

# Managing the Exit: Negotiating an Employment Termination

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## INTRODUCTION

An employment termination is usually excruciating for everyone involved. No one seems to see eye to eye. Communication between the employee and his employer is often acrimonious and may have broken down entirely. The process can feel confusing and unpredictable, with stakeholders involved who do not interact with one another and are potentially unknown, or only vaguely known, to each other. It feels like a no-win situation for everyone, and is usually clouded with intense negative emotions. The employee may want to stay employed but perceive the inevitability of his job loss, or the impossibility of continued employment under the circumstances. He likely feels disempowered, humiliated, and vulnerable. His supervisor may feel like an ogre but see no other choice except to end the relationship. The

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senior manager probably perceives the unhappy catch-22 that tough personnel decisions are necessary to optimize business results but often have a negative impact on workforce morale, which affects the bottom line too. The employer's counsel has likely concluded that a termination decision is defensible, but is still anxious about having to defend it in a costly administrative and/or judicial process. In the middle of all of this sits the human resources (HR) manager, who shares everyone's headaches while being maligned by each side for seeming to align with the others. Making bad matters worse, everyone involved dreads having the conversations necessary to understand the situation and make the best decision, which risks leaving the situation underexamined and the decision suboptimal.

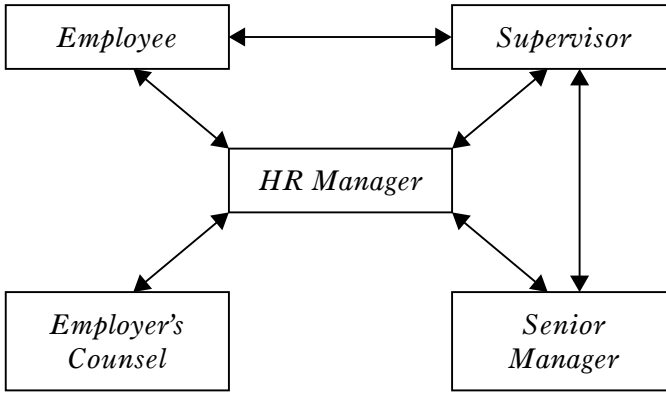
This essay endeavors to chart a path out of this impossible situation. It depicts an employment termination as being governed by a complex set of interrelated negotiations among diverse stakeholders. Much of the challenge in these negotiations results from the various parties having already reached contradictory conclusions and staked out conflicting positions by the time termination is considered. The path toward a better outcome therefore must lead the parties away from their initial conclusions to the data that underlie them, and challenge them to understand their positions in terms of the larger interests they seem to satisfy. HR is often well positioned to blaze this trail. Once the parties begin this journey, they may reach a deepened understanding of each other's perspective, and they may begin to see value-generating options that make termination less intolerable.<sup>1</sup> While the parties may be unlikely to feel as though the resulting discharge is a negotiated "agreement" in the end, they will have nonetheless inched their way to a better result than they would have had without negotiating. The essay then considers how taking care with the difficult conversations inherent to this process can help make things less bad for everyone. In conclusion, I discuss the business importance of negotiating better termination outcomes, and specifically the far-ranging adverse consequences of not doing so.

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1. This essay focuses specifically on the end-of-employment transaction itself. While it hypothesizes pre-termination discussions about the impending job action, it does *not* consider feedback or performance counseling conversations at earlier points in the employment relationship. Despite being beyond the scope of this essay, these present rich negotiation opportunities and could potentially avert the discharge altogether, or change the starting point of a discussion about it.

## MAPPING THE NEGOTIATIONS

An employment termination is the result of a complex web of negotiations among multiple parties, each with their own distinct interests:<sup>2</sup>



Central to this web are the employee<sup>3</sup> and his supervisor. Without the employee's performance and the supervisor's perception of its unacceptability, there would be no need for a termination at all. However, other stakeholders are inextricably involved too. For starters, the supervisor has an ongoing reporting relationship with a more senior manager, who is likely to be evaluating the supervisor's actions. The senior manager also has a critical stake in determining an acceptable level of performance, an appropriate point for terminating employment, and the right balance between the costs and risks of termination and those of retention. The employer's counsel is normally involved as well, assessing the merits of any claim that the employee may be anticipated to pursue post-termination. For example, an attorney will want to understand whether the employee has any legal protections and, if so, will review the personnel file to assess the ability to justify the termination decision and to determine

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2. Cf. ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 5 (2000). This analysis is inspired by a somewhat analogous discussion and depiction of multiple interrelated parties at a deal-making table.

3. This essay resolutely takes the view that the employee, despite an obvious power imbalance in most situations, is himself a negotiating party and not merely the subject of the negotiation or, more bluntly, its victim. Indeed, this essay can validly be read as an argument for an employee having an active role in negotiating his own termination, not to further individual empowerment in the abstract but to enable outcomes that satisfy all parties more fully.

the viability of possible defenses.<sup>4</sup> The attorney may also get involved in structuring a severance agreement, often involving a general release of employment liability claims. This involvement in the termination gives the attorney her own set of interests, potentially distinct from those of the other parties.

