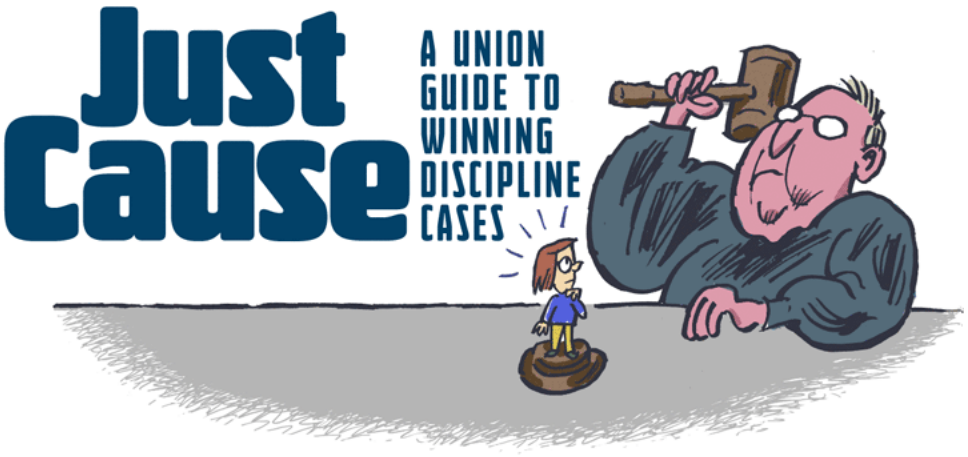

Chapter 5: Equal Treatment

THE JUST CAUSE STANDARD is incompatible with favoritism or discrimination. Employers must treat employees who engage in the same type of misconduct alike.

An employer commits "disparate treatment" if, without a justifiable basis, it imposes a markedly harsher penalty on one employee than on another who violated the same or a highly similar policy or rule. Disparate treatment violates just cause whether it stems from favoritism; personal hostility; racial, ethnic, gender, religious, or anti-union bias; inadvertence; sympathy; or mistake. The union does not need to prove the reason (and usually should not attempt to do so). The proper remedy is to reduce the grievant's sanction to the lowest level imposed on others.

The following cases illustrate disparate treatment:

• A trucking company suspended a driver for thirty days for speeding. A year earlier, it suspended another driver for one day for the same infraction.

• A government agency fired a worker who reported to work under the influence. On previous occasions, it allowed employees to work despite clear signs of inebriation.

• A supervisor saw a worker driving a forklift backwards and charged her with a safety violation. On an earlier occasion, he simply told a worker to turn the lift around.

MAKING THE CASE

A union seeking to make a disparate treatment defense must identify at least one other employee (called a "comparable") who violated the same or a very similar rule as the grievant but was given a substantially lesser penalty. It must also show that the comparable's infraction was as serious as that of the grievant and that the comparable's record was not appreciably stronger. In most cases, the union will need information from the comparable's personnel file.

If the union knows the names of workers who received lighter penalties, it should request copies of their personnel files. Otherwise, it should submit the following written information request:

> Please furnish the union with a list of each employee and former employee who, within the past five years, was charged with _____. For each such employee please provide a copy of the notice of discipline and a copy of the employee's personnel file.

Grievance tip: The personnel files of employees who received the same penalty as the grievant can also be a goldmine. For example, the employer may have fired Worker A for a second or third offense while discharging the grievant after a single infraction.

How far back can the union go? No fixed rule limits how far back a union can go to prove disparate treatment. Many arbitrators accept cases as old as five to seven years. Some go back even further. Cases more than ten years old are likely to be rejected, especially if new management has taken charge.

Note: Arbitrators sometimes excuse past leniency if societal views on an offense have hardened. Examples include sexual harassment, safety, drug use, and violence. Penalties imposed before the union negotiated its first contract may also be rejected.

How many needed? A single comparable, especially if recent, can establish disparate treatment. The union does not have to prove a "past practice." An exception may apply to an attendance case in a large enterprise; because employees can fall through the cracks, an arbitrator may insist on more than one case of unequal treatment.

Grievance tip: Stewards should make entries in their notebooks or on their computers whenever they learn of an employee who openly violates a company policy without being penalized. Such incidents can be invaluable when defending other employees.

Settlements. A comparable employee may have received a lesser penalty due to a grievance settlement or a "last-chance agreement." Review the agreement. If it states that it is "without prejudice" or is "non-precedential," an arbitrator is likely to reject it as evidence of disparate treatment.

