

Strategic Documentation of Employee Discipline and Discharge: Sword vs. Self-Inflicted Wound?

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BREAKOUT SESSION #603 AND #902

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I. Introduction

Documentation of employee performance issues can be used as a sword when defending against employee-related claims and litigation. Employer's should approach performance documentation as an opportunity to tell it's "story" and to confirm that it is organized, fair, and that its actions are legally compliant. Unfortunately, it is also true that performance documentation can actually increase legal exposure by creating circumstantial evidence of wrongdoing (even though it was never the employer's intent). Many of these risks can be mitigated, or even eliminated, by training and educating managers on how to effectively document performance problems in the workplace. Hence, the content herein. Finally, these materials attempt to begin a discussion about whether the traditional, annual performance review can be replaced by and through the use of "Strategic Performance Improvement Plans ("S-PIPS").

II. Legal Impact Of Documenting Performance Issues

A. Reasons for Performance-Related Documentation

1. Memorialization of specific acts of misconduct (written warnings, suspensions, etc.);
2. Annual performance reviews;
3. Performance improvement plans;
4. Minutes or notes from disciplinary meetings; and

5. Attendance records.

B. Why Document?

1. Written records make up for infallible human memories.
2. Documents have evidentiary weight.

Example: Written proof that a warning was given, by whom, when.

3. Effective, strategic documentation can establish like treatment of other employees, which is crucial when defending against discrimination claims.

Favorable Example:

Employee #1, over 40, Hispanic, receives *written warning* for violation of “XX” company performance standard.

Employee #2, under 30, Caucasian, receives *written warning* for violation of same performance standard.

Problematic Example:

Employee #1, over 40, Hispanic, receives *final written warning* for violation of “XX” company performance standard.

Employee #2, under 30, Caucasian, receives undocumented *verbal reminder* for violation of same performance standard.

4. The persuasive impact in a judicial setting.
 - a. *Rossmann v. RDO Equipment Co.*, WL 503242 (D.Minn. 2006) (citing examples of objectively written warnings describing the violations and the consequences for future violations, as well as noting the employee’s reaction to the warnings).
 - b. *Brody v. Starbucks Coffee Co.*, 2009 U.S. Dist. LEXIS 24044 (D.Minn. 2009) (rejected employee’s discrimination claim, in part, because there was no evidence employer deviated from its policies in issuing employee a performance improvement plan that led to his termination).

III. **Avoid Common Mistakes Documenting Employee Performance That Has The Unintended Consequence Of Creating Legal Exposure**

A. Sloppiness – Examples:

1. Two managers attend same disciplinary meeting and their written notes are inconsistent and conflicting.
2. Disciplinary notice issued to employee fails to identify the type of warning (*i.e.*, verbal, final written) and omits consequences for future violations.

B. Forming Legal Conclusions – Examples:

1. Manager investigates allegations of sexual harassment and he writes the following:

“Based on eyewitness accounts, and my ‘gut’ instincts, I believe Sam’s allegations of sexual harassment. I conclude with almost 100% certainty that Pat engaged in multiple acts of sexual harassment. Also, in my opinion and based on solid evidence, management failed to properly act. This is true despite company knowledge of the confirmed acts of sexual harassment.”

2. Employer issues termination notice to the employee:

“You were terminated from employment because you are a thief. Although we could not confirm it, and although the evidence is conflicting, you stole from us and, as a result, you are a liar, a cheat and, as noted above, a thief.”

C. “Non-Progressive” discipline – Examples:

1. Employer issues warnings to an employee for series of substantially the same policy violations as follows:

Written Warning; Verbal Warning; Second Final Written Warning; Final Verbal Warning.

D. Subjectivity vs. Objectivity. Employer issues a written warning to employee for attendance-related infractions.

Favorable Example: “Company attendance standards prohibit more than 2 absences in any thirty day period. You were absent 3 times in April (4-3, 4-18, 4-25). Your attendance violates company policy and you are being issued a written warning.”

Problematic Example: “When enforced, the company has an attendance policy that prohibits more than 3 absences [**wrong - actually 2**] in any thirty day period. You seemed to be absent a lot lately and you are being issued this warning.”

