



Employee Rights and Discipline

After studying this chapter, you should be able to



Explain the concepts of employee rights and employer responsibilities.



Explain the concepts of employment at will, wrongful discharge, implied contract, and constructive discharge.



Identify and explain the privacy rights of employees.



Explain the process of establishing disciplinary policies, including the proper implementation of organizational rules.



Discuss the meaning of discipline and how to investigate a disciplinary problem.



Differentiate between the two approaches to disciplinary action.



Identify the different types of alternative dispute resolution procedures.



Discuss the role of ethics in the management of human resources.

In this chapter we discuss employee rights, workplace privacy, and employee discipline. Managers note that these topics have a major influence on the activities of both employees and supervisors. Robert J. Deeny, an employment attorney, has stated that employee rights and workplace privacy will “continue to be the hottest employment law topics into the twenty-first century.”¹ For example, while drug testing, e-mail privileges, and employee monitoring are routinely debated, employers are now using location awareness technology, global positioning systems (GPSs), and company-provided cell phones to track and locate employees.² Furthermore, managers are discovering that the right to discipline and discharge employees—a traditional responsibility of management—is more difficult to exercise in light of the growing attention to employee rights. Disciplining employees is a difficult and unpleasant task for most managers and supervisors; many of them report that taking disciplinary action against an employee is the most stressful duty they perform. Balancing employee rights and employee discipline may not be easy, but it is a universal requirement and a critical aspect of good management.

Because the growth of employee rights issues has led to an increase in the number of lawsuits filed by employees, we include in this chapter a discussion of alternative dispute resolution as a way to foster organizational justice. Because disciplinary actions are subject to challenge and possible reversal through governmental agencies or the courts, management should make a positive effort to prevent the need for such action. When disciplinary action becomes impossible to avoid, however, that action should be taken in accordance with carefully developed HR policies and practices. Because ethics is an important element of organizational justice, the chapter concludes with a discussion of organizational ethics in employee relations.

Employee Rights and Privacy

Various antidiscrimination laws, wage and hour statutes, and safety and health legislation have secured basic employee rights and brought numerous job improvements to the workplace. Employee rights litigation concerns such workplace issues as employees’ rights to protest unfair disciplinary action, to question genetic testing, to have access to their personal files, to challenge employer searches and monitoring, and to be free from employer discipline for off-duty conduct.³

The current emphasis on employee rights is a natural result of the evolution of societal, business, and employee interests.⁴ **Employee rights** can be defined as the guarantees of fair treatment that employees expect in protection of their employment status. These expectations become rights when they are granted to employees by the courts, legislatures, or employers. Employee rights frequently involve an employer’s alleged invasion of an employee’s right to privacy. For example, employees may feel they have a reasonable expectation of privacy regarding their personal phone calls made from work phones, their e-mail messages made to other employees at work, or freedom from employers’ random searches of their personal belongings. However, if employers tell employees that they have no right to privacy in these areas, they proba-

employee rights

Guarantees of fair treatment from employers, particularly regarding an employee’s right to privacy

bly don't. One legal commentator notes, "When employers clearly state that there is no expectation of privacy, it's hard to argue that a reasonable person could have such an expectation."⁵ Furthermore, the difference between an employee's legal right to privacy and the moral or personal right to privacy is not always clear. The confusion is due to the lack of a comprehensive and consistent body of privacy protection, whether from laws or from court decisions. There are no general federal or state laws that protect the privacy of all employees in the workplace.



Employee Rights vs. Employer Responsibilities

Balanced against employee rights is the employer's responsibility to provide a safe workplace for employees while guaranteeing safe, quality goods and services to consumers. An employee who uses drugs may exercise his or her privacy right and refuse to submit to a drug test. But should that employee produce a faulty product as a result of drug impairment, the employer can be held liable for any harm caused by that product. Employers must therefore exercise *reasonable care* in the hiring, training, and assignment of employees to jobs.⁶

It is here that employee rights and employer responsibilities can come most pointedly into conflict. The failure of employers to honor employee rights can result in costly lawsuits, damage the organization's reputation, and hurt employee morale. But failure to protect the safety and welfare of employees or consumer interests can invite litigation from both groups. Negligent-hiring lawsuits by employees have become an area of great concern for employers.

Negligent Hiring

negligence

Failure to provide reasonable care when such failure results in injury to consumers or other employees

In law, **negligence** is the failure to use a reasonable amount of care when such failure results in injury to another person. Negligent hiring is a legal doctrine that places liability on the employer for actions of its employees during the course and scope of their employment. A general responsibility exists for employers to exercise *reasonable care* in preventing employees from intentionally harming other employees during their course of work.

Unfortunately, when one employee commits a violent act on another employee or an employee willfully defames another employee through e-mail messages communicated at work, the employer may face a negligent-hiring lawsuit claiming that the employer should have used more reasonable care in the hiring of its employees.⁷ While many see negligent-hiring lawsuits as a "Catch-22" for employers (that is, how can employers predict with certainty the future behavior of employees), it nonetheless forces managers to take extra care in the employment and management of the workforce. In the remainder of this section we will discuss various rights employees have come to expect from their employers.

Job Protection Rights

It is not surprising that employees should regard their jobs as an established right—a right that should not be taken away without just cause. Without the opportunity to hold a job, our personal well-being would be greatly curtailed. This line of reasoning has led to the emergence of four legal considerations regarding the security of one's

job: the employment-at-will principle, the concept of the implied contract, constructive discharge, and plant closing notification.

It should be understood, however, that although employees might have cause to regard jobs as an established right, there is no legal protection affording employees a permanent or continuous job. The U.S. Constitution carries no mandate guaranteeing that jobs are among the specific property rights of employees. Regardless, employees have certain expectations regarding the employment relationship. This expectation is referred to as the **psychological contract** and includes an employee's belief about the mutual obligation between the employee and the organization.⁸ For example, in exchange for their talents, energies, and technical skills, workers expect employers to provide fair compensation, meaningful work, and job training. Employees also have the right to expect sound employment practices and to be treated as individuals of dignity and substantial worth.⁹ While the psychological contract is not a legal mandate, nevertheless, it strongly influences the employment relationship.

psychological contract

Expectations of a fair exchange of employment obligations between an employee and employer



employment-at-will principle

The right of an employer to fire an employee without giving a reason and the right of an employee to quit when he or she chooses

Employment at Will

The employment relationship has traditionally followed the common-law doctrine of employment at will. The **employment-at-will principle** assumes that an employee has a right to sever the employment relationship for a better job opportunity or for other personal reasons. Employers, likewise, are free to terminate the employment relationship at any time—and without notice—for any reason, no reason, or even a bad reason. In essence, employees are said to work “at the will” of the employer.¹⁰

The employment-at-will relationship is created when an employee agrees to work for an employer for an unspecified period of time. Because the employment is of an indefinite duration, it can, in general, be terminated at the whim of either party. This freedom includes the right of management to unilaterally determine the conditions of employment and to make personnel decisions. In 1908, the Supreme Court upheld the employment-at-will doctrine in *Adair v United States*, and this principle continues to be the basic rule governing the private-sector employment relationship.¹¹

Public-sector employees have additional constitutional protection of their employment rights under the Fifth and Fourteenth Amendments to the Constitution. The Fifth Amendment applies to federal employees, while the Fourteenth applies to employees working for state, county, and local governments. Both amendments limit the methods and reasons that may be utilized to discipline or dismiss an incumbent employee in the public sector. The clauses of the Fifth Amendment that prohibit denial of life, liberty, and property without due process of law, as well as the Fourteenth Amendment, provide the principal constitutional protection afforded public-sector employees. While these guarantees apply to public-sector employees, the employment rights afforded in these amendments have, nevertheless, influenced private-sector court decisions.

Wrongful Discharge

Estimates of the American workforce subject to arbitrary discharge under the employment-at-will doctrine range from 55 million to 65 million employees. Approximately 2 million workers are discharged each year. Estimates of unfair employee dismissals range from 50,000 to 200,000 a year. In recent years, a substantial number of these employees have sued their former employers for “wrongful or unjust discharge.”

The significance of wrongful discharge suits is that they challenge the employer's right under the employment-at-will concept to unilaterally discharge employees.¹²

Various state courts now recognize the following three important exceptions to the employment-at-will doctrine:

1. *Violation of public policy.* This exception occurs when an employee is terminated for refusing to commit a crime; for reporting criminal activity to government authorities; for disclosing illegal, unethical, or unsafe practices of the employer; or for exercising employment rights. (See Figure 13.1 for examples of public policy violations.)
2. *Implied contract.* This exception occurs when employees are discharged despite the employer's promise (expressed or implied) of job security or contrary to established termination procedures. An employer's oral or written statements may constitute a contractual obligation if they are communicated to employees and employees rely on them as conditions of employment.¹³
3. *Implied covenant.* This exception occurs when a lack of good faith and fair dealing by the employer has been suggested. By inflicting harm without justification, the employer violates the implied covenant. Discharged employees may seek tort damages for mental distress or defamation.

The confusion and conflict between the traditional right of employers to terminate at will and the right of employees to be protected from unjust discharge are far from resolved. Therefore, to protect themselves from wrongful discharge terminations and from large jury awards—sometimes exceeding \$1 million—HR specialists recommend the suggestions given in Figure 13.2.¹⁴

whistle-blowing

Complaints to governmental agencies by employees about their employers' illegal or immoral acts or illegal practices

Whistle-Blowing

Employees engage in **whistle-blowing** when they report an employer's illegal actions, immoral conduct, or illegal practices to governmental agencies charged with upholding the law.¹⁵ A number of federal and state laws protect whistle-blowers from

Figure 13.1

Discharges That Violate Public Policy

An employer may *not* terminate an employee for

- Refusing to commit perjury in court on the employer's behalf
- Cooperating with a government agency in the investigation of a charge or giving testimony
- Refusing to violate a professional code of conduct
- Reporting Occupational Safety and Health Administration (OSHA) infractions
- Refusing to support a law or a political candidate favored by the employer
- "Whistle-blowing," or reporting illegal conduct by the employer
- Informing a customer that the employer has stolen property from the customer
- Complying with summons to jury duty

Figure 13.2

Tips to Avoid Wrongful Employment Termination Lawsuits

- *Terminate an employee only if there is an articulated reason.* An employer should have clearly articulated, easily understandable reasons for discharging an employee. The reasons should be stated as objectively as possible and should reflect company rules, policies, and practices.
- *Set and follow termination rules and schedules.* Make sure every termination follows a documented set of procedures. Procedures can be from an employee handbook, a supervisory manual, or even an intra-office memorandum. Before terminating, give employees notices of unsatisfactory performance and improvement opportunities through a system of warnings and suspensions.
- *Document all performance problems.* A lack of documented problems in an employee's personnel record may be used as circumstantial evidence of pretextual discharge if the employee is "suddenly" discharged.
- *Be consistent with employees in similar situations.* Document reasons given for all disciplinary actions, even if they do not lead to termination. Terminated employees may claim that exception-to-the-rule cases are discriminatory. Detailed documentation will help employers explain why these "exceptions" did not warrant termination.

