Supervisor
Liability Management
Reference Manual
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SUPERVISOR LIABILITY MANAGEMENT REFERENCE MANUAL

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SECTION 1

INTRODUCTION TO AVOIDING SUPERVISORY LIABILITY

INTRODUCTION TO AVOIDING SUPERVISORY LIABILITY

INTRODUCTION

The material included in this manual was developed to provide you, the Utah State government supervisor, with a "bare bones" handbook. With this book, you can find answers to your question about policy or other issues that affect you and your supervisory activities. It is also designed to help you and the people you supervise to avoid the types of mistakes that lead to lawsuits against you, your staff, your agency and the State of Utah. This manual is not the sole or comprehensive source of legal or management information about state government, nor should it be considered to have the definitive answers to every question regarding every possible situation that you may encounter as a supervisor. You should feel free when confronted with a question to contact other supervisors, legal counsel, the Department of Human Resource Management, Utah State Risk Management, or others who can assist you.

THE SUPERVISOR'S ROLE IN AVOIDING LIABILITY AND LITIGATION

The first line supervisor in Utah State Government occupies a critical position in helping the state avoid costly liability and litigation. The first line supervisor is often named in a lawsuit in order to bring agency management into the lawsuit and to get to the "deep pocket" of the state. It is a fact of life that the average state employee is not a primary target for a lawsuit since he or she does not have the wealth necessary to be an attractive target of a lawsuit. Because of this fact, when there is alleged negligence on the part of an employee, the focus of the lawsuit shifts from the employee to the supervisor, the next level on the organizational chart. If the supervisor and management can be brought into the lawsuit then the plaintiff can make larger demands. Often the first line supervisor did nothing to harm anyone, but because of his or her position in the organization he or she becomes a step on the ladder to a large judgment against the state.

For a plaintiff who is suing the State to build a case to reach the "deep pocket" of the State, he or she must show that agency management was negligent and failed in a duty or obligation. The plaintiff must also show that this failure caused his or her client to be harmed. In other words, the plaintiff will have to show that agency management failed to do something that they had stated they would do. Alternately, they would have to show that statute, case law, or other accepted source was not fulfilled. A few of the claims that are made against management in this attempt to link them to employee misconduct are as follows:

Negligent Hiring

Management/supervisors failed to conduct a proper background check on the employee and failed to discover that the employee was unfit for the position. Because of this failure, the plaintiff was harmed. (Example: A convicted pedophile is hired to supervise children and subsequently molests one of the children.)

Negligent Supervision

Management/supervision failed to properly supervise the activities of a subordinate staff member. Because of this failure, the plaintiff was harmed. (Example: Management fails to direct staff in how to deal with a particular problem and staff violates the constitutionally protected rights of a client.)

Negligent Training

Management/supervision failed to properly train subordinate staff. Because the staff was not properly trained, they acted improperly and the plaintiff was harmed. (Example: The United States Supreme Court decides that any individual who is arrested must be informed that he or she has the right to an attorney. Management fails to teach police officers that they must inform arrestees of this new ruling. Officers illegally question an arrestee and do not inform him or her of his or her rights.)

Negligent Retention

Management/supervisors fail to take the action necessary to dismiss a subordinate employee who had violated rules or committed acts justifying dismissal from government employment. The employee was allowed to continue to work and subsequently damages the plaintiff. (Example: Management is aware that an employee has a serious alcohol problem and is drinking at work. The employee has been discipline in the past for being intoxicated at work and has been told that he or she will be fired if it happens again. In spite of this warning the individual continues to drink and management does nothing. The employee is driving drunk on work time in a state vehicle and hits and kills a pedestrian.)

Negligent Entrustment

Management/Supervisors allow a subordinate employee to do something that the employee was not qualified, authorized, or licensed to do. (Example: An employee is authorized by management/supervisors to drive a school bus even though the individual does not have a proper Commercial Driver License. The driver, while operating the bus, hits and kills a small child.

It should be apparent to the reader that each of these claims of negligence is tied directly to the recruitment, selection, training, management, and discipline of staff. These are the same activities that supervisors are called upon to perform on a regular basis in their day to day activities. This manual has been designed to help you perform these activities while avoiding the types of mistakes that lead to these claims. As stated, this manual is only a starting point. If you have questions about any of the topics discussed in this manual, please contact your agency human resource office, risk manager, or other management personnel in authority.

SECTION 2

RECRUITMENT AND SELECTION

RECRUITMENT AND SELECTION

INTRODUCTION AND OVERVIEW

This section is designed to give you a basic knowledge of applicable laws, rules, and steps involved in the recruitment and selection process. The information in this section is specific to recruitments for career service positions (schedule B or merit positions). This includes transfers, promotions, or career exchange assignments. Recruitment of non-career service (schedule A, career exempt or "at will" positions) may be filled through any type of recruitment process that does not violate state and federal anti-discrimination laws or current agency policies and procedures.

Many agencies have their own service positions fall into two basic categories, internal and external. You, as the supervisor, and your agency human resource recruiter need to determine which type of recruitment is most appropriate to fill the vacancy. When making this decision, you will need to take into consideration applicable state rules for filling career service positions as well as agency policies and procedures.

INTERNAL RECRUITMENTS

Internal recruitments come in the following forms:

Work Group (Office, Bureau, etc.)

The vacancy is open only to those current career service employees in the work group where the vacancy exists.

Division

The vacancy is open only to those current career service employees in the division where the vacancy exists.

Agency

The vacancy is open only to those current career service employees in the agency where the vacancy exists.

The Utah Job Match system must be used for all recruitments and jobs are posted on the state website https://statejobs.utah.gov. Jobs that are posted internally are only accessible to those employees within the posted organization.

EXTERNAL RECRUITMENTS

External recruitments are those that are open to those outside of the agency where the position exists. You are also required to use the Utah Job Match system for these types of recruitments.

Statewide

The vacancy is open to all current career service employees within the state.

Public

The vacancy is open to career service employees, non-career service employees, and public job seekers.

EMPLOYMENT LAW AND RULES

Recruitment, interviewing, and selection of employees are governed by several important federal and state laws enacted to prevent employment discrimination. In addition, the state has specific rules that also apply to these situations. Before you begin any recruitment, make sure you are familiar with each of the laws and rules listed below. Violation of any of the following laws can result in a discrimination claim or law suit against you and your organization:

Title VII of the Civil Rights Act of 1964, as amended:

Prohibits discrimination against employees and job applicants on the basis of race, religion, color sex, or national origin.

The Age Discrimination in Employment Act of 1967, as amended:

Prohibits discrimination against employees and job applicants who are at least 40 years old on the basis of age.

The Equal Pay Act of 1963, as amended:

Prohibits sex discrimination in the payment of wages to men and women performing substantially equal work under similar working conditions in the same establishment.

Rehabilitation Act of 1973

Prohibits employment discrimination against any qualified applicant because of a physical or mental disability. This covers most employers with federal contracts and sub-contacts in excess of $10,000. It also requires covered employers to prepare and maintain an affirmative action plan.

Title I of the Americans with Disabilities Act of 1990, as amended:

Prohibits discrimination against qualified job applicants on the basis of disability.

The Civil Rights Act of 1991:

Requires employers to demonstrate that a challenged employment practice is job-related for the position in question. This permits charging parties to secure jury trials in Title VII and ADA discrimination claims. Also provides for compensatory and punitive damages for victims of intentional discrimination under Title VII and ADA.

Pregnancy Act of 1978:

Prohibits discrimination against qualified applicants on the basis of pregnancy, childbirth, or related medical conditions. This requires employers to treat these applicants the same as other applicants.

Utah State Anti-Discrimination Act of 1969 and amendments:

This act combines those listed above and makes employment discrimination within the State of Utah illegal.

Human Resource Management rule R477-4 Filling Positions:

This state rule outlines the specific requirement you must meet when filling positions within state government.

PRE-RECRUITMENT PLANNING

Before beginning any recruitment process, it is wise to plan ahead. The purpose of the pre-recruitment planning is to:

- Identify and plan out the necessary steps of the recruitment; and
- Avoid problems that could delay the recruitment process.

In this step, you will want to review the position, identify any budget, salary, or classification issues that may cause problems, to determine any necessary testing requirements, gather necessary approvals in order to recruit, and establish what type of interview process to be used. In addition, you will want to review the applicable state rules and agency policies and procedures for filling positions. (Internal Human Resource Management Policies and Procedure Sections 1-3 to 3-2) Do not hesitate to contact human resource for any assistance in this process.

JOB ANALYSIS

To begin the recruitment paperwork process a job analysis must be completed. You will find the UJM form in the HR section of the USOE website (usoe.k12.ut.us). The agency may also require of completed forms in this process, i.e. P-2 or C-12. The job analysis has multiple purposes:

1. To identify and analyze the major tasks and skills of the position.
2. To identify the essential functions of the position.
3. To identify and analyze the physical requirements of the position.
4. To form a foundation for the interviewing process, including development of the interview questions or testing.
5. To form a foundation for any legal defense against discrimination charges.

