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DISCIPLINE AND DISCHARGE TECHNIQUES TO AVOID LITIGATION: THE NEED FOR JUST CAUSE - EVEN IN AN AT-WILL WORLD

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During the last two decades employment litigation has increased by over **2,000%**, ten times the rate of other types of civil litigation.[1] The risks associated with such litigation cannot be overstated. Given that a large percentage of employment litigation involves challenges to an employer's disciplinary and discharge decisions, it is vital that employers approach these decisions in a consistent and unbiased manner. Adopting an internal "just cause" standard for discipline and discharge is one of the best ways for all employers – even employers that only have at-will employment relationships with their employees – to ***minimize*** the potential for employment litigation and ***maximize*** the ability to defend their decisions should litigation ensue.

I. EMPLOYMENT AT-WILL.

At-will employment is one type of an employment relationship between an employer and employee. Such employment has no specific duration, and thus can be terminated at any time by either the employer or the employee. Additionally, the terms and conditions of at-will employment can be changed at any time with adequate notice. In Nevada, it is *presumed* that employees are employed at-will, unless there is evidence to the contrary.

As a general rule, at-will employment can be terminated "for any reason or no reason." However, the courts have long recognized various "common law" or unwritten public policy exceptions to at-will employment. As the Nevada Supreme Court explained in *Dillard Department Store, Inc. v. Beckwith*, – Nev. –, 989 P.2d 882 (2000), at-will employment "gives the employer the right to discharge an employee for any reason, so long as the reason does not violate public policy." *Id.* at 885. Additionally, state and federal legislatures have enacted fair employment and civil rights laws which have greatly limited the concept of at-will employment. Thus, it is more accurate to say that at-will employment allows an employer to discharge an employee for any *lawful reason*. While an employer can still claim that it discharged an at-will employee for "no reason," the manner in which fair employment and civil rights laws are enforced and evaluated by the courts makes such a claim foolhardy at best.

II. THE JUST CAUSE STANDARD.

Most human resource professionals associate the just cause standard with union contracts. However, the just cause standard's utility extends beyond unionized workplaces. While the just cause standard cannot be defined with absolute precision, it is best explained as a standard of reasonableness that guides employers in determining what, if any, disciplinary action is warranted in a particular situation. It serves to protect both employers and employees from the effects of unduly harsh, unfair, and biased decision making.

A. The Seven Steps of Just Cause.

While there numerous and varying concepts of what constitutes just cause, in the 1960s, Arbitrator Carroll R. Daugherty articulated what has become the most widely recognized summary of just cause. He reduced the concept down to what are often referred to as the seven questions or tests of just cause.[2] While the seven tests are only guidelines and are not always applicable in all situations, they have been described as "the most practical and incisive criteria for employee discipline and discharge."[3]

The seven tests are:

1. NOTICE

Did the Company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

2. REASONABLE RULE OR ORDER

Was the company's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the Company's business?

3. INVESTIGATION

Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

[1] Ann Juliano and Stewart Schwab, The Sweep of Sexual Harassment Cases, 86 Cornell L. Rev. 548, 550 fn. 7 (2001) (citing Richard C. Mariani, Management Strategies to Deal With Today's Risks, N.J.L.J. (May 13, 1996), at 11).

[2] Arbitrator Daugherty first published "the seven tests" as an addendum to his decision in *Grief Brothers*, 42 LA (BNA) 555 (1964) and in *Enterprise-Wire Co.*, 46 LA (BNA) 359 (1966). They were later finalized in *Whirlpool Corporation*, 58 LA (BNA) 421 (1972).

[3] Arbitration Times, American Arbitration Association (Spring 1988).

4. FAIR INVESTIGATION

Was the Company's investigation conducted fairly and objectively?

5. PROOF

At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

6. EQUAL TREATMENT

Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

7. PENALTY

Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?[4]

When applying these tests to a particular disciplinary or discharge situation, a "no" to any of these particular questions should raise a "red flag," because it usually signifies that just cause did not exist and elements of arbitrary, capricious, unreasonable, or discriminatory action are present, or at least could be inferred. However, a weak "no" answer can be outweighed by strong "yes" answers.

