DISCIPLINE & DISCHARGE: CASE STUDIES

Case # 1 – Absenteeism: Logging on

This school uses a computer program for employees to record their absences. Employees can still talk to a supervisor, but nearly all employees use the computer system. It is more convenient, and one doesn't have to wait for a call-back. It is accessible by computer or cell phone.

A key part of the computer system, as it relates to this case, is how the system identifies the date of the absences. Here's how it works: Employees log-on (with an individualized password) and sees a picture of the calendar. If you visualize a calendar showing all of the days of the month, there will be a big red checkmark on the date of your call. This makes sense because employees cannot call-in an absence for days that have passed. If you try to click a date in the past, the system alerts you and won't give you a confirmation number.

But there is another key feature of the system. You must call in at least 61 minutes before your shift starts. The grievant's shift at the school starts at 8:15 am. On a Friday morning, she decides to take an absence for the day. The system records her logging on at 7:15 am.

As she would later testify, the red checkmark was on Friday. She entered the reason for her absence (not feeling well) on the "drop down menu" and expected the system to give her a confirmation number. But the system had already moved to the next day (Saturday) and issued her a confirmation number for that day. She did not notice that, and she also assumed that it wouldn't do that, since she works Monday through Friday.

The system sends a daily report to HR. HR held a pre-determination meeting to ask what happened and why discipline should not be issued. The transcript of the hearing has the grievant stating:

> *As far as, I mean Yeah. I did, I did do that. I did call off, I guess, for Saturday, not knowing that it was a Saturday date. I did get a confirmation number. It was on my phone. I know better than to do that and next time, I'm gonna call the night before instead of trying to make in the next day and having to call off. Yeah, I'm guilty of whatever but., I just wondered why it would let me in on a Saturday.*

(The reason, as management would point out, is because a group of employees are routinely scheduled to work on Saturdays). The transcript goes on:

> *And then, it like, I didn't even know what day it was, to be honest with you, what the day was at the time, but umm, like I would never think and I didn't know, I didn't even know that it was a Saturday so there was no way for me to call anybody because I didn't even know.*

(As to this last point in the transcript, employees can always call their supervisor if they don't have access to the computer system or prefer to speak directly.)

HR issued a 3-day suspension for the following reasons:

1. Past Record. A year ago, the grievant had failed to use the computer system on 3 days in September and 2 days in November. On the day of the 5th oversight, she received a written warning for all of the oversights in September and November. And then, the next month (December), she received a one-day suspension for failing to use the system on a single date.

2. There is no claim that the grievant does not understand the system. No one else has any troubles. She has been a paraprofessional in the school for 16 years.

3. HR has followed progressive discipline: written warning, 1-day suspension, and now this 3-day suspension.

The union argues:

1. The school conducted an incomplete investigation. When this incident occurred, the school did not check the system for accuracy. Instead, a year later, it demonstrates the system to the arbitrator and jumps to the conclusion that the system works well today, so it must have been working well then.

2. The school did not know at the time whether the system locks you out, or just moves you into the next day.

3. She calls at precisely 7:15 am., so one minute into the 1-hour rule.

4. The school argues that she admitted guilt at the pre-determination meeting. This is not true. She admitted to only confusion between Friday & Saturday.

5. There is no sinister motive. She is a good 16-year employee. She reported off for the wrong date. The blame does not rest entirely on her.

Do you uphold the 3-day suspension?

GREEN = YES

RED = NO

Case # 2 – No-Fault Policy & FMLA

The company has an attendance policy which gives 1 point for an absence and ½ point for being tardy. The penalty grid is:

5 points: 1st written warning
6 points: 2nd written warning
7 points: final written warning
8 points: discharge

The policy, unilaterally imposed by the employer, uses a 12-month rolling period. Thus, points roll off after a year.

More background: When employees want to take a vacation, they can schedule it in advance. They can also save two of the vacation days for what are referred to as "call-in vacation days". They get two days every year. The employee simply must call-in to their supervisor who approves or disapproves, based on operational and staffing needs.

Employees are expected to keep track of their vacation days. The employee can log-on (even remotely) to the computer and find out how many he or she has left.

