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### **How to Handle the Difficult Employee and How to Build a Termination Case**

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**I. INTRODUCTION**

**II. THE CHRONICALLY ABSENT/TARDY EMPLOYEE**

**A. Employee's Legal Rights**

1. Minnesota Human Rights Act ("MHRA")

a. Definition of Disability - Minn. Stat. § 363A.03, Subd. 12. "Disability' means any condition or characteristic that renders a person a disabled person. A disabled person is any person who:

- (1) has a physical, sensory or mental impairment which materially limits one or more major life activities;
- (2) has a record of such impairment; or
- (3) is regarded as having such an impairment."

b. Definition of Qualified Disabled Person - Minn. Stat. § 363A.03, Subd. 36. "Qualified disabled person' means:

- (1) with respect to employment, a disabled person who, with reasonable accommodation, can perform the essential functions required of all applicants for the job in question; . . ."

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2. Americans with Disabilities Act ("ADA")

a. Definition of Disability - 42 U.S.C. § 12102(2). "The term disability means:

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

b. An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to a prohibited discriminatory action because of an actual or perceived physical or mental impairment, whether or not

the impairment limits or is perceived to limit a major life activity. See 42 U.S.C. § 12102(3). This provision, however, does not apply to impairments that are transitory (actual or expected duration of six months or less) and minor.

- c. Construction of “Disability” Definition. The definition of “disability” is construed in favor of broad coverage. An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, such as medication, medical supplies or equipment, prosthetics, mobility devices, etc., but not ordinary eyeglasses or contact lenses.
- d. Definition of a Qualified Individual With a Disability - 42 U.S.C. § 12111 (8). “Qualified individual with a disability” means: “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” Consideration is given to the employer’s judgment as to what functions are essential and if the employer prepared a written job description before advertising or interviewing applicants.

3. Family Medical Leave Act (“FMLA”)

- a. The FMLA provides up to twelve (12) weeks of job-protected unpaid leave during any twelve-month period for the following reasons:
  - (1) Birth and care of the employee’s child and care for a newborn child;
  - (2) Placement for adoption or foster care of the child with the employee;
  - (3) Care of an immediate family member (spouse, son, daughter or parent) who has a serious health condition;
  - (4) Care of the employee’s own serious health condition;

- (5) Qualifying exigency of an immediate family member who is a covered military service member on active duty in support of a contingency operation; or
- (6) Care for covered service member with a serious injury or illness if the employee is an immediate family member or next of kin of the service member.

See C.F.R. § 825.112.

- b. “Serious health condition” means an illness, injury, impairment or physical or mental condition that involves:
  - (1) inpatient care (means an overnight stay in a hospital, hospice or residential medical care facility, including a period of incapacity, or any subsequent treatment in connection with such inpatient care); or
  - (2) continuing treatment by (or under the supervision of) a healthcare provider. Continuing treatment, includes any one or more of the following:
    - (a) a period of incapacity and treatment requiring an absence of more than three consecutive calendar days from work, school or other regular daily activities;
    - (b) pregnancy or prenatal care; or
    - (c) chronic conditions.

See 29 C.F.R. §§ 825.113, 825.114, and 825.115.

4. Minnesota Teacher Continuing Contract Law, Minn. Stat. § 122A.40, Subd. 12.

Immediate Discharge. A school board may immediately discharge a continuing contract teacher on the grounds of a continuing physical or mental disability subsequent to a 12-month leave of absence and inability to qualify for reinstatement in accordance with Minnesota Statutes Section 122A.40, subdivision 12. See Minn. Stat. § 122A.40, subd. 13(a)(6).

5. Civil Rights/Discrimination Laws
6. Contractual Right to Leave

**B. Employer's Right to Require Regular and Consistent Attendance**

1. Teachers. The failure to regularly and consistently attend work may be grounds for termination under Minnesota Statutes Section 122A.40, subdivision 9 for:
  - a. insubordination;
  - b. failure without justifiable cause to teach;
  - c. neglect of duty;
  - d. continuing physical or mental disability subsequent to a 12-month leave of absence and inability to qualify for reinstatement.
2. All Employees - Contractual Obligations
  - a. Duty days/hours.
  - b. Call-in/attendance procedures.
  - c. Medical excuse provisions.

**C. Cases**

1. Absenteeism/Tardiness Challenged Under the ADA/MHRA
  - a. Greer v. Emerson Elec. Co., 185 F.3d 917 (8th Cir. 1999). The employee challenged her termination for excessive absenteeism under the ADA, claiming that she had been terminated on the basis of her disability resulting from depression and anxiety. The court found that the employee was not a qualified individual with a disability under the ADA in light of her excessive absenteeism. The court stated that regular and reliable attendance was a necessary element of the employee's job.
  - b. Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675 (8th Cir. 2001). Allowing an employee to be absent from his position as a receiving clerk in retail store and to make up time missed later was not reasonable accommodation for the employee's irritable bowel syndrome within meaning of ADA. Such an accommodation did

not address the unpredictability of the employee's absences, which left the employer unable to rely on its schedule in order to efficiently receive and process merchandise.

- c. Mallon v. U.S. Physical Therapy, Ltd., 395 F. Supp.2d 810 (D. Minn. 2005). An office manager with spinal stenosis requested, and was granted, a two-month leave of absence from her employment in order to undergo surgery. The employer was able to find a temporary replacement. The employee's surgery was delayed, and she requested another two-month leave, which again was granted. The employee then indicated that she might need a longer leave if she had not fully recovered by the end of the two-month period. The employer then rescinded the leave accommodation on the basis that they may not be able to find a temporary worker for that length of time, even though the employee might have returned to work after two months. The court found that given that the employer previously granted a two-month leave twice, a reasonable jury could find that the employee's leave request was reasonable and that it did not place an undue hardship on the employer to grant the leave.

