HR Challenges - Avoiding Problems When Hiring and Firing Employees

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February 27, 2013
Disclaimer

- May be experienced, smart & dedicated HR professional; BUT…
- Legal advice is not being provided.
- Changes in the law occur on an ongoing basis.
- Please consult your own employee relations attorney for the best answer.
The City of ___ will soon be conducting interviews for a full time Chief. If any of you have recently gone through a hiring process for a Chief, would you please provide me with some sample questions to ask?

The City of ___ will be interviewing for the position of Manager. We are looking for interview questions that have been used by other cities for this position or one similar.

We received tons of Maintenance Worker applicants and want another tool in evaluating the quality of applicants. The agency next to us has such a test where the applicants shovel dirt from one pile to another, drive an obstacle course, and repair a simulated water break. We like their test quite a bit and have the other agency’s permission to use their test.

It is okay to use the other public agency’s test. (A = Yes; B = No)
3 Keys to Legal Credibility in Hiring

- **Accuracy** – the ability of the selection process to validly predict applicants’ job performance
- **Equity** – the assurance that the selection system gives every qualified applicant a fair and equal chance to be selected
- **Buy In** – the extent in which people in the selection process perceive its worth.
The Department of Fair Employment & Housing (DFEH) received a complaint alleging the County engaged in employment discrimination in its selection process.

Who has the burden of proof?

A. The County needs to demonstrate to DFEH that it didn’t engage in discrimination.
B. DFEH has the burden to show that the County engaged in discrimination.
# Statistics

DFEH complaints in 2010: totaled 19,437.

EEOC complaints in 2011 (California: 7,166)

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Show Me The…

- State why the complainant was not selected for the position of supervisor, and provide substantiating documentation.
- Explain the selection process utilized in hiring for the supervisor position.
- Provide copies of all interview notes, evaluation worksheets, evaluation forms, rating sheets, …
- Provide a summary of the application flow data relative to the selection process.
- State why the successful candidate was considered more qualified than the complainant and provide substantiating documentation.
- Submit proof of sexual harassment supervisory training. [Note; this was an age discrimination complaint.]
Dear DFEH, please see our...

- Staffing Requisition
- Dimension Analysis
- Recruitment Plan, Flyer and Advertisements
- Screening scoring notes, with rating definitions
- Computer-generated EEO graph
- Interview Guides (the questions asked)
- Dimension definitions and key actions
- Interview Schedule
- Data Integration Form (scoring sheet)
- Letters sent to each applicant
- Verification of AB1825 Training Records and Course Content
Mary Jane sought employment as a maintenance worker and, both prior to and after the required medical and drug test, Mary Jane furnished the City with her physician’s recommendation for marijuana use. Mary Jane suffers from chronic back pain and uses marijuana to provide relief from pain. The City refuses to hire her because of a positive drug screen. Mary Jane sues and the courts determine that:

A. The Compassionate Use Act allows her to obtain and use marijuana and, therefore, a reasonable accommodation for her continued use should have been made by the City. The City owes Mary Jane a job.

B. Mary Jane should have been employed, but the City could deny her from possessing or smoking pot while at work.

C. The City could deny employment because there is no federal claim for the use of marijuana and the Compassionate Use Act does not apply.

D. The City could deny employment because the Compassionate Use Act does not address the respective rights and obligations of employers and employees.
Probationary Employee Release

An at-will employee may be released from employment at any time, with or without notice and with or without cause.

A. True
B. False
Probationary Employee Release

Fred Fingers is a probationary employee who is accused of taking unused copper piping to a local recycler and keeping the proceeds. An investigation was undertaken, which concluded that Fred Fingers engaged in theft. Fred is released from employment; however, he disputes that he stole any property and asks for a hearing.

Is Fred entitled to a hearing?

A. You betcha!
B. You kidding right – absolutely not!
Name Clearing Appeal

All public employees, including those with no property right to employment, may be entitled to some procedural protection if a discharge seriously affects an employee’s reputation, including significantly impairing the employee’s ability to find comparable employment elsewhere.

