

A Better Partnership®



Winning Through Documentation

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Overview



- Importance of Recordkeeping and Documentation: an Overview
- The Personnel File
- Performance Reviews
- Documentation for Problem Employees
- Before you Terminate
- Some Final Words



Importance of Recordkeeping and Documentation: an Overview



Laws Every Employer Should Know

- Illegal to discriminate or harass on the basis of a protected category: age, race, sex, national origin, color, religion, disability, pregnancy, height, weight, familial status, marital status
- Illegal to discipline or retaliate against an employee for reporting a violation of the law
- Illegal to fail to provide a reasonable accommodation to a person with a disability
- Illegal to discriminate against or fail to provide leave to an employee with a serious health condition (FMLA employer)
- Illegal to discipline or discriminate against individuals for engaging in protected concerted activities (including Union activities)



At-will Employment

- When employment is without a contract for a specified term or that states otherwise, the relationship is at-will.
- In Michigan, a jury is not supposed to second-guess an employer's reasons for terminating an at-will relationship.
- BUT . . .



Why do I need documentation if employees are “at-will”?

- “At-will” status only applies to prevent “wrongful discharge” claims.
- “At-will” status is no defense to otherwise unlawful conduct.
- If a discrimination claim is made, we must be able to show that we did not treat a person with a protected characteristic more harshly than someone else for the same misconduct.



Hit with a Discrimination Claim

- Let's pretend that your company is hit with a discrimination claim.
- What does the court consider?



Defending Discrimination claims: McDonnell-Douglas Framework

- The rebuttable “Prima Facie” case:
 - ◆ Plaintiff was a member of a protected class.
 - ◆ Plaintiff was subject to an adverse employment action.
 - ◆ Adverse action occurred under circumstances giving rise to an inference of discrimination.
- Burden shifts
 - ◆ Employer must articulate a legitimate, nondiscriminatory reason for the adverse employment action.
 - ◆ Appropriate documentation helps ensure that employers can meet their burden and win. Through documentation.



Pre-Employment: the Handbook

- Every Handbook needs:
 - ◆ Equal Employment Opportunity Policy
 - ◆ Harassment Policy with clear complaint procedure
 - ◆ Electronic Monitoring Policy (with acknowledgment) and Social Media (maybe)
 - ◆ Clear “At-Will” Policy
 - ◆ FMLA Policy if you qualify
 - ◆ Social Security Number policy



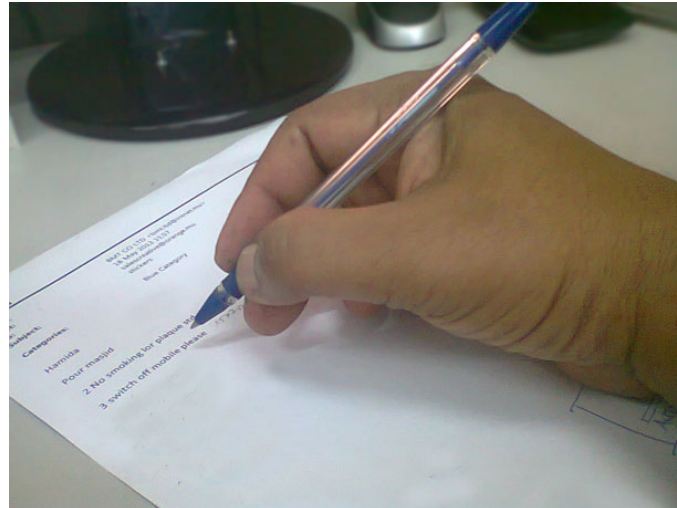
Pre-Employment Relationship

- Written job descriptions
 - ◆ Important in the ADA context
 - ◆ Include specific tasks and responsibilities
 - ◆ How do you do a good review if you don't have a good description of the job?
 - ◆ Keep up to date



Pre-employment relationship: The application

- Ensure applicants certify that
 - ◆ Information provided on application is true
 - ◆ False information may result in discipline or dismissal
 - ◆ An agreed to SOL
 - ◆ A resume is not enough
- Avoid making interview notes on resumes or application forms
 - ◆ If hired, it will be part of the personnel record



Where to I get an application?

