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# Staff Discipline and Termination: Best Practices

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Melvin Muskovitz, a member of Dykema's Labor and Employment Practice Group, represents public and private sector employers in federal and state courts, before administrative agencies and in arbitration. He also devotes a significant portion of his time counseling and assisting employers with respect to issues arising under state and federal employment and labor laws, assisting in drafting employment policies, advising with respect to the employee discipline and termination, and negotiating collective bargaining agreements.

Prior to entering private practice, Mel investigated and litigated unfair labor practice cases with the National Labor Relations Board and was an Assistant City Attorney for the City of Ann Arbor, responsible for all of the City's employment and labor matters. As a result of this diverse background, Mr. Muskovitz provides a unique counseling perspective, combining his investigative and trial skills with hands-on experience, allowing him to find creative and practical solutions to personnel disputes and complex legal issues without disrupting an employer's operations. For seminar and training programs Mel has presented, visit: [www.dykema.com/professionals-melvin\\_j\\_muskovitz.html](http://www.dykema.com/professionals-melvin_j_muskovitz.html). Mel can be contacted at (734) 214-7633 and [mmuskovitz@dykema.com](mailto:mmuskovitz@dykema.com).

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# Topics

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- Path to Effective Discipline
- Termination - Getting it Right
  - Pre-Termination Considerations
  - Special Statutory Considerations
  - Retaliation/Whistleblower Claims
  - Post-Termination Considerations

# Staff Discipline: The Path to Effective Discipline

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- Work Rules/Code of Conduct
  - Progressive discipline – maintain flexibility
  - Major/minor rules – beware of pitfalls
- Up to date job description
- Trained supervisors
- Retain “evidence”
- Get employee response

# Staff Discipline: The Path to Effective Discipline

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- Central person involved in discipline for
  - Consistency
  - Approval
- Oral warnings should be memorialized in writing
- Consider
  - Performance Improvement Plan
  - Last Chance Agreement
  - Letter of Expectations
  - But retain flexibility

# Termination: Pre-Termination Considerations

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- What is employment status: at-will or just cause?
- Does the employee have a legitimate explanation for his/her actions or poor performance?
- Can you prove your case?
- Is the decision to terminate premature?
- Is the decision to terminate inconsistent with previous actions related to the employee?

# Termination: Pre-Termination Considerations

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- Does the punishment “fit the crime?”
- Has the organization administered discipline in a consistent manner?
- Does the employee have any pre-termination rights?
- Special statutory considerations
- Beware of retaliation claims



# Termination: Pre-Termination Considerations

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- What is the employment status: at-will or just cause?
  - Employment Agreement
  - Employer Policies
  - Collective Bargaining Agreement
  - Michigan Veteran Preference Act
  - USERRA

# Termination: Pre-Termination Considerations

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- Does the employee have a legitimate explanation for his/her actions or poor performance?
  - Conduct a thorough investigation
  - Get the employee's version of events
  - Consider whether explanation is plausible

# Termination: Pre-Termination Considerations

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- Can you prove your case?
  - Witnesses
    - Will they be available?
    - Are they credible?
    - First hand evidence or hearsay?
  - Documentary Evidence
    - Was there any?
    - Has evidence been maintained?

# Termination: Pre-Termination Considerations

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- Is the decision to terminate premature?
  - Is progressive discipline required?
  - Consider alternatives to termination if appropriate
    - Last chance agreement
    - Performance improvement plan
- Is the decision to terminate inconsistent with previous actions of the organization?
  - Favorable performance review
  - Merit increase
  - Promotion
  - Award
  - Bonus

# Termination: Pre-Termination Considerations

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- Does the punishment “fit the crime?”
  - Is the punishment appropriate?
  - Look at
    - Nature of the conduct
    - Employee’s record
- Has the organization administered discipline in a consistent manner?
  - Treat similarly situated employees similarly
  - Discrimination claims can arise even if the employee is at-will

# Termination: Pre-Termination Considerations

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- Does the employee have any pre-termination rights?
  - Be sure to follow company's pre-termination procedures
  - Union contracts
  - Possible due process rights
    - Property interest
    - Liberty interest

# Special Statutory Considerations

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- ADA
- FMLA
- Workers' Compensation
- Michigan Veteran Preference Act
- USERRA
- PERA
- Freedom of Speech (Constitutional Protection)
- Whistleblower Claims

