Legal and HR Considerations for Managing Performance

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IPMA
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Most Complaints Result From

- Poor Management
- Poor Communications
- Inconsistent Treatment
- Avoiding Corrective Action
Defining “Under-Performance” or “Bad Performance”
Alex is a real pain to deal with. He has major attitude all the time, spreads rumors, doesn’t really do his job and is hated by many. He always seems to slip by and make goal so you haven’t found a reason to discipline him. You should:

1. “Friend” him on Facebook – surely he’ll say something wrong and you can fire him

2. **Coach, counsel and discipline him** for his attitude and malcontent

3. Hope that he puts in for a transfer

4. Nothing – he is meeting goal and that’s the objective standard
You try not to be too picky on the dress code, but you need to maintain a professional image. On Monday, Sally comes in looking like this:
Your manager has been asked to “deal” with the situation. Your manager should:

1. Be thankful that she is good looking or it would really be inappropriate
2. Talk to her immediately, document it in the file and send her home, if possible, to change
3. Do nothing yet - we don’t want her to file a harassment complaint
Most Common “Performance” Issues

- Failing to adequately complete job duties
- Attendance
- Poor Interpersonal Skills
- The “Virus”
- Other “Intangibles” & Policy Violations
My Most Common Question...

Why is this person still working here?
Consider as a Strategy.....

Quick to Coach, Discipline & Fire

Slow to Hire
What Prevents Managers from Engaging in Coaching, Counseling & Discipline?

Let’s Overcome these Obstacles & Concerns!

“We’re like family!”

“It’s too time consuming” or “I’m too busy”

“This guy is such a pain to deal with that it’s just not worth it”

“That’s just how he is. He’s been like this forever”

“He’s untouchable.”

“I don’t know how to start.” “I don’t know what to say”

“I’m afraid he’ll sue or file a grievance”
Counseling & Discipline Considerations

**Timing**
- Now
- Immediately
- Don’t let things fester
- It will not get better with time

**Communication**
- Face to face is ideal
- By phone is a second best
- Never, ever electronically by text, email or social media
- Ps – do not “friend” your employees
Counseling & Discipline Considerations

**Substance**

- Factual
- Rely on Policy
- Demonstrate the “why”
- Explain the consequences

**Documentation**

- Document the Communication
- Send yourself an email at first
- Next time, written notice or warning
- The corrective action = the level of behavior
Organizational Policies

- Performance Management Policies
- Corrective Action/Group Notice Forms
- Grievance Procedures
Consideration #1
In Fiscal Year 2012, the most alleged cause of action filed with the EEOC was:

1. Retaliation
2. Race
3. Age
4. Gender
5. Sexual Harassment
Three Layers of Trouble & One Troublemaker

Former Rutgers Coach
Mike Rice

Former Asst. Coach
Eric Murdock

Athletic Director
Tim Pernetti

Rutgers President
Robert Barchi
Avoiding Retaliation

Timing is everything – after someone complains is not the time to start disciplining for all the stuff the employee has done for the last 10 years.

All prior decisions will be “married” at trial.

Inconsistencies look like retaliation.

Get all the facts - peel back the curtain and see what there is to be seen.
Consideration #2
Sally recently filed an EEOC Charge for race discrimination.

She has always been a very sub par performer, but now that she has filed a Charge your CEO instructs management that under no circumstances should she receive any discipline because it might look like retaliation.

Two years later, the company has taken a hit on sales and must reduce one employee through a reduction in force.

Since Sally has the lowest production, she is selected as the position that will be terminated.
Two other employees had low production but because they received corrective action, their production improved. Could Sally make a valid claim of discrimination because she did not receive discipline?

1. Yes, discipline is a benefit because it is designed to help the employee improve and the manager in this case intentionally withheld discipline due to her claims of discrimination.

2. No way – she knew the rules and she was given a benefit by not being disciplined!
Encourage Managers to Understand the Purpose of Coaching & Discipline

- Coaching, counseling and discipline are all designed to help the employee improve in the areas identified.
- This is a win-win for the employee, manager & organization.
- Avoiding discipline only creates more problems and doesn’t do any favors for the employee.
- Failing to discipline also creates inconsistencies and employee morale issues.
Consideration #3
The performance review provides management the opportunity once a year to tell the employee what the employee is doing well and what the employee can improve upon.

1. True
2. False
Performance Reviews

- Is your performance review creating more risk than benefit?
- Are managers “too nice” in performance reviews – is this a “real” assessment?
- What is the purpose of the performance review?
- Do we let employees engineer their ratings?
- Reviews need to include all discipline given during the year.
Consideration #4
You receive multiple complaints that Jane is “harassing” the employees. After an investigation, HR concludes that, while Jane has some interpersonal issues, no violation of the company’s EEO policy occurred.

