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# How to Discipline & Document Employee Behavior

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**Anne H. Williams**

Attorney

**M. LEE SMITH PUBLISHERS LLC**  
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# Introduction

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**D**ocumentation and discipline are two concepts that go hand-in-hand in the area of human resource management. In fact, it is kind of a chicken and the egg scenario — which comes first? In order to discipline an employee you should have well-prepared documentation to back up your decision. But, in order to have good documentation, you need a well-crafted disciplinary policy to enforce. The answer seems to be that both your disciplinary system and your documentation procedures need to be running smoothly in order for your company to protect itself from costly lawsuits.

Any employment lawyer worth his salt will tell you that more cases are won and lost due to documentation than any other factor. Why is this? Because juries like to have something to hang their hats on when making a decision. For example, an employee who is fired for coming in late every day for three months might win her lawsuit if the supervisor never documented the fact that the employee was late. Add to that a sloppy performance appraisal that rates the employee as satisfactory in the area of timeliness and the employee is running to the bank before you can spell D-E-F-E-A-T!

Lack of consistent discipline can also come back to haunt you at trial. For example, if Maria is written up three times for tardiness and then fired, but Hank is written up six times over the same time period for tardiness, and does not receive any discipline, you can bet that Maria is going to win her sex discrimination case, even if the supervisor did not have any specific gender bias against her. It is enough that Maria was treated more harshly than her male colleague. Thus, your disciplinary procedure must be applied fairly to your employees. The best way to gauge fairness is to compare employees' files to make sure that equal discipline is doled out for similar misconduct.

In addition to good documentation and disciplinary procedures, employers in the 21st century need to keep some other concepts in mind. Gone are the days when you could write up an employee three times and then summarily fire him. These days, due to the large amount of capital employers have invested in training employees, and the costs to replace an employee, many employers are interested in how to turn bad employees into productive employees. Your documentation and disciplinary procedures should be the first step in this process. By letting employees know their shortcomings,

***More cases  
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## *How to Discipline & Document Employee Behavior*

and giving them a chance to improve, you may be saving your company thousands of dollars in the long run.

This report will aid you in managing your workforce by:

- Highlighting the importance of a written disciplinary policy;
- Explaining the benefits of an effective discharge procedure;
- Demonstrating how internal investigations should be run in order to be productive and keep employee information confidential;
- Clarifying the role that effective job performance appraisals can have in your disciplinary procedures;
- Focusing on when you need to allow an employee representative to be present at an investigatory interview, even if your employees are not represented by a union;
- Teaching disciplinary techniques to avoid discrimination and retaliation claims;
- Describing how employee handbooks can be used as effective tools; and
- Emphasizing the correct use of employee job descriptions.

# Employee Discipline

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# 1

**D**isciplining employees for infractions is something that most employers dread to think about. In fact, wouldn't it be a great world if all employees came in on time, did their job without complaint, and then went home and came back and did the same thing again and again? All right, time to stop dreaming. The reality is that employees experience conflict at work and sometimes break the rules you have set. It then becomes your job to minimize the conflict and get things going back on track. Sounds easy, doesn't it? We all know that it isn't that easy, though. This section will outline the steps you can take to prevent employee infractions, and also the choices you have when you decide to discipline an employee.

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## DISCIPLINARY POLICY GROUND RULES

The first step to keeping your employee discipline problems to a minimum is making sure that the ground rules are clearly communicated to your employees. This way they know what they can and cannot do. You should also clearly communicate the discipline that will be doled out if employees break your rules. For this reason, you need to have a good disciplinary policy in place.

### Maintain At-Will Employment

Some employers may be afraid that publicizing a disciplinary policy may cause a court to hold that they are bound by the policy. To ensure that you have the flexibility you need to enforce your policy, make sure that your policy states that it is not binding and is at the discretion of management.

