Employee Handbooks & Progressive Discipline Policies

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1. Introduction.

Under the "risk management" approach to human resources management, an employer should set the standards for its policies and practices at a level that it is certain it will enforce uniformly throughout the organization. It is not a good idea to establish a policy or practice that the employer cannot or does not intend to enforce consistently. To determine the likelihood of uniform enforcement, the employer should be able, with proper documentation, to sustain the discharge of an employee for violation of a policy, and should be willing to accept the consequences of the resignation of a good employee over the issue of enforcement of the policy.

Effective communication of employment policies and procedures to employees can best be achieved in writing. Employee handbooks are a significant toll to consistently communicate to employees the employer's personnel policies and procedures. Employers should also realize that there is no "cookie-cutter" employee handbook. While many employers implement many of the same types of policies, every employee handbook should be carefully drafted to meet the particular needs of the specific employer. Employers should review handbooks frequently to

ensure that the policies are up-to-date and include items that may help avoid or minimize various problems.

2. Handbook Disclaimers.

Poorly drafted employee handbooks "can create contractual obligations." *Perry v. Sears, Roebuck & Co.,* 508 So.2d 1086 (Miss. 1987). Contract claims of this type are generally based upon written representations about continued employment or the terms of employment. For example, if an employee handbook provides that an employee would be terminated only for "good cause," and if the employee continues employment based upon this "offer," the employee has a contract and right to be terminated only for good cause, *i.e.*, he or she is no longer an "at-will" employee.

To avoid contract claims, the employer should include an employment-at-will disclaimer in a prominent location in its employee handbook or personnel policy manual. The handbook or manual should further identify who in the company's management does and does not have the authority to promise employment for a particular length of time. The handbook or manual should also contain a conspicuous, general disclaimer that the handbook does not create any kind of employment contract or agreement between the employer and the employee. Finally, the handbook or manual should reserve the company's right to change policies and practices, and include a statement that circumstances may arise that make it appropriate to change or even disregard policies and procedures.

In *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So.2d 25, 27 (Miss. 2003), the Mississippi Supreme Court highlighted the value of these disclaimers In that case, a casino employee, who was injured on job and received workers' compensation benefits, brought action alleging wrongful discharge. The court rejected her claim, saying:

> Buchanan was an at-will employee with Ameristar prior to her termination. As evidenced by the record, she signed a "Certification and Agreement" form acknowledging that her employment was for an indefinite period. Buchanan also signed the "Acknowledgment" form in Ameristar's employee handbook which stated that it did not create a contract or guarantee continued employment. The "Employment Status Policy," included in the Ameristar employment manual, clearly states that regardless of the status of an employee, no contractual agreement expressed or implied is created. Any assertion by Buchanan that she was a contract employee of Ameristar is belied by her own signature on forms which clearly define her status as an at-will employee.

See also Hartle v. Packard Elec., 626 So.2d 106 (Miss. 1993) (holding that employee handbook containing warning that policies and procedures contained therein did not constitute legal contract, did not alter the at-will status of employment relationship and did not limit employer's discretion to discharge except for just cause); *Favre v. Wal Mart Stores, Inc.,* 820 So.2d 771, 774 (Miss. App. 2002) ("Disclaimers in employee manuals such as the acknowledgment signed by Favre that have the 'purpose of preserving the employment at will relationship cannot be ignored.'").

Employees should be required to sign acknowledgment forms when receiving an employee handbook, saying that they have read and understand the provisions in the handbook. These forms provide valuable evidence that the employee knew or should have known of the employer's policies and thus it is "fair" to discipline or discharge the employee for policy violations. As an additional safeguard, the acknowledgment form itself should also include the "no contract" disclaimers and references to the individual's "at-will employment" status.

3. Work Rules & Progressive Discipline Policy.

The employer's disciplinary policy is a critical area that, if handled poorly, can create numerous problems for the employer, but if handled correctly, can help the employer avoid trouble. The employer should adopt and follow its own work rules and progressive discipline policy with these caveats in mind.

Work rules must be reasonable, widely disseminated and consistently applied and enforced. Courts have not hesitated to disturb penalties, assessed without clear and timely warning, where the employer over a period of time had condoned the violation of the rule in the past. Lax enforcement of rules may lead employees reasonably to believe that management sanctions the conduct in question.