## 2. Absenteeism Resulting from Continuing Disability

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In re Johnson, 415 N.W.2d 751 (Minn. Ct. App. 1987). A continuing contract teacher with Hodgkins Disease took a medical leave for more than two school years. The school district sought to terminate the teacher. During the hearing, medical evidence was introduced that showed a possibility of a relapse of a psychotic episode and harm to elementary students. The court affirmed that the termination was justified. The court also held that when a teacher consents to or voluntarily requests a leave of absence, the leave need not be based on a physician's examination.

## 3. Absenteeism Resulting in Failure to Teach

- a. Anderson v. Indep. Sch. Dist. No. 623, 292 N.W.2d 562 (Minn. 1980). The school district justifiably discharged a teacher for failure without justifiable cause to teach based upon misuse of sick leave. The teacher misused sick leave on two occasions (teacher called in sick but actually went to a job interview or was traveling) and was warned after first occasion that such conduct was grounds for termination.

b. Halpern v. Bd. of Educ., 45 Conn. Supp. 171, 706 A.2d 1011 (Conn. Super., 1996). The documented evidence of repeated and admitted tardiness, combined with a record of failure to cover assignments, suffice to substantiate a conclusion of inefficiency and or incompetence. The plaintiff's repeated failure to arrive on time for supervisory duties, such as recess, presented safety problems. Her tardiness and forgetfulness with respect to special classes disrupted the schedules of other teachers and deprived students of educational opportunities offered by the school. No matter how skilled a teacher may be, a continuous failure to report on time and to cover assignments constitutes inefficiency and or incompetence.

4. Refusing to Work Pending Grievance Proceedings

a. Carrington v. Mahan, 51 F.3d 106 (8th Cir. 1995). A social worker was transferred to a new assignment and grieved the transfer. Pending the grievance, the employee refused to report to her new work assignment. The court held that although the employee was entitled to a hearing on her transfer grievance, she had an obligation to report for work in her new position and to work pending disposition of that grievance. Thus, her termination was justified.

b. Palmer v. Indep. Sch. Dist. No. 917, 1997 WL 259959 (Minn. Ct. App. 1997) (unpublished). After suffering an on-the-job injury, the teacher was only able to work part-time. The school district, therefore, assigned her a part-time position and placed her on a partial medical leave of absence. The teacher objected to the assignment and refused to report to work on the basis that her new assignment did not meet her medical restrictions and was unreasonable. The court held that the new assignment did not violate medical restrictions and that the school district was not required to consult with the teacher's physician before assigning her the position. The court further held that the pendency of a judicial proceeding does not justify an employee's refusal to report to a new assignment while the appeal is pending.

5. Failure to Follow Absentee Policy/Procedure

McKinnon v. Bd. of Educ., 273 A.D.2d 240, 709 N.Y.S.2d 104 (N.Y. App. Div. 2000). An employee failed to comply with established call-in procedures to report his absences. The validity of reasons for the

employee's absences was not contested. The court held that substantial evidence supported the school board's charges of incompetence and misconduct against the employee, based upon the employee's excessive absences.

6. Use of Contractual Leave

Drain v. Bd. of Educ., 508 N.W.2d 255 (Neb. 1993). A school board terminated the contract of a tenured public school teacher for neglect of duty for being absent for an "unreasonable" amount of time. The teacher had 21½ days of leave before and after her mother's death. The court held the termination was arbitrary and capricious as the clear and unambiguous language of the school district's leave policy, incorporated into the contract, allowed her to take up to 70 days of leave, if accrued, for death of a mother. The teacher had accrued 70 days of paid leave at the time of her absence.

7. Equal Treatment/Discrimination

a. Clearwater v. Indep. Sch. Dist. No. 166, 231 F.3d 1122 (8th Cir. 2000). A Native American teacher was terminated for excessive tardiness. The teacher, however, claimed her firing was based on her race and gender because Caucasian and male employees were not held to the same standard of punctuality. The teacher's late arrivals over a period of more than two years, leaving her students unattended and unsupervised on a number of occasions, were numerous and well documented. The teacher also acknowledged at least five times that she was late after receiving reprimands. The school provided her with numerous opportunities to rectify her behavior. Based on the evidence, the court found in favor of the school district.

b. Elam v. Regions Financial Corp., 606 F. Supp.2d 999 (Iowa 2009). Shortly after the commencement of her employment, the employee started becoming ill and discovered she was pregnant. Her doctor recommended that she be given leave as needed when she became ill, and her employer allowed her to do so without pay. Her absences became frequent and she often had to leave her teller station abruptly while waiting on customers. She was warned as to her absences, and various accommodations were suggested which were rejected by the employee. She was terminated, based in part upon her absenteeism. The employee claimed that her termination was discriminatory as she was terminated because she was

pregnant. The court found in favor of the employer noting that being present to perform one's job is an essential function and that employers may have a reasonable expectation as to an employee's attendance.

**D. Hints in Addressing Absenteeism/Tardies**

**III. CHEMICALLY DEPENDENT EMPLOYEE**

**A. Statutory Obligations**

1. State Law

a. Minnesota Human Rights Act

- (1) The MHRA provides that individuals who are addicted to drugs or alcohol are disabled.
- (2) However, the term "disability" excludes any condition resulting from alcohol or drug abuse which prevents a person from performing the essential functions of the job in question or constitutes a direct threat to property or the safety of others. See Minn. Stat. § 363A.03, subd. 36.

- b. Continuing Contract Law. A teacher may be entitled to a 12-month leave for drug or alcohol addiction prior to termination. If the teacher has not sufficiently recovered after 12 months, the teacher may be immediately discharged. See Minn. Stat. § 122A.40, subd. 13.

2. Federal Law

a. Americans With Disabilities Act

- (1) Drug addiction and alcoholism are considered potential disabilities covered by the ADA. See 42 U.S.C. § 12114.
- (2) Current users of alcohol are not automatically excluded from the definition of a qualified individual with a disability.
- (3) Current users of illegal drugs, however, are not qualified individuals with a disability and, specifically, are excluded from coverage. See 42 U.S.C. § 12114(a).

