

Documenting Employee Discipline And Performance Issues

By Karen Sutherland

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Legal Background

Employee discipline is covered by contract (individual employer policies and rules are treated as contracts, though they may not all legally be considered as such) by statute and by case decisions. If collective bargaining agreements are involved, or if there are rules or policies that may apply, those documents should be consulted and taken into consideration. For purposes of this outline we will assume you have a contract ("Agreement") and a personnel manual ("Manual"). Most of comments in this outline, though, apply even if your workplace does not have labor agreements, for the reasons set forth below.

The following are reasons why documentation of employee discipline and work performance is important. This list is not intended to be exhaustive, but provides some illustrative examples:

- *Documentation of discipline will help establish that future, progressive discipline is not retaliatory.* This applies regardless of whether the employees are at-will or covered by an Agreement. If an employee is not disciplined for inappropriate conduct, and then starts being disciplined after engaging in any kind of protected activity (such as making an L&I, harassment or discrimination claim, being on jury duty, taking medical leave, etc.), then the discipline may appear to be retaliatory. Employers can be liable for retaliation even if they did not engage in any other wrongdoing. For example, an employer in Tacoma was found not liable for sexual harassment, but liable for retaliating against the employee who had complained of harassment.
- *Documentation makes it easier for multiple supervisors or successive supervisors to track behavior and performance.* This applies regardless of whether the employees are at-will or covered by an Agreement. Many employees are supervised by more than one person, or change supervisors during the course of their employment. Accurate documentation of performance and conduct make it easier for multiple supervisors to correct performance deficiencies, to discipline consistently, and to apply progressive discipline where appropriate.
- *Consistent documentation can be used to counter a discrimination charge.* This applies regardless of whether the employees are at-will or covered by an Agreement. If an employee claims that he or she has been disciplined in a discriminatory manner,

consistent documentation of discipline can help establish that the employee was treated no different than other employees who were similarly situated.

- *Disciplinary records can help the employer prove its position in arbitration or in court, if necessary.* This applies regardless of whether the employees are at-will or covered by an Agreement. Supervisors leave, memories fade. Arbitrators, judges and juries expect an employer to document its activities. The lack of documentation may cause the finder of fact to doubt the employer's version of the facts or make it look like the employer is hiding something. Contemporaneous records are more likely to be admissible in court than a later hearsay recollection of what happened.
- *Documentation of discipline helps employees know where they stand, and may improve their performance.* This applies regardless of whether the employees are at-will or covered by an Agreement. People have a tendency to hear only what they want to hear, especially when receiving bad news. Written documentation of discipline can increase the likelihood that an employee will understand and remember the supervisor's expectations and change his or her conduct accordingly.
- *If there is an Agreement or a binding Manual, then there must be documentation before termination for unsatisfactory work performance.* If there is an Agreement or a binding Manual, an employee generally cannot be discharged for unsatisfactory work performance unless the employee has received written notice setting forth the deficiencies in his or her performance. Usually, for severe charges, the employer may discharge an employee immediately for just cause.
- *Progressive discipline is very difficult to impose without written documentation of past disciplinary actions.* If there is an Agreement or a binding Manual, an employee should not be terminated for just cause without some form of progressive discipline unless the charge is very severe. Generally, disciplinary action is more likely to be upheld if it matches the severity of the incident and reflects a progressive approach. If past conduct and disciplinary actions have not been recorded, it is very difficult to establish the severity of repeated conduct or that a higher level of discipline is appropriate.

Practical Guidelines

- *Decide whether the problem is a disciplinary issue or a performance issue.* If you have an Agreement or a binding Manual, the standards and notice requirement for discharge differ, depending on whether the discharge is for just cause or for unsatisfactory work performance. *Weingarten* rights are also affected by this characterization. (*Weingarten* rights are the rights of an employee to have someone else present when the employee is interviewed and the interview could lead to disciplinary action. A recent case held that this right extends to non-union employees, too.)
- *If it is a disciplinary issue, state the reason for the discipline.* If you have a Manual, whenever possible, use one of the causes for discipline set forth in the Manual, if there are any listed. If none of these causes are applicable, set forth a specific policy

or procedure, preferably one taken from the Manual or the Agreement, that applies. If there is an applicable departmental rule, the rule should also be cited. Employees are more willing to accept discipline if they understand that there is an objective reason for it.

