

# Employment Practices Educational Program 2021

By:

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It does not constitute legal advice. Cases are fact sensitive.  
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# Today's Program

- ▶ **Active participation is required!**
  - Required to participate
  - Respond in the Q&A
  - Have your smart phone handy!
- ▶ **Warning: No privilege or confidentiality**
  - Please keep questions general in nature
- ▶ **There is no right of distribution or copying of the presentation/seminar materials**
  - No one is permitted to record or rebroadcast this program or reproduce the materials

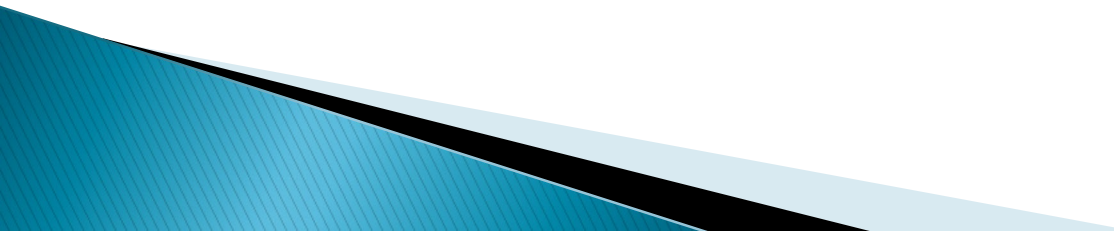
# Today's Program

- ▶ Avoid litigation headaches
    - Personal liability and embarrassment
  - ▶ Understand the need to follow the process and the professionals
  - ▶ Stay within the lines . . . lines of authority.
    - Ignorance *can be* bliss!
    - Consistency.
  - ▶ Updates
    - Implicit Bias
    - Pronouns
    - COVID
    - Cannabis
  - ▶ Overview of disciplinary issues
- 

# Recap

- ▶ Off duty, off premises
  - ▶ A single incident can be enough
  - ▶ Don't be creepy
  - ▶ Anyone can be subjected to unlawful conduct
  - ▶ Investigations aren't cookie-cutter
  - ▶ There is a duty to cooperated & report
    - Monitor the environment
  - ▶ Policies apply to non-employees
    - Review key policies in advance
  - ▶ Once triggered, we must act
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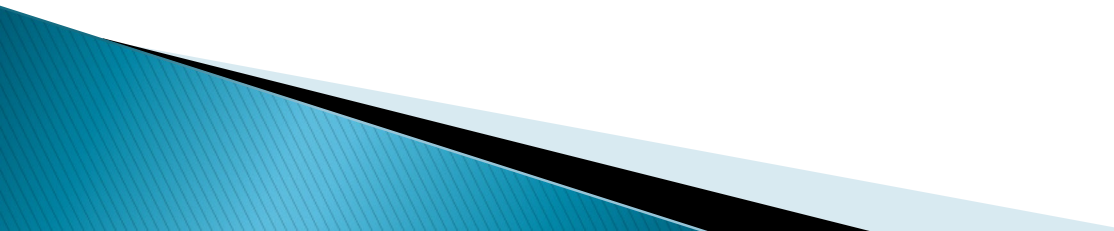
# Top Policies

- ▶ EEO policy
  - ▶ Anti-discrimination
  - ▶ Anti-harassment
  - ▶ Anti-retaliation policy
  - ▶ Complaint policy
  - ▶ Standards of conduct
- 

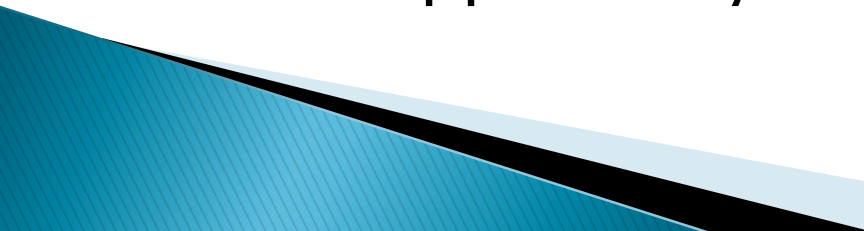
# Another Reason To Monitor & Apply Policies . . .

