

THE DISCIPLINARY PROCESS- A CANINE LEGAL PERSPECTIVE



Texas City Attorney's Association
2010 Summer Conference

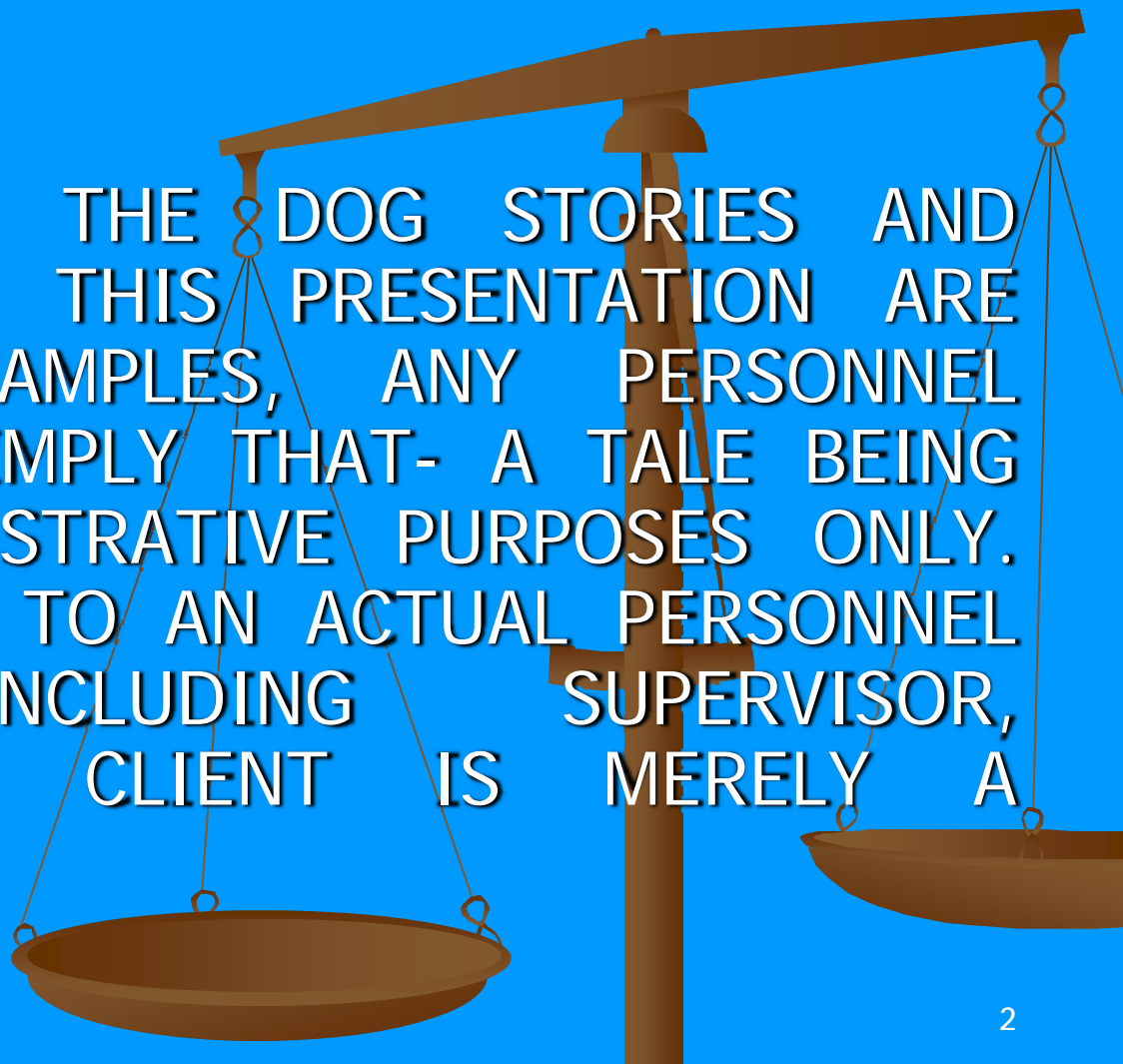
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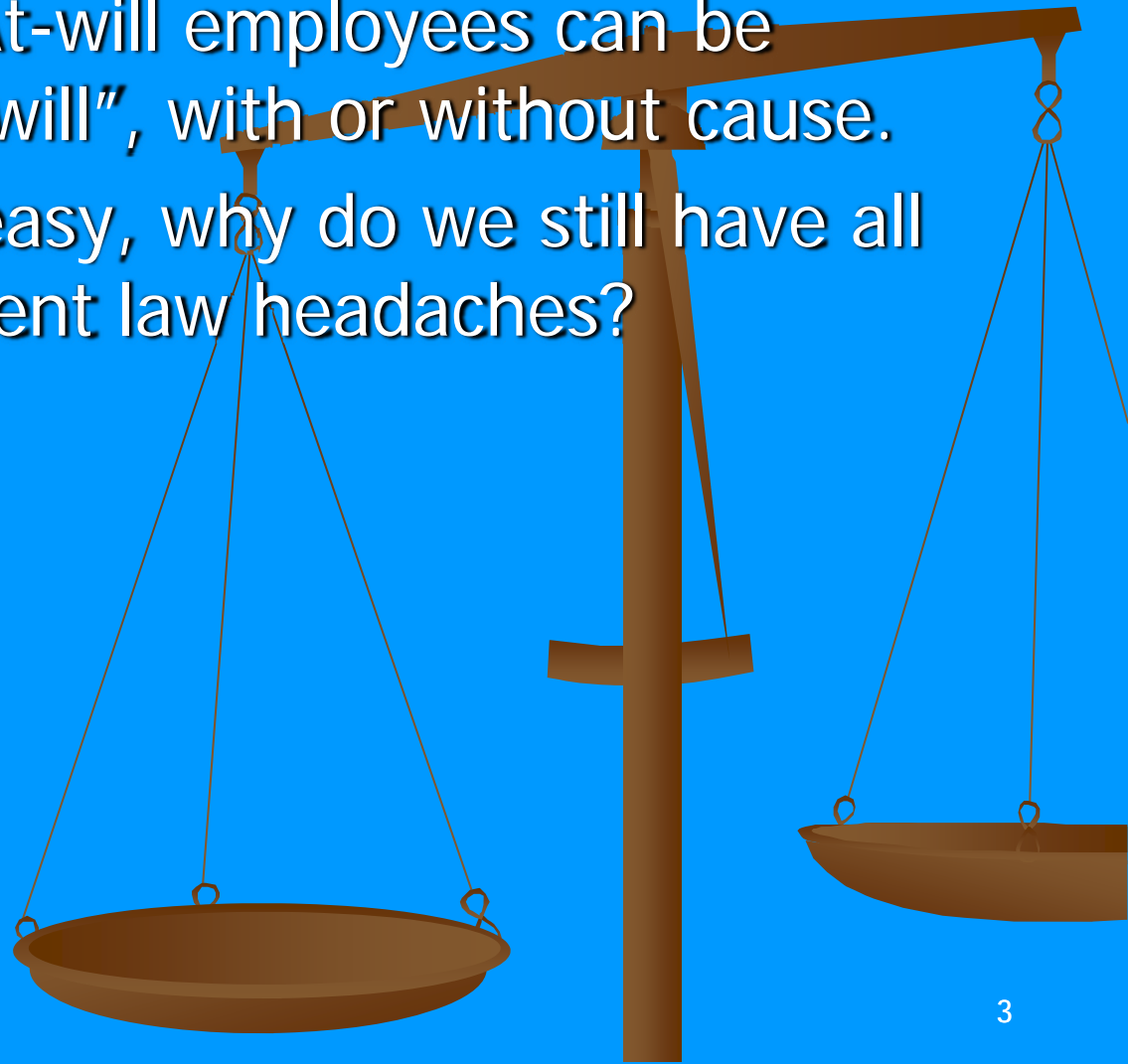
DISCLAIMER

WHILE ALL OF THE DOG STORIES AND REFERENCES IN THIS PRESENTATION ARE REAL LIFE EXAMPLES, ANY PERSONNEL STORIES ARE SIMPLY THAT- A TALE BEING TOLD FOR ILLUSTRATIVE PURPOSES ONLY. ANY SIMILARITY TO AN ACTUAL PERSONNEL INCIDENT, INCLUDING SUPERVISOR, EMPLOYEE, OR CLIENT IS MERELY A COINCIDENCE.