Administering discipline in progressive increments is often an effective means of arresting an employee's attention while giving her sufficient time to improve unsatisfactory conduct or performance. Progressive discipline also comports well with jurors' sense of fairness that an employee should be given multiple chances to improve before being discharged. Progressive discipline should always involve giving effective notice of problems, being specific, citing examples, discussing potential solutions, and allowing opportunities for the employee to correct the problems, with the employer setting standards and timetables. A progressive discipline system should include the following:

- Minor, first time offenses generally warrant verbal warnings (with documentation in personnel file).
- A second offense or more serious violations warrant written warnings.
- A third offense or a serious violation warrants a "final" written warning.
- A fourth offense or serious violation may warrant suspension or termination.
- Immediate suspension should be an option for any serious violation, so that the supervisor may investigate.
- Managers or equivalent should approve termination.

But be warned that automatic adherence to a system of progressive discipline may unduly limit an employer's ability to quickly terminate a poor or dangerous employee. In *Bobbitt v.*

Orchard, Ltd., 603 So.2d 356, 361 (Miss. 1992), the Mississippi Supreme Court addressed the legal effect of the employer's departure from a detailed and fairly rigid progressive discipline policy when it discharged a nursing home employee:

> The question in this case is when an employer furnishes its employees a detailed manual stating its rules of employment, and setting forth procedures that will be followed in event of infraction of its rules of employment, can it completely ignore the manual in discharging an employee for an infraction clearly covered by the manual? Put otherwise, when an offense specifically covered by the employer's own manual provides no more severe disciplining than a warning or counseling of the employee, may the employer pay no attention to the manual and fire the employee instead?
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> We hold the employer to its word. . . . . [B]ecause the manual was given to all employees, it became a part of the contract. It did not give the employees 'tenure,' or create a right to employment for any definite length of time, but it did create an obligation on the part of The Orchard to follow its provisions in reprimanding, suspending or discharging an employee for infractions specifically covered therein.

Therefore, progressive discipline should always be characterized in employee handbooks and elsewhere as the "usual" course rather than a ***mandatory sequence***. The written progressive discipline policy should explain that some forms of employee behavior warrant immediate termination, and should include a disclaimer that the progressive discipline policies are only guidelines, that each situation will be evaluated independently, and that the employer explicitly reserves the right to impose suspension or discharge for a first offense as the circumstances warrant in the employer's discretion. Employers should also reserve the right to suspend an employee, with or without pay, pending investigation and require all employees' cooperation in such investigations.

4. Termination Policy.

Every employer should also adopt a policy that defines the types of termination it recognizes. For example, the employer could define a "resignation" as follows:

> If you find it is necessary to resign, you should give at least two week's written notice to your supervisor; the notice should include your reason for leaving, and the date you will leave work. The advance notice gives the Company the opportunity to find a replacement. Employees who properly resign and later wish to be considered for re-employment will be given preference for job openings if they are qualified for the job and if they maintained a satisfactory performance and attendance record when they worked for the Company. Employees who properly resign are eligible for payment for accumulated vacation time.

The policy could then differentiate a "resignation" (*i.e.,* with notice) from a "voluntary quit" (i.e., without notice or through a "no call/no show"):

> **Voluntary Quit.** An employee who quits *without* proper notice is classified as a voluntary quit. This is a poor practice. An employee who quits without proper notice generally will *not* be considered for re-employment and are not eligible for payment of accumulated vacation time. Absences on five consecutive days without notice will be considered a "voluntary quit."

The employer's termination policy could also define a "discharge" as an involuntary termination initiated by the employer for any reason or no reason at all (which further preserves the "employment at will" nature of the relationship):

> **Discharge.** Discharge includes involuntary termination of employment by the company for any reason. Although employees are subject to discharge at any time and for any reason, with or without prior notice, discharge generally involves economic cutbacks, unsatisfactory job performance, or discharge for disciplinary reasons. If you are dissatisfied with a discharge decision, you may use our open door policy or our grievance procedure to obtain further review.
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> **Retirement.** Retirement is simply a voluntary retirement by the employee. The employee should review the *Summary Plan Description* for our retirement plan to determine whether he or she is eligible for retirement benefits and at what age those benefits would begin.

Such a termination policy is useful for a number of reasons. One of the most important is providing a basis for defeating "constructive discharge" claims. Generally speaking, an

employee's "resignation" is presumed voluntary, unless the employee has sufficient evidence to show that the resignation was involuntarily obtained or forced. But when an employee can show that a "reasonable person" would "have felt compelled to resign" or "could reasonably conclude that he had no meaningful choice but to resign" because "the employer made conditions so intolerable," the employee has shown a "constructive" discharge. *Bulloch v. City of Pascagoula,* 574 So. 2d 637, 640 (Miss. 1990) (adopting criteria from *Shawgo v. Spradlin*, 701 F.2d 637, 640 (5th Cir. 1983) and *Junior v. Texaco Inc.,* 688 F.2d 377, 380 (5th Cir. 1982)).