The Subject Matter Expert (SME) is a key person in the entire recruitment process. The SME is usually the supervisor or manager of the position, or the incumbent who is vacating the position. The role of the SME is to:

1. Assist the recruiter in the job analysis steps prior to recruitment.
2. Assist the recruiter during the recruitment by providing, clarification on position requirements and expert opinion on the backgrounds of job seekers.
3. Make the final hiring decision, if he or she is the hiring official.

With the assistance of the SME, the human resource analyst or technician completes the job analysis steps outlined below. To help in the completion of these steps, the human resource analyst or technician may draw upon a variety of information sources to become familiar with the position and the workplace. Information sources that can be used include, but are not limited to, classification studies, organizational charts, agency mission statements, job standards, performance plans, or previous recruitment files for the same position.

Task Analysis

In task analysis, the SME and HR recruiter review the job standard, or performance management plan from the previous incumbent to determine the major tasks of the position. If the position has changed, new duties will be identified by the SME. The SME and HR representative will identify knowledge, skills, and abilities (KSA's) needed to perform the major tasks identified. Each KSA will be identified as either required at hire (r) or desire (d) search criteria.

Essential Functions Review

In the essential functions review, the job tasks are evaluated using a series of question designed to determine whether a specific task is part of an essential or marginal job function as defined by the Americans with Disabilities Act (ADA). Essential functions are those that if taken away, would significantly change the nature of the job. Marginal functions are those that can be taken away or delegated to others without significantly changing the nature of the job.

Physical Requirements Analysis

Positions are classified into broad physical requirement categories based on the overall level of physical activity required for the position. If a position is classified as "sedentary/light duty," further physical requirements analysis is optional, at the discretion of the human resource recruiter. If a position is classified as "moderate" or "strenuous" in the physical requirements analysis, the specific physical requirements must be identified.

JOB POSTINGS

The purpose of the posting is to inform potentially qualified job seekers that the position is available, provide them the opportunity to apply, and provide you with a sufficient pool of qualified applicants.

Internal (workgroup, division, agency)

These types of recruitments are required to be posted for a minimum of five (5) days. The posting must include an opening and closing date. You can post for a longer period, but not a shorter one. **Reduction In force employees (RIF's) must be informed of the vacancy.** Consult your HR representative for information on how this is done.

External (statewide, public)

Posting methods can include, but are not limited to, newspaper ads, trade journal ads, job fairs, Internet ads, in addition to Utah Job Match. The HR representative will contact the RIF employees for external recruitments.

THE RECRUITMENT SEARCH

The following types of searches should be conducted:

Reduction in Force employees (RIF's)

This is mandatory for all types of recruitments. If a RIF employee is found to be qualified and interested in the position, he or she must be placed in the position as long as the position is equal to or lesser than the position from which he or she was RIF'd. (See DHRM Rule R477-4-4(2)(a).

Veterans

This search applies to public recruitments only. Qualified and interested vets will be included with other qualified applicants to be interviewed. The vets are always in addition to general applicants. They do not displace other applicants.

General

This is a search for qualified job seekers who are not veterans or RIF employees. When the HR recruiter collects the qualified candidates, those candidates will be reviewed with HR to determine the best qualified to be interviewed.

Once a pool of qualified and interested applicants has been identified, interviews can be arranged. Typically, it is your responsibility to arrange your own interviews. Check with the HR representative to verify this.

PREPARING FOR THE INTERVIEW

The employment interview has a dual purpose:

1. To gather necessary information about the applicant's qualifications for the position to determine if he or she is a good match for the position; and
2. To provide the applicant with necessary information so he or she can determine if the position is a good match for him or her.

In order to conduct an interview, you will need to develop interview questions. Interview questions should be developed in a way that provides you with the greatest amount of information possible about an applicant's actual skills and experiences. It is a good idea to have your agency HR representative review your questions. They can spot those questions that may be illegal or less effective and suggest alternate questions. When developing interview questions, focus on the following:

Develop Specific Questions

The questions should be specific to job-related criteria (knowledge, skills, abilities) and behaviors that you identified in your job analysis as being important. Tying your questions to job-related criteria will help you determine if the applicant truly has the skills necessary to perform the job. (Example: This position requires the use of customer service skills. Describe your experience in the area of customer service.)

Require Applicants to Give Examples

This demonstrates when the applicant has used the knowledge and skills or exhibited the behaviors necessary for the position. These types of questions require the applicant to give you a real life example that you can use to determine if the applicant truly has the skills or behaviors you are seeking. (Example: How do you handle conflict? This question does not require an example. The better question is: Give me an example of when you have had a conflict with a co-worker. Describe how you handled the situation?)

Use Open-Ended Questions

Make sure the questions are open-ended and cannot be answered with a simple "yes" or "no". A certain number of yes or no questions may be unavoidable, however, and entire interview based on these types of questions will not allow you or the applicant to gather enough information to make informed decisions. (Example: Do you like using the programming language C++? The better question is: Specifically, what do you enjoy about using the programming language C++ and why?)

Avoid Leading Questions

Avoid questions that are leading and encourage applicants to say what you want to hear. (Example: You enjoy working under pressure, don't you Jim? This is a leading question. A non-leading question is: Describe a situation from your current job where you had to work under pressure and handled it well. What steps did you take to handle the pressure?)

Design Legal Questions

Design your questions to make certain they are legal and stay clear of the areas of sex, race, color, age religion, national origin, or disability. (Example: Can you handle this job at your age? It is illegal to refer to age. The better question is: Are you able to fulfill the job requirements that I have described in our interview?)

PLANNING AND CONDUCTING THE INTERVIEW

Managers and supervisors should prepare for the employment interview in advance. Attention should be given to these areas during preparation:

Planning

Plan the interview by reviewing the job requirements, defining necessary job-related behaviors, and developing appropriate, effective interview questions. This can be done as part of the pre-recruitment planning and job analysis.

1. Plan the environment by choosing a place that will be quite, comfortable, and free from interruptions.
2. All enough time to conduct a thorough interview.
3. Review each applicant's resume or application form. Identify those areas that require additional information such as gaps in employment, terminations, short amount of time at each position, training, etc.

Conducting

Conduct and manage the interview in a professional but friendly manner.

1. Ask only job-related questions. Keep yourself and the applicant on task.
2. Be alert to any personal biases for or against an applicant.
3. Except for those questions specific to an applicant's resume or application form, ask each applicant the same predetermined questions.
4. Take notes. Do not rely on your memory, it will fail you. Notes become especially important if you are faced with a discrimination claim.

SELECTION

When making your final hiring decision, do the following:

1. Compare the applicant's skills against the job-related criteria and behaviors you identified as being important in your job analysis.
2. Check references. Check references as thoroughly as possible. Be sure not to ask any illegal questions during your reference checking. If you couldn't ask it in the interview, you cannot ask it as part of the reference check.
3. Make your choice based on objective factors that are job-related, not a gut feeling.
4. Document the job-related reasons why you did or did not select each applicant. This documentation can be useful in defending yourself against a discrimination claim.

MAKING THE OFFER

Once you have made your decision as to which applicant is best for the position, it is time to extend an offer to the applicant.

Contact HR to review the applicant before it goes to the applicant.

With HR, review the salaries of current staff in the same types of positions with the same experience and background. Determine if the salary you are going to offer will cause any internal salary inequities. If so, discuss them with HR and administration to determine if anything should or can be done.

Make your offer (and any counter offers) in writing. A written offer can help you and the new employee avoid any confusion or conflict about what was or was not offered. If the offer is made verbally, follow it up in writing before the new employee's start date. The offer letter should contain the following information:

1. Position title
2. Department
3. Manager/Supervisor name and phone number
4. Start date (if determined)
5. Hourly rate
6. Position schedule (A-non-career or B-career service)
7. Position status (temp, part-time, full-time, time-limited, etc.)
8. Date by which applicant must respond to offer

9. I-9 requirements (Immigration and Naturalization Right to Work form)
10. Additional job related information (e.g., Licensure requirements, documentation, etc.)

Make sure that when the offer is accepted that HR is aware and has all the pertinent dates with the name, start date, salary, and interview results of all applicants.

SECTION 3

PERFORMANCE MANAGEMENT

PERFORMANCE MANAGEMENT (R477-10)

INTRODUCTION

The following steps identify key points to successful employee management.

SUPERVISOR DEVELOPS A PERFORMANCE MANAGEMENT PLAN

A new or adjusted employee performance management plan to be developed by the supervisor:

1. At the time of hire
2. Upon completion of the probationary period
3. Annually at the beginning of the fiscal year
4. When changes make the existing plan obsolete
5. When a new supervisor is assigned
6. Prior to placing the employee on corrective action

The performance management plan must identify the performance standards and expectations associated with the job.

The performance management plan must identify the time frames and the actions to be taken to improve the employee's performance and increase the value of the employee service.

The performance management plan must identify the role the supervisor will play in providing assistance toward improving the employee performance.

