A Manager's Guide to the Do's and Don'ts of Discipline

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DISCIPLINE AND YOU

It's not up to most managers to write a company's discipline policy. But it is up to you to interpret, implement, and enforce it in a consistent and fair manner. What happens if you don't?

- A jury ordered an insurance company to pay $2.7 million to an employee it had subjected to its discipline process before firing. *Main complaint:* During the process, a manager was guilty of intentional infliction of emotional distress.
- An employee who was fired for theft received $1.2 million after a court determined that the employee was disciplined in retaliation for filing discrimination complaints.
- A manager took matters into his own hands and covertly spied on an employee he had argued with about retirement. The eventual disciplinary suspension based on that surveillance was one reason an initial jury handed $8.4 million to the aggrieved employee.

Most discipline cases lost in court or arbitration are the direct result of a manager's: (1) failure to give adequate warning, document properly, enforce rules consistently and fairly; or (2) misunderstanding of the basic requirements of federal and state legislation.

DISCIPLINE QUIZ

How well do you know your discipline do's and don'ts? Many managers claim that their right to discipline employees is being eroded by a flood of legal restrictions. Some of those complaints are based on fact, some on fiction. See how well you choose between the two in the following statements.

1. An employee who refuses a legitimate work order can be fired on the spot.

2. Company policy clearly prohibits moonlighting by employees. This means you have the right to terminate an employee as soon as you learn he/she is working a second job.

3. An employee about to lose her job because of poor attendance gets a new lease on life when she tells you she is pregnant and expects to have her job protected by the Pregnancy Discrimination Act.

4. An employee who has already received four "final" warnings for poor performance can be terminated without any problem.

5. The performance of an employee who has filed a sexual discrimination charge against her employer continues to drop. It's best to do nothing until her discrimination case is heard.

6. A female employee likes to consider herself one of the boys, and joins in the off-color remarks that are standard throughout the department. So you're surprised when she claims the situation is getting out of hand and she wants it stopped. Since she had been a willing participant in the past, you have the right to tell her to handle it herself.

7. One of your supervisors uses profanity when ordering an employee to return to his workstation immediately. The employee doesn't immediately return to his workstation, and the supervisor assumes he has *carte blanche* to fire him.

8. An employee refuses to operate a paper cutter that he says is dangerous. He's received the same training as all the other operators in your department, who use the cutter routinely and without incident. You warn him that his continued refusal could be considered insubordination and grounds for termination.

9. It took you six years to find out that a productive employee falsified his education on his job application form. Those years of good service must be taken into consideration before any discipline can be imposed.

10. Despite her poor attitude, your office assistant always does an acceptable job. But you'd really like to institute disciplinary procedures because of her irritating manner.

ANSWERS

Discipline is one of those gray areas where it's difficult to come up with a clear-cut delineation between what is fact and what is fiction. Keep that in mind while reading the following "answers."

1. If a manager can prove that employees understood an order and willfully disobeyed it, few judges or arbitrators would object to a termination decision. But if employees can demonstrate that they didn't understand the order, or that it was delivered in an unprofessional way by a manager, they have a good chance of getting their jobs back. Their refusal to carry out an order would also be justified if it were based on a reasonable fear of personal injury.

2. Hard economic times have forced many employees to moonlight. Courts and arbitrators don't look favorably on employer attempts to control off-duty activities. If a second job results in excessive absenteeism, lateness, or decreased performance, a company would have the right to take disciplinary action. If a second job puts employees in a position where they're working for a competitor, or gives rise to a conflict of interest, a manager would be justified in taking whatever action is necessary to stop it.

3. The Pregnancy Discrimination Act of 1978 specifies that women affected by pregnancy-related conditions have to be treated the same as non-pregnant employees. If you terminate non-pregnant employees for poor attendance, you can impose similar sanctions on pregnant ones, taking into account accommodation and the federal Family and Medical Leave Act. In this case, there is no retroactive clause in the PDA that covers performance problems for employees before they became pregnant.

Caution: If an employee could demonstrate that her poor attendance was pregnancy-related even before she knew about it, she might have a case.

4. Employees who receive more than one "final warning" can legitimately claim that the whole warning system has been undermined. Be careful with more than one final warning, unless past practice or previous records encourage a "one last chance" option.

5. Employees who have filed whistle-blowing, race, or sexual discrimination charges against a company must be given careful treatment when it comes to discipline. "Careful" does not mean "special," however. Some employees will try to take advantage of the fact that they have filed discrimination charges against the company and will use it to coast. If you let them get away with it, you are setting a bad precedent for other employees.

