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HUMAN RESOURCES GENERAL OVERVIEW
MODULE I

LESSON 1 ~ DEALING WITH DIFFICULT PEOPLE

Welcome to *Dealing with Difficult People: Managing Against the Odds.* This course introduces you to the major issues involved in dealing with difficult employees. It provides a three-step process to help you transcend preconceptions about difficult people and avoid missteps in managing them. With me is Bob Rosner, best-selling author and contributor to ABCNews.com.

And this is Carla Woodhouse, vice president for MindLeaders with over 20 years of experience within the training industry.

What do employees do that makes them difficult?

I did a poll that asked "What type of co-worker drives you the craziest?"
- ✓ Evel Knievel, the ultimate risk-taker at 6%.
- ✓ *Oprah and all those feelings at 13%.*
- ✓ Homer Simpson, "Duh" at 22%.
- ✓ *Jessica "Come up with your own blond joke," 29%*
- ✓ And number 1, Simon Cowell "The know-it-all" at 30%

And that's just a small sample of the difficult behaviors in the workplace.

And speaking of difficult employees, let me give you an example. Recently I wanted to match a pair of shoes to a dress that I had bought, and I went to the store and found the perfect pair of shoes. The problem is that they didn't have it in my size, and it would take three days for them to come. I was aggravated--three days! At that moment I realized that I could be difficult. And I used that insight in managing others. Do you sometimes find yourself being difficult?

And there is a wide range of difficult behaviors in today's workplace, from the very serious insubordination to the slightly silly people who smell bad--well, slightly silly as long as you don't have to work next to this person. When you take cubicles and pressure and jam us all together, it's no wonder that difficult behaviors can flourish in this kind of environment. Now I don't want to be difficult with you, but it's your job to learn how to manage difficult behaviors so you can create the most productive team possible.

So the point is, it's OK to be different at work, just as long as it doesn't inhibit the productivity of the team.

Our next question "How do I know there's a problem?"

A poll conducted by NYU asked people "What TV show best describes your work environment?"
- ✓ *7% said Science Fiction,*
- ✓ 10% thought it was Courtroom Drama,
- ✓ *18% said a Medical Emergency,*
- ✓ 27% on Soap Opera,
- ✓ *and the number one TV show describing the workplace: 38% said Survivor.*

Soap Opera and Survivor, wow! What a tough place to work or even manage today. And difficult employees push us even closer to the edge. That reminds me of a story of a group of people that were going to bike across Africa, and they spent a lot of time worrying about the big things like war and famine and wild animals. In the end it was the bugs and the traffic that impacted their trip--the little things that counted.

And it's no different at work --it's the little things that you have to monitor and manage: absenteeism, lack of teamwork, morale. How can you stay on top of morale? Former Secretary of Labor Robert Reich has this pronoun test do you use words like "us" and "we" when they talk about the company, or "they" and "them"? Chances are if there's a lot of "theys" and "thems," there could be problems with difficult people in your organization.

That's a great point, Bob. It's important to keep your ear to the ground. But it's also valuable to take your ear off of the ground, and listen to people outside of your group: vendors, customers who ask to work with somebody different, even employees from other departments can all signal that there's a problem.

Yes, Carla. Atmosphere matters. That's why it's so important to pay attention to it.

Coming up, we're going to talk about why difficult employees are being difficult.

Watson Wyatt did a poll and asked employees if they had what they need to do their jobs.
- ✓ 43% said they had the skills,
- ✓ *and only 38% said they had the information they needed to do their job.*

I have almost 50 people that report to me. And this poll brought me to the difficult realization that maybe the organization is contributing to difficult behavior. So we're going to give you three cause categories to help you determine what the difficult behavior is.

And the first category is internal, meaning that the problems come from within the difficult person themselves. And part of the reason could be that the person is just a jerk, a popular conclusion of a lot of managers. But there could be compelling reasons why the person is exhibiting jerky behavior. They could be having family problems. There could be medical issues. There could be financial problems. Or maybe they're just not well-suited for the job you're asking them to do.

Now less obvious are the situations where the cause is external to the employee. For instance there was a software company that announced a program to their employees to pay them $100 for every bug they could find in their product. Now this isn't that uncommon in the software industry. But the problem was, they announced it two weeks before the product was released. What this caused was employees to put more bugs into the program, so they could earn more money. Compensation structures, workflow assignments, even corporate policies like sick leave can cause difficult behavior.

Finally, there's the creativity cause. You know--where employers talk about wanting new ideas and innovation, but when an employee actually listens to management and comes up with a new idea oftentimes they can be beaten down and ostracized for being difficult, because they've been thinking outside the box.

At the end of the day it's your job to manage the difficult employee. But like fingerprints and snowflakes, each difficult employee can be different. We've shared with you internal, external, and creative causes for problems.

Now our next question "What is the biggest mistake we make with difficult employees?"

Herb Kelleher, former CEO of Southwest Airlines once said "A company is stronger when bound by love, than by fear. Now that may sound a little soft. But remember, Southwest is one of the leading companies in the world.

You are getting very sleepy. No, I'm not trying to hypnotize myself, I'm trying to make a point about managing difficult employees. And the best metaphor I know is a pendulum. Why? Because our management style with difficult employees tends to be just like a pendulum. It goes to one extreme or the other. One extreme, we come down like a ton of bricks on the person. The other extreme we deny that there's a problem. When in fact what we need to do is try to make our management style fall in the middle, and take very specific, considered steps in terms of dealing with that difficult employee. Do you know how I know this? Because I've been a difficult employee a time or two in the workplace. And why

is this important? Because we're facing a demographic timebomb. 76 minus 44. 76 million Baby Boomers. 44 million Gen Xers. IBM has a study that says, by the year 2008 we're going to lose almost 19% of our workforce. No, they're not going to be abducted by aliens. It comes down to three words: Baby Boomer retirement. So as these Baby Boomers begin to move out of the workforce. Keeping our difficult employees as productive members of the team is more important than ever.

So as managers we have one more challenge, and that's how to keep even our difficult employees for our future.

