The first responsibility of a leader is to define reality.
The last is to say, “Thank you.”
In between, the leader is a servant.

Max DePree
Author of Leadership is an Art

Andrea Chan

With thanks to Eileen C. Begle, Senior Assistant County Attorney, Office of Harris County Attorney Vince Ryan who originally prepared this paper as “Ten Things Every Supervisor Should Know” in August 2015 for the County Attorney’s Office and Office of Human Resources & Risk Management of Harris County
Introduction

Employees today enjoy more protection than ever. Laws that prohibit discrimination on the basis of race, color, sex, national origin, age, religion, and disability, as well as laws that prohibit employers from retaliating against employees who engage in certain protected activities protect us in our role as employees. Additionally, the Family and Medical Leave Act and the Americans with Disabilities Act are complex laws that provide specific rights to certain eligible employees.

These laws can be intimidating and confusing to an untrained supervisor. Most supervisors understand the basic tenants of these laws. To be a great supervisor, you must also learn and use effective strategies that will ensure fair treatment (but not necessarily identical treatment) for employees while still holding them accountable for their performance and behavior. In most cases, these strategies will also lead employees to achieve their peak performance. In those rare cases when an employee either won’t or can’t achieve that, these same strategies provide a strong defense to any potential employment law claims. That is YOUR job. I hope the information that follows helps you do it with increased confidence.

1. Treat employees the way you want to be treated.

A little compassion (not gullibility) goes a long way toward creating a positive work environment. The best work environments are based on mutual respect and trust. That comes from frequent, honest, and open communication. The “Golden Rule” still works.

2. It’s tough to supervise “friends.”

Close personal relationships with those you supervise may lead to disgruntled employees. This is especially true when the supervisor is someone who is “promoted from the ranks.” Be aware that even if you think you’re treating everyone fairly, there may be a perception that your subordinates may not believe you are being fair. Continuing close, social relationships with select subordinates makes it difficult to maintain the respect of the entire group. There’s a difference between being “friendly” and being “friends.” (See Number 1, above.)

3. Stick to the facts.

Seems like such a simple thing, doesn’t it? Supervisors who jump to conclusions frequently land in hot water. Conclusions about medical issues, untruthfulness, and other issues of moral turpitude are the most problematic.
Conclusions about medical issues can lead to “regarded as disabled” claims under the ADA. Conclusions about untruthfulness or similar issues muddy the water during litigation. If the employer cannot prove the bad behavior that led to the adverse employment action, anyone reviewing the decision (e.g., the Texas Workforce Commission, the EEOC, or a jury) will assume that the reason for the decision was false and that the real reason was discrimination or retaliation.

4. Be deliberate in your use of email.

Email can be a great method of communication with your employees. However, its use can also create a plethora of problems.

a. “Reply All” pitfalls. Yes, we’ve all done it and had it done to us. Take an extra few seconds before you hit “send” to make sure it’s going to the intended parties.

b. “Auto-Fill” pitfalls. Don’t rely on your email program to select the correct name. Double check to make sure it’s going to the right people.

c. No poison pen. Nuance is often lost in emails. Something that you may think is funny may be interpreted as offensive. Unless you are corresponding with someone you trust, keep emails to the point and devoid of emotion. And remember—people can’t read your mind.

d. No downward spiral. Don’t use email to engage in a back-and-forth argument with someone who has a different viewpoint. It’s not the best forum.

e. Stop, look, and listen. Especially when before you hit “send” on a nasty email, step away from your email for 30 minutes. Come back and re-read. Should you really send the email?

f. Email = Document. Sending an email doesn’t mean you haven’t created a “document” for purposes of the Public Information Act. The retention schedules set forth by the Public Information Act still apply to emails and depend on the nature of the communication.

5. Employees can’t read your mind.

Supervisors have to set expectations for employees. Those expectations have to be communicated clearly. We set expectations in many ways:

- Job postings and descriptions;
- Job interviews;
- Policies and procedures;
- Training;
- Direct communication; and
- Being a good example.

