Are the Seven Tests of Just Cause still relevant?

by
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The phrase *just cause* is commonplace in the world of human resources management and labor-management relations. As Elkouri and Elkouri (2003: 931) note, "Most collective bargaining agreements do, in fact, require cause or just cause for discharge or discipline." This standard or one similar, i.e. "justifiable cause," "proper cause," "obvious cause," "cause," or "just and sufficient cause" are negotiated in 92 (ninety-two) percent of all collective bargaining agreements in the United States. Just cause also has been adopted by many public and private sector organizations as the test for whether a disciplinary action given to an employee is fair and appropriate. Nonetheless, precisely defining and applying just cause is a matter of some debate.

Evolution of just cause

It has been fifty (50) years since Arbitrator Carroll R. Daugherty articulated his famous seven "tests of just cause" to determine if an employer's discharge of an employee was warranted (*Enterprise Wire Company,* 46 LA 359, 1966). However, prior to Daugherty the term *just cause* appeared in statutes, contracts, and court decisions; it referred to a standard of *reasonableness* used to evaluate a person's actions in a given set of circumstances. Thus, if an individual acted with just cause, her actions were based on reasonable grounds and committed in good faith. Whether just cause existed, was determined by the courts through an evaluation of the facts in each case. For example, in *Dubois v. Gentry,* 182 Tenn. 103, 184 S.W. 2d 369 (1945), the Supreme Court of Tennessee faced the question of whether a plaintiff who leased a filling station had acted with just cause in terminating a lease contract when World War II caused gas rationing shortages (See also: *Black's Law Dictionary,* 1979: 775). The Court found he had just cause to do so.

Arbitrator Daugherty adapted the just cause standard to labor arbitration, formulating seven tests to ascertain whether an employer could prove that he had fairly and reasonably terminated an employee's employment. Predictably, Daugherty's tests, although widely used, provoked substantial criticism, most notably by Dennis Nolan and Roger Abrams (1985) and the late John Dunsford who admittedly engaged in "launching a broadside against the Daugherty tests" (1989: 28). Others, such as Richard I. Bloch (2000: 41), have recognized the challenges that federal legislation presents to applying the just cause standard, yet still maintain that "adjudging disciplinary matters is, in all instances, an exercise in the application of just cause." In a novel approach, Susan Smith and the late Adolph Koven (2006) expanded and more fully developed the seven tests of just cause over the years in light of court decisions involving sexual harassment, work and family and disability.

The question at issue is whether the seven Daugherty tests are still *relevant* in 2016 and if not, should they be disregarded by arbitrators, employees and employers? If the tests are found to be still relevant, how and in what respects have they evolved and been reinterpreted.

It is clear that the principle of just cause has evolved beyond Daugherty's original seven tests for assessing an employer's disciplinary action. Just cause has expanded into an all-encompassing philosophy of employment found both in labor-management relations as well as in the non-unionized civil service. This was accomplished in three phases: (1) the adoption of the *just cause* principle beyond the labor arbitration arena as a civil service protection, (2), the expansion of *just cause* as a philosophy of employment (3) and the development of additional tests of just cause.

Just cause as a civil service protection

As Wendi J. Delmendo observes, "the courts have not articulated a clear definition of just cause, nor have they agreed whether an employer's determination of just cause should be held to an objective or subjective standard" (1991:1). Despite the lack of consensus among arbitrators and the courts, the standard of *just cause* continues to spread beyond unionized companies to non-unionized companies and in the civil service. Lussier and Hendon (2016: 330) note that:

> Just cause is actually a set of standardized tests for fairness in disciplinary actions---tests that were originally utilized in union grievance arbitrations. However, many companies other than unionized companies have adopted tests for Just Cause in their own nonunion disciplinary processes to try to ensure *fairness* and *due process* in applying discipline with their employees. Just cause standards try to ensure that we investigate any disciplinary infraction fully and fairly and provide disciplinary action that matches the level of the offence.

Thus, the contemporary meaning of just cause includes the original seven tests, yet they have been modified to cover a much more diverse workforce than those originally included within collective bargaining agreements.

In the United States, the concept of just cause also is found throughout state and local government civil service systems, separate from collective bargaining agreements. For example, *City of Houston Employee Guidebook* (2014: 3) notes that, "Civil service protected employees have certain expectations regarding their employment status, including just cause to discipline." The *City of Austin Municipal Civil Service Rules* require "Cause for Certain Disciplinary Actions" (2014: 6.02). The *City of Albuquerque Personnel Rules and Regulations* allows employees to be disciplined "for any justifiable cause" (Sec. 902.1) and vaguely defines just cause for discipline as "any behavior significant or substantial in nature relating to the employee's work or conduct that is inconsistent with the employee's obligation to the City" (Sec. 902). The State of Montana has mandated the right of termination for *good cause* to *all* non-union public and private employees

and has done so since 1987 (Solomon 2007). Thus, the just cause standard has been widely disseminated in public personnel regulations and civil service rules.

