



*Managing Risk Through Effective Employee  
Evaluations and Appropriate Discipline*

Presented By:

**TARA STINGLEY**

**CLINE WILLIAMS**



**TARA A. STINGLEY**

**tstingley@clinewilliams.com**  
**(402) 397-1700**

## **PRACTICE AREAS:**

- **Employment Law Counseling**
- **Employment Law Litigation**
- **Alternative Dispute Resolution:  
Mediation and Conciliation**

# TODAY'S AGENDA

- ✓ Employee Handbooks
- ✓ Performance Evaluations
- ✓ Importance of Good Documentation
- ✓ Progressive Discipline Policies
- ✓ Discipline Following a Workplace Complaint
- ✓ Employment Policy Considerations Unique to Public Employment



# EMPLOYEE HANDBOOKS

# EMPLOYEE HANDBOOK: FRIEND OR FOE?

## **A Handbook can serve several important functions:**

- Introduce the organization and answer common questions
- Explain expectations
- Articulate the consequences for failing to comply with policies and procedures
- Minimize legal risk ... by encouraging resolution of workplace issues
- Demonstrate compliance with applicable employment laws

# EMPLOYEE HANDBOOK: FRIEND OR FOE?

## A Handbook can be problematic IF:

- It is poorly drafted or unclear.
- It creates a contractual expectation.
- It doesn't align with your organization's *actual* practices.
- It places unnecessary burden on your organization.
- It contradicts applicable employment laws.
- It hasn't been reviewed in the last 3 years.



# EMPLOYEE HANDBOOKS = CONTRACTS?

## *Johnston v. Panhandle Coop Association*



- The Nebraska Supreme Court held that personnel handbook provisions may become enforceable as an employment contract, if the handbook language:
  - constitutes a definite offer;
  - is communicated to the offeree; and
  - the offer is accepted.
- Employee's retention of employment constitutes acceptance of the offer.



