

**HOW YOU CAN HELP YOUR ATTORNEY IN
NON-RENEWAL CASES**

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I. INTRODUCTION TO DOCUMENTATION

- A. A clear understanding between employee and supervisor as to what is acceptable job performance is essential.
- B. This understanding is achieved through the development and maintenance of job descriptions and through regular performance assessment.
 - 1. Job description. A general description of what is expected of employees in their positions.
 - 2. Performance assessment. The supervisor's judgment of how well an employee performs his/her job based on established criteria and standards.
 - 3. Disciplinary Actions. The supervisor's response to a specific employee action.

II. WHY DO WE DOCUMENT IN EMPLOYEE SUPERVISION?

- A. The primary purpose of supervision of employee performance is to promote growth and competence and to increase employee productivity.
- B. Documentation provides the foundation for a constructive management/employee relationship. An open line of communication concerning performance is essential to a productive workforce.
- C. Employees have a need to know how they are doing. Ignoring this need creates uncertainty, anxiety, poor morale and loss of productivity.
- D. A well-documented and consistently applied personnel record system may provide a valid defense to employment litigation.
- E. The major objectives of documentation:
 - 1. To inform the employee concerning his or her progress towards meeting job responsibilities and expectations and to correct unsatisfactory conduct or deficient performance.
 - 2. To enforce established rules and policies.

3. To help the employee be a better worker, thereby protecting his or her job and employment security.
4. To protect the employer's investment in training and replacement costs and to obtain a more efficient worker.
5. To protect the health and safety of all employees.
6. To assure a full day's work for a full day's pay.

III. EXERCISE CARE IN DOCUMENTATION OF EMPLOYEE PERFORMANCE

Many supervisors have expressed reluctance to record negative comments for fear of discouraging a borderline employee or for fear of being sued for defamation. Documentation in the hands of disgruntled employees frequently becomes a weapon against their employer. Employer generated documentation has been used in lawsuits against employers as evidence of intentional discrimination, disparate treatment and defamation.

Deficient documentation can be quite damaging to an employer. Those who document are well advised to keep in mind the following question "How will this look to a jury?"

Particular care needs to be exercised in regard to the use of email. Supervision by email is usually not a good idea. Email messages are discoverable and easily forwarded to others at a click of a mouse. Management of email messages creates practical record retention issues. Moreover, while use of email is convenient, you are never really sure that the recipient has received the message (as opposed to having received the e-mail).

IV. AVOID LEGAL PROBLEMS IN DOCUMENTATION

The suggestions that follow are based on our experience in dealing with documentation in a variety of employment disputes.

- A. Have regular meetings with supervisory staff. Supervisors gain from the collective wisdom of participation in a supervisory staff group. Continued reinforcement of the supervisor's role as a "supervisor" is important. Provide adequate training. Insist on candid observations.
- B. Clearly communicate to employees what their duties are and what is satisfactory performance. This is done through periodic review of job descriptions, through training, through instruction and through both formal and informal appraisal.
- C. Tell employees the criteria upon which their performance will be reviewed. Develop standards and establish reasonable goals for employees. Make sure that employees understand the consequences of their failure to improve.

- D. Provide employees with ongoing feedback. When substandard performance is identified, intervention is necessary. Feedback should be both positive and negative.
- E. Document poor performance in writing. Again, this can be in the form of coaching, training, discipline or assessment.
- F. Give the employee time to improve and offer resources and assistance, if appropriate.
- G. Use other supervisory personnel, if possible, to mitigate claims of personality conflict.
- H. Make sure that the employee understands the consequences for failure to perform at an acceptable level. There should be no surprises in employee supervision.
- I. It is important to maintain confidentiality in documentation. Be careful with the information gathered. This is where a trusting relationship begins.

