

Employee Discipline and the “Problem Employee”

By *Eileen M. Baratuci*

Recently, I met with a high level manager to discuss my findings in a workplace investigation. The investigation revealed one employee’s conduct was the source of many other co-worker complaints. The co-workers were too intimidated by this employee to come forward, but when they met with me in individual interviews; their concerns were expressed with a heavy heart.

The problem employee frequently complained and used various forms of intimidation directed at his co-workers to prevent scrutiny of his own poor performance and attendance by his supervisors. This problem employee would often take an innocuous comment by a co-worker as a personal insult. He would chide employees for the “tone” they took in a conversation; despite the fact his own demeanor was often emotionally charged, accusatory and un-professional. He would frequently document his concerns in inflammatory e-mails, and copy others in the process, in an effort to place himself in the chronic role of the accuser and victim. He had previously alleged he was discriminated against by his co-workers. His complaints were never factually supported, but his willingness to file even frivolous complaints proved intimidating to co-workers and management. He was single-handedly undermining the entire work group.

I met with his manager to discuss the dissension in the work group. She already knew the problem was longstanding, but she felt there was no effective means of resolution. We discussed how many good staff members she may be at risk of losing if the situation continued. We looked through the problem employee’s personnel file and found the only performance issues that she or any prior manager had addressed were attendance problems.

When we discussed the need for a more direct approach with this employee, one that would hold him accountable for the workplace disruption he had caused, the manager seemed stunned. She thought her only option was to deal with attendance, because it was a “concrete” performance issue. The manager thought by focusing on only part of the issues that made this employee unaccountable to his job or workplace, she was safe from the risk of a discrimination or retaliation claim.

I explained that the protections for employees against retaliation or discrimination did not require her to narrow the field in the performance evaluation in such a way as to eliminate any reference to the unprofessional or destructive conduct of this employee. This is particularly true because the conduct of the problem employee was causing significant dysfunction in her work group. To not address the workplace disruption caused by this employee would be the equivalent of a teacher not addressing bullying behavior in the classroom, but focusing solely on student attendance. Teachers, like good managers, owe it to the rest of the group to help manage behavior to foster a positive learning or working environment.

The manager felt uncomfortable addressing issues that can be summarized as one worker’s effect on co-worker morale and productivity. Obviously, the problem employee’s approach of intimidating his co-workers had also worked on his manager. We discussed the fact that the employee’s overall impact on the workplace, teamwork, and productivity *is* a performance issue and should be addressed as any other performance issue. She blinked, seemingly stunned and said, “I did not think we could do that.” I further explained, unless you are targeting an employee for their membership in a protected class (race, age, gender, etc.) or targeting the employee for a protected act (such as filing an L&I claim or using Family Medical Leave, etc.) addressing performance issues should not create a viable claim. Also, she would have to use the same criteria for all her employees. There was not room to single out just one

employee. That may require the evaluation forms to be updated long term. In the meantime, I encouraged her to meet with the problem employee and discuss the findings in the investigation.

We also discussed the fact an employee may sue an employer for a host of reasons. The courts do not pre-screen the claims to see if the case is viable. A judge may be asked to evaluate the claim at a later date and can dismiss frivolous or unsupported claims prior to trial. However, the risk that someone might file a claim should not trigger management paralysis. The manager's primary concern should be to fairly and pro-actively address the workplace issues focusing on performance, teamwork, productivity and morale. When focusing on the employer's viable business interests, completing a fair assessment of the employee's strengths and weaknesses will help, not hurt, the employer's ability to defeat an unsupported claim.

How can an employer's subjective decision be supported if challenged?

In union settings, discipline must meet the definition of "just cause" which has been given a broad application in labor law. Several different tests have been applied to define "just cause". The most common is a seven element test developed by Arbitrator Carroll R. Daughery, in *Enterprise Wire Co.* 46 LA 359 (1966). Arbitrators then simplified the test to include the following elements: (1) Notice to the employee/grievant of the rules to be followed and the consequences of non-compliance; (2) Proof the grievant engaged in the alleged misconduct; (3) Procedural regularity in the investigation of misconduct; (4) Reasonable and even-handed application of discipline, including progressive discipline when appropriate. See, Hill & Sinicropi, *Remedies in Arbitration*, 2nd Ed. (BNA Books; 1991) p. 137-145.

