



*This article presents general guidelines for Georgia nonprofit organizations as of 11/19/2010 and should not be construed as legal advice. Always consult an attorney to address your particular situation.*

## **BEST PRACTICES FOR DISCIPLINING OR TERMINATING THE NON-PROFIT EMPLOYEE**

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### **Introduction**

Unlike for-profit corporations, non-profit organizations are often staffed with volunteers, unpaid helpers, or employees who accept lower-paying jobs because they want to make a difference in the local and national communities in which they live or work. Often, nonprofit employees are motivated by their desire to help persons disadvantaged by class, gender, ethnicity, or disability, or their need to advocate a particular cause. As a result, employers in the charitable sector often feel a special sense of responsibility for their employees, which makes disciplining or terminating the non-profit employee an especially difficult task.

Notwithstanding the sense of social responsibility that is inherent in being a nonprofit employer, every nonprofit will likely face a situation where it must either discipline or terminate an employee. The nonprofit's mission and services are too important to risk by permitting unsound practices to stray into the disciplinary or termination process. This article provides suggestions on how to reduce the risk of post-employment lawsuits, by following a few pre-discipline or termination best practices.

In Part I, this article provides a brief synopsis of Georgia law, and an overview of the types of claims that Georgia employers are most likely to face. Part II addresses best practices for reducing liability in the face of a pending disciplinary or termination decision. Included at the end of the article is a checklist to consult prior to terminating an employee.

### **Part I: Georgia Law**

In addition to federal statutory prohibitions, nonprofits must be concerned with lawsuits arising out of state law.<sup>1</sup> Like most states, Georgia recognizes the "employment at-will" doctrine. Under the at-will doctrine, in the absence of a contract of employment for a defined duration, an employer may terminate an employee for good cause, bad cause, or no cause at all -as long as the cause is not illegal.

Notwithstanding the at-will doctrine, Georgia employers are often targets of post-employment lawsuits. A vast majority of the post employment lawsuits arise under Title VII, the primary federal statute governing employment discrimination. In recent years, claims under Georgia law have increased, most notably claims for breach of contract, wrongful termination, negligent hiring and retention, negligent or intentional infliction of emotional distress, slander, defamation, and libel.

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<sup>1</sup> Many federal laws only apply to employers with a certain number of employees. For more information about what laws apply to an organization of your size, visit the [Employment Law Table](#) on the Pro Bono Partnership of Atlanta website. Regardless of whether your employee base meets the statutory minimum, you should still strive to observe the best practices outlined in this article.

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While nonprofits are not sued as frequently as for-profit corporations, even the most dedicated and idealistic volunteer or employee can become disgruntled if he or she believes that he or she has been wrongfully disciplined or terminated. Below are a few best practices to reduce the risk that your organization will be sued by a disgruntled employee, and increase the likelihood of a successful defense in the event that your organization is the subject of an employment lawsuit.

## **Part II: Employee Discipline Best Practices**

While disciplining or terminating employees is never an easy task, it is a task that all organizations must be prepared to carry out. Good habits for discipline or termination begin far in advance of the actual decision, and revolve around three basic principles: 1) honesty; 2) consistency; and 3) documentation.

### **Honesty**

Although it is a simple mantra, it is worth repeating: always be honest and truthful when dealing with your employees. Dishonesty or delay heightens the risk of litigation. An employee who is not told why he or she is being disciplined or terminated is likely to assume the decision is illegal.

Particularly in the nonprofit sector, it is easy to approach discipline or termination decisions with the belief that criticism will demoralize the employee. Avoid this sympathetic tendency, because it later becomes difficult to explain contradictory disciplinary actions. Commit to providing honest performance appraisals and encourage supervisors to conduct corrective action in a timely fashion.

### **Consistency**

Applying consistent principles to the discipline of employees will provide a sound basis for the defense of most post-termination lawsuits. Most employment related lawsuits arise from discipline or termination decisions. Indeed, it is difficult, if not impossible, to maintain a cause of action under Title VII without the employee having been subject to discipline, termination, or some other adverse employment action.

While managers have the right to exercise independent judgment as to the merits of an employee's performance, employers can decrease the probability of being sued by utilizing standards that are clear, objective, fair, and consistently applied. To meet this goal, ensure that the following objects are implemented across all areas of the organization:

- **Duties:** develop a job description that defines the essential functions of the employee's job and also states the standards by which the employee's performance will be measured.
- **Notice:** put the basic elements of the disciplinary program in writing so that employees are aware of the consequences of their failure to adhere to written policies. Written procedures ensure consistency and reduce the risk that different supervisors will give

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varied interpretations and explanations of a particular policy. Written procedures are also an effective way to communicate a universal message to all employees.<sup>2</sup>

### Documentation

While virtually every employer recognizes the need for written documentation supporting any employment decisions, most employers do not consider the legal consequences of inadequate documentation. Managers must realize that their organization may have to explain a disciplinary action or other decision several years after it occurs, and documentation is key when memories are weak or individuals involved in the decision are no longer employed.

To this end, all disciplinary or termination documentation should include the following:

- the date of the event;
- the name of the person conducting the disciplinary or termination procedure;
- the subject of the corrective action should be described in detail, including when, how, where, and why the corrective action occurred;
- all individuals participating in the corrective action should be identified;
- the employee should sign the document or the document should reflect that the employee was offered the opportunity to sign, but declined; and
- to the extent possible, keep all information confidential.

### **Part III: Conclusion**

When not handled properly, discipline or termination decisions can become fertile ground for legal action against the non-profit. The above guidelines are provided as starting points to reduce your risk in these areas. While no plan is wholly litigation-proof, if you commit to the above best practices, you will not only increase employee performance and retention, but also minimize the likelihood of post-employment litigation. For further information on what to do if you are sued by an employee or former employer, please seek legal assistance.

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<sup>2</sup> It is also helpful to obtain a written acknowledgment from each employee that they have read, understand, and agree to abide by the rules of the workplace. The acknowledgment needs to be updated each time new policies are revised, updated or developed.

## CHECKLIST

### What an Employer Should do Prior to Terminating an Employee

- Give honest performance appraisals.
- Document and discuss poor performance with an employee and him or her a chance to correct his/her deficiencies.
- Make sure that other employees, guilty of the same infraction, were similarly disciplined.
- Identify who will conduct termination interview and who will be a witness.
- The manager responsible for conducting the interview should be given a script of what to say and what not to say.
- Consider timing of termination meeting. Do not meet prior to birthdays, holidays or the like.
- Determine how an employee will collect his or her personal effects following the termination meeting.

### Termination Meeting

- Keep the meeting brief (10-15 minutes); employers should make the firing a statement of fact, not open to discussion. Allow employee an opportunity to respond.
- Collect employee's keys and security cards.
- Barring legitimate security concerns, employee should be permitted to leave the building on his or her own (as opposed to being escorted from the building by security).
- Consider providing employee outplacement services; if such services are going to be provided, have the outplacement consultant on-site on the day of the termination meeting.
- Provide balanced but truthful job references to prospective employers.
- Consider providing severance pay; severance packages should be consistent companywide.
- If, subsequent to the meeting, the former employee has questions, answer follow-up questions promptly and thoroughly.

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