In Canada, the legal concepts of "wrongful dismissal" and "cause for dismissal" are closely linked to just cause. As Stacey Reginald Ball observes (2014):

> Many are not aware that the relationship between an employer and employee is a type of contract. The dismissal of non-unionized employees, contrary to the rules that exist in Ontario and Canadian employment law may be a breach of a condition of the employment contract. Employers must have a legitimate reason to dismiss their employees for "just cause." If not, this type of breach may be known as a "wrongful dismissal". Employers must comply with Canadian employment law requirements concerning how they deal with their employees during and after dismissal. Employers may be sued and the former employees may be awarded monies for the failure of the employer to provide reasonable notice and not having just cause for dismissal.

Although Canadian employment law requires a fairly high standard to dismiss an employee for just cause, there is no federal legislation protecting worker job security in the United States, unless one can demonstrate a violation of civil rights.

As Wendi Delmendo (1991) notes, "The United States is one of the few industrialized countries that denies job security to a vast majority of its workers" and "While other countries provide protection for workers from discharge without just cause, in the United States only union and certain civil service employees enjoy similar protection." However, in the last (twenty-five) 25 years, *just cause* increasingly appears in employment law, especially in employment disputes involving the issue of whether an employee's actions constitute just cause for discipline or termination. If the employer was required to have just cause for its action and punished the worker without just cause, a court may order the employer to make the employee whole.

Just cause as a philosophy of employment

By 2016, the concept of *just cause* also was widely used as a set of interrelated employment principles in contrast to *at-will employment*. As indicated, the concept of *just cause* was widely

adopted by public sector and unionized employers. It is now broadly understood as one of two employment approaches to employee-employer relationships. An employer now may adopt an *employment-at-will* or *just cause* philosophy for all or certain categories of employees. Since the 1980s a just cause standard has emerged as an alternative to the traditional employment-at-will doctrine. Under the latter, employees who do not have an employment contract may be terminated by the employer for any reason, or for no reason whatsoever. Under the more recent just cause standard, many courts and arbitrators hold an employer to its word where the employer has stated, or even implied, that it will not fire employees without just cause.

A major reason for the spread of just cause employment is that legislation and court decisions, especially since the 1980s, have substantially eroded the concept of employment-at-will. Public policy legislation and court decisions now greatly restrict an employer's discretion to carry out arbitrary and capricious discharge. Employers may no longer legally discharge or discipline an employee for non-job related factors, i.e., handicap, race, ethnicity, national origin, gender, age, religion, or sexual orientation. In addition, more employers are realizing that employees demand a certain degree of job security or they will be tempted to work elsewhere.

Development of additional tests of just cause

Despite its widespread expansion outside the labor relations arena, *just cause* is seldom defined precisely. However, the fact that *just cause* may not be specifically defined, does not mean there are not widespread definitions, or more accurately, a set of questions or "tests" that can be used to determine if an employer can prove just cause for disciplinary in a particular case. In brief, the standard of just cause constitutes various duties owed by employers as well as rights of employees, whether as parties to a mutual agreement or unilaterally stated in an employee handbook or contract.

During the five decades since 1966, several public sector agencies have promulgated somewhat different versions of Daugherty's original seven tests of just cause and expanded the particular tests for assessing whether an employer imposed a particular disciplinary penalty for just cause. Two notable examples are the United States Postal Service and the federal Merit Systems Protection Board's (MSPB) "Douglas Factors." These two modifications of Daugherty's tests of *just cause* address a two-part question of employers to be answered by employers: 1) is there reasonable proof that the employee committed *wrongdoing*, and 2) if so, what is the *appropriate* disciplinary action to impose?(see Figure #1).

Figure #1

1. *Did Employer offer reasonable proof that Employee committed wrongdoing?*

Just Cause Principle (USPS) 2012	**Tests of Just Cause (Daugherty) 1966**
(1) "*Is there a **Rule**?"*	(1) "…forewarned of consequences of…actions"
(1.a) "If so,…employee *aware* of rule?"	
(1.b) "*forewarned of disciplinary* consequences?"	
(2) "*Is the Rule a **Reasonable** Rule?"*	(2) "…rules *reasonably* related to business efficiency"
(3) "Rule *consistently* & *equitably* enforced?"	(3) "employee guilty as charged"
(4) "Thorough Investigation Completed?"	(4) "Fair & objective investigation"
	(5) "Substantial evidence of employee guilt"
	(6) "Rules applied fairly, without discrimination"

2: If so, what is the *appropriate* disciplinary action for employer to impose?

