When Progressive Discipline Should Cease

by

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The principle of *progressive discipline* is widely accepted as a key element of the Employer burden to demonstrate *just cause* for disciplinary action. Accordingly, discharge [removal] of an employee from the workplace only should be considered after all other actions by management to correct inappropriate behavior or improve unacceptably poor performance have failed. Only when an employee has committed an act threatening the health or safety of another employee or the public; or violated a clear zero-tolerance rule, i.e. theft, drug use, may he/she be summarily discharged, without resorting to progression of increasingly more severe disciplinary actions.

However, when an offending employee's behavior is non-threatening or not covered by a zero-tolerance policy, management is compelled to apply a sequence of non-punitive corrective actions, followed by less severe adverse actions with one purpose in mind---to persuade the employee to change intolerable behavior or improve sub-standard performance. By contrast, *punishment* can never be an acceptable goal of disciplinary action.

Thus, the question arises, what criteria can be applied to ascertain if an employee is finally willing to change behavior or improve performance? Conversely, when is it clear that an employee is not going to alter her job performance/behavior and that discharge is a better option than imposing a less severe disciplinary action i.e., suspension, reprimand, or demotion? In a nutshell, discharge is the preferred choice when the evidence indicates there is no possibility of employee's *reform and rehabilitation*.

Predicting reform and rehabilitation

The issue under consideration has been called the "potential for employee ['s] *rehabilitation,*"[1] which focuses on an employee's *future* behavior, rather than *past* misbehavior or poor performance. The manager is asked to assess the potential for behavioral change when deciding upon a defensible disciplinary penalty for an employee with a history of adverse actions.

[1] Merit Systems Protection Board in its landmark decision, *Douglas vs. Veterans Administration*, 5 MSPR 280, established twelve (12) criteria that supervisors must consider in determining an appropriate penalty for an act of employee misconduct.

To make this assessment, it is useful to consider principles long used in restorative justice: *reform and rehabilitation.* In a nutshell, discharge should be avoided if there is evidence that an employee is willing to cease unacceptable behavior [*reform*] and she can be restored as a trustworthy employee [*rehabilitation*]. The following factors indicate that a certain level of potential reform and restoration *may* be present, and discharge is perhaps premature; if the employee:

- Has been free of disciplinary actions for at least two years prior to the incident;
- Made efforts to correct negative behavior or improve performance;
- Actively sought help for his problems, i.e. EAP, 12-step program, counseling;
- Admitted responsibility for wrongdoing;
- Has shown remorse for mistakes;
- Was cooperative and truthful during the management investigation;
- Is committed to a "performance/behavior improvement plan"

Assuming that previous disciplinary actions have been tried without success, it may be time to finally discharge the employee, if he exhibits any of the following behaviors:

- Engages in an ongoing *pattern* of attendance abuse;
- Continues to blame others for his problems;
- Has made no effort to seek outside help, i.e. EAP, counseling, training, etc;
- Was uncooperative and dishonest during pre-disciplinary investigation;
- Refuses to commit to any serious change or improvement plan;
- Most importantly, he truly does not understand why his behavior is unacceptable.

Obviously, there are those employees who will claim to experience "foxhole conversions" by promising to reform behavior if given a "last chance agreement" by their employer or if reinstatement should be granted by an arbitrator. On the other extreme are those supervisors who

demonize an employee and see no hope of redemption; these supervisors are the ones who smugly claim to have never screwed up or deserved a second chance.

However, a reasonable arbitrator always will assess the potential for employee reform and rehabilitation based on the evidence available at the hearing. Knowing this, a union representative, friend, or caring supervisor should preemptively nudge an employee with problems to make affirmative changes before it is too late; to begin by facing the reality of his precarious situation. A firm but friendly admonishment, such as, "If your behavior continues, you ultimately are going to be terminated. I urge you to seek mediation or please make an appointment with an EAP counselor today, before it is too late." It could be just the "nudge" that makes all the difference.[2]

[2] Thaler, Richard H., and Sunstein, Cass R. (2008) *Nudge: Improving Decisions About Health, Wealth, and Happiness*, rev ed., New York: Penguin Books.