

The 5 steps of progressive discipline



Updated 11/20/19

A progressive discipline system is a process that includes a series of warnings to deal with employee performance problems. Each step includes a formal warning, with improvement benchmarks to help the employee correct their issues.

It's also the most reliable way to protect your organization from wrongful termination charges. It allows you to ensure that any employee fired because of inferior performance was treated fairly and in accordance with your company's policies.

The five-step model for progressive discipline

1. Oral reprimand

As soon as a supervisor perceives a worker's performance problem, he or she should issue an oral reprimand. The supervisor should ask the worker whether there are any long-term problems or skill deficiencies that need to be corrected.

Have the manager keep detailed notes or prepare a memo to file about the conversation, in case further action is necessary. Don't assume that managers will remember specifics about disciplinary actions—or even remain employed by your organization—when a complaint makes its way to court.

2. Written warning

If the problem persists (or more problems emerge), a supervisor should meet with the employee and provide a written warning that details the problem and the steps needed to improve. If possible, ask another person—a management-level employee or HR rep—to sit in on the meeting.

The written warning should summarize the issues discussed, set a timeline for action and describe corrective steps. Explain the standards that will be used to judge progress. Specify time frames for performance improvement, and state that continued failure will result in termination.

Place a copy of the memo in the employee's personnel file. Have the worker sign a copy to acknowledge receipt. Otherwise, the employee could claim that he or she never received it.

3. Final written warning

If performance does not improve, deliver a final written warning, perhaps accompanied by probationary status for the employee or a “last chance agreement.” Include copies of the previous warnings, indicate specific areas in which the employee must improve and specify the time period within which the worker’s behavior or performance must be corrected.

Specify the time period and, again, obtain the employee’s signature on the warning.

4. Termination review

If problems continue, supervisors should notify HR. In general, supervisors shouldn’t hold sole firing authority. However, to preserve supervisors’ exempt status under the Fair Labor Standards Act, they should have significant say in hiring and firing decisions. Some organizations suspend employees while they investigate and decide what to do.

Before taking any final action, consider these questions:

- Does the employee claim a contractual relationship exists, and if so, does that assertion have merit?
- Has the employee recently filed a workers’ compensation claim, complained to a government agency about alleged workplace violations or taken any other actions that might make a discharge look like unlawful retaliation on your part?
- Is there an issue relating to good faith and fair dealing, especially if the termination involves a long-term employee?

Even if the answer to any of these questions is “yes,” you still can survive a challenge to a firing. But you must be able to prove that the circumstances of the particular case justify your actions.

5. Termination

Only after you’ve completed all these steps should you go ahead with firing your employee. You’ll do so knowing you gave him or her every opportunity to succeed.

If you’ve documented your entire progressive discipline process, courts will know that, too.

5 questions to ask: Is this discipline fair?

Ensure that you treat all employees fairly during disciplinary investigations. Check by asking:

1. Does the punishment fit the crime?
2. Is the discipline consistent? Have different supervisors used different discipline for similar conduct?
3. Has the discipline been administered after a proper investigation of the facts? Be an impartial fact-finder until you gather all the facts.
4. Is the discipline being administered too quickly? A proper investigation may take weeks.
5. Is the disciplinary process confidential? Warn everyone involved that discussions about discipline should be strictly on a need-to-know basis.

Audit disciplinary practices and systems to detect a possible pattern of discrimination

Before you make a final discharge decision, be sure to perform a brief audit to identify possible discrimination.

For example, if you are about to fire a worker for poor performance based on recent evaluations, compare him or her to other employees holding the same position in the same department.

If you find an evaluation that's as negative or worse than that of the employee you are about to terminate, and that person wasn't fired, ask: Do the two employees belong to different protected classes?

If so, you had better be able to explain why one warranted termination but the other did not.

Lesson from the courtroom

Chantelle, who is black, worked as an assistant director of a hospital. When she was fired for poor performance as demonstrated through a performance evaluation, she sued, alleging race discrimination. She pointed to two white men holding the same job title in the same division who had worse performance reviews but were not terminated. That was enough for the court to order a jury trial on race discrimination. (*Humphreys v. New York City Health*, SD NY, 2018)

Final note: It is critically important for HR to have input and ultimate veto power over a manager's termination decision.

That authority must include the ability to independently investigate whether discharge is truly warranted. The investigation must be thorough and not look like it's rubber-stamping the decision. Otherwise, the employer will be liable for any discrimination that affected the manager's termination decision.

Consistently apply progressive discipline

Progressive discipline can end up becoming a trap for employers that don't scrupulously honor the underlying purpose of the rule being implemented: to help employees improve and prevent unnecessary terminations by pushing workers in the right direction.

The problem: What if an employee is doing better but gets fired anyway?

Lesson from the courtroom

Jeffrey, who is black, had a series of workplace infractions on his record. His employer used a progressive discipline system that had the stated purpose of helping employees improve.

Jeffrey was terminated when he got into an argument at work. His employer argued it fired him because Jeffrey had a long history of disciplinary actions, including prior incidents of arguing and not doing as he was told.

He sued, arguing that a white co-worker was not fired for a similar disciplinary history.

That got him through the first phase of the lawsuit. Then he had to show that race was the underlying reason why he was discharged while the white co-worker was not.

Jeffrey argued that the progressive discipline system was designed to help workers and that it was manipulated as an excuse to fire him. For example, he pointed out that he went several years with no

infractions and good performance reviews. He said that wasn't considered before he was fired.

The court said the omission of positive information could be seen as proof of pretext. A jury will decide if discrimination was the real reason Jeffrey was terminated. (Daniels v. Texas DOT, No. 4:14-CV-00702, ED TX, 2016)

Document each stage of progressive discipline

Employers that have a progressive discipline process have an advantage if a terminated employee sues them for discrimination.

Those cases often hinge on showing that other employees who broke the same rule weren't punished, and then arguing that the disparity proves bias against whatever protected characteristic the fired employee has. That's hard to do if the other employees weren't at the same step in the disciplinary process.

Lesson from the courtroom

Todd worked for a medical facility that used progressive discipline. He had several disabilities, including obsessive-compulsive disorder, bipolar disorder, and attention deficit disorder.

The employer's discipline system calls for a verbal warning, a written warning, a suspension and finally termination for the fourth offense. The facility also has strict rules against disclosing any patient information to the public.

Todd received a verbal warning when he argued with his supervisor about answering phone calls. He then received a written warning for not following attendance procedures. Next, he was suspended for missing a scheduled shift. He was finally fired after discussing a specific patient in public.

Todd sued, alleging he had been singled out for termination because he is disabled. He argued that others who talked about the patient weren't terminated.

But the employer explained to the court that the others weren't at the same step of the disciplinary process as Todd was. That was enough to get the case dismissed. (Lindeman v. Saint Luke's Hospital, 8th Cir., 2018)

When deciding on discipline, keep detailed notes to distinguish between similar-sounding offenses. Example: Not all insubordination is created equal. A worker who rolls his eyes at a supervisor doesn't deserve the same punishment as someone who engages in a shouting match.

Yes, you can have some flexibility with progressive discipline

It's perfectly acceptable to build some flexibility into your disciplinary process. For example, you may want to include a provision allowing for immediate termination in particularly egregious circumstances. In a hospital setting, for example, you might provide for immediate termination in the event of a serious mistake that compromises patient safety.

Check to ensure that you have been implementing your disciplinary process consistently over time. Are you holding some workers to the process, but not others? That can spell big trouble unless you carefully document why a particular mistake or policy violation deserved different, more lenient treatment.