

**2015 Local Government Officials  
Conference**  
**“How to Deal With Difficult Employees”**



CONSULTANTS TO MANAGEMENT

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**Introduction**



- What is your largest expense?

**EMPLOYEES**

- An ounce of prevention is worth a pound of cure
- 5% of employees cause 95% of your problems

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**Limiting Liability**



**When** do you start limiting your liability as an Employer?

- (a) When the employee is hired?
- (b) When the employee is fired?
- (c) During employment?
- (d) Before (a), (b), and (c)?

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### Limiting Liability (continued)



- What is a “Thurman” clause and Why is it Important?
  - READ CAREFULLY BEFORE SIGNING. . .

I agree that any claim or lawsuit relating to my service with [DaimlerChrysler] or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary.

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### Limiting Liability (continued)



- Practice Point: This begins BEFORE an employee is ever hired!
- On the front end.
  - Thurman v. Daimler-Chrysler, 397 F.3d 332 (6th Cir.)
  - Oswald v. BAE Industries, (2012).
- Going out the door.
  - Cole v. Temple Israel, et al., 2007-Ohio-245 (9th App. Dist)
  - Sampson v. Cuyahoga MHA, 131 Ohio St. 3d 418 (2012)
  - George v. Village of Newburgh Heights, (8<sup>th</sup> App. Dist)

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### Hiring the Wrong Person



- Hiring and Selection
  - A proper hiring and selection process can streamline all the documentation involved which can sometimes prove to be tedious. Uniform methods can also insulate an employer from possible discrimination claims. Because choosing the “right” candidate is so important in the public sector (hard to get rid of a public employee once they complete a probationary period), it can save money and time on the back end.
- Job Posting Policies – Standard policy for asking candidates to apply for jobs.
- Structured Interviews – Consistent, job-related questions asked to each applicant set (or sub-set).
- Validated Tests and Assessment Centers

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### Probationary / Instructional Period



- A Probationary/Instructional period is an employee's chance to put his/her best foot forward. Behavior and conduct during these periods is the best that an employer can expect to ever get from that particular employee. Accordingly, don't fall victim to the myth that a probationary employee will improve.
- During probationary/instructional periods watch out for the following:
  - Resignation games
  - Probationary periods should apply to days worked not calendar days
  - You are not permitted to extend probationary periods (alternative option is to terminate employment unless employee signs last chance)

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### Controlling Sick Leave Abuse



- **Identify the Abuser**
  1. Examine Sick Leave Records and Create Chart
  2. Look for Patterns
  3. Malingers (may need to look for professional assistance from the medical community)
  4. Documentation
- **Monitor Sick Leave Usage**
  1. Develop a System (require accurate documentation, require timelines, always check time bank, check if the request justified per policy)
  2. Supervisors – develop a tracking sheet for each employee
  3. Implement the System (meet with identified abuser (document meeting) and begin using tracking system)

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### Controlling Sick Leave Abuse (continued)



- **Monitoring (continued)**
  3. Train Supervisors – supervisor who are responsible for implementing the system should be trained on how to properly implement the system.
  4. Follow-up
    - Employers need to follow-up with the supervisors to ensure that the first meeting has been completed and the tracking system is in place.
    - Employers should track attendance in departments or offices where a system has been implemented to measure its effectiveness.

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### Controlling Sick Leave Abuse (continued)



- **Dealing With the Abuser**  
 Fraud Flags: Examples
  - Released to work with restrictions – restrictions include all of the less desirable duties
  - Released to work but should be assigned a different supervisor
  - Released to work, but must not lift over 25 lbs
- **Employers can use Fraud Flags...**
  - in deciding to seek a second FMLA opinion
  - in deciding to ask the employee for more information
  - in deciding whether to ask the employee for a release to contact his/her doctor

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### Controlling Sick Leave Abuse (continued)



- **When to Challenge the Doctor's Slip (pp. 11-15)**
  - slip excuses dates prior to the medical examination
  - slip projects backward in time to diagnose a prior condition
  - The slip contains the word "may" or "might" or "possibly"
  - The slip states that a particular job task or hours of work causes medical condition, no medical opinion
  - The slip is undated, or doesn't match either the absence date or the illness
  - The slip was obtained AFTER discharge, or well after absence
  - The slip is overly broad or illogical
  - The slip is signed by one having no medical authority
  - The slip appears altered

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### Controlling Sick Leave Abuse (continued)



#### The Americans with Disabilities Act

- The ADA defines a "qualified individual with a disability" as an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.
- The ADA defines the term "disability" to mean, with respect to an individual:
  1. a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
  2. a record of such an impairment; or
  3. being regarded as having such an impairment.

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### Controlling Sick Leave Abuse (continued)



- **Alternatives to Traditional Discipline**
  1. Better Communication – continuous dialogue between the supervisor and the worker (this is not a memo reminding employee of policy or email)
  2. Counseling – still officially in the realm of “non-discipline”
  3. Performance Improvement Plan
  4. Peer Review – only works in a small number of circumstances and never in a unionized environment
- **Progressive Discipline**
  1. Verbal
  2. Written
  3. Suspension (including paper suspension)
  4. Termination

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### Using Evaluations to Improve Performance



- Most employers, at least in theory, conduct evaluations on an annual basis, but twice during a probationary period. If followed, this is probably sufficient; however, problems can arise where evaluations are delayed, missed, or where “special” evaluations are ordered.
- Proper Use:
  - Given consistently or pursuant to a performance improve plan
  - Covers Both Positive and Negative
- Improper Use:
  - Inconsistent or missed entirely (e.g. “special evaluations”)
    - Collins v. State of Illinois, 44 FEP 1549 (1987 – prima facie case of discrimination where employee showed “special” evaluations at 3, 6, 12, and 18 months where other employees only received annual evaluations

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### Using Evaluations to Improve Performance (continued)



- A. Coach or Judge**
  - When the supervisor acts as or is perceived as a judge, he/she will more likely encounter hostility and defensiveness from the interviewee. A more desirable position is for the supervisor to assume the role and attitude of a coach. In the role of coach, the supervisor can devote his/her energy to improving the employee’s performance.
  - assume that any problems noted in the employee’s performance are jointly held.
  - Once the problems have been isolated, the supervisor and the employee can jointly work out a formal or informal process of retraining or correction. If, however, the employee is argumentative or hostile, it may be necessary to take disciplinary action
- B. Evaluations should not be a surprise**

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**Progressive Discipline**



**A. Purpose**

- To inform the employee of what is expected of him/her;
- To instruct the employee regarding the types of conduct that are unacceptable;
- To interpret for the employee the policies, rules, and regulations; and
- To ensure the employee acts in accordance with the organization's policies, rules, and regulations in the future.

