

Perspectives

Insights From Colleagues of UE

Properly Documenting Employee Disciplinary Actions

By Dan Wilczek

Most people understand the importance of documenting the disciplinary actions an employer takes against employees. In fact, employees usually expect that disciplinary meetings will be recorded. Yet even as we lawyers advise employers to “be sure to document the meeting,” we often don’t provide enough concrete guidance. In this article, I will share my views on what makes a document good or bad, and explain why and how documentation can help you make better employment decisions.

The Benefits of Proper Documentation

Your institution should never find itself in litigation against an employee without solid documentation. As the employer, you control both the process of documentation and the timing of employment decisions. You probably have a good sense of what employment actions may turn into legal disputes, such as the dismissal of a long-time employee. In those situations, you may need to exercise special patience instead of rushing forward without good documentation. You can and should ensure your decision is well-documented before finalizing it.

When litigation occurs, judges, juries, and administrative agencies expect employment decisions to be well-documented. Good documentation will not earn you “extra credit,” but its absence can result in a failing grade. Furthermore, documents have become more, not less, important with technological advances in courtrooms. Your documents, good or bad, will be enlarged electronically and highlighted, with every helpful line bolstering your case and every ambiguity used against you.

Documenting meetings and incidents helps ensure clear communication. A written record creates definite proof of what an employee was told and helps eliminate the potential for miscommunication between the institution and the employee. By having the employee sign the document, you can further ensure comprehension of what was said during the meeting. Documenting incidents also creates a record for evaluating future conduct. You can chronicle an employee’s history with the institution and help identify patterns of conduct, even in the event of staff turnover.

About the Author

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Documentation helps you make better decisions. By writing the document, you can conduct a self-check regarding whether a decision is well thought-out and properly supported. The drafting process often enables the decision maker (and a supervisor) to consider an action more objectively. By judging the strength of the documentation, you also evaluate the factors that help an employment decision survive a legal challenge.

Good documents can also help avert disputes in the first place. An employee is more likely to accept an involuntary discharge if it is supported by a solid written foundation. And you can be sure that an attorney will review the documentation that a potential client received before deciding to represent a disgruntled employee. If the employee does sue, proper records can help expedite successful resolution of the case. A well-documented decision is more difficult to overturn, and good records strengthen live testimony. At trial, a solid document will help a witness to testify, enhance credibility, refresh recollection, and can rehabilitate the credibility of a witness subjected to vigorous cross-examination. Proper documentation can make the difference between a persuasive, credible witness and one who appears weak, uncertain, or even dishonest.

The Perils of Poor Documentation

Bad documents, by contrast, omit important facts, are poorly written, and inconsistently identify reasons for the disciplinary action. Bad documentation limits flexibility. It hamstring the institution's ability to prove in court that other facts or reasons supported the decision. If a witness varies from the document in any significant regard, the discrepancies will be used against the witness.

Poorly drafted documentation invites litigation by creating opportunity for an employee to imbue the document with unintended meaning. You should not have to explain what a document means or place it in context. Furthermore, bad documentation may actually generate additional claims. For example, carelessly drafted or distributed documents might support an employee's claim for defamation.

Specific Elements of Good Documentation

Documentation provides the framework for explaining your employment decision to the court. A good document should *record all important facts and the bases for any decision* in a manner that will be understandable and persuasive to a judge or jury. You need to assume that all important facts and decisions will be challenged and prepare documents with an eye toward the facts that the institution wants to establish.

Document Drafting Tips

Be truthful and accurate. Deliberate deceit will certainly come back to haunt you. Once a jury concludes that a document's author has lied or exaggerated, it will not believe anything that witness says or has written. Accuracy is much more important than speed. Take the time to be truthful and accurate.

Review the document in draft form. Make sure the author critically reviews the document's first draft. Ask, "What impact will this have on a jury? Does it accomplish all necessary proof? Does it help to establish that I was fair? Is it complete?" Creating a first draft permits a critical and objective review.

Have someone else review the document. Since it is an important document, have someone with human resources or legal experience review it to ensure that it communicates the reason for the decision and why it is fair. However, this review should be performed only by someone who otherwise has a legitimate reason to see the document.

Destroy all drafts. Keep only the final version.

