Words that Work and Words That Don’t: HR Tips

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Brad E. Bennett

- Over 20 years of experience as an employment and labor lawyer and human resources professional.
- Represents clients in litigation, collective bargaining, arbitrations, and administrative proceedings before the EEOC, OCRC, SERB, and SPBR.
- Assists clients with HR compliance, including day-to-day employment issues, discipline, handbook policies, job descriptions, internal investigations, leave issues, FLSA compliance, and HR audits.
- Listed in Best Lawyers in America.
- Selected to “Super Lawyers” every year since 2015.
- OSBA Certified Specialist in Labor and Employment Law.
Words That Work and Words That Don’t

AGENDA

• Interview and Selection
• Performance Evaluations
• Discipline Process
• Employment Policies

TOMORROW YOU'LL HAVE TO LIVE WITH THE THINGS YOU SAID
Words That Work and Words That Don’t

Interview and Selection Process

• How many received “interview training” prior to conducting first interview?

• Not a good thing to learn through “trial and error”
Words That Don’t Work

- Not using structured questions/formats
- Failure to document rationale/ranking
- Delving into protected/illegal areas
- Making promises that can’t be fulfilled
- Not valuing the non-verbal “PR” aspect (late arrival, interruption)
- Misuse of social media (electronic stored communications act)
Basic Interview Format

• **Tier One Questions** – Asked to all applicants for the position

• **Tier Two Questions** – “Behavioral” or “situational” interview questions

• **Tier Three Questions** – Specific to each applicant (resume and “power words”)

Social Media During Selection

How is it being used by supervisors?

- “Show me your social media profile”
- “Friend me”
- Google searching...

Challenges:

- Discrimination?
- Invasion of privacy?
- Electronic Stored Communications Act?
**ADA Impact on Interviewing**

**Interview Options**

- Request to describe/demonstrate performance of job-related functions?
- Provide job descriptions during interview process?
EEOC v. Service Temps Inc. (2012)

Automatic rejection of deaf applicant without discussing accommodations causes lawsuit
Discriminatory interview questions by one member of a panel taints the whole process.

Barbano v. Madison County
922 F.2d 139 (1990)
EEOC v. High Speed Inc. (2011)

Never a good idea to say “we can’t hire you – you’re pregnant”
Words That Work and Words That Don’t

Grading the person, not the position

Not communicating through the entire evaluation “system”

Committing “rater errors”

Management misspeak
Performance Evaluation Systems

Made up of what you say/write in the following:

- Job Description
- Continual Management Feedback
- Discipline/Coaching
- Performance Evaluation
Words That Don’t Work -

Supervisor/Rater Errors

- Primacy/Recency
- Leniency
- Central Tendency
- Halo/Horns

- Be Like Me/Mini-Me Effect
- Inflation
- Length of Service Bias
- Morally Malignant
Words That Don’t Work

Management Misspeak

Clear, direct, and positive communication is essential

Sometimes I’ll start a sentence and I don’t even know where it’s going. I just hope I find it along the way.
Management Misspeak in Performance Review
Words That Work!

- Use a check and balance system that provides a second eye to review the proposed evaluation for rater error
  - i.e., HR or other supervisor or department head
- The best protection against evaluation errors and management misspeak is supervisor training!!
Words That Work and Words That Don’t During the Discipline Process
Words that don’t work . . .

Failure to document historical problems
• Attendance issues never addressed before they’re problems
• “Attitude” problems (lack of follow-up)
• Leave abuse

HR Answer – if it isn’t documented, it didn’t happen!

Just as bad:
• Using words in discipline notice that actually help an employee’s case
• “When we met today, I explained that your report of harassment was unfounded. You then became upset and I didn’t appreciate your tone. You are hereby suspended for your behavior.”
Words that don’t work . . .

Ostrich Communicator (Lenient)
“Ostrich Communicator” (Lenient)

• Desire to “get along” or not to “cause waves” (may also be close to retirement)
• Letting “home issues” of the employee result in forgiveness of work behavior
• Being “too busy” or thinking “if no coworkers are complaining, why worry?”
• Uses HR or other resources as the “bad guy” – own the decision!

• Burying head in the sand only allows issues to snowball
  • Other employees may view manager as “weak” and engage in same action
  • Bullying employee will take advantage (hostile work environment arises)
  • High turnover
  • Next manager left to deal with the issue
Words that don’t work . . .

“Ready... Shoot... Oh, and Aim”
“Ready... Shoot... Oh, and Aim”

- Knee-jerk reaction (emotional response)
- Lack of investigation
- Failure to review with HR prior to taking action
- “Just Cause” standard even met?
  - Due process?
  - Punishment fits the crime?
  - Policy reviewed?
  - Past practice consulted?

Must improve Emotional Intelligence (EQ)

- Take a break when emotions high
- Involve neutral party to review issue first (HR)
- Get a game plan first
Words that work and words that don’t …during the discipline process

Words that don’t work when delivering discipline:

- Failure to include a management witness (who can prove what you said?)
- Failure to follow CBA requirements
- Avoid “management misspeak” here too!

Words that work:

- Meeting should be short
- *Never* in public (in front of coworkers)
- Don’t argue
- Decision is final (non-debatable)
- Written Legitimate Business Reason Articulated (linked to policies)
Words That Work and Words That Don’t

Failing to have updated handbook policies

- Harassment
- Reasonable Accommodation
- Lactation Breaks
- Light Duty Policy
- Insurance Opt-Out
Words That Work and Words That Don’t

Employment Policies

• **Workplace Harassment**
  - Include all protected classes (not just sex)
  - Include off-duty behavior
  - Include statements/actions over social media
  - Include retaliation
  - Include workplace bullying?
Harassment Quiz

Do any of the following constitute harassment?