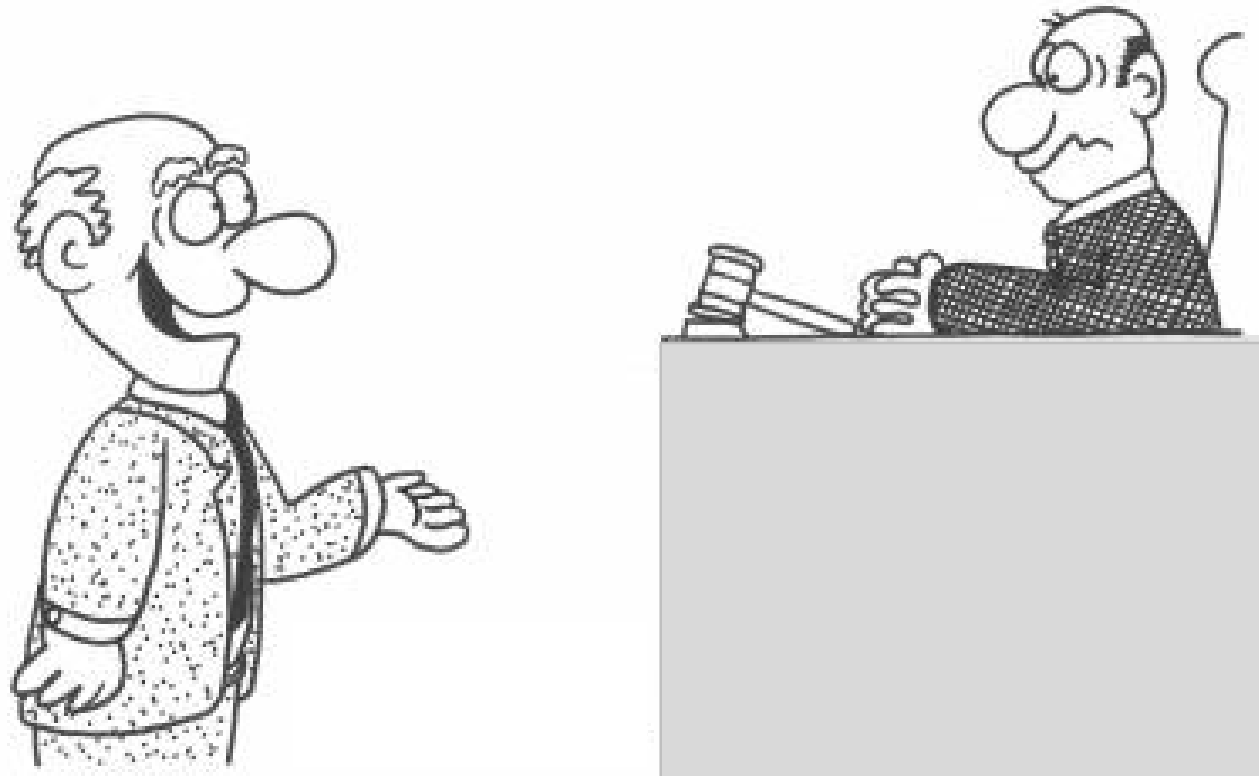
# AVOIDING A HANDBOOK CONTRACT

Your Handbook's Introduction should state:

- **THIS HANDBOOK IS NOT A CONTRACT.**
- No one except [a designated representative of the EMPLOYER] has the authority to execute an agreement for a fixed term or contrary to the policies in the handbook.
- The handbook belongs to the EMPLOYER.
- The EMPLOYER reserves the right to modify the handbook as needed, consistent with applicable law.
- Employment is at-will, if it is.



# AVOIDING HANDBOOK BLUNDERS: Demonstrate Receipt



“Your Honor, I *just know* the Plaintiff got the handbook!”

CLINE WILLIAMS

# AVOIDING HANDBOOK BLUNDERS: Demonstrate Receipt

- Distribution of handbook and periodic changes to all:
  - On-site/off-site employees?
  - Hard copy or electronic form?
- Acceptance of handbook and periodic changes:
  - Execution of paper acknowledgment
  - Electronic confirmation
- Maintaining record/proof of acceptance



# PERFORMANCE EVALUATIONS

# PERFORMANCE EVALUATIONS – COMMON MISTAKES

- Irregular Evaluations
  - Employees should be evaluated on a regular basis.
- Subjective Evaluations
  - Evaluations should be based on objective criteria.
- Ambiguous Evaluations
  - Employee evaluations should be clear and specific.
- Inaccurate Evaluations
  - Employers must be able to provide specific information to improve performance.
  - Avoid “Nebraska Nice” during evaluations.

# TIPS FOR BETTER PERFORMANCE EVALUATIONS

- Train the evaluators.
- Reviews should be objective and specific.
- Evaluate the performance, not the person.
- Be consistent.
- Conduct face-to-face evaluations.
- Consider employee feedback.

# TIPS FOR BETTER PERFORMANCE EVALUATIONS

- Performance evaluations must be ACCURATE!!!!
- If the performance evaluation is not going to be completed in an accurate manner that actually represents the employee's performance, you are better off not doing the evaluation at all.
- If you argue there is a long record of poor performance, this must be objectively supported by the performance evaluations.
- Be aware of "evaluation inflation": not everyone is a rock star or routinely "exceeds expectations."

# PERFORMANCE IMPROVEMENT PLANS

**Coaching Plan | performance improvement**

**Date:** February 20, 2019

**Employee:** John Doe

**Coaching Plan Dates:**

**Expectations:**

Your performance needs to substantially improve in the next two weeks.

CLINE WILLIAMS



# PERFORMANCE IMPROVEMENT PLANS

## Coaching Plan | performance improvement

**Date:** February 20, 2019

**Employee:** John Doe

**Coaching Plan Dates:** March 20, 2019

### **Expectations:**

Your performance needs to improve in the following respects: regular and reliable attendance; attention to work duties; fewer errors; and maintaining better communication with supervisor and team regarding projects, deadlines, and potential issues.

