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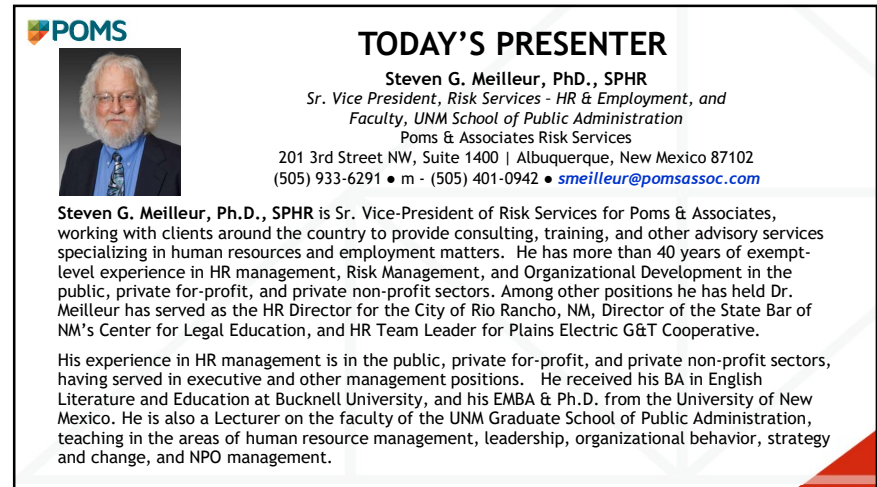
THE PROPER AND DEFENSIBLE WAY TO ADDRESS EMPLOYEE PROBLEMS

Documentation, and the Process of Corrective & Disciplinary Action

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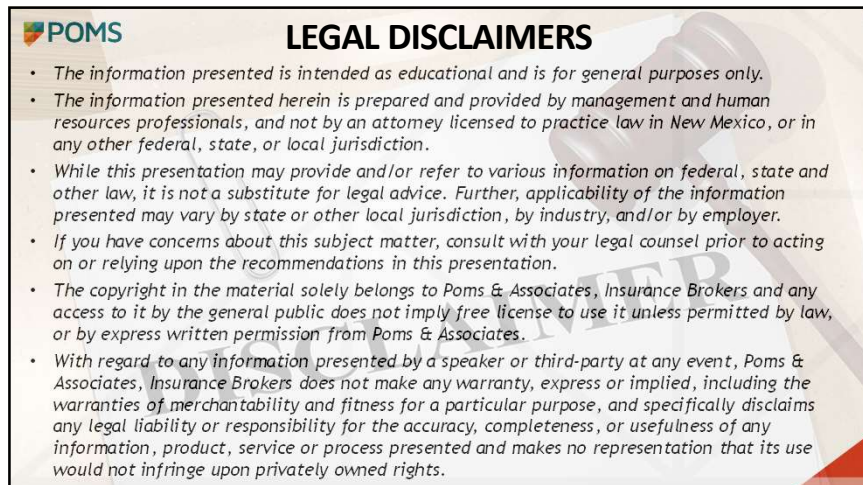
TODAY'S PRESENTER

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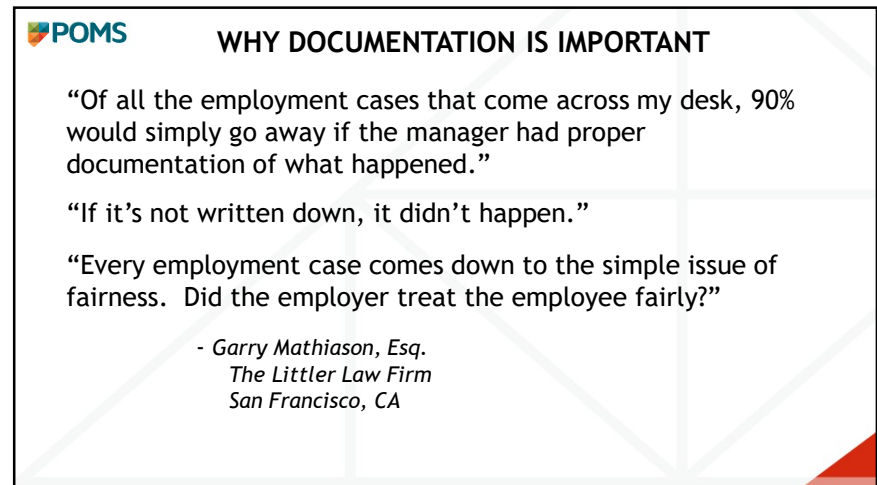


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WHY DOCUMENTATION IS IMPORTANT

“Of all the employment cases that come across my desk, 90% would simply go away if the manager had proper documentation of what happened.”

“If it’s not written down, it didn’t happen.”

“Every employment case comes down to the simple issue of fairness. Did the employer treat the employee fairly?”

- Garry Mathiason, Esq.
The Littler Law Firm
San Francisco, CA


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**CORRECTIVE ACTION AND DISCIPLINE:
THE PRINCIPLE OF POSITIVE PROGRESSIVE DISCIPLINE**




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CORRECTIVE ACTIONS ARE . . .

Corrective action is a process of communicating with the employee, when an employee does not meet expected and communicated performance standards, and taking appropriate action:

- To improve employee **PERFORMANCE**
- To promote compliance with established rules and expectations, and to improve employee **CONDUCT**
- To change and improve unacceptable employee **BEHAVIOR/ATTITUDE**.



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DISCIPLINARY ACTIONS ARE . . .

Disciplinary action is taken to turn performance, conduct, and behavior/attitude problems around when the employee still does not meet expected and communicated performance standards, and corrective action has not been effective,

OR when the seriousness of offense warrants more formal measures than corrective action.

- Take disciplinary action in positive and constructive way, to send a message that you are out help the employee become a fully productive member of your work unit.
- While your overall goal is still improvement, consequences for the employee's failure to improve are much more serious.
- The disciplinary process features efforts to provide feedback to the employee so he or she can correct the problem.
- The goal of discipline is to improve employee performance.