B. Why Do All Employers, Even Those Who Only Have At-will Employees, Need to Follow a Just Cause Standard?

All employers, even those who only have at-will employees, need to adopt an internal just cause standard as a result of the general principles courts use to govern the allocation of proof in employment disparate treatment cases, which typically involve the use of circumstantial (indirect) evidence from which inferences must be drawn. These principles were first set forth in the United States Supreme Court case of *McDonnell Douglas Corp. v. Green*[5] and later reaffirmed and clarified in *Texas Department of Community Affairs v. Burdine*[6] and *St. Mary's Honor Center v. Hicks.*[7] They serve as an orderly way to evaluate evidence in disparate treatment cases and require that:

(1) the plaintiff establish a *prima facie* case of discrimination;

(2) the employer respond with a legitimate, nondiscriminatory reason for its actions; and

(3) in order to prevail, the plaintiff must establish that the employer's articulated legitimate, nondiscriminatory reason was a pretext to mask unlawful discrimination.

The *McDonnell Douglas* analytical framework is not the only method of establishing unlawful disparate treatment, but it has become the most used method, both by the federal courts and the Nevada state courts.[8] When comparing the seven steps of just cause to the allocation of proof used by the courts in intentional discrimination cases, it is clear that a "yes" answer to each of the seven tests places an employer in a better position to defend itself and prevail in any employment discrimination case that may be filed.

Under the *McDonnell Douglas* framework, a court ***must*** award judgment to a plaintiff as matter of law at the close of the defendant's case if, based on evidence presented, any rational person would have to find the existence of facts constituting *prima facie* case of discrimination, and the defendant has failed to introduce evidence which, if taken as true, would permit the conclusion that there was nondiscriminatory reason for adverse action.[9] Employers will almost always have to justify their actions in an employment litigation case as the level of proof at the initial *prima facie* case stage is quite low, and serves as only a bare minimum threshold.

Indeed, the elements of the plaintiff's *prima facie* case are flexible and tailored to the specific facts of the case. In the context of discipline, the plaintiff must show that he or she was:

(1) a member of a protected class; and

(2) either did not violate the work rule or engaged in misconduct similar to that of a person outside the protected class, and the disciplinary measures enforced against him or her were more severe than those enforced against the other persons who engaged in similar misconduct.[10]

[4] The widespread use and acceptance of Arbitrator Daugherty's seven tests have led to a book based on them, well worth adding to any human resource professional's collection. *See* Adolph M. Koven and Susan L. Smith, *Just Cause: The Seven Steps* (BNA 2d ed. 1992). This presentation is largely based on Arbitrator Koven and Dr. Smith's book.

[5] 411 U.S. 792 (1973).

[6] 411 U.S. 248 (1981).

[7] 509 U.S. 502 (1993).

[8] *See Apecehe v. White Pine County,* 96 Nev. 615 (1989) (applying the *McDonnell Douglas* analytical framework to case involving violations of Nevada's fair employment laws).

[9] *Hicks*, 509 U.S. at 510.

[10] *See e.g.,* Jones v. Gerwens, 874 F.2d 1534 (11th Cir. 1989).

With regard to discharge, a plaintiff can establish a *prima facie* case of discrimination by showing he or she was:

(1) a member of a protected class;

(2) performing his or her job well enough to meet the employer's legitimate expectations;

(3) discharged; and

(4) replaced by a person outside the protected group.[11]

III. DISTINGUISHING PROGRESSIVE DISCIPLINE FROM JUST CAUSE.

"Progressive discipline" is not synonymous with "just cause." Rather, progressive discipline is but one component of just cause. It has two primary objectives: (1) to put an employee on notice that he must correct his behavior or eventually face discharge; and (2) to make sure that the "penalty" is commensurate with the "offense." The latter is based on a belief that discipline should not be purely punitive, but geared instead toward correcting improper behavior so that the employee has the opportunity to improve his conduct. For all but the most serious of infractions such as theft, striking supervisors or co-workers, sabotaging equipment, on-the-job drug or alcohol use etc., progressive discipline should be followed.