- ▶ Workplaces “rife” with rough language:
  - May undermine *your* ability to later take action
  - Restaurant
    - Employee used social media

# No “complaint” . . . No problem?

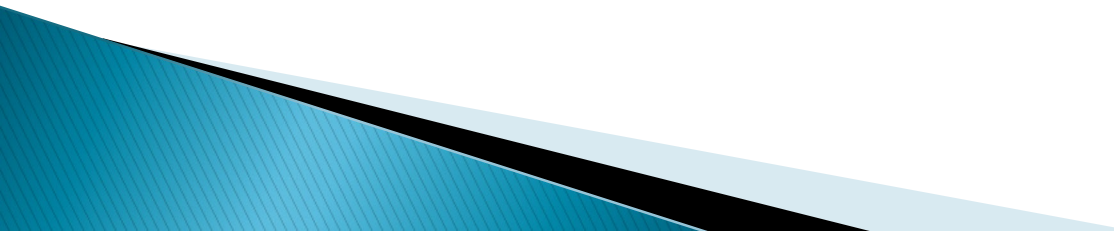
- ▶ “Please don’t do anything, but . . .”
  - ▶ “I don’t want to pursue it anymore . . .”
  - ▶ “Sue [the alleged victim] told me [coworker] that . . .”
  - ▶ “I [witness] saw . . .”
  - ▶ Notice triggers obligation
- 

# PROMPT REPORTING IS ESSENTIAL!

- ▶ Organizations rely upon prompt, timely reports of violations
    - to ensure its ability to promptly, effectively and efficiently address it
    - incident is fresh in the minds of witnesses
    - witnesses can be more readily identified
    - collect and preserve evidence
    - get accurate, detailed records or statements
    - to maintain the integrity of the workplace
    - prevent further violations
  - ▶ Balance: protect employees and provide accused a fair opportunity to address allegations
- 



# Tips To Avoid A Disaster

- ▶ LISTEN
  - ▶ Take notes
  - ▶ Exercise your “Right to remain silent”
    - Don’t BABBLE
    - Don’t make excuses, provide explanations
      - Don’t expound
  - ▶ Don’t be arrogant
  - ▶ Don’t be dismissive
- 

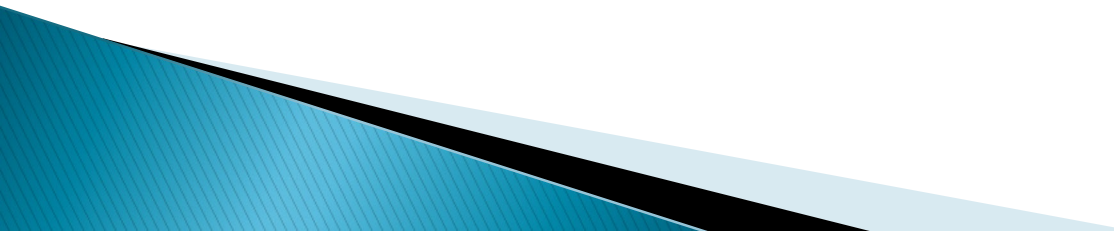
# Tips To Avoid A Disaster

- ▶ Keep lookout
  - The “scene of the crime”
- ▶ Identify resources in advance
  - Policies specify unacceptable conduct
- ▶ This isn't hide and seek

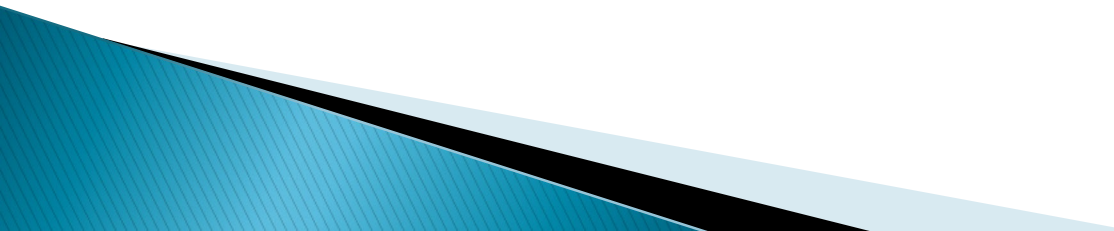
# Failure to Address

- ▶ Futility argument used to overcome the defense of failure to internally complain
- ▶ Allows problems to feaster
- ▶ Creates dissatisfaction/dissension
  - Widens the divide
- ▶ Enables the wrongdoer
- ▶ Send the wrong message to others
  - Encourages others to do it
  - Discourages complaints/efforts to resolve it