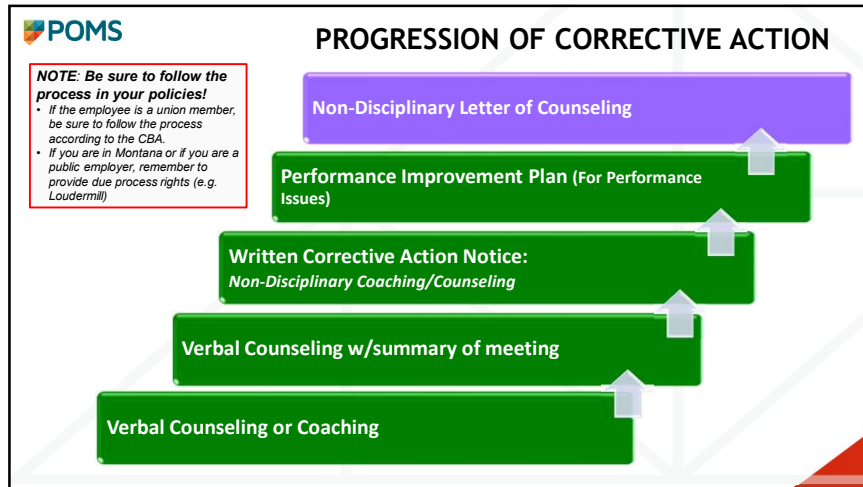
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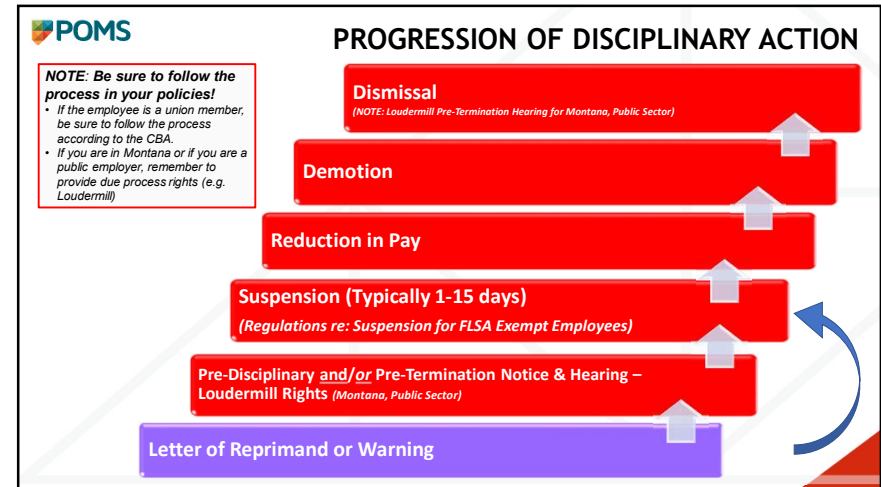
POSITIVE PROGRESSIVE CORRECTIVE AND DISCIPLINARY ACTION IS:

- Both corrective and disciplinary actions should be “progressive” and “positive” -- starting at the lowest level, and then progressing up the steps.
 - However, this depends on the specifics of each case
 - Avoid prescriptive policies, retain ability to skip steps
- Each corrective action, whether it is verbal or written, **MUST be progressively documented ... or “it never happened.”**
- Each action should build upon the previous action and must be documented properly in order to provide the employees the opportunity to correct the performance, conduct, or behavior/attitude deficiencies or problems.

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POMS THE BENEFITS OF PPCDA

It is designed to **HELP THE EMPLOYEE TO BE SUCCESSFUL IN THEIR JOB, BY HELPING THEM TO CORRECT THE PROBLEM**

- Establishes expectations and predictability
- Applies consequences fairly and consistently
- Corrects inappropriate behavior and poor performance
- It is a FAIR way to treat employees
- Allows supervisor to intervene at the first signs of trouble
- Enhances communication between managers and employees
- Improved morale and retention
- Ensures consistency and FAIRNESS in dealing with employees
- Lays groundwork for fair, legally defensible termination for employees that cannot improve

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POMS BEFORE TAKING CORRECTIVE OR DISCIPLINARY ACTION:

• ASK YOURSELF:

- Have I made reasonable efforts to create an opportunity for the employee to resolve the problem and be a success?
- Have I trained the employee properly on how to do their jobs and explained how the performance will be measured or what the work rules are?
- Have I documented that the employee has been trained and performance objectives have been set or that I have explained the work rules?
- Have I clearly stated my expectations of the employee?

“You should get that report done as soon as possible.” **Vs** *“I must have the production report before 2 o’clock this Friday.”*

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POMS THE BENEFITS OF DOCUMENTATION: “THE FMLA SHIELD”

- Make sure you track exactly when you begin disciplinary action, especially when it comes to the FMLA.
- When you document corrective action and discipline as it happens, you can break the so-called, “FMLA Shield.”
 - Sometimes, a worker facing an uncertain employment future will “check out” for a while on FMLA leave. Sometimes, they may even think taking FMLA leave will prevent serious discipline such as being terminated.
- ... But beware close timing between discipline and employee’s request to take FMLA leave ...
 - Employees who ask for or take FMLA leave are protected from retaliation for doing so. However, they aren’t protected from the consequences of workplace problems unrelated to the FMLA that lead to discipline.

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POMS THE BENEFITS OF DOCUMENTATION: “THE FMLA SHIELD”

- But timing is everything. If you intend to discipline someone who is on or is about to go on FMLA leave, be sure everything about the disciplinary process looks legitimate and fair.
- In other words, carry on with disciplinary measures so long as you can show that you would have done the same absent any request for FMLA leave.
 - In doing so, it often will be critical to show that you have engaged in progressive discipline with the employee before and after the employee requested and/or took FMLA leave.
- The best way to defeat an employee’s “FMLA shield” is to produce contemporaneously written documentation showing where you were in the termination process when the employee requested or took leave.

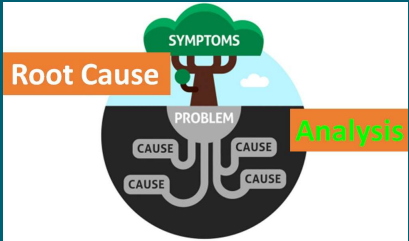
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POMS YOUR ROLE AS A LEADER

- Improve performance of the individual, work groups/teams, and the organization.
- Provide and communicate clear expectations
- Improve conduct and behaviors so that employees perform at their best for the employer.
- Provide support & expertise to employees - coach
- Find solutions & solve problems
- Make needed corrections
- The most important job you have as a leader is ...
- **TO HELP THE PEOPLE YOU ARE RESPONSIBLE FOR, TO BE SUCCESSFUL IN THEIR JOBS**



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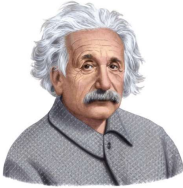
PROBLEM-SOLVING AND ROOT CAUSE ANALYSIS IN CORRECTIVE & DISCIPLINARY ACTION

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IDENTIFY AND DEFINE THE PROBLEM

“Understanding* and formulating the problem is often more essential than its solution”
Albert Einstein

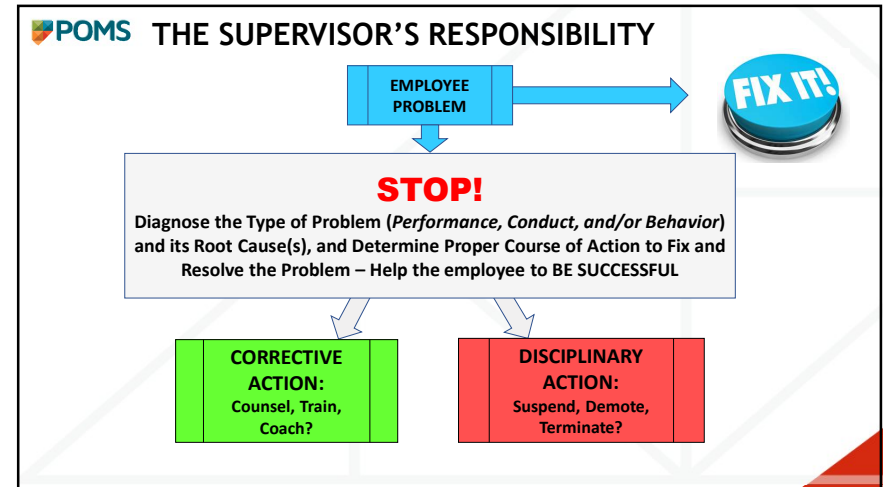


“*Understanding ... the problem” means:

1. The impact of the problem on performance of the individual, group, organization, and community/constituents served
2. Diagnosing the root cause(s) of the problem so you can distinguish the symptom from the cause

Only then, can you formulate your plans to solve the problem.
Be careful not to “lead with the solution.”

