

# Labor Law for Supervisors

Presented by:

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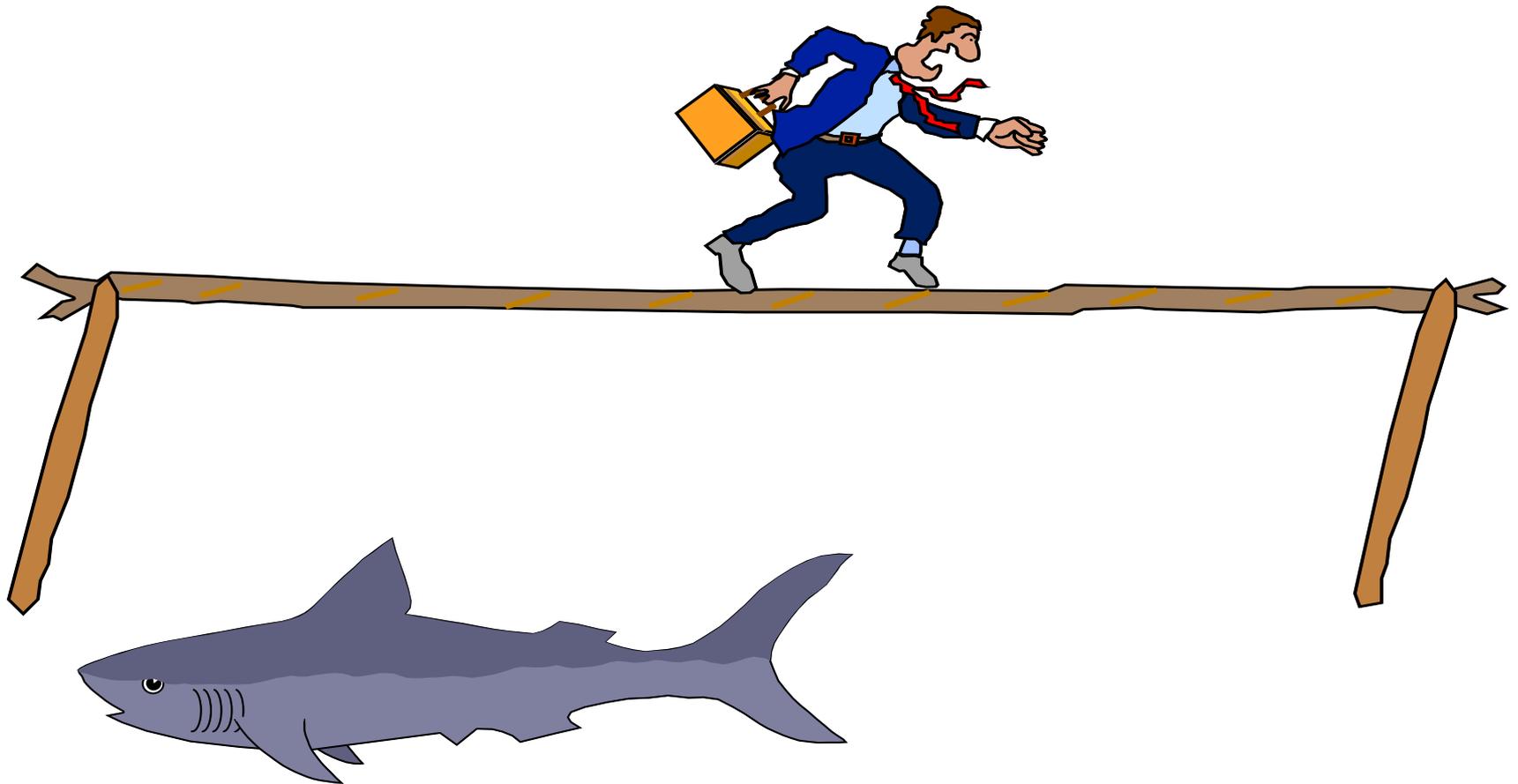
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# Mission: Impossible

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# Opening Comments

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- 80% of all EEOC claims center around Hiring and Firing decisions;
- 20% of all lawsuits filed are employment related;
- The average EEOC suits are settling between \$100,000 and \$300,000;
- FY 2014 – 88,778 total charges, Monetary Benefits (Millions) \$296.1
- FY 2014 – ‘No reasonable Cause’ 57,376 (65.6%); ‘Reasonable Cause’ 2,745 (3.1%)
- Retaliation Claims (37,955) remain high

