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How to Become a Better Supervisor to Promote Employee Engagement and Reduce Risk

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Objectives of Program

- Strengthening Your Supervisory Skills to Promote a Positive Environment and Minimize Liability
 - Leadership Pitfalls and Practical Pointers
 - Effective Communications
 - Maintaining Confidentiality
 - Importance of Addressing Adverse Employee Conduct
- Documentation: A Supervisor's Ally
 - Addressing Behavior Issues and Performance
 - Annual Evaluations
- Protecting Against Harassment
- Traps To Be Avoided

Leadership Pointers & Pitfalls

- Be a role model
- Consistently demonstrate professional behavior and communications
- Be engaged
- Do not gossip or perpetuate gossip or “water cooler” conversations
- Respect employee privacy and be careful about giving personal advice for non-work matters
- Do not make promises without authority
- Encourage employees to seek assistance
- Consistently apply and enforce policies and benefits

Effective Communication

- It is not necessarily what you say as a leader, but how you deliver the message.
- More than just the words you use, effective communication combines a set of 4 skills:
 - Engaged listening
 - Nonverbal communication
 - Managing stress in the moment
 - Asserting yourself in a respectful and constructive manner
- Always keep in mind your objective as a leader:
 - Problem solving and improved performance, not punishment
 - Provide constructive criticism
 - Give prescriptions for positive performance and motivate team members



Effective Communication

- For this reason:
 - Don't discipline or issue criticism with an audience.
 - It is okay to acknowledge your own wrongdoing.
 - 24-hour rule: let emotions dissipate when appropriate.
 - Attack the issue, not the person. This does not mean that you have to be defensive about insisting upon good performance and holding people accountable.
 - Strengthen listening skills: "listen" for what is said, but also what is unsaid.

The Issue of Confidentiality

- Get HR involved sooner than later.
- Do not ensure confidentiality of conversations when asked to speak “off the record.”
- Certain issues (e.g., discrimination, safety, harassment) will require disclosure to certain persons.
- Supervisors should keep complaints, ensuing investigation, and related materials confidential, but only to the extent practicable.
- Involved employees should be advised not to discuss or disclose information to co-workers and to maintain confidentiality.

Inappropriate and Disruptive Behaviors

Inappropriate behavior is any conduct that is unwarranted and is reasonably interpreted to be demeaning or offensive. Even though it may not be unlawful, such behavior can have a detrimental effect on relationships between staff and health care practitioners.

Examples:

- Belittling or berating statements, demeaning and condescending language, use of profanity or disrespectful language, inappropriate comments written in the medical record, deliberate failure of cooperation or do tasks without good cause, not responding to calls, and imposition of idiosyncratic requirements on staff unrelated to business operations.

Inappropriate and Disruptive Behaviors (cont'd)

Similarly, disruptive behavior is any abusive conduct, including sexual or other forms of harassment, or other conduct that harms or intimidates others to the extent that quality of care or patient safety could be compromised.

Examples:

- Physically threatening language directed at employees or contractors, throwing things, anger outbursts, profane-disrespectful language, demeaning or impatient behavior, sexual harassment.

Importance of Addressing Inappropriate & Disruptive Behaviors

- Minimize risks of claims and litigation costs.
- Poorly handled employee discipline issues may likely result in lower productivity, reduced morale in the workplace, and higher turnover.
- Diminished reputation.
- Permitting adverse and disruptive employee behaviors can adversely impact the quality of the services provided to patients and clients; statistics support this conclusion.

Reminder: In responding to adverse behaviors, attack the issue, not the person.



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Documentation: A Supervisor's Ally

Why Documentation is Important?

- Addressing and documenting employee matters is not simply a ministerial task of creating paperwork. Rather, it serves several purposes:
 - Defense litigation tool
 - Establishes a record of employment actions and support for those actions
 - Records workplace incidents
 - Records employee performance
 - Informs employees of what is expected of them and the consequences for not meeting the expectations (policy manuals and handbooks also serve this purpose)

Performance Evaluations

- Performance evaluations can be a tool or a sword
- Performance evaluations provide:
 - General expectations
 - Feedback
 - Goals/reviews prior goals
 - Behavioral standards
 - Employee acknowledgement of receipt, not agreement to content
- Focus on objective criteria tied to the job description
- A performance evaluation supports disciplinary measures, including termination
- Motivates improvement and productivity
- Perform evaluations at regular intervals
- Be truthful and stick to the facts; avoid inflammatory words
- When using a rating scale, support the ratings with explanations; do not simply rubber stamp

Documenting Performance Issues

- Address minor infractions before they become major impediments. Not every incident will require a formal notice, but it should still be documented.
- Make it a habit to discuss an employee's performance with them continuously as part of the performance management process; this includes positive and negative feedback.
- Document only the facts, not subjective judgments or conclusions; be mindful of verbiage in write-ups to avoid comments being taken out of context.
- Even a simple email may suffice.
- If you plan on disciplining or terminating, document that intention even before you implement that course of action.