E. Being Stupid.

Example: Front Line Supervisor (age 28) and Department Manager (age 32) engage in the following email exchange about employee, Bill, who is 59 years old:

- Supervisor: S’up Buddy: Having problems with Good “Ole” (or should I say Old) Bill again. Can we talk?
- Manager: Whaaaaat? 😊 Did you take away his scooter again? 😊 (sorry, couldn’t resist, ‘member when we were talking about pranking Bill by sending him brochures for the nursing home?)
- Supervisor: No, seriously, he is pissing me off by constantly dispensing his “grandfatherly” advice to me. Plus, he is not meeting quota, again.
- Manager: I will talk to HR and see if we can come up with something. Maybe we can “eliminate” his job. Put some thought into that and we can talk to HR -- who I am sure will try to throw up as many roadblocks as possible to get rid of him. Bottom line, I want whatever we do to sound “legit.”
- Supervisor: I cannot read what you just said, can you put it in bigger font? Then I can have Bill read it to me with his “binoculars” (*i.e.*, reading glasses). Thanks, Man. Keep it real. 😊 See you at that rager tonight at Sally’s (from the warehouse) -- she’s smok’in hot [fire truck emoji omitted].

IV. **Alternatives To The Annual Performance Review: Making The Case For The Use of Strategic Performance Improvement Plans (“S-PIPS”)**

A. Annual Performance Reviews.

1. When annual performance reviews are honestly completed and the process is effectively administered, this form of employee documentation can pay dividends when defending against employee claims and litigation.
2. An annual performance review puts an employee on clear notice of his or her strengths and, perhaps more importantly, opportunities for improvement. And, reviews create an important record of the employee’s historical performance.

3. The problem, however, is that supervisors and managers are routinely *dishonest* in the review process, giving employees higher ratings than deserved (*i.e.*, “Minnesota Nice” performance evaluations).
4. Managers often use the annual performance review as a “morale booster” instead of addressing performance deficiencies.
5. Timelines are sometimes (actually, often) not followed thereby leaving gaps that can come back to bite the employer.

Example: Employer’s performance review policies require managers to issue performance reviews every 12 months. Yet, the author of these materials has litigated cases where there were gaps of two or more years between performance reviews. An employer’s failure to follow its own procedures is routinely used as a proxy for circumstantial evidence of pretext in discrimination cases.

6. *Annual* review processes can also result in the failure to address performance deficiencies in a timely manner. Some managers will wait to address problems until the annual review is issued.
7. There can also be a significant “disconnect” in the process whereby internal departments are not communicating with each other. This leads to inconsistent results in the performance review document.

Example: Suppose an employee was approved for intermittent FMLA leave. This leads to erratic attendance. Notwithstanding, and unbeknownst to the leave coordinator, the manager gives the employee an unfavorable rating in her annual performance review for attendance. In this situation, the company may have just created evidence that bolsters a claim for FMLA interference or FMLA retaliation.

B. Performance Improvement Plans.

1. Performance Improvement Plans are routinely used by employers to address employee performance issues in a formalized way.
2. These plans take a variety of forms and can be simple or complex depending on the performance issues being addressed.
3. Regardless of form or format, effective Performance Improvement Plans have the following common characteristics:
 - a. Clear identification of the employee performance or behavior issue(s);

- b. The policy or performance standard at issue and an explanation why the employee is not meeting it;
 - c. Specific, measurable and achievable goals in order to bring the employee back into compliance;
 - d. Clear timeframes associated with the compliance goals; and
 - e. Unambiguous notice of consequences if the employee fails to comply with the plan.
- C. Making the Case For Use Of Strategic Performance Improvement Plans (“S-PIPS”).
- 1. S-PIPS can functionally displace the traditional, annual performance review model.
 - 2. If used effectively, with proper managerial/supervisor training, S-PIPS offer many advantages over annual performance review which include:
 - a. S-PIPS presume baseline positive performance. Aren’t all employees expected to perform at a satisfactory level at all times? Managers can give positive feedback whenever s/he wants to for satisfactory (or excellent) performance. Therefore, the time, energy and expense of reviewing baseline expectations are avoided altogether;
 - b. S-PIPS are more precise. Managers can hone in on specific, problematic behaviors and establish a clear roadmap for bringing the employee back into compliance, or separation from employment;
 - c. S-PIPS are more fluid. Serious performance issues can be addressed more rapidly and in the moment. It is no longer necessary to “wait” for a scheduled review period;
 - d. S-PIPS increase the odds managers will be honest. The focus is on the specific, problematic performance, not every aspect of the employee’s job; and
 - e. S-PIPS decrease (or eliminate) the risk of non-compliance with lock-step annual performance review policies that managers often fail to follow (unless the employer has an audit procedure/process – which is highly recommended).