Discipline & Wrongful Termination

Handouts
6-24-16
Quiz

True  False

1. An at-will employee may be terminated “for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong” as long as it was not for illegal discrimination.

2. In order to discipline an employee covered by 62.13 you must meet the 6 tests of just cause.

3. Even though an employee spoke up at a public meeting and embarrassed you, since they are protected by the first amendment they cannot be disciplined.

4. We discipline employees to punish them for their inappropriate conduct.

5. An employee can be disciplined for their off duty conduct.

6. An employee falls down the steps at work and is taken to the emergency room for treatment. Based on the accident you could conduct a drug & alcohol test.

7. You suspect your secretary has illegal drugs in her purse. Since her purse is on her desk you could search it.

8. Under Title VII of the Civic Rights Act of 1964 the leading cause of discrimination is race discrimination.

9. If an employee refuses to answer a question during an internal investigation based on his attorney’s and union’s advice there is nothing you can do to compel the employee to answer the question.

10. An employee is entitled to 3 hours of unpaid time off to vote.

11. An employee cannot be counseled or disciplined for any use of sick leave while on FMLA

12. When a jury makes a decision on a case it will generally come down to one question: “Was the employer fair with the employee?”

13. It is okay to go back and create the appearance of a paper trail that should have existed but didn’t as long as it is accurate.

14. Only the employee who filed an initial claim of discrimination is protected from retaliation under Title VII of the Civil Rights Act

15. Once you know an employee is an alcoholic they are protected under ADA and cannot be disciplined for performance issues related to their alcoholism
Actions You Can Take to Reduce the Need for the Use of Discipline

- Deal with problems right away when they small
- Be consistent – no favoritism
- Establish clear, concise, up-to-date policies and rules
- Train on your policies and rules
- Enforce policies and rules consistently
- Set performance standards
- Conduct accurate performance evaluates on all employees annually
- Have a training & development plan for all employees
- Take the time necessary to hire good employees and
- Make sure you follow your probationary evaluation process
- Recognize and reward good performance
- Provide the right level of supervision for each staff member
- Involve employees in the day-to-day operations of the department
- Be fair and respectfull
- Thoroughly investigate allegations of misconduct
- Provide leadership and supervisory training for all supervisors
- Provide development training for employees who will or are assuming acting roles
Seven Tests of Just Cause

1. **Notice of expected conduct** – Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

2. **Reasonable rules** – Whether the rule or order that the subordinate allegedly violated is reasonable (to the safe and efficient operation of the employer)

3. **Complete investigation** – Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order

4. **Fair & objective investigation** – the investigator did not have an ax to grind, the employee had a chance to be heard – the rules of due process were followed

5. **Adequate proof of wrong doing** – Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate

6. **Equal treatment** – Whether the chief is applying the rule or order fairly and without discrimination against the subordinate

7. **Proper penalty** – Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department

**Arbitrary & Capricious**

- Absence of a rational connection between the facts found and the choice made. (Natural Resources. v. U.S., 966 F.2d 1292, 97, [9th Cir.'92].)

- A clear error of judgment; an action not based upon consideration of relevant factors and so is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or if it was, taken without observance of procedure required by law. (5 USC. 706(2)(A) (1988))
Case Studies

General Information – some of the employees in these case studies are “at-will” employees and others fall under the Fire Fighter union contract. Your employee manual for at-will employees has a section on discipline that lists types of discipline i.e., oral warning, written warning, suspension and termination but states that an employee can receive any level warranted by their conduct with no prior warning. The union contract follows a normal progression of oral, written, suspension and termination.

#1 – Lisa Hernandez – Secretary
Lisa has been with your department for 5 months. She continues to make minor mistakes when the office is very busy. You mentioned to her during her first week the importance of accuracy. You also told her the pace of work at times could be a little crazy. You have had no other conversations with her concerning her performance. She will be off probation next week.

What are you going to do and why?

Level of discipline if any and why

#2 – Tom Peterson – Fire Fighter
Tom has been with your department for 29 years. He has always been a marginal employee who tends to get very vocal when anyone tries to discuss his performance with him so the previous supervisors basically ignored his low productivity and negative out bursts with other employees. Word has it that he will be retiring in the next 18 months. Yesterday you observed him in the kitchen long past the time allotted and you also heard him berating another employee. After checking his file you find he received an oral warning for being rude to another employee 20 months ago.

What are you going to do and why?

Level of discipline if any and why
#3 – Carol Clark – Fire Fighter
Carol has been with your department for the last 2 years. She is very attractive, fairly strong willed and not afraid to mix it up with the guys. Yesterday you heard some commotion coming from the kitchen. As you approached the doorway you heard the guys laughing and saw Carol slap Jerry across the face. Jerry abruptly leaves out the back door and the group breaks up immediately. You know that Jerry can be crude and rude at times and has never felt women should be working in the department.

What are you going to do and why?

Level of discipline if any and why

#4 – Tom Carlson – Training Officer
Tom has been with your department for 29 years. He was recently off work for 11 weeks on FMLA for some significant medical reasons. While he was away Jerry, another staff member took over his job. Jerry found that Tom had never made the change to the new training software system that had been installed the previous year. He also found a lot of mistakes that Tom had made, many related to use of the old software system. It took Jerry 3 weeks to make the conversion and correct the mistakes. In reviewing the records you also found that Tom had never attended the training on the new software when it was offered last year. Tom will be back tomorrow from his time off on FMLA.