- ◆ You can find them online or buy them from employers associations (be careful) or
- ◆ We can draft one for you
- **MAKE SURE YOUR EMPLOYMENT APPLICATION HAS AT A MINIMUM THE FOLLOWING “EXTRAS”**



An At-Will Statement

- Try something like this:
 - ◆ "I understand and agree that my employment can be terminated with or without cause and with or without notice at any time at the option of either me or the company. I understand that no employee of the company has the authority to enter into any agreement for employment for any specified period of time or to make any agreement contrary to the foregoing."



And I'm Telling The Truth Statement!

- How about this:
 - ◆ "I affirm that all of the information contained on this job application is true and complete and that any falsification, misrepresentation or omission herein may result in refusal of, or immediate dismissal from, employment."

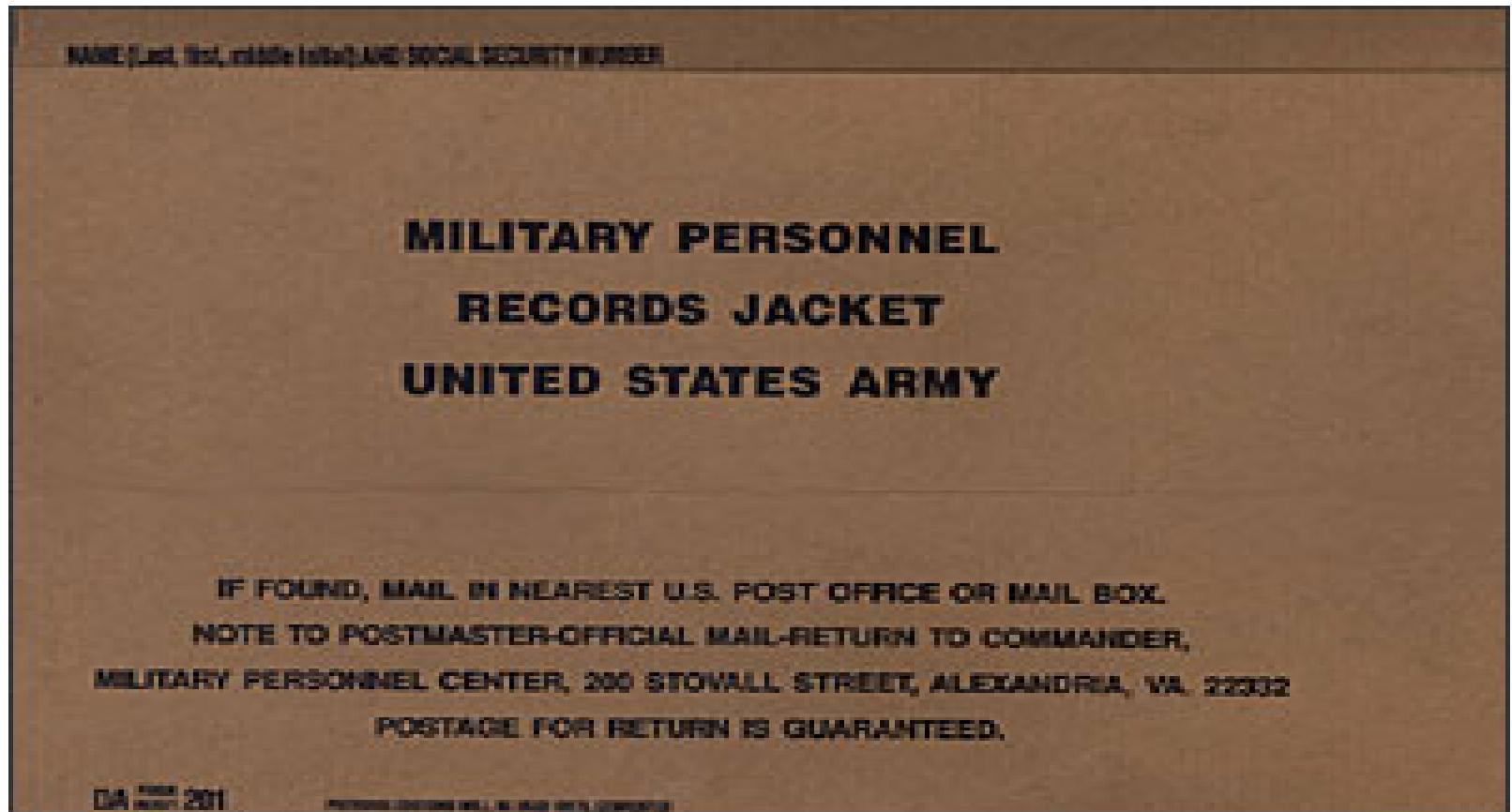


And If I Am Going To Sue You I Promise To Do It Right Away And Not Wait 2 Years Statement!

