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LEGAL ISSUES FOR SUPERVISORS

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The Legal Environment:

Basics of Employment Law

OVERVIEW OF EMPLOYMENT DISCRIMINATION

Discrimination is prohibited in the workplace. There are, however, several types of discrimination that are prohibited by federal statutes. These are:

- pregnancy discrimination;
- age discrimination;
- race discrimination;
- sex discrimination;
- national origin discrimination; and
- disability discrimination.

While a detailed discussion of each of these types of discrimination could fill volumes, following is a brief discussion of each type of discrimination and practical tips in addressing discrimination in the workplace.

The central theme of the employment discrimination laws in the United States is that similarly situated employees or prospective employees should receive equal treatment by employers. These laws are an effort to equalize treatment in the employment relationship for groups or individuals who are different in some respect. Age, race, color, religion, sex, national origin and disability are all protected characteristics under the various employment discrimination statutes. These statutes include the Age Discrimination in Employment Act of 1967 (ADEA), the Americans With Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII). While these laws generally protect different traits, they operate in a similar manner. Nevertheless, there are some important differences. This section will outline the basics of the ADEA, the ADA and Title VII.

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (ADEA)

The Age Discrimination in Employment Act of 1967, found at 29 U.S.C.A. § 623(a)(1)-(d), protects employees from discrimination in the workplace based on an employee's age. The policy behind the ADEA is to protect older workers from the stereotype that they are inefficient or cannot

perform the same work that younger workers can perform. The protected class of employees includes workers 40 years of age and older.

An employer is prohibited from taking an adverse employment action against a protected employee “because of” his or her age. Adverse actions might include but are not limited to the following: firing, refusing to hire, demotions, transfer, reprimand or discipline. Essentially, employers are prohibited from using age as a “determinative factor” in an employment decision concerning a protected worker (*i.e.*, a worker 40 years of age or older). Employees who file suit claiming age discrimination will depend heavily on employment statistics. Employers violate the ADEA when they take an adverse employment action against a protected employee, and the replacement employee is “substantially younger” than the displaced employee.

An employer, however, may be able to justify the adverse employment action because of some legitimate, non-discriminatory reason for the adverse action. Good cause and reasonable factors other than age are mentioned in the statutory provisions of the ADEA. Additionally, for example, airline pilots may be required to retire at a certain age because of the safety concerns involved in flying an airplane. This “bona fide occupational qualification” must be reasonably necessary to the normal operation of the employer’s business. Since the essence of the airline business is the safe transportation of passengers, the employer’s concern about an employee’s age and the safety of the airplane and passengers is justified by business necessity.

A significant difference between Title VII and the ADEA is when a discharged employee can show “direct” evidence of discrimination. For instance, “direct” evidence might be when a supervisor says to a discharged employee that “old guys just can’t work like the young folks can.” Statistics that indicate, for example, that a large percentage of employees 40 years of age or older are terminated in a reduction in force would be “indirect” evidence. When direct evidence is involved, an employer must be able to show that even though age was considered illegally, the employer would have made the same employment decision anyway. Going back to the example from above, even though the supervisor made the comment concerning older workers, if the employer can show that the older employee would have been fired for a legitimate non-discriminatory reason, the employer can avoid liability under the ADEA.

This difference between Title VII and the ADEA applies only when there is direct evidence of discrimination and that the illegal consideration of age in the employment decision was a motivating factor in the adverse employment decision. To point out this distinction between Title VII and the ADEA, consider a female candidate for partner in an accounting firm.

Assume that a partnership committee member tells the female candidate that “she needs to be more feminine and less aggressive in the workplace.” Thereafter, the female candidate is not elected partner. The female employee might be able to show a connection between the comment and the adverse employment action. Under the ADEA, however, if the employer were able to show that even though age was a motivating factor in the employment decision, the employer would have made the same decision anyway, the employer can totally escape liability. Under Title VII, however, if the employee shows that sex was a motivating factor in the employment decision and the employer shows that it would have made the same decision regardless of the consideration of sex, the employer may still be liable for some damages to the employee.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964, found at 42 U.S.C.A. §§ 2000e-2000e-17, generally prohibits intentional and unintentional discrimination based on an employee’s race, color, religion, sex or national origin. Title VII applies to employers with 15 or more employees in at least 20 consecutive weeks during the previous year. Title VII cases generally involve situations in which an employee claims to have been treated differently from other similar employees in the workplace “because of” a protected trait. Protected traits are those listed in the statute: race, color, religion, sex and national origin. The discharged employee must show that the protected trait played a role in the employer’s decision and that the protected trait had a determinative influence on the outcome of the employment decision.

Title VII also prohibits employers from using an employment practice that has a discriminatory impact on a protected group. The employer cannot use employment practices that are facially discriminatory. The employer is also prohibited from using employment policies that, although neutral in their treatment of different groups, in fact fall more harshly on a protected group and cannot be justified by business necessity. The classic example of a discriminatory practice is an employment test which has an adverse effect on a protected group and serves no legitimate business purpose. A general aptitude test which has a disproportionate impact on men is discriminatory when the test is unrelated to job performance.

On the other hand, a legitimate test would be one which is a strong indicator of success on the job. Employers must validate any testing instrument prior to using the test results in the employment decision. Essentially, employers must prove that applicants performing well on the test will perform well on the job. The Equal Employment Opportunity Commission (EEOC) has established guidelines for determining whether the results of a particular test have a discriminatory impact. Those

guidelines provide that a selection rate for a protected group that is less than 80% of the rate for the group with the highest passage rate will generally be considered as evidence of adverse impact. The test or selection process must have a manifest relationship to the position in question. For instance, a test that measures typing speed would have an manifest relationship for an open typist position. Professionally developed tests are generally acceptable to the EEOC as long as the test is not administered in a discriminatory manner. This prohibition includes subjective employment practices which may have discriminatory adverse impacts on a protected group of employees.

For example, consider a City Fire Department policy concerning facial hair. The City Fire Department has a policy that firefighters must be clean-shaven so that the air breathing apparatus the firefighters use on the job will form a tight seal on their faces and prevent toxic fumes from entering the breathing unit. A small number of African-American men, however, in the Fire Department have a skin disease which is aggravated by shaving. Since this disease is rare in white men, the Fire Department's policy has a disparate impact on African-American men in the Fire Department. Nevertheless, the Fire Department would be able to justify the policy based on the business necessity of safety in the workplace.

Employers must be conscious of minority statistics concerning the workplace. A Title VII lawsuit will be successful if the plaintiff can show a high statistical correlation between the challenged employer policy and a low number of minorities in the workplace. Generally, Title VII is based on the assumption that non-discriminatory practices will, over time, result in a workforce more or less representative of the racial or ethnic composition of the community from which the employer's hiring is done.

If the Title VII plaintiff does show that the differences between the racial profile of the community and the employer's workplace are statistically significant, the employer may be able to justify the difference by pointing to a "bona fide occupational qualification" for the position. For example, a Baptist church is justified in hiring only Baptists to be ministers in the church. The qualification must be "reasonably necessary to the normal operation of that particular business." In other words, the qualification must go to the essence of the employer's business. This exception is primarily related to safety issues related to the position.

Sex (or Gender) Discrimination

Title VII prohibits an employer from discrimination based on an employee's sex or gender. While gender discrimination may take many forms, discrimination based on sex falls into four general categories:

pregnancy discrimination, sexual harassment, grooming and dress codes, and sexual orientation discrimination.

Pregnancy

Pregnancy clearly affects a woman's ability to work. Most women who deliver a baby will require several weeks of recovery time before returning to the workplace. Women who are pregnant may have physical activities constrained by their medical condition. In the Pregnancy Discrimination Act of 1978 (PDA), Congress amended Title VII to include pregnancy discrimination in the definition of discrimination "based on sex."

The Pregnancy Discrimination Act outlaws all types of employment discrimination based upon pregnancy or pregnancy-related conditions. A woman cannot be denied a job because of (1) pregnancy or (2) the fact that she obtained an abortion. Pregnant women cannot be forced to take a leave of absence except when they are unable to effectively perform their job duties. A woman who is unable to work because of pregnancy is entitled to the same medical and leave benefits the employer gives to employees with temporary medical disabilities. If an employer offers health insurance benefits, it must cover pregnancy under the same conditions as other medical problems; however, the employer-provided insurance is not required to cover the expenses of abortion unless it is to save the life of the mother or where the charges cover medical complications resulting from an abortion. An employer cannot discriminate against a woman because she has had an abortion.

An employer cannot single out pregnancy for special treatment or procedures for determining ability to work. If the employer requires its employees to submit a doctor's statement concerning their ability to work, or their need for a leave of absence in cases of sickness or accident, the employer can require the same when pregnancy is at issue. If the employer offers paid or unpaid disability leave, it must be provided to pregnant employees on the same basis as to sick or injured employees.

An employer cannot refuse to hire a job applicant because she is pregnant, unless the pregnancy will cause the applicant to be unable to complete a formal training program. Employees must be allowed to work while pregnant, unless the pregnancy causes the employee to be unable to meet reasonable performance standards.

No uniform rule requiring pregnancy leave at a certain number of weeks of pregnancy is valid. All cases must be handled on a case-by-case basis by determining the individual's ability to do the job. Additionally, Title VII and the PDA do not require an employer to offer health insurance coverage

or other benefits for pregnancy if the employer does not offer the benefits for sick or injured employees or their dependents.

Grooming and Dress Codes-Sex Discrimination?

