

INVESTIGATION AND DISCIPLINE OF SCHOOL EMPLOYEES: EFFECTIVE STRATEGIES TO MINIMIZE GRIEVANCES, CHARGES AND LAWSUITS

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I. UNDERSTANDING THE EMPLOYMENT STATUS

A. “At-Will” Status

1. Definition

The term “at-will” employment means that the term of employment is of indefinite duration and terminable at the discretion of the district for any reason.

2. Presumption of “at will” status

Employees not covered by a collective bargaining agreement or individual employment contract are presumed “at-will” employees under Illinois law.

a. Exception: Employees covered by a personnel manual or employment handbook which contains any of the following:

- i. Mandatory progressive discipline provisions (*e.g.*, sequence of verbal warning, written warning, suspension without pay, termination);
- ii. Binding employee complaint/grievance procedure;
- iii. Pre-disciplinary and/or pre-termination hearing procedures (*e.g.*, right to notice and hearing prior to suspension and/or termination); and
- iv. Any other provisions inconsistent with “at-will” employment status (*e.g.*, employee subject to immediate termination only if specific type of misconduct is committed).

b. Disclaimer: Personnel manual does not effectively disclaim employment contract status unless manual contains clear and express disclaimer in bold text at outset of manual.

3. Non-discrimination

Illinois and Federal law prohibits the discharge of an “at-will” employee for unlawful or discriminatory reasons, including:

Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

- a. Employees who are members of a protected classification (e.g., age, sex, race, union affiliation, disability, etc.);
 - b. Employees who exercise free speech or constitutional rights (e.g., employee makes public statements expressing concern regarding operations of the district administration);
 - c. Employees who report criminal conduct or violations of law to supervisory personnel or enforcement authorities (e.g., “whistle blower” claims); and
 - d. Employees who file sexual harassment claims, discrimination charges, grievances, or unfair labor practices (e.g., retaliation claims).
4. Implications of “at-will” employment status
- a. Employee’s procedural due process rights are limited. Result: Employer may dismiss employee without prior notice and opportunity for pre-termination hearing; and
 - b. Employer need not establish progressive discipline or “just cause” for discharge. *But note:* Employer must sufficiently document basis for discharge to avoid exposure to potential discrimination charge.

B. Contractual Employee Status

- 1. “Contractual” employees include any employees covered by a collective bargaining agreement or individual employment contract. Employees covered by a personnel manual or employment handbook may also assert contractual rights.
- 2. Implications of contractual status – the “just cause” standard.

Employer generally must satisfy “just cause” and progressive disciplinary requirement standards in dismissal of employees. The “just cause” standard generally requires that employer establish the following:

- a. Notice to employee of specific reason(s) for discharge;
- b. Prior imposition of progressive discipline (unless employee’s misconduct clearly warrants immediate discharge, e.g., theft);
- c. Opportunity for pre-termination hearing;

- d. Employee's repeated unsatisfactory performance or violation of work rules or disciplinary provisions;
- e. Employee's misconduct or performance deficiencies are sufficiently serious to warrant discharge; and
- f. Clear prior warning to employee that continued performance deficiencies or repeated misconduct will result in termination.
 - i. *Caution:* Arbitrators have held Employer did not meet "just cause" burden where Employer failed to previously warn employee regarding implications of continued unsatisfactory performance or conduct (*i.e.*, discharge).
 - ii. *Recommend:* Disciplinary notices (*e.g.*, warning letters, reprimands, suspension notices, etc.) should clearly inform employee that repeated misconduct or failure to improve performance deficiencies "will result in additional disciplinary action, up to and including termination of employment."

C. Tenured Employees

- 1. Procedural protection against dismissal.
- 2. "Irremediable" standard for discharge requires, in many cases, an opportunity to be advised of the misconduct and a chance to fix it.