So what are "intolerable" conditions? In *Cothern v. Vickers, Inc.,* 759 So. 2d 1241, 1245-46 (Miss. 2000), the Mississippi Supreme held that a demotion of a 30-year employee that caused the employee "unbearable stress and humiliation" was not sufficient to support a constructive discharge claim. In *Bulloch*, the Court held that a police department's internal investigation of a police officer and cooperation with another police department's investigation of the officer was not sufficient to support a constructive discharge. 574 So. 2d at 638-41. In *Redd Pest Control Co. v. Foster,* 761 So.2d 967, 974 (Miss. App. 2000), the Mississippi Court of Appeals held that criticisms of employees for not producing sufficient income from their sales routes and instructions to increase production were not sufficient to support a constructive discharge. In *Miss. Emp. Sec. Comm. v. Fortenberry,* 193 So. 2d 142, 143 (Miss. 1967), the Mississippi Supreme Court held that the presumption that an employee voluntarily quit was not overcome by evidence that the employee's supervisor had verbally reprimanded her for mocking the supervisor (which the employee denied) and that the plant manager would not allow the employee to return to work without apologizing to the supervisor.

Under federal law, the discriminatory "constructive discharge" standard is actually greater than the one used to measure whether a person has experienced a "hostile work

environment" for purposes of a harassment claim. *Landgraf v. USI Film Prods*., 968 F.2d 427, 430 (5th Cir. 1992) ("To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove hostile working environment"), *aff'd,* 511 U.S. 244, (1994); *see also Steele v. Offshore Shipbuilding, Inc.,* 867 F.2d 1311, 1316-18 (11th Cir. 1989) (employees were subjected to hostile work environment, but were not constructively discharged).

An employer generally must have a reasonable opportunity to remedy an employee's complaints before an employee can prevail on a constructive discharge claim. *Webb v. Florida Health Care Management Corporation*, 804 So.2d 422, 424 (4th Cir. 2001*); Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1015 (7th Cir. 1997) ("[U]nless conditions are beyond 'ordinary' discrimination, a complaining employee is expected to remain on the job while seeking redress."); *Clowes v. Allegheny Valley Hospital,* 991 F.2d 1159, 1161 (3d Cir. 1993) ("As other courts of appeals have noted, a reasonable employee will usually explore . . . alternative avenues [such as complaints about mistreatment] thoroughly before coming to the conclusion that resignation is the only option.").

For example, in *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536 (11th Cir. 1987), a female employee returned from a pregnancy leave and was temporarily assigned to a "floater" job. Dissatisfied, she quit one day later. The court found that it was unreasonable for her to simply assume that she would be *permanently* relegated to the "floater" job or would be *permanently* denied promotion to a department manager's position. The court held that she was required not to assume the worst, and not to jump to conclusions too fast.

Thus, under the employer's termination policy, if the employee "resigns" in compliance with the policy, the employer will have written evidence that would strongly tend to undermine

the claim that a resignation was not voluntary. If the employee simply quits without notice or stops coming to work, the employer can point to its policy and argue that the employee voluntarily quit.

The employer has an even more effective defense if the employer has some sort of internal grievance procedure and a complaint process for discrimination and harassment complaints. The employee's failure to follow an employer's grievance process can be powerful evidence against an employee in litigation or administrative proceedings that a quit was truly "voluntary."

For example, in *Junior v. Texaco, Inc*., 688 F.2d 377, 380 (5th Cir. 1982)). In *Junior*, the Fifth Circuit considered whether an employee was constructively discharged because he had received a low performance evaluation. The court ruled that he ***did*** have meaningful choices other than to resign because, "[s]ignificantly, the company provided a procedure for the appeal of an unjustified job performance appraisal [but] Junior chose not to initiate the administrative appeal process." 688 F.2d at 380.

In general, if an employer is going to have a grievance procedure, it should be enforced consistently, it should be fair, and it should work promptly. Moreover, the grievance, investigation, hearing (if any) and action should all be documented. The value of the employer's grievance process may be lost without such documentation.

