

2017 Discipline Issues

Puiggari & Associates

Michele Puiggari

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Top 10 Ways to Get Sued by Employees

#10 Failure to Train Supervisors

#9 **Failure to Document**

-addressing today

#8 Failure to Understand and Mishandling of
Health, Disability and Accommodation Issues

#7 **Failure to Establish Good Cause or Just Cause
and to follow Policies for Termination**

-addressing today

#6 Failure to Properly Address Discrimination
Issues

-other topic today

Con't

#5 Failure to adhere to Wage and Hour Laws

#4 Failure with End of Employment Issues

#3 Failure to Treat Employees with Respect

#2 **Not Providing Pre-termination Due Process**

-addressing today

#1 Failure to Consult and Seek Assistance

Example

- ❑ Termination
 - Must consult MACo
 - Must have documentation to support
 - Must provide due process (so you must know what this is ... or have HR to assist)

Why Discipline and document

- ▶ Your Job
- ▶ Employees aren't perfect
- ▶ Not following the Rules
 - ▶ Expensive (money and time)

Discipline

- ▶ In reality: This is just the way to provide performance feedback
 - ▶ Immediately
 - ▶ Don't forget good feedback too

Most Likely Legal Complaints

▶ Discrimination

- ▶ Montana Human Rights Act/Title VII/Government Fair Practices
 - ▶ Sex, age, race, physical or mental condition, creed, nationality religion, marital status , political affiliation

▶ Wrongful Discharge

- ▶ Violated CBA
- ▶ Violated WDA
- ▶ Terminated without good cause, or against public policy or in violation of handbook
- ▶ Terminated without just cause

▶ Unemployment Insurance

- ▶ MT 39-51-et. seq.

Discipline

- ▶ Must Discipline to Show:
 - ▶ NOT DISCRIMINATION
 - ▶ NOT VIOLATION OF PUBLIC POLICY
 - ▶ NOT AGAINST HANDBOOK or CBA
 - ▶ FOR GOOD /JUST CAUSE—WDA, CBA and UI

Wrongful Discharge Act

§39-2-904. Elements of wrongful

(1) A discharge is wrongful only if:

(a) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;

(b) the discharge was not for good cause and the employee had completed the employer's probationary period of employment;
or

(c) the employer violated the express provisions of its own written personnel policy.

Wrongful Discharge Act

▶ TWO TYPES OF DISCHARGE:

▶ a constructive discharge

▶ **Any situation employer severs relationship (including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason)**

Probationary employee

- ▶ **WDA** –can terminate without good cause
 - ▶ **HOWEVER** use Good Cause to Avoid other Claims
 - ▶ Discrimination
 - ▶ Must document file- give employee chance to respond
 - ▶ 6 months presumed
 - ▶ Can extend if in policies
 - ▶ Can use disciplinary probationary period (called a Corrective Action Plan)

Wrongful Discharge Act

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“Good cause” = part of just cause

reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason.

Violation of Public Policy

Basically something that violates the law

Violate own Handbook

Don't follow own policy

Don't make promises: (all employees treated with respect)

Wrongful Discharge Act

- ▶ Grievance procedure
 - ▶ Same as all CBA provide
 - ▶ Give adequate time to follow process
- ▶ Provide to employee within 7 days
 - ▶ of severing employment relationship
 - ▶ If employee doesn't use no WDA claim

MACo Approval

- ▶ Must get approval for termination/ suspension from MACO. Will not get without Due Process Letter
- ▶ Approval: covers costs/expenses if subsequent claim
- ▶ AVOID LIABILITY—FOLLOW THIS ADVICE NO MATTER HOW ONEROUS YOU THINK IT IS

Approval

- ▶ Need to show notice/prior discipline to employee
 - ▶ Notice of rule
 - ▶ How violated (investigation)
 - ▶ How expected to perform
 - ▶ Timeframe to improve
 - ▶ Format on MACo website
- ▶ For Suspensions without pay/Terminations
 - ▶ Must have Due Process letter

Due Process letter

- ▶ Explains to employee proposed potential discipline
- ▶ Includes
 - ▶ What employee did
 - ▶ What rule it violated
 - ▶ What proof employer has
 - ▶ Provides employee chance to respond BEFORE discipline decided upon
 - ▶ Form on MACo website

Public employees

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- ▶ Public Sector Employees have Property Interest in the Job
 - ▶ Like having a house
 - ▶ To Suspend/Terminate an Employee **MUST** show Employer Had Just Cause



UI

- If employee is fired by employer, employer must show person terminated for misconduct or gross misconduct
- If employee quits, employee must show they had good cause

MUST BE ABLE TO SHOW PRIOR DISCIPLINES TO SHOW MISCONDUCT

“Misconduct” includes :

- (i) **willful or wanton** disregard of interests of a fellow employee or the employer;
- (ii) **deliberate** violations of standards of behavior that the employer has the right to expect of an employee;
- (iii) **carelessness or negligence that causes or is likely to cause serious bodily harm; or**
- (iv) **carelessness or negligence of a degree or that reoccurs to a degree to show an intentional or substantial disregard of the employer's interest.**

UI Need for Discipline

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- ▶ If can show prior Disciplines
 - ▶ If employee disciplined and then did not change this shows misconduct

Discrimination Law: State and Federal

Federal Law-Title VII provides:

It shall be an unlawful employment practice for an employer to discriminate in the terms and conditions or privileges of employment (or applicant—or person because of an association with a person in a protected category) on the basis of the individuals, race, sex, age, national origin, religion, color, mental or physical disability.

