

“Dropping The Hammer”

Terminating The Difficult And Poor Performing Employee

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I. TERRELL OWENS AND THE PHILADELPHIA EAGLES - A CASE STUDY

A. OPINION OF ARBITRATOR RICHARD BLOCH, ESQUIRE

The Label of "Bad Attitude or Trouble Maker" is not enough.

The documentation presented by the Eagles at the Arbitration Hearing and supported by testimony of witnesses included the following conduct by Owens:

- Refusing to shake the Coach's hand
- Declining to speak to Coach Reid or the Offensive Coordinator
- Staring straight ahead without making eye contact when spoken to
- Refusing to interact with teammates
- Refusing to attend mandatory autograph sessions
- Lying to the media about being asked to sign a waiver to play in the Super Bowl
- Negative media statements about Donovan McNabb
- Violating the team dress code
- Parking in Coaches' spaces and handicap spots.

The Arbitrator's ruling in favor of the Eagles' itemized paragraph by paragraph the documentation of Coach Reid and the Philadelphia Eagles, the occasions of misconduct and set forth specifically the consequences to Terrell Owens if he continued his course of behavior.

On August 10, 2005 Coach Reid wrote a letter outlining Owens' inappropriate behavior and informing Owens that no further action would be taken. The August 10, 2005, letter also set forth the Eagles' expectations of Owens after he returned from his initial suspension:

"We expect you to return to the Eagles on August 17, 2005 with a renewed attitude and focus. That includes abiding by all terms of your contract, being respectful to your teammates and coaches and playing within a structure that will lead us all to have success".

A second letter reiterated the improper conduct and, most importantly, specified the consequences of the inappropriate conduct:

"Let me stress again that we are putting you on notice for the third time that your actions are inappropriate. If you continue to act this way we will deem this to be conduct detrimental to the club which will subject you to a fine of an amount equal to one week's salary and/or suspension for a period not to exceed four weeks."

In November 2005 Owens' behavior continued to be a disruption to the Eagles and he was presented with an alternative or a second suspension. The Arbitrator concluded it may hardly be argued that Terrell Owens was unaware that he was treading on increasingly thin ice or that his actions, considered individually or taken together, did not constitute conduct that was in fact detrimental to the club.

The plan of progressive discipline is to properly advise an employee of unacceptable behavior, to warn that this tenure is becoming increasingly challenged and to attempt to provide for the possibility of better behavior in the future. The repeated, unambiguous warnings accomplished all of this.

The Arbitrator concluded that on the basis of numerous conversations and continuing acts of provocation from Owens, the team could rightly conclude that the player was simply not getting the message. The team was faced with evidence of a disturbed and distracted team, a media storm aided and abetted by Owens and an apparent inability or unwillingness on the part of Owens to appreciate the destructive impact of his attitude and jeopardy that surrounded him and the club could reasonably take the actions it did.

Owens was told his behavior was unacceptable and how to improve. The Eagles organization gave him every chance to turn it around and most importantly advised him of the consequences of this behavior each and every step of the way.

Document-Document-Document is the lesson to be Learned!

Documentation procedures and lessons to be learned from the Eagles and Terrell

Owens:

1. Thoroughly explain the expectations in writing;
2. Advise the employee of the consequences of his misconduct;
3. Document each instance of inappropriate behavior; and
4. Provide the employee an opportunity to improve and avoid termination.

Complete performance evaluations as the first step in documentation of the employee's conduct.

The Opinion of Arbitrator Richard Bloch is attached in the Appendix

II. EFFECTIVE PERFORMANCE EVALUATIONS

A. PERFORMANCE EVALUATIONS

A performance evaluation provides appropriate feedback of positive and negative aspects of performance and protects employers from claims of unfairness and discrimination. A poor performance will undermine effective management productivity and create ill feelings and mistrust between employees and supervisors. Good working relationships are more likely to occur when individuals effectively communicate with one another. The written performance appraisal is only one method of communication and it should not be a substitute for effective daily interaction. The written formal evaluation should not be the first time that an employee is hearing about improper performance or behavior. A sample evaluation form is in the appendix.