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POMS IDENTIFY AND DEFINE THE PROBLEM

1. PERFORMANCE (Can’t Do) - problems related to the quality of work (failure to meet quality standards)

- Usually based lack of knowledge, skill, or ability
 - Performance Improvement Plan, Training/Coaching
- Poor quality of work - What is the root cause?
 - Untimely completion, limited production
- Failure to meet quality standards
- Indicators of poor performance
 - Inaccuracies, errors
 - Failure to meet expectations for work quality, cost, or service
 - Spoilage or waste of materials
 - Inappropriate or poor work methods, processes
 - Customer/client dissatisfaction
- Conduct and/or behavior problems will also impact performance




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POMS IDENTIFY AND DEFINE THE PROBLEM

2. CONDUCT (Won’t do) - problems related to violating policy or work rules resulting in disruption to the workplace

- Employees need to clearly understand conduct expectations, communicated to spell out:
 - Standards of performance and workplace conduct, promoting a culture of respect and good performance.
 - Corrective action and disciplinary procedures, which provide clear structures for dealing with problems.
 - Standardized procedures make sure everyone is treated fairly and equally in similar circumstances.
- Policies, Work Rules, Protocols, Procedures, Standards
 - Employment policies, including a code of conduct policy
 - Job Descriptions
 - Employment agreements, contracts
- Some sort of tribunal process to resolve problems, disputes or conflicts




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POMS IDENTIFY AND DEFINE THE PROBLEM

3. BEHAVIOR / ATTITUDE - inappropriate and disruptive actions that interfere with workplace operations, or preventing employees from carrying out assigned tasks

- May cross over to “conduct,” but should be linked to performance impacts, including impact on other employees
- Inappropriate behaviors (poor attitude)
 - Disruptive/disorderly behavior
 - Negativism, lack of cooperation, hostility
 - Unwillingness to take responsibility
 - Failure or refusal to follow reasonable instructions or direction
- Resistance to change
 - Unwillingness, refusal, or inability to update skills and work methods
 - Resistance to policy, procedure, work method/process changes
 - Lack of flexibility in response to problems
 - Non-cooperation with work group, team, other colleagues




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POMS IDENTIFY AND DEFINE THE PROBLEM

3. BEHAVIOR / ATTITUDE - continued


- Inappropriate interpersonal relations
 - Gossiping, spreading rumors or misinformation
 - Bullying or mobbing behaviors
 - General incivility/insolence, disrespectful toward others
 - Use of insulting, intimidating, or abusive language
 - Inappropriate communication style (over-aggressive, passive)
 - Impatient, inconsiderate, argumentative
 - Destructive humor, sarcasm, horseplay
 - Inappropriate conflict with others such as customers, coworkers, supervisors
- Inappropriate physical behavior
 - Smoking, eating, drinking in inappropriate places
 - Threatening, hostile, or intimidating behaviors
 - Sleeping on the job
 - Problems with professional appearance, personal hygiene



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POMS PROBLEM-SOLVING CORRECTIVE ACTION

- 1. FRAME AND DEFINE THE PROBLEM**
 - In performance terms - what needs to be “fixed?”
- 2. DIAGNOSE THE PROBLEM - Focus on Root Causes**
 - Distinguish between symptoms and causes
 - Perform Root Cause Analysis
- 3. GENERATE SOLUTIONS TO ADDRESS THE ROOT CAUSES OF THE PROBLEM**
 - Prioritize Corrective Actions
 - Develop Plan to Change Performance/Conduct/Behavior
- 4. IMPLEMENT CHOSEN SOLUTIONS**
- 5. MONITOR & EVALUATE EFFECTIVENESS OF SOLUTIONS BASED ON IMPROVEMENTS IN PERFORMANCE**



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POMS START CORRECTIVE OR DISCIPLINARY ACTION WHEN...

- The short answer? Immediately after you see a problem or issue that needs to be addressed. Immediately.
- You see a pattern emerging
 - e.g. absenteeism, missed deadlines
- The conduct causes disruption in the office
- A policy or rule is violated
- Performance hasn’t improved despite Corrective Action
- Don’t wait to address the problem.
- Don’t diminish or alter responsibilities.
- Follow through on “promised” discipline.

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POMS START CORRECTIVE OR DISCIPLINARY ACTION WHEN...

- Make sure you track exactly when you begin disciplinary action, especially when it comes to the FMLA, the ADA, and other laws.
- When you document corrective action and discipline as it happens, you can break the so-called, “FMLA Shield.”
 - **Reason:** It’s not unusual for a worker facing an uncertain employment future to “check out” for a while on FMLA leave. Sometimes, they may even think taking FMLA leave will prevent serious discipline such as being terminated.
 - They may believe the employer won’t risk an FMLA retaliation lawsuit by firing them while they are on leave or right after coming back.
 - That strategy won’t work if you can show the disciplinary process had already begun before they asked for FMLA leave.
 - See: *Hatch v. Franklin County Jail, et al., 3rd Cir., 2018*

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POMS IDENTIFY AND DEFINE THE PROBLEM


- Identification of the real problem is extremely important. Which bucket or buckets?
- If the wrong cause and solution for that cause is selected, the problem will still be there.
- **Common Mistakes When Identifying Problems**
 - Defining problem too broadly or too narrowly
 - Focusing on wrong problem to begin with
 - Dealing with symptoms, not real causes
- **Determine the root cause of the problem.**
 - Removing the cause should cause the symptoms to disappear or cease.
 - Symptom: Customer dissatisfaction
 - Cause: Poorly trained employees
 - Solution: Implement customer relations training program for employees

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POMS IDENTIFY AND DEFINE THE PROBLEM

Investigate the Case: Review the following:


- Position description, goals and expectations
 - Current and accurate?
 - Performance standards and metrics
- Last Performance Reviews or Annual Review
 - Goals and Projects Assigned at Annual Review
 - Goals and Projects Assigned subsequent to AR
- Your Incident Files
- Possibly other internal and external customers
- Applicable policies/procedures both company and departmental:
 - How was it communicated to staff?