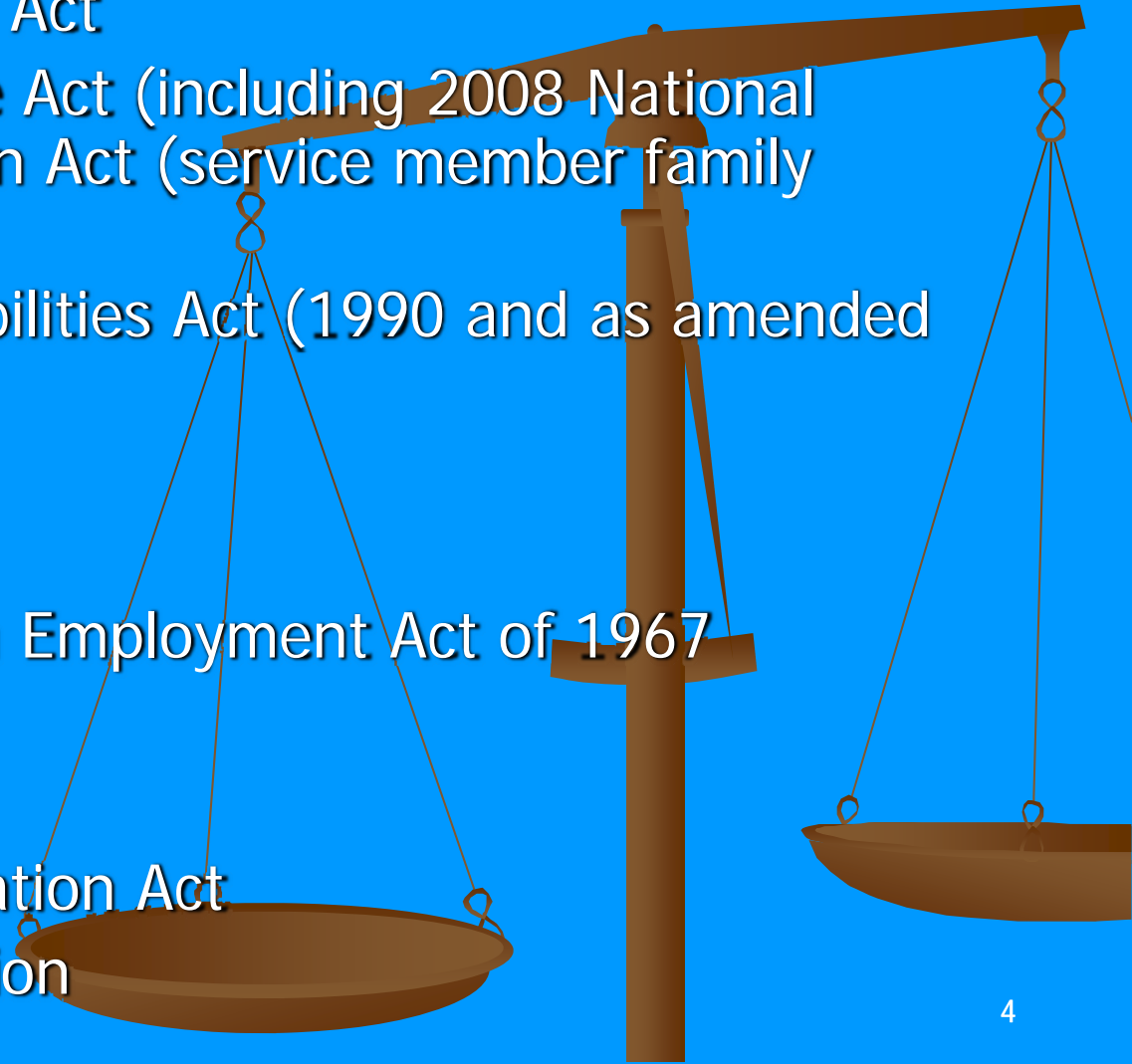
EMPLOYMENT AT WILL?

- General Rule- At-will employees can be terminated "at will", with or without cause.
- If it were that easy, why do we still have all these employment law headaches?



EXCEPTIONS OR LIMITATIONS TO AT WILL EMPLOYMENT

- Fair Labor Standards Act
- Family Medical Leave Act (including 2008 National Defense Authorization Act (service member family leave))
- Americans with Disabilities Act (1990 and as amended 2008)
- Negligent hiring
- Negligent retention
- Age Discrimination in Employment Act of 1967
- Whistleblower Act
- Free speech
- Pregnancy Discrimination Act
- Worker's Compensation



AND MORE

- Civil Rights Act of 1964
- Equal Protection
- Title VII- Retaliation
- 42 USC 1981 and 1983
- USERRA
- Contract employees (ie. City Manager)
- Statutory Appointments (ie. Municipal Court Judge)



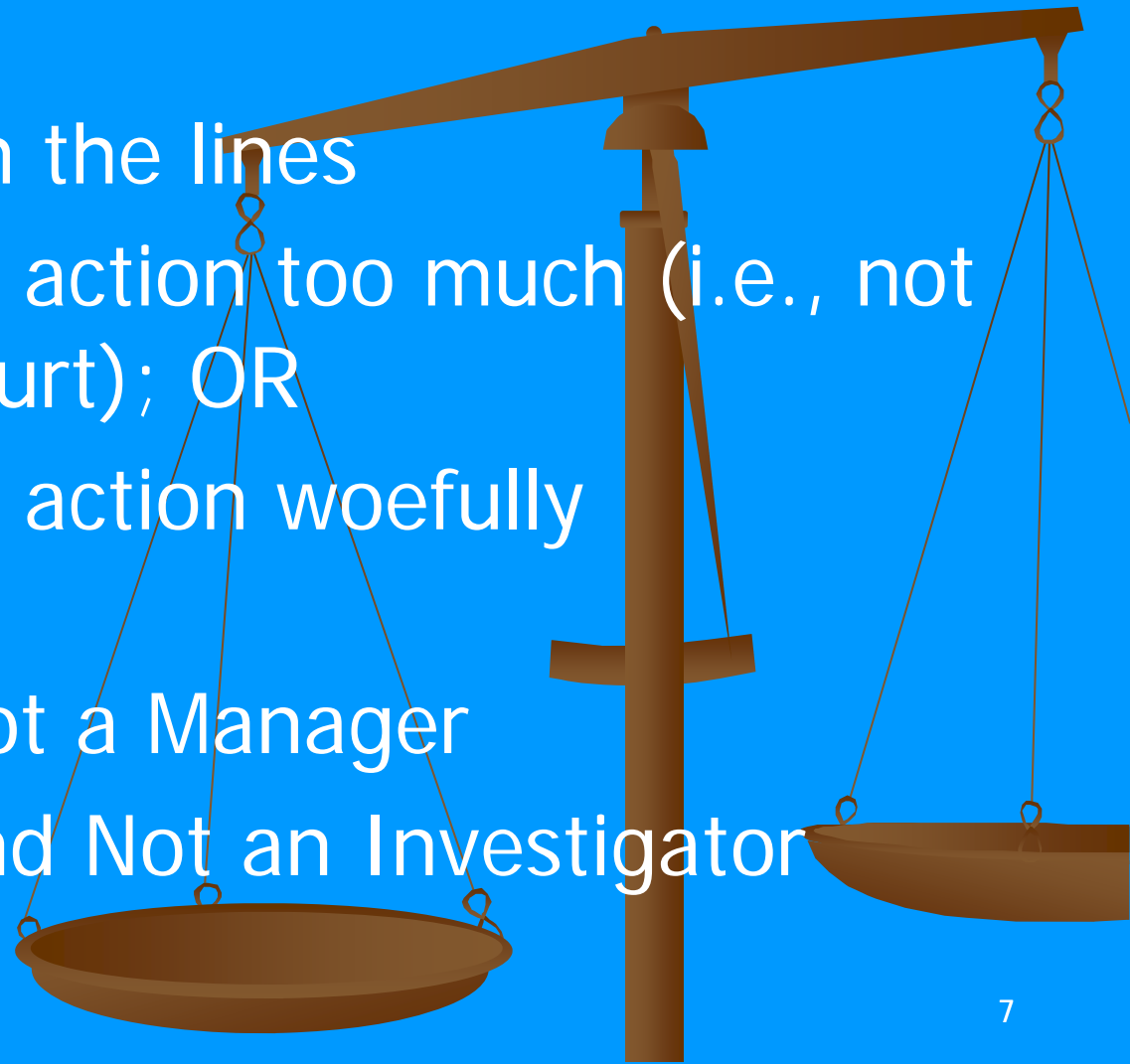
WHO DO WE HAVE TO WORRY ABOUT?