Does anyone recognize what is absent?

**PUNISHMENT**

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**Progressive Discipline (continued)**



- The key is to understand the basic difference between punishing employees and attempting to correct employee behavior.
- Determining the Level of Discipline:
  - Consider the impact of the violation, and the resulting discipline, on the organization as a whole and on other employees
  - Consider how the offense will affect public opinion,
  - Consider the potential liability the offense may subject the employer to,
  - Consider the expectation for improvement in the employee's conduct in the future.
- The level of discipline ultimately administered should be the lowest level which both adequately addresses the above concerns and which the employer believes will ensure the violation does not occur again in the future.

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**Progressive Discipline (continued)**



**B. Making Discipline Stick**

When an employer reaches a point where discipline is necessary, it is important that the implemented discipline can stand-up against potential challenges.

Insubordination:

**Be Able to Prove:**

- a. That a direct order was given
- b. That the order was reasonable and understood
- c. That refusal, or the absence of any good faith effort to obey, occurred

**Expect the Employee to Allege:**

- a. That he did not understand the order
- b. That he was "set up" or provoked
- c. That the refusal was justified by a safety concern
- d. That the order was unreasonable

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**Progressive Discipline  
(continued)**



Neglect of Duty: (R.C. 124.34)

**Be Able to Prove:**

- a. The existence of the duty
- b. The reasonableness of the duty
- c. The unexcused failure to execute the duty
- d. Prior warnings, counseling, and training

**Expect the Employee to Allege:**

- a. That the employee did not know what was expected of him
- b. That the employer's standards are not reasonable, or are not enforced
- c. That he was aware of the duty, but never given adequate training
- d. That the penalty is too harsh

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**Progressive Discipline  
(continued)**



Inefficiency/Unsatisfactory Performance:

**Be Able to Prove:**

- a. A preexisting standard
- b. That it was reasonable
- c. That it was communicated to the employee
- d. That an assessment was made in a fair manner
- e. That the employee consistently failed to meet that standard, notwithstanding training and progressive discipline

**Expect the Employee to Allege:**

- a. Lack of training or knowledge of the standard
- b. Past practice or nonenforcement of the standard
- c. Impropriety in the assessment process
- d. Mitigating circumstances
- e. That it was a single isolated incident

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**Progressive Discipline  
(continued)**



Absentecism/Tardiness:

**Be Able to Prove:**

- a. That the absence was either not approved or was not properly documented
- b. That absence without approval violates a work rule
- c. That the work rule is known to the employee
- d. That the rule is evenly applied

**Expect the Employee to Allege:**

- a. Mitigating circumstances, e.g., too sick to call in, weather, etc.
- b. Past practice of granting leave without pay
- c. Past practice of nonenforcement

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**Progressive Discipline  
(continued)**



Dishonesty/Failure of Good Behavior:

**Be Able to Prove:**

- a. That the action was intentional
- b. That the perpetrator is properly identified
- c. The existence of a rule, law, or funding guideline
- d. The effect on insurability/liability

**Expect the Employee to Allege:**

- a. Failure of proof
- b. Past good work record
- c. Past practice

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**Progressive Discipline  
(continued)**



**C. Checklist for Appropriately Handling Discipline**

- 1. cool off first;
- 2. mentally prepare yourself to be in the right frame of mind;
- 3. seek privacy;
- 4. listen to the employee;
- 5. act and think objectively;
- 6. assume responsibility for Employer rules (do not apologize for what is being done);
- 7. recognize the probable effect of your actions on this employee and other employees;
- 8. explain the consequences of a future violation;

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**Progressive Discipline  
(continued)**



**C. Checklist for Appropriately Handling Discipline (continued)**

- 9. encourage self-discipline;
- 10. encourage the employee to relate his understanding of the decision;
- 11. seek help from your supervisor, if necessary; and
- 12. prepare a written summary for the employee's file.

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Dave Yost • Auditor of State

***HOW TO DEAL WITH  
DIFFICULT EMPLOYEES***

April 2, 2015

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### **About Andrew:**

Andrew is a Senior Consultant for Clemans Nelson. He joined Clemans Nelson in 2011 after working for two of the most preeminent law firms in Cleveland. Mr. Esposito advises clients in human resource management, labor relations, contract negotiations, regulatory compliance, discipline, and policy development. He regularly conducts training on a variety of human resource and labor relations issues such as social media and technology in the workplace, supervisory principles and practices, performance evaluations, FLSA, FMLA, and discriminatory harassment.

Mr. Esposito has experience assisting in litigation before every level of the Ohio judicial system. This experience has enabled him to accurately assess potential claims and advise clients on how to avoid costly litigation. Mr. Esposito received his J.D. from Cleveland-Marshall College of Law and his Bachelors of Specialized Studies from Ohio University in Political Science and Biology.

### **About Clemans Nelson & Associates:**

Clemans Nelson has provided quality management consulting services to employers for almost 40 years. We are one of the largest full-service consulting firms in the Midwest specializing in labor relations and human resource management.

We draw from the collective experience of our staff to develop practical solutions to your problems. Our extensive research capabilities allow us to quickly find the correct answers to your questions. The diverse professional background of our staff enables us to develop the best approach for resolving your employment issues. Consultants for Clemans Nelson have negotiated more Ohio city, county, and township labor contracts on behalf of employers than any other firm.

We are uniquely qualified to handle all of your labor relations and human resource management needs.



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## **I. INTRODUCTION**

There is one particular idiom that comes to mind when thinking about challenges in the workplace – an ounce of prevention is worth a pound of cure. This saying is equally true in the employment field as the medical field. Reacting to problems in the workplace is not only more difficult, it is more costly. This program is going to take employers through some of the more common problems that employers face and discuss strategies for preventing problems before they start.