retaliation from their employer; some provide whistle-blowers with financial incentives to expose wrongdoings.¹⁶ For example, in response to recent corporate scandals, the Sarbanes-Oxley (S-O) Act was passed in 2002 to protect whistle-blowers employed in publicly traded companies.¹⁷ The law encourages whistle-blowing by motivating publicly held companies to promote a more open culture that is sympathetic to employees who have a "reasonable belief" that a law has been violated. Federal employees are covered by the federal Whistleblower Protection Act (WPA).¹⁸ The Notification and Federal Employee Antidiscrimination and Retaliation Act (No Fear Act), also passed in 2002, provides whistle-blower protection under federal law at the Environmental Protection Agency (EPA),¹⁹ and the False Claims Act (FCA) applies to employees who provide information about false or fraudulent claims made against the federal government.²⁰

Not only is whistle-blowing a protected right of employees, but these cases result in embarrassment for employers, harassment for employees, and large fines for employers that are found guilty. In one whistle-blowing case, federal prosecutors fined TAP Pharmaceutical Products \$875 million for fraud—conspiring with doctors to cheat the government.²¹ In another case, Medical World Communications paid the government \$3.7 million to settle charges of mail fraud.²²

To prevent cases such as these, HR professionals recommend that companies implement a whistle-blowing policy that encourages employees to report illegal or immoral conduct internally rather than externally. The policy should provide for the safeguard of employee rights, a complete and unbiased investigation of the incident, a speedy report of findings, and an appeals procedure for employees who are dissatisfied with company findings.²³

Implied Contract

Although it is estimated that 70 percent of employees in the United States work without benefit of an employment contract, under certain conditions these employees may be granted contractual employment rights. This can occur when an implied promise by the employer suggests some form of job security to the employee. These

implied contractual rights can be based on either oral or written statements made during the pre-employment process or subsequent to hiring. Often these promises are contained in employee handbooks, HR manuals, or employment applications or are made during the selection interview. Once these explicit or implicit promises of job security have been made, courts have generally prohibited the employer from terminating the employee without first exhausting the conditions of the contract. For example, a leading case, *Toussaint v Blue Cross and Blue Shield of Michigan*, found an employee handbook enforceable as a unilateral contract.²⁴ The following are some examples of how an implied contract may become binding:

- Telling employees their jobs are secure as long as they perform satisfactorily and are loyal to the organization.
- Stating in the employee handbook that employees will not be terminated without the right of defense or access to an appeal procedure—that is, due process.
- Urging an employee to leave another organization by promising higher wages and benefits, then renegeing on those promises after the person has been hired.

Fortunately, employers may lessen their vulnerability to implied-contract lawsuits by prudent managerial practices, training, and HR policies. HR experts recommend the following approaches:

1. Training supervisors and managers not to imply contract benefits in conversations with new or present employees.
2. Including in employment offers a statement that an employee may voluntarily terminate employment with proper notice and the employee may be dismissed by the employer at any time and for a justified reason. The language in this statement must be appropriate, clear, and easily understood.
3. Including employment-at-will statements in all employment documents—for example, employee handbooks, employment applications, and letters of employment.²⁵ (See Highlights in HRM 1.)
4. Having written proof that employees have read and understood the employment-at-will disclaimers.

Constructive Discharge

It is increasingly common for employees to quit or resign their employment because of acts of alleged discrimination and to subsequently claim that their employment rights were violated through a **constructive discharge**. That is, they were “forced” to resign because of intolerable working conditions purposefully placed upon them by the employer.²⁶ Put simply, the employer has forced on an employee working conditions so unreasonable and unfair that the employee has no choice but to quit. In a leading constructive discharge case, *Young v Southwestern Savings and Loan Association*, the court noted:

The general rule is that if the employer deliberately makes an employee’s working conditions so intolerable that the employee is forced into involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if he had formally discharged the aggrieved employee.

The courts, by formulating the constructive-discharge doctrine, attempt to prevent employers from accomplishing covertly what they are prohibited by law from

constructive discharge

An employee’s voluntary termination of his or her employment because of harsh, unreasonable employment conditions placed on the individual by the employer

Highlights in HRM 1

Examples of Employment-at-Will Statements

Employment handbooks frequently include an opening statement that employees are employed at will; that is, there are no duration guarantees. Also no supervisors or managers, except specified individuals (that is, the HR director or company president), have the authority to promise any employment benefit—including salary, job position, and the like. All handbooks should include a disclaimer that expressly provides that all employment policies and benefits contained in the handbook are subject to change or removal at the sole and exclusive discretion of the employer.

Two examples of at-will statements are as follows:

I acknowledge that if hired, I will be an at-will employee. I will be subject to dismissal or discipline without notice or cause, at the discretion of the employer. I understand that no representative of the company, other than the president, has authority to change the terms of an at-will employment and that any such change can occur only in a written employment contract.

I understand that my employment is not governed by any written or oral contract and is considered an at-will arrangement. This means that I am free, as is the company, to terminate the employment relationship at any time for any reason, so long as there is no violation of applicable federal or state law. In the event of employment, I understand that my employment is not for any definite period or succession of periods and is considered an at-will arrangement. That means I am free to terminate my employment at any time for any reason, as is the company, so long as there is no violation of applicable federal or state law.

A note of caution: Because at-will employment is governed by state laws, in order for an employer to preserve its at-will status, it must follow the regulations of its jurisdiction. This includes the writing of employment-at-will statements.

achieving overtly. For example, unscrupulous employers may want to rid themselves of seemingly undesirable employees by deliberately forcing on them unfavorable working conditions so grievous that employees would rather quit than tolerate the disagreeable conditions.²⁷ Under this action, the employer may be attempting to limit liability should an employee seek redress through various protective employment statutes. It should be noted that the constructive-discharge doctrine does not provide employees with any new employment rights. Rather, through a constructive-discharge suit, the employee is only protecting employment safeguards previously granted through laws or court rulings.

Retaliation Discharge

Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and other employment laws prohibit employers

from retaliating against employees when they exercise their rights under these statutes (see Chapter 3). Unfortunately, more retaliation claims are succeeding in court because employers are perceived by judges and juries as imposing unfavorable working conditions on employees even when discrimination claims are meritless.²⁸ Employees may believe retaliation occurs when managers transfer them to lower-rated jobs, deny them salary increases or promotions, impose on them unrealistic job assignments, or become belligerent or uncommunicative with them after they file discrimination complaints or receive a favorable settlement.

To prevent retaliation charges, William Kandel, employer defense attorney, encourages employers to implement a separate anti-retaliation policy and to train managers and supervisors in acceptable and unacceptable methods to resolve employee complaints.²⁹ A key component to any anti-retaliation policy is to treat employees with dignity and respect.³⁰ Other suggestions to reduce retaliation discharges include the following:

- Take no adverse employment action against employees when they file discrimination charges. Treat employees as if nothing had happened.
- Be consistent and objective in your treatment of employees. Evaluate employees on performance, not personalities.
- Harbor no animosity toward employees when they file discrimination lawsuits. Treat every employee the way you would want to be treated—fairly.

Plant Closing Notification

The federal government, several states, and local jurisdictions have passed legislation restricting the unilateral right of employers to close or relocate their facilities. In 1989 Congress passed the Workers' Adjustment Retraining and Notification Act (WARN), which requires organizations with more than 100 employees to give employees and their communities sixty days' notice of any closure or layoff affecting fifty or more full-time employees.³¹ Notice must be given to collective bargaining representatives, unrepresented employees, the appropriate state dislocated-worker agency, and the highest-elected local official. Terminated employees must be notified individually in writing.³² The act allows several exemptions, including "unforeseeable circumstances" and "faltering businesses." For example, Michigan Industrial Holding did not violate the sixty-day notice provisions—due to unforeseeable business circumstances—when a major client cancelled a contract, causing an immediate plant closure.³³ However, failure to comply with the law can subject employers to liability for back pay, fringe benefits, prejudgment interest, and attorney's fees. WARN does not prohibit employer closings, layoffs, or loss of jobs; the law simply seeks to lessen the hardships caused by job loss.



Privacy Rights

The right of privacy can be regarded as a matter of personal freedom from unwarranted government or business intrusion into personal affairs. The right of privacy—a right well recognized in both law and legal commentary—includes the general principle of “personal autonomy.” It largely involves the individual’s right to be left alone.³⁴

Not surprisingly, employees strongly defend their right to workplace privacy. After a U.S. Supreme Court decision ruled that the random drug-testing policy of the City of Mesa, Arizona, violated a firefighter’s Fourth Amendment privacy rights,



Mesa fire captain Craig Peterson, who filed the suit, stated, "The way I looked at it, this policy violated my rights, and I wasn't going to submit to it. The right of privacy is one of the most basic rights we have."³⁵

Employer challenges to privacy rights in the workplace have sparked a heated debate over the extent to which fundamental rights previously thought untouchable may be lessened through the employment relationship. Through company policies and court decisions, employees now realize that privacy rights on the job are more limited than those at home. According to Janis Procter-Murphy, employment attorney, "employee privacy is recognized as one of the most significant workplace issues facing companies today."³⁶

Employers defend their intrusion into employee privacy by noting their legitimate interest in some of the personal affairs of employees, particularly when those affairs (such as drug use, criminal activity, and co-worker dating) may

directly affect employee productivity and workplace safety and/or morale.³⁷ Court cases regarding workplace privacy generally attempt to balance an employee's legitimate expectation of privacy against the employer's need to supervise and control the efficient operation of the organization. In this section we address the important workplace privacy issues of substance abuse and drug testing, searches and monitoring, e-mail privacy, access to personnel files, employee conduct outside the workplace, and genetic testing.

Substance Abuse and Drug Testing

Consider these facts. Compared with nonabusing employees, substance abusers:

- are 10 times as likely to miss work than those who are clear and alert
- are 3.6 times as likely to be involved in on-the-job accidents
- are 5 times as likely to file workers' compensation claims
- are 33 percent less productive
- use 16 times as many healthcare benefits³⁸

In 2003, the U.S. Department of Labor reported that three-fourths of adults who use illegal drugs are employed.³⁹ It is estimated that drug abuse by employees costs U.S. employers \$75 billion every year in terms of safety risks, theft, reduced productivity, accidents, and benefits costs. Furthermore, in these litigious times, the failure of an employer to ensure a safe and drug-free workplace can result in astronomical liability claims when consumers are injured because of a negligent employee or a faulty product. To fight the battle of workplace drugs, 97 percent of Fortune 500 companies have drug-free workplace policies, and according to the American Medical Association, 67 percent of employers have drug-testing policies.⁴⁰

Safety-Sensitive Jobs. Drug testing is most prevalent among employees in sensitive positions within the public sector, in organizations doing business with the federal government, and in public and private transportation companies. The definition of *sensitive position* has been formulated by the courts to include employees holding positions requiring top-secret national security clearance, those working in the interdiction of dangerous drugs, uniformed police officers and firefighters, transportation safety positions, and employees working in the nuclear power industry. These employees can be required to submit to a drug test when “reasonable suspicion” for a drug test exists and the employer’s testing procedures are also reasonable. Under the Omnibus Transportation Employee Testing Act of 1991, employers are legally required to test for drugs in transportation-related occupations, including airline, railroad, trucking, and public transport facilities.

