Introduction

- My background
- Program objectives
  - Define discipline
  - Discuss the use of discipline to correct unacceptable employee performance
  - Define wrongful termination
  - Review of the primary laws that protect employees from wrongful termination

Quiz

- Please complete the quiz

General Comment

- Dealing effectively with employee problems/challenges in the workplace can be a daunting task for a supervisor or manager
- But in some cases it comes down to this – “Would you rather spend a few hours resolving an employee problem or months dealing with a law suite that comes with a wrongful termination claim?”

Preventing the need for Discipline

- There are often things we can do to prevent the need for discipline
- There are also situations where discipline is the only appropriate tool to use
- Knowing when and how to use the tool is critical
- Proper use of discipline could also
  - mitigate the chance for a law suit or
  - provide the defense needed to win the case

Actions You Can Take to Reduce the Need for the Use of Discipline

- Review handout
Discipline Defined

Two Basic Types of Disciplinary Processes

• Progressive discipline – found in
  - most labor contracts,
  - civil service systems, and
  - under 62.13 for protective service

• Corrective discipline – which is now what many municipal employers have for their “At-will” employees

Progressive Discipline System

• Progressive discipline systems require the employer to follow a prescribed set of increasingly harsher disciplinary steps
• The final step is termination of employment which is often decided ultimately by a third party (Fire & Police Commission, arbitrator and possibly circuit court)

Progressive Discipline System

• Disciplinary actions follow a set progression
• Maximizes employees’ rights
• Limits the employer’s flexibility to correct problems and to tailor punishment to fit the offense.
• Can help ensure consistency in disciplinary actions
• And gives employees fair warning about their problem behaviors along with a chance to improve and keep their jobs.

Corrective Discipline System

• Corrective discipline systems typically contain steps in administering discipline, but allow managers to select the type of discipline based on the facts and circumstances of each case.
• While the basic elements are similar employers aren’t required to take any of the steps or take them in any specific order.

Corrective Discipline System

• With flexibility, however, comes the manager’s responsibility to treat similarly situated employees in similar ways
Applying the use of Discipline to Correct Unacceptable Employee Performance

- For progressive discipline – “Just Cause”
- For corrective discipline – normally “Arbitrary & Capricious”
- Review handout
- It will be important for you to know your City/Villages process and standards
- Meeting these standards will also likely help in a discrimination suit

Why We Discipline Employees

- We normally discipline employees for 2 reasons
  - Policy/rule/contract violations
  - Unacceptable performance – inability to perform the essential functions of their job to acceptable standards
- When we look at termination we can add a third reason
  - Reduction in force (RIF)

Types Discipline or Other Actions You Could Take

- Oral warning
- Written warning
- Suspension
- Demotion
- Last chance agreement
- Termination
- Informal talk
- Coaching
- Training
- Performance Improvement plan
- Change in duties
- Wage freeze
- Transfer or reassignment

Case Studies

- Go through the first 6 case studies and determine what you would do in each case and why.

Wrongful Termination Defined & the Primary Laws that Protect Employees from Wrongful Termination
Theories of Discrimination

• Most of what we have discussed to this point relates to what I would call labor law
• This next section relates to what I will term liability law – the employer is now filing a cause of action with a state or federal agency (EEOC, ERD, DOJ, etc.) or directly into circuit court
• Handout on Theories of Discrimination

Federal Law

• Title VII of the 1964 Civil Rights Act prohibits discrimination on the basis of race, color, religion, sex, pregnancy or national origin
• Title VII applies to all employers that have 15 or more employees.
• Remedies – back pay, front pay, attorney’s fees, compensatory and punitive damages
• Other major federal laws – ADA, Age Discrimination in Employment Act, Equal Pay Act, Pregnancy Discrimination Act, FLSA, FMLA, etc.

Wisconsin Fair Employment Act

Prohibits discrimination or harassment based on:
• Race, Color, Religious observation or practice, Sex, National origin,
• Ancestry, Age, Creed, Handicap, Marital status, Arrest record, Conviction record, Sexual orientation, Sexual harassment
• Membership in the National Guard, state defense force on any reserve component of the military force of the United States or this state
• Use or nonuse of lawful products off the employer’s premises during non-working hours
• Unfair honesty testing and genetics testing
• Employees and job applicants who decline to attend a meeting or participate in any communication about religious or political matters

Retaliation

The types of activity for which employees are protected from retaliation can be classified into two main categories:

1. Opposing any practices made unlawful by the anti-discrimination statutes
2. Participating in proceedings brought pursuant to such laws

Retaliation Claims

The elements of a retaliation case are similar to disparate treatment discrimination cases:
• Participation in protected conduct (e.g., complaining of illegal discrimination) of which the employer was aware;
• An adverse employment action occurred and
• Causal connection between the protected activity and the adverse action
• A key distinction between discrimination and retaliation cases is that the former focuses on status (member of a protected class) while the latter focuses on conduct.

