



Hitting The Reset Button At Work

Insights

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If you have ever attended an employment law seminar or a management training class, you have no doubt heard the speaker extol the virtues of consistency when dealing with employees. Consistency provides your employees with clear direction and minimizes uncertainty. Once your employees know what you expect, they are more likely to meet those expectations without the need for discipline.

Consistency is also the key to prevailing in the unemployment compensation arena and reducing your company's exposure to discrimination claims. In both contexts, the issue of whether the disciplined or discharged employee engaged in inappropriate conduct, or failed to meet the performance expectation, often is not in dispute. Instead, the basis for many claims is that the company allegedly failed to treat the claimant the same as it did another "similarly-situated" employee who engaged in comparable conduct. In other words, the employee complains that the company acted inconsistently and the reason for the inconsistent actions is the employee's protected status.

The Problem

Allegations of discriminatory or inconsistent treatment may also arise after an employer takes disciplinary action against an employee who has recently made a complaint of inappropriate conduct (*e.g.*, discrimination, harassment, safety, *etc.*), filed a workers' compensation claim, or requested or taken leave protected under federal or state law. The circumstances and timing of the disciplinary action may give rise to a claim of retaliation, especially when the employer relies upon a seldom- or never-enforced rule or performance standard as the basis of the discipline *after* the employee engaged in a form of protected activity.

Again, the issue ultimately may not be whether the employee broke the rule, but instead whether the employer's enforcement of the rule was consistent with its normal or past practice. With the growing number of retaliation claims being made (retaliation was the number one charge filed with the EEOC in 2010), employers should be cautious when taking disciplinary action under these circumstances.

How Did We Get Here?

One reason for enforcement failure is that most supervisors prefer to avoid confrontation with their employees. The common thought is that they have to work with and rely on these employees day in

employees. The common thought is that they have to work with and rely on these employees day in and day out and believe it is hard enough to get work done when they do not have an adversarial relationship with their employees.

Still other supervisors fail to act because they do not know what to do. They are afraid that if they do the wrong thing, the Company, and maybe the supervisor, will be sued. Faced with this perceived dilemma, many supervisors take the path of least resistance, do nothing, and hope the problem goes away on its own. The supervisor feels safer doing nothing about the underperforming employee and simply lives with the problem.

When the problem does not correct itself – and it rarely does – and the supervisor has no choice but to act, the timing may be bad, or the discipline may be inconsistent with established "precedent." In a recent case, an employee alleged race discrimination and retaliation following his termination. The facts showed that the former employee had an eight-year history of documented performance problems and numerous "final" warnings. The company had finally had enough and terminated the employee, but did so a few months after employees complained about race discrimination. The company eventually prevailed, but its failure to act earlier subjected it to the costs and disruption of litigation.

A supervisor's inaction creates several potential problems in the workplace that go beyond the "problem" employee. Good employees may lose respect for supervisors because they fail to enforce the rules and standards, and good employees may move on. Most employees adhere to the rules, and think it's only fair that other employees be required to do so as well. Employees like structure. How often do supervisors hear from the co-workers of the former employee: "it's about time you did something" or "we were wondering when enough would be enough?"

Failure to enforce the rules and standards also may actually lower the standards for everyone, not just the problem employee. In most cases, the lowest conduct or performance standard accepted by management by not enforcing the rules becomes the *de facto* standard for everyone in the group. For example, if the standard is to produce ten units a day and an employee is allowed to produce only seven without penalty, then seven may be the new standard for everyone. If 7:30 is the "official" or posted starting time, and an employee is regularly allowed to start at 7:45, is the new start time 7:45? The same concern applies to conduct issues. Once the supervisor establishes a tolerance level for employee conduct, that tolerated level may be the new code of conduct, not the one set forth in the handbook.

Employers and supervisors may be left thinking that they are damned if they do and damned if they don't. Fortunately, it does not have to be that way: there is a way out. You can escape the history of your inaction, or that of your predecessors, by "resetting expectations." If expectations are reset correctly, you may be able to shed the past, get everyone on the same page going forward, and take necessary corrective action without creating unnecessary exposure for the company.

Getting From Here To There – And Back Again

The resetting expectations process requires that the company give everyone a clean or almost clean slate on the specific issue at hand. Here's how it can work: the first step is to identify where you are, where you want to be, and what it will take to get there. Next, communicate with your employees the new (or renewed) expectations of them. You can, and probably should, admit that you or the company allowed the standards to slip and that you and the company accept full responsibility for the past.

Management should then: 1) tell the employees what its expectations are going forward; 2) provide a date when employees are expected to begin meeting these standards; and 3) explain the possible consequences for their failure to do so. The timeline should be reasonable under the circumstances and the message should include an offer of assistance to achieve the goal. The more reasonable your demand, the increased likelihood of success. Put these expectations in writing and request that the employees acknowledge by signing that they understand and agree. A copy of the signed form should then be placed in each employee's personnel file.

Once employees are put on notice of your expectations and possible consequences of failure, each supervisor must follow up and ensure that the employees are meeting the standards. For those who don't, take appropriate action – and do so on a *consistent* basis. Termination for failing to meet the reset expectations must be an unfortunate reality if efforts to regain control are to be effective.

Get Back On Track

It's never too late to reset expectations. If you do, the next time you contact your human resources department or your employment lawyer for approval to take disciplinary action and are met with the usual list of questions designed to determine whether your actions are consistent, you should be in good shape.

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