



Remove the Nail

Skills and Professional Development



What does it take for a company to decide when enough is enough? We live in litigious times. Managers and company owners fear retaliatory lawsuits from employees. Some employees, ostensibly shielded by “protected class”^{*} status, behave badly and mistreat other employees. Companies allow fears of accusations of age-bias, race-bias, or gender-bias to keep us from dismissing or even disciplining a toxic employee.

^{*}Protected classes are “a group of people with a common characteristic who are legally protected from employment discrimination on the basis of that characteristic. Protected classes are created by both federal and state law,” according to Practical Law

Please don’t misunderstand me, I realize that prejudice and bias are real. Any in-house counsel who has practiced for more than five years has heard or lived the war stories of bad actors: employees and managers exhibiting outrageous acts of harassment. Quite frankly though, those are the obvious cases. What about the situations where an employee isn’t “so” bad? The impact on an organization of this not-so-bad employee can be extremely damaging and far-reaching. This type of employee sows strife and distrust in a creeping, calculated manner. Although at first she may seem helpful and capable, the negative narratives she tells herself and others seep into the cracks and crevices of interpersonal relationships among her coworkers.

Some warning signs that you may be dealing with this type of “problem” employee include the following:

- She provides different levels of service to internal customers depending on whether or not she likes them.
- He ignores or speaks condescendingly to employees that he perceives are below his position in the organization.
- She feigns ignorance about receiving or seeing an email.
- He lies — and you know he’s lying.
- She acts like a “hall-monitor,” trying to catch other employees coming in late or leaving early while doing the same thing herself and getting others to “cover” for her.

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- Other employees do all they can to work around her because they know she doesn't "like" them.
 - He refuses to acknowledge his own mistakes and sulks or pouts when someone points out an error.
 - She blames others if she has misunderstood an instruction or direction.
 - He uses forgetfulness as an excuse not to do things.

Many of the examples can be termed as passive-aggressive, which means "being, marked by, or displaying behavior characterized by the expression of negative feelings, resentment, and aggression in an unassertive passive way (as through procrastination and stubbornness)."

We have probably all seen or exhibited this behavior at one time or another. Unfortunately, the common response by managers and other employees to a passive-aggressive personality is to work around it or avoid it altogether. This is especially true if the employee performs the rest of her or his job satisfactorily.

What organizations fail to recognize or acknowledge is how much emotional and mental work is being expended in dealing with such a difficult employee. Left unchecked and unaccountable, this employee can change the whole personality of a department or even a company. Ignoring this employee's behavior only serves to encourage her to continue with unhealthy patterns and communicates to other employees that management doesn't care or is powerless.

As we strive to become better attuned and aware of unconscious bias, emotional intelligence, and diversity, we should not allow ourselves to lose sight of encouraging and promoting professionalism, courtesy, and accountability. Toxic behavior is not protected by the law. We should not let someone's race, gender, age, or other trait allow her or him to get away with bad behavior. No one gets a free pass to act unprofessionally or mistreat others.

There are nine protected classes: sex, race, age, disability, color, creed, national origin, religion, and genetic information. These laws are meant to counter discrimination, not to protect unprofessional and toxic behavior. It is true that we cannot and should not discipline or dismiss people for being a member of a protected class. However, the law does not prohibit us from discipline or termination of employees for being rude, unprofessional, discourteous, disrespectful, deceptive, or insubordinate. If we shy away from holding people accountable, we and our organizations are like the whining dog in the following adage:

One day, a man was walking down the street and sees a dog on a porch that was just sitting there, whimpering, whining, and moaning. The man was curious as to why he was whimpering, so he went and knocked on the door and a guy came out and said, "Yes, how may I help you?"

He said, "Sir, is this your dog?"

"Yes, that's my dog."

"Well, what's wrong with him?"

The owner of the dog said, "What do you mean?"

"Well, he's sitting here moaning and groaning."

The owner said, “Well, he’s actually sitting on a nail.”

To which the man replied, “What! Your dog is sitting on a nail. Why doesn’t he get off?”

“Well, it just doesn’t hurt him enough.”

Does it hurt enough yet to take action on that problem employee? Whether you realize it or not, multiple people are probably already in pain and the organization is already suffering the effects. Open your eyes and your ears and listen for the whining dog. Initiate the discipline and warning process immediately. In-house lawyers are the first line of defense against meritless litigation. We need to regularly be counseling our clients to act early and often when an employee’s conduct disrupts the organization. And when appropriate attempts of behavior improvement fail — remove the nail.

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