CHAPTER FIVE
EEO AND DISCIPLINE

In the Chapter Four, we looked at EEO and hiring. In this chapter, we will cover the next major make or break employment issue—disciplinary actions. We will start with a brief overview of management's burden in a disciplinary case, then we will look at the EEO principle that governs disciplinary actions, and close by showing you the three classic mistakes that supervisors make.

THE BASICS OF DISCIPLINE

I do not want to spend too much time on this, as I cover disciplinary actions in *Taking Disciplinary Actions: A Federal Supervisor's Guide to Corrective Discipline* (Dewey Publications, 2003). However, just so we are speaking the same language, let us briefly summarize the basic legalities of discipline in federal service.

Disciplinary actions are formal and informal actions taken to correct employee misconduct. Informal actions are a broad variety of either oral or written warnings, counselings, threats, or discussions to put the employee on notice of the rules that were violated. Formal disciplinary actions are letters of reprimand, suspensions without pay, demotions, or removals.

The easiest way to summarize the legalities of a disciplinary action is to examine management's burden of proof in a formal disciplinary action. If you take a formal disciplinary action (letter of reprimand, suspension without pay, demotion, or removal) against a status employee who challenges the action to any third party, management has a four-part burden of proof.

1) *Cause of action.* Management must show that the conduct is misconduct and there is a cause for any disciplinary action of any severity. The government does not have a list of all the conceivable offenses an employee could commit, but rather uses a general standard that the action must "promote the efficiency of the service" and that the misconduct somehow affect the mission or purpose of the job.

2) *Formal action justified.* Next, the agency must show why formal as opposed to informal action is appropriate. The standard is not the severity of the offense but rather constructive knowledge of wrongdoing—whether the employee should have known that what he or she was doing was wrong.

3) *Penalty appropriate.* Assuming formal action is indeed appropriate,

the agency must justify its selection of penalty and why it could not have imposed a lesser sanction. You have probably heard personnelists talk about the "*Douglas* Factors," which is a list of factors management must consider when assessing penalties such as the seriousness of the act, the employee's past formal discipline, the clarity and vigor of the warning, and others.

4) *Proof of facts.* Last, the agency must be able to prove the basic facts of the case—that what it is alleging happened really did happen—through testimonial, documentary, and physical evidence at a hearing.

EEO STANDARD APPLIED TO DISCIPLINE

Even if management can show all four of the above elements, the case can still be overturned if the action were illegal discrimination. The standard they use goes back to our definition of disparate treatment in Chapter Two, where the EEOC said, "Disparate Treatment occurs when an employer treats some employees less favorably than other similarly situated employees because of their race, color, religion, sex, national origin, age, or handicap."

The key words are "similarly situated," and it sounds easy enough. You have two employees who jointly embezzle from your agency, you fire one and give the other a letter of commendation. The one not fired will be reinstated following a complaint because he can easily show that he was "similarly situated" with the other and treated "less favorably" based upon whatever factor he chooses to use to distinguish himself.

The problem, though, and why we are spending an entire chapter on this, is that the situations never happen like that. They happen at different times, in different places, and under seemingly different circumstances. So let us look at the three biggest mistakes that get supervisors into EEO trouble: condoning past violations, uneven discipline across organizations, and avoidance.

Condoning Past Violations by Good Employees

Here is the scenario, your best employee has a spotless work record, excellent attendance, numerous awards, is scrupulously honest, and has dedicated himself to the agency for many years. He is highly respected, he gets things done, and is your key player.

Your budget people notify you that he misused a government credit card by a small amount. You confront him, and he is genuinely contrite. He admits the wrongdoing, apologizes profusely, and promises it will never happen again. He is sincere and genuine, and you know that he will never misuse the credit card again.

Every supervisory instinct in your body tells you to do no more than to give the employee an oral or written warning. He is, after all, your best employee and you know he is sincere. Further, you do not want to harm him by having a formal disciplinary action like a reprimand in his record. I guarantee you that 98 out of 100 readers would let him off with at worst, a stern warning. This is exactly what happened at one particular federal agency where the manager followed all the right instincts and let him off with a good talking–to.