Employer grooming and dress codes usually contain different standards for workplace appearance for men and women. Generally, when an employer's standard of appearance in the workplace makes a minimal impact on the employee, the employer's preference of dress code will be honored. Title VII is primarily concerned with granting men and women equal opportunity to access the job market. Distinctions between men and women that are not based on protected or immutable characteristics do not violate Title VII's mandate of equal opportunity; however, if an employer required women to dress provocatively, such a dress code might result in liability for discrimination based on sex.

Sexual Orientation

Sexual orientation is not considered to be part of the definition of "sex" under Title VII. Thus, while discrimination against employees because of their sexual orientation is not prohibited by Title VII, the law does protect employees from being sexually harassed because of their sex, even if the harassing employee is a of the same sex as the victim.

Religious Discrimination

Under Title VII, employers have a duty to reasonably accommodate an employee's religious practice unless accommodating the practice would cause an undue hardship on the employer's business. Consider a worker who religious practice does not allow her to work on Saturdays. If the employer cannot modify the shift schedule to accommodate the employee's request without undue hardship on the employer's business, the employer does not have to accommodate the employee. Undue hardship is measured primarily in terms of cost to the employer. In the example above, the employer would have incurred costs in providing a replacement worker for the Saturday shift modification and thus such a modification would be an undue hardship on the employer. The employer's duty is to accommodate employee religious practices when the accommodation does not require a costly modification in the workplace.

National Origin and Alienage Discrimination

One of Title VII's protected traits is national origin. Employers are prohibited from making employment decisions "because of" an individual's national origin. The term national origin refers to the country from which a person or his ancestors came, not a person's citizenship. It should be noted,

however, in the Immigration Reform and Control Act of 1986 (IRCA), employers are prevented from discriminating against aliens who are lawfully authorized to work in the United States. 8 U.S.C. § 1324a.

Retaliation

Title VII prohibits retaliation against employees who have participated in or exercised their Title VII rights. The purpose of the anti-retaliation provision is to protect employees who assert Title VII violations and to encourage employees to report Title VII violations. The provision prevents employers from retaliating against employees who have opposed unlawful employer conduct under Title VII. The section also prevents employers from retaliating against employees who have made a charge of discrimination, testified, or assisted in an investigation, proceeding or hearing concerning a Title VII violation.

SEXUAL HARASSMENT: THE POLICY

Most public employers have specific policies against sexual harassment. The majority of these policies, adapted from suggested EEOC guidelines, are similar to the sexual harassment policy referenced below:

It is the City's policy that all employees are responsible for ensuring that the workplace is free of sexual harassment. Sexual harassment of any kind is expressly prohibited and will not be tolerated. Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
2. Submission or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
3. Such conduct has the purpose and effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Sexual harassment of any type, including jokes, the exhibition of pictures, diagrams, and cartoons, is strictly prohibited and will not be tolerated. Supervisory personnel are required to take immediate and positive steps to eliminate any form of sexual harassment when it comes to their attention. Because of the City's strong disapproval of offensive or inappropriate behavior at work, including any of the foregoing, all employees must avoid any action, conduct, or behavior which could be viewed as sexual harassment, including, but not limited to, unwelcome sexual advances,

requests for sexual acts or favors, and other verbal or physical conduct of a sexual nature.

Any employee who believes he or she has been subjected to sexual harassment at work by *anyone*, including supervisors, coworkers, contractors, or visitors, is strongly encouraged to report the matter promptly to his or her immediate supervisor or manager. If the immediate supervisor or manager is involved, the employee should report the matter to the Human Resources Department or to any other City official. It is important that employees report such incidents because without employees' assistance, violations may go undetected.

The Human Resources Department will promptly investigate all complaints, and appropriate privacy safeguards will be applied. Confidentiality will be maintained to the greatest extent allowed by law. The Human Resources Department will be required to report its findings to the City Manager or the City Manager's designee. The City will take appropriate corrective action to remedy all violations of this policy. No employee who brings a sexual harassment complaint to the attention of the City will suffer any retaliation or adverse employment decisions as a consequence.

Any sexual harassment or sexually harassing behavior is considered to be a violation of City policy and will be dealt with accordingly by corrective counseling and/or suspension or termination, depending upon the severity of the violation. It is a violation of City policy, however, to file a false accusation of harassment or to provide false or misleading information or obstruct the City's investigation of harassment. Such improper conduct will result in discipline, up to and including discharge.

The following types of conduct may be viewed as sexually harassing behavior by a City employee:

Verbal: Unwelcome sexual innuendo, suggesting comments, insults, threats, jokes about gender-specific traits, sexual propositions.

Nonverbal: Unwelcome suggestive or insulting noises, leering, whistling, or making obscene gestures.

Physical: Unwelcome touching, pinching, exhibition of pictures, diagrams, and cartoons, brushing of the body, coercing sexual intercourse, or assault.

OVERVIEW OF THE LAW REGARDING SEXUAL HARASSMENT

There are two types of sexual harassment: (1) *quid pro quo* sexual harassment and (2) hostile work environment sexual harassment. *Quid pro*

quo is a Latin phrase meaning “this for that.” *Quid pro quo* harassment occurs when a supervisor grants an employee a work benefit in exchange for sexual favors from the employee. When this type of harassment occurs in the workplace, the harassing supervisor either conditions work-related benefits or withholds work-related benefits based on the performance or non-performance of sexual favors by the subordinate employee. In other words, the supervisor tells the employee that to receive an employment benefit, he or she must give sexual favors. Literally, this may entail statements or actions implying “sex for getting the promotion” or “sex for not getting fired” or “sex for a good evaluation,” etc. If a supervisor conditions work-related actions on sexual behavior, the employer is vicariously liable for the supervisor’s conduct.

A sexually discriminatory hostile environment is created if an employee is subjected to “sexual advances, requests for sexual favors and verbal or physical conduct of a sexual nature.” Graffiti or openly displayed pictures of sexual content are included, as well as jokes aimed at one sex even though the jokes were not sexual in nature. The actions and environment must be “unwelcome.” If an employee participates in creating a hostile environment, there is no Title VII violation; however, tolerating the behavior does not establish that the conduct was welcome. The harassing behavior must reach the level of unreasonable interference with the victim’s work or creating an intimidating, hostile or offensive environment. One incident of sexually offensive conduct will not rise to the level of interfering with the workplace.

Defenses to these types of sexual harassment, however, are the same. The United States Supreme Court over the years has struggled with the issue of who is responsible when a supervisor engages in sexually harassing behavior. In 1998 the Supreme Court took a “middle road” approach and held as follows:

- An employer is automatically liable for a supervisor’s sexual harassment only if the employee suffers a “tangible employment action” such as discharge, a demotion, or an undesirable reassignment.
- If no tangible job action occurs, an employer is not automatically liable for the supervisor’s sexual harassment, but the employee is also not required to prove that top management knew about it or was negligent in failing to prevent it. Instead, an employer is liable unless it can prove:

the employer “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and

the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”

This is known as an “affirmative defense” because an employer has the burden of proof on these points.

Based upon the foregoing, the United States Supreme Court reached different conclusions in two of the major sexual harassment lawsuits it considered in 1998. In *Farragher v. City of Boca Raton*, the Supreme Court held the City liable for the sexual harassment of a female lifeguard by her supervisors. The City had no affirmative defense because it “failed to disseminate its policy against sexual harassment among beach employees,” it “made no attempt to keep track of the conduct of supervisors” and did not inform employees “that the harassing supervisors could be bypassed in registering complaints.” Under these circumstances, the Supreme Court said the City did not exercise reasonable care to prevent the supervisors’ harassing conduct.

In contrast, in *Burlington Industries, Inc. v. Ellerth*, the Supreme Court sent the case back to the trial court. In this case the employee admitted she knew Burlington had a policy against sexually harassment and that she nonetheless failed to tell anyone with authority over her supervisor about his allegedly harassing behavior. The Supreme Court said the employee should have an opportunity to prove to the trial court that her supervisor sexually harassed her and that Burlington should have an opportunity to prove its affirmative defense to liability.

INVESTIGATING SEXUAL HARASSMENT COMPLAINTS

A City employee who believes that he or she has been the subject of sexual harassment should speak with a supervisor or the Human Resources Department. As a general rule, the Human Resources Department will investigate the complaint. General guidelines to follow in investigating sexual harassment complaints are as follows:

1. **Interviews** - An investigation should begin immediately after an allegation of sexual harassment is made. You need answers to the “who, what, when, where, why and how” questions.

(a) Witness Interviews

- Do them separately, one at a time, and confidentially.

- Remember that you are gathering facts, not making judgments. Avoid statements like “that sounds like a compliment” or “he always does things like that” or “you are overreacting.” Do not ask witnesses questions such as “did you see Bill touch Jane?” Rather, ask “have you seen anyone touch Jane in a manner that made her feel uncomfortable?”
- Do not disseminate allegations. Also, tell any and all witnesses to discuss the facts only with authorized management personnel and not to discuss the facts with co-workers or others.
- Witnesses are often reluctant to come forward with statements concerning the alleged behavior for fear of retaliation. Assure the witnesses that the employer will not tolerate any retaliation against them.