- Use this:
 - ◆ "I agree that I will not commence any action or suit relating to my employment with the company (or termination of the employment) more than 180 days after the employment action at issue, and I agree to waive any statute of limitations to the contrary. I understand that this means that even if the law would give me the right to wait a longer time to make a claim, I am waiving the right, and that any claims not brought within 180 days of the action complained of will be barred."



The Personnel File



The Personnel Record

- **Bullard-Plewecki Employee Right to Know Act** governs the maintenance and disclosure of personnel records



Bullard-Plewecki Employee Right to Know Act

- Broad definition of “personnel records”
 - ◆ If documents should have been included in an employee’s personnel file and were not, the employer may be precluded from using them in litigation.
 - ◆ Employee can sue employer for failure to comply with the act’s recordkeeping requirements.



The Personnel File

- Include initially (if applicable to your organization)
 - ◆ Completed employment application
 - ◆ Any employment agreements, including non-compete and confidentiality agreements
 - ◆ Offer letter
 - ◆ Employee handbook acknowledgement
 - ◆ Sign-off sheets for any employee policies
 - ◆ Training record and orientation checklist
 - ◆ I-9s (should keep these as a separate file, but they are part of an employee's "personnel record")



The Personnel File

- Maintain the file! Include:
 - ◆ Attendance record
 - ◆ Performance records
 - › Performance reviews
 - › Disciplinary records
 - ◆ Compensation and benefits records
 - › Benefits application or enrollment forms
 - › Beneficiary designations
 - › Compensation history
 - › Payroll deduction authorization
 - › COBRA notices



What to leave out

- Records of an employee's associations, political activities, publications or communication of non-employment activities, unless employee consents or activities interfere with work or occur on work premises during work hours
- Arrest records that did not result in a conviction, unless a felony charge is pending



Not part of personnel record

- Confidential medical records, including those made by the employer if the medical personnel involved has access to the file
- Information relating to a criminal investigation by the employer
 - ◆ These must be destroyed if the employee is not subject to discipline, and employee must be notified upon completion of the investigation or within two years, whichever comes first.
- Records relating to grievance investigations that are not used for any employment purposes



Not part of personnel record

- Records maintained by an educational institution directly relating to a student and protected by the Family Educational Rights and Privacy Act of 1974
- Employee references if person making the reference is identified
- Information that would constitute a clearly unwarranted invasion of privacy if revealed



Employee rights under B-P Right to Know

- Employee may review his/her personnel record upon written request up to two times per year
 - ◆ Insert a response if they disagree with something
 - ◆ Must be allowed to copy (reasonable fees are okay)



Employer duties under B-P Right to Know

- May not disclose disciplinary records to a third party (except the employee's union) without prior written notice to employee by first-class mail
- Not required if
 - ◆ Employee waived notice
 - ◆ Ordered in a legal proceeding or arbitration
 - ◆ Requested by a government agency in relation to an employee's claim

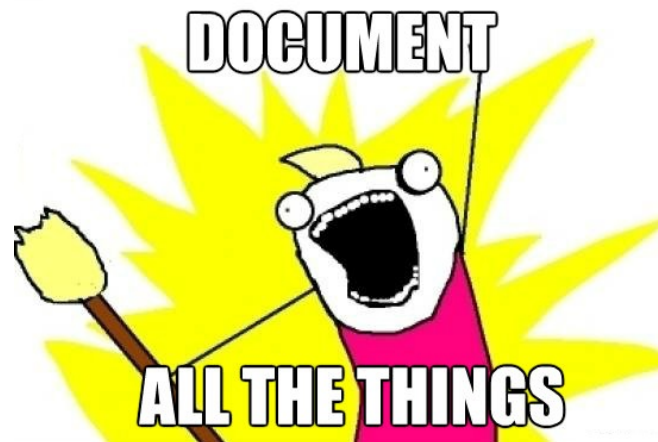


Performance Reviews



Documenting Performance Reviews

- If a discrimination claim is made, we must be able to show that we did not treat a person with a protected characteristic more harshly than someone else for the same misconduct.
- An evaluation serves to explain any resulting adverse employment decision by providing a record of an employee's performance over time.
 - ◆ Document poor performance BEFORE adverse decision



Actual performance review comments

"A photographic memory but with the lens cover glued on."