- *If it is a performance issue, state the employer's expectations and the manner in which the performance is deficient.* This applies regardless of whether the employees are at-will or covered by an Agreement. Determine your ultimate goal for the employee and the most effective way to accomplish that goal. If there is a specific policy or procedure, it should be cited. Intermediate goals, improvement requirements and timelines for reassessment should be included if the process of change will take awhile.
- *Get employee feedback, if possible.* This applies regardless of whether the employees are at-will or covered by an Agreement. If you conduct an interview with the employee as part of the performance review or disciplinary process, get feedback from the employees on what tools they may feel they need to make an effective change. If feasible, adopt the employee's suggestions. People tend to respond better if they feel some ownership in the proposed change.
- *Be as broad as possible regarding the basis for discipline or the basis for unsatisfactory performance.* This applies regardless of whether the employees are at-will or covered by an Agreement. If there are multiple provisions of the Manual or Agreement or work rules that have been violated, or multiple performance deficiencies, list all of them. Broad descriptions allow for similar conduct to be the basis for progressive discipline or a second warning of unsatisfactory work performance if the employee engages in similar, but not identical, conduct in the future. Listing all applicable grounds also provides a broader basis for upholding the employer's actions in an arbitration or legal proceeding.
- *Describe the specific conduct or performance deficiency.* This applies regardless of whether the employees are at-will or covered by an Agreement. After listing the violation(s) or deficiency(ies), describe what the employee did wrong with enough detail to allow for correction of the problem (if appropriate) or to provide the evidence necessary to support discharging the employee.
- *Be clear about consequences.* This applies regardless of whether the employees are at-will or covered by an Agreement. Let the employee know what will happen if change is not forthcoming, or if inappropriate conduct is repeated.
- *Avoid inflation.* This applies regardless of whether the employees are at-will or covered by an Agreement. If you use a scale to grade performance, do not indulge in grade inflation. A score of "needs improvement" or "satisfactory" may not be sufficient to support a discharge if the performance could have been graded as "unsatisfactory." The fact that every other employee was rated "excellent" and this particular employee received a "good" rating does not normally establish that the employee's performance was unsatisfactory.

- *Document improvement accurately.* This applies regardless of whether the employees are at-will or covered by an Agreement. If the employee has improved, but the performance or conduct is still unsatisfactory, make sure that your evaluation includes both of these facts (instead of just stating that the employee has improved) and explains what else is needed to bring the conduct up to acceptable levels.
- *Be evenhanded.* This applies regardless of whether the employees are at-will or covered by an Agreement. Similar problems should be treated similarly to avoid claims of discrimination or retaliation.
- *Apply a level of discipline that is appropriate for the conduct or performance.* Check the Agreement and Manual for guidance.
- *Remind the employee that he or she can still be disciplined or discharged for other inappropriate conduct.* This applies regardless of whether the employees are at-will or covered by an Agreement. Sometimes, written documentation implies that, if the employee addresses the specific problem listed, then the employee will remain employed forever. Make sure that, after listing required corrective action, a statement is included to the effect that nothing in this warning (or memo or evaluation or whatever the document is) precludes corrective action for any other matter. This is particularly important for at-will employees. Ideally, disciplinary memos and performance correction notices for at-will employees should also reiterate their at-will status.
- *Follow the Manual and the Agreement's steps for records retention.* The Manual or Agreement, if any, may describe how long records relating to employees, including performance and disciplinary records, are to be kept.
- *Decide what you are going to do in advance.* This applies regardless of whether the employees are at-will or covered by an Agreement. Planning ahead will allow you to determine if you must allow a representative of the employee to be present at your meeting with the employee (*i.e.*, if the interview may lead to discipline), to determine whether a pre-disciplinary hearing is required (*i.e.*, if an Agreement requires a hearing, or if the employer is a public entity), and to decide whether it is appropriate to contact the Human Resources Department or an employment attorney for advice. Planning ahead by anticipating the employee's response may also reveal any areas where additional investigation or documentation may be necessary.

These materials are not intended and should not be used as legal advice or other recommendation. If you need a legal opinion on a specific issue or factual situation, please contact an attorney. Anyone using these materials should not rely on them as a substitute for legal advice.