

# Using 'Just Cause' to Defend Against Unfair Discipline

January 15, 2019 / Robert M. Schwartz

The principle of “just cause” is the keystone of the collective bargaining agreement. By imposing rigorous qualifications for discipline, the just-cause standard protects everyone in the union.

If an employer could fire workers for trivial or manufactured reasons, it could easily rid itself of militant officers, stewards, and rank and filers.



A typical just-cause provision reads, “No employee will be disciplined or discharged except for just cause.” Some agreements use “good cause,” “proper cause,” “reasonable cause,” or simply “cause.” Labor arbitrators usually say such terms are equivalent to just cause.

Newly minted supervisors sometimes assume that just cause is an easy criterion to satisfy. On its face, it only appears to require a legitimate reason for taking action. Years of advocacy, however, have helped to mold the standard into a formidable bulwark.

## Just Cause for All?

Many countries protect nonunion employees against unfair dismissal. England, France, Ireland, Germany, Japan, and Italy are among those that require all employers to prove just or good cause.

In the U.S., campaigns for “Just Cause for All” laws have been pursued at the state level. Organizers often cite recommendations by the International Labor Organization (an agency of the United Nations) and the Uniform Law Commission, which promotes uniformity of law among the states.

Montana was an early success. A 1987 statute gives at-will employees the right to sue for lost pay if discharged without “good cause.” It has, however, no reinstatement provision.

Just Cause for All campaigns allow union and nonunion workers to fight together for fairness and job protection.

Among its accepted requirements: employers must publicize rules, enforce them consistently, follow due process, treat employees alike, act on substantial and credible evidence, apply graduated penalties, and consider mitigating and extenuating circumstances.

Just cause protection marks a sharp dividing line between union and nonunion or “at-will” workers. With few exceptions, employers may not dismiss union workers unless they engage in egregious or repeated misconduct.

On the other hand, employers can fire at-will employees for “good cause, for no cause, or even for cause morally wrong.” An at-will employee can be discharged for a single mistake, an argument with a supervisor, an unintentional violation, off-duty conduct, or even for reasons that are patently false.

Since the 1960s many unions have relied on a checklist developed by arbitrator Carroll Daugherty known as “the seven tests of just cause.” Unfortunately, the Daugherty tests do not accurately reflect the way arbitrators currently decide cases. It was time to rethink the seven tests.

That’s why I undertook a review of more than 15,000 awards by labor arbitrators. The results are laid out in my book *Just Cause: A Union Guide to Winning Discipline Cases*, now available in a newly updated second edition. I found wide agreement among arbitrators on the following basic principles:

### **1. Prior notice**

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

Punishing an employee for failing to follow a rule or policy that the employee does not know about is clearly unfair. Employers must publicize standards in handbooks, on bulletin boards, through the Internet, or by announcement. They must also identify potential penalties, especially if there is a possibility of suspension or discharge.

### **2. Recent enforcement**

*Punishment may not be imposed for violating a rule or standard that the employer has not enforced for a prolonged period.*

When management fails to take action against an infraction for several months or longer, employees are encouraged to believe that the policy or rule is no longer in effect. In such circumstances, imposing discipline is equivalent to applying a rule of which the employee is unaware.

### **3. Due process**

*An employer must conduct an interview or hold a 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. A paramount obligation is to allow a worker a chance to tell his or her side of the story before the employer makes a decision to impose discipline.

### **4. Substantial evidence**

*Charges must be proven by substantial and credible evidence.*

Disciplinary action must be based on reliable evidence, not on rumor or speculation. Hearsay (an accusation 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 much stronger punishment against one employee than it has assessed against another employee known to have committed the same offense.*

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

## **6. Progressive discipline**

*When responding to misconduct that is short of egregious, an employer must issue at least one level of discipline that allows the employee an opportunity to improve.*

It is widely accepted that the purpose of workplace penalties should be to correct misconduct, not to punish or humiliate. When a possibility exists that an employee can improve, the employer should apply the lowest 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 account of any mitigating, extenuating, or aggravating circumstances.*

In addition to the seriousness of an infraction, an employer must consider any other circumstances that reduce or increase the likelihood that the grievant will repeat the offense.

<https://labornotes.org/2019/01/using-just-cause-defend-against-unfair-discipline>

*Union attorney Robert M. Schwartz's Just Cause: A Union Guide to Winning Discipline Cases is now available in a revised second edition.*

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