# Opening Comments

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- Average ADA claims are settling between \$20,000 and \$30,000;
- Religious discrimination cases are on the rise;
- FMLA awards have gone as high as \$313,000;
- The average sexual harassment claim in TX is settling for \$500,000 plus legal expenses

# Avoiding Trouble

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- Consistent application of all Company Policies
  - » Employee Handbook
  - » Trained Managers and Supervisors
- Honest dealings with Employees
  - » Provide feedback to employees
- Employment At-Will

# Employment Laws

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- National Labor Relations Act (1935)
- Fair Labor Standards Act (1938)
- Equal Pay Act (1963)
- Civil Rights Act of 1964
- Age Discrimination in Employment Act (1967)
- Americans with Disabilities Act (1990)
- Civil Rights Act of 1991
- Family Medical Leave Act (1993)

# Job Descriptions

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- ADA does not require job descriptions. However, ADA requires that you:
  - » Hire the most qualified candidate for the job with or without providing “reasonable accommodations”;
  - » Identify the essential functions of the job; and
  - » Base your hiring, discipline, promotion, and termination procedures on the persons ability to perform the essential functions of the job.

# About applications

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- Not required to accept applications when the company does not have an opening.
- Be careful of selectively keeping some applications /resumes and not others. Has been viewed in court as a form of discrimination.
- Be sure your application has an “employment at-will” statement.
- Have applications completed on site.
- Be sure applicant was the one who completed form.
- Must retain all applications for one year after considering applicant. (Keep ads for one year as well.)
- Don't write on application, write your notes on separate paper.

# Reviewing applications

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- Application:
  - » Be sure the application is completed and signed.
  - » Make note of those areas that are not completed or there is a scratch out. These are areas to pursue during interview.
  - » Look for breaks in employment.
  - » Check for spelling errors, grammar, etc.
  - » Have every applicant complete an application, even if a resume is provided.

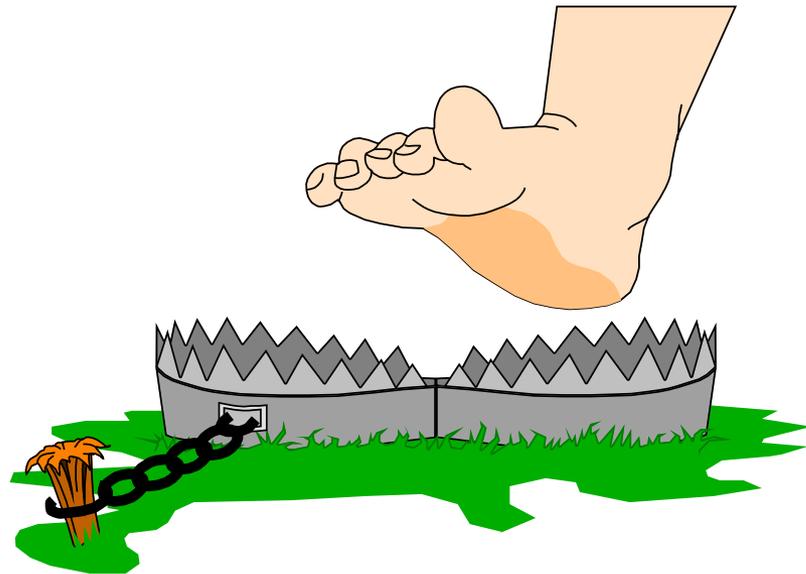
# Conducting the Interview

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- Remember the “80/20 rule”, let the applicant do 80% of the talking.
- Use the application and job description as the basis for your discussion.
- Any question asked must be legal.
- Use open-ended questions.
- Any notes taken should be on a separate sheet of paper, don't write on the application form.

# Avoid the traps

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# Unacceptable questions

- Family status (discrimination against women):
  1. Are you married?
  2. What is your maiden name?
  3. Do you have any children?
  4. Are you pregnant?
  5. What are your child care arrangements?
- Age (potential age discrimination):
  6. What is your birth date?
  7. How old are you?
  8. What year did you graduate from high school or college?

# Unacceptable questions (continued)

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- Race discrimination:
  9. What is your race?
- Religious discrimination:
  10. What is your religion?
  11. Which church do you attend?
  12. What are your religious holidays?
- National origin discrimination:
  13. Where were you born?
  14. Where does your accent come from?
  15. Are you a citizen of the United States?