6. Beware of relying strictly on past practices. The fact that she feels the language is creating a "hostile environment" for her gives her a strong case for sexual harassment if you don't put an immediate stop to it.

7. Gross insubordination is a serious offense that usually justifies termination. A judge or an arbitrator could make an exception in this case, however, ruling that the supervisor's use of profanity led to the insubordination. Managers set the tone for their departments with their own

words and actions, factors that are taken into account in every disciplinary procedure.

8. There is no such thing as insubordination if an order involves putting employees into dangerous situations where they could hurt themselves. Every piece of equipment could be considered dangerous, if employees have not been trained in their operation. This employee had received the same training as other employees who were operating the cutter without incident. You'd be on firm ground in this disciplinary situation.

9. Judges and arbitrators place the falsification of company records in the same category as the theft of company property. It is one of those offenses where progressive discipline may not be required, particularly if the information is the type that would have disqualified the person from the job in the first place. Even a good work record may be insufficient to mitigate a discharge decision.

10. An employee with acceptable performance can be disciplined for having a poor attitude if a manager can prove that the relationship is hurting the performance of that employee or others. If the employee is not hurting departmental job performance, a discharge might be hard to support on the basis of a poor attitude only, although other discipline could be justified. You should document specific instances where the employee's poor attitude has hurt other employees or the company. Transfer or termination may be upheld for attitude problems if the employee has been given counseling, an opportunity to improve, and prior warnings.

RULES OF THUMB

Start with these basic rules of thumb for all managers before making disciplinary decisions.

- **Know your company policy on discipline.** But be flexible. Rule-makers can't project every set of circumstances, every violation, or even every possible application of a policy that will cross your path. So follow the company discipline policy, but be prepared for curves in the road.

- **Be aware of the big picture.** Consider the seriousness of the incident in question versus the employee's entire work record.

- **Don't use discipline as a personal weapon.** Don't approach the discipline process with the attitude of waiting for just a minor excuse to invoke penalties.

- **If you promise progressive discipline and don't follow it,** an arbitrator or judge will see that you do.

- **If an employee is unaware of a rule** or is not aware that specific conduct would violate a rule, he/she may not have broken it.

- **Managers who only enforce the rules when they feel like it** usually end up on the losing side in court or arbitration.

- **A written warning is practically worthless** if it doesn't specify the penalty for further violations.

DISCIPLINARY RIGHTS

Both managers and employees have rights and expectations when it comes to discipline. Here is your side.

- Employees will follow all basic company rules concerning behavior at the workplace. They will report to work on a regular basis, carry out their assigned responsibilities, and accept being disciplined for breaking company rules.

- Managers will be given the respect due them as company representatives. Employees will carry out all legitimate management orders. If an employee has

problems with a specific order, he/she should carry it out, then file an appeal under the grievance system.

- Employees will discuss all problems with their immediate manager first. If the problem is not resolved at this level, it can be brought to the next higher level.

Here is the employee's side.

- Employees have the right to know what is expected of them and what will happen to them if they don't meet the expectations. Companies that surprise employees in the disciplinary process frequently end up being unpleasantly surprised by an arbitrator or judge.

- Employees have the right to expect consistent and predictable penalties for rule infractions. Consistent discipline demands that employees receive the same general penalty for the same offense. It does not require the exact same penalty in every case. *Example:* There is nothing inconsistent about firing a **probationary** employee for insubordination and issuing a written warning to a **senior** employee for the same offense.

- The facts of the case must be examined carefully by management before any disciplinary decision is made. Discharge and other disciplinary actions are reversed by judges or arbitrators if they feel a manager acted on an assumption or simply jumped to a conclusion.

- Employees are entitled to a "day in court" during which they are allowed to question the facts and present a defense. They must be made aware of the nature of their violation and understand all the facts behind the charges. They should also be given a chance to improve behavior or performance, unless the offense is so serious that it warrants immediate termination. No discipline should be imposed until guilt has been established.

- Employees should have a way to appeal disciplinary decisions. Judges and arbitrators look for an appeal system that employees can use to dispute disciplinary decisions.

PERSONAL REVIEW

To make sure you're seeing both sides of the labor/management equation when it comes to discipline, create a "personal" profile with these questions.

- Have you examined your motives, no matter how pure you may think they are?

- Do you make every discipline move job-related?

- Have you reviewed past policy and precedents to make sure that nothing you're contemplating for the future will go against what's gone on in the past?

- Have you investigated thoroughly and checked all the facts of a situation to see if you've got the total picture?

