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Managing Within the Law

webinar manual



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The reference text contained in this manual is one attorney's opinion and interpretation of the law. Your employer's policies and procedures may differ with this advice and still be consistent with good legal practice. This manual or the content presentation does not attempt to offer solutions to individual problems but rather to provide general information about current developments in employment law. Questions about individual issues should be addressed to the employment law attorney of your choice.

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Discusses the objectives of the workshop and the benefits for managing within the law while managing for excellence and fostering a respectful workplace. It provides an overview of the other sections in the workbook and of the main concepts of Managing Within The Law. Includes how to document and pitfalls of electronic communication.

Section Two – Performance Management 2-1

Discusses methods that can be utilized to manage effectively and help prevent wrongful action and retaliation lawsuits. It also discusses steps to counseling employees for improvement, alternatives to termination, and how to legally terminate an employee.

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Introduction

About Fair Measures

In 1982, we began providing legal services and training on management law for line managers, business owners, Human Resource professionals and lawyers. We specialize in training executives and managers in management practices that increase management effectiveness and prevent employee lawsuits. We conduct sexual harassment programs for all employees. We also provide hourly legal services, one-on-one counseling of people involved in claims such as harassment and retaliation, train-the-trainer, custom course development, policy and procedure drafting and review, and Human Resources staff training and consultation. Visit us at www.FairMeasures.com and subscribe to our monthly eNews.

All of our instructors are attorneys who have years of experience handling employment claims. All of them also are skilled presenters and facilitators, who use stories, humor and interactive exercises to make the law come alive. Our instructors also are published authors on many employment topics including sexual harassment, the Americans with Disabilities Act and conflict resolution.

We apply the latest techniques for adult learning to create fun, interesting, interactive programs with exciting information that people remember and apply. The most frequent feedback we get is that the class is too short!

Fair Measures is founded on the knowledge that organizations prevent lawsuits not by scaring managers into compliance, but by empowering them to create respectful workplaces.

Helpful Ideas for Today's Workshop

-  Focus today on improving your skills. Turn off outside distractions (like your cell phone). Almost everything can wait (If co-workers can cover for you, you may leave now to call them for help). You deserve some quality time to concentrate on your roles and responsibilities.

-  Listen and take notes with the intention that you will teach what you learn today to others in your work area.

-  If this organization's policies and procedures are in the last section, refer to them during class. After class, always check for the most current policies and procedures.

-  If you hear opinions different from your own, first seek to understand. Listen with respect.

-  These issues may be emotionally charged. As a group, we probably have experienced every issue covered. If any of us feels uncomfortable, we should speak up in the moment so that others will learn.

-  Working with others is not adversarial. It's a relationship based on mutual trust.

-  Allow yourself to become encouraged, more secure and empowered with the information and skills you learn today.

Why Manage within the Law?

Evolution of Employment Law - Managers in the past generally did not concern themselves with legal issues. Managing focused on profits and people. Legal issues were handled by the Human Resources or legal departments. Most managers never made decisions that had legal implications. All of that has changed. It started slowly.

- The federal Civil Rights Act of 1964 was one of the first restrictions on the manager's right to hire and fire.
- The Age Discrimination in Employment Act passed in 1967.
- The Pregnancy Discrimination Act in 1972.
- In 1978, sexual harassment was outlawed.
- People with disabilities were protected in 1992.
- Family and medical leaves were guaranteed in 1993.
- In 1980, the first modern wrongful termination case was decided by an appeals court in California.
- In 1995, the California Supreme Court extended wrongful termination law to apply to demotions or other adverse actions.
- Today, all 50 states and the District of Columbia recognize some form of wrongful termination.

Why Manage within the Law?

You Are Managing in a Mine Field - Almost every decision you make could result in a lawsuit. Whenever you hire, train, evaluate, discipline, demote, lay off or terminate an employee, you are making a decision with legal implications. Talking about sensitive issues with employees can create a hostile environment and lead to sexual or racial harassment lawsuits. An employee's complaint about a co-worker or working conditions can lead to litigation if not addressed properly. Emotional reactions and anger toward complaints can be considered retaliation.

Costs of Litigation - When there is a lawsuit, the costs are substantial. In many of these cases, employees are entitled not only to lost wages, but also to emotional distress damages, to compensate them for their pain and suffering, humiliation and embarrassment. But for all employers have spent on lawsuits, employers lost most of the time. And even when they won, they lost in terms of reduced productivity, bad public relations and their own attorney's fees.

Managing within the Law teaches you how to prevent lawsuits because preventing lawsuits is much cheaper than winning them. This workshop also teaches you how to make decisions, and how to document your decisions, so that if a lawsuit is filed, your chances of winning are greatly increased. More importantly, this program emphasizes managing in the spirit of the law. The spirit of the law is fairness, respect, dignity, acceptance and more. Your challenge as a manager is to create a workplace where everyone lives these values. It is a challenge, and there is a reward, because creating a respectful workplace benefits your organization, your colleagues and you. Thank you for choosing to be here today.

What Does a Lawsuit Cost?

1) What are the costs and losses to the employer if it is sued by an employee?

2) What are the costs and losses to you if you personally are sued by an employee?



Manager's attorney's fees are paid by employer if manager

- acted reasonably and in good faith
- within course and scope of employment

Why We Are Here

- Reinforce values
- Prevent lawsuits
- Legal compliance
- Manage in the spirit of the law

VALUES

Employer Policy

New laws

- Equal Pay Act (1963)
- Civil Rights Act, Title VII (1964)
- Affirmative Action (1965)
- Age Discrimination in Employment Act (1967)
- Pregnancy Discrimination Act (1972)
- Sexual Harassment regulations (1978)
- Wrongful Termination (1980's)
- Americans with Disabilities Act (1990)
- Family and Medical Leave Act (1993)
- Wrongful Action (1995)

Old law

- master/servant at-will relationship
-

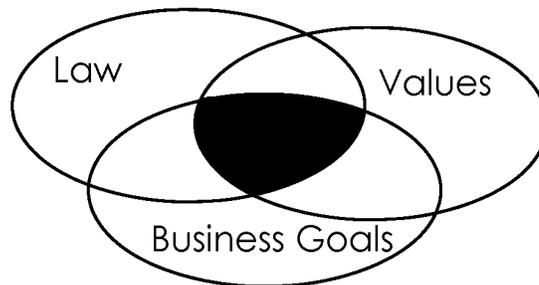


What Are Our Values?

In your group, brainstorm and put on flip chart paper:

- How should we treat others so we have a good working environment?

Manager's Decisions Must Balance



- ☐ Most law is based on values and is consistent with sound business principles, but it's not illegal to make unsound business decisions.

Workshop Objectives

- Understand laws and your legal responsibilities
- Enhance your skills:
 - interview applicants legally
 - set goals
 - document performance issues
 - avoid unintentional discrimination
 - take appropriate action while mitigating risk
 - partner with Human Resources
- Be inspired by the spirit of the law
- Have fun

Workshop Topics

- Four Key Concepts

- Performance Management
 - performance appraisals
 - corrective action
 - demotion
 - termination
 - layoffs

- Discrimination Law (EEO) - Affirmative Action
 - interviewing and hiring
 - promotions and glass ceiling
 - stereotypes
 - references

- Illegal Harassment

1 - Introduction

Course Topics - Managing Within the Law II and Hiring the Best

MWTL - Part II

- Meet Safety Requirements — OSHA, Workers' Compensation
- Manage Family and Medical Leaves of Absence
- Accommodate Injured and Disabled Workers - Americans with Disabilities Act
- Respect Privacy Rights — e-mail, voicemail, drug tests
- Manage Independent Contractors and Temporary Workers
- Properly Pay Overtime and Classify Exempt Employees
- Comply with Ethical Responsibilities
- Manage in Cyberspace
- Understand Manager's Rights and Employee Responsibilities

Hiring the Best: Interviewing for Top Talent

- The benefits of partnering with HR/Staffing teams
- The power of job descriptions and how to use them to the manager's advantage
- The proper way to prepare for an interview, including what can't be asked and what should and must be asked
- How to effectively use peer interviews
- Why behavior based questions work and how to use them for any job-related competency, including "soft skills"
- Screening resumes without creating legal risk
- What type of documentation should be created before, during and after interview
- How to handle applicants who are visibly disabled, pregnant, or with "unprofessional" appearance
- What to do when applicants volunteer "impermissible" information in a job application
- How to check references legally
- Rules about tests and non-conventional interview techniques - polygraphs, drug testing, quizzes, other strategies
- Visas and hiring - what managers need to know about H-1Bs and more
- Understanding the employer's policies, procedures and forms around the hiring process
- The legal framework for hiring, including EEO laws, affirmative action and reasonable accommodations

Four Key Management Concepts - Overview

- Be consistent
- Have a legitimate business reason
- Document events
- Call the experts

Key Concept #1: Be Consistent

- Treat like cases alike
- Consistent documentation proves consistent treatment
- Only the decision maker must be consistent
 - every manager must be consistent with overall employer policy
 - reasonable approach is to be as consistent as possible across the organization

Employer can treat employees inconsistently

- In promoting, when the employees have different qualifications.
- In giving merit increases, when employees perform at different levels.
- When the employees have different managers and the managers have different standards.

