PROGRESSIVE DISCIPLINARY PROCESS

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- Most employment relationships are “at-will”
- Employer may discharge for any reason except the following:
  - Discrimination based on a protected class
  - A reason that is contrary to public policy (illegal firing for whistleblowing)
  - Implied contract
  - Local ordinance or charter

- Due process employees are normally allowed to appeal a disciplinary action through an internal or external process.
- To discipline a due-process employee, there must be “just cause” for the disciplinary action.

STAGES OF PROGRESSIVE DISCIPLINARY PROCESS

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

LEVEL OF DISCIPLINE

Examples of conduct that may result in informal verbal counseling:

- Absenteeism
- Tardiness
- Low task performance/productivity

Examples of conduct that may result in more severe discipline:

- Stealing
- Fighting or other violence in the workplace
- Sexual Harassment
- Continued absences, tardiness or performance

IN RE HERRMANN, 926 A.2D 350 (N.J. 2007)

- Public employee working for family services.
- After 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.
- Waved a lit lighter near a 5 year old child's face.
- The New Jersey Supreme Court 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 and 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.

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, 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.

COMMON PROBLEMS WITH DISCIPLINE

- Making the decision to discipline and/or the level of punishment without all relevant facts
- Failure to document prior incidents on which discipline is based
- Inconsistent application of the rules; ambiguous rules
- Unexcused delay in discipline action
- Performance evaluations don't accurately address performance concerns
- Failing to have a balanced and complete investigation

- Consistency in application of policy

  -Is the policy in writing?

  -Are all employees held to the same expectations and standards?

  -Is the proposed disciplinary level well documented and reasonable in light of prior disciplines?

- Performance Evaluation

  -Are the supervisor's remarks accurate and representative of employee conduct and behavior?
- Are employee issues and deficiencies properly documented?
- Expect conflicting evaluations to be used as evidence to counter employer's position.

PRACTICE TIPS

- Follow the employer's stated disciplinary policy.
- Be consistent in disciplining two similarly-situated employees.
- Don't let too much time pass between the final incident and the discharge.
- Apply penalties equitably and consistently.
- 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.
- Documentation is good when it is timely, factual and accurate, clear and precise, and signed and retained.
- 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.

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