- Have you properly forewarned the employee regarding the behavior expected by the company?

- Did you give the employee the opportunity to offer his/her side of the story?

- Have you consulted with the Personnel department prior to taking disciplinary action?

PROGRESSIVE DISCIPLINE OR PROGRESSIVE PENALTY?

An employee received an oral warning for being absent from his workstation. Two weeks later, he was given a written warning for the same offense. This was followed by a three-day suspension, and finally a discharge when his computer was left unattended and a valuable disk was overwritten.

The employee sued, claiming that the company had not followed the progressive discipline procedure outlined in its handbook. The company produced written documentation, showing that the employee had received an oral warning, written warnings, and a suspension prior to the discharge, exactly as described in the discipline policy.

Each warning gave the date and time that the employee was absent from his station. It also stated the discipline the employee could expect for further infractions. **Key point:** No comment was made about why the employee continued to leave his computer unattended.

The judge asked the employee why he continued to break an important work rule even though he knew it might cost him his job. The employee said he was having difficulty understanding a new software program, and he had to get the help of a colleague in another department. He said he was afraid to tell his manager, because his data processing classification required him to know every aspect of this particular program. He also told the judge that his manager had never asked him the reason for his unauthorized absences.

The judge ruled that the company had used a progressive penalty system, not a progressive disciplinary system, and reinstated the employee. Progressive discipline demands that the employee learn what type of conduct is acceptable and be given an opportunity to conform.

RULES OF DISCIPLINE

No state or federal law requires a company to establish a progressive discipline policy. But if you do promise one, make sure you follow it. Progressive penalty is an important part of progressive discipline, but it is only one element of the overall system. An employee must understand the reason for the penalty and be given an opportunity to correct the behavior, or the system is not progressive discipline.

Rule #1: The object of progressive discipline should be to *rehabilitate employees, not punish them.* Always ask an employee for the reason behind the problem. Never take it for granted or assume anything. If the problem is correctable by additional training, specify what steps you and the employee will take to resolve it. Document everything that is said and done in case the problem persists and you have to go to the next step in the progressive discipline system.

Rule #2: Employees must *understand* that their behavior violates company rules. Employment law differs from civil law in that "ignorance of the law" can be used as a defense.

Caution: To make sure your communications are getting through loud and clear, take these steps.

- **Be thorough when you are disciplining employees.** State exactly how the policy has been violated. Give clear-cut examples of what is unacceptable about the behavior. Set the standards to be met so the employees can't claim they didn't know they were doing something wrong.

- **No matter what the communication situation, try to see it from both sides.** Put yourself on the receiving end of your message and see if it makes sense, is complete, and provides a solution to the problem.

Rule #3: If employees are not warned about the *possible consequences* of poor performance,

a judge or arbitrator may see it as an indication that there hasn't been any effort at rehabilitation.

Rule #4: Employees must be *treated equally* under the progressive discipline system. A manager can't slap one employee on the wrist, then shove another out the door for the same offense.

Case in point: An African-American worker was the only employee, during approximately a two-year span, to be suspended and ultimately terminated under her employer's progressive discipline policy. So she sued her employer for race discrimination. *Reason:* Sixteen non-black employees, who should have been suspended or terminated for violating the company's rules of conduct, faced little more than a written warning, if that. The company responded that, a year into her employment, a new manager adopted a stricter approach to employee discipline; hence, her dismissal. An appeals court wasn't swayed and sent the case to trial. (*Curry v. Menard, Inc.)*

DIFFERENT WARNINGS

Managers tend to treat oral warnings too informally, failing to combine them with written documentation and goals for improvement. Vague statements such as "you could do better" or "you're not holding up your end" are not effective oral warnings.

An oral warning is just as important as a written one in the progressive discipline process. There are two critical elements that must be present in every oral warning:

- the problem must be spelled out clearly;
- the employee's reaction must be noted.

If the oral warnings fail to correct the problem, the next one should be put in writing. A written warning should contain the following four elements:

- date(s) and time(s) of offense(s);
- a summary of previous discipline, including oral warnings;
- a plan to correct the problem;
- a warning about future violations.

When you get to a final warning, it should contain a statement explaining that further violations within a stated time may result in termination.

Every final warning should cover these concerns.

1. The employee must understand that any further violation can mean termination. That's why only one "final warning" should be issued to the same employee.