II. DOCUMENTING EMPLOYEE CONDUCT AND MISCONDUCT

A. Document, Document, Document

- 1. Practical benefits: Helps to establish expectations and to convince employees that conduct is unacceptable.
- 2. Document an employee's personnel file with any written warning given, particularly where the progressive discipline policy requires a written warning before proceeding to the next level of discipline. Supervisor should also document verbal warnings in the supervisor's file.
- 3. *Illinois Personnel Record Review Act* (IPPR) requires employers to include in an employee's personnel file any documents intended to be used in determining discharge or other disciplinary measures. IPPRA restricts ability of employer to use a document not included in the file.

B. Advantages of Documentation

1. *Improves compliance* with performance expectations by informing the employee of areas which require improvement;
2. *Provides fair notice:* Employees are advised of the impact of future misconduct on continuing employment;
3. *Lessens the chance of litigation:* Accurate and defensible performance documentation advises employee of their standing and aligns their expectations to those of management. Employees who are “blind-sided” at the time of discipline or termination of their long-standing poor performance problems are more likely to file claims; and
4. *Improves chances of defeating claims or disputes:*
 - a. *Eliminates acquiescence defense:* prevents the employee from arguing that the conduct at issue was condoned by a lack of action; and
 - b. *Strengthens equity arguments before a judge or jury:* Where the employer has made a good faith effort to evaluate and point out performance problems to improve performance, judges and juries will tend to be more sympathetic. Again, prevents the “blind-siding” argument or the argument that the employer’s objection to the conduct is pretext for an unlawful reason (discrimination) because the conduct has been going on for years and the employer never objected before.

C. Disadvantages of documentation

1. Supervisor’s failure to follow established procedures; and
2. Supervisor’s failure to document misconduct can result in a lack of a record which can eventually undermine discipline efforts.

D. General Principles in Documentation

1. The goal is to improve compliance

Documentation of misconduct should be viewed not as a process of criticizing the employee but as a process of helping an employee understand expectations. For minor incidents and warnings, admonishment can be coupled with suggestions for improved performance. This approach will counter the tendency of many supervisors to avoid warnings for fear of hurting the employee’s feelings.

2. Communicate expectations regularly

Supervisors should not wait until they have decided to terminate someone to begin the process of documenting long standing malfeasance (e.g., failure to comply with attendance expectations).

3. Document accurately and proportionately

Not every minor infraction should result in a written reprimand or suspension – remember the concept of progressive discipline. Generally, minor infractions can be addressed through verbal warnings. At the same time, serious infractions should be addressed in writing which informs the employee to remediate the deficiencies or additional discipline, up to discharge, will follow.

4. Document consistently

Similarly situated employees should be subject to similar discipline for similar misconduct. Work rules must be applied evenly. For instance, an employee who has excellent word processing skills should be treated the same when late for work as the less capable co-worker is when late for work. Failure to consistently apply discipline is a basis for discrimination claims.

5. Document credibly

Where an established work rule has been violated, some corrective action should be taken. Similarly, corrective action should be taken where an employee is told to remediate, but fails to do so. Failure to address poor performance or misconduct may result in discrimination claims from an employee who is disciplined for poor performance and misconduct because it may create the perception that the employer lets others get away with work rule violations, but not the complaining employee.

6. Document continuously

Where an incident is serious enough to potentially impact the employee's employment (e.g., appear in the next evaluation or eliminate the employee for consideration for a promotion), the employer should strongly consider sending the employee a memo about the matter immediately. The supervisor's memory of the incident will be fresher and carry more weight with the employee if the documentation is timely.

E. Content of Documentation

1. Identify the facts

Provide facts to support conclusions. For example, a statement that “Bonnie did not behave like a team player” is of little value to the employee in future litigation unless specific facts are provided to support this statement. Remember, litigation can take years to resolve. Crucial facts and chronologies will be forgotten if not documented. Examples of more effective documentation:

a. Adequate Description:

“Bonnie failed to assist Frank when he was ill”

b. Better Description:

“I asked Bonnie on September 1 to phone Frank, who was at home sick, to find out if he needed assistance completing the budget projections. Bonnie said she would, but never called. Subsequently, the budget was not completed on time.”