And I've got one more challenge for you Carla: to remember that the walls have eyes. It's logical to hyperfocus on one difficult employee and forget that all the other employees are watching, asking "Are you being too harsh, or Are you being too lenient in how you treat that difficult employee.

Next we're going to talk about the first steps in dealing with difficult employees.

Peter Drucker once said "So much of what we call management consists in making it difficult for people to work."

As managers, it's not our intent to make it difficult for employees, but sometimes with the pressures of deadlines and schedules we can fall into the trap of ready, fire, ... aim!

Carla, let me give you an example of ready, fire, aim and the implications it has on trying to manage difficult people. Julie Gnuse is in the Guinness Book of World Records because 95% of her body is covered in tattoos. Now we all get a certain mental picture of her and a lot of us jump to all kinds of conclusions, but get this: Julie has all of those tattoos because she realized when she got her first tattoo that it helped a skin condition that she had. So for medical reasons she got the rest of the tattoos. Do you have some different feelings about Julie now? Do you see the problems with jumping to conclusions by just a surface look at someone.

So if you dig beneath the surface you might just find some surprising things. For instance I had an employee who was on the verge of being dismissed. He was disruptive, obnoxious, almost sabotaging the goals of the team. When I talked to him, I found out that he didn't feel a part of the team, so I put him in charge. And he performed beautifully. Here are three steps to help you put your difficult employees back on track.

Carla the important first step is you have to clarify the behavior. It's not good enough to just talk to the individual employee. You've got to talk to other members of the team. You've got to really do some digging if you want to get at the sources of the problem.

A very important second step is to qualify. I literally make a list of the pros and cons of the difficult employee's behavior. That way I know if the consequences are negative or positive to the organization.

And the third step: modify. Now the irony here is we always want to start changing the behavior because we're all busy, we've got a lot to do. That's why it's important to take the time to clarify and qualify, so you can be sure that your suggestions and things you want the employee to do are relevant to the situation and will really meaningfully turn this person around.

Next, let's take a look at how we handle that face to face conversation with a difficult employee. We did an ABCNews.com poll that asked "What is most important to employees?"

- ✓ *More pay, 8%.*
- ✓ Care and concern, 13%.
- ✓ *A chance to contribute, 37%.*
- ✓ And at number one, fair treatment, 41%

Carla, I don't want to frighten you but I'm going to tell a brief dating story. I was with this woman, and we were having a difficult conversation. And suddenly I noticed she had begun to cry. I want to make her feel better. I wanted to make the tears go away, and she surprised me: she just turned to me and said, "Sometimes you've just got to let a person cry."

Emotions are part of life, and they come to work. Sometimes when you're dealing with a difficult employee, you're going to stir up those emotions. Let's not be so focused on the end of the conversation that we forget that the emotions may be a part of the process.

Before you ever get into a face-to-face conversation you've got to know all your options. This is no time to shoot from the hip. You've got to understand your HR policies, you've got to understand the laws and regulations, and you've got to understand your corporate culture.

Every boss has a tongue, but one of our most powerful tools is our ears. Every employee wants to be treated fairly, and there's no better way to do that than to sit back and listen. Listening to their side of the story can give us some great insight into their behavior.

Difficult employees are difficult because they push our buttons --their quirks, their values, their personalities, their beliefs. The key thing as a boss is you need to focus on their behaviors. That's the area that you can have the biggest positive impact.

And finally, it's important to establish performance targets. It's difficult for employees to know what their behavior should be if we haven't set their expectations. Periodic checkpoints can also help to light their way.

And our next question: "When is discipline or dismissal required?" "Hitting people over the head isn't leadership, it's assault"--General Dwight Eisenhower.

With all due respect for the general, sometimes we get to the point with our difficult employees where they need a little bit of hammer time--no, not that Hammertime--this hammer time. Whack!

But you have to remember that hammer time can negatively impact creativity and ideas. At the same time, I've been a difficult employee and I understand the concept that enough is enough. There have been plenty of times that I've tested boundaries with bosses, and a little hammer time might have done me good.

Sometimes just having a conversation with the employee gets them on the right track. But if it becomes repeated or more serious, then progressive discipline is often what's needed. Finally, if the infraction is really serious like theft, or gross insubordination, dismissal is warranted. What's important is make the punishment fit the crime.

And if dismissal is the route that you have to take, remember, this is a serious, serious step both for the organization, for you and for the individual involved, so it's important to document every performance failure at every stage in the process. And get human resources involved early and often.

Fortunately dismissal doesn't happen very often, or it's too strong of a measure. Next, we're going to give you more suggestions on what to do if nothing is working. We spotted a sign over a taxidermist and veterinarian's office that said "Either way, we'll take care of your dog." So, like the sign, eventually you're going to have to cure the difficult employee, or put them out of their misery. I'm going to offer you some additional tips and strategies that just might do the trick. Jim Collins wrote a book called "Good to Great," and in that book he emphasizes having the right people on the bus. But he also puts a lot of importance on ensuring that the people on the bus are in the right seat. Sometimes just a change of scenery, a new department or a different job role can offer the difficult employee an opportunity to go from good to great.

Hey Carla, I was just on the bus and there was no seat for me!

Ha, that's a great point, Bob. Sometimes there isn't a seat on the bus for the difficult employee. And that's when offering career counseling gives them an opportunity to find a job that they're better suited for. Another idea is to seek a second opinion. I haven't encountered a manager yet, who hasn't had a difficult employee at one time or another. That manager can offer you a different view, a fresh idea, a different way to deal with the difficult employee. Finally, don't forget the employees that are not difficult! The non-squeaky wheel deserves some attention, too.

We've given you strategies, insight, and hopefully some energy to deal with the difficult employees in your workplace. Increasingly the success of your organization is going to depend on the choices you make with them.