State Law ADDS: creed, marital status, political affiliation/beliefs, any age)

Policies: Can add categories

Governmental Fair Practices Act

- ▶ **49-3-201. Employment of state and local government personnel.** (1) State and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin.
 - (2) All state and local governmental agencies shall:
 - (a) promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government;
 - (b) regularly review their personnel practices to assure compliance; and
 - (c) conduct continuing orientation and training programs with emphasis on human relations and fair employment practices.
 - (3) The department of administration shall ensure that the entire examination process, including appraisal of qualifications, is free from bias.
 - (4) Appointing authorities shall exercise care to ensure utilization of minority group persons.
 - (5) Compliance with [2-2-302](#) and [2-2-303](#), which prohibit nepotism in public agencies, may not be construed as a violation of this section.

Discipline: Documented Rationale

- ▶ Shows why employer acted
- ▶ Makes supervisors justify actions
- ▶ Protects against claims discriminatory or not just cause

When to Discipline

- ▶ Whenever Employee violates policy
- ▶ When Employee's actions not appropriate
 - ▶ Disrupt employer operations
 - ▶ Gossip
 - ▶ Create dissension
- ▶ When Employee not performing
 - ▶ Late
 - ▶ Mistakes
 - ▶ Etc.

Types

- ▶ Verbal
 - ▶ Should still be documented
- ▶ Written
- ▶ Suspension
- ▶ Termination

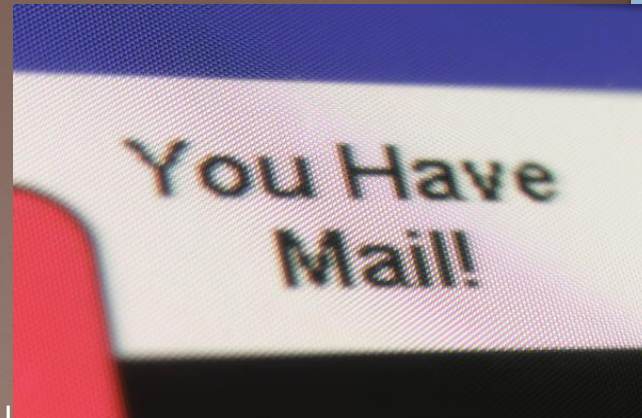
Just Cause -7 steps (keep in mind when disciplining)

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- ▶ Notice of Rule/ Expected Behavior
- ▶ Reasonable Rules
- ▶ Investigation
- ▶ Fair Investigation
 - ▶ It is fair if it is the investigation you would want done if the complaint was about you.
- ▶ Proof of offense
- ▶ Equal Treatment
 - ▶ use some judgment here
- ▶ Penalty
 - ▶ Fits the offense

Discipline

- ▶ Written
 - ▶ Focus on Performance
 - ▶ What rule violated
 - ▶ History of violations if applicable
 - ▶ Put in facts, not opinions
 - ▶ shorter is better
 - ▶ proof (**make sure get employee's side of the story**)
 - ▶ Expected improvement/time frame
 - ▶ Place for employee response
 - ▶ Have employee sign (witness if needed)
- ▶ E-mail
 - ▶ Way to recap verbals
- ▶ Quiet place –uninterrupted
- ▶ This is not a discussion/argument: don't engage



Corrective Action Plans

▶ USE THEM

- ▶ Determine what you want as end result
- ▶ Contain what is in disciplines—much more detailed
- ▶ What is expected—minute specific steps
- ▶ Timeframes
- ▶ Roadmap for employee and employer

Elements CAP or Performance Improvement Plan (PIP)

▶ Section 1

▶ Summary of Concern

Value as employee, wish to assist with improving work performance

But up to them to follow plan

▶ Section 2

▶ What behavior is inappropriate (be specific) give examples if relevant

▶ What Rule was violated

▶ What investigation done that substantiates conclusion

▶ If more than one issue, separate

CAP Con't

- ▶ **Section 3**

- ▶ **For each issue;**

- ▶ **What behavior is expected to improve (be specific)**

- ▶ **Timeframe for improvement**

- ▶ **What the county will do to assist (training, bigger monitor etc)**

- ▶ **Section 4**

- ▶ **What will happen if CAP not met**

- ▶ **Signatures indicating agreement**

Supports

- ▶ MACo
 - ▶ Personnel Administrator
 - ▶ Brian Hopkins and McKenzie McCarthy
 - ▶ Website
 - ▶ There is sample due process letter for terminations and suspensions
 - ▶ Website has sample discipline forms
 - ▶ All regional training materials---should review and ask questions
 - ▶ Regional and Webinar Trainings
 - ▶ Get everyone there!