

Performance Management, Practical and Legal

Presented By:

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Why Should You Be Concerned ?

- What percentage of jurors would try to return a verdict for an employee who is unfairly treated yet no law has been broken?



A. 10%

B. 35%

C. 51%

D. 68%

???

Discrimination Claims Keep Rising

- Charges filed in the past 5 years:

- 2005: 75,428 2006: 75,768

- 2007: 82,792 2008: 95,402

- 2009: 93,277 2010: 99,922

- 2010 Charges by claim:

- Race (35.9%), Retaliation (31.0%), Sex (29.1%), Disability (25.2%), Age (23.3%), National Origin (11.3%), and Religion (3.8%)

At-Will Employment

- Law in Texas
 - No specified term of employment
 - No reason or notice required for termination
 - May make unilateral changes in terms of employment
- Exception: Employer cannot make employment decisions based on an employee's protected characteristic (race, age, gender, color, national origin)
- Best Practice: to have business justified reason for taking adverse employment actions
 - If Employer does substantively change policies, have employee acknowledge the change.

Reasons to Address Problems with Employees

- Cost of hiring and training replacement (70% to 200% of salary)
- Employee morale
- Fairness to employees
- To protect the Employer

BE SURE ALL
EMPLOYMENT ACTIONS
ARE PROPERLY
DOCUMENTED

Key Areas of Documentation

- Job Descriptions
- Performance Appraisals
- Disciplinary Action
- Termination

Job Description - Purposes

- Inform applicants/employees of duties
- Identifies appraisal process
- Sets performance standards and goals
- Supports future disciplinary action

Job Description - Components

- Essential functions
- Marginal functions
- Required training, education skills – job related
- Work conditions

PERFORMANCE APPRAISALS



Performance Appraisals - Purposes

- Are employees meeting standards
- Set goals
- Identify employees who are candidates for more responsibility or promotion
- Determine eligibility for raises or bonuses
- Identify needs for training
- Supports future disciplinary action

Performance Appraisals – Basic Rules

- Honesty
- Fairness
- Accuracy
- Precision

Performance Appraisals - Process

- Train supervisors – for consistency
- Review appraisals after completion
- Discuss performance throughout the year
- Make successful completion a requirement for supervisors

Performance Appraisals - Preparation

- Review job description
- Review prior appraisals and other documentation in file
- Compare performance to requirements of job
- Rate each area independently
- Set goals for future

Performance Appraisals – The Meeting

- Schedule and complete on time
- Focus on behavior and performance
- Warn of consequences
- Don't compare to others
- Listen for discrimination concerns



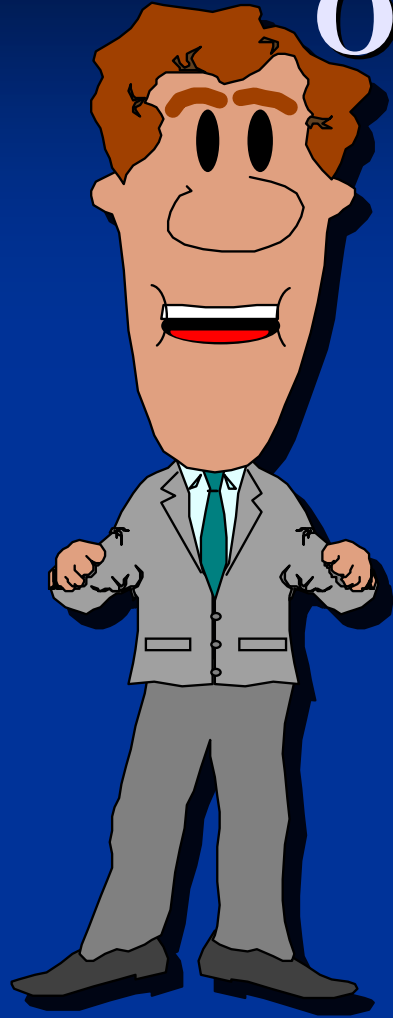
Performance Appraisals – The Meeting (cont'd.)

