

SPECIAL REPORT

HOW TO DISCIPLINE AND TERMINATE WITHOUT FEAR

By Bob Weiss

There are two major reasons that employers need to enforce effective disciplinary processes and terminate employees when appropriate. These reasons are often misunderstood or neglected at significant risk and cost to employers.

- 1) The vast majority of employees want to work in a safe and orderly workplace. They do not want to work with frustration, interference, or fear caused by others whose behaviors are disruptive. Corrective discipline creates a safe, appreciated, and productive work environment.
- 2) By enforcing reasonable disciplinary policies and rules, employers take due diligence that helps protect them from liability for negligence claims.

Employment-at-Will is a doctrine that allows an employer or employee to terminate the employment relationship at any time for any reason or no reason as long as it is not an illegal reason. There are numerous exceptions to employment-at-will based on federal and state laws such as not discriminating against an employee on the basis of protected categories (age, sex, race, etc.), as well as contractual and some other legal rights of employees. Therefore, it's very important to apply respected standards of discipline to protect management rights to take reasonable and necessary action when misconduct occurs.

First, Avoid Self-Defeating Attitudes

Often, managers make excuses that enable them to: a) avoid taking disciplinary action, b) procrastinate until they get frustrated and overreact, or c) wait until serious outcomes occur. A manager who uses excuses instead of taking responsible action puts an organization at risk. Do any of these excuses sound familiar?

- Employees should know what is expected without being told.
- The employee has always been that way and won't change.
- We can't afford to discipline or fire the employee because of staffing shortages.
- We can't act because the employee will sue us.
- The employee will get angry and act out if we address the problem.

Second, Use These Seven Standards

The following standards are from a 1966 arbitration award that continues to be widely accepted as demonstrating that an employer has taken legally appropriate discipline.

1. The employer's policies and rules are known and reasonably related to the orderly, safe and efficient operation of the business. Make sure they are well written, distributed to employees, and discussed so that everyone has a common understanding about what is expected and the consequences of misconduct.

2. The employee has received fair warning of disciplinary consequences of misconduct. This can occur by: a) following standard 1 above, b) coaching and counseling to reinforce appropriate behavior, and c) using corrective discipline incorporating these standards that includes formally putting an employee on notice about the consequences of repeated problems.

3. Policies and rules have been applied consistently, without discrimination, to all people. This is an obvious indicator of fairness and objectivity.

4. The employer investigated before taking final disciplinary action.

5. The investigation was full, fair and impartial.

6. There is substantial proof, or a preponderance of evidence, that misconduct occurred.

7. The penalty is related to the seriousness of the violation and the past record of the employee, including the use of "progressive discipline."

Caution: Don't list each of the seven standards as a required step in your disciplinary policy or distribute these in any way that assures employees that these standards will always be followed. Doing so could create inadvertent technical violations or unnecessarily reduce employment-at-will rights, creating an additional compliance burden on the employer.

Instead, train all managers to understand and routinely apply the spirit and intent of the above standards for discipline as an inherent safeguard of consistent, effective, and legally defensible disciplinary practices.

Items 4, 5, 6, and 7 are covered in more detail since these are often misunderstood or ignored, causing significant problems and risks.

Standards 4 and 5: Conduct a full, fair, and impartial investigation before taking final disciplinary action. A few tips.

- ✓ The three most important words involving any disciplinary process or termination decision are: investigate, investigate, and investigate. The fourth most important word is document, so that your findings and the credible reasons for your actions are clearly stated.
- ✓ Start an investigation immediately or as soon as reasonably practical once information about alleged misconduct becomes known. *It doesn't matter if a person who reports a concern wants it pursued or not.* Under various legal requirements (e.g., harassment), an employer has legal obligations to investigate and take appropriate action once informed of possible wrongdoing. An employer also risks charges of negligence involving harm to other others if an appropriate investigation and action are not taken.
- ✓ Maintain confidentiality to the extent possible. *Don't guarantee confidentiality* because you may be required to reveal information to conduct an effective investigation or to use in a legal process.
- ✓ Identify and interview complainants, witnesses, and the person suspected of misconduct.
- ✓ Ask “*who, what, when, where, why and how*” questions. Don't jump to conclusions or make erroneous assumptions.
- ✓ Identify and review all documents and other available sources of credible information.
- ✓ Look for patterns of consistent or inconsistent information in evaluating facts and credibility of people involving a situation.
- ✓ Use a knowledgeable and impartial HR professional, manager, or consultant to conduct the investigation.

Standard 6: Use the right standard of proof.

