

2024

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Introduction



Kristen E. Smith

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TODAY'S AGENDA

Kristen Smith – (12:00PM-12:05PM)

- Introduction / Agenda

Alyson Mathews – (12:05PM-12:20PM)

- Employee Management & Progressive Discipline Primer

Hannah Redmond – (12:20PM-12:30PM)

- What to Watch: Supreme Court Employment Cases to Keep on your Radar

John Bagyi – (12:30PM-12:45PM)

- What the Supreme Court's Recent Affirmation Action Decision Means for Private Sector Employers

Employee Management & Progressive Discipline Primer



Alyson Mathews

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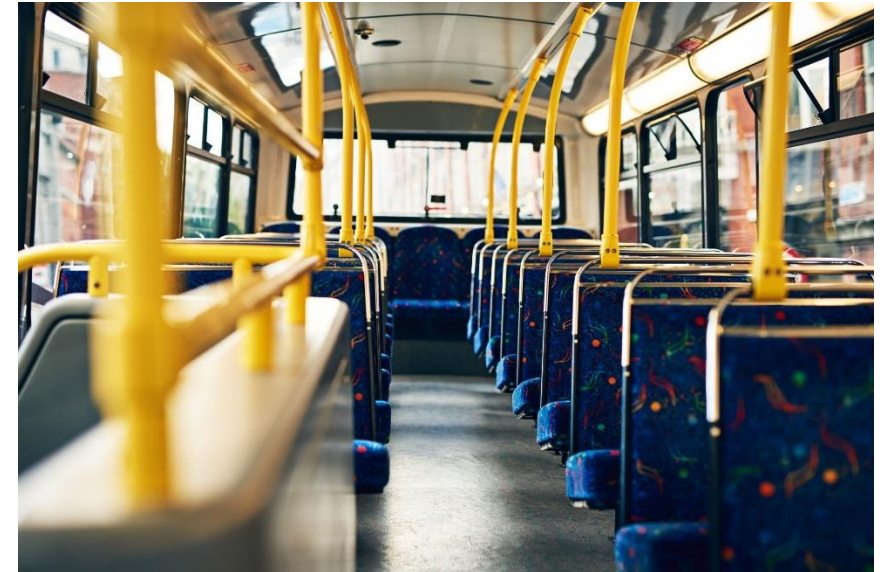
Garden City, NY

Goals of Performance Management & Progressive Discipline

- Provide guidance to employees on workplace expectations
- Improve an employee's workplace performance
- Remove an employee from the workplace

Good to Great by Jim Collins

- Get the right people on the bus.
- Get the wrong people off the bus.
- Get the right people in the right seats.



Causes of Poor Performance

Which ones can you fix?

- Lack of knowledge or skill
- Unclear or unrealistic expectations
- Job is a poor fit
- Lack of leadership
- Lack of motivation
- Personal conflicts
- Inadequate Resources
- Work culture

Set Employees Up For Success



PROVIDE EMPLOYEES WITH A
COPY OF THEIR JOB
DESCRIPTION



PROVIDE EMPLOYEES WITH
JOB-RELATED TRAINING, AS
WELL AS PRACTICES,
PROCEDURES, POLICIES AND
WORKPLACE RULES



PROVIDE EMPLOYEES WITH
FIELD TRAINING OR A MENTOR

Benefits of Performance Evaluations

- Helps career growth
- Improves performance
- Increases employee engagement
- Helps determine training needs
- Clarifies expectations
- Allows for conversation between employee and management
- Evaluates goals
- Provides documentation including for progressive discipline



Performance Evaluation

1

- Establish performance standards

2

- Communicate performance standards

3

- Measure employee performance

4

- Compare actual performance to performance standards

5

- Discuss performance with employee

6

- Implement action plan

Performance Evaluation

Strategies that Work

- Provide ongoing feedback
- Document performance issues
- Be honest on evaluation forms
- Be consistent and objective

Theory of Progressive Discipline

- Use progressive steps, where appropriate, to produce positive correction action
- Severity of the penalty increases each time an employee engages in misconduct



Benefits of Progressive Discipline

- Rehabilitative form of discipline that provides the opportunity for an employee to correct unacceptable behavior
- If followed, helps to ensure that discipline is consistently and fairly administered
- Will help avoid and/or defend claims that procedures were applied unfairly and/or discriminatorily

Forms of Progressive Discipline

- Verbal warning
- Counseling letter
- Letter of reprimand*
- Paid suspension
- Unpaid Suspension*
- Counseling/Treatment*
- Probation*
- Demotion*
- Termination*



* In the public sector, may require hearing or employee's consent

Factors to Consider Before Disciplining an Employee

- Nature of violation
- Extent to which the employee was aware of the violated rule
- Whether violation was intentional
- Employee's explanation/rationale
- Employee's disciplinary record
- Employee's length of service
- Employee's prior performance



How an Employee Challenges Discipline

- False accusation
- Explanation for conduct
- No knowledge of workplace rule or policy
- Workplace rule or policy not enforced
- Lack of training
- Bias
- Lack of documentation

Document All Aspects of Performance Management and Progressive Discipline



Verbal Warning

- Before the meeting, advise the employee of the nature of the meeting and, if applicable, the right to bring a union representative.
- Explain the situation to the employee.
- Give the employee an opportunity to respond and provide an explanation.
- Provide the employee with corrective directives.
- Document that a verbal warning was given.