Key Concept #2: Have a Legitimate Business Reason

You can treat employees inconsistently based on:

- Employee qualifications
- Employee performance
- Employer rules
- Business needs

Key Concept #3: Document Events



Why document?



What is documentation?

- internal memos, letters
- e-mail & IM's
- notes of meetings, calls
- progress reports
- text messages
- one-on-one agendas
- employee self-appraisals
- blog entries
- warnings and corrective action
- performance improvement and 360s
- faxes
- web pages
- social network posts

Key Concept #3: Document Events

- Where is documentation?
 - employer hard drives and servers
 - personnel files
 - manager's PC, laptop, PDA, home PC
 - phone accounting logs, message slips
 - calendars
 - voice mail
 - time records
 - expense reports
 - cell phones

- How long to keep?
 - statutes of limitation can be many years from date of last adverse action
 - employer document policies must be followed
 - call HR for guidance

- Employee right to see files?
 - personnel files — yes, in most states
 - manager's working file — no, unless subpoenaed

The Documentation Process

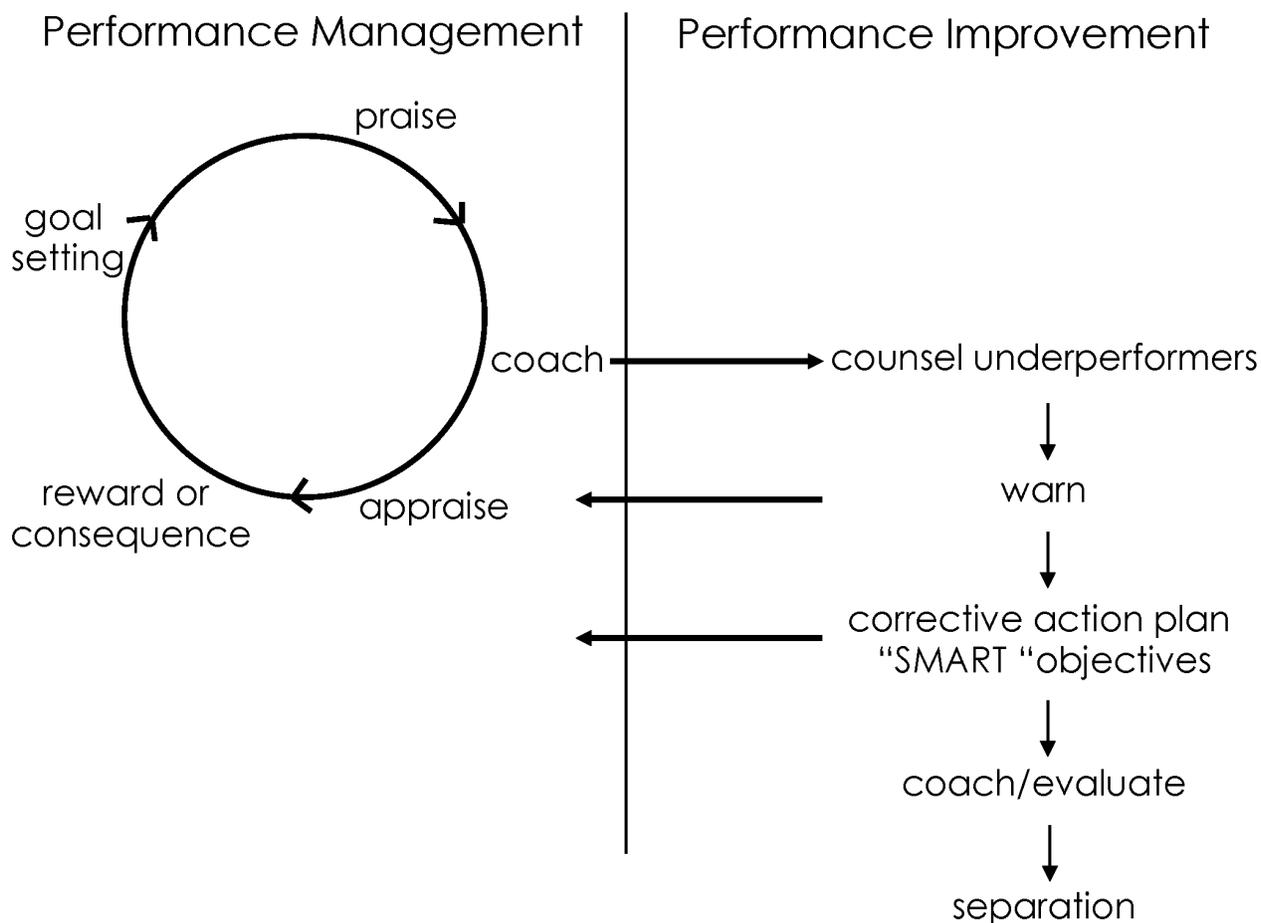
- Documentation is:
 - not the first step — talking is
 - collaborative dialogue between manager and employee
 - a process, not an event
 - the basis for continuous feedback and learning

- Manager's working files:
 - write it down the first time: if this happens again, will I want this documented?
 - manager's file is a conduit: act on it or throw it out
 - do not include draft documents; destroy drafts
 - pass it on to the next manager
 - mini "brain dump": make daily notes of coaching, praise, counseling, corrections

Manager's Working File: Sample

- 2-2-XX Weekly one-on-one with Bob; discussed upcoming product demos and quarterly goals. Bob agreed to submit "Happy Disks" proposal by 2-9.
- 2-4-XX Phone call from "Happy Disks" V.P. (Mary Client) telling me that Bob did great job at product demo. Mary was impressed with his product knowledge. She wants price for 10 units IDY-44 systems.
- 2-6-XX Bob was 5 days late submitting client invoices; discussed importance of submitting invoices on time and how impacts employer revenues.
- 2-12-XX Talked to Bob about "Happy Disks" proposal. Told him appreciated hard effort. Pointed out significant errors in pricing structure. Bob used last year's pricing scheme instead of the new price structure. If we had not caught error, would have resulted in \$50,000 loss in revenue. Bob said he understood error and would review more carefully in future.

Performance Cycle



- **Coach** "This is to achieve continuous improvement."
- **Counsel** "This is a critical area to improve."
- **Warn** "If you don't improve, your employment is subject to discipline action up to and including termination."
- **Plan** "This is specifically what you need to do, by when, and what I will do to help you achieve that." Use "SMART" objectives – **S**pecific, **M**easurable, **A**chievable, **R**elevant, **T**ime-bound.
- **Separation**

Performance Appraisals

- Appraisals let employees know that they are valued.
- Appraisals are key management documents. Do them — on time!
- Appraisals are key legal documents. Be honest!
- From first day on,
 - set goals keyed to organizational strategy and job description
 - establish standards keyed to performance appraisal
 - state how measured
 - monitor progress with regular one-on-one's
 - revise and set goals
 - document the process with email and working file notes
- Follow all policies and procedures.
- Performance appraisal do's:
 - compare this year to last year
 - include good and bad
 - avoid halo or devil effect
 - appraise the entire year
 - provide specific examples

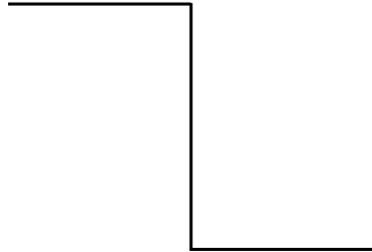
Performance Management

- Goal is to motivate, direct and improve employee performance.
- Real-time feedback is crucial.
- From first day on,
 - set goals keyed to organizational strategy and job description
 - establish standards
 - state how measured
 - monitor progress with regular one-on-one's
 - revise and re-set goals often
 - document the process with email and working file notes
- Follow all policies and procedures.
- Performance management do's:
 - regular feedback
 - face problems as they arise
 - avoid halo or devil effect
 - focus on the future
 - provide specific examples

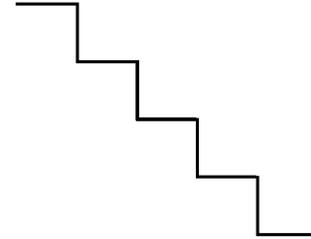
Address Performance Challenges

Follow all policies and procedures

Don't do this:



Do this:



Performance Improvement Process

- What is the employee doing—or not doing—that affects job performance?
- What is the impact on the team's performance?
- If there is no impact on individual or group performance, STOP! If it is a personal issue, consider a referral to Employee Assistance Program.
- If you have identified a performance problem, then:
 - Does the employee have a clear understanding of what you and the company expect?
 - Are expectations consistent across the team?
 - Are you treating this employee consistently with others?
 - Does the employee have the time, tools, training, and support needed to perform?
 - Does the employee have the technical and behavioral skills needed?
 - Are there special issues to consider (disability, family member illness, religious observance, etc.)?
- Determine what the employee needs to do.
- If coaching has not resulted in the desired outcomes, create a corrective action plan and timeline.
- Discuss with the employee and get feedback.
- Document, document, document!

Sample Warning/Improvement Form

Sample Form - may be used for misconduct warning or performance improvement plan. This is an example for use in class and is not this organization's form. DO NOT use this form outside class.