Private-Sector Employers. Managers and supervisors need to understand that legislation on drug testing in the private sector is fragmented and largely regulated by individual states. States with restrictive drug-testing laws generally prohibit testing for drugs except in very specific circumstances. Pro-drug testing states generally permit testing, provided that strict testing procedures are followed. Unless state or local laws either restrict or prohibit drug testing, private employers have a right to require employees to submit to a urinalysis or blood test when *reasonable suspicion* or *probable cause* exists.⁴¹ Reasonable suspicion could include observable safety, conduct, or performance problems; excessive absenteeism or tardiness; or increased difficulty in working cooperatively with supervisors or co-workers. Employers who want to implement mandatory or random drug testing programs may face more stringent state court restrictions. According to one legal authority, “Employers should be especially careful in deciding whether to use random testing and will not be able to do so for non-safety-sensitive jobs in a number of states.”⁴²

Drug-Free Workplace Act of 1988. This federal act applies to organizations with government contracts of \$25,000 or more.⁴³ Among other things, the act requires employers to publish and furnish to employees a policy statement prohibiting drug usage at work, to inform employees about the dangers of drugs, and to list options available for drug counseling. Additionally, employers must notify the federal contracting agency of any employees who have been convicted of a drug-related criminal offense.

Americans with Disabilities Act. Employers subject to the Americans with Disabilities Act (see Chapter 3) must comply with the law’s provisions regarding drug addiction. The ADA clearly exempts from coverage any employee or job applicant who “is currently engaging in the illegal use of drugs.” Illegal drug users are not considered to be “individuals with a disability.” However, recovering or recovered drug addicts are included under the law’s provisions. As the law states,

Nothing in the ADA shall be construed to exclude as an individual with a disability an individual who—

- (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
- (2) is participating in a supervised rehabilitation program and is no longer engaging in such use.⁴⁴

The ADA also protects employees addicted to legal drugs obtained legally. For example, an employee who lawfully takes pain medication and subsequently becomes addicted to the medication satisfies the ADA definition of an individual with a disability.

Drug Testing. Urinalysis is by far the method of choice for employers who test for drugs, although employers also use blood sampling and hair sampling. Some of the sharpest criticism of drug testing concerns the reliability of these testing methods to identify someone currently under the influence of a drug. Three problems are noteworthy. First, employees or job applicants may attempt to beat drug-testing procedures. “Cheaters” may try to dilute urine samples, thereby helping rid the body of toxins. Another method is to add chemicals to a urine specimen, making the drugs undetectable or disrupting the testing process itself. Interestingly, nine states have laws making drug test fraud a crime.⁴⁵ Second, illegal substances remain in urine for various periods of time: cocaine for approximately 72 hours, marijuana for three weeks or longer. Therefore, an employee may test positive for a drug days or weeks after using it. Third, urine tests become problematic when testing equipment is miscalibrated or insufficiently cleaned, samples become contaminated, and chain-of-custody problems occur. (*Chain-of-custody* documentation accounts for the integrity of each urine specimen by tracking its handling and storage from point of collection to final disposition.) Any of these difficulties can cause a *false positive* test result, in which a particular drug is mistakenly identified in a specimen. Importantly, it is recommended that the results of drug tests be provided only to those who need to know—for example, supervisors or HR staff members—and not to other co-workers or disinterested managers. Boeing, 3M, United Airlines, and Motorola use an independent medical review officer (MRO) to ensure the integrity of their drug-testing programs. (MROs are required in certain states for tests mandated by the federal government.)

An alternative to drug testing is to evaluate an employee’s suitability for work through *impairment testing*. Also called fitness-for-duty or performance-based testing, impairment testing measures whether an employee is alert enough for work. One impairment test requires an employee to keep a cursor on track during a video game-like simulation. Another testing technique evaluates an employee’s eye movements. The employee looks into a dark viewport, then follows a light with his or her eyes. Test results, when compared against baseline data gathered earlier on the employee, mimic those of a sobriety test for probable-cause impairment. One advantage of impairment testing is that it focuses on workplace conduct rather than off-duty behavior. Furthermore, it identifies employees who are impaired because of problems that a drug test can’t spot: fatigue, stress, and alcohol use.

Drug-Free Workplace Policies. Both HR professionals and legal experts highly recommend that employers implement a “zero-tolerance” drug-free workplace policy. The policy should state under what conditions employees may be subject to a drug test, the testing procedures used, and the consequences of a positive report. Figure 13.3 provides recommendations for an extensive drug-free work policy.

Employee Searches and Electronic Monitoring

- General Electric employs tiny fish-eye lenses installed behind pinholes in walls and ceilings to observe employees suspected of crimes.
- DuPont uses long-distance cameras to monitor its loading docks.

Figure 13.3

Recommendations for a Drug-Free Workplace Policy

1. Adopt a written zero-tolerance drug-free workplace policy and provide a copy to all employees. A signed copy should be placed in the employee's personnel file.
2. Post "We Are a Drug-Free Workplace" signs where employees will widely observe them.
3. Provide employees with substance-abuse prevention educational materials. Arrange substance-abuse awareness training for employees and managers.
4. Perform pre-employment drug testing on all new hires.
5. Advise employees that they are subject to drug testing when "reasonable suspicion" exists.
6. Provide for follow-up testing to ensure that an employee remains drug-free after return from a substance-abuse treatment program.
7. Provide for "post-accident" drug testing when justified by property loss or damage, serious injury, or death.
8. Use only federally or state-approved certified labs for analysis.
9. Utilize the services of a medical review officer for all positive drug test results.
10. Maintain strict confidentiality of all test results. Provide information only on a "need-to-know" basis.
11. Apply terms of a written policy strictly, fairly, and equally among employees and managers.

Source: Adapted from "Steps to a Successful Drug-Free Workplace Policy," *Occupational Hazards* 66, no. 8 (August 2004): 46.

- Mervyn's department stores issue employees clear plastic bags for carrying personal belongings. The bags are checked as they enter and leave work.
- The Cheesecake Factory, a restaurant chain, uses video monitoring of kitchens, dining rooms, and hostess stations.

While these examples may seem a violation of privacy rights, it is not uncommon for employers to monitor employee conduct through surveillance techniques. While most workplace monitoring must have some legitimate business purpose, very few federal legal controls protect workers from being watched. State laws, however, set their own regulations on how much prying employees must tolerate.

Why do companies search employees and monitor their activities? The answer is employee theft. The U.S. Chamber of Commerce estimates that employee theft (stealing merchandise, supplies, or equipment; selling information; embezzlement; "time theft"; computer crime; and so on) costs U.S. businesses \$40 billion annually. According to U.S. Department of Commerce estimates, employee theft is responsible for 30 percent of all business failures.⁴⁶ In one study, results showed that "[a]n astounding 95 percent of all businesses experience employee theft."⁴⁷

To help fight these employee crimes, the courts have allowed searches of lockers, desks, suitcases, toolboxes, and general work areas when adequate justification exists and employees have received proper notification beforehand. Employees have limited reasonable expectation of privacy in places where work rules that provide for inspections have been put into effect. They must comply with probable-cause searches by employers. And they can be appropriately disciplined, normally for insubordination, for refusing to comply with search requests. Importantly, absent emergencies or other special circumstances, random searches of employees' personal belongings or company facilities should be avoided. Random searches likely will result in employee anger and claims of privacy rights—with concomitant costs in productivity.⁴⁸

Managers must be diligent when conducting employee searches. Improper searches can lead to employee lawsuits charging the employer with invasion of privacy, defamation of character, and negligent infliction of emotional distress. Employers are advised to develop an HR search policy based on the following guidelines:

1. The search policy should be widely publicized and should advocate a probable or compelling reason for the search.
2. The search policy should be applied in a reasonable, evenhanded manner.
3. When possible, searches should be conducted in private.
4. The employer should attempt to obtain the employee's consent prior to the search.
5. The search should be conducted in a humane and discreet manner to avoid infliction of emotional distress.
6. The penalty for refusing to consent to a search should be specified.

Some searches are more intrusive to employees than others. For example, “strip searches” are likely to inflict emotional distress and should be avoided. Likewise, any touching of employees for hidden items should be minimized and, if conducted, the search should be made by a person of the same sex.

One of the most common means of electronic monitoring by employers is telephone surveillance to ensure that customer requests are handled properly or to prevent theft.⁴⁹ Employers have the right to monitor employees, provided they do it for compelling business reasons and employees have been informed that their calls will be monitored. However, a federal law, the Electronic Communications Privacy Act (ECPA), places some major limitations on that right.⁵⁰ The ECPA restricts employers from intercepting wire, oral, or electronic communications. Under the law, if an employee receives a personal call, the employer must hang up as soon as he or she realizes the call is personal. As noted by one legal authority, “Personal calls can be monitored only to the degree needed to determine that they are indeed personal.”⁵¹

E-Mail, Internet, and Voice Mail Privacy

The benefits of e-mail, the Internet, and voice mail are many; they provide instant delivery of messages, facilitate teamwork, increase time efficiency, offer access to global information, and promote flexible work arrangements. Unfortunately, technology also permits employees to act in unscrupulous, inappropriate, and unauthorized ways, creating ethical, productivity, and legal problems for employers. These illegitimate uses of technology cause employers to monitor the conduct of employees, creating significant privacy issues for both employees and managers.

In a survey conducted by the Society for Human Resource Management, 74 percent of respondents said they monitor the Internet usage and e-mail messages of

their employees. A Privacy Foundation study found that 14 million U.S. workers are subject to continuous monitoring while online. Why do employers monitor their employees? The reasons are varied: to prevent intimidating behavior of employees, to ensure effective use of company time, to prevent employee gossip, to eliminate the surfing of pornographic web sites, to stop employees from doing personal business on company time, or to ensure employee safety including the prevention of sexual harassment or cyberstalking. For example, in a recent case, a sexual harassment suit cost Chevron \$2.2 million because an employee sent coarse messages over the company e-mail system.⁵² Additionally, employee monitoring is done to prevent personal information from becoming accessible to those with prying eyes or “hackers” who might use the information inappropriately.

Employers have a great latitude to monitor their own equipment. Court cases governing e-mail and the Internet generally grant to employers the right to monitor materials created, received, or sent for business-related reasons. Employees who erase their messages may wrongly assume their messages are gone when deleted. Although employees may assume that their right to privacy extends to e-mail, the Internet, or voice mail messages, it does not. Furthermore, employees can be disciplined or terminated for inappropriate e-mail messages or Internet use. HR experts and legal authorities strongly encourage employers to develop clear policies and guidelines that explain to employees how e-mail, the Internet, and voice mail are to be used, including when and under what conditions employees can be monitored⁵³ (see Figure 13.4). As with other employment policies, employees should sign a form indicating that they have read and understand the policy.

Figure 13.4

E-Mail, Internet, and Voice Mail: Policy Guidelines

E-mail, Internet, and voice mail policies seek to reduce an employee's reasonable expectation of privacy balanced against the employer's legitimate business reasons for monitoring employee conduct. A comprehensive e-mail, Internet, and voice mail policy would cover the following:

- Ensure compliance with federal and state legislation.
- Specify the circumstances, if any, under which the system can be used for personal business.
- Specify that confidential information not be sent on the network.
- Set forth the conditions under which monitoring will be done—by whom, how frequently, and with what notification to employees.
- Specify that e-mail and voice mail information be sent only to users who need it for business purposes.
- Expressly prohibit use of e-mail or voice mail to harass others or to send anonymous messages.
- Make clear that employees have no privacy rights in any material delivered or received through e-mail or voice mail.
- Specify that employees who violate the policy are subject to discipline, including discharge.

Monitoring employee behavior is an important deterrent to illegal conduct of employees.