- U.S. Department of Labor
- Equal Employment Opportunity Commission
- Texas Commission on Human Rights
- (Civil Service Commission- for the lucky few)



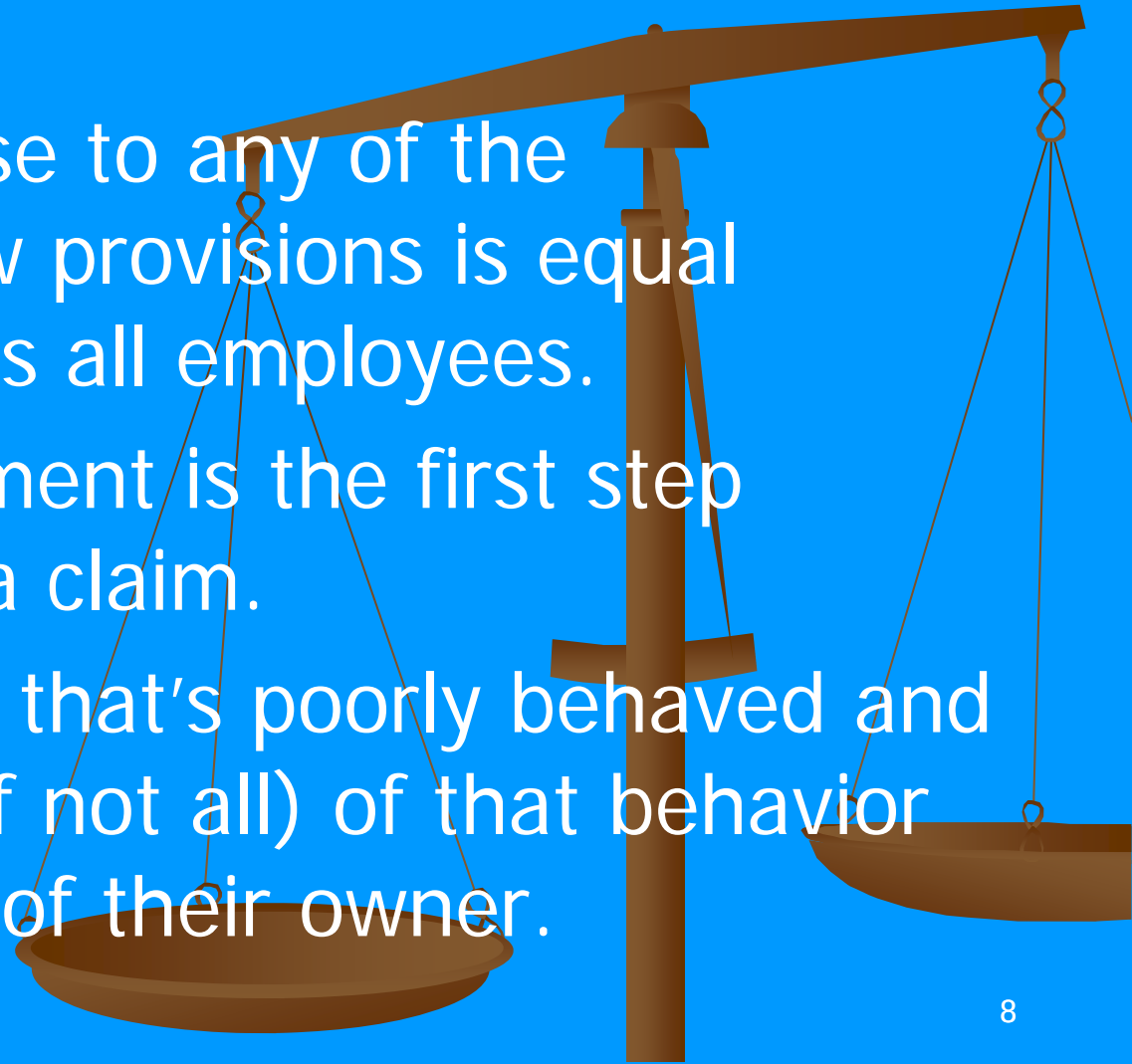
ROLE OF THE CITY ATTORNEY

- Keep it between the lines
- Is the proposed action too much (i.e., not defensible in court); OR
- Is the proposed action woefully insufficient?
- CA= Lawyer, Not a Manager
- CA= Lawyer, and Not an Investigator



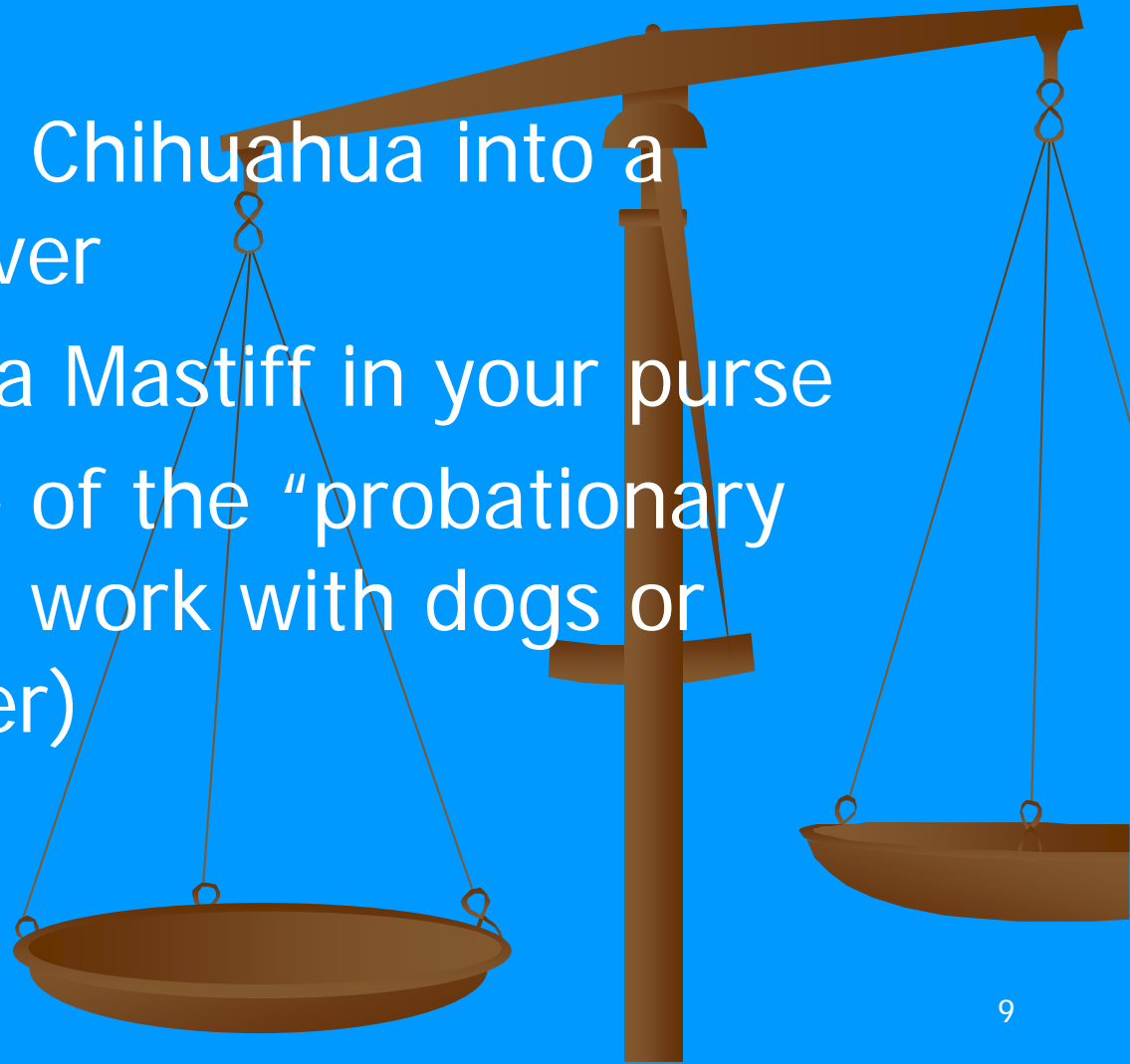
SO WHAT DO DOGS HAVE TO DO WITH ANY OF THIS?