2. Label the behavior, not the person

Statements that negatively label the person – such as “Bonnie is a poor word processor” – not only fail to provide sufficient facts but also alienates the employee and distracts from the goal of correcting the performance. Rather than label the person, describe the behavior.

For example, *“Bonnie’s word processing skills need improvement. At the present time she inputs approximately 55 words per minute with an average of 15 mistakes. This should be improved to at least 70 words per minute with an average of five mistakes.”*

3. Identify examples of good or bad work

Provide specific examples to support statements. Attach copies of documents which support comments made in an evaluation.

For example: A written warning states that *“Bonnie’s grant application contained numerous typographical and factual errors which delayed the processing of the response to the grant request.”* Attached to the warning are copies of grant applications with errors.

4. Common performance problems

The following is a list of common performance or conduct problems which may require documentation:

- a. Poor quality of work;
- b. Failure to perform assigned tasks;
- c. Excessive tardiness;
- d. Carelessness, negligent or intentional misuse of property;
- e. Mistreatment of co-workers;
- f. Lack of productivity;
- g. Violation of other known work rules; and
- h. Gross misconduct, insubordination, and other serious offenses which may subject employee to termination. Examples include:
 - i. theft of property;
 - ii. insubordination toward supervisor or administrator;
 - iii. fighting;
 - iv. aggressive physical contact with other employees;
 - v. possession, use or sale of illegal drugs or weapons; and
 - vi. sexual or other unlawful harassment.

III. DOCUMENTING DISCIPLINE

A. Progressive Discipline Policies Must Be Followed

1. Definition

Progressive discipline is a series of increasingly severe disciplinary sanctions for employee misconduct, with termination as the final step.

2. Advantages of progressive discipline

- a. Arbitrator is more likely to sustain “just cause” discharge if progressive discipline record is established by employer.
 - b. Employee has greater opportunity to remediate prior misconduct and avoid discharge.
 - c. Employee is less able to successfully contend that employer’s disciplinary sanctions are overly severe.
3. Disadvantages of progressive discipline
- a. Arbitrator is more likely to overturn discharge for lack of “just cause” based upon a single incident of misconduct if the collective bargaining agreement includes a progressive discipline provision.
 - b. Employer must follow disciplinary sequence and document compliance with progressive discipline requirements.

B. Practical Issues

- 1. Must employer always follow progressive disciplinary sequence?
 - a. Mandatory/permissive distinction;
 - b. Severity and degree of misconduct are key factors; and
 - c. Assess nexus between incident of misconduct and prior offense (e.g., the employee who fails to keep work area clean, but was previously warned of failure to advise supervisor of absence, has likely not been previously warned that work area cleanliness is required).
- 2. When does an employee’s misconduct warrant immediate discharge and bypassing of progressive disciplinary steps?
 - a. Consider seriousness of misconduct from a safety or security standpoint.
 - b. Examples: sexual harassment, theft, weapons possession, alcohol use, or unauthorized access to confidential files.

C. Determining Appropriate Disciplinary Action

- 1. Severity of employee’s misconduct: Assess impact upon district students, staff and/or operations.
- 2. Employee’s prior disciplinary record:

- a. Relatedness of type of misconduct to prior offenses (e.g., sexual harassment incident after prior reprimand for excessive socializing with employees).
 - b. Frequency and timing of prior misconduct.
 - c. Prior disciplinary notices include warnings (e.g., “If you engage in similar future misconduct, you will be subject to additional disciplinary action, up to and including termination”).
3. Progressive discipline requirements: If employee is covered by a collective bargaining agreement, review disciplinary provisions to verify “just cause” standard or mandatory progressive discipline requirements (discipline generally must follow sequential pattern of oral warning, written reprimand, suspension without pay, termination).
 4. Suspension with pay option: Consider option of suspension with pay pending further administrative investigation if significant misconduct is alleged and employee should be removed from the district pending final administrative determination. If alleged misconduct does not affect the employee’s ability to perform assigned duties or present a safety threat, the employee may continue working while investigation continues.
 5. Bargaining agreement/policy considerations