LESSON 2 ~ BECOMING MORE ASSERTIVE

Host: Welcome to Becoming More Assertive. Many employees find it difficult to stand up for themselves and express their ideas and feelings. If you don't present yourself positively and share opinions and ideas, you'll be less influential. This program will help you discover your assertiveness. It will also discuss what causes unassertiveness and describe how to take action toward becoming more assertive. Take this 12 question self-assessment to help you find your level of assertiveness. Please take out a piece of paper, number it from 1 to 12 and answer the following statements by writing "yes" or "no" for each statement.
(1) It's difficult to say no when asked to do something you don't enjoy.
(2) You set limits on your time and energy.
(3) You put others' needs before your own.
(4) You ask for help when needed.
(5) You accomplish your goals, even at the expense of others.
(6) You stand up for yourself when your rights are violated.
(7) At work, you usually avoid conflict. (8) You feel good about yourself.
(9) You lack clear goals.
(10) When speaking, you maintain eye contact.
(11) It's difficult for you to initiate calls to customers or other employees within your company. And (12) You can compromise your principles and still get something accomplished.

Give yourself one point for every "yes" response to even-numbered statements, and one point for every "no" response to odd-numbered statements. Add your points. Now, the higher your score, the more assertive you are. Eight or lower suggests you should consider becoming more assertive. Now that you've completed the self-assessment and determined just how assertive you really are, let's go to our program and watch as five individuals take the necessary steps toward assertiveness.

Answering machine: Hey, it's Jamie. Leave a message at the tone.
Mother: Jamie? Jamie, this is...
Jamie: Mom? What?
Mother: Jamie, I'm just calling to see how you're doing.
Jamie: I'm fine, Mom. I've just really been busy with my work.
Mother: Well, it sounds like you're not too happy. Sounds like you're working too much. Are you making some new friends?
Jamie: Yes, I make new friends, Mom.
Mother: Are you, honey?
Jamie: Mom, I - yes.
Mother: Jamie.
Jamie: Yes, I am. Just last week we went to this - well, this event and I had lots of fun.
Mother: Well, that's good. Who'd you go with? Did you go out with that boy that you like?
Jamie: No, Mom, I went alone. Look, I'm over that. I already told you. I just don't feel like going out there to be judged right now. It's like a dog show out there.
Owen: It's never going to happen. I'm just not good enough.
Jamie: I know. I just don't think I can deal with the consequences in meeting someone new right now.
Mother: Jamie, honey, you need to figure this out.
Jamie: I don't know.
Mother: I mean, you're going to have to get over...
Jamie: I just don't think I can deal with it right now.
Mother: ...what happened to you and - I mean, I know it's hard but you just got to get out there and I know you will.

Jamie: I know, Mom. I will.
Owen: Bob, phone, phone.
Bob: Owen? Aren't those my pants? Hello? Oh, hi, Jim. Yeah, I got those numbers for you.
Owen: Huh?
Bob: Uh-huh. My pants. Yeah, yeah. Yeah. No. Yeah, I understand. Of course.
Owen: Hey, I saw that second-floor girl today. Man, I am this close to talking to her. I swear.
Bob: Oh, yeah?
Owen: Well, kind of.
Bob: Tonight?
Owen: I saw her in the window.
Bob: Yeah. No. Yeah - well...
Owen: Tomorrow, though, man. Tomorrow I'm going up there, I'm going to talk to her, you know?
Bob: Tomorrow - yeah, tomorrow night would be...
Owen: I've just got to make sure not to look like an ass.
Bob: Well, actually I don't have my date book here in front of me. Can you - uh-huh. Yeah. No, I understand. Sure. How about seven o'clock, Starlight room? Yeah, that's great. Okay, good. Yeah, thanks. Okay. Bye.
Owen: She's so cool, though, you know?
Bob: Yeah?
Owen: That's the thing. I can't - I can't see myself going out with her. It's like, I try to picture it, you know, mentally?
Bob: Starlight. Well, have you ever really talked to her? I mean, doesn't she just stay up in her apartment all the time?
Owen: Yeah, but we met that one time when she was moving in.
Owen: Hey.
Jamie: Hey.
Owen: I thought that went pretty good.
Bob: What - what pants were you wearing at the time?
Owen: Dude, what are you talking about? Getting a little strange on me there, Bob.
Bob: Yeah. Yeah. Why can't I just tell him not to wear my pants? Is that so hard? Why can't I handle that?
Maxine: Rubbish. You don't think actual cowboys would wear those getups, do you?
Maxine: Don't you get enough of that at work, George?
George: Oh, hi, Maxine. I didn't hear you come in.
Maxine: I'm stealthy.
George: Actually, I get plenty of that at work. Twenty years of washing dishes - that's plenty.
Maxine: I'm beginning to worry about you, George. Have you thought about getting another job? Didn't you have any dreams?
George: I don't know. Guess so. If I had, I forgot them.
Maxine: Let's see what smells so good.
Jamie: Yeah, I know. No, I talked to Mary. They want it all done later tomorrow, at nine, so I've really got to go. Okay, Mom, I will. I will. Mom, I've got work to do, okay? Okay, Mom. Yeah, I know. Love you. Bye.
Jamie: Pizza?
Delivery guy: Hey.
Jamie: Just keep the change. Just slide it through.
Delivery guy: It's not going to fit.
Jamie: Turn it. Just try.
Delivery guy: It's not going to fit.
Jamie: Okay, hold on.
Jamie: Thanks.
Delivery guy: Here's your pizza.

