

PROGRESSIVE DISCIPLINE POLICIES AND EMPLOYMENT AT WILL
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I. EMPLOYMENT AT WILL

There are many good reasons for establishing progressive discipline policies. However, often an employer hesitates to implement a progressive discipline policy for fear that it will destroy the right to terminate employees under the “at-will” doctrine.

Texas is an “at-will” employment state. Unless there is a contractual obligation, the “at-will” doctrine permits either the employer or employee to terminate the employment relationship at any time, for any reason or no reason, so long as the reason is not illegal.¹ For example, some illegal reasons are terminations based on retaliation for whistleblowing, or for filing a charge of discrimination.

A public employer may inadvertently modify the employment terms of the at-will status of its employees with an employee manual² or through a civil service system.³ Your employment applications and handbook should have clear statements disclaiming any contractual obligations and expressing that all employment is “at-will.” See exhibits 1 and 2. Offer letters should not state an employee’s salary in annual terms as courts have held that such terms can create an enforceable one year employment contract. Use weekly, or monthly terms and also indicate that the designation of the salary does not create a definite term of employment. Handbooks should state that the contents are

¹ *County of Dallas v. Wiland*, ___ S.W.3d ___ (Tex. 2007).

² *City of Odessa v. Barton*, 967 S.W.2d 834, 835 (Tex. 1988).

³ *Thomas v. Long*, 207 3d 334, 343 (Tex. 2006).

guidelines and that nothing in the handbook creates any contractual rights or changes an employee's at-will status.

Even if you have a written at-will policy, an oral statement can modify the at-will policy. Although indefinite assurances such as “you can keep working here as long as you're doing a good job” or “you'll only be let go for good cause” will not be considered to bind the employer, *Montgomery County Hospital District v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998), assurances said in a context that indicates the statement is more than a general platitude, vague assurance, praise or indefinite promise of permanent continued employment may be considered binding. To be binding, the promise must be definite and one which can be justifiably relied on by the employee. *Id.*

Of course, there will be positions that are covered by employment contracts and also, there may be civil service positions for police and fire positions. These positions are not “at-will” and the procedures for terminating employment will be spelled out in the agreement or contract.

II. PROGRESSIVE DISCIPLINE

The goal of progressive discipline is twofold. First of all, it protects the organization and its supervisory personnel from claims of employment discrimination by consistent application of uniform personnel policies with appropriate documentation. Second, it provides employees with notice when performance standards are not met or when standards of conduct are violated. Additionally, progressive discipline advises the employee of the action needed to improve the deficiency and a time table for improvement.

Teresa Howe, author and principal of Workplaces That Work!, suggests that today, the purpose of progressive discipline is to improve employee performance, to correct a problem and to provide coaching. She asserts that “coaching models are often used to promote good discussion and chart the disciplinary process.” She also suggests that “a thoughtful and well-communicated progressive discipline policy can assist the employer in promoting a sense of fairness and internal justice in the workplace, as well as assisting employees in overcoming difficulties and meeting job expectations.”⁴

Morale and productivity may be adversely affected when a supervisor is perceived as being “unfair,” such as when an employee is suddenly terminated without having an opportunity to correct a deficiency. Progressive discipline not only presents an opportunity for an employer to successfully correct a problem, but also is perceived by all employees as being “fair.” The employer benefits if the employee is able to correct the deficiency as employees who can be rehabilitated should not be considered expendable and some may not be easily replaced. Additionally, the documentation provides a clear record that supports the supervisor’s action when a terminated employee sues alleging discrimination.

A. Stages of progressive discipline

Usually, there are three stages of progressive discipline: a verbal warning, a written warning and suspension/termination. Some policies have as many as five stages: a verbal warning, a written warning, a written reprimand, suspension/demotion and termination. Serious infractions may result in immediate termination, for example:

⁴ *The True Meaning of Progressive Discipline*, Teresa Howe, CharityVillage.com, March 15, 2004.

possessing or consuming controlled substances on the job, coming to work intoxicated, or fighting, to name a few.

Normally, the employee's immediate supervisor will give a verbal warning, which includes specific requirements for improvement. Documentation of the warning should be placed in the employee's file. If a verbal warning does not result in appropriate correction in an appropriate time frame, a written warning should be issued in a meeting with the employee. The written warning should explain what behavior needs to be corrected, how the situation must be corrected and also should give a time frame by which it is anticipated that the situation will be corrected. This warning must be signed by the supervisor. If demotion, reassignment or termination may be the next action, there should be a statement in the written warning of possible consequences of failure to correct the offending behavior.

1. Verbal Warning

It is most important that employees in similar circumstances are being treated in a similar—not identical—manner. Of course, work rules will have been communicated to employees during a training period which may occur right after an employee is hired or after a change of practice. Initially, counseling may be used to bring substandard performance to the employee's attention. This counseling typically will precede any formal disciplinary proceedings, although there may be circumstances that warrant immediate resort to formal discipline. Generally, the formal disciplinary process begins after there is an infraction that is recurring over a reasonable period of time and that has been brought to the attention of the employee. The verbal warning should be used when the problem behavior continues, even though it has been brought to the attention of the

employee. A private meeting with the employee should be used to explain the behavior that is undesirable and the specific action that must be taken to address the problem. The meeting with the employee should emphasize that the supervisor anticipates that the problem can be solved, but that it is the employee's responsibility to solve the problem.