Supervisors. If comparables cannot be found within the bargaining unit, the union should consider nonunit personnel such as supervisors, office staff, and engineers. When a rule applies to all employees in a facility—a ban on fighting, for example—the equal treatment rule applies. An employer may not impose a substantially harsher penalty on a bargaining unit member than it imposed on a nonmember who committed the same offense.

Note: Under U.S. labor law, a union has a right to examine the personnel file of a supervisor or other non-unit employee if it has a factual basis for believing that the person engaged in similar misconduct as the grievant and if the rule in question applies to all employees.

Grievance tip: Stewards should make dated notebook entries whenever they observe a supervisor violating a rule or policy.

VALID DISTINCTIONS

An employer can defeat a disparate treatment claim if it has a valid basis for imposing a harsher penalty on the grievant. For instance, in comparison with prior offenders, the grievant may have:

- A more egregious disciplinary record
- Considerably less service time
- Committed a more severe or dangerous infraction
- Acted intentionally
- Been warned recently for committing a similar violation
- Fewer mitigating or extenuating circumstances
- Refused to accept responsibility
- Threatened witnesses
- Been uncooperative during the investigation

Example: A worker was fired for smoking in the plant. Although the company only gave written warnings to previous offenders, an arbitrator rejected the union's claim of disparate treatment because the grievant, unlike the others, smoked in an area where items were flammable.

Not every distinction between employees justifies a harsher penalty. Among the excuses arbitrators often reject are the following:

- The supervisor who punished the grievant has a more demanding disciplinary philosophy than other supervisors.
- The grievant is a union steward or officer.
- The penalty given the comparable was a mistake.

Example: While differences in service time or past discipline can justify differences in penalties, wide disparities, for example, between a warning and a discharge, are frequently regarded as violations of the equal treatment principle.

QUESTIONS AND ANSWERS

Cross-unit comparison

Q. A worker was fired for taking home scrap. Can we cite a member of another union in the facility who was only suspended for five days for a similar offense?

A. Yes. Employees who are subject to the same or similar rules should be issued the same or similar penalties, regardless of bargaining unit.

One vs. many

Q. Over the past five years, six employees were charged with failing to lock out their machines during repairs. The company fired five but gave one a 30-day

suspension. Yesterday, another worker was fired for the offense. Can we argue disparate treatment?

A. Yes. The fact that most offenders were fired is beside the point. The significant fact is that the employer gave special treatment to a similarly-situated employee.

Post-discipline comparable

Q. We filed a grievance for an employee who was fired for refusing an order. A month before arbitration, the company issued a written warning to a worker for a similar transgression. Can we cite the warning as evidence of disparate treatment?

A. Yes. Most arbitrators say disparate treatment can be proven by subsequent events.

Negligence is negligence

Q. Employee M was fired after backing his truck into a loading dock and causing $8,000 in damages. Two years ago, the company suspended employee T for a similar accident with damages of $500. Can we claim disparate treatment?

A. Yes. When negligent acts have the same potential for causing harm, arbitrators often insist that employers apply similar penalties, even if the actual damages are significantly different.

Similar highs

Q. The company fired a worker who tested positive for marijuana. A year ago an employee who came to work drunk was suspended for two weeks. Disparate treatment?

A. Yes. Treating employees who commit drug offenses more harshly than employees who commit alcohol offenses violates the equal treatment principle.

<>Holding steward to higher responsibilities

Q. A steward was suspended for loafing, a heavier penalty than is usually applied for this offense. During the second-step grievance meeting, the general manager said that the penalty was justified because “stewards are supposed to set an example.” Does this give us a case?

A. Yes. Other than illegal strikes and refusals to obey, an employee’s status as a steward does not justify enhanced punishment. Failure to investigate others

Q. Company policy requires employees to be drug-tested if they have an accident that causes lost time or a need for medical care. A worker who went home after a fall was tested and fired for cocaine. Can we argue disparate treatment because two other employees and a supervisor who incurred lost-time injuries were not tested?

A. Yes. As one arbitrator explained: “Disparate treatment arises when the grievant has been treated unequally with respect to notice, application of a rule, investigation, proof, or penalty.” Investigating the grievant but not the other employees violates the equal treatment principle.

Reset

Q. After we won an arbitration case by pointing out that employees who violated the company’s “zero-tolerance” fighting policy have not always been fired, the company posted a notice that in the future it would discharge all offenders. Does this preempt future disparate treatment claims?

A. Possibly. Although the logic is not apparent, many arbitrators overlook past favoritism if an employer makes a public announcement that a penalty will be applied in all future cases.

Possible repercussion

Q. If we cite an employee who received a lenient penalty for the same offense, could management increase the penalty to make it consistent?

A. No. As explained in Chapter 3, the double jeopardy rule prevents an employer from increasing a previously assessed penalty.