Additional Employee Rights

• Wage and hour claims (Houston Texas)
• Military leave (Cat’s Paw)
• Jury duty
• Voting leave (State Statute 6.76)
• Worker’s compensation
• Reporting safety of regulatory violations
• Exercising or attempting to exercise rights under law such as requesting disability accommodation, taking FMLA, etc.
First Amendment

- Speech made pursuant to an employee’s official duties – speech that owes its existence to the employee’s job – is not protected by the First Amendment. (Garcetti v Ceballos, 547 U.S. 410 (2006))

First Amendment Rights

- If the employee is speaking as a citizen, then is the speech on a matter of public concern or private concern?
- If the employee is speaking on matters of private concern, then the speech is likely unprotected.
- If the speech is on a matter of public concern, then does the employee’s interest in commenting on matters of public concern outweigh the employer’s interest in promoting efficiency of its public services?

Examples

- Matters of public concern: Matters of elections, pending legislation, corruption, race discrimination, public health and safety are in the zone of public concern.
- Matters of internal employment policy that do not touch on these public concerns are normally unprotected like – employee grievances concerning internal office policy, office morale, an office transfer policy or whether a grievance committee was needed by the organization.

Fourth Amendment

- The Fourth Amendment prohibits unreasonable search and seizures
- Most common areas to be concerned about would be:
  - Drug testing (must satisfy the Fourth Amendment reasonableness standard for those tests)
  - Searching employees’ desks and lockers
  - Monitoring employee e-mails

Fourth Amendment

- A public employee is protected from unreasonable searches of His/her workplace or belongings by their employer.
- The reasonableness of the search is determined by whether the individual has legitimate expectation of privacy in the area or item searched
- If there is no reasonable expectation of privacy, then the search is lawful
Fourth Amendment Examples
- Purse, briefcase, or luggage
- Employee cell phone
- Items left on a desk
- Files in a desk or file cabinet
- City issued cell phone or computer
- Employees work emails
- Package delivered to an employee at work

According to the Supreme Court in O’Connor v. Ortega
Generally, a search for a work-related purpose or for the investigation of work-related misconduct is reasonable if:
1) it is justified at its inception,
2) the measures adopted are reasonably related to the objectives of the search, and
3) the search is not excessively intrusive in light of the circumstances.

Bottom line
- Clear explicit policies
- Get consent
- Discuss with your City Attorney

Fifth Amendment
- Protects a person against being compelled to be a witness against himself or herself in a criminal case
- Public employees have constitutional protection from self incrimination but it only applies to criminal proceedings, not civil employment disputes
- Two relevant cases are

Garrity Doctrine
- Garrity and Spevack (1967). US Supreme Court found that during an investigation, when an individual is given a choice between incriminating himself or losing his job, the individual’s statements are not voluntary, but coerced, and the fifth Amendment bars the use of the individual’s statements in a subsequent criminal proceedings.

Garrity Warning
- Review handout
Fourteenth Amendment

- Prohibits violations of an employee’s equal protection and due process rights
- It requires public employers to provide certain procedural safeguards if the employee has a protected “property interest” in their employment
- This normally occurs when the employee can only be terminated for “good cause” or “just cause”

Loudermill Hearings

- This would apply to employees:
  - under a union contract,
  - civil service system or
  - protective service employees under 62.13

- Consider extending this to at-will employees

Loudermill Hearings

- Notice: The first part of the Loudermill process requires notice to the employee of the basis for the potential discipline prior to the hearing.
- Hearing: The second part requires the employer to give the employee a chance to respond to the charges prior to issuing the discipline.
- Important – don’t draft the final disciplinary letter/notice prior to the Loudermill hearing. Provide a gap in time before imposing discipline.

Constitutional Protection

- Most claims by public employees are filed under U.S.C. Section 1983
- An employee who wins can collect compensatory damages, punitive damages, and attorney fees
- No caps on damages
- Employees do not have to file a complaint with the EEOC or ERD
- Statute of limitations is 6 years rather than the shorter 300 day under Title VII or ADA

Off-Duty Conduct and the Nexus Test

- Employer may discipline or discharge an employee for off duty misconduct when that misconduct:
  - May harm the employer’s reputation
  - Employee is unsuitable or unfit for the job, or
  - Causes reluctance, refusal or inability of others to work with the employee

Case Studies

- Go through the last 6 case studies and determine what you would do in each case and why.
Thank You.