Administrative options of suspension with or without pay should be consistent with any collective bargaining agreement or personnel policy restrictions and should not be implemented without affording the employee adequate procedural due process (*i.e.*, notice and opportunity for hearing).

D. Communicating the Discipline to the Employee

1. Meet with employee and, if applicable, union representative, to communicate decision. Consider having another member of administration present, such as the district’s human resource director or equivalent position, to observe and take notes for documentation purposes.
2. Follow progressive discipline policy: The collective bargaining agreement and/or the district’s policies may define the type of written communications that must be given. If verbal reprimand is issued, documentation of the communication to the employee should be made in the supervisor’s file.

3. Communication of discipline to others. If the investigation arises out of an unlawful harassment complaint and the investigation concludes that the district's harassment policy has been violated, the complaining party should be notified. The complainant may be advised that the investigation has determined there has been a violation of the policy and that the district has taken action to prevent further violation of the policy. Details of the discipline (*e.g.*, the harasser was suspended) should not be discussed.

IV. INVESTIGATIONS OF EMPLOYEE MISCONDUCT

A. Effective Employer Investigations Reduce Liability Exposure

1. *Harassment complaints*: complainant files sexual harassment charge. Administration conducts prompt investigation and implements prompt corrective action by disciplining employee. The investigation and timely response reduces likelihood of additional harassment by alleged harasser and minimizes threat of potential Title VII claim against the district (*i.e.*, complainant alleges the district was notified of employee's sexual harassment and failed to investigate charges or take appropriate corrective action).
2. *Failure to investigate*: The district's exposure to inadequate supervision or negligent retention claims is increased by Administration's failure to conduct prompt and complete investigation of employee misconduct.
 - a. *Inadequate supervision*: complainant may assert that the district failed to adequately protect complainant from abusive or harassing co-employee despite prior notice of employee's misconduct towards other employees.
 - b. *Negligent retention*: The district may be liable if it fails to fully investigate claims of sexual abuse or harassment and the employee sexually assaults or harasses an employee or student. This liability may exist even if the prior investigation concluded that the complainant's allegations were unfounded. The courts will review the record and assess the thoroughness of the prior investigation. *Stoneking v. Bradford Area School*, 667 F. Supp. 1088 (1987).

B. How to Investigate

1. Follow internal policy guidelines.
2. Follow any mandatory timeliness for initiating and completing investigation in accordance with district policy (*i.e.*, sexual harassment policy), administrative guidelines or union contract.

3. Conduct prompt investigations of alleged employee misconduct. This promotes effective decisions because witness recollection is improved and reports and witness statements are current.
4. If necessary, remove the employee from proximity to the student / victim, either through an administrative leave or temporary transfer.
5. Initiate or update criminal background investigation. Review employee's personnel file to ensure that criminal background report was received. Request updated criminal background information.
6. If employee allegedly engaged in sexual assault, abuse or harassment, review the list of child sex offenders on file with the municipal police department.
7. Review personnel file for documentation of other instances of conduct which could be seen as relevant to the new complaint.
8. Advise all interviewees that retaliation is prohibited and that anyone who feels the subject of retaliation should report it immediately.