- (4) The ADA also specifies that employers may have the following policies with respect to alcohol and illegal drugs:
- (a) An employer may prohibit the use of alcohol and illegal drugs in the workplace;
  - (b) An employer may require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
  - (c) An employer may require that employees conform to the Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 701–707 (limits federal funds unless employer provides drug-free workplace by prohibiting possession/use, etc., having awareness program, making requirements condition of employment);
  - (d) An employer may hold an employee who is an alcoholic or who engages in illegal drug use to the same qualification standards for employment or job performance and behavior that the employer holds other employees, even if the unsatisfactory performance is related to alcoholism or illegal drug use.

See 42 U.S.C. § 12114(c)(4); 29 C.F.R. § 1630.16(b).

- (5) The ADA does not require employers to implement rehabilitation programs for alcoholics or drug addicts. The Act also does not require an employer to accommodate an employee addicted to drugs or alcohol who violates an employer’s job performance or behavioral requirements by giving that employee the opportunity to enter into a rehabilitation program prior to being discharged. See S. Rep. No. 116, 101st Cong., 1st Sess. at 4142 (1989) (Senate Committee on Labor and Human Resources). Similarly, the ADA does not require the employer to pay for the rehabilitation unless it pays for other forms of rehabilitation for employees with disabilities unrelated to work injuries.

(6) The ADA limitations pertaining to physical examinations do not apply to drug testing (including allowing the use of results as the basis for termination). See 42 U.S.C. § 12114(d).

b. Family Medical Leave Act

(1) Substance abuse may constitute a “serious health condition permitting an employee to take leave on behalf of either the employee or a covered family member.” However, FMLA leave may be taken for treatment for substance abuse only when the employee is being treated by a health care provider or a provider of health care services referred by a health care provider. Absence because of the employee’s use of the substance, rather than for treatment, does not qualify for FMLA leave. See 29 C.F.R. § 825.119.

(2) Treatment for substance abuse does not prevent an employer from taking employment action against the employee as long as the action is not taken because the employee exercised his/her right to FMLA leave. See 29 C.F.R. § 825.119(b).

**B. Alcohol/Drug Testing**

1. Americans With Disabilities Act

a. Drugs. The ADA does not prohibit drug testing of applicants or employees and does not consider such tests to be a medical examination. Test results may be used as the basis for taking disciplinary action. See 42 U.S.C. § 12114; 29 C.F.R. § 1630.16.

b. Alcohol. Testing for alcohol is considered a “medical examination.” Accordingly, an employer may only test job applicants for alcohol use after extending a conditional job offer and may withdraw the offer only where the employee’s failure of the test established an inability to perform the job. Similarly, employees may be tested only when job-related and consistent with business necessity. See 42 U.S.C. § 12114.

c. The ADA does not prohibit Department of Transportation testing of employees and applicants for illegal drug use and on-duty impairment by alcohol. See 42 U.S.C. § 12114(e).

2. Omnibus Transportation Employee Testing Act of 1991, 49 C.F.R. Part 40
  - a. Federal law requires drug and alcohol testing for workers who perform safety-sensitive functions in certain transportation industries (i.e., school buses).
  - b. Testing is required in six situations:
    - (1) Pre-employment testing prior to starting a safety sensitive job;
    - (2) Post-accident testing for employees involved in an accident in which alcohol or drug use could have been a factor;
    - (3) Random testing of current employees at an adjustable, industry-wide rate;
    - (4) Reasonable suspicion testing where an employer has reason to suspect drug or alcohol use;
    - (5) Return-to-duty testing for employees who previously tested above the permissible limits; and
    - (6) Follow-up testing at least six times in the first year after returning from treatment.
  - c. Background checks for prior positive test results and refusals for preceding two-year period are required.
3. Minnesota Drug and Alcohol Testing in the Workplace Laws
  - a. Legal Requirements. State law sets forth requirements all employers, including school districts, must meet in order to legally test employees for alcohol or drug use. See Minn. Stat. § 181.950–57. The basic requirements are:
    - (1) The employer must have a testing policy in place which contains certain minimum information;
    - (2) The employer must give all employees and applicants timely written notice of the policy;
    - (3) The tests must be conducted in accordance with the reliability and fairness safeguards set forth by the Act;

- (4) The employer may test only in five specific circumstances.
  - (a) Preemployment testing;
  - (b) Reasonable suspicion testing;
  - (c) Treatment program testing;
  - (d) Routine physical examination testing; and
  - (e) Random testing.
- (5) Permissible Consequences
  - (a) An employer may refuse to employ an applicant who fails a test if the confirmatory test substantiates the original positive test result.
  - (b) An employer may discharge an employee if an employee tests positive on a first test and refuses treatment or tests positive on a subsequent test after completing treatment. While circumstances for discharge are limited, an employer may impose other forms of discipline short of discharge.

b. Lawful Consumable Products Act, Minn. Stat. § 181.938

- (1) This Act provides that an employer may not take any adverse employment action against a job applicant or employee because of their use of lawful consumable products, such as alcohol or tobacco, while off work premises and during non-working hours.
- (2) While restricting an adverse employment action related to the consumption of lawful products, the Act does not impose restrictions pertaining to the consumption of illegal drugs.
- (3) An employer still may restrict the use of lawful consumable products if the restriction relates to a bona fide occupational requirement and is reasonably necessary to avoid the appearance of a conflict of interest between the employee's responsibilities and the employer.

- (4) An employer also may refuse to hire an applicant or may discipline an employee who fails to comply with the conditions of a chemical dependency treatment or aftercare program.

