Discipline, Documentation and Discharge: Avoiding Disasters

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I. Discipline and Performance Management
   A. Employees want performance feedback, but generally only when it is good.
   B. Managers dislike providing feedback, particularly if it is not good. Managers generally want to “motivate” employees with positives.
   C. What is said and what is heard can be two very different things. For example, consider this conversation with an employee who is meeting only 50% of her sales goals and who sees weekly sales reports for her entire department.

   1. Supervisor to employee: “You have a good work ethic and bring a lot of energy to the team. We just need to work on getting your numbers up. I know you have a difficult territory. I’m sorry that I have not had more time to work with you on possible strategies.”

   2. Supervisor believes that the employee knows that her performance is not meeting the standards because she can see from the weekly sales reports where she stands relative to her peers are and supervisor has told her she needs to improve. Supervisor says employee should not be surprised that when she is let go for performance.

   3. Employee feels she has received positive feedback from the supervisor and is not particularly concerned with her performance as compared to her peers because she knows her territory is more difficult. Plus, her supervisor has just given her praise and made no reference to her job being in danger. In fact, supervisor has taken on responsibility for her poor performance and committed to helping her. Employee is shocked when she is let go.

II. Most Important Aspects of Effective Discipline
   A. Consistency of discipline is important in defending claims of preferential treatment and discrimination.

   1. For example, supervisor cannot discipline one employee for coming to work late unless others are treated the same. In deciding the discipline for a particular offense, supervisor should ask herself whether the same action would be taken if the employee committing the violation was a “superstar” with top sales numbers.
2. This does not mean that work history cannot be considered. For example, a 15-year employee who only has been late twice in the last year can receive more leeway than the 6-month employee who is late at least once a week.

3. Too often, the non-star employee that is disciplined falls into a protected class. Not necessarily surprising given the number of protected classes.

4. Numerous cases of discrimination survive summary judgment because the employee offers evidence of similarly situated employees being disciplined less harshly. See, e.g., Shaw v. Tulsa Dynaspan Arrow Concrete, 408 Fed.Appx. 177 (10th Cir. 2011).

B. Proportionality means “does the punishment fit the crime” and does the discipline being imposed at the time fit the act that is being disciplined.

1. Too often we see examples where an employee has violated work rules several times and the supervisor has ignored the behavior. Then, the seventh time it happens, the supervisor calls HR on Friday and says “I just want him gone today.” The single event does not warrant firing and all the prior events have been overlooked.

C. Due process is generally considered a union concept, but it applies equally in the non-union environment, although not in as formal of a sense. Simply put, the employer should always give the employee an opportunity to tell his story before imposing discipline.

1. If the misconduct is a serious threat to the work environment, send the employee home while an investigation is done.

2. As part of the discipline, meet with the employee and get his side of the story. Unless the employee admits everything, it is best not to impose the discipline at the same time.

3. Take the time to get it right before discharge. Be sure to collect all documents and speak with all necessary parties. Once a decision is made, it cannot be bolstered with information learned afterwards.

III. Key Rules for Communicating Discipline

A. Honesty at first blush may seem unduly harsh, but it will save many problems later on.

1. If poor performance or misconduct is the reason, or even partially the reason, for a discharge, do not tell the employee that the discharge is due to a “reorganization” and has nothing to do with his performance.
2. What is put in writing is deemed written in stone and cannot be “put into context” later.
   a. For example, if an employee receives a good performance review, a bonus and a salary increase that will lead an employee (and a judge or jury) to conclude that employee is doing well.
   b. These factors cannot be overcome with the supervisor’s reports of verbal counseling, that the employee received a lower bonus than peers, or that the salary increase was just “cost of living.”

B. **Clarity** requires that the employee be told specifically what conduct is unacceptable or what performance standards are not being met.
   1. Be specific about what conduct is unacceptable, including examples of what employee did.
   2. Be specific about what change is expected and when it must occur. Generally change must be “immediate and sustained.”
   3. Be specific about what the consequences are for further misconduct or poor performance.