DATE: _____

Employee Name: _____

Supervisor: _____

STANDARD: *(State the policy or performance standard the employee has violated)*

PROBLEM BEHAVIOR: *(Specific instances when the employee has violated the standard and state negative consequence to the work. Be clear, and limit to specific verifiable facts.*

"On (date) at (time) you..."

"I have discussed this with you several times, include on XYZ dates."

DESIRED OUTCOME: *(State the specific result the employee must achieve using the "SMART" objectives. Give both do's and don'ts.)*

TIMETABLE: *(State the date by which standards must be achieved. Give timetable and milestones only in cases of poor performance, not misconduct. Include: "You must show immediate and sustained improvement.")*

CONSEQUENCES: *(State what will happen if the employee does not improve. Usually, "Failure to improve will lead to discipline up to and including termination.")*

EMPLOYEE'S INTENTION: *(Specific changes in behavior which the employee agrees to make to meet the desired outcome. Also used for other employee comments.)*

"I have read and understood the above."

Employee Signature

Original: Personnel File

Copy: Employee

1 - Introduction

Write Objective Documentation

- 1) Be honest.
- 2) Be specific. Limit to objective, verifiable facts.
- 3) Use clear, precise language.
- 4) Do not give your conclusions without facts and/or examples to support your conclusions. Can be based on reports from witnesses.
- 5) Avoid sarcasm, demeaning comments, inflammatory remarks, incriminating statements. Don't let your emotions get the better of you.
- 6) Document with quality, not quantity.

CONCLUSORY

OBJECTIVE, VERIFIABLE

Frequently, often

Ten times in the last two weeks.

You have a bad attitude

You slammed down the phone, hit your terminal, cursed Chris two times, refused to answer my questions about your project, responded to customer complaints sarcastically, and left work for two hours without approval.

You made an effective presentation

Your presentation followed a logical sequence, building interest through a combination of success stories and insightful questions posed to the customer. You used humor appropriately to defuse a tense moment. Your product knowledge was evident by your answers to questions.

You were drunk

You did not complete any work the afternoon of May 3. I saw you sleeping and when I confronted you you spoke with slurred words, rambling sentences and incoherent statements. You then left the area and were found an hour later passed out in the bathroom.

You are a good team player

Alternative:

Memo Writing Exercise

Write a disciplinary memo for _____ in the video.

Problem Behavior (list the specific, objective verifiable facts that are proof of the problem)

Desired Outcome (give broad directions that prohibit all similar behavior, and give positive examples of desirable future behavior)

Beware of Electronic Documentation

- E-mail, computer files, text messages and web visit logs generally:
 - are admissible in court
 - belong to the employer
 - are not private to the employee
 - may be accessed at any time by the employer

- Electronic time bombs:
 - admissions ("That's illegal." "That's harassment.")
 - emotional comments
 - sarcasm
 - first drafts & multiple drafts
 - mailing lists (breach of confidentiality)
 - jokes

- Action items:
 - follow employer policy
 - assume your boss or a judge is reading your e-mail
 - do not send jokes from or to work
 - unsubscribe from joke lists at work
 - don't visit non-work related web sites
 - limit personal e-mail
 - insure mail lists are current for confidential information
 - avoid e-mailing employee problems to HR or management— call instead
 - limit copies
 - don't mark "attorney-client" unless authorized
 - don't mark "company confidential" unless appropriate

Key Concept #4: Call The Experts

Keep others informed and seek their advice.
Team approach is most effective.

- Your management
 - maintain appropriate confidentiality
 - renew for consistency

- Human Resources
 - form a partnership

- Legal counsel
 - valuable resource

- Other team members
 - maintain appropriate confidentiality

Performance Management

Employment at Will & Its Limits

- At-will employment
 - employee has the right to quit
 - employer has right to terminate or take any adverse action at any time, with or without cause

- Examples of adverse actions:
 - demoting employees
 - taking away perceived good job assignments
 - assigning unpleasant tasks
 - assigning unwanted overtime work
 - denying promotions
 - denying requested transfers
 - transferring employees
 - deciding how to distribute employee rewards
 - denying or limiting pay increases
 - instituting corrective actions
 - terminating employment

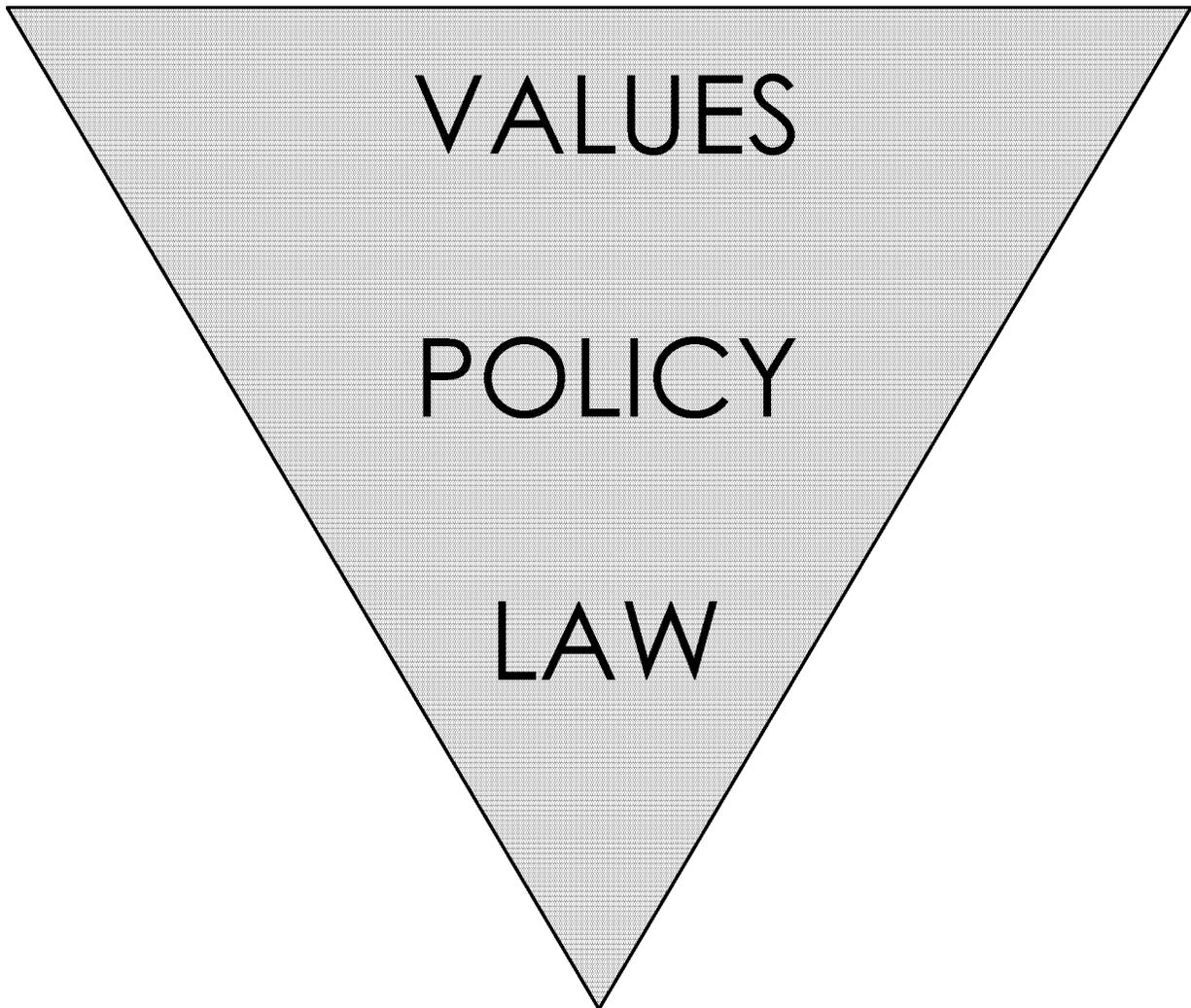
- Right to take adverse action at-will:
 - is limited by courts or statutes in most states
 - may be limited by employer policy or values

- Cannot take adverse action at-will if to do so would violate:
 - public policy (upholds other laws)
 - contract (employer policies, documents)
 - covenant of good faith and fair dealing (implied contracts)

Three Rules for Preventing Wrongful Action

- Keep promises
- Be fair
- Respect "whistle-blowers"

How can I help my employees succeed?



2 – Performance Management

Performance Mgmt. Case Study

As a result of a reorganization, you have inherited a salaried, exempt, professional employee. After a few weeks, you decide you really like Terry, but you can't figure out how he has lasted in the job for over five years. Terry has come in between 9:00 and 10:00 a.m. four of the last 10 days, left before 5:00 twice, and has missed both weekly deadlines.

You decide to have a talk with Terry, but before you do, you review what documentation exists. You look at the official personnel file, the former manager's working file and the e-mail files of the former manager. You spend hours reviewing, summarizing and putting this information into chronological order. When you're done, this is what you have:

Four years of identical performance reviews: Terry is rated meets standard in 3 categories and exceeds in 2 categories. Every review mentions need to meet deadlines better.

Last year's performance review: Terry meets standard in 2 categories and exceeds in 3. For the first time, Terry was rated exceeds in dependability, due to beating a major critical deadline.

