
Basic Principles of Just Cause

By Robert M. Schwartz, retired union attorney and author

The elements of just cause have evolved from published and unpublished labor arbitration decisions. Over many years, a consensus has been reached on the following basic principles.

1. Fair notice

An employee may not be punished for violating a rule or standard whose nature and penalties have not been made known.

Fundamental fairness prohibits an employer from punishing an employee for violating a rule or policy of which the employee is unaware. Employers must publicize standards in handbooks, on bulletin boards, through the internet, or by direct announcement. They must also identify possible penalties, especially suspensions and discharges.

2. Active enforcement

Punishment may not be imposed for alleged misconduct that the employer has tolerated for a prolonged period.

When management fails to take action against known infractions for several months or longer, employees are encouraged to believe that a rule or policy is not in effect. This is called *lax enforcement*. In these circumstances, imposing discipline is equivalent to applying a rule about which the employee is unaware.

3. Due process

An employer must conduct an interview or hearing before making a decision to issue discipline, must take action promptly, and must list charges precisely. Once assessed, discipline may not be increased.

Due process, a legal term for procedural fairness, is implicit in the just cause standard. In particular, a worker must be allowed to tell his or her side of the story before the employer makes a decision to impose discipline.

4. Substantial proof

Charges must be proven by substantial and credible evidence.

Because livelihoods are at stake, disciplinary decisions must be based on reliable evidence, not rumors, suspicion, or speculation. Hearsay alone (an account of an incident by a person who does not appear at a hearing) does not support a severe penalty.

5. Equal treatment

Unless justified by a valid distinction, an employer may not assess a considerably stronger punishment against one employee than it assessed against another known to have committed the same offense.

Favoritism and discrimination are incompatible with just cause. Employers must treat employees who commit the same or similar offenses essentially alike.

6. Progressive discipline

When penalizing misconduct that is short of egregious, the employer must issue one or more levels of discipline that allow the employee an opportunity to improve.

Workplace penalties are supposed to correct misconduct, not punish or humiliate. When a likelihood exists that an offender can improve, the employer should apply the lowest level of punishment that is likely to achieve the desired result.

7. Mitigating, extenuating, and aggravating circumstances

Discipline must be proportional to the gravity of the offense, taking into account mitigating, extenuating, and aggravating circumstances.

In evaluating the seriousness of an infraction, the employer should consider whether the employee's actions were intentional or an honest mistake, whether they caused damage, and whether they were isolated or part of a pattern. The employer must also consider any circumstances that bear on the likelihood that the grievant will repeat the offense. These often include the employee's past record, seniority, and attitude.

Representing Members at Investigatory Interviews

Under the *Weingarten* labor law doctrine, a union member has a right to ask for representation when questioned about a matter that could lead to disciplinary action. As a steward or other representative, you have the following rights:

- * On arrival, you may ask the employer for a description of the matter being investigated. The employer must comply. If your request is ignored or denied, you may instruct the employee not to answer questions.
- * After learning the reason for the interview, you may ask for a private meeting or Acaucus with the employee. You must be allowed sufficient time and privacy to learn what happened and to give advice.
- * When the interview resumes, you may object to confusing or harassing questions.
- * At the end of the interview, you may bring up mitigating and extenuating circumstances as well as any other facts that support the employee. These may include poor training, faulty supervision, or the fact that similar conduct by other employees was not punished.

TIPS

- * Do not enter the interview room before the employee arrives. Do not sit near management. Make clear that you are on the employee's side.
- * Advise the employee to stay calm and answer questions in a truthful manner.
- * If the employer instructs the employee to provide a written account, help the worker to prepare it. Save a copy.

* In some circumstances, a worker's best course is to admit guilt, take responsibility for what happened, and promise that the conduct will not be repeated.

* Take detailed notes.

Sample Grievance Information Request

To: Joyce Miller, Human Relations Manager
From: Frank Sawyer, chief steward
Re: Discharge of Pat Jones (Rule 9: Unsafe Conduct)

Date: January 15, 2020

Dear Ms. Miller:

Regarding the above matter, the union requests that the employer furnish the following documents and other information:

1. **A copy of the personnel file** of Pat Jones.
2. **Copies of all company rules and policies** relating to unsafe conduct.
3. A **copy of any receipt** signed by Mr. Jones for rules relating to unsafe conduct.
4. **Copies of any guidance**, instructions, or memoranda issued to supervisors on how to enforce Rule 9, including email correspondence.
5. **A list of all facts** and circumstances considered in making the decision to terminate Mr. Jones.
6. **Copies of all documents**, incident reports, letters, photographs or other items considered in making the decision to terminate Mr. Jones, including email correspondence.
7. **The names of all witnesses** to the incident involving Mr. Jones and copies of any written, audio, or video statements from such persons.
8. **The names of each person interviewed** by the company, along with any interview notes, audio, or video recordings.
9. **A copy of the report** prepared by _____ concerning the incident.
10. **The personnel files** of the following employees: _____, _____, _____.
11. **The names of any other employees disciplined for violating Rule 9** over the previous five years, including employees who are no longer working for the company.

12. In regard to each employee listed in response to Request #11, please provide:

- A. A copy of the **original notice of discipline** issued to the employee
- B. A statement as to whether the original penalty was modified, and if so, the **final penalty** imposed
- C. A copy of any **grievance settlement** related to the infraction
- D. A copy of the **employee's personnel file**.

13. **The names of any non-bargaining unit employees**, including supervisors, who committed similar infractions as Mr. Jones over the past five years, the dates and descriptions of each occurrence, and any penalties issued for said violations.

Please provide the requested information within the next two weeks. If this case goes to arbitration, the union will oppose any attempt to introduce non-disclosed information.

Refusing Unsafe Work Instructions

Ordinarily, employees are expected to “obey now and grieve later,” when given an order or instruction they regard as improper. Nonetheless, arbitrators have disallowed discipline for refusing unsafe work under the following circumstances:

1. The employee reasonably believed that the order will place him, her, or others at substantial risk of bodily injury; and
2. The order was beyond the normal hazards of the employee's job.

Reasonable belief. The employee's apprehension must be based on past occurrences or known facts, not on speculation or rumor. Assurances from management that the job is safe and the availability of protective equipment must be taken into account.

A worker who declines to perform a job must do more than simply assert: I am exercising my safety rights. The worker needs to identify hazards and facts that suggest danger. The worker must also express a willingness to do the work if the job is made safe.

Examples. Arbitrators have recognized the safety exception in the following circumstances:

- * Severe thunderstorms and lightning on construction site
- * Poorly ventilated dust concentrations
- * Excessive lifting by worker with back condition
- * Dangerously high noise levels
- * Work requiring more than one person
- * Excessive risk to members of the public.

Note: An employee may not refuse an assignment that is part of his or her usual duties or that poses a risk that is common on the job. For instance, a construction worker may not refuse to work because of heights.