

# Defending the Agency

## Reprimands, Suspensions, PIP or Removal

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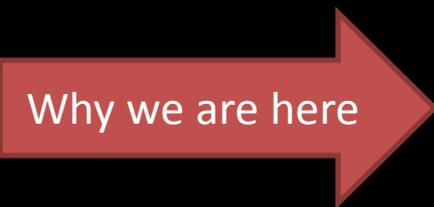
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# Session Topics

1. Accountability for misconduct
  - Reprimands, suspensions, and removals
2. Accountability for poor performance
  - Performance Improvement Plans (the PIP)
3. Demonstrating non-discrimination
  - Evidence and strategy in investigations and hearing

# A Balanced Civil Service



Accountability for Misconduct

# Reprimands, Suspensions, Removals

# Decide: Performance or Misconduct

- In general, problem employees fall into one of two categories:
  - Misconduct (discipline)
  - Unacceptable performance
- Procedures and options differ
- How to decide:
  - Read the performance plan and determine whether the problem is covered by the a critical element

# Procedures and Proof

## Misconduct

1. Rules of behavior
2. Progressive discipline
3. Standard of proof:
  - Preponderance

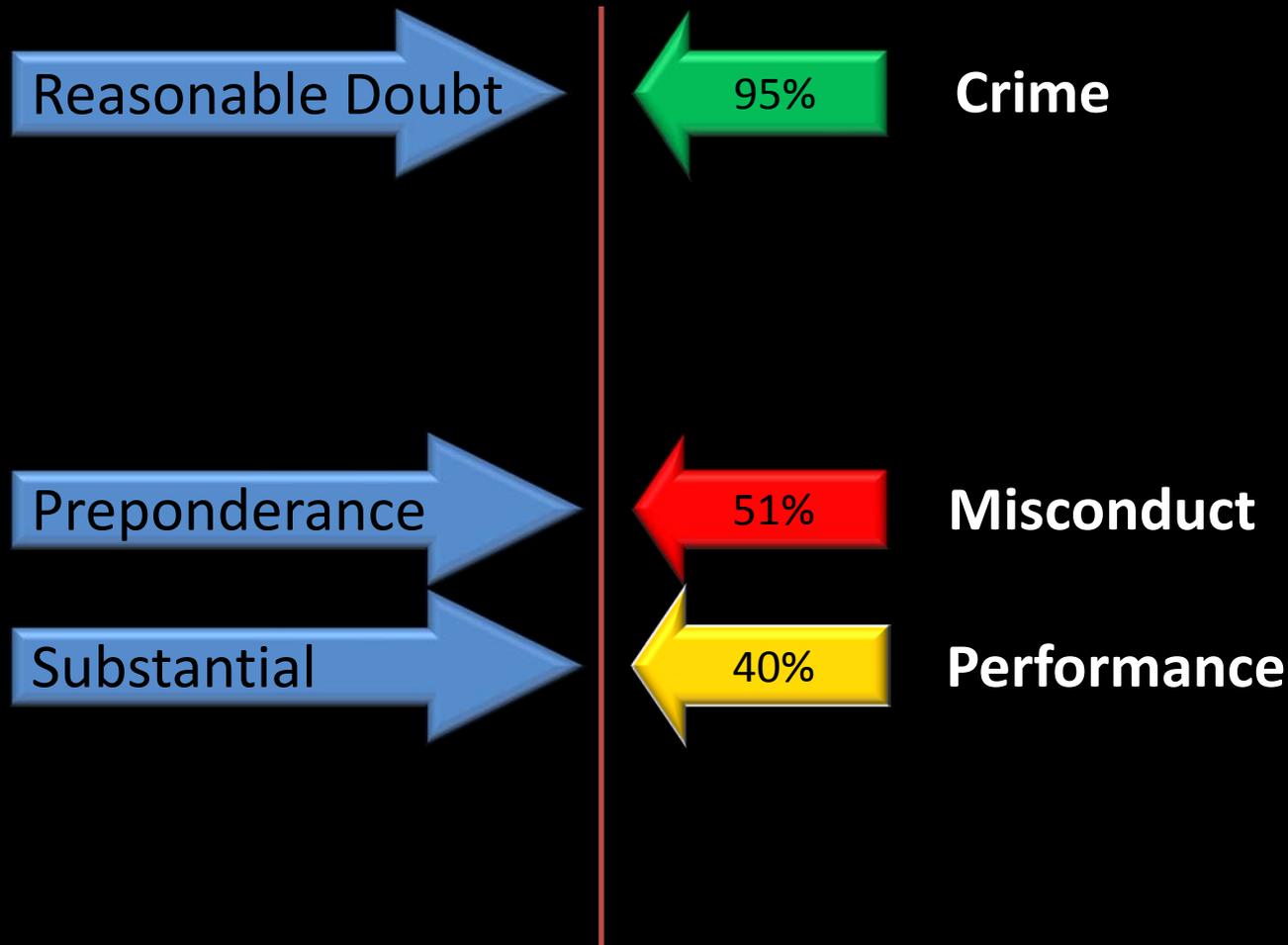


## Performance

1. Critical elements
2. PIP
3. Standard of proof:
  - Substantial



# Evidence Standards Burdens of Proof



# Supervisor's Tool Options

## Misconduct

1. Reprimand
2. Suspension
3. Termination



## Performance

1. Reassignment
2. Demotion
3. Termination

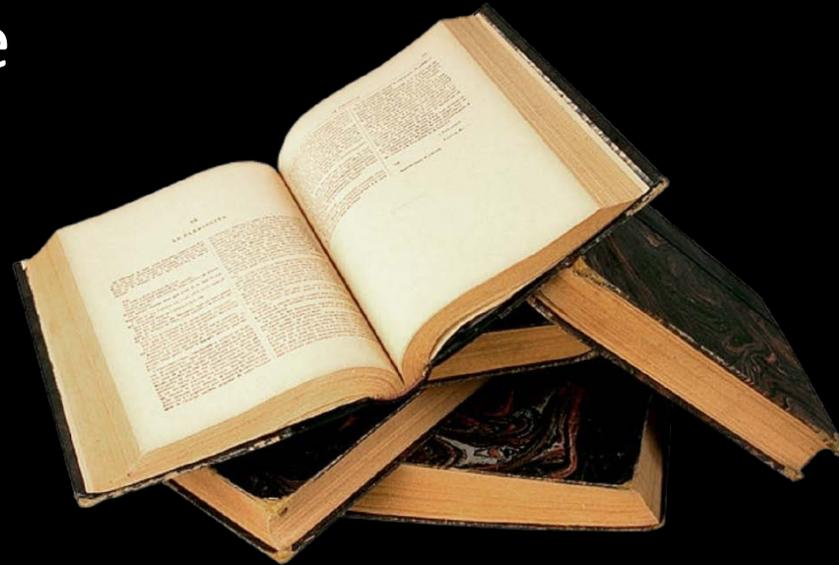


Simplicity is the ultimate sophistication.

# FIVE ELEMENTS OF DISCIPLINE

# 1. Establish a Rule

- Legal requirement
- Agency regulation
- Local policy
- Supervisor's unique rule
- Should-have-known
- Nexus with job

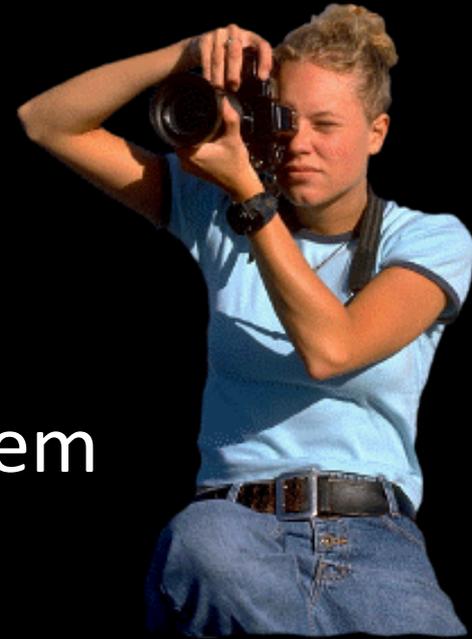


## 2. Inform Employee of the Rule

- General notification to work group
  - Staff meeting, bulletin board
- Specific directive to employee
  - Email is terrific
- Training session
- Oral communication
- Common knowledge
  - Should-have-known