## **II. LIMITING LIABILITY**

In some states, employees may have six years or more in which to bring a lawsuit against their employer. When do you start limiting your liability as an Employer? When the employee is hired? When the employee is fired? During employment?

Employers can start limiting their liability as soon as a prospective individual applies for a job. This is accomplished through the incorporation of a “Thurman” clause. In *Thurman v. Daimler-Chrysler*, the United States Court of Appeals for the Sixth Circuit held that a reduced limitation period for bringing a cause of action against an employer contained in an employment application was reasonable and enforceable.<sup>1</sup>

The clause in question in *Thurman* stated:

### **READ CAREFULLY BEFORE SIGNING. . .**

I agree that any claim or lawsuit relating to my service with [DaimlerChrysler] or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary.

In addition, the application stated “This application will be considered active for twelve (12) months from the date filed. If you are hired, it becomes part of your official employment record.” In September and October of 1999, Thurman reported incidents of sexual harassment to DaimlerChrysler. One of the incidents led to a criminal complaint against the harasser which resulted in a guilty plea.

In June 2000, Thurman filed a lawsuit against the harasser and DaimlerChrysler alleging violations of the Michigan Civil Rights Act, Title VII of the Civil Rights Act of 1965, Section 1981 and numerous state tort claims. The Sixth Circuit affirmed the decision of the court, granting summary judgment in favor of DaimlerChrysler pursuant to the abbreviated statute of limitations contained in the employment application.<sup>2</sup>

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<sup>1</sup> 397 F.3d 332 (6th Cir. 2004) affirmed by *Oswald v. BAE Industries*, 2012 U.S. App. LEXIS 10005 (6th Cir. 2012)

<sup>2</sup> This does not ensure that an employer’s attempt to limit the length of the limitations period will be successful in every instance. See *Boaz v. FedEx Customer Info. Servs.*, 725 F.3d 603 (6th Cir. 2013), *Wineman v. Durkee Lakes Hunting & Fishing*



### **III. HIRING THE WRONG PERSON**

A proper hiring and selection process can streamline all the documentation involved which can sometimes prove to be tedious. Uniform methods can also insulate an employer from possible discrimination claims. Choosing the “right” candidate is so important in the public sector (hard to get rid of a public employee once they complete a probationary period).

In order to hire the right person, employers, at a minimum, should:

- Understand the Job – complete a position analysis and review the position description for accuracy.
- Determine the Interview Method – Structured, Conversational, Stress, Comprehensive, Group.
- Prepare Questions (If the answer to your question is not essential for determining if the person is qualified and capable of performing the job, don’t ask it!)
- Conduct the Interview
- Evaluate Candidates

### **IV. PROBATION/INSTRUCITONAL PERIOD**

A Probationary/Instructional period is an employee’s chance to put his/her best foot forward. Behavior and conduct during these periods is the best that an employer can expect to ever get from that particular employee. Accordingly, don’t fall victim to the myth that a probationary employee will improve.

During probationary/instructional periods watch out for the following:

- resignation games
- probationary periods should apply to days worked not calendar days
- you are not permitted to extend probationary periods (alternative option is to terminate employment unless employee signs last chance)

### **V. CONTROLLING SICK LEAVE ABUSE**

Combatting leave abuse has become a major challenge for Employers. To understand if an employee is abusing leave, one must know the tools of the trade. While legitimate illnesses still account for the majority of employee absences, some studies have shown that less than one-third ( $\frac{1}{3}$ ) of absences from the workplace are related to poor health.

#### *A. IDENTIFYING THE ABUSER*

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*Club*, 352 F.Supp.2d 815 (E.D. Mich. 2005); *Bailey v. Ameriquest Mortgage Co.*, 2002 WL 100391 (D. Minn. 2002), overruled on other grounds, 346 F.3d 821 (8th Cir. 2003).



Once the manager and supervisor have a basic understanding of the regulations applicable to the use of sick leave, they need to identify those employees who are abusing this benefit.

1. Sick Leave Records

The first step in identifying the abuser is to look at the overall record of sick leave used during the employee’s career with your agency or previous public employment. The immediate supervisor should review the records and prepare a chart (see Appendix A) which identifies the following:

- a. Employee’s name.
- b. Years of public service in which the employee was eligible to accrue sick leave.
- c. Total hours of sick leave possible. This is computed by multiplying the number of years in public service times the number of hours the employee was eligible to accrue each year. (Example: a full-time employee working 40 hours per week accrues 120 hours per year times 10 years public service, equals 1200 hours possible accrual.)
- d. Total hours of sick leave accumulated to date (i.e., current sick leave balance including transferred hours from previous public service).
- e. Total sick leave hours used (i.e., #3 minus #4).
- f. Total number of sick leave hours used due to major illnesses. Include surgeries, childbirth, injury accidents, FMLA-qualifying serious health conditions, etc. You may also include in this column, or an additional column, sick leave hours used due to a death in the immediate family. Do not include in this column routine-type illness such as flu, upset stomach, diarrhea, headaches, backaches, etc., even if supported by a doctor’s statement unless such statement indicates these as a symptom of a serious health condition.
- g. Total number of sick leave hours used on the day before or the day after the employee’s regular days off (e.g., Monday and Friday for an employee who is off on Saturdays and Sundays).
- h. identify any illnesses occurring on a regular basis and the number of times the illness has occurred. (Example: flu – 6; diarrhea – 8; upset stomach – 12.)



- i. In the “comments” section identify any unusual situations you are aware of which might justify the employee’s use of any large block of sick leave. (Example: 2001 – 300 hours — operation.)

Once the chart outlined above has been compiled, the supervisor and manager can quickly identify those employees who appear to be using excessive amounts of sick leave for other than serious medical situations. This will be important as we explore ways of approaching these individuals in later chapters.