A liberty interest is implicated where:

(1) there is a stigmatizing charge;
(2) the employee denies the charge or contests its accuracy; and
(3) there is public disclosure of the charge. The employee has a right to a hearing to clear his or her name.

Also referenced as a Lubey Hearing.
Bringing a Representative

An employee whose position isn’t represented through a collective bargaining agreement is under investigation for workplace wrongdoing. You’ve called the employee to schedule his interview and he asks if he may bring a representative. May he?

A. No, as only unionized employees are entitled to a representative.
B. Yes, since a criminal charge may also follow (i.e., theft).
C. Yes, even non-unionized employees may bring in a rep.
D. Yes, provided the representative is an attorney.
E. Only the guilty bring a rep, so let’s see if he brings someone.
Louis Loud received a Notice of Intent to Discipline, with a proposed suspension without pay of one week. You have been designated as the “Skelly Officer” and will hear the matter before rendering the final disciplinary action (if any is to be implemented). Louis Loud refuses to participate in the meeting with you unless he can “cross-examine” the witnesses and investigator.

Should Louis Loud be permitted to interview others?

A. Yes.
B. No.
Full Evidentiary Hearing

An employee is not entitled to a full evidentiary hearing prior to the discipline taking effect, but merely to the opportunity to respond informally to an individual authorized to impose or effectively recommend discipline.

However, the due process right does require that an employee have the opportunity for a full evidentiary hearing before a neutral decision maker at some point, but that can be after the discipline is imposed.
Findings

The workplace investigator concluded that Annie Able’s complaint against Ben Watch is “not substantiated.”

Does this mean that Ben Watch:

A. Didn’t engage in the complained about conduct; or
B. The investigator couldn’t prove that he had engaged in the conduct
Standard of Proof

- Beyond a reasonable doubt
- Clear and convincing evidence
- Preponderance of the evidence
- Good faith investigation / reasonable conclusion

In weighing the evidence, the general civil standard of proof was applied. An incident was found to have occurred if the preponderance of the evidence obtained during the investigation supported that conclusion. That is, it was more likely than not that the event happened. In reaching these determinations, it is critical that the information is both reliable and susceptible of proof. In other words, no action can be taken based on evidence that cannot subsequently be proven. Credibility resolutions were made where appropriate.
Findings

- **Sustained:** The allegation is found to have occurred and, where applicable, to have violated the applicable rule and/or policy.

- **Not Sustained:** The alleged misconduct could neither be proved nor disproved, given the existing evidence.

- **Exonerated:** The alleged act or failure to act was found to be true; however, such conduct was appropriate under the circumstances or was not found to constitute a violation of the applicable provisions of the rule and/or policy.

- **Unfounded:** The investigation revealed conclusively that the alleged act did not occur.
Off-Duty Misconduct

Employers should treat carefully when investigating and disciplining employees for off-duty conduct.

California Labor Code 96(k) reflects a public policy against discipline of employees for “lawful conduct occurring during non-working hours away from the employer’s premises.”

Where unlawful off-duty conduct is involved, an employer will need to justify any discipline by establishing a job-related nexus.

A prudent course of action is consultation with legal counsel before taking any action.
Police Investigation or Arrest

Sometimes employers tend to think that they should defer their own investigation until a related criminal proceeding has run its course. In general, this “wait and see” approach is discouraged.

A criminal proceeding involves a higher burden of proof than a disciplinary proceeding. The prosecution in a criminal proceeding must prove its case “beyond a reasonable doubt” while in a disciplinary proceeding the employer must prove the offense by a “preponderance of the evidence.”

Nothing prohibits an employer from conducting its own investigation into misconduct that runs parallel to a criminal investigation or prosecution.

Don’t share your investigative notes or findings in the criminal proceeding except as directed by your legal counsel. However, asking the police to share notes with you is acceptable.
Unfair!!

The Union is alleging that Betty Boss imposed too harsh of discipline and that the agency is treating the union member differently.

