

GALLAGHER & KENNEDY

— P.A. —
LAW OFFICES

DONALD PEDER JOHNSEN
DIRECT DIAL: (602) 530-8437
CELL: (602) 332-4215
E-MAIL: DPJ@GKNET.com

2575 EAST CAMELBACK ROAD
PHOENIX, ARIZONA 85016-9225
PHONE: (602) 530-8000
FAX: (602) 530-8500
WWW.GKNET.COM

Donald Peder Johnsen

Don Johnsen is a shareholder with the law firm of Gallagher & Kennedy, P.A., in Phoenix. He practices exclusively in the area of employment and labor law and civil litigation, counseling and representing management in such matters as employment discrimination and harassment claims, wrongful discharge claims, wage and hour disputes, employee hiring, discipline, and discharge procedures, drug and alcohol testing matters, arbitrations, restrictive covenants, and miscellaneous employment policy matters.

Don received his bachelor's degree from the University of Arizona (B.A. 1981). He received his law degree from the College of William & Mary (J.D. 1987), where he was Managing Editor of the William & Mary Law Review and a member of the Order of the Coif. After law school, he served as a judicial clerk to the late Hon. Clement F. Haynsworth, Jr., United States Court of Appeals for the Fourth Circuit. He is admitted to practice law in Arizona and Minnesota. He is a member of the Employment & Labor Law Section of the State Bar of Arizona, and a member of the Labor & Employment Law Section of the Minnesota State Bar Association. He has an "AV" rating from Martindale-Hubbell, and is listed in the 2007-11 editions of "The Best Lawyers in America" in its "Labor and Employment Law" category.

1. Employment Discrimination/Sexual Harassment.

- a. Representation of employers in charges of discrimination and harassment with the Equal Employment Opportunity Commission, the Arizona Civil Rights Division, and other agencies.
- b. Representation of employers in discrimination and harassment litigation in state and federal courts.

2. Wrongful Discharge.

- a. Counseling employers on employee discipline and discharge matters.
- b. Representation of employers in litigation in state and federal courts (wrongful discharge, breach of employment contract, breach of covenant of good faith and fair dealing, wrongful discharge in violation of public policy, intentional and negligent infliction of emotional distress, negligent hiring, retention, and supervision, defamation, invasion of privacy, and false imprisonment).

3. Miscellaneous Employment Matters.

- a. Review of employment applications and recruitment, interviewing, and hiring procedures.
- b. Counseling employers on drafting employment agreements and severance agreements.
- c. Counseling employers on negligent hiring, retention, and supervision issues.
- d. Review and interpretation of employee handbooks and policy manuals.
- e. Review and interpretation of personnel policies (absenteeism, vacation, sick leave, discipline, wage payment, etc.).
- f. Counseling employers on internal complaints and investigations.

4. Federal/State Workplace Regulation.

- a. Counseling employers on federal and state workplace regulatory compliance:
 - Fair Labor Standards Act (overtime and minimum wage matters, child labor matters)
 - Family & Medical Leave Act
 - Worker Adjustment Retraining & Notification Act (plant closing statute)
 - immigration matters
- b. Representation of employers in administrative claims before federal and state regulatory agencies.
- c. Representation of employers in civil litigation with federal and state regulatory agencies.
- d. Representation of employers in private civil actions by current and former employees.

5. Drug and Alcohol Testing.

- a. Counseling employers on development, implementation, and administration of drug and alcohol testing programs.
- b. Counseling employers on compliance with the Drug-Free Workplace Act.
- c. Counseling employers on compliance with state statutes and local ordinances regulating permissive workplace drug and alcohol testing.

- d. Counseling employers on compliance with the Omnibus Transportation Workplace Testing Act of 1991, requiring drug and alcohol testing.
- e. Representation of employers in litigation over drug and alcohol testing, including invasion of privacy claims.