C. Employer Checklist of Investigation Procedures

1. Preliminary considerations.
 - a. In addition to eradicating issues of misconduct, potential abuse or other malfeasance, recall that purpose of investigation is to minimize potential liability.
 - b. Determine identity and number of investigators.
 - c. Create a confidential file.
2. Notify the employee accused of misconduct of the complaint and advise that the administration will investigate. Schedule investigatory conference. Check collective bargaining agreement or personnel handbook for any notice and/or hearing requirements.
3. Gather facts.
 - a. Review relevant personnel files and policies.
 - b. Confirm the complainant's allegations in an investigatory conference. Get specific information on the basis of the complaint; find out who, what, where, why and when.
 - i. Take the complaint seriously.

- ii. Do not accept conclusory statements. For example: the statement “x harassed y” is insufficient. It is better to have “On October 4, 1996, x asked y out on date and grabbed her waist.”
 - iii. Determine effect of the conduct on the victim.
 - iv. If applicable, determine what victim or the student (or the student’s family) wants.
 - v. Request that the complainant provide a written statement.
 - vi. Determine identity of witnesses and have the complainant provide their contact information.
 - vii. Assess complainant’s credibility: If doubts about the complainant’s credibility exist, consider the basis for those doubts and whether there is a reason to doubt credibility in this specific instance.
 - viii. Confirm or assess the complainant’s willingness to testify regarding employee’s misconduct if necessary at disciplinary or arbitration hearing.
 - ix. Take a statement and get complainant’s signature.
 - x. Draft notes at or immediately following the interview.
 - xii. Advise that retaliation is prohibited.
 - xii. Never promise confidentiality.
3. Assess whether DCFS should be notified: **When in doubt, NOTIFY.**
4. Conduct an investigatory conference with the employee accused of wrongdoing.
- a. *Scheduling:* Notify employee of right to union representation. Afford union representation if requested.
 - i. Right to union representation: The IELRB has adopted the Weingarten standard for determining employee’s right to representation. This requires the District to allow representation upon request at any investigatory or pre-disciplinary meeting which may

reasonably result in discipline. *Summit Hill School District 161*, 4 PERI 1009 (IELRB, 1987).

- ii. Role of union representative should be limited to advising employee and clarifying any questions raised by the administrator conducting the investigatory conference. The union should not be allowed to cross-examine the administrator or to direct the employee not to answer or respond to questions.
 - iii. Check collective bargaining agreement for contractual requirements regarding union representation.
- b. Explain that the purpose of the interview is to investigate a complaint, but state that no decision has been made on the truthfulness of the allegations.
 - c. Review specific factual allegations in detail with employee. Administration need not provide copies of written witness statements absent a contractual requirement.
 - d. Allow employee to respond to each factual allegation and to provide his/her version of incident. Administration should not defend allegations or discuss assessment of the veracity or credibility of the witness statements. The objective of the conference is to afford employee procedural due process rights and to engage in fact-finding rather than imposition of disciplinary or corrective action.
 - e. *“Use Immunity Option”*: If employee is also subject to potential criminal charges based upon the alleged misconduct, the employee may attempt to refuse to answer questions based upon the constitutional Fifth Amendment prohibition against self-incrimination. The administrator should advise the employee that: (1) any statements made during the investigatory conference cannot be used against him or her in any criminal proceeding; and (2) the employee’s refusal to answer may be grounds for disciplinary action after the employee has been granted “use immunity.” If the employee still refuses to answer questions, the employee may be disciplined for insubordination. *Blunier v. Board of Fire and Policy Commissioners*, 190 Ill. App. 3d 92, 545 N.E.2d 1363 (3rd Dist. 1989).
 - f. Request employee to document testimony by written statement or fact chronology. Obtain signature and date on any written statement.