Once you have set an expectation for an employee, you must gather information to find out whether he is meeting those expectations. Then you have to provide feedback. Most of the time the feedback is positive. But if the employee isn’t meeting your expectation, first check to make sure that you have conveyed that expectation. If you are confident you have clearly communicated the expectation, you must provide clear feedback and the information necessary to help the employee reach the expectation. Then you follow-up later to see if the employee is doing it correctly.
We constantly use the same cycle for managing employee performance:

- Set Expectations
- Gather Info
- Provide Feedback
- Follow-Up
- (re-set)

You have to tell your employees specifically what to do and whether they are doing it correctly. They can’t read your mind.

6. **At will employment is not a defense to discrimination or retaliation claims.**

Generally, employees without a written employment contract can be fired for good cause, bad cause, or no cause at all. In an at-will situation, either the employer or employee may terminate the employment relationship at any time, with or without warning, and with or without cause, unless there is an existing agreement with express terms and conditions covering its termination. However, the employment-at-will doctrine is not without its limits. Terminations initiated by the employer must not be discriminatory or in violation of specific federal or state laws.

Title VII of the Civil Rights Act of 1964 (Title VII) protects employees from discrimination based on their race, color, sex, national origin, and religion. The Age Discrimination in Employment Act of 1967 protects employees aged 40 or older from discrimination based on age. The Americans with Disabilities Act of 1990 (ADA) protects employees from discrimination based
on a disability or perceived disability.\textsuperscript{1} Chapter 21 of the Texas Labor Code basically mimics Title VII and the ADA. Together, these laws are meant to promote equal employment opportunities for everyone.

Judges and juries expect employers to treat employees fairly, including giving the employee more than one opportunity to correct inappropriate behavior or poor performance. And public employers often face more intense scrutiny than other employers. Therefore, when taking an adverse employment action against an employee, we must have a legitimate, non-discriminatory, and non-retaliatory reason for doing so. Moreover, that reason (or those reasons) must be documented accurately.

Keep a log for each employee. This document does not go in the personnel file until an employee leaves. It is your document to help you keep track of the facts. Still, it is a public record subject to disclosure under the Public Information Act. Therefore, everything written must be professional, accurate, and objective. (See Number 3, above.) The log will help you spot patterns in employee performance that need to be addressed. Include the oral and written feedback you give to the employee. The log will also help you draft appropriate performance management documents, whether positive or corrective, if and when needed.

Calm down before you write anything to correct performance. Tell the employee what specific behavior or performance was unacceptable. \textbf{Stick to facts.}\textsuperscript{2} Explain why it was unacceptable. Explain any consequences of the unacceptable performance or behavior. Explain clearly what the employee must do to avoid further disciplinary action. If the employee offered an excuse for his behavior, explain whether the excuse is valid and the extent, if any, to which it affects your decision. Don’t forget to follow-up! If you’ve talked to an employee about getting to work on time and he goes three weeks without being tardy, note it in the log. \textbf{It’s great to focus on an employee’s strengths.}

\begin{center}
\begin{tabular}{|p{\textwidth|}}
\hline
The goal of this process is to get every employee to peak performance. \\
This is \textit{not} about “building a file to fire someone.” \\
We \textit{want} people to be successful and \textit{assume} that they can be! \\
\hline
\end{tabular}
\end{center}

By following those steps, you will make sure the employee doesn’t have to read your mind.

\section*{7. Exercise the employer’s rights for handling chronic absenteeism.}

Employers have more legal alternatives for dealing with chronic absenteeism than most supervisors realize. Sometimes, just mentioning the absences to the employee will curb or even stop abuse. Other times the supervisor may have to be more assertive.

\textsuperscript{1} Each of these laws includes other protections, but these are the basic rights established.  
\textsuperscript{2} Here are some words that you might incorporate into your supervisor vocabulary: Attitude, Appropriate, Support, Team Player, Boundaries, Commitment, Organized, Relationship, Personal Hygiene, Professional, Values, Efficient, Creative, Initiative.
Require employees who have poor attendance records to speak directly to a supervisor when calling in sick. Sending a text message, leaving a message with their best friend, and emailing are not acceptable. If the employee leaves a voice mail, call him back.

Sitting down with an employee and starting a conversation with, “I’ve noticed …” supported by some facts may be all it takes to get an employee on the right track.