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POMS COMMON ROOT CAUSES OF EMPLOYEE PROBLEMS

- Lack of Skill or Knowledge About How to do the Job
- Poor Leadership/Management/Supervision
- Poor Communication
- Poor Change Management
- High-Stress Work Environments
- Personal or Family Issues
- A Medical Condition
- Discrimination in the Workplace
- Workplace Harassment and/or Bullying
- Stale Job Responsibilities - Boredom
- Scarce Rewards and Recognition
- Not Enough Resources to do a Job




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 **COMMON ROOT CAUSES OF EMPLOYEE PROBLEMS**

- Low Employee Motivation and Engagement
- Poorly Written or Communicated Policies and Procedures
- Unresolved Conflict in the Workplace
- Unclear or Unreasonable Performance Expectations
- Poor Employee Placement
- Inefficient Work Methods, Processes, Systems
- Inadequate Maintenance of Equipment & Machinery
- Burnout and Stress
- Inconsistent or Unfair Application of Policies
- Lack of Discipline and Accountability
- Poor Hiring Practices



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 **DISCUSS THE PROBLEM WITH EMPLOYEE**

REMEMBER - The goal is to work with the employee to solve the problem(s)

- Describe the gap between actual and desired performance, conduct, or behavior.
- Discuss previous counseling, corrective action on same or similar performance/conduct/behavior problems.
- If no agreement is reached, describe impact
- If no agreement is reached, describe possible consequences of not correcting the problem.
- After gaining agreement, ask:
 - What specifically will you do to correct this problem?
 - What might prevent you from doing what you've agreed to?
 - Is there something the employee needs from you (training, resources, etc.)
 - Will you do it?
- Thank the employee and end on a positive note


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**LEGAL AND DEFENSIBLE PRACTICES IN
CORRECTIVE ACTION AND POSITIVE DISCIPLINE**



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 **DOCUMENT, DOCUMENT, DOCUMENT!**

- HOW to document is even more important than the “document, document, document” mantra.
- Research has revealed that cases that are weak and hard to prove include five common characteristics:
 1. Subjective decision making,
 2. Failure to explain expected job performance,
 3. Lack of assistance from management,
 4. Failure to warn employee; and
 5. Testimony that lacks credibility.
- “Poor or missing documentation is the plaintiff attorney’s best friend.”

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POMS “It was a ... confidential communication ...”
“Well, apparently not, Ms. McMillan.”

- Keep in mind that all documents - including emails - are subject to discovery in litigation or EEOC investigation, and in the public sector, as well as some jurisdictions, they are a public record.
- Assume that the document will be seen by a third party - an attorney, hearing officer, or other adjudicator.
- They will become evidence in a trial.
- **PROOFREAD** - watch for *how* it is written
- The “**SNIFF TEST**” - use the “How will this look to a jury,” or the “How will this look on the front page of the paper” test.



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POMS YOUR DOCUMENTATION IS YOUR EVIDENCE

BURDEN OF PROOF IN EMPLOYMENT CASES:

- The initial burden of proof in most employment claims is on the employee (or plaintiff) in the form of the initial claim/charge against the employer.
- Plaintiffs typically must prove, by a preponderance of the evidence, that they have been wronged and are entitled to damages.
 - “Preponderance of the evidence” simply means “more likely than not,” a 51 percent to 49 percent calculus that the evidence and argument advanced by the plaintiff is more credible than that advanced by the defendant.
- This initial burden on the plaintiff is a light one and is usually easily satisfied, at which point a credible charge against the employer has been made.

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POMS YOUR DOCUMENTATION IS YOUR EVIDENCE

BURDEN OF PROOF IN EMPLOYMENT CASES:



- Once a claim/charge is “justified” by the plaintiff to the court (or other body), **the burden of proof will shift to the employer** and other named defendants to disprove the claim/charge by proving your case, that the charge is false or unfounded.
- The way you prove your case is by submitting evidence to the court or other adjudicator.
- Your documentation is, quite simply, the evidence you need to prove your case.
- **NOTE:** In cases involving a company’s termination of an employee “for cause” pursuant to an employment contract, however, that standard burden of proof allocation is reversed. The company, not the employee, has the burden to establish that its termination of the executive was justified. The company has the burden of proof.

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POMS YOUR DOCUMENTATION IS YOUR EVIDENCE

MEETING THE EMPLOYER’S BURDEN OF PROOF IN EMPLOYMENT CASES:

- “If its not written down ... it didn’t happen.”
Then you have no evidence to meet your burden, and you will lose the case.
- But, if it **IS** written down by a manager or supervisor, then the documentation is considered to be “prima facie evidence” that an event occurred.

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POMS YOUR DOCUMENTATION IS YOUR EVIDENCE

**If it's not written down,
IT NEVER HAPPENED!
Or ...
IT WON'T HAPPEN**

PRIMA FACIE EVIDENCE
"At first face" or "On its face"

- Upon initial examination, sufficient corroborating evidence appears to exist to support a case.
- Prima facie denotes evidence that, unless rebutted, is sufficient to prove a particular proposition or fact.
- In employment cases, the employer has the burden of proof, which requires it to present prima facie evidence for all of the essential facts in its case. If it cannot, its claim may be dismissed without any need for a response by other parties.

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POMS COMMON LAW STANDARDS IN "FAIR" CORRECTIVE AND DISCIPLINARY ACTION

"JUST CAUSE" DETERMINANTS:

1. Was the employee warned of the consequences of the performance, conduct, or behavior problem?
2. Was the employer's rule reasonable?
3. Did management investigate/diagnose before disciplining?
4. Was the investigation fair and impartial?
5. Was there evidence of guilt, or of the nature of the problem?
6. Were the policies, rules, and corrective action/discipline applied in a fair and even-handed fashion?
7. Was the corrective action/discipline reasonable, given the offense?
8. Was the corrective action/discipline reasonable, based on similar infractions by others in the past?

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POMS COMMON LAW STANDARDS IN "FAIR" PROCESS

"DUE PROCESS" PROCEDURES:
(Public Sector, Montana, or Granted by Policy or Contract)

1. An unbiased tribunal (*group of people chosen to examine a case*).
2. Notice of the proposed action and the grounds asserted for it.
3. Opportunity to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to cross-examine adverse witnesses.
7. A decision based exclusively on the evidence presented.
8. Opportunity to be represented by counsel.
9. Requirement that the tribunal prepare a record of the evidence presented.
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision.

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POMS COMMON LAW STANDARDS IN "FAIR" PROCESS

"DUE PROCESS" CONSIDERATIONS:
(Public Sector, Montana, or Granted by Policy or Contract)

1. Did the process meet the "due process" requirements that:
 - The person must be given notice;
 - The person must be given the opportunity to be heard; and
 - The final decision is made by a neutral decision-maker.
2. How have precedents been handled in the organization for similar problems warranting corrective action/discipline?
3. Is a complaint process available and known to employees?
4. Was the complaint process used?
5. Was retaliation used against the employee in any way?
6. Was the decision to discipline made based on objective facts?
7. Would the actions and processes be viewed as "fair" and "equitable" by a third party or entity?