"He's so dense, light bends around him."

"Donated his brain to science before he was done using it."

"Fell out of the family tree."

"A room temperature IQ."

"Takes him an hour and a half to watch 60 minutes."

"Got a full 6-pack, but lacks the plastic thingy to hold it all together."



The Form does not matter, but

- There is more potential for discriminatory treatment under subjective criteria
 - ◆ But: Not all job functions can be narrowed down to numbers
- Limit the choices to between 3 and 5 (e.g., needs improvement/acceptable/above standard/outstanding)
 - ◆ Too many choices can create inconsistencies
 - ◆ A little attention to detail goes a long way
 - › Make sure evaluations are well written and clear



No, no, no!



WARNER NORCROSS & JUDD LLP
EMPLOYEE DEVELOPMENT FORM

Name: <u>MARY A. RICHMAN</u>	Hire Date: <u>JUNE 10, 2009</u>
Attorney/Supervisor: <u>MICHAEL LEBEL</u>	Review Due Date: <u>APRIL 10, 2009</u>
Completed By: <u>M. LEBEL</u>	

Job Responsibilities: Incumbent or supervisor briefly describe the essential purpose of the position.

WHAT EVER I TELL YOU TO DO!

Strengths: Identify the individual's greatest strengths in performing their job responsibilities.

DOING WHAT I TELL YOU TO DO!

Accomplishments: Looking back over the 12-month review period, list the individual's major accomplishments and/or special skills and abilities brought to the job.

DOING WHAT I TELL YOU TO DO WITHOUT COMPLAINING

Professional Goals: List career goals this person should achieve over the next 12 months. Career goal setting is an objective (Goal II, Strategy II.A.3) outlined in the WN&J Strategic Plan.

KEEP DOING WHAT I TELL YOU TO DO

Training – List training sessions attended over the past review period and classes to be taken over the upcoming review period. Include Computer classes as well as outside training attended or wanting to attend.

Training Taken:

Training to be Taken:

Technical Skills: Assess the individual's technical skills including computer skills and knowledge of functional area and procedures.

Exceptional Very strong Meets expectations Additional time/ Poor training needed

Comments:

Areas Needing Improvement: Indicate where current performance needs to improve and provide guidance for the improvement.

NONE

WN&J Expectations: To maintain an environment that fosters a positive, collegial atmosphere among firm members, we expect everyone to follow these basic principles of good working relationships, as reflected by our Statement of Expectations. Please indicate performance in each of these areas.

	Outstanding	Meets Firm Expectations	Improvement Needed
Respect – Treat each other with respect and in a professional, courteous and civil manner, whether in person, by telephone or in written communication. Refrain from profanity, insults, ridicule, or other disparaging remarks.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Encouragement – Recognize, and freely express appreciation for, each firm member's contribution.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Truthfulness – Never knowingly misrepresent, mischaracterize, or misquote information.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Communication – Communicate expectations fully and clearly when seeking assistance from another firm member. Follow up as necessary and be available to answer questions.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Responsibility – Take responsibility for our own actions. Never try to shift responsibility by blaming others.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Cooperation – Work together in a spirit of cooperation toward our common goals.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Feedback for Supervisor: List things your supervisor could do to improve your efficiency or job satisfaction.

Mary A. Richman 01/10/09 Michael Lebel 04/10/09
Employee Signature Date Attorney/Supervisor Date

Would you like to discuss this evaluation with the Director of Human Resources? Yes No

Note to Employee: Your signature on this form does not convey agreement with all aspects of your evaluation; it means you have reviewed and discussed the evaluation with your attorney/supervisor.

