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PROGRESSIVE DISCIPLINARY PROCESS OVERVIEW

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PROGRESSIVE DISCIPLINARY PROCESS OVERVIEW

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When taking substantial disciplinary action or otherwise changing the employment status of an employee, employers often apply the progressive disciplinary process to ensure a more systematic and consistent method for evaluating "routine" employee misconduct. Progressive discipline may be mandatory based on state and federal statutory requirements or as a result of collective bargaining. However, employers may choose to adopt a progressive disciplinary process to give employees sufficient notice of unacceptable performance and behavior, and the opportunity to correct the deficiency before being terminated. Keep in mind that having a progressive disciplinary process does not automatically negate an employer's ability to immediately terminate an employee who has engaged in severe and egregious behavior. However, employers are expected to be consistent and uniform in handling the disciplinary process and issuing the level of discipline.

What is Progressive Discipline?

Progressive discipline generally includes a series of increasingly severe penalties for repeated offenses, typically beginning with counseling or verbal warning series of steps of escalating discipline before the employee is terminated. Progressive discipline is designed to improve employee performance while allowing the employer to document its actions. Progressive discipline provides for a series of steps designed to address performance and behavioral deficiencies. If the problem is not resolved the first stage, the next step is implemented until either the problem is fully addressed or the employee is discharged.

Generally, the stages of progressive disciplinary process include:

- Counseling or verbal warning
- Written warning
- Performance Improvement Plan
- Suspension
- Termination

Pros and Cons of Having a Progressive Disciplinary Process

Pros

- Provide employees with adequate information about how their current performance/behavior varies from what is expected.
- Allows managers to correct employee behavior at first sign of deficiency.
- Improves communication between managers and employees.
- Helps managers achieve higher performance and productivity from employees.
- Enhance employee morale by demonstrating that inadequate performance by fellow employees won't just be tolerated.
- Avoids expensive replacement costs.
- Ensures consistency and fairness in dealing with employee problems.
- Gives employer assurance that it has made reasonable effort to allow the employee to address concerns.
- Gives the employer a written record that will be useful in initiating or defending any arbitration or lawsuit that might result from the discipline or discharge.

Cons

- Contradicts "at will" employment – now employer has to give employee several steps of discipline before termination.
- Requires everyone with disciplinary authority to be trained, fully knowledgeable of the policy, and willing to assume responsibility for administering the discipline steps.

- Requires a lot of documentation and follow up necessary to administer the policy.
- Requires a formal, written policy which has to be followed consistently.

Common Legal Issues Found with the Progressive Disciplinary Process

- **If an employer adopts a progressive disciplinary process, does it have to follow it every time?**

Clemons v. Tex. Concrete Materials, Lexis 8394 (Tex. App. – Amarillo 2010)

Employee, truck driver, was terminated for use of profanity over his truck's two-way radio. Another employee admitted to using the same profanity over the radio on a couple of occasions without being reprimanded or punished. HR representative admitted that no other employee had ever been discharged for violation of radio policy.

Employee alleged age discrimination and the company's payroll records revealed a trend for much younger workforce.

The company had a progressive disciplinary process, i.e. oral reprimand, written reprimand and termination, to deal with employee misconduct. Employee was fired without this process. Company's representative admitted that the employee's discharge was an exception to the rule of receiving either an oral warning or written reprimand before termination.

Based on the foregoing, the court concluded that the company was not entitled to summary judgment because the company did not establish that the employee was terminated solely for violating the company's radio policy.

Nara v. R.L. Polk & Co., 1991 Ohio App. Lexis 2753

Employee was injured on the job, made a claim for workers' compensation, and subsequently was discharged. She filed a suit alleging she was terminated in retaliation for having filed a successful workers' compensation claim.

The court found that the employee was in fact discharged pursuant to progressive discipline policy and not as retaliation. The employer showed that the employee was disciplined for various infractions on 4 occasions prior to her injury: (1) a verbal warning; (2) written reprimand; (3) verbal warning; and (4) verbal warning. After the WC claim and Nara's return to work, she was disciplined again 3 times: (1) written reprimand; (2) three-day suspension; and (3) discharge.

Employer had a progressive discipline system, but not a written policy. The system was applied as follows: (1) verbal warning; (2) written warning; (3) work suspension; (4) discharge.