Addressing & Documenting Employee Behavioral & Performance Issues

- Make sure staff is informed about process for reporting complaints
- Example of incidents warranting investigation and/or discipline:
 - Violations of anti-discrimination and harassment laws
 - Employee theft or fraud
 - Violations of policies, health and safety guidelines
 - Performance deficiencies
- Prepare disciplinary warning notice that:
 - Describes the nature of incident and/or policy violation;
 - Is factual and avoids inflammatory comments;
 - Details plan of improvement/corrective action;
 - Indicates form of discipline (warning, suspension, termination); and
 - Warns of consequences for repeat acts or non-compliance.



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Protecting Against Harassment

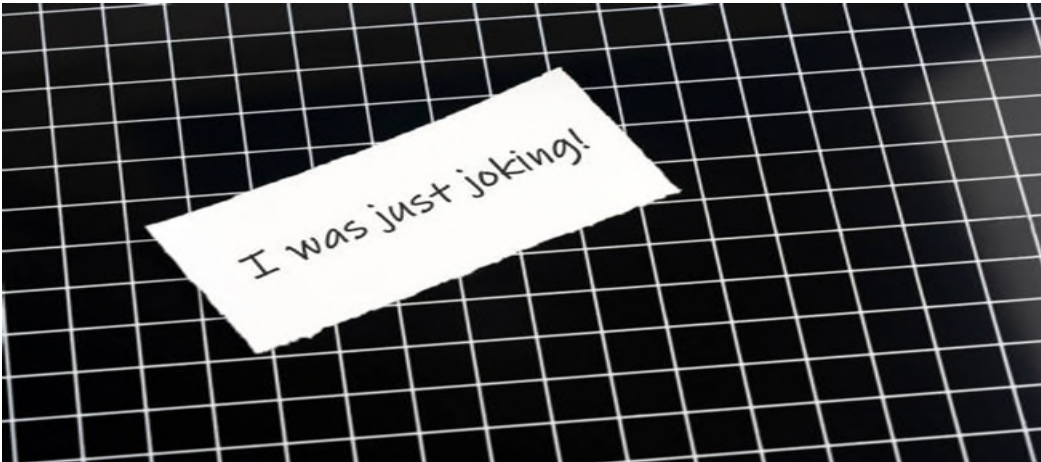
Harassment Factors to Consider

- What is unlawful v. inappropriate behavior? Both require action.
- Who can be a victim? Employees, interns, contractors, vendors, or third parties visiting the entity. **The victim does not have to be the targeted person, but can be a third party who is offended.**
- Who can be a harasser? Anyone in the workplace: supervisors, co-workers, subordinates, clients or customers, other non-employees (vendors, contractors, interns), and visitors.
- **Gender is irrelevant:** persons who identify as male, female, transgender, and those who do not adhere to the gender binary can be victims. Sexual harassment can occur between persons of same or opposite sex.



Harasser's Intent is Irrelevant

- Harassment is unlawful even if it is not motivated by any sexual or discriminatory intention.
- It is no defense that one engaged in behavior that may in the past have been deemed acceptable or tolerated.
- Not a defense to claim that it “was just a joke”



Situations to Avoid

- Hugging.



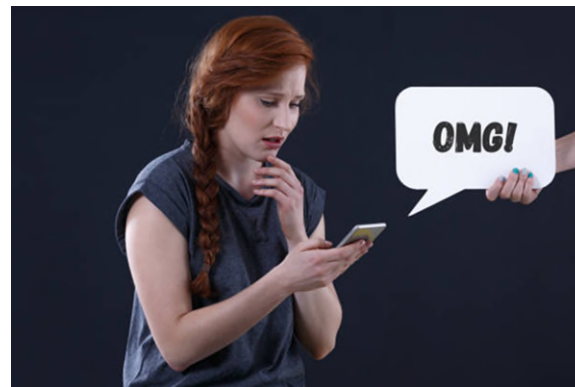
- Standing in close quarters, i.e. invasion of personal space.



- Calling someone “honey” or “sweetheart” or “sweetie” or telling them “you look beautiful.”

Situations to Avoid(cont'd)

- Inappropriate conduct or harassment outside of the workplace
- In appropriate use of electronic devices. No privacy expectation
- Not applying the same rules for remote work



Reporting Harassment & Anti-Retaliation

- Complaints may be reported in writing or *verbally*.
- Supervisors may not ignore a known situation of potential or actual sexual harassment or discrimination.
- The facility takes complaints and reported concerns seriously and will promptly address.
- Retaliation is prohibited against any person who complains and/or those who participate in investigations related to the complaint.



