



EMPLOYEE FILES – HOW TO DOCUMENT POOR PERFORMANCE AND IMPROPER CONDUCT

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It is not uncommon for us to receive a call from an Executive Vice President of an organization, telling us that they want to terminate an employee. The Executive Vice President usually presents a list of sound reasons why the employee must be discharged. But problems often arise when we ask them about back-up documentation – annual performance evaluations, memos to the file or other notes regarding improper conduct or poor performance. Many times, nothing has been placed in the employee's file.

While most employees are employees "at will" and can be terminated at any time, for any reason, there are public policy exceptions to this rule. As examples, a person cannot be terminated because of their age (if an employee is over 40), race, disability religion or gender. These exceptions cover a majority of the workforce. Therefore, in many cases, an organization should be able to show that: (1) termination was not because a person was a member of a protected class; and (2) notice was given to the employee regarding their performance or conduct prior to their termination.

There are several ways to document poor performance and improper behavior. The most common is annual performance evaluations.

Most supervisors dislike giving poor performance evaluations. Many times, they are either friends with the person they are evaluating, or they are afraid of the repercussions in the workplace if they give a disgruntled employee a negative review. Therefore, reviews tend to be "glowing" instead of realistic. But a supervisor is doing their association a disservice if he/she does not give an honest evaluation of every employee. When an employee is terminated for poor work product, but has only positive performance evaluations, it is more difficult to prove that an employee's performance was the reason he/she was terminated. Also, a jury/mediator will have much more sympathy for an employee who was fired, if the employee had no notice of his/her mistakes and was given no apparent opportunity to improve.

If an employee is having problems in the workplace, the first course of action is commonly a verbal warning from a supervisor. Even though the warning is verbal, it still must be documented in the employee's file. A note should be placed in the file setting forth: (1) that a verbal warning was given; (2) the date and time of warning; (3) who was present when the warning was given; (3) a description of the conduct that resulted in the warning; and (4) the employee's comments or explanation of the events that resulted in the warning.

If the employee's behavior or work product does not improve, then a written warning should be given. This warning should formally state the same information discussed during the verbal warning, but it should also discuss: (1) what the employee needs to do to improve their behavior or job performance; and (2) what are the repercussions if the employee does not improve his/her behavior/job performance.

It should be noted that all warnings should be consistent. For instance, if two employees are given warnings regarding coming in late to work, one employee should not be written up for "tardiness" and the other written up for "unexcused absences". If employees with similar violations are treated differently, there should be a written explanation in both files explaining the disparate treatment.

Along those lines, whatever disciplinary procedure your association

follows, make sure that it is consistently applied to all employees. Even a reasonable rule may be challenged if it is applied only sporadically.

Finally, even with small organizations, it is important to have an employee manual, explaining the organization's policies. This will put all employees on notice regarding what type of behavior will result in disciplinary action, and therefore bolster any termination proceeding based on a violation of these rules.

Ultimately, we recommend consulting with legal counsel before terminating any employee in a protected class to ensure that the basis of the termination has been properly documented and is defensible.