

# **EMPLOYEE EVALUATION, DISCIPLINE, AND DISCHARGE**

*Wisconsin Government  
Finance Officers Association*

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**Presented By:**



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## I. Overview

- A. Goal: Establish the foundation of good personnel management documentation. with three foundation points:
1. Solid discipline documentation
  2. Solid day-to-day evaluations
  3. Solid annual evaluations
- B. Lawsuits demonstrate the value of doing good performance documentation.
1. The Lack of Documentation. Age discrimination claim successful in *GPI Corp v. LIRC*, 2005 WI App 806. “While Kurtzweil’s testimony conceded that he had problems adjusting to using computer and drafting (CAD) technology and had verbal disputes with [a supervisor], the Commission questioned GPI’s credibility as to the purported magnitude of these problems. The Commission noted that Kurtzweil’s personnel file was free of any negative notations and that while GPI had a system of progressive discipline, that system was never used with Kurtzweil.”
  2. The Effect of Bad Documentation. Age discrimination claim successful in *Bevan v. Honeywell, Inc.*, 118 F.3d 603 (8th Cir. 1997) where the Court upheld a jury’s finding of discrimination as “Bevan always received high performance ratings in annual reviews and was awarded regular merit increases. The Court said based on this information the jury could reasonably disbelieve the employer’s assertion that the termination was not discriminatory.
  3. The Effect of Awful Documentation. *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976 (7th Cir. 2000). Legal secretary filed sexual harassment claim based on five incidents she alleged created a hostile environment. Three months after she filed that claim, the secretary was fired after being discovered gluing an artificial fingernail on the finger of a friend in the ladies’ bathroom. The secretary argued the employer’s stated reason for firing her was pretextual. The employer responded that, although the fingernail incident may seem trivial, it was the proverbial “straw that broke the camel’s back” and that the secretary’s work was unsatisfactory and her attire inappropriate. The plaintiff’s attorney directed the Court to the performance reviews. As far as the documents were concerned, her work had been entirely satisfactory throughout. The annual performance reviews from the three lawyers she had been working for were highly positive, particularly the one filled out by the young associate. The Court noted, “*It is common for supervisors to overrate their subordinates for purposes of building morale, avoiding conflict, and deflecting criticisms that the supervisor isn’t doing a good job (or that he shouldn’t have hired*

*this subordinate in the first place). Not much weight can be given to positive reviews. But not much does not equal zero. And by going out of his way to say nice things about the plaintiff, Dalinka made it possible for a reasonable trier of fact to infer that his later denigration of her performance was invented for the purposes of litigation . . .”*

4. The effect of a good evaluation. Age claim dismissed without a trial in *Ziegler v. Beverly Enterprises-Minnesota, Inc.*, 133 F.3d 671 (8th Cir. 1998) based on deteriorating performance evaluations from 1984 to 1993. The Court was also impressed by a memo given to the employee describing her need for improvement and setting forth the employer’s expectations.

C. Sound documentation remains the foundation of defense

1. Quality documentation
  - a. Establishes credibility and professionalism for the supervisor
  - b. Serves as a deterrent to challenges to the supervisor’s decision
  - c. Resolves many of the disputes reserved to oral testimony
2. Drafting prior to making decisions results in better decision making. The supervisor is able to analyze and see the result of the decision before implementation.
3. While we often focus on negative conduct by employees, the same documentation principles can be used to recognize superior performance and raise morale.
4. The employee (including former employees) may have a right to inspect what you write and provide a rebuttal:
  - a. Right to Review Records. WIS. STAT. 103.13(2). Every employer shall, upon the request of an employee, which the employer may require the employee to make in writing, permit the employee to inspect any personnel documents which are used or which have been used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, termination or other disciplinary action, and medical records, except as provided in subs. (5) and (6). An employee may request all or any part of his or her records, except as provided in sub. (6). The employer shall grant at least 2 requests by an employee in a calendar year, unless otherwise provided in a collective bargaining agreement, to inspect the employee's personnel records as provided in this section. The employer shall provide the employee with the opportunity to inspect the employee's personnel records within 7 working days after the employee makes the request for inspection. The inspection shall take

place at a location reasonably near the employee's place of employment and during normal working hours. If the inspection during normal working hours would require an employee to take time off from work with that employer, the employer may provide some other reasonable time for the inspection. In any case, the employer may allow the inspection to take place at a time other than working hours or at a place other than where the records are maintained if that time or place would be more convenient for the employee.”)

- b. Augmentation. If the employee doesn't like what you have to say, then the employee can write a rebuttal. Wis. Stat. § 103.13(4) “PERSONNEL RECORD CORRECTION. If the employee disagrees with any information contained in the personnel records, a removal or correction of that information may be mutually agreed upon by the employer and the employee. If an agreement cannot be reached, the employee may submit a written statement explaining the employee's position. The employer shall attach the employee's statement to the disputed portion of the personnel record. The employee's statement shall be included whenever that disputed portion of the personnel record is released to a 3rd party as long as the disputed record is a part of the file.

D. Even though employees may serve “at will,” knowing the answers to the following questions can help you make legitimate nondiscriminatory decisions.