Your entity may have a policy or procedure that requires employees to provide a doctor’s note any time they call in sick for four or more consecutive working days. It is allowable to have a department to require an employee to provide a doctor’s note any time, if the situation warrants. An employee who has a poor attendance record should be required to provide a doctor’s note every time he calls in sick (even if using another form of paid leave) until he achieves and maintains a good attendance record. One caveat here: an employee on intermittent FMLA is not required to provide a doctor’s note for every absence.

No law prohibits an employer from asking an employee who has called in sick, “What’s wrong?” If an employee thinks nobody notices (or cares) when he calls in sick, he is more likely to keep doing it for minor ailments and start doing it under circumstances that may not be authorized by policy.

In situations where an employee is calling in sick frequently, supervisors need to find out why. The employer has legitimate reasons to know what is going on with the employee. We are responsible for ensuring:

✓ the employee is okay;
✓ we provide the employee’s rights under FMLA, ADA, and workers’ comp;
✓ we protect the employee’s colleagues; and
✓ the work gets done.

We can’t do any of those things without talking to the employee.

Effective listening skills are critical. An employee who calls in sick frequently when he really isn’t sick might be bored with his job or struggling with personal difficulties at home. A great supervisor listens for evidence of other causes and, where appropriate, offers help to the employee.
8. **HIPAA does not apply to records held as an employer.**

The Health Insurance Portability and Accountability Act (HIPAA) is important federal legislation designed to protect an individual’s ability to get health insurance. But most of the time all we hear about are the privacy rules. Those rules protect the privacy of certain medical records, referred to as protected health information (PHI). Most governmental entities have some PHI. Some examples of PHI are the inmate medical records held by law enforcement and the medical records of citizens held by the health department or EMS, e.g., tuberculosis control and the Women, Infant, and Children’s (WIC) clinics. But records we hold as an employer are not PHI. They are expressly carved out of the statutory definition of PHI.

For confirmation, check out what the U.S. Department of Health & Human Services (the federal agency responsible for writing the HIPAA regulations and for enforcing compliance) says about it: [http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/employers.html](http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/employers.html)

With that said, we should still keep any information or documentation we get from an employee regarding his or her health on a **strict need-to-know basis**. Those documents must also be kept in a file **separate from the rest of the personnel file**. This includes simple doctor’s excuses, FMLA records, all workers’ comp records, as well as any documentation regarding disability.

9. **It is your responsibility to recognize FMLA-qualifying events when they happen.**

While you may have an HR professional who actually handles all of the FMLA paperwork, it is your responsibility to recognize FMLA-qualifying events based on information your employees provide when they call in. Then you can refer the employee to the appropriate staff person. Let’s examine those qualifying events.

A. **The original qualifying events.**

When first adopted in 1993, the qualifying events were limited to:

- The birth of placement of a child for adoption or foster care;
- The **serious health condition** of the employee’s spouse, parent, or child; and
- The employee’s own **serious health condition**.

B. **Definition of serious health condition.**

The FMLA identifies two categories of **serious health conditions**.

- Over-night inpatient care and
- **Continuing treatment** by a health care provider.
Over-night inpatient care is easy to recognize. If the employee or her spouse, parent, or child is in the hospital, the absences related to the hospitalization and recovery are covered. The definition of continuing treatment, however, is a little more complicated.

Identifying an FMLA-qualifying event based on continuing treatment by a health care provider is harder. The Act lists several categories of continuing treatment. The first category is the hardest to identify. You cannot identify an illness as fitting within this category based on a diagnosis. Instead, the Department of Labor established this formula:

1. The formula.

A period of incapacity greater than three consecutive calendar days AND
   One or more doctor visits OR

   One doctor visit plus one prescription / regimen of treatment.

Using the formula, two employees with identical symptoms and the same number of absences could be treated differently. One employee could go to the doctor and get a prescription, qualifying for FMLA protection, and the other could tough it out and not get FMLA protection.

2. Any period of incapacity because of pregnancy or prenatal care.

3. Chronic serious health conditions, such as asthma, diabetes, or epilepsy.

4. Permanent or long-term illnesses, such as Alzheimer’s, a severe stroke, or terminal stages of a disease; and

5. Conditions requiring multiple treatments, such as injuries or illnesses that require treatment to prevent a period of incapacity greater than three consecutive full calendar days.