Interacting with all of these parties is the HR manager. What is the role of HR in all of this? Is the HR manager an agent for one particular side, either the employee's advocate or the management team's executioner? Is he there to advance the lawyer's interests, to make sure that the employee has no cause of action and, if challenged, that the employer can put forward a well-documented file in defense?<sup>5</sup> Alternatively, does an HR manager serve as a mediator, facilitating the conversations among these many different parties? As a mediator, HR might enable discourse between parties who otherwise would have no contact, e.g., the employee and the employer's counsel, and those who can no longer communicate productively because of rancor and strong emotions, e.g., the employee and his supervisor. Does HR have its own role to play as a negotiating party unto itself? If so, what are HR's interests?

The answers to these questions will depend in part on the organization itself. However, many cutting-edge organizations see HR as a distinct negotiating party,<sup>6</sup> and this understanding is assumed here. As suggested by the ensuing conversation, such an HR organization would have a separate interest in capturing as many of the compatible interests of the other parties as possible, thereby enabling Pareto improvements to employment transactions, in that they satisfy more

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4. A discussion of how legal liability may arise in the employment context exceeds the scope of the present discussion. Of possible consequence to these end-of-employment negotiations, however, is the fact that an attorney assesses not just ultimate liability, but also the likelihood that the former employee could make out a *prima facie* case of discrimination, thereby extending an onerous administrative process, and present facts sufficient to defeat summary judgment, protracting litigation and introducing the uncertainty of a fact-finding jury. These possibilities create expense, distraction, and potential reputational damage, even if the employer is ultimately without liability.

5. All of the preceding possibilities raise interesting principal-agent tensions, which I flag in passing but do not explore here. See generally MNOOKIN ET AL., *supra* note 2, at 69-91.

6. See, e.g., Wayne F. Cascio, *From Business Partner to Driving Business Success: The Next Step in the Evolution of HR Management*, 44 HUMAN RESOURCE MGMT. 159 (2005) (describing HR as a "strategic business partner" that "add[s] value" of its own to the organization, as illustrated by the example of SYSCO Corporation). See generally Society for Human Resource Management reference materials at <http://www.shrm.org> (directing HR professionals in the best practices of "[l]eading [p]eople" and "[l]eading [o]rganizations").

of the parties' interests without making anyone worse off.<sup>7</sup> HR also typically has overarching organizational interests in mind, such as fairness, high work expectations, and clear communication. In practice, as described below, HR's involvement in the negotiation can be somewhat akin to mediation, but with an eye toward ensuring that its interests are satisfied for the benefit of the overall organization.<sup>8</sup>

THE IMPOSSIBILITY OF CONCLUSIONS AND POSITIONS:  
"FIRE HIM!" V. "DON'T FIRE ME!"

Such a complicated web of negotiations would create significant logistical complexity under the most amicable circumstances. What adds even more difficulty, however, and makes an employment termination often feel impossible, is that the parties have typically reached their conclusions and entrenched their positions<sup>9</sup> by the time they contemplate an end to employment. These conclusions and positions stymie productive negotiation, because they are often divergent and seem irreconcilable.

The employee, for one, will have perhaps concluded that he is actually doing a good job, or maybe as good a job as anyone else is or as anyone has a right to expect. If he recognizes performance deficiencies, he may have concluded that they are not his fault, but rather are the result of poor training or ineffectual supervision. In line with these conclusions, he may well believe that his supervisor has been treating him unfairly, and that any employment termination would be unfair or even illegal. These conclusions suggest logical positions for the employee to hold. "Don't fire me!" is an obvious starting point. He might even feel that his unappreciated performance warrants recognition or, if he acknowledges performance difficulties, that he deserves better training or a different supervisor.

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7. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13-16 (4th ed. 1992). Economists define Pareto efficiency as the hypothetical state in which it is impossible to make any contracting party better off without making another worse off. A transaction is considered Pareto superior when it leaves at least one party better off and no one worse off.

8. An HR manager should be thoughtful about how to structure a process for these negotiations to follow, and to negotiate different phases of this process with the affected parties to achieve the optimal result. Beyond an elementary observation that it is probably unproductive and impractical to gather all parties at the table simultaneously, and that HR may engage in some degree of shuttling in a manner akin to mediation, the specifics of the process will likely vary depending on the organization and the individual situation. Cf. MNOOKIN ET AL., *supra* note 2, at 119-20.

9. See ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 3-14 (2d ed. 1991).

The supervisor will likely have reached different conclusions and articulated opposing positions. She will have concluded that the employee is doing a terrible job and probably will never meet the performance standards. She will feel that she has been more than fair in her supervision, even at the expense of the rest of the department. Continued hand-holding and performance conversations would be a waste of time. The only tenable position flows obviously from these conclusions: "Fire him!"

Making the picture even more complex are the conclusions and positions of other parties involved in the termination. Like the supervisor, a senior manager may likewise have concluded that the employee's performance is unacceptable, but she may assign additional fault to the supervisor and even HR. She may also have reached the broader conclusion that the company is tolerating poor performance generally, which threatens business viability. This larger financial perspective may make the termination seem justifiable, even if a high risk of employment liability exists. Moreover, the senior manager may see the termination as a necessary but insufficient step to address larger organizational deficiencies. The resulting position? Get rid of the employee, and possibly the supervisor and/or HR as well.

To this, the employer's attorney adds her own conclusions about the readiness of the personnel file, i.e., the extent to which performance reviews and other documents can demonstrate the legitimate basis for a job action if it is challenged later. This in turn will inform the attorney's assessment of the overall liability risk presented, which will prompt positions either in favor of or against termination.