1. Did the employee know the possible or probable consequences of his or her behavior?
2. Are the employer's expectations reasonably related to an improved work product or the effective operation of the workforce?
3. Was a complete review conducted to determine the facts before finalizing the evaluation?
4. Was the performance review conducted fairly, using an unbiased evaluator and giving the employee a chance to be heard?
5. Is there adequate direct (non-hearsay) evidence of unacceptable performance?
6. Are all similarly situated employees treated the same?
7. Does the proposed result (reduced pay increase, decrease, no increase, disciplinary action) appropriately consider the seriousness of the misconduct and the employee's record of service with the employer?

- E. What should the Supervisor keep in mind from a drafting standpoint? What does the supervisor need to be prepared for? Specific issues commonly raised in “quality of performance” cases:
1. Has the employer clearly shown the employee proper performance techniques?
  2. Was there adequate time and opportunity for the employee to modify his or her behavior?
  3. Were “special circumstances” considered?
  4. Did the employer identify specific objective steps the employee must take to be considered competent?
  5. Do any other employees have similar problems who are not being disciplined or terminated?
  6. Has there been any improvement in the quality of this employee’s performance?
  7. Is the employer concluding poor performance exists based solely on “results,” such as poor department performance or poor “customer” satisfaction (i.e. complaints)?

F. Drafting Tips

1. Keep it simple. Verbose and convoluted writing can sometimes be more harmful. The best thing to say after you have said what needs to be said is nothing.
2. Know and draft for your audiences. Create documents that a layman will understand and recognize your audience is a judge, jury, the press, and internal superiors.
  - a. Is the documentation you prepare what your superiors would expect of its professional employees?
  - b. Is the documentation what the employee respects?
3. Front page. Write as if your memorandum is on the front page of the newspaper.
4. Be professional, and avoid informality. Be wary of informality of email communications.
5. Don’t write “angry.” Take the time to prepare the draft and then time to review it.

6. Contemporaneously. Creation of documentation should be completed contemporaneously around the time of the incident. Include dates, but avoid backdating.
7. Be you. Write using common vocabulary of plain and understandable words and phrases.
8. Just the facts. Focus on the facts. Avoid generalizations, exaggerations, absolute statements and vague statements.
9. Be specific.
10. Who? Use acronyms and first names only after using the full name earlier in the document.
11. Spur your memory. Include locations and other descriptive elements. The aid for recollection.
12. Document exactly what the person said.
  - a. Do not quote someone speaking in the third person. Use mirroring (respond with what the employee said) as a tool to understand the employee's position and to reaffirm your understanding of what the employee said and means.
  - b. Don't misstate what the employee says or use legally loaded terms (for example, the employee says she feels "challenged too much by coworkers." The supervisor then writes the employee feels this is a "hostile working environment" or "harassed").
13. Make your decision. Come to a conclusion, give direction to the employee, and then implement and effectuate your decision.
14. Staplers are good. When referencing past documentation, let those documents speak for themselves. Don't attempt to paraphrase those past documents. Instead, just attach a copy.
15. Achievement of goals. Does the documentation help you help the employee meet standards, be successful, and further the entire workforce?
16. Don't be nice and don't be mean. Be professional. Professionalism does not require and does not mean you are cruel.

## THE BAD FORM OF DOCUMENTATION

### MEMORANDUM

TO: Bob Smith  
FROM: Jay Cutler  
RE: Inappropriate Behavior

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On Wednesday, you and I met to discuss your rude statements that you made to Sally. I witnessed your statements. I was appalled that such words would come from you. Sally was also very upset. She told me that you create a hostile working environment. **I AGREE!!**

You have repeatedly and progressively gotten worse in your tone and in the type of comments that you believe you can get away with. Your poor behavior seems to be the norm, and I don't know how much more we can tolerate.

I am putting you on notice that your conduct is in violation of our rules and that future rule violations will not be tolerated. If you engage in future acts of misconduct, then I will consider terminating your employment. Understood?

## THE GOOD FORM OF DOCUMENTATION

DATE: September 21, 2017  
TO: Jay Cutler (Finance Assistant)  
FROM: Aaron Rodgers, Finance Director  
RE: Unprofessional Comments on January 14, 2016

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On Wednesday, September 20, 2017, at 9:35 a.m., at the entrance of the lunchroom, I witnessed you tell Sally Jones that you thought she was “such a cry baby,” and you told Sally “I can’t stand working with you.” I witnessed that Sally was distraught and crying following your statements. I met with Sally prior to meeting with you and she confirmed that she was upset. She indicated that she would move forward from this situation if you apologized.

During our meeting in my office at approximately 11:30 a.m., you admitted to making these comments. You told me you would be “more respectful” of Sally and your coworkers, and that you believed your comments were “out of line.” You stated that you would apologize to Sally. You told me this information before I had the opportunity to encourage you to apologize. We discussed that your conduct was in violation of Rule of Conduct Section 7.A and D regarding professional courtesy and cooperativeness. We also discussed your 2015 and 2016 performance evaluations where I identified that your rankings for “cooperation” and “professionalism” were “marginal.” You then apologized to Sally. I appreciate that you accepted responsibility for your actions. In consideration that you promptly accepted responsibility for your actions and that you quickly apologized to Sally, I have decided not to consider severe disciplinary action.