## 2. Patterns

The chart discussed in the previous section can also be used to identify those employees who have established certain patterns when using sick leave. The following are a few examples of patterns:

- a. Illnesses which occur on the same day of the week on a regular basis. The most common among abusers is a Monday or a Friday in order to enjoy a three day weekend. But patterns of this type can also occur the day after bowling league night, the day before or immediately following vacation, the day after the employee works late on his second job, etc.
- b. Another pattern which is readily recognizable once you have compiled the sick leave chart is that of recurring illnesses. While it is possible to have the same illness more than once, the human body usually builds some resistance to most illnesses once it has overcome the virus or germ causing the problem. Therefore, employees who have the same illness or symptoms occurring time and time again should be suspected of abusing sick leave and/or be counseled to seek medical attention in order to discover if there is a more serious underlying problem with their health.

There is a good chance if the employee is not seeking medical treatment for recurring illnesses that the employee is simply looking for an excuse to use sick leave or is falsifying his/her sick leave request.

- c. Patterns may also be found in regard to how frequently sick leave is used. Some abusers will use a sick day each month or about every six weeks. These types of patterns are more difficult to trace, but often indicate an employee who simply tires of the daily work routine and decides he/she needs a little R & R.

## 3. Malingers

While the human resources community may refer to false medical symptoms as “sick leave abuse,” the medical community uses the term “malingering,” which is defined



as the intentional production of false or exaggerated symptoms motivated by some external incentive—the incentive being, in our case, a day of paid sick leave. Unlike the abuser discussed in (B)(2) above, the malingerer may actually believe he/she is continually sick and may be seeking regular medical attention from a healthcare provider.

It is even possible for this “condition” to be taken to pathological extremes. Munchausen Syndrome (also known as hysterical elaboration or hysterical conversion disorder), for example, is defined as a “repeated falsification of illness,

usually acute, dramatic, and convincing...” Robert Berkow, M.D., ed., *The Merck Manual*, 16<sup>th</sup> ed. See also Michael D. O’Brien, *Medically Unexplained Neurological Symptoms*, *British Medical Journal*, Feb. 21, 1998. Another clinical term given to this type of individual is “hospital hobo,” *Merck Manual*, supra.

Because malingers have convinced themselves they have an actual illness, it can be much more difficult to change their poor attendance habits. The employer may need to employ the assistance of a professional from the medical community to help convince the employee that no medical condition exists which justifies their repeated absences.

4. Documentation

The development of the Sick Leave Chart discussed in Section A can only be accomplished if the supervisor or manager insists on proper documentation of all sick leave used. A form that does not force the employee to identify the specific nature of his illness is of little value in reviewing patterns or attempting to identify a malingerer.

Requiring an employee to document why sick leave is being used can also, itself, be a deterrent to excessive absenteeism. If the employee must put in writing his/her false excuse for using sick leave, there is a greater fear of developing a recognizable pattern or being exposed as falsifying the sick leave request.

B. *MONITORING SICK LEAVE USAGE*

1. Developing A System

The first step in monitoring the sick leave being used by employees is to develop a system for accurately tracking each time sick leave is used and establishing this as a priority function of the supervisor. The system should include a thorough review of each sick leave request to ensure:

- a. all required documentation has been submitted;



- b. the request for sick leave has been accurately completed and timely submitted;
- c. the employee has sufficient leave hours accrued to cover the absence;  
and
- d. the request for sick leave appears justified.

Each supervisor should also develop a Tracking Sheet for each employee to track the following:

- a. date sick leave was used;
- b. total hours used;
- c. reason for sick leave use;
- d. description of illness or injury;
- e. whether illness or injury was verified by a healthcare provider, including name of provider;
- f. whether illness or injury qualified for FMLA;
- g. comments section for the supervisor's concerns regarding the request;
- h. whether a meeting was held with the employee to discuss the request;  
and
- i. whether the request was recommended for approval.

The Tracking Sheet will assist the supervisor in monitoring the sick leave as it is used and hopefully identify potential abusers at an earlier stage. The Tracking Sheet will also be useful in the future for completing the Sick Leave Chart if the supervisor needs to counsel the employee about his/her attendance.

## 2. Implementing the System

The first step in implementing the system is to meet with those employees who have been identified as abusers. The idea here is not to discipline the employee, but simply place the employee on notice that you are monitoring his/her use of sick leave and expect improvement in the employee's attendance. A script should be prepared and reviewed by the supervisor prior to the meeting. The supervisor should follow (not read) the script, and not permit the conversation to turn into a



debate. The supervisor should also not allow the employee to turn the focus of the meeting to other employees or other issues. The purpose of the meeting is not to argue over whether previous absences were justified, but to improve the employee's attendance in the future.

The second step in implementing the system is to begin using the tracking system discussed in (A) above. Each time the suspected abuser is absent, the supervisor should meet with the employee to discuss the reason for the employee's absence and how the employee is progressing on improving his/her attendance. Each meeting with the employee should be documented on the Tracking Sheet.

Any violation of sick leave regulations, any absences without approved leave, or a continuous failure to improve attendance should be met with progressive discipline in addition to continual counseling.

3. Supervisory Training

Each supervisor who will be responsible for implementing the system should participate in this training program. As new supervisors and managers are employed, the system for monitoring sick leave should be explained to them and they should be provided training on how to implement the system.

4. Follow-up

Someone should be assigned to follow up with each supervisor to ensure the initial meetings have been completed by a specified date and the tracking system is being implemented.

Someone should also be assigned to monitor the improvements in attendance in each department or office where the system has been implemented to determine the success of the program. These could also be compared with departments or offices where the program has not been implemented. As the program progresses, the numbers should be shared to encourage continued use of the system and to encourage others to implement the system in their office or department.

C. *DEALING WITH THE ABUSER*

1. Fraud Flags

Nothing is more frustrating to a supervisor than being handed a scribbled "Doctor's Statement" on a tiny piece of prescription pad paper.



If it is readable at all, the employee will “interpret” it as excusing all absences and justifying whatever he/she demands. It is especially irritating to see comments such as:

- “This employee is released for light duty.” (where no such program exists)
- “Employee is released to return to work subject to the following restrictions:” (list follows) (usually precludes any distasteful duties)
- “Employee is released to return to work, but should have a nurturing environment conducive to self-esteem, and free of stress.”
- “Employee is released to work, but should be assigned to a different supervisor.”
- “Employee is released to work, but may not be able to encounter extremes in heat or cold, must not work outdoors, must not lift over 25 pounds, and might need additional rest periods.”
- “Employee is released to return to work, but should be given employment on the day shift only.”
- “Employee should be allowed to take naps during the day.”
- “Employee should not be subjected to a verbally abusive environment.” (employee is a corrections officer)

In this section we will list the “fraud flags” that courts and arbitrators have raised over various medical statements.