A. The union has the burden of proof to show that the employee is treated differently.
B. The agency has the burden of proof to show that either why it is treating the employee differently or that it is treating the employee similarly to others.
Disparate Treatment

In disciplinary matters, variations of the discipline impose will be permitted notwithstanding the charge of disparate treatment. Discrimination is an affirmative defense and, therefore, the union generally has the burden of proving the employer improperly discriminated against the employee.

“Thus, in order to prove disparate treatment, a union must confirm the existence of both parts of the equation. It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantively like those of individuals who received more moderate penalties.

Failure to Return to Work

Toni was a medical technician at Sylvan Health. She experienced work-related stress and depression from her new boss, her workload increased, and her shift was changed. Her doctor gave her a medical leave, and Toni requested a leave of absence. Sylvan denied the leave after its own doctor provided a contradictory second medical opinion. Toni was subsequently fired for her failure to return to work.

A. Toni wins her unlawful discharge lawsuit because Sylvan failed to seek a medical opinion from a 3rd health care provider, as permitted under the ADA.

B. Sylvan wins the lawsuit because they are not required to seek a 3rd opinion when the first two opinions are contradictory.

C. Sylvan wins the lawsuit because Toni did not request the 3rd medical provider opinion.

D. Since there was contradictory evidence, she wasn’t entitled to ADA leave and, thus, the lawsuit is dismissed.
Factors Arbitrators Use

- Reasonableness of the Rule or Standard of Conduct
- Notice to the Employee of the Rule
- Notice of the Disciplinary Consequences
- Notice of the Charges
- Timely Action on the Charges
- Adequate and Fair Investigation
- Opportunity to Respond to the Charges
- Proof of the Charged Misconduct
- Equal Treatment for Similar Misconduct
- Double Jeopardy
Tardiness

Tim Lee is your front counter’s office assistant with responsibilities of opening the office, receiving customers and connecting them with the correct project planner or engineer. Unfortunately, Tim Lee’s most consistent trait is his ability to show up at work 10 minutes late. Despite coaching, Tim Lee has not changed his behavior and continues to arrive at work late. Which is the next best step?

A. Change his work hours.
B. Deny his merit step increase.
C. Place him on a performance improvement plan.
D. Require him to email you each morning, noting that he has arrived at work.
Insubordination Defined

- Employee’s refusal to work or obey must be knowing, willful, and deliberate.
- The order must be both explicit and clearly given, so that the employee understands both its meaning and its intent as a command.
- The order given must be both reasonable and work related.
- The order must have been given by someone with the appropriate authority.
- The employee must be made aware of the consequences of failing to perform the work or follow the directive.
- If practical, the employee must be given or have time to correct his purportedly insubordinate behavior.
Conducting Effective Evaluations

- Develop performance goals, standards and expectations from resource documents
- Meet with employee to discuss and provide documentation (“no surprise” rule)
- For each employee, create and maintain supervisor file throughout the reporting period

Exclude:
- Personality/personal traits not specifically related to job performance
- Non-work related issues
- Attendance related to protected leave
Trust Traps

- Making Assumptions
- Covering Yourself
- Breaking Promises
- Shooting the Messenger
- Mixing Messages
- Sugarcoating
Failure to Return to Work

Dan has exhausted his FMLA and CFRA time, but is requesting additional time off work due to his medical issues. Dan is the only person in his job classification and the department has found it quite difficult with Dan being away. The department denies Dan’s request for additional time off, citing that the FMLA and CFRA are for a set period of time and Dan’s absence from work is an undue hardship. Dan doesn’t return to work as scheduled and is fired. Dan sues.

Does Dan win his job back?

A. This is California, so, duh, Dan gets his job back.
B. Yes, because additional time off is a reasonable accommodation under the ADA.
C. No, because it’s a hardship on the department having Dan off work.
D. I have no idea, so I’ll say “no.”
Lisa was laid off while she was on FMLA for childbirth following a department-wide reorganization. An HR Manager, however, felt that the reorganization was a ruse and notified Lisa after the termination and told her the real reason for the layoff was her pregnancy. Lisa sued. Even though this HR person wasn’t involved in the actual decision-making, the court ruled that the case could go forward.
In Cuyahoga County, Ohio, the county terminated employees by sending plainclothes police officers to the unlucky employees’ doors. The theory, according to the HR manager, was that they didn’t want people to find out by coming into work and not being able to get in the door because their badges didn’t work anymore.