The grievant's history:

By October 2015, he had already accumulated 5 ½ points and received his first written warning. He had also used up all of his vacation and FMLA leave. On October 9, 2015, he received another point and received his 2nd written warning. In November 2015, he gained 8 hours available for FMLA leave and immediately used it up. On December 1st he received another point (which pushed him to 7.5 points) and he received his final written warning.

Then, January 2016 arrived. On January 28th he took a full 8-hour vacation day, but he only had 4 hours in his vacation bank. As a result, he received a half-point. Most notably, his supervisor had approved the vacation day but did not know he only had a half-day available.

More specifically, here's what happened. When an employee – here the grievant – requests a "call-in vacation day", and the supervisor approves it, the supervisor goes into the system and enters the "call-in vacation day". He does not check the employee's bank of vacation.

(Earlier in the week, the grievant had taken off his shoe and sock to show him the laceration on his big toe. The supervisor made a mental note to himself that it appeared the grievant was able to work without difficulty.)

In the multitude of documents which employees receive, employees are cautioned to "keep track" of your vacation time and FMLA leave. Employees can log-on, but they can also just call the outside source (a third party) at any time.

Having reached 8 points, he was discharged.

Union's case:

1. The grievant qualified for intermittent FMLA leave because of a diagnosis of diabetes and heart problems. The company knew this and admits to knowing. In addition, he should not be

penalized for using his FMLA leave fully documented by his physician. He has legitimate medical difficulties, including the documented toe injury.

2. He is a 9-year employee with an otherwise good work record.

3. He forgot that he had taken a vacation day on January 22, 2016. If he had remembered, he would still be at 7.5 points.

4. It would not have helped him to check his vacation bank, because the system is always one week behind and his January 22nd vacation day would not have appeared.

The company counter-argues:

1. It takes the system one week to update, but all employees know this. All of the union's witnesses (including union officials) know that the system is updated in a week's time. For the week, you have to know that you took vacation. All testified that they understood the system and had no problems with it.

2. We also hired a private investigator showing the grievant performing numerous personal errands and walking without difficulty on FMLA leave days. This tape is in the evidentiary record of this case.

3. The grievant took a lot of care to make sure he was maximizing his use of FMLA leave and vacation days. Now, he claims that he did not keep track, nor feel motivated to check the system. The termination is for just cause.

Do you uphold the discharge?

GREEN = YES

RED = NO

Case #3 – Panel Reaction

One arbitrator heard three cases and drew the following conclusions:

Case 1: Sharing your Password

It's the employer's computer. The employer gives the grievant a password for his use only. The grievant shares the password with a contractor. The IT department then uncovers adult pornography on the computer. IT can pinpoint the time, but not the user. Management discharges the grievant for violation of the rule.

Decision: Yes, the rule prohibits the downloading and viewing of pornography, but if the employer cannot prove who violated the rule, the employer is left to discipline the grievant for being negligent. He receives a suspension.

Do you agree with the arbitrator's decision?

GREEN = YES

RED = NO

Case 2: Theft of Time

I know employers who make the argument that depriving the employer of 7 or 8 hours of work is the equivalent of theft. The complication here is that some employees can keep their E-Bay or Amazon account open while doing their work. So, the first question is: Are they getting their work done? And if an employee is really getting away with that much, where is the supervisor? The second question is: Is this behavior correctable and should there be progressive discipline? Usually discharge is reserved for the serious violations such as pornography, moonlighting, and the like.

Do you agree with the arbitrator's decision?

GREEN = YES

RED = NO

Case 3: Breaches

There are many cases in which employees have left the office with sensitive data. The rules are explicit. So, the IRS agent who took home a thumb drive or the state employee who took home DMV records is going to be discharged. Confidential information belongs to the employer. There may be unique circumstances, but I think the union is looking at discharge.

Do you agree with the arbitrator's decision?

GREEN = YES

RED = NO

Conclusion: The lines will continue to shift, as the doctrine of misuse evolves. But as to the cases I heard: viewing pornography is dischargeable, so long as the proof is strong. Visiting non-business sites

(whilst getting your work done) is subject to progressive discipline. And as to secure data, employees who have trained on confidentiality can expect discharge.