The employee does not have to ask for FMLA by name. On the contrary, it is always the employer’s responsibility to determine whether an absence may be covered by FMLA. As a supervisor, it is your responsibility to talk about absences with the employee to make that determination. For instance, where an employee has had a period of incapacity greater than three consecutive calendar days, the supervisor should ask the following questions.

**Questions to ask after 3 days:**

- Have you been to the doctor?
- How many times?
- Did he give you a prescription?
- When do you think you’ll return to work?
Similarly, if the employee is out because his spouse, parent, or minor child is in the hospital, the supervisor should consider whether the absences may be for an FMLA-qualifying event. Many factors go into that determination, including how long the employee expects to be off work. If the employee plans to return to work very soon, it might not be worth the administrative cost of designating FMLA.

C. The military qualifying events.

In 2008 Congress amended the FMLA to cover certain military qualifying events. They are:

1. Qualifying exigency of the employee’s spouse, parent, or child being on or called to active military duty in a foreign country.

2. To care for a veteran or military service member recovering from a serious injury or illness sustained in the line of active duty (includes spouse, parent, child, and next of kin).

10. Timesheets are serious business.

Timesheets must be accurate, including the in and out times. Obviously, supervisors can’t be with an employee all the time. Good supervisors, though, do not ignore obvious discrepancies between what is happening on a day-to-day basis and what is recorded on an employee’s timesheet.

For example, if you sign an employee’s timesheet that shows she worked 8 AM to 5 PM every day with a 60 minute lunch, but you have an in-box full of work-related emails from that employee sent before 8 AM or after 5 PM, you have a problem. The Fair Labor Standards Act requires us to pay non-exempt employees for all the hours they work. Given that hypothetical, not only is the timesheet inaccurate, but the governmental entity is exposed to liability for unpaid wages and, possibly, overtime.
11. **It is YOUR job to lead your employees to peak performance.**

The taxpayers deserve fully productive employees. One serious cause of bad morale is when one employee perceives that another employee is not being held accountable for poor performance or bad behavior. Supervisors who accept their responsibility for the performance of their employees play a big role in improving morale and guaranteeing organizational success.

12. **You aren’t in this alone.**

Your first source of information as a supervisor is your personnel manual or regulations. If you can’t find the answer, you have options. Check with a fellow supervisor. Ask your supervisor. Get help from your department HR staff. If you are still stumped, call your entity’s HR staff. They have people who know the policies and major employment laws inside and out.

If you and your entity are really stumped, you can contact us at Olson & Olson. We can find someone to help you.

**Conclusion**

Being a great supervisor isn’t easy. But anybody can learn to do it. It takes knowledge, patience, and practice. The information provided here is just the tip of the iceberg! Those who take the responsibility seriously, though, will be more confident and happier in their role as a supervisor.
Additional Resources.

Helpful websites:

www.contentedcows.com
Website for the book of the same name that focuses on retention of employees. It also offers a free monthly on-line newsletter.

www.generationsatwork.com
Website for book of the same name. Online newsletter dealing with a multi-generational workforce.

www.fastcompany.com
On-line version of the magazine. Includes and archive on management-related topics.

www.workforce.com
On-line abbreviated version of the magazine, including a free weekly newsletter.

www.nwlink.com/~donclark/
General issues related to leadership and training.

Helpful videos:

Mike Maslanka@Your Desk (Man’s Search for Meaning) (3:16)
https://www.youtube.com/watch?v=tBLUA7S3jPA&list=PLE1x2dF9qltHII3B0xql5q5-o9I_ky5hAg&index=15

Mike Maslanka@Your Desk (The Art of Baseball) (2:52)
https://www.youtube.com/watch?v=0re7Bb7nyWQ&list=PLE1x2dF9qltHII3B0xql5q5-o9I_ky5hAg&index=18

The Surprising Truth About What Motivates Us (10:48)
https://www.youtube.com/watch?v=u6XAPnuFjJc

How to Tell Someone They Smell
https://www.youtube.com/watch?v=NpLLxeHCBP0

Giving Feedback – Put the Girls Away
https://www.youtube.com/watch?v=28N2p3smEsw