

# What Supervisors Need to Know About Managing Employees

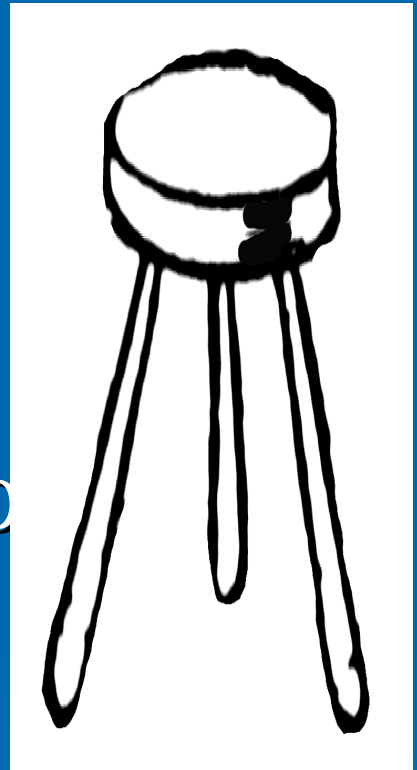
Loyola College in Maryland

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# The 3-legged stool:

1. Fairness
2. Consistency
3. Documentation



# Fairness

- Is the proposed action (e.g., discipline, promotion, demotion, performance appraisal rating, termination) reasonable under the circumstances? Is the sanction in line with the offense?
- ✳ Would others (who knew the facts) perceive the action as fair?
- Are there any inappropriate motivations (e.g., positive or negative bias, personal differences)?
- In a poor performance case, has the employee been given fair warning of the concerns and an opportunity to improve?
- In a misconduct case, was the employee on notice of the employer's expectations, rules?

# Consistency

- How has the employer handled similar situations in the past?
  
- Are employees being treated the same way without regard to protected classifications?
  - Race
  - Color
  - Religion
  - Sex (including pregnancy)
  - National/ethnic origin or citizenship status
  - Age
  - Disability
  - Marital status
  - Sexual orientation
  - Genetic information
  
- A word about “pretext”

# Documentation

- Purposes
- Content
- Timeliness

# Documentation

## Purposes

- Communication
- History
- Evidence

A word about e-mail:

**CAUTION**

# Documentation

## Content

- Factual
- Accurate
- Professional
- Avoid creating contractual obligations

# Documentation

## Timeliness

- Contemporaneous is best
- Summary before taking adverse action is second best
- Justification after taking adverse action is worst

# Special Topics

- Interview Questions
- Background Checks
- References (getting and giving)
- Absenteeism  
(FMLA/ADA/Medical Inquiries)
- Overtime
- Retaliation

# Interview Questions

- Do not elicit information that may not lawfully be considered in a hiring decision
- Do not ask questions or make comments that are based on stereotypes

# Interview Questions

- Do ask questions to evaluate the candidate's qualifications for the position
- Do try to standardize list of questions if interviewing several candidates

# Background Checks

- Employers have a duty to use reasonable care in selecting employees
- Employers fulfill the duty of care by gathering information (*e.g.*, employment application and/or CV, personal interview, employment references)
- Additional background checks may be necessary, depending on the position (not the applicant)
- Checks performed by the third parties may require the applicant's authorization

# References

- Negligent hiring – reasonable standard of care
- Checking references requires exercise of judgment (*e.g.*, ask follow-up questions, be attentive to “red flags”)
- The goal is not just to obtain the reference, but to evaluate it
- Offers may be withdrawn based on unsatisfactory references (or lack of references)

- Defamation – Maryland statutory immunity protects an employer acting in good faith who discloses information about a current or former employee to a prospective employer or regulatory authority
- “Good Faith” means no actual malice or intentional/reckless disclosure of false information

# Absenteeism

➤ FMLA

➤ ADA

➤ Medical Inquiries

## ➤ Family and Medical Leave Act

- Designate qualifying leave as soon as possible
- Right to reinstatement
- Restrictions on seeking medical information
- May not penalize employees for FMLA leave (*e.g.*, attendance policy, performance evaluation)
- May not “retaliate”

# Americans with Disabilities Act (ADA)

- Requires reasonable accommodation of “qualified individuals with disabilities” (history, current, or perceived)
- Modifications of workplace policies, including time and attendance policies, can be required as accommodations
- Medical inquiries/examinations are strictly regulated

# ADA

## ➤ Medical

### Inquiries/Examinations

- Before offer is made – prohibited
- After offer is made but before first day of work – can ask anything, but may not disqualify based on disability
- Current employees – must be job-related and consistent with business necessity

# ADA and FMLA

## Confidentiality

- Medical information must be collected and maintained on separate forms and in separate files and treated as confidential medical record
- Supervisors may be informed regarding necessary restrictions on the work or duties of employee and necessary accommodations
- Medical information may not be used for any other purpose (*e.g.*, to make adverse employment decisions)

# Overtime

## ➤ Exempt employees

- Salary basis
- Limited deductions
- No overtime pay

## ➤ Non-exempt employees

- Must be paid 1 ½ times hourly rate for hours over 40/week
- “Hours worked”
- “Suffered or permitted”

# Retaliation

- Retaliation is unlawful, even if underlying claim is without merit
- Discrimination statutes, FMLA, workers compensation, labor relations laws, etc. have retaliation prohibitions
- Employer may not terminate employee solely because s/he files a workers compensation claim
- “Whistleblower” protections