Delivery guy: Yeah, buddy.
Maxine: Oh, George, very good. You watch that, George?
George: Yeah, sometimes.
Maxine: What's good to watch?
George: Well, I'm partial to game shows. Why?
Maxine: Don and I - we used to watch westerns. Don liked old westerns. Since he's been gone, I just keep watching them. Keep eating at the same places we ate, at the same time of day. For example, now, after dinner, I'll go to the pie shop and have some pie, like I did with Don. I'm sick of pie, but I just do it.
George: Well, why don't you have something else?
Maxine: I don't know. I'll have pie. It's not such a big deal.
George: No, Maxine, what do you want?
Maxine: What do you mean?
George: Don likes pie. What do you like?
Maxine: I don't know. I really don't know what I like anymore. I miss him so much.
George: It's okay.
Bob: Now I understand it's a big up-front cost but, sir, over the long run, it's really going to help out your productivity and your revenues if we go ahead and - uh-huh. No, I understand that but - hang on. Wait a minute. I had pants. I had clean pants. Sorry - no. No! Oh, my meeting. Owen!
Bob: Owen, I'm going to kill you.
Mother: Hello? Hello?
Bob: Come on, I've got a seven o'clock!
George: I've been needing to...
Jamie: ...change, not be so afraid. Believe in...
Owen: ...myself. Say what I...
Bob: ...want to say.
Maxine: I'm going to make good things happen.
George: Ask for what I want.
Bob: Learn to confront.
Maxine: Find out what I desire.
Jamie: Hey, I'm becoming the person I want to be. A-s-s-e- r-t-i-v-e.
Bob: Hey, I'm becoming the...
George: ...person I want to be.
Jamie: A-s-s-e-r-t-i-v-e.
Maxine: I'm thinking for myself.
Jamie: Conquering all my fears.
Owen: Realizing my strengths.
Bob: Standing up for my ideas.
Jamie: I'm going to challenge my own beliefs.
Bob: Take care of myself.
George: Know when to say no...
Owen: ...and learn when to let go.
Maxine: Hey, I'm becoming the person I want to be.
George: A-s-s-e-r- t-i-v-e.
Bob: Hey, I'm becoming the person I want to be.
Owen: A-s-s-e-r-t-i-v-e.
Maxine: Excuse me. Excuse me. Sir? Are these your pants?
Bob: Yes. Yes, those are definitely my pants.
Maxine: I took them out of the dryer. I hope you don't mind. I'm - I'm just about to start a load of my own.
Bob: Thank you.
Maxine: They're very nice pants.

Bob: I'm sorry, I can't let you borrow them.
Maxine: You look very tired. A young man like you? You should take better care of yourself. Get some exercise.
Bob: I will.
Bob: You can confront Owen about the pants. You can do it. And the socks. You're competent to do so.
George: Boss, I know, over the last couple decades, you've thought of me as a busser. Me, too. That's what I thought. Boss, I've taken busing as far as it can go, maybe further. What I want do is cook. Yeah, cook. Okay.
Maxine: Donnie, I loved watching those old movies with you. Really, I did. So don't take this too hard, but I'm going to quit cold turkey, just as soon as I can figure out a good way to do it.
Jamie: This is ridiculous. I can do this. Nothing bad's going to happen.
Bob: Yeah. Jim, hi. It's Bob. Yeah, I know. I'm sorry about that. I had a little personal emergency. It won't happen again.
Owen: Morning, Bob.
Bob: Can you hold the phone just a minute? Thanks. What are you doing?
Owen: Nothing.
Bob: Why are you holding my pants?
Owen: Oh, I'm going to borrow these pants, Bob.
Bob: No, Owen, you're not.
Owen: Huh?
Bob: You do have pants of your own, right?
Owen: Yeah. I'm sure I do, but these babies are nice.
Bob: Yeah, well, so were those.
Owen: Look, I have to go talk to the second-floor girl today. Give me a break.
Bob: All the more reason.
Owen: What?
Bob: Well you don't want to look back and say, "You know, the first time I spoke to the second-floor girl, I was wearing some other guy's pants." Do you?
Owen: I - wow, I - no. No. That's actually a good point, Bob. Thanks.
Bob: No problem. Goes for my socks, too. Hey, Jim, yeah. Yeah, sorry about that.
Owen: Hi, I'm Owen.
Jamie: Hi, I'm Jamie.
Owen: We met here one time, when you were moving in.
Jamie: I remember. You play baseball, right?
Owen: Yeah, I do.
Jamie: So are you any good?
Owen: Leading the company league in RBIs - two years in a row.
Jamie: Is that good?
Owen: Yeah, it's good. You don't play?
Jamie: Not really.
Owen: You want to?
Jamie: When?
Owen: Right now?
Jamie: Okay.
Maxine: Don, I'm out on the town. Enjoy your western.
Host: Welcome back. Assertive behavior can help you take charge of your career and your life while preserving your own dignity and the dignity of others. It will allow you to achieve your career goals, be more in control and feel healthier and happier.

LESSON 3 ~ COMPLYING WITH ADA REQUIREMENTS

Host: Welcome to our program, Complying With ADA Requirements. The Americans With Disabilities Act or ADA, makes it illegal to discriminate against people with disabilities. It covers all phases of the employment process, beginning with recruitment and hiring. As a manager, you need to know what the ADA covers and how it functions. During this program, you'll learn the basic ADA requirements and which disabilities and impairments are protected by the ADA. You'll also learn how to make reasonable accommodations for disabled employees and the kinds of questions managers can ask, once a disabled person has been hired. Our guide to the ADA is Jason Stern, an employment law attorney and consultant, who advises companies about workplace issues. Joining Jason throughout the program will be other experts on disability in the workplace, including disabled people who speak from their own experience. Watch now and learn about the requirements of the ADA and what you can do to accommodate disabled employees.

Don Brown: According to the United States Census data, there are approximately 56 million individuals with disabilities in this country. And we know the number one cause of disability is aging, so we certainly can anticipate more individuals to have disabilities.

Deborah: Until the ADA, the primary law in place in the United States is the Social Security Act, which defines disability as inability to work, and so that's what people have expected. It causes numerous problems just because people have an assumption that they usually are not even conscious of, that disability means inability to work, and nowadays that's just not true.

Daniel: ADA Requirements.

Jason: The ADA makes it illegal to discriminate against someone with a disability. What does that mean to you and your business? The ADA applies to private employers, local and state governments, employment agencies and labor organizations. It applies to you, if your company has 15 or more employees, including part-time employees who have worked for at least 20 weeks during the current calendar year or 20 weeks during the previous calendar year.

Don Raikes: I started doing some computer programming when I was in high school back in the mid '70s when it was just a Teletype machine and paper tape to save the programs on. I've had a great deal of success in the job interviews I've had. I've worked for very large companies and very small companies, ranging from three or four people up to major international corporations.