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POMS COMMON LAW STANDARDS IN "FAIR" PROCESS

| Employee Should: | Employer Should: |
|---|---|
| <ol style="list-style-type: none"> 1. Know clearly what policies, procedures, and work rules must be followed 2. Be informed of expected standards of performance -e.g. job description, work procedures 3. Have the right to be given appropriate feedback 4. Be given the chance for improvement 5. Receive professional assistance, training, and other support, if necessary | <ol style="list-style-type: none"> 1. Clearly state what the problem is - performance, behavior, conduct 2. Specify impacts of the problem(s) 3. Listen to the employee's explanation of "what happened" 4. Provide clear, specific expectations of what change is to be made. 5. Provide specific timelines for improvement or change 6. Clearly indicate consequences of not making required changes 7. Provide specific direction, guidance, and training for improvement. 8. Document all "good faith efforts" to help the employee to succeed. |

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MEETING COMMON LAW STANDARDS IN DOCUMENTATION

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POMS COMMON LAW STANDARDS IN DOCUMENTATION


1. **Clearly state what the problem is - performance, behavior, conduct**
 - Where possible, refer to a specific situation or incident. Rather than citing an employee's lack of attention to detail generally, point out that the employee's budget report has been incomplete for each of the preceding weeks, and give examples.
 - As much as possible, tie an employee's performance to a stated company rule or policy that has been violated.
- **LEGAL EFFECT:** Specificity clearly puts an employee on notice of specific performance, conduct, or behavior which needs to be changed.
 - Such notice is more persuasive to a court because it only requires an employee to change performance, conduct, or behavior - not personality traits, and because it demonstrates that the employee has been given a fair opportunity to succeed.

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POMS COMMON LAW STANDARDS IN DOCUMENTATION

2. **Explain the impact/importance of the problem to the company, work team, individuals, and employee**
 - Explaining the importance of the problem focuses attention on the company's needs, rather than on the personal interaction between the manager and the employee.
 - It also stresses the seriousness of the issue to the employee.
- **LEGAL EFFECT:** In many different legal contexts, the fact that the deficiency or problem is important to the company will assist the employer.
 - It may demonstrate that failure to correct the problem is "good cause" for termination or that an employer's proffered reason for termination is not a pretext for discrimination.

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 COMMON LAW STANDARDS IN DOCUMENTATION

3. Listen to the employee’s explanation of “what happened,” and partner with employee to find a solution

- Listening to the employee’s “side” of the story is only fair - you don’t want to find out afterward that there was a very good explanation for the problem (e.g. a legal reason for being late).
- The partnering approach helps the employee to perceive the situation as an opportunity to succeed rather than an attack with no way out.
- It also encourages creative problem-solving by the employee and allows management to take advantage of the employee’s expertise in solving the problem.
- It also establishes the basis for the employee to commit to correct the problem(s).

- **LEGAL EFFECT:** If partnering for a solution is unsuccessful, documenting this approach may demonstrate the reasonableness of the employer’s request and the employee’s refusal to cooperate.

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 COMMON LAW STANDARDS IN DOCUMENTATION

4. Provide clear, specific expectations of what change is to be made.

- Indicate exactly what you expect the employee to do to correct or resolve the problem.
 - Example: If an employee is being written up for tardiness, your expectation could be, “You must be present and ready to begin work each scheduled day at 8:30 a.m.” Or if a write-up addresses poor sales performance, you could state the number of sales to be met in a specific timeframe (or however you measure sales productivity).

- **LEGAL EFFECT:** The “fairness” doctrine is clear here - it isn’t enough to tell the employee what they has done wrong.
- You need to clearly state what the employee needs to do to correct the problem, in measurable terms.
- This also shows your good faith effort to help him/her to improve.

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 COMMON LAW STANDARDS IN DOCUMENTATION

5. Provide specific timelines for improvement or change

- Indicate exactly WHEN you expect the employee to correct or resolve the problem.
 - Example: Don’t say, “We expect you to turn things around immediately.” That can mean different things to different people, she said. Rather, say, “We expect your report will be turned in by 5 p.m. tomorrow.”
- Follow up at the specified deadline. If you don’t follow up, it shows you don’t care enough about the problem to ensure that it is corrected.

- **LEGAL EFFECT:** The “fairness” doctrine is also clear here - again, you need to clearly state specifically WHEN the employee needs to make required changes to correct the problem.
 - This also shows your good faith effort to help him/her to improve.

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 COMMON LAW STANDARDS IN DOCUMENTATION

6. Clearly indicate consequences of not making required changes

- Describe the consequences if the behavior or poor performance continues.
- You don’t want to discuss consequences in early coaching sessions.
- However, after repeated attempts to help the employee meet expectations have been unsuccessful, or in the case of serious policy violations, disciplinary action may be needed.

- **LEGAL EFFECT:** Courts in every legal jurisdiction have clearly indicated that employees must be told what the consequences may be if they do NOT make required changes to correct the problem(s) within the specified timeframe.

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POMS COMMON LAW STANDARDS IN DOCUMENTATION

7. Offer help and assistance, and document all “good faith efforts” to help the employee to succeed.

- Document your commitments to help the employee to succeed.
- Correcting performance/conduct/behavior problems is STILL the employee’s responsibility *but* do what is appropriate for you to help the employee to succeed such as coaching, training, etc.

• **LEGAL EFFECT:** Employees should clearly place the responsibility on the employees, rather than on themselves, for improvement.

- Clear responsibility helps to combat an employee argument that performance problems stem from a failure by the employer.
- Giving time for an employee to correct the problem is necessary for effective notice and is important to the perception of a fair process, both to an employee and to outside observers.

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POMS COMMON LAW STANDARDS IN DOCUMENTATION

8. Write documentation carefully, and precisely. Avoid vague phrases that could provide grounds for discrimination lawsuits.

- Don’t terminate someone for a “bad attitude” or because he isn’t a good “culture fit.”
- Those are red flags that could cause the employee to believe the firing is attributable to his or her gender, race or national origin—or to his or her membership in another group protected under federal civil rights laws.

• **LEGAL EFFECT:** Vague language means your evidence is weak and will not stand up to a legal or other challenge.

- Remember to prepare documentation with the expectation that a third party (internal or external) will review it.
- Include enough information so others know what happened and what steps were taken to put the employee on notice and offer the individual an opportunity to correct performance.

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POMS COMMON LAW STANDARDS IN DOCUMENTATION

9. Summarize past discussions and note employee agreement, where possible.

- Note reasonable expectations on time frames that have been agreed to in the past.
- Summary of past discussions make both employer and employee aware of the background leading up to the current action, which may prevent the employee from viewing the current action in isolation.

• **LEGAL EFFECT:** Document your good faith efforts to help!

- Summary of past discussion in performance documentation not only demonstrates an employee’s past efforts at correcting performance, but also provides documentation of employer efforts that may not have been previously documented for whatever reason, such as oral or informal warnings or comments.
- Documenting employee agreement is important to combat possible arguments that the plan of action requested by the employer was not reasonable or known to the employee.

