

DOCUMENTING EMPLOYEE ISSUES

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A. Why it is Important to Document Employee Discipline and Unsatisfactory Work Performance.

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 discussion we will assume a contract, hereinafter "Agreement" and a personnel manual and policies, hereinafter "Manual."

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

1. *There must be documentation before termination for unsatisfactory work performance.* 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. Written warnings remain in the employee's file for a period specified in the Agreement or Manual, provided no additional written notices of unsatisfactory work performance have been added. Letters of reprimand also remain in an employee's file for a period specified in the Agreement or Manual. There may be an exception to time limits for discipline or discharge for just cause. Usually, for severe charges, the employer may discharge an employee immediately for just cause.

2. *Progressive discipline is very difficult to impose without written documentation of past disciplinary actions.* Unless the charge is severe, an employee should not be terminated for just cause without some form of progressive discipline. Generally, neither the Agreement nor the Manual will set forth a specific schedule for the types of discipline that can be imposed for each type of charge, nor do they specify how many steps must be taken before an employee is discharged. 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.

3. *Documentation of discipline will help establish that future, progressive discipline is not retaliatory.* If an employee is not disciplined for conduct, and then starts being disciplined after engaging in any kind of protected activity, discipline that is recorded for the first time after the protected activity may appear to be retaliatory.

4. *Documentation makes it easier for multiple supervisors or successive supervisors to track behavior and performance.* 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.

5. *Consistent documentation can be used to counter a discrimination charge.* 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.

6. *Disciplinary records can help the employer prove its position in arbitration or in court, if necessary.* Supervisors leave, memories fade. Arbitrators, judges and juries expect an employer, particularly a large 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.

7. *Documentation of discipline helps employees know where they stand, and may improve their performance.* 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.

B. Why it is Important to Document Other Personnel Issues.

1. *The employer has the burden of proving that a business necessity exists.* Situations may arise where the employer seeks to prevent the employment of a married couple. The state statutes and regulations regarding discrimination contain an exception to the general rule that employees cannot be discriminated against on the basis of their marital status where the employer can prove a business necessity for the discrimination. There should be documentation of the business necessity (e.g. the married couple would be auditing each other's work or supervising each other) and documentation of reasonable attempts to accommodate the couple, such as through a transfer to another department or a shift change. Without such documentation, it is difficult for the employer to prove that there was a genuine business necessity for discharging, refusing to hire or seeking the resignation of employees who are married to each other.

2. *The employer has the burden of proving that a BFOQ exists.* Situations may arise where there are certain aspects of a job that limit its availability to people of certain characteristics, which are called "bona fide occupational qualifications" or "BFOQs." For example, a job may require heavy lifting or proficiency in a foreign language. Because such limitations have a "disparate impact" on people of a certain gender, ethnic background, etc., the employer must be able to document that the qualifications are necessary to perform the essential functions of the position. Documentation in advance is easier to support in an arbitration or in

court than documentation that is developed after a person who is considered unqualified applies for the position.

3. *Documentation of the "essential functions of a position" provides an objective basis for determining if a disabled person can perform the job.* If a person who is disabled applies for a position, or if an existing employee becomes disabled, the employer must determine if the individual can perform the essential functions of the position, with or without reasonable accommodation. For example, a job may require the ability to stand or reach, to drive, to read or to respond verbally. Because such limitations have a "disparate impact" on certain people with disabilities, the employer must be able to prove which requirements for the position are "essential functions." Documentation in advance is easier to support in an arbitration or in court than documentation that is developed after a person who is considered unqualified applies for the position.

4. *Documentation of attempts at reasonable accommodation of a disability will make such attempts easier to prove.* The employer and the employee should work together to determine if a disabled individual is capable of performing the essential functions of a position with reasonable accommodation. Documentation of any attempts to accommodate (such as conversations with physicians or physical therapists, discussions with contractors, analysis of the cost of an accommodation, attempts to find a suitable alternative position, etc.) will make it easier to establish that the attempts at accommodation were reasonable at the time. Additionally, notification of future job openings may be required under certain circumstances. Such notification should also be documented.