

# *Surprises vs. Expectations*

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Surprised employees sue. This succinct statement is a truism that employers know but often fail to take into account when dealing with employees. Employees have certain expectations about their employment – some realistic and some unrealistic. Your goal as an employer should be to minimize the unrealistic expectations so that when you discipline or terminate an employee, he is not surprised. Even though some things are hard to say, straight forward, plain-language information is the best and only way to ensure that your employee understands your expectations of him and that he has realistic expectations of you. Below are a few of the areas where employers often fail to simply lay it on the line with employees.

“At-will” Nature of Employment: Texas is an employment-at-will state. This basically means that, absent an agreement to the contrary, an employee can quit at any time for any or no reason, and an employer can terminate the employment of an employee at any time with or without cause. Many employees do not know this fact. Does this lack of knowledge change the “at-will” nature of employment? No, but it certainly lessens the surprise (and hence the increased likelihood of a lawsuit) if the employee understands this from the beginning. The at-will nature of employment should be clearly stated in plain language on your application and in any written policies and procedures. Many employers like to dilute this language because it is not exactly warm and fuzzy. Don’t be tempted to do this. A better practice is to state it clearly, plainly and in bold-faced type.

Performance Evaluations: Done properly, employee performance appraisals can be a win-win for the employer/employee relationship. “Properly” means honestly, consistently and timely. The most important adverb in that list is honestly. This is the area that many employers find incredibly difficult – telling the employee that his performance needs improvement. Some employers fill out the evaluation as “meets or exceeds” standards while verbally telling the employee that his work is substandard. The manager often feels that this softens the blow and will not be a permanent blemish on the employee’s record. Other managers water down the evaluation so that the employee can still qualify for a raise. Months down the road, however, when the employee’s performance is causing you to consider termination, the verbal warnings will not be remembered, and the written positive evaluation will stand as a memorial to your evaluation of his performance. An employee who is terminated for substandard performance with only positive evaluations in his file often alleges that the employer’s true reason for termination was something illegal such as discrimination or retaliation. How can you avoid this? When preparing employee evaluations, be honest, be factual and avoid conclusory language. Also, be specific so that the employee knows and understands how his performance is deficient. Clearly lay out your expectations, set a time frame for improvement and describe the consequences for failure to improve. Then, monitor the situation. Check with the employee during the improvement period. By the end of the time period, the employee should have a good idea of whether or not his future includes employment with your company. There should be no surprises.

Disciplinary Actions: Many employers set out a detailed disciplinary procedure in their handbooks and then, fail to follow it. Even though most disciplinary procedures contain a safe harbor clause allowing the employer to skip steps if necessary, it is advisable to follow the procedure in the majority of cases. Most of these procedures are carefully developed so that the employee understands what he did wrong, understands what type of conduct you expect and has a reasonable opportunity to conform his conduct to your expectations. This process eliminates surprise. If you have developed such a procedure, follow it. The advice given above with regard to performance appraisals applies equally here. In straight-forward language, tell the employee what he did wrong. Plainly set forth your expectations. Monitor the employee’s progress and provide feedback. Then, if another incident occurs, the employee will not be surprised when his employment is terminated.

We are not trying to say here that surprised employees are the only ones who sue. There are suits filed by vindictive employees, employees with agendas and employees who have valid allegations of discrimination. But, the surprised employee category accounts for a large number of the employment discrimination cases, and if employers can eliminate one area of liability simply by following consistent and reasonable procedures and practices, it will be worth it.

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