- Look for positive solutions
- Allow time for discussion
- Document discussion
- Allow employee to comment (in writing)
- Obtain employee signature

Discipline



WHAT IS THE PURPOSE OF EMPLOYEE DISCIPLINE?



- To change employee behavior or performance to meet established standards.
- To establish a “consequence” for inappropriate behavior or levels of performance.

Discipline – General Rules

- Thorough Investigation
- Documented
- Progressive, if possible
- Consistency
- Prompt

Discipline - Investigations



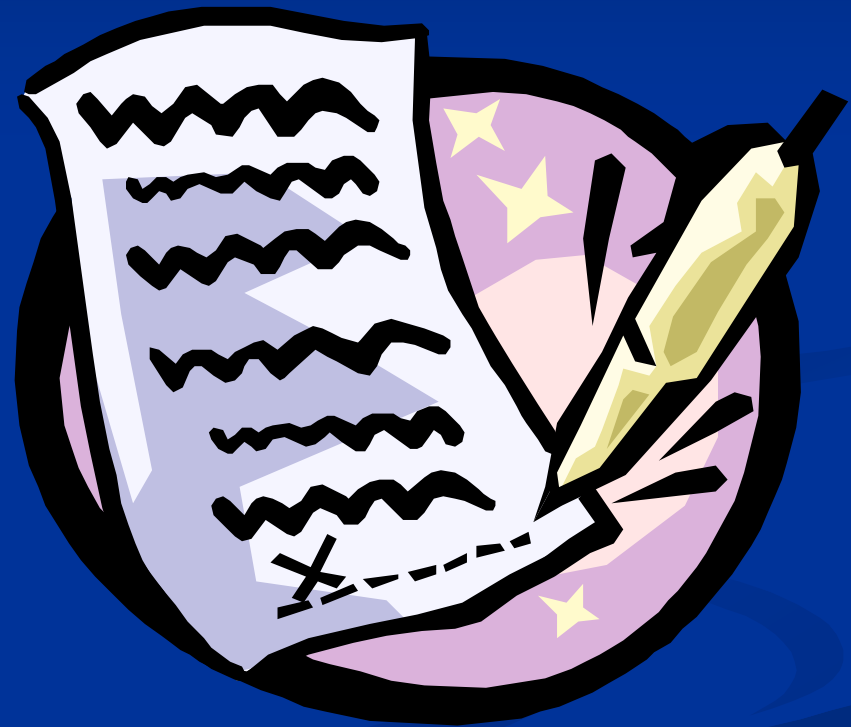
- Interview employee – get signed statement
- Interview witnesses – get signed statements
- No hearsay (gossip) – go to the source
- Support conclusions with facts
- Preserve evidence

Making the Decision

- Is there evidence to support the decision?
- Is there a rule that can be cited?
- Was employee aware of rule?
- How have other employees been disciplined for similar offenses?
- Review prior disciplinary history.

Discipline - Documentation

- *Always* be honest
- Use standard form
- Always consider your audience
 - Make documents clear and understandable
- Be specific
- Just the facts, ma'am





Writing a Disciplinary Document That a “Stranger” Could Read and Understand

- The sequence of events – include dates
- Why this action did not meet standards
- The corrective action required
- Refer to prior counseling sessions
- The consequences if the correction action is not met.

Discipline – Practices to Avoid

- Documenting opinions/editorializing
 - “I think” and “I believe”
- Commenting on legal issues
 - Avoid harassment or discrimination language
- Speculating
 - Reaching conclusions not based on fact
- Exaggerating
- Joking, cynicism, and sarcasm

Examples of Poor Documentation

■ Legal Opinions

■ From an HR rep's memo to the file

- “In my opinion, the decision to terminate the employee was discriminatory and violated Title VII. We should try to settle the employee's claim before this becomes a big issue.”