(b) Alleged Victim Interview

- Have the alleged victim **write out the facts** and **notarize** the statement. Explain that such allegations are serious and the employer will investigate the claim quickly. Tell the complaining employee that the procedure for handling the complaint requires the victim to write out the facts and that the document must be notarized.
- Try to put the complaining employee at ease, acknowledge that coming forward with the complaint is difficult, but maintain a professional attitude about the situation.
- Tell the complaining employee that they will not be retaliated against for making the complaint.
- Obtain specific details concerning the alleged harassment.
- Have the complaining employee describe the type of conduct, the frequency of the conduct, where it occurred, how long it has been going on, whether they believe it has happened to other employees, and on what they base that knowledge.
- Find out if the conduct occurred during work or after hours, at a work-related function, or outside of the work place.
- Find out if the conduct was unwelcome, not whether the complaining employee voluntarily complied with the conduct.
- Note that even if the complaining employee voluntarily submitted to a supervisor's sexual demands, that does not mean that the conduct was welcomed. It might be that the victim thought that saying “no” would result in employment-related consequences.

- Find out if others were subjected to similar treatment by the alleged harasser.
- If there was a significant period of time between the conduct and the complaining employee's report, find out why the report was delayed.
- Prepare a detailed chronology of events.
- Determine whether there may be any ulterior motives on the part of the alleged victim, such as a recent demotion, denial of a pay raise, or other adverse employment action.
- Find out what the complaining employee wants. Can the alleged victim continue to work with the alleged harasser? Can the alleged victim be productive working with the alleged harasser?
- Ask if the complaining employee is afraid of retaliation.
- Ask what the complaining employee sees as the resolution of the problem.
- Examine the alleged victim's job description, and put a copy in the investigative file.

(c) Alleged Harasser's Interview

- Have the alleged harasser **write out the facts** and **notarize** the statement.
- Find out whether a prior consensual romantic relationship has existed between the parties.
- Find out how long they have known each other. Indicate in the statement the job title of the alleged harasser and the business relationship (*e.g.*, supervisor/subordinate) of the alleged harasser to the alleged victim.
- Find out whether they have a history of socializing with each other, either alone or in groups.
- Examine the alleged harasser's job description, and put a copy in the investigative file.
- The accused will often deny the accusations. Make note of the accused's reaction to the allegation.
- Find out if the alleged victim may have ulterior motives in bringing the complaint.

- Determine whether the alleged harasser has supervisory authority over or could fire and/or promote the alleged victim.

(d) Interview the Accused's Supervisor

- Find out whether the accused's supervisor knows of any discipline problems or changes in behavior of the accused or the complaining employee.
- Find out whether the accused's supervisor has any knowledge of any relationship between the parties and if any rumors have been circulating.
- Have any written memoranda been made concerning the parties' behavior?

2. **Confidentiality** - While the employer cannot be totally confidential with the allegations, the employer should be aware of possible defamation suits.

- Tell the witnesses to keep quiet about the incident. Do not tell people about the incident. People should be told on a "need to know" basis only.
- Emphasize to all persons involved in the investigation (including the complaining employee, witnesses, and the accused) the need for strict confidentiality, and let them know, if necessary, that failure to maintain confidentiality will result in discipline.

3. **Involve Attorneys in the Process**

- Do not make any conclusory reports as to whether or not harassment occurred.

4. **Do Not Transfer the Complaining Employee** since this could be seen as retaliation.

- An employer may tell the alleged victim that if there is some other job available while the investigation is pending and the complaining employee wants the job, the alleged victim may have the job.
- If the complaining employee is assigned to a less desirable position or to a position with a lower potential for advancement, the EEOC and/or a jury may see this as retaliation against the victim.

5. **Discipline Harasser** - Swift, effective remedial action is crucial.

- Use general progressive discipline.

- Consider such things as the severity of the conduct, the frequency of the conduct, and any prior conduct of the alleged harasser.

6. **Get the Victim to Agree** that discipline was appropriate.

7. **Follow Up With the Victim**

- Conduct interviews with the complaining party to see if the harassment has ended, and also if the employee has been retaliated against by other employees or supervisors.

- Managers and supervisors should pay close attention to insure that the employer's policy is followed.

8. **Open a Separate File For Sexual Harassment Cases**

- Keep the separate file outside the employee's personnel file.

9. **Document Everything**

- The more aggressively the employer moves against sexual harassment, the better the record will look to a jury, and the less likely it is that a plaintiff's attorney will take a sexual harassment case against the City.

DISABILITY DISCRIMINATION AND THE ADA

Introduction

Until July 26, 1990, federal law did not require non-government-affiliated private employers to assure equal employment opportunity for job applicants with physical or mental disabilities. Sections 503 and 504 of the Rehabilitation Act of 1973 applied only to government contractors, subcontractors and the recipients of federal funds. In May, 1989, bills proposing different versions of the Americans With Disabilities Act of 1990 (ADA) were introduced with broad support in the House of Representatives and Senate. Within fifteen months Congress approved the new Act and President Bush signed it.

The primary purpose of the ADA is to eliminate discrimination against individuals with disabilities, and thereby to bring them into the economic and social mainstream of American life. The ADA has been described both as a civil rights act and employment legislation. It proscribes unequal treatment of the disabled in private sector employment, public services, public accommodations, transportation and telecommunications. Whether the new legislation actually will achieve its purpose depends on its interpretation and manner of enforcement in years to come.

The Act's purpose, set forth in its Section 2(b), is to

- (1) Provide a clear and comprehensive national mandate for the elimination of discrimination against these individuals;
- (2) Provide clear, strong, consistent and enforceable standards addressing discrimination against individuals with disabilities;
- (3) Ensure that the federal government plays a central role in enforcing these standards; and
- (4) Invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and regulate commerce, in order to address the major areas of discrimination people with disabilities face daily.

Overview of the Americans With Disabilities Act

The ADA consists of five (5) major sections. Title I is devoted to employment practices. Title II relates to public services, including public transportation other than by aircraft or certain rail operations as well as by intercity and commuter rail. Title III deals with public accommodations and services operated by private entities. Title IV is devoted to telecommunications for the hearing impaired and speech impaired, and Title V contains miscellaneous provisions. For purposes of this section, Titles I (employment) and V (miscellaneous provisions) will be discussed.

The ADA defines a person with a disability as someone who (i) has a physical or mental impairment that substantially limits that person in some major life activity, or (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

This definition distinguishes an actual physical or mental impairment from a mere physical condition, such as black hair or blue eyes, which is not included. By "major life activity" the definition means activities like walking, talking, breathing or working. An example of someone with a "record" of an impairment is a person who has recovered from cancer but who is discriminated against because of his or her past experience with a disability. An example of a person who is "regarded as having an impairment" is someone who has a significant physical burn on his or her face which does not actually limit that individual in any major life activity, but who is nonetheless discriminated against because of the disfigurement.

Employers with 25 or more employees fell under the provisions of the ADA two years after its enactment; that is, beginning on July 26, 1992. Employers with 15 to 24 employees were covered four years after

enactment. The ADA does not apply to employers with fewer than 15 employees.

The ADA forbids an employer to refuse to hire someone solely on the basis of that person's disability, if the applicant is otherwise qualified to perform the job.

Reasonable Accommodation and Undue Hardship

An employer must make reasonable accommodations for an applicant's disability. The term "reasonable accommodation" includes the following:

- making existing facilities used by employees readily accessible to and used by individuals with disabilities
- job restructuring
- part-time or modified work schedules
- reassignment to a vacant position, acquisition or modification of equipment or devices where necessary to accommodate disabled employees
- appropriate adjustment or modification of examinations, training materials or policies
- provision of qualified readers or interpreters
- other similar accommodations for individuals with disabilities

In other words, if there is some modification in a job's requirements or structure that an employer can reasonably effect, and this modification will allow the disabled employee to do the job, then the change must be made. An employer may not deny employment opportunities to a job applicant or employee if the denial is based on the employer's need to make a reasonable accommodation for the employee's physical or mental impairment.

If an employer, however, can demonstrate that the accommodation would impose an undue hardship on the operation of the business, then the duty to accommodate is waived. An "undue hardship" is an action requiring significant difficulty or expense for the employer. The ADA instructs courts to consider the following factors in determining whether a reasonable accommodation creates an undue hardship:

- the nature and cost of the accommodation

- the overall financial resources of the facility involved in the provision of the reasonable accommodation
- the number of persons employed by this facility
- the effect on expenses and resources, or the impact of such accommodation upon the operation of the facility
- the overall financial resources of the employer
- the overall size of the employer with respect to the number of its employees
- the number, type, and location of the employer's facilities
- the type of operation or operations of the employer
- the composition, structure, and functions of the workforce of the employer
- the geographic separateness, administrative, or fiscal relationship of the facility to the employer

When the balance of these factors makes it unreasonably burdensome for an employer to accommodate a disabled job applicant or employee, then a court is likely to allow the employer to refrain from making the accommodation.

The ADA tolerates employers' screening of prospective employees strictly on the basis of "business necessity" and "job-related" skills and qualifications. The Act puts the burden on the employer to ensure that qualification standards and tests do not otherwise discriminate against candidates on the basis of their non-job-related impediments.

Although an employer may inquire about a job applicant's ability to perform job-related functions, it may not otherwise make inquiries into the existence, nature or severity of an applicant's disabilities. There are only two instances in which requiring a medical examination is permissible: when it is conducted after an offer of employment is made, or when it is voluntary and part of an employee health program that maintains separate confidential files for participating employees.

An offer of employment may be conditioned upon the results of a medical examination if the following two conditions are met. First, all entering employees must be subjected to the examination, regardless of whether they have a disability. Second, all information obtained from such a medical

examination must be collected and maintained on separate forms and in separate medical files. The information must be treated as a confidential medical record.