### C. Cases

1. Larson v. Koch Ref. Co., 920 F. Supp. 1000 (D. Minn. 1996). The employee, a refinery supervisor, was arrested for drunken driving. He subsequently was terminated based on short notice for absences, the bad example his arrest set in the work place, and his failure to meet general workplace expectations. The employee claimed that it was impermissible to use his arrest as grounds for dismissal as his arrest was closely related to his alcoholism and other alcoholic employees were treated differently. The court ruled that although the MHRRA protects an employee's status as an alcoholic, it does not protect an employee from the consequences of his conduct.
2. Matter of Copeland, 455 N.W.2d 503 (Minn. Ct. App. 1990). A police officer was drinking heavily and using crack cocaine. When questioned as to his chemical dependency, the officer denied he had a problem. He was cited for improper job performance. Performance complaints also led to the discovery of narcotics in his squad car, at which time he was asked to take a drug test, which resulted in a positive test. The department then terminated the officer without offering any rehabilitation program based upon his drug use and possession while performing his duties. The officer challenged the decision on the basis that he was removed from his position after a drug and alcohol test without being offered a rehabilitation program, in violation of Minnesota Statutes §§ 181.950–.957. The court held that these statutes do not prevent discharge based on conduct independent of the test results, even if the conduct is inextricably intertwined with the test results or obtained as a result of the drug and alcohol test.
3. Flynn v. Raytheon Co., 868 F. Supp. 383 (D. Mass. 1994). The court held that while the ADA protects an individual's status as an alcoholic, it is clear that a company need not tolerate misconduct such as intoxication on the job. A reasonable accommodation does not extend to accommodating an alcoholic employee showing up for work under the influence of alcohol or drinking alcohol on the job.

4. Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Ore. 1994). The ADA may require an employer to provide a leave of absence to an employee with an alcohol problem, particularly if the employer would provide that accommodation to an employee with cancer or some other illness requiring medical treatment.
5. Longen v. Waterous Co., 2002 WL 1906027 (D. Minn. 2002) (unpublished). The employee and employer entered into a “last chance agreement” which provided that the employer would terminate the employee in the event he ingested or imbibed mood-altering chemicals, including alcohol. The conditions imposed upon the employee were done so after the employer had tolerated his repeated absences, both as a result of his intoxication and as a result of his treatment. After violating and being terminated for violation of the agreement, the employee alleged that the last chance agreement violated the ADA and the MHRA. The court disagreed, stating that the employer could have terminated the employee rather than enter into last chance agreement with him. Thus, the court found that the last chance agreement was a reasonable accommodation of the employee’s disability, chemical dependency, and, thus, did not violate the ADA or the MHRA.

**D. Hints in Addressing Employee Chemical Dependency**

**IV. FREE SPEECH ISSUES**

**A. Constitutional Authority**

1. United States Constitution
  - a. First Amendment. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
  - b. Fourteenth Amendment. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Minnesota Constitution. Article I, Section 3. The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.

**B. Application of Free Speech Rights in the Employment Context**

1. General Considerations
  - a. An employee does not forfeit the First Amendment right to speak out on matters of public concern as a condition of employment by a public school even when the speech or other expression includes comment on or criticism of school policies or officials. Nevertheless, a public employer has an interest in assuring the efficient performance of the school, which justifies regulation of employee speech where the speech materially and substantially threatens the efficiency of its operation. See Pickering v. Bd. of Educ., 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed.2d 811 (1968).
  - b. The result is that courts engage in a balancing test, weighing the competing interests of the public employer and public employee. The employee's interest is as a citizen to comment upon matters of public concern, and the school's interest is as an employer in maintaining efficient operations.
  - c. Two inquiries guide interpretation of the constitutional protections accorded to public employee speech. First, it must be determined whether the employee spoke as a citizen on a matter of public concern. If the matter was not of public concern, the employee has no right to free speech. If the matter was one of public concern, the speech will be protected if the employer did not have some reason for treating the employee differently from any other member of the general public. See Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951 (2006).
2. Private Matters
  - a. Speech on private matters is not entirely unprotected, but speech on matters of public concern receive a higher degree of protection. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed.2d 471 (1977).

- b. When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. See Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951 (2006).
- c. Courts have held that the following constitute matters of private concern: assignment of employees, employee compensation, promotion, other terms and conditions of employment, termination, disputes or grievances with the school district or its employees, use of public funds, peer review, physical or psychiatric examinations, private writings, sexual preference, tenure, sexually explicit material access.

### 3. Public Matters

- a. Speech must fairly relate to a matter of political, social or other concern to the community, not simply to the employee to enjoy First Amendment protection. See Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed.2d 708 (1983). Speech is a matter of public concern if it relates to a political, social or other community interest.
- b. Whether an employee's speech addresses a matter of public concern depends upon the content, form and context of the particular statement. Additionally, an employee's right to comment on matters of public concern must be balanced against the employer's interest in promoting the efficient fulfillment of its responsibilities. Courts will consider:
  - (1) whether the conduct was disruptive; and
  - (2) the time, place and manner of the speech.
- c. Courts have held that the following constitute matters of public concern: academic dishonesty, athletic rules violations, board candidate support or opposition, board-staff relations, criticism of administrators, curriculum, student discipline, sex discrimination, educational quality, educational philosophy, funding issues, medication policy, and management of public funds.

4. Mixed Questions. Mixed questions of public and private concern, such as criticism of school district's personnel policies and criticism related to educational theories, are protected. See Cox v. Dardanelle Pub. Sch. Dist., 790 F.2d 668 (8th Cir. 1986).
5. Classroom Speech, Conduct and Activity. Educational institutions have broad authority in selecting and regulating curriculum. There are very limited rights, if any at all, to academic freedom in the K–12 context.

### C. Cases

1. Pickering v. Bd. of Educ., 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed.2d 811 (1968). The school board dismissed a teacher who wrote a letter to the editor criticizing a proposed levy increase. Some statements were inaccurate. The teacher was fired on the grounds that the letter unfairly impugned the school board's integrity. The Supreme Court overturned the termination, finding that the letter addressed a matter of public concern. The Court found that the inaccuracies did not undermine the school board's status unless made with knowing falsity. While the letter was critical of the employer, it did not impede on the teacher's performance of duties or the regular operation of the school.
2. Cybyse v. Indep. Sch. Dist. No. 196, 347 N.W.2d 256 (Minn. 1984). A former substitute teacher of the school district applied for a position with the school district and did not receive the position on the grounds that the school district hired a stronger candidate. She sued the school district claiming that the reason she was not hired was because she was married to a school board member of another school district who had "pro-teacher" views and was paid by the teacher's union to conduct two seminars for teachers on how to elect pro-teacher candidates to school boards. The teacher alleged that her right to freedom of association under the First and Fourteenth Amendments had been violated. While a teacher's associational freedom can be compromised in the school setting if outweighed by an appropriate concern of the public employer, the court found that there was no indication that the husband's activities on the neighboring school board would have any impact on the teacher's effectiveness as a teacher. Thus, the school district's motion for summary judgment was denied.
3. Graham v. Special Sch. Dist. No. 1, 1992 WL 174719 (Minn. Ct. App. 1992) (unpublished). A school social worker expressed concerns to various staff members and officials, both orally and through internal memoranda, about perceived violations of state procedures for the