SUPERVISOR REGULARLY ADVISES THE EMPLOYEE

The supervisor must regularly advise the employee as to how well the employee is conforming to the terms of the performance management plan. This should be done almost daily on an informal basis and regularly in a formal setting with documentation.

SUPERVISOR EVALUATES PERFORMANCE

Using the agency approved rating system; the supervisor must develop a written performance evaluation. Appropriate evaluations may be:

1. Every quarter for a new employee or an employee in a new job
2. Upon completion of the probationary period
3. Annually at the end of the fiscal year
4. When the plan is modified or replaced
5. At the end of a corrective action period

The evaluation compares the employee's actual performance to each of the standards identified in the performance management plan and should be conducted as needed.

The supervisor assigns an "overall rating" to the employee's performance based on the overall rating standard identified in the performance management plan.

EMPLOYEE REVIEWS EVALUATION

Employee writes comments then signs the evaluation to indicate they have seen it and received a copy

The employee adds to the performance evaluation any comments he or she feels are appropriate.

The employee signs the evaluation indicating only that he or she has received a copy and has had an opportunity to review its contents. Refusal to sign shall constitute insubordination and subject the employee to possible disciplinary action.

SUGGESTIONS FOR COMPLETING THE PERFORMANCE MANAGEMENT PLAN

The following outline suggests a method for developing a performance management plan.

SELECT OBJECTIVES
Select a reasonable number of objectives (products or services) you want the performance evaluation to measure. Make sure the objectives you select are critical to the success of the job and develop the employee.

ESTABLISH PERFORMANCE STANDARDS FOR EACH OBJECTIVE
Identify the units of measure that you will use to compare actual performance levels with the performance standards identified in the performance management plan.

Establish performance standards for each objective. There should be a standard for each level in the 5-tierl rating system (Outstanding, Highly Successful, Successful, Below Successful, and Unacceptable). The “Successful” rating represents the minimum level of performance you will accept without placing the employee on corrective action and/or imposing discipline. (The same applies to a 3-tier system, where “successful” is the middle rating).

Make sure the performance standards are the same for all employees who have the same objective in their performance management plan.

ESTABLISH “OVERALL RATING” PERFORMANCE STANDARDS
Determine how many and/or which of the performance standards the employee must meet or exceed to receive ratings above or below the “successful” rating

PERFORMANCE IMPROVEMENT R477-10-2
When an employee’s performance does not meet established standards due to failure to maintain skills, incompetence, or inefficiency, and after consulting with HR, agency management may place an employee on an appropriate and documented performance improvement plan in accordance with the following rules:

(1) The supervisor shall discuss the substandard performance with the employee and determine appropriate action. (Performance Evaluation)
(2) An employee shall have the right to submit written comment to accompany the performance improvement plan.
(3) Performance improvement plans shall identify or provide for:
    (a) a designated period of time for improvement;
    (b) an opportunity for remediation;
    (c) performance expectations;

(d) closer supervision to include regular feedback of the employee's progress;
(e) notice of disciplinary action for failure to improve; and,
(f) written performance evaluation at the conclusion of the performance improvement plan.

(4) Performance improvement plans may also identify or provide for the following base on the nature of the performance issue:
(a) training;
(b) reassignment;
(c) use of appropriate leave;

(5) Following successful completion of a performance improvement plan, the supervisor shall notify the employee of disciplinary consequences for a recurrence of the deficient work performance.

(6) A written warning may also be used as an appropriate form of performance improvement as determined by the supervisor.

PERFORMANCE EVALUATION R477-10-1

Agency management shall utilize the Utah Performance Management (UPM) system for employee performance plans and evaluations. The Executive Director, DHRM, may authorize exceptions to the use of UPM and this rule consistent with Section R477-2-2. For this rule, the work employee refers to a career service employee, unless otherwise indicated.

(1) Performance management systems shall satisfy the follow criteria:
(a) Agency management shall select an overall performance rating scale.
(b) Performance standards and expectations for each employee shall be specifically written as a performance plan.
(c) Managers or supervisor provide employees with regular verbal and written feedback based on the standards of performance and behavior outlined in the performance plan.
(d) An employee shall have the right to include written comments pertaining to the evaluation with the employee's performance evaluation.

(2) Each fiscal year a state employee shall receive a performance evaluation.
(a) A probationary employee shall receive an additional performance evaluation at the end of the probationary period.

Agency- The employee will sign or electronically indicate they have seen or received a copy of the performance evaluation. If the employee refuses to sign, have another supervisor sign as a witness that the employee was given the evaluation.

DISTRIBUTION

If the electronic UPM system is not used, send a paper copy HR.

SUGGESTIONS FOR ESTABLISHING A FEEDBACK PLAN

The following suggests a method for developing the feedback plan that the supervisor will use to regularly advise the employee as to how well he or she is complying with the terms of his or her performance management plan.

COLLECT INFORMATION
Decide what information you will need in order to measure how closely the employee's actual performance compared to the performance standards identified in the performance management plan.
Decide who will collect, record, and store the information.
Decide how the information will be collected.
Decide when and how often the information will be collected.
Gather the necessary information.

COMPARE INFORMATION TO STANDARDS
Use the information you collected in step 1 to compare the employee's actual performance with the performance standards established in the performance management plan.

PROVIDE FEEDBACK
Decide how often your "frequent" formal feedback sessions will be held.
Set tentative dates and times for formal feedback sessions.
If UPM is not available, establish a tickler system to remind you of the dates you have set for the formal feedback sessions.
Provide feedback.
Adjust the employee's performance plan and/or take appropriate corrective actions to bring the employee's performance up to or above the successful or passing performance standards established in the performance management plan.

SUGGESTIONS FOR COMPLETING THE PERFORMANCE EVALUATION

The following suggests a method for completing a formal performance evaluation:

Use the information you have gathered during the review period to compare the employee's actual performance with the performance standards identified in the performance management plan.
Make allowances for any shortfalls that were not caused by the employee.
Assign the rating to each objective that most accurately reflects the relationship between the employee's actual performance and the performance standards identified in the performance management plan.
Use the "Overall Rating" standards identified in the performance management plan to determine the employee's overall performance rating.
Provide the employee with a copy of the evaluation.
Provide the employee with an opportunity to write on or attach to the evaluation any comments he or she feels are appropriate.

SECTION 4

CORRECTIVE ACTION, DISCIPLINE, AND GRIEVANCE

CORRECTIVE ACTION, DISCIPLINE AND GRIEVANCE (R477-9, 10, 11)

TERMS DEFINED

Corrective Action

Non-punitive developmental actions implemented by a supervisor to assist an employee in achieving acceptable performance levels.

Discipline

Punitive actions initiated by a supervisor which are intended to correct unwanted employee behavior.

Grievance Process

The formal process which affords employees the right to have an independent authority review the legality, fairness, or justification of an action taken by a supervisor with or against the employee.

CORRECTIVE ACTION/DISCIPLINE- DISTINGUISHING CHARACTERISTICS

The distinguishing characteristics of "Corrective Action" and Discipline are:

Corrective action incorporates a non-punitive plan which is designed by the supervisor and is intended to correct and employee's substandard performance in an effort to avoid having to use discipline.

Corrective action should be considered "employee development" and generally comes prior to disciplinary action. However, discipline can be used in conjunction with corrective action depending upon the severity of the situation.

Discipline is punitive in nature and is designed to punish an employee for some action (or lack of an action; i.e., nonfeasance) and, through negative incentives, correct or modify certain behavior.

Because corrective action is not punitive, it is grieved only up to the department head (step 4). Disciplinary action, on the other hand, is grieved up to and including the Career Service Review Board.

CORRECTIVE ACTION VERSUS DISCIPLINE

	CORRECTIVE ACTION	DISCIPLINE
Cause:	Poor performance (May include some types of behavior problems)	Willful misconduct Behavior problems
Intent:	Non-punitive	Punitive
Goal:	Improved performance through employee development	Modified behavior through punishment
Duration:	Should be 3-6 months, depending on circumstances	May be short term (suspension up to 30 days)
Grievance:	Up to Department Head	Career Service Review Board

MISPERCEPTIONS ABOUT "CORRECTIVE ACTION"

Corrective action is used when an employee's performance level does not meet established standards. The intent of the corrective action process is to help employees, not to punish, embarrass, or humiliate them. Although termination is one of several disciplinary measures that can result from failure to meet the terms of a corrective action plan, the goal of corrective action is to help the employee achieve successful performance. Corrective action should be done with the sincere intent to help the employee increase their performance and avoid the disciplinary process. Managers should do all in their power to limit this embarrassment by reinforcing with the employee his/her good efforts and expressing confidence that they can overcome their performance problems(s).

PROGRESSIVE DISCIPLINARY ACTION

The following is a list of progressively severe actions supervisors can take when dealing with problem employees. These actions do not necessarily have to be taken in the following order. For instance, some unwanted behaviors warrant immediate discipline; i.e., fighting at work, stealing, falsification of records, etc.

ORAL WARNINGS

Verbal communication of sub-standard employee performance or behavior.

WRITTEN WARNING

Written communication regarding sub-standard employee performance or behavior.