One manager issued a final warning to an employee that any infraction of the work rules would result in termination. During the next year, the employee received 20 additional warnings. When he lost his temper and ripped a locker door from its hinges, he was fired. "Too late," an arbitrator said when he reinstated the employee because he had not been properly warned. The arbitrator reasoned that the employee had no reason to believe the next infraction would result in termination because the manager had made the final warning system meaningless.

2. A time limit should be established for the infraction. If this employee had broken a rule the week after receiving a final warning, no one would question a discharge decision. But what if he had a perfect record for the next two years? Would one minor violation justify a termination? Probably not. That's why it's a good idea to establish a reasonable time period for the maximum penalty.

Caution: Note the word "infraction." One employee received a final warning stating that one more unauthorized absence would result in his termination. Two months later he was found guilty of negligence and fired. He sued and was reinstated when he successfully argued that he

had been given a final warning about absenteeism. No notice was given that any other infraction would result in discharge.

That does not mean that you can only fire an employee for violating the same rule or that a series of minor violations could not add up to a termination. It does mean that your final warning must be worded so that there is no question in the employee's mind that the next infraction — major or minor — will result in termination.

PLANNING THE DISCIPLINE INTERVIEW

Whether you're giving an oral warning to a probationary worker or issuing a final warning to a veteran employee who is on thin ice, the concept of due process applies. The best way to meet this requirement is through proper planning before the discipline interview.

Start by collecting performance appraisals, prior disciplinary procedures, and any other pertinent documentation. Look for any clues that might explain the reason for the disciplinary problem. Read between the lines for these underlying factors:

- underqualified for position
- overqualified for position
- inadequate training
- lack of direction
- unreasonable deadlines
- poor supervision
- lack of goals or unclear goals
- monotonous, uninteresting work
- inability to measure progress
- no opportunity for advancement
- no job security
- inability to get along with supervisors
- inability to get along with other employees
- physical drawbacks (e.g., poor lighting, excessive noise, inadequate ventilation, excessive heat)
- hazardous working conditions
- not having proper tools or equipment
- unfair compensation system
- confusing or outdated company personnel policies
- unfair distribution of overtime
- inadequate performance appraisal system
- inadequate accommodation for an employee with a disability.

THE INTERVIEW CHECKLIST

The following questions will help you prepare a step-by-step discipline interview guide.

- What is the major subject of the interview? Is it a single incident or is it part of a larger problem?
- If it's related to behavior or attitude, what immediate steps can you take to change it?

If it's related to ability, knowledge, or skill, would additional training resolve it?

- What does company policy state about the subject? Is the employee aware that the behavior violates company policy?

- Do you have the proper documentation to sustain a disciplinary action?
- Have you reviewed the employee's record and any previous disciplinary interviews?
- How have you dealt with similar problems in the past?
- How does your previous discipline compare to what you have in mind now?
- If the proposed discipline is more severe, are you prepared to explain why?
- If the proposed discipline is less severe, are there extenuating circumstances to justify it?

A CASE IN POINT

James Wolff has just suffered his fifth accident in the last three years. He had previously received an oral warning and two written warnings for carelessness and negligence. Wolff claimed the previous accidents were due to unsafe working conditions, not his own carelessness. In the latest accident, Wolff drove a forklift truck into a pile of skids. A falling skid narrowly missed another employee. He claimed his foot slipped off the brake pedal and that it could have happened to any other employee.

Now you must decide what type of discipline, if any, is justified. Start by examining his entire personnel record, concentrating on performance appraisals and previous disciplinary warnings. Here are some questions to help you look behind the facts of a disciplinary investigation.

1. **What was the nature of each of Wolff's previous accidents?** Did the investigations pinpoint fault? Could the accidents have been the result of unsafe working conditions?
2. **How does Wolff's accident record compare with the rest of his department?** If his record is about the same or lower than the department standard, unsafe working conditions might be a factor. If his rate is considerably higher, it's obvious the problem is with Wolff.
3. **Could it be a training problem?** Has Wolff received the same instruction as other employees who have better safety records? You must be able to show that he was properly trained, and had the job experience and the physical capability to perform the job.
4. **Did the previous warnings state that Wolff could be suspended or even terminated** if his discipline record did not improve?
5. **Were his actions costly to the company** in terms of damage to product, equipment, or lost time?
6. **Do his actions create a hazardous condition for other employees?** The employee who was almost hit with the skid would certainly agree that they did.

Caution: Companies have been found guilty of negligence when they have allowed careless employees to continue in jobs that have injured other employees.