- Best first defense to any of the employment law provisions is equal treatment across all employees.
- Disparate treatment is the first step towards losing a claim.
- Show me a dog that's poorly behaved and at least some (if not all) of that behavior falls at the feet of their owner.



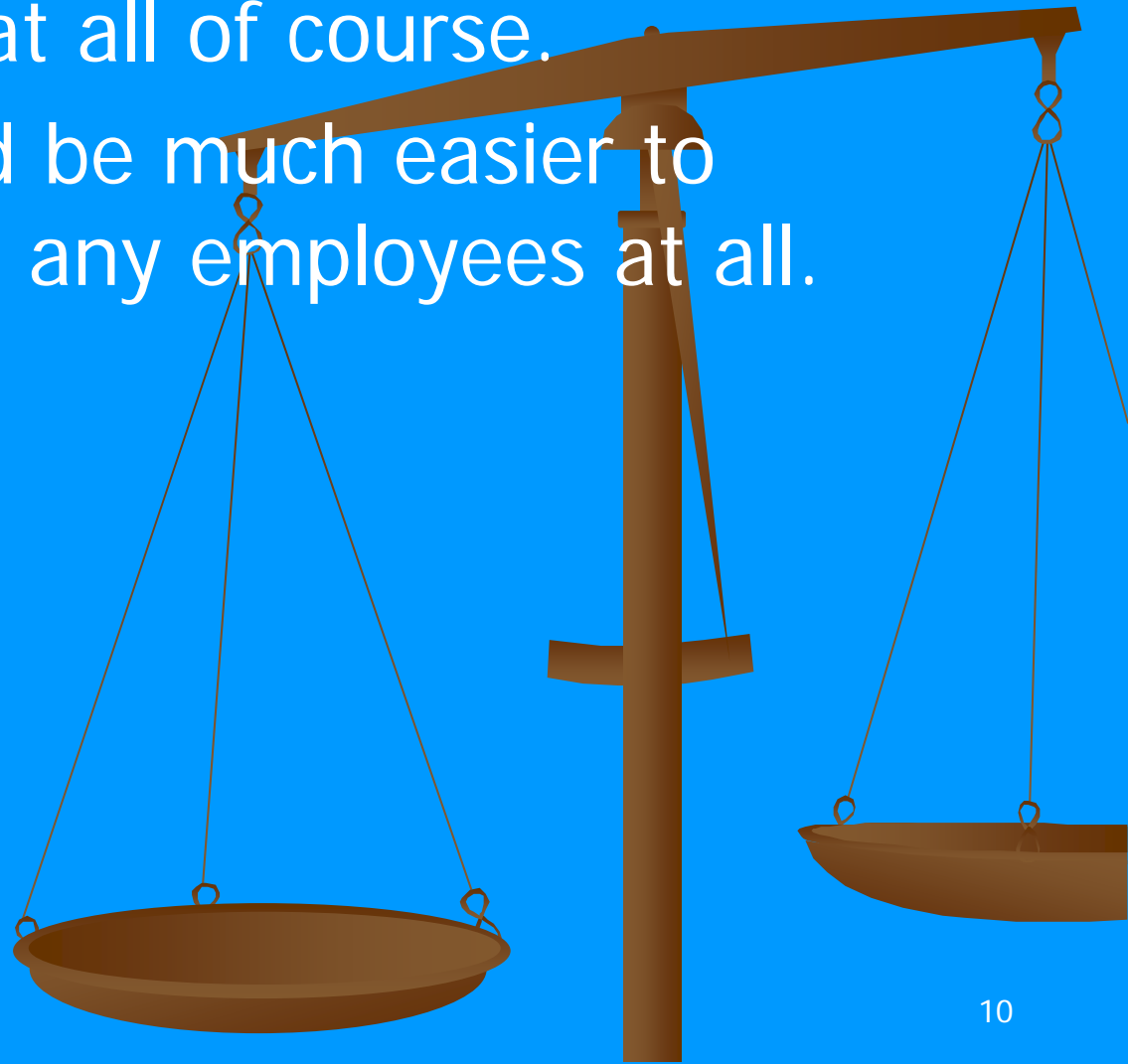
STEP 1- PICK THE RIGHT DOG.

- You can't turn a Chihuahua into a Labrador Retriever
- You can't carry a Mastiff in your purse
- Take advantage of the "probationary period" (doesn't work with dogs or spouses however)



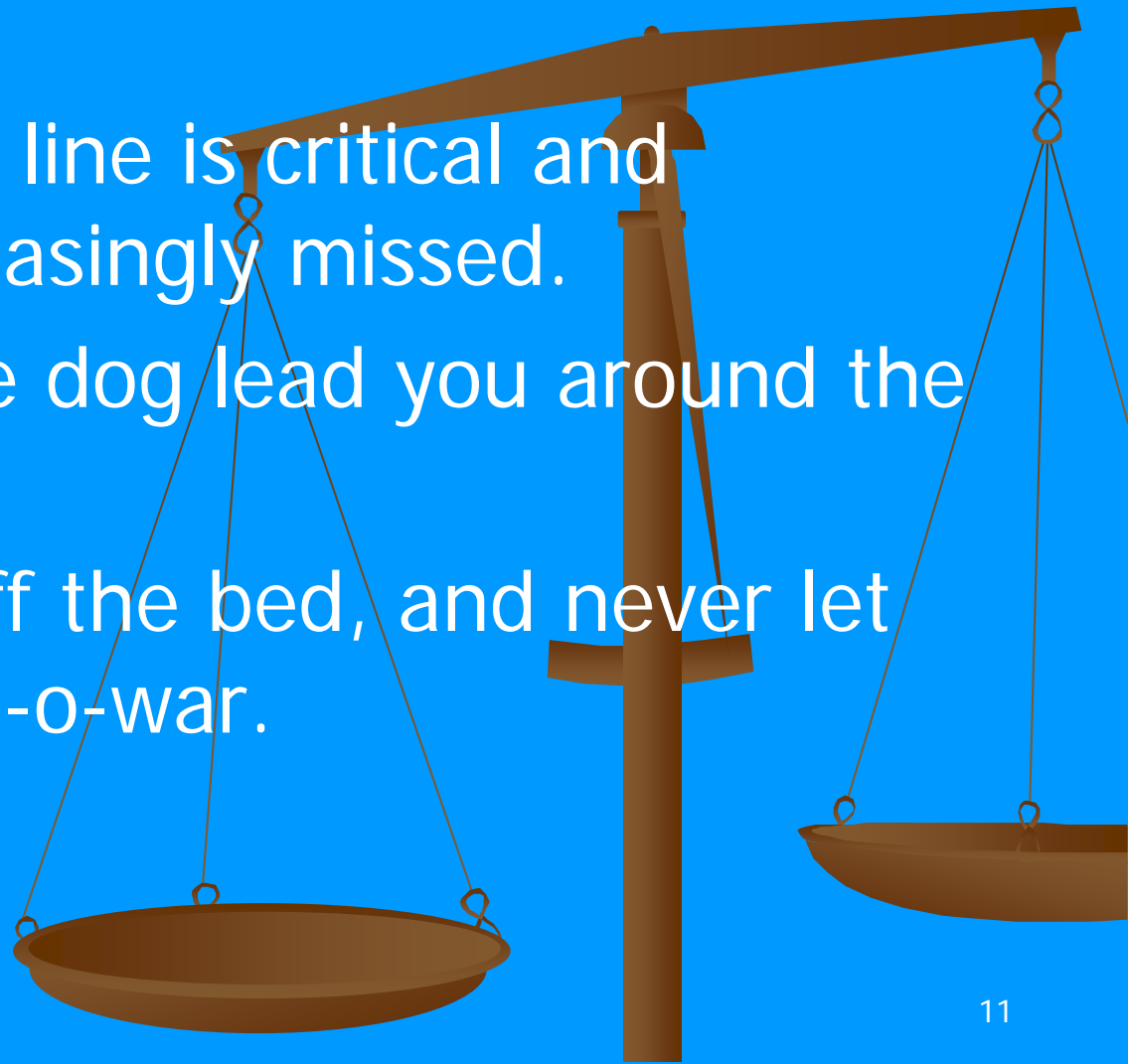
EASIEST CHOICE?

