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DISCIPLINE, TERMINATION AND WORKERS' COMPENSATION

Difficult workers' compensation problems are only one aspect of a multi-dimensional employment law problem.

Workers' Compensation Claimants are a Protected Class

Sources of Protection

- Federal and State Civil Rights Acts
- Workers' compensation laws
- Other federal statutes
 - Americans with Disabilities Act
 - Family and Medical Leave Act
 - Similar state statutes
- Case law

CAVEAT: nothing in this course excuses having your own human resource or legal professional look at your specific situation. Small facts can make a big difference. And, there is a substantial variance in state law.

Federal and State Statutes

- Generally, a workers' compensation claimant has a right to his job unless there is medical evidence to prove he can no longer perform it.
- The Americans with Disabilities Act (ADA) protects persons with a disability who are able to perform the essential functions of their job with or without a (reasonable) accommodation.
- The Family Medical Leave Act (FMLA) protects those who have taken 12 weeks or less time off because of their own serious health condition or that of a spouse, child, or parent.
- At-Will Employment is not a factor in these discussions. Exceptions to at-will employment include: Workers' compensation claimants and persons with disabilities.

Part I: Sources of Protection

- A. Most state workers' compensation laws protect claimants and witnesses against any retaliation.
 - The FMLA will protect a worker on medical leave for his/her own health condition.
 - The ADA will protect those with disabilities from discrimination.

Part I: Sources of Protection

B. Remedies for the Injured Worker

- Penalties
- Reinstatement
- Reimbursement of lost wages
 - The injured worker must be willing and able to work
 - The injured worker has a duty to mitigate

Part II: Analysis from the Employers' Perspective

How Do We Avoid a Valid Claim?

- A. What compels this change?

- B. What is the least detrimental action (with respect to the injured employee)?

- C. Do you have adequate evidence to support to your position?

Part III: Analysis from the Employee's Perspective

What is a *Prima Facie* Case?

- A. Was there an injury?

- B. Was there an employment relationship ?
 - Presumption of employment where services are rendered.
 - Some state statutes may apply to casual or daily hires.
 - Is there a contractual or statutory right of rehire?
 - Affirmative defense

- C. Was there an adverse action?

Part III: Analysis from the Employee's Perspective

What is a *Prima Facie* Case?

D. Was there a link between the injury and the adverse action

- Imputed knowledge

E. Legal Right to Benefit

- If there is a complaint the injured worker was deprived of a benefit, he may have to prove he had a legal right to obtain that benefit.

F. Least Detrimental Alternative

- Accommodation, modified work, alternative work, regular work ,
- When is an injury a disability?

Part III: Analysis from the Employee's Perspective

What is a *Prima Facie* Case?

G. Was the Industrial Injury the Reason for the Adverse Action?

- "But For" Test
- Chronology Test: In California the employee only has to prove the adverse action occurred after the industrial injury; then the burden to prove there is no connection shifts to the employer.
- Is the employer's explanation a pretext?

Part IV: Defenses

- A. Statute of Limitations: the period in which to file a claim may be as short as 90 days but more likely a year.
- B. Adverse action required by business necessity(ies)
 - Business Necessity: This may be either functional or economic.
 - Functional
 - What is the nature of the business?
 - What is the function performed by the particular employee?
 - How damaging is it to leave that position open?
 - Are there other employees who can perform the same function?
 - Economic
 - Is there a business cycle issue?
 - Is the business in a critical position economically?
 - Is the business doing quite well, thank you very much?

Part IV: Defenses

C. Was the adverse action required by business necessity?

- Do the requirements of business mandate the action taken? A business has the right to run efficiently and profitably. See *Pugh v. See's Candies, Inc.* (1981) 116 Cal. App. 3rd 311, 330, 171 Cal. Rptr. 917

D. Status of Injured Worker

- Temporarily disabled?
- Permanently disabled/at maximum medical improvement?

Part IV: Defenses

E. Inability to Perform the Job (*requires medical evidence*)

- Is the inability to perform temporary or permanent?
 - Permanent
 - Can the job be modified?
 - Temporary
 - Is there any necessity to act now?
 - Were temporary employees considered?
- Is the worker a danger to himself or to others?
- What action has the least detrimental impact on the employee?
- Has there been an interactive process?

Part V: Disciplining the Injured Worker

(Documentation, Documentation, Documentation)

A. Good Cause

The employer can proceed with disciplining an industrially injured worker anytime he can show good cause.

- Good cause defined

"a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." *Pugh v. See's Candies, Inc.* (1981) 116 Cal. App. 3rd 311, 330, 171 Cal. Rptr. 917

- Elements of Good Cause

- Consider the business judgment of the employer, or the fairness to the employee of the decision to discharge, while giving substantial weight to managerial discretion.
- Balance business efficiency and profitability against the employee's maintaining his or her job.