This year's review is not due yet, but you do have this:

1-15 manager's file: Terry 4 days late on project deadline

3-15 manager's file: Terry 5 days late and counting.

6-1 e-mail, manager to Terry: Great job on meeting the 6-1 deadline. You are the top choice for that promotion coming up.

6-6 e-mail, Terry to manager: My wrist has been hurting with all the keyboarding and everyone else feels the same way, so I got everyone together and we have called the Safety Department and they are coming to do an ergonomics evaluation on all of the workstations tomorrow.

6-7 manager's file: Terry blew 6-6 deadline, still not here.

6-14 manager's file: Terry one day late for 6-13

6-28 manager's file: Terry two days late.

7-15 manager's file: Terry 7 days late

7-18 [your first day as manager] e-mail, from the Safety Department: As a result of our audit, you must purchase new ergonomic workstations for everyone in your area. This expense comes out of your departmental budget.

7-19 e-mail, manager to Terry: recounts your first 1-on-1 with Terry, sets objectives for 7-25

7-25 e-mail, manager to Terry: Terry missed deadline, estimates 2 days late

7-29 e-mail, manager to Terry: Terry is four days late; set new deadline for 8-5

Performance Mgmt. Case Study continued

8-5 manager's file: Terry called in "sick" to voice mail; work due today is not here

8-5 Today, just now, as you finished writing this chronology, you got an e-mail from your director to you: The requisition for a senior technical position in your group has been approved. Your predecessor intended to promote Terry, but of course the decision is up to you. Your decision must be in by next week to get the headcount in next year's budget.

There are two other employees in your group. They have been here for less than a year. Each has received one review, in which each was rated meets standard in 3 categories and exceeds in 2. There is no mention of deadlines, no notes about them in the manager's working file, and no relevant e-mail. They've met their deadlines these past two weeks.

After you have finished reading the case, discuss the questions on the next pages with your group. You also may wish to consult pages 2-7 through 2-15 in the manual, and management policies.

Performance Mgmt. Case Study - Questions

- 1) What justifications (see p. 2-9, or policy) do you have for not promoting Terry?

- 2) Which category of documentation would be given the most weight by a court — the performance reviews, e-mail or manager's file notes? Why? How well does this documentation support the fairness of not promoting Terry?

- 3) Name at least three state or federal laws (see first two bullets p. 2-13) for which Terry could claim retaliation for whistle-blowing if he is denied the promotion. What facts could he use to support his claims?

- 4) Do you think a court would say that, compared to the promises on p. 2-8, Terry was promised the promotion? How could the manager write the e-mail so there is no promise? Is the manager required to keep promises made by prior managers?

- 5) What facts in the case put you on notice that you should investigate Terry's reasons for poor performance? (p. 2-10)

- 6) If you decide to promote someone other than Terry, would Terry have a claim for wrongful action based on public policy? Based on breach of contract? Based on the covenant of good faith and fair dealing?

(Questions continued next page)

Performance Mgmt. Case Study — Questions

- 7) What should you do about the pending promotional decision?
- 8) Assuming Terry simply uses time poorly, name at least three things you could do to help him be successful.
- 9) Assuming weekly deadlines, what is a reasonable time to improve before termination?
- 10) Based on this case and your own experience, what lessons have you learned about writing performance reviews?

making promises?

helping employees become successful?

Next Steps:

- Please review all of the material on pages 2-7 through 2-15, and ask the facilitator any questions you have about the information.
- If you have any current situations that you would like to discuss with the facilitator in light of this information, now is the time to bring them up.
- What questions do you have about the legal or practical aspects of performance management, corrective action, investigations, coaching, counseling, performance improvement, or termination? Please ask them now.

Rule One: Keep Promises

- It's a matter of integrity

- Legally, we must follow our policies
 - some policies are mandatory
 - most guidelines allow for discretion

- Your decision not to follow a guideline should be
 - justified with a legitimate business reason
 - cleared with Human Resources and/or management as appropriate
 - documented

Don't Make Promises You Can't Keep

 Comments like these made to applicants, employees, contractors or temporary workers could be held to create contracts. (Instead, use the alternatives):

- "You will have job security."
("You may have opportunities for advancement.")
- "This is more than a job, it's a career."
("...it's an adventure.")
- "We've never had a layoff, so we never will."
("...but you never know what will happen in the future.")
- "You will have a great future here."
("The company has a great future.")
- "We always get bonuses."
("...but there is no guarantee for the future.")
- "You will be a permanent employee."
("You will be a regular employee.")

 Use comments like these to avoid making promises:

- I would like to...
- I'll try...
- I'll talk to my manager about...
- I hope...
- I'll think about...
- I will consider...
- I may..., I might...

 Don't make promises in career development conversations.

 If promises have been made, you may rescind them if:

- you give advance notice before rescinding the promise.
- the employee has not met all contingencies.
- the employee has not relied on the promise to his or her detriment.

Rule Two: Be Fair

Assess performance fairly and accurately, treating “like” cases alike.

- Employee performance issues
 - failure to improve after reasonable support and guidance
 - refusal to cooperate
 - denial of the problem or blame of others
 - tries hard but is incapable of performing to standards
 - performance not as good as other's
 - inconsistency/unreliability
 - other

- Employee misconduct
 - violates employer standards of conduct such as:
 - safety violations
 - discrimination & harassment
 - insubordination
 - disclosing proprietary information
 - theft
 - misuse of employer property
 - unauthorized computer access
 - falsifying employer records
 - illegal substances at work
 - weapons at work
 - fighting
 - abusive language
 - violence or threats
 - attendance abuse

Fair Performance Management

- Guidelines for fair handling of employee performance issues:
 - consult with Human Resources
 - follow all policies
 - communicate your expectations and assessments
 - conduct performance appraisals
 - coach, counsel, warn
 - develop performance improvement plan using “SMART” objectives
 - take corrective action
 - implement adverse action

 - Poor performance may be caused by outside factors
 - don't pry; do say "If there is anything at work affecting your ability to do your job, please let me know. If there is anything outside work affecting your job, I want to respect your privacy, but if I can help in any way, let me know or you can contact HR or the Employee Assistance Program."
 - be alert to potential issues of disability, family/medical leave, co-worker misconduct, etc.

 - In appropriate circumstances, some of the above steps may not be recommended

 - Give a reasonable time to improve
 - what is reasonable?
-

How and When to Investigate

- Investigations are conducted by qualified personnel (security, HR, legal)

- Manager duties:
 - be available for interviews
 - provide complete information
 - make employees available for interviews
 - address confidentiality
 - direct employees back to work who are talking about the accused or the complainant
 - make an extra effort to keep up morale in the office and ensure work is being accomplished
 - be proactive - have established expectations in place that gossiping and other non-productive or destructive activities are not tolerated

Be Fair When Taking Adverse Actions

- Do not fire on-the-spot
 - may immediately suspend pending investigation

- Do use appropriate safety and security measures

- Do tell the truth
 - "quit or be fired" = termination
 - no "sugar coating" the real reason for termination

- Be respectful by not publicly humiliate by yelling, firing in cubicle, firing in hotel lobby, airport or other public place.

- Partner with HR to:
 - ensure appropriate review of the situation, including consistency with other, similar cases
 - obtain final approval
 - obtain necessary documentation
 - notify others, as appropriate (e.g. security)
 - decide what to say to your group

Rule Three: Respect "Whistle-Blowers"

- Under federal law, workers throughout the U.S. who do the following in good faith cannot be retaliated against for:
 - reporting government fraud
 - questioning the safety of consumer goods
 - complaining about unsafe working conditions
 - reporting tax code violations of the employer
 - refusing to take a lie detector test (except in security positions)
 - taking time off for military duty
 - entering an alcohol or drug treatment program
 - complaining about illegal harassment or discrimination
 - organizing for a union
 - engaging in group action about working conditions
 - reporting accounting or financial irregularities
 - raising overtime or minimum wage issues

- Under the laws of most states, workers can't be retaliated against for:
 - filing a legal claim
 - expressing their political beliefs
 - serving on a jury or as a witness
 - refusing to commit perjury for the employer
 - receiving one wage attachment or garnishment
 - refusing to serve unsafe food
 - refusing to support political candidates/issues supported by the employer
 - filing a claim for Workers' Compensation

Rule Three: Respect "Whistle-Blowers"

Methods workers can use to raise their concerns include:

- filing lawsuits
- cooperating with government investigations
- filing complaints internally
- complaining informally
- contacting the press
- calling a company hotline

If you receive a complaint, even if you suspect bad faith:

- treat with respect
- contact HR, Safety, Legal or other appropriate resource immediately
- document

2 – Performance Management



Wrongful Termination Law by State

Y = This form of wrongful termination is recognized by state, N = This form not recognized,

NC = no cases or clear expression, NR = no definitive state ruling

State	contract	good faith	public policy
AL	Y	N	N
AK	Y	Y	Y
AZ	Y	Y	Y
AR	Y	N	Y
CA	Y	Y	Y
CO	Y	N	Y
CT	Y	Y	Y
DE	Y	Y	Y
DC	Y	N	Y
FL	N	N	Y
GA	N	N	N
HI	Y	N	Y
ID	Y	Y	Y
IL	Y	N	Y
IN	Y	N	Y
IA	Y	N	Y
KS	Y	N	Y
KY	Y	N	Y
LA	N	NR	Y
ME	Y	N	Y
MD	Y	N	Y
MA	Y	Y	Y
MI	Y	N	Y
MN	Y	N	Y
MS	NR	N	Y
MO	N	N	Y
MT	Y	Y	Y
NE	Y	N	Y
NV	Y	Y	Y
NH	Y	Y	Y

