



**Virginia Bankers Association  
2023 VBA Connect Conference**

**Hot Topics in Employment Law**

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*Your workplace, our insight*

# Hot Topics Agenda

1. Understanding Today's Juries in Employment Cases Makes Better Managers.
2. Employers that Ensure that there is Documentation of Performance and Conduct Problems Have the Best Defenses to Discrimination, Harassment, and Retaliation Cases.



# **Understanding Today's Juries in Employment Cases Makes Better Managers**

# Understanding How Jurors Think

- Most jurors have had a bad experience in some employment experience with a member of management.
- Most jurors have never been in management.
- Most people who have never been managers have a negative view of management and see it as
  - uncaring, incompetent, clueless, blame-shifters, greedy, untrustworthy.
- If it's the manager's word against the employee's word, manager loses.

# Understanding How Jurors Think cont.

- COVID-19 caused people to change their views on a number of topics, including employers. During COVID-19, people were scared and were happy with employers that allowed remote work.
- Now that we are on the other side of COVID-19, Jurors have a very negative view of employers and they are more willing now to push back even if the law does not support the lawsuit. Jurors will make a decision on what they think is right and they will ignore the law the Judge gives them.

# Understanding How Jurors Think cont.

- Jurors hold the workplace to a higher standard than the law requires. Jurors expect to see written documentation about an employee if that employee has performance problems.
- At-Will employment does not matter to jurors. They believe people are entitled to a job unless there is a documented reason for that employee to lose that job.
- We live in a lottery mentality world and jurors like to be part of making large awards.

# Properly Managing Problem Employees with Documentation

- The best way to fix poor performance, and to protect the employer if there is litigation, is with proper performance documentation that is:
  - Consistent
  - Honest
  - Actually manage performance

# Properly Managing Problem Employees with Documentation cont.

- Most employers have good policies about managing performance in Handbooks but many employers do not require supervisors and managers to follow those policies consistently.
- Many managers do not like to communicate bad news to employees because it is viewed as being confrontational and most people don't like being in situations that are uncomfortable.
- Managing employees is not always comfortable.



# Managing Existing Problem Employees - Consistency

- Before disciplining an employee, ask –
  - Are performance expectations and/or subsequent discipline for not meeting expectations being applied equally and non-discriminatorily to others in employee's same position or similar positions?
  - Are there any other similarly situated employees in the same group, business unit, site location or operating division whose performance is equal to or below this employee?
    - If so, what type of disciplinary action has been or is currently being taken with them?
  - Have you disciplined or terminated other similarly-situated employees with similar performance issues?

# Consistency in Following the Employee Handbook

- Make sure you know what is in your Employee Handbook; your problem employees know.
  - Are there policies in place that you should be following?
  - Are the policies being applied uniformly to all employees?
    - Example: “Zero tolerance” policy for workplace violence.
- The EEOC always asks whether there is a disciplinary policy/procedure in place and whether it was followed.
  - If you have one but do not follow it, it looks suspicious.
  - If you followed it in this case but generally do not follow it, it looks suspicious.
  - BE CONSISTENT.

# Who IS a Problem Employee?

- Employees who:
  - Have recurring issues such as absenteeism and tardiness.
  - Have problems following company policies.
  - Have conduct issues.
  - Fail to perform the essential functions of the job.
  - Refuse to accept constructive feedback.

# Who is NOT a Problem Employee?

- Employees who have:
  - Made complaints about unlawful conduct.
  - Missed work for medical leave.
  - Requested accommodations.

# Who is NOT a Problem Employee (cont.)?

- Employees who have made legitimate complaints, have disabilities, etc. can create additional work for the organization, but they should not be viewed negatively from an employment perspective.
- NOTE: An employee's protected status does not necessarily mean he/she is not problematic, but you should exercise caution when taking adverse employment action against such an employee.

# Who is NOT a Problem Employee (cont.)?

- Before disciplining any employee, ask –
  - Has the employee brought any concerns to Human Resources or management in the last 90 days?
  - Has the employee had any absences due to medical issues in the last 90 days?
  - Is management or Human Resources aware of any medical issues that might have an impact on the employee's ability to perform the essential functions of his/her job?