# Unacceptable questions

## (continued)

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- Sex discrimination:
  16. What is your gender?
- Race discrimination:
  17. Have you ever been arrested?
- Discrimination based on disability:
  18. Do you have a disability?
  19. How many days were you sick last year?
  20. What prescription drugs are you currently taking?
  21. Do you have any health problems?

# Unacceptable questions (continued)

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22. Have you ever been treated for alcohol or drug problems?

23. Have you ever filed for Workers' Compensation?

24. What is the nature or severity of your disability?

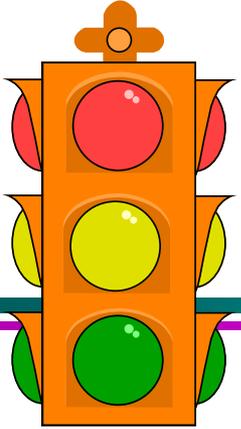
● Economic status (discrimination minorities/women):

25. Do you own or rent your home?

26. Who resides with you?

27. Have you ever had your wages garnished?

28. Have you ever filed for bankruptcy?



# Acceptable interview questions

1. Do you have any responsibilities that conflict with the job attendance or travel requirements? (Family Status)
2. What is your address? (Residence)
3. If hired, can you provide proof that you are at least 18 years of age? (Age)
4. Have you ever been convicted of a crime? (Arrest)
5. Can you show proof of your eligibility to work in the US.? (Citizenship/National origin)
6. Are you fluent in any language other than English? You can only ask this as it relates to the job. (Ntl. origin)

# Acceptable questions (continued)

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7. Are you able to perform the essential functions of this job with or without reasonable accommodations?  
(Disability)
8. Can you describe or demonstrate how you will perform the essential functions of the job? (Disability)
9. How many work days did you miss last year?  
(Disability)
10. How many Mondays and Fridays were you absent?  
(Disability)
11. Do you use illegal drugs? (Disability)

# Acceptable questions (continued)

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12. How did you break your arm? (How focuses on the manner, not the extent or duration needed for healing.) (Disability)
13. Did you graduate from high school / college? (Age)
14. Do you have the required licenses to perform this job?
15. How do you intend to get to work?
16. Do you want to provide any additional information that relates to your ability to perform the job? (Clubs and associations)
17. Are you a US Veteran? (Military service)

# Acceptable questions (continued)

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- Open-ended questions:
  - » If I were to call your previous employer, what would they tell me about you and your job performance? Be specific.
  - » What specific duties did you perform on your last job?
  - » How did you spend a typical day at your current job?
  - » Tell me about a major project or accomplishment of which you are proud.
  - » What do you think distinguishes a good employee from a bad one?

# Acceptable questions (continued)

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- Open-ended questions:
  - » Have you ever worked as a team member?
  - » What are some of the things in a job that are most important to you?
  - » What skills from your last job can you use on this job?
  - » Why are you leaving your current position?
  - » It's Thursday, and you have a Monday morning deadline. The workload looks impossible. What do you do?

# Acceptable questions (continued)

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- Open-ended questions:
  - » What do you consider your strengths and what areas do you consider need improvement? Be specific.
  - » Describe to me what your best day would be like?
  - » What do you think it takes to be a good \_\_\_\_\_?  
(Insert job title)
  - » If you could change one thing in you last job, what would it be? Why?
  - » Have you ever been disciplined at a former job? If so, what happened?

# Acceptable questions (continued)

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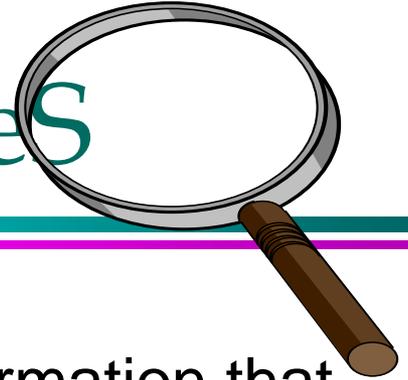
- Open-ended questions: (Checking for violent tendencies)
  - » “Describe an instance when your boss made you angry and what you did about it”. (Checking for how applicant handles rage.)
  - » “Tell me about a failure in your life and why it occurred”. (Checking whether person can accept responsibility for mistakes or blames others.)
  - » “Who is your best friend and tell me something about your friendship”. (Checking individual social connectedness, since typical workplace killer is isolated - very much a loner.)