1. Prohibited Activity in Completion of Evaluation

A performance evaluation may not take into account an individual's race, sex, religion, age or disability. And it is also not permissible to consider an individual's plans to have a family or pregnancy. The standard should be to rely on objective performance standards when evaluating an individual.

2. Subjectivity Destroys a Good Performance Evaluation

When bias or unlawful considerations such as race, sex or union activity influence the evaluator the employer faces Human Relations and legal problems.

3. Guideline for Performance Evaluations:

a. Use the Job Description as the Basis for your Evaluation

One of the purposes of a performance evaluation is to analyze the employee's performance of a particular job, the duties of which should be set out in the position or job description. The evaluation should contain the employee's performance of the duties outlined in the job description.

b. Review Previous Evaluations For Change in Performance

The prior years' performance evaluations should form the baseline for an individual performance. You should always review previous performance evaluations to note if performance problems are continuing in nature. Previous goals set in prior evaluations and a significant decline in the individual's performance should be reviewed and investigated.

c. Evaluate on the Basis of Personal Information

The evaluator should have personal knowledge of the individual and his job performance over the evaluation period and also should have knowledge of the job requirements for the position. Statements in the evaluation from others are troublesome as their accuracy can be questioned and may not be admissible at a later proceeding.

d. Establish Goals and Areas of Improvement

The evaluation is the proper place to establish goals for the employee and, where standards of performance exist, the goals can be set in terms of those standards. The key factor is that the goal be as precise as possible so that the employee knows what is expected of him or her.

Performance problems and goals must be set forth in a clear manner. The evaluator should also follow up with the employee to determine if the goals are being met

and/or progress is being made toward meeting these goals before the next formal review.

There should not be any doubt as to the employee knowing and understanding the deficiencies of his/her performance at the conclusion of the evaluation. It is recommended that any deficiencies and/or performance below acceptable levels are noted on the evaluation form. If there is a specific statement of the performance deficiencies, the employee will not be able to take the position that he “did not know” there was a problem.

Once the substandard performance has been established the evaluation should specify what must be done to remedy that performance. The evaluation form should also set out a date when the objective will be reassessed.

e. Do Not Wait for Annual Performance Evaluation to note Performance Deficiencies

A performance appraisal is an ongoing process and if an individual is not performing properly it is better to let him/her know immediately so he/she can correct it rather than waiting for the formal performance evaluation when it may affect compensation.

f. Rate Everyone Accurately

It is a common error to rate everyone average or in the middle. This usually avoids the more difficult judgment, however, the midpoint is difficult to defend and the process will lose credibility at the time of scrutiny.

g. Do Not Complete Performance Evaluations Based on Feelings

If you fear honest evaluation, this will destroy your relationship with the individual. An unwillingness to honestly evaluate someone makes everyone else’s job more difficult.

h. Provide for a Review of the Evaluations by a Second Party.

The performance evaluations completed by the manager/supervisor should then be reviewed by another individual in the department to overview all of the evaluations for both accuracy and credibility of the completed evaluations.

i. Maintain Confidentiality of medical information or other personal matters.

Confidentiality should be maintained with regard to medical information, personal matters of the employees that are learned through the evaluation process.

B. THE INTERVIEW

1. Review The Prior Performance Evaluation and The Individual's Work History

Before completing the evaluation for which the interview was scheduled, it is wise to review last year's performance so that the evaluator can properly comment on whether the employee has fulfilled goals established at the last performance evaluation.

2. Provide Notice To The Employee Of The Interview Date

The employee should have advance notice of a performance evaluation interview. Employers can set the date of the next review on the current appraisal form or they can give to the employees a series of dates as to when the next one will take place in a certain time period. The employee should be provided notice of the coming review before it occurs. There should be no surprises as to the date of the evaluation.