assessment of children. She subsequently was terminated on the grounds of conduct unbecoming a teacher, insubordination, and inefficiency in teaching. Her “general litigiousness” was noted as a factor in her termination. The social worker sued, claiming a violation of her First Amendment rights. The court reviewed whether the social worker engaged in a protected activity and, if so, whether the protected activity was a substantial or motivating factor in her termination. The court found that the social worker’s complaint to the Department of Education would constitute a matter of legitimate public concern and would likely outweigh the school district’s interests, particularly where the Department of Education found some of the social worker’s complaints valid and helpful. Thus, the court found the social worker presented sufficient evidence of a viable claim to withstand dismissal of her claims on summary judgment. See also Calvit v. Minneapolis Pub. Sch., 122 F.3d 1112 (8th Cir. 1997).

4. LeVake v. Indep. Sch. Dist. No. 656, 625 N.W.2d 502 (Minn. Ct. App. 2001). A public high school teacher was reassigned to teach a different class after he refused to teach the prescribed curriculum of evolution in a tenth grade biology class. He sued, claiming, among other issues, that the school district violated his right to free speech. The court held that a public high school teacher’s right to free speech as a citizen did not permit him to teach biology class in a manner that circumvented prescribed course curriculum established by the school board. Thus, the reassignment of the teacher to another science class when he refused to teach evolution did not violate the First Amendment.
5. Jereczek v. Bd. of Educ., 1991 WL 34701 (Minn. Ct. App. 1991) (unpublished). A teacher wrote and distributed a letter critical of the superintendent and signed the letter in his official capacity. The school district suspended the teacher on the grounds that the letter had a serious impact on staff and administration effectiveness. The teacher sued, claiming a violation of his First Amendment rights. The court held that the teacher’s suspension was justified. In making this determination, the court found that the record amply supported the school district’s findings as to the importance of administration cohesiveness during the difficult budget discussions and a reasonable concern about the letter’s disruptive effect. Furthermore, the court determined that the record also supported the trial court’s content and public interest conclusions in that there had been a series of disagreements between the superintendent and teacher concerning the teacher’s assignments and responsibilities. Thus, the letter’s content and tone focused primarily on the teacher’s personal grievances rather than matters of general public concern. Therefore, based

upon the letter's minimal public interest and the significant potential disruption, the court determined the termination was justified and affirmed the decision to dismiss the First Amendment claims of the teacher.

6. California Teachers' Ass'n v. Governing Bd., 45 Cal. App. 4th 1383, 53 Cal. Rptr. 2d 474 (1996). A school district has the power to prevent its employees from wearing political buttons in its classrooms and when otherwise engaged in providing instruction to the district's students. See also Nigosian v. Weiss, 343 F. Supp. 757 (E.D. Mich. 1971) (although union activities are protected, the school district properly discharged the teacher for discussing union disputes in the classroom after failing to obey valid directives to discontinue such discussions).
7. Loeffelman v. Bd. of Educ., 134 S.W.3d 637 (Mo. Ct. App. 2004). Comments made by teacher during English class to answer a student's question relating to a project for another class did not constitute a matter of public concern where the comments expressed a private opinion regarding interracial relationships and biracial children.

#### **D. Hints in Addressing Employee Free Speech Claims**

### **V. THE EMPLOYEE WITH A MEDICAL ISSUE**

- A. As set forth above, employers are prohibited from discriminating against an employee with a physical or mental impairment, a record of impairment or who is regarded as impaired, who, with or without a reasonable accommodation, can perform the essential functions of the job. See 42 U.S.C. § 12118; Minn. Stat. § 363A.03.
- B. Discriminatory conduct includes not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business. See 42 U.S.C. § 12112(b)(5).
- C. In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to perform the essential functions of that position or enjoy equal employment opportunities. See 29 C.F.R. § 1630.2(o).

- D. Determinations of whether an employer provided appropriate accommodations often will depend upon whether the employer engaged in an interactive process as to an employee's need for reasonable accommodations. See 29 C.F.R. § 1630.2(o)(3). This inquiry often includes an examination of the following:
1. An identifiable need for an adjustment or change at work because of a medical condition.
  2. Determination of the purpose of the position and its essential job functions.
  3. Clarification of what the individual needs and identification of appropriate reasonable accommodations.
  4. Good faith participation in the interactive process.

**E. What is a possible reasonable accommodation?**

1. Job restructuring by either the reallocating or redistribution of marginal job functions that an employee is unable to perform because of disability or altering when and/or how a function, essential or marginal, is performed.
2. Permitting an employee to use accrued paid leave or unpaid leave.
3. Modified or part-time schedule.
4. Reassignment to vacant position which the employee can perform.

**F. Undue Hardship**

Several factors must be considered in determining whether an undue hardship exists:

1. The nature and cost of the accommodation;
2. The overall financial resources of the facility making the accommodation;
3. The number of persons employed at this facility;
4. The effect on expenses and resources of the facility;
5. The overall financial resources, size, number of employees, and type and location of facilities of the employer;

6. The type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
7. The impact of the accommodation on the operation of the facility.

**G. Hints in Addressing Accommodation Issues**

**VI. HIRING PRACTICES**

**A. Application Procedures**

1. Ensure appropriate policies and procedures are in place.
2. Updating of Job Description
  - a. Importance of updating job descriptions.
  - b. What may need to be updated?