We will continue to monitor your performance for the next 4 weeks. Failure to satisfy this performance improvement plan, or to maintain a satisfactory level of performance thereafter, may result in the termination of your employment.

# IMPORTANCE OF GOOD DOCUMENTATION

# IMPORTANCE OF GOOD DOCUMENTATION

- Communicates expectations to employees.
- Helps the employee understand what he/she needs to improve upon to keep his/her job.
- Demonstrates what the employer has done to notify the employee of performance issues.
- Supports an employer's position on the legitimate, non-discriminatory reasons for termination.
- Memorializes key facts.

# WHEN SHOULD YOU DOCUMENT?

Simple answer: when you care enough about the issue to rely on it later!

- Major incidents
- Violation of workplace rules and EEO issues
- Performance deficiencies
- Meetings with employees about performance issues

# PROPER DOCUMENTATION

- Does it state the “who,” “what,” “when,” “where,” and “how”?
- Author of the documentation
- Date
- Policy or expectation violated
- Consequences of further violations/deficiencies
- Acknowledged by implicated employee
- Witnessed by HR or another supervisor

# PROPER DOCUMENTATION

Example:

*Yesterday Bob was caught making nasty remarks to a lady in the office. She tattled on him and got pretty hysterical. We yelled at Bob to knock that stuff off, and that was the end of it.*

Is this helpful, or not?

CLINE WILLIAMS

# PROPER DOCUMENTATION

How we can make this better:

Yesterday *[precise date?]* Bob *[last name?]* was caught *[by who? how?]* making nasty *[what specifically was said?]* remarks to a lady *[name?]* on the production line. She tattled *[better description?]* on him and was hysterical *[avoid inflammatory terms]*. We yelled *[“counseled”]* at Bob to knock that stuff off *[more accurate description?]*, and that was the end of it *[follow-up with female employee? Bob acknowledged misconduct? discussion of anti-retaliation? who authored this document, and when?]*.



# PROPER DOCUMENTATION

- Document promptly and contemporaneously.
- Focus on job duties and performance categories.
- Be factual, accurate, and concise.
- Avoid emotions.
- Avoid subjective opinions.
- Where appropriate, include key documents as objective evidence.
- When in doubt, talk to HR/Legal!

