Labor and Employment Alert: California Court Finds That Consistently Applying Progressive Discipline Undermines At-Will Employment

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"A foolish consistency is the hobgoblin of little minds." Ralph Waldo Emerson

California, like 48 other states, is an employment-at-will state (Montana is the sole exception). This means that employment without a specified term may be terminated at the will of either party. But the presumption of at-will employment can be overcome by the parties agreeing – either expressly or impliedly – to limit the employer's termination rights. In *Christine Oakes v. Barns & Noble College Booksellers*, a California Court of Appeal (in an unpublished decision), found that consistently applying a progressive discipline policy may undermine at-will employment notwithstanding disclaimers to the contrary.

Oaks worked at Barnes & Noble for 23 years (21 years as a store manager) until she was terminated without notice. During her employment, she received a code of conduct and an employee handbook – both of which had clear, unequivocal at-will disclaimers. The handbook and a corporate procedure manual also contained a progressive discipline policy expressly stating that Barnes & Noble retained the discretion to repeat or bypass one or more of the disciplinary steps. Despite these pronouncements, Oaks claimed that her discharge breached an implied contract with Barnes & Noble to terminate her only for good cause. The trial court found no evidence that would rebut the various at-will disclaimers and dismissed this claim. But the Court of Appeals reversed and sent the case back for trial.

The Court explained that Barnes & Noble met its initial burden by showing that Oaks was an at-will employee through its disclaimers. Oaks then was required to show that this at-will language did not actually control their employment relationship. The Court found that she had done so because she had a lengthy term of employment with periodic raises and generally favorable performance reviews. Oaks had also presented testimony from her direct supervisors that the progressive discipline policy should be applied – and actually had been applied – in every situation where termination was considered. The

"existence of an unwritten policy of always using progressive discipline" contradicts the discretionary language in Barnes & Noble's policies. This conflict created an issue of material fact as to whether an implied contract existed, and a jury must now determine the precise terms of the employment relationship and whether Barnes & Noble violated those terms.

To avoid discrimination claims, employers are often told to apply their policies consistently. The *Oaks* case illustrates that, on the flip side, consistent application of some policies may undermine the at-will doctrine. Contact your Vorys lawyer if you have questions about best practices for maintaining the employment-at-will relationship.