Our work environment is a professional environment, and I want our team to interact well with one another. When those discussions are unprofessional, are in violation of our rules or expectations of conduct, or when they interfere with the effective and productive operations of the workforce, then I will intercede and take appropriate corrective action. It is important that you know that unprofessional behavior on your part has no business in our workplace and must immediately cease if you wish to remain employed. While I am not taking disciplinary action at this time, future acts of misconduct by you will warrant severe disciplinary action and likely termination of your employment.

If you have any questions regarding this memorandum, then you are directed to meet with me.

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*I have received the memorandum. I understand the directives and expectations given to me. I understand it is my responsibility to direct questions or concerns I have about this memorandum to my supervisor:*

\_\_\_\_\_  
Jay Cutler

Date: \_\_\_\_\_

## **II. First Building Block – Proper day-to-day discipline documentation.**

- A. Include facts - Summarize specific facts (who, what, when, where, why).
- B. State the allegation of improper conduct and your review of the matter. “I discussed this incident with you on \_\_\_, \_\_\_ and your response was...”
- C. Apply the rules and expectations of conduct and demonstrate employee awareness
  - 1. “This conduct violates various departmental rules/policies, including, but not limited to:”
  - 2. “You were aware of these rules because...”
  - 3. “Your evaluation dated \_\_\_ also reflects that you did not follow this rule.”
- D. Analyze the employee’s record of service. For example, “Your prior disciplinary record includes:”
- E. Analyze allegations of dissimilar treatment. For example, “You didn’t identify any other similarly situated employee.”
- F. Make your decision and set forth your expectations
  - 1. Announce penalty (oral warning, written warning, etc.).
  - 2. “Future misconduct may result in discipline, including discharge.”
- G. Place a copy and keep it in the personnel file.
- H. Never “sunset” documentation.

## **III. The Second Building Block – Proper Day-to-Day Evaluation Documents.**

- A. Continuously monitor and promptly address less than satisfactory job performance.
  - 1. Inquire as to improvement.
  - 2. Inquire as to follow-up assistance, training, mentoring or resources.
  - 3. Meet regularly with the employee to discuss improvement or lack thereof.
  - 4. Monitor the required improvement under a corrective action plan.
  - 5. Meet with the employee to discuss the decision - helpful tips for effectively conducting discipline and day-to-day evaluation meetings
  - 6. Select a time and place that is discrete and free from interruption. Treat the matter confidentially.

7. Have a second manager in the room if a witness or note taker would be helpful
8. Consider what you know about the employee that may help set the tone for the meeting: his personality, his personnel record, and the requirements of his particular job.
9. Start on a cooperative note and be ready to help the employee overcome any resentment.
10. Keep in mind that one of the purposes of the meeting is to allow the employee an opportunity to respond to the information being provided.
11. Consider just what you want to accomplish by the interview. Have an open mind as to information the employee may provide.
12. Have the employee's personnel file and other information on hand at the time of the interview.
13. Prepare documentation to be given to the employee—consider having alternative documents based on the statements and conduct of the employee during the meeting.
14. Avoid the attitude of blaming or punishing the employee.
15. Stick to the facts; do not become involved in personalities.
16. Listen to what the employee has to say; practice “constructive silence.”
17. Encourage the employee to express how he feels and do not show undue disapproval when he does.
18. Ask open-ended questions; avoid yes/no alternatives.
19. Reiterate and paraphrase statements made by employee.
20. Be descriptive, not judgmental.
21. Be specific rather than general.
22. Focus on behavior rather than the person.
23. Say what you mean and what the employee needs to hear to correct the unsatisfactory behavior.
24. Describe behavior in terms of more or less rather than good or bad.
25. Explore alternatives.

26. Concentrate on what is said, and consider motives of the employee for giving you certain feedback.
27. Do not accept excuses which are not acceptable. Do not minimize the offense. Do not be unduly sympathetic.
28. If applicable, then set up a plan for improvement with the employee—let the employee create a written corrective action plan which meets with your approval. Include in the plan commitments by both the employee and the supervisor as to the steps that each will take to bring about the desired improvement for the employee to remain employed.
29. Stress the need for immediate, substantial and continuing improvement.
30. Give the employee a copy of the document and have the individual sign the document that will be retained by the Employer.
31. Follow up after the meeting.
32. Create a written summary of the meeting.
33. Fill out any employment forms – send original documents to Human Resources Department and keep a copy.
34. Do necessary follow up.
35. Monitor employee’s improvement and meet with employee as established an improvement plan.
36. Take additional corrective and training action as appropriate.

B. Drafting the proper documents.

1. Develop the documents for reliance as part of the annual evaluation, and in the event you need to rely on this incident independently for discipline or corrective action.
2. Include facts necessary to meet a heightened discipline standard. Summarize specific facts (who, what, when, where, why).
3. Document the fact that the employee was notified of the incident and the nature of the employee’s response was:
  - a. “I discussed this incident with you on (date) and your response was . . .”
  - b. “This conduct violates various departmental rules/policies, including, but not limited to:” Cite the Rule!