V. **SPECIFIC PROBLEMS WITH SUPERVISORS AND DOCUMENTATION**

There is a variety of common problems that an employer needs to be aware of in the design, implementation and review of documentation systems. Many of the problems emerge at the supervisory level in documenting an employee's performance:

- A. *Rating inflation.* As a general rule, supervisors give employees inflated performance appraisals. Evaluations should be comparative and should reflect reality. Inflated performance appraisals give employees a false sense of security and deprive them of an opportunity to improve.
- B. *Prejudice or bias.* Management needs to be alert to possible bias, based on race, sex, age, religion or any other basis that is not job-related.
- C. *Overshadowing reality.* An evaluator may be unduly influenced by some preeminent aspect of performance. Employee performance in one area may skew the appraisal in another. Poor employees usually have some strengths and good employees some weaknesses.
- D. *Failure to use the complete rating scale.* Supervisors place employees at the average because it is the "easy thing to do." The midpoint avoids the difficulty of making and justifying a more accurate assessment. Supervisors do not do anyone a favor by not accurately and completely using the rating scale.
- E. *Inconsistencies in scoring, weighing, or defining factors.* Supervisors frequently fail to understand the rating system. Supervisors also, at times, provide comments that are inconsistent with rating. This creates a "field day"

for a plaintiff's attorney and a credibility problem for the employer in employment litigation suits. Be cautious about utilizing numerical ratings, particularly those which use scales of more than 1-5. It may be difficult for a supervisor to explain why an employee received a 3, rather than a 4, on a 10 point scale.

- F. *Unrealistic goals and/or objectives.* Evaluations may reflect the shortcomings of management. If a supervisor establishes unrealistic goals and then negatively evaluates an employee because he or she has not met those goals, the supervisor is creating problems.
- G. *Comments that are misleading.* It is much easier for a supervisor to say that an employee is "improving" than to say that the employee's performance is not at standard. While the use of the word "improving" implies substandard, it does not directly address the problem. The evaluation should state directly that performance is substandard. If the employee is improving, that is fine, but documentation of the problem, the standard and the employer expectation is critical.

Moreover, in some cases, management attempts to explain or offer an excuse as to why the employee is not meeting the standard. Evaluations are not to explain deficiencies, but rather to identify them and to establish the basis for improvement. Supplying excuses or not being direct in the performance evaluation creates a document that will be used against the employer.

- H. *Too much or too little detail.* Supervisors need to find the appropriate balance between generality and specifics. A general comment begs the question of supporting examples. A specific comment may make the employer look like it is "picking on an employee."
- I. *Focus on the problem and not the employee.* The focus must be on the identified deficiency and not the employee. Be as specific as you can. Don't condemn the person, just the problem.

VI. THE RELATIONSHIP BETWEEN DOCUMENTATION AND SEPARATION

Although the primary objective of documentation is to improve performance (to help the employee be a better worker), the process cannot be entirely separate from the prospect that the employee will not improve and that employment separation will be necessary. Documentation may be called upon to support a management decision that is adverse to the employee. Employers need systems that are fair to employees, yet provide sufficient documentation to convince a third-party neutral as to why you took the adverse action.

- A. Practical Guidelines for Documentation.

1. The employee should be told what the employee is doing wrong.
 - a. Be clear and specific.
 - b. How is this documented?
 - c. Review the history of the deficiency.
2. The employee should be told what the employee must do.
 - a. What are your expectations?
 - b. What must be done for the employee to succeed?
3. The employee, in many instances, should be given assistance.
 - a. How can you help the employee succeed?
 - b. What assistance will be offered?
 - c. The employee clearly has a responsibility to help himself/herself.
 - d. Document all assistance and any attempts to provide assistance.
4. The employee should be informed of the timetable for achieving improvement.
 - a. When is improvement expected?
 - b. Employee must be given a chance (time) to improve.
5. The employee should be told of the consequence for failure or unwillingness to correct the identified deficiencies.
6. Follow-up review should occur.