# 3. Prove employee broke the rule

- Personal observation
  - He-said/she-said >
- Witness statements
- Video, computer logs, security system
- Admission/confession



1-Rule

2-Notice

3-Conduct

Letter of  
Reprimand  
(1<sup>st</sup> step of  
progressive  
discipline)

# 4. Select a defensible penalty

- *Douglas* factors →



# Douglas Factors

1. Nature and seriousness of the offense
  - Relationship to duties
  - Intentional, technical, or inadvertent
  - Malicious or for gain
  - Isolated or repeated
2. Job level and type
  - Prominence of position
3. Past discipline
4. Work record performance
5. Effect on supervisor's confidence in employee
6. Consistency with other discipline
7. Consistency with table of penalties
8. Notoriety and publicity
9. Clarity of notice
10. Rehabilitation potential
11. Mitigating circumstances
12. Alternative sanctions

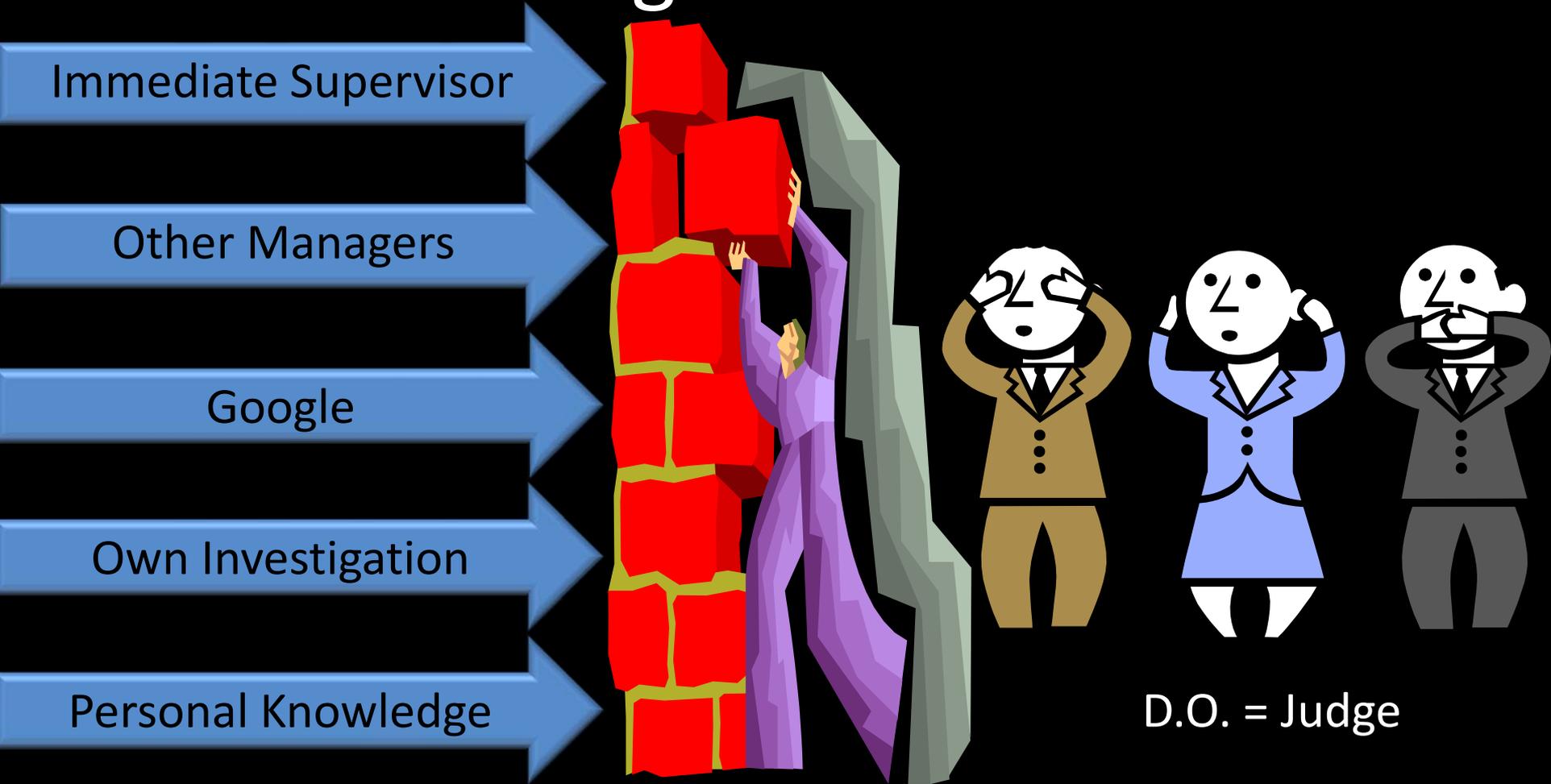
*Douglas v. VA*, 5 MSPR 280 (1981)