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Access to Personnel Files

The information kept in an employee's personnel file can have a significant impact—positive or negative—on career development. The personnel file, typically kept by the HR department, can contain performance appraisals, salary notices, investigatory reports, credit checks, criminal records, test scores, and family data. Errors and/or omissions in personnel files, or access to the files by unauthorized people, can create employment or personal hardships.

Legislation at the federal level (see Figure 13.5) and laws in various states permit employees to inspect their own personnel files. How much access is allowed varies from state to state. For example, employers can prohibit employees from viewing information that might violate the privacy of others. Reference letters and criminal investigation reports are of this nature. A state law can limit the employee to copies of documents that he or she has signed, such as performance evaluations or job applications. The states that grant employees the privilege to see their personnel files generally provide

- The right to know of the existence of one's personnel file
- The right to inspect one's own personnel file
- The right to correct inaccurate data in the file

Typically, if a state law allows employees to examine their files, employers can insist that someone from HR, or a supervisor, be present to ensure that nothing is taken, added, or changed. Even in the absence of specific legislation, most employers give their employees access to their personnel files. Employment professionals recommend that organizations develop a policy on employee files that includes, as a minimum, the points noted in Figure 13.6.

Medical information of employees requires special handling. The Americans with Disabilities Act (discussed in Chapter 3) requires that an employee's medical history be kept in a file separate from other personal information. Also, new medical privacy

Figure 13.5

Right-to-Privacy Laws

LAW	EFFECT
Electronic Communications Privacy Act (1986)	Prohibits the interception, recording, or disclosure of wire, electronic, and aural communications through any electronic, mechanical, or other device. An interception takes place when an employer monitors a telephone call while it is occurring. Permits employer monitoring for legitimate business reasons.
Privacy Act (1974)	Applies to federal agencies and to organizations supplying goods or services to the federal government; gives individuals the right to examine references regarding employment decisions; allows employees to review their personnel records for accuracy. Employers who willfully violate the act are subject to civil suits.
Family Education Rights and Privacy Act—The Buckley Amendment (1974)	Prohibits educational institutions from supplying information about students without prior consent. Students have the right to inspect their educational records.
Fair Credit Reporting Act (1970)	Permits job applicants and employees to know of the existence and context of any credit files maintained on them. Employees have the right to know of the existence and nature of an investigative consumer report compiled by the employer.

regulations contained in the Health Insurance Portability and Accountability Act (HIPAA) mandate that covered employers safeguard health information provided to employers by insurers or healthcare providers—doctors, group medical plans, and so on. HIPAA clearly states that an individual's past, present, or future health information be used on a limited basis.⁵⁴ Therefore, as a general rule, an employee's medical information must be handled in a sensitive and confidential manner.

Figure 13.6

Personnel Files: Policy Guidelines

- Ensure compliance with applicable state laws.
- Define exactly what information is to be kept in employee files.
- Develop different categories of personnel information, depending on legal requirements and organizational needs.
- Specify where, when, how, and under what circumstances employees may review or copy their files.
- Identify company individuals allowed to view personnel files.
- Prohibit the collection of information that could be viewed as discriminatory or could form the basis for an invasion-of-privacy suit.
- Audit employment records on a regular basis to remove irrelevant, outdated, or inaccurate information.

Camera-Equipped Phones

General Motors and defense contractor Syzygy Technologies are two companies that ban employee use of camera phones, personal digital assistants, and similar digital devices. Reasons for the ban include protecting competitive proprietary information and safeguarding employee privacy. Companies routinely ban such devices from restrooms and wellness and exercise facilities because of the risk of privacy violations. John Sweeney, information specialist at SHRM, notes, “Employees using such facilities should feel safe and have no concerns that they might be photographed without their consent.”⁵⁵

Employee Conduct outside the Workplace

Consider the following case. On Monday morning the owner of ABC Corporation reads in the newspaper that a company employee has been charged with robbery and assault on a local convenience store owner. The employee has been released pending trial. A phone call to the employee’s supervisor reveals that the employee has reported to work. What should the owner do?

Legal authorities generally conclude that the off-duty behavior of employees is not subject to employer disciplinary action. Case law suggests that misconduct outside the workplace may not, in some circumstances, be a lawful justification for employee discipline. Organizations that want to discipline employees for off-duty misconduct must establish a clear relationship between the misconduct and its negative effect on other employees or the organization. This might be established, for example, in cases in which off-duty criminal misconduct (such as child molestation) creates a disruptive impact on the workplace. Another example might be when the public nature of the employee’s job (such as police or fire department personnel) creates an image problem for the organization. Generally, however, little of what an employee does outside the workplace bears discipline by the employer.

Workplace romances, however, create a particular dilemma for organizations. The concern is employer liability if a co-worker, supervisor-subordinate, or other power-differentiated romance goes sour, leading to charges of sexual harassment.⁵⁶ Acceptable behavior in a consensual relationship between employees can become harassing behavior if one party to the relationship no longer welcomes the conduct. Organizations may also increase the potential for workplace violence should a scorned lover seek violent revenge at the work site.

Furthermore, workplace romances can lead to employee charges of favoritism against a co-worker involved in a supervisor-subordinate romance. These “reverse harassment” claims are based on preferential treatment given an employee engaged in a romantic affair. Workplace romances can also create morale problems when other employees feel unfairly treated; such situations can lead to jealousy, resentment, and hard feelings. Supervisor romances can have profound effects on organizational operations and productivity.

Genetic Testing

Advances in genetic research now make it possible to identify the genetic basis for human diseases and illnesses.⁵⁷ Genetic findings present opportunities for individualized prevention strategies and early detection and treatment. Unfortunately, knowledge gained through genetic testing can also be used discreetly by employers to discriminate against or stigmatize individuals applying for employment or individuals currently employed. For example, genetic testing can identify an individual’s risk of developing common disorders such as cancer, heart disease, or diabetes.

Because employee diseases and illnesses raise employment costs, employers may avoid hiring or retaining individuals who they believe are likely to become unduly sick, resign, or retire early, thus creating additional recruitment, training, or medical costs. Not surprisingly, when employers use genetic tests as a means to deny employment opportunities to workers, the tests raise important moral and ethical concerns, not to mention privacy issues. However, employers must remember that there is no scientific evidence to substantiate a relationship between unexpected genetic factors and an individual's ability to perform his or her job.

Few federal or state laws or court decisions govern an employer's use of genetic information. Genetic testing, however, likely violates the antidiscrimination mandates of Title VII of the Civil Rights Act and the Americans with Disabilities Act. Future legislation—either federal or state—to prohibit genetic discrimination in employment is uncertain.⁵⁸

Disciplinary Policies and Procedures



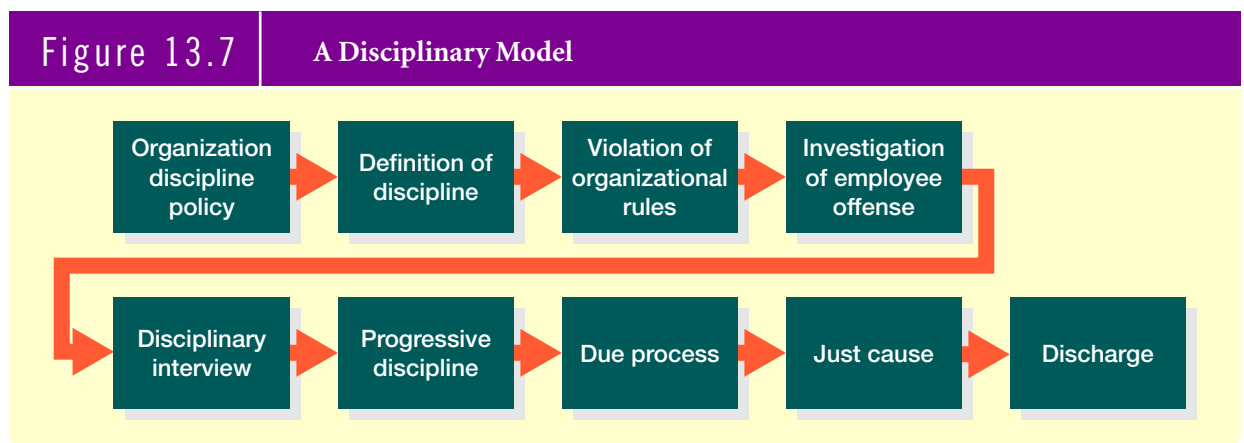
The rights of managers to discipline and discharge employees are increasingly limited. There is thus a great need for managers at all levels to understand discipline procedures. Disciplinary action taken against an employee must be for justifiable reasons, and there must be effective policies and procedures to govern its use. Such policies and procedures assist those responsible for taking disciplinary action and help ensure that employees will receive fair and constructive treatment. Equally important, these guidelines help prevent disciplinary action from being voided or reversed through the appeal system.

Disciplinary policies and procedures should extend to a number of important areas to ensure thorough coverage. Figure 13.7 presents a disciplinary model that illustrates the areas where provisions should be established. The model also shows the logical sequence in which disciplinary steps must be carried out to ensure enforceable decisions.

A major responsibility of the HR department is to develop, and to have top management approve, its disciplinary policies and procedures. The HR department

Figure 13.7

A Disciplinary Model



is also responsible for ensuring that disciplinary policies, as well as the disciplinary action taken against employees, are consistent with the labor agreement (if one exists) and conform to current laws. However, the primary responsibility for preventing or correcting disciplinary problems rests with an employee's immediate supervisor. This person is best able to observe evidence of unsatisfactory behavior or performance and to discuss the matter with the employee. Should discipline become necessary, the employee's immediate supervisor is the logical person to apply the company's disciplinary procedure and monitor employee improvement.

The Results of Inaction

Figure 13.8 lists the more common disciplinary problems identified by managers. Failure to take disciplinary action in any of these areas only serves to aggravate a problem that eventually must be resolved. Failure to act implies that the performance of the employee concerned has been satisfactory. If disciplinary action is eventually taken, the delay will make it more difficult to justify the action if appealed. In defending against such an appeal, the employer is likely to be asked why an employee who had not been performing or behaving satisfactorily was kept on the payroll. Or an even more damaging question might be "Why did that employee receive satisfactory performance ratings (or perhaps even merit raises)?"

Such contradictions in practice can only aid employees in successfully challenging management's corrective actions. Unfortunately, some supervisors try to build a case to justify their corrective actions only after they have decided that a particular employee should be discharged. The following are common reasons given by supervisors for their failure to impose a disciplinary penalty:⁵⁹

1. The supervisor had failed to document earlier actions, so no record existed on which to base subsequent disciplinary action.

Figure 13.8

Common Disciplinary Problems

ATTENDANCE PROBLEMS

- Unexcused absence
- Chronic absenteeism
- Unexcused/excessive tardiness
- Leaving without permission

DISHONESTY AND RELATED PROBLEMS

- Theft
- Falsifying employment application
- Willfully damaging organizational property
- Punching another employee's time card
- Falsifying work records

WORK PERFORMANCE PROBLEMS

- Failure to complete work assignments
- Producing substandard products or services
- Failure to meet established production requirements

ON-THE-JOB BEHAVIOR PROBLEMS

- Intoxication at work
- Insubordination
- Horseplay
- Smoking in unauthorized places
- Fighting
- Gambling
- Failure to use safety devices
- Failure to report injuries
- Carelessness
- Sleeping on the job
- Using abusive or threatening language with supervisors
- Possession of narcotics or alcohol
- Possession of firearms or other weapons
- Sexual harassment

2. Supervisors believed they would receive little or no support from higher management for the disciplinary action.
3. The supervisor was uncertain of the facts underlying the situation requiring disciplinary action.
4. Failure by the supervisor to discipline employees in the past for a certain infraction caused the supervisor to forgo current disciplinary action in order to appear consistent.
5. The supervisor wanted to be seen as a likable person.

