

Disciplining employees under the modern employment laws

Ask employers what their toughest challenge is, and they probably will mention discipline. It seems no one likes to play parent in the workplace. On the other hand, there's no way to avoid it.

Consider, for example, one of the classic labor-law cases—*In re Grief Brothers Cooperage Corporation and United Mine Workers of America*—in which the parties had specified that the company had “just cause” for discipline, but didn't define the term. The arbitrator did, coming up with a famous list of “Seven Steps” to define the discipline process in the union environment. Those seven steps have become an informal test employers use to see if the discipline they are imposing is, in fact, appropriate—even outside the union environment.

The arbitrator in the 1964 decision asked seven questions and told the parties if the answer to any was “No,” then the employer probably hadn't acted fairly and could be challenged. Those seven steps are outlined below. And because the world has changed in the 43 years since the original decision, two more questions have been added to the mix (*see box at right*).

1. Notice: Did the employer forewarn the employee in a handbook, posting or memo?

To prove employees had notice, get a receipt showing delivery of handbooks or policies, take attendance at orientation or training sessions and note prior warnings.

Some offenses are so serious, or some expected conduct is so routine that no notice is needed. The best example is Tom Cruise's cross-examination of a soldier in the movie *A Few Good Men*. A Marine testified there was no such thing as a Code Red since it was not in the training manual. Cruise asked the Marine if they eat any meals at Guantanamo and if so, where? “Yes,” replied the Marine, “three squares a day, in the mess hall.” Cruise pointed out that there's nothing in the manual about

meal times, so how did the soldier know? He knew because it was obvious—no notice was needed.

2. Reasonableness: Was the rule or order reasonably related to the orderly, efficient and safe operation of the business?

What's reasonable depends on the nature of the business and the transgression. Smoking in a dynamite plant or stealing 75 cents in a bank setting may warrant discharge; smoking or petty thievery might not be so serious in other workplace settings. A first offense of failing to work mandatory overtime in a plant may not be critical. It might in an emergency room.

3. Investigation: Before administering discipline, did the employer make an effort to discover whether the employee did, in fact, violate or disobey a rule or order?

You must prove an investigation was conducted. It must be fair, it must be complete and it must be done before imposing a final decision. (The trademarks of a good investigation will be covered in a future article.) Keep in mind that the average juror's frame of reference is often the investigations portrayed in a favorite *Law & Order* episode. That's not an easy bar to hurdle, and it's tough to prove an investigation was fair, complete and preceded any judgment.

4. Fair and objective: Was the employer's investigation conducted fairly and objectively?

Can you prove you considered all the facts?

5. Proof: Did the employer obtain sufficient evidence that the employee was guilty as charged?

Obviously, direct and irrefutable evidence is the best proof. However, circumstantial evidence also works. Remember, the average juror is used to some pretty high standards of proof—based on TV and movie portrayals of investigations. Employers should push their investigations as much as possible

to produce those kinds of results.

6. Equal treatment: Has the employer applied its rules, orders and penalties evenhandedly and without discrimination?

This is the nondiscrimination test. In other words, if the employer was blindfolded and could not identify the alleged violator or any protected characteristics that he or she may possess, would the result have been the same?

7. Appropriate penalty: Was degree of discipline reasonably related to the seriousness of offense and the employee's record?

In other words, does the penalty fit the crime? We are all offended by the prison sentence Jean Valjean received in *Les Miserables* for stealing a loaf of bread to feed his family. Jurors react the same way.

DiLorenzo's corollaries

Corollary 1: Is the employee entitled to reasonable accommodation for any reason, such as for a disability or religion?

Today, the nondiscrimination rule (No. 6) does not go far enough. If the employee is entitled to reasonable accommodation, then the employer must lift the blindfold and make a careful, proactive examination of the job requirements and the employee's needs.

Corollary 2: Has the employee engaged in any protected activity?

If so, retaliation rules contained in the various anti-discrimination laws, whistle-blower protections, the National Labor Relations Act and other laws kick in. Ask yourself whether you would have disciplined the employee even if he or she hadn't engaged in protected activity. Remember, employees don't get a free pass—but they shouldn't get extra scrutiny, either.