- c. “You were aware of these rules because...”
- d. “Your prior record includes:”
- e. “You didn’t identify any other similarly situated employee.”
- 4. Announce direction and expectations.
- 5. Identify consequences - “Future unacceptable performance may result in discipline up to and including discharge.”
- 6. Place a copy and keep it in the file. Again, don’t sunset.

#### **IV. The Third Building Block – the Annual Performance Evaluation**

##### **A. Objectives**

- 1. Opportunity for dialogue.
- 2. Create written record.
- 3. Summarizes performance over the year.
- 4. Set standards and expectations.
- 5. Establish consequences and benefits.
- 6. The precursor or beginning of formal discipline in one way or of promotion in the other way.

##### **B. Basic concepts. Performance evaluations must:**

- 1. Be done.
- 2. On time.
- 3. Be thorough.
- 4. Reflect the entire period being evaluated.

##### **C. Provide meaningful input to and from employees as to job performance.**

##### **D. Reinforce good work.**

##### **E. Discuss areas for improvement.**

##### **F. Set specific steps for improvement.**

##### **G. Where appropriate, coordinate with formal disciplinary step.**

- H. Consider all counseling and discipline (consider attaching documents to the evaluation).
- I. Be coordinated with the supervisory team to minimize the “Sliding Scale.” The “Patton Problem,” and the “Halo Effect,” by agreeing on how to evaluate and score employees and comparing notes on “shared” employees.
- J. Be honest. Do not let empathy cause you to overrate employee.
- K. Establish buy-in from the employee.
  - 1. The employee should identify weaknesses and specific solutions that they will take to enhance their performance to an acceptable level.
  - 2. Give the employee an opportunity to respond in writing to the evaluation. He or she has a legal right in Wisconsin to ask an Employer to change an evaluation or disciplinary or evaluative document used by the employer for certain statutorily identified reasons, and, when the Employer refuses to make the requested changes, then the Employer may physically attach the employee’s written response to the personnel document.
- L. Preparing the written evaluation
  - 1. Review documentation and previous performance evaluation(s) to determine patterns.
  - 2. The evaluation criteria need to reflect the entire period’s performance.
  - 3. Prior confrontation of the problem (and management of the problem) does not excuse failing to consider that issue in the annual evaluation.
  - 4. What standards should we use? (“meets” or “does not meet” two step standard or multiple steps such as unacceptable, poor, satisfactory, good). A marginal performer should not average a 3 on a 5-point scale.
  - 5. Judge whether the employee’s performance failed to meet your ideal in all relevant performance areas.
  - 6. Draft the evaluation for the proper audience. Recognize whom you are writing for. (Dilemma: rehabilitation of the employee vs. protecting ability to ultimately discharge).
    - a. Note what has been directly observed. (Provide dates, notable discussions, written evaluative and discipline documents etc.)
    - b. Write using detailed facts. Use language that is based on facts and written factually, not conclusory. Example: avoid the words “bad attitude.” Example: do not write, “Employee is a poor worker.”

Instead, write, “Employee’s work production for May was 30 percent below quota.” Your audience is someone who does not know or understand your organization or your subjective perspective. You must educate them.

- c. Note specific deficiencies. “During the past year you failed to meet our standards in the following ways: \_\_\_\_\_”
  - d. Note how the current deficiencies relate to past deficiencies. “In prior evaluations, your supervisor(s) has noted the following deficiencies: [Similar problems] [Other problems].
  - e. Use examples to clarify generalizations. Subjective standards, standing alone, are problematic. for example, “You have poor rapport with managers and co-workers.”
  - f. Clearly state minimum obligations for improvement, with timelines.
  - g. State the potential consequences. “These deficiencies must be corrected, or the employer will consider further discipline, up to and including discharge.”
  - h. If possible, set specific goals which must be met for satisfactory performance.
7. Place the burden for improvement on the employee, not on the supervisor or on a “shared” basis.
  8. In the end: Does the document reflect the employee’s true value to the organization, (strengths and weaknesses), compared to other employees?
  9. Use the same measurement standards and criteria for all employees who have the same job descriptions.
  10. Don’t be limited by the evaluation form.
    - a. Don’t just check the boxes or circle the numbers. Provide detailed analysis and feedback. This information is critical for educating the reader and for refreshing your memory in the future.
    - b. Use attachments where appropriate.
    - c. Explain with facts and avoid labels.
  11. If you are a new manager, get feedback, if possible, from others.