- Employee telling a sexually explicit joke?
- Employee putting his hand on another employee’s shoulder?
- Employee asking another employee out on a date?

Answer – depends

- Fact-based inquiry
- Welcomed/encouraged?
- Told to stop?
- Frequency/severity
Words That Work and Words That Don’t

Reasonable Accommodation Policy

• Required to supply a “reasonable accommodation” to enable an employee to perform the “essential functions” of the job – ADA,

• Includes Title VII protection (religion, pregnancy)
Follow an interactive process to determine accommodations

Case law and the EEOC look at whether an “interactive process” was utilized between the employer/employee to determine whether a reasonable accommodation is available

• Utilization of an interactive process is helpful during the defense of ADA “failure to accommodate” claims
• Accommodations policies are crucial!
Interactive Process – 8 Steps

1. Employee requests accommodation
2. Employer examines the job and determines essential functions
3. Employer consults with employee to learn about physical/mental abilities as they relate to the essential functions
4. Employer makes individualized determination whether employee poses direct threat, and if threat can be removed by reasonable accommodation
Interactive Process – 8 Steps

5. Employer and employee **interact** to identify potential accommodations

6. Employer considers whether the accommodation would impose an **undue hardship** – if so, other alternatives must be considered

7. If reasonable accommodation is available, employer **provides** it in a timely manner

8. Be sure to **follow up** to ensure accommodation is working

*Key is to have and follow a properly worded accommodation policy!*
Words that Don’t Work ...Case Example

- Employee told supervisor “that his apnea ‘was coming back again’ and that he would have to pay $1,200 for the medical device he needed because Blue Cross would not cover it” just to let him know
- “This is not enough to suggest that Parsons requested accommodation from Auto Club.” . . . . FURTHER:
- “When an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be ‘too little, too late’”
ADA and Marijuana as Accommodation

- Road Worker has reported that his physician has recommended medical marijuana under Ohio law for his medical condition.
- He requests to use it and that he also:
  - Be excused from having marijuana in his system or from having it on his person for purposes of the Drug-Free Workplace Policy.
  - And “any and all other reasonable accommodations”
ADA and Marijuana

- Courts have generally held that ADA does not protect medical marijuana because it remains illegal under federal law.
- Ohio’s Medical Marijuana Law allows it to be prohibited under a drug free workplace policy.
EEOC v. Abercrombie and Fitch

- Failed to consider religious accommodation during interview process
- See also Webb v. City of Philadelphia, (3d Cir. Apr. 7, 2009)
  - Police where maintaining appearance of neutrality and formality considered.
Lactation Breaks

The Patient Protection and Affordable Care Act also requires employers to accommodate nursing mothers’ need to express breast milk by providing a place to do so as often as needed.

• Have a Lactation Break policy?
Pregnancy and Light Duty Policies

• An employee, who delivers light packages for UPS, becomes pregnant
• Her doctor orders her to lift no more than 20 lbs
• Even though her work rarely, if ever, requires her to lift heavy packages, UPS includes lifting up to 70 lbs as an essential job function
• Employer policy accommodated lifting restrictions with temporary assignments only when: (1) the employee suffered an on-the-job injury; (2) the employee had a disability under the ADA; or (3) a driver lost their DOT certification
• UPS requires the employee to take unpaid leave (she used all of her FMLA leave), and reinstated after giving birth
Pregnancy and Light Duty Policies

- The Supreme Court decided that UPS’s rule that employees could be assigned to light duty **only for on-the-job injuries** discriminates against pregnant women. The Court’s rationale is the same as the EEOC guidelines.

- The EEOC’s 2014 guidelines specify that employers must accommodate pregnant employees with light duty if the same is done for employees **similar in their ability or inability to work**.

Pregnancy and Light Duty Policies

• Supreme Court’s prima facie case for pregnancy accommodation:
  • (1) affected by pregnancy, childbirth, related medical condition; (2) requested accommodation; (3) denied accommodation; and (4) employer accommodated others similar in their ability or inability to work

• Employer must then proffer its legitimate, nondiscriminatory reason (which cannot involve cost of including pregnant worker)

• Employee can overcome Employer’s reason if she demonstrates that the employer’s policies impose a “significant burden” on pregnant workers
Pregnancy – Takeaways

• Review/revise the following policies to ensure that they are worded so as to capture requirements for employees affected by pregnancy, childbirth, or related medical conditions:
  
  • Job accommodations, light duty, leave of absence, lactation breaks, discrimination/harassment.

• Conduct management/supervisor training
# Cash-in-Lieu of Insurance /Opt-Outs

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<tr>
<th><strong>ORC 505.603(A)</strong> -</th>
<th><strong>ORC 505.60(D)</strong> -</th>
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<td>• May provide a cash-in-lieu payment to township employees who completely opt out of the township insurance</td>
<td>• Alternatively, can provide for reimbursement of out-of-pocket premium paid if employee obtains insurance elsewhere OR is denied coverage under township plan</td>
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<td>• Up to a <strong>maximum of 25%</strong> of the township’s cost</td>
<td>• Up to maximum of average of what Township would have paid</td>
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<td>• Must have cafeteria plan to qualify.</td>
<td>• <strong>OAG Opinion</strong> – cannot provide payment for “opting down” in coverage only (e.g. from Family to Single)</td>
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<td><strong>ORC 505.601</strong> -</td>
<td>• <strong>ACA implications</strong> of reimbursement plans.</td>
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<tr>
<td>• If Township does not provide insurance AT ALL– may <strong>reimburse</strong> employee for out-of-pocket premium.</td>
<td>• Be sure words match the plan to avoid Audit finding</td>
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