Setting Organizational Rules

The setting of organizational rules is the foundation for an effective disciplinary system. These rules govern the type of behavior expected of employees. Organizations as diverse as Gerber Products, Wal-Mart, Steelcase, and Pitney Bowes have written policies explaining the type of conduct required of employees. Because employee behavior standards are established through the setting of organizational rules and regulations, the following suggestions may help reduce problems in this area:

1. Rules should be widely disseminated and known to all employees. It should not be assumed that employees know all the rules.
2. Rules should be reviewed periodically—perhaps annually—especially those rules critical to work success.
3. The reasons for a rule should always be explained. Acceptance of an organizational rule is greater when employees understand the reasons behind it.
4. Rules should always be written. Ambiguity should be avoided, as this can result in different interpretations of the rules by different supervisors.
5. Rules must be reasonable and relate to the safe and efficient operation of the organization. Rules should not be made simply because of personal likes or dislikes.
6. If management has been lax in the enforcement of a rule, the rule must be restated, along with the consequences for its violation, before disciplinary action can begin.
7. Employees should sign a document stating that they have read and understand the organizational rules.

When seeking reasons for unsatisfactory behavior, supervisors must keep in mind that employees may not be aware of certain work rules. Before initiating any disciplinary action, therefore, it is essential that supervisors determine whether they have given their employees careful and thorough orientation in the rules and regulations relating to their jobs. In fact, the proper communication of organizational rules and regulations is so important that labor arbitrators cite *neglect in communicating rules* as a major reason for reversing the disciplinary action taken against an employee.⁶⁰

hot-stove rule

A rule of discipline that can be compared with a hot stove in that it gives warning, is effective immediately, is enforced consistently, and applies to all employees in an impersonal and unbiased way

The Hot-Stove Approach to Rule Enforcement

Regardless of the reason for the disciplinary action, it should be taken as soon as possible after the infraction has occurred and a complete investigation has been conducted. HR professionals often use the **hot-stove rule** to explain the correct application of

discipline

(1) Treatment that punishes, (2) orderly behavior in an organizational setting, or (3) training that molds and strengthens desirable conduct—or corrects undesirable conduct—and develops self-control



discipline. A hot stove gives warning that it should not be touched. Those who ignore the warning and touch it are assured of being burned. The punishment is an immediate and direct consequence of breaking the rule never to touch a hot stove. Likewise, a work rule should apply to all employees and should be enforced consistently and in an impersonal and unbiased way. Employees should know the consequences of violating the rule, so that it has preventive value.

Defining Discipline

In management seminars conducted by the authors of this text, when managers are asked to define the word *discipline*, their most frequent response is that discipline means punishment. Although this answer is not incorrect, it is only one of three possible meanings. As normally defined, **discipline** has these meanings:

1. Treatment that punishes
2. Orderly behavior in an organizational setting
3. Training that molds and strengthens desirable conduct—or corrects undesirable conduct—and develops self-control

To some managers, discipline is synonymous with force. They equate the term with the punishment of employees who violate rules or regulations. Other managers think of discipline as a general state of affairs—a condition of orderliness in which employees conduct themselves according to standards of acceptable behavior. Discipline viewed in this manner can be considered positive when employees willingly practice self-control and respect organizational rules.

The third definition considers discipline a management tool used to correct undesirable employee behavior. Discipline is applied as a constructive means of getting employees to conform to acceptable standards of performance. Many organizations, such as Goodyear Aerospace and Arizona State University, define *discipline* in their policy manuals as training that “corrects, molds, or perfects knowledge, attitudes, behavior, or conduct.” Discipline is thus viewed as a way to correct poor employee performance. As these organizations emphasize, discipline should be seen as a method of training employees to perform better or to improve their job attitudes or work behavior.

When taken against employees, disciplinary action should never be thought of as punishment. Discipline can embody a penalty as a means of obtaining a desired result; however, punishment should not be the intent of disciplinary action. Rather, discipline must have as its goal the improvement of the employee’s future behavior. To apply discipline in any other way—as punishment or as a way of getting even with employees—can only invite problems for management, including possible wrongful discharge suits.



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Discipline should never be viewed as punishment but rather as a way to correct undesirable employee behavior.

Investigating the Disciplinary Problem

It's a rare manager who has a good, intuitive sense of how to investigate employee misconduct. Too frequently investigations are conducted in a haphazard manner; worse, they overlook one or more investigative concerns.⁶¹ In conducting an employee investigation, it is important to be objective and to avoid the assumptions, suppositions, and biases that often surround discipline cases. Figure 13.9 lists seven questions to consider in investigating an employee offense. Attending to each question will help ensure a full and fair investigation while providing reliable information free from personal prejudice.⁶²

Figure 13.9

Considerations in Disciplinary Investigations

1. In very specific terms, what is the offense charged?
 - Is management sure it fully understands the charge against the employee?
 - Was the employee really terminated for insubordination, or did the employee merely refuse a request by management?
2. Did the employee know he or she was doing something wrong?
 - What rule or provision was violated?
 - How would the employee know of the existence of the rule?
 - Was the employee warned of the consequence?
3. Is the employee guilty?
 - What are the sources of facts?
 - Is there direct or only indirect evidence of guilt?
 - Has anyone talked to the employee to hear his or her side of the situation?
4. Are there extenuating circumstances?
 - Were conflicting orders given by different supervisors?
 - Does anybody have reason to want to "get" this employee?
 - Was the employee provoked by a manager or another employee?
5. Has the rule been uniformly enforced?
 - Have all managers applied this rule consistently?
 - What punishment have previous offenders received?
 - Were any other employees involved in this offense?
6. Is the offense related to the workplace?
 - Is there evidence that the offense hurt the organization?
 - Is management making a moral judgment or a business judgment?
7. What is the employee's past work record?
 - How many years of service has the employee given the organization?
 - How many years or months has the employee held the present job?
 - What is the employee's personnel record as a whole, especially his or her disciplinary record?

Documentation of Employee Misconduct

“It’s too complicated.” “I just didn’t take time to do it.” “I have more important things to do.” These are some of the frequent excuses used by managers who have failed to document cases of employee misconduct. The most significant cause of inadequate documentation, however, is that managers have no idea of what constitutes good documentation. Unfortunately, the failure of managers to record employee misconduct accurately can result in the reversal of any subsequent disciplinary action. The maintenance of *accurate* and *complete* work records, therefore, is an essential part of an effective disciplinary system. For documentation to be complete, the following eight items should be included:

1. Date, time, and location of the incident(s)
2. Negative performance or behavior exhibited by the employee—the problem
3. Consequences of that action or behavior on the employee’s overall work performance and/or the operation of the employee’s work unit
4. Prior discussion(s) with the employee about the problem
5. Disciplinary action to be taken and specific improvement expected
6. Consequences if improvement is not made, and a follow-up date
7. The employee’s reaction to the supervisor’s attempt to change behavior
8. The names of witnesses to the incident (if appropriate)

When preparing documentation, it is important for a manager to record the incident immediately after the infraction takes place, when the memory of it is still fresh, and to ensure that the record is complete and accurate. Documentation need not be lengthy, but it must include the eight points in the preceding list. Remember, a manager’s records of employee misconduct are considered business documents, and as such they are admissible as evidence in arbitration hearings, administrative proceedings, and courts of law. As noted by one manager at a seminar on discipline, “When taking corrective action against an employee, the importance of compiling a complete and objective disciplinary record simply cannot be overstated.”

The Investigative Interview

Before any disciplinary action is initiated, an investigative interview should be conducted to make sure employees are fully aware of the offense.⁶³ This interview is necessary because the supervisor’s perceptions of the employee’s behavior may not be entirely accurate.⁶⁴ The interview should concentrate on how the offense violated the performance and behavior standards of the job. It should avoid getting into personalities or areas unrelated to job performance. Most important, the employee must be given a full opportunity to explain his or her side of the issue so that any deficiencies for which the organization may be responsible are revealed.

In the leading case *NLRB v Weingarten, Inc.*, the Supreme Court upheld a National Labor Relations Board ruling in favor of the employee’s right to representation during an investigative interview in a unionized organization.⁶⁵ The Court reasoned that the presence of a union representative would serve the beneficial purpose of balancing the power between labor and management, because the union representative could aid an employee who was “too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors.” In the *Weingarten* case, the Court decided that because the employee had reason to believe that the investigative interview might result in action jeopardizing her job security, she had the right to representation.



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An investigative interview should always be held in private and should elicit the comments and concerns of the employee.



progressive discipline
Application of corrective measures by increasing degrees

It is important to note also that an employee's right to representation in a unionized organization does not extend to all interviews with management. The *Weingarten* case places some carefully defined limits on an employee's representation rights. For example, representation rights apply only to *investigative interviews*, not to run-of-the-mill shop floor discussion, and the rights arise only in incidents when the employee requests representation and *reasonably believes that discipline may result* from the interview. Furthermore, the *Weingarten* decision does not automatically guarantee an employee an investigative interview. The law does permit employers to cancel the interview if a representative is requested, and management may then continue the investigation by other appropriate means.

Within the past twenty-five years the National Labor Relations Board has flip-flopped four times on whether nonunion employees enjoy *Weingarten* rights. Currently, nonunion employees do not have the right to have a co-worker present in an investigatory interview that may lead to disciplinary action.⁶⁶ It is recommended, however, that employers monitor NLRB decisions in this area.

Approaches to Disciplinary Action

If a thorough investigation shows that an employee has violated some organization rule, disciplinary action must be imposed. Two approaches to disciplinary action are progressive discipline and positive discipline.

Progressive Discipline

Generally, discipline is imposed in a progressive manner. By definition, **progressive discipline** is the application of corrective measures by increasing degrees. Progressive discipline is designed to motivate an employee to correct his or her misconduct voluntarily. The technique is aimed at nipping the problem in the bud, using only enough corrective action to remedy the shortcoming. However, the sequence and severity of the disciplinary action vary with the type of offense and the circumstances surrounding it. Because each situation is unique, a number of factors must be considered in determining how severe a disciplinary action should be. Some of the factors to consider were listed in Figure 13.9.

The typical progressive discipline procedure includes four steps. From an oral warning (or counseling) that subsequent unsatisfactory behavior or performance will not be tolerated, the action may progress to a written warning, to a suspension without pay, and ultimately to discharge. The "capital punishment" of discharge is utilized only as a last resort. Organizations normally use lower forms of disciplinary action for less severe performance problems. It is important for managers to remember that three important things occur when progressive discipline is applied properly:

1. Employees always know where they stand regarding offenses.
2. Employees know what improvement is expected of them.
3. Employees understand what will happen next if improvement is not made.

positive, or nonpunitive, discipline

A system of discipline that focuses on early correction of employee misconduct, with the employee taking total responsibility for correcting the problem

Positive Discipline

Some HR professionals believe that progressive discipline has certain flaws, including its intimidating and adversarial nature that prevent it from achieving the intended purpose. For these reasons, organizations such as Saint Alphonsus Regional Medical Center, Ocean Spray, Banner Health, Pennzoil, and Bay Area Rapid Transit are using an approach called **positive, or nonpunitive, discipline**. Positive discipline is based on the concept that employees must assume responsibility for their personal conduct and job performance.⁶⁷

Positive discipline requires a cooperative environment in which the employee and the supervisor engage in joint discussion and problem solving to resolve incidents of employee irresponsibility. The approach focuses on early correction of misconduct, with the employee taking total responsibility for resolving the problem. Nothing is imposed by management; all solutions and affirmations are jointly reached. HR managers often describe positive discipline as “nonpunitive discipline that replaces threats and punishment with encouragement.”