- Having no dog at all of course.
- HR issues would be much easier to address without any employees at all.



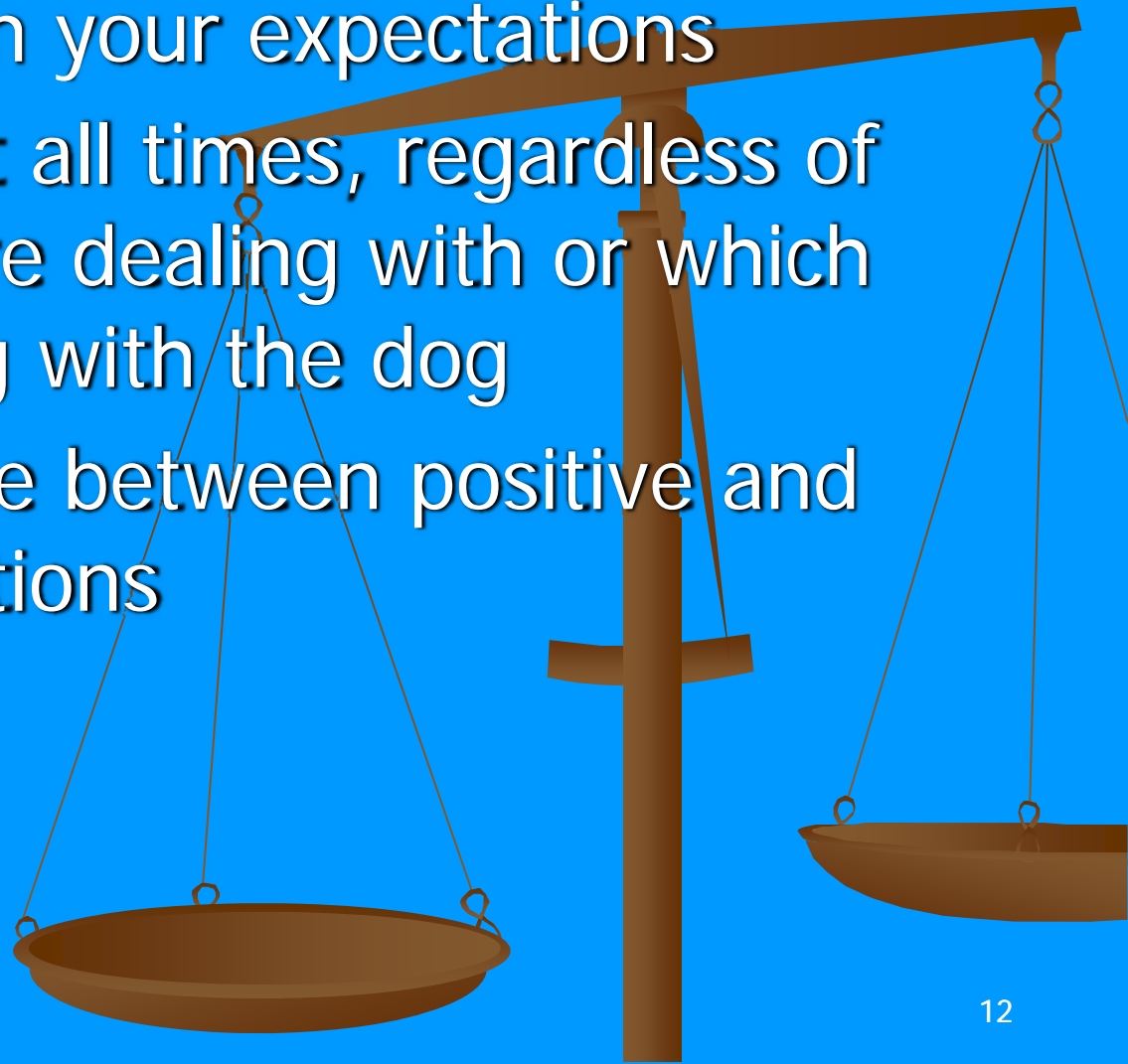
STEP 2- Enforce the Boss/Bossee Relationship

- Maintaining this line is critical and something increasingly missed.
- You can't let the dog lead you around the block.
- Keep the dog off the bed, and never let them win at tug-o-war.



STEP 3 - CRITICAL FACTORS TO RAISING A WELL BEHAVED DOG

- Be reasonable in your expectations
- Be consistent at all times, regardless of which dog you're dealing with or which person's dealing with the dog
- Maintain balance between positive and negative corrections



Adequate notice – What are the three primary excuses we hear from client employees?

- Did they know about the rule?
- Was the rule violated?
- Are others who violated the rule treated the same?



