

# Ask the Lawyer



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## Handling insubordination a legal minefield for managers

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Insubordination is a serious charge, often justifying the removal of an employee. Some observers of the federal workplace might think that at least some insubordination occurs on a daily basis without much of a management response. These observers see employees who continue with impunity to fail to do what they have been instructed to do.

One difficulty for managers is the legal definition of the word “insubordination.” According to the U.S. Court of Appeals for the Federal Circuit and the Merit Systems Protection Board, insubordination is the willful refusal to follow a lawful order. The challenge usually is proving the willfulness of the employee’s failure to do what was expected.

Proving willfulness requires the manager to show that the expectation was clear and unequivocal. Sometimes, in an effort to be polite, a manager may not explicitly state that a work expectation is required, leaving the employee with the notion that the assignment is optional, or at least could be done at a later time or in a different manner. The manager who disciplines an employee for insubordination has to have evidence that is sufficiently strong to rule out the plausibility of these types of situations.

Other excuses that must be proven implausible by the manager are: I forgot; I didn’t understand; you weren’t clear; I think you should put it in writing next time; I thought you meant Joe, not me; and many more that most experienced federal managers have heard.

If a manager is unclear whether an action qualifies as insubordination or if the manager is uncertain whether the original work order was good enough, the employee’s failure to complete a work assignment is still misconduct. It may not necessarily be insubordination.

A charge of failure to complete a work assignment merely requires proof that the work assignment was given and not done. The employee’s motivation or intent is irrelevant. The supervisor’s credible testimony — hopefully backed with documentation — is sufficient to prove the charge.

The downside to using a lesser charge like “failure to complete a work assignment” is that the maximum reasonable penalty — when the employee appeals an adverse action before MSPB — is less severe than it is for insubordination. So, if a matter is really serious and the evidence is strong, the manager should charge insubordination. Otherwise, a manager should try to get the attention of an errant subordinate by making a lesser charge and taking clear action directed at notifying the employee that the non-performance is unacceptable.

Here’s an example. The Federal Circuit upheld the removal of Navy civilians who refused to be vaccinated for anthrax. The charge was insubordination, and an impartial observer would easily see that the order to be vaccinated was clear.

In another case, the Federal Circuit found no insubordination when an employee refused to pay the balance on a government travel card because her vouchers had not been fully processed. The court held that the order was not clearly communicated and the refusal was not insubordination. In that case, a lesser charge would likely have been upheld.

The final question is whether an order is lawful. The basic rule is that any order is lawful as long as the employee is not being asked to commit an illegal act or to endanger his or her life or health or the life or health of others. An employee who refuses to carry out an order because he thinks it's unwise, as opposed to illegal, is risking an insubordination charge and possible serious adverse action.