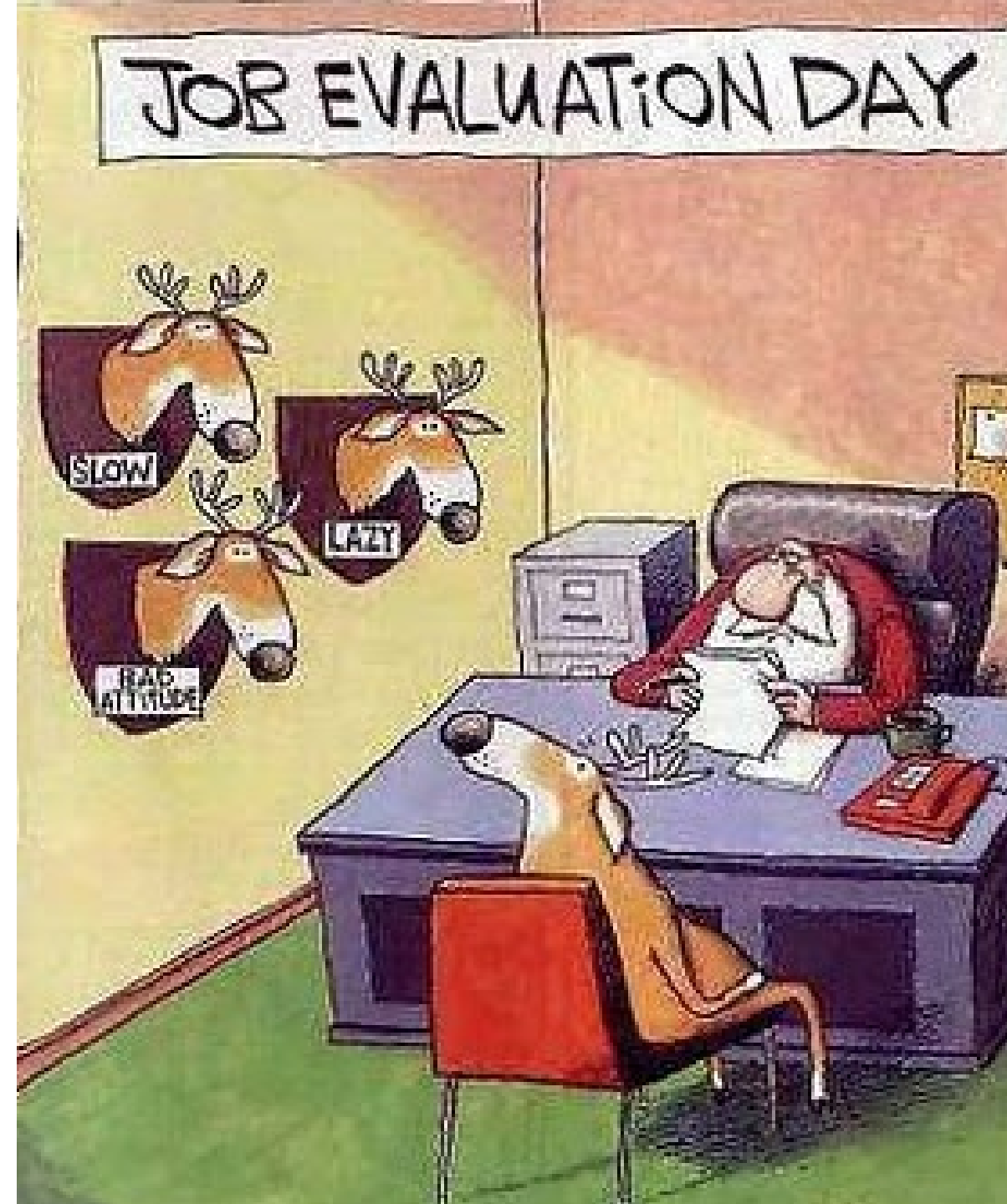


**“IF YOU CAN’T SAY ANYTHING NICE . . .”**

# CONSTRUCTIVE CRITICISM IS *NOT* HARASSMENT

Legitimate supervisor comments or critiques regarding an employee's job performance are permissible:

- Quality
- Quantity
- Timeliness
- Expectations



# SUPERVISORS' ROLE IN PREVENTING A PERCEPTION OF HARASSMENT

- Be open to communication.
- Encourage employees to raise concerns internally.
- Treat all employees fairly and with respect.
- Treat similarly situated employees in a consistent manner.
- Recognize that “adverse employment actions” include actions less severe than termination.
- Get help with tough situations!



**EMPLOYEE HANDBOOKS:  
PROGRESSIVE DISCIPLINE POLICIES**

# PROGRESSIVE DISCIPLINE POLICIES

## **BENEFITS IF DONE CORRECTLY:**

- Clear explanation of consequences to aid employee morale and buy-in.
- Guidance to managers and supervisors regarding appropriate action.
- Basic fairness.
- Provides an opportunity to correct behavior.
- Aids employers in documenting behavioral and performance issues, and defend against claims of discrimination and retaliation.
- Aids in applying similar discipline for similar behavioral/performance issues.

# PROGRESSIVE DISCIPLINE POLICIES

## CONSEQUENCES IF DONE INCORRECTLY:

- Could create inflexibility and prevent needed action.
- If policy is not followed consistently, it could appear discriminatory.
- Implied contract?
- Jeopardize at-will status of employment?
- Time consuming or poses unnecessary hurdles?