C. **Documentation** is critical but need not be in any particular form.
   1. Supervisor can provide memo of discipline or a summary of what was discussed with the employee. A follow up email to the employee can be sufficient.
   2. Even if only give verbal counseling, make a note on a calendar to show when it was done.
   3. Performance reviews are documents that must reflect deficiencies if they exist. Inadequate performance reviews are worse than no performance reviews at all.
   4. “According to defendant, plaintiff was advised that he was not performing up to expectations and was verbally disciplined or coached for using a cellular telephone. However, defendant acknowledges that it did not keep performance or disciplinary records for temporary employees and there is no written documentation to support defendant's argument.” Green v. Paragon Films, Inc., 814 F.Supp.2d 1174 (N.D. Okla. 2011).

D. **Follow through** is often the hardest part of disciplinary process.
   1. If an employee is told certain behavior must cease, then action must be taken if it does not cease.
2. Employer cannot provide the same criticism for years and then suddenly decide that “this time I mean it” or “I’ve finally had enough.”

3. We have seen any number of age discrimination claims based on this scenario.

IV. Avoid Creating Bad Documentation

A. In conducting investigations, do not make legal conclusions.

1. Do not conclude that “X harassed Y in violation of the law.”

   a. Harassment under the law is very specific and generally must meet a high standard. Comparison of recent cases shows how fact specific the standard is.

      i. *Morris v. City of Colorado Springs*, 666 F.3d 654 (10th Cir. 2012) (Harassment not legally sufficient)

      ii. *Chavez v. New Mexico*, 397 F.3d 826 (10th Cir. 2005) (Harassment legally sufficient)

2. If writing up an investigation, make clear the limits or the scope of the investigation, including what was not done.

   a. Do not necessarily accept what employee says in his complaint. For example, employee may report that my “supervisor improperly disciplined me when I had a serious illness.”

   b. Unless provided with doctor’s certification of “serious illness” or medical records, do not conclude that statement is true and simply jump to the issue of alleged mistreatment.

      i. The report should state that “employee reported that she had serious illness, but no medical documentation was reviewed.” Or can even state that the statement was assumed to be true, but not verified.

B. Do not make generalized statements about the employee or the supervisor. For example, avoid conclusions such as

1. “No co-workers want to work with this employee”

2. “Employee always comes in late on Mondays”

3. “Employee had been talked to about this multiple times”

4. “The supervisor appears to have a problem working with women.”
C. Instead, investigation should focus on facts of who said or did what.

V. Document Retention

A. Not only must the discipline or performance deficiencies be documented, the documentation must be retained.

B. In the age of electronic files, the documentation can easily be lost.

C. As part of annual reviews, managers should be asked to collect and save any emails or other notes given to the employee evidencing discipline or performance deficiencies.
   1. Trying to collect information later can be impossible with computers that are changed out or some communications that are sent by text or IM.
   2. Collecting the information can also be a problem if there are management changes.
      a. Employment cases often do not go to trial until at least three years after the discharge, given the requirements for administrative procedures.

D. When employee leaves, his/her computer should be searched before it is wiped clean.
   1. If there is any possibility of a claim from the employee, the employer must preserve all “relevant” documentation including computer files of employee, HR and management.
   2. If employer provides the employee with a severance agreement in return for a release, preserve the computer until the release is signed.
   3. In a recent case, an employee at the time of her discharge asked to get copies of documents on her computer.
      a. The employer denied her request, had the computer cleaned and put back in service before a severance agreement and release was signed, which ultimately never was signed and a lawsuit was filed instead.
      b. Documents on the computer would not likely show any discrimination, but creates question of why was the computer maintained. Courts will presume, make an “adverse inference,” that there was something that would have been favorable to the employee or unfavorable on the employer on the computer if it had been saved.
E. In litigation, lack of documentation or loss of documentation can take over facts of the case.