Written Counseling Memo

- Identify what the employee did wrong
- Review any past progressive discipline
- Explain why the employee's behavior was unacceptable
- Demonstrate that you have considered and responded to the employee's explanation
- Tell the employee how to improve or correct behavior
- Warn the employee what will happen if the behavior continues
- Be fair and objective
- Require the employee to sign to acknowledge receipt



What to Watch: Supreme Court Employment Cases to Keep on your Radar



Hannah K. Redmond

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Muldrow v. City of St. Louis

- Certiorari granted as to a single issue:

“Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?”

Muldrow v. City of St. Louis – Facts

- Transfer initiated under direction of new supervisor
- New, post-transfer position – same pay and benefits, but fewer overtime opportunities, some differences in hours of work and weekend duty expectations
- Plaintiff filed administrative complaint of discrimination with Missouri Commission on Human Rights
- 8 months later, was transferred back

Muldrow v. City of St. Louis – District Court Decision

- Sex discrimination & retaliation claims pursuant to Title VII and Missouri Human Rights Act
- District Court dismissed Title VII claims and declined supplemental jurisdiction over state law claims
- Plaintiff appealed the District Court's decision as to her Title VII discrimination and retaliation claims

Muldrow v. City of St. Louis – Eighth Circuit

- Adverse employment action = “tangible change in working conditions that produces a material employment disadvantage”
 - Minor changes are insufficient
 - Unwelcome or unwanted changes are insufficient

Muldrow v. City of St. Louis – Eighth Circuit

- “This Court has repeatedly found that an employee’s reassignment, absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action”
- Crucial facts: no reduction in title, salary, benefits

Muldrow v. City of St. Louis – SCOTUS

- Resolution of circuit split
- Provide clarity about when a transfer amounts to adverse employment action for discrimination purposes
- Set to be argued on December 6, 2023

Laufer v. Acheson Hotels – District Court

- ADA “tester” case
- Reservation Rule – ADA Regulations require accessibility disclosures for places of public lodging
 - Must be available on any reservation portal – *i.e.*, website, third-party booking sites, etc.
- District Court held plaintiff lacked standing because she never intended to visit defendant’s hotel

Acheson Hotels v. Laufer – First Circuit

- Tester status alone does not indicate a lack of standing
- Held plaintiff had standing
 - She had a right to the information Acheson Hotels did not provide
 - Under the ADA, the denial of that information can constitute discrimination
 - That denial provides plaintiff the right to sue
 - The fact that plaintiff did not intend to use the information did not eliminate her injury

Acheson Hotels v. Laufer – SCOTUS

- Argued on October 10, 2023
- Emphasis on mootness concerns
- One to watch, but possibility tester standing issue will not be addressed

What the Supreme Court's Recent Affirmation Action Decision Means for Private Sector Employers



John M. Bagyi

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What impact does the *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* have on DEI initiatives?

- The decision is not directly applicable to private sector employment decisions
- However, this decision is likely to lead to
 - Increased attention
 - Increased challenges

Where does this leave us?

- DEI initiatives are not necessarily illegal
 - Fact-specific analysis required
 - Focus – did the initiative result in a racial preference with respect to terms and conditions of employment (hiring, promotion, layoff, etc.)
 - Equal opportunity vs equal outcomes
 - Note – even legally defensible DEI initiatives may be used as evidence of discriminatory motive in a discrimination claim
- Important considerations –
 - Organizational values
 - Risk tolerance

Potentially Problematic DEI Actions

Description	Problematic?
Limiting the formation of, or treating affinity/resource groups differently, based on protected status	Yes
Maintaining quotas or preferences for hiring and/or promotion of individuals based on protected status	Yes
Developing and utilizing creative approaches to bring individuals into the organization (e.g., apprenticeships, job shadowing, and career transition programs)	No
Evaluating supervisors/managers/executives based on their achievement of or progress toward hiring and/or promotion protected status based quotas	Yes

Permissible and Problematic DEI Actions

Description	Problematic?
Identifying and addressing barriers to participation in internships, scholarships, training, and/or mentoring opportunities	No
Providing training on empathy, sensitivity, microaggressions, discrimination, and harassment	No
Establishing or maintaining internships, scholarships, training, and/or mentoring opportunities and other programs that limit participation based on protected status (e.g., race, sex, national origin)	Yes
Permitting affinity/resource groups to limit participation based on employees' protected status	Yes

Permissible and Problematic DEI Actions

Description	Problematic?
Outreach to underrepresented groups concerning employment opportunities to expand the pipeline of diverse candidates	No
Selecting candidates for hiring and/or promotion based on their protected status	Yes
Identifying and addressing barriers to building and maintaining a diverse and inclusive workplace (e.g., review and refine performance evaluation processes to ensure there are no implicit biases or barriers to DEI)	No
Actions, including training and assessments, intended to increase self awareness, and understanding of our differences	No

Your Questions



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October is National Cybersecurity Awareness Month



#SecureOurWorld

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New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar [here](#).

Non-NYS Bar Association Members can purchase through Amazon [here](#).

Thank You

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It is not to be considered as legal advice.
Laws can change often, and information may become outdated.

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