A Primary Safeguard: Be Professional at All Times

The focus should be on proper and acceptable workplace practices. If staff abides by proper and acceptable standards and practices, they will likely avoid committing any acts of harassment or sexual harassment and minimize the risk of misperceptions about their behavior. This is one of the most important points to convey.

If you are unable to answer all three of the following questions in the affirmative, then you should err on the side of refraining from saying or doing the suspect activity:

- Would I do or say it in front of my significant other?
- Would I do or say it in front of my boss?
- Would I do or say it in front of a newspaper reporter?

The Interactive Disability Accommodation Process

- Disability Discrimination Claims: The Interactive Dialogue
 - Once an employer is made aware of a qualified individual's physical or mental limitations, the employer must communicate with the applicant or employee (the interactive process) to determine if there is a reasonable accommodation the employer can provide, absent undue hardship, to overcome those limitations and enable the employee to perform the essential functions of the position.
 - Exhaustion of existing leave does not preclude the need for the interactive process.
 - This process requires coordination between HR and supervisors.
 - If several reasonable accommodations are identified, the employer may choose one so long as the chosen accommodation is effective.
 - Document the process.

Harassment & Working Remote

- The EEOC recognizes decentralized workplaces and remote workplaces as organizational risk factors for sexual harassment.
- Harassment in remote work settings can include:
 - Sending flirtatious or suggestive comments, jokes, photos, and even GIFS via email or work chatrooms;
 - Inappropriate conduct over video conferencing, such as exposing oneself on camera, winking at co-worker, or making unwelcome comments about their appearance;
 - Taking screenshots of employees during video conferences;
 - Initiating unnecessary late night phone calls or video conferences;
 - Inappropriate conduct during virtual happy hours; and
 - Stalking a co-worker via social media.



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Questions?

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Andrew Zwerling is the Chair of Garfunkel Wild's Litigation and Alternative Dispute Resolution Practice Group. As an experienced litigator with over 40 years as a trial and appellate lawyer in State and Federal courts, including his successful argument before the United States Supreme Court, Andrew is known as an innovative, creative troubleshooter and problem solver. He specializes in employment law, health care law (including OPMC defense), and commercial litigation, and has worked on litigations valued as much as over \$120 million. He also conducts internal investigation for clients relating to sexual harassment and other personnel issues. Andrew is also active as an arbitrator and a mediator.

A prolific legal writer, Andrew has dozens of publications covering a range of subjects, including employment law and litigation. As an active lecturer, he has conducted presentations on myriad subjects in New York and Connecticut, including sexual harassment, responding to employee discipline problems, leadership responsibilities of management, disruptive physicians and restrictive covenants in employment agreements.

Prior to joining the firm, Andrew spent 17 years as a prosecutor, serving as an Executive Assistant District Attorney with the Queens County District Attorney's Office. There he prosecuted numerous high-profile felony cases, served as the Equal Employment Opportunity Officer, handled sensitive internal sexual harassment investigations and managed a staff of up to 150.

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Marianne Monroy, Chair of Garfunkel Wild's Employment Law Practice Group, has more than 25 years of experience representing private corporations, non-profits, and individual clients in connection with a broad range of employment law matters including age, disability, race, sexual harassment, wage and hour, benefits, audits, defamation, restrictive covenants, and breach of contract claims. Her practice also includes litigation of a wide variety of commercial and business issues, including contract disputes, managed care, and judicial review of agency and other administrative determinations and has defended clients against claims under the Americans With Disabilities Act, Family and Medical Leave Act, Fair Labor Standards Act, False Claims Act, New Jersey Law Against Discrimination and the Conscientious Employee Protection Act.

Marianne defends clients throughout the tri-state area in state and federal courts, as well as before administrative agencies, including, among others, the Equal Employment Opportunity Commission, the New York State Division of Human Rights, the New York City Commission of Human Rights, the New Jersey Civil Rights Commission, and the Connecticut Commission on Human Rights and Opportunities.

Marianne has particular experience in counseling clients concerning general human resources issues and compliance with state and federal employment laws. She regularly conducts employee complaint investigations, drafts employee policies, develops employee on-boarding procedures and documentation, represents clients during agency audits (e.g. DOL audits), advises on employee benefit and COBRA issues; creates and implements reduction in force programs, and drafts and negotiates separation agreements. She also provides employee leadership training programs, as well as sexual harassment, wage and hour and disability training programs aimed at protecting clients from potential claims, increasing employee engagement and productivity, and reducing staff turnover.

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