

## Managing Conflict and Confrontation

How to have difficult conversations with employees and live to tell about them

KANSAS ASSOCIATION OF COUNTIES  
ANNUAL CONFERENCE  
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**Tara Eberline**

FOULSTON  SIEFKIN LLP  
ATTORNEYS AT LAW

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### Agenda

- Discipline Meetings and performance evaluations
- Internal Investigations
- Accommodation requests
- Termination Meetings

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### Discipline Meetings

<ul style="list-style-type: none"> <li>• Be prepared</li> <li>• Performance v. expectations</li> <li>• No surprises</li> <li>• This isn't Lake Wobegon: tell the truth</li> </ul>	<ul style="list-style-type: none"> <li>• Share the good and the bad</li> <li>• Watch for deflections</li> <li>• Prepare for big emotions – or silence</li> <li>• Make sure your management team is aligned before the meeting.</li> </ul>
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Being direct and compassionate	
Confrontational and general	Factual and specific
<ul style="list-style-type: none"> <li>• “You’re always late.”</li> <li>• “You’re not a team player.”</li> <li>• “You botched the Acme deal.”</li> </ul>	

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Being Direct	
Confrontational and general	Factual and specific
<ul style="list-style-type: none"> <li>• <b>“You’re always late.”</b></li> <li>• “You’re not a team player.”</li> <li>• “You botched the Acme deal.”</li> </ul>	<p>“On 1/2/18, you were 26 minutes late, on 1/14/18, you were 18 minutes late, and on 2/29/18, you were 42 minutes late.</p> <p>Your tardiness resulted in you missing the beginning-of-shift meeting on three occasions, resulting in your supervisor needing to repeat the directions for you after you arrived. It also left us short-staffed and required another employee to incur overtime.”</p>

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Being Direct	
Confrontational and general	Factual and specific
<ul style="list-style-type: none"> <li>• “You’re always late.”</li> <li>• <b>“You’re not a team player.”</b></li> <li>• “You botched the Acme deal.”</li> </ul>	<p>“On November 1, your supervisor, Ms. Smith, asked you to pitch in on the Acme project, and you refused, stating that it ‘wasn’t in your job description.’ Again the following day, you refused to stay late despite Ms. Smith’s request when your coworker had a family emergency. These actions negatively impact the team and are unacceptable.”</p>

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## Being Direct

### Confrontational and general

- “You’re always late.”
- “You’re not a team player.”
- **“You botched the Acme deal.”**

### Factual and specific

“As project manager for the Acme deal, you were responsible for managing the project from start to finish. When you spoke disrespectfully to Mr. Smith on September 1, 2018, missed a critical meeting with Acme’s Chief Executive Officer without providing notice on September 10, 2018, and delivered a status report on the project that contained numerous typos, misspellings, and inaccurate information, Acme Co. cancelled the deal, resulting in a loss of confidence in the City and the project moved to another City.”

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## Performance Evaluations

- Require the employee to come prepared.
- Consider your evaluation form – does it encourage discussion?
- Offer employees an opportunity to respond verbally during the meeting.
- Offer your employees an opportunity to respond on the evaluation itself.

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## Taylor v. Rite Aide Corporation

- Taylor worked for Rite Aide for 9 years and was consistently evaluated as “very good” or “meets expectations,” with a few areas for improvement.
- Taylor complained about sex discrimination and hostility towards her taking FMLA leave.
- Within weeks, Taylor was terminated for “job performance,” and later asserted claims of discrimination and retaliation.
- Court: Summary judgment granted on discrimination claim, but denied on retaliation claim.
- Satisfactory performance reviews, including her final review showing “immense improvement” in her weakest category, was enough (with other evidence) to allow a reasonable juror to conclude the employer’s stated reason for termination may be pretext.