Such irreconcilable conclusions and positions are typical as a termination nears. It seems impossible that anything productive could result from trying to square the employee's conclusion that he is doing good work with the supervisor's conclusion that he is not. It is similarly hard to imagine how to negotiate between the employee saying, "Don't fire me!" and the supervisor replying, "Fire him!"

These intransigent conclusions and positions make negotiating an employment termination especially challenging, but they also help explain why the HR manager has such a valuable role in the negotiation. The HR manager is often newer to the table than the other parties, and thus potentially less entrenched and conclusory in his thinking. His first important challenge is to engage the parties to retreat from their conclusions and to articulate the interests underlying their positions. As the parties respond, they may begin to step back from the ledge.

**Employee's Conclusions**

"I am doing a good job."  
 "My poor performance is not my fault."  
 "I have been treated unfairly."  
 "Terminating me would be illegal!"

**Employee's Positions**

"Don't fire me!"  
 "Reward my good performance, my progress, my effort, or my good citizenship."  
 "Retrain me."  
 "Give me a new supervisor."

**Supervisor's Conclusions**

"The employee is doing a terrible job."  
 "The employee will never meet expectations."  
 "I have treated this employee fairly."  
 "I have been more than generous with my time and energy, and it has been in vain."  
 "The employee is dragging us down."

**Supervisor's Positions**

"Fire him!" "...the sooner, the better."

**Senior Manager's Conclusions**

"The employee is doing a terrible job."  
 "HR is obstructionist and doesn't understand the urgency of our business priorities."  
 "The employee's poor performance may be the supervisor's fault."  
 "We are tolerating poor performance here."  
 "Tolerating poor performance will compromise future business results."  
 "The cost of employment litigation is covered by insurance, and is lower than the costs of retention."

**Senior Manager's Positions**

"Fire him!"  
 "HR needs to stop getting in the way!"  
 "Maybe the supervisor (or HR) should be fired too!"

**Employer's Counsel's Conclusions**

"He's not protected." (or) "He is protected."  
 "The file is ready." (or) "The file isn't ready."

**Employer's Counsel's Positions**

"He's an at-will employee: fire him!"  
 "There's a high risk of liability here: retain him!"

## HR PRACTICE CHALLENGES

*Any given termination is likely to be even more challenging than this discussion suggests, for each one presents its own potentially unique permutations of conclusions and positions. An HR manager must understand the nuances of each case in order to negotiate effectively. For example:*

- While it may be true that most employees will resist a supervisor's negative performance assessment, some may actually agree with it, and indeed may see the employment situation as a "bad marriage." Nonetheless, the employee may still feel that he has been treated unfairly. An HR manager relieved at the parties seeing eye-to-eye with respect to performance will trip up badly if he misses, or glosses over, the employee's conclusion of unfair treatment.

- Supervisors and senior managers may not always share the same opinion of an employee's performance, or the appropriate response to a deficiency. A senior manager may feel that an employee proposed for disciplinary action is actually performing fine, but is being unfairly used as a scapegoat for the supervisor's own deficient performance. The converse could happen too: a supervisor may think that an employee performs acceptably, but is being unfairly targeted by a senior manager impatient with the performance of a struggling department. An HR manager should avoid assumptions and listen carefully to tease out where each party is actually coming from.

DESCENDING THE LADDER OF INFERENCE:  
WHAT DOES IT MEAN TO "DO A GOOD JOB"?

The only place to begin is for the HR manager to challenge each party to describe how they reached their conclusions. He should ask open-ended questions and listen with curiosity. Such inquiry will help the parties descend the ladder of inference, from their entrenched conclusions to the data underlying them.<sup>10</sup> In so doing, the

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10. This analysis utilizes the "ladder of inference" model developed by Chris Argyris and others at the Harvard Business School. See also PETER M. SENGE ET AL., *THE FIFTH DISCIPLINE* (1994). According to this model, an individual selects from the overall pool of available data a subset of observations, which he interprets according to his beliefs and prior experiences and then extrapolates into conclusions. The analysis here proceeds in reverse order, with the parties starting at their conclusions and proceeding "down the ladder" to understand the underlying basis for those conclusions.



HR manager is also likely to discover how a party's implicit values and potentially limited perceptions may have affected the inferences that he has drawn from the data. Understanding these nuances will enable a more productive conversation to take place.

Let's start with the employee's conclusion that he is "doing a good job." The HR manager should seek to find out on what set of data he draws that conclusion. Does he keep track of the number of errors he has made, or the number of feedback conversations that his supervisor has had with him? If so, how does he know the equivalent statistics for his peers, or the statistics that would meet company expectations? What does a "good job" mean to him? What is included in the evaluation, and what is not? What has his supervisor told him about the job that he is doing?

Equivalently, the HR manager should challenge the supervisor's conflicting conclusion that the employee is "doing a terrible job." How is one's work reviewed in the department, and what standards are applied to determine whether it is a good job, a terrible job, or something in between? What is included in the work being evaluated? What is the company standard for meeting performance expectations in the employee's position? How does the employee's performance compare with that of his peers? How specifically and how frequently has the supervisor talked to the employee about his performance?

To the extent possible, the HR manager should look for and closely review spreadsheets and documented conversations on each side that substantiate what the parties are saying. An absence of documentation may give rise to legitimate skepticism. Whenever possible, HR should look to measure what both sides are saying against independent objective criteria,<sup>11</sup> such as any company policies regarding performance standards, attendance expectations, etc. These might validate one party's conclusion, or might suggest a different one.

