

# Insubordination in the workplace: Managing misconduct

Even the best-run business can have problem employees. They are, after all, human. Some employees will just never work out long term. Others may bring problems at home into the workplace. In some cases, these pressures can lead employees to disobey orders, an act defined as insubordination. Managers must resist both the impulse to overreact and the temptation to ignore the defiant behavior. Consistent employee discipline is the key to managing insubordination.

## Defining insubordination

Generally, insubordination is the willful defiance of authority. There is no strict legal definition that applies to all situations and all employers. Employers may want to define what it means specifically in their organization. Generally, three elements must be present to constitute insubordination:

1. The employer (manager, supervisor, etc.) has given the employee an order.
2. The employee acknowledges the order.
3. The employee willfully refuses to carry out the order.

Orders can be verbal or written. They do not have to be formal. The duties listed in the employee's job description set employer expectations and are essentially orders. The employee's refusal to perform those duties constitutes insubordination.

Not every act of employee insubordination results in an angry confrontation. Many times, employees take the passive-aggressive approach of quietly ignoring an order or a clear responsibility. The result is the same - work that should be done is not. The manager's authority erodes.

Insubordination is also a form of willful misconduct. The employee knows the rules and still consciously and intentionally ignores them. Willful misconduct is the term typically used in unemployment compensation law. Employees who are insubordinate commit willful misconduct and can't get unemployment benefits.

## Employee discipline

Before you issue any discipline, consult your company's disciplinary rules. These often include providing an oral warning or making notes in an "informal" supervisor file. You should always follow the rules outlined in your disciplinary program. If your organization doesn't have a formal disciplinary program, consult with your supervisor before doing anything unless the matter is urgent. For example, if two employees are involved in a heated argument with physical contact, you must separate the two. You could send both home and then consult the disciplinary policy. Better yet, make sure all your supervisors and managers are trained in "what if" disciplinary scenarios.

Because insubordination takes many forms, employers need a flexible response. Employer handbooks should broadly define insubordination and give a few examples. The handbook should also state that the examples are

not an exhaustive list.

Some subtle forms of insubordination, such as delaying performing an objectionable task, are better handled as performance issues. Employee evaluations should address these deficiencies. Doing so puts the employee on notice that an issue exists, and builds the employer's case for future discipline.

Employee discipline procedures should allow the employer some wiggle room. For example, the procedures should never guarantee a first offense be met with a warning. Responding to violent actions or employee theft with a mere warning would be ludicrous. If a 'warning guarantee' is in place, even the most egregious offender could claim wrongful discharge. The fired employee could allege the employer failed to follow its own written procedures.

You may want to develop a general employee discipline form for management use. The form should encapsulate your organization's disciplinary policy but allow space to explain any deviation. You do not need to give the employee discipline form to the worker. Use it as an internal check that discipline is being imposed according to your rules and fairly.

## **Legal considerations for insubordination in the workplace**

Most insubordination will fall somewhere between the performance issue and the firing offense. As an employer, you have the right to manage your workplace. You have wide discretion in what sort of disciplinary system you want to use. You can use a point system, a progressive disciplinary system or no system at all. Some employers develop their own employee discipline form. Of course, no matter what system you choose, you must be consistent and apply the rules in a non-discriminatory way. Judges want to see that you acted fairly and honestly.

Courts compare how you treat similarly situated employees being punished for the same offense. They expect that if you suspend a cashier for a \$75 drawer shortage, you suspend every cashier with a similar shortage. On the other hand, if one of those cashiers continues to show shortages, then you can punish him more harshly. The cashiers are then not similarly situated. The key is to document each and every disciplinary offense as it happens. That lets you distinguish between seemingly similarly situated workers. Don't rely on memory. Write it all down.

Not every act you may consider insubordination should result in discipline. Some insubordination may be protected activity under employment laws. For example, refusing to carry out a directive to fire a worker for an illegal discriminatory reason is protected activity. Punishing that refusal could then trigger a retaliation lawsuit. Refusing to perform a criminal act is not insubordination. Nor is refusal to ignore significant health and safety concerns. If a supervisor tells a subordinate not to report safety violations to OSHA, refusing to follow the order is not insubordination.

## **Protected employee classes**

Firing an employee who has filed or may file a discrimination claim could open the employer to retaliation charges. An employee who just filed a sexual harassment complaint could cite the firing's timing as evidence of retaliation.

Employers should ensure they are disciplining employees who commit similar infractions in the same way. Failure to do so can lead to discrimination charges. For example, a fired black employee cited instances where white employees were merely warned for similar infractions in her complaint.

Several anti-discrimination laws apply to discriminatory firing. Title VII of the Civil Rights Act bars discrimination based on race, creed, color, sex and national origin. The Age Discrimination in Employment Act (ADEA) protects

employees 40 years of age and older. The Family and Medical Leave Act (FMLA) bars employers from interfering with employee rights to leave. Like all other employment laws, it includes an anti-retaliation provision.

Military members have rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Under USERRA, covered employees can only be discharged for cause during the first 12 months after reemployment. That means you have to show a good reason for discharge such as insubordination.

## **Employee discipline procedures should fit your culture**

An auto repair shop would not necessarily have the same culture as a doctor's office. So using off-the-shelf discipline policies will not work either. There is no one-size-fits-all employee discipline policy.

A National Labor Relations Board (NLRB) case illustrated this point. A manager of a catering business fired an employee for swearing at him. He invoked the National Labor Relations Act (NLRA) claiming the manager impaired his right to complain about work conditions. The NLRA protects such conduct.

The employer countered with a transcript of the expletive-laden words the employee used. The employee noted that swearing was a common way to communicate in that workplace. The NLRB ruled in the employee's favor, noting that swearing was common "shop talk" in that business.

This does not mean employers must always tolerate vulgar outbursts. It means that employee complaints about employment conditions expressed in a way commonly used in that workplace are protected. Going forward, the employer could change the culture and enforce common courtesy rules.

## **Firing employees for insubordination**

Sometimes employers feel they must fire the insubordinate employee. First, employers should make sure that there isn't a legal prohibition against discharging the employee. For example, if the employee has a signed employment contract, you must follow the rules in the agreement. If the employee is covered by a union contract, follow the disciplinary rules the collective bargaining agreement spells out.

Some firings may be considered part of a mass layoff as defined in the Worker Adjustment and Retraining Notification (WARN) Act. If, special rules may apply depending on the employer's size. Many states have similar rules for smaller employers. Consult with counsel to ensure you are in compliance.

Public employers operate under slightly different rules. Generally, public employees are entitled to an "opportunity to be heard" before you make a final termination decision.

## **Training management**

Employers have the right to discipline insubordinate employees. However, employee discipline must be applied in a consistent, non-discriminatory fashion. Employers must ensure that discipline is not based on personality conflicts between managers and employees.

Discipline can also not be in retaliation for employees exercising their legal rights under a number of federal, state, and local laws. Managers with firing authority should be familiar with their obligations under each law. To ensure this, employers should develop training for managers. The training should be developed after consulting with counsel. It should tell managers:

- what constitutes insubordination;
- what offenses warrant immediate firing; and
- what company disciplinary procedures are.

The goal is to have an employee discipline system that is fair and does not lead to further legal liability.