- g. Ask whether any other witnesses can confirm employee's testimony. Identify the names of the witnesses and get contact information. Advise that administration will attempt to schedule interviews with any designated witnesses.
 - h. Advise employee that administration will evaluate all witness statements and conduct any necessary follow-up investigatory conferences prior to deciding whether to impose any disciplinary or corrective action based upon the alleged employee misconduct. Do not inform employee of recommended disciplinary action or termination until investigation has been completed and appropriateness of disciplinary action is fully discussed and determined.
 - i. Assess accused employee's credibility.
 - j. Take a statement and get employee's signature.
 - k. Draft notes at or immediately following the interview.
5. Interview corroboration witnesses (can be done before or after interviewing employee).
- a. *Purpose:* Administration should seek to corroborate or validate the complainant's allegations by verifying allegations with other witnesses not parties to complaint.
 - b. Absent corroborating witnesses, administration must resolve credibility issue with consideration of these factors:
 - i. Consider detail of witness recollection;
 - ii. Inconsistency of testimony on key points;
 - iii. Witness' personal stake in outcome;
 - iv. Witness' prior false statements; and
 - v. Written vs. oral witness statements.
 - c. Try to elicit identity of the students or victims and accused employee from the witness as opposed to identifying these individuals to the witness at the beginning of the interview.
 - d. Find out what he or she knows: GET SPECIFICS.
 - e. Distinguish between firsthand and secondhand knowledge.
 - f. Assess the credibility of the witness.

- g. Take a statement, if warranted.
 - h. If the witness is an employee, remind the witness of the obligation to keep the investigation confidential
 - i. Draft notes at or immediately following the interview.
6. Obtain and look at all potential documentation of the misconduct (e.g., notes and letters from the accused employee, telephone records, text messages, electronic key card entry/departure records, e-mail, telephone records, security videotape).
 7. Look at all electronic records in the District's control.
 - a. Search employee's computer, e-mail and internet activity.
 - b. Examine cell phone text messages.
 - c. Have parents look for documentary and electronic evidence.
 8. Voice records: telephone messages.
 9. External electronic information.
 - a. For harassment and similar issues, search for the employee on myspace.com, facebook.com and other social networking sites and blogs that might corroborate the misconduct.
 - b. For potential theft, check e-bay and craigslist.com for sales of the missing items.
 - c. Consider the facts in light of the resources available on the internet.

D. Evaluating the Facts and Making the Decision

1. Evaluate the facts from both the perspective of a reasonable person with the complainant's characteristics, and one with the accused employee's characteristics.
2. Determine if misconduct has occurred.
3. Assess the appropriateness of the conduct.
 - a. Look at employee's performance criteria, job description and expectations.
 - b. For instructors:

- i. Failure to follow designated curriculum.
 - ii. Failure to demonstrate healthy and positive communications with students.
 - iii. Failure to use sound professional judgments in interactions with students.
 - c. Look at the organizational chart.
- 4. Look at general performance expectations required of all employees.
 - a. Using sound judgment in relationships with staff and students.
 - b. Demonstrating respect for students and staff at all times.
 - c. Creating an atmosphere conducive to education.
 - d. Making students feel safe and secure.
 - e. Fostering a healthy learning environment.

E. Documenting the Investigation

- 1. Prepare summary memorandum confirming investigatory conference with employee. Document the presence of union representation, any critical factual admissions, and the employee's opportunity to respond to each of the factual allegations.
 - a. Review witness statements, incident reports and administrative investigation reports to determine whether misconduct occurred and, if so, what type of disciplinary action should be imposed.
 - b. Note that this document will become a part of the employee's personnel record and may become a significant piece of evidence in the event that a lawsuit arises.

F. Draft a thorough, even-handed report.

- 1. Make the report chronological.
- 2. Describe when first learned of the complaint and what that complaint initially consisted of. Be specific.
- 3. Provide exact details of the complaint.

- a. Note the documents reviewed.
- b. Describe the interviews.
- c. Distinguish between firsthand knowledge and rumor.
- d. State conclusion as to whether the complaint is substantiated.
- e. Recommend corrective action.
 - i. Assess severity of misconduct.
 - ii. Look at prior discipline record.
4. If applicable, identify when DCFS was notified, who contacted DCFS, who at DCFS took the call and other details.