Case # 4 – Physical Tussle

Ten people work on the 3rd shift doing essentially the same work. The store is closed during the 3rd shift.

On the night in question, two of the workers (both men – at least 20 years apart in age) have a disagreement about the placement of products on the shelf.

At the pre-determination meeting, the company plays the videotape. It shows the younger guy pushing (and possibly punching or slapping) the older guy. They tussle and fall into a glass case (no damage). A supervisor intervenes and orders them to clock out. They walk out together, talking all the way, and hug each other outside the entrance to the store.

The videotape does not have audio, but after the hug, they both agree to come in the next day (on their day-off) and talk to the store manager about what happened.

The next morning, the managers hears them out. They completely explain what happened. They apologize. The manager tells them that he will look into it, and that they should report for work at their normal shift time. In consultation with HR, and after watching the videotape, the decision is to discharge both for violation of this rule:

> *RULE*
> *…it is not possible to list all forms of behavior that are considered unacceptable in the workplace. The following are examples of infractions of rules of conduct that may result in disciplinary action, including termination of employment.*
>
> *…misconduct including horseplay, fighting, or threatening violence.*
>
> *…employer will not tolerate any acts or threats of violence in the workplace by anyone, including associates, vendors, visitors, customers, or other individuals on the company premises. Perpetrators of such acts or threats will be subject to disciplinary action as appropriate, up to and including termination. Further, the Employer at its discretion will facilitate arrest and prosecution by local law officials of those who perpetrated or threaten acts of violence.*

The union grieved both discharges. This is a case of the younger guy.

As part of the union's case-in-chief, the guys testified (plus co-workers confirmed) that they are friends and their families socialize together. In fact, the grievant's testimony is that their relationship is akin to a father-son relationship. The union was able to settle the first case (the settlement is not in the record), and the union feels that similarly here, discharge is too harsh. This case is also not like others in the past. Here, the supervisor who intervened testified that their altercation resembled a "three stooges thing" where the open hand goes back and forth like a paintbrush. In addition, the expressed remorse which the Manager acknowledged and testified to at the hearing. Under the just cause standard, at most there should be a suspension.

The company counters: this case involved the younger guy and there is no dispute that he made the first physical contact. The videotape doesn't show whether it's a slap or a punch, but the grievant admits to a physical "tussle". This may have been a flare-up over a ridiculous argument, but the rule is intended to prevent any form of physical violence and this incident here could have led to injury or worse. The

union does not dispute that there have been prior cases of such violence and even a long or good record are not mitigating factors. This is not a threat case, but one of actual violence – and no one disputes that the training on the rule is extensive and effective.

Do you uphold the discharge?

GREEN = YES

RED = NO

Case #5 – Loaded Magazine at Federal Building

The grievant is a 16-year employee. He has been going to work in this federal building for at least 10 years, and there has been a metal detector that all building occupants walk through to enter.

On this morning, he walks through the detector and the security guard pulls him out of the line. The guard discovered a loaded ammunition magazine in the grievant's backpack. (No handgun was in the backpack or anywhere on him.) The guard confiscated the magazine and wrote a report that made its way to building management, liaison to building tenants, building rep and finally HR.

7 months later in August 2016, HR sat down with the grievant and asked directly, *Did you bring a loaded magazine onto the property?* to which the grievant replied, no, no, no. Further questioning took place. At one point, the grievant replied 'why are you trying to make me out to be Timothy McVeigh?' This comment alarmed the managers in attendance. In early September, HR decided to discharge him. The letter went out September 8, 2016 and cited: 1. Lack of candor in the interview; 2. Possessing ammunition on property; and 3. Conduct unbecoming.

The union grieved the discharge and argued:

He said, 'no, no, no, "because the ammunition never got past security, and the question was: "Did you attempt to enter the building with a loaded pistol magazine?' In this light, his answer is more defensible.

The notice on the building says, "guns are prohibited." It does not say ammunition and one of the 7 tests of just cause is that an employee must know. The employer brings up the McVeigh comment in order to bolster a weak case, when that comment was not made in the way that management now claims.

