


A UNIFIED THEORY OF DISCHARGE

Harry D. Jones[©]

ANDERSON & JONES, PLLC

Dallas, Texas

www.andersonjoneslaw.com



Thought I'd get a little academic.


Rather than use analogies like the Alphabet Minefield

ADA, ADEA, EEOC, TEA, OSHA, DOL, FERPA, §1983, Title I, Title IV...

I wanted to walk you through checklists and charts designed to classify, categorize and compartmentalize.

Working toward a common approach to formulating terminations.

This reductionist approach require more thought than research...I used my memory of the 100s (no 1,000s) of terminations I've counseled, guided and deluded.



At this point in a man's life...in the 40's, you start to take stock – I'm sobered by the number of people who have lost jobs on my watch!

My goal was to think with you.

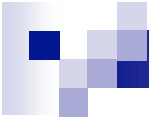
Less nuts and bolts: more guiding principles.

More strategy – less tactics. Also, my rule of thumb was not to bore myself in this speech.



Value of Unification

- Training simplified - Rather than thinking of everything, you focus on the main things
- Systems streamlined - Instead of multiplying depth, overlap functions
- Cost contained - as I'll explain: talk yourself out of rash decisions
- Risk minimized - What we are seeking is defensibility both in the Court of public opinion and the Court with the actual, live bailiff.



But you may disagree with me – Harry, it is that complex. Regulatory realities make it so.

First, I ask: is it really that complicated? Or have we made it so?

We = lawyers.

I would assert that the

Alternative is unattractive:

to a unified Theory of Discharge

■ Categorization

-- which leads to fragmented thinking about why a person is losing their job. e.g., An employee, she's an African-American from Somalia, originally. When she hires, she doesn't mention she's a Muslim. She becomes a swim coach. She has seizures on the job. She shows up to work wearing a hijab. You tell her she can't. She's rudely insubordinate. She has another a seizure. She has fights with a swimmer's parents who are Jewish. She's told by the AD to say nothing at all that is not swimming-related. She claims a WC injury from falling into the pool with hijab on - - almost drowns. She claims free speech violation. Religious bias. Race bias. Disability. She starts having additional delusions. Her colleagues are in revolt. She says the AD made a pass.

■ Differentiation

-- try to put all of those boxes in a pattern

■ Multiplication of risk & cost

Do I fight all of these issues? Some?

■ Uncertainty

What to do? Loss of strength?



WAIT!


Lawyers are not supposed to strive for non-complexity.

I thought we were supposed to love the workplace security, work injury, leave of absence, headscarf policies, race/sex bias/harassment, retaliation, constitutional crisis care. Hours stretched far into the horizon like a West Texas highway – little associate memos blowing in the wind like tumbleweed.



I'd rather my clients win and prosper than preserve complexity.

There has to be a smarter way than perpetual hand-wringing. There must be decision.



So I've spent 18 years seeking the basis of a theory. A verified theory. A theory that would apply to due process terminations or at-will.

Theory applies to due process termination or at-will.


The slow accumulation discharge.

The dual reason discharge.

The "I can't put my finger on it, but she has to go" discharge.

The high-profile employee.


What unifies these cases?



First of all...

Best bet: in your analysis,
pretend due process is always
in play (let counsel determine
that later).

The mechanism of the termination can be decided later.
But my theory has to precede the mechanism.



In fact, that's the point.

Common approach ^{to termination} relieves the
top executive from continual (& early)
involvement.

If your philosophy is adopted, enculturated and “grooved” into your institution, you won’t need to take a unified position on:

- The hijab
- The altercation No. 1
- The altercation No. 2
- The doctor’s note that looks fake
- The delusions
- The seizures
- The leave



But I'm in the presence of lawyers and academicians. So I must be precise.

“Formulation” of termination?’

What does that mean?

Is a termination approach susceptible to a “formula” per se?

Well, no; not algebraic.

I have to turn to the world of high school romance to make my point



What was the most difficult thing about breaking up?

You know – you saw her, four lockers down. You asked about her. You wondered about her. Luck intervened. A month later you were holding hands, sad to say goodbye between periods, the envy of all your friends – she is yours. You're going together. An item. But a few weeks into it, your high school brain wonders:

- Why do our hands perspire so much?
- Why do I have to talk so much?
- What's the name of that other girl, six lockers down??



What made that next step so hard? The break up? (I'm speaking hypothetically here) --

Was it

The pain?



The loss?

Some existential fear that your life would never be the same without her?



The rumors?

Did you fear that she'd slander you?

That she'd reveal that your mom had a ludicrous nickname for you?

NO, IT WASN'T THOSE THINGS.

Nor is it when you break up with an employee



It was the actual communication
of the breakup.
("It's not you, it's me...")

How do you say it? Her verbal skills were legendary. Yours weren't developed yet. You could bench 300 pounds, lay down a 4.6 in the 40, and grab the rim.

But face to face – saying it. To her face. Breaking up is hard to do.



Why?

The reason ^{for the breakup} was difficult to determine.

It defied formulation.



Because the reason sounded bad.

Um, I'm tired of us talking so much. NO.

Um, I don't want to get in trouble every time I check someone else out.

Test: Would it sound good to her mom??

Test: Would it sound good to her mom and your mom?



Sometimes it was

Because there were too many reasons.