1. For example, in a discrimination case the former HR employee was deposed and said that she “thought” she had made notes of interviews she did at the time she had investigated, which was three years before the deposition date, and had placed the notes in a folder in her former office
   a. In the interim, company had moved.
   b. The former HR person had not been replaced, and her old office had long since been cleaned out and the notes were never located.
   c. It is quite likely that the notes never existed and, even if they did, they would not have changed the facts of the case
   d. Court denied summary judgment on the grounds that the loss of the alleged notes might allow a jury to conclude that the reason given for the discharge was pretextual.

F. Litigation hold letters are a means of preventing loss of documentation.

1. Whenever the possibility of litigation arises, the employer must preserve all “relevant” documents.
2. Courts expect companies to send an internal communication to all persons in the company who may have any such documents.
3. Lawyers and HR may know what “relevant” means, but many managers will not.
   a. Not sufficient to just send out letter, must follow up and be sure that the documents are preserved.

VI. Handling the Discharge

A. Evaluating the Risk – Checklist

1. Is The Rule Or Standard The Employee Violated Published?
2. Did The Employee Ever Receive A Personal, Written Copy Of The Rule Violated?
3. Did You Give The Employee Adequate Warning About His Or Her Behavior?
4. Did You Make It Clear What The Consequences Would Be If The Behavior Continued?
5. If Other Employees Have Violated This Rule Or Standard, Did They Receive The Same Disciplinary Action As The Employee?

6. Does The Employee’s Behavior Hamper The Orderly, Efficient, Or Safe Operation Of Business? Is The Employee’s Performance Bad Enough To Warrant Discharge?

7. Did You Make Every Effort To Determine Whether The Employee Did, In Fact, Break The Rules?

8. Did You Conduct A Fair And Objective Investigation? Is The Investigation Documented?

9. Have You And Your Company Enforced Rules And Standards Consistently And Without Discrimination?

10. Do You Have Enough Evidence To Prove That The Employee Violated The Company’s Rules Or Has Performed Badly Enough To Deserve Discipline?

11. Does The Punishment Fit The Crime? Have You Considered The Employee’s Service Record?

B. In meeting with the employee, the employer must be honest but need not go into great detail.

   1. By the time the decision to discharge has been reached, supervisor or HR already should have had discussions about discipline of performance deficiencies, so there is no reason to go back over all the details.

C. Do not use euphemisms such as “reorganizations” or “restructuring” if they are not entirely accurate. Often times in restructuring people are moved from one job to another if the company believes they have valuable skills. An employee who is not offered another position in a restructuring sometime has performance or skill issues and her manager may prefer to avoid “hurting her feelings” and simply refer to restructuring.

D. Reason given must be accurate and cannot be added to after the fact (but need not be overly detailed).

   1. One of the most common grounds for employees proving discrimination is that the reason given for discharge was a “pretext.” Thus, if employee is told job elimination is the reason for discharge and that “this has nothing to do with you” supervisor cannot later say that the reason this employee’s job was eliminated is because she was not a good performer. That will most certainly create a claim of that the reason given was a pretext for discrimination.
E. If the company provides severance pay, be sure to obtain a release and confidentiality agreement in return for the payment (and follow ADEA OWBPA provisions if applicable).

F. Employers should be prepared to provide payment of wages upon termination as required by state law.

G. Employers should advise managers to refrain from giving references.

1. If the employee is let go for performance or misconduct a manager may want to help the employee out and give a positive reference. The reference can undermine the reasons given for the discharge.

H. Employers should be sensitive about providing explanation to co-workers; in general, co-workers need not know anything beyond that the employee no longer works there.

I. Under some state laws, employees may be able to access their personnel files following termination.

VII. Conclusion

A. Discipline and performance management should be done in a thoughtful and consistent manner.

B. Consistent and well-documented discipline will support a discharge.