7. **How have you handled similar situations in the past?** Compare the severity of the discipline you imposed with the circumstances of the infractions. Have you suspended or fired other employees for being responsible for "near miss" accidents? Carelessness that results in great expense to the company or that creates a hazardous condition for co-workers is considered by most arbitrators and judges to be good cause for termination.

After you have answered those questions, it's time to develop your plan for the disciplinary interview. Here are four issues that should be covered in a disciplinary memo and serve as the underpinning for the discussion.

1. *Outline the problem*. Wolff has had five accidents in a three-year period, despite being warned about the consequences of carelessness.

2. *Get the facts*. His accident rate is well above the departmental average, even though he has received the same training as the other operators.

3. *Find out his side of the story*. You can't get the answer to his most recent accident until you have completed the disciplinary interview. Maybe there are factors that must be taken into account which could mitigate the offense.

4. *Determine a corrective action*. What you decide to do to him now will depend on what was said to him in previous warnings. If he was told that a suspension would result from one more accident, you will have to carry through on it, unless he is able to come up with mitigating circumstances. If you don't, you won't be able to discipline other employees who violate safety rules.

Caution: Deciding on the validity of an excuse or the "weight" of a mitigating circumstance requires skill and experience. As Wolff's manager, you could: a) seek advice from a third party, such as a mentor or higher level executive; b) check on what colleagues have done in the past in reacting to similar excuses or circumstances; or c) put the question to someone in Personnel to get an opinion.

AVOIDING DISCIPLINE ERUPTIONS

Employees facing a discipline session know you don't want to see them to discuss the weather, sports, or how their kids are doing in school. Here are some general steps you can take to make sure a tense disciplinary session remains professional and productive.

- **Explain exactly why you are there and what your major concerns are.** Take the initiative in devising a move or countermove for every potential employee reaction.

- **Don't think of discipline as necessarily leading to termination.** Think of it as a way to reshape or redefine employee behavior. Many employees can be "saved" if you can figure out ways to fix the problem without bringing down the full weight of the system.

- **If there is disagreement, don't get pulled into a personality conflict.** Employees are usually tense during a discipline session, and they may say things in a fit of temper. Try to remain as calm as possible.

- **Treat the employee as you'd want to be treated.** No sarcasm or patronizing responses. You're there to remove problems and roadblocks to smooth operations, not exacerbate them.

- **Tackle the issues head on.** Don't try to push tough discipline problems into the background. As a manager, you've been moved into the front lines to confront such problems. Get them out in the open and they're more likely to be solved.

- **Don't just be a policeman.** Be a facilitator. Enforcing rules is not your only priority. Getting the job done is just as crucial. Apply the rules as guidelines for enhancing productivity, not as methods to punish transgressors.

COUNSELING AND DISCIPLINE

Discipline and counseling often go hand in hand. But counseling should not be part of every

disciplinary interview. There are circumstances when counseling is premature or totally wrong. Employees who maintain their innocence of whatever they have been charged with will remain defensive or argumentative if managers try to counsel them.

The employee who acknowledges the problem, accepts the discipline imposed, and expresses sincerity in changing whatever it is that is creating the problem is a good candidate for counseling.

Under these conditions, a manager can actually turn a disciplinary interview into a motivational session. The best way to do that is to involve the employee in the solution process. Try these techniques.

- **Be rational, not emotional.** Don't get involved in an emotional exchange — stick calmly to the facts, the rules, and the infraction. When you show by your responses you're in control, you're less apt to feel a need to "assert authority."

- **Don't make comparisons between the individual and other employees,** and don't get involved in a discussion of other "similar" disciplinary situations, even if the employee tries to bring them up.

- **If you suspect that personal problems are hurting the employee's performance,** but he/she denies that or declines to discuss them, all you can do is express your openness to future discussion, your willingness to make a referral, and your firm need to see a change in the behavior.

- **Focus on behavior — the specific actions and rules at issue — not the individual.** Don't get into name-calling or pigeonholing the employee as lazy, a troublemaker, etc. Instead, concentrate on the specific action that broke a specific rule, and on the specific actions you want the employee to change.

- **Don't insist on your own interpretation.** Wherever possible, try to have employees analyze the problem or make the connection between incidents for themselves.

- **Involve the employee in finding a solution.** Remember that your goal is not punishment, but changing unacceptable behavior. You want to overcome the employee's resistance to company rules or policies and gain his/her cooperation in changing the problem behavior. You can't change it; only the employee can.

USE CONSTRUCTIVE CRITICISM

It might be tempting to start an interview by refuting an employee's arguments right off the bat. Avoid the temptation. That doesn't mean that you shouldn't use facts later in the interview. But you should let employees talk first, giving them an opportunity to offer their side. Maybe there are extenuating circumstances.