The HR manager should similarly challenge the employee and supervisor to articulate their factual basis for drawing opposite conclusions about whether the employee has received fair treatment. What does fair treatment look like? How does the employee's experience compare with that? How does it compare with the experiences that his peers have had? Are there yardsticks available by which HR can measure fairness? Does the employee handbook say anything? What amount of training (second chances, ongoing coaching, etc.) do employees in other areas receive, and what might that suggest about

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11. See FISHER ET AL., *supra* note 9, at 81-94.

the fairness of the employee's experience? And how does the employee's rate of pay compare to that of his peers: might he be better compensated such that higher expectations are still fair?

HR should challenge all the parties' conclusions in this way. What causes the senior manager to conclude, "We are tolerating poor performance here," and how might her observations of a more general tolerance of poor performance within the company be relevant to this situation? If the employer's counsel concludes that "the file isn't ready," what is the basis for that conclusion? Are her underlying facts incomplete, or alternatively, might she perceive a legitimate cause for concern that others are oblivious to?

In exploring the underlying data in this way, perhaps the HR manager will agree with one party's conclusion, but then again maybe he will not. As a result of this process, the HR manager's recommended next step (termination or not, severance or not, documented performance conversation or not, etc.) may be different than it would have been before pushing through the other parties' initial conclusions to the underlying data. Moreover, this process may cause the other parties to see things differently too, or at least to acknowledge the possibility of other facts being relevant or their own perceptions being susceptible to alternative interpretations. That alone may make the situation become somewhat less intractable. At the very least, this exercise will prompt the HR manager to assess and map the underlying data and understand where the parties' conclusions are coming from. This will enable a more informed, more objective, and potentially more productive conversation to take place.

## HR PRACTICE CHALLENGES

*Indeed, an HR manager's effectiveness in large part depends on his ability to help parties descend the ladder of inference in this way. Consider the following examples:*

- An employee complaining of discrimination has likely brought his complaint in good faith, even if it is actually without merit. The reason is simple. The employee perceives only a limited subset of the relevant data, and these may seem to point convincingly to a conclusion of discrimination. For example, he would certainly be aware of receiving negative feedback, or being told that his employment would be terminated. He also may be aware of a unique trait he possesses as compared to his peer group, such as race, religion, or sexual orientation. Observing a correlation between the negative treatment and the unique trait, and absent any other context, he may infer causation. The supervisor, by contrast, almost certainly has more data. She will know if other employees have received similar feedback, for example, or if there are performance metrics or other information to justify her different treatment of the employee. The employee likely lacks this perspective. Of course, it is always possible that the employee knows something to which the supervisor is oblivious, and which substantiates the complaint. The challenge for the HR manager is to lead the parties down the ladder of inference, and to explore, understand, and help clarify all of their perceptions of the situation.

- A “performance conversation” can mean different things to different people. A supervisor may deliver consistent “feedback” to an employee by notifying her of every mistake she makes. Meanwhile, the employee may perceive that she has not received “negative feedback,” because the supervisor has never said how her errors relate to overall performance standards. The employee may think that her performance is fine despite these mistakes, which “everyone makes.” Not only will the supervisor see the employee's performance differently, but she may erroneously conclude that the employee “knows where she stands,” from these conversations about errors. Because of the potential for such confusion, the HR manager should look askance at potentially conclusory terms such as these, and seek instead to understand what specifically each party means in using them.

MAKING THE TERMINATION LESS BAD: IDENTIFYING UNDERLYING  
INTERESTS AND SATISFYING MORE OF THEM

A related and equally critical step in making the negotiation manageable is shifting the discussion from opposing, mutually-exclusive positions to the underlying interests that the positions are intended to satisfy.<sup>12</sup> The HR manager should explore the interests represented by the employee's position of "Don't fire me!" and the others' of "Fire him!" He might discover the following:

	Employee	Supervisor
<b>Position</b>	"Don't fire me!"	"Fire him!"
<b>Interests</b>	"I need a job." "I need financial security." "I want to feel appreciated." "I want the humiliation to stop." "I want to be successful." "I don't want to have to look for a job, especially in this economy."	"I need to maintain high-quality work." "My department needs to be successful." "I want him to be successful." "I don't want to keep giving him bad feedback." "I need to be able to spend time with other employees too."
	Senior Manager	Employer's Counsel
<b>Position</b>	"Fire him!"	"Fire him!"
<b>Interests</b>	"I want this company to perform well." "I want to maximize profitability." "I want the supervisor to be able to focus on other things." "I want the employee's coworkers not to feel undermined by his mistakes."	"I don't want terminated employees to have a claim against us." "I want to minimize the company's liability." "I only want to spend time on work that represents true legal risk."

These interests reveal a lot about the situation that was previously lost in the friction between conflicting positions. It becomes possible to see that the same position ("Fire him!") can fulfill quite distinct interests for different parties, such as the supervisor's desire for her employee to be successful and the senior manager's desire to maximize profitability. It may even be that parties share an interest—e.g., the employee and his supervisor both wanting him to be successful—but see opposing positions fulfilling that interest. Most importantly, an interest-based analysis enables the HR manager to understand *why* the other parties have taken their respective positions. Knowing these underlying reasons helps the parties see what is really at stake in the situation.