# 5. Due Process Provided

- The misconduct procedures automatically provide Constitutional due process:
  1. Notice of charged misconduct
  2. Opportunity to respond
  3. Impartial decision, usually from higher level supervisor.

5 CFR 752

# Deciding Official's Role



Accountability for Poor Performance

# Performance Improvement Plans

# Step 1: Write Good Standards

- Use critical elements only
  - Specific and clear
  - Measurable
  - Reasonable

# Step 2: Implement Standards

- Employee participation
  - Usually accomplished by giving draft standards to employee for comment
- Signed receipt
  - At the beginning of the appraisal period
- 60 - 90 days in advance (roughly)
  - Only need to do when standards are implemented or modified

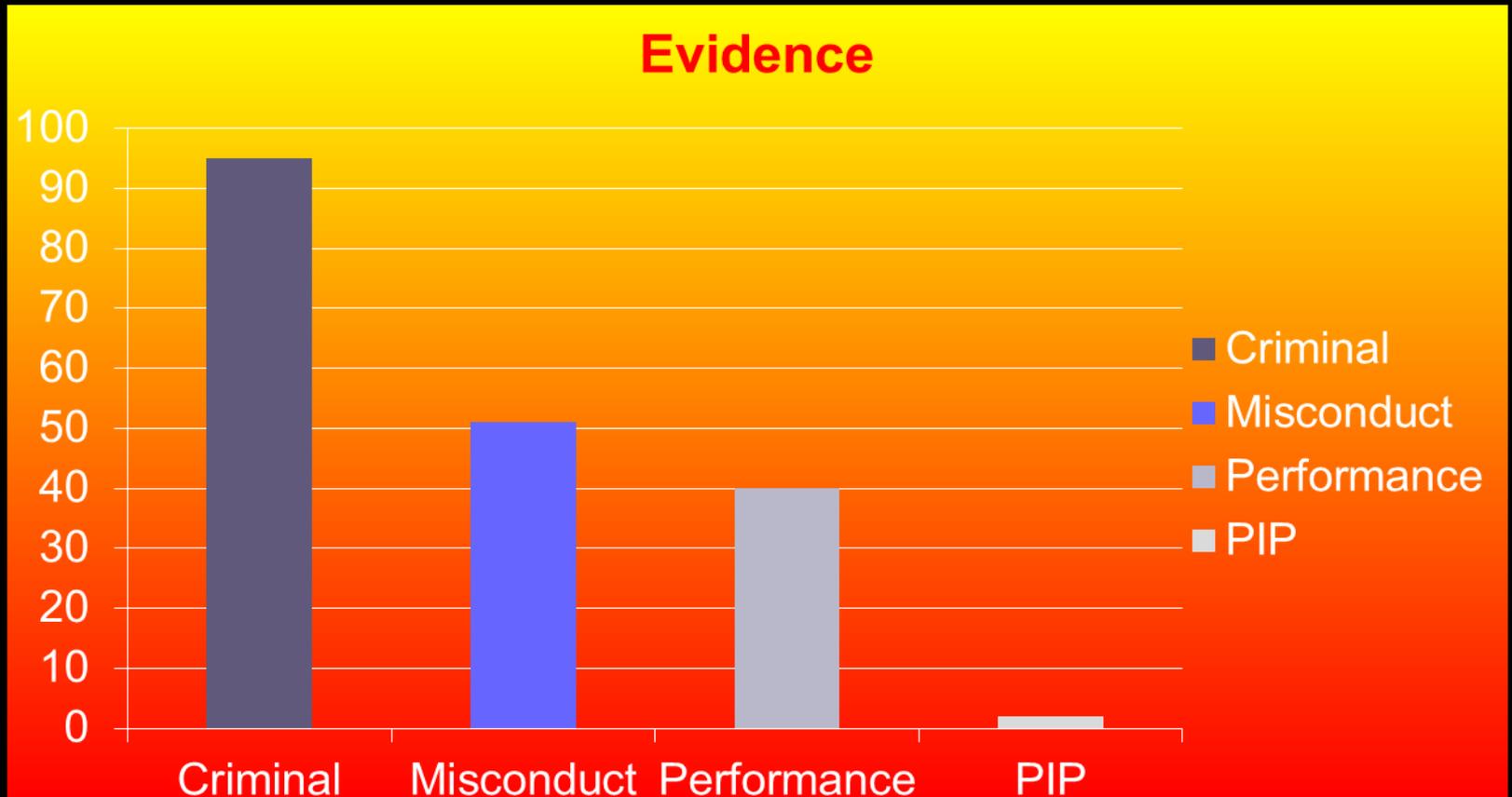
# Step 3: Measure Performance

- Continually observe performance relative to standards.
- As soon as “Unacceptable” in any critical element, move to step 4, initiation of a PIP.

# Pre-PIP Considerations

- Supervisor articulates reason for determination that performance is unacceptable >
- Look for relevant recent occurrences:
  - Career ladder promotion
  - Summary rating of record (annual rating)
  - Performance award
  - WIGI
    - Before the PIP
    - Due during the anticipated PIP

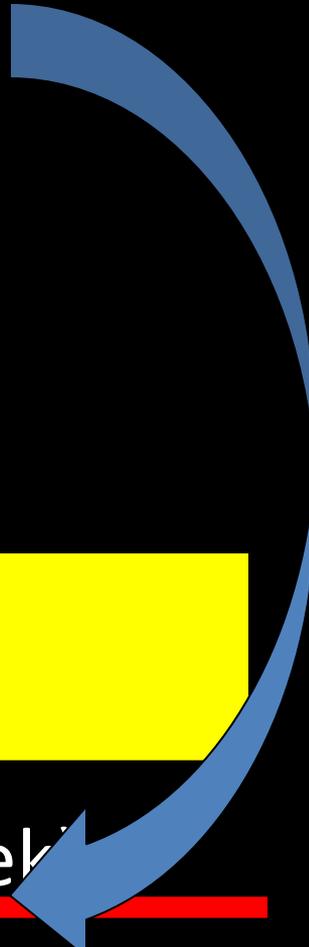
# How Much Proof Do You Need?



# Step 4: Performance Improvement Plan

- Drafting the PIP letter:
  - Identify the critical element(s) that are being failed.
    - Attach a copy of the relevant employee performance plan
    - Flesh out as necessary
  - Define the “minimum retention level.” >
  - State the length of the PIP. >
  - Explain consequences of failure of the PIP.