David: My interview with Don actually was the same as all other interviews that I get, you know recognizing the fact Don is blind. One of the discomforts that I encountered was that I was expecting to be able to look at someone and have them look back at me. That's a very typical thing to expect when you're interviewing and that wasn't happening, clearly because of his disability. That was uncomfortable, but that's something that you have to get over. The advice that I'd give to another manager in terms of hiring somebody that has a disability is first off, to treat them fairly and treat them as they would any other not disabled user.

Jason: In a job interview, you cannot ask questions that are likely to reveal information about a disability. If a disabled person is qualified for the job, or could be qualified if reasonable accommodations were made, you must treat that applicant the way you would any qualified applicant.

Don Brown: With any job there are qualification standards. Must be able to do this, must have two years of experience, must be able to perform this. So it's not any different for persons who are disabled. The purpose of the interview is to assess whether or not the person is qualified for the position.

Deborah: An employer cannot ask questions during the interview period about having a disability. An employer can ask questions about how a person would do a job, and whether a person might need accommodations, and what they might be.

Jason: According to the ADA, job descriptions must be written to focus on essential job functions, so a disabled person won't be ruled out because of less important duties.

Don Brown: When we look at whether or not a person is qualified, a qualified individual with a disability, it pretty much hinges on whether or not this individual can in fact perform the essential job functions. The EEOC has produced a number of documents designed to assist employers in identifying essential job functions and incorporating those functions in their position development process.

Jason: You cannot use the interview or application to seek information about medical conditions, past or present.
Deborah: If an employer has a valid reason for needing to know the medical status of people who work there, it's permissible to conduct a pre-employment medical exam after an offer of employment has been made and the pre-employment medical exam needs to be administered to everybody who applies or everybody in certain categories. People can't just be singled out to have medical exams if other people are not.
Jason: The ADA also addresses health insurance. The law says, "You can't refuse to hire a disabled person simply because your health plan doesn't cover his or her disability." For that matter, you can't refuse to hire an able-bodied person because the person's dependent is disabled or because the dependent's disability isn't covered by your insurance. In addition to the federal ADA, your state may have its own laws on disability. If you have an ADA question, consult your human resources department or an ADA expert. ADA Coverage. ADA Coverage:
Daniel: In general when I talk with prospective employers, my background experience speaks for itself in that they're able to see that I get the job done. It doesn't really matter that I'm deaf or have any kind of disability. In fact it becomes almost a bonus for the employer because they are able to take someone who can get the job done and be able to tell people, "Look, hey we hire people with disabilities."
Jason: To qualify for protection under the ADA, an applicant or employee must be both disabled and qualified for the job. If not, the ADA doesn't come into play. How does the ADA define disabled?
Don Brown: The ADA has a three-pronged definition of disability. The first prong of the definition is any mental or physical impairment that substantially limits a major life activity. Examples of major life activities would be: seeing, breathing, walking and even, working. Substantial limitation is based on what the average person can do. If the average person can walk the length of this hallway without having to stop and rest, and I need to stop and rest, then I am substantially limited. I can't do what the average person can do.
Deborah: When most people think of disabilities or physical impairments, they think of what we call the "classic ones." Mobility impairments, using a wheelchair or crutches or a cane, people who are blind or visually impaired, or people who are deaf or hard of hearing, but there's many, many more people who are covered by the ADA. It includes people who have difficulties because of medical conditions, such as back problems. There are more and more people in the workplace with repetitive motion injuries. Mental impairments include psychiatric disabilities, like depression which is very common or schizophrenia or panic disorders and it can also include people with mental retardation and people who have had brain injuries.
Don Brown: In determining whether or not an individual has a disability, we must take into consideration, mitigating measures. If an impairment can be mitigated by particular measures, such as medication or eyeglasses or contact lenses, then that person would not be considered an individual with a disability.
Jason: The second definition of disability is having a history or record of substantial limitation, regardless of whether the disability is cured, controlled or in remission.
Don Brown: Let's say that a person had cancer 10 years ago and the cancer has been cured but it's still on record, and some adverse employment action is taken as a result of that record, then that individual would in fact be covered under the ADA.
Jason: The third definition of disability is being regarded as substantially limited.
Don Brown: If a person applies for a job as a receptionist, and has a facial disfigurement, if the employer suggests that this person cannot work here because their facial disfigurement may in fact frighten or make customers uncomfortable, that employer is in fact perceiving this person as having an impairment. So this individual would in fact then be covered under the ADA and this person would not have been otherwise covered under the ADA.
Jason: Some common conditions that are protected are: alcoholism, cancer, paralysis and AIDS. The ADA also protects applicants and employees from an employer's false assumptions. Some things are definitely not covered. Physical traits like height, weight, hair color, eye color; personality characteristics, a bad temper or lack of judgment; environmental, cultural or economic disadvantages,

like a lack of education or a prison record; behavioral disorders, a gambling addiction, kleptomania or pyromania; illegal use of drugs or addiction, including prescription drugs. But rehabilitated addicts or alcoholics may be protected if they have a history of impairment or mental illness. Common conditions not generally covered by the ADA are high blood pressure, broken bones, mild asthma and obesity. But in some cases, one of these could become an ADA covered condition. Reasonable Accommodations.

Daniel: There are times when I do need to use the telephone. Because my hearing loss is not as severe as some, what I use is a VCO, voice carry-over device. So I just dial up the relay service and then I can just speak for myself and read the response from this device.

Don Brown: A reasonable accommodation is any modification or adjustment to the work environment or how tasks are customarily performed. A number of our systems in employment are not accessible to persons with disabilities and in order for disabled individuals to have an equal employment opportunity, those playing fields must be leveled, and we do that by incorporating reasonable accommodations. Reasonable accommodations fall into the following categories: Making buildings and facilities accessible; buying or modifying equipment; modifying examinations, training materials or policies; providing readers and interpreters; restructuring a job or modifying work schedules, reassigning a disabled employee to a more suitable vacant position. Reasonable accommodations are applicable throughout the employment process, meaning the recruitment process, the application process, the selection process as well as existing employees and termination process.

David: I determined the accommodations that were required for Don by asking him actually. Our corporation has a commitment to making sure that people are properly resourced and so I just asked him straight out, "What hardware do you need, what software do you need to be able to get your job done effectively?"

