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The Misuse of Annual Employee Performance Evaluation and Failure to Utilize Progressive Disciplinary Action

I have been involved as an expert witness in numerous employment cases. In almost every case, a single negative annual employee performance evaluation, often involving invented facts, a minor NCAA rules violation portrayed as serious transgression and/or negative student evaluations are used to justify the termination of a strong employee who raised gender inequity issues. Often, there is no indication in the coach's personnel file of any previous unsatisfactory performance evaluation or pedagogical deficiency. Termination was obviously retaliatory in purpose, with the athletic director demonstrating resentment over the coach raising a gender inequity, salary or treatment issue. It is simply not the purpose of the annual employee evaluation to raise or correct undesirable behavior or a specific job performance deficiency.

The function of an annual performance evaluation should be to review the 12-month achievements of each employee directly focusing on the employee's formal job description duties and responsibilities and strategic plan objectives assigned to that employee's position. The annual evaluation should be a process that helps employees maximize their performance, continue to grow in their positions, celebrate their accomplishments collectively and individually and address future professional development objectives. Annual performance evaluation meetings should also include discussion of programs and practices that increase efficiency, decrease waste, improve safety, and reduce the risk of litigation. Thus, annual performance evaluations should not replace informal and formal personnel actions (oral coaching and counseling, performance improvement plans and corrective action) that are the proper elements of the employee discipline system.

The use of the annual employee evaluation as a disciplinary mechanism is improper because it allows an undesirable behavior to continue until the end of an employment period and permits it to continue to negatively impact either staff or students. A separate and distinct process that immediately corrects undesirable performance or behavior is therefore necessary. Such model human resources policy and practice exists and is termed "gradually escalating discipline." The "gradually escalating discipline" steps that should be used to address undesirable or improper conduct should occur in the following order, consistent with the seriousness of the employee's behavior or non-performance of job responsibilities:

STEP ONE Informal oral correction. The supervisor points out improper pedagogy or other behavior and explains expectations. This conversation can be best described as coaching or counseling to accomplish small corrections and improvements, No written documents are inserted in the employee's personnel file.

STEP TWO Formal written performance improvement plan. A written document is created by the supervisor in collaboration with the employee to address an on-going performance problem with the plan including measurable outcomes for improvement and reevaluation within a time certain. These written plans and the result of reevaluations are inserted in the employee's personnel file.

STEP THREE Corrective action. The supervisor creates a written communication that contains the reason for initiating corrective action, a clear description of the behavior that needs to be changed, corrective steps for remedying the behavior and formal warning of the specific consequences (i.e., suspension with pay, suspension without pay, termination) if the behavior is not remedied by a time certain or if it reoccurs. The provisions of the corrective action letter are dependent on the seriousness of the employee misconduct or performance failure.

More serious transgressions might skip the first and/or second steps. Most important, the supervisor must recognize that the primary purpose of "gradually escalating discipline" is to ensure that the coach stops the undesirable performance or behavior immediately so such conduct does not affect job performance or have a negative impact on students or other employees.

I think the reason why many administrators do not use such established HR systems is simply fear of confronting with the employee to discuss unacceptable behavior. It is pure avoidance. When such systems are not used, there is no record of supervisor dissatisfaction with behavior or performance and there is no record of the supervisor trying to help the employee correct undesirable behavior, which, in my opinion are requirements for successful termination proceedings. What I see in too many court cases is an employee that raises a Title IX issue or objects to an administrator's decision and not a coach engaging in improper conduct or performance, and, in close proximity, a negative annual performance evaluation, intended to suggest that the occurrence of improper behavior is the cause for the termination decision. These two circumstances - an invented but plausible reason for disciplinary action and an improper use of the annual performance evaluation, are the predicates used by many plaintiffs to allege retaliation.

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