The contract requires 'timely discipline" and the Employer waited from January 25, 2016 (date of incident) to August (first investigatory meeting) and September 8, 2016 (discharge letter). This 8-month delay is a due process and contract violation.

He has no discipline on his record and many co-workers testify that he is a model employee and excellent co-worker. The just cause standard (or even federal standard, "efficiency of service") mandates progressive discipline.

1. In counter-argument, the employer points out that the sign refers to guns, but the union admits that the rule prohibit "explosive" on property. And the US Dept of Transportation is one authority for classifying ammunition as an explosive. The grievant admits to receiving annual copies of the rules.

2. The grievant admitted his act endangered the safety of everyone in the building. It was an irrational act, another reason for including the 'conduct unbecoming charge.'

3. The managers testified that they were horrified by the McVeigh comment. This is someone whose bomb at a federal building in Oklahoma City killed 168 and injured 680. This is a government building in a city like Oklahoma City. A union rep was present at the August investigatory interview, yet the grievant shows a lack of candor and reinforces the reason for the discharge.

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Do you uphold the discharge?

GREEN = YES

RED = NO

Case # 6 – Sleeping

The discharge letter read:

"…your actions of sleeping while on duty, leave your job assignment and neglect of duty violated the …Working Rules. Because of your willful and blatant violation of the Working Rules, your employment is terminated effective immediately."

The Working Rules reads:

> To ensure orderly operations and provide the best possible work environment, [we] expect employees to follow rules of conduct, that will protect the interests and safety of all employees and the organization. The rules of personal conduct shall include, but are not limited to, the following:
>
> …acts which when committed will be sufficient cause for disciplinary action of warning, suspension or discharge, depending upon the circumstances involved and the seriousness of the offense.
>
> …A. Sleeping on the job.

The grievant has been on the job for 2 years. At the time of the discharge, he had just been promoted and was shadowing a tenured operator. He was essentially a trainee operator. On the day in question, a supervisor found him asleep in an unused control room. The next day, the grievant wrote HR:

> *There was no excuse for the way I handled that Tuesday morning. Everyone else has to deal with the same schedule and they get by just fine. It was a selfish decision and I can't think of a time in my life that I have been more disappointed in myself.*

The next day, HR issued the discharge letter. At the hearing, the HR Director explained: he intentionally left his work station and sought a location where he could sleep and not be caught.

The union grieved on three grounds: no discipline on his record, remorse and disparate treatment. The union advocate introduced 9 cases in the past 10 years in which employees who slept were issued warnings (verbal and written). Not one employee was discharged. In fact, one was identical to this case. That employee also left his work station and bedded down (with his coat as a pillow) and was caught sleeping.

Management counters: the rule clearly states that termination is a penalty for sleeping. The grievant admits to knowing the rule, if not the penalty. The 9 cases cited by the union are from a time when the refinery was owned by a competitor. We have owned this refinery for 2 years and none of the 9 cases arose under our tenure. Employees must be aware of their surroundings, given that this is a refinery. Employees who take a deliberate and intentional act to sleep are placing everyone's safety in jeopardy.

Arbitrators have long distinguished between dozing off and bedding down. The grievant here did the following:

- Used a table to make a makeshift bed, with two seat cushions
- And two coats as a makeshift blanket

This is someone who goes to great lengths to leave his work station and sleep. We have the authority under the rule and Management Rights clause in the CBA to choose the penalty.

This case took 2 years to get to arbitration.

Do you uphold the discharge?

GREEN = YES

RED = NO

Case # 7 – Timecard Fraud & Disparate Treatment

Five employees are caught and admit to timecard fraud. They would clock-in and out for each other. This happened multiple times.

Of the five, three are given a 1-day suspension and a last chance agreement (LCA).

The other two are discharged. Management argues that, in the two discharge cases, they have videotape which shows the timecard violations. They do not have any video on the other three.

All five are long-term employees (10 or more years of experience). None have any history or discipline.

Will the two discharged employees be successful on a disparate treatment defense?

GREEN = YES

RED = NO