DISCIPLINE TOOLBOX:
A Guide to Productive Discipline

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THIS IS NOT DISCIPLINE!
WHAT IS “DISCIPLINE”?

- **#1 Goal**
  - Employee performance that meets expectations
  - Call attention to performance that falls short and provide a path to success
  - Punishment is not the goal or the purpose – avoid negative reinforcement

- **Forms of Discipline**
  - Verbal Warning (nothing is ever REALLY verbal)
  - Written Warnings
  - Suspension
  - Final Warnings
  - Performance evaluations
  - Counseling
  - Termination is NOT discipline, it is what happens when discipline fails

- **Counseling**
  - Should come with all forms of discipline
  - How do they do better if we do not tell them?
  - This is the biggest challenge.
DISCIPLINE IS A PATH TO SUCCESS
PERFORMANCE VS. MISCONDUCT

- Can’t or Won’t
  - Can’t can be fixed
  - Won’t may not be – but you need to know the difference between correctible behavior and serious misconduct
  - Know the difference between poor performance and misconduct!

- Misconduct
  - Theft/Dishonesty/Falsification
  - Intoxication/Smoking/drinking/marijuana
  - Insubordination
  - Horseplay/violence/fighting
  - Gambling - be CAREFUL
  - Sleeping
  - Harassment/discrimination/retaliation
  - Policy violation

- Performance
  - Lack of productivity
  - Poor quality
  - Failure to follow procedures or meet standards

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AT-WILL VS. JUST CAUSE

- Labor Code Section 2922
  - “An employment, having no specified term, may be terminated at the will of either party on notice to the other.”
  - CAN BE MODIFIED BY A CONTRACT.

- EXCEPT
  - Protected classifications:
    - Race, color, ancestry, national origin, religion, creed, age (40 and above), disability (mental and physical), sex, gender (including pregnancy, childbirth, breastfeeding or related medical conditions), sexual orientation, gender identity, gender expression, medical condition, genetic information, marital status, military and veteran status.
  - Protected Actions:
    - Conduct protected by law
    - Some examples of “protected activity” include filing or threatening to file a claim or complaint with the Labor Commissioner, taking time off from work to serve on a jury or appear as a witness in court, disclosing or discussing your wages (discussing working conditions generally), using or attempting to use sick leave to attend to the illness of a child, parent, spouse, domestic partner, or child of the domestic partner of the employee, engaging in political activity, complaining about safety or health conditions or practices.

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PROTECTED ACTIVITIES

- Wage garnishment
- Disclosing or refusing to disclose wages/compensation
- Participation in substance abuse rehabilitation
- Refusing to authorize disclosure of medical information
- Jury duty
- Political activity
- Military service
- Public safety personnel
- Refusing to patronize employer
- Refusal to commit an illegal act
- Time off for a child’s suspension from school
- Time off for school activities

- Time off for domestic violence victim (including support services and relocation)
- Refusal to take a polygraph test
- Maintaining privacy of arrests not leading to conviction
- AIDS test results
- Serving as an election officer
- Reporting victims of abuse or neglect pursuant to statute
- Disclosing information on a violation of law to law enforcement.
PROGRESSIVE DISCIPLINE

Defined
- A process with defined disciplinary steps of increasing severity.
- Typically rigid
- Not required by law.

Most common in union environments
- A creature of the contract
- Usually requires “good cause”

Problems with Progressive Discipline
- Inflexible
- Lacks Nuance

Advantages of Progressive Discipline
- Clarity
- Simplicity
- End point is defined by policy
Barnes & Noble College Booksellers hired Christine Oakes in 1987. She became a store manager in 1989 and was terminated in 2010.

On several occasions, the employer provided with a code of conduct, that included an acknowledgement, "I recognize that subject to the provision of law, I am an at-will employee. I also understand that the company has made no promise to provide me with employment for any definite period of time and that no contract of employment has been created."

The employee handbook had a disclaimer that it was provided for reference only and was not an employment contract. It further provided that employment was at will and employees could be terminated "at any time, with or without cause and without prior notice."

*Oakes v. Barnes & Noble College Booksellers, LLC*
The handbook had a policy of progressive discipline, including a coaching process that generally starts with one or more conversations and, if necessary, proceeds to a written memo and then to a final memo. A separate procedure manual also described the policy.

Oakes' annual performance reviews were fine until 2009, when she fell below standards for accountability, customer focus and communication. She was fined with no advance notice, and no progressive discipline.

Oakes sued the company, alleging wrongful termination based on breach of contract, among other claims.

Barnes & Noble sought dismissal of the claims before trial, arguing that she was an at-will employee who was terminated for legitimate business reasons. The trial court agreed and dismissed the lawsuit, but Oakes appealed.
PROGRESSIVE DISCIPLINE TRAPS
(Contin.)