Can you say “wimptastic?” Do not deactivate a badge until after the employee has been informed. You do not send police officers; nor send termination notices via email.
Delivering the News – Right Way

- Give written notice to the employee.
- Hand-deliver, with privacy, the notice.
- Prepare your verbal remarks with a written script (at least an outline).
- Have a witness on hand for the entire meeting.
- Empathy is good, but do not sugarcoat or mislead.
- Make eye contact.
- Don’t talk too much.
- Never fire someone on a Friday!
A Red Herring?

Mustafa Rehmani, a Muslim born in Pakistan, worked as a system test engineer for Ericsson. Rehmani was dismissed following his admission of sending prohibited emails from coworkers’ email accounts. However, a few days before his termination, he reported to HR that several of his Indian colleagues had been harassing him based on his national origin and religion.

A. Given the timing, do not investigate his harassment complaint as Ericson has good cause to fire Mr. Rehmani.

B. Continue the dismissal process based on the emails, and do a concurrent harassment investigation. After the investigation concludes, then decide if you should rehire Mr. Rehmani or make some other arrangements.

C. Put the dismissal on hold until the investigation concludes.

Rehmani v Superior Court (2012) 204 Cal.App.4th 945 [138 Cal.Rptr.3d 464].
A San Francisco Police Officer suffered a heart attack and was diagnosed with diabetes, high blood pressure, high cholesterol and coronary artery disease. The officer returned to work in a temporary modified duty assignment performing administrative work. The Department ultimately implemented a General Order that eliminated all permanent light-duty assignments and limited temporary modified duty work to a maximum of one year. The Department retired out the Officer as he was unable to perform the essential job functions of the position. The employee sued.

A. The Department wins as performance of essential job functions is required. Case closed.

B. The employee wins as he was previously provided modified work and the department has an obligation to continue to provide such an assignment.

C. The employee wins as limiting modified duty work to one year is not reasonable.

Lui v City and County of San Francisco (2012) ___ Cal. App.4th ____[___ Cal.Rptr.3d____] [2012 WL 6197419]
Lattice Porter is Christian and attends church services, bible studies and prayer services at her church. Initially, she had every Saturday and Sunday off; however, her work schedule was modified to Friday and Saturday has her days off. She objected and demanded a return to Sundays off as a religious accommodation. The agency offered her a swing shift as an accommodation so Ms. Porter could attend Sunday morning service.

A. This was a reasonable accommodation as there was no prohibition of working on Sunday and she was able to meet her religious commitments.
B. The reasonable accommodation is to grant what the employee requests.
C. Not changing her work schedule would have the best choice as religion trumps government and that was her original schedule.
D. Religious employees are not be scheduled on their church (or similar) day. So, this was not an appropriate work schedule.

Porter v. City of Chicago (7th Cir. 2012) 700 F.3d 944.
Laid Off while on Military Leave

Douglas worked as a maintenance technician and his employment was marked by inconsistent and poor performance. Because of the recession, layoffs were necessary and Douglas was let go. However, at that time he was on an approved multi-month military leave. Douglas sues his employer.

A. Douglas wins because the Uniformed Services Employment and Reemployment Rights Act guarantees Douglas his job.
B. The employer must demonstrate that Douglas was a poor employer in order to win.
C. In addition to (B), the employer must show that Douglas was treated the same as other employees.
D. Douglas must show that the employer violated its layoff policies.

Miller v. Minco Products, Inc. (8th Cir.2012) 701F.3d 268.
Another bite of the apple?
Salvador Basurto was involved in an on-duty vehicle accident. A preliminary alcohol screening showed he had alcohol in his system from the prior evening and the police concluded that he was not DUI but caused the accident. As a result, the public agency terminated Salvador’s employment. Throughout the administrative appeal process, Salvador contended that the punishment was too severe. Nevertheless, the dismissal was upheld. Salvador sues alleging discrimination and process issues. The trial court:

A. Denies his claims of discrimination and process issues as Salvador didn’t raise them during the administrative hearing.
B. Orders a trial.
C. Remands it back to the public agency to hear these complaints.
D. Orders Salvador’s reinstatement with back pay and benefits.