Do not use “*beyond a reasonable doubt.*” This is the highest standard of proof used in courts of law that involve property rights and the possible loss of liberty. Do not apply this standard in employment decisions.

The commonly used standards in employment discipline are “*substantial proof*” or “*preponderance of the evidence*” to show that the employer is acting in good faith and has credible reasons to believe misconduct occurred.

Standard 7: The penalty is related to the seriousness of the misconduct and the past record of the employee, including the use of progressive discipline.

The purpose is to assure that a penalty reasonably fits the misconduct and is intended to correct a problem rather than punish, retaliate, or be an overreaction. Try to evaluate an individual's intentions to assure that the reasons for misconduct or poor performance are considered as part of the decision process. If a penalty appears excessive or unreasonable, it can be difficult to defend against charges of discrimination or retaliation.

For example, insubordination (refusal to follow a direct order of a manager) should always be considered serious misconduct, but there should still be consideration for the degree of seriousness and the past record of an employee. A first incidence of smoking on company property (after being told not to) by a long-term employee without a prior discipline record is not as serious as an incidence of insubordination for leaving a critical care patient monitoring station to purchase a candy bar after being instructed not to do so.

Progressive discipline means that increasing levels of disciplinary actions are enforced for ***repeated*** misconduct depending on the ***seriousness*** of the violation. This allows an employer to consider if this is the first or repeated incident of such misconduct. Then, an employer can decide what level of discipline is most likely to prevent recurrences of the misconduct. **Examples:** a) verbal counseling b) written warning c) final written warnings, possibly including a suspension from work with or without pay d) termination.

Don't neglect or inconsistently administer the right to discipline or terminate employment for misconduct. In most work settings, employers have the legal right to immediately terminate employment for serious misconduct. An employer's disciplinary policies should cite examples of the serious misconduct for which immediate termination of employment can occur, such as but not limited to significant acts of theft, violence, harassment, and gross insubordination.

Employers can unintentionally negate their right to take necessary disciplinary action by being inconsistent in similar situations without good reasons. Surprisingly often, businesses allow employees to engage in serious misconduct without enforcing commensurate disciplinary action. Then, they discipline or fire other employees for lesser offenses.

Unless there are credible reasons for such inconsistency, employers set themselves up to risk losing a ***disparate treatment*** discrimination case because of the inexplicable inconsistency, even when serious discipline would otherwise be appropriate and legally defensible!

*In other words, you can make the right decisions and still end up with significant legal risks and costs, not because of **what** you do, but rather **how** you do it.*

The following story provides an example about how the standards in this section enable an employer to take defensible disciplinary action.

A true story: An emergency services company had a policy that required customer service employees to come into work during non-scheduled hours for weather emergencies. The same policy prohibited employees from leaving at the end of a shift during a weather emergency without approval. The policy was a business necessity to provide the company's safety and security services for customers.

Three employees violated the policy during the same snow storm. Should management administer the same discipline to all three? Think of the seven standards. First, before administering final discipline, *investigate, investigate, investigate*.

One employee knew that a snow storm was coming that weekend and he bragged about how he wouldn't work because he didn't need the money. He also had received discipline for violating other policies that he didn't like. He was belligerent with his supervisor who informed the employee that he might call him at home to come to work. The employee said he wouldn't answer his phone. The supervisor then issued an immediate direction to come into work that weekend. The employee failed to report to work as directed.

Another employee violated the same policy by going home at the end of the shift without approval. **Why?** An investigation revealed that he was never informed about the policy. He had worked there for about three months and was hired as a part-time employee. Since being hired, he had repeatedly cooperated in picking up additional hours and had worked almost full time. He also had a good performance record.

The third employee knew about the policy and had a good work record. When the storm hit, the supervisor directed him to stay. Instead, the employee inexplicably babbled that he just couldn't and left. **Why?** An investigation revealed that his fiancé had recently been in a serious car accident and just called from home to say she was having a bad reaction to medicine. She was alone and no emergency vehicle would be able to reach her for hours because of the weather. The employee was distraught and would not have been effective had he stayed.

What would you have done? In the first case, the employee was defiant in refusing to follow an important policy, and he demonstrated willful disregard for the safety of customers. He was insubordinate in refusing a direct order to work and was in the progressive discipline process for similar misconduct. He was given a final written warning and three day suspension from work without pay. He could have been fired.

In the second case, the *employer* was more responsible for the problem than the *employee*, because management failed to communicate the existence of the policy. The employee simply acted out of ignorance. He was given verbal counseling about the policy and consequences of not following it in the future.

