WRITING EMPLOYEE DOCUMENTATION: STANDING UP TO CHALLENGE

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Why is documentation important?

- Documentation is the backbone of a human resources department.
- Supports human resource objectives.
- Promotes good performance.
- Addresses and corrects issues of concern.
- Provides legal defenses.

As Judge Judy says:

If it isn't documented, it didn't happen.

It's good to document good deeds

- Helps to establish open mind and fair assessment of employee performance.
- Good to document that you didn't do anything. You're not out to get her.

  "Dear Carol: We believed your excuse this time. You're off the hook."

Think before you act

- Ask before you act.
- What evidence do you have?
- Are you basing your actions on objective descriptions, not labels?
  - Are you being consistent?

Best Practices To Keep In Mind

- Consider who will be reading the documentation.

  It will help you frame the scope and the manner in which the documentation is prepared. Is it being read internally, by an administrative agency, current/former ee, attorney, a judge or a jury.

Best Practices

- What events are you documenting?
  - Counseling?
  - Discipline/termination?
  - Promotions and demotions?
  - Conduct that might lead to adverse action?
  - Interactive process?
  - Training?

Best Practices

- When to document?
  - Contemporaneous to the event.
  - Supervisor's log that may have more frequent entries.
  - Follow-up discussions on previous issues.
  - Check your document retention policy.

Best Practices

- Where do you maintain the documentation?
  - Secured location.
  - Personnel file? When is it ok?
  - Are there files separate from central personnel records?
  - What is your policy and procedure for forwarding to ensure it is not lost?

Best Practices

- Why are you preparing the documentation?
  - Hard to refute a fact if there is a contemporaneous writing to support it.
  - It's time-consuming, but a number of tangible benefits.
  - Memory lapses and time lags can diminish accuracy of information needed later.
  - Written documentation can bolster credibility.
  - Counters allegations of pretext and discrimination which are instrumental to supporting summary judgment.

Best Practices

- How to prepare the documentation?
  - If handwritten, is it legible?
  - Electronic documentation is searchable

Before you take action

- Obtain and establish the EE's version and perspective.
- Due process
- Is there a valid excuse for the conduct?
  - Write down their excuse.
  - Can be done anytime before taking action.
  - Note that every time EE was counseled, s/he had an excuse. Does not take responsibility.
  - Pin the EE down.

What evidence do you have?

- Evidence is anything that will help determine the issues.
- Anything that will show **more likely than not** that an event occurred.
- A balanced analysis should include reasons that support the findings and reasons that could support a contrary finding.

Types of Evidence

- Direct – something you can see, hear, touch – like documents.
- Indirect – circumstantial, a cookie on Carol's desk with a bite out of it infers Carol ate the cookie.
  Carol is a thief – every time she is here things disappear; if she's gone, nothing disappears.

Where/How Do We Document?

- E-mail
- Notes
- Calendars
- Schedules
- Text messages
- Performance evaluations
- Records

What is a fact?

- For example, poor attendance.
  A time record?
  A coworker reports they heard Carol comes in late a couple times a week, but didn't see them?
  Supervisor says he remembers seeing time records. Do you have them? No.
- Records with a chain of custody. Does it have to be the original? Maybe.
- Admitted conduct – Carol told someone. "I forgot to issue the order quashing the bench warrants." Is that sufficient to show Carol deserved to be fired?

Consistency

- Step back and check for bias from
  - EEOC perspective
  - Retaliatory motivation
  - Personal bias

Beware of your own irritations

- Is Carol a thorn in your side? Maybe you should back off?
- How do you treat those who irritate you and are not your friends?
- Are you documenting your own opinion and not the facts?
- Carol probably thinks that she is a good employee,(probably thinks she's your BEST EMPLOYEE) and that she's the same as others but is being treated differently.

Thorn in your side or treated the same?

- Check the records of all people similarly situated.
- EEOC says go back two years.*
- Are you documenting everyone similarly situated?
- Are others engaging in the same conduct but have a different personality?
- Are you documenting facts, not opinions?

- *But they usually ask for records going back at least five years.

Four areas for evaluation

- Performance
- Negligence
- Rules and behavior
- Insubordination

Performance

- Presume the employee's good faith – avoid cynical presumptions.
- That presumption should only be overcome by proof of intentional disregard
- What is misconduct? Not mere inefficiency, unsatisfactory conduct, poor performance due to inability or incapacity, isolated instances of inadvertent or ordinary negligence, or good-faith errors in judgment
- Did the EE know what the standards were? Did you tell him/her?
- Have you documented failure to meet standards?
- Is there consistent enforcement?
- This must be a priority – you cannot be "too busy" to follow up on the EE's performance.

Elements for validity

- Is it job-related?
  - For example, what are the essential functions of the job? What does the job description say?
  - Is the valuation based on those essential functions and not other characteristics? Rated on communication skills or appearance, but that is not part of the essential functions?

Elements (cont'd)

- Objective criteria – can you explain to the employee, or a judge or a jury what the criteria are specifically? Examples?
- Same criteria being used for all?
- Are you using a standard evaluation form measuring all on an equal scale?
- Are your supervisors being trained in the use of the criteria?
- Is the process standardized and controlled?