A public employee may request that someone be present at any meeting concerning wages, hours of work or conditions of work. Tex. Gov't Code 617.005. Representation is permitted at any stage of a grievance—informal as well as formal and the employee does not have to be present with the representative at the meeting. *Lubbock Professional Firefighters v. City of Lubbock*, 742 S.W.2d 413, 417 (Tex. App.—Amarillo 1987, writ ref'd n.r.e.). The representative may be an attorney, or other person who does not claim the right to strike. *Corpus Christi American Federation of Teachers v. Corpus Christi Independent School District*, 572 S.W.2d 663, 665 (Tex. 1978). The representative does not need to be an employee of the public entity. *Sayre v. Mullins*, 681 S.W.2d 25, 28 (Tex. 1984).

2. Written warning

A formal written warning is the next step in the process if the verbal warning does not result in satisfactory performance. If the infraction is very serious, the written warning may be the first step in the progressive discipline process. The written warning is delivered at a meeting with the employee. The written warning should include a review of the prior disciplinary action taken, a full explanation of the current disciplinary action and specific requirements for rectifying the situation. The warning should clearly state that this is the last chance and that suspension without pay and/or termination are the next step. Set a follow-up date to check for progress. The employee should be

reminded that the employee's behavior is being monitored. Although the supervisor may continue to express confidence that the employee can rectify the problem, the supervisor should emphasize again that the employee is responsible for solving the problem.

3. Suspension/Termination

When discipline does not result in satisfactory performance, suspension without pay for a definite period of time or termination will be necessary. A meeting with the employee should summarize the previous progressive discipline and the current problem. The timeframe for suspension should be given in writing and the letter should include a warning of possible termination if performance does not meet standards after the employee returns to work. If it appears that the employee is unable or unwilling to meet performance standards, termination may be necessary. Prior to termination, the work history and record of progressive discipline should be reviewed with the Human Resources Department, if there is one, or an appropriate administrative person. Schedule a final meeting with the employee and explain the decision to terminate and the specific reasons. Provide the employee with a termination letter. This letter should be brief and should include the reasons for termination, the effective date of the termination and any information regarding a grievance process to grieve the termination. Consider having another management person present at a suspension/termination meeting.

B. Application of Progressive Discipline Policies

A thoughtful, written progressive discipline policy that is communicated to all employees can be helpful to both the employer and the employee. However, generally smaller employers do not have formal written policies. Written policies should be reviewed by an attorney. If you determine that your policy should be written and

distributed, be extremely careful of the language used and be sure that you follow the rules to the letter. Suits have been brought claiming that a failure to follow written policies is a breach of an implied employment contract. If there is no formal written policy, it is good practice to formulate a policy for your own use which is tailored to your particular workplace. There are two problems in the workplace that call for discipline: incompetence and misconduct.

1. Use of progressive discipline policy for incompetence

A progressive discipline policy is a good tool for communicating with an employee who is not performing various functions correctly due to lack of experience or lack of skill. The counseling technique enables you to advise the employee of what the expected performance is and also gives you the opportunity to determine whether the appropriate behavior can be learned in a reasonable period of time. The employee has a clear understanding of expectations and is able to determine whether performance is sufficiently improved to retain employment.

2. Use of progressive discipline policy for misconduct

Obviously, there are egregious behaviors that require immediate dismissal such as: acts of violence, falsifying records, or possession of controlled substances at the workplace. Other forms of misconduct, such as chronic lateness, sleeping on the job, or absence without notice or reason, may sometimes be corrected with progressive discipline. Depending upon the nature and seriousness of the misconduct, a progressive discipline policy permits the employee to get a better understanding of job expectations and gives the employer time to determine whether the expectations will be met or

whether termination is warranted—that is, an employee continually breaks the rules for keeping the work place efficient and safe.

3. The “Hot Stove” Rule

Teresa Howe offers Douglas McGregor’s “hot stove rule” as a means of influencing employee performance through use of progressive discipline:

“Foreseeable: Just as the flames provide warning that you will be burned by touching the stove, your employees should know in advance that poor conduct or performance will result in specific, predetermined consequences.

Immediate: When you touch a hot stove, you know instantaneously that you have done something wrong. Similarly, an employee should be quickly told if he or she is failing to meet expectations.

Impersonal: The fact that you are burned is a function of the stove, not who you are. Likewise, the discipline applied in a particular situation should reflect the offense, not the person who committed it.

Consistent: Regardless of who touches a hot stove, the result will be the same each and every time. This is also true of discipline; it should not be applied arbitrarily, nor should it differ, for the same offense, from one person to the next.”⁵

⁵ *The True Meaning of Progressive Discipline*, Teresa Howe, CharityVillage.com, March 15, 2004