    - Removal from the position
  - Schedule weekly meetings (issue Monday, meet Friday).
  - Give a first-week’s assignment.
  - Maybe give a longer-term assignment.

# Define Retention Level



Outstanding

Exceeds Expectations

**Fully Successful**

Marginal (20 or more widgets per week)

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Unacceptable (19 or fewer widgets per week)

# 30-day PIPs Satisfy MSPB

- The Board has recently affirmed and reaffirmed that a 30-day PIP satisfies an agency's obligation to provide an employee with a reasonable opportunity to demonstrate acceptable performance.

*Lee v. EPA,*

2010 MSPB 240

*Towne v. Air Force,*

2013 MSPB 81

# Step 5: Manage the PIP

- DOCUMENT AND MEASURE
  - Work assignments, accomplishments, failures
  - Complaints
  - Witnesses
  - Counseling sessions
- The PIP is not the time to learn the job;
  - The PIP is the final exam.

# What's the Most Important Tool for Problem Employee Management?

A



B



C



D



# Step 6: Make the Decision

1. No action
2. Voluntary action
  - Last rites (again)
3. Involuntary action
  - Reassignment
  - Demotion
  - Removal



# Step 7: The Proposed Removal Letter

- Quote the critical element
- Identify the incidents of unacceptable performance during the PIP
  - Dates
  - Specific deficiencies
- Deciding official, time limits, rights
- Solicit personal problems

# Performance Incident Example

## *Incident No. 1:*

- On September 5, 2011, I told you to begin work on my speech for the annual management conference, and that I needed a draft by September 8. On September 11, I asked if you had finished the assignment, and you told me you had not yet started because you were busy on other matters.