PERFORMANCE IMPROVEMENT PLAN

Plan of action taken by a superior to improve a subordinate's **performance,** which does not meet established standards (for reasons other than willful misconduct.) The plan should be tailored to the needs of the employee, and must be in accordance with the provisions given in R477-10-2 of the Human Resource Management Rules.

Corrective action shall include one or more of the following:

1. Closer supervision
2. Training
3. Referral for personal counseling
4. Voluntary or involuntary reassignment
5. Use of appropriate leave
6. Career counseling and out-placement
7. period of constant review
8. Opportunity for remediation
9. Written warnings

DISCIPLINE

When a corrective action plan has failed to improve an employee's performance, or when the employee's behavior is at issue, disciplinary action must be taken. Disciplinary actions may include one or more of the following options:

1. Written reprimand – supervisor
2. Suspension without pay (up to 30 days) – supervisor
3. Demotion – department head only
4. Dismissal – department head only

STEPS THAT MUST BE TAKEN IN THE DISCIPLINARY PROCESS

Written Reprimand/Suspension

1. Written notice of disciplinary intent and appointment to be heard.
2. Employee's possible written response and/or acceptance of appointment.
3. **Supervisor** meets with employee or receives response.
4. **Supervisor** considers employee response.
5. **Supervisor's** written decision. decision.
6. Written reprimand given, or Suspension imposed, as appropriate.

Demotion/Dismissal

1. Written notice of disciplinary intent. and appointment to be heard.
2. Employee possible written response. and/or acceptance of appointment.
3. **Department head's** meets with employee or receives response.
4. **Department head** considers employee response.
5. **Department head's** written
6. Demotion/dismissal imposed (if appropriate).

GRIEVANCE

The grievance process affords an employee the ability to have some independent authority review the legality, fairness, or justification of an action taken by a supervisor with or against the employee. Levels in the grievance process are as follows:

STEP 1:
SUPERVISOR (WRITTEN)

The employee may submit a written grievance to his or her immediate supervisor.

STEP 2:
DIVISION DIRECTOR (OR EQUIVALENT)

If the aggrieved employee is dissatisfied with the written decision rendered in step 1, the employee may submit the grievance in writing to the employee's division director.

STEP 3:
DEPARTMENT HEAD

If the aggrieved employee is dissatisfied with the decision rendered in step 2, the employee may submit the written grievance to the employee's department head or designee. The department head's decision shall be final in all matters except:

1. Promotions.
2. Wage, salary, benefits.
3. Violations of Human Resource Management Rules.
4. Reduction in force.
5. Disciplinary actions (suspensions, demotions, dismissals, abandonment of position). These matters may be appealed in step 4.

STEP 4:
ADMINISTRATIVE BOARD HEARING OFFICER

If the aggrieved party is dissatisfied with the decision rendered in step 3, and if the matter falls within the jurisdiction of the Career Service Review Office, the employee may submit the grievance in writing to the Administrator of the Career Service Review Office.

STANDARD NOTIFICATION

In a standard disciplinary process, the employee must be notified in writing regarding management's intent to impose some form of discipline. The following summarizes the notification steps:

First Notification / Notification of Intent of Discipline

(Notice of Intent to Discipline) – Management notifies the employee in writing that disciplinary action is being <u>considered.</u> This letter enumerates the allegations in detail.

Five (5) Days

The employee is then given at least five working days to respond in writing to the allegations.

Consideration

The author of the first notification letter gives careful consideration to the employee's responses.

Hearing (State-only in cases of demotion/dismissal) (USOE all disciplines)

The department head provides the employee with a face to face informal hearing.

Notification of Disciplinary Action

The employee is notified in writing as to the decision to impose discipline or cancel the process.

How precisely you, as a supervisor, follow these notification steps will have a direct relationship on either winning or losing a grievance proceeding.

DISCIPLINE CONSIDERATIONS

DHRM Rules require that several considerations be taken into account by the supervisor when deciding upon the type and severity of the discipline.

1. The severity of the occurrence(s).
2. The repeated nature of violation(s).
3. Prior disciplinary actions(s).
4. Previous oral warnings and discussion(s).
5. Previous formal warning(s).
6. The employee's past work record.
7. The effect on agency operations.
8. Potential of the violation for causing damage to persons or property.

Once the supervisor has taken into account the above considerations, the rules provide for the following disciplinary alternatives:

1. The supervisor can give the employee a written reprimand.
2. The supervisor can give the employee a suspension without pay for up to 30 calendar days.
3. The supervisor can recommend to the department head that the employee be demoted.
4. The supervisor can recommend to the department head that the employee be dismissed.

POTENTIAL JUSTIFICATION FOR DISCIPLINE

NONCOMPLIANCE WITH:

Department Safety Policies
Policies which are designed to prevent employee physical harm or injury.

Professional Standards Adopted
Agency expectations of an employee concerning such things as personal behavior, code of conduct and ethics, quality of work.

Work Place Policies
Relating to the ground rules set by an agency concerning such things as employee breaks, lunch, use of telephone, etc.

Inefficiency
Wastefulness of government resources (time, energy, money, etc.).

Incompetence
Being inadequate or unsuitable for a particular purpose.

Failure to Maintain Skills/Adequate Performance Levels
Unable to do the work hired to do. Employee does not meet agency minimum skills or performance expectations.

Insubordination / Disloyal to Orders
Unwilling to submit to appropriate authority.

Misfeasance*
Performance of a lawful action in an illegal or improper manner.

Malfeasance*
Intentional wrongdoing; deliberate violation of law or standards; mismanagement of responsibilities.

Nonfeasance*
Omission or failure to do what ought to be done.

***Note:** The actual determination of whether or not an employee is charged with misfeasance, malfeasance, or nonfeasance would be determined by a formal investigation. These terms should not be used unless your human resource representative has been advised by the Attorney General that there is a legal basis for using them.

ADDITIONAL POINTS TO CONSIDER FOR BOTH CONSTRUCTIVE AND PROGRESSIVE DISCIPLINE

The primary aim of discipline by any supervisor is to change behavior.

The Degree of Severity Compared to the Seriousness of the Infraction

Infractions vary in seriousness; so should the consequences.

Management's Consistency

Employees respect and appreciate fairness.

Length of Service

Labor practice tends to look at a long-term employee's service as entitlement to some leniency; however, a hearing officer might hold a new employee less deserving of punishment for rule infraction than a long-time worker.

Employee's Work Record

There is a tendency by hearing officers and arbitrators to allow for one bad mistake, depending upon the severity.

Motivation

An employee can be unwittingly led or pushed into doing something that he or she would not have normally done.

Communication

Before imposing discipline, determine whether the employee had prior knowledge of the rule.

Precedence

Have similar matters been addressed / treated by you, or your agency, department, etc. This may, or may not, have bearing on the matter.

Intent - - Employee's and Management's

Will the action taken by management and/or the employee appear reasonable upon review by an impartial review?

Inadequate Documentation

Do not rely on memory. Write things down soon after they happen. Document facts, not opinions. Record direct observations of actions and results. You should be cautious of recording hearsay. Include behavioral documentation. Be consistent. Be specific.

SECTION 5

SUBSTANCE ABUSE AND DRUG-FREE WORKPLACE

SUBSTANCE ABUSE AND DRUG-FREE WORKPLACE (R477-14)

INTRODUCTION

This rule implements the federal Drug-Free Workplace Act of 1988, Omnibus Transportational Employee Testing Act of 1991, USC 2505; 49 USC 2701; and 49 USC 3102, and Section 67-19-36 authorizing drug and alcohol testing, in order to:

Provide a safe and productive work environment that is free from the effect of unlawful use, distribution, dispensing, manufacture, and possession of controlled substances or alcohol use during work hours. See the Federal Controlled Substance Act, 41 USC 701.

Identify, correct, and remove the effects of drug and alcohol abuse on job performance.

Assure the protection and safety of employees and the public.

PROHIBITED BEHAVIOR

State employees shall be prohibited from unlawfully manufacturing, dispensing, possessing, distributing or using any controlled substance or alcohol during work hours, on state property or while operating a state vehicle at any time or other vehicle while on duty except where legally permissible.

Employees shall follow Utah State Human Resource Management Rules regarding drug use outside of work if any violations directly affect the eligibility of state agencies to receive federal grants or to qualify for federal contracts of $25,000 or more.

TESTING

When, during work hours, there is reasonable suspicion that an employee is using or is impaired through the use of a controlled substance or alcohol unlawfully, an employee may be required to submit to medically accepted testing procedures to determine whether the employee is using a controlled substance or alcohol in violation of federal or state law. However, all testing for possible substance must be coordinated through the agency Drug Program Coordinator. Supervisors may contact their human resource representative to confirm the name of their Drug Program Coordinator.

1. All drug or alcohol testing shall be conducted by federally certified or licensed physician or clinic, or testing service approved by DHRM.