Barurto v Imperial Irrigation District (2012) ___Cal. App.4th___[___ Cal.Rptr.3d___] [2012 WL 5448196]
Administrative Procedures

Characteristics of administrative procedures undertaken in a judicial capacity include:

- a hearing before an impartial decision maker;
- testimony given under oath;
- a party’s ability to subpoena and examine witnesses;
- introduce documentary evidence, and make arguments;
- taking of a record of the proceeding; and
- a written statement of reasons for the decision.
Our Customers

Sally works at your front counter. Her duties include welcoming visitors and receiving permits. Sally takes great pride in her work and generally loves the job, finding a connection with the people. Jerry Atric is a long-time builder and visits the office twice each week. Each time when he arrives he tells Sally how beautiful she looks, touching her at the elbow, and asks that she leave her husband to attend to his needs.

Sally feels highly uncomfortable with Jerry’s comments, telling you that she is subject to a hostile work environment. In your discussion with Jerry, he confirms his interactions with Sally, telling you that he is only joking and without humor in his life he would have been dead decades ago. Sally doesn’t see any changes in Jerry’s behaviors and quits. She sues the agency for harassment.

A. You win as you cannot control the behavior of customers.
B. Sally wins as your duty is to her above any duty to customers and visitors.
C. You win as Sally needed to sue Jerry and not the public agency.
D. For you to win, you need to have Jerry arrested and convicted of battery.
Whistleblower

Disciplining an employee who has filed a complaint under the Whistleblowers Protection Act can be challenging.

The employer must show there was a legitimate reason for the discipline.

The employer must be prepared to show there was no retaliation.
- Protected activity
- Adverse action
- Causal connection
Hello Kitty Bubble Gun

A 5-year-old girl was suspended from school earlier this week after she made what the school called a "terrorist threat." Her weapon of choice? A small, Hello Kitty automatic bubble blower. The kindergartner caught administrators' attention after suggesting she and a classmate should shoot each other with bubbles.

"I think people know how harmless a bubble is. It doesn't hurt," said Robin Ficker, an attorney for the girl's family. According to Ficker, the girl didn't even have the bubble gun toy with her at school.

The kindergartner was ordered to undergo a psychological evaluation during her 10-day suspension, which was later reduced to two days. The evaluation deemed the girl normal and not a threat to others, Ficker said. The girl's family is considering a lawsuit against the school to get the blemish - all because of bubbles - off their daughter's record. The mother has tried to get the girl in another school since this time, and they won't take the little girl because of this mark on her record, Ficker said.

The School District told ABC News, "We are confident that much of the information supplied to the media may not be consistent with the facts... The Mount Carmel Area School District takes the well-being and safety of students and staff very seriously."
A Guiding Light?

- Be civil – don’t be the first one to be a jerk.
- Build a culture of integrity.
- Admit your mistakes.
- You get more out of listening than you do talking. (Let the process unfold.)
- Articulate other people’s perspectives.
- Understand your adversary’s perspective.
- Follow the Golden Rule.
- Make your battles big enough to matter, but small enough to win.

Courtesy of Bob Heywood, from his presentation at PARMA’s annual conference (2012)
Reading Materials

- 101 Tough Conversations to have with Employees by Paul Falcone [ISBN 9780814413487]
- Pocket Guide to Public Sector Arbitration: California (from California Public Employee Relations, CPER) [ISBN 1928925124]
- Pocket Guide to Just Cause: Discipline and Discharge Arbitration (from California Public Employee Relations, CPER) [ISBN 978192892586]
- Discipline and Discharge in Arbitration; Norman Brand Editor-in-Chief [ISBN 1570180601]
- Client Update published monthly by Liebert Cassidy Whitmore (www.lcwlegal.com)
- Uniform Guidelines on Employee Selection Procedures, 29 CFR §1607 et seq
Questions