

Performance improving? Let probation continue

Here's a warning to employers that use a progressive disciplinary system: Follow it—for everyone. Cutting the process short except for good, solid reasons is asking for trouble.

Performance improvement plans are a good example. Once you set one up, let the employee finish it before terminating him.

Recent case: Lorenzo worked as a field investigator for ICS Merrill, which investigates insurance claims. Field investigators conduct video surveillance of claimants to use as evidence of insurance fraud. Lorenzo was the company's only black investigator.

When a new supervisor placed him on disciplinary probation for 90 days, he was told he had to improve his "video rate" from 8% to 55%. The rate measures how much of an investigator's time is spent videotaping a target's activities.

Lorenzo was about 60 days into his probation when he was terminated for poor performance.

He sued, alleging race discrimination. He pointed out that he had already improved his video rate to over 20% when he was suddenly terminated. This, he alleged, was proof that poor performance was a pretext for race discrimination.

The court essentially agreed that cutting the probationary period short while Lorenzo was clearly improving could be evidence of discrimination. It looked like ICS Merrill jumped the gun for fear Lorenzo would meet his goal. Now a jury will decide whether the company was legitimately disciplining Lorenzo—or just looking for an excuse to cover up discrimination. (*Lott v. ICS Merrill*, No. 11-1704, 6th Cir., 2012)

Final note: The court was also concerned that no policy, rule or handbook actually stated that employees were supposed to maintain a 55% video rate. Lorenzo testified that the first he heard of the rule was when he was placed on probation. No other employees could remember hearing about the rule, either.