The court held for the employer because the employer's progressive discipline system did not require that all employee errors be addressed in 4 sequential steps. Rather, disciplinary decisions took into account various other factors such as the seriousness of the infraction and the employee's disciplinary record.

Moreno v. Tex. DOT, 440 S.W.3d 889 (Tex. App. – El Paso 2013)

Moreno worked for Tex. DOT for 15 years without any disciplinary issues. When his supervisor retired and a new supervisor took over, the new supervisor started being critical of Moreno's job performance. Moreno was eventually terminated for abusive behavior and unprofessional conduct.

Moreno alleged that other employees similarly situated who had engaged in more egregious conduct were not terminated and were allowed the benefits of progressive discipline.

Tex. DOT's HR manual provided for both progressive disciplinary action and, in cases where behavior or performance problems are too severe for progressive disciplinary action,

immediate disciplinary action. The manual made it very clear that at any time behavior problems are considered cause for immediate disciplinary action, supervisors may take immediate disciplinary action, including jumping steps in the progressive disciplinary process.

The court concluded that because of the clear language of the policy, Tex. DOT had no contractual or express obligation to take progressive disciplinary action with an employee before terminating him. Therefore, Tex. DOT's employment manual did not create any putative property interest in continued employment that altered its at-will employment relationship with the employee. Tex. DOT was allowed to have both at-will and progressive process.

Gutierrez v. City of Corpus Christi, S.D. Tex., No. 2:13-cv-359 (Jan. 12, 2013)

Armando Gutierrez, a 55-year old Hispanic man, who was terminated from his position by the City of Corpus Christi was allowed to proceed with his age discrimination claim based on conflicting testimonies by several supervisors on who decided to terminate him, and the City's failure to follow its own progressive discipline procedure.

Gutierrez was able to raise sufficient doubt concerning the City's explanation as to why he was terminated by relying on several factors, one of which included the employer's failure to follow its own progressive discipline process.

Warren v. Tri Tech Labs, 993 F.Supp. 2d 609 (W. Dist. Virginia 2014)

Warren, who was African American, was terminated and filed this race discrimination suit. Prior to termination, Warren was never informed about his performance.

Employer had an employee handbook which included a chapter on discipline, which stated "Disciplinary action may range from: verbal warnings; written warnings, suspension, and/or discharge". Employer adopted progressive discipline policy but stated that it "reserved the right, in its sole discretion, to decide whether and what disciplinary action will be taken in a given situation".

The court concluded that the employer's employment policies did not require progressive discipline, thus Warren was not subject to progressive discipline policy. Even if the employer's employment policies did require progressive discipline, according to this policy, employee may be terminated at any time without proceeding through all the steps. There was evidence that white employees were fired without the benefit of progressive discipline.

Cox v. State, 87 P.3d 607 (Okla. 2004)

Cox worked for Oklahoma Department of Human Services. He was accused by co-worker of sexual harassment and creation of hostile work environment. He admitted to telling sexual jokes. An examination of his computer uncovered a stored sexually explicit image of an exposed penis urinating into a beer stein. There were email messages of sexually explicit nature to subordinate female employees. After the investigation was completed, Cox's supervisor stated that once she reviewed the evidence from the investigation, she became convinced that termination was justified, rather than some lesser discipline.

Oklahoma Supreme Court upheld the termination. Although Oklahoma state employees were subject to the progressive discipline, Cox's discharge was justified. One of the specific exemptions to the progressive discipline was any incident involving sexual misconduct and/or harassment. Progressive discipline was a general rule to correct inadequate job performance, whenever appropriate. Retaining Cox would contravene the policy against sexual harassment. Imposition of progressive discipline in all instances was not required.

Dorgan v. Foster, Lexis 50254 (5th Cir. 2006)

A former city employee sued the city and the mayor alleging age and sex discrimination and deprivation of her property interest in continued employment. One of the issues was the fact that the city had a progressive disciplinary policy. According to the manual, the purpose of the policy was to allow the employee to know that their conduct or performance is unacceptable and give them an opportunity to improve. The employee in this case was terminated without using the progressive disciplinary process.

The court denied the city's motion to dismiss and remanded the case to the trial court to determine the facts.