# Concluding the Interview

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- Give the applicant a chance to add anything else he or she thinks is important for you to know in making your decision.
- Make applicant aware of next steps:
  - » Will applicant be asked to attend other interviews? With whom and when.
  - » Who will contact the applicant next and in what time-frame?
- Thank the applicant for his or her time.

# Checking references



- Employers are less willing to release information that they believe could lead to a **Defamation of Character Lawsuit**.
- Defamation refers to slander and libel.
  - » Verbal comments may constitute slander.
  - » Written remarks may constitute libel.
- Defamation occurs when a person (former employer) makes a written or verbal statement to a second person (prospective employer) about a third party (job applicant), which is untrue.

# Checking references (continued)

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- Hence, many employers are hesitant to give information about a former employee other than :
  - a. Date of employment;
  - b. Job title; and
  - c. Salary (verify range, do not release actual figure).
- Some employers will release information only if they have a release from former employee.
- **Texas Reference Checking Law** became effective Sept. 1999:
  - a. Provide references on current and former employees.
  - b. Not be held liable as long as it does not disclose information it **knows** to be false or disclose information in reckless disregard of its truth or falsity.

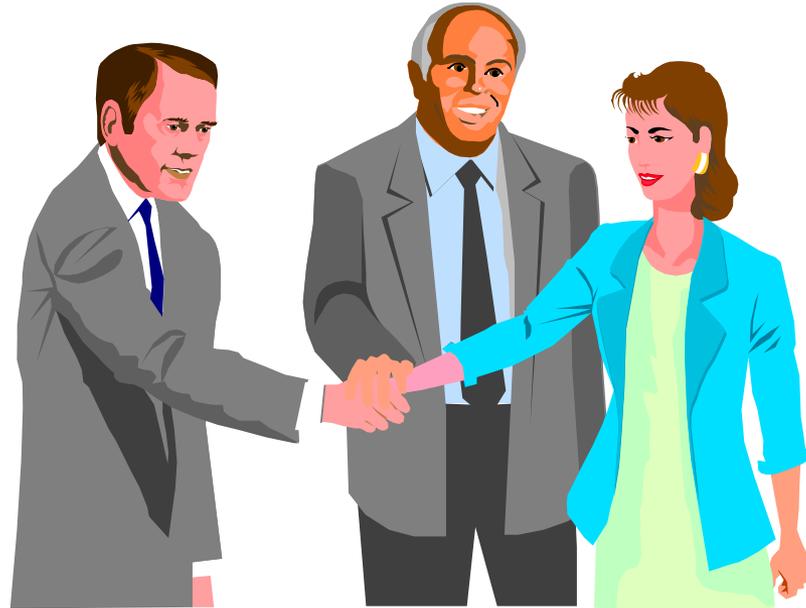
# Checking References (continued)

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- Advisable to give only written employment references as verbal comments can change.
- All references should be handled by only one person. All inquires should go to HR Dept.
- Get applicant to sign a release that authorizes prior employer to release information, part of application process. (TWC has a release form.)
- Seek reference from at least the last 3 employers, and get names of former supervisors or others familiar with work record or job performance.

# The Offer

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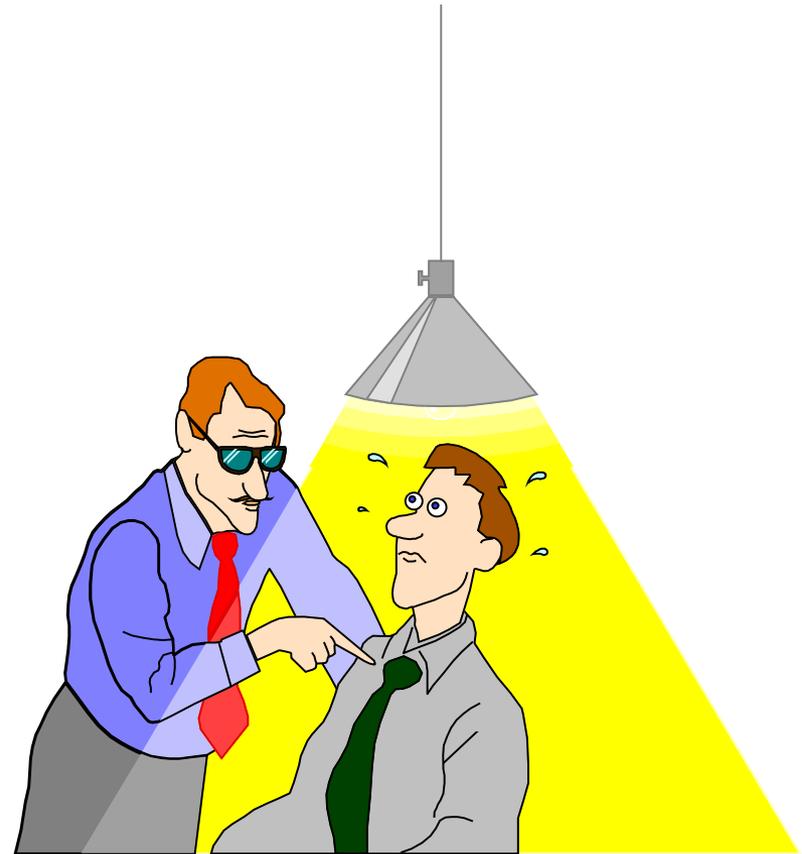
# Conditional Offer of Employment