### *Example*

Sharona was an employee of a large department store for over 21 years. At the time her employment commenced, she signed a clear acknowledgment that her employment was at-will. She was aware that the company had a progressive discipline policy,

***Make sure that the ground rules are clearly communicated to your employees.***

although it was only published in a supervisors manual and was never distributed to employees. The policy in the manual stated that the store specifically reserved the right to depart from standard disciplinary procedures when it is deemed warranted. The store terminated Sharona for willful misconduct and did not follow the progressive discipline procedure. Sharona sued and lost. The court agreed with the store that Sharona's acknowledgment of her at-will employment trumped the progressive discipline policy. It also interpreted the policy to mean that progressive discipline would only take place once an initial decision not to terminate an employee had been made.<sup>1</sup>

***Be careful not to make any express promises in your policy or handbook.***

The above example is a good reminder that at-will employment can be surrendered by policies that are inconsistent with it, such as a binding progressive discipline policy. But you can carefully reserve the right to terminate at will, even if you have a practice of following progressive procedures. To win a case against you, an employee must establish both that there was a specific promise to follow progressive discipline in all situations, and that she was aware of that promise and relied on it as job protection. Therefore, you should be careful not to make any express promises in your policy or handbook. In order to maintain your employment-at-will relationship with your employees, your disciplinary policy may say something like:

Violation of company policies and rules may warrant disciplinary action. Forms of discipline that the company may elect to use include verbal corrections, written warnings, final written warnings, and/or suspensions. The system is not formal, and the company may, at its sole and absolute discretion, deviate from any order of progressive disciplinary actions and utilize whatever form of discipline is deemed appropriate under the circumstances, up to and including immediate termination of employment. The company's policy for discipline in no way limits or alters the at-will employment relationship.

Keep in mind that different states have different laws on at-will employment. Check with your employment attorney to make sure that your disclaimer is sufficient.

### **Discrimination and Harassment Prohibition**

In addition to a clearly communicated disciplinary policy, you should have a prohibition against discrimination and harassment in your workplace. An employer's written policy against discrimination and harassment in the workplace is the bedrock of any internal investigation. It's suggested that a discrimination and harassment policy state the following:

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- the company prohibits and won't tolerate discrimination or harassment based on race, color, national origin, sex, or religion;
- the company has an internal complaint procedure that employees should use if they feel they have been discriminated against or harassed;
- complaints are treated as confidentially as possible;
- no adverse action will be taken against an employee for using the procedure for a good faith complaint;
- the company takes internal complaints seriously and will promptly investigate them; and
- the company will take appropriate action based on the results of the investigation.

The policy must be communicated to employees by periodically providing a copy to each employee, posting it, or including it in an employee handbook. Employees should be required to sign an acknowledgment that they have received and read the policy. The policy also should be covered in new employee orientation.

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## **DISCIPLINARY SYSTEMS**



There are many systems available for disciplining employees. One system, called progressive discipline, is very popular in the union context. It requires the employer to progress through each step before proceeding to the next. This is very limiting. Frequently, the facts and circumstances warrant a different type of discipline. It is better to craft a system that ensures that your managers and supervisors have the flexibility to administer verbal warnings, suspensions, or terminations based upon the seriousness of the particular incident in question, regardless of the employee's prior disciplinary history.

A better system provides managers and supervisors with flexibility and can be referred to as a "corrective discipline" system. Such a system allows the manager or supervisor to select the type of discipline based upon the facts and circumstances of the particular situation. However, this flexibility does not relieve the manager or supervisor of the responsibility to ensure that similarly situated employees are treated similarly. It is then the responsibility of the human resources department to review discipline for consistency, such as making sure that a supervisor does not go easy on a white employee while bringing the hammer down on a Hispanic employee.

When drafting a discipline policy, you should take care to make clear that managers or supervisors "may" administer discipline "depending upon the facts and circumstances." Avoid using words such as "must," "shall," or "will."

## **Corrective Discipline**

The purpose of discipline is to assist employees in changing their performance, attendance, or behavior. This requires that the employees have adequate information about their current performance, attendance, or behavior versus the desired performance, attendance, or behavior. When disciplining or terminating an employee, you decrease your legal risk if you can show that you had previously warned and/or counseled the employee, making clear to the employee what she was doing wrong and what she was required to do in order to meet the company's expectations. This is a good employment practice, and judges and juries will generally give great weight to such evidence when an employee claims that she was improperly discharged.

There are four general types of disciplinary action available when employees fail to meet expected levels of performance or conduct.