**B. Application Forms**

1. Establishment of Rights and Responsibilities
2. Establishment of Job Expectations
3. Establish an employee's procedural rights if disciplinary incidents do arise (i.e., veteran status).
4. Establishment of Qualifications
5. Solicit Information That May Identify Problems or Issues
6. Authorizations/Releases
7. Acknowledgment of Information

**C. Background Checks**

1. Discretionary vs. Mandatory Criminal History Background Checks
2. Conditional Hiring and Discharge
3. Factors to Consider When Reviewing a Background Check

4. Other Background Checks
  - a. Board of Teaching Background Check
  - b. Driver's License Check
  - c. Credit Check
  - d. Other

**D. Pre-Employment Testing/Examination**

1. Drug and Alcohol Testing
  - a. Commercial Motor Vehicle Drivers
    - (1) Federal law requires school districts to conduct pre-employment testing for controlled substances for all bus drivers before the first time the driver performs safety-sensitive functions for the school district, unless the driver is exempted from this requirement (i.e., participated in a controlled substance testing program within the previous 30 days). See 49 C.F.R. 382.301(a) and (b).
    - (2) A school district may, but is not required to, conduct pre-employment alcohol testing of bus drivers under federal law. If a school district chooses to conduct pre-employment alcohol testing, it must comply with the following requirements:
      - (a) It must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).
      - (b) It must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., it must not test some covered employees and not others).

- (c) It must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.
- (d) It must conduct all pre-employment alcohol tests using the alcohol testing procedures of 49 C.F.R. part 40.
- (e) It must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

See 49 C.F.R. § 382.301(d).

- (3) Alcohol and drug tests shall be conducted only after the applicant has received a conditional offer of employment.

b. Other Employees

- (1) A school district may, but is not required to, test job applicants whose position does not require a commercial driver's license to undergo drug or alcohol testing.
- (2) A school district may request or require any job applicant whose position does not require a commercial driver's license to undergo drug and alcohol testing, provided:
  - (a) a job offer has been made to the applicant; and
  - (b) the same test is requested or required of all job applicants conditionally offered employment for that position.
- (3) If a job applicant has received a job offer which is contingent on the applicant passing drug and alcohol testing, the school district may not withdraw the offer based on a positive test result from an initial screening test that has not been verified by a confirmatory test.

- (4) In the event the job offer is subsequently withdrawn, the school district shall notify the job applicant of the reason for its action.

See Minn. Stat. § 181.951.

2. Physical Examination

- a. An employer may require a medical examination after making an offer of employment that is conditional on the satisfactory outcome of the examination if it is required of all new hires within the same job category. See 42 U.S.C.A. 12112(d)(3)(A); 29 C.F.R. § 11630.14(b); Minn. Stat. § 363A.20, subd. 8(a)(1)(i).
- b. The examination must test only for essential job-related capabilities. See Minn. Stat. § 363A.20, subd. 8(a)(1)(ii).
- c. The test cannot consist of a polygraph, voice stress analysis or any test purporting to test the honesty of any employee or prospective employee. See Minn. Stat. § 181.75.
- d. An employer cannot require an employee to pay for the cost of the medical examination. See Minn. Stat. § 181.61.

**E. Confirmation of Previous Employment and Credentials**

1. Information That May Be Obtained from a Private Employer. A private employer is not subject to any statutory restrictions or obligations to release personnel data about an employee. Private employers may, however, be restricted from releasing personnel data pursuant to a collective bargaining agreement, other employment agreement or policy. In addition, absent statutory immunity, as described below, private employers may be subject to common law claims for the release of personnel data (i.e., interference with a business relationship, defamation, etc.).
2. Information That May Be Obtained From a Public Employer. The following personnel data on current and former employees, volunteers and independent contractors of a government entity is public and must be disclosed upon request:
  - a. Name; employee identification number, which must not be the employee's Social Security number; actual gross salary; salary range; contract fees; actual gross pension; the value and nature of

employer-paid fringe benefits; and the basis for and the amount of any added remuneration, including expense reimbursement, in addition to salary;

- b. Job title and bargaining unit; job description; education and training background; and previous work experience;
- c. Date of first and last employment;
- d. The existence and status of any complaints or charges against the employee, regardless of whether the complaint or charge resulted in a disciplinary action;
- e. The final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body;
- f. The terms of any agreement settling any dispute arising out of an employment relationship, including a buyout agreement as defined in Minnesota Statutes Section 123B.143, subdivision 2, paragraph (a); except that the agreement must include specific reasons for the agreement if it involves the payment of more than \$10,000 of public money;
- g. Work location; a work telephone number; badge number; and honors and awards received; and
- h. Payroll time sheets or other comparable data that are only used to account for employee's work time for payroll purposes, except to the extent that release of time sheet data would reveal the employee's reasons for the use of sick or other medical leave or other not public data.

3. Information That School Districts Must Disclose. Minnesota Statutes Section 13.43, subdivision 16, imposes upon school districts to disclose certain employee information to other schools. The statute provides:

The superintendent of a school district or the superintendent's designee, or a person having administrative control of a charter school, must release to a requesting school district or charter school private personnel data on a current or former employee related to acts of violence toward or sexual contact with a student, if

an investigation conducted by or on behalf of the school district or law enforcement affirmed the allegations in writing prior to release and the investigation resulted in the resignation of the subject of the data.

**F. Pre-Employment Interviews**

**VII. CONTRACTS FOR EMPLOYMENT**

**VIII. EVALUATIONS**

**A. Licensed Staff**

1. Evaluation of a Probationary Teacher
  - a. Required by Minnesota Statutes Section 122A.40, subdivision 5.
  - b. Three times each year for a teacher performing services on 120 or more school days.
  - c. Two times each year for a teacher performing services on 60 to 119 school days.
  - d. Once each year for a teacher performing services on fewer than 60 school days.
  - e. Days devoted to parent–teacher conferences, teachers’ workshops and other staff development opportunities and days on which a teacher is absent from school not included.
  - f. A school district and exclusive representative must develop a probationary review process through joint agreement that may include trained observers serving as mentors or coaches. See Minn. Stat. § 122A.40, subd. 6.
2. Evaluation of a Continuing Contract Teacher. Minnesota Statutes Section 122A.40, subdivision 8 provides that: “A school board and an exclusive representative of the teachers in the district shall develop a peer review process for continuing contract teachers through joint agreement. The process may include having trained observers serve as peer coaches or having teachers participate in professional learning communities.”