So what do you think happens? No, the employee, as we would expect, never did it again. Somebody else did. Several months later, their worst employee, whom everyone was dying to get rid of, used Uncle Sam's credit card to get an unauthorized five hundred dollar cash advance at a casino. They investigated and had no problems with proof, as they had him on video tape and he had no justifiable reason for using the card there. They gleefully fired him and could easily prove the four elements we discussed above: he misused a credit card, which affects the efficiency of the service and creates a cause of action, he should have known it was wrong since he had abundant training on the proper use of the card, the penalty of removal was appropriate given his job, and there were no problems with proof.

What do think happens? You probably have guessed it by now. He files an EEO complaint based on one of the seven factors in which he is different from the good employee, and the agency has no choice but to settle the case. The problem is that the two employees are "similarly situated." They both committed the same offense—misuse of a government credit card—and one received formal action, while the other was simply warned not to do it again.

To be sure, the offenses differ in seriousness, but they were the same offense, Misuse of a government credit card is misuse of a government credit card. As former New York Governor Al Smith said, "no matter how thin you slice it, it's still baloney." If you go to every single federal agency's table of penalties it will have a range of penalties for a first offense of misuse of a credit card anywhere from a letter of reprimand or short suspension up to about a thirty-day suspension. And none of them says that it only applies to bad employees and not to your pets.

Make sure you understand this—where you treat the best employee differently from the bad employee is in the formal penalty you give. You can always justify why the formal penalties were different, as long as both are getting some type of formal discipline. In the above case, if you give the good employee a letter of reprimand, and now the worst employee uses it at a casino and is removed, you can always justify it. We mentioned this briefly in Chapter Three on what is not discrimination. These "*Douglas* Factors" I mentioned above not only allow you to give different penalties, they require you to. You must consider, for example, how good an employee it is, whether he has received awards, whether he is

contrite, how good his attendance has been, how serious the offense is, and whether he has received prior formal discipline.

If you give one a letter of reprimand and the other a removal, you can easily give a legitimate non-discriminatory reason for the different penalties. What you absolutely cannot justify is letting one employee off with no more than a warning, and formally disciplining the other.

I cannot tell you how often this happens. The Air Force lost an EEO case at a printing facility where it fired a bad employee for unauthorized use of the facilities to print up tickets and a flyer for a friend who owned a night club. He had two prior formal disciplinary actions so the Air Force had no problem showing cause, constructive knowledge, penalty, and proof of facts. However, the employee filed an EEO complaint and showed that management had tacitly condoned what they called "scrounge jobs," and two other employees of a different race had used the facilities, with the knowledge of management, to print up some small items for a Boy Scout troop and a local church.

The Air Force tried unsuccessfully to argue that the offenses were different because one was for a profit-making organization and the others for nonprofit. The EEOC did not buy the distinction, said that it is still baloney, and ordered the employee reinstated with back pay.

In a Postal Service case, an employee went up to six woman coworkers on separate occasions and made outrageous sexual proposals accompanied by smacking his lips, making sucking sounds, and fondling himself. The Post Office fired the pervert, and what do you think happened.? He filed an EEO complaint and showed that a supervisor of a different race in the same organization had within the past year aggressively pursued a woman employee and even physically fondled her. However, because he was a good supervisor, was genuinely contrite, and the woman did not want to make a big deal out of it, the higher manager let the supervisor off with a stern warning. Again, EEOC found discrimination because the two were "similarly situated," committed the same offense (sexual harassment), one was formally disciplined, and the other let off with a mere warning.

There is a law as immutable as the law of gravity in play here and it goes like this: whenever two employees, your best employee and your worst employee, commit an offense, the good employee always does it first. It never happens the other way around where you can spot the consistency issue. When your best employee commits a minor violation of a serious rule, you must formally discipline—using the fact that he or she is your best employee to give the mildest possible formal action. Then when your worst employee commits a more serious violation of the same rule, you can safely discipline with a serious penalty.