The ADA does not protect current users of illegal drugs from employment discrimination on the basis of their drug use. The ADA does protect individuals, however, who have successfully completed a supervised drug rehabilitation program and who no longer engage in the illegal use of drugs, or who have otherwise been rehabilitated successfully and no longer engage in illegal drug use. The ADA also protects participants who are enrolled in a supervised rehabilitation program, if they no longer use illegal drugs. Finally, the ADA protects persons who are regarded as engaging in illegal drug use but do not so engage. The Act provides that nothing in it prohibits or authorizes drug testing of job applicants or employees, although drug tests are not to be considered medical examinations.

Employers may prohibit the use of illegal drugs or alcohol at the workplace by all employees; may require that employees not be under the influence of illegal drugs or alcohol in the workplace; and may hold a drug user or alcoholic to the same qualifications, performance and behavioral standards to which all employees are held. This is true even if unsatisfactory performance or behavior is related to the individual's drug use or alcoholism. Finally, an employer in an industry that is subject to the alcohol and drug use regulations of the Department of Defense, Nuclear Regulatory Commission or Department of Transportation, may require that its employees comply with the alcohol and drug use regulations of these federal agencies.

People with AIDS and people who are HIV-infected are covered under the ADA, just as they have been covered under Section 504 of the Rehabilitation Act. In order to allay any fears about the contagiousness of diseases, the ADA requires the Secretary of Health and Human Services to study all infectious and communicable diseases and how they are transmitted, and to compile and disseminate information about such diseases. Employers in the food services industry will be able to reassign workers whose diseases may be spread to customers through contact with food, as determined by the Secretary of Health and Human Services.

Prohibited Employment Practices Under the ADA

Discrimination on the basis of disability is expressly prohibited by the ADA. The general rule is that no covered entity shall discriminate against a qualified individual with a disability because of the disability in regard to job application procedures, hiring, advancement or discharge of employees, compensation, job training, or other terms, conditions and privileges of employment. A "qualified individual" is an employee who, with or without

reasonable accommodation, can perform the essential functions of the job. Prohibited employment practices include:

- limiting, segregating, or classifying a job applicant or employee in a way that adversely affects his or her opportunities or status;
- participating in an arrangement or relationship (including that with an employment or referral agency, labor union, fringe benefits organization or an organization providing training and apprenticeship programs) that would have the effect of subjecting a covered entity's qualified applicant or employee to discrimination;
- using standards, criteria or methods of administration that lead to, or perpetuate, discrimination on the basis of disability;
- excluding or otherwise denying equal jobs or benefits to a qualified individual because of his or her relationship or association with an individual with a known disability;
- failing to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the covered entity's business; or denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if the denial is based on the covered entity's need to make reasonable accommodation to any physical or mental impairments of the employee or applicant;
- using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or class of individuals with disabilities unless the standard, test or other selection criteria used by the covered entity are shown to be job-related for the position in question and consistent with business necessity; and
- failing to select and administer employment tests in the most effective manner to ensure that a job applicant or employee's skills, aptitudes or whatever other factors the test purports to measure are reflected, rather than reflecting the impaired sensory, manual or speaking skills of such employees or applicants (except where such skills are the factors that the test purports to measure).

Specific Exclusions Under the ADA

Section 608 of the ADA specifies that the terms "disabled" or "disability" will not apply to an individual solely because that individual is a transvestite. Section 511 of the Act deals with other exclusions under the

term “disability.” For purposes of the Act, homosexuality and bisexuality are not impairments and, therefore, do not qualify as disabilities under the Act. The term “disability” also does not include:

- (1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
- (2) compulsive gambling, kleptomania, or pyromania; or
- (3) psychoactive substance use disorders resulting from current illegal use of drugs.

Miscellaneous Provisions

Section 501 deals with how the ADA is to be construed. Nothing in the ADA is designed to apply lesser standards than those applied under Title V of the Rehabilitation Act of 1973, or to invalidate or limit any remedies, rights or procedures of any federal or state laws, including those of any political subdivision of a state or jurisdiction, that provide greater or equal protection for the rights of individuals with disabilities. The Act is not to be construed to prohibit or impose restrictions on smoking in work places covered by Title I, transportation covered by Title II or Title III, or public accommodations covered by Title III.

Section 501(d) provides that nothing in the ADA is to be construed to require an individual with a disability from accepting any accommodation, aide, service, opportunity or benefit he or she does not want.

Section 503 of the ADA prohibits discrimination for purposes of retaliation against an individual who has opposed any act or practice which is unlawful under the ADA. Likewise, it is unlawful to coerce or intimidate, threaten or interfere with any individual in the exercise or enjoyment of, or because he or she has aided or encouraged any other individual to exercise and enjoy any right or remedy granted or protected under the Act.

THE TEXAS WHISTLEBLOWER ACT

The Texas Whistleblower Act, found in Chapter 554 of the Texas Government Code, was designed by the Legislature to protect public sector employees who report violations of law by their government employers. Prior to being amended in 1995, a prevailing employee was able to recover punitive damages in amounts limited only by a jury’s imagination. As a result, there was a period of time when these types of lawsuits were very popular. The Legislature amended the Whistleblower Act in 1995, doing away with punitive damages and putting a cap on the amount of damages a

plaintiff could hope to recover. The result has been a decided decrease in the numbers of these types of cases being filed.

A public employee, in order to bring a claim, must prove that he or she: (1) reported a violation of law (2) in good faith (3) to an appropriate law enforcement authority, and (4) was suspended, terminated or suffered some adverse employment action as a result of making the report.

The following definitions apply in considering whistleblower violations. A *report* must be a direct communication of a specific violation of law (or at the least, the suspicion of a violation). The *violation of law* may be a local, state or federal statute, an ordinance or a rule adopted pursuant to a statute or ordinance. *Good faith* requires a showing that the employee actually believed at the time of the report that a violation of law had occurred or was imminent and that this belief was objectively reasonable in light of his or her experience and training. An *appropriate law enforcement authority* refers to an authority that is part of a state or local governmental entity or the federal government that an employee in good faith believes is authorized to enforce the law allegedly being violated or investigate or prosecute the violation. “[T]he media clearly is not an appropriate ‘law enforcement authority.’”

The following defenses may be available to the employer: (1) Plaintiff failed to prove that “but for” the report, he or she would not have been terminated (or demoted, etc.); (2) the employer had a legitimate reason for the adverse employment action; (3) Plaintiff failed to initiate internal grievance procedures; (4) Plaintiff failed to file suit within 90 days of the date of the alleged violation or within 30 days after the grievance procedures were exhausted. [Note: before the 1995 amendments, the plaintiff had a total of 120 days to initiate suit even if the grievance procedure had not been completed.]

The following damages are available to a successful plaintiff: (1) personal liability - Plaintiff may seek a civil penalty against a supervisor who violates the Texas Whistleblower Act, such amount not to exceed \$15,000; however, it should be noted that this penalty must be paid by the supervisor and it may not be paid by the governmental entity; (2) damages, as noted below, as well as:

- injunctive relief;
- actual damages for mental anguish, lost future wages and loss of future earning capacity;

- court costs;
- reinstatement;
- past lost wages and benefits; and
- reasonable attorney's fees.

Under the 1995 amendments, however, damages are limited. The total damages available for any claim based on conduct that occurred after June 15, 1995, are limited as follows:

- \$ 50,000 - if the employer has fewer than 101 employees;
- \$100,000 - more than 100 employees and fewer than 201;
- \$200,000 - more than 200 employees and fewer than 501;
- \$250,000 - more than 500 employees.

The number of employees is calculated by determining the number of employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year.

As a public employer, educate all of your managers (from the top down) about the importance of taking any report of illegal activity seriously and launching an immediate investigation. The failure to do so may result in liability for an individual supervisor or the governmental entity.

Interviews: The Do's And Don'ts

JOB APPLICATION FORMS AND INTERVIEW QUESTIONS

Federal and state laws prohibit certain questions, while even more questions are legally dangerous because they have been used to help prove discrimination. Most employment application forms, even those of large companies, violate the law or ask legally dangerous questions. In a national survey of 501 employment application forms during 1987, one employment law author found 500 to have dangerous questions, at least when judged against a strict national standard based on the statutes, regulations, and case

decisions under all state and federal discrimination laws. Some forms had over a dozen illegal or unwise questions. Questions that are dangerous to ask on job application forms are also dangerous to ask in employment interviews or to obtain by other methods such as asking past employers or people listed as references.

Questions prohibited by individual state laws or regulations, or dangerous to ask under state fair employment laws and federal equal employment laws include, but are not limited to, questions concerning:

1. *Age.* No question concerning age is safe unless required under some specialized governmental regulations, or the question is limited to asking, "Are you 18 or older?" Some forms incorrectly ask if the applicant is 65 years of age or younger, or 70 years or younger.
2. *Race, sex, height or weight, color of eyes or hair, or skin complexion.* None of these characteristics relate to valid job requirements or bona fide occupational qualifications (BFOQs). The questions may be used in a disparate impact lawsuit where the plaintiff claims that use of the answers (1) impacted African-Americans or women differently from whites or men, and (2) they were not BFOQs. (In very limited instances height and weight may be valid criteria, such as a minimum height requirement for flight attendants so they can reach the overhead compartments on airplanes).
3. *National origin, place of birth, or type of employment authorization.* Some employers ask about these things in a misguided attempt to comply with the Immigration Reform and Control Act. The examination of work documents required by the Immigration & Naturalization Service and the completion of its I-9 Form need not be done until after a decision to hire the person is made. Therefore, employers should not require job applicants to prove their authorization to work in the United States. It is legally permissible, however, to inform applicants of the I-9 requirements, or ask, "If hired, can you prove you are authorized to work in the United States?"
4. *Length of residence or home ownership.* These questions have nothing to do with an individual's ability to do a job, and statistically it often can be shown that the average length of residency or higher rate of ownership occurs with whites, as compared with African-Americans or Hispanics.
5. *Arrest records and misdemeanor convictions.* Statistically, it often can be proven that males and African-Americans have such records more often than females and whites. An arrest record proves nothing, for even innocent people are sometimes arrested, but the charges are dismissed later and the person is not charged with any offense. Misdemeanor convictions are not job-related in many types of jobs (*e.g.*, manual labor or factory work). Nevertheless, misdemeanor records concerning theft or drug

convictions might be important in hiring people where extra trust or access to drugs is involved. Conviction records often can be asked about and checked.