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THE PROCESS OF POSITIVE PROGRESSIVE DISCIPLINE

| | |
|-------------------|---|
| Facts | • Focus on facts to define the problem |
| Objectives | • Explain to employee how to resolve the issue or problem |
| Solutions | • Help employee reach objectives |
| Actions | • Actions to take if the problem is not corrected |

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POMS THE PROCESS OF POSITIVE PROGRESSIVE DISCIPLINE

- 1. Problem Analysis** - Investigate and gather information!
 - Before you act, make sure you know what happened
 - **Root cause analysis** of performance/conduct/behavior problem
- 2. Assess the Severity and Impact** - consider how the problem is affecting the employee, team and company
- 3. Decide How to Respond** - choose the appropriate disciplinary measure based on frequency, severity, and how company handled similar issues in the past.
 - Make preliminary determination about what level of positive corrective or disciplinary action is appropriate to fix the problem.
- 4. Prepare to Talk to the Employee** - plan your meeting to include what you will say and how you will say it
 - Follow steps included in your official form.
 - Prepare draft of corrective action/discipline form to guide discussion with employee



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POMS THE PROCESS OF POSITIVE PROGRESSIVE DISCIPLINE

- 5. Meet With Employee** - review and discuss issues on the form you have drafted, talk about what has happened, and **collaborate to solve the problem!**
 - Discuss the problem(s) to ensure employee understands what needs to change
 - Describe the gap between actual and desired performance, conduct, or behavior, and impact of problem on the organization, department, peers, etc.
 - Reference previous counseling, corrective action on same or similar performance, conduct, and/or behavior problems.
 - Describe possible consequences of not correcting the problem.
 - Gain commitment from employee to correct/improve problem performance, conduct, and/or behaviors, and after gaining agreement to correct the problem(s):
 - Have employee specify steps they will take, or changes they will make to improve performance, conduct, and/or behavior, and to correct the problem.
 - Ask if there something the employee needs from you (training, resources, etc.)
 - Tell employee when you will meet again to review final document

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POMS THE PROCESS OF POSITIVE PROGRESSIVE DISCIPLINE


- 6. Revise Documentation Based on Employee Input** - make written record of the corrective action or discipline, improvement plan, and employee commitments to change/improve
 - Prepare final draft of form, based on employee meeting
- 7. Meet Again With Employee to Review Revised/Final Documentation**
 - Obtain signature, or revise again if needed
- 8. Follow-up -to make sure the employee is meeting their commitment**
 - If the problem **HAS** been resolved:
 - Thank the employee for living up to their commitment.
 - Use positive reinforcement and recognition as the best ways to build and maintain superior performance.
 - Make note to file and attach to original documentation.
 - If the problem **HAS NOT** been resolved:
 - Find out why and act quickly and appropriately.
 - Look for alternative solutions.
 - Use factual justification for further action.



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POMS SUMMARY OF PROCESS TO ISSUE DOCUMENTATION

- Prepare a draft of the corrective action/disciplinary document
- Meet with HR to review the document
- Meet with the employee to review the contents
- Listen to their side of the story, and gain their commitment to resolve the problem
- Based on the conversation, go back and finalize the document, review again with HR if necessary
- Meet a second time with the employee to review the contents and finalize with signature.
- File the original signature copy in the employee's official file in HR
- Make a copy of the document and give it to the employee.



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POMS MEETING WITH THE EMPLOYEE

- Describe the gap between actual and desired performance, conduct, or behavior.
- Discuss previous counseling, corrective action on same or similar performance/ conduct/behavior problems.
- If no agreement is reached, describe impact
- If no agreement is reached, describe possible consequences of not correcting the problem.
- After gaining agreement, ask:
 - What specifically will you do to correct this problem?
 - What might prevent you from doing what you've agreed to?
 - Is there something the employee needs from you (training, resources, etc.)
 - Will you do it?
- Tell employee when you will meet again to review final document
- Thank the employee for their cooperation, and for their commitment to address and correct these problems.
- End on a positive note

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TOP TEN (?) BEST PRACTICES IN POSITIVE CORRECTIVE ACTION AND DISCIPLINARY ACTION

POMS

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POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

1. USE AN OFFICIAL EMPLOYEE CORRECTIVE ACTION or DISCIPLINE FORM

- Such a form will make documenting employee misconduct easier for managers and supervisors and it ensures a uniform process.
- The pre-printed, fill-in-the-blank form should include:
 - Spaces for basic information regarding the employee,
 - The time and date of the incident or incidents,
 - The type of problem being addressed: PERFORMANCE, CONDUCT, and/or BEHAVIOR
 - A description of the incident warranting employee discipline,
 - The specific policy or work rule that was violated,
 - Previous documented corrective action related to the problem
 - The action that will be taken against the employee,
 - Training or other assistance to be provided to the employee, and
 - The consequences of not correcting the performance, behavior, or conduct.

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POMS USE AN OFFICIAL FORM TO DOCUMENT ORAL COUNSELING

<COMPANY NAME>
DOCUMENTATION OF VERBAL COACHING, COUNSELING OR CORRECTIVE ACTION

| | | | |
|--------------------|--|-------------------|--|
| Employee's Name: | | Department: | |
| Position Title: | | Mtg. Date & Time: | |
| Supervisor's Name: | | Meeting Location: | |

SUPERVISOR: You can use a draft of this form to plan your discussion with the employee. Once you have met with them, be sure that you have completed this form completely and accurately, as soon as possible following your coaching/counseling/corrective action meeting with the employee. See below for additional guidance.

Note that this form is set up with tables so that the long boxes will expand as you enter text in them. To check or uncheck the small boxes, click on them.

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POMS USE AN OFFICIAL FORM TO DOCUMENT ORAL COUNSELING

DO NOT CHANGE THE WORDING IN THE BODY OF THIS FORM

CHECKLIST: All documentation of verbal coaching, counseling or corrective action should include:

| | |
|---|---|
| <input type="checkbox"/> the employee's name | <input type="checkbox"/> the date of the verbal warning |
| <input type="checkbox"/> specify performance/conduct/behavior problem(s) (#1) | <input type="checkbox"/> a specific statement of the expected performance |
| <input type="checkbox"/> any explanation given by the employee | <input type="checkbox"/> the employee's commitment to improve |
| <input type="checkbox"/> reference earlier discussions, and if documented or <u>not</u> | <input type="checkbox"/> other objective information that is significant |

SAMPLE DOCUMENTATION OF VERBAL COACHING, COUNSELING, OR CORRECTIVE ACTION:
"I spoke with [Employee] today about his absenteeism record and gave him a verbal warning. Since [Date], [Employee] has been absent from work on [Number] occasions for a total of [Number] days. [Employee]'s response was, 'You can't make people work when they are sick,' and he argued about the verbal warning. I told him that he could request a medical leave of absence if he needed it, but that I expected him to be here every day unless a doctor says otherwise."

1. Check reason(s) for this verbal coaching/counseling/warning with the employee, as appropriate.

- Work performance is unacceptable / needs improvement (specific examples of substandard performance).
- Conduct is unacceptable / needs improvement (Often violation of policy, work rules, etc.).
- Behavior is unacceptable / needs improvement (Often impacts on another employees' performance).
- Violation and/or disregard of policy, work rules, procedures or other directives is unacceptable.

The violation is: Safety related Non-safety related

Attendance is unacceptable.

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POMS USE AN OFFICIAL FORM TO DOCUMENT ORAL COUNSELING

2. Document the verbal coaching, counseling, or corrective action, including expected performance or behavior change needed (see checklist & sample above):

3. Describe previous coaching, counseling or corrective action taken concerning this issue:
 Has previous coaching, counseling or corrective action occurred for similar problems/situations: Yes No
 If "Yes," provide a brief description of each previous action taken. Reference previous written documentation.