What would you do and why?

Level of discipline if any and why

#5 – Jim Brown – Lieutenant
Jim has been with your department for 26 years. He is one of your most productive employees and likely will be promoted to the next Captain position when it opens up next year. As you were walking to your car you saw Jim driving toward you in the parking lot. He stops to ask a question and you notice he doesn’t have his seat belt on. He sees you glance at the belt and he puts it on immediately without you saying a thing. Sitting next to Jim is Fire Fighter Chad Complainer. Last week you gave Chad an oral warning for failing to wear his seat belt.

What are you going to do and why?

Level of discipline if any and why
#6 – Tina Perkins - Dispatcher
Tina has worked for the City for 19 years. Over the last year her productivity has dropped by more than 50%. Over the last 6 months you have had 2 coaching session with her but you have seen very little improvement. Some of the other staff in dispatch have had to put in overtime to make up for her lack of productivity. Morale amongst the staff is suffering. Everyone likes Tina but you can tell their patience is starting to wane. You just heard from another staff member that Tina has MS.

What are you going to do and why?

Level of discipline if any and why

#7 – Terry Parker - Probationary Fire Fighter
You were just notified by one of your staff that Terry Parker was at a party over the weekend where the police were called and he along with 4 others were cited for using marijuana. There will be an article in tomorrow’s newspaper covering the incident.

What would you do and why?

Level of discipline if any and why

#8 – Bob Brewer - Captain
Bob has been with your department for 32 years. He is one of your best employees. He is going through a very nasty divorce and has been off his game a little for the last few weeks. As you walk past him you notice he seems disorientated and you think you can smell alcohol but aren’t sure.

What are you going to do and why?

Level of discipline if any and why
#9 – Barb Wilson – Fire Fighter
Barb has been with your department for 4 years. Last year she filed a complaint that she was being harassed by some of the other employees. After the investigation, 2 of her co-workers were each given a day off and her supervisor was transferred to a different shift. Barb’s previous performance evaluations were all adequate or better. Her performance over the last 4 months has been marginal at best. Her reports have been late with quite a few mistakes. You also have a sense that some of the other staff have gone out of their way to avoid interacting with her.

What are you going to do and why?

Level of discipline if any and why

#10 – Ken Grant – Fire Fighter
Ken has been with the City for 19 years – the last 3 with your department. He was hired basically because he was a friend of the previous Chief. Ken has been off of work a lot over the last few years due to a series of accidents both on and off the job – mostly related to a chronic back problem. Last year he was off 23 days and is not doing much better this year. Ken is 43 years old and is one of the least senior employees on your shift. He never seems to miss more than 1 day at a time but misses at least 2 days per month. This morning he called in and left a message with your secretary that he hurt his back yesterday and is going to his doctor this afternoon and will likely be off his next duty day. The rest of the employees are fed up with having to pick up the pace because of Ken’s absences and lack of productivity.

What are you going to do and why?

Level of discipline if any and why
#11 – George Manning – Fire & Police Commissioner
George has been on the Commission for 25 years. He is well connected politically and is the head of the Commission. Yesterday you walked into the office and noticed George behind the counter rubbing the shoulders of the new clerical employee. She did not seem to appreciate what was going on. When you came in George stopped, made a few comments and then left the building. The clerical employee just shook her head and said nothing.

What are you going to do and why?

Level of discipline if any and why

#12 – Sally Brooks – Fire Fighter
Sally has been with your department for 11 years. She is a little rough around the edges and can be pretty blunt when she doesn’t agree with you or other staff members. Recently one of your new Fire Fighters, Tom Perkins has admitted to everyone that he is gay. This morning the training officer conducted harassment training for all employees. Sally left half way through the training with no explanation. Tim Martin one of her crew thought he heard Sally later making some derogatory comments about Tom on the phone to her husband. It seems the whole station is on edge.

What would you do and why?

Level of discipline if any and why
Garrity Warning

Before the meeting, at the beginning of the meeting, or after the employee’s first refusal to answer a question, the following statement should be made if you want to compel the employee to answer:

“You are under a direct order to answer these questions. Failure or refusal to answer all of these questions completely and truthfully shall be considered grounds for serious discipline, up to and including discharge. Nothing you say nor the fruit thereof may be used against you in the later criminal proceedings, but may be used in later disciplinary proceedings.”

If the employee refuses to answer a question:
   a. Repeat Garrity warning
   b. Repeat question asked
   c. If second refusal, then ask why
   d. If the employee claims “Fifth Amendment” then remind employee the Garrity warning eliminates that excuse
   e. If “advice of counsel or Union rep” remind employee it is their decision not to answer, and if advice is wrong, only remedy is lawsuit against their advisor
   f. Remind the employee of the penalties for refusing to answer

Note: Once you have given an employee a Garrity Warning nothing they say can be shared or used by law enforcement in a criminal investigation.

Material above came from a program conducted by Attorney Kyle J. Gulya – von Briesen & Roper, s.c.