This material could be used in any of several ways:

- in deciding whether to deny sick leave
- in deciding to process discipline for being AWOL
- in deciding to ask the employee for more information
- in deciding whether to ask the employee for a release to contact his/her doctor
- in assessing ADA issues



- in deciding to seek a second FMLA medical opinion
- in writing grievance answers or even arbitration briefs
- in deciding whether “Dr. Feelgood” is credible and professional

2. When to Challenge the Doctor’s Slip

- a. The slip purports to be retroactive, and tries to excuse dates prior to the date of the medical examination.
  - Burnette v. Vanguard Plastics, 3 WH Cases 2d 1489 (U.S. Dist. Ct., Kansas, 1996)(Court and jury disbelieved a doctor’s statement signed July 7 that purported to excuse an employee retroactively to June 17 of the same year.)
  - Marquette Tool and Die and Int’l. Assn. of Machinists, 88 LA 1214 (Hilgert, 1987)(Employee saw doctor on October 10, got letter excusing him for October 1, 2, 3, and 6 — held invalid.)
- b. The slip purports to project backward in time to diagnose a prior condition that had abated by the time of the examination.
  - Moore v. Schiano (1996) 117 Ohio App.3d 326
- c. The slip contains the word “may” or “might” or “possibly.”
  - McPhaul v. Bd. of Commrs., Madison County, *supra*. (Physician’s note stated that employee “possibly” had fibromyalgia.)
  - Gaines v. Runyon, 6 AD Cases 688 (6th Cir., 1997)(Employee’s demand for accommodation denied where doctor’s statement said “it may be well for him to continue on the day shift.”)
  - State, ex rel. Malenowski v. Hordis Bros., 29 Ohio St.3d 342 (1997)(Word “might” is too indefinite in doctor’s statement.)
- d. The slip states that a particular job task or hours of work causes medical condition, no medical opinion.
  - Schneiker v. Fortis Insurance Co., 10 AD Cases 75 (7<sup>th</sup> Cir. 2000)(Physician’s diagnosis that employee’s depression and stress occurred only when working with a particular supervisor insufficient to establish disability.)



- True Temper Corp. v. United Steelworkers, 74 LA 22 (Duff, 1979)(Doctor’s note said that packing broom rakes made patient nervous. Arbitrator rejected it because it did not state that grievant could not physically perform the work without jeopardizing his health.)
- e. The slip is undated, or doesn’t match either the absence date or the illness.
- City of Detroit, Water and Sewage and Detroit Sanitary Chemists and Technicians Assn., 91 LA 639 (Brown, 1988)(Employee was authorized three days’ leave; took ten; submitted undated doctor’s statement that presented diagnosis different from condition initially claimed.)
- f. The slip was obtained AFTER discharge, or well after absence.
- Boyd v. State Farm Insurance Co., et al., 1998 CO5.42038, No. 97-11396 (5<sup>th</sup> Cir. 1998).(Court found employee’s submission, after his termination, of doctor’s diagnosis which purportedly qualified him for FMLA inadmissible.)
- James River Corp. and United Paperworkers Int’l., 104 LA 358 (Borland, 1994)(Note obtained after discharge and based solely on statement of grievant with no actual examination is invalid.)
- g. The slip is overly broad or illogical.
- Baily v. Amsted Indus., 9 AD Cases 292 (8<sup>th</sup> Cir. 1999)(Employee submission of notes from various physician’s indicating broad conclusions such as the employee was suffering from “bouts with depression” and “sleep disturbances” without more found to be insufficient indication of a “serious health condition” under FMLA.)
- Williams v. City of Charlotte, 4 AD Cases 1675 (W.D. N.C. 1995)  
(Submission of physician’s diagnosis that employee suffered from “shift work sleep disorder” insufficiently broad to qualify as an impairment under the ADA.)
- Kiphart v. Saturn Corp., *supra*.(Physician’s general conclusory statement that employee suffered from periodic insomnia and needed to take naps during the day insufficient to demonstrate employee was “substantially limited” under the ADA.)
- h. The slip is medically flawed or inadequate for FMLA.



- Manchester Plastics and Manchester Plastics Independent Union #595, 110 LA 169 (Knott, 1997)(Doctor’s slip claimed FMLA because of gastroenteritis linked to diabetes. DOL representative stated that gastroenteritis is not “serious health condition” and not inevitably linked to diabetes.)
  - i. The slip projects a future return date.
- General Electric Co., 71 LA 129 (Twomey, 1978)(Doctor’s note stating that employee has been under his care for six days due to a viral infection was given no credibility in that physician only saw the employee on the first day of infection; and physician could not possibly assess that employee would be fully able to return to work within precisely six days without seeing employee again.)
  - j. Absence extends beyond medical return date.
- James River Corp. and United Paperworkers, 107 LA 638 (Borland, 1996)(Note gave return date, but employee was AWOL and without notice beyond that date.)
  - k. The slip is signed by one having no medical authority.
- Fran Jom dba Temple Convalescent Hospital and Hospital Employees Union, #399 SEIU, 75 LA 97 (Siegel, 1980)(Contract allowed for notes by “licensed physician,” defective when signed by chiropractor.)
  - l. The slip simply says was under my care from (date) to (date).
- Eastern Associated Coal Co. and UMW, ARB Decision 102 (Bituminous Coal Operators) (Feldman, 1997)(Slip provided no statement as to condition.)
  - m. The slip appears altered.
- Chatman v. Board of Review, No. 37008, Ohio Court of Appeals, Fifth Dist. (1978)(Employee altered date on medical slip to extend period of excused absence; alteration confirmed by doctor.)
- Robertshaw Controls, 69 LA 887 (Duff, 1977)(Employee altered date on doctor’s slip.)
  - n. The slip is signed by a nurse or secretary.