## V. Other Options - The Performance Improvement Plan

- A. There is no defined formula. Each PIP must be tailored to the individual employee's circumstances, desire for improvement, worth and damage they may cause to the organization, and organizational objectives.
- B. Common (Expected) Elements:
  - 1. Detailed descriptions of the deficiencies giving rise to the need for an improvement plan. Be as specific as possible, including dates, times, and other employees that were involved.
  - 2. A brief restatement of what was discussed during the meeting with the employee.
  - 3. The areas/tasks for which the employee's performance has been inadequate.
  - 4. Additional training, tools or resources that will be made available to the employee to make the necessary performance improvements.
  - 5. The date and time of a follow-up meeting to re-evaluate the employee in the performance deficient areas. Make sure that the employee has ample time to make the necessary improvements. Depending on the type of deficiency, this timing could vary from a week to a month or more.
  - 6. The consequences the employee can expect if the necessary improvements do not occur.
  - 7. A signature by the employee affirming that he or she fully understands the terms of the agreement, the potential consequences, and that the employee has been given the opportunity to ask questions and respond to the alleged deficiencies.
- C. Day 1 – 30
  - 1. Review evaluations and discipline documents and develop the PIP
  - 2. Set goals and establish buy-in from the employee by having him set specific goals and timeframes.
  - 3. Reestablish the fundamentals of performing the job.
  - 4. Conduct a series of evaluations identifying specific and consistent performance problems, with no improvement.
  - 5. Offer a mentor.
  - 6. Offer resources and training, and provide your own suggested resources including reading materials and training opportunities.
  - 7. Establish needed follow-up, set up specific action, schedule times

8. These are not pass/fail, at least initially. Notice just still be given to the employee that failure to improve may jeopardize their job.

D. Days 31 – 60

1. Investigate and document events as they occur in violation of prior direction (including investigation of “hearsay” reports from others).
2. Increased frequency of pre-announced formal evaluations.
3. Increased frequency of unannounced evaluations.
4. Evaluations by other supervisors or outside professionals consistent with prior conclusions.
5. Evaluate fundamentals.
6. Review timelines and objectives completed.
7. Compel summary memoranda from the employee to demonstrate use of time, resources utilized and improve shown.
8. Clear statement that discharge will occur if dramatic and sustained improvement does not occur.

E. Days 61 – 90.

1. Weekly evaluation meetings, with or without notice.
2. Step up on all aspects of the plan.
3. Notice of intent to demote/termination (within statutory or contractual timelines).
4. Make your decision.

**VI. Other Problematic Situations**

- A. The very real dilemma of coworker testimony. How do you combat this issue?
- B. Who is on first? Separate sometimes-contradictory personnel files—when HR’s file does not match up with the Department’s file.
- C. The Supervisor’s Ghost File
- D. Supervisor notes
- E. When the employee wants to record meetings.
- F. Employee rebuttals containing false allegations
- G. So you didn’t document it . . . .
- H. Electoral involvement . . . .
- I. The threat of legal action . . . .

### **Scenario – Accommodation**

You are meeting with your employee Matthew Stafford to drop off his self-evaluation form for his annual performance evaluation. In the previous evaluation, Matthew has demonstrated good performance, and has scored at the satisfactory level and good performance levels. You are about to complete his evaluation but want his feedback since his performance this year reflects several negative areas of performance, including work quality and work quantity deficiencies. A negative evaluation will result in a reduction in pay for him. Matthew tells you the following:

I have to tell you something. I had a really bad experience with my past employer when I told them about a learning condition that I have. I have ADHD and have been taking different medications to deal with it. Over the past year, I have had a lot of problems adjusting to medication. It is important that you know this because I do not think my performance evaluation reflects my actual performance or my ability. This evaluation also does not reflect my prior evaluations. I'd like you to reconsider this evaluation and change it. I want to be here for a long time and I view this type of evaluation will have a negative effect on my income growth and my ability to be successful.

You also need to complete Stacey's evaluation. She has been absent from work for approximately six months due to severe pregnancy complications. You have learned that her progress is improving and that she anticipates returning to work within the next 30 days. You are concerned because you do not have a good time table and period to evaluate Stacey's performance since she has been gone for half the year. Additionally, it has been six months since you have seen any work quality performance from her. Prior to her pregnancy, you did identify that her performance was becoming more deficient. A negative evaluation will result in a reduction in pay for her. You confer with a colleague who is a supervisor in another community. She tells you that you should forego the evaluation for this year and give her a pass. You confer with another supervisor from another community. That supervisor tells you to conduct the evaluation and be just as strict or nice as you would be as if she was working. You contact a third friend, and he tells you to delay the evaluation for another six months pending her return so you have a more up to date time period to evaluate.

***What would you do?***

**A. ADA and WFEA Handicap discrimination**

1. An employee with a disability must meet the same production standards, whether quantitative or qualitative, as a non-disabled employee in the same job.
  - a. Lowering or changing a production standard because an employee cannot meet it due to a disability is not considered a reasonable accommodation.
  - b. Reasonable accommodation may be required to assist an employee in meeting a specific production standard.
  - c. The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability, as long as the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard.
    - (i) According to EEOC, in most instances, an employee's disability will not be relevant to any conduct violations.
    - (ii) Whether an employer's application of a conduct rule to an employee with a disability is job-related and consistent with business necessity may rest on several factors, including the manifestation or symptom of a disability affecting an employee's conduct, the frequency of occurrences, the nature of the job, the specific conduct at issue, and the working environment.
    - (iii) These factors may be especially critical when the violation concerns "disruptive" behavior which, unlike prohibitions on violence, is more ambiguous concerning exactly what type of conduct is viewed as unacceptable.
2. An employer should evaluate the job performance of an employee with a disability the same way it evaluates any other employee's performance.
  - a. An accurate assessment of the employee's performance may, in some cases, alert the employee that his disability is contributing to the problem, leading the employee to request reasonable accommodation to address the problem and improve performance, which can benefit both the employee and the employer.
  - b. An employee who must use an alternative method of performance because of a disability must be evaluated accordingly provided it does not impose an undue hardship.

3. Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline (including a termination) or an evaluation warranted by poor performance.
  - a. If the employee responds to an evaluation by revealing he has a disability that is causing the performance problem, this revelation does not require the employer to modify the rating. The rating reflects the employee's performance regardless of what role, if any, disability may have played. If an employee states that her disability is the cause of the performance problem, the employer should follow up by making clear what level of performance is required and asking why the employee believes the disability is affecting performance.
  - b. If an employee states for the first time that her disability is the cause of a misconduct problem or requests accommodation, the employer may still discipline the employee for the misconduct.
    - (i) If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for reasonable accommodation.
    - (ii) If the discipline is something less than termination, the employer may ask about the disability's relevance to the misconduct, or if the employee thinks there is an accommodation that could help her avoid future misconduct. If an accommodation is requested, the employer should begin an "interactive process" to determine whether one is needed to correct a conduct problem, and, if so, what accommodation would be effective.
  - c. **Clemency and Forbearance**. WFEA still has broad accommodation responsibilities for employers:
    - (i) Where the employer knew that the Complainant dozed off on the job as a direct result of her sleep apnea and also knew that the employee was undergoing medical treatment to prevent her from dozing off, the accommodation which the Complainant required was clemency and forbearance which was to refrain from firing the employee for "loafing" the next time managers spotted her sleeping. *Target Stores v. LIRC and Crivello*, 217 Wis.2d 1, 576 N.W. 2d 545 (Ct. App. 1998).
    - (ii) Employer failed to reasonably accommodate the

complainant by failing to extend “clemency and forbearance” in the form of temporarily tolerating absences while a medical intervention that was already under way for migraine headaches had a chance to resolve the problem of his disability-related absences. “Clemency and forbearance” is not an open-ended requirement mandating that an employer indefinitely suspend its attendance requirements for a disabled employee. “Clemency and forbearance” requires that an employer “forbear” by temporarily tolerating an employee’s disability-related absences under circumstances similar to those presented in this case (i.e., a temporary accommodation was required to permit medical treatment which, if successful, would remove the difficulty in the Complainant performing his job-related responsibilities). *Stoughton Trailers v. LIRC & Geen*, 2007 WI 105, 303 Wis. 2d 514, 735 N.W.2d 477.

- (iii) Clemency and forbearance also requires giving an employee sufficient time to submit documentation to avoid being assessed an “occurrence” under an attendance policy.
4. When an employee requests a reasonable accommodation in response to the employer’s discussion or evaluation of the person’s performance or discipline, the employer may proceed with the discussion or evaluation but also should begin the “interactive reasonable accommodation process” by discussing with the employee how the disability may be affecting performance and what accommodation the employee believes may help to improve it.
- a. The employer and employee should suggest possible accommodations.
  - b. Don’t rush to judgment and skip this important step. *Wisconsin Bell, Inc. v. Labor & Indus. Review Comm’n*, 2017 WI App 24, 375 Wis. 2d 293, 895 N.W.2d 57, 62. Employee worked at a call center and during his employment is diagnosed with bipolar disorder. He informs his supervisor who allows him accommodations including time spent offline. Employee moves to a different call center, but does not inform supervisors. He is disciplined at the new position for disconnecting eight straight customer calls. Management was not aware of his disability, but during a review board hearing documentation was provided information regarding his disability. Management determined that intentionally disconnecting customers would not be allowed under any condition. He was suspended and had to enter into a back to work agreement where he could be terminated for just cause during a 1 year time period. During this period he left early due to illness but had activated a health code

which prevents calls. During that time he was chatting with employees about personal matters on the system chat. Management did not think he was actually ill and fired him.

The LIRC interprets “because of” to include discriminatory animus which occurs “from the employer acting on the basis of dissatisfaction with a problem with that employee’s behavior or performance which is caused by the employee’s disability.” The LIRC found that the suspension did not violate WEFA because the people who disciplined the employee were not aware of his disability, and it would not have been a reasonable accommodation to hang up on customers. However, at the time of termination, the employer had knowledge of the bipolar disorder and symptoms. The conduct involving the chat system and medical code activation were consistent with evidence submitted regarding descriptions from doctors describing the symptoms. It is possible to escape liability if an employer acts in good faith, but based on the evidence the LIRC found that the employer did not act in good faith.

- c. Reasonable accommodation may not require the employer to:
    - (i) tolerate or excuse the poor performance;
    - (ii) withhold disciplinary action (including termination) warranted by the poor performance;
    - (iii) raise a performance rating; or
    - (iv) give an evaluation that does not reflect the employee’s actual performance.
  - d. Where a lower performance rating results from an inability to perform a marginal function because of the disability, the appropriate accommodation would be to remove the marginal function (and perhaps substitute one that the employee can perform).
5. The supervisor does not have to assume that an unsatisfactory rating means that the reasonable accommodation is not working. The employer can proceed with the unsatisfactory rating but may also wish to determine the cause of the performance problem to help evaluate the effectiveness of the reasonable accommodation. If the reasonable accommodation is not assisting the employee in improving his performance as intended, the employer and employee may need to explore whether any changes would make the accommodation effective, whether an additional accommodation is needed, or whether the original accommodation should be withdrawn and another should be substituted.