As a result, the company advises Jane to improve her communication, but she receives no discipline. It was just an “undocumented” verbal conversation.

Jane is empowered and her behavior continues.
The Importance of Investigations in Workplace Discipline

- Skilled investigators?
- Know what you have – bad manager, virus employee, bully, etc?
- He said/She said
- Investigation Findings & Recommendations
- Follow-up
Consideration #5
Fred comes to work dragging for the third day and it has become very disruptive. The manager talked with him twice about his lack of performance and given him a written counseling. The manager thinks he has an alcohol problem. The manager should:

1. Discreetly give him phone number for AA
2. Give the employee written disciplinary action
3. Pull him aside and ask him if he has an alcohol problem
Two weeks later, Fred comes to work with alcohol on his breath and he is clearly intoxicated. The manager should:

1. Drive him home
2. Tell him to take FMLA for his problem
3. Discipline him consistent with your organization’s Drug Free Workplace Policy
Mentioning an Employee’s Disability

Sally has been acting out of sorts lately. She is failing to communicate, has withdrawn from all social interaction and her appearance is different.

Her performance has also diminished.

The manager meets with her and expresses concern that she may be depressed, and recommends that she seek help.
Was it appropriate for the manager to tell the employee, under these facts, that she appeared depressed and recommend she seek help?

1. Yes
2. No
“Talk to the Hand”
Disability

- Employers never have to take away essential job functions or lower performance standards.
- Sporadic attendance is generally not a reasonable accommodation if attendance is an essential job function.
- Employees can, and should, be disciplined for performance failures – even if caused by a “disability.”
- Employers should not mention or volunteer that the disability made the employee do it.
- The ADA is complex – convince management to seek help.
Consideration # 6
Sally has been late three times in the last month. Sally is a single mom so the manager tries to be understanding but it’s really tough because someone else has to take up the slack for her. The managers in my company would most likely:

1. **Call her into the office and speak to her privately about her attendance**
2. Send her an email with a copy of the attendance policy
3. Ignore it for now – it’s only been three times and the managers don’t want to seem insensitive because she is a single mom after all
Caregiver Responsibilities

- Caregiving Stereotypes
- No Good Deed Goes Unpunished
- Avoid Title VII or ADA Implications
Consideration #6
The jury returned a verdict in favor of:

A. Aaron’s
B. The employee in the amount of $195,000
C. The employee in the amount of $1.95 million
D. The employee in the amount of $19.5 million
E. The employee in the amount of $95 million
STATE COURT OF FULTON COUNTY

ELIZABETH COOK,

Plaintiff,

-against-

AARON’S, INC.,

Defendant.

COMPLAINT

PLAINTIFF DEMANDS TRIAL BY JURY

Plaintiff ELIZABETH COOK, by her attorneys SIMMONS BROWDER GIANARIS ANCELiDES & BARNERD, LLC.; MORELLI PATNER PC and CATES LAW FIRM.
A Pound of Prevention

- Sweat the Small Stuff
- Training Really Matters Here
- Don’t wait for the matter to be a “hostile environment”
- Conduct a “real” investigation
- Final Written Warning or Termination for Policy Violations
Considerations #8
Party at the Beach While on FMLA

Plaintiff told her employer she needed to go out for surgery.

Leave was supposed to last 4 weeks.

Two weeks after surgery, plaintiff and three others traveled to Cancun.

Defendant had a policy that prohibited vacation during paid sick leave.
The company terminated her for violation of the policy on vacations during sick leave. The Court held:

A. The company violated the FMLA – she can be sick and on vacation at the same time

B. The policy was consistent with the FMLA so there was no violation
“Nothing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse their leave....”
Pulaski Days

- Employee suffered from a “recurrence of severe lumbago with lower extremity radiculopathy.”
- Doctor indicated she was “completely incapacitated” for three weeks.
- Three days later, employee went to “Pulaski Days,” a local Polish heritage festival.
- Over 8 hours, she visited three Polish halls with a group of her friends.
- One friend shared 127 pictures from that day, and employee posted 9 of those on her page.
Photo information

Oct 3, 2009
686×1024 pixels – 80KB
Filename: DSC_0065.JPG
Camera: NIKON CORPORATION
Model: NIKON D90
ISO: 200
Exposure: 1/60 sec
Aperture: 3.5
Focal Length: 18mm
Flash Used: Yes
Latitude: n/a
Longitude: n/a

Tags

Report abuse

Photo reuse
All rights reserved
Employer Response

- Called her in
- Asked her about call in procedures
- Asked her about job requirements & injuries that she argued prevented her from fulfilling requirements.
- Asked her if she knew how seriously company took fraud. Employee made it clear she knew they took it very seriously.
- Showed her the pictures and discussed the inconsistencies.
The employer had an honest belief that the employee committed FMLA fraud. Can she legally be terminated?