Reviewed by Director of Human Resources _____



Performing Employee Evaluations is Like Driving a Ferrari



- Great car
- High maintenance
- ***If you won't do the maintenance . . .***
 - ◆ ***Don't buy the car***
- Good evaluation systems are good
- Bad evaluation systems create problems



“Forced Ranking Systems”

- Difficult to administer
- Legal risks
- Inappropriate for smaller employers
- Main Value: Forces managers not to engage in “grade inflation”



Good Evaluation System Basics

- We do them carefully or not at all
- We do them when we say we will
- We don't rate everyone "excellent"
- We rate "below expectations" when that's the honest rating
- We don't impair "at-will" status
- We set measurable expectations
- We require employee involvement
- When we say we'll monitor an issue during the coming year, we do it



Writing the evaluation

- Use simple and understandable words
- Make sure both you and the employee understand what the evaluation means and that the meaning is the same
- Write so that an outside third party could understand (a judge or jury, if worse comes to worst)
- Identify specific examples where employee performance fell short of or exceeded expectations



Don't Grade Inflate

- Average means average
- When we grade inflate we tell good employees that they can't do better and we tell poor employees they are doing enough



Be Careful of Subjective Evaluations

- The issue is whether the employee is valuable to the business
- The issue is not whether the employee is like you



Be Careful of Memory

- Poor employees will improve performance shortly before the review
- Can you remember what happened over the past year?



Quality Counts

- Employees will not accept your criticisms when the appraisal is
 - ◆ late
 - ◆ poorly written
 - ◆ subjective
 - ◆ lacks clear direction



Documentation for Problem Employees



Process of Disciplining problem employees

- Seven Steps
 - Notice
 - Reasonable Rule
 - Investigation
 - Proof
 - Equal Treatment
 - Penalty
 - Documentation



Joint Process

- Manager/HR
 - ◆ HR as “sounding board”
 - › legal checklist
 - ◆ HR as resource/partner
 - › potential EEO or other legal issues
 - ◆ HR as “governor”
 - › manager should be able to justify action to HR
 - › part of process/partnership
 - › not adversarial



Written Discipline Should Include

- Fact Scenario (with witnesses if applicable)
- Rules Violated (if applicable)
- Employee Response
- Discipline Levied
- Future Consequences



Notice and Reasonable Rule

- Notice
 - ◆ Published work rule
 - ◆ Handbook
 - ◆ Posted rules
 - ◆ Give with paychecks
 - ◆ Company newsletter
- Reasonable rule = common sense
 - ◆ Employee handbook
 - › Harassment rules
 - › EEO rule
 - › At-will statement
 - › Conduct rules
 - › Safety rules
 - › Attendance rules



Workplace investigations

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"Your last meal is the books you cooked."



Workplace Investigations

- Notify HR **immediately** for problems involving:
 - ◆ Discrimination
 - › Protected class, disability
 - › Retaliation: union, working conditions, safety
 - ◆ Harassment
 - › Sex or other protected class
 - › Retaliation for complaining about discrimination or harassment
 - ◆ Ethics
 - › Actions inconsistent with company policy or the law



Document the Incident and the Investigation



- Encourage complaints to be submitted in writing
- Preserve relevant material or objects: including any record complainant made
- Preserve relevant documents
 - ◆ Personnel files
 - ◆ Billing
 - ◆ Travel expense records
 - ◆ Training records
 - ◆ Attendance sheets
 - ◆ Witness interview notes



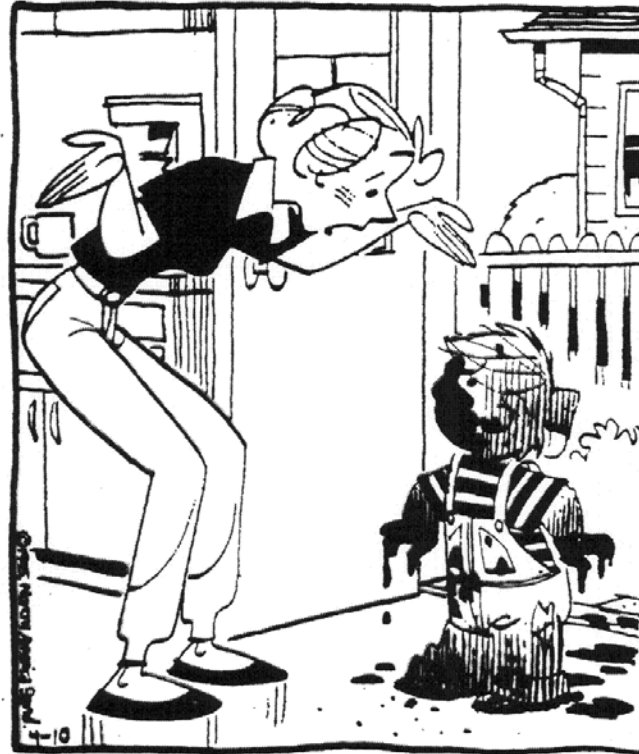
Interview Notes

- Notes must be complete and accurate, but fact statement can be supplemented if more is remembered later
- Arrange notes in chronological order
- Ask the right questions
 - ◆ What
 - ◆ Who (who did it, who was there?)
 - ◆ Why
 - ◆ When
 - ◆ Where
 - ◆ How