VII. THE SUPERVISORY FILE

- A. Generally speaking, supervisors have the right to maintain their own personal "logs" or records of matters which involve the normal course of their activities and responsibilities. These logs are generally not shared by the supervisor.
- B. "Logs" or records may include, but are not limited to, the dates and times of specific incidents involving employees under their control.
- C. "Logs" or records are not part of the employee's official personnel file and, therefore, the entries contained therein may not need to be made known to the employee.

- D. Since the entries in these personal "logs" or records are not contained in the official personnel file, the only way this material might be utilized as the basis for a formal reprimand or as evidence in the event a disciplinary proceeding is commenced, is if they are incorporated into the same document which is placed in the official personnel file. If these items are not incorporated into that report, they will likely be considered inadmissible.
- E. It is important to note that many of the minor items which might have been recorded will be insufficient in themselves to substantiate any sort of reprimand. However, when these items are taken together, they may show a pattern of activity which justifies the employer's actions.

VIII. WHAT IS JUST CAUSE?

- A. Just cause is generally accepted in the industrial relations field as a standard which must be met by the employer in order to justify disciplinary or discharge action taken by the employer.
- B. Usually centers on:
 1. Determining whether the offense alleged occurred;
 2. The quantum of proof required; *PREPONDERANCE OF EVIDENCE*
 3. The significance of the failure to follow customary procedures;
 4. Determining whether the penalty imposed is commensurate with the seriousness of the offense; and
 5. Whether there are mitigating factors which affect the degree of punishment imposed.
- C. There are numerous definitions of just cause, but all share the concept of an employer's obligations in determining:
 1. Whether the employee is guilty of the misconduct or actions alleged; and
 2. The degree of discipline imposed.
- D. Among earliest definitions of just cause:
 1. "... [W]hat reasonable men, mindful of the habits and customs of industrial life and the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just." Riley Stoker Corp., 7 LA 764 (Harry Platt, 1947).

- E. Later arbitration cases attempted to expand upon the concept of just cause by attempting to define industrial fairness and due process of both a substantive and procedural nature.
1. Most widely known attempt to reduce just cause to a set of precise criteria is Carroll R. Daugherty's seven tests first cited as an appendix to a decision involving Grief Bros. Cooperage Corp., 42 LA 55 (1964) and finally formulated in Whirlpool Corp., 58 LA 421 (1971).
 - a. A series of seven questions in which a negative answer to any one suggests that just cause does not exist.
 - b. The emphasis in these tests is on due process – whether an employee has been informed that the conduct alleged is forbidden; whether the work rules are reasonably related to the orderly, efficient, and safe operation of the business; whether the employer administers discipline evenhandedly; and whether the discipline imposed is commensurate with the offense committed.
 2. In Ritchie Industries, Inc., 74 LA 650 (1980) Raymond Roberts, referring to discharge or discipline related to the inability to perform work, outlined the usual standards as that the cause or reason for discharge substantially impairs the employment relationship; that the cause has been chronic or, by its inherent nature, will become so, and that there is no reasonable prognosis that the cause will be removed in a reasonable period of time.
- F. Fairness and fair dealing are important considerations in a non-renewal process.
1. "The Arbitrator does not feel bound to a mechanical application of the Daugherty framework and believes that a proper analysis of just cause can be conducted utilizing basic standards of fairness." School District of Janesville, Baron A/P M-91-294.

IX. THE DAUGHERTY STANDARDS OF JUST CAUSE

- A. General Remarks
1. A "no" answer to any one or more of the following questions normally signifies that just and proper cause did not exist.
 2. In other words, such "no" answers mean that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the

arbitrator to substitute his/her judgment for that of the employer. Greif Bros. Cooperage Corp., 42 LA 555 (Daugherty).