G. If Appropriate, Require a Psychological Evaluation or Fitness-for-Duty Assessment of the Employee

1. This can assist in preventing liability from attaching to the district if a similar problem arises in the future, particularly if the evidence of misconduct is insufficient to result in discharge of the accused employee.
2. Place the employee on administrative leave pending receipt of psychiatrist's report.
3. Send the designated physician copies of the complaint and other pertinent documents, or a letter describing the reason for the evaluation and the employee's conduct.
4. Require the employee to execute a medical release so that the district can discuss the results of the evaluation with the physician.
5. Advise that the district will pay for the evaluation.
6. Advise that employee is responsible for paying for any required treatment or therapy.

H. Obtain Drug or Alcohol Testing of Employee, If Applicable

I. If Misconduct Occurred or May Have Occurred:

1. Take prompt and corrective action.
 - a. If appropriate, order no contact between accused employee and the complainant.

- b. For instructor or other professional staff member, direct that professional development plan be created to address the misconduct.
 - c. Engage in enhanced monitoring of employee.
2. Action should be designed to prevent future similar conduct.
 3. Discipline should be consistent.
 4. Advise the complainant that the investigation is complete and that remedial measures have been taken.

K. If No Misconduct Is Found to Have Occurred.

1. Inform complainant in writing.
2. Stress commitment to an environment conducive to learning.
3. Encourage the complainant to come forward if the situation changes.
4. Stress to accused employee the performance expectations he / she is required to meet.
5. Look at future complaints against this same employee very carefully.

L. Pursuant to Institution Guidelines, Follow Up with the Victim and Accused Employee After the Investigation Is Complete

1. **Really, they are probably “just friends”.**

A female, fifth grade tenured teacher, Ms. Robinson, has befriended a boy, Romeo, in another fifth grade teacher's class. Romeo is experiencing numerous problems in school, including acting out, defiance, being disruptive in class, difficulties with concentration and has lately experienced a drop in grades. Romeo's parents are going through a divorce, and the father has recently moved to California. Romeo's mom is overwhelmed with life as a single mother of three and her new full time job, and appreciates the attention being given to her son by Ms. Robinson.

The matters comes to the District's attention when a parent of another fifth grade student reports that she saw Ms. Robinson and the Romeo at a 9:30 p.m. movie last Saturday night, and the interactions between the two seemed akin to people on a date. Shortly thereafter, another teacher on the fifth grade team tells the School Principal that she saw Ms. Robinson with her arm around Romeo, that Romeo flicked Ms. Robinson's hair, and when they saw that they were being watched, they pulled apart.

In conversation with other teachers, Ms. Robinson has stated that she has befriended Romeo, and taken him to a movie, her family's vacation home in the Wisconsin woods for a long weekend, fishing in a local forest preserve, shopping, to an arcade, paintballing, and to a museum. Ms. Robinson has talked about having bought Romeo a few minor things, including a paintball rifle, some clothing, a laptop computer and some new games for his Nintendo. Ms. Robinson has been heard to say that, without her attention, poor Romeo would be entirely alone emotionally and she does not want to see that happen.

ISSUES:

1. Does the District need to investigate this matter, given that no one is complaining?
2. Is there more of a basis to investigate if a second grade teacher reports that she heard, at an Easter party, that Ms. Robinson was fired from her last school before coming to the District for inappropriate conduct and having pornography on her computer?
3. If the District does conduct an investigation, what should that investigation entail?
4. What if Ms. Robinson denies having a special relationship with Romeo? What next?
5. Does the District have enough information to discipline Ms. Robinson? To dismiss her? What kind of discipline would be appropriate here?
6. What if Ms. Robinson agrees to end her out-of-school relationship with Romeo and accept a transfer to a different school in the District, and the District issues her a strongly worded written warning about maintaining a professional distance in her relationships with District students. Is the District protected from liability from suit by another student's family when, a year later, Ms. Robinson is arrested for having sex with a fifth grade boy, and his parents claim that the District was on notice of Ms. Robinson's pedophilic tendencies?