# Unwitting Admissions

- ▶ I didn't mean it
  - ▶ There wasn't a formal complaint
  - ▶ It was only a joke
  - ▶ \_\_\_\_isnt our employee
  - ▶ We're both Italian, Black, Jewish, Gay . . .
  - ▶ I'm an E-O-J
  - ▶ They did it too
  - ▶ Boys will be boys
- 

# Retaliation Indicators

- ▶ The Spotlight
  - ▶ Manufacture a Record
  - ▶ Threaten or Isolate
  - ▶ Set Up
  - ▶ Job Elimination
  - ▶ Career Paralysis
  - ▶ Termination
- 

# Solve the Riddle

- ▶ A father and son were involved in a car accident in which the father was killed and the son was seriously injured. The father was pronounced dead at the scene of the accident and his body was taken to a local morgue. The son was taken by ambulance to a nearby hospital and was immediately wheeled into an emergency operating room. A surgeon was called. Upon arrival and seeing the patient, the attending surgeon exclaimed “Oh my God, it’s my son!”
- ▶ Can you explain this?

# Action Plan

- ▶ Slow down
  - Don't knee jerk it
  - Clear your processes
  - Conscious awareness
  - Break down associations and assumptions
  - Perception vs. Reality
- ▶ Uniformity
- ▶ Seek out resources
  - <https://melsafetyinstitute.org/>
  - <https://implicit.harvard.edu/implicit>