Document the Investigation

DENNIS THE MENACE



"WHO, WHAT, WHEN, WHERE AND HOW?"

Do it now – don't wait to
document the investigation



Interview Notes

- Type up interview notes right after the interview, and give to complainant for corrections
- Have complainant review notes for accuracy, sign them, and include in investigation record
- Retype with any corrections and have the complainant sign that version, and include in investigation record
- Repeat for all witnesses



Safeguard the documentation

- Preserve confidentiality:
important to select the
right investigator
- Treat all documents
with the same level of
security



Interview of Suspected Employee

- Take “quick notes” during the interview
- Expand notes immediately after
 - ◆ Narrative form
 - ◆ Quote key statements



Draft a Report

- Draft a thorough and even-handed report
- Include detailed description of events in chronological order
 - ◆ Date, time, and place of each incident
 - ◆ Sources of all information
 - ◆ History of procedural steps that occurred
- When report is complete, look through all assembled documentation and look for holes
 - ◆ Fill them
 - › Additional witnesses or re-interview witnesses



Finalize

- Remember that six months from now no one will remember any detail unless it's documented.
Document the important details!
 - ◆ Discard drafts when complete
- Don't shoot us in the foot by:
 - ◆ Making premature unnecessary admissions or credibility calls
 - ◆ E.g.- "it looks like we may be guilty of a violation"
 - ◆ E.g.- "I just don't believe our manager's story"
 - ◆ Documentation that ignores evidence without explanation



Email

- **DO NOT** seek information by email
 - ◆ Email is a document that people tend to treat as a conversation. That is bad in an investigation.
 - ◆ Email is hard to get rid of, and it looks suspicious when you get rid of it.
 - ◆ Email is too easy to forward inappropriately.



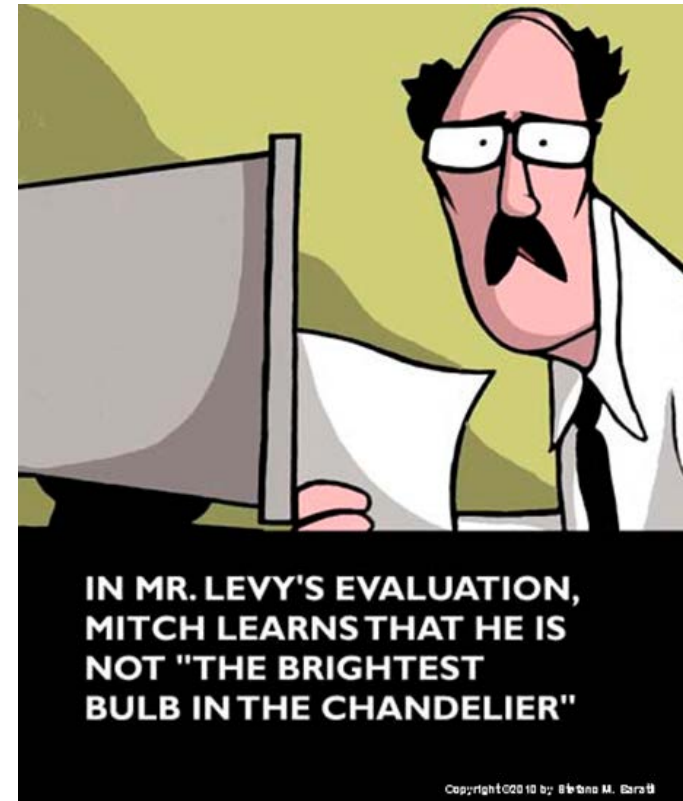
Proof

- Will a total stranger (like a judge or juror) read the record and conclude that you should have taken the action you took?