6. Employers should not focus discussion about a performance or conduct problem on an employee's disability. The point of the employer's comments should be a clear explanation of the employee's performance deficiencies or misconduct and what he expects the employee to do to improve. Moreover, emphasizing the disability risks distracting from the focus on performance or conduct, and in some cases could result in a claim under the ADA that the employer "regarded" (or treated) the individual as having a disability.
7. The employer may seek appropriate medical documentation to learn if the condition meets the ADA's definition of "disability," whether and to what extent the disability is affecting job performance, and what accommodations may address the problem.

### **Scenario – the FMLA**

Mitch Tribilsky's spouse recently gave birth to her fourth child. He was off from work for approximately twelve consecutive weeks of FMLA following the birth of his child, for his own serious health condition, and following the death of his mother. During the pendency of his leaves, you identified numerous areas of performance deficiency. You believe it is imperative to identify these performance deficiencies in his annual evaluation. These deficiencies would have been addressed with him immediately had he been working at that time.

Sam Bradford has taken intermittent FMLA leave in several hour blocks for most of the workweeks this year to provide care for his father. You have identified reduced performance and reduced output that you believe directly relates to his absence from work. You have four other employees in the department who have performed at a very high standard and have exceeded the performance measures that you have established. Mike has not met those standards. You want to identify your performance considerations in his evaluation. You believe it is necessary so that he is aware of where he stands. Moreover, it is your understanding that merit increases will be afforded to the four employees who exceeded these standards but not to employees who only meet or do not meet these standards.

What would you do?

## A. FMLA

1. Taking FMLA leave does not absolve the employee from meeting employment standards while the employee is working. FMLA leave may require not penalizing the employee for failing to meet standards because the employee takes leave. *Pagel v. TIN, Inc.*, 695 F.3d 622 (7th Cir. 2012). Pagel argued that TIN interfered with his employment by failing to make a reasonable adjustment to its employment expectations to account for his FMLA-protected leave, and then terminated him when he failed to meet those unadjusted expectations. The FMLA does not require an employer to adjust its performance standards for the time an employee is actually on the job, but it can require that performance standards be adjusted to avoid penalizing an employee for being absent during FMLA-protected leave. For example, an employer that expected an employee to complete all the duties of a full-time bookkeeper while she was taking intermittent FMLA leave, and then fired her for failing to meet that full-time standard may violate the FMLA if the performance problems that supposedly justified the termination were a direct result of FMLA leave so that termination for those reasons would have made the FMLA leave “illusory.”
2. *Goelzer v. Sheboygan County*, 604 F.3d 987 (7th Cir. 2010).
  - a. Applicable facts cited by court:
    - (i) Employee terminated two weeks before she was scheduled to commence two months of FMLA leave, and after using FMLA leave in substantial increments the previous four years. The supervisor consistently gave her good performance reviews and she received merit pay increases. For 2000, her evaluation noted she was “rarely absent,” and a 4.0 (out of 5.) in the “attendance” category. She received a 4.0 for attendance the following year and noted she “is rarely absent (36 hours of sick leave in 2001).” She received an overall rating of 3.72 in that evaluation and again received a merit increase
    - (ii) The next year in 2002, she began to have significant health issues and used 312.50 hours of sick leave. Her 2002 performance evaluation stated that, “[t]hrough Dorothy has had an excellent record in the past, (36 hours of sick leave in 2001), she utilized 312 hours or 39 days of sick leave in 2002.
    - (iii) She continued to have health problems in 2003. She had another eye surgery that year and took two weeks of FMLA leave as a result. She also had many doctors' appointments throughout the year. She took time off on thirty-two different

days during 2003 for her health issues and used a total of 176.50 hours of leave. Her performance evaluation stated: “Dorothy utilized 176.50 hours or 22 days of sick leave in 2003.” He gave her an overall rating of 3.36, with a 3.5 in the attendance category. He did not award her a merit pay increase. Goelzer disagreed with some of the reasons Payne gave for not awarding her a merit increase, and she wrote Payne a memorandum detailing her position. Payne responded on February 5, 2004 in a memorandum to Goelzer that said in part: “On page 3 of 4, you have denoted goals you believe to have accomplished. As we discussed during your performance review and I have noted in your annual performance review, your perspective is different than mine. I am very pleased that you understand the importance of having a user-friendly filing system in place. As you mentioned, you were out of the office having eye surgery in 2002 and 2003. In fact, the past two years, use of sick leave and vacation combined, you were out of the office 113 days. As the only support person in the office, this has presented challenges in the functionality and duties associated with the office.”