1. **Yes**
2. **No**
“Honest Belief”

“So long as the employer honestly believed in the proffered reason given for its employment action, the employee cannot establish pretext even if the employer’s reason is ultimately found to be mistaken, foolish, trivial, or baseless.”
FMLA, ADA, Cancer & a Really Bad Guy
The employee sued under the FMLA & ADA. She:

A. Lost
B. Won $82,000
C. Won $820,000
D. Won $8.2 million
E. Won $82 million
Medical Leave & Discipline

- Use the fraud detection mechanisms available under the laws
- Create pay policies that are consistent with the FMLA & ADA but which can prevent fraud
- Require employees to use the call in procedures, and discipline when they are not followed
- Managers must know when something is, or might be, FMLA & ADA leave and how to handle it
Consideration #9
The Culture They Deserve

Penn State child sex abuse scandal

The Penn State child sex abuse scandal was a scandal that broke in 2011 at Pennsylvania State University, as a result of longtime former university football assistant coach Jerry Sandusky’s sexual assault of at least eight underage boys on or near university property, and alleged actions by some university officials to cover up the incidents or to enable more. Based on an extensive grand jury investigation, Sandusky was indicted in 2011 on 52 counts of child molestation dating from 1994 to 2009, though the abuse may have dated as far back as the 1970s.[9] Per the findings of the grand jury, several high-level school officials were charged with perjury,[9] suspended, or dismissed for covering up the incidents or failing to notify authorities. In the wake of the scandal, school president Graham Spanier was forced to resign, and head football coach Joe Paterno was fired late in the 2011–12 season, while Sandusky maintained his innocence.[8]

The trial of Jerry Sandusky on 52 charges of sexual crimes against children started on June 11, 2012, at the Centre County Courthouse in Bellefonte, Pennsylvania. Four charges were subsequently dropped, leaving 48. On June 22, 2012, Sandusky was found guilty on 45 of 48 counts of sexual abuse.[9] Sandusky was sentenced on October 9, 2012 to a minimum of 30 years and a maximum of 60 years in prison.[7]

The scandal had far-reaching outcomes for the university. The report of an independent investigation commissioned by the PSU board and conducted by former FBI director Louis Freeh and his law firm stated that Spanier and Paterno, along with athletic director Tim Curley and school vice president Gary Schultz, had known about allegations of child abuse on Sandusky’s part as early as 1998 and were complicit in failing to disclose them. In so doing, Freeh stated that the most senior leaders at Penn State showed a “total disregard for the safety and welfare of Sandusky’s child victims” for 14 years and “empowered” Jerry Sandusky to continue his abuse.[9] On July 23, 2012 the NCAA imposed swiping penalties on Penn State—among the most severe ever imposed on an NCAA member school—including a fine of $60 million, a four-year postseason ban and vacating of all victories from 1998–2011.[10] In doing so, NCAA President Mark Emmert stated that the sanctions were levied “not to be just punitive, but to make sure the university establishes an athletic culture and daily mindset in which football will never again be placed ahead of education, nurturing, and protecting young people.”[11] The Big Ten Conference subsequently imposed an additional $13 million fine.[12]

As of July 2012, two other investigations are ongoing: a federal criminal probe by the local United States Attorney launched shortly after the discovery of Sandusky’s crimes, and a separate probe from the Department of Education into whether Penn State responded to the incident properly and reported it in accordance with federal law.[13][9]
Let no one be above your policies or the law
Ethics & Integrity Start at the Top
The Culture You Deserve
Considerations

- Deal with top performers acting badly
- Let no one be above your policies & the law
- Ethics & integrity start at the top
- Organizations get the culture they deserve
Consideration #10

Guess what? You're Fired!

You  Door
Basic Behaviors of the Bad Boss

- Absentee Manager
- Credit Monger
- Micromanager
- Management by Email
- Inconsistencies
- The Wet Fish
- “I know better” (aka “I know everything”)
- Protect My Own / Favoritism
- Workplace Bully
Worst Mismanagement Fail

DO

NOTHING
Does Your Management & Leadership Team have the:

- Skill
- Motivation
- Personality
- Time
- Training
- Ethics & Judgment
- Courage
Solutions

Teach Them

Empower Them

Hold Them Accountable
Coaching, Counseling & Discipline

Deliver regular, frequent and specific feedback – positive and constructive.

Document all discussions – if it isn’t in writing it didn’t happen.

Don’t delay – feedback should be immediate.
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