3. Effect of Failure to Conduct Required Number of Evaluations of Probationary Teacher

a. When Terminating and Not Renewing a Teacher for Other than Mere Economic Reasons

(1) The school district must substantially comply with the provisions of the law in terminating and nonrenewing probationary teachers.

(2) The school board substantially complied with the provisions of the law when it gave a probationary superintendent three written evaluations during his first year of probation and one written evaluation during his second year of probation. See Allen v. Bd. of Educ. of Indep. Sch. Dist. No. 592, 435 N.W.2d 124 (Minn. Ct. App. 1989); see also Kleinschrodt v. Indep. Sch. Dist. No. 2886, Co. No. A05-1346, 2006 WL 1984696 (Minn. Ct. App. 2006) (unpublished) (three e-mail evaluations to probationary part-time social worker, even though not in compliance with requirement of formal written evaluations, did not require reversal of school district's decision to not renew, as the school district otherwise substantially complied with the remaining provisions governing contract nonrenewals and made some minimal efforts to evaluate the social worker's performance); Tchida v. Indep. Sch. Dist. No. 31, Co. No. A08-1348, 2009 WL 1919615 (Minn. Ct. App. 2009) (unpublished).

b. When Terminating and Not Renewing a Teacher for Mere Economic Reasons. The Minnesota Court of Appeals has held that a school district's failure to evaluate a probationary teacher at least three times each year did not invalidate its decision not to renew the teacher's contract for budgetary reasons because the school district otherwise substantially complied with applicable statutory provisions by personally serving the teacher with timely notice of nonrenewal at the end of the school year. Savre v. Indep. Sch. Dist. No. 283, 642 N.W.2d 467 (Minn. Ct. App. 2002).

**B. Nonlicensed Staff**

1. No statutory requirement.
2. Possibly governed by contract or policy.
3. Evaluate as frequently as possible, especially with:
  - a. probationary employees; or
  - b. problem employees.

**C. Suggestions for Evaluations**

1. Use subjective and objective criteria—record anecdotal comments.
2. Be comprehensive—record everything observed (good and bad).
3. Conduct evaluations uniformly.
4. Use of more than one evaluator when possible.
5. Unannounced vs. announced evaluations.
6. Inform employees of the evaluation process and advise the employee of the results of the evaluation.
7. Discuss the evaluation with the employee and make suggestions for improvement—document suggestions and responses of employee.
8. Allow the employee to respond or comment on the evaluation, both orally and in writing.

**IX. CONDUCTING AN EFFECTIVE INVESTIGATION**

**A. Who Should Conduct the Investigation?**

**B. Planning for Interviews**

1. Determine policies, procedures, laws, collective bargaining agreements, etc. that may apply to the alleged conduct.
2. Determine if there are any documents or other items of evidence that may assist in the investigation.
3. Review personnel or student files.

4. Determine who initially should be interviewed.
5. Determine the order of interviews.
6. Prepare for Interviews
  - a. Prepare questions in advance, but be prepared to ask follow-up questions.
  - b. Anticipate the questions that interviewees are likely to ask and be ready with logical, coherent and reasonable responses. Possible questions are:
    - (1) Am I being investigated?
    - (2) How will you use the information? Is it confidential?
    - (3) Will I get into trouble by giving you this information?
    - (4) What are you really investigating?
  - c. Do not disclose private “educational” or “personnel” data.

**C. Conducting Interviews**

1. Location
2. Tennesen Warning
3. Opening Statement
4. Questioning Techniques
5. Note-Taking
6. Student Interviews
7. Closing the Interview

**D. Investigation Conclusions**

## X. LEGAL ISSUES TO CONSIDER BEFORE MAKING TERMINATION/DISCHARGE DECISION

### A. Licensed Staff

#### 1. Grounds for Termination/Discharge

##### a. Probationary Teachers

- (1) The school board may determine that a teacher's probationary contract shall not be renewed as it sees fit. By statute, the school board must pass a resolution of nonrenewal prior to July 1 and serve a written notice of nonrenewal upon the teacher prior to midnight on June 30.
- (2) Total discretion is vested in the school board with respect to renewal or nonrenewal for probationary teacher contracts. No hearing is required. See Pearson v. Indep. Sch. Dist. No. 716, 290 Minn. 400, 188 N.W.2d 776 (Minn. 1971). However, the statutory procedures must be followed if a school board decides not to renew a probationary teacher's contract. See Skeim v. Indep. Sch. Dist. No. 115, 305 Minn. 464, 234 N.W.2d 806 (Minn. 1975); see also Marshall County Cent. Educ. Ass'n v. Indep. Sch. Dist. No. 441, 363 N.W.2d 126 (Minn. Ct. App. 1985).

##### b. Continuing Contract Teachers

- (1) A continuing contract teacher may be terminated if, proven by a preponderance of the evidence, grounds for termination or discharge support the proposed termination. A lesser penalty may be imposed only to the extent that either party proposes such a lesser penalty.
- (2) In determining whether termination is the appropriate penalty, the remediability of the teacher's conduct must be considered.
  - (a) "Remediability" has been defined as "whether damage has been done to the students, faculty or school, and whether the conduct resulting in that damage could have been corrected had the teacher's supervisors warned her." Kroll v. Indep. Sch. Dist. No. 593, 304 N.W.2d 338 (Minn. 1981), citing

Gilliland v. Bd. of Educ. of Pleasant View Consol. Sch. Dist. No. 622, 365 N.E.2d 322 (Ill. 1977).