6. Labor-Management Relations.

- a. Representation of employers in grievance arbitration proceedings.
- b. Representation of employers in unfair labor practice charges before the National Labor Relations Board.

7. Unemployment Compensation Claims.

- a. Counseling employers on claim adjudication procedure.
- b. Representation of employers in contested claim proceedings.
- c. Representation of employers in appeals of contested claims.

8. Non-Competition Agreements.

- a. Counseling employers on the development of agreements.
- b. Representation of employers in litigation to enforce agreements.
- c. Defense of employers in litigation over unenforceable agreements.

The Importance of Proper Documentation in Employment Claims

Don Johnsen
Gallagher & Kennedy, P.A.
June 15, 2011

Importance of Documentation



“It’s not what you know; it’s what you can prove.”

Importance of Documentation



“It doesn’t matter what I believe; the only thing that matters is what I can prove.”



Importance of Documentation

- There's no such thing as a verbal warning!
- If it's important enough to factor into a termination, it's important enough to write down.



Importance of Documentation

- Performance reviews
- Coaching/Counseling
- Warnings



Importance of Documentation

- Memos, letters, emails
- Calendar/Daytimer/planner entries
- Electronic logs
 - CTRL-Shift-J
 - CTRL-Shift-N



Importance of Accuracy

- Claimant usually must prove that employer is lying about reason for termination
- Best method of proof is to show that employer is making inconsistent or inaccurate statements about claimant's conduct or performance



Performance Reviews

- Performance reviews can be important documents
- But reviews must be accurate and consistent



Subjective Measures are OK

- "Poor communication skills"
- "Ineffective leadership"
- "Seems to lack self-confidence"
- "I'm not happy"



Blunt Language is OK

- "I am extremely disappointed..."
- "Your work has been unsatisfactory"
- "Your performance has been unacceptable"
- "Your employment is in jeopardy"
- "You will be terminated..."



Reviews must be accurate

| PUBLIC SCHOOLS FOOD SERVICES | | EVALUATION SUMMARY FORM | | |
|---|---------------------------------|--|------------------------------------|--|
| <input type="checkbox"/> New Hire | <input type="checkbox"/> 90 Day | <input checked="" type="checkbox"/> Annual | <input type="checkbox"/> For Cause | |
| Name | SS No. <u>563-96-8701</u> | | | |
| School/Department | Position Title <u>MANAGER</u> | | | |
| IMMEDIATE SUPERVISOR MUST CHECK EACH FACTOR IN APPROPRIATE COLUMN | | | | |
| FACTOR CHECK LIST | ☉ | ⊙ | ⊕ | (Circle in Column 1, MUST be explained in Section B) |
| 1. Observer of work hours | | | ✓ | Section A: Record job strengths and superior performance: <u>TRUE STRENGTH IS THE CAPABILITY TO HANDLE ANY SITUATION. THERE IS NO ANTI-SOCIAL BEHAVIOR. SHE IS A GOOD PEOPLE WITH THE SKILLS.</u> |
| 2. Attendance | | | ✓ | |
| 3. Grooming and dress | | | ✓ | |
| 4. Compliance with rules | | | ✓ | |
| 5. Safety practices | | | ✓ | Section B: Specify work performance deficiencies or job behavior requiring improvement or correction. Explain checks in Column 1: |
| 6. Public contact | | | ✓ | |
| 20. Work coordination | | | ✓ | Signature of Supervisor: <u>[Signature]</u> |
| 21. Initiative | | | ✓ | |
| 22. Cooperation | | | ✓ | Reviewed by Director of Food Services: <u>[Signature]</u> |
| 23. Works independently | | | ✓ | |
| 24. Maintains confidentiality | | | ✓ | Employee's Signature: <u>[Signature]</u> |
| 25. Tact and diplomacy | | | ✓ | |
| ADDITIONAL FACTORS FOR MANAGERS AND OFFICE STAFF | | | | Date: <u>4-25-03</u> |