- In deposition testimony taken before the trial court dismissed the lawsuit, Oakes testified that, as a manager, she had been instructed by HR department to use progressive discipline before terminating employees. Two company supervisors testified that they were unaware of any other cases where employees had been terminated without the progressive discipline steps having been followed.

- Although employment is at-will, the court ruled that parties in an employment relationship may commit to discipline and termination processes, even by implication when not in writing.

- At-will language does not necessarily overcome other provisions in the employer's personnel documents themselves suggest limits on the employer's termination rights.

- The appellate court therefore reversed the trial court's dismissal of the wrongful termination claim, ruling that a trial was necessary to determine both the precise terms of the parties' employment relationship and whether Barnes & Noble violated those terms.
FLEXIBLE DISCIPLINE

- Defined
  - All factors are considered in determining appropriate disciplinary action.
  - Flexibility is the advantage
  - More demanding for management.

- Documentation is critical
  - Having a record of employee performance…and lack thereof
  - Clear and specific articulation of justification for action taken.
  - You have to know the “why”…and be able to state it.

- Problems with Flexible Discipline
  - Can lack clarity when not properly documented
  - Risk of claims…if you don’t do it right.

- Advantages of Flexible Discipline
  - Tailored response to circumstances
  - Employee specific outcomes
  - Can build credibility with the workforce.
RECOGNITION

- Recognize good performance!
  - Show appreciation in a tangible, visible manner.

- Mistake #1: "That's what they get paid for." "She's just doing her job." "He knows I know he's an okay worker." a
  - Often the effect on employees that believe they "get no respect" or "appreciation" is to conclude that "no one around here seems to care if I do a great job or a lousy job, so I'll just do the minimum."

- Praise in public, correct in private.
  - Be specific when you praise employees. Don't just say "you did a good job." Let them know what they did well, where, when, and why it is valuable to the company.

  - Employees need to see a worth, a purpose and a value to the job they perform.
INSTRUCTION AND TRAINING

- Give employees simple, clear instructions.
  - Employees need to know the amount of work that is expected, the level of quality, where they will perform duties, what tools they will need, and who they will need to see if equipment malfunctions or materials run out.
  - Take sufficient time to ensure that every employee understands what is expected. If you need to, ask them to repeat their assignment back to you.

- Train in advance:
  - Determine what they need to know about the job to be done.
  - Write down the necessary information they will need.
  - Think of ways to illustrate the information you will present. Show examples of the finished work and/or tools employees will use.
  - Anticipate questions that new employees may have.
  - Explain words that may be new to employees, and explain the purpose of tools and equipment.
  - Allow sufficient time for training.
  - Make sure all employees can hear you and see you while presenting the training.
PROTECTED CONCERTED ACTIVITY

National Labor Relations Act, Section 7.
  "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."

ALRA contains similar language

It is an unfair labor practice to restrain or interfere with the exercise of Section 7 rights.

Cannot discipline for the exercise of Section 7 rights.

Must be both protected and concerted.

Activity is "concerted" if it is engaged in with or on the authority of other employees, not solely by and on behalf of the employee himself. It includes circumstances where a single employee seeks to initiate, induce, or prepare for group action, as well as where an employee brings a group complaint to the attention of management. Activity is "protected" if it concerns employees' interests as employees. An employee engaged in otherwise protected, concerted activity may lose protection through misconduct.

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WRITTEN WARNINGS

- **Specific**
  - Take your time!
  - Reference the specific conduct and why it is a problem.
  - Avoid generalization – “bad attitude”

- **Accuracy**
  - Do you need to investigate?
  - In reference to an actual, current event.
  - Do not incorporate the past. Speak now or forever hold your peace.

- **Objective**
  - Test your bias
  - Tie it to performance of assigned tasks

- **Do they have to sign it?**
  - No.
  - Note a refusal to sign, and delivery of the notice.
FAIRNESS

- Make your decisions according to company rules, policies and procedures. If the company has a policy that grants certain privileges or advantages to higher seniority employees, follow that policy. Don’t do favors for friends.

- When disciplining, try to be consistent and unemotional. It should not matter if you like the employee or not.

- Force yourself to articulate your reasoning. If an employee asks why they are being disciplined or terminated, you should be confident in explaining why
  - Not feeling comfortable saying why is a red flag.
  - Even in an at-will context, there should ALWAYS be a reason. It is just good business.