# GENDER PRONOUNS

Pronouns



**He/  
Him/ His**

**She/Her/  
Hers**

**They/  
Them/  
Theirs**

**Ze (or  
Zie)/Hir/  
Hirs**

**Ze (or  
Zie)/Zir/  
Zirs**

Subject



**He**  
asked

**She**  
asked

**They**  
asked

**Ze**  
asked

**Ze**  
asked

Object



I told  
**him**

I told  
**her**

I told  
**them**

I told  
**hir**

I told  
**zir**

Possessive



This is  
**his**  
office

This is **her**  
office

This is  
**their**  
office

This is **hirs**  
office

This is  
**zirs**  
office

Reflexive



He  
reminds  
**himself**

She  
reminds  
**herself**

They  
remind  
**themselves**

Hir  
reminds  
**hirsself**

Zir  
reminds  
**zirsself**



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Congratulate [Name] and 10 others for  
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Congratulate [Name] (She/Her/Hers) for  
**starting a new position** as P&O Business Partner,  
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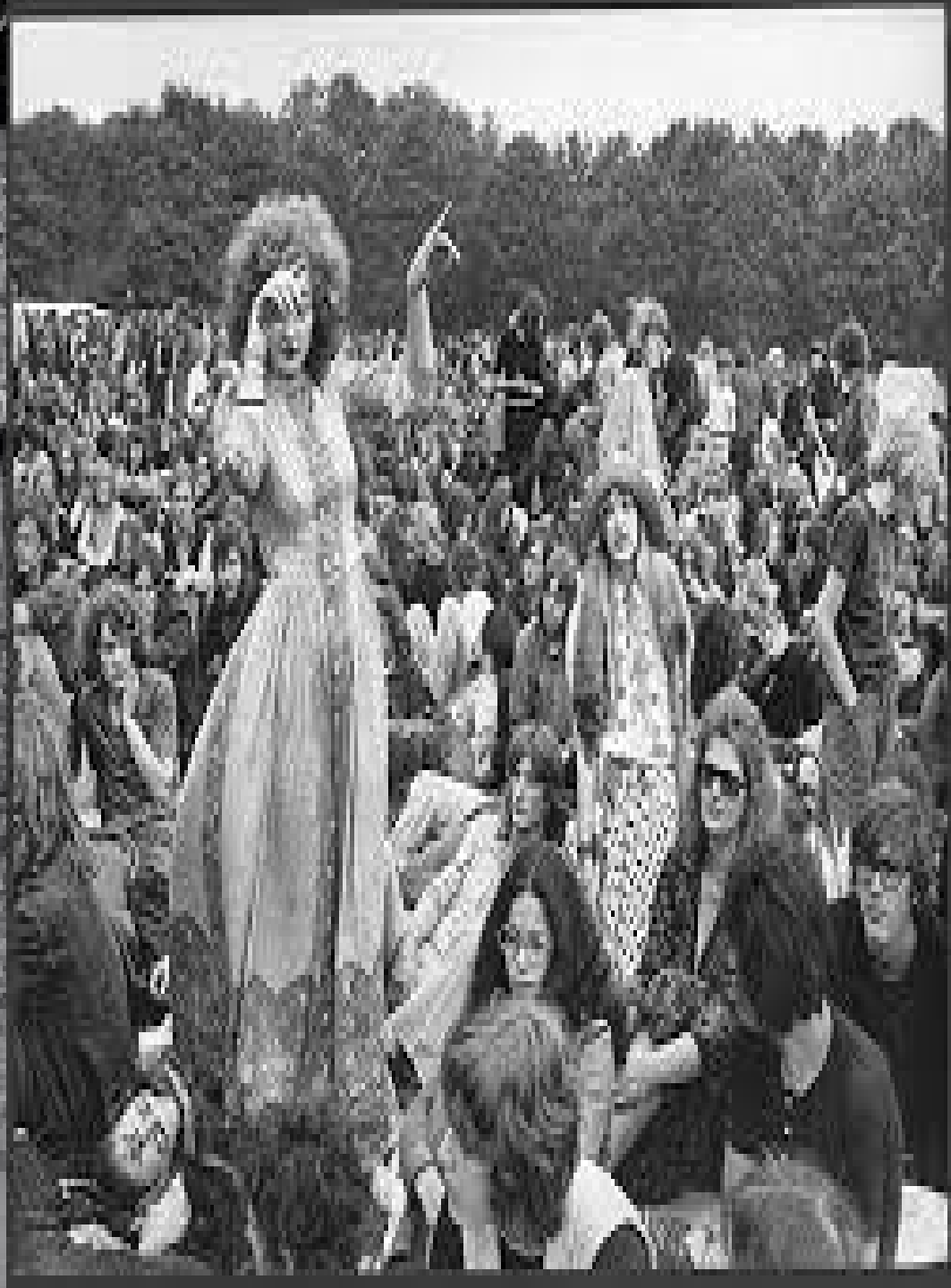
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# COVID –19



# Covid Vaccinations

- ▶ Not an ADA disability related inquiry
- ▶ Limit the proof to vaccination
- ▶ Mandating Vaccines
  - JIF Website: COVID-19 Info
- ▶ Follow your senior management!

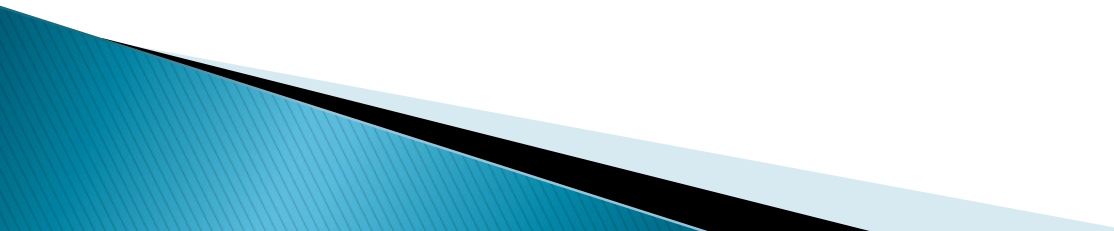
CANNABIS

Medical  
Verses  
Recreational  
Use



# Employer Prohibitions

Employers are prohibited from taking into account whether or not a person uses cannabis items.



# Advertising – Attire/No Solicitation



# Statute also prohibits . . .

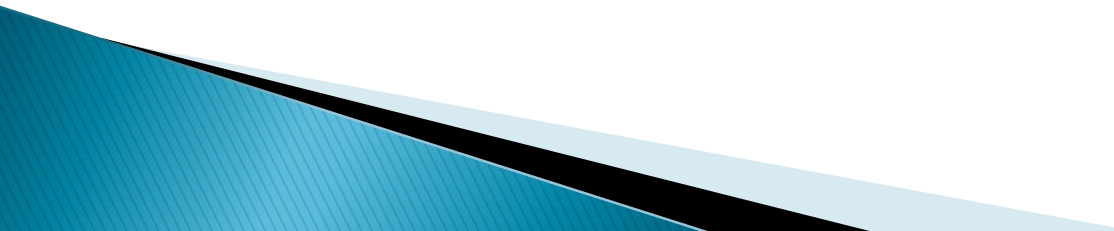
- ▶ Any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid



# How do we treat the drunk person?



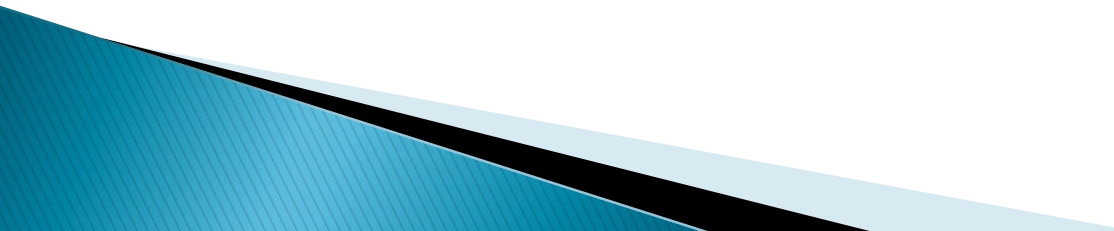
# Drug Testing– Post Legalization

- ▶ Make sure your policies are compliant!
  - ▶ Different policies for different types of jobs/testing:
    1. CDL or other Federal limitation (Police)
    2. Safety Sensitive
    3. All others
  - ▶ 1 & 2 ONLY: random testing
  - ▶ 1–3: Pre–employment & reasonable suspicion
  - ▶ 1–3 post accident if under employer investigation.
- 

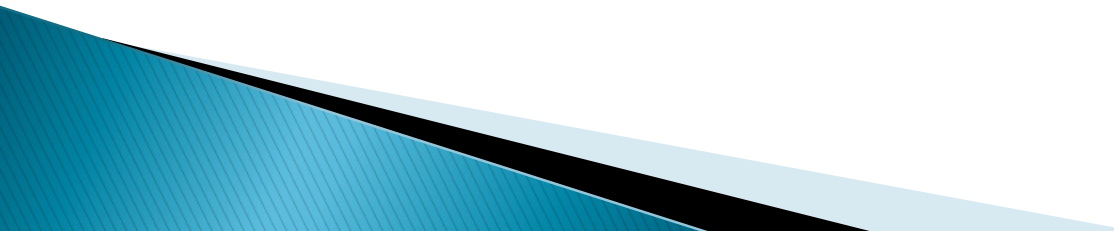
# Physical Evaluation

- ▶ Conducted by an individual with the necessary certification to opine on the employee's state of impairment, or lack thereof, related to the usage of a cannabis.
  - Certified Workplace Impairment Recognition Expert
- ▶ Use your DRE for the time being?

# Common Indicators of Impairment

- ▶ Odor of alcohol/marijuana
  - ▶ Dilated or constricted pupils
  - ▶ Unusual eye movement
  - ▶ Bloodshot or watery eyes
  - ▶ Urine specimen contains an olive in it
  - ▶ Extreme fatigue/sleeping
  - ▶ Excessive sweating
  - ▶ Flushed skin
- 

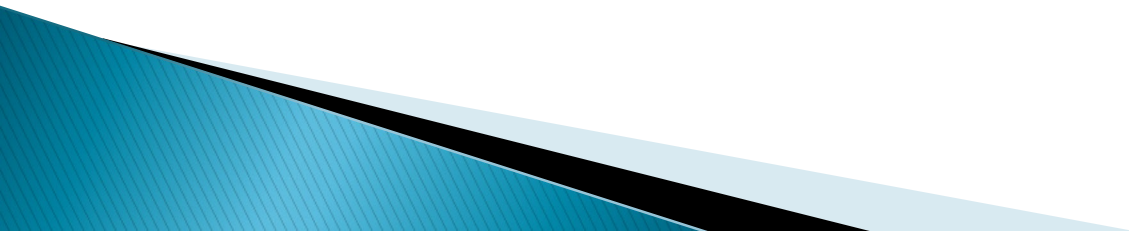
# Common Indicators of Impairment

- ▶ Shaking hands or body tremors/twitching
  - ▶ Irregular or difficulty breathing
  - ▶ Wearing sunglasses in the office
  - ▶ Rambling/incoherent
  - ▶ Highly excitable or nervous
  - ▶ Issues with gait or walk
- 