The employee should also be asked to prepare in advance for the interview. It is a good practice to request the employee to read over his past performance evaluations before coming to the interview.

3. Schedule Sufficient Time To Conduct The Interview

The employee should not be given the impression that his performance review is getting a limited amount of time and the evaluator should eliminate all other distractions during the course of the interview such as phone calls and other meetings.

4. Do Not Get Emotional

The evaluation process can be an opportunity for stress and tension to arise to the level of inappropriate comments and reactions. The conversation should be kept positive and constructive and the negative aspects handled in a professional manner.

The worker's personality should not be subject of the interview. The interview should focus on the worker's evaluation and work performance. Any personal comment with regard to the worker can destroy the objective nature of the evaluation and change the topic from the work to the individual. Comments that are judgments of the worker's personal characteristics are to be avoided.

Recall the line to your children:

"It is not that you are a bad person, it is your behavior that is bad "

III. EMPLOYEE DISCIPLINE

A. INTERNAL GRIEVANCE PROCEDURE

An internal, informal grievance procedure can be beneficial to both employer and employee in stopping problems before they escalate, requiring a more formal disciplinary procedure that can involve an Arbitrator or Mediator. It can be established as a dispute resolution procedure to handle work-related complaints and problems.

It can be established as an open door policy or a formal procedure with a series of steps outlining how the employee is to resolve a problem in the work place. The employer must determine its purpose in implementing the program.

1. Informal Procedures/Open Door Policy

- The basic purpose of the informal dispute resolution is to encourage employees to discuss complaints with management.
 - (a) Such procedures usually begin with a recommendation that employees first discuss their problems with their supervisors/managers.
 - (b) If employees are not satisfied with their supervisor's response or if the nature of the problem makes a supervisory discussion uncomfortable or awkward, employees typically are invited to approach a higher level of management or human resources.

- An informal procedure can be very effective if employees believe their complaints will receive an objective hearing and not result in reprisals or retaliation.
- An informal procedure can be less intimidating to employees than a more formal procedure and can help encourage open, honest communication and resolve the majority of problems at an early stage before conflicts, crisis, or discipline is necessary.

2. Formal Procedure/Internal Grievance Procedure

A formal dispute resolution procedure typically includes three to five steps for reviewing employees' complaints. Each step generally calls for a higher level of management review or involvement and often culminates with a panel or committee review. Formal complaint procedures also include time limits for conducting each step of the process.

- The first step of a formal process usually consists of a discussion with the immediate supervisor. If the dispute is not resolved at that level, the complaint is put in writing and the dispute is appealed to the next step or level.

- The second and subsequent steps involve participation by increasingly higher levels of management such as supervisor's manager, department head, plant manager, human resources director and/or chief executive and other high ranking executive.

- Most formal procedures require management to conduct a thorough investigation, including the gathering of written or physical evidence and interviews with witnesses.

- For a formal dispute resolution procedure to be effective, employees must be persuaded they had an opportunity to present their side of the story. The advantage of formal dispute resolution procedures is they can instill greater confidence in employees that they will receive a fair chance to present their complaints than in informal procedures.

The Procedure formal or informal should be added to the Employee Handbook or Manual. A sample of the Informal Grievance Procedure is attached in the Appendix

B. PROGRESSIVE DISCIPLINE

Progressive discipline is a series of employee counseling sessions and/or warnings designed to remedy employee performance issues and unacceptable conduct. If the performance issues or conduct occur again, then the employee moves or progresses to the next step of discipline and continues in the process until the problem is remedied or the employee is terminated. It is most effective when an employee can take ownership of his performance because it gives the employee the opportunity to choose his own course of action with a clear understanding of the consequences.