In the third case, the employee's upset state of mind caused him to rush out instead of discussing the situation with the supervisor, which he normally would have done. The third employee received a written warning, because he should have at least discussed the reasons that he believed required him to leave. (Continued on next page)

The rest of the story: The first employee filed a complaint with the National Labor Relations Board (NLRB). He argued that he had been trying to start a union and that management gave him much more serious discipline than the other employees received as a form of discrimination and retaliation for exercising protected rights.

An investigator from the NLRB called and spoke with me about the “problem,” stating that the company was in a lot of trouble because of its inconsistent disciplinary treatment of the employee. I invited the investigator to meet with me, stating that there were extenuating circumstances about which she was unaware.

Note that standard 3, *policies and rules have been applied consistently without discrimination*, needs to be interpreted in a reasonable manner consistent with Standard 7, *Discipline should be based on the seriousness of the violation and the past record of the employee, including the use of “progressive discipline.”*

When we met, I explained each of the situations to the investigator and how they differed in facts, employee intentions, disciplinary history, and therefore the seriousness of the misconduct. I also showed her the investigatory documentation and walked her through the application of the seven standards to each of these situations.

The first employee clearly exhibited extremely serious misconduct because of willful disregard for customer safety, intentional violation of a known and reasonable policy, and insubordination. Furthermore, he was already in progressive discipline based on a past record of similar misconduct. None of these factors applied to the other two employees. There was no illegal discriminatory intent in treating the first employee differently than the other two. Management was simply exercising its legal rights and responsibilities to enforce reasonable policies to protect customers.

Finally, I informed the investigator that no one in management had any knowledge of the employee’s alleged attempts to start a union, and that I believed the complaint was a frivolous subterfuge. Furthermore, if the employee had actually been involved in efforts to start a union, I argued that would *not have excused* his serious misconduct for which he could have been fired. As an aside, the employee was not able to identify one witness to support his claim of trying to start a union.

The NLRB investigator agreed with management and dismissed the charge.

Note that in the preceding story, there wasn’t any inconsistent treatment. There were distinct facts and circumstances involving each situation that merited different disciplinary decisions, although the initial acts of misconduct appeared to be similar. Administering the same discipline would have been unfair. Full and impartial investigations were required to obtain the necessary facts.

The following story provides a different example about how the standards in this section enable an employer to take defensible disciplinary action including termination of employment.

A true story: An employee was terminated, after an investigatory suspension, for serious misconduct that included deception during the hiring process and behavior that was perceived to threaten the safety and well being of other employees and customers. I oversaw the initial investigation, handled the termination process, and wrote the termination documentation, applying the seven standards described in this section.

The fired employee filed an EEOC charge which was dismissed for lack of merit. The individual then filed a law suit including a retaliation claim against the employer and several employees as “agents” of the employer that included a \$1 million claim against me. This is the only time in a 25 year career that I was personally sued by a complainant.

The rest of the story: The judge dismissed the law suit on the employer’s Motion for Summary Judgment before it reached the trial jury stage due to lack of legal merit. Although the complainant’s attorney made numerous arguments, the obvious facts were: 1) the employer’s policies and practices were reasonable, well communicated, and consistently applied 2) the employee should have known the consequences of his behavior 3) an impartial and thorough investigation was conducted during an investigatory suspension before making a final decision 4) substantial proof of misconduct was found 5) discipline was related to the seriousness of the situation, and 6) the reasons for termination were well documented. There were no credible facts in dispute and the law clearly supported the employer’s decision to terminate.

Risk of Supervisor Liability: Most federal EEO type statutes do *not* allow individual supervisors or other “agents” of an employer to be personally sued for violations. However, this can vary based on the particular facts and federal court jurisdiction. There is also supervisor liability risk under some state fair employment laws, personal injury laws, and other employment laws such as the Federal Family and Medical Leave Act and the Fair Labor Standards Act. Of course, nothing can stop an individual from filing a frivolous law suit, regardless of legal standing to sue.

Best protection: Know employee rights as well as employer rights and responsibilities, and follow fair disciplinary practices as outlined in this section.

Use of investigatory suspensions: Usually, an employer can suspend an employee from work during an investigation of serious misconduct. A suspension: a) allows time for an investigation while maintaining the safety and efficiency of the workplace b) helps management avoid overreacting out of misunderstanding or anger, and c) demonstrates that a decision was carefully considered. An employer can make a decision to reinstate an employee with or without back pay, or terminate employment, based on the findings of the investigation.

Bottom line: Properly used, the above standards are important tools that enable an employer to enforce fair, ethical, and legally defensible disciplinary policies in the best interests of the employer, employees, customers, and the public.