

## **Complex Discipline and Discharge Issues Facing In-House Counsel**

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# Complex Discipline and Discharge Issues

## A. Difficult Employment Scenarios Facing In House Counsel

1. Has the #Me Too Movement and media attention in the past year changed how your company deals with sexual harassment complaints in the workplace?
2. The O'Reilly factor/Weinstein employee – the very valuable/powerful employee who generates great revenues for the company - or leads the company - but is a serial harasser and upper management/executives don't want the employee to be disciplined (let alone fired) because the employee is so important to the company's bottom line. Would you deal with this type of behavior any differently today than the company might have two years ago?
3. The current employee who files a charge or an internal complaint, and then has performance issues and the inevitable retaliation claim that results when the employee is disciplined.
4. The employee who goes out on leave immediately after a performance management issue or conversation with a manager. What do you do with this person when the leave is up and the business doesn't want the employee back?
5. Workplace safety concerns from an employee exhibiting erratic behavior in the workplace. The employee may say odd or seemingly irrational statements to co-workers or a manager, but the employee seems to be able to pull it together when Human Resources talks to the employee. Co-workers and managers may feel somewhat scared or threatened, yet there has been no specific threat against anyone by the employee.
6. Disciplining an employee for poor performance when the employee becomes ill and may need leave before management has the chance to actually administer the discipline.
7. Disciplining or terminating the long-term employee who has been passed around to various departments and is a poor to marginal performer at best, but management has never dealt with the performance problems.
8. What about the poor performing employee who does not have a well-documented history of performance problems, and then the employee has yet another performance problem and management decides it is the last straw and wants to fire the employee?
9. Dealing with a marginal/poor performer who seems intent on filing a workplace safety complaint with OSHA.

10. How do you manage a high performing employee who is very good at the job, but is a very difficult person (e.g., very rude, obnoxious, demeaning, offensive, etc.) for co-workers to deal with and leaves a lot of carnage in his or her wake?
11. Discipline of a union employee when Human Resources and the Labor Relations don't agree on whether or how to discipline.
12. In the acquisition context, when a larger company acquires a smaller, family-owned business and some of the family members become your employees – how do you terminate one of the family members after the acquisition has been completed and the business decides that the former family executive needs to go away? Or does your company have a practice of not hiring the former owners?
13. How do you terminate a Human Resources colleague that you have worked with, perhaps closely, for many years?
14. How do you deal with FMLA issues (eligibility, notification of leave, verification, tracking, return to work)? Does your company manage these issues internally, or do you use a third party provider, and why?
15. How do you deal with disability and reasonable accommodation issues from a process standpoint? Do you have a separate department that manages those issues, or is it part of Human Resources? What do you tell the employee's supervisor or manager about the disability and the need to accommodate? Do you utilize unpaid leave once FMLA leave has been exhausted as a form of reasonable accommodation?
16. For #15-16, what if the company is a small to medium sized company that may not have the resources of a larger corporation like Medtronic, US Bank, or Xcel Energy – would your advice be any different?
17. What, if anything, do you do with employees who make negative or disparaging posts about the company, its products or services, and/or its management on social media like Facebook, Instagram, etc.?
18. Do you utilize social media sources when you are reviewing job applicants?

## **B. Checklist - An Alternative Way to Ensure that Discipline and Discharge Decisions are Lawful/Defensible in the Event of a Subsequent Charge or Lawsuit**

In the unionized context, discipline or discharge of an employee must typically meet a just cause standard. A commonly accepted test for establishing just cause was first articulated by Arbitrator Carroll Daugherty in *Enterprise Wire Co.*, 46 Lab. Arb. 359 (1966). While just cause is not required to support a termination in the non-union context, ensuring that the seven tests of just cause are met is a good way to ensure that an employee termination will be lawful and defensible. Below is a brief explanation of the seven tests of just cause, along with an added modification. If a termination can meet these factors, the termination likely will be lawful and an employer should have a solid defense to any potential employment claim contesting the discharge. While it is not required in the non-union context that a discharge decision be able to meet all of these factors to be lawful, the fewer factors that an employer can meet, the greater the potential risk in making the termination decision.

1. Did the employee have notice of the employer's policies and expectations, and what the consequences were for not following policies or not meeting expectations?
2. Were the employer's rules/policies/expectations reasonably related to the business efficiency and performance that an employer might reasonably expect from an employee?
3. Was there an investigation into the alleged misconduct or poor performance leading up to the termination?
4. Was the investigation fair, objective and thorough, and were all potential witnesses as well as the offending employee interviewed and given the chance to explain what they observed and/or knew about the situation?
5. Was there sufficient/reasonable proof of the employee's poor performance or misconduct?
6. Has the employer applied its rules/policies in a reasonably fair and unbiased manner in the current case compared to prior similar situations?
7. Was the penalty/discipline fair and reasonably related to the seriousness of the offense and the employee's prior work record?
8. An additional point – Has the employer complied with all applicable laws for the situation? (For example, was the employee eligible for FMLA leave and did she receive the leave she was entitled to; did the employer engage in the interactive process in attempting to reasonably accommodate an employee's disability; has the employee been properly classified as an exempt employee not entitled to overtime under state and federal wage and hour laws, etc.)