- 1. Verbal counseling.** This is generally the first step. An employee might receive several verbal warnings before progressing to the next step. However, for a serious problem, skip this step. Verbal warnings should always be done calmly, objectively, and privately. If the supervisor is angry with the employee, make sure she waits until she has cooled down to talk with the employee. It is a good idea to have a second manager present during the verbal counseling as a witness. Verbal counseling sessions should be documented by a formal memo or informal note in the employee's personnel file.
- 2. Written warning.** This is generally preceded by a verbal warning. The manager or supervisor should meet with the employee and his representative (more on this in Section 4), as in a verbal counseling session, but the employee should be given and allowed to review a formal written warning. As with verbal counseling, a second manager can be present as a witness. The written warning should have a place for the employee to sign, acknowledging that he or she has received the warning, regardless of whether he or she agrees with the contents of the warning. If the employee refuses to sign, another manager or supervisor should be called as a witness to observe that the employee has been presented with the warning and refused to sign it, and that witness should sign the warning.

An adequate written warning should include, at a minimum, the following elements:

- ✓ The date of the warning
- ✓ The employee's name
- ✓ The name of the manager or supervisor administering the warning
- ✓ A description of the misconduct or inadequate performance
- ✓ The date of the misconduct or poor performance (if appropriate)
- ✓ A signature line for the manager or supervisor

- ✓ A signature line for the employee, with a notation such as the following: “The employee’s signature indicates only that the warning was received. It does not necessarily indicate that the employee agrees with the contents of the warning.”
- ✓ A signature line for a witness, if the employee refuses to sign
- ✓ You may also attach or include a formal “action plan,” depending upon the nature and severity of the offense. In addition to the standard elements of a written warning, a formal action plan may include the following additional elements:
  - A statement of the policy, rule, or practice that was violated.
  - The steps which the employee agrees to follow in order to correct the problem or meet the desired level of performance, attendance, or behavior.
  - Any commitments of assistance or support that the manager or supervisor has made.
  - The time frame to be followed in achieving the goal of improved performance, attendance, or behavior; and
  - The consequences that will occur if the performance, attendance, or behavior is not improved within the specified time frame.

When describing the desired level of performance or conduct, draft the language sufficiently broadly to include conduct that is reasonably related to the conduct in question. For example, if the employee is being warned for cursing at his immediate supervisor, you should not write in the action plan that the employee must “stop cursing at his immediate supervisor.” Instead, you should consider writing something such as, “the employee must control his temper and avoid unprofessional outbursts at work.”

Establishing a specific time frame in an action plan indicates that “something will happen” at the end of the specified period. If the employee’s performance or conduct has not reached the expected level, you should administer further discipline, unless there are mitigating circumstances. If the employee’s attendance or performance meets the expected level within the specified time frame, no further discipline should be administered unless the employee suffers a “relapse” in the future. If you specify a time frame for correction of a particular problem, you should not take any action against the employee for that problem during that time frame. For example, if you warn an employee that he must improve his performance within 30 days, you should not discipline or discharge him for his performance during that 30-day period. You can discipline him for a different type of infraction, though, such as tardiness or absenteeism. If you implement an action plan, make sure that the supervisor follows up with the employee after 30 days to see if he met his goal or not.

***Specify a time frame for correction of a particular problem.***

**Before terminating an employee, review the personnel file and all relevant documents in order to determine if the termination is appropriate.**

**3. Suspension.** This may range from one day to two weeks or more, depending upon the circumstances, and is almost always unpaid. In unusual circumstances, some employers will place employees on one day of paid “decision-making” leave, as a way of encouraging the employee to think about the future of his employment. Paid suspensions, however, can be perceived as a “reward” for poor behavior, and may therefore have an adverse effect. For this reason, most employers prefer unpaid suspensions. Some employers will progress immediately from the first suspension to termination for the next offense, while others will attempt to correct the employee’s performance or behavior with multiple suspensions of increasing length (e.g., 1-day, 3-day, 5-day, 10-day, etc.). As a general rule, each suspension should be longer than the last, with termination as the final result. When suspending an employee, if it is your intention to terminate the employee for a subsequent offense, you should state this in the written warning or action plan accompanying the suspension. Otherwise, the employee may claim — and a judge or jury may believe — that the employee assumed that the next offense would simply result in a longer suspension.

**4. Termination.** Before terminating an employee, you should review the personnel file and all relevant documents in order to determine if the termination is appropriate — and defensible in a subsequent lawsuit — given the facts and circumstances. In addition, you should ensure that similarly situated employees have been treated similarly in the past. Some behavior warrants automatic dismissal. Examples include:

- Violent behavior or threats of violence;
- Drug and alcohol use on duty;
- Carrying a weapon on company property;
- Disregarding safety rules;
- Theft, destruction of company property, or falsifying documents;
- Insubordination;
- Abandonment of job (no call, no show for three consecutive days).