2. Drug and alcohol test with positive results or a possible false positive result shall require a confirmation test.

3. Any employee who refuses to submit to a drug or alcohol testing may be subject to disciplinary action.

POSITIVE TEST RESULTS

Management may take corrective or disciplinary action if:

1. There is a positive confirmation test for illegal drugs.

2. An alcohol test result shows .08 percent blood alcohol content or more.

3. Management determines there is impairment in job related performance, even when an alcohol test shows less than .08 percent blood alcohol content.

RANDOM TESTING FOR SAFETY SENSITIVE POSITIONS

Employees in safety sensitive positions, as approved by DHRM, are subject to drug or alcohol testing without justification of reasonable suspicion or critical incident. Random drug testing of employees in safety sensitive positions may be conducted by an agency, if authorized by the Executive Director in DHRM.

1. Employees in safety sensitive positions whose alcohol test results are .02 or greater, when tested before, during, or immediately after performing safety sensitive functions, must be removed from performing safety sensitive duties for 8 hours, or until another test is administered and the result is less than .02.

2. Employees in safety sensitive positions whose alcohol test results are .04 or grater when tested before, during or after performing safety sensitive duties, may be subject to corrective action or discipline.

RECORDS

The agency's human resource office or authorized official shall keep a separate, private record of drug or alcohol test results. The employee's official personnel file shall only contain a document making reference to the existence of the drug or alcohol test record.

SUBSTANCE ABUSE CORRECTIVE ACTION

Supervisors and managers who receive notice of a workplace violation of these rules must take immediate action as provided in Utah State human Resource Management Rules.

Supervisors and managers may refer for potential action employees convicted of controlled substance abuse upon notice of the occurrence.

1. Agency management may require an employee to complete an approved substance abuse program.

2. An employee undergoing rehabilitation shall be granted sick leave, annual leave, or leave without pay for inpatient treatment.

3. Employee4s must sign a release to allow the transmittal of verbal or written progress reports between the state agency and the substance abuse program or treatment provider.

4. All communication, regardless of the employee's rehabilitation, shall be classified as private.

5. An employee may be required to continue outpatient treatment prescribed by an approved substance abuse provider on the employee's own time and expense.

6. Upon successful completion of treatment, the employee shall be returned to work in his previously held position, or a position with a comparable or lower salary range.

SUBSTANCE ABUSE DISCIPLINARY ACTIONS

Employees who fail to complete the prescribed treatment without a valid reason may be subject to disciplinary action.

Any employee who refuses to submit to a drug or alcohol testing may be subject to disciplinary action.

Management shall take disciplinary action against employees who manufacture, dispense, possess, use or distribute controlled substances or use alcohol, per R477-11, under the following conditions:

1. If the employee's action directly affects the eligibility of the agency to receive grants or contracts in excess of $25,000.

2. If the employee's action puts employees, clients, customers, patients or co-workers at physical risk.

Upon review of the facts surrounding any violation, management may suspend or terminate the employee.

Any employee who is convicted under a federal or state criminal statute which regulates manufacturing, distributing, dispensing, possessing or using a controlled substance for a violation occurring in the workplace shall notify the agency head of the conviction no later than five calendar days after the conviction.

The agency head shall notify the federal grantor or agency for which a contract is being performed within ten calendar days of receiving notice from the judicial system, other sources, or an employee performing work under the grant or contract who has been convicted of a controlled substance violation in the workplace.

SECTION 6

ETHICS AND WHISTLE BLOWING LAWS

ETHICS AND WHISTLE BLOWING LAWS

Utah Public Officers' and Employers Ethics Act
and Protection of Employees

Utah's public employees fall under at least two laws relating to ethics in government. There are also Utah State Human Resource Management Rules as well as individual departmental rules relating to ethics.

The Utah Public Officers' and Employees' Ethic Act, which is found in the Utah Code, Chapter 67-16, governs employee conduct. The protection of Employees (whistle blower act) as found in the Utah code, Chapter 67-21, provides protection of public employees who in good faith report waste or violations of law.

Both of these laws apply to all "public officers", including state employees and elected officials. These laws were written to give guidance in handling unique situations found in the public sector. Legislative employees are specifically exempted from the provisions of these laws.

The purpose of the Ethics Law is to "…promote the public interest and strengthen the faith and confidence of the people of Utah in the integrity of their government." It is not intended to prohibit other employment or outside interests that do not interfere with State employment.

The Ethics Law discusses the following specific areas:

1. Using confidential information to secure privileges or exemptions.

2. Accepting outside employment that would impair professional judgment.

3. Receiving compensation for performing agency transactions.

4. Disclosure of a substantial interest in any businesses regulated by the State.

5. Prohibition of involvement in businesses that conflict with an employee's pubic position.

6. Accepting a gift or loan that may tend to influence the discharge of duties or from a business that is involved in any State transaction.

There are some exceptions given in the Ethics Law regarding receiving outside compensation for the performance of State duties.

1. Employees are not prohibited from receiving occasional non-cash gifts with a value of less than $50.

2. Employees may receive public awards for meritorious service.

3. Employees may receive honoraria or expenses paid for papers, talks, demonstrations, or appearances made on their own time and not at the State's expense, with the approval of the administrative authority.

In support of the Law, Utah State human Resource Management Rule requires employees to:

1. Full apply themselves to their assigned duties during their assigned working hours.

2. Meet standards established in their performance plan.

3. Make frugal uses of State resources.

4. Observe workplace rules.

5. Comply with general state administrative policies and rules.

When an employee is required by the responsibilities of his or her position to take an action or make a decision, which could be interpreted as a conflict of interest, the employee SHALL declare the potential conflict in advance to his or her superior(s).

Penalties for violating the Ethics Act are severe, and employees may be terminated for knowingly violating the law.

When faced with ethical dilemmas, public employees are granted unique protection under the Whistle Blower Statue. This is not a protection universally afforded to private sector employees, but the reporting of fraud or waste is a matter of public policy and is therefore protected.

The Whistle Blower Law prohibits an employer from taking adverse action against an employee who acted in good faith to report the waste of public funds, property, manpower, or a violation or suspected violation of a legally adopted rule or law. Good faith is assumed if the person has communicated the information to the State Auditor.

SECTION 7

EMPLOYMENT DISCRIMINATION

EMPLOYMENT DISCRIMINATION (R477-15)

INTRODUCTION

The Department of Human Resource Management Fair Employment Practices Policy Statement requires all state employees to adhere to the applicable principles of fairness, equality, integrity, consistency, and merit principles in the application of the State's rules and statutes governing employees and prospective employees.

Laws define "Employment Discrimination" to include many different types of actions.

Harassment
Disparate Treatment
Disparate Impact
Failure to Accommodate
Retaliation

ONLY if the actions are based upon:

Race
Color
National origin
Religion
Sex
Disability
Age (if over 40)
Political beliefs OR
Retaliatory motives

TERMS AND CONCEPTS

Discriminatory Harassment

Includes unwelcome verbal or physical treatment based on sex, race, color, religion, national origin, age, disability, political beliefs, or retaliation.

Occurs where the conduct unreasonably interferes with an individual's work performance or creates a *hostile or offensive work environment*.

Disparate Treatment

Means that the employee is *treated less favorably* than others because of race, color, sex, national origin, disability, political affiliation, or age (if over 40).

Less favorable treatment includes failing or refusing to hire any applicant or discharging any employee, or otherwise discriminating against any individual with respect to compensation, terms, conditions, or privileges of employment.

Less favorable treatment also includes limiting, segregating, or classifying employees or applicants for employment in any way that would deprive or tend to deprive them of any employment opportunities or otherwise adversely affect their status as an employee.

Disparate Treatment (Sex based)

Disparate treatment includes discrimination against either sex.

Discrimination based upon "sex" is defined to include sexual harassment as well as discriminatory treatment based on pregnancy, childbirth, or related medical conditions. Employers may not fire or refuse to hire or promote a woman based on pregnancy, childbirth, having an abortion, or contemplating an abortion. Employers may not force a pregnant employee to take mandatory leave unless it is based on an individual's ability to perform essential job functions. Further, it is unlawful to ask job applicants pregnancy, childbearing, or child car questions.

Disparate Impact

Employment practices, including employment application criteria, are considered to have a *disparate impact* on a protected class when:

A. Application of the criteria tends to affect a protected group differently than other applicants; and

B. The question is not "job related for the employment position" or consistent with "business necessity"; or

C. There is an alternative selection device that could be used without a discriminatory effect that would similarly serve the employer's interest in trustworthy and efficient workmanship.

Therefore each employment practice, as well as each question on a job application, needs to have a **meaningful relationship to the potential job performance** of the applicant and no less discriminatory alternative for the question may exist.

Failure to Accommodate

Failure to Make Reasonable Accommodation for Qualified Individuals with a Disability

Supervisors will not be responsible for fully comprehending the Americans with Disabilities Act ("ADA") requirements that surround reasonable accommodations for employees with disabilities. The law regarding disability accommodation is more complex than the law surrounding other forms of employment discrimination. Thus, your agency's *Americans with Disabilities Act Coordinator or Human Resources Representative* will take the primary role.

Supervisors do need to understand their role in making ADA accommodations and understand when an employee's request, problem, or condition becomes an ADA issue.