- (b) The Court of Appeals in the case of Downie v. Independent School District No. 141, 367 N.W.2d 913 (Minn. Ct. App. 1985), referred to several factors that should be considered in determining remediability.
  - i) Prior record of the teacher.
  - ii) Severity of the conduct in light of the teacher's record.
  - iii) Whether the conduct resulted in actual or threatened harm, either physical or psychological.
  - iv) Whether the conduct could have been corrected had the teacher been warned by superiors.
  - v) The court noted, however, that school boards are not required to wait for harm to come to their students before discharging a teacher.
- (c) If the conduct is remediable, the teacher is entitled to a written warning before being dismissed. See Beranek v. Joint Indep. Sch. Dist. No. 287, 395 N.W.2d 123 (Minn. Ct. App. 1986).
- (d) If the teacher's conduct is irremediable, no written warning is required before initiating discharge. See Kroll, supra; Downie, supra; Beranek, supra; and McBroom v. Bd. of Educ. Dist. No. 205, 494 N.E.2d 1191 (Ill. App. 1986).
- (3) There must be a rational nexus between the conduct and unfitness. A rational nexus exists when:
  - (a) the conduct affects the performance of the teacher's duties;

- (b) the conduct becomes the subject of such notoriety so as to reasonably impair the capability of the teacher to perform his/her duties.
- c. Coaches. A school board may terminate a coach's duties for any reason as it sees fit. See Minn. Stat. § 122A.58. However, the reasons must be true and based upon competent evidence. See Matter of Hahn, 386 N.W.2d 789 (Minn. Ct. App. 1986) (school district's proffered reasons that a coach's contract was not renewed because his contract had expired met the requirement of the statute allowing for the termination of coaching duties based on any reason which is found to be true based on substantial and competent evidence in the record).

2. Procedural Requirements for Termination/Discharge

a. Probationary Teachers

- (1) Nonrenewal at the end of the year.
  - (a) Evaluations conducted.
  - (b) Statutory notice timely provided.
  - (c) Written reasons provided if requested.
- (2) Immediate discharge, after a hearing held upon due notice.
- (3) Immediate discharge upon receipt of notice of revocation of license for conviction for child abuse or sexual abuse.

b. Continuing Contract Teachers

- (1) Progressive discipline
  - (a) Required by contract
  - (b) Imputed by law
  - (c) Types of progressive discipline
    - i) Oral warning/reprimand;
    - ii) Written warning/reprimand;

- iii) Letter of expectation/directive;
  - iv) Notice of deficiency;
  - v) Paid suspension;
  - vi) Unpaid suspension;
  - vii) Discharge.
- (d) Major instances of misconduct do not always require progressive discipline, including suspension or other forms of discipline, before discharge. Some, but not all, of them are:
- i) fighting, assault or threatening physical assault on another person;
  - ii) possession of a weapon;
  - iii) stealing;
  - iv) intoxication or drug abuse or possession of drugs or alcohol on school premises;
  - v) immoral conduct or indecency;
  - vi) cumulative effect of many instances of misconduct. See, e.g., Carlan v. Bd. of Educ. Lawrence Union Free Sch. Dist., 128 A.D.2d 706, 513 N.Y.S.2d 202, 38 Ed. Law 710 (N.Y.A.D. 2 Dept. 1987); Graham v. Special Sch. Dist. No. 1, Co. No. C6-89-533, 1989 WL 94450 (Minn. Ct. App. 1989) (unpublished).

(2) Termination or discharge

- (a) Notice of grounds.
- (b) Suspension with pay pending hearing, if requested.
- (c) Adherence to hearing procedures in Minn. Stat. § 122A.40, subds. 14 and 15.

- (3) Immediate discharge upon receipt of notice of revocation of license for conviction for child abuse or sexual abuse.

c. Coaches (Minn. Stat. § 122A.58)

- (1) Licensed athletic coaches must be given written notice of termination and reasons for proposed termination.
- (2) The coach may request a hearing before the school board on the proposed termination.
- (3) The school board must issue a written decision on the termination, including reasons and findings of fact based on the competent evidence in the record.
- (4) Procedures do not apply to termination of a coach pursuant to:
  - (a) a district transfer policy;
  - (b) nonrenewal of a contract;
  - (c) termination, demotion, discharge or suspension under Section 122A.40;
  - (d) probationary employees.

**B. Nonlicensed Staff**

1. Whether Grounds for Termination Exist

- a. Contractual Requirements – Just Cause. Seven principles of “just cause”:
  - (1) Did the employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?
  - (2) Was the employer’s rule or managerial order reasonably related to the (i) orderly, efficient and safe operation of the employer’s business; and (ii) the performance that the employer might properly expect of the employee?

- (3) Did the employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
- (4) Was the employer's investigation conducted fairly and objectively?
- (5) At the investigation, did the employer obtain substantial and compelling evidence or proof that the employee was guilty as charged?
- (6) Has the employer applied its rules, orders and penalties evenhandedly and without discrimination to all employees?
- (7) Was the degree of discipline administered by the employer in a particular case reasonably related to: (i) the seriousness of the employee's proven offense; and (ii) the record of the employee?

b. Statutory Requirements

- (1) Veterans Preference Act (Minn. Stat. § 197.46)
  - (a) An employee may only be removed for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.
  - (b) Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment must be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge.
  - (c) The failure of a veteran to request a hearing within the provided 60-day period constitutes a waiver of the right to a hearing. Such failure shall also waive all other available legal remedies for reinstatement.
  - (d) The veteran may appeal from the decision of the board to the district court by filing written notice of appeal within 15 days after notice of the decision.

- (2) Independent review under PELRA.

**C. All Employees**

1. Ensure that procedural requirements have been met.
  - a. Contractual
  - b. Statutory (i.e., Veteran's Preference)
  - c. Constitutional. In general, an employee is entitled to a "Loudermill hearing," which includes:
    - (1) an oral or written notice of the charges against him/her;
    - (2) an explanation of the employer's evidence; and
    - (3) an opportunity to present evidence, either in person or in writing, of why he/she should not be discharged.

See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487, 1495 (1985). Ensure consistency of discipline with past practices.

2. Ensure discipline is not imposed for improper purposes.
3. Document the basis of disciplinary action.