# PROGRESSIVE DISCIPLINE POLICIES: SOLUTIONS

- Does your policy match your actual practice?
- Remove formulaic or rigid requirements.
- Ensure flexibility in application of discipline: state that progressive discipline is *discretionary*, not mandatory.
- Confirm ability to bypass steps in a progressive discipline policy, depending on the circumstances and severity of the infraction.
- Clarify throughout the handbook that policy violations may result in discipline, up to and including termination of employment.

# APPLYING PROGRESSIVE DISCIPLINE

- Aim for consistency: similarly situated employees must be treated the same
  - Element of *prima facie* claim of discrimination: similarly situated individuals outside the protected class were treated more favorably than the claimant
  - Maintain institutional knowledge: What have you done previously?  
Record-keeping of discipline?
- What other performance/behavioral problems has the employee had?
- Consider who is making the discipline decision: do you need oversight or an independent decision maker?

# APPLYING PROGRESSIVE DISCIPLINE WHEN AN EMPLOYEE MAKES A COMPLAINT

- You are about to discipline an employee for conduct, and then they make a workplace complaint. What do you do?
  - Pause. Evaluate. Discuss.
  - Did the employee engage in the misconduct for which discipline was to be given?
  - Is there documentation of your discussion/decision to discipline prior to receiving the employee's complaint?
  - Does the employee's complaint relate to the underlying misconduct for which the employee is being disciplined/terminated?
  - Is the information source for the misconduct implicated/compromised?

It is best to investigate the employee's underlying complaint before making or finalizing a discipline/termination decision.

# DISCIPLINE FOLLOWING A WORKPLACE COMPLAINT?

## Example 1:

Employee routinely fails to set up equipment for the next shift, despite being counseled to do so. It is an essential function of the job, and Employee is capable of performing it. Many witnesses report the same concern. At the termination meeting, Employee complains that his supervisor is targeting him because of his age.

*Should you continue with the termination?*

# DISCIPLINE FOLLOWING A WORKPLACE COMPLAINT?

## Example 2:

Employee has had terrible attendance, not showing up to work. Supervisor reports the problem, and the decision to end employment is made. At the meeting, Employee indicates that she can't bring herself to come into work recently because she is being harassed by her supervisor.