The Supervisor's Role

1. Supervisors should focus on employees' performance, behavior, and conduct, NOT on the employee's disability.

2. Supervisors do not need to adjust employee performance or conduct standards when an employee requests an accommodation. Instead, supervisors should refer the employee to the ADA Coordinator or Human Resources Representative.

3. Upon referral, the ADA Coordinator will participate in an interactive proves with the referred employee and will determine the accommodations to be provided. The ADA Coordinator will usually include the supervisor in this process.

ADA Confidentiality Rules for Supervisors

Recognize that accommodations, by nature, constitute "disparate" or different treatment. Other employees will not know why one employee is getting what is perceived as a benefit. If confidentiality becomes a problem, refer the employee to the ADA Coordinator.

An employee may disclose their ADA related information to whomever they choose. However, the supervisor CANNOT inquire about such information. Only the ADA Coordinator may inquire about such information.

Accommodations are based upon medical documentation. This medical information shall not be shared except on a need to know basis.

ADA Conclusion

Non-discrimination extends to all work related activities, such as Christmas parties. This means that all work related venues must be accessible for people with disabilities as well as for guests of employees, when the guest is a qualified individual with a disability.

Remember the whole purpose of accommodation is to help the employee get the job done. Supervisors do not have to do anything that is not reasonable, effective, or appropriate.

Failure to Make Reasonable Accommodation for a Bona Fide Religious Belief

Supervisors must make reasonable accommodations for employees with a bona fide religious belief, if the accommodation is necessary for the employee to perform the essential functions of the job. Examples of accommodations would be requests to alter a work schedule or requests for lateral transfers. The rules that apply to accommodations for people with disabilities similarly apply to employees requesting religious accommodations.

Employees must notify their supervisors with documentation demonstrating that they need such reasonable accommodation to effectively perform the essential functions of their job,

based on their religious practices. These religious practices must arise out of a "bona fide religious belief."

Retaliation

Utah State Human Resource Rules prohibit retaliation against employees for exercising their right to complain or for assisting in any manner in an employment discrimination investigation or proceeding. Alleged discriminators are strongly warned against taking any retaliation actions. Retaliation against any employee who opposes what they *reasonably* believe is a discriminatory practice is forbidden, even if the underlying cause is found not to have occurred. Examples of retaliation include open hostility or exclusion of the complainant or participant, as well as assignment of demeaning duties not otherwise performed, patronizing behavior, harassing phone calls, spreading rumors, and verbal or physical threats.

EXAMPLES FROM COURT CASES WHERE DISCRIMINATION OCCURRED

Age Discrimination

A company fired an employee because he was 56 years of age with 12 years of seniority and, therefore, made too much money. The company replaced him with a substantially younger employee who was 40 and would make less money.

Discrimination Based on Retaliation

An employee filed a discrimination complaint, alleging that his employer denied him promotions because of his race. The employee had a reasonable belief that he was subjected to racial discrimination, but he could not prove this claim in court.

The employer subsequently denied this employee training, subjected him to racial slurs, and told his co-workers not to talk to the employee. The court found that the employee could not prove his underlying discrimination claim, yet he could win on his retaliation claim.

Sex Discrimination

An employer enacted a reduction in force ("RIF"). This RIF resulted in the loss of 10 times as many female and minority employees as Caucasian male employees. The employer subsequently fired a Caucasian male in order to mask the effects of the reduction in force.

EMPLOYMENT DISCRIMINATION COMPLAINT PROCEDURE

Employees must understand that they can file a complaint (verbal or written) with an investigator and with <u>any</u> of the following personnel/offices:

Supervisor(s)
Human Resources Office

Employee Services Representatives
Agency Director
Department of Human Resource Management (DHRM)
Utah Anti-Discrimination Labor Division
Equal Employment Opportunity Commission (Federal)

COMPLAINT PROCEDURE AND INVESTIGATION STEPS

The supervisor should contact agency human resource office to review appropriate procedures. Any supervisor who has knowledge of discriminatory behavior shall take immediate, appropriate action and document the actions. Any complaint of discrimination must be acted upon following the receipt of complaint. Any supervisors who knew or should have known that discriminatory behavior was occurring on duty, or who have been made aware of the behavior occurring off duty but affecting the work environment, and did not take timely action to correct the situation, shall be subject to disciplinary action.

1. The supervisor should ensure that privacy and confidentiality are maintained on all actions and communications. Participants in any discrimination proceedings shall treat all information as “protected” under the Government Records Management Act. Commitment to respect both the anonymity and privacy of both the victim and the accused must be balanced with the competing rights involved in discrimination investigations, including the investigator’s right to conduct a thorough review of the facts and the alleged discriminator’s right to confront his or her accusers.

2. The supervisor will preliminarily interview the complainant and the alleged discriminator and document the conversation. The supervisor will instruct the alleged discriminator to have no contact or communication concerning the investigation with the complainant. The supervisor will inform the alleged discriminator that, if the behavior has occurred, it must cease. The supervisor will contact human resource office to determine what, if any appropriate action to take.

3. The supervisor will report back to the alleged discriminator and complainant in writing, notifying them of findings, steps taken to resolve the problem, and indicating that the behavior is expected to stop. The supervisor should ask the complainant if the steps taken resolve the problem for him or her. The supervisor will inform the complainant to report back immediately if the behavior occurs again, or if retaliation is occurring.

4. The supervisor will inform the agency human resource office of action taken.

5. If the complainant desire further investigation, the supervisor will notify him or her to put the complaint in writing for a formal investigation. The supervisor will also document this notification.

6. The supervisor must inform the complainant that he or she (supervisor) will exercise discretion in interpreting the severity or pervasiveness of the conduct to determine whether a formal investigation is necessary, regardless of the complainant’s desire. \

RECORDS

Utah State Human Resource Management Rules regulate disclosure of discrimination records. Employees need to realize that copies of records that are a result of a discrimination investigation are not to be retained in employee personnel files but, rather, shall be maintained and stored in the agency's human resource office, DHRM office or in the possession of an authorized official. Removal or disposal of records in the protected file may only be done with the approval of the agency head, Executive Director, or DHRM, and only after three years from the resolution of the complaint or investigative proceeding.

The Americans with Disabilities Act specifically regulates medical records. Medical information that is collected for employees should be maintained on separate forms and in separate files and treated as a confidential medical record, except that the following may access on a need to know basis:

-Those who need the documentation to make reasonable accommodations.
-First aid and safety personnel for emergency treatment.
-Government officials investigating ADA compliance.

UNLAWFUL HARASSMENT SUPPORT INFORMATION

LEGAL DEFINITIONS

Title VII of the Civil Rights Act of 1964

This act states, "…it is illegal for employers, labor unions, etc. to discriminate on the terms, conditions, and privileges of employment on the basis of religion, color, natural origin, race, or sex." sec. 2002e-2. [sec. 703]

Equal Employment Opportunity Commission (EEOC)

The Equal Employment Opportunity Commission is the federal agency responsible for enforcing Title VII. In June of 1999, the EEOC issued a new Enforcement Guidance for Title VII of the 1964 Civil Rights Act to include liability for harassment by supervisors.

DHRM Rule R477-15

Unlawful Harassment Policy and Procedure is found in DHRM Rule R477-15. Please refer to this rule for details.

SUPERVISOR RESPONSIBILITIES

Supervisors play an integral part in ensuring the prevention, recognition, and resolution of unlawful harassment situations in the workplace. As a supervisor, you should let your employees

know you take this issue seriously. Also remember that as a supervisor you are liable if you knew or should have known of the misconduct, unless you can show you took immediate and appropriate corrective action. Therefore, it is important to take a proactive stance in preventing unlawful harassment. When supervisors see a potential harassment situation, use this three-step process to analyze the situation:

1. Obtain an objective description of the behavior.
2. Determine if the behavior is unwelcome
3. Determine if the unwelcome behavior is based on race, religion, color, gender, national origin, age, or disability.

If the behavior is unwelcome, or it could be seen as unwelcome by any third-party observer, deal with it at that level, before it becomes a complaint. Take appropriate action in a timely manner and follow up to ensure that the behavior has stopped and there are no retaliatory actions, subtle or otherwise. When an unlawful complaint is presented, take the situation seriously, refrain from making judgmental statements, and do not make assumptions.

Court interpretations based on different case facts makes harassment is an evolving subject. The United States Supreme Court, Utah Supreme Court, Federal District Court, and Tenth Circuit Court of Appeals continually render decisions requiring vigilance for human resource employees. Supervisor should avail themselves to training and information as offered, to stay current with harassment issues.

SECTION 8

WORKPLACE SAFETY

WORKPLACE SAFETY

INTRODUCTION

Every worker has the primary responsibility for his or her own safety at the work site. However, it is both the immediate supervisor and overall agency management's responsibility to provide the type of work environment, safety and other equipment, and supervision that aid and assist the employee in protecting his or her OWN safety and the safety of others. This responsibility is broadly established under section 5(a)(1) of the ***United States Occupational Safety and health Act (OSHA):***

> *Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.*

SUPERVISOR RESPONSIBILITIES FOR EMPLOYEE SAFETY

In addition to the general standard of safety, there are numerous specific OSHA standards that apply to various work situations. Under OSHA requirements, individual supervisors are expected to know and to follow the applicable safety standards. At a minimum, supervisors are expected to do all that they can to provide a safe working environment for subordinate staff. The material contained in this section has been developed to assist in this process.