Be timely. Prepare the document as soon after the incident as possible. Although it is never too late to write a document, its persuasiveness decreases with the amount of time that passes before recording an incident.

"As you know" is better than nothing. If it appears that a prior event may become significant, write an "as you know" memorandum. This sort of memorandum documents the earlier undocumented events as a part of the introductory paragraph. For example, you may write: "As you know, I have discussed with you repeatedly the importance of you being on time for work, including when you were late for work on 10/25, 11/1, and 11/3. On 11/3, I told you that if you were late again, you would be subject to discipline up to and including discharge."

Final Warning

Compare the two examples below. Both adequately document a final warning, but the second warning explains the process and creates a strong framework for defending the decision.

Date: November 1, 2012

To: Bill Franklin From: John Smith

Re: Final Warning

On October 23, your area was again not cleaned properly. I have talked to you about this previously. Failure to clean your area properly again could result in the termination of your employment.

CONFIDENTIAL

Date: November 1, 2012

To: Bill Franklin From: John Smith

Re: Final Warning

This is your final warning for failing to adequately perform your cleaning responsibilities in Mortensen Hall. I received another complaint from the Math Department that the classroom floors were not mopped. I examined the floors myself and found that the floors in classrooms 5 and 8 had not been thoroughly cleaned. This is your final warning that if you fail to properly clean your building again, your employment will be terminated.

In the past six weeks, your performance has fallen to an unacceptable level. I counseled you about the need to complete all your cleaning responsibilities every night on September 14 and 21. On each occasion, you said that you understood and would do better. Unfortunately, I continued to receive complaints. As you know, I gave you an oral warning on October 3 and a written warning on October 15. These warnings are attached. These problems cannot continue. An inadequately cleaned building reflects poorly on the College. The students deserve to be taught in clean classrooms.

I have offered in the past, and offer now, to review with you again your job duties and my expectations. I continue to be willing to assist you any way I can. You have shown on occasion that you have the ability to do the job well. Whether you continue working at the College depends on your willingness to make the necessary effort.

I have read and understand the Final Warning.

Employee Signature

Date

The key to good documentation is not persuasive writing or voluminous material that “papers the file.” Rather, a good document records a decision-making process that demonstrates three critical facts:

1. The institution made a well-thought-out decision
2. The decision was fair
3. The institution is a good employer

Was the decision well thought out? A document demonstrates the soundness of the employer’s decision if it:

- Identifies the violated rule or standard.
- States the legitimate reason why the rule or standard is fair (for example, documents should note that all employees must comply with performance standards).
- Demonstrates how the employer communicates the rule or standard.
- Describes any previous steps in the progressive discipline process, such as counseling or minor sanctions, and attaches copies of any earlier documentation.
- Explains the effect on the institution of the employee’s failure to satisfy the rule or the meet the standard in the most recent incident.
- States clearly the employer’s future expectations, even if that requires restating the rule.
- Invites the employee to ask any questions regarding expectations, thus leaving no room for claimed misunderstanding.
- States plainly the consequences of an additional violation.
- States the institution’s willingness to assist in any reasonable manner and the institution’s hope that the employee will improve.
- Includes a date and identifies the author.
- Contains the employee’s dated signature and date. (If the employee refuses to sign, note the date and time that the employee was presented with the document and his or her refusal; then sign the document under the notations.)

- Notes it is “confidential” and is handled as such according to the institution’s policies.
- Uses plain, nontechnical language that a jury can understand.
- Avoids exaggerated, conclusive, inflammatory, or illegible language.

Was the decision fair? Proof of a fair decision rests on establishing these factors:

- The employer clearly communicates expectations.
- The employer enforces expectations evenhandedly.
- The employer gives clear notice when performance or behavior is unacceptable.
- The consequences of continued unacceptable performance or behavior are clearly stated.
- The employee has a meaningful opportunity to improve.
- The employer offers to assist the employee.

Is the institution a good employer? If, in documenting a decision, you cannot honestly and with full confidence state that you followed these steps, you need to consider whether your decision-making process has flaws. You should take a step back and delay your decision until all these steps have been clearly and unmistakably taken. Such patience almost always pays dividends, either by salvaging an employee in difficulty or by putting you in a stronger position to defend your decision if necessary. In the last analysis, good documents show that your institution is a good employer.

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