6. *Type of military discharge.* Statistically, African-Americans have a disproportionate share of less than honorable discharges from the military, as compared with whites. A less than honorable discharge means little or nothing as to whether an applicant is qualified for the job, especially since it is alleged that many less than honorable discharges during the Vietnam War era were not based upon wrongdoing.

7. *Friends or relative already employed by the employer.* If an employer asks these questions, in a job application form or interview, it may be assumed, depending upon the facts, to be information used to deny a job under an anti-nepotism rule, or to give preference to those with friends or relatives already employed. Either set of facts could cause equal employment legal problems. If the current work force is not representative of the job applicant pool in terms of race or national origin, a disparate impact claim based upon race or national origin may occur. For example, if an employer's work force is 90 percent white while the pool of possible, qualified job applicants is 40 percent African-American, preference to friends and relatives of current workers (mainly white) has a disparate impact on African-Americans and is not justified by a business necessity. If the question is asked in furtherance of an anti-nepotism rule and the employees are mostly males, it may have a disparate impact on females.

8. *How the applicant found out about the job (referral source).* Many job application forms ask this; however, it may have a disparate impact based upon race or national origin, and it makes no difference whether the applicant is qualified (that is, it is not a BFOQ). If information is desired as to the effectiveness of various recruitment methods, job applicants should be asked to give this information on a separate form that does not include the applicant's name.

9. *Past bonding or security clearance problems, credit problems, personal bankruptcy, method of transportation, relative to notify in case of emergency, sexual orientation, family plans, living arrangements, and other personal questions.* Most of these questions are not relevant to a specific job, and the answers might be proven to show a difference based upon race, sex, national origin, or disability. Past bonding problems, however, may be relevant and job-related when hiring bank tellers and others where bonds must be obtained. Questions about who to contact in case of emergency may be asked after each employee is hired.

AMERICANS WITH DISABILITIES ACT (ADA) RESTRICTIONS

In the past, many job application and interview questions were dangerous to ask because they might be used as part of the proof of discrimination in hiring, but the questions were not always illegal, in and of themselves. The ADA, however, has created an entire group of questions that are specifically prohibited. Under the ADA employers may not ask about job applicants' disabilities, health problems, medical history, workers' compensation claim history, or any other questions concerning past or present physical or mental impairments. When a job applicant's disability is obvious, or when an applicant voluntarily discloses the existence of a hidden disability such as diabetes, epilepsy, HIV infection, or cancer, the law still limits the types of questions that may be asked.

The following is a guide to what may and may not be asked of job applicants in these various situations.

1. Questions that may be asked of job applicants, whether disabled or not:

- (After explaining the physical and mental job tasks) Are you able to perform the duties of the job for which you have applied, with or without reasonable accommodations?
- Explain or demonstrate how you can perform the essential duties of the job (but allowed only if asked of all job applicants in any broad job category).
- (After explaining the requirements) Can you meet our attendance requirements?
- Do you have the necessary background or certifications for the job (*e.g.*, relevant training, experience, licenses)?
- Do you need any accommodations to take a required entry test (such as a typing test or work performance test)?

Most other positive, obviously job-related questions may be asked. The key is to limit questions to those that judge the ability of the applicant to do the essential tasks of the job, with or without accommodations.

2. Examples of Questions That Must Not Be Asked of Any Job Applicants:

- Have you ever been treated for any of the following diseases (with a list of diseases)?

- Please list any conditions or diseases for which you have been treated during the past five years?
- Have you ever been hospitalized?
- Have you ever been treated by a psychiatrist or psychologist?
- Have you ever had a mental illness?
- Is there any health-related reason that might prevent you from performing the job?
- Do you have any physical limitations or restrictions? Are you taking any prescription drugs?
- Have you ever been treated for alcoholism or drug addiction?
- Have you ever filed a workers' compensation claim?
- How many days of work did you miss last year due to illness?

3. Questions Interviewers Can Ask if a Disability is Obvious or is Voluntarily Disclosed by the Applicant:

- Are you able to perform the duties of the job for which you have applied, with or without reasonable accommodations?
- (If the disability appears to cause a problem in performing the essential duties of the job in question, the following can be asked, even if not asked of all job applicants.) Please explain how you will perform the job duties.
- (If the disability appears to cause a problem in performing the essential duties of the job in question, the following can be asked; even if not asked of all job applicants.) Please demonstrate how you will perform the job duties.
- (If applicants must take an oral, written, or job-performance test before being hired) Are there any accommodations you need to take the entrance or qualifying test(s)?
- (After explaining the requirements) Can you meet our attendance requirements?

4. Examples of Questions That Must Not Be Asked, Even if Disability Is Known:

- Does the disability restrict your activities?
- How did it (the disability) happen?
- How long have you been disabled?
- What do the doctors think is wrong?
- Is it permanent?
- How will you get to work?
- Do we have to do anything special to accommodate you? (Negative approach)
- Do you have to miss work for medical treatment?
- Do you receive any disability benefits or government aid?

Information that may not be obtained during an interview cannot be obtained by other methods such as asking past employers or people listed as references nor can the information be requested in a credit report, workers' compensation claim history, or by any other methods (*e.g.*, via the Texas Open Records Act if the applicant is a former public employee).

The job applicant, or a social agency working with the job applicant, can voluntarily disclose a disability and/or ask for an accommodation. If a disability is known by the interviewer and the job applicant does not request an accommodation, the applicant should be asked if any accommodations are needed for required entry exams or on the job.

Interviewers may, and usually should, rely on the statement of an applicant that there is a disability; however, in cases where there is reason to believe the individual is not legally disabled—especially if an accommodation is expensive or disruptive—an employer may ask for a statement from a physician or other specialist indicating that a disability exists.

Performance Appraisals

ELEMENTS OF AN EFFECTIVE APPRAISAL SYSTEM

An effective performance appraisal system that accomplishes any organization's goals should have essentially four elements:

1. Objective performance criteria that should be based on some form of observable behavior that is related to the duties of the job. The criteria for evaluation are communicated to employees. Goals and objectives should be reached through consultation between the supervisor and employee.
2. Persons conducting the appraisals, usually immediate supervisors, are trained in how the system works and how to deliver effective feedback on performance.
3. Written guidelines for administering the appraisal system are used by raters.
4. Employees who disagree with a rating are given an opportunity to challenge the rating and have further explanation of how the rating was derived.

These broad guidelines provide the general elements that can be applied to any number of appraisal systems. Application of the guidelines can be applied on a decentralized and flexible basis that will allow various employee groups to adapt a performance appraisal to their own special needs. Clerical workers may be different from street personnel in terms of the feedback they want and the standards used to measure performance. Thus, the format of their appraisal systems may differ within the framework of the foregoing guidelines.

Objective standards for measuring performance are the cornerstone in any effective performance appraisal system. Once valid standards are set, however, many times an ineffective performance appraisal can be traced to the person who is conducting the appraisal—usually the immediate supervisor or manager.

There are several common reasons that supervisors do not conduct effective performance appraisals.

Guilt. A performance appraisal is the most tangible exercise of managerial power over another person. The manager or supervisor is being asked to be

the judge and jury over another person's performance. Often this can have adverse consequences for that person in terms of pay or job security. Many supervisors feel uncomfortable exercising this power or they feel guilty about criticizing performance and hurting a subordinate's feelings.

For effective performance appraisal, however, the supervisor must ignore these emotions, or at least work through them; otherwise there is a tendency to give everyone a good or above average appraisal, which can lead to trouble for the employer when personnel decisions are challenged later. Many an age discrimination suit has been lost when an employee is fired for poor performance after years of good performance appraisals.

On an individual level, the supervisor's failure to be truthful about bad or disappointing performance is counterproductive to the purpose of improving performance. Hurt feelings are an unavoidable side effect of negative criticism, but it is often the first step to changing employee behavior and moving down the path to where criticism will not have to be heard again. Remember that the purpose of any performance appraisal should be to help both the local government and the employee.

Lack of accountability. Supervisors often conduct ineffective performance appraisals because they feel inadequate about giving feedback to their subordinates. Conducting effective performance appraisal should be written into a supervisor's job description. It should be clear that part of the supervisor's job duties and responsibilities is to set goals for employees and counsel them on performance relative to those goals.

Accountability for performance appraisals goes beyond merely filling out an appraisal form once a year and putting it in a personnel file. This is a form of report card mentality that defeats the purpose of continuing feedback designed to improve performance.