It is likewise important to listen for interests that the parties may have that were not captured by their staked-out positions. Despite wanting to fire the employee, for example, the senior manager

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12. See *id.* at 40-55.

certainly has an interest in maintaining workforce morale and engagement, which employment terminations in some circumstances can undermine. And who knows what other interests curiosity-based questions might uncover? Perhaps an employee absolutely cannot afford to lose his job until the summer but then would be more amenable to making a transition. Perhaps the supervisor is aware of a promising employee in a different department who may be promoted into the employee's position when it frees up.

Suddenly the situation is beginning to look more nuanced. Conclusory characterizations have given way to the underlying facts of the employment situation, and polar positions have yielded to a complex set of interests representing what matters to the parties. This understanding is critical, for it helps the parties begin to identify options<sup>13</sup> that could potentially make the termination less bad.<sup>14</sup> Usually no one is happy when employment ends, but a termination negotiated to satisfy as many of the parties' interests as possible will leave the parties less unhappy than they would have been without the negotiation.

The parties may find that their interests can be satisfied, at least partially, through outcomes other than their original positions. For example, the employee wants to stay employed both for financial security and to avoid a job search in a tough economy. Continued employment is one way to satisfy those particular interests. An alternative option, however, might be termination with severance and outplacement support, which would meet these two interests while still satisfying the company's interest in ending employment.

Shared interests may create an opportunity for value creation.<sup>15</sup> For example, the employee and his supervisor both have an interest in his being successful. What might happen if they were to discuss this mutual interest? Might they arrive at a fuller appreciation of the employment situation that led to the termination, to everyone's mutual benefit? Despite the unhappy ending here, might the supervisor be willing to provide a neutral—or, in the right context, even favorable—reference? Might the supervisor know another employer

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13. *See id.* at 56-80.

14. A critical threshold question suggested above is whether the data, upon HR's scrutiny, really support a conclusion to terminate employment. Even if not, however, the parties clearly still have their work cut out for them. Despite ruling out termination, they need to negotiate an outcome that nonetheless satisfies as many of their interests as possible. In other words, the "agreement" will not have an employment-termination term, but they need to decide what terms it will contain.

15. *See MNOOKIN ET AL.*, *supra* note 2, at 16.

whose hiring profile is a better fit for the employee, and would she be willing to share that information?

The parties may also trade among their differences to create value.<sup>16</sup> Perhaps the employee has a strong interest in retaining employment through the summer, or through the holidays. At the same time, the employee may not be interested in pursuing post-employment legal action in any event, making a release of claims a low-cost concession for him. The employer, which values minimizing employment liability, may be glad to give the employee another few months of employment in exchange for such a release, which it values more. Analogously, the employer may be unwilling to delay termination, but able to extend certain benefits for some period of time after termination in exchange for a liability release. The extended benefits may satisfy some of the employee's interests in extending employment.

In addition to potential trading opportunities, there may be low- or even no-cost options that one party can agree to unilaterally in order to create value for the other party.<sup>17</sup> For example, an employee who sees termination as inevitable may value removing the uncertainty about what exactly is going to happen and when. In certain cases, the HR manager or supervisor may be able to provide such advanced notice at essentially no cost, to the potentially substantial relief of the employee. In a similar vein, the employee may perceive termination-related reputational costs vis-à-vis co-workers. He may wish to mitigate those costs through the face-saving possibility of announcing his own departure, working out a notice period, and telling others whatever he chooses about the end of his employment. Such a scenario can be low-cost to the employer in some cases, especially relative to the potential benefit to the employee.

Note, however, that such options should be a net benefit to the parties, or else their addition will not in fact add value to the termination. In doing this math, the parties must consider all the relevant costs. For example, an HR manager might be tempted to avoid, or settle, an administrative charge of discrimination by paying the departing employee some amount of severance. A modest settlement payment—so the rationale might go—would be far less costly than

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16. *See id.* at 14-15.

17. Of course, even such low- or no-cost concessions are not quite unilateral, to the extent that granting them engenders goodwill in the employee. Indeed, such goodwill is valuable to the employer: it translates into a reduced likelihood of post-employment legal action, and likely mitigates other adverse business consequences associated with the perception that a departing employee was treated poorly. This point is developed further below. *See infra* note 27 and accompanying text.

the headache, expense, and possible liability associated with a discrimination charge, and thus the exchange would create value. While this calculus may hold up within the isolated termination, the HR manager should consider whether agreeing to such a settlement would encourage other employees to file similar charges in the future in order to obtain similar settlement payments. This possibility of more frequent *future* disputes and payouts may thus be a potential cost of agreeing to such an option in the *current* termination. In certain situations, this anticipated future cost may tip the balance such that the option of settling the discrimination charge actually nets more cost than benefit. Naturally, such a calculation will depend on how the employer's attorney assesses the expense and potential liability associated with a given discrimination charge.<sup>18</sup>

Negotiating in this way, the parties may inch toward the Pareto frontier. Everyone is left less unhappy than they would have been without engaging in negotiation. And given the company's strong interest in the unpleasant but, from its perspective, necessary outcome of terminating the employee, perhaps just such a negotiation leaves the parties at the optimal result.