In order to assist you in this process you are encouraged to do the following:

1. Become aware of the areas of potential risk that exist in your work site. Every job site has unique risks. As the supervisor you are in a position to be aware of the specific hazards of each activity associated with the job. With this awareness comes the responsibility to address problems or to refer them to others who can address them.

2. When you see staff engaging in unsafe work, behaviors and/or activities, correct and instruct them in proper techniques.

3. Document all accidents, near misses or other potential problems in the worksite. If an employee is injured on the job, the supervisor must immediately comply with the Workers Compensation reporting requirements.

4. Include in every employee's performance plan a requirement of performing the duties on the job in a safe fashion and following all safety rules so as to avoid injuries to self and others.

5. If, after proper instruction and correction, an employee continues to perform unsafe acts that employee may be subject to disciplinary action.

6. On the job accidents should be investigated and reviewed by the immediate supervisor of the injured employee and others in management, including agency's risk committee, to determine what caused the accident and what can be done to reduce or eliminate the possibility of the accident occurring again.

SPECIFIC REQUIREMENTS

In addition to these general requirements, specific safety requirements exist ina number of areas. A few of the safety duties of supervisors exist in the following areas (for specific information about any of these topics or areas please contact your agency's safety officer, risk manager, or the Utah State Division of Risk Management.

General Life Safety

1. Be cautious in the use of extension cords.

   A. When it is necessary to use extension cords, they should be medium to heavy duty cords. Avoid the light duty cords since they are seldom designed for work situations. Improper use of extension cords has been known to cause fires.

   B. Do not run extension cords across paths of travel as it can easily become a trip and fall hazard.

   C. Make sure that you are using the right type of cord for the load it is required to carry.

   D. Do not use an extension cord in place of permanent wiring. Work with the facility manager to provide the necessary outlets to meet the power demands of the worksite.

2. Trip and fall hazards exist in all work locations. Proper lighting and keeping pathways clear of any trip and fall hazards can reduce the possibility of this type of injury.

3. Employees working with power equipment must be required to use safety equipment, gloves, eye protection, etc. All power equipment must be kept in working order and the safety guards maintained. Removal of guards from equipment, except in extraordinary situations, must be forbidden.

4. Supervisors have a duty to become aware of hazardous chemicals and other dangerous materials in their workplace and to inform staff about these materials. It is suggested that supervisors work with staff from their own agencies or from State Risk Management in identifying and addressing hazardous material concerns.

5. Supervisors should ensure that office and building exits and hallways are unobstructed.

6. Emergency egress plans must be in place and periodic fire alarm and emergency evacuation tests should be conducted on a regular basis. Staff must leave the building in the case of a test. Supervisors are responsible for ensuring compliance with the exit requirements.

7. Exit signs should be illuminated and emergency lighting maintained.

8. Because of the ever present problem of Hepatitis A, hand washing requirements should be enforced and staff informed that basic hygiene requirements can dramatically reduce the incidence of this and other similar diseases.

Fire Safety

1. Flammable or combustible materials must be properly stored away from exits and other risky locations like boiler rooms, attics, and stairwells.

2. Basic fire alarms, fire extinguishers and other related equipment must be operable and in good repair at all times. Any questions regarding this equipment should be referred to knowledgeable staff or experts.

3. Fire extinguishers are designed to fight different types of fires. Ensure that the ones you are using are correct for the type of hazards that exist in your work area. Ensure that your staff knows how to operate fire extinguisher, if they are ever called upon to do so.

4. Open flames should be avoided in most settings unless the job specifically requires the use of fire. Candles are inappropriate in most work locations.

Office Safety

Most employees and supervisors assume that eh typical office is a relatively safe location and, therefore, they fail to address unique problems in the office environment. Unlike a machine shop where a mistake can result in the immediate loss of a hand or a finger, office hazards and injuries may be cumulative, occurring over time. Repetitive motion injuries, such as carpal tunnel syndrome, that occur in a work location are expensive and time consuming to treat. Supervisors need to be aware of these hazards and ask for help in setting up work location, chairs, lighting , keyboards, etc., in a fashion to reduce these hazards. The Division of Risk Management has staff to assist in this technical area.

In relation to office safety supervisors need also to look at the following:

1. Slip and fall hazards exist in an office setting. Keeping corridors clear and unobstructed is a necessity. Extension cords should be used with caution and never laid across paths of travel.

2. Hazardous chemicals and other materials exist in the office. Such things as copier toner and other commonly found cleansers and other materials may present a hazard if used improperly. Supervisors need to be aware of the proper use of these materials.

3. Space heaters have been specifically forbidden by DFCM for use in most offices because of the potential fire hazard. Supervisors should strictly enforce this requirement.

Blood Borne Pathogens

OSHA has adopted rules regarding safety against blood borne pathogens in the work place. Agencies and supervisors need to become aware of these requirements. Staff from the Division of Risk Management is able to answer questions and to assist agencies in meeting these requirements.

Driver Safety

The most common claim filed with the Division of Risk Management involves some type of automobile accident. Based on recent statistics from the State Fleet Services the two type of accidents that most commonly happen are “backing accidents” and “hitting a fixed object.” These accidents account for a third of the accidents in a fiscal year. These accidents are almost always the fault of the driver.

1. All individuals who operate state vehicles or their own vehicles on state business are required to complete a Risk Management approved driver safety course on a regular basis. Individuals for whom driving is an essential function of the job must complete a driver safety course every year. All other drivers must complete the course every three years.

2. Drivers involved in “at fault” accidents should be retrained and the accident documented. Repeated violations may be grounds for disciplinary action.

3. Supervisors and managers should periodically check to make sure that all drivers have valid driver licenses.

CONCLUSION

This section has only very briefly discussed a few of the basic safety requirements for a supervisor. Supervisors are encouraged to become aware of any specials or unique circumstances that apply to their specific agencies. Please contact your agency’s safety officer or risk manager for additional information or training.

SECTION 9

TIME AND ATTENDANCE (FLSA & FMLA)

TIME AND ATTENDANCE (R477-7,8)

THE FAIR LABOR STANDARDS ACT (FLSA)

TERMS DEFINED

FLSA Exempt

Employees who are exempt from the Fair Labor Standards Act. This term must not be confused with the term "career service exempt", which refers to an employee appointed to a position exempt from career service in state employment and who serves at the pleasure of the appointing authority.

FLSA Non-Exempt

Employees who are not exempt from the Fair Labor Standards Act. These employees qualify for either compensatory time off or overtime pay at the rate of one and one half times their normal pay rate when they work more than 40 hours in a regular work week.

Pay Period

Typically, two consecutive work weeks combined together for payroll purposes on employee pay checks.

Compensatory Time

For FLSA Non-Exempt employees, compensatory time is paid time off at the rate of one and one half times for each hour worked. This is provided in lieu of overtime pay for hours worked in excess of 40 hours during a given work week.

For FLSA Exempt employees, compensatory time is paid time off at the rate of one hour for each hour worked. This is provided in lieu of overtime pay for hours worked in excess of 40 hours during a given work week.

Excess Hours

The category of compensable hours separate and apart from compensatory overtime hours that accrue at straight time only when an employee's hours actually worked, plus additional hours paid but not worked, exceed an employee's normal work period.

Compensable

Time that must be compensated under the FLSA.

INTRODUCTION

The Fair Labor Standards Act establishes overtime pay requirements for employees who are FLSA non-exempt. Under the FLSA, non-exempt employees are entitled to pay at the rate one and one half times their normal hourly rate OR compensatory time off at the rate of one and one half hours for each hour worked in excess of 40 hours in a regular workweek.

1. Non-exempt employees establish a front-end agreement with their agency authorizing management to compensate them for overtime worked by actual payment or time off at the rte of time and one-half.

2. Management may direct an employee to work overtime, but employees must obtain prior supervisory approval for all overtime worked.

   A. Employees must be compensated for all hours they are required or permitted to work.
   B. Employees must be compensated, but can be disciplined for working unauthorized overtime.

3. The singe 40-hour workweek is the standard for the State and does not permit averaging hours over two or more weeks. (There are exceptions to this standard work week for Corrections, law enforcement, and hospital personnel).

4. The FLSA exemption status for each job class is determined by the Department of Human resource Management. Contact your human resource representative if you have any questions about your FLSA status.

SUPERVISOR RESPONSIBILITIES

Supervisors have the responsibility to ensure that time sheets accurately reflect the number of hours worked by their employees and to manage the amount of overtime accrued.

1. Supervisor must not maintain an informal or secondary record of time and attendance that does not match the time sheets submitted for payroll processing. All overtime hours worked must be reported during the week they were worked.