Performance Evaluation is not…

- It is not something management does **to** employees.
- It is not something that happens once a year in a little room for 20 minutes.
- IT IS A SYSTEM!!!

The Process

- Set expectations at the start
- Involves ongoing feedback and documentation, i.e., follow-up memos.
- Does the EE know the targets?

Performance Improvement Plans

- Don't wait until it's too late.
- Documents issues of concern.
- Gives fair warning.
- Documents employee good faith.
- Forces the supervisor to communicate.
- Allows correction which can prevent discharge.
- Provides opportunity for EE to avoid "fight or flight" and get another job. So often about dignity.
- What is the downside to a PIP or LCA?

Avoid accusing

- Describe and document the areas of concern

  "Carol is incompetent."

  What does that mean?

Describe with specifics

- Carol is expected to fill out the purchase orders. They are on a standard form. Here is the form. Here are the last forms Carol filled out incorrectly.

DON'T LET THE PIP FALL DOWN A BLACK HOLE

- Monitor
- Note corrected performance
- Document continuing issues
- Failure to do so renders the original PIP useless and may require starting over

Carol failed a drug test and was put on an LCA. Part of the LCA allowed drug-testing at any time. None was done. Carol complained about her supervisor being a bully. Supervisor NOW wants to drug test Carol. What do you think?

Exhibit #1 in litigation:

- The evaluation.
- Carol has been a thorn in her supervisor's side for three years. He now wants to fire her.
  - Look at her evaluation. What do you think it says? Carol doing a great job.
  - It's hard to be honest. But it's critical.

Ordinary negligence is not misconduct.

- It's a mistake.
- Reckless disregard can be misconduct.
  - Look at repetition – Harry cut off his finger using the table saw when he was horsing around – probably an accident; but if he cuts off a second finger…..
  - Seriousness – petty v. major
  - Safety
  - Is there a failure to recognize the issues or a lack of willingness to correct?

    Comments like, "Go ahead and get it over with" or "We didn't need that customer anyway" or "You don't need me to make copies, we're wasting paper".
  - EE needs to have a desire to do a good job. If she doesn't, it's probably ok to fire her. If you can objectively defend your decision.

Policy/Rule Violations and Behavior

- Reasonable rules? Are they outdated? Do they go to the heart of the matter or just picky/petty? Courts have said stacking up picky little things may be indicative that the ER is "out to get them."
- Is the rule in writing? Did the EE know about it, receive it and understand it? For example, language and disability issues? Does your policy say "may" or does it say "shall" or "must"?
- Can you prove an EE violated a policy?
- Do you have documented warnings about consequences of violation?
- Seriousness of the violation?
- Consistent enforcement?

Insubordination

- What do you think that means?

Insubordination as a rule violation

- Refusal to obey a direct order.
- For arbitration/cba, this must be tight.
- Must be an order. Not "Would you please…" or "I would like you to do this."
- It must state the consequences of refusal.
- Exceptions: Safety issue and illegality (state and local ethics laws, not personal).
- Opinion is not refusal: "That is the stupidest thing I ever heard" is not refusal.
  - LCA which says "may result"

Other infractions

- Document the issue or behavior
- Why is it work-related?
- Seriousness
- Documented warning regarding further repetitions.
- Documentation of repetitiveness
- Consistency of enforcement

Objective Descriptions and Verifying Facts

- Is it defamation – false information which injures another person (Not factual)?
  - Three types:

    Intentional

    Negligent (Lies which you believe and act upon that belief.

    False light (overgeneralized)

Immunity

- Was the information reasonably necessary for the protection of the interests of one of the parties?
- Was the scope limited to what is reasonably necessary to protect the interest?
- Communicated on a proper occasion?
- Confined to proper parties only?
- Conducted in a proper manner?
- Conducted by good faith?

Negligence

- Even if it is not intentional, it may be inexcusably careless.
  - John Moore v. Joe Moore
  - "Jose" should have been "Juan"

Be sure of the accuracy

- Check the records
- Check the calendar
- Check the physical site
- Try to verify – just b/c someone says it does not mean it is accurate. Show me. EE says an object blocked their line of sight.
- Generalities are not enough. What do the words mean?
- Is the testimony realistic?

Generalities

- Alcoholic
- Thief
- Germ-ridden
- Paranoid
- Half bubble off level
- Incompetent
- Bad attitude
- Racist
- Sexist

Specifics – describe facts, don't label people

Alcoholic	three times at work under the influence
Thief	$600 unaccounted for (but does that equal theft?)
Germ-ridden	failed inspections two times
Paranoid SOB	Six fights in the last three months
Half bubble off level	What are the standards?
Racist/Sexist	What words did they use?
Incompetent	What is the behavior?