[redacted] ELEMENTARY SCHOOL
 [redacted]
 Fax: 480.813.6809
 May 5, 2003


TO: [redacted]
 FROM: [redacted]
 RE: [redacted]

As per our discussion on Thursday, May 1, I feel that [redacted] needs to meet with you and Mrs. [redacted] to discuss next year's options. Here is the documentation that I have noted *Along the route of this school year*

April 25, 2003: We received our May Food Service menus. The stack of menus were sent to the kitchen to be separated for students to take home. That afternoon, my attendance secretary came in to my office and stated that [redacted] walked in to the office and threw the menus at the attendance secretary and stated, "I don't separate menus!" My attendance secretary was shocked in the manner in which [redacted] acted out.


There have been parents that have complained about her demeanor, staff members that have complained about her demeanor, and now it appears that I have students that are afraid of her. I do not feel that this she is providing a positive environment for the students and adults to be around.

I will support your decision on whether she is rehired at [redacted] next year, however, I truly feel that if she comes back, it will be just a matter of time before problems arise. I appreciate your support in this matter. Please call me if you have questions.



Signing for Documents

- Employees should sign to confirm receipt of documentation



Signing for Documents

- Employees should sign to confirm receipt of documentation
- If employee refuses to sign?

Private & Confidential

Date: 04/01/04


To: [Redacted]

From: [Redacted]

Summary and Description of Incident(s)
 Vanessa was observed placing calls on hold when they would come into her phone line. Once these call were placed on hold, Vanessa would not answer the calls but would keep these calls on hold until the guest released the calls themselves. From March 5, 2004 until March 28, 2004, it was shown that a total of 115 calls were handled in this manner. Please see attached information.

I understand the disciplinary action that has been issued to me. Further violations of company policy may result in further disciplinary action, up to and including termination.

Did not want to sign _____ 4/1/04 _____
 Employee Signature Date



Signing for Documents

- Allow employee to attach response or rebuttal

I refuse to sign.

I *know* and *do* more than any 3 people in this department.

These low scores are due to prejudice and an extreme lack of high quality/high volumn printing and graphics experience of **any** kind.

vanessa

Signing for Documents

- Advise employee that refusal to sign constitutes grounds for termination



You're fired!

Signing for Documents

- Unsigned documentation is better than nothing

September 16, 1997
Tuesday

| September 1997 | | October 1997 | | | | | | | |
|----------------|----|--------------|----|----|----|----|----|----|----|
| S | M | T | F | S | S | M | T | F | S |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 |
| 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 |
| 31 | | | | | | | | | |

| Time | Notes |
|-------|---|
| 7:00 | |
| 8:00 | Meeting with Sales Department (Conference Room) |
| 9:00 | ↓ Joe & Mary |
| 10:00 | |
| 11:00 | Conference Call (Boston Office) Mike & Thomas |
| 12:00 | Lunch with Hangman (Wilson) |
| 1:00 | MW Gesler |
| 2:00 | |
| 3:00 | Wardell, Comp |



Signing for Documents

- Back-dated documents are worse than anything



Show me the money!



Retention of Documents





Retention of Documents

- One year from creation of document, or one year from date of employment decision, whichever is later
- In event of charge or suit:
 - Duration of action
 - Retain records of similarly situated employees

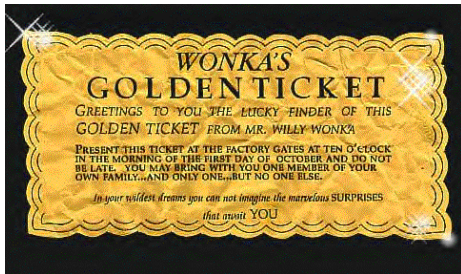


Retention of Documents

- Consequences of failure to retain documents:
 - "Adverse inference" against employer
 - Default judgment against employer



Good Documentation:





Good Documentation:





Further questions?