**5. Other forms of discipline.** In addition to the steps outlined above, it is worthwhile to explore other forms of discipline, such as demotion, transfer, and reduced raises or bonuses. Many employees can be very satisfactorily managed by economic concerns, such as bonuses and raises.

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## **DISCIPLINE IN THE UNION CONTEXT**

CBA. It is very important that all of your managers and supervisors are well-trained on how to follow the disciplinary procedure in the CBA, or you may find yourself being forced to reinstate a fired employee because the supervisor violated the terms of the CBA. The CBA will most likely have progressive discipline steps and provide that the employee can grieve any disciplinary action. Usually, disputes that are not resolved through the grievance process end up in the hands of an arbitrator. Although the above principles apply mainly to unionized employers, it is smart for nonunion employers to follow these principles as well.

In the union context, an employer's decision to discipline or discharge an employee will normally be upheld in arbitration if it is based on "just cause." The most significant factors that influence most arbitrators' findings of just cause are as follows:

- Did the company give the employee forewarning of the possible disciplinary consequences of the employee's conduct?
- Was the company's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the company's business?
- Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
- Was the company's investigation conducted fairly and objectively?
- During the investigation, did the decisionmaker obtain substantial evidence or proof that the employee was guilty as charged?
- Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
- Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Arbitrators are more likely to uphold immediate discharge (with no prior progressive discipline) in cases of grossly unacceptable behavior such as dishonesty, theft, assault on a supervisor, willful damage to company property, falsification or material omission on an employment application, disclosure of trade secrets, or falsification of work records. However, even in these cases, they often impose a high standard of proof of intent. If you cannot show intent or gross carelessness, the immediate discharge probably will not be upheld. Other types of infractions that may support immediate discharge include security violations, possession of illegal drugs or a weapon, insubordination, coming to work drunk, or drinking on the job.

## PROTECTED CONCERTED ACTIVITY

**Whether your employees are represented by a union or not, they can file a charge against you with the NLRB if you violate their rights.**

It is a violation of the National Labor Relations Act<sup>2</sup> (NLRA) to discharge or discipline an employee because of his or her membership (or nonmembership) in a union, or because of his or her participation (or refusal to participate) in union or other “concerted” activity. Whether your employees are represented by a union or not, they are allowed to engage in concerted activity and can file a charge against you with the National Labor Relations Board (NLRB) if you violate their rights.

Concerted activity means, even in the absence of a union, acting on behalf of co-workers or interacting with others to achieve a common goal. It has been defined as any group action by employees for the legitimate furtherance of their common interests. Generally, the action must be taken with the authority of, or on behalf of, other employees, and not solely by or on behalf of the particular employee(s) engaged in the activity.

Specific examples of union activities are participating in an organizing campaign or a strike. However, the concerted activity does not have to be in relation to a union to be protected. For example, if employees are sharing information about their wages, that is protected activity. Specific examples of protected and concerted activity include: work stoppages, safety-related protests, filing grievances, honoring picket lines, and sharing information about wages or asking for a wage increase for a group of employees. Let’s take a look at an example.

### **Example**

Larry, Moe, and Curly worked as maintenance workers at an apartment complex. They were ordered to scrape paint in an apartment they feared had airborne asbestos. The manager ordered them to scrape the paint anyway. The trio had a sample of the paint analyzed and found out it contained five percent asbestos. The manager refused to acknowledge the results of that test and fired all three of them for refusing to enter the apartment. Although they were not represented by an attorney, the trio filed a complaint with the National Labor Relations Board, which decided that they had engaged in protected concerted activities and reinstated them.<sup>3</sup>

This example illustrates that employees’ concerted activity may be protected by federal labor law — even in a nonunion setting. It should be noted, however, that while the NLRA protects employees who concertedly refuse to work in protest over wages, hours, and other working conditions, employees who engage in conduct that’s unlawful, violent, in breach of contract, or

otherwise indefensible aren't protected. Thus, employees take some risk when asserting this right.

It's also worth noting that the NLRB held that the "reasonableness" of the workers' decision to engage in concerted activity is irrelevant. According to the Board, "Inquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected." Thus, your employees' conduct may be protected even if they lack an objective, reasonable basis for their actions. So, the asbestos brothers would probably be protected even if they didn't have the test results.