- An well-worded incident has just two parts:
  - 1) What you told the employee to do, and
  - 2) What he did instead that was wrong.

Evidence and Defense in Investigations and Hearings

# Demonstrating Non-Discrimination

# Pop Quiz

1. Bill is the only employee who works for Deborah who is over 40 years old. Can Deborah put Bill on a PIP?
2. Last month Bill filed a discrimination complaint accusing Deborah of discrimination. Can Deborah reprimand Bill for tardiness?
3. Can Deborah stop Bill from writing to the agency head about perceived discrimination?

# Pop Answer

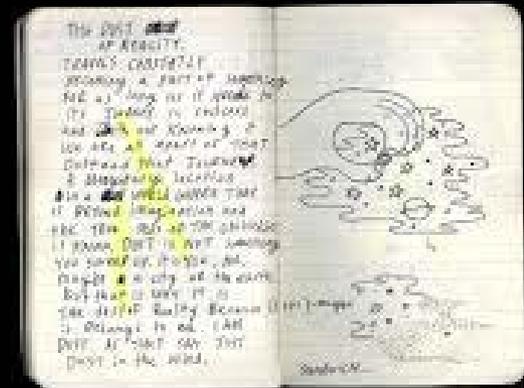
1. Yes
  2. Yes
  3. Yes
- A federal supervisor can do anything he wants as long as he has a business-related, legitimate, bona fide reason for doing it.
    - Supervisors are required by law to discriminate.
    - Not on race, sex, age, etc., but on ... what?

The Magic Key for Defense:

# Bona Fide Reason

# What is a Bona Fide Reason?

- Job-related nexus
- Specific
- Dated
- Witness identified, if any
- Written
  - Contemporaneous notes
  - Hand written in ink
  - Private and voluntary



# No Discrimination, Unless ...

- Circumstantial (prima facie) evidence simply shifts the burden to the agency to prove it had a bona fide reason for the actions.
  - With a bona fide reason, the actions are not discrimination.
  - As the agency here could not produce legitimate reasons for its actions, discrimination is assumed.

*Wahnee v. Dol,*  
EEOC Appeal No. 0120055072  
(May 7, 2008)

# Ageist Language

- Employee claimed age discrimination when the agency attempted to take several actions. His evidence was his supervisor's statements:
  - *You know I can't have that old fart, he drives me nuts.*
  - *I should have gotten rid of that old shit when I had the chance.*
  - *I am going to get rid of that old man.*
- Has the employee proven age discrimination?>

# No Discrimination, Unless ...

- Evidence such as this simply shifts the burden to the agency to prove it had a bona fide reason for the actions.
  - With a bona fide reason, the actions are not discrimination.
  - As the agency here could not produce legitimate reasons for its actions, discrimination is assumed.

*Wahnee v. Dol,*  
EEOC Appeal No. 0120055072)

# Bona Fide Can Be Good Faith Belief

- Facts:
  - Agency terminated employee for FMLA violation.
  - Employee claimed disability discrimination and attempted to prove he had not violated FMLA.
- Court:
  - Immaterial whether employee actually violated FMLA.
  - Issue is whether employer had a good faith belief that employee violated FMLA (i.e., whether agency had a discriminatory animus).

*Parker v. Verizon Pennsylvania,*  
No. 07-4829 (3<sup>rd</sup> Cir. Feb. 4, 2009)

# Opinions Count; Documents Better

- No discrimination: Selecting official testified -
  - The complaint's interview answers were short and lacked detail.
  - His personal experience was that the complaint lacked leadership skills.

*Lankford v. NRC*, 109 LRP 34383 (JUN 9, 2009)
- Discrimination: Selecting official testified -
  - Chose selectee based on qualifications.
  - However, did not put rating documents into evidence.
    - Allows for an adverse inference to be drawn; reg violation

*Frazier v. Agriculture*, 109 LRP 33949 (JUN 4, 2009)

# Non-Bona Fide Reason

- The challenging aspect of discrimination law
  - Applicant for promotion claims her non-selection was based on her race.
  - The selecting official:
    - Said she selected the selectee because she recognized her name (and did not otherwise consider complainant).
    - Understated the qualifications of the complainant.
    - Overstated less significant qualifications of the selectee.
    - Was of the same race as the selectee, and the only applicant of that race. >

# Non-Bona Fide Bites

- Because the selecting official's reasons for not promoting the complainant were not believable (were *pretext*), EEOC concluded that the real reason for the non-selection must be race-discrimination.
  - Even though there is no direct evidence of a race-based animus.