To conduct effective performance appraisal, supervisors should be coaches rather than judges. Accountability should be based on the supervisor's exercise of skill in coaching activities designed to develop people and improve their performance. Coaching skills fall into two categories—enabling skills and motivation skills. Enabling skills consist of activities that develop a subordinate's ability to perform the job. These include training, developing skills competence, providing necessary tools and equipment as well as removing any obstacles to performance. Motivation skills generally refer to giving positive feedback that recognizes or reinforces good performance, and giving constructive feedback to help employees improve in areas where they are able to do better.

Using effective coaching skills can reduce the guilt supervisors feel when having to provide negative feedback. By conducting frequent informal

feedback sessions, there is no surprise if a formal review produces an unfavorable rating.

Ineffective application of standards. Overrating also can be a problem in the evaluation process. This occurs, for example, when poor employees are rated as marginally competent, marginal employees are rated as satisfactory, satisfactory employees as above standard, and good employees are rated as excellent. If an employee is discharged for poor performance but has constantly been overrated as an average performer, past performance evaluations can be used against the employer. The employee can reasonably argue that for years his performance has been rated satisfactory, and suddenly he is being terminated. Obviously, it cannot be because of his performance because his evaluations have been satisfactory. Therefore, the employee assumes that it must be for some illegal reason. Supervisors who are rating all their employees as satisfactory are not making the tough performance distinctions required for an effective performance evaluation system. Supervisory training can be the key to effective performance appraisal. Performance appraisals need to set forth more than conclusory statements as to deficiencies or conduct. The appraisal should include supporting examples for any deficiency along with suggested action for improvement of performance. In that way, the supervisor is forced to evaluate more objectively the employee's total performance without the tendency to overrate.

How does a supervisor know when an employee has achieved preset goals? The answer lies partly in the way the goals are defined and the behavior needed to achieve those goals. Performance should be measured in terms of behavior or action that can be objectively seen. Performance appraisal systems fail when they are based on subjective opinions about how a person is performing. A supervisor should not base a performance appraisal on a person's attitude or what the supervisor thinks is going on inside the person's head.

Does this mean a person cannot be disciplined for a "bad attitude" or rewarded for a "good attitude?" Not at all. It does mean that behavioral examples of what constitutes a good or bad attitude should be spelled out.

Providing good customer service is a common goal upon which employees are evaluated. But it is not enough to state that a goal of an employee is good customer service. Effective performance evaluation requires that objective, observable behavior be spelled out that constitutes good customer service. Thus, good customer service might require that each customer be greeted within 10 seconds and thanked after every transaction. These are actions that can be observed.

Once behavior has been identified that amounts to good performance, different levels of performance can be established. For example, if the behavioral standard for a clerical staff member is to complete reports within three days with fewer than two errors, exceptional performance would be completion of reports in one day with no errors.

Typical comments found on performance evaluations indicate the difference between assessing performance based on observable behavior as opposed to subjective opinions about attitude. A statement that “Joe has lost interest in the job and shows no potential for advancement” is based on a subjective guess about what is going on inside Joe’s head. An appraisal based on observed behavior, however, might include a statement that “Joe is arriving at work late and is processing five fewer claims per week than at the same time last year.”

One exercise demonstrates the difference between observable behavior and speculation about what is inside a person’s head. Have someone walk into a room, pace slowly back and forth and frown while shaking his head. Then ask people what they saw. Subjective respondents will say they saw someone who was worried, pensive, contemplative or depressed. But the only real observable, objective behavior was a person pacing back and forth while frowning and shaking his head.

Use of subjective language in performance evaluations may make it difficult to prove that a person who was discharged for poor performance was unqualified for the position. For example, an African American employee alleged that his discharge was racially motivated. The employer countered that performance evaluations established that the employee was unfit for the position. The court ruled that the employer’s subjective performance criteria did not establish that the employee was incapable of doing his job. Negative evaluations of the African American employee were couched in such terms as “lacks a sense of priorities” and “lacks initiative.” Noting that subjective evaluations are more susceptible of abuse and likely to mask pretext, the court found that the employer could not initially establish that the employee was unqualified for the job by using such performance evaluations.

Rating the performance of employees against preset goals requires the establishment of some scale that describes levels of performance. A five-level rating scale might contain the following levels of performance, ranging from substandard performance to excellent performance:

Marginal — Significant goals or objectives were not met. Performance is clearly below acceptable standards or has decreased over time.

Adequate — Most goals or objectives were met but with some shortfalls. Performance is below acceptable standards based on experience or level of skill. Performance could be improved through development or application of effort.

Skilled — All objectives and goals met. Sometimes produces beyond expectations.

Commendable — Performance consistently above set goals or objectives. Qualified to assume additional responsibilities. Objectives met and many exceeded.

Outstanding — Performance far exceeds set goals. Extraordinary accomplishment with measurable impact on overall objectives. Significant breakthroughs or achievements.

In the alternative, a three-level rating scale can be adopted as follows:

Needs Improvement — Work falls short of goals or is below an acceptable level for time in job and requirements of job.

Good — All performance goals met.

Best — Performance consistently exceeds goals.

A few points should be made about setting rating scales.

The mid point for setting rating scales should be that performance which is equal to a 100 percent achievement of goals and objectives. Thus, in the five-point rating scale above, the “skilled” rating would equal the organization's definition of 100 percent performance. The higher “commendable” or “outstanding” ratings should require the employee to exert extra effort beyond preset goals. There should be a stretch in performance that capitalizes on unforeseen events and makes a demonstrable impact on organization performance. For example, 100 percent performance might require a person to return citizen telephone calls within one day. The higher rating of commendable might be achieved by calling back citizens the same day while the top rating of outstanding might require the person to take some initiative in customer service that was unforeseen but in line with overall goals. Top level performance on the rating scale should be difficult to achieve and will not happen every day.

Having 100 percent performance as the midpoint of the rating scale does not mean employees at this level are “average.” The scale should avoid this label. After all, the organization does not strive to be average. Employees who meet organization goals should be labeled as winners. Accordingly,

the 100 percent employee might be labeled as “meeting high standards” or “valued employee” or “proficient.” In successful organizations with effective performance appraisal, most employees will be at this 100 percent level.

Any personnel action such as discipline or discharge may be defended from challenge if it was taken pursuant to a legitimate business justification. Poor performance is one such business justification. In any lawsuit that challenges an adverse personnel action, the first piece of evidence that a plaintiff’s attorney will request is the employee’s past performance appraisals. If the case goes to trial, those appraisals will be enlarged and put on display for a jury to scrutinize. The jurors also will take them back into the jury room. It is therefore essential that performance appraisal be done fairly and consistently.

Federal and state laws prohibiting employment discrimination are the main source of legal concern for performance appraisal. Employees may allege that a promotion denial, layoff, discharge or compensation action was illegally influenced by, for example, the employee's race, sex or age. Employers typically will turn to past performance appraisals to justify the action. If performance appraisals are not well documented or inconsistently applied, however, the employer’s defense is weakened or destroyed.

A legally defensible performance appraisal system should contain the following elements:

- be in writing
- contain specific procedures
- include specific instructions for supervisors
- provide training for supervisors in how to evaluate employees
- use standardized forms for related groups of employees
- be thoroughly communicated to employees
- be given formally at least on an annual basis
- evaluate specific work behavior and not personal traits.

A review of performance appraisals by the next highest level of management is one way to ensure objectivity. The equal employment opportunity staff may also conduct random audits of appraisals for EEO

compliance. If performance reviews impact adversely on one group of protected employees, an EEO audit can detect this.

THE CURRENT STATUS OF PERFORMANCE EVALUATIONS

A study presented in a 1992 *Journal of Management* article that consolidated recent surveys of hundreds of companies found that the average performance appraisal system is 11 years old, and that the typical system was designed by personnel specialists with little or no input from supervisors or employees. A Management-by-Objectives (MBO) approach is the most popular way of assessing executives, supervisors, and professional employees. An MBO approach usually has the employee and immediate supervisor agree on specific goals for the employee to achieve in the next year, and then measures success toward meeting the goals at the end of the year.

The surveys found that nonexempt (hourly) personnel are typically evaluated by assigning a standard term—such as excellent, good, average, poor, or bad—to traits such as attendance, quality of work, and other standardized factors; however, the surveys showed that executives and a sizable number of hourly workers often were not rated under any formal or announced format. The surveys also revealed that many evaluation forms asked for a mixture of quantitative and qualitative information. The most frequent quantitative measures for executives and managers were sales, profits, and costs, while the most frequent quantitative measures for hourly employees were attendance, number of rejects, and number of units of work produced.

The surveys also showed that supervisors and managers typically spend about seven hours per year evaluating the performance of high level employees, and about three hours per year in the evaluation of employees at lower levels. Many companies reported spending less than one hour per employee. Most companies claimed to conduct extensive evaluator training; however, much of it occurred only when a new system of performance evaluation was adopted. Many companies did little or no year-to-year training. Only one-fourth of the companies claimed they evaluated the evaluators or held them responsible for how well they conducted performance evaluations.

Almost all companies reported ratings in performance evaluations to be top heavy. For example, where a scale of five was used, it was common for 60-70 percent of all employees to be rated in the top two categories.

Seventy-five percent of the organizations claimed to have a dispute resolution process by which employees can contest their evaluations; however, only 25 percent reported that they have a formal appeal process.

Most companies admitted worrying about the fairness of their procedures. Many were concerned about performance evaluator's memory, with good reason. Evaluators conducting a once-a-year evaluation are too likely to remember only the most recent performance—good or bad—rather than 12 months of job performance.