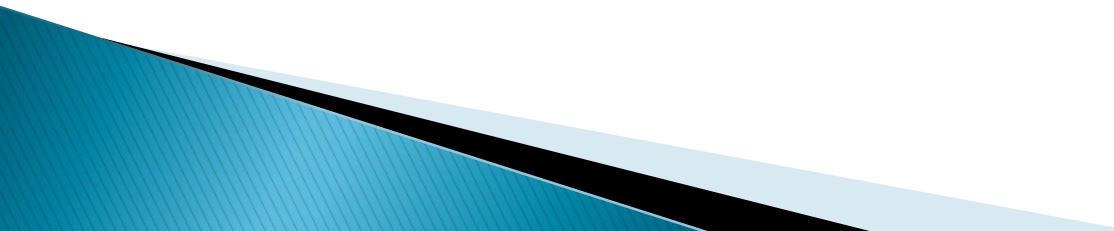
# Hiring and Performance

- ▶ Questions, exams, measures directed at actual job duties
  - Job Description
  - Focus on K/S/A's to perform job duties
    - Not on whether they're a “stoner”
  - Greater focus on
    - performance during pre-hire screening process
    - interview
    - job specific tests (mental/physical)

# Considerations in Disciplinary Actions



# Pre-Disciplinary Considerations

- ▶ Check documentation
    - Strength of position
    - Clearly, sufficiently stated cause
    - Performance issues
  - ▶ Uniform application
    - All employees similarly situated
  - ▶ Timing: why now?
    - Anything else going on?
    - Employee complaint?
- 

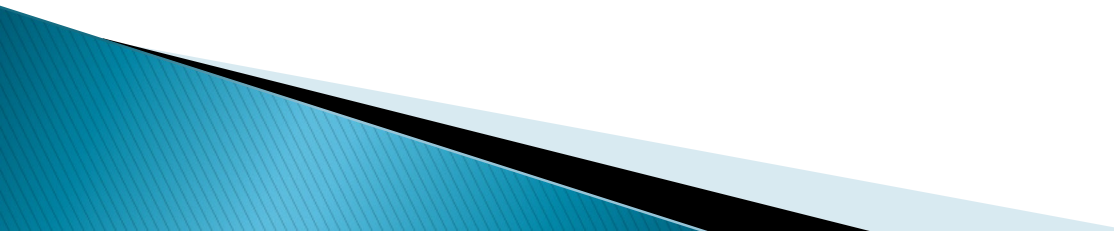


# Pre-Disciplinary Considerations

## ▶ History

- Employee's track record
- Past practice
- Between employee and accuser? Superior? Coworker(s)?
- Performance Appraisals

# Documentation/Evidence

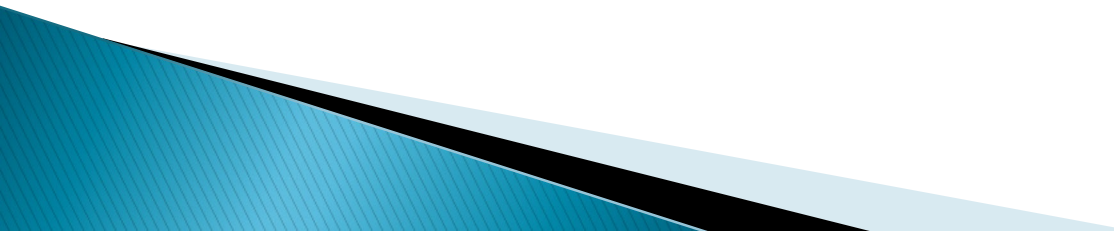
- ▶ Progressive discipline (including verbal warnings)
  - ▶ Performance appraisal
  - ▶ Memo/e-mail regarding performance or discipline issues
  - ▶ Notes
  - ▶ Staff meeting agendas and/or minutes (including handouts & attendance sheets)
  - ▶ Statements of witnesses
  - ▶ Records related to the type of issue or problem (e.g., attendance, computer or telephone records)
  - ▶ Samples of work errors
- 

# Performance Appraisals

## – Why Bother?

- ▶ Provides a fair opportunity
  - Notice
- ▶ Establishes a record
- ▶ Doesn't require disciplinary action
- ▶ Can be used to undermine a claim

# A Parting Note . . . .

- ▶ Documentation is key
  - ▶ Institute/Adhere to 1 Point of Contact
  - ▶ Review your key policies
  - ▶ Use your resources!
- 

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# THANK YOU!

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