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*Smith v. Woodcraft Industries*

- Smith worked for Woodcraft Industries for 2.5 years and consistently received favorable performance reviews.
- Smith was subjected to sexual harassment during her employment and objected to her supervisor's comments.
- Smith later gets terminated for job performance and sues, alleging hostile work environment and retaliatory discharge.
- Court: Summary judgment denied on retaliatory discharge claim, in part because "[employee's] prior positive reviews could lead a reasonable juror to question the sincerity of the proffered explanation."

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Discipline Meetings and Last Chance Agreements

- Be prepared.
- Specifically describe the performance or conduct concerns.
- Specifically describe your expectations moving forward.
- Specifically describe the consequences of not meeting those expectations.
- Does the employee have to sign?

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Sample Last Chance Agreement

- This Last Chance agreement is entered into by Employee and Employer on October 1, 2018.
- On September 1, 2018, Employee failed to pass a random drug test that was administered as a condition of Employee's employment. This is grounds to terminate Employee's employment.
- Employer has decided to give Employee one last chance to correct his conduct.
- Employee agrees:
  - Employee will enroll in and complete a substance abuse treatment program. Employee's participation is mandatory, and Employee will participate until the program determines that Employee has successfully completed the program.
  - Employee will be subject to frequent, unannounced drug tests for a period of 12 months. Any refusal to test or positive or altered results will result in immediate dismissal.
  - This agreement does not change Employee's at-will status and does not protect Employee from other discipline, including termination.

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### But what if...

- ...the employee denies everything?
- ...the employee claims that the entire write-up is discriminatory or retaliatory?
- ...the employee claims that her performance failures are because of a medical condition?
- ...the employee refuses to cooperate in your investigation?

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### Internal Investigations



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### Harassment Defense

- *Faragher/Ellerth defense*: Employer acted with reasonable care to prevent and correct harassing behavior, and the employee failed to take advantage of the preventative opportunities.
- Considerations:
  - Comprehensive harassment policy and procedure
  - Frequent, documented training
  - Prompt and thorough investigation by experienced investigator

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## Harassment Investigations

- First meeting with complaining party
  - Take the complaint seriously
  - Be objective
  - Ask the complainant to identify all potential witnesses and evidence
  - Explain the process
  - Document the conversation



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## Harassment Investigations

- Meet with alleged harasser:
  - Introduce yourself and identify your role (especially important for lawyers – “I am not your attorney.”)
  - Explain the purpose of the investigation
  - Require specific responses
  - Identify other witnesses and evidence
  - Take steps to prevent retaliation
- Common questions:
  - Can I bring my lawyer?
  - Who complained about me?
  - What about my rights?
  - Can I invoke the 5<sup>th</sup> Amendment?
  - I'd like to file a complaint of my own.

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## Harassment Investigations

- For each witness, including complainant, alleged harasser, and third parties:
  - Remain neutral
  - Start broad and narrow in
  - Follow-up on details of their knowledge
  - Remind them of harassment and retaliation policies and procedures (and document that you did so)

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## Harassment Investigations

- Reach and document conclusions.
- Meet with the complainant and the alleged harasser to close out.
  - Remind both of the policies.
  - Remind both about anti-retaliation expectations.
  - Remind both to maintain confidentiality.
- Check back in with the complainant in a couple weeks to ensure the situation is resolved.

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## *Faragher/ Ellerth in action: Cooper v. CLP Corp.*

- Cooper alleged that his immediate supervisor (the store manager) created a hostile work environment by frequently making fun of his "lazy eye."
- CLP had a policy that prohibited harassment based on disability and required employees to report harassment to store manager or HR Director.
- All employees received training on the policy during orientation and were given the telephone number of the HR director to report instances of harassment by store manager.
- Cooper did not report the alleged harassment to the HR director, but instead mentioned it to his district manager (who was not one of the company representatives designated by the policy) during one of her visits.
- District Court and 11<sup>th</sup> Circuit: SJ for Employer. Failing to follow the proper reporting process was insufficient to put the employer on notice of the harassment.