Vadim: When a deaf person comes into a workplace, that person does become responsible to help the manager understand what his or her needs are. The manager can't know everything. The manager can't know what a blind person needs, what a deaf person needs, what a person in a wheelchair might need, unless perhaps that manager has already had some experience outside of work with those disabilities.

Dede: Wake up. I use voice recognition software because I have both carpal tunnel and fibromyalgia and fibromyalgia is a type of arthritic condition that makes it hard to sit for prolonged periods of time at a computer. "To outline all aspects of our training program..." I missed a year of work coping with chronic illness. When I got voice activated software, I was able to do anything that I could do before in the workplace. "New paragraph..." I use this in conjunction with foot-mouse pedals. Literally if I even had no hands at all, I could manage this completely.

Don Brown: A disability, such as carpal tunnel syndrome or a mental impairment is not immediately apparent to others, and may be met with skepticism by an employer. My advice to managers is to approach this in a very sensitive manner, to ask the employee what it is he or she may need in order to successfully perform essential job functions.

Deborah: Some of the accommodations that are used by people with psychiatric disabilities are pretty easy to accomplish, like having a higher wall around a person's cubicle or allowing a person to have private space to be able to concentrate and not be distracted or allowing a person the ability to come in late in the morning, if the medication that they're taking requires that they have a little bit more time to recover from feelings of drowsiness.

Jason: Disabled employees need to let you know about their disabilities in order to guarantee their right to accommodation. Employees don't need to notify you in a specific way, but they must give enough information to show a disability exists and has a substantial impact on a major life activity. In some cases, where you can see the disability for example, your knowledge of the disability may be implied. The ADA states a reasonable accommodation may not cause an employer undue hardship. Undue hardship is defined as requiring significant difficulty or expense. There are no financial guidelines to follow, but there are three major factors used in evaluating undue hardship: (1) The size of the business and its financial resources. (2) The net cost of the accommodation, taking into consideration any tax benefits. (3) The impact of the accommodation on business operations. The

Internal Revenue Service allows you to deduct up to $15,000 a year for expenses associated with removing certain architectural and transportation barriers.
Kathy: "Right, okay so we have the Dutch Coalition on Disability and Development."
Don Brown: When we talk about reasonable accommodation, the accommodation has to be effective. An employee may request a particular accommodation that may be more costly, but if the employer identifies a similar accommodation that would be effective, then the employer certainly can go with the accommodation that is less costly.
Deborah: The federal government has set aside a fair amount of resources for employers to be able to find out about accommodations. There is the Job Accommodation Network, which is a national resource. There is a Disability Business Technical Assistance Center that puts on training programs and is very, very good at very, very current interpretations of the law.
Daniel: Some of the best advice I could offer would be to talk to the employee, find out what accommodations are really needed. Don't make assumptions. Every person with a disability has their own unique needs and they have found different ways of making accommodations. And often you'll find that what is necessary will cost far less than you expected.
Kathy: "Post-Hiring Questions."
Jason: As in the interviewing process, there are certain questions you cannot ask disabled employees once they've been hired. You cannot ask about a disability or require a medical examination, unless your request is job-related and necessary to business operations.
Deborah: The main rule about how you treat people once they've been employed, is that you can't single people out and treat them differently from other people. You can't single people out for example, and say, "All of the people who use wheelchairs have to do that, but nobody else does." If you make decisions based on what you learned about a person's medical condition or disability, the decisions have to be justified by what's really required to do the job.
Jason: The following four situations may justify limited inquiry. (1) If an employee requests an accommodation and the disability isn't obvious, you may request documentation that shows the right to accommodation. (2) If you have a reasonable belief a disability will keep an employee from performing essential tasks, you may ask limited medical questions or request an examination. (3) You may also ask questions or request an examination, if you believe an employee's disability poses a direct threat to the health or safety of others. (4) A work-related injury is another case in which you may ask limited medical questions or request an examination in order to assess your liability under workers' compensation. Even if you have a job-related reason, no request can exceed what you need to know to evaluate the impact of a disability on a particular situation and very important, all medical information must be kept confidential and stored in a separate medical file. Do not keep medical information in an employee's regular personnel file.
Deborah: It's very important for employers to let everybody know that the employer takes the ADA seriously, that it's the law and that everybody is responsible to some degree, especially if they supervise other people, for making sure that they are treating everybody fairly. The benefit for employers is getting workers who are qualified to do good work. It's really that simple.
Host: As a manager, familiarizing yourself with the ADA will help you successfully employ and retain workers with disabilities.

LESSON 4 ~ AT-WILL EMPLOYMENT

Host: Welcome to our program, At Will Employment. If you work for an at will employer, employment can be terminated at any time, for any reason, or no reason at all, with or without notice. During this program, you'll learn the rules of at will employment and the exceptions to the rules. You'll also learn practical problem-solving tips to avoid termination and layoff problems. Watch now as Ann Kiernan, an employment law attorney and consultant, explains the benefits and risks of at will employment and what you need to know to avoid liability for a wrongful termination.
Interviewer: Ann, what does at will employment mean?
Ann: At will employment is the law in the District of Columbia and 49 of the 50 states; Montana is the only exception. At will employment means that a person's employment can be terminated at any time,

for any reason, or no reason at all, with or without notice. This doctrine is a product of the Industrial Revolution and laissez-faire capitalism. Laissez-faire capitalism preached freedom of contract and workers and employers began to set their own terms for wages and conditions of employment. Starting in the late 1950s and continuing through today, the courts have created a variety of exceptions to the at will employment doctrine.

Interviewer: What are these exceptions?

Ann: There are four main exceptions. Contractual, Statutory, Public Policy and Employment Tort.

Interviewer: What are some examples of contractual exceptions?