When you do get around to criticizing, don't use "you" statements. They are bound to put the employee on the defensive and lead to an unpleasant exchange. You have to get the message across, but try doing it with an "I" statement, which describes your point of view without extending a challenge.

- I want you to follow the smoking rules and regulations.

- I'm concerned that you simply break rules that you don't feel like following.

I-statements tend to keep the lines of communication open. They do not cast blame or judgment. They make employees more likely to hear and consider the changed behavior that you want them to adopt.

- I want you to follow the safety rules.

- I want you to improve your attendance record.

POTPOURRI OF DISCIPLINE DISCRIMINATION PROBLEMS

When discipline gets mixed with potentially volatile employment issues, such as religion, race, disability, loyalty, and attitude, workplace problems can explode into discrimination lawsuits.

Two employees who were originally from Ghana claimed that their Hispanic supervisor subjected them to overly intrusive supervision, threatened and charged them with undeserved discipline, and tried to deny authorized overtime. They were eventually fired for sleeping on the job — even though other workers had been given oral or written warnings, and the supervisor had woken up Hispanic workers and hadn't disciplined them. The company agreed to pay the workers $75,000; provide training to managers about anti-discrimination laws; and institute and post a policy for reporting complaints of discrimination. (*EEOC v. General Cable Corp.)*

An employee "went ballistic" during a meeting and then made a comment to his supervisor about going out and buying a gun. The company consequently launched a formal investigation into his behavior. It decided to suspend the employee for 45 days for violating company policy by leaving the meeting without permission and for being insubordinate, quarrelsome, and discourteous. The employee, in turn, filed a race discrimination suit and tacked on a retaliation claim after he was reprimanded for not wearing safety glasses.

Court: The employee failed to present sufficient evidence to prove that race was a motivating factor in his discipline. Case dismissed. *(Hysten v. Burlington Northern and Santa Fe Railway)*

During an ongoing investigation into drug activity on its premises, an employer warned those it interviewed not to discuss the investigation with anyone. When two employees spilled the beans, they were terminated. They claimed that was a violation of their right under the National Labor Relations Act (NLRA) to discuss discipline or disciplinary investigations. Upholding the dismissals, a court explained that the company had not violated the NLRA in this case because it had a substantial and legitimate business justification for the confidentiality rule. *(Desert Palace, Inc. d/b/a Caesar's Palace)*

After an employee was diagnosed with hypertension, which was caused by work-related stress, she asked for a reasonable accommodation, such as restructuring her job, filling staff vacancies, or transferring her to a less-demanding position. The company refused and instead asked her to enter the company's "career reappraisal" program. This time the employee refused and was fired. *Reason:* Her negative attitude prevented her from doing her job effectively.

The employee sued for wrongful termination and breach of contract, based on the company's progressive discipline policy. An appeals court ruled that the company should have accommodated her disability by considering her for another position, and should not have failed to follow its progressive discipline policy before firing her. (*Strass v. Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.)*

OFF-THE-JOB PROBLEMS

When does an employee's personal problem become a manager's concern? *The answer:* When an off-the-job problem is creating on-the-job discipline problems. Employee privacy is a major issue these days, with some employees winning cases when their employers infringe on their personal lives.

Managers who have documented records to prove rules infractions or declining performance have every right to confront the employee in a disciplinary interview. But they can't make

accusations or suggest possible drug, alcohol, marital, or mental problems. Early intervention by a perceptive manager can resolve many of these off-the-job problems before they explode into career-ending disciplinary problems.

There are things you should never say, do, or agree to in a disciplinary interview with an employee whose off-the-job activities are creating job-related problems.

1. **Don't try to diagnose or label** the employee.

2. **Don't moralize or talk about doing the right thing.** All your comments should be directed at the specific job problem.

3. **Don't let your personal feelings** enter into the interview.

4. **Don't be overly swayed by excuses or allow yourself to be manipulated.** Employees with personal problems become skillful in changing a disciplinary interview to suit their own purposes. Don't fall into those traps and allow yourself to be distracted from the disciplinary purpose of the interview.

5. **Don't argue or make idle threats.** The employee must leave the meeting feeling that corrective steps must be taken or he/she is going to lose a job. Unless employees leave the meeting with the idea that their performance must improve or their behavior must change according to a timetable, you haven't conducted the disciplinary interview properly.

TERMINATION

Discharge is an admission of failure — on your part as well as the employee's. You reach this stage when progressive discipline fails. You reach it quicker if the infraction is for a serious offense, such as drinking or drugs on the job, that does not require progressive discipline.