- **Severe and egregious conduct**

In re Herrmann, 926 A.2d 350 (N.J. 2007)

Herrmann was a public employee working for family services. After just one unacceptable incident with a client, she was served a preliminary notice and then a final notice of disciplinary action seeking her termination for conduct unbecoming a public employee. The employee's conduct in question was Herrmann waving a lit lighter near a 5 year old child's face.

This case went all the way to the New Jersey Supreme Court which held that progressive discipline is not necessary when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the progressive discipline policy would be contrary to the public interest. The court stated that Herrmann's action was so egregious that, notwithstanding the lack of a prior history of infractions, her termination was appropriate. Progressive discipline does not have to be applied in every disciplinary action. It can be bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property.

Turner v. Copley, 351 S.W.3d 49 (Mo. App. 2011)

Employer had a progressive discipline policy which included a section on exceptions. In case of certain severe behavior, immediate discipline could be imposed. The exceptions listed several examples, but the list was non-exclusive. One of the exceptions was physical or verbal abuse of a supervisor, fellow employee, or citizen.

Turner was terminated for abuse of a fellow employee when he teased her about her husband. The court upheld the termination, because Turner's conduct fell within the exceptions to the progressive discipline policy. Further, the court held that Turner received sufficient notices from the employer regarding his termination: (1) 12 page letter that severe disciplinary action was being considered; (2) pre-disciplinary hearing; and (3) 20 page dismissal letter listing the reasons for his termination.

Selmeczki v. N.M. Dep't of Corr., 139 N.M 122 (N.M. App. 2006)

The employee worked for the department of corrections for 13 years with no prior disciplinary history and favorable job reviews. When 2 high ranking officers visited his unit, the employee acted very angrily, slapped coins at the supervisors and cursed at them in relation to a lack of pay raises for correctional officers.

When he was terminated, he filed this suit contending that progressive discipline was required in his case pursuant to N.M. state law. Per NM Personnel Act, all employees who have completed a probationary period may only be disciplined for just cause.

The court found that progressive discipline was not required in this "egregious action" that provided cause for termination. Progressive discipline need not be used in all cases. When misconduct is so severe as to not warrant progressive discipline, immediate dismissal is the only appropriate action.

Employee also argued disparate treatment and provided examples of other employees who acted disrespectfully towards higher ranking offers but were not terminated. The court concluded that none of the other actions were substantially similar to this case because none involved the combination of hostile words and acts tending to provoke a physical altercation with a supervisor.

Development Ctr. v. Central Personnel Div., 604 N.W.2d 230 (N.D. 2000)

This is another ND Supreme Court case upholding an exception to the progressive discipline rule. Employee left work without punching out the time clock to perform duties for another employer and accepted pay from both employers. Additionally, she took a disabled client with her without prior approval.

Employee was a state employee and all state employees fell under the administrative code which mandated progressive discipline. Progressive discipline was mandated unless the employee's conduct fell within one of the "serious" violations enumerated in the rule. The court held that employee's conduct in this case was a serious infraction excluded from the mandatory progressive discipline.

- ***At Will Status***

Dahlberg v. Lutheran Soc. Servs., 625 N.W.2d 241 (N.D. 2001)

Dahlberg was a therapeutic recreational therapist for troubled children. When she was hired, she received an employee handbook, which provided that her employment was at will and could be terminated for any reason. She acknowledged the receipt by signing. A year later, the employer adopted a 3-step progressive discipline policy which included first notice, second notice and termination.

Subsequently, Dahlberg received 2 written notices under the progressive discipline policy, both for lack of judgment regarding supervision of residents. After another incident, Dahlberg was suspended without pay and was told not to return to work during her suspension. When Dahlberg returned to talk to some residents, she was terminated. Dahlberg argued in her lawsuit that the employer failed to follow the progressive discipline policy by terminating her.

The ND Supreme Court held that Dahlberg acknowledged her at will status by signing the employee handbook. When the progressive discipline policy was added, it did not include any specific language overriding her at will status. The employer could have included a specific disclaimer in the progressive discipline policy, but the court held that failure to do so did not override the at will presumption of the employee handbook. When the progressive discipline policy and the employee handbook are construed together as a whole, they unanimously preserve at will presumption. Based on that, the employer was not contractually bound to follow the progressive discipline policy in terminating Dahlberg.