Ann: Well, union members are contractual. They are not at will employees. The terms and conditions of employment for workers represented by unions, are governed by the collective bargaining agreement between the union and the employer. In addition to union members, an employee who has an individual contract of employment is not at will. He or she can be fired only for the reasons spelled out in the contract. Oral promises may also be enforced as contracts and thus, would also be an exception. For instance, in a New York case, a worker who was told he would not be fired, "unless you screw up badly," was held by the Appellate Court to have an enforceable contract: not to be discharged, except for good cause. Those are all examples of express contracts. But there are also implied contracts. The most important is the employee handbook. Typically, these manuals spell out the employer's rule of conduct, procedures, employee benefits, etc. In many, but not all states, if the handbook sets out the offenses for which a worker can be disciplined, assures that a worker will not be fired after a probationary period except for good cause, or it establishes progressive discipline procedures, the handbook is a contract. If you as a manager or supervisor fail to follow its procedures, the company will be liable for breach of contract. Now some states do not recognize the handbook as contract exception. Some states require a clear prominent disclaimer if the handbook is to avoid being a contract. But some other states say that a handbook is always a contract and no disclaimer can ever change that.

Interviewer: Are there any other contractual exceptions to at will?

Ann: Yes, some state courts have also created an exception to at will employment, by recognizing claims for breach of the implied covenant of good faith and fair dealing that exist in every contract, written or oral. Under that principle, each party to a contract impliedly agrees that neither party shall do anything which has the effect of destroying or injuring the right of the other party to receive the fruits of the contract. For instance, in one case a salesman claimed his employer had fired him to avoid making commission payments. The contractual agreement says the salesman had to be employed when the customer paid the invoice in order to get the commission. Since the salesman was not employed when the invoice was paid, the company had not breached the contract when it refused to pay the commissions, but the employer did breach the covenant of good faith and fair dealing by firing him to get out of paying the commissions. And the jury awarded the salesman the full amount of the commissions in issue. Now the implied covenant of good faith and fair dealing is not widely recognized as an exception to at will employment. Most state courts have ruled that this implied obligation does not alter the basic at will rule, but some states have used it to require employers to have good cause for terminations. Most other states use the implied covenant only where there is an express contract as well.

Interviewer: Ann, can you explain the statutory exceptions to the at will employment doctrine?

Ann: Sure. There are many federal statutes a manager should be aware of that limit his or her right to fire, discipline or terminate at will. These include: Title VII of the Civil Rights Act of 1964 which bars discrimination based on race, color, sex, religion or national origin. The Age Discrimination in Employment Act, prohibits discrimination against employees 40 years old and over. The Americans with Disabilities Act and the Rehabilitation Act forbid discrimination against the disabled, and require reasonable accommodation of disabilities. The National Labor Relations Act says workers can't be fired for union activity. The Occupational Safety and Health Act, OSHA, and similar laws, such as the Clean Air Act, The Federal Mine Safety Act, The Toxic Substances Control Act. They forbid termination of an employee who refuses to work in an unsafe workplace. The Employee Retirement Income Security Act, ERISA, prohibits discharging a worker in order to prevent him or her from getting benefits. The Employee Polygraph Protection Act bars employers from firing workers who refuse to take lie detector

tests, with some very limited exceptions. The Consumer Credit Protection Act prohibits firing an employee because of a wage garnishment. The Uniformed Services Employment and Reemployment Rights Act bars employers from discriminating against military veterans or employees with obligation to the National Guard or the Reserves. The Immigration Reform and Control Act proscribes discrimination on a basis of citizenship or national origin, unless the worker is an illegal alien. The Judiciary and Judicial Procedure Act says employees can't be fired because they're called to federal jury duty. The Fair Labor Standards Act requires employers to pay minimum wage and overtime wages, and prohibits discharging an employee who pursues his or her rights to pay. The Bankruptcy Reform Act bars employers from firing workers because they filed for bankruptcy protection. The Family and Medical Leave Act allows employees up to 12 weeks of unpaid leave to take care of a family member or for the employee's own illness, and mandates that the worker be restored to his or her original job, or an equivalent upon return to work. The False Claims Act and the Whistleblower Protection Act safeguard employees who report fraud by government contractors or abuse, waste or misconduct by government agencies. The Worker Adjustment and Retraining Notification Act mandates at least 60-days notice to employees of a plant shutdown or mass layoff, that means at least 50 people. The Fair Credit Reporting Act bars employers from taking action against an employee based on a credit report or consumer investigative report, without giving the employee or applicant a copy of the report.

Interviewer: What about state laws?

Ann: It's against the law in many, if not most states for employers to refuse to hire or to discipline or terminate because an employee is summoned to serve on a jury or subpoenaed to appear in court as a witness; takes time during the work day to vote; reports wrongdoing under a state whistle-blower law; uses alcohol, tobacco or other legal substances during non-work hours; takes leave under a state family and medical leave law; has a characteristic protected under state or local anti-discrimination laws, such as marital status, sexual orientation, gender identity, parental status, familial status, genetic information, age under 40, etc. Has filed for workers' compensation or engages in political activity. The bottom line is it's your responsibility as manager to know the legal ramifications if you refuse to hire, discipline or terminate an employee. Be sure to check with the human resources department for specific state laws and your company's procedures.

Interviewer: What about public policy exceptions to at will employment?

Ann: Most state courts have held that an otherwise at will employee can't be fired if the firing would contravene established public policy. California led the way in 1959, when it held that a worker who was fired because he refused to present perjured testimony on his employer's behalf, had a claim for wrongful termination. Other courts have created similar exceptions, by rulings that employees cannot be fired for refusing such things, as participating in an antitrust price-fixing scheme, using illegal accounting practices or putting defective products on the market.

Jim: Now Alex, I'm going to need your full support on this contract. I want you to make the changes we talked about and put those terms in the contract.

Alex: I don't know, I think I need to talk to someone about some of these changes. Some of them seem illegal.

Jim: Alex, I wouldn't talk to anyone if I were you. That would look bad for our department. We've been working on this contract for six months and if you can't be a team player, then you don't belong on the team.

Alex: Well, we'll just see about that. I'm not participating in anything illegal.

Ann: Many states also protect whistle-blowers who report, object to or complain about illegal activities by the employer. Some states do it by statute, others by court opinion. Some states limit whistle-blower protection to workers who report matters affecting the public health or the public treasury, but others grant broader coverage.

Interviewer: Now in addition to the common law and statutory basis for employer liability, employers can face serious claims for tortuous conduct against employees. Isn't that right?