There are many ways in which a termination decision can become a legal problem, and the list seems to grow daily. That's why you should run through a checklist before you even decide on discharge, much less carry it out. Here are some points to cover.

1. Your termination decision could be seen as a violation of public policy, which protects employees when they:

- perform jury duty
- refuse to carry out illegal acts
- report law violations
- exercise political rights.

2. Constructive discharge. Working conditions are made so intolerable for an employee, that he/she quits. Of course, if the manager contributes to the conditions, the company is liable. The company is also liable if the manager knew or should have known about the situation, but did nothing to correct it. This happens frequently in sexual harassment cases where a "hostile environment" forces a person to resign.

3. Abusive discharge. A woman was fired for refusing to date her supervisor. The court upheld her claim that the discharge was "abusive and in bad faith." The 1991 Civil Rights Act calls for increased damages and jury trials for cases of abusive discharge.

4. Corrective action. If the discharge is for performance reasons, you must make sure all procedures of the performance appraisal system have been followed. When the discharge is for disciplinary reasons, make sure that all applicable steps of the progressive discipline policy have been followed.

5. Documentation. All events and actions that might lead to discharge must be fully documented. The documents must also indicate that the employee has been warned that continued problems could result in termination.

If the termination is for disciplinary reasons, the documentation should include the incidents

leading to disciplinary action, with dates and other circumstances; the disciplinary steps taken; the policies violated; and the consequences of the employee's actions.

6. Approval. A manager who feels that discharge is in order should submit a recommendation for discharge to his/her department head. No termination action should be taken without the prior approval of top management. If you can find any reasons to question your disciplinary actions, you can be sure that the employee or an attorney will too.

SPECIAL SITUATIONS

There's no such thing as a standard discipline situation. And there's no such thing as a standard reaction by the courts or outside arbitrators. But there are guidelines you can borrow from those third parties when you are faced with tricky situations like those that follow.

Situation: A veteran performer began to fall down on the job...not literally, but almost. Not only was her behavior erratic and her performance poor, but every once in a while her manager caught a whiff of alcohol on her breath.

So he threw the company's discipline machinery into gear, called her in to set new goals, and gently suggested that if there were personal problems, she should seek assistance from the company's employee assistance program.

Nothing worked. She claimed she didn't have an alcohol problem. The manager issued verbal and written warnings. Finally, he dropped the axe. Lo and behold, she suddenly did have an alcohol problem, and claimed protection under the Americans with Disabilities Act (ADA).

Key points: She denied a disability when it counted. Employers are not responsible if they do not know about a disability or an employee claims not to have one. Also, while the ADA covers alcoholics, it does not protect them from the consequences of their drinking (e.g., poor performance, misconduct).

Situation: Cost-cutting measures forced a company to cinch up its financial belt several notches. That meant a veteran employee was reclassified to a lower-paying job. He wasn't pleased. Adding to his discomfort was the tough pregnancy his wife was experiencing, and his own financial difficulties.

His irritation got the better of him one day in front of a major company supplier. His snide comments shocked both his supervisor and the client, and led to his being called on the carpet the very next morning.

Accused of disloyalty by his manager, the employee claimed extenuating circumstances had caused a one-time behavior, which would not be repeated. The die is cast, ruled his boss. Disloyalty is disciplined by dismissal. Not so fast, ruled an arbitrator. Get a handle on the big picture.

Key points: The guy had personal and professional difficulties. His overall discipline record was very positive, with no signs of his being a malcontent or of past problem behavior. The management decision was, like the employee's behavior, a knee-jerk reaction to a more complicated situation. He got his job back.

Situation: Some managers find it tough to be very critical of their subordinates. And some are even more reticent when it comes to dealing with individuals who are members of a protected group. Both types can find themselves on shaky ground with those attitudes.

For a couple of years, a black female employee racked up strong results and received well-deserved kudos. Then her performance got sloppy, and her attention to detail swerved way off course.

Instead of guiding her back on the straight and narrow, a manager let things run their course. He avoided critical feedback and glossed over her problems. Her performance kept plummeting, and she was eventually rated near

the bottom of her work group. Still he made no move, explaining later he didn't want to hassle her or force her into the company's standard improvement program for problem employees.

That inattention came back to haunt both manager and employee when she was caught in a downsizing thresher and he was eventually sued for the very thing he sought to avoid being accused of — race discrimination.