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- Make offer in person if possible.
- Conditionally hired: must pass Drug Test or Physical Exam or Job function Test.
- Conditionally hired vs. Probationary Period; full-time vs. permanent employee.
- Go over expectations.
- Use the smallest figure possible:
  - \$ 500 per week vs. \$ 26,000 annually

# What the Performance Review IS NOT

- A time to discuss pay increases.
- A time to discuss violation of Company policy for the first time.
- A time to threaten.
- A time to make “bombshell” announcements.



# What the Performance Review IS

- A time for employees and supervisors to discuss employee performance based on requirements of the job.
- A time to set specific goals for improvement.
- A time for coaching, suggesting, complimenting, and open discussion.



# Pitfalls of Negligent Performance Reviews

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- Performance appraisals which do not adequately identify an employee's shortcomings can undermine subsequent discipline of a poor performer.
- Employers (and maybe supervisors themselves) can be sued for their negligence in handling performance reviews.
- Employers and supervisors have been sued for negligence where a poor evaluation costs the employee his job. (Unfair performance review resulting in termination.)
- False negative evaluations causing an employee's termination have been the basis for lawsuits against both the employer and the supervisor personally. ( Supervisor intentionally interfered with the employment relationship between employee and Company where allegedly false performance appraisals caused the worker's discharge.)

# What is a Charitable Performance Review and why do they happen?

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- A charitable review is a review that does not address unacceptable performance or behavior and the need to improve or correct same;
- Happen because:
  1. Manager/Supervisor does not want confrontation.
  2. Manager/Supervisor wants path of least resistance.
  3. The problem will "solve itself".
- Charitable review amounts to documenting a case against yourself.
- Sooner or later the employer will regret the decision to tolerate charitable reviews.

# Consequences of a Charitable Performance Review

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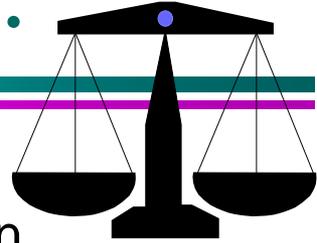
- **Employee** suffers because he/she does not know that improvement is necessary and in which areas.
- **Company** suffers:
  - » It weakens the defense of a possible future negative personnel decision, including discharge;
  - » Negatively impacts the long-term productivity of the organization as a whole by lowering standards;
  - » Has a demoralizing effect on the entire workforce as other employees know who is carrying their weight and who is being carried.

# What can be done to avoid Charitable Reviews

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- Accurate, honest, periodic performance evaluations go a long way to reduce exposure to claims.
- A well documented review is the cornerstone of the employers defense against charges of wrongful discharge and discrimination.
- Takes courage to give a candid performance evaluation to an employee who needs improvement.

# Courts look favorably at Performance Reviews when:



- The appraisal is **based on a job analysis** of the position in which the employee is being appraised.
- The appraisal is based **primarily on specific and objective evaluation criteria**.
- Employees are given **advance notice of job standards**.
- **Supervisors have received training** in performance appraisals policy and practice.
- Employees are given an **opportunity to review results** of their own appraisals
- Appraisals are **reviewed by high level management**.

NOTE: All of the above fall within the ProShare system.