4. Document the employee's response, including any explanation given for performance, conduct or behavior needing improvement. Be sure to ask for and document the commitment the employee makes to improve performance, or to correct conduct or behavior:

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POMS USE AN OFFICIAL CORRECTIVE ACTION or DISCIPLINE FORM

- **Describe problem(s)/situation(s) to be corrected:**
 - State factual details of each distinct occurrence or incident that is a problem with employee's performance, conduct, and/or behavior. Be specific with respect to dates, times, places, witnesses, etc. Where applicable, cite appropriate policy, procedure or work rule that has been violated.
- **Document the employee's response, including any explanation given for performance, conduct or behavior issue listed above that needs improvement or correction.**
 - Confirm that the employee understands why each performance, conduct, and/or behavior listed above is unacceptable, and needs to be improved and/or corrected. Confirm that the employee is willing to fix these problems as a condition of continued employment.
- **Describe previous oral or written coaching, counseling or corrective/disciplinary action that has been taken and documented concerning each of the problems/issues listed above:**
 - Has previous coaching, counseling or corrective/disciplinary action occurred for similar problems/situations:
 - Yes No
 - If "Yes," provide a brief description of each previous action taken. Be specific with respect to dates, and include references to each documented prior coaching, counseling, or corrective/disciplinary action taken.

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POMS USE AN OFFICIAL CORRECTIVE ACTION or DISCIPLINE FORM

- **What is needed for improvement and to correct the behavior, conduct, and/or performance problems identified?**
 - For each of the performance, conduct, and/or behavior problem listed above, state specific action(s) to be taken and/or changes to be made by the employee to improve, and/or correct as appropriate. State any performance, compliance or behavioral changes or improvements that are required of the employee.
- **What commitments has the employee made to correct the behavior, conduct, and/or performance issues described above?**
 - For each problem listed above, document the specific actions or steps that the employee has agreed and committed to take in order to improve and/or correct the required performance, conduct, and/or behavior.
- **What additional training, coaching, direction, or support is required? When will it be provided? By whom?**
 - Include information about specific actions or steps that you as the employee's supervisor or others will take to assist the employee in improving and/or correcting the required performance and/or behavior.

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POMS USE AN OFFICIAL CORRECTIVE ACTION or DISCIPLINE FORM

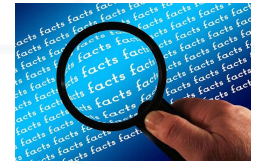
- **When and how will performance/conduct/behavior improvements or corrections be monitored and evaluated?**
 - Include a schedule for monitoring and feedback, if appropriate. This is particularly important for performance issues that may require follow-up coaching or training.
- **Supervisor/Manager: Review the following verbally with the employee - check each box as you review with the employee.**
 - To reiterate, the performance, conduct and/or behavioral problems we have discussed and recorded above will not be condoned or accepted at <COMPANY NAME>.
 - You are expected to make every effort to correct these performance, conduct, and/or behavioral problems, and failure to do so will result in further appropriate disciplinary action, up to and including possible termination of employment with <COMPANY NAME>.
 - <COMPANY NAME> is opting to provide you with corrective or disciplinary action measures through this document and accompanying counseling, in order to give you an opportunity to correct the performance, conduct, and/or behavior problems discussed above, and can terminate such corrective measures at any time, solely at its discretion.
 - The use of this Official Written Notice of Corrective or Disciplinary Action will not change your at-will status, nor does it constitute an express or implied contract of employment.
 - The original signed Official Written Notice of Corrective or Disciplinary Action, along with necessary and appropriate follow-up documentation will become part of your permanent employment record.

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POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

2. CONDUCT A FULL AND FAIR INVESTIGATION.

- Before an employer decides to discipline an employee, there should be a full and fair investigation of the events.
- In certain circumstances, it may be appropriate to have someone other than the employee’s direct manager or supervisor conduct the investigation or review the discipline decision.
- If there were witnesses to the misconduct, those witnesses should be interviewed, and note in a separate document what they had to say.
- Sometimes information from other sources may lead a manager to reconsider whether discipline is appropriate.

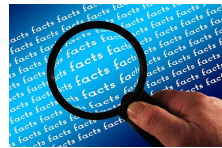


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POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

3. TAKE TIME TO GET THE FACTS - Proper Diagnosis of the Problem

- For employee discipline documentation to be effective, it must be factual.
- The goal in completing such documentation is that anyone who might read the employee discipline form will get a clear picture of what happened and why the discipline was imposed.
- Be sure to do a root cause analysis of the problem, whether performance, conduct, or behavior.
- Detail the impact of performance, conduct, or behavior problems on organizational, team, and colleague performance.




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POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

4. BE OBJECTIVE AND FACTUAL

- In completing the form, it is important that the manager be objective in describing the incident.
- The manager or supervisor should describe the conduct that led to the discipline, rather than the attitude of the employee, the manager’s personal views of the employee, or a “diagnosis” of the employee/problem.



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POMS *Tip 4 Continued:* **BE OBJECTIVE AND FACTUAL**

- Factual statements focus on employee conduct, behavior, and/or performance - **not** on the supervisor's conclusions.

| Subjective | Factual |
|----------------------------|---|
| "You are habitually late." | "You were 10 minutes late to work on March 10 and 15 minutes late on March 20. You were 30 minutes late on April 3 and April 30. You did not call in to report that you would be late." |
| "Your work is sloppy." | "You have made an average of five errors each week for the last ten weeks on your cycle counts. Your errors have required us to conduct a complete inventory audit." |

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POMS **TOP TEN BEST PRACTICES IN DOCUMENTATION**


5. BE CLEAR AND SPECIFIC

- In completing the form, it is important to set forth the facts in specific detail, and clearly written.
- Proofread with HR before issuing document to employee.
- The manager should clearly state what the employee did that violated a company policy or work rule.
 - For example, managers shouldn't say that the employee is lazy, but should describe the facts that have led to the conclusion.
 - For example: "Marion Jones failed to arrive at the work site on time for seven consecutive days. Jones left the site early on each of those days. The work that was assigned to Jones by the supervisor was not completed on any of the days that Jones worked."
- The more specific factual detail that you can record on the form, the better. If there is not enough space provided on the form, additional pages can be attached.

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POMS *Tip 5 Continued:* **BE CLEAR AND SPECIFIC**

- Document whether the employee has broken a rule, policy or performance standard and specify what it is.
- It's easier to justify your actions if the workplace requirement is in writing and communicated to employees. If there is a written standard, include a copy of it with your paperwork.
- Remember:** Rules don't have to be in a formal handbook to apply. Any written employee communications, including emails, are acceptable.




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POMS **TOP TEN BEST PRACTICES IN DOCUMENTATION**

6. COMPLETE THE FORM WHILE THE FACTS ARE FRESH

- The memory of an event is clearer right after the event, as opposed to days later.
- Legal principle of "temporal proximity" of event to document
 - Managers should complete the employee discipline form as soon as possible after the misconduct occurred so that their recollections will be clear and accurate.