*Bowers v. DoT,*

111 LRP 30492

(EEOC OFO 4/15/11)

# Statistical Evidence

- Numbers by themselves cannot establish discrimination
  - The fact that very few women were employed in certain job categories does not “speak for itself” and constitute direct evidence of discrimination.

*Low v. Energy,*

110 LRP 69304

(N.D. Okla. NOV 16, 2010)

# Mistreatment ≠ Discrimination

- The agency disciplined the employee for doing something she was ordered to do.
- EEOC found no discrimination:
  - Although the discipline was harsh and unfair, Title VII (the anti-discrimination statute) does not protect against unfair or unwise decisions.

*King v. DVA,*

EEOC Petition No. 0320110017

(May 10, 2011)

# Bad Management ≠ Discrimination

- The manager articulated a legitimate, nondiscriminatory reason for the agency's action.
- An agency's business decision cannot be found discriminatory simply because it appeared that the agency acted unwisely or that the decision was an error or misjudgment.

*Jangula v. USPS,*  
EEOC Appeal No. 0120111330  
(5/24/13)

# Equal Opportunity Harasser

- Employee claimed sex/race harassment and probationary removal because her supervisor:
  - Yelled at her
  - Followed her after hours
  - Hit her on the shoulder
- No discrimination because:
  - Supervisor harassed everybody this way
  - Documented poor performance (billing errors)

*Canagasaby v. DVA,*  
EEOC Appeal No. 0120100467  
(DEC 9, 2010)

# Supervisor Member of Same Protected Group

- The 52 year old supervisor asked the 51 year old applicant how many years she had to retirement eligibility.
- Not age discrimination because:
  1. The statement was ambiguous, and
  2. The supervisor was also over 40 years old.

*Perry v. DVA,*  
U.S. Dist. Court,, D.C.,  
111 LRP 33361 (2011)

# Prior History as a Defense

- The fact that the supervisor has treated individuals of the complainant's group well in the past is evidence of non-discriminatory animus.
  - The complainant was 53 years old and the supervisor had previously hired individuals in that age range.

*Hams v. NRC,*  
EEOC Appeal No. 0120120178 (2013)

# PIP-Specific Issues

# Cannot EEO-Complaint a PIP

- A PIP is a preliminary step to taking a personnel action and, in most instances, does not constitute an adverse action sufficient to render an employee aggrieved.

*Lopez v. Agriculture*, EEOC Appeal No. 01A04897 (2000)

*Jackson v. CIA*, EEOC Appeal No. 059311779 (1994)

- In the Analysis that accompanied the 1992 issuance of EEOC regulations at 29 CFR Part 1614, EEOC explained:
  - “We intend to require dismissal of complaints that allege discrimination in any preliminary steps that do not, without further action, affect the person; for example, progress reviews or improvement periods that are not a part of any official file on the employee.”
- Exceptions: Reprisal and hostile-environment pattern

# Special Challenges

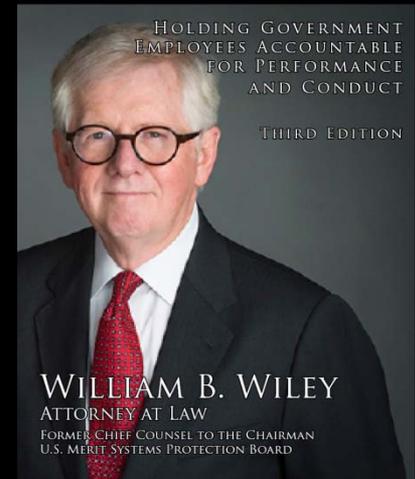
- Disability accommodation
  - You need not lower the standard
  - You need to pause the PIP process and do the disability accommodation three-step
- Subsequent failure of another critical element during the PIP
  - Another PIP



Good luck out there.

William Wiley  
Deborah Hopkins

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