A good strategy for making an employment decision defensible includes the following considerations:

1. Do you have sufficient information to make a disciplinary decision? If not, what needs to occur to make certain management has all the relevant information they need? (See elements 2 and 3 of the just cause test). Is an investigation needed to gather additional information from other employees about the impacts of this conduct on the workplace?
2. Are there policies and procedures which govern workplace behaviors, such as a set of "workplace expectations", information in a job description or an employee evaluation? Do those policies or documents explain the importance of positive working relationships, teamwork or other subjective but vital employer interests? Do the policies indicate discipline may occur if the policies are violated? (See element 1 of the just cause test).
3. Do the employee's performance evaluations (or job description) cover some of the expectations management will rely on for discipline or corrective action? If so, what has the employee been told about this behavior in the past? (Element 1 of just cause test, put another way).
4. If the employee has been notified his/her conduct is problematic, has the employee been given specific expectations about how to improve? If not, should that occur before taking disciplinary action?
5. Have those policies or performance expectations been consistently applied? Are there other instances where the employer disciplined an employee, or placed an employee on a performance improvement plan, due to similar disruptive or unproductive conduct? (See element 4 of the just cause test).
6. Do employer policies or union or employment contracts require certain steps take place before discipline occurs, such as coaching sessions with the employee? If so, has the supervisor complied with these provisions? Typically union contracts call for discipline to be progressive, going through steps such as a verbal warning, written warning, suspension or demotion, and only then termination.

7. If prior disciplinary steps have already placed the employee on notice his/her conduct is not acceptable, evaluate whether any sustained improvement occurred. If not, what is the next appropriate step in the disciplinary process? Use employer policies or the union contract as your guide, or have your attorney review similar case law. Jurors as well as arbitrators expect an employer to clearly communicate expectations and they want the employer's decisions to be fair in general. Fairness often includes a reasonable time for the employee to demonstrate improvement.

8. If you have taken these steps, your next decision is whether to discipline the employee. If so, you need to clearly document your reasons for making the decision to discipline the employee. You must include in that documentation the impacts on the workplace as specifically as you can. Explain the nature of co-worker complaints, the disruption to the workplace and any risks of co-worker's claims (bullying or harassment).

9. In any disciplinary decision for just cause employees or at will employees, clearly document the reasons for your decision. Be thorough, just as you would if you were taking the decision straight to court or arbitration for review. Don't hold back for fear of triggering a strong response by the employee. Adding to your reasons later will undermine the strength and credibility of your decision making process. In some cases, added reasons may be excluded from consideration in a subsequent hearing. If you're reasons are well supported, non-discriminatory and non-retaliatory, you should have no difficulty in laying out those reasons clearly and in writing. Have an attorney look this over to make sure you are not relying on protected characteristics or conduct. The attorney can also evaluate whether just cause, progressive discipline or due process is established, when applicable.

Not all these steps are necessary if the problem employee does not have a union contract or the procedural protections prior to discipline that union or Civil Service protections provide. However, for employees who serve at the will of the employer, it makes sense to go through the check list set any way. If challenged, jurors or other fact finders may place this standard of "fairness" and clear communications on the employer when asked to evaluate a potential claim.

By going through the same check list, you can better assess whether management has effectively communicated expectations to the problem employee. This is a critical step for management, who, in the example described above, had been silent in making the employee aware of management's expectations. Managers should use a performance plan as a tool to place a time frame on re-evaluating the employee's progress. This prevents the employer from delaying the process too long and having the performance expectations evaporate. If no progress occurs, be clear about the outcome. If termination from employment is the likely outcome, state this clearly to the problem employee.

Conclusion

A disruptive or problematic employee costs management a disproportionate amount of time to manage. Their conduct may trigger other employees to quit. Continued disruptive conduct that intimidates or targets other employees may increase the risk of discrimination or harassment claims overall. Tolerance of a problem employee's conduct makes other employees feel management should be held accountable in some way.

Being pro-active and taking steps to protect the morale and productivity for all employees will limit the chances that one employee's disruptive conduct will detrimentally impact the entire workplace. Don't wait for the problem employee to engage in egregious forms of behavior before taking action. By that time, the workplace is already compromised. Your strongest employees may have concluded management is not concerned about their welfare, and decide to quit or shut down, leaving a deep hole in employee morale and large hurdle for effective workplace relationships.