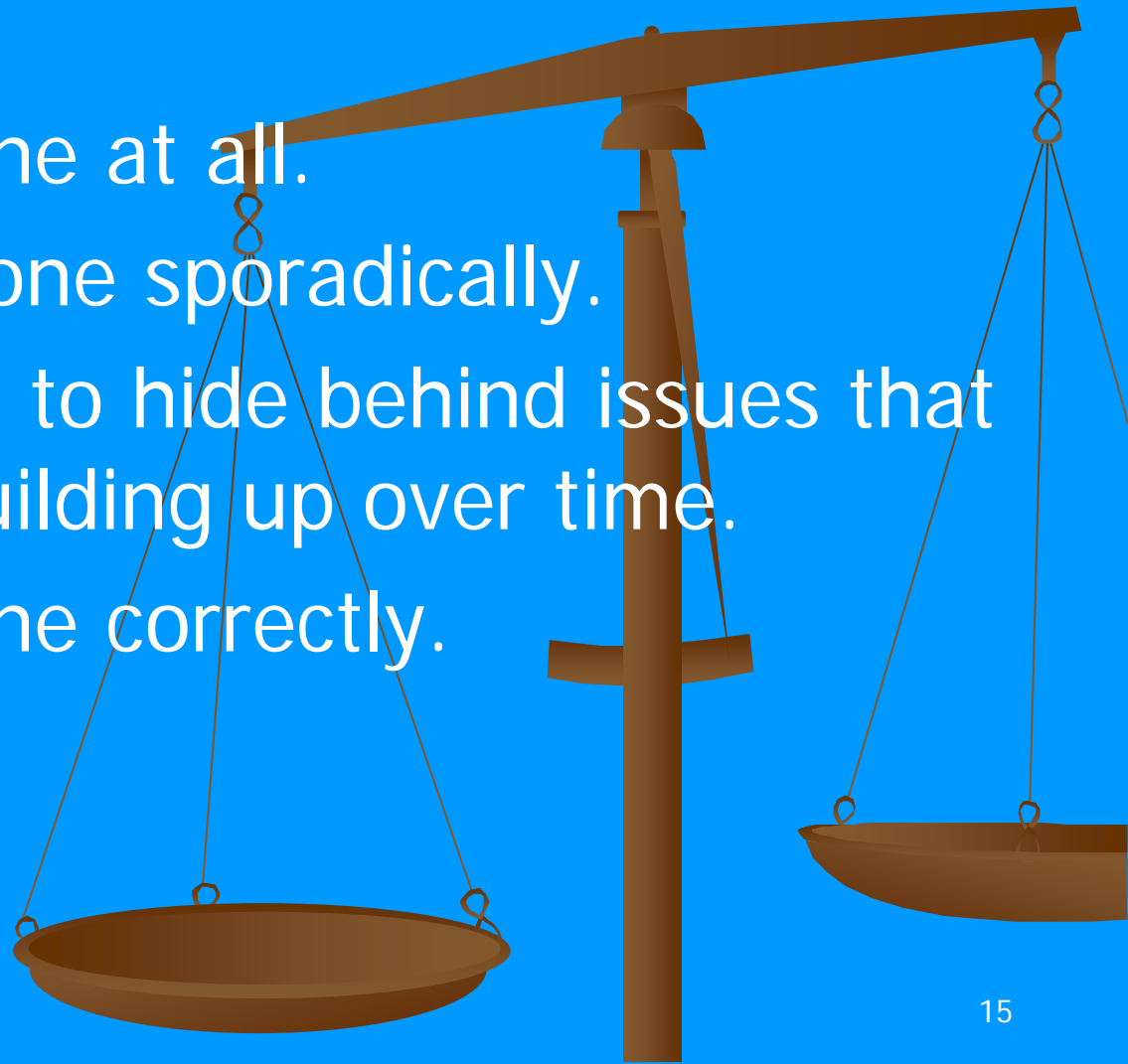
PERFORMANCE APPRAISALS

- Purpose of Performance Appraisals.
- Feedback to employees- good and bad.
- Management tool.
- Resource evaluation.
- Improvement enhancement.
- Discipline.
- Morale maintenance/ rapport.
- Compensation/ promotion indicator.



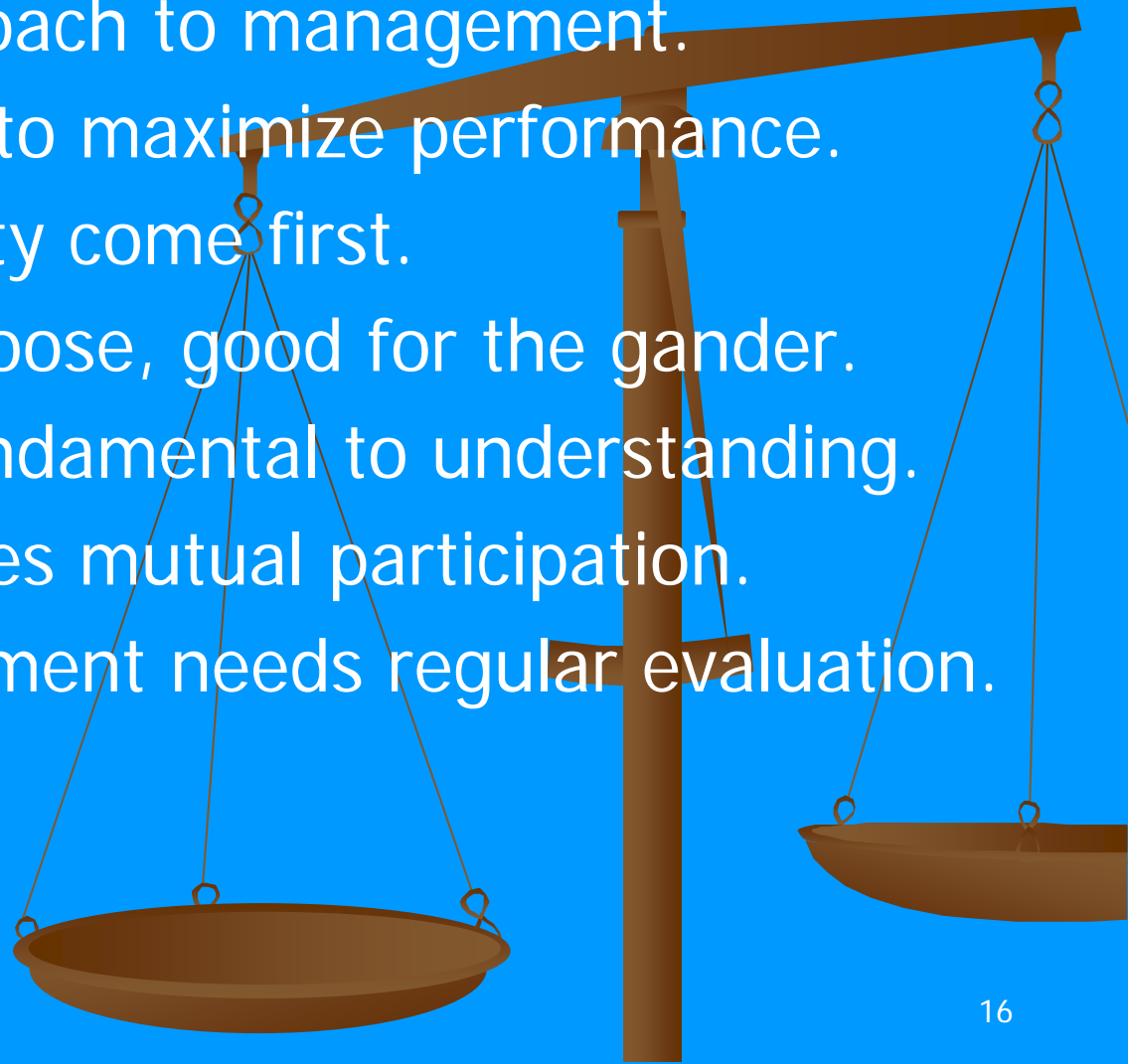
CONCERN AREAS

- Not being done at all.
- Only being done sporadically.
- Being utilized to hide behind issues that have been building up over time.
- Not being done correctly.