- (iv) In 2004, Goelzer used 94 hours of sick leave. She received a merit increase of 1.5% after her 2004 evaluation.
- (v) In 2005, the next year, Goelzer's health was stable, but her mother's health was not. Goelzer took FMLA leave on nine days in 2004 for appointments related to her mother or husband, and her 2005 FMLA applications included requests for intermittent leave to care for her mother. Goelzer received a 1.25% merit increase after 2005. Goelzer stated in an affidavit that when she asked why she did not receive a higher merit pay increase, Payne responded that she had missed a lot of time at work due to appointments with her mother.
- (vi) In 2006, Goelzer learned she would need foot surgery that year. Her leave request was approved, but she was terminated before taking the leave.

b. Rejecting Summary Judgment for the Employer, the Court found:

- (i) Evaluative Comments. A jury might be swayed by comments Payne made that could suggest frustration with Goelzer's use of FMLA leave. In her 2002 performance evaluation, for instance, Payne explicitly contrasted Goelzer's use of FMLA leave with her past “excellent”

attendance, saying, “[t]hough Dorothy has had an excellent attendance record in the past, (36 hours of sick leave in 2001), she utilized 312 hours or 39 days of sick leave in 2002.” Payne gave her a 3.5 rating in the “attendance” category in 2002. He noted her use of sick leave in the following year's performance evaluation as well, stating “Dorothy utilized 176 hours of 22 days of sick leave in 2003,” and he gave her an overall rating of 3.36 that year but did not award a merit increase. Notably too, when Goelzer asked Payne in 2006 why she did not receive a higher merit increase based on her 2005 performance, she says that Payne responded that she had missed too much time from work to attend to appointments with her mother.

A jury might also look to the memorandum Payne wrote in 2004 in response to Goelzer's view that she should have received a merit increase, where he said in part: “you were out of the office having eye surgery in 2002 and 2003. In fact, the past two years, use of sick leave and vacation combined, you were out of the office 113 days. As the only support person in the office, this has presented challenges in the functionality and duties associated with the office.” A jury might view this memorandum as evidence that Goelzer lost her job because she exercised her right to take FMLA leave, as it might Payne's comments in an evaluation he wrote in January 2006: “On occasion, I have been concerned with office and phone coverage. Dorothy had numerous appointments the past year and needs to be more cognitive of the time she is away from her desk or corresponding with others on non-related work activities.” The defendants do not dispute that the FMLA protected Goelzer's attendance at these appointments, and a jury could look to those comments as indication that Payne was not pleased Goelzer had been absent for many FMLA-covered appointments, even though she was permitted to take them by the Act and an employer is not to interfere with that right.

- (ii) Favorable Performance Reviews. Moreover, although Payne now maintains he had concerns about Goelzer's skill set and performance, he consistently gave her favorable performance reviews. He says now that her satisfactory performance ratings reflect his “lowered expectations” of her abilities, but the performance ratings themselves do not speak of lowered expectations, and a jury would not be compelled to credit this explanation. In fact, just over seven months before Payne told Goelzer she was being terminated, he had conducted Goelzer's annual performance review and

concluded that her performance met or exceeded expectations in all areas.

- (iii) Delaying the Decision. A factfinder might also consider that, if Payne had serious problems with Goelzer's performance, he could have asked the County Board to terminate Goelzer's employment before he received the promotion, yet he did not do so. In addition, although Payne asserts that he wanted an assistant with a larger skill set, there are no documents evidencing a plan to restructure the assistant position before Goelzer's termination.
- (iv) Timing. Payne told Goelzer that she was losing her job two weeks before she was scheduled to take two months of FMLA leave.

3. Stray Comments by Managers Can Undermine the Best Evaluative Efforts. *Smothers v. Solvay Chemicals Inc.*, 10th Cir., No. 12-8013 (Jan. 21, 2014) (“In depositions, Solvay managers acknowledged that managers and co-workers had long complained about Mr. Smothers' FMLA-protected absences. Mr. Smothers presented evidence that Solvay refused to promote him and gave him negative ratings on his recent performance evaluations expressly because of his FMLA-protected absences. Additionally, Mr. Wallendorff admitted that he tried to force Mr. Smothers to change shifts until Human Resources advised him this would be unlawful. Although Mr. Wallendorff did not ultimately follow through with the forced shift change, he testified that he and others remained openly frustrated with Mr. Smothers' absences. They repeatedly asked senior managers and Human Resources if there was “something else [they could] do.” This background evidence lends further support to the inference that Solvay was frustrated with Mr. Smothers' use of FMLA leave and seized upon his safety violation and quarrel with Mr. Mahaffey as a pretext to fire him and avoid the inconvenience caused by his FMLA-protected absences.”).

4. This leaves us with three core principles:

- a. When an employee is fully eligible for FMLA leave and takes leave completely in compliance with the law, then the employer cannot count FMLA leave against the employee during any type of evaluation.
- b. But taking leave can have a negative effect on an employee's performance evaluation if:
  - (i) the employee fails to qualify for all the basic leave eligibility requirements such as minimum term of employment and

minimum work hours over the past one year, as specified in FMLA.

- (ii) the employee takes leave in excess of 12 weeks over a 12 month period, which is more than what is permitted under the FMLA.
  - (iii) the employee does not notify the employer in-advance about taking leave, as required for certain types of FMLA covered leave.
  - (iv) the employee does not provide all the required documents (certifications) supporting the claim for the leave.
  - (v) the leave is not for reasons permitted by FMLA.
- c. An employee is not entitled to reinstatement if the employee would have been fired regardless of whether he takes the FMLA leave.