Uneven Discipline Across Organizational Lines

In the case above we were looking at two employees under the same supervisor. Now let us put them in different parts of the organization. Here is the example. At a large DoD base with thousands of employees, the base commander directly supervises five departments. Under their delegations of authority, for anything over a two-week suspension, the department head is the proposing official and the base commander is the final deciding official. A department head proposes the removal of an employee for an offense (it does not matter what), and it goes to the base commander who hears the employee's reply, upholds the proposal, and removes the employee.

The employee now files an EEO complaint alleging that several employees of a different race in another department under another department head committed the same offense but were not disciplined. How good a case does the employee have? Is he similarly situated with the others even though they in separate departments?

This is another one that I could clone and show you dozens of examples. Management loses this case and every one like it because of the delegations of authority. The question logically arises of how far do they look when they identify "similarly situated"—the entire agency, a region, or one supervisor?

And the answer is that they look at who is the final signatory authority or final deciding official over the action. And in this case, since the final deciding official is the base commander, they will compare people in different parts of the overall organization. On the other hand, if the final deciding official were the department head or even a lower supervisor, then they would only compare employees under that person for purposes of "similarly situated."

In fact, I remember a case at the DoD Dependents Schools (DoDDS) where EEOC did a world-wide comparison. DoDDS is broken into different overseas regions throughout the world wherever there are U.S. Forces. Employees serve a five-year overseas tour which may be extended, and while the regional director has the authority to extend a tour, a denial of an extension can only be recommended by the regional director and must be approved by the headquarters in D.C. The Regional Director of one region recommended the nonextension of an employee in his region, which was approved by the headquarters. When the employee filed an EEO complaint, EEOC ordered that she be compared, not with just employees in her region under the regional director, but with other employees throughout the world because the final approval lay with headquarters.

You should also be aware that this issue of disparate treatment in disciplinary actions is huge in other forums besides EEO just as a general disparate treatment issue without regard to the seven EEO factors—before the Merit

Systems Protection Board (MSPB), labor arbitrators, and other third parties. And they take it just as seriously—especially labor arbitrators—and generally use the same method to determine "similarly situated"—by looking under the final deciding official.

Avoidance

The last of our three most common mistakes is best shown by one of my all-time favorite cases—a U.S. Court of Appeals case from the 1990s.

The employee had recently been hired as a lawyer at a federal activity and quickly acquired a reputation with management as an agitator. She participated energetically in racial activities at the agency and soon became widely sought out by other employees for counsel, assistance, and support. Management soon became concerned about the amount of time she was spending socializing on the job and counseling other employees, which was in no way related to her official functions. On one occasion, her supervisor commented to her that she was the "matriarch" of the other employees of her race, and she promptly backed him off by threatening an EEO complaint for the comment.

She spent a great deal of her day acting in these general advocacy functions and management became angry about what it felt was time-wasting. However, for fear of being accused of reprisal since these were largely racial and ethnic activities, management took no action in the matter and never told her again about its concern.

Her performance also fell. Shortly after she started, her supervisor noticed several serious inadequacies in her job performance. However, on the one occasion when he mustered the courage to broach the subject with her, she threatened him with an EEO complaint, and her aggressive and defiant attitude immediately discouraged further discussion of the topic.

Fearful of an EEO complaint, management bent over backwards to avoid giving her any cause to take offense. Her supervisor said nothing negative to her about her performance and gave her satisfactory (fully successful) performance ratings for three years. Although her performance deficiencies were demonstrable and indisputable, management gave the employee a wide berth because of the dangers of confronting her and never ventilated its concerns about her performance.

Her socializing on the job, and her poor performance continued for three years and management's anxieties did not diminish. In anticipation of any EEO complaints, however, management carefully documented all her performance deficiencies.