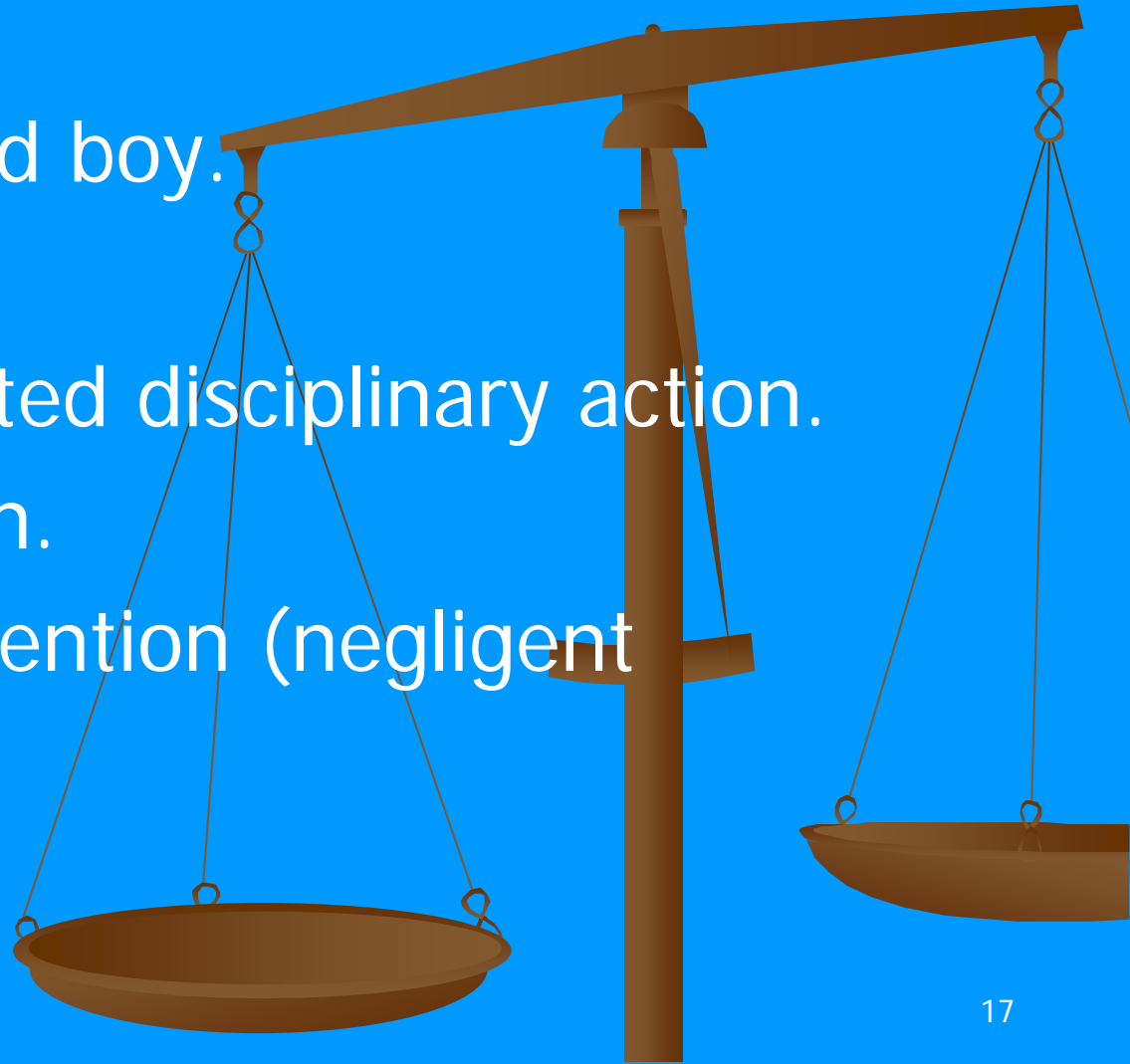
Seven Steps to Performance Appraisals

- Proactive approach to management.
- End in mind is to maximize performance.
- Goals of the City come first.
- Good for the goose, good for the gander.
- Feedback is fundamental to understanding.
- Synergy requires mutual participation.
- Sharp management needs regular evaluation.



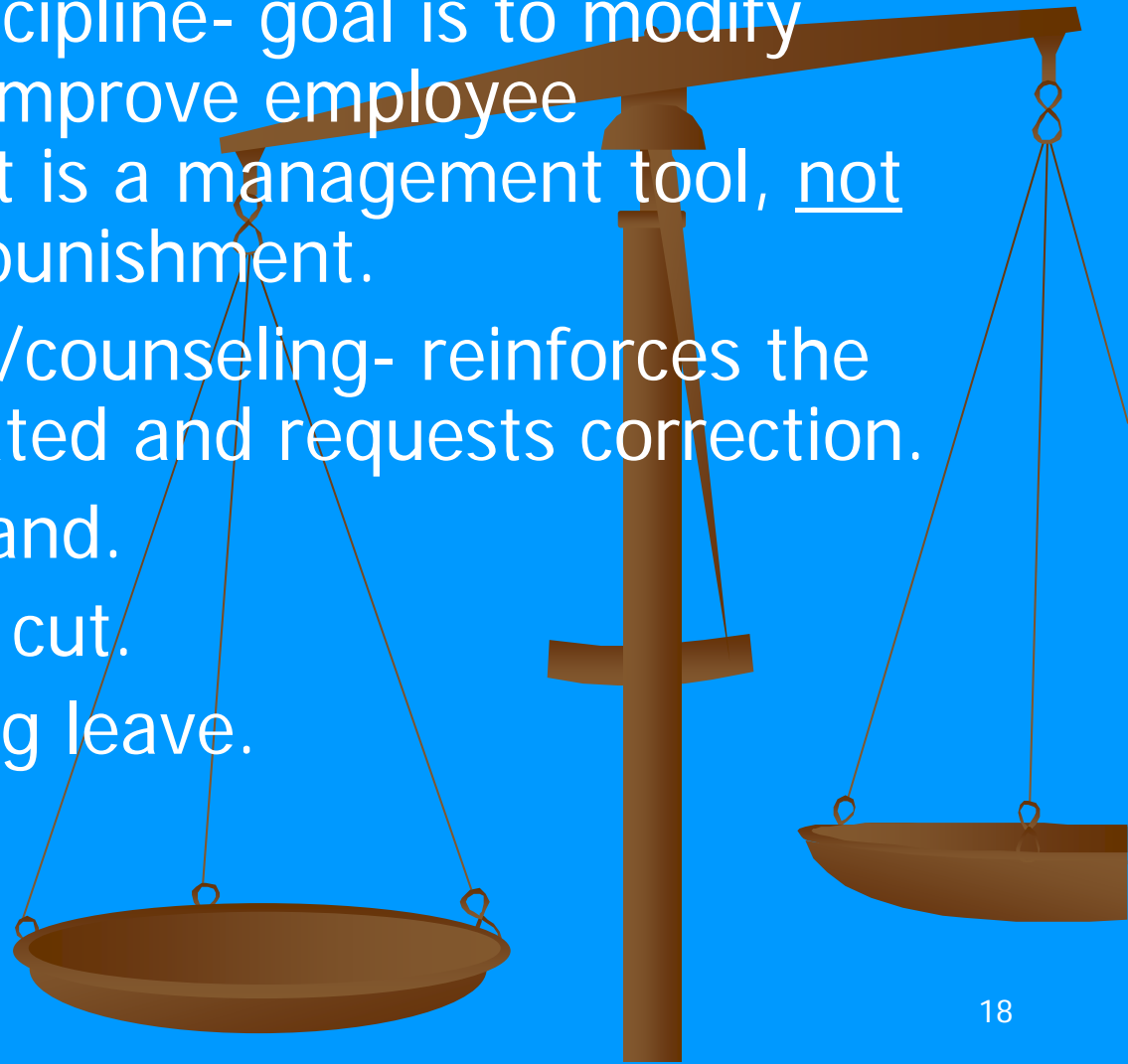
Legal and Management Pitfalls for Performance Appraisal Neglect

- Adaboy v. bad boy.
- Stress.
- Unsubstantiated disciplinary action.
- Discrimination.
- Employee retention (negligent retention).



DISCIPLINARY ACTION

- Progressive Discipline- goal is to modify behavior, and improve employee performance. It is a management tool, not just a form of punishment.
- Verbal warning/counseling- reinforces the rule being violated and requests correction.
- Written reprimand.
- Demotion/ pay cut.
- Decision-making leave.
- Termination.



TERMINATIONS

- Purpose of Terminations- Management tool.
- Purge under-performers and miscreants.
- Improve department performance.
- Avoid legal liability for negligent retention.