While positive discipline appears similar to progressive discipline, its emphasis is on giving employees reminders rather than reprimands as a way to improve performance. The technique is implemented in three steps. The first is a conference between the employee and the supervisor. The purpose of this meeting is to find a solution to the problem through discussion, with oral agreement by the employee to improve his or her performance. The supervisor refrains from reprimanding the employee or threatening him or her with further disciplinary action. Supervisors may document this conference, but a written record of this meeting is not placed in the employee’s file unless the misconduct occurs again.

If improvement is not made after this first step, the supervisor holds a second conference with the employee to determine why the solution agreed to in the first conference did not work. At this stage, however, a written reminder is given to the employee. This document states the new or repeated solution to the problem, with an affirmation that improvement is the responsibility of the employee and a condition of continued employment.

When both conferences fail to produce the desired results, the third step is to give the employee a one-day *decision-making leave* (a paid leave). The purpose of this paid leave is for the employee to decide whether he or she wishes to continue working for the organization. The organization pays for this leave to demonstrate its desire to retain the person. Also, paying for the leave eliminates the negative effects for the employee of losing a day’s pay. Employees given a decision-making leave are instructed to return the following day with a decision either to make a total commitment to improve performance or to quit the organization. If a commitment is not made, the employee is dismissed with the assumption that he or she lacked responsibility toward the organization. The positive discipline process used by Banner Health is shown in Highlights in HRM 2.

Discharging Employees

When employees fail to conform to organizational rules and regulations, the final disciplinary action in many cases is discharge. Because discharge has such serious consequences for the employee—and possibly for the organization—it should be undertaken only after a deliberate and thoughtful review of the case. If an employee is fired, he or she may file a wrongful discharge suit claiming the termination was “without just or sufficient cause,” implying a lack of fair treatment by management.

Highlights in HRM 2

The Banner Health System Performance Recognition Policy

Recognition

Recognition is the foundation of the Performance Recognition process. It is based on the belief that you have control over your own behavior and are accountable for your actions. Your desire to exhibit the behaviors that are expected of Banner Health employees can be directly affected by the feedback you receive. Sincerely expressed appreciation affirms that you are making a difference and adding value to the organization. Recognition can also indicate to you when performance enhancement or improvement needs to occur. When you experience this recognition, your efforts can increase, as well as your satisfaction with your workplace.

Coaching

Each of us has been involved in coaching at some time. When we coach each other, within or outside of our own department, we provide feedback, guidance, and training. Our goal is always to help someone be successful.

Coaching may be formal or informal, based upon the seriousness of the performance problem. Formal coaching is a structured process requiring you to develop a mutually agreed-upon plan of action for improvement.

Supervisors generally coach for one of two reasons:

- Performance Enhancement: these discussions help us by clarifying expectations, providing feedback, identifying opportunities for development in reaching our goals, and recognizing our accomplishments. The supervisor may document these discussions as a reminder to a follow-up, or as a means of tracking progress in meeting our goals.
- Performance Improvement: these discussions occur if there is a recognized need for improvement in performance. Coaching objectives include clarification of expectations, identification of the cause for current performance not meeting those expectations, development of effective solutions, and commitment to correct the problem.

Formal Discipline

If performance does not improve after coaching, or a single incident occurs which warrants a more serious response, the supervisor may apply the Formal Discipline levels of Performance Recognition. *This Formal Discipline process does not apply to employees in their Conditional Period or to those in a Supplemental position.* At each step in the Formal Discipline process, a sincere effort will be made to encourage you to take responsibility for your problem and commit to making a change. Recognition and coaching may occur between the levels of the Formal Discipline process to provide you feedback on your progress, and to identify concerns.

Levels of Formal Discipline

1. Initial Reminder

The Initial Reminder requires a formal discussion between the supervisor and the employee. This is the first level of Formal Discipline, and should be used when a performance problem has not been corrected through coaching. It may also be used if the seriousness of the problem warrants beginning at the Initial Reminder level without previous coaching.

(continued on next page)

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2. Advanced Reminder

The Advanced Reminder is the second level of the Formal Discipline process, and should be used if continued or additional performance problems have occurred following the Initial Reminder. The Advanced Reminder level of Formal Discipline may also be used if the seriousness of the problem warrants a more advanced level of Formal Discipline.

A memo summarizing the discussion and reinforcing the need for improvement will be written and discussed with you. Your supervisor will follow up to ensure the problem has been corrected and to recognize performance improvement.

3. Decision-Making Leave (DML)

The DML is the last formal level in the Performance Recognition process. This step is taken as a result of a sustained or serious performance problem. Following a discussion of the problem and your failure to live up to the agreement for correcting the problem, you will be given a day of leave with pay (*not* from your PTO hours) to seriously consider your intentions of making a total commitment to improve your performance.

Upon return from the DML, if your decision is to make an immediate and sustained improvement in your overall work performance, you will report this to your supervisor. You and your supervisor will develop an action plan. If you decide not to meet performance expectations, you may return to work under directed compliance or you may resign. You will be given a memo summarizing the DML discussion and your decision.

Deactivation

If you maintain an overall satisfactory work record after a formal level of discipline, your immediate supervisor will acknowledge improvement. If you have not received any additional Formal Discipline, the previous Formal Discipline will no longer be active after the following time periods: Initial Reminder, 6 months; Advanced Reminder, 12 months; Decision-Making Leave, 12 months.

Crisis Suspension

Certain types of incidents warrant removing you immediately from the workplace. These incidents would require the supervisor to address the problem immediately; for an example, a safety or security issue, or any offense when a DML or termination may be the appropriate level of response for the first occurrence. If termination is likely, you will be removed from the work schedule until the completion of the investigation. Crisis suspension requires consultation with Human Resources/Employee Relations.

Termination

Termination may occur when:

- Following the DML, you do not immediately improve and maintain an overall satisfactory work record, or
- You commit an offense so serious that progressing through the Formal Discipline levels of Performance Recognition is not warranted.

Termination is not a formal step in the Performance Recognition process, but is the result of your refusal or inability to meet the performance expectations.

Source: Adapted from Banner Health Performance Recognition Policy. Used with Permission of Banner Health, Phoenix, AZ.

Figure 13.10

“Just Cause” Discharge Guidelines

1. Did the organization forewarn the employee of the possible disciplinary consequences of his or her action?
2. Were management’s requirements of the employee reasonable in relation to the orderly, efficient, and safe operation of the organization’s business?
3. Did management, before discharging the employee, make a reasonable effort to establish that the employee’s performance was unsatisfactory?
4. Was the organization’s investigation conducted in a fair and objective manner?
5. Did the investigation produce sufficient evidence of proof of guilt as charged?
6. Has management treated this employee under its rules, orders, and penalties as it has other employees in similar circumstances?
7. Did the discharge fit the misconduct, considering the seriousness of the proven offense, the employee’s service record, and any mitigating circumstances?

If an employee termination is to be upheld for good cause, what constitutes fair employee treatment? This question is not easily answered, but standards governing just cause discharge do exist, in the form of rules developed in the field of labor arbitration.⁶⁸ These rules consist of a set of guidelines that are applied by arbitrators to dismissal cases to determine if management had just cause for the termination. These guidelines are normally set forth in the form of questions, provided in Figure 13.10. For example, before discharging an employee, did the manager forewarn the person of possible disciplinary action? A no answer to any of the seven questions in the figure generally means that just cause was not established and that management’s decision to terminate was arbitrary, capricious, or discriminatory. The significance of these guidelines is that they are being applied not only by arbitrators in discharge cases, but also by judges in wrongful discharge suits, and by the EEOC in discrimination violations such as sexual harassment.⁶⁹ It is critical that managers at all levels understand the just cause guidelines, including their proper application.

Informing the Employee

Regardless of the reasons for a discharge, it should be done with personal consideration for the employee affected. Every effort should be made to ease the trauma a discharge creates.⁷⁰ The employee must be informed honestly, yet tactfully, of the exact reasons for the action. Such candor can help the employee face the problem and adjust to it in a constructive manner.

Managers may wish to discuss, and even rehearse, with their peers the upcoming termination meeting. This practice can ensure that all important points are covered while giving confidence to the manager. While managers agree that there is no single right way to conduct the discharge meeting, the following guidelines will help make the discussion more effective:

1. Come to the point within the first two or three minutes, and list in a logical order all reasons for the termination.
2. Be straightforward and firm, yet tactful, and remain resolute in your decision.
3. Make the discussion private, businesslike, and fairly brief.
4. Don't mix the good with the bad. Trying to sugarcoat the problem sends a mixed message to the employee.
5. Avoid making accusations against the employee and injecting personal feelings into the discussion.
6. Avoid bringing up any personality differences between you and the employee.
7. Provide any information concerning severance pay and the status of benefits and coverage.
8. Explain how you will handle employment inquiries from future employers.⁷¹

Termination meetings should be held in a neutral location, such as a conference room, to prevent the employee from feeling unfairly treated. When discussing the termination, management must never provoke the employee or allow the employee to become belligerent toward management. Should the employee become agitated, or show signs of hostility, the meeting should be stopped immediately with notification given to security or the HR department.

Finally, when terminated employees are escorted off the premises, the removal must not serve to defame the employee. Managers should not give peers the impression that the terminated employee was dishonest or untrustworthy. Furthermore, managers are advised never to discuss the discharge or “bad-mouth” the terminated employee with other employees, customers, or other individuals. Managers should be very tight-lipped in this area.⁷² Increasingly, terminated employees are pursuing lawsuits that go beyond the issue of whether their discharge was for business-related reasons.

Due Process

Management has traditionally possessed the right to direct employees and to take corrective action when needed. Nevertheless, when employees are alleged to have violated organizational rules, many individuals also believe that employees should not be disciplined without the protection of due process. HR managers normally define **due process** as the employee's right to be heard—the right of the employee to tell his or her side of the story regarding the alleged infraction of organizational rules. Due process serves to ensure that a full and fair investigation of employee misconduct occurs. Normally, due process is provided employees through the employer's appeals procedure. However, proactive employers will additionally incorporate the following principles—or rights—in their interpretation of due process:

1. The right to know job expectations and the consequences of not fulfilling those expectations.
2. The right to consistent and predictable management action for the violation of rules.
3. The right to fair discipline based on facts, the right to question those facts, and the right to present a defense.
4. The right to progressive discipline.
5. The right to appeal disciplinary action.

due process

An employee's right to present his or her position during a disciplinary action



alternative dispute resolution (ADR)

A term applied to different types of employee complaint or dispute resolution procedures

Alternative Dispute Resolution Procedures

In unionized workplaces, grievance procedures are stated in virtually all labor agreements. In nonunion organizations, however, **alternative dispute resolution (ADR)** procedures are a developing method to address employee complaints.⁷³ The employer's interest stems from the desire to meet employees' expectations for fair treatment in the workplace while guaranteeing them due process—in the hope of minimizing discrimination claims or wrongful discharge suits.⁷⁴ ADR procedures received a boost from the U.S. Supreme Court when, in *Gilmer v Interstate/Johnson Lane Corp.*, the Court enforced a private agreement that required the arbitration of an age-discrimination claim.⁷⁵ The mandatory use of arbitration to resolve employment disputes received additional support when the U.S. Supreme Court held in *Circuit City Stores, Inc. v Adams*⁷⁶ that employers may require employees to bring their work-related disputes before an arbitrator rather than file a lawsuit. This major decision allows employers to establish arbitration programs as a means for employees to resolve employment complaints—replacing court action as an option.⁷⁷ Additionally, Section 118 of the Civil Rights act of 1991 encourages the use of ADR procedures, including arbitration.