- In re Shepherd, 1998 Ohio App. LEXIS 2194(Court rejected a note signed by a midwife’s assistant, saying that there was no indication of assistant’s qualification to determine that patient should not travel.)
- Fort Wayne Foundry, 103 CA 940 (Paolucci, 1994)(Doctor’s statement signed by nurse three days after absence was insufficient.)
- o. The slip claims illness for a period of time when employee was elsewhere.
- La Cross Lutheran Hospital, 73 LA 772 (McCrary, 1979)(Employee submitted a doctor’s slip excusing a period of absence during which employee was in Las Vegas.)
- p. The slip claims a disability, but employee’s actions are inconsistent with it.
- Bell Telephone Co., 84-2 ARB 8408 (Stutz, 1984)(Doctor’s slip claimed inability to work, but employee photographed doing strenuous activity in garden.)
- Lorain MR/DD and OAPSE, FMCS Case No. 94-14093 (Marshall, 1994)(Employee who presented a doctor’s statement regarding back problems was seen by clients and staff performing Scottish dance routine, discharge upheld.)
- q. Doctor signed slip without examining employee.
- Hamilton County DHS and OCSEA, FMCS Case No. 88-15256 (Bell, 1988)(Medical statement invalid where it was signed by LPN, who happened to be grievant’s daughter, and was based upon telephone conversation with no actual examination.)

3. ADA Issues

The ADA, in addition to dealing with accessibility issues, prohibits discrimination against “...a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”

The ADA defines a “qualified individual with a disability” as an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

The ADA defines the term “disability” to mean, with respect to an individual:



1. a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
2. a record of such an impairment; or
3. being regarded as having such an impairment.

As you can see from the above, the ADA was never intended to protect an employee with alleged minor illnesses who is using excessive amounts of sick leave. Even if the employee does have a recognized disability, the ADA does not prevent a manager or supervisor from enforcing the agency's sick leave regulations on such individual in the same manner the regulations are applied to those employees without a disability.

Managers and supervisors should also note that an employee alleging that he or she can no longer perform the essential functions of his/her position, who fails to request a reasonable accommodation, or for whom there is no reasonable accommodation, does not meet the definition of a "qualified individual with a disability" and is therefore not protected by the ADA.

In most cases, the ADA will not affect the manager's or supervisor's ability to address sick leave abuse issues. FMLA, on the other hand, can impact a manager's or supervisor's ability to reduce absenteeism, but usually does not prevent them from dealing with a true sick leave abuser. After all, the objective is not to prevent an employee with a serious health condition from utilizing his/her accrued sick leave to treat or manage such condition or to assist a spouse, son, daughter, or parent with a serious health condition. Management's objective should be to ensure that employees who have no serious health conditions do not waste away their sick leave unnecessarily to the point where the employee has insufficient leave available should a serious medical situation occur.

#### 4. Alternatives to Traditional Discipline

Historically, employers have reacted to employee misbehavior through the use of verbal warnings, written warnings, suspension(s), and terminations. In fact, due to a need to show that an employee was "on notice" of the behavior to be expected, some employers have implemented those forms of traditional discipline in a progressive manner, increasing the penalty with each new violation. These traditional methods of attempting to improve an employee's performance are often more effective in building a case for the eventual removal of the employee.

Most employers today would prefer to improve an existing employee's performance as opposed to investing the time and expense involved in hiring and training a new



employee. The following are some alternative methods of improving an employee's performance:

- a. *Better Communication:* The best way to prevent an employee from becoming a sick leave abuser is to correct attendance problems before they ripen into patterns of misbehavior. Here, the most obvious approach calls for a continuous dialogue between the supervisor and the worker, with the supervisor as coach and mentor. This usually requires actually meeting with employees and reviewing their attendance on an ongoing basis. This works well where in place along with positive reinforcement strategies.

Surprisingly, this practice of better communication is largely underutilized; instead, supervisors rely on terse memos or upon annual "performance evaluations." Worse yet, many supervisors utilize e-mail with the result being a communication with a decidedly negative tone.

- b. *Counseling:* This is still, officially, in the realm of "non-discipline," because it can be simply a more structured form of the communication process mentioned above.

If the goal is behavior modification, then it can simply be an instructional process wherein the supervisor inquires into the source of the attendance problem and advises the worker how to do better. On the lower end of the scale, it may not even be necessary to place any record of the meeting in the employee's personnel file. If, however, further problems are anticipated, then it is annotated so that the supervisor can prove the employee was "on notice."

- c. *Performance Improvement Plan:* This is an idea that mirrors many of the techniques used in the field of public education.

A performance improvement plan can be voluntary or involuntary. It can be a tool to gently modify behavior, or it can be used in lieu of a short suspension. It begins with an assessment of the employee's attendance, then proceeds to a meeting wherein the supervisor and the employee, in a non-confrontational way, discuss how the attendance problem can be constructively remedied. The "plan" may include such things as retraining, a modification to the work environment, a change in how incidents are documented, the revision of directives to make them clearer, a change in the employee's personal habits, or even a change in reporting procedures.

From the employee's standpoint, it clarifies what the employer expects. From the employer's standpoint, it acts to eliminate all of the employee's



excuses before they can come up. The end result is a document that both parties sign.

- d. Peer Review: This is a technique that works well only in a small number of circumstances; and never in a unionized environment. It involves convening a group of the employee’s peers to discuss how an employee’s absences adversely affect the agency and co-workers

If the “peers” are professionals at their jobs, they will be quite candid in expressing their views. However, the supervisor must be careful not to reveal confidential medical information regarding employees.

## 5. Progressive Discipline

While most employers would prefer to resolve employee attendance problems without resorting to traditional discipline, this is not always possible when the employee refuses to cooperate. This is especially true when addressing an employee’s attendance which the employee refuses to recognize as a problem.

If all the methods previously discussed in this program fail to produce the results desired, discipline may be applied in a progressive manner to correct the problem. This should start with counseling and progress to a verbal warning, written reprimand, and eventually to a suspension or termination if the employee’s attendance fails to improve. Progressive discipline may also include a “working suspension” where the employee continues to work and be compensated, but which is recorded as a disciplinary suspension. However, if an illness, injury, or other situation occurs which qualifies for both sick leave and FMLA, the employee cannot be disciplined for exercising his/her rights under the FMLA.