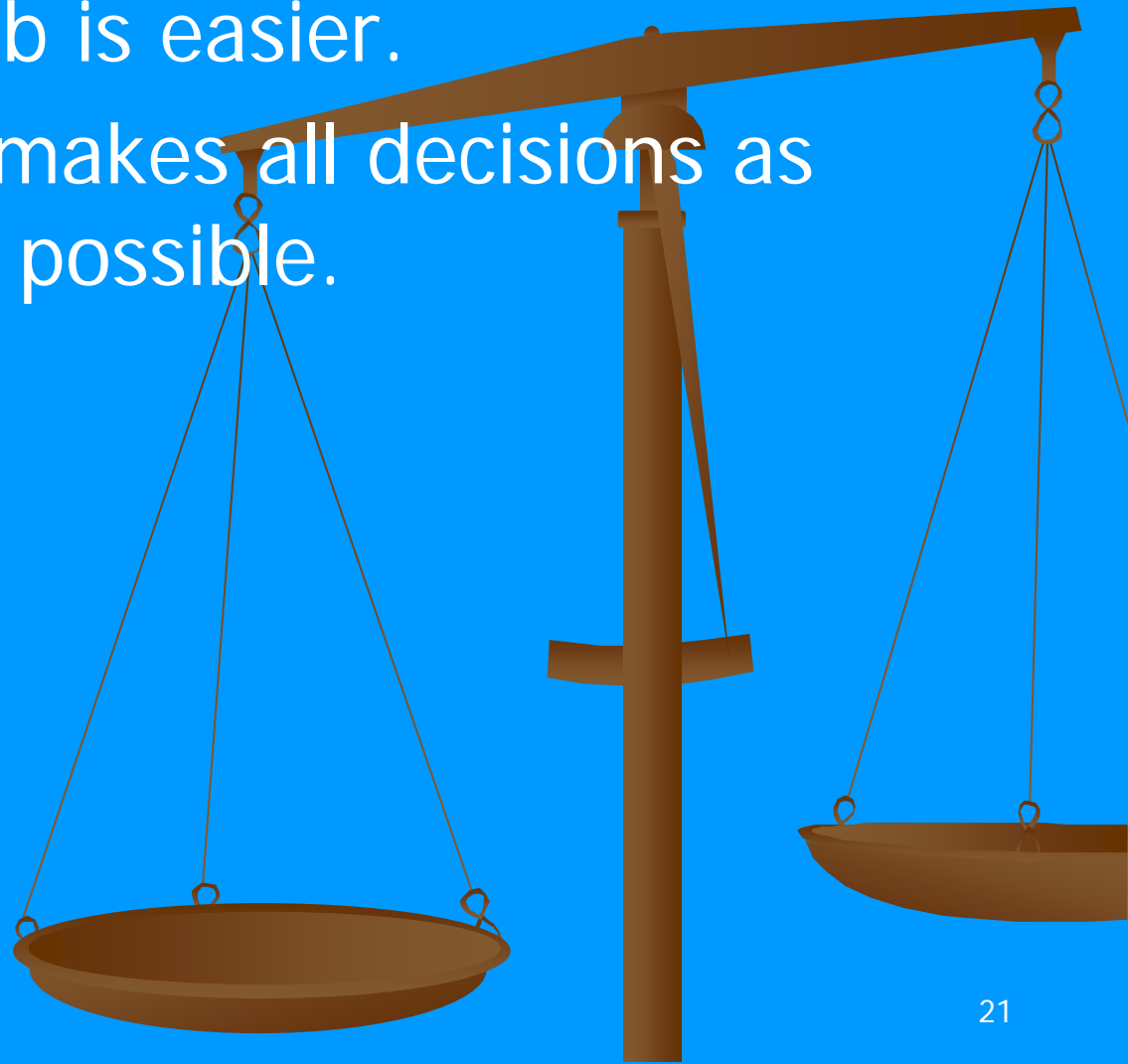
Terminations Gone Wrong

- Bad end to bad disciplinary process.
- Improper basis.
- Whistleblower
- Worker's Compensation
- FMLA, CRA 1964, FLSA
- ADA... (see exceptions to employment at will)



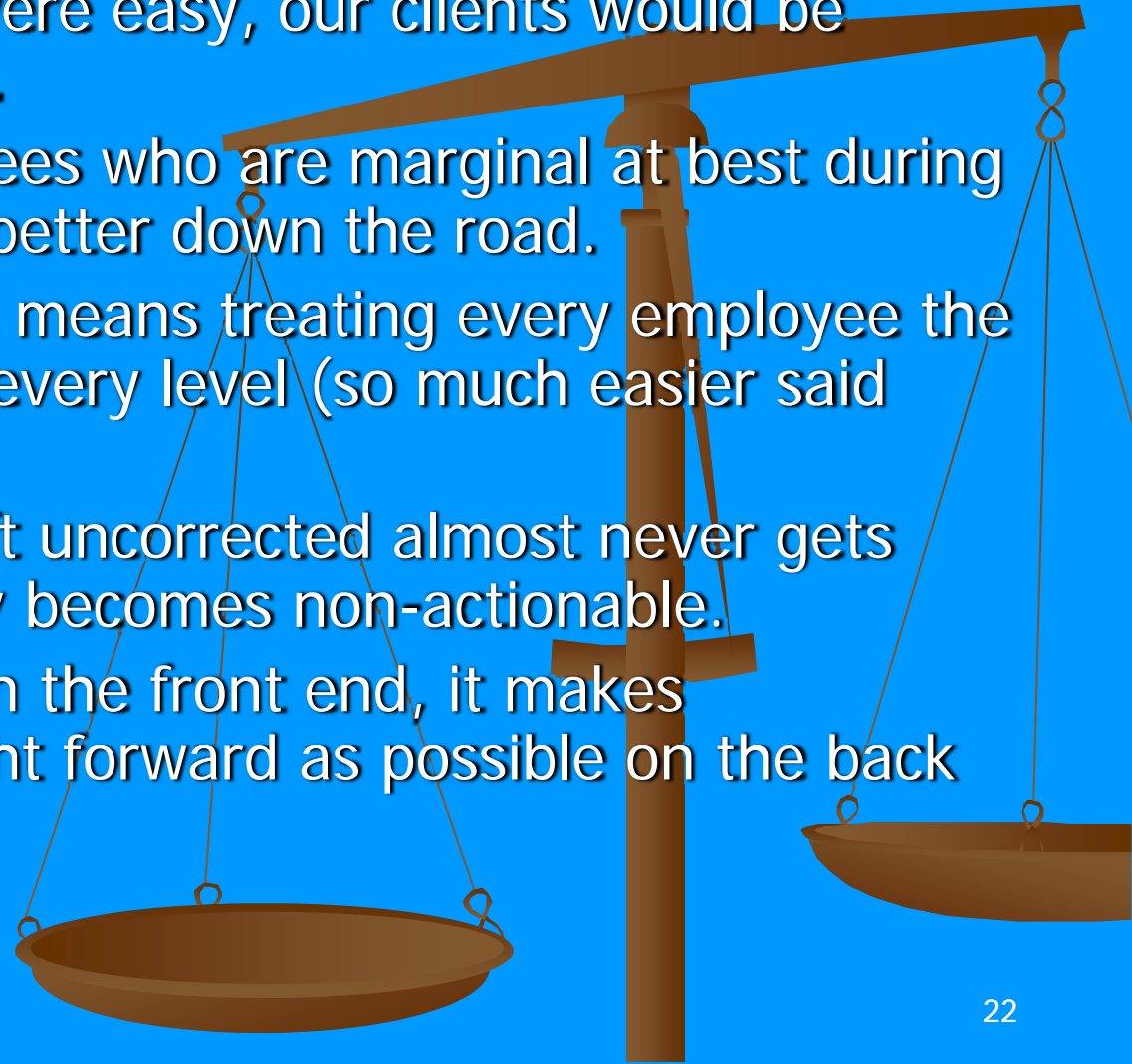
Benefits of Doing it Right

- Everyone's job is easier.
- Due process makes all decisions as defensible as possible.



FINAL TIPS AND CONCLUSIONS

- If personnel issues were easy, our clients would be much better at them.
- Probationary employees who are marginal at best during probation rarely get better down the road.
- Consistent treatment means treating every employee the same all the time at every level (so much easier said than done)
- Poor performance left uncorrected almost never gets better and eventually becomes non-actionable.
- If you do the work on the front end, it makes termination as straight forward as possible on the back end.



How to Drive Your City Attorney CRAZY

It may be that your city attorney is already crazy, and you will not require the advice which follows:

1. If you are holding regular conferences with your city attorney, stop doing so at once. This will keep him from finding out what you have in mind until it's too late to do anything about it.
2. Do not tell your city attorney what you're going to do, always tell him after it has been done. This is a particularly good tactic when you know there are potential problems.

