

Avoid Surprise Litigation by Using Effective Progressive Discipline

By Linda D. Feldmann

Webster's Dictionary defines the word "surprise" as "1. to attack unexpectedly; 2. to detect or elicit by taking unaware; or 3. to strike with wonder or amazement especially because unexpected." In the context of employment-related discipline and discharge, however, the word "surprise" is often synonymous with the word "lawsuit." If an employee will be surprised by your decision to terminate, it is likely that you, the employer, have not taken sufficient measures to progressively discipline the employee or to inform the employee that his/her work and job performance are unsatisfactory.

In such cases, an employee faced with a "surprise" termination will view the termination exactly as Webster's does—as an attack that produces wonderment, amazement, and in many cases, a lawsuit. With a few simple steps, employers can develop a basic progressive discipline program that aims to correct undesirable or ineffective employee behavior or performance on an ongoing basis. If there's no improvement by the employee in question, the program will also help you document a full and fair evaluation of the employee's performance prior to termination. By taking the surprise out of employment-related discipline and discharge, you can help lessen your exposure to employment-related lawsuits.

Tell Your Employees What Their Job Duties Are and How Their Performance Will Be Measured

It is important that employees know what is expected of them when they are hired and throughout their employment. Initially, employees need to have a complete understanding of the duties and objectives of their jobs. In many cases, employees are hired for a specific position or job title that itself seems to convey the nature of the employee's job duties, yet the employer has an understanding of the job that may be radically different. An easy way to avoid this confusion is to develop objective and measurable performance standards that help employees understand the essential functions and duties of their position, how their performance will be evaluated, and the elements of successful job performance. You also need to ensure that job descriptions and performance standards are routinely updated so that employees are made aware when their job duties have changed or if their performance will be judged on some modified criteria. Prior to initiating discipline, make sure that job performance expectations have been made clear to the employee to avoid the element of surprise.

Discipline As Needed and Document Well

If an employee is not meeting expectations or is not performing at a level that the employer expects, the employee must be made aware of the problems in a timely and well-documented manner. Don't assume that managers will remember specifics about disciplinary actions taken, or that the manager himself will still be

employed by the company at some later date in the event that a termination-related lawsuit is filed. In our highly mobile society, with lawsuits sometimes winding their way to the courts years after a termination—when facts are forgotten and managers who made decisions are no longer employed by the company—these kinds of assumptions prove costly to employers. Similarly, when faced with particularly egregious conduct by an employee, many employers often assume that “everyone knows why we fired him,” and thus fail to document disciplinary action or the ultimate discharge of the employee adequately. However, such an assumption leaves room later for inferences by judges or juries that the disciplinary or discharge action taken was for reasons other than those stated at the time. Lack of adequate documentation remains one of the most prevalent mistakes made in conducting disciplinary actions and is easily avoidable with just a few steps.

1. Issue verbal warnings for minor infractions and document these verbal warnings. For minor first-time infractions (e.g., lateness, minor clerical mistakes), the employee’s supervisor should issue a verbal warning regarding the problem and tell the employee what will happen if no improvement is made. The supervisor should then put a written note in the employee’s personnel file indicating that a verbal warning has been given, the date of the warning, and the reason for the warning. With the prevalence of email, many employers now find it easier to follow up a verbal warning with a short e-mail to the employee describing the verbal conversation. This e-mail should also be printed out and placed in the employee’s personnel file.

2. Follow up with written warnings/reprimands. For repeated minor infractions that remain uncorrected or for more substantial infractions, the employee’s supervisor should meet with the employee and discuss performance or behavior issues, the steps that need to be taken to alleviate or correct the problems, the timeframe in which the corrective action(s) must be made, and the consequences if such corrective actions are not made in a timely manner. If possible, it is advisable to have another management-level employee or company human resource representative sit in on this meeting. Immediately following the meeting, the supervisor should send the employee a written warning which summarizes the issues discussed in the meeting and place the signed copy acknowledging receipt by the employee in his/her personnel file. The written warning should:

- set forth the date it is sent and should be signed or initialed by the person sending the warning
- identify the person sending the written warning along with his/her title at the company
- reiterate the performance or behavior issues that were discussed in the meeting and, if a specific incident is the cause of the warning, the date of the incident; specifics related to that incident should be described in detail
- describe in detail the steps that need to be taken to alleviate and correct the problems

- provide a timeframe in which the employee must make the improvement
- inform the employee in very clear language of consequences if such corrective action is not made in a timely manner
- indicate that a copy of the warning will be placed in the employee's personnel file
- include a signature blank for the employee to sign acknowledging that he/she received the written warning.

3. Issue final written warnings. If significant improvement in performance is not accomplished in the time frame set forth in the written warning, and a final warning is appropriate, the supervisor should prepare a final written warning to the employee and place the signed acknowledgement receipt by the employee in the employee's personnel file. The final written warning should include the items listed in the steps outlined above, with special attention given to outlining the employee's failure to perform adequately since the written warning was received; what additional steps, if any, must be taken to correct the problems; the date by which corrections must be made; and should state that failure to satisfy the performance expectations will result in further disciplinary action, up to and including termination. If there have been improvements in performance, the supervisor may acknowledge the improvement, but explain why it is not sufficient.

4. Impose disciplinary action and discharge in a consistent manner. While each individual performance issue is different, it is extremely important that employers use consistent disciplinary measures when faced with similar situations and apply the same standards to all employees. Absent such consistency, it is possible that a future judge or jury could infer that the reason for the differential treatment was based on an unlawful reason such as race, age, or sex. For instance, when two employees have similar performance records, one such employee should not be suspended for a particular offense while the other employee is merely warned for the same or similar offense. The importance of consistency does not mean that all disciplinary actions must be exactly alike since situations may be unique. It is imperative, however, that when an employer varies from past practice in meting out discipline or treats similarly situated employees differently, to document in writing why the employee in question was treated differently based on a specific set of circumstances.