Sorenson v. Kennecott-Utah Copper Corp., 873 P.2d 1141 (Utah App. 1994)

When Sorenson began his employment, he signed a document called "General Rules of Conduct" which provided that violations of these rules is cause for either (1) written warning, or (2) suspension subject to hearing for discipline purposes. Such hearing can result in discharge depending on the severity of the offense.

Sorensen was terminated for inadequate performance and he filed suit claiming that the employer had an implied-in-fact agreement entitling him to progressive discipline, including notice, a hearing, and cause for termination.

The court concluded that employment at will is presumed, absent evidence to the contrary. An employee may rebut that presumption by demonstrating a manifestation on the part of the employer, communicated to the employee and

sufficiently definite to induce a reasonable belief that employment is other than at will. Relevant evidence to carry that burden is employee handbooks, company manuals, bulletins, oral statements, and the employer's code of conduct.

The court concluded that in this case progressive discipline was applied in an informal manner "as a matter of good management". Progressive discipline was not a mandatory requirement, and it did not alter the at will relationship.

- ***Similarly Situated Employees***

Diaz v. Westin Hotel, 2007 U.S. Dist. Ohio Lexis 17837

Diaz was terminated and she filed this suit for retaliation based on gender, pregnancy and exercising her rights under FMLA. Her employer had a progressive discipline system and she was disciplined several times before being discharged.

The court reviewed examples of other employees who were disciplined less harshly or not disciplined at all but found that they were not similarly situated and did not have comparable disciplinary record. Diaz had a series of infractions warranting progressive discipline. The separate disciplinary actions leading to her termination were handed out to Diaz by at least 3 different supervisors, only one of whom was alleged to have harbored any animus toward her. The court ruled for the employer.

Taylor v. UPS, Lexis 23510 (U.S. Dist. – N.D.Tex. 2003)

An African-American employee was terminated after the following: (1) warning letter, (2) intent to suspend, and (3) retraining. When the employee continued to not follow proper methods, he was terminated. Employee claimed (1) disparate treatment because other employees were not terminated and (2) racial discrimination because a manager called him "boy". On disparate treatment, the court found that the other employees, unlike Plaintiff, did improve their performance after the initial warning. On the racial slur, the court concluded that that was a stray remark, as there was no other evidence of racial slurs or discrimination.

UPS provided evidence regarding Taylor's poor performance and lack of improvement after the process and granted the summary judgment for UPS and the court ruled against the employee.

Trigg v. Merck Sharp & Dohme Corp., 2015 U.S. Dist. Penn., Lexis 57602

Trigg was a medical director until he was terminated at the age of 64. The reason for the termination was that he deviated from the script during a presentation to internal employees. Trigg filed suit alleging that the reason for termination was a pretext for age based discrimination. The court agreed with the employee and held that he was not afforded progressive discipline as two younger employees who committed similar or greater offenses and were not discharged.

Stewart v. Treasure Bay Casino, 2015 U.S. App. Lexis 13413 (5th Cir. 2015)

Stewart was a black employee who was terminated by his employer. He filed suit alleging racial discrimination. The employer's handbook provided for progressive discipline. According to the handbook, employee discipline could begin at any step in the progressive discipline process, and the employer was not bound to progressive discipline in all cases.

Stewart received:

- A counseling notice (1st step in the discipline policy)
- A written warning (2nd step in the discipline policy)
- Final warning (3rd step in the discipline policy). This one stated that further violations could lead to further corrective actions including separation.

When Stewart's behavior did not improve, he was terminated.

The records showed that the company repeatedly discussed with Stewart the complaints about his conduct throughout the duration of his employment, although not immediately before he was terminated, it was sufficient to the court that the termination was not racially motivated.

PRACTICE TIPS

1. Follow the employer's stated disciplinary policy.
2. Be consistent in disciplining two similarly-situated employees.
3. Don't let too much time pass between the final incident and the discharge.
4. Apply penalties equitably and consistently.
5. Make sure to document each stage of the progressive disciplinary process and if the normal disciplinary process is not followed, make sure your document clearly reflects why.
6. Documentation is good when it is timely, factual and accurate, clear and precise, and signed and retained.
7. Employer policies do not need to list every possible thing that might lead to discharge, but it is advisable to include the broad categories of offenses that would result in immediate termination, and those that would generally fall under the progressive disciplinary process.[1]

[1] Texas Workforce Commission website at http://www.twc.state.tx.us/news/efte/termination_checklist.html.