Key points: The manager virtually ignored her faults, giving her no productive feedback or constructive criticism. On top of that, he offered results-getting criticism to the white employees under his stewardship. He helped them solve problems. No matter how well-meaning a manager's actions, they must stand up to non-discrimination scrutiny.

KEY CASES

Here are some more courtroom clashes in which employers' disciplinary decisions have been called on the legal carpet.

Case: One company must cough up more than $30 million. Payable to six female employees. Due to harassment by one store director. Since the company took no disciplinary action against the director, despite the employees' repeated complaints, it ultimately paid the price under state law, which does not cap damage awards. (*Gober v. Ralphs Grocery Co.)*

Key points: This employer did everything wrong by doing nothing. Don't make the same mistakes. Take every complaint of sexual harassment seriously, and investigate them thoroughly. Be sure to discipline offenders appropriately, regardless of their sex. If you discipline members of one gender more harshly than the other, you could face discrimination charges.

Case: An employee placed a call from home to his supervisor, who was in the office, inquiring about his paycheck. The supervisor assured him that he would receive the pay differential he was promised, but then mentioned that he was tired of "carrying" the employee. The 42-year-old employee became irate and called his 25-year-old supervisor a "****ing kid" several times. The employee was fired that same day.

The employee went to the National Labor Relations Board (NLRB). He claimed he was fired for engaging in a protected activity (i.e., discussing his pay). While reprehensible behavior can render an otherwise protected activity unprotected, the NLRB ordered the employee to be reinstated with back pay. But an appeals court stepped in and ordered the Board to reexamine the case. *Sticking point:* The Board had previously rejected a rule that would protect insubordination that did not involve actual or threatened physical violence. *Said the court:* The nature of the employee's outburst should count against him; it's up to the Board to decide how much. (*Felix Industries, Inc. v. NLRB)*

Key points: Courts and arbitrators are often more concerned with the manner in which words are spoken than they are in the words themselves. Keep these guidelines in mind.

1. Was the language contained in a general statement or was it directed at a specific person?

2. Was the bad language directed at a manager in front of other employees or was it done in private?

3. Did the manager provoke the incident by using obscene or profane language?

4. Did the obscene or profane language occur at a time of high tension, such as overtime work or during a major production problem? Courts will usually consider such circumstances as mitigating factors in a discipline decision.

5. Was the language directed at customers or the general public? This would almost always be considered grounds for

termination, regardless of other circumstances.

6. Has the employee had prior warnings for previous instances of obscene or profane language? If so, did the warnings specify what would happen for future violations?

Case: A 58-year-old employee was terminated without warning and replaced by a 38-year-old. The company said his poor attitude and performance were to blame, but the employee charged age bias under state law. A jury took one look at the employee's past performance appraisals — all good — and the company's complete lack of documentation supporting its poor attitude assertion, and awarded the employee more than $500,000. Included was a punitive damages award against the company for $10,000 — and one against the company president for $65,000. (*Katz v. Tectonic)*

Key points: This case illustrates why proper documentation of discipline, performance problems, misconduct, etc., is so important. The lack of documentation gave the jury the impression that the employer's actions were based purely on a discriminatory motive and thus worthy of extra "punishment."

Case: After receiving complaints from several female workers that a male colleague had made inappropriate comments toward them, a company launched a sexual harassment investigation. The male employee was not disciplined for his behavior, but a "Letter of Record" was placed in his personnel file stating that his behavior was unacceptable. Emotionally devastated over the investigation, the male employee began taking medication and had difficulty working and sleeping. When he was eventually fired, he sued the company for intentional infliction of emotional distress.

Court: Under federal law, an employer's failure to investigate a sexual harassment complaint may allow a jury to impose liability on the employer. Therefore, employers have an obligation to conduct sexual harassment investigations, despite the fact that such investigations often produce emotional distress. (*Malik v. Carrier Corp.)*

***Key points*:** As explained by the court, this employer had every right to investigate the complaints and impose the necessary discipline on the accused harasser. Once employers are notified of a problem, they have a responsibility to remedy and prevent harassment.

FMLA AND DISCIPLINE

The federal Family and Medical Leave Act can be costly if managers mix discipline with the requirements of the Act.

Key points: You can't use retaliatory discipline to get back at employees who take advantage of the benefit, and you must follow the letter and spirit of the law in dealing with FMLA leave returnees. To do that, be aware that the employee must be returned to the same or an equivalent position. That doesn't mean similar or pretty close. It means equivalent in everything from pay, responsibilities, and job security to benefits and authority to lines of reporting and opportunities for promotion.

DCP