treating the terminated employee with dignity, providing an accurate and honest explanation for the employment decision, and allowing the employee to express his or her views are all critical factors that significantly reduce the likelihood that the employee will file a wrongful termination claim. Unfortunately, accounts and explanations are often seen as dangerous and as providing fuel for a creative plaintiff's lawyer. But the option of giving no explanation may be worse, since it compounds the insult by giving no explanation for the injury.

Perhaps employment law attorneys, in their role as outside counsel, can assist their corporate clients not only with the critical documentation needed to defend an employment lawsuit, but can also encourage their clients to train their managers in the interpersonal skills that are likely to prevent them. Even in high-risk situations, such as an involuntary termination, the possibility of an employment lawsuit can be significantly reduced through a termination procedure that is honest, accurate, and respectful. For, as Winston Churchill replied when he was criticized for being too nice when announcing England's declaration of war on Japan, "If you have to kill a man, it costs you nothing to be polite."

Joni E. Johnston, Psy.D. is the President and CEO of WorkRelationships.com (<http://www.workrelationships.com>), a corporate consulting firm that helps companies turn employment liability into employee retention. She can be reached at jonij@workrelationships.com