Don't Kitchen Sink

- Adding in every single bad thing an EE does will confuse the issue and weaken the case.
- Creates extra fronts to defend – some will be weak and affect the credibility of the strong points.
- Can implicate or trigger laws or ways to sue which were not at issue before. More liability you do not need.
- If HR won't let you, they are probably saving you.
- Including all the behaviors and bad traits exceeds work relatedness.
- Witnesses often want to tell you about nonwork-related personal facts about the EE. Lift your pen. Do not put that in your notes.

Is it just irritation?

- Throwing in everything that irritated you opens the door to retaliation suits.
- Bound to be some protected activity in there. Most everyone is protected in one way or another.
- Keep your clean case clean and simple.

The Take-Away

- Report facts
- Don't embellish
- Do not exaggerate for effect
- Do not speculate
- Be transparent about what you do not know
- Do not "fill in the gaps."
- You don't need all the facts, you just need enough facts. And if you don't have enough, you need to rethink the action you are contemplating.

Do This:

- Date (Including year)
- Specific facts (Susie is disrespectful and said..)
- Accurate and honest statements
- Explanations regarding a document's purpose
- Direct quotes
- Witnesses/others involved
- Meeting attendees (names and titles)
- Reference to company rules and policies

And this…

- Confirm ee access to company policies
- Drafter's printed name, signature, title
- Previous counseling that may not have been documented
- For disciplinary documents, ee signature (or refusal to sign) and any comments
- Be direct, specific expectations and why the ee said they are not meeting expectations
- Action plan/next steps, specific changes ee needs to make, goals and how to achieve them, and consequences for failure.

Not this…

- Editorial comments/personal opinions (EE gave more whiny excuses about dr. appointment.
- Unsupported conclusions/accusations (EE is a drunk)
- Derogatory comments
- Generalities (EE has a bad attitude)("not a good fit")
- Legal terms and conclusions (EE engaged in sexual harassment)(that's a legal conclusion)
- Absolutes (EE always misses deadlines)

Or this…

- Proxy adjectives (“too emotional”)
- Hedge language (“ee seems to be making mistakes”)
- Abbreviations
- Sarcasm
- Promissory language (placing ee on “six months probation”)
- Speculation
- Excuses for ee (“we know ee tried his best, but…)

Or this…

- Inaccurate statements, even if they are to be nice (providing restructuring as reason for discharge when it is really for cause)
- Confusing language, spelling and grammar errors

The Document

- Date
  - Dear Employee
  - The purpose of this document is to inform you of my recommendation to….
  - The reasons for my recommendations are based on (A statement describing the infraction and reference the specific policy, procedure or code of conduct)
  - Describe previous or related infractions and disciplinary action which occurred within the past 3-6 months.

The Document

- Insert a statement with a reminder to ee that another similar or related incident may result in further or additional disciplinary action.
- Outline due process and a statement that employee has the right to:
  - Present the employee's version of the events to management within a specific time frame as outlined in your personnel policy/handbook

The Document

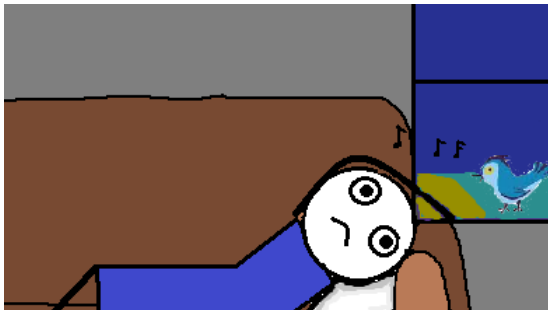
- Example:
  - Within three business days after the receipt of this letter, please schedule a meeting with me to discuss this issue or reply in writing. I will consider the information you provide me at that time before I forward my recommendation to HR.

What keeps me awake at night…

- Inconsistency
- Favoritism
- E-mails – they often vent frustration, and it's a document. "What do I do with this crazy b…?" What's the message?
- Cryptic notes and abbreviations.
- No date on the notes.
- No identification of who took the note.
- Was this document actually sent or is it just a draft?
- Supervisor writes all over the original documents. Preserve and protect the original. Make a copy if you want to write all over it.

I'm still awake

- Failure to coordinate with other managers
- Did not keep documents
- Did not keep EE's notes on excuses or reasons for actions
- Assumed someone else kept the records
- Speculation and labeling
- Writing on documents "oriental chubby guy who was wearing hearing aids"



Document ALL Warnings

- A verbal reprimand is worth the paper it is written on, but…
  - Check with HR before you put it in writing or email
  - Give a copy to the employee. (Always??)
  - Even nondisciplinary counseling should have a follow-up memo

Preserving the Evidence

- Every time you fire someone you should assume they are going to file a lawsuit
- "The cloud ate our records" will not be met with much sympathy.
- There may be sanctions: Huge expense for restoration, penalties, suppression of evidence, jury instructions that they can presume guilt, or summary judgment granted for bad faith
- What's the worst thing???????

EEOC advice on storage of records

- You are responsible for your vendor's storage of your records.
- Preserve personnel and hiring records for a minimum of one year from the date of the personnel action. I would keep them longer.
- Must have unfettered access to all records if there is an EEOC request.
- It's your problem, not EEOC's.

Where's the camel?

Questions?

- You got this!!!!!