At each step of the progressive discipline process, the employee should be counseled again regarding the improvements in attendance desired by the employer. The discipline form should also outline the previous disciplinary actions that have been implemented to improve the employee’s performance. The objective should continue to be to correct the employee’s sick leave abuse; termination should only be considered when it becomes evident the employee is not willing to change his/her ways.

## 6. Measuring Your Success

If anyone could develop a solution for resolving sick leave abuse in the public sector overnight, they would be an instant millionaire, because every public employer in the state would want to buy their system. The system discussed in this program will dramatically reduce the number of sick leave hours used by employees if properly implemented over an extended period of time. Sick leave abuse is a learned habit



which usually worsens with each occasion sick leave is used inappropriately and left unchecked. Like many bad habits, employees may improve for a while and then begin to slip backward into their previous practices. This is why a system must be developed to continuously monitor employees' attendance and counsel or eventually discipline those employees who fail to maintain good attendance records.

The best measure of success will be the overall reduction in the amount of sick leave used in those departments or offices which implement the program. This should be continually monitored and reinforced with data outlining the success of the program and additional training for those supervisors who must administer the sick leave monitoring system.

**APPENDIX A  
SICK LEAVE CHART**

Department: \_\_\_\_\_  
 Compiled by: \_\_\_\_\_

For Period Beginning \_\_\_\_\_  
 and Ending \_\_\_\_\_

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Employee Name	Years of Service	S.L. Hrs. Possible	S.L. Hrs. Accumulated	S.L. Hrs. Used	S.L. Hrs. Major Illness	S.L. Hrs. Day Before/ Day After	Recurring Illnesses	Comments

## **VI. USING EVALUATIONS TO IMPROVE PERFORMANCE**

Most employers, at least in theory, conduct evaluations on an annual basis, but twice during a probationary period. If followed, this is probably sufficient; however, problems can arise where evaluations are delayed, missed, or where “special” evaluations are ordered.

A delayed evaluation may allow the employee to avoid discipline for poor performance because it suggests inadequate supervision, while a “special” evaluation can raise questions of improper motive and disparate treatment. In *Collins v. State of Illinois*, 44 FEP 1549 (1987), the U.S. Court of Appeals, 7th Circuit, noted that a prima facie case of discrimination was established when a black library employee showed that she had received “special” evaluations at three, six, twelve, and eighteen months, whereas white employees received evaluations only on an annual basis. Generally, prima facie in discrimination cases means the complaining employee has introduced enough evidence that the burden shifts to the employer to do something to defend the legitimacy of the employer’s evaluation system, or the difference in the way it was applied. In other words, the supervisor had better be able to point to special performance problems, unique to the complaining employee.

Another “timing” complication can arise when an employee who is facing termination suddenly receives, or has recently received, a glowing recommendation. See generally, *Turgeon v. Howard University*, 32 FEP 925 (D.C. D.C.1983).

### *A. Coach or Judge*

The unfortunate problem with performance evaluation generally, and with evaluation interviews in particular, is the tendency to cast the supervisor into the role of judge. When the supervisor acts as or is perceived as a judge, he/she will more likely encounter hostility and defensiveness from the interviewee. A more desirable position is for the supervisor to assume the role and attitude of a coach. In the role of coach, the supervisor can devote his/her energy to improving the employee’s performance.

One approach that is effective in bridging this gap from judge to coach is the exercise of stepping out of character and assuming that any problems noted in the employee’s performance are jointly held. When using this approach, the first step to improve performance is to correctly diagnose the reason(s) for poor performance. Is the poor performance due to factors such as an employee’s personal disabilities, lack of motivation, approach to the job, or constraints beyond the control of the employee? The supervisor should ask himself or herself the following questions: Can the employee perform well in this area? Have I ever seen good performance in this area? Does the employee seem to be trying hard but not approaching the job correctly? For example, is the employee doing tasks in the wrong sequence, or applying the wrong procedure? With these questions in mind, the supervisor should ask the employee why performance is substandard.

While it is natural to blame outside factors for poor performance, the employee may be able to provide some insights into the reasons for poor performance. While some of the reasons may be known to the supervisor, other reasons may involve perceptions or experiences unique to the employee. Even though the supervisor may not agree with the employee’s diagnosis, it is advisable to at least treat it with respect.

Once the problems have been isolated, the supervisor and the employee can jointly work out a formal or informal process of retraining or correction. If, however, the employee is argumentative or hostile, it may be necessary to take disciplinary action.

*B. Evaluations are not a Surprise*

Most difficulties in the evaluation process stem from the failure on the part of the manager to identify specific performance standards and the failure to communicate those standards to the employee. Consequently, the formal appraisal comes as a “surprise” to the employee when informed that he/she has not met the standards of performance. By clearly communicating the standards and expectations that will be used in evaluating the employee’s performance at the beginning of the process, many potential problems can be avoided.

A significant value of an ongoing, informal evaluation is to provide an opportunity for the employee to be aware of his/her manager’s standards and expectations, and to provide a chance to work up to those standards and expectations. The supervisor should meet with employees to review goals and expectations frequently during the rating period. In addition, the supervisor should maintain a helpful and supportive attitude and demonstrate confidence in the employee’s ability to meet and exceed the stated standards and expectations.

Feedback during the evaluation period should occur frequently. Both “positive” (praise) and “negative” (constructive criticism and suggestions) feedback is important for employee motivation and direction. Feedback should be specific and descriptive. For example, “You don’t listen to people” is fairly general and does not offer much help. On the other hand, “When customers talk to you, you continually walk away from them” is specific and descriptive. It tells the employee exactly what action is undesirable, and therefore identifies the area for improvement.

While it is recommended that feedback be well-timed and clearly understood, it is nevertheless ill-advised to criticize an employee in the presence of other employees; it should be given privately, at a time when the employee will be receptive.