# So How Do You Handle Problem Employees?

1. Consistency
2. Honesty
3. Managing

# Documenting Performance

- Supervisors should evaluate and provide feedback to their subordinates daily, weekly, monthly, and annually.
- Employees should not be surprised with statements in a performance review.
- Supervisors can protect the company with documentation and performance reviews that are designed to help the employee and are truthful and fair.
- If it is not in writing, it did not happen. A conversation about conduct or performance needs to be documented.



# Documenting Performance (cont.)

- Many employees who are terminated for performance problems:
  - Were not aware they were having problems; and/or
  - Were not given an opportunity to correct the problems.
  - The termination of employment is then viewed as unfair and that can lead to litigation.
- One of the biggest mistakes employers make is failing to document performance problems or misconduct before termination of employment.
  - You can legally terminate an at-will employee at any time for any (non-discriminatory) reason, but that argument will not get you very far in a lawsuit.

# Types of Performance Documentation

- Performance Reviews
- Informal Counseling
- Verbal Warning
- Written Warning
- Performance Improvement Plan (PIP)

# Performance Reviews

- The performance evaluation process should be consistent between departments and divisions in the organization. This will help avoid inconsistencies as to what is acceptable conduct and what is not.
- Grade employees on objective criteria, such as ability (or lack thereof) to perform the essential functions of the job. Be specific and give examples. Avoid subjective written comments. Stick to the facts.