# Four Reasons for Poor Performance

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- **THEY DON'T KNOW:**
  - » Relates to Knowledge: No one has taught the new employee to do the job; or trained the employee as the job changed.
  - » Solution: Train the job
- **THEY CAN'T DO:**
  - » Relates to Aptitude: The employee may be in over their head.
  - » Solution: Relocation - do something else.
- **THEY WON'T DO:**
  - » Relates to Attitude: The employee chooses not to do the job, not because they don't know or they can't do the job.
  - » Solution: Redirection and change mind set.
- **EXCESSIVE INTERFERENCE:**
  - » Relates to Control: These employees are not empowered or can not control their environment.
  - » Solution: Change the system and/or change procedures.

# Causes of Poor Performance Created by Poor Supervisors

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- Inadequate feedback.
- Overload of work for the employees ability
- Not providing appropriate rewards for extra work.
- Allowing conflict between workers to go unresolved.
- Lack of clear promotion criteria.
- Over supervising
- Allowing off-work problems to impact work.
- Not acknowledging cultural differences.
- Inadequate performance reviews.
- Poor or slow information from the top.
- Changing work responsibilities without proper training.
- Ignoring conflict between supervisor and employee.
- Not treating more mature workers with respect.

# Causes of Poor Performance Created by Poor Supervisors (continued)

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- No concern for task assignments or career development.
- Closing communication channels.
- Lack of orientation for new hires.
- Overreacting to new non-performance situations.
- Refusing to let go of tasks delegated to others.
- Emphasis on quality while pushing for quantity.
- Putting workers down in front of their peers.

*Supervisors/Managers need to look at their own approach to make sure you are not hindering the employee.*

# Four Steps of Progressive Discipline

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- 1. VERBAL WARNING:
  - » Inform the employee about the problem.
  - » Set guidelines for correcting the problem.
  - » Clarify the consequences.
  - » Have the employee follow-up with you on progress or as supervisor, follow-up with the individual.
  - » Keep a written record for your files. (i.e... Topic, date, what you and employee agreed on.)

# Four Steps of Progressive Discipline (continued)

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## 2. WRITTEN WARNING:

- » Review verbal warning.
- » Provide clear documentation.
- » Develop the next step in the Action Plan.
- » Clarify the consequences.
- » Put the Action Plan in writing.
- » Have the Employee sign the Discussion Report.
- » Place original documentation in the personnel file and provide Employee with a copy.

# Four Steps of Progressive Discipline (continued)

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## 3. SUSPENSION

- » This is time of with or without pay.
- » The suspension can be from one to five days.
- » Visit with the Employee upon their return to work.
  - Review why the action took place.
  - Clarify consequences if this should happen again.
- » Document your file.

# Four Steps of Progressive Discipline (continued)

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## 4. TERMINATION

- » Document and verify every action leading to termination.
- » Set a specific time for the interview.
- » Choose a time for the action that is best for the company. If the decision has been made, don't delay your meeting.
- » When possible, have the employee sign statement of discussion.
- » Don't apologize for having to take this action.

# WHEN YOU CANNOT TERMINATE AN EMPLOYEE UNDER FEDERAL OR STATE LAW.

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- » because of a person's age (if over 18 but less than 72): sex (including pregnancy); color; handicap; religion; military status; national origin; or race, unless for valid job-related reasons.
- » because of union organizing activity (unless conducted during working hours) or membership in a union.
- » because an employee exercised his/her right to a safe workplace.
- » because an employee exercised his/her right to a minimum wage or overtime.
- » to prevent a person from beginning vested in a pension or retirement program.
- » for "whistle blowing" to a federal, state or local regulatory agency.
- » for service on a jury.

# WHEN YOU CANNOT TERMINATE AN EMPLOYEE (continued).

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- » a veteran within six months to one year of discharge from the military.
- » because of an employee's bankruptcy, garnishment of wages one time during a year.
- » because the employee filed a workers compensation claim.
- » because the employee attended a precinct meeting.
- » because an employee took two hours or less for voting.
- » for service on active military duty (reserves).
- » for refusing to take a polygraph examination. (After January 1, 1989)
- » for refusing to work on a Sunday or other day in order for the employee to observe his religious practice.

# WHEN YOU CANNOT TERMINATE AN EMPLOYEE (continued).

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- » because of drug abuse or alcoholism if your Company is a federal or state contractor or, if you have NO Drug/Alcohol Testing Policy.
- » because the employee refused to perform an illegal act.
- » because of a disability which is protected by ADA which does not affect the employee's ability to perform the job with "reasonable accommodation" by the Company.
- » because the employee complained or filed a complaint with EEOC as a result of sexual harassment.
- » to deprive an employee from receiving benefits under a group health plan.