*Should you continue with the termination?*



# **EMPLOYMENT POLICY CONSIDERATIONS UNIQUE TO PUBLIC EMPLOYMENT:**

**Constitutional Considerations  
Unique State and Local Laws  
Collective Bargaining Protections**

# CONSTITUTIONAL CONSIDERATIONS

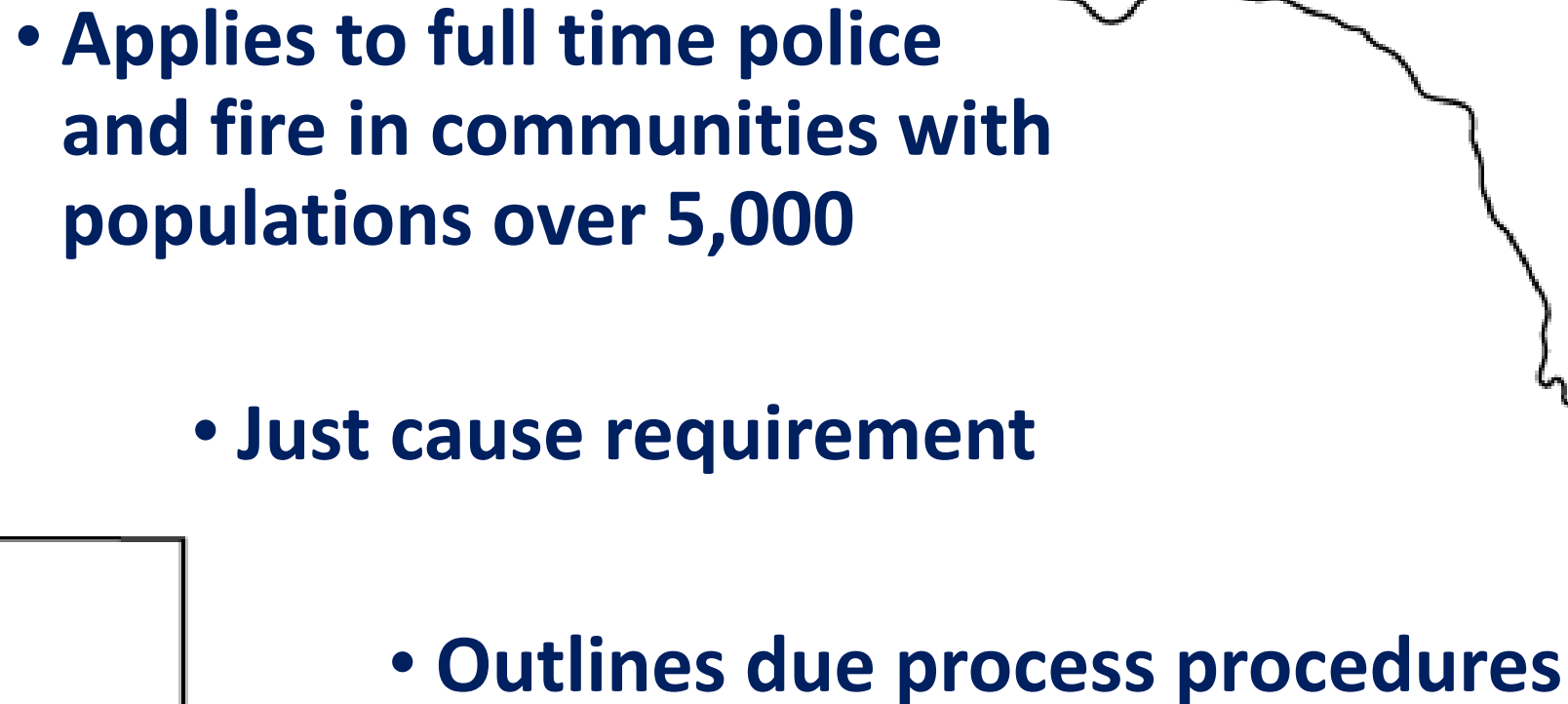
## DUE PROCESS

- Must establish a Protected Interest (life, liberty, or property)
- Most commonly this is a Property Right
  - Expectation of employment based on state law
    - Tenure statutes
    - Civil service laws
    - Established rules
  - Distinguish at-will employment





# NEBRASKA CIVIL SERVICE ACT

- 
- **Applies to full time police and fire in communities with populations over 5,000**
    - **Just cause requirement**
    - **Outlines due process procedures**

# CONSTITUTIONAL CONSIDERATIONS: DUE PROCESS



- Protected interest - Liberty
  - “Stigma plus”
  - Damage to reputation or defamation which may limit future employment

# CONSTITUTIONAL CONSIDERATIONS: DUE PROCESS

## Hearing Requirement – *Loudermill*

- Pre-deprivation procedures
  - Identification of charges
  - Summary of evidence
  - Provide an opportunity to respond
- Post-deprivation/termination procedures
  - Formal hearing

# QUESTIONS?

**TARA A. STINGLEY**  
**[tstingley@clinewilliams.com](mailto:tstingley@clinewilliams.com)**  
**[www.clinewilliams.com](http://www.clinewilliams.com)**

DISCLAIMER: THESE MATERIALS ARE NOT INTENDED TO CONSTITUTE A COMPLETE ANALYSIS OF ALL LEGAL CONSIDERATIONS. THEY ARE OF GENERAL NATURE AND INTENDED FOR EDUCATIONAL AND INFORMATIONAL PURPOSES ONLY, NOT LEGAL ADVICE.

**CLINE WILLIAMS**