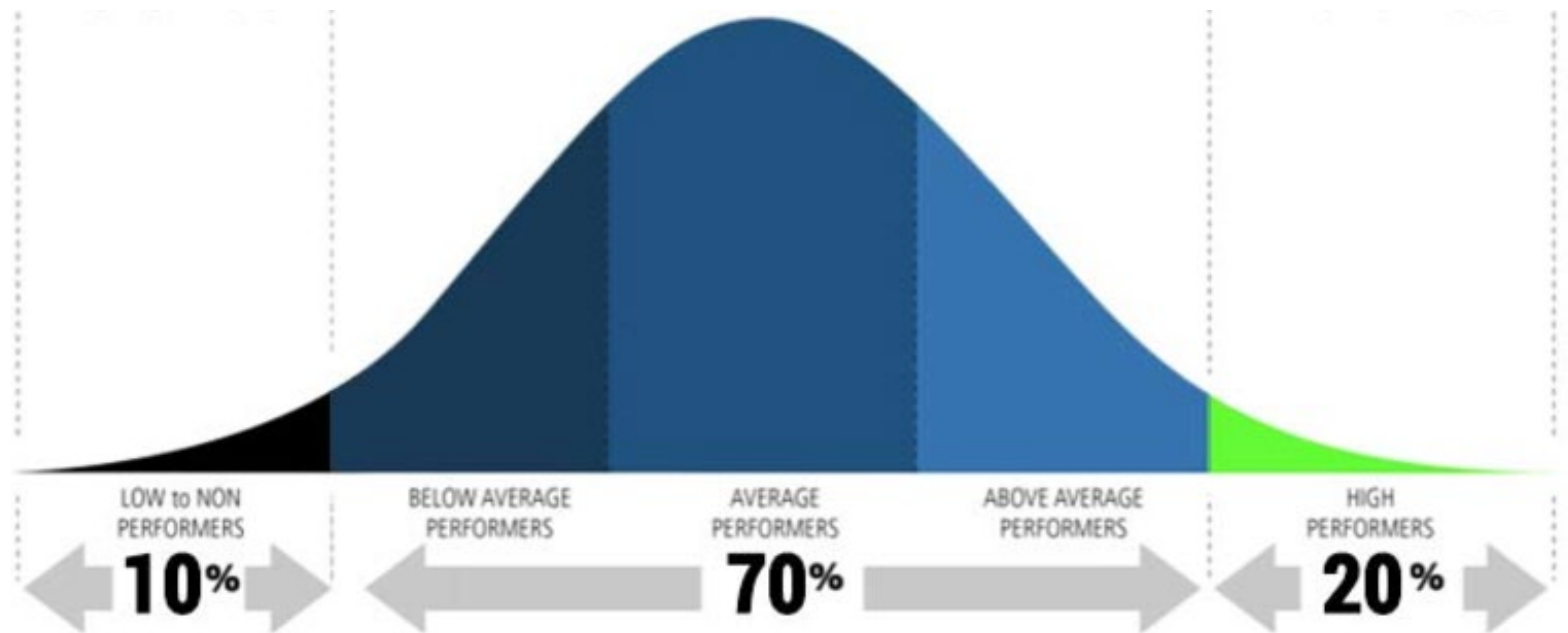
# Performance Reviews - Example

	5	4	3	2	1
	Consistently Exceeds Performance Requirements	Consistently Meets Performance Requirements	Often Meets Performance Requirements	Sometimes Meets Performance Requirements	Rarely Meets Performance Requirements
<p><b>FILING:</b> Pleadings, discovery, correspondence, etc. properly named and placed in the appropriate computer and paper file on a daily basis. Pleadings index updated and maintained. Filing is done without prompting from attorney or paralegal. When new document is received, attorney and paralegal are notified of receipt of the document and told that filing will be or has been completed.</p>					
<p><b>Self-Assessment:</b> [Include comments here.]</p>					
<p><b>Supervisor:</b> [Include comments here.]</p>					

# Performance Reviews (cont.)

- Be **honest**. Don't "sugar coat" an employee's performance. If an employee is only meeting expectations, say so. Avoid using glowing terms about an average employee. It is confusing, inconsistent and dangerous to tell a "meets" employee that he/she is outstanding or exceeding all expectations.
- Set aside time to meet with the employee to discuss the evaluation. Have the employee sign the evaluation to acknowledge receipt, not necessarily agreement with the evaluation. Allow the employee to make comments on the evaluation.
- Employment discrimination claims generally start with employees who were subject to incomplete or inconsistent information over why they were disciplined or fired.

# Typical Performance Curve



# Employee Performance Reviews – What Not to Do

- These statements were made in an employee’s performance evaluation during a period when she was performing poorly *less than 6 months* before her employment was terminated \* –
  - Beth strives for achievement of excellence in all she does.
  - Beth is a very valuable member of the team. She continually demonstrates strong personal effectiveness in all she does.
  - Beth can always be counted on to achieve results in a variety of work projects. She is a very effective employee and will play an important role in the continued success of our company.
- Under “performance areas requiring improvement” –
  - Beth can strive to achieve optimal levels of personal performance and accomplishments in providing service to our clients.

\* The employee’s name and company-specific information have been changed for confidentiality purposes.

# Performance Reviews – What Not to Do (cont.)

- The employee brought a claim for discrimination after her employment was terminated for poor performance.
- The performance evaluation is one of the key things the employee relied on in claiming that her employment was not terminated for legitimate performance problems.
- The employer was put in the position of having to argue that the performance evaluation was not accurate and rely on the managers testimony that he did not put truthful information in the evaluation because he did not want to hurt her feelings. That is a loser argument for an employer.



# Informal Counseling

- By keeping the lines of communication with employees open, supervisors may be able to prevent or quickly correct performance problems.
  - Communicate clear performance expectations to employees.
    - If employees do not understand what is expected of them, they will have an extremely difficult time meeting those expectations.
  - Provide regular feedback on performance.
    - Frequent feedback is critical to ensuring that expectations are understood. Employees can also identify issues that may be impacting performance that the supervisor can resolve.
  - Reward and recognize good performance.
    - Employees like being praised. Recognizing good performance increases the likelihood that the good performance will continue.