(5) "*Severity* of Discipline Reasonably Related to *Infraction* Itself?"	(7.a) "Reasonably related to seriousness of Employee's offense"
(5.a) "In line with that usually administered?"	(7.b) [Reasonably related] "to employee's past record"
(5.c) [In line] "with Seriousness of Employee's Past Record?"	
(6) "Discipline…Taken in a *Timely* Manner?"	

The US Merit Systems Protection Board (MSPB) further defined the standard that federal employers must meet to *prove* that a proposed disciplinary action was appropriate in what is commonly referred to as the "Douglas Factors" (*Douglas v. Veterans Administration*, 5 MSPB 313, 331 (1981). The twelve Douglas Factors are:

> (1) The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.
>
> (2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.
>
> (3) The employee's past disciplinary record.
>
> (4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.
>
> (5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties.
>
> (6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses.
>
> (7) Consistency of the penalty with any applicable agency table of penalties.
>
> (8) The notoriety of the offense or its impact upon the reputation of the agency.
>
> (9) The clarity with which the employee was on notice of any rules that was violated in committing the offense, or had been warned about the conduct in question.
>
> (10) Potential for the employee's rehabilitation.
>
> (11) Mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.
>
> (12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

A contemporary application of the principles of just cause:

Whereas Arbitrator Daugherty's original seven tests of *just cause* were applied to the field of industrial relations and labor arbitration, just cause provisions are now commonly found in non-unionized organizations, public civil service rules, as well as in legislation in Canada and the members of the European Union. Although there are many articulated standards of just cause, there are certain common themes or tests that may combined together to determine whether an employer acted fairly and in good faith.

The following modified tests of just cause are offered as guidelines for ascertaining if an employer demonstrated by the evidence that he fairly determined the accused employee was (1) guilty of wrongdoing, (2) and if so, imposed an appropriate disciplinary penalty:

"Did the Employer offer reasonable proof that Employee committed wrongdoing?"

1. Did the employer publicize reasonable workplace rules and take steps to ensure employees clearly understood the rules, as well as the disciplinary consequences of violating a work rule or disobeying a direct order?

2. Did the employer conduct a fair and timely investigation, by a neutral investigator, prior to proposing disciplinary action?

3. Did the employer protect the employee's pre-determination due process rights before proposing disciplinary action, i.e., Loudermill hearing and Weingarten representation?

4. Did the employer's investigation produce evidence of employee wrongdoing by the applicable level of proof, i.e., "preponderance of evidence," "substantial cause," or "clear and convincing"?

"*If so, what is the proof of appropriate disciplinary action?"*

5. Has the employer applied the disciplinary penalty consistently and without discrimination over a reasonable period of time?

6. Did the employer consider any extenuating circumstances that would mitigate the proposed disciplinary action, i.e., employee work history, off-duty stressors, health, length of time since incident?

7. Did the employer consider factors that indicate whether the employee is capable of rehabilitation, i.e., reinstatement, last chance agreement, etc.?

Caveats

These proposed "tests" are not weighted. Nor is it implied that a negative answer to one of these tests indicates that the employer failed to prove just cause. For instance, it might occur that the employer failed to conduct a Loudermill pre-determination hearing or did so poorly, yet could still prove just cause to discipline or discharge an employee.

These proposed tests should never become the sole basis for evaluating whether the employer met his burden of proof to demonstrate just cause for discipline and that the penalty was appropriate. As John Dunsford emphasizes, the role of arbitrator (or hearing officer) assumes a certain degree of discretionary judgment in assessing just cause is inescapable.

For example, consider the final proposed test of just cause (#7): did the employer consider whether an employee is capable of *rehabilitation*? This judgment by an arbitrator or fact finder is dependent on behavioral indicators, such as witness credibility, which involves body language, demeanor, motive, direct and corroborating testimony, and myriad other subjective factors within the arbitrator's brain. Although it might not be compelling, an arbitrator might consider whether the employer gave consideration to the fact that an employee is remorseful, attending an Employee Assistance Program for addiction problems, or that his union asked for a last chance agreement.

The proposed redefinition of just cause and checklist of tests are not the final criteria, yet they can assist in helping the arbitrator evaluate an employer's handling of a disciplinary action in a particular case. They also are useful for an employer to use before deciding on a disciplinary action. Also, as noted by Houston Police Department Sergeant/Staff Attorney David Thomas (2016), the just cause tests are "encouraging and helpful from the standpoint of an advocate because we know what the framework is for proving or defending our cases." Finally, without considering objective

tests of just cause, the arbitrator risks substituting her own judgment for the manager's. An arbitrator is not a manager or job expert. Just cause is not a tool for the arbitrator to decide what a manager should have done in a particular instance. Rather, it can be a matrix for determining if the disciplinary action taken was fair and appropriate.

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