It is recommended the Discipline Procedure be set forth in the Employee Handbook or Manual for Employees to have knowledge of the process and consequences

1. Goals of Progressive Discipline:

- Advising the employee that his performance was unsatisfactory with respect to the established performance standards and/or or contrary to the employer's expected conduct;
- Reasonable steps are taken to inform the employee of the situation and give him the opportunity to address his performance or conduct and to improve;
- Other employees are held to and are able to meet the same standards or, if not, that they are being treated consistently with other employees; and
- The employee has taken responsibility for the performance problem or conduct and has not improved despite being given the opportunity to do so.
- In drafting a progressive discipline system an employer should be careful to note that the disciplinary procedure is not required and an employer has discretion to terminate an employee at any time for any reasons without resorting to the grievance process.

- The discipline policy should provide a list of infractions that are unacceptable conduct that could lead to discipline. It is advisable to indicate that the penalty will be grounds for disciplinary action up to and including immediate discharge in order to leave yourself room for lesser penalties.

2. Guidelines For Discretion in Progressive Discipline Process:

- Severity of the offense;
- Past performance record and discipline of employee; and
- Past practices or past actions in similar incidents.

3. The Protected Classes

Caution should be exercised when disciplining a member of a protected class as you must consider whether your disciplinary action could have a potential adverse affect on a member of that class. Could the employee claim that you have treated the employee unfairly because of race, color and national origin, age, gender, etc. Is there a legitimate business reason for the decision or is some other factor involved?

It is recommended that a full review of all personnel records, evaluations forms and disciplinary records be completed and an interview of the protected class manager be conducted to be certain there are no unreported issues involving the employee before discipline and/or termination is completed.

4. "Just Cause" For Discipline

The basic principle underlying discipline procedures is that management must have just cause for imposing the discipline. An Arbitrator has listed the following tests for determining whether a company had just cause for disciplining an employee:

- Was the employee adequately warned of the consequences of his conduct, either orally or in printed form?
- Was the company's rule or order reasonably related to efficient and safe operations?

- Did management investigate before administering the discipline? An investigation normally should be made before the decision to discipline is made. An alternative course of action is to suspend the employee during the investigation with the understanding that he will be restored to his job and paid for lost time if he is found not guilty.
- Was the investigation fair and objective?
- Did the investigation produce substantial evidence or proof of guilt?
- Were the rules, orders and penalties applied evenhandedly and without discrimination? Caution is to be exercised if the enforcement has been lax in the past since management should not suddenly reverse its course and begin to crack down without first warning employees of its intent.
- Was the penalty reasonably related to the seriousness of the offense and the employee's past record?

5. Procedures For Handling Discipline

a. Tips for the Discipline Meeting:

- Have a copy of the Employee Handbook or Work Rules;
- Have an understanding of the Handbook and Rules;
- Learn to be a good listener;
- Follow the letter and spirit of the Handbook and Rules; and
- Keep records.

Each supervisor should have access to warning forms or other documentation format prepared by HR which will permit the supervisors to have easy access to these forms at the time of the infraction. The initial process should be a warning procedure which should minimally identify the date, name of the employee, and a brief outline regarding the occasion for the warning and/or disciplinary action. Be specific about the reasons for warning such as improper conduct, excessive lateness, poor production.

- A final warning should be carefully communicated to the employee in order to avoid misunderstandings. It is best to have another member of the management staff present to verify the conversation. It is necessary that a written record of the final warning be completed.

A Sample Warning Form is part of the Appendix

b. Investigation

An investigation should be conducted which is thorough and includes an interview of all known and potential witnesses, a review of all records and examination of all the circumstances. If it is necessary for time to pass to complete the investigation, the employee may be suspended during this time period and then reinstated if found not guilty.

c. Reasonableness of the Penalty

The penalty must be reasonably related to:

- The nature and seriousness of the offense;
- The individual employee's past record;
- His length of service with the company;
- Past practice of the company regarding this rule and its violation by others;
- and
- All the surrounding circumstances of the case.
- Is there corroboration and available evidence to support the discipline if it is challenged by the employee by a third party?

6. Discharge For Disciplinary Reasons

Discharge is reserved for two situations:

1. Offense is so serious as to render a warning futile such as assault, theft, sabotage, property damage, etc.; and
2. As the final step for repeat offenders based upon available written records as the last step in the progressive disciplinary system.

