

## “IT’S SO HARD ADMITTIN’ WHEN IT’S QUITTIN’ TIME.”

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Mary Chapin Carpenter’s song sums up a lot of wisdom about life and it also conveys some important truths in the employee relations area.

One of the precepts everyone learned in Employee Relations 101 is that employee performance discussions should be documented because if they are not, memories of discussions can be blurred by the passage of time or by the quest for riches...or revenge. If it’s written down, it’s easier to prove what was really said. That is true, as far as it goes. But just writing something down usually isn’t enough – and how do you know when you need to write something down in the first place?

### WHY IT MATTERS

99.5% of supervisors (this is our unofficial estimate) want to establish a positive and proactive relationship with their employees. Also, supervisors correctly believe that every performance problem does not need the sledgehammer treatment. Often an informal discussion is enough to let the employee know about a certain area of performance that needs improvement. “The Talk” with the employee corrects the problem and everyone is happy and none the worse for wear. We heartily approve of that approach. But what if the nudges aren’t working? What happens if the problem continues or gets worse?

While there is no bright line test to tell supervisors when to escalate counseling, supervisors seem to know instinctively that it is time to go to the next level. It’s about that tight feeling in the stomach and the slight feeling of dread when supervisors see that their verbal pointers are not having the intended effect. And it’s this Next Level that we’ll discuss in this article.

All too often as lawyers we're faced with a situation where an employer wants to terminate an employee for sustained unacceptable performance which at first blush sounds pretty bad. But when we ask to see what warnings the employee has received, we hear about all the second, third, and fourth chances the employee has been given, and how the employee isn't going to change so it's time for termination. Now! All the second, third and fourth chances are not likely to be convincing to a jury who will learn from a plaintiff's lawyer about how this hard-working employee with a clean record was let go for no reason.

## THE FUNDAMENTALS

For starters, when you go to that Next Level, it should be in writing. What you learned in Employee Relations 101 is correct. Writing is (or should be) clearer and less subject to change over time. But writing is only the beginning of the "more" that is required. The writing needs to start with a clear description of the behavior that needs to be changed, or the rule that needs to be followed. This is an area where we see a number of problems. For one, it is important to remember that this is a performance counseling session, not a performance review or appraisal. A performance review will cover a much broader spectrum of issues and should present a balanced view of the employee's performance over a longer period of time. In it, you should discuss positive performance aspects as well as areas where improvement is needed.

That is not your objective in a counseling session. Your objective is to give the employee clear notice that certain behaviors must change. And the counseling should not attempt to do more than that. Getting that said in a clear way is accomplishment enough. Save the good words for the performance appraisal. The counseling should be tightly focused on what needs to be improved. We have seen some intended warnings which, after we have reviewed them, seemed unclear whether the supervisor intended to compliment or warn the employee. Such warnings can be worse than no warnings at all in the hands of a skilled plaintiff's lawyer who is suing you on behalf of your counseled employee.

There should also be an explanation of *how* the unacceptable behavior is impacting the employee's job or the department. In other words, what exactly are the problems being caused by the behavior you are trying to change. For example, "Your regular lateness puts an unfair load on your already busy co-workers who have to take care of your customers and still get their work finished on time." "Your rudeness to and criticism of co-workers makes the department much less comfortable for everyone and impacts on our ability to serve our customers in a friendly and confident manner."

We aren't suggesting a sermon but only a brief description of how the behavior is impacting employees' co-workers, customers, or their own jobs. The point here is

that the counseling should be direct and clear about what is not working. Would a jury reading this a year from now be able to tell what concerned you and would they be likely to agree with you that this was a legitimate problem to raise with the employee?

A further aspect of the clarity necessary to a well-written counseling session is a clear description of the "what-if." This is frequently hard for supervisors but there needs to be an explanation of the next steps to be taken if the problem is not corrected. The purpose of counseling is to improve behavior, and certainly most counseling is undertaken with the expectation that further steps will not be necessary. But we all know that sometimes further steps are necessary; and, when they are, you will be in a better position to demonstrate the basic fairness of your actions if those alternatives are clearly described ahead of time. After all, if performance improves, those further consequences will never matter anyway. And if performance does not improve and further disciplinary action is required, employees cannot say that they had no inkling that this was such a big problem.

Nor do we mean to imply that further discipline must always mean termination. The next steps will depend on the type of problem being addressed. There may be situations where any further behavior really will result in termination. If so, say it clearly. Perhaps the gravity of the situation will convince the employee to correct the behavior; and, if it does come to termination, you have already warned the employee of that outcome. Or there may be situations where something less than termination will be a logical consequence of further behavior shortcomings. One phrase which many find to be useful is the following: "Further violation of this rule (further performance shortcomings) will result in further disciplinary action up to and including termination."

Realizing that the primary purpose of employee counseling is behavior modification, it's frequently helpful to schedule follow up or review sessions to discuss an employee's progress in correcting the areas described in the counseling. Schedule these follow-up discussions at the time of the initial counseling. Document your views of employees' behavior in those follow-up sessions which will hopefully show an improving trend in performance.

## **THE PAYOFF**

All of these steps won't guarantee that a terminated employee will never sue your company. But carefully documented performance counseling will provide you with significant defenses and will make your company a less attractive target for a plaintiff's lawyer. Remember that plaintiffs lawyers like the best cases they can find simply because a good case simplifies their job of proving that you should pay them and their client a significant amount of money. On the other hand, if they interview

your former employees and see carefully written counselings telling them what they were doing wrong and telling them what would happen if they continued doing it, much of the bloom is off that particular rose from the plaintiff's lawyer's perspective.

Finally, with carefully crafted counseling, if it does come to termination you can be comfortable that you have been fair to the departing employee and that you are doing the right thing for your company and co-workers.

With well-documented counseling sessions it won't be so hard admitting that it's quitting time.