**VI. PROGRESSIVE DISCIPLINE**

*A. Purpose*

Whether the employer refers to the action as “progressive discipline” or “corrective action,” the objectives should be the same:

- To inform the employee of what is expected of him/her;
- To instruct the employee regarding the types of conduct that are unacceptable;
- To interpret for the employee the policies, rules, and regulations; and
- To ensure the employee acts in accordance with the organization’s policies, rules, and regulations in the future.

The terms may be used interchangeably, as they are in this material. The key is that the reader is able to understand the basic difference between punishing employees and attempting to correct

employee behavior.

Even the term “progressive discipline” can be somewhat of a misnomer since there are some offenses which warrant immediate suspension or termination of employment. Each offense must be examined carefully to determine the appropriate level of discipline which should be applied. The employer must consider the impact of the violation, and the resulting discipline, on the organization as a whole and on other employees, how the offense will affect public opinion, the potential liability the offense may subject the employer to, and the expectation for improvement in the employee’s conduct in the future. When using the principles of progressive discipline, the level of discipline ultimately administered should be the lowest level which both adequately addresses the above concerns and which the employer believes will ensure the violation does not occur again in the future.

If initial attempts to correct the undesirable aspects of the employee’s behavior are unsuccessful, progressive discipline dictates that the employer apply increasing penalties until the employee fully understands that the undesirable conduct will not be tolerated. Each successive time progressive discipline is administered, the employee is given instruction regarding acceptable and unacceptable behavior, and is warned that additional violations will result in more severe discipline. At each stage of this process, the employer must keep in mind the ultimate goal is to correct the employee’s behavior or, if that appears unobtainable, to remove the problem from the workplace.

#### *B. Making Discipline Stick*

In order to prevail in a case for discipline, a supervisor or employer must understand some of the key offenses which may occur in the workplace. While there may be many variations on these themes, some basic infractions include those listed below.

1. Insubordination: Insubordination is the willful disobedience of a reasonable order, where the employee’s conduct is not objectively justified. Insubordination may also be found where an employee, by language or gestures, manifests unprovoked hostility or disrespect.

Be Able to Prove:

- a. That a direct order was given
- b. That the order was reasonable and understood
- c. That refusal, or the absence of any good faith effort to obey, occurred

Expect the Employee to Allege:

- a. That he did not understand the order
- b. That he was “set up” or provoked
- c. That the refusal was justified by a safety concern
- d. That the order was unreasonable

2. Neglect of Duty: This is a concept contained in 124.34 O.R.C., and generally refers to an employee’s failure to carry out assigned duties. It differs from insubordination in that the mental element here is not “willful” action, but simply a failure to act.

Be Able to Prove:

- a. The existence of the duty
- b. The reasonableness of the duty
- c. The unexcused failure to execute the duty
- d. Prior warnings, counseling, and training

Expect the Employee to Allege:

- a. That the did not know what was expected of him
- b. That the employer's standards are not reasonable, or are not enforced
- c. That he was aware of the duty, but never given adequate training
- d. That the penalty is too harsh

**Note:** This offense is something of a chameleon in that it encompasses both misfeasance and nonfeasance. For instance, a law enforcement officer who sees a crime, but fails to make an arrest is guilty of neglect of duty, (*Stafford v. Civil Service Commission*, 355 S.W. 2d 555; and *Lenchner v. City of Miami*, 156 S. 2d 767), as is an employee who sleeps on the job (*March v. Hanley*, 375 N. 4 S. 2d 409).

- 3. Inefficiency/Unsatisfactory Performance: This violation can be found where the employer has established reasonable, objective standards of performance which have been communicated to the employee, but which have not been met over a period of time.

Be Able to Prove:

- a. A preexisting standard
- b. That it was reasonable
- c. That it was communicated to the employee
- d. That an assessment was made in a fair manner
- e. That the employee consistently failed to meet that standard, notwithstanding training and progressive discipline

Expect the Employee to Allege:

- a. Lack of training or knowledge of the standard
- b. Past practice or nonenforcement of the standard
- c. Impropriety in the assessment process
- d. Mitigating circumstances
- e. That it was a single isolated incident

**Note:** It is unwise to assert that the employee was always marginal because this implies negligent training or retention on the employer's part; rather, it is better for the employer to prove that the employee could, at some prior time, perform the work, but has simply exhibited poor performance of late.

4. Absenteeism/Tardiness: This violation can be found where an employee has accumulated an excessive number of unexcused absences or incidents of tardiness.  
Be Able to Prove:

- a. That the absence was either not approved or was not properly documented
- b. That absence without approval violates a work rule
- c. That the work rule is known to the employee
- d. That the rule is evenly applied

Expect the Employee to Allege:

- a. Mitigating circumstances, e.g., too sick to call in, weather, etc.
- b. Past practice of granting leave without pay
- c. Past practice of nonenforcement

**Note:** Employers have the right, absent a contractual restriction, to inquire into the nature of an illness (only HR or upper management as a result of *Columbus v. Lee*). See *State, ex. rel. Britton v. Scott*, 6 Ohio St. 3d 268; *Lorain County Board of MR/DD v. OAPSE*, FMCS no. 862-5849; and *South Euclid FOP v. D'Amico*, 13 Ohio App. 3d 46.

5. Dishonesty/Failure of Good Behavior: These offenses begin to assume the appearance of malfeasance and could include a broad cross section of offenses too numerous to mention. Note that where the offense runs parallel to a tort or a criminal violation, the elements will be virtually the same.

Be Able to Prove:

- a. That the action was intentional
- b. That the perpetrator is properly identified
- c. The existence of a rule, law, or funding guideline
- d. The effect on insurability/liability

Expect the Employee to Allege:

- a. Failure of proof
- b. Past good work record
- c. Past practice

C. *Checklist for Appropriately Handling Discipline*

1. cool off first;
2. mentally prepare yourself to be in the right frame of mind;
3. seek privacy;
4. listen to the employee;
5. act and think objectively;
6. assume responsibility for Employer rules (do not apologize for what is being done);

7. recognize the probable effect of your actions on this employee and other employees;
8. explain the consequences of a future violation;
9. encourage self-discipline;
10. encourage the employee to relate his understanding of the decision;
11. seek help from your supervisor, if necessary; and
12. prepare a written summary for the employee's file.