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## **FACTORS TO CONSIDER**

When selecting a course of action in response to a problem, there are many important factors that you should consider.

Evaluate the mitigating and aggravating factors. Mitigating factors are things such as long service with the company, history of satisfactory appraisals, prior commendations or awards, and defenses or excuses offered by the employee in response to the problem in question. Aggravating factors are things such as short length of service, history of unsatisfactory performance, prior instances of performance/conduct/attendance problems, and the degree to which the employee has responded to the current problem with denials or dishonesty.

### ***Example***

Rhett has been with the company for 13 years as a machinist. He has always received satisfactory marks on his performance evaluations. Rhett has been tardy twice in the last month due to car problems. He has always called in and explained his problem. Ashley has been with the company for only four months as a machinist. For the last two months, Ashley has been tardy four times. He has never called to say he will be late, and on two occasions he sneaked in and asked fellow workers to cover for him. In this example, both workers have committed the same errors: tardiness. However, the mitigating factors for Rhett — good work record and plausible explanation for his tardiness — weigh in favor of lenient discipline, perhaps a warning. However, the aggravating factors — no call, dishonest behavior, and no plausible explanation — lean toward a more severe discipline for Ashley, and perhaps even termination.

Keep in mind that you can always consider options short of discharge, such as oral or written warnings, probation, demotion, suspension, or transfer.

In the above example, Rhett is a good candidate for an oral warning, whereas you may need to issue harsher discipline to Ashley.

Another important factor to consider before disciplining an employee is the risk associated with retaining the employee. These risks include:

- That the employee will engage in future misconduct resulting in employer liability for that conduct, as well as for “negligent retention” of that employee;
- That the employee’s attitude will deteriorate because he perceives that he has “gotten away with” something;
- That the morale of other employees will be harmed if this employee is retained; and
- The risk of “setting a precedent” which other employees will expect you to follow in the future.

You should also carefully consider the harm associated with discharging or severely disciplining the employee. Evaluate the risk that the employee will claim discrimination on the basis of membership in a protected group. To minimize this risk, ensure that this employee is treated the same as similarly situated employees who are not members of the protected group(s), and ensure that you can prove that the disciplinary action was unrelated to the employee’s membership in the protected group(s).

Also evaluate whether the employee has a legitimate claim for breach of an expressed or implied contract. To minimize this risk, ensure that the action taken — and the manner in which it is taken — is consistent with the employee’s contract (if any) and any handbook, policy manual, or work rules which you have promulgated.

An employee also may claim retaliation for engaging in protected activity. To minimize this risk, ensure that the employee is treated the same as similarly situated employees who have not engaged in protected activity, and ensure that you can prove that the disciplinary action was unrelated to the employee’s protected activity.

Always consider the potential liabilities if a judge or jury concludes that your action was unlawful, including back pay, reinstatement, front pay, punitive damages, and attorneys fees. These costs can add up. While it is never good to retain an employee because you are afraid that he may sue your company, it is important to evaluate the risks of a lawsuit and proceed cautiously.

Once you have made the choice to discipline, stick with it and remember to document all of your steps. More on documentation in the next section.



# About the Author

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**A**nne H. Williams is an attorney editor in the Editorial Department of M. Lee Smith Publishers LLC. She has written and edited several employee benefit newsletters, HR Spotlights, and HR Executive Special Reports. She is the author of the HR Executive Special Reports: *The H in OSHA Stands for Health, Workplace Harassment Trail Guide*, *FMLA Leave: A Walk Through the Legal Labyrinth*, *Ten Commandments for Avoiding Religious Harassment and Discrimination Claims*, *How to Avoid the HR Hazards of Your Electronic Workplace*, *ADA from A to Z*, and *How to Manage Your Aging Workforce*. Prior to joining the company, Ms. Williams practiced law in Chicago, Illinois, for five years.

Before coming to Tennessee, Ms. Williams served as an Assistant Attorney General in Illinois where she practiced employment discrimination defense law in the Government Representation Bureau. Prior to that she practiced law at Dowd, Bloch and Bennett in Chicago where her primary area of practice was labor union representation and employment law.

Ms. Williams graduated from DePaul University College of Law in Chicago, Illinois, after obtaining her undergraduate degree in English Literature from DePauw University in Greencastle, Indiana.

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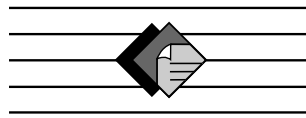
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