



Discharge and Documentation: The Discharge Decision

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For many legitimate, nondiscriminatory reasons, an employer may choose to discharge an employee. Ohio, as are most states, is an "at-will" state, meaning that in the absence of an agreement to the contrary, employment may be legally terminated for any reason or no reason at any time. In these circumstances, the employer's *power* to end the relationship is not at issue. The issue for evaluation is the employer's *motivation*. Thus, the termination reasons need to be evaluated to ensure that an unlawful discriminatory motive cannot be inferred. One evaluation tool is to consider the "just cause" standard.

The just cause standard is a standard of reasonableness. Arbitrators have developed a test for just cause. The test includes asking the following questions.

1. Was the employee on notice that the conduct was prohibited?
2. Did the employer conduct a timely and fair investigation including giving the employee an opportunity to tell his or her side of the story?
3. Did the investigation produce evidence of guilt?
4. Has the employer applied its rules consistently and without unlawful discrimination?
5. Does the punishment fit the crime?

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Posing and answering these questions has many beneficial effects which all tend to support the conclusion that the employer acted reasonably. A suspension with or without pay, or with pay being conditioned on the outcome, may be appropriate while this process is being completed. Ultimately, each question and answer involves documentation.

The first question concerns notice. Which rules or directives did the employee violate? Employers should consult their handbooks and written work rules to determine the extent they satisfy the notice element. This is not to say that an employer must have a written rule to address every aspect of conduct. Fewer written rules may promote flexibility. Verbal directives are enforceable. The key here is to prevent a lack of notice from being used as evidence that the reasons offered are false or insufficient and thus a pretext for discrimination.

The second and third questions concern the investigation and its results. Elemental, but worth noting is the employer's investigation should be completed before the discharge decision. Have witnesses been interviewed and statements prepared? Have all relevant supervisory personnel offered their input? Are there computer records, paper records or statements from customers or vendors to substantiate the misconduct? In most circumstances, before reaching a conclusion, the employer should confront the employee with the evidence and seek the employee's response. This step too often is bypassed. An employee's admissions, lies or failures to deny at this stage often produce the best evidence that the employer acted reasonably and in the absence of any unlawful motivation. Based on all of the evidence, what are the reasonable conclusions? When motivation rather than power is the issue, the employer's reasonable belief in its conclusions, rather than the correctness of the conclusions, ultimately matters.

The fourth and fifth questions, whether the employer has consistently applied the rule and whether the punishment fits the crime, require reviewing personnel records and the institutional memories of management employees. If the human resources person managing this process is new, he or she should consult with management personnel who have been around longer. The frontline supervisor should be consulted about his or her response to similar conduct in the past. Everything uncovered does not have to be entirely consistent. It is the act of uncovering how similarly situated employees have been treated that allows the employer to make a fully informed and reasonable decision.

The employer also should review the employment history of the employee in question. The employee's personnel file does not always need to contain a documented history of offenses to support the termination decision, but any lack of such support should be considered. The employer should also search for, retrieve and review all other files, including files informally maintained by frontline supervisors. Employers should consult with their attorneys about gaps, inconsistencies or missing records. Having reviewed all of this information, the employer should then evaluate whether in its reasonable opinion the punishment fits the crime.

In the end, the employer need not obtain the employee's agreement that the discharge reasons are correct, but if the employee believes that the employer believes the reasons, then the employer has gone a long way toward preventing any second guessing of its motivation. An employer who has asked and answered the noted questions will be well positioned to confidently assert the legitimate, nondiscriminatory and lawful reasons for discharging the employee.



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