- Base all decisions and actions that you take with regard to employees discipline on Company policy and procedure and the employee’s work performance.
  - Remember that actions and results are what matters

- Treat all employees as you would want to be treated.
DISCIPLINE AND DISCHARGE

- Do you maintain and enforce a clear set of rules?
- Are the rules clear and well-disseminated to all employees?
- Has a complete investigation been conducted by a disinterested party?
- Are you sure you have all the facts?
- Was the accused employee interviewed about the incident before a decision was finalized, and were any plausible claimed explanations checked out?
- Have all facts been gathered?
- Did you apply the same penalty for this infraction in the past? If not, what are the mitigating or aggravating circumstances?
- Did you document everything?
- Did you leave out personal bias in your documentation and explain why conclusions were reached?
PERFORMANCE EVALUATIONS

Are the same standards used to evaluate everyone? Is their actual performance being objectively considered?

- Are standardized forms being used in evaluations?
- Are you being truthful with them, and directly addressing problems?
- Are employees being dealt with consistently and fairly?
- Are you hiding from calling out poor performance? Is the review accurate?
CONFLICT RESOLUTION

- Do you accept your responsibility as mediator of disputes and keeper of the department morale and productivity?

- Do you know your staff well enough to avoid putting clashing personalities together when not necessary?

- Do you attempt to discern the basis for abrupt, negative mood changes?

- Do you try to understand different goals and motivations of each of your employees?

- Do you brow-beat employees or stroke them?

- Do you take into account the “dignity factor?”

- Do you counsel/discipline employees in private (but praise in public)?
ABSENTEEISM AND TARDINESS

- Be alert to disability, FMLA/CFRA, workers’ compensation and other leave laws…understand the why…and document it.
  - New parent leave
  - School activity leave
  - Paid sick leave
  - Other protected absences

- Record keeping accuracy!

- Consistent enforcement

- Job descriptions

- Avoid no-fault policies – some reasons are protected.

- Communicate expectations.

- Document counseling and expected results.

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MISCONDUCT

- Investigate
  - Have your ducks in a row.
  - You don’t have to be right, but you have to act in good faith and conduct a fair investigation.
  - Remember to get both sides before you make a decision.

- Document
  - Preserve evidence
  - Identify policy

- Evaluate correction
  - What is the level of severity?
  - Can it be fixed?
  - Can you feel comfortable that this employee has processed the lesson?

- Job descriptions

- Communicate expectations.

- Document counseling and expected results.
PERFORMANCE

- Evaluate supervision…even yourself
  □ Was the employee trained?
  □ Was there a path to success?
  □ Why did the employee fail?
  □ Dialogue is important

- Document
  □ Demonstrate where they fell short.
    ■ If quality, show it.
    ■ If quantity, how much is expected and how much was done?

- Develop corrective plan
  □ Identify obstacles to the employee’s success
  □ Determine how to remove obstacles
  □ What do they need to do, and what do you need to do?

- Job descriptions

- Communicate expectations.

- Document counseling and expected results.
CONSISTENCY IN DISCIPLINE

- Understand comparative discipline
  - How are similar situations treated?
  - How is this one similar or the same?
  - Make sure you can articulate your why.

- Question the policy
  - Is the rule fair and reasonable?

- Question the result
  - Is your expectation fair and reasonable

- Mitigation
  - What factors exist that justify or explain what the employee has done or failed to do?

- Aggravation
  - What factors exist that make it worse?

- Make sure you are being objective and not personal.
DOCUMENTATION

- Relevant records of performance or misconduct.

- Relevant history.
  - Include comparative examples.

- Documentation of discussion.
  - Use a witness
  - One speaks, the other takes notes.

- Follow through on results and expected outcome.

- Get an acknowledgement signature…if you can.

- Don’t forget to collect or ask for documents that support the employee.
  - Do you need to get medical restrictions?
  - Do you need other documentation?
WEINGARTEN RIGHTS

- Applies in union settings

- Right to union representation in meetings that can lead to discipline.
  - If the employee could reasonably believe that adverse consequences could result, then the right is triggered.

- No Miranda…they have to ask for it.

- Non union workers can ask for a co worker to be present, but you do not have to grant this request outside of a union setting.
GUIDELINES

- Remain unemotional
  - Don’t let an upset employee draw you in.

- Do not become a therapist.
  - Do not inquire into personal matters that may provide an explanation or mitigation…let them go there on their own.

- Make sure there is acceptance of responsibility.

Accountability in the workplace is linked to an increase in commitment to work and employee morale.
TERMINATION AND UI

- Don’t forget Notice of Change in Relationship
  - Be truthful and consistent on reasons

- Voluntary quit is ineligible for UI
  - Unless they quit with good cause/compelling personal reason.
  - Something that would cause a reasonable person to quit.

- Termination for “misconduct” is ineligible for UI.
  - Not just good cause

- Refusal to accept work is ineligible for UI
  - Appropriate to individual’s health, safety, morals and physical condition
  - Consistent with prior experience and earnings
  - Reasonable distance from employee’s residence.
SET THE STANDARD!