While the right to adopt arbitration agreements is supported by court decisions, arbitration agreements—to be enforceable—must be fair and equitable to both employees and employers.⁷⁸ Employers cannot “stack the deck” against employees by imposing rules on employees that clearly favor the employer. As one legal expert has noted, “As much as possible, the agreement should provide employees with the same rights and remedies that they would have enjoyed had their day in court been available to them.”⁷⁹

USING THE INTERNET

Current federal and state laws and leading court decisions regarding alternative dispute resolution procedures can be found on the American Arbitration Association web site. Go to the Student Resources at:

<http://bohlander.swlearning.com>

step-review system

A system for reviewing employee complaints and disputes by successively higher levels of management

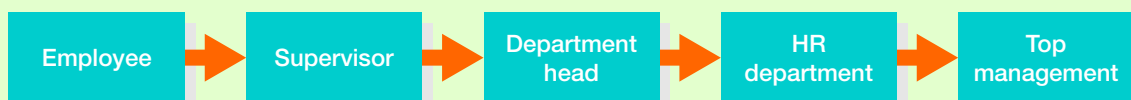
Step-Review Systems

As Figure 13.11 illustrates, a **step-review system** is based on a pre-established set of steps—normally four—for the review of an employee complaint by successively higher levels of management. These procedures are patterned after the union grievance systems we will discuss in Chapter 14. For example, they normally require that the employee's complaint be formalized as a written statement. Managers at each step are required to provide a full response to the complaint within a specified time period, perhaps three to five working days.

An employee is sometimes allowed to bypass the meeting with his or her immediate supervisor if the employee fears reprisal from this person. Unlike appeal systems in unionized organizations, however, nonunion appeal procedures ordinarily do not provide for a neutral third party—such as an arbitrator—to serve as the judge

Figure 13.11

Conventional Step-Review Appeal Procedure



of last resort. In most step-review systems, the president, chief executive officer, vice president, or HR director acts as the final authority, and this person's decision is not appealable. Some organizations give employees assistance in preparing their complaint cases. For example, an employee who desires it may be able to get advice and counsel from a designated person in the HR department before discussing the issue with management.

Unfortunately, step-review systems may not yield their intended benefits. Employees may believe that management is slow in responding to complaints and that management's response often does not solve the problem. Furthermore, employees may believe that, regardless of policies forbidding reprisal, supervisors would still hold it against them if they exercised their rights as spelled out in the step-review system. These concerns should not lead to the conclusion that all step-review systems are ineffective, but rather that management must take special precautions to ensure that the systems work and provide the benefits intended.

Peer-Review Systems

peer-review system

A system for reviewing employee complaints that utilizes a group composed of equal numbers of employee representatives and management appointees, which functions as a jury because its members weigh evidence, consider arguments, and, after deliberation, vote independently to render a final decision

A **peer-review system**, also called a complaint committee, is composed of equal numbers of employee representatives and management appointees. Employee representatives are normally elected by secret ballot by their co-workers for a rotating term, whereas management representatives are assigned, also on a rotating basis. A peer-review system functions as a jury because its members weigh evidence, consider arguments, and, after deliberation, vote independently to render a final decision.

Organizations such as Turner Brothers Trucking, Northrop-Grumman, Polaroid, and Citicorp consider one of the benefits of the peer-review system to be the sense of justice that it creates among employees. The peer-review system can be used as the sole method for resolving employee complaints, or it can be used in conjunction with a step-review system. For example, if an employee is not satisfied with management's action at step 1 or 2 in the step-review system, the employee can submit the complaint to the peer-review committee for final resolution.

Open-Door Policy

open-door policy

A policy of settling grievances that identifies various levels of management above the immediate supervisor for employee contact

The open-door policy is an old standby for settling employee complaints. The traditional **open-door policy** identifies various levels of management above the immediate supervisor that an aggrieved employee may contact; the levels may extend as high as a vice president, president, or chief executive officer. Typically the person who acts as "the court of last resort" is the HR director or a senior staff official.

The problems with an open-door policy are well documented. Two of its major weaknesses are the unwillingness of managers to listen honestly to employee complaints and worker reluctance to approach managers with their complaints. As an employee once told the authors of this text, "My manager has an open-door policy but the door is only open one inch." Obviously this employee felt he had little opportunity to get through to his manager. Other problems are attributed to this system as well. The open-door policy generally fails to guarantee consistent decision making because what is fair to one manager may seem unfair to another. Higher-level managers tend to support supervisors for fear of undermining authority. And, as a system of justice, open-door policies may lack credibility with employees. Still, the open-door policy is often successful when it is supported by all levels of management and when management works to maintain a reputation for being fair and open-minded.

ombudsman

A designated individual from whom employees may seek counsel for resolution of their complaints

Ombudsman System

Rockwell, Johnson & Johnson, Herman Miller, Eastman Kodak, and Pace University are just a few organizations who employ ombudsmen. An **ombudsman** is a designated individual from whom employees may seek counsel for the resolution of their complaints. The ombudsman listens to an employee's complaint and attempts to resolve it by seeking an equitable solution between the employee and the supervisor. This individual works cooperatively with both sides to reach a settlement, often employing a problem-solving approach to the issue. Gordon Halfacre, ombudsman for faculty and graduate students at Clemson University, notes, "The ombuds is an advocate for a fair process, not an advocate on behalf of individuals or the institution."⁸⁰ Because the ombudsman has no authority to finalize a solution to the problem, compromises are highly possible and all concerned tend to feel satisfied with the outcome.

To function successfully, ombudsmen must be able to operate in an atmosphere of confidentiality that does not threaten the security of the managers or subordinates who are involved in a complaint. For example, complaints of sexual harassment, abuse of power, or issues that deal with circumstances that violate the law or unethical behavior (whistle-blowing) require high degrees of confidentiality to protect those involved. While ombudsmen do not have the power to decide employee complaints, it is recommended that they have access to high levels of management to ensure that employee complaints receive fair treatment.

mediation

The use of an impartial neutral to reach a compromise decision in employment disputes

Mediation

Along with arbitration, mediation is fast becoming a popular way to resolve employee complaints. **Mediation** employs a third-party neutral (called a mediator) to help employees and managers reach voluntary agreement acceptable to both parties. The essence of mediation is compromise. The **mediator** holds a meeting with the employee and management, listens to the position of each side, gathers facts, then, through discussion, suggestions, and persuasion obtains an agreement that will satisfy the needs and requirements of both sides. A mediator serves primarily as a fact finder and to open up a channel of communication between the parties. Unlike arbitrators, mediators have no power or authority to force either side toward an agreement. They must use their communication skills and the power of persuasion to help the parties resolve their differences. A cornerstone of mediation is that the parties maintain control over the settlement outcome.

mediator

A third party in an employment dispute who meets with one party and then the other in order to suggest compromise solutions or to recommend concessions from each side that will lead to an agreement

Mediation is a flexible process that can be shaped to meet the demands of the parties. Also, it can be used to resolve a wide range of employee complaints, including discrimination claims or traditional workplace disputes.⁸¹ Employees like the process because of its informality. According to one authority, "Mediation might be described as a private discussion assisted by an impartial third party."⁸² Settlements fashioned through mediation are readily acceptable by the parties, thus promoting a favorable working relationship.

Arbitration

Prompted by the *Gilmer* and *Circuit City* decisions, private employers may require that employees submit their employment disputes for a binding resolution through arbitration.⁸³ (Arbitration is fully explained in Chapter 14.) Arbitration is used primarily to resolve discrimination suits in areas of age, gender, sexual harassment, and

race. Other workplace issues such as promotions, compensation, discipline, and application of company policies may be arbitrated if allowed in the employer's arbitration program. Employers cite savings in litigation costs and avoidance of time delays and unfavorable publicity as advantages for using arbitration.

While arbitration agreements normally mandate that employees arbitrate their discrimination claims and may prevent employees from suing their employer in court, they cannot prohibit employees from filing discrimination charges with the EEOC and pursuing other statutory rights with government agencies. In *EEOC v Waffle House Inc.*,⁸⁴ the U.S. Supreme Court ruled that employees can file discrimination suits with the EEOC even when the employer has a mandatory arbitration agreement and it is signed by the employee.⁸⁵ Writing for the Court, Justice John Paul Stevens noted, "The EEOC has the authority to pursue victim-specific relief regardless of the forum that the employer and the employee have chosen to resolve their dispute."⁸⁶

Managerial Ethics in Employee Relations



ethics

A set of standards of conduct and moral judgments that help to determine right and wrong behavior

Throughout this textbook we have emphasized the legal requirements of HRM. Laws, agency rulings, and court decisions impact all aspects of the employment process—recruitment, selection, performance appraisal, safety and health, labor relations, and testing. Managers must comply with governmental regulations to promote an environment free from litigation.

However, beyond what is required by the law is the question of organizational ethics and the ethical—or unethical—behavior engaged in by managers. **Ethics** can be defined as a set of standards of acceptable conduct and moral judgment. Ethics provides cultural guidelines—organizational or societal—that help us decide between proper or improper conduct. Therefore, ethics, like the legal aspects of HR, permeates all aspects of the employment relationship. For example, managers may adhere to the organization's objective of hiring more protected-class members, but how those employees are supervised and treated once employed gets to the issue of managerial ethics.

Compliance with laws and the behavioral treatment of employees are two completely different aspects of the manager's job. While ethical dilemmas will always occur in the supervision of employees, it is how employees are treated that largely distinguishes the ethical organization from the unethical one. Interestingly, a recent research study, *Employee Trust and Organizational Loyalty*, sponsored by the Society for Human Resource Management, showed that employee perceptions of ethical behavior by their organizational leadership may be the most important driver of employee trust and loyalty. According to the study, of critical interest to employees is the consistent and credible communication of information about the organization's ethical standards and its values, the organization's mission, and its workplace policies.⁸⁷ We believe that managerial ethics in employee relations requires honesty in all dealings between employees and their managers, including mutual respect throughout the performance of workplace duties.

Many organizations have their own code of ethics that governs relations with employees and the public at large.⁸⁸ This written code focuses attention on ethical

values and provides a basis for the organization, and individual managers, to evaluate their plans and actions. HR departments have been given a greater role in communicating the organization's values and standards, monitoring compliance with its code of ethics, and enforcing the standards throughout the organization. Organizations now have ethics committees and ethics ombudsmen to provide training in ethics to employees. The ultimate goal of ethics training is to avoid unethical behavior and adverse publicity; to gain a strategic advantage; and most of all, to treat employees in a fair and equitable manner, recognizing them as productive members of the organization.