Let's see:

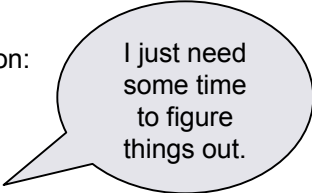
1. Boredom
2. Fear of intimacy
3. Exhaustion
4. A search for less drama
5. A cuter, more dynamic possibility



So, rushing in to terminate the relationship was hard...

Because the reason was sort of false.

You settled on:



I just need
some time
to figure
things out.



OR...

You knew a better reason
might occur after
communication.

Aha! I saw you kissing Brad.

Too late... you already told her it was you had to study more.



As you can see, my theory is taking shape – using crude analogies and mixed metaphors.

DEFINING THE REASON(S).

The key is 



Not starting with the sheer volume of documentation.

I repeat.

Is that what you want to focus on?

Okay, so you have 48 e-mails and three voice recordings that your swim coach is not in fact a strict Muslim – she is Muslim, but Sufi, not Sunni or Shia, and this is not required to wear the veil.

Do you want to engage in a theological analysis for a “reason” when you want to say religion played no part at all?



Great Mistakes: made

- Confusing documentation with rationale
- Insufficient testing of the reason - Coming down on the biggest stack of documents, instead of
- Ranking of reason(s). with logic
- Rushing to a reason. & sticking with it despite better ones that came along.

MAYBE, an insubordistic reason is better than using a complicated theological answer.



The unified theory of discharge is:

HAVE THE BEST REASON
DEFINED EARLY, BUT ABLE TO
BE EXPLAINED & EXPANDED
LATER.

to the extent possible...

I'm proud of this theory and it helps me win; but when I showed it to my wife, she asked me – is that it??



“Best”

(not perfect)

In the search for perfection, we miss the good.



Defined:

not blurred

This takes thinking through the issues, not at them.

THE REASON THE SWIM COACH HAS TO BE TERMINATED
IS SHE CANNOT EFFECTIVELY COACH SWIMMING.




A reason must be reasonable.

Shouldn't a swim coach be able to swim?

Should she be interested in swimming?

Shouldn't she be able to distinguish a breaststroke from the butterfly?

And demonstrate it?



A less documented reason that
is more reasonable is better
than a voluminously
documented (unfair or
inconsistent) reason.

So, I get the box of documents. I look in vain for anything that tells me whether the swim coach is an effective swim coach. Instead, I find reams of paper talking about:

- HIJAB
- ALTERCATIONS
- CRAZY DOCTOR
- FREE SPEECH NOT IMPINGED
- E-MAILS FROM SUFI IMAM




Defined:

spare, not verbose.

SWIM COACH CAN'T COACH

COACH CAN'T COACH



Remember, in my theory --

Capable of expansion.

Let me explain why almost everything in this box leads into, funnels into, unifies into ineffectiveness as a swim coach.

Now, all the evidence helps me – she’s extremely ineffective – spectacularly ineffective...but not points 1, 2, 3, 4, 5, 6 ...It’s 1A, 1A1, 1A2, 1B...



The more you document a bad reason, the worse your fate.

Pretty soon, in a religious discrimination case, where you want to say – it was never about Islam, it was about kids swimming well – there's nothing about freestyle in your records, it's all about Yarmulkes, the Koran, Christmas trees, and apparent inconsistencies...



If the (poor) reason creates risk,
documentation expands risk.

She wouldn't comply with our rule about hats.



GOAL \neq DOCUMENTATION.

GOAL = DEFINITION.



HABITS MUST INCLUDE DOCUMENTATION

Because documents support our defined reason.



**ANALYSIS WILL INCLUDE
DOCUMENTS**



BUT DOCUMENTS DON'T
DETERMINE THE BEST
REASON



Again = we're not looking for a

~~NOT A~~ SERIES OF REASONS

Even though the letter that goes out may have many – we – we'll know our best reason.



It's

THE BEST, PLUS ALTERNATIVES




If there is

NO ONE CLEAR REASON:

a problem

Months pass, the swim coach keeps being absent. Her doctor says she cannot work. Her doctor is not, in fact, a doctor. You have your reason.



So what do you do?

A SMALL, INTENSE DIALOGUE GROUP



IF NOT THIS,
WOULD WE STILL
TERMINATE?





UNTIL YOU GET TO THE
BEST REASON,
DO NOT COMMIT

(INVESTIGATION)

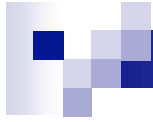


TRUTH



WORK WITH ACCEPTED PAST DEFINITIONS, BUT NOT RIGIDLY

Don't get handcuffed by the past.



**WORK WITH COUNSEL TO
DEFINE IT**



IMAGINE THE EXPLANATION
IN SIX MONTHS.

A YEAR.

TWO YEARS.



IMAGINE THE NATURAL EXPANSION AREAS

Ineffectiveness as a swim coach.

Think about meters.



EARLY SKEPTICISM IS A PLUS

If I have the best reason defined early, but able to be explained
and expanded later...I am in a position of strength.



If you try to contract me – I can expand.

If you try to be broad, I can be narrow.

I can make my reason stick.

I'm not too worried about bad documents – I've sidelined them.

My inarticulate witnesses can't hurt me as much.

I'm logical.

Most of the time, we'll win.

P.S...

When we're back in school, my girlfriend broke up with me. Her reasons didn't hold up. Here we are in our 40's, very happily married. So, she needed this unified theory.