Too often, we incorrectly equate progressive discipline with a rigid set of disciplinary steps. However, this is not the case, unless the employer has obligated itself to follow a published pattern of "cookie cutter" discipline.

Prudent at-will employers adopt internal practices of following just cause and progressive discipline, where appropriate, without committing in writing to always follow a particular model of either just cause or progressive discipline. Such internal practices allow employers to enjoy the broadest possible protections of the at-will employment doctrine, while at the same time enjoying the added "defensive" benefits of using just cause and progressive discipline procedures.

Employers should also be mindful of several common pitfalls that must be avoided when issuing progressive discipline:

1. The Unrecorded Past History of Infractions.

All to often, a "problem" employee's behavior and the oral counseling and warnings are not documented. The failure to document these occurrences can have disastrous effects if the disgruntled employee elects to sue.

2. Unreasonable Lengths of Time.

The time between disciplinary infractions becomes an issue in two ways. If there is a substantial amount of time between infractions, it is very hard to argue that a suspension or discharge was based on a "pattern" of unacceptable behavior. At some point, an employee must be deemed to have been rehabilitated and allowed to start from a clean slate. For example, it would highly suspect if an employer were to suspend or terminate an employee in September 2001 for showing up fifteen minutes late to work, based upon tardiness problems in 1999, where no such problems resurfaced in 2000 or 2001.

Too little time in between discipline is also a problem. A rapid succession of written warnings and counseling, particularly for minor infractions, gives the appearance of a subterfuge or pretext for some other reason. Such attempts to quickly build a paper trail in the mistaken belief that it will justify the employer's actions are highly risky. From a practical standpoint, such rapid fire warnings do not allow an employee any real opportunity for improvement.

3. Delay in Issuing Discipline.

Discipline should always be issued within a reasonable time after an infraction has occurred. Long delays look suspect in the eyes of administrative agencies, juries, and plaintiffs' counsel.

IV. APPLYING THE SEVEN STEPS OF JUST CAUSE.

A. Notice.

One of the most essential requirements of "defensible" discipline is that the employee had knowledge of the rule, regulation, or policy that he is accused of breaching. There are some forms of workplace misconduct that all employees, as a matter of common sense, know are unacceptable (*i.e.*, stealing and intentionally destroying company property), but most need to be specifically communicated to the employee.

Some forms of notice include:

1. Written policies and handbooks.

The most reliable form of notice is written policies that are issued to all employees *with a signed acknowledgment form maintained in employees' personnel files.*

2. Counseling and warnings.

Progressive discipline provides another good notice of improper conduct. All but the most innocuous of counseling sessions and oral warnings should be documented.

3. Oral notice at group meetings.

Oral notice, while not as reliable as written notice, is a perfectly acceptable form of notice. Preferably, oral notice should be given to employees in a group setting, such as a department meeting or training session. However, to have real value from a litigation standpoint, all employees present must have signed an attendance list and a summary

[11] *Hicks*, 509 U.S. at 506.

or outline of the meeting topics needs to be prepared and maintained. This type of notice is a good way to reinforce written policy and procedures. It allows an employer to demonstrate not only that its rules and regulations are found in an employee handbook, but are periodically reviewed with employees during the course of their employment (*i.e.*, sexual harassment training).

4. Past Practice.

As used in the context of discipline and discharge, past practice is the way in which managers, supervisors and employees have worked with each other on a day-to-day basis, and includes the way in which managers and supervisors enforce or, unfortunately, fail to enforce the company's rules and policies. Past practice can negate the effect of written polices and procedures when the company blatantly ignores the written procedures or is very lax in enforcing them. This is sometimes referred to as "negative notice."