SUMMARY



Employees may claim that they have legal rights guaranteeing them fair and equitable treatment while on the job. Employee rights issues frequently involve employer searches, drug testing, and monitoring of an employee's personal conversations. Employers, however, have the responsibility to provide a safe and secure workplace free from harmful employee acts. When the perceived rights of employees differ from the reasonable responsibilities of management, conflict can result.



Both employees and employers have rights and expectations in the employment relationship. The employment-at-will doctrine regards the rights of employees and employers to terminate the employment relationship; the implied-contract concept is an exception to the employment-at-will doctrine. Under this concept, an employer's oral or written statements may form a contractual obligation that can preclude automatic termination of employees. Constructive discharge occurs when an employee voluntarily terminates employment but subsequently alleges that he or she was forced to quit because of intolerable working conditions imposed by the employer. Employees may claim they are retaliated against when employers punish them for exercising their rights under law or for receiving favorable EEOC or court awards.



Once employed, employees expect certain privacy rights regarding freedom from unwarranted intrusion into their personal affairs. These rights extend over such issues as substance abuse and drug testing; searches and monitoring; off-duty privacy rights; e-mail, Internet, and voice mail privacy; and genetic testing.



The HR department, in combination with other managers, should establish disciplinary policies. This will help achieve both acceptance of the policy and its consistent application. To reduce the need for discipline, organizational rules and procedures should be widely known, reviewed on a regular basis, and written and explained to employees. The rules must relate to the safe and efficient operation of the organization. When managers overlook the enforcement of rules, they must re-emphasize the rule and its enforcement before disciplining an employee.



The term *discipline* has three meanings—punishment, orderly behavior, and training of employee conduct. When used with employees, discipline should serve to correct undesirable employee behavior, creating within the employee a desire for self-control. This third definition of discipline can be achieved only when managers conduct a complete and unbiased investigation of employee misconduct.

Investigation of employee misconduct begins with proper documentation of wrongdoing. When managers are investigating employee problems they need to know specifically the infraction of the employee, whether the employee knew of the rule violated, and any extenuating circumstances that might justify the employee's conduct. When employees are to receive discipline, the rule must be uniformly enforced and the past work record of the employee must be considered.

6 The two approaches to discipline are progressive discipline and positive discipline. Progressive discipline follows a series of steps based on increasing the degrees of corrective action. The corrective action applied should match the severity of the employee misconduct. Positive discipline, based on reminders, is a cooperative discipline approach in which employees accept responsibility for

the desired employee improvement. The focus is on coping with the unsatisfactory performance and dissatisfactions of employees before the problems become major.

7 Alternative dispute resolution procedures present ways by which employees exercise their due process rights. The most common forms of ADRs are step-review systems, peer-review systems, the open-door system, the ombudsman system, mediation, and arbitration.

8 Ethics in HRM extends beyond the legal requirements of managing employees. Managers engage in ethical behavior when employees are treated in an objective and fair way and when an employee's personal and work-related rights are respected and valued.

KEY TERMS

alternative dispute resolution (ADR)
constructive discharge
discipline
due process
employee rights
employment-at-will principle

ethics
hot-stove rule
mediation
mediator
negligence
ombudsman
open-door policy

peer-review system
positive, or nonpunitive, discipline
progressive discipline
psychological contract
step-review system
whistle-blowing

DISCUSSION QUESTIONS

- 1** 1. Explain three areas in which employee rights and employer responsibilities could result in conflict. How might this conflict arise?
- 2** 2. Define the employment-at-will doctrine. What are the three major court exceptions to the doctrine?
- 3** 3. What are the legislative and court restrictions on employer drug testing in both the private and the public sector?

- 4** 4. If you were asked to develop a policy on discipline, what topics would you cover in the policy?
- 5** 5. What should be the purpose of an investigative interview, and what approach should be taken in conducting it?
- 5** 6. Discuss why documentation is so important to the disciplinary process. What constitutes correct documentation?



7. Describe progressive and positive discipline, noting the differences between these two approaches.



8. What do you think would constitute an effective alternative dispute resolution system? What benefits would you expect from such a system? If you were asked to rule on

a discharge case, what facts would you analyze in deciding whether to uphold or reverse the employer's action?



9. Working by yourself, or in a team, identify ethical dilemmas that could arise in the HR areas of selection, performance appraisal, safety and health, privacy rights, and compensation.

BIZFLIX EXERCISES

In Good Company: Firing an Employee

This scene from the film *In Good Company* shows Mark Steckle's (Clark Greg) efforts to fire Dan Foreman (Dennis Quaid) and Carter Duryea (Topher Grace). Carefully assess Mark's behavior against the discussion of employee rights and discipline in this chapter.

A corporate takeover brings star advertising executive Dan Foreman a new boss who is half his age. Carter Duryea—Dan's new boss—wants to prove his worth as the new marketing chief at *Sports America*, Waterman Publishing's flagship magazine. Carter applies his unique approaches while dating Dan's daughter, Alex (Scarlett Johansson).

This scene comes from the “teddy k. is coming” sequence near the film's end. It starts with Mark Steckle saying to Dan Foreman, “Look, we've been carrying your fat, bloated salary for way too long.” This scene follows Teddy K.'s (Malcolm McDowell) synergy speech to the assembled employees of his recent acquisition,

Waterman Publishing. The film continues with Carter and Dan carrying out their plan to get some new magazine advertising.

What to Watch for and Ask Yourself

- This chapter opened with the observation that managers and supervisors find it hard to discipline employees. Does this observation apply to Mark Steckle? Why or why not?
- Does Mark follow the suggestions shown in Figure 13.2 in trying to end the employment of Dan and Carter?
- The earlier section “Disciplinary Policies and Procedures” offered guidelines and observations on correct approaches to employee discipline. Does Mark follow any of those procedures? If not, which aspects of his behavior deviate from the procedures described earlier?

HRM Experience

Learning about Employee Rights

In the constantly changing field of human resources it is imperative that both HR managers and supervisors be aware of changes that affect the organization and the process of managing employees. Nowhere is this more true than in the growing field of employee rights. As employees demand more job and employment rights regarding drug testing, monitoring, unjust dismissals, off-duty conduct, and genetic testing, employers must be knowledgeable about new laws, court rulings, and the policies of other organizations that influence each area. This knowledge will enable managers to respond to these employee concerns in a positive and proactive manner. Failure to provide employees their rights could lead to costly and embarrassing lawsuits, resulting in diminished employee loyalty or morale. The purpose of this exercise, therefore, is to enable you to familiarize yourself with issues of employee rights.

Assignment

Working individually or in teams, for each of the following employee rights topics, identify and discuss the privacy concerns for both employees and employers. You may wish to review articles in HR journals such as *Labor Law Journal*, *HRMagazine*, *Workforce*, and *Employee Relations Law Journal* as you complete this assignment. Answer the questions pertaining to each topic.

- Employment-at-will and wrongful discharge suits
 - Substance abuse and drug testing
 - Searches and monitoring
 - Employee conduct away from the workplace
 - Genetic testing
 - E-mail, Internet
1. What is the issue concerned with?
 2. Why is this issue of current interest to employees and managers?
 3. What rights are employees demanding?
 4. What, if any, laws or court cases affect this right?
 5. Generally, how are employers responding to this employee right?

case study**1****Discharged
for Off-Duty
Behavior**

The following case illustrates the off-duty privacy claim of an employee and management's right to uphold the reputation of the company.

Before his termination on Monday, May 6, 2004, John Hilliard worked as a senior sales representative for Advanced Educational Materials (AEM), a provider of high-quality educational books and supplies to junior and senior high schools. During his twelve years of employment, John was recognized as an outstanding employee with close working relationships with the schools he served. His sales record was excellent. John's discharge resulted from what AEM claimed was a serious breach of its code of conduct for employees.

On Saturday, May 4, 2004, due to a chance meeting between John and his manager, Jean Ellison, John was observed leaving an adult video store carrying what his manager described as pornographic magazines and an X-rated video. The following Monday, Jean discussed the incident with AEM's vice-president for sales and a representative from HR. All agreed that John's off-duty behavior constituted a serious violation of the company's code of conduct for employees, which read, in part, "Employee off-duty behavior in no way should reflect unfavorably upon the company, its employees, or sales of any educational materials." AEM has traditionally held its sales representatives to high moral standards because the company sells extensively to public school administrators and teachers.

At his discharge meeting John vigorously opposed his firing. While he acknowledged making the purchases, he argued strongly that what he did on his personal time was "no business of the company's" and his behavior in no way reflected unfavorably upon AEM or the sales of its products. Besides, he said, "The purchases were made as jokes for a stag party."

Source: This case is based on an actual termination for off-duty misconduct. All names are fictitious.

QUESTIONS

1. Given the facts of this case, should John have been discharged? Explain.
2. Should the sales representatives of AEM be held to a higher standard of personal conduct than sales representatives for other types of organizations? Explain.
3. Should management have considered John's past work record before deciding on discharge? Explain.

case study **2****You Can't Fire Me! Check Your Policy**

Supervisors report that discharging an employee is one of the toughest tasks they perform as managers. Furthermore, termination for absenteeism can be particularly difficult due to the causes of absenteeism, and, in some cases, the past work record of the employee. This case illustrates a typical absentee problem faced by management.

Mary Schwartz was employed by Beach Electrical Systems for nine years. For the first six years of her employment she was considered a model employee. Mary's annual performance reviews were always above average or exceptional and she was described by her managers as a loyal and dedicated employee. However, things changed rapidly in 2000 when Mary became, as her current manager stated, "an absentee problem."

According to HR department records, in 2001 and 2002 Mary was absent 12 percent and 19 percent of the time, respectively. Her worst year was 2003, when she was absent 27.2 percent of the time. However, unlike other absent employees, Mary was always absent because of genuine and verifiable illnesses or work-related accidents. Mary's supervisor had talked to her periodically about her attendance problem, but she was never given an official warning notice—oral or written—that she would be fired if her attendance record did not improve.

The incident that caused her termination occurred on Thursday, May 20, 2004. On that day her manager notified all department employees (eight in total) that they would need to work overtime on Saturday, May 22, 2004, to complete a critical order for a highly valued and important customer. All employees agreed to work Saturday, except Mary, who cited "personal reasons," which she refused to disclose, for her refusal to work.

On Monday, May 24, 2004, her supervisor, with concurrence from the department manager, terminated her employment for "unsatisfactory attendance." Mary did not dispute the attendance record; however, she filed a grievance through the company's alternative dispute resolution procedure alleging that management did not discharge her according to the organization's published disciplinary policy. She pointed to the section in the policy manual that states, "Employees will be warned for absenteeism before they are terminated." Mary maintained that she was never officially warned as required. Management replied that Mary was well aware of her absentee problem but that warning her would have served no purpose as she was unable to prevent her continued illnesses from occurring. Additionally, her refusal to work overtime on Saturday was a further indication of her lack of concern for her job or the welfare of her company.

Source: Based on an arbitration case heard by George W. Bohlander. Names have been changed.

QUESTIONS

1. What role, if any, should Mary's past work record play in this case? Explain.
2. Does management have a right to know why employees refuse to work overtime? Explain.
3. Evaluate the arguments of Mary Schwartz and management in this case.
4. If you were a member of the company's peer-review complaint committee, how would you vote in this case? What facts would cause you to vote this way?

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