A 1990 *Business Horizons* article cited studies showing that managers often claim they perform annual performance evaluations, while their employees often say otherwise. In one study, 70 percent of managers said they did annual evaluations, but less than 30 percent of their employees said their performance was subject to annual review. The difference between responses—70 percent minus 30 percent appears to show that 40 percent of the employees were evaluated, but did not know it. Some employees reported that the only evaluation they ever received was during an exit interview upon termination of their employment.

PRACTICAL AND LEGAL PROBLEMS IN EVALUATIONS

Many performance evaluation systems now in use by employers are believed to be unfair by employees. Whether this is true or not, the belief increases the chance of an employment lawsuit eventually being filed. Once an employee or ex-employee files a complaint, the performance evaluations may be used to help prove employment-based legal claims. The problems with many performance evaluation forms, processes, and procedures giving rise to an increased chance of a lawsuit include:

1. Appraisal forms that ask supervisors or raters to judge general personal characteristics, rather than job-related actions.
2. Performance evaluation procedures that ask supervisors or raters to judge highly subjective attributes such as personality or attitude.
3. Lack of training for individuals who will conduct performance evaluations.
4. Lack of consistency among the various supervisors or raters in how they judge performance. Some are strict, others are lax, and still others always rate toward the middle.
5. Supervisors or raters who avoid being specific in their ratings of employee weaknesses and strengths in an attempt to just mechanically handle the required appraisal.
6. Supervisors or raters who actively avoid difficult subjects and controversy, or are afraid of creating a permanent record that might harm the

employee in the future. Therefore, the lowest ratings given are fair or average, even when the employee is poor or terrible.

7. Supervisors or raters who desire to be considered nice, as well as avoid difficult situations, by overrating employees.
8. Supervisors or raters who hope that problem employees will somehow just go away, so they find no need to give honest, but poor, ratings.
9. Supervisors or raters who intentionally overrate employees they like or those who are their friends, while underrating other employees.
10. Supervisors or raters who discriminate based upon race, religion, sex, national origin, age, disability, or other illegal factors.
11. Supervisors, raters, or other managers who cannot, or will not, explain performance evaluation results to employees.
12. Performance appraisal systems that do not provide a procedure for employees to learn of their ratings and express disagreement with them.
13. Evaluation systems where there is no appeal, by grievance or otherwise, from an arbitrary, unfair, or discriminatory evaluation.
14. Appraisal procedures that do not include a systematic review to insure consistency and fairness.

DEVELOPING A SAFE, EFFECTIVE APPRAISAL SYSTEM

All employers engage in performance evaluations of employees. Those who claim they do not use—or have quit using—performance evaluations simply substitute a subjective, informal process for a more objective, formalized process.

Explicit, accurate performance appraisals convey the message that employees are accountable for their actions. The use of objective, job-related criteria applied in a consistent manner conveys the message that an employee is being treated fairly—a key method of avoiding legal action.

The development of actual performance evaluation systems and forms is beyond the scope of this training session; however, the following ideas are helpful in instituting an effective performance evaluation system that may prevent employee legal complaints, and help win lawsuits that might be filed:

1. *Adopt an official performance evaluation policy and procedure.* The recent trends in management in applying new programs such as Quality First, Self Directed Work Teams, or Deming Concepts sometimes result in discontinuing the use of formal performance evaluations. Some human resource managers go so far as to claim that the use of performance evaluations is outdated, thus they are not used by their companies; however, managers that claim that employees are not evaluated are deceiving themselves and their employees. Performance evaluation does occur. No company or governmental entity employs people regardless of job performance. Therefore, the lack of a formal system simply means that supervisors and their entities rely on an unwritten, unofficial system. These systems are unfair. Employees have a right to know how they are judged. Failure to grant this right may increase the chance of a lawsuit and the chance of losing the lawsuit.

2. *Do not copy existing generic evaluation forms.* Many of these forms simply ask the evaluator to rate employees as excellent, good, fair, poor, or bad—or similar terminology—based on a standardized list of characteristics such as attitude, attendance, ability, and dependability. Not only are these areas too subjective, but each company or governmental entity needs to tailor performance evaluations to its type of work force and needs.

3. *Develop job descriptions and coordinate evaluation forms with the descriptions.* To the degree possible, performance evaluations should measure employees' abilities to perform the specific, essential tasks of each job position. Good performance evaluations objectively measure exactly how well each employee performs the specific tasks of each job. Evaluation forms that are too general or subjective, or rate employees on factors not directly related to important job tasks, increase the chance of a successful lawsuit. For example, suppose a Hispanic lab technician is fired and sues for race discrimination. In defense, the employer produces his quarterly performance evaluations for the final 12 months of his employment that indicate he was rated poorly in the general categories of attitude, interpersonal skills, and overall performance. The discharged employee's attorney might find it rather easy to claim that the supervisor who did the rating discriminated against the individual because he was Hispanic; however, if each quarterly evaluation form states the number of times the employee failed to complete lab assignments—for example an average of 43 times per quarter and the average rate for lab technicians is 5—the employer can easily prove that the stated reason for discharge, poor performance, was the real reason, and not a pretext for discrimination.

4. *Substitute objective measures of performance for subjective ones, where possible.* For example, do not have supervisors rate employees as excellent, good, poor, satisfactory, or unsatisfactory in attendance when you can have them record the exact number of absences in a given period. Do not ask

evaluators to give a general rating as to work proficiency if they can record the number of times a job task was completed or not completed within an allocated time period. In the minds of many employees, courts, and juries, subjective factors imply discrimination.

5. *Train supervisors and other raters.* People who are to conduct evaluations must be trained as to the purpose of the employer's evaluation system, how to use the performance evaluation system, how to rate fairly and consistently, and how to obtain help if there are any questions or problems. One short training session when adopting a new evaluation system is not sufficient. New employee-evaluators should receive extensive training and older employee-evaluators need periodic updates in training. A key element of training should include education on how to discuss the evaluations with employees so employees clearly understand the conclusions reached, as well as needed changes in future employee performance. While many supervisors hate this area of their job and try to avoid even thinking about it, it is vital that they be trained how to conduct an evaluation meeting in a constructive, businesslike manner.

6. *Use an appraisal system that has at least one level of overview by a more senior supervisor.* This is of vital legal importance so that evaluations are checked for fairness and consistency among supervisors. Also consider asking a human resources supervisor or your attorney periodically to review performance evaluations to further insure consistency and correct documentation. Most successful lawsuits based upon performance evaluations are won by comparing the individual's ratings with the ratings of others and showing that the individual was treated more harshly than other employees.

7. *Require that all evaluations be discussed with the employee.* All deficiencies in employee performance must be discussed in a specific, but positive, way so that employees have notice of the deficiencies and know what is needed to correct them. Otherwise, a later disciplinary action or discharge may result in a successful lawsuit.

8. *Give each employee a method of officially disputing evaluation conclusions.* This is best done by requiring that each employee sign and date the evaluation, stating that he or she has no objections to it, or in the alternative, summarizing disagreements with the ratings in writing.

9. *Provide a method of appealing evaluations.* Employees should be entitled to appeal the conclusions of a performance evaluation in a simple, but quick manner, and without fear of retaliation by the supervisor.

10. *Measure how well supervisors and other raters conduct performance reviews.* It makes little sense to give an employee a duty and not make him

or her responsible for the performance of that duty. Yet many employers assign performance evaluation duties to supervisors without imposing personal responsibility to complete the evaluations in accordance with policy and general fairness. To avoid lawsuits, the primary decision as to how well the evaluators conduct performance evaluations should be judged on their fairness, consistency, and communication with the employee. Ability in rating subordinates should be a significant part of each supervisor's own performance evaluation.

11. *Establish an effective recordkeeping system.* Documents almost always carry more weight in court than does the testimony of the people involved in a dispute, for two reasons: First, they are written when memories are clearer. For example, a notation made at the end of the day that an event occurred is usually more accurate than trying to remember what happened months or years later. Second, they appear to be more honest. Judges and juries normally discount many statements made in preparation for a trial or during the course of the trial, believing (often correctly) that they reflect more what helps win the lawsuit, rather than what really happened. The same judges and juries give more credence to documents prepared before any lawsuit was filed. Therefore, all performance evaluations, notations of employee-supervisor discussions of the ratings, employee signatures and written objections, and any record of appeals of ratings, as well as the results of the appeals, should be attached to or kept in the employee's personnel files.

12. *Remember that documentation occasionally can hurt, as well as help.* As a general rule, a written record will help defend against a plaintiff's lawsuit; however, documentation may sometimes lose a case. During the preparation of a lawsuit based on actions such as employment discrimination or wrongful discharge, the plaintiff's attorney may use extensive discovery procedures to examine a huge number of files, records, memos, and other materials. Even personal memos, electronic mail, voice mail, and other retained information may fall into the hands of the plaintiff's attorney. As a consequence, it must be insured, by training and supervision, that discriminatory or other incriminating statements are not made, stated, or kept in performance evaluations or other documents.

13. *Once prepared, use the performance evaluations.* Consult an employee's performance evaluations before making any major decisions affecting the employee. Pay raises, promotions, discharges, and other decisions must be consistent with the results of performance evaluations. If not, the employee is more likely to sue and may be more likely to win the lawsuit.

**CHECKLIST OF SUGGESTIONS WHEN COMPLETING YOUR
EMPLOYEES' PERFORMANCE EVALUATIONS**

1. Clearly define the deficiency or problem.
2. Refer to a specific situation or course of conduct.
3. Be constructive.
4. Invite the employee's help for a solution.
5. Explain the importance to the City.
6. State the consequences to the employee of a failure to improve.
7. Summarize past discussions and note employee agreement.
8. Note concurrence by other levels of management, if any.
9. Offer assistance, but clearly place the responsibility for improvement on the employee.
10. Express serious concern and, if appropriate, disappointment.
11. Provide time limits.

