

Documentation: It's Not Just For Patients

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“If it’s not documented, it did not happen” is a well-recognized maxim related to the defense of cases involving the delivery of medical care. A variation of that maxim is applicable when defending an employment case brought by a disgruntled employee: If you did not document the conduct, it couldn’t have been important. And it follows that if it wasn’t important, you can’t rely on it for any significant decisions related to that employee, including hiring, discipline or discharge.

This article highlights the times in the employment relationship when documentation is important and de-

scribes the attributes of that documentation that will provide supportive evidence if you need to defend your employment decisions.

Hiring Decisions: An employer is well served to keep a record of the individuals who were interviewed for a job and the information that was used when deciding who to hire. Ideally there will be a job description with a set of job-related questions asked of each person interviewed, a set of notes prepared by each interviewer with information related to the responses to each of the questions asked, and a documented description of why the successful candidate was selected. It is important to note the name of the person interviewed, the date of the interview (including the year) and the name of the person making the notes. The interviewer should be comfortable having the notes used as an exhibit if there is litigation. Therefore, they should not contain physical descriptors of the applicants, references to age or other protected attributes, or partial notes that could be misinterpreted. They should focus on work-related issues and the responses given by the applicant to a set of questions consistently asked of each applicant.

Performance Evaluations: Employees depend on performance evaluations to assess their success in an organization. Evaluations are frequently the only written documents employees receive about their work. Therefore, they should be timely, complete and HONEST. It is difficult to defend a performance based discharge if the most recent performance evaluation provides that the employee is meeting or exceeding expected performance standards. Moreover, it is difficult for an employee to believe that she is being dealt with fairly if she is told she is losing her job because of her performance when she has not received any notice of her performance deficiencies. Therefore, performance evaluations should focus on objective strengths and weaknesses. If the employee needs to meet objective performance goals, they should be documented. It is not instructive to say that Tom is not a team player; it is much more effective to say that Tom was asked to assist with a certain task on three occasions and each time he failed to help. You will have much more credibility when you defend a decision to terminate an employee’s performance if the employee was given clear, documented notice of

areas that need improvement.

Disciplinary Documents: Disciplinary documents need many of the same attributes of a good performance evaluation. They should demonstrate that the employee was apprised of the procedure, policy or work rule that she failed to follow, that the determination that the employee's performance was deficient is objectively verifiable, and that the employee was given a chance to improve. The employee needs to know the conduct that needs to be changed, how to fix the problem, the timeline, and the consequences of her failure to fix the problem. In Oregon, employment is presump-

tively at-will, which means you can fire an employee for any reason or no reason so long as it is not an illegal reason. However, your conduct will be suspect if the reason does not reflect a good business decision. Claiming to fire an employee for failing to meet vague performance expectations, when the real reason for the termination was because of absences protected by medical leave laws will be vulnerable to challenges: the real basis for the termination and the quality of the performance based communication.

Bottom line: Remember that the reason to document is to clearly communicate information to the affected

employee and, as with patients, to create a record of the reason for your conduct. Be sure you can document fair and impartial treatment of the employee that will allow a fact finder to support your decision if it is ever called into question.

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