# → VERY IMPORTANT ←

Before you take any action to terminate an employee for one or more of the above reasons, you should consult your human resources department or attorney before taking termination action.



# The Discharge Meeting

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- **Keep it short:** Only one person should do the termination. The decision has been made, no reason for lengthy meeting.
- **Be polite:** There is no reason to be abusive, rude conduct can lead to the appearance of unfairness.
- **Give reason in general terms:** If termination is for cause, state the reason (i.e. excessive absenteeism). If it is an At-Will , state “We no longer have need of your services.” In Texas the employer is not required to give a reason.

# The Discharge Meeting

## (continued)

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- **Allow the Employee to comment:** Do not prevent the employee from commenting or refuse to hear what the employee has to say. (May provide evidence.)
- **Don't debate the discharge:** Debate can degenerate into an argument and may lead to unguarded comments that can hurt you or the company later in court.
- **Have a witness:** It is always a good idea to have a witness at a discharge meeting.
- **Tell the truth.**

# The Discharge Meeting

## (continued)

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- **Document the discharge meeting:** Witness should take notes of what was said. Write it up and place in file
- **Have loose ends tied up:**
  - » Have the Employee's pay if possible. Must pay within six calendar days (TX Payday Law).
  - » Provide severance pay, vacation (if it is the Company policy ).
  - » Collect Company property (i.e. cell phone, pager, keys. credit card).
  - » Review COBRA options (if applicable).

# The Discharge Meeting

## (continued)

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- **Consider a Settlement and Release.**
- **Assist the former employee:** Either the Human Resources person or the employees supervisor should assist in cleaning out the workstation or locker. Make sure that no Company property is removed. Don't get into a discussion with former employee. Treat the former employee with respect.

# Post Discharge Procedures

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- **Communicating with others:** Limit your communication concerning the discharge to avoid claims of defamation. Simply advise your staff that the individual is no longer with the Company.
- **Reference Checks and Recommendations:** Limit comments to a neutral reference (i.e. date of employment, job title, location).
- **Unemployment Compensation:** Prepare before a TWC hearing by reviewing all documentation. Provide truthful information. Have parties involved available to attend hearing.

# Post Discharge Procedures

## (continued)

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- **Communications with former Employee:** The former employee may have legitimate reasons to call the Company. All communication should be polite and business like. Limit conversations concerning the discharge.
- **Communications with Government Agencies:** All communications with TWC, EEOC, Dept. of Labor, etc. should be coordinated so that information provided is consistent with stated reason for discharge. Person handling those duties should seek advice of counsel if necessary to insure responses do not result in the creation of bad evidence.

# Preventing: Wrongful Discharge Claims

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- ☆ **Conduct periodic reviews** of applications, offer letters, and personnel policies to ensure that the proper “at-will” statements are included.
- 🕒 **Train supervisors to record significant employee problems** so the subsequent discipline or discharge actions are justified and can be justified.
- 🕒 **Train supervisors to handle performance appraisals objectively** so that problems are identified and remedial actions and time tables are specified.

# Preventing: Wrongful Discharge Claims (continued)

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- 🕒 **Require supervisors to suspend employees pending further investigation rather than immediate termination.**
- 🕒 **Provide for internal review of all termination decisions before implementation.**
- 🕒 **Conduct the termination notification in private with at least two members of management present to provide an accurate account of what occurs at the meeting.**

# Preventing: Wrongful Discharge Claims (continued)

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- ⌚ **Restrict discussion of the termination to individuals with a need to know** to minimize the potential for claims of defamation, invasion of privacy and emotional distress.
- ⌚ Authorize **one person to handle post-employment job reference questions** to reduce the risk of claims of defamation and invasion of privacy.

# Top Five Reasons Why Supervisors will not take action.

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## **1. Lack of training.**

» This is a learned skill, usually handled via OJT.

## **2. Perceived lack of support from management**

» Supervisor fears owner or manager will not back him/her.

## **3. Desire to avoid being the heavy.**

» Supervisor does not want to be the only one disciplining.

## **4. Fear of lost friendships.**

» Most supervisors rose through the ranks and are now supervising their co-workers and friends.

## **5. Concern of draining valuable time.**

» “I don’t have the time.” Need to find/make time.

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# Questions & Answers