ADDITIONAL DOCUMENTATION GUIDELINES

1. Whatever you do, be consistent.
2. If you are going to record an event, do it in a timely manner while it is fresh in your mind.
3. Date every piece of written documentation, including the year.
4. Whenever possible, discuss the incident with the employee and have the employee sign and date the documentation, indicating he or she has read it. If the employee refuses to sign, make a note to that effect on the documentation and give the employee a copy.
5. Be sure the recording follows proper internal policies and procedures. Do not skip any steps unless it is deemed necessary to do so.

6. Beware of “notes to the file.” While they may be very useful in compiling a chronology of events, they are less helpful in defending against a charge if they were never discussed with employee.
7. Avoid any emotional content. This applies whether you are drafting a written reprimand or simply making an entry into your diary.
8. Do not include any “legal” opinions.
9. Do not include mental impressions. (Example: The way Mary came tearing in here today, she must have had another fight with her husband).
10. State the facts of what happened. (Mary arrived at work ten minutes late. This was the third time this week. She threw her purse onto her desk and when I asked how she was, she stated in a loud voice, “I feel like _____, if you really need to know!” Also present were Ed, Sally and Mike).
11. Avoid self-serving narratives. Above all, keep in mind the possibility that you may one day find yourself reading this to a jury. As you record events, ask yourself how it would sound to an impartial third party unfamiliar with the situation and the parties.

Discipline

A POSITIVE, PROGRESSIVE DISCIPLINE SYSTEM

1. *Employees are given advance notice of the rules and penalties for rule violations.* To be legally effective, an employee handbook or some other method of written communication of the basic disciplinary rules, procedures, and penalties must be distributed to employees. Requiring employees to attest they have read the policies or handbook by signing a statement to that effect and placing it in each employee’s personnel file helps prove that the employer is serious about the issue. It also prevents an employee from later claiming in court that he or she was unaware of the rules.
2. *Supervisor First Notices Work Performance Problem or Minor Rules Infraction.* The supervisor speaks informally to the employee. To insure a positive approach that increases the chance of remedying the problem, supervisors must be informed of the various employee assistance programs that may be available to help employees.
3. *First Incident of Misconduct, or Failure to Improve Performance or Stop Minor Rules Infractions.* A verbal warning is given. This should be a more formal meeting between employee and supervisor where the supervisor reminds the employee of the employer’s expectation of

performance or behavior and the employee's responsibility for meeting the expectation. An informal discussion of the cause(s) of the problem and possible solutions should be discussed in a friendly, positive manner. The supervisor should place a memo about the meeting in the supervisor's own files noting the problem, expected remedy, and date. The original copy of the memo should be given to the employee and a copy forwarded to the Human Resources Division.

4. *Subsequent, Continued Poor Performance or Misconduct.* Give a *written warning*. During the written warning stage, the supervisor holds a formal meeting in which the employee is given the reasons why the behavior cannot continue. A major attempt is made to get the employee to actually agree to certain steps necessary for improvement, rather than the supervisor simply dictating the required steps. These steps are written out and the employee is asked to sign an agreement promising to take the listed steps. The employee is also given a chance to object or explain. Whether signed by the employee or not, the employee is told the memo will go into the employee's Human Resources file. The memo should be dated and filed. The purpose of the documentation is to

- a. eliminate misunderstandings between the supervisor and the employee;
- b. ensure that the employee is given notice of unacceptable conduct in time to permit improvement; and
- c. ensure that documentation is available to justify the action taken in the event of alleged discrimination charges.

5. *The Problem(s) Continue.* At this point in the disciplinary process, most employers give a final warning, suspend without pay, or place the employee on probation; however, a *one-day leave of absence* for the employee to decide if he or she wants to resign or change his or her behavior may be more effective. The supervisor informs the employee before the leave of the improvements that will be expected if the employee decides not to resign. The notice should be written. A suspension becomes a permanent part of the employee's Human Resources file.

6. *Return From Suspension.* If the employee does not resign, the employee and the supervisor meet upon the employee's return to work to establish a written, clearly stated, set of *improvement objectives*. The improvement objectives should be based upon the changes discussed during the suspension meeting, and any promises made by the employee upon returning from the suspension. The employee should be required to sign an agreement promising to meet the new improvement objectives. If the employee refuses to agree to the needed improvements, the employee is terminated. Employees who agree to meet the improvement objectives are

informed that failure to meet them will result in termination. Often the employee is also given a right to appeal the issuance or terms of the improvement objectives. A copy of the improvement objectives is placed in the employee's personnel file.

7. *The Employee Fails to Meet Improvement Objectives.* The employee is terminated.

THE TOOLS OF A PROGRESSIVE DISCIPLINARY SYSTEM

Progressive discipline usually entails the following steps or procedures. These steps are not and should not be rigid nor is it imperative that a documented verbal reprimand be the first step. Based on the severity of the infraction, any step listed below may be the first step. For example, if an employee is tardy three days in a row, then a documented verbal reprimand may be appropriate; however, if that same employee comes to the workplace with a sawed off shotgun, then termination would be appropriate, regardless whether this was a first offense.

The Documented Verbal Reprimand

The documented verbal reprimand (or oral reprimand or employee counseling) is best suited for a minor rule infraction or incident of substandard performance. It should identify violations and indicate areas needing improvement. A written record of the warning should be maintained. Often these warnings are kept in departmental files and not the City's "formal" personnel files.

The Written Reprimand

A written reprimand is a formal warning of an infraction that may result in suspension, demotion or termination should the violation recur. Prior to the issuance of a written reprimand, a disciplining supervisor should confer with his immediate supervisor regarding the proposed discipline. Both the disciplining supervisor and the employee should sign the written reprimand. Included in the written reprimand should be a statement of what changes in behavior are expected, when the next evaluation will be held and the penalty that will be imposed if no changes are made by the employee. The written reprimand usually is placed in the employee's permanent personnel file. An appeal may be allowed, depending upon the City's personnel rules.

Suspension

A suspension is to bring about a change in behavior and results in time off without pay. The employee is encouraged to reflect on his behavior during

the suspension and determine whether he wishes to correct the offending behavior or terminate his employment. Usually a suspension of more than ten (10) days requires the written approval of the City Manager. An appeal may be allowed.

Demotion

An employee may be demoted for a disregard or violation of the City's personnel rules or for repeated refusal or inability to improve performance. Demotions may be for a short period of time or permanent, depending upon the circumstances. In all cases a reduction in salary results. An appeal may be allowed.

Termination

When all else fails, termination of employment may be necessary. As referenced in this chapter, it should be well documented and steps taken to insure that the termination proceeding is handled professionally.

TERMINATION PROCEDURES

Once the decision to terminate an employee is being seriously considered, the following guidelines should be followed.

1. **The Termination Decision Meeting.** The supervisor (and department head or other designated individual, if applicable), a Human Resources representative and an attorney, if needed, meet to determine the following matters:

A. Is there a reasonable basis for immediate discharge or, if not, has the progressive discipline system been followed?

[NOTE: Rarely is immediate discharge advisable. It should be considered only in those situations where there are threats to persons or illegal activities. Examples where immediate termination is or may be appropriate are as follows: Damage to property, theft of property, physical assault at work, possession or sale of illegal drugs or alcohol at work, possession of a weapon at work, falsification or destruction of records.]

B. Is there complete documentation that "proves" the charges?

C. What should be the exact, stated grounds for termination?

D. Are the stated reasons for the termination consistent with problems that previously have been discussed with the employee?

E. Does the termination appear to violate any state or federal laws or does the termination look like discrimination or retaliation?

F. Is the termination of the employee consistent with the manner in which other employees have been treated?

G. Are there any facts such as a personal dispute between the employee and supervisor, statements about the employee's age, sex, race, etc., or past inconsistencies in the treatment of the employee that may assist the employee in proving discriminatory treatment by the City?

H. Are there any provisions in the City's Policies and Procedures Manual that may protect the employee from being terminated under the present circumstances?

I. Should the employee be given the option of resigning?

2. **The Termination Meeting with an Employee.** The meeting at which the employee is given notice that he or she will be terminated should be:

A. held in a location where confidentiality may be maintained;

B. generally not held immediately before or after a holiday, vacation or other special event (the employee's birthday, for example);

C. held with a witness present (usually a Human Resources representative);

D. may be tape recorded;

E. conducted in a professional manner without emotion (if possible) and the supervisor should be careful about statements made during the interview;

F. very brief; and

G. to the greatest extent possible, kept confidential (*i.e.*, the supervisor should not return to his office and immediately call everyone he knows and say "guess what, old Bill has been fired at last").

ADDITIONAL REQUIREMENTS OF A GOOD SYSTEM

Some additional requirements that help in creating an effective disciplinary system that reduces legal complaints and lawsuits, and may win those that are filed, include:

1. All meetings should be held at the end of a weekday that does not precede a holiday, if feasible.
2. All steps and meetings should be conducted in private. Starting with the oral reprimand, employee privacy should be respected, even if by just finding a quiet corner of the workplace where co-workers cannot hear the discussion.
3. All actions, starting with the oral reprimand, must be documented in writing. All documents beginning with the written reprimand generally should be attached or added to the employee's personnel file, depending upon the severity of the discipline.