Wrongful Termination Law by State

Y = This form of wrongful termination is recognized by state, N = This form not recognized,

NC = no cases or clear expression, NR = no definitive state ruling

State	contract	good faith	public policy
NJ	Y	N	Y
NM	Y	N	Y
NY	Y	NR	Y
NC	Y	NR	Y
ND	Y	N	Y
OH	Y	N	Y
OK	Y	N	Y
OR	Y	N	Y
PA	Y	N	Y
RI	N	NC	Y
SC	Y	N	Y
SD	Y	N	Y
TN	Y	N	Y
TX	N	N	Y
UT	Y	Y	Y
VT	Y	N	Y
VA	Y	N	Y
WA	Y	N	Y
WV	Y	N	Y
WI	Y	N	Y
WY	Y	Y	Y

Discrimination

Employer Policy

- Equal Employment Opportunity
 - no discrimination; no harassment

- Diversity
 - collective mixture of employees' differences and similar characteristics
 - values
 - beliefs
 - experiences
 - backgrounds
 - skills
 - knowledge sets
 - cultures

Laws and Regulations

- Discrimination

- Harassment

- Affirmative Action (government contractors only)

What is Discrimination?

 Illegal discrimination is adverse treatment based on these protected characteristics

- Sex/gender
- Age 40 and over
- Race & color
- National origin
- Religion
- Citizenship
- Veteran/military status
- Genetic characteristic
- Pregnancy
- Family and Medical Leave
- Disability
- Sexual orientation (state law)
- Gender identity and expression (state law)
- Marital status (state law)

Discrimination Issues

- Key Question: how was this person treated compared to someone with different characteristics?

- "Glass ceilings" are found if:
 - individuals can show discriminatory promotional decisions and
 - their group is well-represented in lower ranks but not represented at upper levels

- Illegal discrimination can be intentional or unintentional. If same manager who hires employees also takes adverse action against them, there may be legal presumption of no discrimination.

Two Rules for Preventing Discrimination

- Don't make assumptions
 - don't base decisions on biases, prejudices and stereotypes
 - be aware of cultural differences

- Follow the Four Key Concepts
 - be consistent
 - have legitimate business reasons
 - document
 - call the experts

You Know Discrimination Law Already, Right?

Please answer the following questions about the law as it applies to your current employer.

- T F 1. White men are protected by discrimination and harassment law.
- T F 2. An employer legally can ask about an employee's retirement plans only after an employee says she is thinking of retiring.
- T F 3. A manager legally must reasonably accommodate single parents who ask not to be sent on extended business trips.
- T F 4. You cannot discipline an employee whose misconduct is caused by a disability.
- T F 5. If you have an affirmative action plan, you must hire a woman or minority candidate.
- T F 6. A sales manager can refuse to hire for outside sales an applicant with a good track record whose religion prohibits working or traveling on Saturdays.
- T F 7. You can always reject as "overqualified" an applicant who has more experience than you are looking for.
- T F 8. A woman employee can successfully sue a woman supervisor for sex discrimination.
- T F 9. You must always ask applicants if they are U.S. citizens.
- T F 10. Employees whose children, parents or spouse have serious health conditions may take off one day a week to care for them, forever if necessary, even if it creates an undue hardship on the department.
- T F 11. Veterans who return to their civilian jobs are no longer at-will employees and can be fired only for good cause.
- T F 12. A manager cannot ask if an employee is disabled, but once employee gives notice of disability, the manager can ask questions about the disability.

Now review pages 3-6 through 3-14 and find the correct answers. You can divide this up with your partner so each takes half the questions. If you learn anything new while researching, mark it and share it with your partner afterwards. If you have any questions about what you read, mark it and ask in class after you complete the assignment.

Sex, Pregnancy, Race, Age Protections

- Sex/gender
 - protects women and men
 - employees must receive equal pay for equal work, if they have equal knowledge, skill, ability, education, experience
 - industry studies show women historically have been promoted based on performance, while men were promoted based on potential
 - basing decisions on stereotypes is illegal

 - Pregnancy
 - don't ask in interviews
 - don't consider in decisions
 - new hires who are pregnant may be eligible for medical and leave benefits
 - must reasonably accommodate any disability
 - ask the experts

 - Race & color
 - protects all -- Caucasian, African-American, Hispanic, Asian, Pacific Islander, Native American and everyone else
 - studies show top white and minority performers are rated equally, but average white employees were rated higher than average minority employees

 - Age 40 and over
 - under 40, may be protected by employer policy, state law
 - mandatory retirement is illegal except for CEOs, VPs, airline pilots, air traffic controllers, public safety positions, military
 - don't make assumptions based on age
-

Religion, Veteran, Ethnicity, Citizenship Protections

- Religion
 - reasonable accommodation: rearrange schedules, give time off for religious observances (unpaid if in addition to vacation)
 - religious dress allowed unless proven to unreasonably interfere with business or safety
 - ceremonial daggers are not considered weapons; reasonable restrictions may be applied

 - Veterans/Military Status
 - military service or membership in National Guard or Reserves cannot be basis for hiring or employment action
 - special Leaves of Absence laws may apply

 - National Origin/Ethnicity
 - heavy accent is ground for not hiring in jobs requiring oral communication
 - "Speak only English" rules may be considered discriminatory by EEOC, but allowed if necessary to prevent disruption of work group, provide customer service, or for other business need

 - Citizenship
 - non-citizens who are legally entitled to work in this country cannot be discriminated against
 - legally entitled: U.S. citizens, permanent residents ("green card"), work authorized aliens, U.S. Nationals
 - exceptions for documented positions requiring Dept. of Defense security clearance, export control
-

3 - Discrimination

Marital Status, Family Medical Leave, Sexual Orientation, Gender Identity Protections

- Marital status
 - single, divorced, married, widowed
 - cannot be used in making decisions

 - Family and Medical Leave
 - after 1 year of employment, up to 12 weeks/year off
 - for birth, adoptions, or serious health condition of employee, child, parent, spouse
 - also for exigency arising out of spouse, child or parent being called to active duty
 - up to 26 weeks leave per year to care for spouse, parent or child recovering from serious illness or injury sustained in the line of active duty
 - benefits continue while on leave, but not pay
 - must return to same or equivalent job
 - state laws may also require leaves or provide partial wage replacement

 - Sexual orientation
 - protected in 22 states and DC
 - Executive Order prohibits discrimination by federal contractors
 - may be protected by employer policy
 - applies to actual or assumed orientation
 - public employees protected in 11 additional states

 - Gender identity
 - not the same as sexual orientation
 - includes gender expression or presentation, all bathroom use, dress, grooming, mannerisms, speech patterns
 - applies to transgender, transsexual, intersex people
 - protected in 20 states and DC
 - Executive Order prohibits discrimination by federal contractors
 - public employees protected in 6 additional states
-

Disability and Genetic Characteristic Protections

- "Disability" = impairment that limits at least one major life activity.
- Examples of physical or mental impairments:
 - Physical conditions
 - impairments of mobility, sight, hearing, back injuries
 - Medical conditions
 - cancer, HIV/AIDS, tuberculosis, alcoholism, epilepsy, diabetes
 - Mental illness
 - schizophrenia, manic depression, clinical depression, anxiety disorder, phobias
- Issue is not the diagnosis, but the effect on the individual
- Employees and applicants covered if they put you on notice
 - by informing you of disability or
 - by requesting an accommodation
- Employees and applicants not covered if
 - currently using illegal drugs
 - under influence of alcohol while working
 - disability uncontrolled by medication
 - disability or behavior poses a danger to others
 - unable to perform essential functions, even with a reasonable accommodation
- Employers barred from using results of genetic tests or family medical history in making employment decisions genetic monitoring of employees for the effects of toxic substances in the workplace permitted under limited circumstances

Preventing Disability Discrimination

- Don't ask about the disability
 - do not ask if you suspect a substance abuse or personal problem
 - try: "You seem distracted from work. I want to help you if it's job related. If it's personal, I want to respect your privacy, but if you want my help let me know, or contact HR or EAP."

- Don't make assumptions; instead ask, "Can you do the job?"

- Must hire people with disabilities if:
 - most qualified AND
 - can do "essential functions of the job" with or without reasonable accommodation

- Essential functions:
 - high percentage of tasks OR
 - purpose of the job

- Make reasonable accommodations to enable them to do the job
 - light duty
 - reduced schedule
 - restructure job / reassign some marginal functions
 - adaptive equipment
 - physical assistance
 - move to another job
 - permit medical leaves
 - note: you do not have to create a new job

Affirmative Action

- Affirmative Action required for federal contractors and subcontractors

- State initiatives re affirmative action have no impact on federal law

- Affirmative Action applies to women, minorities, people with disabilities, military status

- How Affirmative Action works:
 - employer audits its workforce and compares with available qualified labor pool
 - if workforce does not reflect labor pool, employer must set goal and recruit AA applicants
 - managers do not look at race or sex; they choose the most qualified applicant
 - Use AA *only as tie breaker* if there is a goal established by HR for hiring, training or promoting (not layoffs)

3 - Discrimination

Illegal Interview Questions

These are examples, but not an exhaustive list.