■ Speculation

■ From an HR investigation file

- “I'm not really sure what happened, but it looks like the employee may have taken some discarded waste-product home with him from the dumpster.”

Examples of Poor Documentation (Cont'd.)

■ Exaggerating

■ From a supervisor's file

- “The employee is always late. She never has a good excuse.”

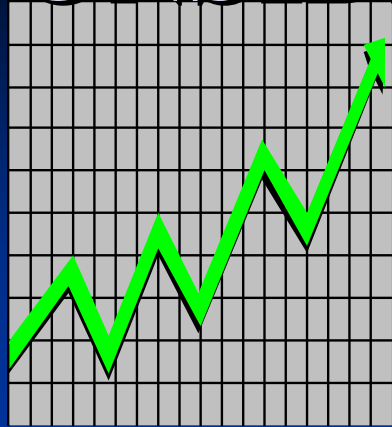
■ From a manager's file

- “Her failure to use the right form could have cost the company millions of dollars.”

Examples of Poor Documentation (Cont'd.)

- Joking, cynicism, and sarcasm
 - From employees appraisal performance
 - “Since my last report, the employee has reached rock bottom and has started to dig.”
 - “This young man has delusions of adequacy.”
 - “This employee is depriving a village somewhere of an idiot.”

CONSIDER



A PROGRESSIVE DISCIPLINE SYSTEM

- * Third party decision makers, including juries, have sympathy for employees who are terminated without counseling.
- * A succession of oral and written counselings and perhaps a disciplinary suspension:
 - may avoid a discharge
 - will make a discharge easier to defend
- * Consider not formalizing your progressive discipline policy into a rigid system of offenses, steps and penalties.

Issuing Disciplinary Action – Counseling Session

- Consider whether you should have witness even if employee does not request one
- Give copy to employee
- Get employee signature
- Don't argue
- Document discussion



TERMINATIONS

Three Truths to Recall When Terminating an Employee

- Juries care about fairness, not illegality
- Juries favor employees
- Juries always give employees the benefit of the doubt

What Jurors Expect of Employers

- Fairness
- Completion of homework
- Reasonableness v. Technicalities
- Prior warnings – no surprises – except in extreme cases
- Consistency
- Punishment suits crime
- Honesty

Preparation for the Termination Meeting

- Be discreet
- Plan
 - Who will attend – Trustworthy witness
 - Who will conduct
- Rehearse what you'll say.
 - Anticipate employee's questions regarding pay and benefits.
- Prepare final paycheck if possible.

Preparation for the Termination Meeting

- Have IT ready to change computer access codes.
- Arrange for a quiet, private place for the meeting.
- Need for security/off-duty police?
- Never fire remotely (telephone, e-mail) unless employee fails to show up.

TERMINATION MEETING

- Consider offering an opportunity to resign.
- Beware of tape recordings.
- Be brief; don't debate your decision.
- Be candid but compassionate.
- Relay benefits.
- Request company property.

TERMINATION MEETING

- Do not give false reason for termination
- Beware of defamatory statements

TERMINATION MEETING

- Arrange for removal of employee's personal belongings (after hours?).
- Provide discharge letter or form.
- Decline requests for reference letter.
 - Neutral reference policy
- Document what is said.
- Severance - Release

Mistakes That Lead to Big Jury Verdicts

- “Knee jerk” reactions
- Prior acceptable, satisfactory evaluations
- Terminating for cumulative problems, even though no prior disciplinary documentation
- Failure to conduct a full investigation and give accurate reasons for actions
- Inappropriate statements, especially in e-mails
- Not conducting termination meeting with dignity and respect

Post Termination

- Restrict communicating reason(s) for discharge to only those with a need to know.
- Unemployment considerations.
 - Be cautious of attorneys participating in unemployment hearing.

QUESTIONS?

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