HOT TOPIC: National Labor Relations Board Scrutiny of Employee Handbook Provisions

In recent years, the NLRB has looked to the employee handbook as source of violations of employees' protected rights under the National Labor Relations Act. The Board has challenged a number of common handbook provisions, resulting in disparate holdings, even under quite similar facts, and leaving confusion and consternation in its wake. Here are a few recent decisions in which the NLRB has found a number of provisions unlawful on their face:

- A "standards of behavior" policy prohibiting "negative comment about our fellow team members" (including managers) and engaging in "negativity or gossip," and requiring employees to "represent [the Respondent] in the community in a positive and professional manner in every opportunity" (Hills and Dales General Hospital)
- A bus company's rules barring disclosure of "any company information," including wage and benefit information; prohibiting employees from making statements about work-related accidents to anyone but the police or company management; prohibiting "false statements" about the company; barring participation in outside activities that would be "detrimental" to the company's image, "discourteous or inappropriate attitude or behavior to passengers, coworkers, or the public," and prohibiting employees from engaging in "disorderly conduct during working hours" (First Transit, Inc)
- A social media policy in an employee handbook, which required that employees' contacts with parents, school representatives, and school officials be "appropriate," and also included a provision subjecting employees to potential discipline for publicly sharing "unfavorable" information "related to the company or any of its employees." (Durham School Services)

In late April, an NLRB law judge struck down a communications policy embodied in Kroger Co. of Michigan's handbook. The challenged provision required employees, whenever they published "work-related information" online and identified themselves as Kroger employees, to include a disclaimer stating "the postings on this site are my own and do not necessarily represent the postings, strategies, or opinion of the Kroger Co. family of stores." According to the ALJ, this requirement was a tedious enough burden on employees that it would dissuade them from exercising their protected statutory rights online. It was overbroad, the ALJ said, in that it applied to all manner of online communications in which work-related information was discussed, including Facebook postings.

In another recent decision involving Lily Transportation, an ALJ invalidated several overly broad handbook rules and found the employer's attempt to repudiate them was insufficient. One faulty provision was an "inappropriate conduct" rule that barred disclosure of confidential company, customer, and employee information, including confidential information maintained in personnel files. The ALJ found this clause would lead employees to reasonably believe they were restricted from being openly critical of the employer's treatment of its workers and from discussing wages, benefits, and related information with coworkers or union reps. Another rule directed employees to refrain from posting certain information and comments on the Internet. It was not restricted to confidential or even company information; it didn't distinguish between protecting information about customers or company business (restrictions that would conceivably be lawful) and the sharing of other information; and it prohibited the posting of any information without the company's prior approval.

In *Flex Frac Logistics, LLC* (No. 12-60752; opinion issued March 24, 2014), the Fifth Circuit enforced an NLRB order that a nonunion employer had unlawfully maintained an overly

broad confidentiality rule which barred discussions of "personnel information" outside the company. The rule would in effect, if not expressly, prohibit employees from discussing wage information, thus chilling their protected rights. The Fifth Circuit held the very existence of the provision was violation even without proof the company's enforcement.

The Good Old Days

Do you ever feel overworked, over-regulated, under-leisured, and under-benefited? Take heart; things have improved greatly. This "personnel policies" notice (dated 1852) was found in the ruins of a London office building:

1. *No member of the clerical staff may leave the room without permission from the supervisor. No talking is allowed during business hours.*

2. *Clothing must be of sober nature. The clerical staff will not disport themselves in raiment of bright colors, nor will they wear hose unless in good repair. Overshoes and topcoats may not be worn in the office, but neck scarves and headwear may be worn in inclement weather.*

3. *The craving for tobacco, wine, or spirits is a human weakness, and as such is forbidden to all members of the clerical staff.*

4. *Members of the clerical staff will provide their own pens. A new sharpener is available on application to the supervisor.*

5. *The supervisor will nominate a senior clerk to be responsible for the cleanliness of the main office and the supervisor's private office. All boys and juniors will report to him 40 minutes before prayers and will remain after closing hours for similar work. Brushes, brooms, scrubbers, and soap are provided by the firm.*

6. *This firm has provided a stove for the benefit of the clerical staff. It is recommended that each member of the clerical staff bring four pounds of coal each day during cold weather. Coal (and wood) must be kept in the locker.*

7. *This firm has reduced the hours of work. The clerical staff must now only be present between the hours of 6 a.m. and 7 p.m. weekdays.*

8. *Now that the hours of business have been drastically reduced, the partaking of food is allowed between 11:30 and noon, but work will not on any account cease!!!*

9. *The firm recognizes the generosity of the new labor laws, but will expect a great rise in output of work to compensate for these near-Utopian conditions.*