Ann: That's right. A tort is a civil wrong, other than a breach of contract. One example is intentional infliction of emotional distress, also called the tort of outrage. This requires intentional and outrageous conduct by the employer, causing severe emotional distress to the employee as the result. This is not

easy to prove. Since the courts require the employer's conduct to be beyond all possible bounds of decency, atrocious, utterly intolerable in a civilized community. Criticism of an employee's performance, abrasive remarks, unjustified reprimands, excessive supervision, even verbal attacks are not enough. Another is false imprisonment. While employers have the right to detain and question employees suspected of theft or other wrongdoing, they can't confine employees and give them, you know, the third degree. In a recent case, a seventeen-year old cashier won both compensatory and punitive damages after she was detained in an office and subjected to a four-hour interrogation on a charge she had stolen some cash from her register. She was told she couldn't leave until she confessed and she wasn't even allowed to call her parents. There's also defamation. Defamation is a false statement that harms a person's reputation. If it's written down, it's libel; if it's oral, it's slander. These claims arise most often when a former employee has been given a bad reference and doesn't get a new job as a result. Promissory estoppel is another tortuous conduct example. A variety of courts have held, that if an employee resigns one job based on false promises about a new job, the employee can recover damages. In one case, an employee resigned her job of 11 years after having been recruited to join another employer. She went to the new office, got her uniform, got her schedule, but the day before she was supposed to start, she was told not to come in because the wife of one of the business owners objected to her hiring. Her claim of promissory estoppel was upheld. And there's also fraud. While the precise elements of fraud vary from state to state, generally an employee must prove the employer knowingly made a false representation of a material fact, aware that the employee would rely on it. In one such case, an employee who had announced his intention to resign, was convinced to stay by his employer, who assured him he had a lifetime job and denied that they were looking for someone to replace him. Based on those assurances, the employee turned down the new job. When he got fired a few weeks later, the court said he could sue for fraud.

Interviewer: How can you prevent legal claims of wrongful discharge by at will employees? Are there any practical management tips to follow?

Ann: Oh sure! First, and most important, consult your human resources or legal departments for the current policies and legal requirements in your state. Don't try to handle these issues on your own. Here are some other suggestions: Avoid contractual obligations. Work with your human resources department to review employee handbooks, job applications, work rules and other employee documentation, so you can delete or limit any statements which refer to permanent employment, progressive discipline or the causes for termination. Keep the company's options as open as possible. Make sure any document describing reasons for termination also includes language reserving the company's rights in case of a layoff, reduction in force, different economic conditions or a change in business operations. Eliminate all references to a probationary period. If you can't, call it an introductory period instead and make it clear that completion of the introductory period does not make someone a permanent employee or give them any additional rights or change their at will status. When recruiting and interviewing, avoid references to job security and don't make promises to candidates. Review your offer letters to eliminate any inappropriate commitments. If you're making a job offer, be sure to stick to the preapproved statements about the company and the job, and you'll minimize the potential for innocent or even deliberate misunderstandings.

Speaker: I'd really like to come work for your company. One thing though, it's really important to me to be promoted within the next year. Can you make this a part of the offer agreement?

Gloria: I really can't commit to dates for a promotion or a salary increase. In your offer letter, we describe your position and your salary and that's really all I'm approved to discuss. Let's take a look at your offer letter.

Ann: Don't discriminate or violate workers' statutory rights. If you manage managers or supervisors, train them about company human resource policies and about their legal obligations as managers. Support your company's diversity and affirmative action efforts. Make sure to conduct employee performance reviews on time. Honestly appraise the employee's strengths and weaknesses and comply with all company policies and procedures. Get a second or even a third opinion when considering termination or demotion of an employee with 15 years or many years of service, or protected characteristics such as race, sex, religion, age, disability, etc.

Gloria: Hey, Jen, did you need to see me?
Jen: Yes Gloria, come on in. I need your opinion on something. We've had consistent poor reviews on Phil in accounting, and I've tried everything but he's just not putting any effort in to improve. Nothing seems to work. I feel it's time to terminate him.
Gloria: So what's the problem?
Jen: He's 51 and he's been an employee for 17 years.
Gloria: So he's covered by age discrimination laws.
Jen: Yep.
Gloria: Well, we'll make sure we have all the documentation and then we'll discuss it with human resources before we let him go.
Jen: Okay Gloria, thank you.
Ann: Respect whistle-blowers. Investigate all employee allegations of fraud, waste, mismanagement or legal violations, or refer those allegations to your human resources or legal departments. Treat whistle-blowers fairly and professionally, even if you're angry or offended, and never retaliate against an employee who's made a charge of wrongdoing, discrimination or harassment.
Alex: I told Jim I saw some irregularities on the contract and he made it very clear that if I said anything about I might lose my job.
Gloria: I cannot believe Jim said that. Look, thank you for coming to me with this information and I will check it out. But don't worry about losing your job. Jim cannot fire you just for notifying us of potential irregularities.
Alex: That makes me feel better.
Ann: Treat employees with respect. Write objective documentation for all decisions on hiring, promotion, discipline or discharge. Avoid defamation claims by limiting reference information about ex-employees to dates of service and job title. Keep the reasons for discharge or demotion of employees as confidential as possible internally. Make sure that all employee documentation, such as performance reviews, improvement plans, memos, e-mails, etc., is objective and accurate. Avoid exaggeration, subjective characterizations, and insults.
Gloria: Oh sure, no problem. Phil worked for us from May of 1983 to June of 2001. His title, accountant. Sure, all right, bye.
Christina: Gloria, so why did we let Phil go anyways?
Gloria: I'm sorry, I need to keep that information confidential.
Ann: Although at will employment has been the rule for more than 100 years and remains the law throughout most of the United States, the doctrine has been riddled with exceptions. By understanding the doctrine and using some of these practical management tips, you'll help avoid personal and corporate liability for wrongful terminations. it,
Host: As you've seen, you need to understand what at will employment means and how it impacts your workplace. Not only will it help you in termination and layoff situations, but also help you realize your limits when it comes to employment decisions.