- Do you have children?
- Are you married?
- Are you pregnant?
- Are you planning to have children?
- When were you born?
- What is your date of birth?
- What date did you graduate from high school?
- Where were you born?
- What is your religion?
- What race are you?
- What kind of name is that?
- What kind of accent is that?
- Do you have to wear that turban?
- Have you had problems with the Immigration Service?
- What neighborhood do you live in?

- Do you have plans to retire?
- Are you planning to take pregnancy leave?

- Are you a citizen? (unless DOD security clearance required)

Legal If All Applicants Asked

- How about this weather we're having?

- What languages are you fluent in? (if speaking other languages is a job requirement)

- Can you arrive at work on time?
- This job has on-call. Are you able to respond within one hour?

- What are your future career plans?

- Are you legally entitled to work in this country?

- Will you now or in the future require sponsorship for a work visa?

Illegal Interview Questions (continued)

- Do you have an arrest or conviction record?*
- Would you go out with me?
- Would your husband be willing to relocate?
- What child-care arrangements do you have?
- Have you ever filed a discrimination complaint against a former employer?
- What is your current salary?

Legal If All Applicants Asked

- Does weekend/overnight travel present a problem for you?

* May be allowed for some employers, such as law enforcement. Check with HR.

3 - Discrimination

Illegal Disability Questions

- How did you become disabled?
- How long have you been disabled?
- Do you have any medical problems?

- Do you need reasonable accommodation for the job?

- How many sick days did you take last year?

- How often will you need time off for treatment of your disability?

- Have you ever filed for Workers' Compensation?

Illegal Genetic Questions

- Is there any history of cancer in your family?

- Have you ever received genetic testing or counseling?

Legal If All Applicants Asked

- Are you able to perform the essential functions of the job with or without a reasonable accommodation?

- Please describe or demonstrate how you would perform this essential function of the job.

- Can you meet the attendance requirements of this job?

Legal If All Applicants Asked

- How are you today?

Permission is hereby granted by Fair Measures to copy illegal interview questions pages.

Legal Hiring Do's

- Partner with your recruiter/staffing organization.
- Identify technical requirements: education, experience, knowledge, skills, abilities.
- Identify required competencies: judgment, initiative, creativity, problem-solving, flexibility, assertiveness, planning, commitment, team building, etc.
- Write job description. Determine essential functions and compensation.
- Screen resumes. Don't use false measures of competence (e.g. preferring a degree to years of experience.) Don't automatically screen out "overqualified" who want the job and can do it.
 - be careful setting parameters for resume database searches
 - make sure to keep results of all resume database searches
- Train all members of interview team. Interview includes casual conversation, lunch, phone calls, follow up emails.
- Prepare for the interview. Write out questions, asking all applicants the same basic questions. Consider assigning areas of focus to different interviewers.
- Ask statement-feeling questions:
 - make a statement about the job, then ask, "How do you feel about that?"
- Use behavior-based questions - "Tell me about a time when you... [demonstrated this characteristic/skill]"
 - what was situation? or task?
 - what did you say or do?
 - what was the effect of your actions?

Legal Hiring Do's

(Continued)

- Volunteer all material facts you know that would affect a reasonable person's decision whether or not to accept employment, such as:
 - reporting relationships, expected job assignments, expected working hours, travel requirements, etc.
- Use interviews as PR opportunities. Keep applicants informed of process. Reason for not hiring: "We found another candidate whose qualifications better match our current requirements."
- Document decision. Complete Applicant Tracking form and follow organization's staffing processes including checking references.

Rules for References

Employer should check references when hiring to validate hiring decisions and avoid negligent hiring claims:

- document with name of person giving reference, date and comments

If a manager is asked for a reference on a current or former employee or co-worker who worked for this employer:

1) External References

Refer to your organization's policies. Generally Human Resources will confirm or deny dates of employment, job titles.

Negative comments may be slander, or lead to claims of self-published defamation.

Positive recommendations could lead to lawsuits for:

- discrimination (if only some employees given references)
- negligence (if weakness not mentioned)
- slander (if weakness mentioned)

Don't give letters of recommendation or social networking recommendations without HR approval.

If allowed by policy and no breach of employer intellectual property, encourage your employees to take copies of their performance appraisals to show potential employers.

False or inaccurate information can lead to claim for negligent misrepresentation.

Rules for References (continued)

2) Internal References

Inside the organization, references are allowed and encouraged.
Don't give opinion
on non-work related issues.

3) Personal References

Personal references for people you know socially or from previous employers are generally allowed per policy, but you have personal liability. If you give any good information, you must disclose any violence, threats, or harassment by employee. Ask caller to keep your statements confidential from employee.

Case A

Encouraged by her supervisor, Laurie applied for a promotion to a management position. Because she was already performing several of the responsibilities of the management position and based on her supervisor's favorable comments, Laurie believed she was the frontrunner for the job. On her most recent performance evaluation, Laurie had received a rating of 4.40 out of a possible 5. Laurie had four children, six-year-old triplets and an eleven-year-old, and her husband was the primary caregiver for them.

Laurie and Donna were the finalists for the position. Donna had six years less experience than Laurie and received a 3.84 rating on her most recent performance review. Donna had two children, aged 9 and 14. Three managers, Nanci, Dawn, and Mary, interviewed the candidates, with Nanci being the ultimate decision maker. Two months before the promotion came up, Nanci had learned that Laurie had three children in kindergarten and sent an email to Laurie stating, "Oh my -- I did not know you had triplets. Bless you!"

During Laurie's interview with Mary, Mary asked her how she would respond if an associate did not complete a project on time. Unhappy with Laurie's answer, Mary replied, "Laurie, you are a mother[.] [W]ould you let your kids off the hook that easy if they made a mess in [their] room[?] [W]ould you clean it or hold them accountable?"

Based on Mary's report and on her own opinions, Nanci graded Donna's interview performance higher than Laurie's and offered the promotion to Donna. Nanci explained to Laurie: "It was nothing you did or didn't do. It was just that you're going to school, you have the kids and you just have a lot on your plate right now...If [the three interviewers] were in your position, they would feel overwhelmed." Finally, Nanci told Laurie that, "There would be something better down the road," and that Laurie would look back and say "It's a good thing that that opportunity didn't work out because I'm happier with this down the road."

- 1) What is the company's legitimate business reason for not offering the promotion to Laurie?

Case C

Stan, an African-American man, applied for a promotion, and sued for sex discrimination when the job went to an African-American woman. Five months later, Stan was suspended for a month without pay after his employer learned that he had falsely claimed on his resume that he had a bachelor's degree. Stan was told that he would be reinstated, with back pay, if he submitted a corrected resume. Stan turned in a new resume, got reinstated, and got paid. Lisa, a white co-worker, was also discovered to have put a non-existent bachelor's degree on her resume, and was told that the company "would overlook the incident if she submitted a corrected resume", which she did.

1. What is the employer's legitimate business reason for suspending Stan?
2. Can Stan make new claims of discrimination ?
3. What other claim can Stan now raise?
4. Since Stan was reinstated with full back pay, can he still raise those claims?
5. What are the lessons of this case?

When you have completed this case go on to the next one.

(based on McClure v. Career Systems Dev. Corp., 447 F.3d 1133 (8th Cir. 2006))

Manager's EEO/AA Checklist

This is from the checklist that auditors from U.S. Office of Federal Contract Compliance Programs use in their inspections.

What managers should KNOW:

- The employer's EEO Policy and commitment to Affirmative Action programs.
- The difference between Equal Employment Opportunity and Affirmative Action programs. [EEO = no discrimination or harassment. AA = audit, set goals, recruit targeted groups, use goal as tie breaker.]
- The employer's EEO Manager, EEO office location and telephone number.
- The current Affirmative Action program goals for your department, if any.
- The minimum objective criteria a candidate must meet to be considered for open positions and what factors are most important in choosing among those who meet minimum standards.

What managers should DO:

- Hold periodic department meetings to discuss the employer's EEO, harassment prevention, fair treatment policies, and outreach to source diversity candidates.
- Partner with staffing to increase diversity of candidates.
- Do a walk-through of the work area to ensure the area is free of offensive materials.
- Be able to discuss:
 - plans to correct under representation of minorities and women within your area of responsibility, as reflected in your Affirmative Action Plan.
 - counseling of employees on their career development.
 - any personal involvement in community work with minority groups, women's groups, disabled or veteran organizations which support the employment of these groups.
 - any reasonable job accommodations made for individuals with disabilities, any reasonable accommodations for employee religious beliefs.
 - training opportunities for employees

Talking Politics at Work

- No federal law bars discrimination based on political activity or views.
 - state laws (ex. CO, DC, NY) may provide protection

- Private sector employees have no constitutional rights at work.

- Government workers have free-speech rights if:
 - it involves a matter of public concern
 - is not part of the employee's job duties, and
 - does not disrupt operational efficiency.

