

## Disciplining and Documenting Employee Behavior - Guidelines To Consider

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This month's topic will discuss some basic issues to consider with respect to disciplining and documenting employee behavior.

Disciplining employees is one of the least favorite, and most necessary, tasks that business owners and managers have to deal with. However, since practically every employer will have to take steps to discipline an employee at some point, following are some guidelines that you might want to consider.

1. Establish ground rules – A great way to keep disciplinary problems to a minimum is by establishing ground rules, and making sure those rules are clearly communicated to employees. One of the best ways to accomplish this is by creating a good disciplinary policy. At the same time, any disciplinary policy you adopt should explicitly state that all employees are employees at will. Mississippi courts typically protect employers that have an express statement regarding employment at will within their policies.

2. Prohibit discrimination and harassment – Although most of my clients have adopted policies that prohibit discrimination and harassment in the workplace, I still run across situations where employers have failed to adopt a formal reporting procedure, or have failed to keep abreast of changes in employment law. The United States Supreme Court has provided substantial protection for employers that exercise reasonable care to prevent and correct harassment and discrimination. Obviously, this includes the adoption of an effective policy, as well as its implementation through training and communication.

3. Adopt a flexible disciplinary system – Flexible disciplinary systems typically provide the employer with the ability to “match the punishment to the crime.” Examples of a flexible disciplinary system might include verbal counseling, written warnings, suspension, and termination. One of the best defenses employers have in a wrongful termination suit is to be able to show that the former employee was warned, at various levels, for the conduct that resulted in his or her termination. Also, make sure that your policy reserves the right to utilize whatever form of discipline you deem appropriate, up to and including termination. While you can consider mitigating or aggravating factors in disciplining employees, make certain that you discipline similarly situated employees in similar ways. Otherwise, litigation can arise.

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4. Document, document, document – The importance of documenting employee behavior (and disciplinary actions) cannot be overstated. Far too many cases turn on the fact that there was simply no documentation in the employee’s file regarding performance issues. I recommend to my clients that they document every disciplinary action they take and include the documentation in the employee’s personnel file. This includes generating a memo when a verbal reprimand is appropriate, as well as documenting the written warnings given for more serious offenses. A memo or written warning should contain information regarding the date the warning or reprimand was given, a description of the misconduct or inadequate performance, the date on which the misconduct or inadequate performance occurred, a signature line for the manager / owner, and, if it is a written warning, a signature line for the employee. A novel approach some companies have taken is to allow the employee to submit a written statement regarding their version of events. This practice can tend to keep the employee from “changing their story” later during a deposition or at trial.

5. Performance evaluations – Performance evaluations can be an effective way to prevent (or defend) lawsuits. An honest appraisal, one that details shortcomings as well as positives, can be very helpful should litigation arise. Make sure that your evaluations are honest and objective – avoid grade inflation, where every employee is “above average.” If an employee has been the source of disciplinary problems, consider that in your rating. If a number of disciplinary problems exist, and you still rate the employee “satisfactory,” then you might have to defend your later decision to terminate that “satisfactory” employee. It is difficult to successfully argue at trial that an employee was a bad employee when your performance evaluations state that the employee was satisfactory or above average.

6. Employee handbooks – Employee handbooks are one of the best ways to avoid unnecessary litigation. Handbooks can expressly reserve your employees’ employment at will status, and at the same time, set down rules that you expect your employees to adhere to. Effective handbooks typically contain work rules regarding employee conduct, personal appearance and demeanor, absenteeism / tardiness, confidentiality, drug-free workplace, and statutory issues, such as the ADA, Title VII, and the ADEA. Disciplinary rules should also be a part of your handbook. You should also consider having your handbook reviewed periodically by a lawyer to make sure that the handbook has kept pace with changes in the law.

The above information is general in nature, and should not be considered to be legal advice regarding any specific issue that might arise. However, I would welcome the opportunity to discuss any of the above issues, or any other legal issue that you might encounter. Nichols, Crowell, Gillis, Cooper & Amos, PLLC is a full service law firm, and we would be pleased to assist you with virtually any situation on a timely, efficient basis.