# Special Statutory Considerations

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- ADA
  - Accommodation unless undue hardship
  - Leave of absence is an accommodation
- FMLA
  - Right to leave
  - Right to return to work
- Workers' Compensation
  - Cannot terminate because filed a claim
  - Can terminate because of absenteeism
  - Beware of disparate treatment



# Special Statutory Considerations

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- Michigan Veterans Preference Act
  - “Veteran” means an individual who served in the United States Armed Forces, including the reserve components, and was discharged or released under conditions other than dishonorable
  - Limited grounds for termination or suspension,
    - Official misconduct
    - Habitual, serious or willful neglect of job duties
    - Incompetency
    - Conviction of intoxication or felony; extortion
  - Written notice of cause and opportunity for hearing before action taken

# Special Statutory Considerations

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- USERRA (Military Leave)
  - Right to leave
  - Right to return to work
  - A re-employed service member cannot be discharged, except for cause
    - Within one year, if served in the military for more than 180 days
    - Within 180 days if served in military between 30 and 180 days

# Special Statutory Considerations

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- Michigan Public Employment Relations Act
  - Protected concerted activity
  - Does not have to involve a union
    - Protected activity
    - Concerted activity

# Special Statutory Considerations

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- Freedom of Speech (Constitutional Protection)
  - Elements of a claim
    - Speech involves a matter of public concern
    - Employee's interest outweighs employer's interest
    - Employee suffers an adverse action
    - Causal connection between speech and adverse action

# Special Statutory Considerations

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- Whistleblower Claims
  - Elements of a claim
    - Reports, or is about to report a violation, or suspected violation, of a law, regulation or rule, to a public body, or
    - Is requested by a public body to participate in an investigation, hearing or inquiry held by that public body, or a court action
    - Employee suffers an adverse action
    - Causal connection between speech and adverse action

# Retaliation Claims

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- Federal and state employment and labor laws prohibit retaliation against employees who exercise their statutory rights.

ADA

Title VII

ADEA

USERRA

FLSA

WDCA

FMLA

ELCRA

PERA

MPWDCRA

# Elements of Whistleblower and Retaliation Claims

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- Employee has engaged in protected activity
- Employee has suffered an adverse employment action
- Causation – link between activity and adverse action
- Protected activity
  - Conduct protected by the Whistleblower Protection Act
  - Initiated an internal complaint of harassment
  - Filed a claim of discrimination with EEOC or MDCR
  - Requested an accommodation for a disability

# Elements of Whistleblower and Retaliation Claims

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- Protected Activity
  - Requested a pregnancy leave of absence
  - Took FMLA leave
  - Engaged in Union activity or other protected concerted activity
  - Filed a wage and hour complaint
  - Incurred a work related injury



# Elements of Whistleblower and Retaliation Claims

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- Causation
  - “Smoking gun” evidence
  - Circumstantial evidence
    - Knowledge
    - Disparate treatment
    - Timing

# Steps to Avoid Claims of Retaliation

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- Include prohibition against retaliation in EEO and anti-harassment policies
- Establish effective complaint procedures
- Ensure legitimate reason for adverse employment action
- Avoid disparate treatment
- Second opinion before taking adverse action

# Post-Termination Considerations

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- Ensure that post-termination procedures are followed
- Be candid with the employee
- Respect the employee's feelings
- Respect the employee's privacy
- Avoid inconsistent post-termination statements
- Retain relevant documents
- Help the employee find other employment
- Obtain a release

# Post-Termination Considerations

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- Ensure that post-termination procedures are followed
  - Policies
  - Due process rights
  - Union contracts
- Be candid with the employee
  - Don't "sugar-coat" it
- Respect the employee's feelings
  - Avoid embarrassing the employee
  - Avoid "escorting" the employee from the building unless necessary
- Respect the employee's privacy
  - Share information only on a need-to-know basis

# Post-Termination Considerations

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- Avoid inconsistent post-termination statements
  - Termination notice
  - Unemployment compensation response
  - References
- Retain relevant documents
  - Secure the employee's personnel file
  - Retain all documents that support the decision

# Post-Termination Considerations

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- Help the employee find other employment
  - Outplacement services
  - Neutral reference
- Obtain a release
  - Consider conditioning severance on execution of a release
  - Notice and revocation periods (40+ year old employees)

# Final Thoughts

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- Start with good hiring practices
- Well trained supervisors are key

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# Questions?

## Thank you.

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