2. If employees work overtime on a given day, supervisors may require the employees to take time off during the <u>same</u> work period so that the employees will not accrue overtie pay or compensatory time off.

3. Once compensatory time is accrued, employees and management shall arrange for compensatory time off as soon as possible. Management shall encourage employees to use accrued compensatory time within 30 days following the pay period in which it was accrued, so long as taking compensatory time off does not unduly disrupt agency operations or endanger public health, safety, or property.

4. Leave and holiday time taken within the work period shall not count as hours worked when calculating overtime accrual.

   A. When an employee’s hours actually worked plus additional hours paid but not worked exceed an employee’s normal work period, the employee shall accrue excess hours.

B. Employees may use excess hours the same way as annual leave or agency management may pay employees for excess hours in accordance with DHRM Rule R477-8-6(8)(g).

5. Supervisors must not make changes to employee time sheets affecting hours worked or overtime accrued. In the event of a dispute over the hours worked, supervisors may discuss the situation with the employee and report the perceived problems to their human resource or payroll representative. Once again, employees may be disciplined for working unauthorized overtime.

APPLICATION OF THE FLSA TO SPECIFIC AREAS

The following paragraphs provide guidance regarding several specific problem areas and address several common misconceptions in dealing with FLSA.

Alternative Scheduling

Alternative schedules are available to provide greater flexibility in scheduling employees and to curtail traffic congestion, while ensuring the public's access to services proved by state agencies. The schedules permit employees to work outside of the traditional 8 AM to 5 PM, Monday through Friday, schedule. Employees may be scheduled to work nine- or ten- hour days or be given other schedules which serve to reduce the number of commuting trips employees must make or which provide the employees additional days off. Although an employee is working an alternative schedule, overtime and compensation must still be addressed. Please confer with your human resource representative regarding alternative scheduling options.

Telecommuting

Telecommuting is not a substitute for a 40 hour work week. FLSA non-exempt employees who are telecommuting must complete a time sheet; and they must not be compensated on any basis other than hours actually worked. These employees are entitle4 to overtime or compensatory time, as indicated above, for all hours worked above 40 in a regular work week.

Rest and Meal Periods

The FLSA does not require that employees be given rest periods; but if rest periods are provided, they must be counted as hours worked if they last 20 minutes or less. Coffee and snack breaks are compensable rest periods and cannot be excluded from hours worked as meal periods. The compensability of rest periods that last longer than 20 minutes depends upon the employee's freedom during these periods. As a general rule, meal periods are <u>not</u> compensable when they are at least 30 minutes long. The employee is completely relieved of duty, and the employee is free to leave his or her duty post.

On-Call Time

Whether or not the time a non-exempt employee is on-call needs to be counted as compensable working time depends on the employee's freedom while on call. If an employee must remain on the State's premises or so near that he or she cannot use the

time freely, the time is compensable. But if an employee can come and go freely, even though he or she must leave a telephone number or carry a pager, the time can be excluded from hours worked. Even when a FLSA non-exempt employee can come and go freely, he or she must be compensated for on-call time in accordance with DHRM rules.

Training Programs, Lectures, and Meetings

Time spent in training programs, lecture, and meetings, need not be compensated when:

Attendance occurs outside of the employee's regular working hours, AND attendance is voluntary and the employee is not led to believe that non-attendance will prejudice his or her working condition or employment standing, AND the employee does no productive work while attending.

FLSA LIABILITIES

The United States Department of Labor Wage and Hour Division conduct investigations and inspections to determine compliance with FLSA. This agency also issues rules, regulations, and interpretations of this act.

An employer who fails to pay an employee overtime compensation, as required by the FLSA, is liable to the employee for the amount of unpaid overtime and may be liable for liquidated damages equal to the amount of unpaid wages and overtime. This amounts to "double back pay". An employer who willfully violates the FLSA is liable for a fine of up to $10,000. If an employer is convicted of violating the FLSA more than once, the employer is also subject to imprisonment for up to six months for each subsequent conviction. Employees who prevail in an FLSA case are entitled to collect their attorney fees. Such fees can be substantial even where there is small damage claims. Employers can only recover attorney fees when there is egregious conduct on part of the employee, such as bad faith litigation.

THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

The Family and Medical Leave Act requires State agencies to provide up to 12 weeks of job-protected leave to "eligible" employees for certain family and medical reasons. Employees are eligible if they have worked for the state for at least one year and for at least 1,250 hours over the last twelve months. The leave taken may be paid, if the employee has leave balances, or unpaid, if the employee does not have leave balances. Current state rules require employees to exhaust their sick annual, and converted sick leave balances before going onto unpaid FMLA leave.

The employee may take FMLA leave for any of the following reasons:

1. To care for the employee's child after birth, or placement for adoption, or foster care.
2. To care for the employee's spouse, son or daughter, or parent, who has a serious health condition.

3. For a seriouis health condition that makes the employee unable to perform the employee's job.

Generally speaking, "serious health conditions" must involve: (1) inpatient care (overnight stay) in a hospital or medical care facility, or (2) continuing treatment by a health care provider. Examples include: pregnancy and childbirth, cancer appendicitis, pneumonia, sever nervous disorders, and clinical depression.

The employee may be required to provide advance leave notice and medical certification. The employee ordinarily must provide 30 days advance notice when the leave is "foreseeable."

SUPERVISORS ROLES AND RESPONSIBILITIES

Supervisors have unique responsibilities for ensuring agency compliance with the FMLA. When employees are absent, sick, or injured, the employees generally tell their supervisor before telling anyone else.

It is not the supervisor's job to diagnose the sickness or injury; rather, the supervisor's roles are to:

1. Know what the employee's rights are.
2. Know when FMLA leave may apply.
3. Notify appropriate personnel when an employee may qualify for FMLA leave.
4. Not deny a qualifying employee's leave request.
5. Not retaliate against an employee for taking FMLA leave.
6. Understand the relationships among the FMLA, the Americans with Disabilities Act, and Workers Compensation Laws.

NOTIFY APPROPRIATE PERSONNEL OF THE NEED FOR FMLA LEAVE

You may notify your agency's human resources or direct the employee to "usoe.k12.ut.us" to the HR section where all the forms are available. The forms must be submitted to human resources who will determine whether or not an FMLA qualifying condition exists and designate the leave as FMLA, if appropriate. You may be required to provide FMLA leave application for the employee if the employee is unable to do so. FMLA applies to the:

-Birth of a child
-Care for a foster child
-Emergency or planned operation or medical procedure
-A period of incapacity of more than consecutive calendar days
-Intermittent leave that involves continuing treatment
-Anytime a medical certification has been submitted by the employee

ADDITIONAL CONSIDERATIONS

Confidentiality Requirements

With the exception of informing your HR representative, supervisors should not divulge the nature of employee illnesses, disabilities, and injuries. Under the Americans with Disabilities Act, this information should be kept confidential and be divulged only to those who have a bona fide need to know. Generally speaking, you should divulge the information only to your HR representative and let him or her decide who else has a need to know.

Do Not Deny a Qualified Leave Request

You must not interfere with, restrain, or deny the exercise of any right provided under the FMLA. If the employee requests the leave in advance for a non-emergency medical procedure, it is okay to ask the employee to reschedule if the leave taken at that time will cause an undue hardship on your operations. But, you should nevertheless allow the employee to take the leave if he or she is unwilling or unable to reschedule the procedure. Generally speaking, it is better for the supervisor to confer with the agency's HR representative before denying any leave request for a purpose potentially qualifying under the FMLA.

Do Not Retaliate Against an Employee for Taking FMLA

You must not discharge, discipline, or discriminate against any person for taking FMLA leave or for involvement in any proceeding under or relating to FMLA. The follow are among actions which may be considered retaliation under the FMLA:

-Giving the employee an unsatisfactory performance evaluation
-Failing to return the employee to work as quickly as possible
-Assigning the employee less desirable duties
-Ostracizing the employee in any way

Supervisor must ensure that their decisions are job related and consistent with business necessity and not retaliatory or discriminatory.

The Americans with Disabilities Act (ADA), Workers Compensation, FMLA Connection

The ADA, Workers Compensation, and FMLA laws interact and sometimes conflict with each other in various ways. Your role as a supervisor is to help ensure that your agency complies with all three laws. The main relationship between the ADA and the FMLA is indicated under "Confidentiality Requirements" above. Once again, do not divulge the nature or extent of a disability an employee may reveal to you to any (not even your immediate supervisor) but your HR representative or the person who is specifically charged with determining eligibility under the FMLA. Furthermore, you should not ask an employee about any disability he or she may have. If an employee reveals a disability and is seeking leave as an accommodation for that disability, it is probably best to refer the employed to your agency's ADA Coordinator or HR representative.

As a supervisor, you also need to be concerned with the interactions between Workers Compensation and the FMLA. In this regard, you must be aware that an employee who is out on workers compensation leave cannot be compelled to return to work on a temporary traditional assignment status (TTA) if the employee's condition also qualifies as a serious

health condition under the FMLA. The employee can exhaust his or her 12 week FMLA entitlement before returning to work.