#### HANDLING THE DIFFICULT CONVERSATIONS WITH CARE

While they stand to leave all the parties better off, the conversations leading up to an employment termination are difficult to have. After all, terminations are the "capital punishment of employment,"<sup>19</sup> with high stakes and personal dimensions stretching far beyond the workplace. A few words are therefore warranted to suggest how to make these challenging conversations easier, and why handling these conversations with care will benefit everyone.

The foregoing discussion has focused on a "what happened" or "what needs to happen" conversation, but it is important to remember that such a conversation will almost certainly affect the parties'

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18. One might characterize this concept as the employer refusing to negotiate when it has done nothing wrong. Within the frame of this essay, however, a more helpful view is that the parties *should* negotiate even then, but that the employer may be unwilling to include a "settlement payment" term in the negotiated agreement. As described here, such unwillingness in this context may be consistent with value creation.

19. See, e.g., *Separation*, §5(23) of *Guide to Managing Human Resources*, UNIV. OF CAL., BERKELEY, <http://hrweb.berkeley.edu/guides/managing-hr/er-labor/separations/separation>.

emotions and their identity.<sup>20</sup> Discussing his own potential employment termination, an employee will likely feel fear, anxiety, shame, confusion, and anger. The topic will likely prompt “identity quakes”<sup>21</sup> as he reacts to information that makes him doubt his competence, question his self-sufficiency, or see himself as a victim. The supervisor and the HR manager are likely to feel strong emotions too, such as guilt, frustration, anxiety, pity, and fear. They will experience “identity quakes” of their own, as the conversation makes them fear that they are uncaring and possibly even mean people. They may wrestle with whether the company has turned them into executioners, and if so what that says about them. Moreover, in the HR manager’s probing questions, the supervisor herself may feel challenged and cast into the role of the incompetent victim or even scapegoat, further complicating things.

What can be done to mitigate these effects so that the parties can maintain a productive dialogue? Being conscious of the emotional and identity dimensions of the conversation and teasing them apart from the “what happened” conversation are an important start.<sup>22</sup> Sometimes it can help even to voice these dynamics explicitly. A supervisor might say: “It is difficult for me to talk to you about this, because I am frustrated that the situation hasn’t improved and I worry about the personal consequences to you. This conversation also makes me feel nitpicky and uncaring, which is not how I identify myself.” An HR manager might say: “This is the worst part of my job. It makes me feel like the angel of death, and it makes me sad and disappointed that I can’t say what you probably want to hear.” He might also ask the employee: “I imagine that this must be an intensely difficult situation for you. Can you tell me how you feel about it, and how it affects your sense of identity?” By voicing these identity concerns and feelings, the parties may be able to separate more easily the objective content of their conversations from these personal dimensions.<sup>23</sup>

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20. See DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 3-17 (1999). This work helpfully observes that a difficult conversation actually comprises three distinct aspects: one about what happened, another about the parties’ feelings about what happened, and a third about the implications of what happened to the parties’ sense of identity. The conversation is difficult precisely because of these additional emotional and identity dimensions.

21. See *id.* at 111-28. This term describes the dissonance between one’s self-identity and the conflicting identity implications of a particular difficult conversation.

22. See *id.* at 3-17.

23. In other words, such moves will help separate the people from the problem. See FISHER ET AL., *supra* note 9, at 17-39.



Significantly, even though the conversations suggested in earlier sections are in a real sense about “what happened” and “what needs to happen,” the very act of having them can make the whole process less intimidating and easier to discuss. The reason is simple. A termination is too often something that *happens* to an employee, without his input and with no clear dialogue about what is taking place. Talking frankly and compassionately with an employee about the situation can mitigate his sense of uncertainty and foreboding. Moreover, asking an employee for his side of the story, and then listening to it with curiosity and compassion, is potentially empowering and respect-instilling. Apart from the potential substantive benefits suggested above, establishing a clear and open dialogue alone will lessen the situation’s unpleasantness, and will make subsequent conversations less difficult and scary. Each side will know more clearly where the other is coming from, and each side will recognize that the other is open to the possibility of a reality that differs from his prior perception.

In addition, the conversations may affect, for the better, how the parties actually perceive the situation, which will in turn make the discussions easier. If an employee has concluded that his supervisor has treated him unfairly, for example, everyone will benefit when the employee talks about this perception with the HR manager. The act of a good-faith conversation will itself cut against a perception of unfairness. Moreover, either the HR manager will agree with the employee and take the necessary remedial steps,<sup>24</sup> or he can help the employee descend the ladder of inference to appreciate how missing data or implicit assumptions led the employee to a perhaps understandable but nonetheless erroneous conclusion. Either way, the conversation is unlikely to harm the situation further, and indeed will probably help.<sup>25</sup>

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24. The effectiveness of such a move parallels that of moving from a “blame frame,” in which one party unhelpfully views the entirety of a conflict to be the other party’s fault, to mapping and addressing the “joint contribution” that both parties have made to the difficult situation. See STONE ET AL., *supra* note 20, at 58-82.

25. The benefits discussed here are separate from the fulfillment of any legal duty that may exist, outside the scope of this essay, to investigate alleged unlawful employment practices.

## HR PRACTICE CHALLENGES

*Lessons here can be especially poignant:*

- A personal anecdote bespeaks the value of handling these difficult conversations well. After I met with one employee in the latter stages of progressive discipline, she told me how much she valued me “treating [her] like a human being.” I had merely sought out a meeting, acknowledged with compassion the difficulty of the situation, and asked her to share the emotional and identity challenges it created for her. While her employment still ended—and the end was still unwelcome for her—the process ended up being less dehumanizing for her. Our connection and her trust enabled clear communication that made the situation less daunting for everyone.