2. **Praise be! Another investigation!**

Paul Priestly is a third shift janitor at West Middle School in Suburban School District, and a member of the School Service Personnel Association. He is a deeply religious Christian man and attempts to live every aspect of his life in accordance with his faith. He is married with four children.

Hank Heathen is also a third shift janitor at West Middle School and also a member of the union. He is not religious at all, and basically agrees with the unqualified comments of former Minnesota Governor Jesse Ventura that religion is for the weak-minded. Heathen works hard and plays hard. He is known for the amount of alcohol he can consume without being the slightest bit compromised the next day at work. He is also known for his “sexploits,” which he regularly brags about and attempts to entertain his coworkers with.

Knowing that Priestly disapproves of and is deeply offended by his whole way of life, heathen will often show up at work after a long night of drinking and carousing and make a point of loudly announcing to Priestly: “I have sinned again! I have committed the vile sin of fornication! With another man’s wife! In the middle of the night on the front steps of a holy house of worship! God have mercy on my soul!”

Although some of the coworkers privately think Heathen’s mock confessions are offensive, others think them hilariously funny. Almost everyone laughs at them. Priestly, however never cracks a smile. He believes Heathen is a deeply troubled man who is bound for eternal damnation unless he is somehow saved by Christian faith.

ISSUES:

1. If another janitor who is personal friends with Priestly outside of work, reports to the Director of Building and Grounds that Heathen and Priestly “really don’t get along” is there any complaint requiring investigation?
2. What if the supervisor is aware of the situation, described above. Is an investigation required now, even though Priestly is not complaining?
3. Suppose that the collective bargaining agreement requires progressive discipline. If Heathen was disciplined a year ago for using racial slurs and telling jokes with offensive racial content, can the District suspend Heathen for a second incident of harassment? How strong is the union’s position that Heathen has never been warned before that his religious comments could get him into trouble?
4. What kind of potential liability exists here for the District?
5. What steps should the District take to protect itself from potential liability? What sort of remedial measures would it want to rely on and what documents should it have in its file?

3. **Chaucer's Final Tale**

Chaucer was a third-year non-tenured English teacher at Stratford High School District. Chaucer has been regularly evaluated by the administration pursuant to its evaluation process for non-tenured teachers. After Chaucer's third year evaluation was completed, but before the Board could consider whether to reemploy him for a fourth year, the Superintendent received a complaint from two female students (and their parents) in Chaucer's sophomore English class alleging inappropriate conduct by Chaucer, including that he:

- Made inappropriate personal comments to female students, including asking them after class whether they were "dating anyone."
- Issued lower grades to female students who did not participate in his poetry club.

After speaking to the students and their parents, the students (and parents) have demanded that the students be transferred to a different English teacher. The students and their parents said that they do not want to file any formal complaint against Chaucer and have requested that the students' identities not be disclosed.

ISSUES:

1. Should the District investigate the students' complaints?
2. Can the District discuss the complaints with Chaucer if the students do not consent to filing a formal complaint?
3. If the District meets with Chaucer to review the allegations of inappropriate conduct and allows Chaucer to respond to the complaint, must the District identify the students?
4. What are Chaucer's procedural due process rights prior to:
 - a. discipline based upon the inappropriate conduct;
 - b. denial of tenure; and
 - c. termination mid-year for sexual harassment?
5. Can the District discipline Chaucer if he denies the allegation?
6. Should the District consider the students' complaints of non-classroom conduct during its review and assessment of Chaucer's performance and revise his third year evaluation?
7. Can the District deny Chaucer tenure or discharge him if he admits to the alleged inappropriate conduct?
8. If the Dean plans to deny Chaucer tenure based upon his classroom performance, should the student complaints be referenced in the Dean's assessment and recommendation for denial of tenure?