- Federal law (National Labor Relations Act) limits a private sector employer's right to limit employees' communications about pay, benefits, safety, hours, and other terms or conditions of employment:
 - communications or conduct that are violent, unlawful, or that disrupt operations or productivity are not protected.

- Supervisors should avoid political discussions with subordinates in order to minimize potential claims of favoritism, discrimination, harassment, or bullying.

- Remind employees that the organization insists on respectful treatment of all, and will investigate employee complaints of abusive conduct.

State Discrimination Protections

State	Age	Marital Status	Parent/ Family	Gender Identity	Sexual Orientation	Tobacco Use	Lawful Activities/ Substances	Medical Marijuana
Alabama	40+							
Alaska	Y	Y	Y		S			
Arizona	40+				S			Y
Arkansas	S							
California	40+	Y		Y	Y		Y	
Colorado	40-70	Y		Y	Y		Y	
Connecticut	Y	Y		Y	Y	Y		Y
Delaware	40-70	Y		Y	Y			Y
DC	18-65	Y	Y	Y	Y	Y		
Florida	Y	Y						
Georgia	40-70							
Hawaii	Y	Y		Y	Y			
Idaho	40+							
Illinois	40+	Y		Y	Y	Y	Y	Y
Indiana	40-75	Y		S	S	Y		
Iowa	18+	Y		Y	Y			
Kansas	18+	Y						
Kentucky	40+		Y	S	S	Y		
Louisiana	40+				S	Y		
Maine	Y	Y		Y	Y	Y		Y
Maryland	Y	Y		Y	Y			
Massachusetts	40+	Y		Y	Y			
Michigan	Y	Y		S	S			
Minnesota	25-70	Y	Y	Y	Y	Y	Y	Y
Mississippi	S					Y		
Missouri	40-70				S	Y	Y	
Montana	Y	Y		S	S	Y	Y	
Nebraska	40+	Y						
Nevada	40+			Y	Y	Y	Y	Y
New Hampshire	Y	Y		Y	Y	Y		
New Jersey	18-70	Y	S	Y	Y	Y		
New Mexico	40+	Y		Y	Y	Y		
New York	18+	Y	Y	Y	Y		Y	Y
North Carolina	Y			S	S		Y	
North Dakota	40+	Y				Y	Y	
Ohio	40+	Y			S			
Oklahoma	40+					Y		
Oregon	18+	Y		Y	Y	Y	Y	
Pennsylvania	40+	Y		S	S			Y
Rhode Island	40+			Y	Y	Y		Y
South Carolina	40+					Y		
South Dakota	S	Y				Y		
Tennessee	40+					Y		
Texas	40+							
Utah	40+			Y	Y			
Vermont	18+			Y	Y			
Virginia	Y	Y		S	S	Y		
Washington	40+	Y		Y	Y			
West Virginia	40+					Y		Y
Wisconsin	40+	Y			Y	Y	Y	
Wyoming	40+					Y		

Y means no age specified. For other states, upper and lower limits of protection are listed.

S means state or public employees only.

State Fair Employment Practices Agencies

ST	Agency	Website	Phone
AL	N/A		
AK	State Commission on Human Rights	http://humanrights.alaska.gov/	907-274-4692
AZ	Attorney General, Civil Rights Division	https://www.azag.gov/civil-rights	877-491-5742
AR	N/A		
CA	Dept. of Fair Employment and Housing	www.dfeh.ca.gov/	800- 884-1684
CO	Civil Rights Division	www.dora.state.co.us/civil-rights	303-894-2997
CT	Commiss. Human Rights & Opportunities	www.state.ct.us/chro	860-541-3400
DE	Office of Discrimination	http://dia.delawareworks.com/discrimination	302-577-5050
DC	Office of Human Rights	http://ohr.dc.gov/	202- 727-4559
FL	Commission on Human Relations	http://fchr.state.fl.us/	850-488-7082
GA	Commission on Equal Opportunity	http://gceo.state.ga.us/	404-656-1736
HI	Civil Rights Commission	http://labor.hawaii.gov/hcrc/	808-586-8636
ID	Human Rights Commission	http://humanrights.idaho.gov/	208-334-2873
IL	Dept. of Human Rights	http://www2.illinois.gov/ihrc/Pages/default.aspx	312-814-6200
IN	Civil Rights Commission	www.state.in.us/icrc	800-628-2909
IA	Civil Rights Commission	https://icrc.iowa.gov/	515-281-4121
KS	Human Rights Commission	http://www.khrc.net/	785-296-3206
KY	Commission on Human Rights	http://kchr.ky.gov/	800-292-5566
LA	Commission on Human Rights	http://www.gov.state.la.us/HumanRights/humanrightshome.htm	225-342-6969
ME	Human Rights Commission	www.state.me.us/mhrc/	207-624-6290
MD	Human Rights Commission	www.mchr.state.md.us	410-767-8600
MA	Commission Against Discrimination	www.state.ma.us/mcad/	617- 994-6000
MI	Department of Civil Rights	www.mdcrr.state.mi.us/mdcrr/	517-335-3165
MN	N/A		
MS	N/A		
MO	Commission on Human Rights	http://www.labor.mo.gov/mohumanrights/	573-751-3325
MT	Human Rights Commission	http://erd.dli.mt.gov/human-rights/human-right-commission.html	406-444-4344
NE	Equal Opportunity Commission	www.noel.org/home/NEOC/	402-471-2024
NV	Equal Rights Commission	http://detr.state.nv.us/nerc.htm	702-486-7161
NH	Commission for Human Rights	www.state.nh.us/hrc	603-271-2767
NJ	Division on Civil Rights	http://www.nj.gov/oag/dcr/index.html	609-292-4605
NM	Human Rights Bureau	http://www.dws.state.nm.us/LaborRelations/HumanRights/Information	505-827-6838
NY	Division of Human Rights	http://www.dhr.ny.gov	518-474-2705
NYC	Commission on Human Rights	https://www1.nyc.gov/site/cchr/index.page	718-722-3131
NC	Civil Rights Division	http://www.ncpah.com/civil/	919-431-3036
ND	Human Rights Division	http://www.nd.gov/labor/human-rights/index.html	800-582-8032
OH	Civil Rights Commission	http://crc.ohio.gov/	614-466-5928
OK	Office of Civil Rights Enforcement	http://www.oag.state.ok.us/oagweb.nsf/ocre.html	405-521-2029
OR	Civil Rights Division	www.boli.state.or.us/civil	503-731-4075
PA	Human Relations Commission	www.phrc.state.pa.us/	717-787-4410
RI	Commission for Human Rights	http://www.richr.state.ri.us/	401-222-2661
SC	Human Affairs Commission	www.state.sc.us/schac/	803-737-7800
SD	Division of Human Rights	http://dlr.sd.gov/humanrights/	605-773-4493
TN	Human Rights Commission	www.state.tn.us/humanrights/	800-251-3589
TX	Civil Rights Division	http://www.twc.state.tx.us/customers/cwp/civil-rights-discrimination.html	512-463-2642
UT	Antidiscrimination & Labor Division	http://laborcommission.utah.gov/divisions/AntidiscriminationAndLabor/employment_discrimination.html	801-530-6801
VT	Human Rights Commission	http://hrc.vermont.gov	800-416-2010
VA	Div Human Rights	http://www.ag.virginia.gov/Programs%20and%20Resources/Human_Rights/	804-786-2071
WA	Human Rights Commission	http://www.hum.wa.gov/	800-233-3247
WV	Human Rights Commission	http://www.hrc.wv.gov/Pages/	304-558-2616
WI	Wisconsin Equal Rights Division	http://dwd.wisconsin.gov/er/	608-266-6860
WY	Labor Standards	http://www.wyomingworkforce.org/employers-and-businesses/labor-standards/Pages/	307- 777-7261

Oracle Overtime Supplemental

What is Overtime?

- Federal Law--Fair Labor Standards Act--requires that all employees be paid overtime at time and a half for more than forty hours per week.
- Some categories of employees are exempt, by law.
- Individual state laws may be more generous, i.e. California says more than 40 per week, or 8 in a day, and also provides for double time.

Special Overtime Issues

-  Comp time:
 - No employees are entitled to compensatory time off
 - Compensatory time off is available only to public agencies (city, county, state)
 - Private employers must pay overtime

-  Emails and tasks outside normal work hours:
 - employees are entitled to overtime for all time spent performing work, including periodic checks of email over a weekend even if it was not pre-approved.
 - unless employee has permission to work overtime, manager must coach employee to review and respond to work related emails during working hours only. This also applies to improving job skills.
 - use performance management process to correct an employee who works unauthorized overtime.

-  Time employees spend in training (meetings and lectures included) must be paid, unless:
 - it occurs outside of work hours
 - attendance is voluntary
 - it is not job related and
 - no productive work is performed.

State Laws - Overtime

OVERTIME REQUIRED AFTER...	STATES
12 hrs/day 40 hrs/week	CO
8 hrs/day 40 hrs/week	AK, CA, NV
46 hrs/week	KS
48 hrs/week	MN
7 th day of work/week	CA, KY
40 hrs/week	AR, CT, DC, HI, IL, IN, KY, ME, MD, MA, MI, MO, MT, NH, NJ, NM, NY, NC, ND, OH, OR, PA, RI, TX, VT, WA, WV, WI
No state law	AL, AZ, DE, FL, GA, ID, IA, LA, MS, NE, OK, SC, SD, TN, TX, UT, VA, WY

Special Overtime Issues

-  Other hours worked: If employee is required or expected to attend an event or function (e.g., internal team dinner, kickoff event, customer appreciation dinner, sporting event, etc.), that time is considered time worked and must be reported.