If you find that an employee was truly not on notice of a particular rule or policy, the employee should be counseled and provided with the necessary notice. If the problem extends beyond the one employee, a written policy should be developed and issued to all applicable employees along with a "receipt of acknowledgment."

If during the course of disciplining an employee you discover lax or inconsistent enforcement, the company will most likely have to live with *its failure* and not take any disciplinary action against the employee until the enforcement issue has been adequately addressed. Two things need to occur to fix the problem of lax and/or inconsistent enforcement: (1) the managers and supervisors charged with enforcing the particular rule or policy need to be retrained or at least reminded of their responsibilities; and (2) *before* any renewed "crackdown" occurs, employees must be put on notice of the company's intention to change the way it which it has been enforcing a particular rule or policy. This is most effectively accomplished by written memo or letter to employees, for which they sign a receipt of acknowledgment.[12]

B. <u>Reasonable Work Rules</u>.

"If reasonable regulations are unreasonably interpreted or applied, the result is the same as if regulations were unreasonable on their face."[13] Work rules should be reasonably related to legitimate business needs or purposes. What is reasonable depends on the particular business or industry, but work rules that appear to be arbitrary or reflect the personal whims of a particular manager or supervisor should not be implemented or form the basis for discipline.[14]

The discriminatory or arbitrary enforcement of company rules and policies is often fatal to an employer's defense against a wrongful discharge or employment discrimination lawsuit. Procedures need to be in place to make sure managers and supervisors are treating similar situations in a similar manner.

C. <u>Investigation</u>.

A full, fair, and objective investigation needs to be undertaken to make sure the employee in question is indeed guilty of the infraction alleged. Employers need to consider all the facts available, from whatever source that could have an impact on the incident under investigation or the extent of discipline likely to be issued.

Components of an effective investigation include:

1. Timeliness.

Investigations should be promptly completed before any disciplinary actions are taken for a number of obvious reasons: witnesses' memories fade, evidence can be tampered with or lost, and witnesses can be improperly influenced.

2. Witness interviews and statements.

Inadequate investigations often yield inadequate proof. Care should be taken to identify and interview all witnesses to the events in question and where possible to obtain written statements, as memories fade over time and witness accounts can "evolve" if they are not reduced to writing.

3. "Due process" meeting with employee.

While not always required, investigations should always include giving the employee a "due process" meeting during which the employee can tell his side of the story and respond to the evidence obtained by the employer. As with witnesses, it is advisable to obtain a written statement from the employee.

4. "Follow-up."

If the initial investigation leaves unsettled questions or produces contradictory versions of what took place, efforts to resolve these issues should be taken.

5. Retention of physical evidence.

If there is physical evidence such as a harassing note, a destroyed piece of equipment, a surveillance tape, or the like, such evidence should be preserved in its

[12] *Just Cause: The Seven Tests*, at 27-85.

[13] *Just Cause: The Seven Tests*, at 130 (quoting *Aro, Inc.*, 64-2 ARB ¶ 8500, 4778 (King,1962)).

[14] *See Just Cause: The Seven Tests*, at 86-158.

original form. If that is not possible, the evidence should be photographed.

6. Suspension pending investigation ("SPI").

For serious offenses, where an employee's continued presence at work could cause unrest or where there are concerns that the employee may compromise the investigation by influencing witnesses or destroying evidence, the employee should be placed on suspension pending investigation ("SPI"). If the alleged conduct is not substantiated or the proper penalty is something less than the time the employee is on SPI, the employee should be paid for the time lost while on suspension.[15]

D. Fair Investigation.

Arbitrator Daugherty made "fair investigation" a separate component of his seven just cause tests in an effort to emphasize his belief that the person who conducts an investigation or who reviews the results of an investigation and the anticipated discipline is extremely important. He believed that while the same management official can be both the "prosecutor" and "judge," this individual should not also be a witness to the incidents at issue. While this may not always be possible for less serious discipline, Arbitrator Daugherty's position should be given some deference when dealing with situations in which lengthy suspensions or discharges are possible.

