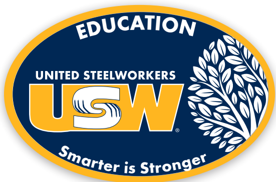

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STEWARDS CORNER

Monthly Newsletter for Union Stewards

APPLYING JUST CAUSE TO NO-FAULT ATTENDANCE POLICIES

Shop Stewards responsible for representing co-workers with respect to discipline should be thoroughly familiar with the just cause standard that is a part of most collective bargaining agreements (CBA). In some instances, a CBA may have language that requires the employer to discipline with "just cause," "good cause," "proper cause," "for cause," "with cause," etc. If your CBA does not have this language, many (but not all) arbitrators will "imply" a just-cause standard on employer discipline of employees. Check your CBA!

To review briefly, for discipline to be warranted under just cause, there must be:

1. **Fair notice**, meaning the employee was notified that violating a rule or policy could result in discipline;
2. **Due process**, meaning the employee was afforded the opportunity to provide their side of the story;
3. **Progressive discipline**, meaning (except in cases of egregious misconduct) the employer applied lesser forms of discipline before any heavier penalty so that the employee had the opportunity to correct their behavior;
4. **Consistent enforcement**, meaning there was no lapse in enforcement that could have led the employee to believe the rule or policy was no longer in effect;
5. **Equal treatment**, meaning the employer's rule or policy has been applied equally, without favoritism or discrimination;
6. **Substantial proof**, meaning the employer has concrete proof that the employee violated the rule or policy; and
7. **Mitigating/extenuating circumstances**, meaning the employer considered factors such as the employee's length of service and prior disciplinary record as part of determining whether the level of discipline imposed was appropriate.

But when it comes to misconduct in the form of absenteeism, many employers adopt a no-fault attendance policy that would seem to clash with some elements of the just cause standard.

What the Heck is a "No-fault" Policy?

Under a no-fault policy, absences automatically result in "points" or "occurrences", the accumulation of which results in a series of penalties that end with termination. The policies also generally provide for the falling off of points after a prescribed period of time. They are often referred to as "no-fault" because discipline appears to be applied automatically, regardless of the reason for the absence (with exceptions for certain types of absences such as approved leave or leave covered by the FMLA) or without considering the employee's years of service or disciplinary record.

In other words, the no-fault nature of this type of policy suggests that it is not subject to due process or mitigating/ extenuating circumstances factors associated with just cause. But stewards should know that despite the "no-fault" nature of these attendance policies, most arbitrators will still apply elements of just cause, including that the policy must be communicated to the workforce, applied in a consistent and non-discriminatory way, and that the policy itself must be reasonable.

What makes a no-fault attendance policy reasonable? One arbitrator held that a reasonable policy would be one that is specific about the various thresholds at which discipline will be applied (for example, one occurrence will result in one point); follows progressive steps for discipline (for example, for four points a verbal warning, six points a written warning, eight points a final warning, ten points termination); and provides for periodically removing points with good attendance. Still, other arbitrators have held that strict application of a no-fault policy does not relieve the employer of the burden of showing that the discipline (termination, in particular) meets all the factors associated with just cause.

How Have Arbitrators Ruled on "No-fault" Grievances?

Let's look at a couple of arbitration decisions in which the arbitrator applied just cause to discipline based on a no-fault attendance policy.

In *Allied Healthcare*, the arbitrator dealt with a case in which the grievant had clearly met the threshold for termination for absenteeism based on his accumulation of points, apparently as a result of his failing to follow the employer's procedures for applying for the employer's sickness and accident program. Despite the employer's attendance policy clearly being a "no-fault" point system, the arbitrator nonetheless applied a just cause standard to the termination, writing:

A penalty that is too harsh for the offense is unreasonable and not based on just cause. The penalty should consider the misconduct and the individual employee.