- As the preceding anecdote suggests, it is sometimes possible for an HR manager to use empathetic inquiry, sincere acknowledgment, and expressions of concern to help employees separate their sense of self-worth from their performance struggles. Disentangling these two ideas will make termination-related conversations easier. Sometimes, an employee may even come to see termination itself as a dignity-preserving way out of an unwinnable situation. While this outlook might be perverse at earlier stages of employment, it is often salubrious in these final hours.

- Small details make a big difference in getting these conversations right. It is critical for an HR manager to be present for, and indeed to seek out, employees struggling with performance difficulties. Make appointments and keep them. Don’t take your smartphone into the meeting. Inquire with empathy. Actually listen, and look into voiced concerns. Follow up with employees. The more an HR manager engages in these conversations, the easier they will be. The more that an HR manager’s actions communicate true concern for the employee’s emotions, and affirmation of the employee’s worth and identity independent of her job challenges, the better the conversations are likely to go.

A CONCLUDING THOUGHT:  
THE BUSINESS CASE FOR WHY THIS MATTERS

This essay has described how negotiation theory provides a roadmap for making an employment termination less awful for everyone involved. It has envisioned an HR manager driving a process that pushes employee, supervisor, senior manager, and attorney alike

past their entrenched conclusions to the underlying data so that a better-informed and more productive conversation can take place about the employee's performance and an anticipated job action. It has likewise described how the HR manager can potentially get the parties past their divergent positions to map their more nuanced interests. In so doing, the parties may identify different options, as well as value-creating trades, to satisfy more of these interests and thereby make the termination better than it would have been without negotiation. The essay then sketched how these difficult topics can be discussed more easily to everyone's benefit.

But why does any of this matter? It does not take a lawyer to know that, except for a limited number of relatively narrow exceptions, the default standard in the United States is at-will employment, which means that an employee may be fired without notice for any cause or even no cause at all.<sup>26</sup> This doctrine, a skeptic might argue, implies that the underlying reasons for a termination generally do not matter, and thus that the manner of termination is certainly irrelevant. The skeptic might therefore conclude that the methods described herein for improving termination experiences are an inefficient cost with no corresponding benefit.

The response to such a critique recasts the value of negotiating an employment termination in organizational terms for the employer.<sup>27</sup> Most terminations may indeed comply with the law, but there is nonetheless a tremendous amount of litigation challenging

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26. See, e.g., Alexander Hamilton Institute, *Employment-at-will: FAQs*, BUS. MGMT. DAILY (Dec. 10, 2011, 3:00 PM), <http://www.businessmanagementdaily.com/19743/employment-at-will-faqs> (web page for business managers explaining the employment-at-will doctrine). See also SHAWE & ROSENTHAL, *EMPLOYMENT LAW DESKBOOK* § 16.01 (2011) (“[I]n the absence of a written contract of employment for a defined duration, an employer can terminate an employee for good cause, bad cause or no cause at all.”).

27. One can imagine a scenario in which the act of termination itself, irrespective of the preceding employment situation, occurs in a sufficiently egregious manner to raise concerns of unlawfulness along the lines of intentional infliction of emotional distress (IIED) or other theories of liability. See, e.g., *Agis v. Howard Johnson Co.*, 355 N.E.2d 315, 318-19 (Mass. 1976) (holding that an employee's termination constituted IIED when her manager began firing employees in alphabetical order so as to impel an unknown thief to confess). In addition, one can formulate compelling arguments that making terminations less bad for the participants is morally preferable to the alternative. Without diminishing the force of these lines of thought, the present discussion will focus solely on the business justification for applying negotiation theory to employment terminations.

the legality of individual job actions.<sup>28</sup> In the haze of individuals' entrenched conclusions and positions leading up to a particular termination, it can often be unclear what in fact is going on, and thus whether severing employment would be unlawful. Terminating an employee without the HR manager first leading the parties down the ladder of inference to assess the underlying data can thus be like playing Russian roulette with employment liability.<sup>29</sup>

Moreover, the employer's failure to engage an employee who believes that he has been treated unfairly will only increase the likelihood of post-employment legal action. As a preliminary matter, the employer will have missed a chance to remedy the perceived unfairness. The employee's concerns may turn out to be legitimate, and if so the employer can fix the problem. It is likewise possible that the employee's limited perspective of the situation has led him to an erroneous conclusion of unfairness, in which case the employer can share a larger factual reality showing the situation's ultimate fairness. Either way, disregarding the employee's concern will cost the employer an important opportunity to neutralize his motivation to seek legal action altogether.

In addition, an employee who perceives unfair treatment will become more entrenched in that view if the employer snubs him in this way. Hardened in his conclusion of unfair treatment, and deprived of an empathetic reception within the workplace, the employee may become likelier to pursue outside options, such as filing an administrative charge or a lawsuit.<sup>30</sup> Even assuming that the employee's claim

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28. Comprehensive statistics regarding employment litigation are unavailable. However, activity in the area of employment discrimination, a significant subcategory, is suggestive of the overall activity. The U.S. Equal Employment Opportunity Commission (EEOC) reported nearly 100,000 administrative charges of discrimination filed in 2011 under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and other federal anti-discrimination laws. See EEOC Enforcement & Litigation Statistics, <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm> (last visited Mar. 19, 2012). This represents a 33% increase over 2005 levels. See *id.* Moreover, employment discrimination lawsuits represent nearly 1 in 10 suits filed in federal district court, with a recent decline hypothesized to reflect merely a migration of such suits to friendlier state courts. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 115-19 (2009).