-  Vacation or sick time is not used to calculate overtime.

-  Break/Meal time:
 - use the state where the employee is assigned
 - no work is performed
 - ensure hourly employees take legally required meal/break period

-  When in doubt, consult HR

State Laws – Meal and Rest Breaks

Rest Breaks	Meal Breaks	Both
<p>CA, CO, KY, MN, NV, OR, VT, WA</p>	<p>CA, CO, CT, DE, IL, KY, ME, MA, MN, NE, NH, NV, NY, ND, OR, RI, TN, VT, WA, WV</p>	<p>CA, CO, KY, MN, NV, OR, VT, WA</p>

Manager's Responsibilities

-  Ensure that employees record all time worked, including overtime:
 - employees are not permitted to work "off-the-clock"
 - managers may not instruct or allow their employees not to enter time worked
 - employees are required to enter time worked whether or not they worked overtime
 - regular unapproved overtime handled as performance issue

-  Ensure the accuracy of time records:
 - never instruct or allow employees not to enter time worked
 - if an employee thinks he or she has not been paid properly, review the time records with the employee
 - employee corrects any errors promptly and resubmits for payment
 - if matter not resolved, manager needs to consult HR

Summary

Learning Summary

- ☐ Four Key Concepts:
 - be consistent
 - have a legitimate business reason
 - document events
 - use objective, verifiable facts
 - be aware of e-mail pitfalls
 - call the experts

- ☐ Performance Management:
 - value employees
 - respect "whistle-blowers"
 - keep promises
 - be fair
 - be honest in appraisals
 - communicate
 - follow policies and guidelines

- ☐ Discrimination:
 - don't make assumptions
 - have clear standards applied consistently
 - have a legitimate business reason if employees are managed differently



4 – Summary

I learned...

I am going to...

Your Legal “To Do” List

Before you leave this room, take a few moments to think about what you need to do to implement what you've learned. Here are a few ideas to get you started.

- 1) Does anyone in your group need to be informed of performance goals and standards that aren't being met?
- 2) Do you need to design a better documentation system and/or go back and add more documentation to an employee's file?
- 3) Are there any posters on the walls that should come down?
- 4) Should you consult with HR for more strategic support?
- 5) Do you need to inform HR/management about situations in your work group?
- 6) Do you need to meet with your staffing team to better understand your AA goals and design a plan for achieving them?
- 7) What information did you learn today that you want to summarize and discuss with your workgroup or put in an email and send to all your reports?
- 8) If you manage managers, add to their yearly goals to take this training program. If you manage employees and disrespect is common in the workplace, arrange to bring in our Respectful Workplace program.
- 9) Visit www.FairMeasures.com and sign up for monthly eNews legal update.
- 10) What else do you need to do to ensure you are living your organization's values and managing legally and ethically?

Rip this page out of your workbook and put it with your calendar so that these things will actually get done.

4 – Summary



Answers to Quizzes and Exercises

Performance Management Case Study - Answers

1. Performance not as good as others, attendance abuse, inconsistent performance.
2. Reviews, followed by e-mail, because those are the only things Terry has seen. The documentation does not support a decision not to promote Terry: He's the most senior employee with the best performance review.
3. Workplace safety, organizing for a union, filing for Workers' Compensation (he did not file, but the argument is that he was not promoted to prevent him from filing). If employer manufactures the keyboard, complaining about unsafe consumer goods. If the wrist injury is serious enough to qualify as a disability, harassment or discrimination on that basis.
4. Yes, a court would think that Terry was promised the promotion. "If you keep up this kind of timely performance, you might be..." The new manager is required to keep promises made by other managers, who are agents of the employer, unless the promise is properly rescinded.
5. The e-mail with "my wrist is hurting" puts you on notice that he may have a workplace injury requiring that he be given a Workers' Compensation report of injury form. He also may be missing deadlines due to his hurt wrists, and may be leaving early, coming in late because of doctor's appointments, physical therapy, etc.
6. Yes. Yes. Yes.
7. Give him the promotion with a clear understanding of all standards and requirements, including meeting deadlines, attendance. If he doesn't meet standards, demote back to current level. If does not have satisfactory performance at this level, begin performance improvement plan.
8. Send to time management class, establish an attendance schedule, break tasks down to smaller pieces and manage each piece, ask for feedback, purchase project management software, more frequent or daily one-on-ones.
9. It depends on rationale. Perhaps three weeks minimum.
10. Reviews: be specific; include positive and negative; if it's a problem, deal with it; don't give only positive feedback to motivate someone; etc. Making promises - don't; find out if prior manager has made promises; rescind promises. Helping employees be successful - do; one size does not fit all; helping employees become successful is an important part of career success for a manager.

Discrimination Section

Discrimination Quiz Answer Key

1. T
2. T
3. F - This is discriminatory against married people.
4. F - Allowing misconduct is not a reasonable accommodation!
5. F - You always hire the best qualified candidate, and can use an affirmative action plan only as a tie-breaker.
6. F - The applicant must be hired if most qualified and be reasonably accommodated to avoid Saturday work, unless it creates an undue hardship (e.g. 50% of sales are made on Saturdays).
7. F - Courts have held that "overqualified" is a code word for "too old." Make sure you have a legitimate business reason (salary expectation, unwillingness to relocate, etc.) for rejecting such candidates. It is unlawful to reject an experienced older applicant simply based on your assumption that the worker might become bored or dissatisfied.
8. T - If a supervisor discriminates against the employee because she is a woman, it is not a defense that the supervisor is the same gender.
9. F - Citizenship inquiry allowed only if job requires Department of Defense or national security clearance; otherwise can ask only if applicant is legally entitled to work in US.
10. T
11. T - If the active duty has been 31-180 days, there is 6 months of job protection; for deployments of 181 days+ there is 1 year of protection.
12. F - the manager can ask questions about the employee's limitations and ability to do the job, not about the disability itself

Discrimination Section

Case Study Answers

Case A

1. Laurie did not do as well as Donna in the interview process.
2. Her role as a mother of small children was used as the basis for the decision not to promote her even though there was no evidence that her family responsibilities hurt or even affected her ability to do the job.
3. Yes. If management takes adverse action because of an employee's gender, that is discrimination, no matter what the gender of the decision maker.
4. Base all employment decisions on objective, verifiable facts. Avoid stereotypes.

Case B

1. Yes, since there is a substantial difference in their ages.
2. Poor performance. Dean refused to develop performance metrics, did not support company policy, and did not treat co-workers respectfully.
3. Yes. The court held that the jury was entitled to decide what the consultant meant, "and, more importantly, what [Michael] understood the reference to mean when he wrote it down and whether [Michael] adopted the goal of having 'young, energetic' workers as his own."
4. The bonuses and Michael's praise of him at the company meeting both are evidence that Dean's performance was satisfactory, said the court: "The jury could also conclude that the deficiencies that [the employer] claimed existed in [Dean]'s work were exaggerated to cover up the age-based motivation for the termination."
5. Be honest in managing performance. If an employee is not meeting expectations, don't pay bonuses or praise the employee in public. And even a dirty napkin can be evidence!

Case C

1. Discipline for resume fraud and violating company's values.
2. Yes. Sex and race discrimination based on the different punishment he and Lisa received for the same offense.
3. Retaliation, if he was treated worse than Lisa because he had filed a sex discrimination case over the promotion.
4. Yes. The US Supreme Court held in 2006 that an employee suspended without pay suffers an adverse employment action even when reinstated with back pay.
5. Treat like cases alike to avoid claims of discrimination and retaliation. Have a legitimate, documented business reason for treating employees differently.

Discrimination Section

Case Study Answers

Case D

1. Discrimination based on veteran/military status. Unless they have been dishonorably discharged, qualified returning veterans are entitled to be reinstated into their civilian jobs.
2. No. Temps and independent contractors are also protected under discrimination laws, not only regular employees.
3. Yes. The employer checked Rick's references. Stanley said that Rick's work had been incompetent. The reference check also found that Purdue University had dismissed Rick for poor academic performance and had never granted him a degree. Rick was not qualified for the job by credentials, since he did not have the required engineering degree. He was also not qualified by experience, since he had a poor work history. In addition, Rick lied on his application. Dishonesty is good cause for disqualification for hiring and for termination, if he had been hired. The court upheld the employer's decision not to hire Rick, stating:
"Allowing someone who is not an engineer to do engineering work on aircraft parts, when he had lied about his credentials and confirmed the lie by his poor performance of the job for which he had been hired but was not qualified, would be the height of irresponsibility and could get the employer into serious trouble."
4. Perhaps because he thought they were fellow alumni, Stanley's statement was, as the court put it: "a way of letting him off lightly rather than have to tell him to his face that he was no good."
5. Managers should coach, counsel, warn all employees about performance issues, and document those efforts. Tell the truth and do not sugar-coat reasons for termination.