The arbitrator concluded that the grievant had been terminated for just cause under the no-fault attendance policy because "there are no mitigating circumstances that justify setting aside Grievant's discharge. The Grievant was a relatively short-term employee who was absent from work almost as often as he did work." The arbitrator rejected the union's argument of ☞

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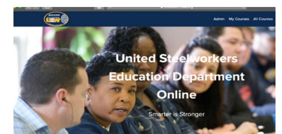

disparate treatment (meaning other employees were guilty of similar misconduct and not terminated) because the record showed that the employer had previously terminated 55 employees for violating the policy, and none were reinstated. Allied Healthcare shows how some arbitrators will still apply just cause principles like the appropriateness of the penalty based on the employee's work record and whether the policy has been applied even-handedly and without discrimination.

In *Beamis Company*, a machine operator with 23 years of service and a good work record was terminated after she exceeded eight absences or "occasions" within a 12-month period under the employer's no-fault attendance policy. The last three "occasions" that automatically led to her termination were the result of her being absent for three consecutive days to see her doctor and recover from her chronic arthritis (the employer's policy treated each day as a separate "occasion"). She thought that these absences would be covered under FMLA, but the employer found her doctor's note wanting and terminated her under the no-fault policy. The arbitrator, in this case, sustained the grievance in part, reinstating her but converting her termination to a suspension. He found the policy's treatment of each absence as a separate occasion violated just cause's progressive discipline and mitigating circumstances elements because:

When an employee, for whatever reason, accumulates multiple occasions in an unbroken sequence, there is no meaningful forewarning with increasingly severe consequences. Therefore, since progressive discipline is integral to just cause, the Company has the duty to consider whether a penalty under the No-Fault policy is reasonable for a given set of circumstances.

The arbitrator went on to say that "for any case in which the rules of the No-Fault policy conflict with the precepts of just cause under the Agreement, the circumstances of that case need to be thoroughly examined."

Background Matters

One final note to bear in mind when it comes to no-fault attendance policies.

An important factor that an arbitrator will likely consider is whether the policy was negotiated with the union or unilaterally established by the employer. The latter is usually done by way of management rights language that allows the employer to adopt "reasonable" work rules. Because the just cause standard is expressly provided for in the collective bargaining agreement (while the employer's policy is likely in a separate policy manual), stewards should use this to argue for the full application of the just cause standard, despite the no-fault nature of the employer's policy.

Even where the employer's no-fault attendance policy is negotiated with the union, shop stewards should still argue for the full application of the just cause standard, particularly in cases of termination because of the severity of such a penalty.

FMLA Considerations. . .

When representing members with absenteeism issues, thoroughly investigate the reasons for the member's absences from work. If you work in a facility covered by the **Family and Medical Leave Act** (FMLA), the absences may be FMLA "qualifying events." Don't assume that our members are aware of their rights under the law or that management is fulfilling their responsibilities to notify members of their rights.

The August 2021 edition of the Stewards Corner newsletter includes a brief overview of FMLA eligibility and qualifications. Management has the responsibility to notify employees of FMLA coverage and eligibility via postings; however, they also have the responsibility to follow up on employees' absences and inform them that their absences could possibly be covered under FMLA. If management isn't living up to their obligations under the law, we, as union representatives, should do what is necessary to rectify that situation. Reach out to your Union leadership and USW Staff Representative to determine the next steps.

TEACHING TUESDAYS

All classes are held at **11 AM (EST)** and **8 PM (EST)**

- 9/6/2022: **Investigating Grievances** 11 a.m. | 8 p.m.
- 9/13/2022: **Past Practice** 11 a.m. | 8 p.m.
- 9/20/2022: **Building Solidarity Around Grievances** 11 a.m. | 8 p.m.
- 10/4/2022: **Writing and Presenting Grievances** 11 a.m. | 8 p.m.
- 10/10/2022: **FMLA 1** 11 a.m. | 8 p.m.
- 10/18/2022: **Developing an Effective Safety Program** 11 a.m.| 8 p.m.

Scan the QR code to get more information
http://usw.to/teachingtuesdays