29. Here too, I note but do not analyze the possibility that a legal duty to investigate may arise in certain situations, reinforcing the need to engage in such an exploratory process.

30. See Steven Keeva, *Does Law Mean Never Having to Say You're Sorry? Going to Trial over a Case Is Costly, Frustrating—and Can Perhaps Be Avoided with a Simple Apology*, 85 A.B.A.J. 64 (1999) (observing that tort victims are less likely to sue when the individuals who caused the harm express "empathy" and "concern for their well-being").

is meritless, and that the employer's counsel can argue successfully for a no-cause determination or a dismissal, the employer will likely incur substantial legal expenses just to get to that point. By contrast, an employee whose concerns the HR manager heeds carefully is on balance less likely to seek outside recourse, even after an adverse action like termination.<sup>31</sup>

Equivalently, capturing more value for a terminated employee in the terms of his termination "agreement" will reduce, quite straightforwardly, the likelihood of his pursuing a lawsuit or other outside relief (or revenge) against his former employer.<sup>32</sup> Not only will he have more of his interests satisfied, but he will see that his employer is going beyond its minimal legal obligations in spite of the adverse circumstances, which may communicate good faith.

Even if the former employee cannot state a legal claim, or chooses not to attempt one, the employer's treatment of his exit will carry reputational consequences. He might relate his story to would-be jobseekers that he knows, or even broadcast it on a career website. In addition, other employees have watched the process of progressive discipline and ultimate termination, and likely have their own perceptions of its fairness or unfairness. Some of them may have heard the former employee's perspective as well. A perception that the employer deals unfairly with its workforce, irrespective of the legal permissibility of doing so, will detract from employee morale,<sup>33</sup> which in turn leads to workplace problems such as increased absenteeism and turnover, reduced employee productivity, and more frequent and severe interpersonal work conflicts.<sup>34</sup>

These problems create significant costs. Increased turnover drives up recruiting costs,<sup>35</sup> and these costs may be multiplied to the

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31. *See id.*

32. Here again, however, an employer may be legitimately wary of negotiating options that create value in the current termination, but could lead to additional costs in future employment transactions. As discussed above, such an example may be offering an employee a monetary settlement for a charge of discrimination when the employer has done nothing wrong. *See supra* note 18 and accompanying text.

33. *See, e.g.,* CARSON F. DYE & ANDREW N. GARMAN, *EXCEPTIONAL LEADERSHIP: 16 CRITICAL COMPETENCIES FOR HEALTHCARE EXECUTIVES* (2006) (describing, among other factors, how distrust of management and poor interpersonal relations may contribute to low employee morale).

34. *See, e.g.,* H.C. Ngambi, *The Relationship Between Leadership and Employee Morale in Higher Education*, 5(3) *AFR. J. BUS. MGMT.* 762, 764-65 (2011), available at <http://www.academicjournals.org/ajbm/abstracts/abstracts/abstracts2011/4Feb/Ngambi.htm>.

35. *See id.*

extent that a damaged reputation in the job market makes the employer less attractive to jobseekers. Greater absenteeism increases overtime costs, as it forces management to react more frequently to unexpected dips in attendance that affect the employer's ability to get the job done.<sup>36</sup> Moreover, it worsens workforce productivity over time, as the employer comes to anticipate more absences and, as a result, is forced to staff its operations less leanly.<sup>37</sup> More frequent workplace disagreements mean more internal complaints, which cost time and money to investigate and remediate.<sup>38</sup> They also lead to more frequent administrative actions and lawsuits, which require a costly defense and leave the employer vulnerable to liability.<sup>39</sup>

A skeptic might counter that litigation insurance can absorb many of these costs, but insurance is no easy solution. Not only might an insurer refuse to insure an employer with deficient internal employment practices,<sup>40</sup> but more frequent litigation will generally drive up the cost of insurance. Moreover, non-litigation expenses such as recruiting and overtime costs will almost certainly fall outside the bounds of an insurance policy and, instead, will come directly out of the employer's bottom line.

These are all significant costs for an employer, regardless of a termination-friendly regime of at-will employment. They demonstrate that a suboptimal termination can have ripple effects far more significant than mere unpleasantness for the individual parties involved. In a real sense, mitigating these costs is HR's central value proposition in the context of employment terminations. By enabling clearer thinking about a termination, improving the participants' experience of it, and capturing value that might otherwise be lost, negotiation theory provides a powerful tool for HR to use in accomplishing this important objective.

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36. *See id.*

37. *See id.*

38. *Cf. id.*

39. *Cf. id.*

40. *See, e.g.,* Erika Blomquist et al., *Employment Practices Liability Coverage: Updates and Strategies in Addressing Employment-Based Claims*, A.B.A. SEC. LITIG. INS. COVERAGE LITIG. COMM. C.L.E. SEMINAR 1, 4-5 (March 4-6, 2010), available at [http://apps.americanbar.org/litigation/committees/insurance/materials\\_2010.html](http://apps.americanbar.org/litigation/committees/insurance/materials_2010.html).