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POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

7. GET THE EMPLOYEE'S ACKNOWLEDGEMENT.

- Managers should make sure that they review the completed form with the employee and have the employee sign it.
 - Such an acknowledgement shows that the employee has been told that that his action was a violation of a company policy or work rule and prevents the employee from claiming in the future that he did not know of the problem.
- In the event that the employee refuses to sign the form, managers should:
 - Note that on the form and record the date and time.
 - Write "I reviewed this form with the employee, who then refused to sign the form.
 - The manager who heard the refusal should sign the form. Have a witness if possible, but not necessary.
 - Give the employee a copy of the form - original to the employee file.

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POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

8. ALLOW THE EMPLOYEE TO EXPLAIN THEIR SIDE OF THE STORY

- This may change your perception of what happened.
- It may reveal an underlying legitimate reason for the problem (ADA, FMLA, etc.)
- Record the employee's version of events on the form.
- While the explanation may not alter the discipline that is being imposed, it allows the employee to tell his side of the story - evidence of fair dealing.
- It also helps to preserve the employee's version of events in the event he changes his account in the future.

THERE ARE TWO SIDES TO EVERY STORY. IF YOU AREN'T WILLING OR ABLE TO LISTEN TO BOTH SIDES, DON'T BE SO QUICK TO MAKE JUDGEMENT ON WHAT YOU HAVEN'T HEARD.

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POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

9. BE FAIR

- "Every employment case boils down to a simple issue of fairness. Did the employer treat the employee fairly."*
 - Evaluate "fairness" from the perspective of an outsider - a third party.
- Managers or supervisors need to be fair and uniform in imposing discipline regardless of who is being disciplined.
- Best Practice is for HR to review the organization's policy manual with managers and supervisors on a periodic basis to ensure that they are familiar with policies and are consistently and uniformly enforcing them.

FAIR
AND
EQUITABLE
TREATMENT



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POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

10. USE THE CORRECTIVE ACTION/DISCIPLINE PROCESS AS A POSITIVE EXPERIENCE.

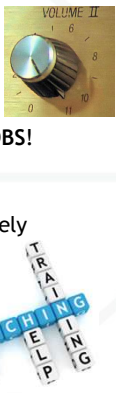
- While the responsibility is on the employee to improve his or her performance, behavior, or conduct, you should also offer solutions to help the employee to correct the problem.
- With some employees, it may be beneficial to map out some definitive next steps the employee will take to improve conduct in the future.
 - However, remember that such plans must be available for all employees who are having performance problems. Again, it's a matter of uniformity in the discipline process
- Documentation of employee misconduct must be handled as a business issue. It helps the employee change his behavior. And it protects the business.

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POMS BUT THIS TOP TEN LIST GOES TO ELEVEN

11. BE A COACH AND ADVISOR.

- **REMEMBER** - The supervisor's most important job is to help the employees that they supervise, **TO BE SUCCESSFUL IN THEIR JOBS!**
- Offer encouragement and direction to correct an issue early on
- Coaching is a less formal way to raise issues and concerns
- The appropriate response to first time problems that are relatively minor
- **Keys to Effective Coaching:**
 - Don't be too formal
 - Engage the employee
 - Collaborate on solution
 - Don't forget to document coaching/oral counseling
 - Follow-up to make sure the problem is resolved
 - Again, your goal is to improve performance!

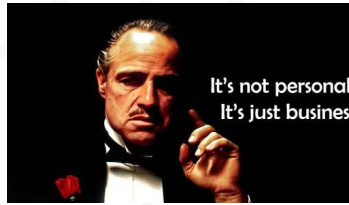


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POMS BUT THIS TOP TEN LIST GOES TO ... TWELVE?

12. FOCUS ON SOLVING THE PROBLEM - NOT ON BLAMING THE PERSON

- Concentrate on the performance, incident, conduct, or behavior.
- Stick to the facts, and don't include opinions about the employee or comment on personality traits.
- For example, instead of saying "John is irresponsible," describe the specific actions that led to this conclusion (John lost the keys to the company van, John forgot to lock up when leaving, John missed a deadline, etc.)



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**IN SUMMARY:
DOCUMENTATION DO'S AND DON'TS**


POMS

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POMS IN SUMMARY: DOCUMENTATION DO's


- Stick to **PERFORMANCE, CONDUCT, AND BEHAVIOR**, and Performance Impacts of **CONDUCT** and **BEHAVIOR!**
- Produce and file documentation as needed throughout the year.
- Create contemporaneous documents - temporal proximity
 - **NEVER** back date documents
 - Include the date
 - Include full name(s) at least once, then initials or first name is OK
- Consistent treatment for similar issues
- Clear and precise language is critical
- Use a professional tone, and avoid bias
- When possible, obtain the employee's signature to verify the discussion and goals ... (what if they won't sign?)

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 **IN SUMMARY: DOCUMENTATION DO's**

- **Do state what happened.** Be specific, be objective.
- **Do state what policy the employee violated.** Attaching a copy of the policy from your employee handbook is helpful.
- **Do indicate why the violation harms the company.** This provides context, which may not be obvious to everyone involved.
- **Do provide specific instructions on how the employee can improve.** Give concrete guidance and suggestions; ask for input from employee.
- **Do indicate consequences.** Be clear on what will happen if the situation is not remedied. This also protects you later if further infractions occur.
- **Do issue corrective action/discipline consistently.** Everyone needs to be held to the same standard.
- **Do follow up.** Following up with either the employee or the supervisor, or even just checking records, is important. (The appropriate type and schedule for follow-up depends on the circumstances).


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 **IN SUMMARY: DOCUMENTATION DON'Ts**

AVOID

- Expressing personal opinions, accusations, or judging
- Generalities, overstatements and exaggerations
- Words and phrases without detailed, objective descriptions such as:
 - Weakness, shortcomings, inadequacy, failure, it appears, insubordinate
 - Bad attitude, not a team player, you don't fit in, not a "culture" fit
- Reaching conclusions without all the facts
- Legal conclusions
- Absolute Expressions unless completely accurate - such as:
 - Always, Never, Every time, Invariably
- Documenting anything for the record that you have not already communicated directly to the employee

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 **IN SUMMARY: DOCUMENTATION DON'Ts**

- **Don't be too vague.**
 - It is important for the employee to understand specifically what it was that he or she did wrong, what she needs to do improve, how she is going to improve it.
- **Don't be too specific.**
 - Over-documenting can appear to be nit-picking; be sure to not be so detailed as to appear unfair (e.g., "employee was two-and-a-half minutes late"). It raises the question of whether all employees were equally penalized for such an infraction.
- **Don't issue a discipline or terminate without a witness.**
 - Any time you are going to convey negative news to an employee, it is important to have at least two company representatives in the room. This helps to minimize any questions over what occurred.
- **Don't forget to file it in the personnel file.**
 - If the documentation is lost, it may as well never have occurred. Employees should get a copy of the documentation.
- **Don't forget the employee signature line.**
 - It is very important to show that you at least made an effort to have the employee sign off on the reprimand.

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**YOU MUST CHOOSE...
BUT CHOOSE WISELY**


YOU MAKE THE CHOICE TO BE A LEADER



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 **QUESTIONS**


- This is the chance to address issues that may not have been covered to your satisfaction; or
 - To expand a point; or
 - To clarify a point.
- If there are any further questions which we were not able to get to today, please feel free to contact the instructor(s).



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