It is always recommended that a more detached human resources professional review both the adequacy of a manager's or supervisor's investigation and the contemplated disciplinary action, particularly when the matter involves suspensions or terminations.[16]

E. Proof.

Once an investigation is complete, the central question is whether there is sufficient proof that the employee is guilty. "'If no infraction has been proved, then no penalty is just.'"[17]

"Direct" evidence from witnesses is usually regarded as the best way to prove most types of misconduct, but often only circumstantial evidence (indirect evidence inferred from the circumstances) is available. When dealing with a case that consists only of circumstantial evidence, caution should be exercised to avoid re-creating a picture of what happened that overlooks other parts that do not fit the particular picture.[18]

The "proof" inquiry does not stop with determining guilt. An employer must also make sure that there is proof that the employee had notice of the rule or violation he violated and that it has sufficient proof that the company has administered the same type of discipline contemplated in the past for the same type of situation. If a similar situation has never occurred, then an employer has to decide whether or not this is the case and the employee with which it wants to set a precedent.[19]

F. Equal Treatment.

The need for equal treatment in discipline and discharge matters is essential. Without it, enough doubt about an employer's real reasons for the action taken is usually created, thus requiring a jury to hear and decide the case. Uniformity plays a large role in issues of notice, as discussed above, and in the selection of a penalty.

Equal treatment does not mean "identical treatment" for a particular offense. Rather it means that similarly situated employees who committed similar offenses under similar circumstances are treated in substantially the same fashion. Thus employers can take into account an employee's length of service, the existence or non-existence of other discipline, the employee's position with the company, and other mitigating factors justifying a more lenient or more harsh form of discipline.[20]

It is essential that employers have procedures in place to ensure equal treatment. Employers must have a way of tracking and researching how past disciplinary matters have been handled.

G. Penalty.

In addition to equal application of penalties, the actual penalties selected should be reasonably related to the seriousness of the infraction. Penalties that are unduly harsh raise the specter of potential unlawful discrimination and help to paint an unflattering picture of the employer as being arbitrary and capricious in the eyes of a third party (*i.e.*, a jury or the EEOC) called upon to evaluate the merits of the employee's case.

It is at this seventh and final test of just cause that the practice of progressive discipline plays a primary role. Discipline in the workplace should not be purely punitive in nature. The penalty selected and the way it is conveyed to the offending employee should be geared toward correcting improper behavior so that the employee has the opportunity to conform his conduct with the employer's expectations.[21]

[15] *Just Cause: The Seven Tests*, at 159-228.

[16] *Just Cause: The Seven Tests*, at 229-36.

[17] *Just Cause: The Seven Tests*, at 237 (quoting *Arizona Aluminum Co.*, 82-1 ARB ¶ 8212 at 3975 (Sass, 1982)).

[18] *Just Cause: The Seven Tests*, at 237 (quoting *New Haven Trap Rock* Co. 66-1 ARB ¶ 8082 (Summers, 1965)).

[19] *Just Cause: The Seven Tests*, at 237-302.

[20] *Just Cause: The Seven Tests*, at 303-328.

[21] *Just Cause: The Seven Tests*, at 377-431.

V. THE IMPORTANCE OF DOCUMENTATION.

The importance of documentation cannot be emphasized enough. Company rules, regulations, and procedures need to be reduced to writing, counseling and discipline need to be accurately recorded, and disciplinary and discrimination investigations must be well documented, complete with the investigator's notes and applicable witness statements.

VI. THE NEED TO TRAIN LINE SUPERVISORS.

"Line supervisors," those with the most daily contact with employees, need to be taught how to be good supervisors. It takes more than knowledge about the employer's services or products to be a good supervisor. Line supervisors need supervisory skill training, the knowledge to recognize basic employment law issues, and the skills to effectively discipline and discharge employees.