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## *Faragher/ Ellerth in action: Kramer v. Wasatch Cnty. Sheriff's Office*

- Employee complained that her supervisor was sexually harassing her and sexually assaulted her multiple times.
- The selected investigator had no background investigating sexual harassment and was a close acquaintance of the supervisor.
- Investigator focused investigation on a consensual sexual relationship the employee had with a co-worker, leading to the complaining employee being disciplined and encouraged to resign.
- District Court: Summary judgment for the employer.
- Tenth Circuit: Reversed and remanded. The investigation performed by the employer was insufficient, and a fact question remained regarding whether the employer's response to the employee's complaint "fell short of demonstrating that the [employer] took reasonable steps to discharge its duty under Title VII."

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**Disabilities and Religion**

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**REQUESTS FOR ACCOMMODATIONS**

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**ADA or Religions Accommodations**

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- **What triggers the conversation?**
  - I need X [a job change, time off, etc.] because Y [physical or mental impairment or religious belief].
- **First question: How can I help you?**
- **Step two: Call Human Resources**

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**ADA or Religions Accommodations**

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- **Additional Questions (to be handled through HR):**
  - What job functions are impacted?
  - In what way is it impacted?
  - Why is the job function impacted? (i.e., is it really because of a disability or religious requirement?)
  - What does the employee propose as a solution?
- **Ending the meeting: Make no promises, other than to get back to the employee in a reasonable timeframe.**
- **Consider facts on case-by-case basis, but take into consideration how similar situations have been addressed.**

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**ADA Accommodations**

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*Van Rossum v. Baltimore County*

- Health inspector began experiencing severe pain and pressure, reduced vision, numbness, and “brain fog” that she attributed to mold and fungus in her office.
- Symptoms got worse when her department moved to another location.
- Her employer refused her repeated requests to change offices, and she eventually retired early.
- Jury: \$780,000 to employee.

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Religious accommodations: What if the employee doesn't ask?  
*EEOC v. Abercrombie & Fitch Stores, Inc.*

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- Samantha Elauf, wore headscarf to interview and received strong enough rating to be hired.
- Neither the interviewer nor Elauf mentioned the headscarf during the interview; Elauf did not ask for an accommodation.
- After the interview, the district manager rejected Elauf because the headscarf would violate the company's Look Policy.
- 10<sup>th</sup> Circuit: SJ for Employer. Employers cannot be liable under Title VII for failing to accommodate a religious practice until the applicant provides the employer with actual knowledge of a need for an accommodation.
- Supreme Court: Reversed. Employers cannot refuse to hire an applicant if the employer is motivated by a desire to avoid needing to accommodate a religious practice. No actual knowledge of a need for accommodation is required.

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**Termination Meetings**

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- Minimize risk—follow your policies
- Be consistent
- Be direct, sensitive, and firm
- Tell the truth
- Use a script
- Consider timing and location
- Bring a witness to take notes

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### Don't Allow Empathy to Become Evidence

- "I'm sure you'll be happier at home with the kids."
- "You should be enjoying your golden years anyway."
- "We don't want you to re-injure your bad back."
- "If only you hadn't filed that complaint."
- "With the election coming up, we need a supportive team."

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### *Smothers v. Solvay Chems., Inc.*

- Smothers, who had taken FMLA leave and suffered from a medical disability, committed a serious workplace safety violation and was subsequently terminated.
- Smothers alleged discrimination and retaliation, pointing to other employees that had committed similar (or worse) safety violations who only received warnings or were not disciplined.
- District Court: SJ for the employer.
- Tenth Circuit: SJ reversed on FMLA and ADA claims in part because Smothers was disciplined more severely than other employees that committed comparable offenses, and because Solvay based its decision on an inadequate investigation.
- Thus, a reasonable jury could infer that the safety violation was pretext for unlawful discrimination or retaliation.

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### Any Questions?

Tara Eberline  
teberline@foulston.com  
913.253.2136

FOULSTON  SIEFKIN LLP  
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