5. Recognize specific situations requiring special consideration and/or legal advice. Finally, it is important for employers to recognize, and teach their managers and supervisors to recognize, that in certain situations following the progressive discipline steps outlined above may not be appropriate or may not be sufficient in order to discipline or terminate an employee. When faced with any of the following circumstances, it is advisable that employers seek advice from their company's counsel regarding the disciplinary action or discharge being contemplated:

- the supervisor/manager has not followed the progressive discipline steps—i.e., the “empty employee file” situation
- the employee is a union member covered by a collective bargaining agreement
- the employee has a written employment contract with the employer, which may specify certain rights and obligations (such as arbitration) of the parties and may specify disciplinary steps to be taken or required notice to be given by the employer
- the employee believes he/she has a written employment contract that is valid which the employer was previously unaware of
- the employer has recently purchased/acquired the business unit that the employee works for and the employer’s obligations to the employee may be covered by a previous company policy manual or an acquisition agreement between the employer and the prior employer
- the employee may belong to a protected group due to age, race, color, gender, sexual orientation, national origin, citizenship, marital status, disability status, or veteran’s status
- the employee is on company-approved disability or out on FMLA leave; or may have recently announced a pregnancy or recently returned from a maternity or other authorized medical leave
- the employee has a pending complaint against the employer, manager, or supervisor or has made a past complaint regarding treatment or employment by the employer
- the employee is being terminated as part of reduction in force or other group layoff or the employer is contemplating eliminating a position(s) and the same or similar position will be filled in the foreseeable future.

Don’t let your employees be surprised by a discharge and don’t let yourself be surprised by a lawsuit. Following the few simple progressive discipline steps outlined above and in the sample written warning letter will make avoiding surprises easier and lessen your exposure to employment related lawsuits.

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Sample Written Warning/Reprimand

The following is provided for illustrative purposes only. Always consult your company's legal counsel or a licensed attorney with regard to your specific disciplinary or discharge situation.

[on company letterhead]

From: [name and title of author]

To: [name of employee]

Date: [date letter is sent, which should be immediately following any meeting discussing these issues]

As we discussed on [date that meeting with employee took place], your performance as [position] has been less than satisfactory. Specifically, [reiterate the performance or behavior issues that were discussed in the meeting and if a specific incident is the cause of the warning, describe the date of the incident and specifics related to that incident in detail].

The purpose of this written notice is to outline the steps we discussed in our meeting that you need to take to improve your performance and correct these problems, and to make you aware what will happen if your performance does not improve. As we discussed, we want to give you the opportunity to demonstrate your willingness and ability to do the job; however, substantial improvement is required in the areas listed below:

- Use specific examples of the problem performance.
- If feasible, describe how the unacceptable performance affects the operation of the department, company, etc.
- State your specific expectations for future performance and the timeframe that such action must be taken.
- Describe what will happen if the performance does not improve in a timely manner.

Common examples of the above include:

Absenteeism. During the past ___ months/weeks, you have been absent from work a total of ___ days, which is considered excessive absenteeism. As we have discussed before, your frequent absences from your duties as [title] put a burden on other staff members and negatively affect productivity. Immediate and sustained improvement in your attendance is required. Continued absences will result in disciplinary action, up to and including termination.

Quantity of Work. During the last ___ month(s) you have completed only ___ assignments and those that have been submitted have been late and/or incomplete. The last piece that you completed for [name of supervisor/colleague] was not well defined, and it was submitted too late for the client to approve or use. As a result, the client was unhappy and we may lose business. Going forward, I expect you to complete ___ assignments per week. These

assignments must be submitted to me for approval by [time] each [day]. We will meet again in ___ weeks to review your progress. It is my hope that you will correct these deficiencies and succeed in your position at [name of company]. However, please understand that failure to meet the above expectations will result in disciplinary action, up to and including termination.

Quality of Work. There are an unacceptable number of mistakes in your work product. Memos that you type often have to be returned to you because of spelling errors or incorrect format. On [day], you typed a one-page memo that had three simple spelling errors. On the same day, I gave you a report to type and outlined the format. You did not follow the instructions and the report had to be retyped. These errors reduce efficiency in the department and increase cost. From now on I expect memos to be carefully proofread and error-free before being returned to me. I also expect the correct format to be used consistently. Please understand that I am anxious to see you correct this situation and succeed at [name of company]. However, failure to make these necessary improvements will result in disciplinary action, up to and including termination. We will meet again in ___ weeks to review your progress. If you have any questions, please let me know.

Sales Related Deficiencies. You have failed to make your budget for the past ___ months by at least ___% and during that time, you have sold only ___ pieces of new business. Over the past ___ months, I have continued to stress the importance of focusing your attention on our main mission, which is to develop new business for [name of company]. Unfortunately, you still have not shown progress in this area. During the next [number] days I expect you to (i) bill \$___ in the month of [month], achieving ___% of your total monthly budget; (ii) make at least ___ sales calls per week for a total of ___ calls during the month of [month]; (iii) close a minimum of ___ pieces of new business during [month]; (iv) include me in at least ___ sales calls per week. Your success is of the highest priority to [company], however, certain performance standards must be met in order for you to continue your employment. It is important for you to understand that this is a critical juncture in your employment with [company], and your success or failure is entirely up to you. Failure to achieve the above goals may result in disciplinary action, up to and including termination. We will meet at the end of [month] to review your progress.

Receipt of this memo acknowledged on [date]:

Employee Signature
[name of employee]

cc: Personnel file of [name of employee]
[list other company officials receiving memo, including those who were present at the initial meeting and the employee's direct supervisor(s)]