# Verbal Warnings

- Document the meeting and take good notes. Have a management desk file. Memorialize the conversation with the employee—send an e-mail about your discussion, and ask for a response back.
- Make sure it is clear to the employee that he/she is receiving a verbal warning.
- Give the employee an opportunity to speak during the meeting, but hold him/her accountable.
- Have a witness attend the meeting.
- Notify Human Resources.
  - HR generally isn't involved in informal counseling, but once the performance problems or misconduct rise to the level of a verbal warning, HR should be brought in.

# Written Warnings

- A written warning serves two purposes –
  - An employee who was not inspired to change based on a verbal warning is more likely to grasp the seriousness of the situation with a written warning; and
  - The employee's performance problems will be clearly documented in the employee's personnel file.
- Written warnings can be as simple as an email; however, many employers choose to have a specific form for written warnings. It depends on the business.
  - Emails may not be effective for employees who work in the field and rarely check their work email.
  - Employees who work in an office setting frequently check email and receive job-related communications via email, so a written warning via email may be appropriate.

# Employee Warning Notice

**Employee Name:** Stanley Hudson  
**Employee ID:** 1234  
**Manager:** Michael Scott

**Date:** 10/10/13  
**Job Title:** Sales Associate  
**Department:** Sales

## Type of Warning

First Warning       Second Warning       Final Warning

## Type of Offenses

Tardiness/Leaving Early       Absenteeism       Violation of Company Policy  
 Substandard Work       Violation of Safety Rules      (Specify policy \_\_\_\_\_)  
 Other: \_\_\_\_\_

## Description of Infraction:

**As was explained to you on numerous occasions since you began work here, in your role as a Sales Associate, you are expected to make sales and generate revenue for the company. On October 10, 2013, after I asked you to make a sales call instead of playing Sudoku, I found you taking a nap at your desk. During our meeting, you did not provide an acceptable explanation as to why you were not making sales calls, but did request coaching on sales.**

## Plan for Improvement:

**I will meet with you next Monday to develop sales strategies. During the next 60 days, I will meet with you each Friday to review your sales calls and completed sales. You will be responsible for making at least three (3) sales calls per day and completing at least one (1) sale per week.**

## Consequences of Further Infractions:

**If you do not make the necessary job performance improvements, we will consider further disciplinary action, up to and including dismissal. Please understand that your job is in jeopardy if you choose not to improve in the areas outlined above.**

# Performance Improvement Plans

- Step 1: Document Performance Issues
  - The supervisor should document the areas of the employee's performance that require improvement, being as specific as possible.
    - E.g., “The memo Bob submitted to the client on March 7, 2023 contained several typos, including a misspelling of the client's name” is better than “Bob's writing has a lot of mistakes.”
- Step 2: Develop an action plan using SMART goals.

# Performance Improvement Plans (cont.)

## ■ SMART:

- **Specific**—What do you want the employee to accomplish and by when?
- **Measurable**—Need concrete criteria for measurement.
- **Attainable**—Outline the steps to get there. Split it up into bite sized amounts.
- **Realistic**—Don't set the employee up to fail. The goal needs to be something that he or she can achieve in a reasonable time frame.
- **Time Framed**—Tell the employee how long he/she has to improve his/her performance. Put dates on the calendar and meet regularly (weekly if need be) to track performance.

# Performance Improvement Plans (cont.)

- Step 3: Meet with the employee, and present the employee with the PIP.
  - Have a witness at the meeting take detailed notes.
- Step 4: Follow up with the employee.
  - The employee's supervisor should meet with him/her regularly during the PIP period to discuss and document the employee's progress toward the PIP's objectives.

# Performance Improvement Plans (cont.)

- Step 5: End of the PIP
  - Once the time frame for the PIP expires, you should assess whether the employee achieved the PIP's objectives. If the employee did not meet the PIP's objectives –
    - Did the employee put in significant effort toward meeting the PIP's objectives?
    - Were the objectives reasonable and achievable?
    - Would giving the employee additional time to meet the objectives be beneficial?
    - Is there another job within the company for which the employee's skills knowledge, skills, and abilities would be better suited?
    - Should the employee be terminated?



# Questions?

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