

## Employment Law: Employer Must Follow Progressive Discipline Policy For Unsatisfactory Performance.

**T**he employee in question had been medical records director in a nursing home for more than sixteen years. A new administrator at the nursing home began reviewing patients' charts and making note of numerous deficiencies which were felt to exist in the system for how the charts were being maintained. The medical records director was given a deadline by which time the specific deficiencies noted were to be corrected.

Then, instead of reviewing the charts to see if the alleged deficiencies had been remedied, the administrator abruptly terminated the medical records director for alleged employee misconduct. The Supreme Court of New Mexico ruled the medical records director had not been guilty of intentional misconduct, and that her termination was not justified.

An employer must follow its own progressive discipline policies before an employee can be let go for unsatisfactory job performance, the court ruled. Employees have the right to expect that an employer will follow its own employment policies. For example, the court pointed out that if an employee is to be warned for two unexcused absences, and fired only after two warnings, the employee cannot be fired any sooner than that for excessive absenteeism.

Employees have the right to have the employer's job-performance expectations made known to them, the right to have unsatisfactory job performance pointed out, and the right to make necessary corrections before being subject to discipline. Discipline that is imposed cannot exceed the discipline that has been threatened.

When an employee is proven guilty of willful misconduct, on the other hand, substantial deliberate misbehavior in violation of an employer's work rules, an employee can be fired without going through progressive discipline. **Chicarello vs. Employment Security Department**, 930 P. 2d 170 (N.M., 1996).

***There is a difference between unsatisfactory job performance and willful misconduct.***

***Willful misconduct means intentional disregard of the employer's work rules. It is deliberate misbehavior amounting to a substantial disregard of the employer's legitimate interests and expectations and of the employee's duties and obligations toward the employer.***

***An employee can be fired without notice for willful misconduct.***

***Unsatisfactory job performance, on the other hand, requires the employer to take a stepwise approach. The employer should warn the employee that his or her conduct is not up to the employer's expectations and provide an opportunity to bring the employee's performance up to the employer's expectations. If an employee fails to make corrections, the employee can be laid off but not fired.***

***An employee has the right to expect an employer will follow its progressive discipline policy for unsatisfactory job performance.***

SUPREME COURT OF NEW MEXICO, 1996.

## Non-Immigrant Alien Registered Nurses: Employers Must Now Update H1A Immigration Status With INS.

**C**ongress passed new legislation in October, 1996 to allow employers of non-immigrant alien registered nurses who already were in the U.S. working under H1A immigration status on September 1, 1995 to extend their immigration status and eligibility to work as registered nurses in the U.S., through September 30, 1997.

On March 7, 1997 the Immigration and Naturalization Service (INS) of the U.S. Department of Justice announced regulations to require employers of non-immigrant alien registered nurses who already are in the U.S. working under H1A immigration status to update their nurses eligibility to remain in the U.S. and work as nurses, by filing Form I-129, Petition for Nonimmigrant Worker, with the INS service center servicing the locale where the nurse is working. Proof is required that the nurse was working in the U.S. under a valid H1A authorization on September 1, 1995, and that the nurse is currently licensed to practice as a registered nurse.

The Immigration and Naturalization Service's March 7, 1997 announcement points out that there is no authority under the October, 1996 legislation to allow registered nurses to enter the country and work here who did not already have valid H1A immigration status on or before September 1, 1995.

The INS's March 7, 1997 announcement, unfortunately, is only an interim rule, and thus it could be changed after the public-comment period expires in May, 1997.

Unfortunately, it is also completely unclear at this point what is going to happen to the H1A nurses after September 30, 1997.

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