Written record and documentation of the discharge is mandatory.

7. When You may Not Discharge

New Jersey is an At-Will Employment State. The presumption is that either employer or the employee can terminate the employment relationship at any time and for no reason without notice. The Courts have provided certain exceptions to the At-Will Doctrine over the years. The following are certain conduct and activities of the employee for which the employer may not terminate:

- Federal and state civil rights laws prohibit the discharge of employees based on race, color, religion, sex, national origin, citizenship, disabilities, veteran status and age;
- Enforcement of federal and state minimum wage, overtime pay and child labor laws;
- Federal and state law prohibits discharge of an employee for filing complaints about unsafe or unhealthy working conditions;
- Federal and state law prohibits discharge of an employee who engages in organizational or union activity;
- Federal law prohibits discharge of an employee who files claims under federal retirement and welfare benefit laws;
- Federal and state law prohibit the discharge of an employee for refusing to take a lie detector test;
- Federal law prohibits the discharge of any person whose wages have been garnished on one occasion;
- Federal and state law prohibit discharge of an employee for serving on jury duty;
- Federal law prohibits the discharge of an employee because the employee had filed for bankruptcy;

- Federal law prohibits publicly held companies from retaliating against an employee who reports or assists in the investigation regarding securities fraud; and
- Federal law prohibits the discharge of employees for exercising their rights under the Family and Medical Leave Act.

8. Review of Steps Before Termination:

a. Rules:

1. Are the rules and regulations known by all employees?
2. How was the employee informed of the rules and regulations?
3. Are the rules and regulations job related and reasonable in the situation?

b. Enforcement:

1. Have other employees in other departments been treated similarly to the employee to be discharged?
2. Are company records of other employees' conduct available and reviewed to ensure uniform application of the rules?

c. Warnings:

1. Has the employee been warned in the past of the specific violation in question?
2. Has this employee received a final warning regarding this violation and other violations in compliance with the progressive discipline system?
3. Have the warnings been recorded and documented by the supervisor prior to discharge?

d. Investigation:

1. Have all the facts been carefully gathered prior to making the decision to discharge the employee in question including the

employee's knowledge of the violation, how the employee came to know the rule, the details, the actual violation or improper conduct and interview and consultation with all witnesses and other documents to support the decision?

2. Has the employee been given an opportunity to explain his or her version of the events?

9. Steps of the Termination:

Review documentation with personnel or senior management for the following reasons:

- Ensure a valid business reason using specifics and facts and not emotion
- Avoid untrue or defamatory statements.
- Be sure the "final straw" is strong and good reason. Do not rely on previous violations to be sufficient documentation of this discharge.
- Prepare for the meeting with senior personnel and management and anticipate an adverse reaction by the employee; witnesses are recommended to be present.
- Review the actual file to ensure all facts, information and forms are correct, thorough and available.
- Notify the employee. If the decision has been made to discharge, do not wait and have all present at the meeting that are involved in the final discharge such as the employee, supervisor and witness to the meeting.
- Conduct the discharge in private and confidentiality is important.
- The employee should be notified in a business like manner that is brief and concise using one valid reason for the discharge and if questioned do not provide additional information that is not already documented in writing with the employee.

- You may permit the employee to respond but make no decisions or promises with regard to the future. In expressing the reason for the termination, do not use such phrases as “going in another direction” or “we decided to make a change”.

10. Final Steps

It is necessary to:

- Make arrangements for return of company property;
- Discuss severance pay, benefits, COBRA and final paycheck;
- It is recommended that the termination at immediate and not wait for any date in the future but if so arrange for an agreed upon final date and time;
- If necessary, an escort from the building is to be arranged; and
- Document the final meeting. Prepare a final summary or memorandum of the final meeting indicating the nature of the reason for the valid termination and the employee’s response and/or statements made by the employee at the time of discharge.