Performance Improvement Plans

- Purpose:
 - ◆ advise employee of critical status
 - ◆ advise employee of steps to be taken immediately
 - ◆ advise employee that continued employment is in jeopardy



Performance Improvement Plans

- Answer the questions:
 - ◆ WHO is in trouble
 - ◆ WHAT is the problem
 - ◆ WHEN did the problem start
 - ◆ WHERE is the problem occurring
 - ◆ WHY is this a problem
 - ◆ HOW can the employee fix the problem
- Make sure HR staff handles writing the PIP, not managers



Before you Terminate

Ready
FIRE
Aim



Before You Terminate. . .

- Can you honestly say that the employee won't be surprised?
- Are other members of management “on board?”
- Have you done a risk assessment?



Risk Assessment

- Length of service
- Performance evaluations
- Discipline warnings
- Retaliation claim
- Legally protected class
- Reaction of co-workers
- Ability to obtain new employment
- Consider using a separation agreement



Equal Treatment

- When the investigation concludes and it's time to take action, consider:
 - ◆ Have similarly situated employees been treated the same?
 - ◆ Do supervisors handle the same situations in a similar manner?



Fair Penalty

- Does the punishment fit the crime?
- Three strikes and you're out?
- Minor vs major offense
- Straw that breaks the camel's back



How to Terminate Someone



- Three keys to effective termination
 - ◆ Dignity
 - ◆ Dignity
 - ◆ Dignity



How to Terminate Someone

- State candidly the reasons for discharge
- Ensure confidentiality
- Explain benefits available
- Present a united front
- Allow opportunity to come back and gather personal effects
- Don't create a martyr in eyes of other employees



Some Final Words



A note on consistency

- “A foolish consistency is the hobgoblin of little minds.”
 - › Ralph Waldo Emerson



A note on consistency?

- Consistency is key?
 - ◆ Consistent application of policy
 - ◆ Protects employer's reserved rights
 - ◆ Protects against discrimination claims
 - ◆ Assists supervisors to implement policy



Consistent Employment Documents

- Application forms
- Job offer letters
- Trade secret/non-compete agreements
- Employee handbooks
- Employee benefit descriptions and plans
- Communications to employees



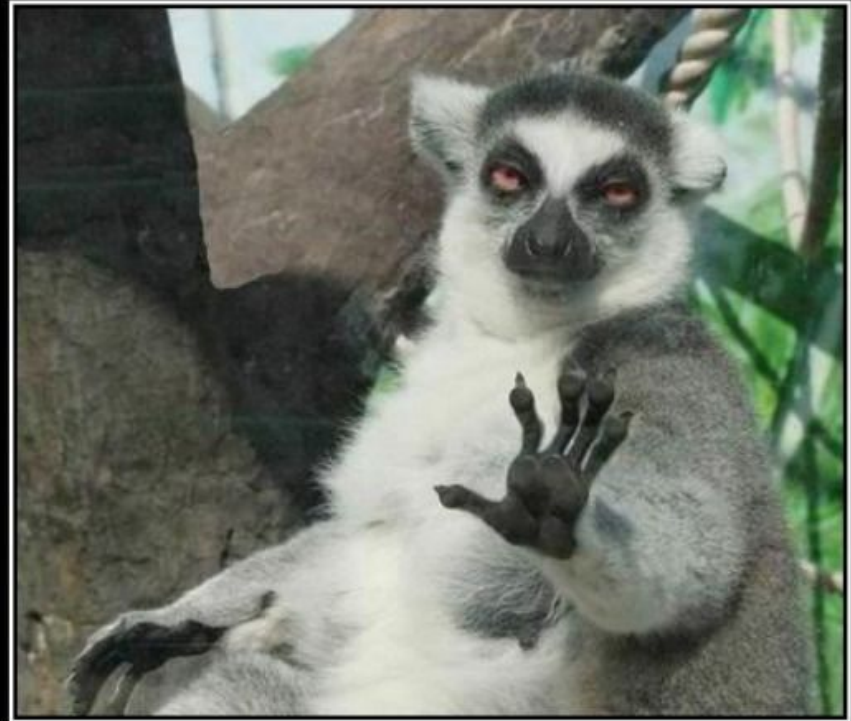
Final Note: Records Retention

- Federal employment regulations specify retention periods for different kinds of documents
- Make sure your organization has a written document retention policy – and follow it!



Thank you!

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STOP TALKING

You never make sense anyway.

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