3. However, occasionally, in some particular case an arbitrator may find one or more "no" answers so weak and the other "yes" answers so strong that he may properly "split the difference" between the opposing positions of the parties and find that the correct decision is to chastise both the employer and the disciplined employee by decreasing but not nullifying the degree of discipline imposed by the employer (e.g., by reinstating a discharged employee without back pay).
4. The criteria set forth below are to be applied to the employer's conduct in making his disciplinary decision before it has been processed through the grievance procedure to arbitration.
5. Please note that the word "employer" as used below could have been substituted by either of the following words: department head, supervisor or management.

B. The Questions:

1. Did the employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the employer's rule of managerial order reasonably related to (a) the orderly, efficient, and safe operation of the employer's business and (b) the performance that the employer might properly expect of the employee?
3. Did the employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the employer's investigation conducted fairly and objectively?
5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the employer?

C. Elements of just cause for non-renewal.

1. The nature of reasons advanced for the non-renewal, and reliability of the evidence offered in support of those reasons.
2. The fairness of the procedure leading up to the decision to non-renew, with particular emphasis on compliance or noncompliance with any contractual or policy obligations that would be likely to have a substantial impact on the decision.
3. Evidence of the employer's compliance or noncompliance with employment practices/policies which the employee might reasonably have expected the employer to follow.

X. **GENERAL APPROACHES IN ARBITRATION DECISIONS**

A. In general:

1. A review of the literature and of arbitration decisions shows that while reference to Daugherty's standards is gaining greater acceptability among both management and labor advocates and is used as the basis for establishing just cause in American Arbitration association workshops, the questions usually addressed by arbitrators in determining whether just cause exists are as follows:
 - a. Was the alleged misconduct satisfactorily proven?
 - b. If so, does the misconduct warrant disciplinary action?
 - c. Did the employer act in an arbitrary or discriminating way?
 - d. Are there circumstances that may mitigate the penalty imposed?
2. The degree to which arbitrators are willing to find that just cause exists, and to uphold the employer's actions, depends to a certain extent, however, upon the type of misconduct alleged. In some instances, a certain standard of proof is required; in others, it must be proven that the misconduct specifically harms the employer, and in yet others, arbitrators are willing to give employees a "second chance."

B. Was the alleged misconduct satisfactorily proven?

1. Some parties and some arbitrators frame the degree of proof needed to establish just cause in terms of "a preponderance of the evidence," "clear and convincing proof," or "beyond a reasonable doubt." The last is especially true in cases which involve moral turpitude.

2. More often, however, the degree of proof applied, no matter whether a standard is referenced or not, is evidence sufficient to persuade the arbitrator of the truth of the matter.
3. The nature of the misconduct also determines the burden the employer must assume in proving that the misconduct justifies disciplinary action. Certain arbitral standards regarding the burden of proof needed to establish just cause seem to generally prevail in misconduct involving off-duty, off-premise misconduct, insubordination, theft and dishonesty and fighting and altercations. The standards appear to vary the most, however, in the area of troubled employee misconduct and harassment, particularly sexual harassment.

C. Does the proven misconduct warrant disciplinary action?

1. Once there is evidence to prove the employee guilty of misconduct, the issue turns to:
 - a. Whether the employee was aware that the misconduct would result in disciplinary action;
 - b. Whether the employer has treated its employees with similar misconduct in the same manner and
 - c. Whether the employer has acted arbitrarily in determining the employee should be disciplined.
 - d. Essentially, these questions protect the employee against employer taking discriminatory or arbitrary action.

XI. CONCLUSION

A. In order for your employees to do their best:

1. They must know what they are supposed to do, preferably in terms of an end-product.
2. They must have a clear understanding of what their authority is – and of its limits.
3. They must know what their relationships with other people are.
4. They should know what constitutes a job well done in terms of specific results.
5. They should know when and what they are doing exceptionally well.

6. They should know when and where they are falling short.
7. They must be made aware of what can and should be done to correct unsatisfactory results.
8. They must feel that their supervisors not only recognize the value of their contribution, but will make it known to others.
9. They must feel that their supervisors have an interest in them as individuals.
10. They must feel that their supervisors are anxious for them to succeed and progress.

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