Part V: Disciplining the Injured Worker

(Documentation, Documentation, Documentation)

B. Progressive or Stepped Discipline

(Documentation of these steps is critical.)

- Oral warning, documented
- Written warning with advice of further discipline
- Written warning accompanied by consequences
- Termination

Take Aways

- *First, no serious discipline or termination should take place without adequate documentation.*
- *Second, if the documentation does not exist you should delay taking that serious discipline or termination step until you have corrected the lack of documentation.*

Part V: Disciplining the Injured Worker

(Documentation, Documentation, Documentation)

C. Nature of the Infraction

- There are some offenses such as theft and fighting that are so clearly inappropriate that progressive discipline need not be applied.

- Other conduct that requires discipline.
 - Inadequate job performance,
 - Tardiness and/or absenteeism,
 - Insubordination and/or disruptive behavior,
 - Sexual and/or other harassment of fellow employees, customers, others,
 - Health and safety violations,
 - Destruction of company or another employee's property,
 - Dishonesty or abuse of company policies,
 - Misuse of time,
 - Illegal actions.

Part V: Disciplining the Injured Worker

(Documentation, Documentation, Documentation)

- D. Is the infraction described in your employee handbook?
It is important to consult the employee handbook before taking action.
- If the offensive behavior is not described in the employee handbook, consider an addendum and/or notice to all employees that the offensive behavior will no longer be permitted.
 - Evenhanded enforcement is critical.

Part V: Disciplining the Injured Worker

(Documentation, Documentation, Documentation)

E. Is the Infraction a Pretext

- Claim of Selective Enforcement: If the rule is in the handbook, the employee will likely argue that the rule was broken by everyone and enforced selectively against him.

- Witch Hunt: If the rule was not in the employee handbook the disciplined employee will argue the rule was made specifically for him as a means of discriminating against him.

- Enforcement must be evenhanded but consequences can be flexible:
 - Compare consistent enforcement with varying consequences
 - Document flexible consequences with good faith rationale.

Part V: Disciplining the Injured Worker

(Documentation, Documentation, Documentation)

F. Evidence of the Infraction

- No evidence, other than supervisor's observations but consistent misconduct has become intolerable.
 - Do not proceed without documentation.
 - If you start performance reviews, note good qualities as well as bad. Document infractions of all employees and supervisors; not just those of the miscreant.
- Egregious misconduct but equivocal evidence
 - Act reasonably and in good faith when making a determination that harassment occurred in a "he said, she said" situation.
 - In a sexual harassment situation, a court has held the employer need not prove harassment actually occurred only that it had a reasonable, good faith belief that it did. *Cotran v. Rollins Hudig Hall International Inc.* (1996) 49 Cal. App. 4th 903, 916, 57 Cal. Rptr. 129

Part V: Disciplining the Injured Worker

(Documentation, Documentation, Documentation)

G. Avoid hasty discharges by having at least two levels of review

(It is good practice to prohibit line supervisors from summarily terminating employees)

- Thoroughly review every discharge decision with at least two levels of management preferably including a human resources professional.
- If it involves offenses such as tardiness or poor performance, you may allow the employee to remain on the job during review.
- If the offense, such as violence or insubordination, requires immediate removal the employee may be suspended or placed on leave.
- An attorney should review discharges for employees who are in a protected class, such as a workers' compensation claimant.
- "Jury proof" the decision. Not only must the decision have factual and legal integrity, it must be perceived by a jury as being "fair".

Part V: Disciplining the Injured Worker

(Documentation, Documentation, Documentation)

H. Review the Decision

- Investigation of facts and circumstances where appropriate
 - Outside party investigation
 - Signed statements of the witness(es)
 - An attorney can provide attorney-client privilege

- Verify company rules and procedures have been followed,
 - How have persons similarly situated been treated?
 - Have all steps in a stepped disciplinary program have been followed?

Part V: Disciplining the Injured Worker

(Documentation, Documentation, Documentation)

I. Alternatives

- **Consider probation or other alternatives** as the "the least detrimental" action. The employee should be counseled regarding required improvement.
- **Additional training** should be considered during or at the end of a probationary period. If appropriate, the employee should be reevaluated then as well.
- **Transfers** are a viable alternative. In certain situations, such as personality conflicts, the company should consider a change in department and/or duties in an attempt to salvage the employee.

Part V: Disciplining the Injured Worker

(Documentation, Documentation, Documentation)

– Termination

- Pre-termination interview of employee with a signed statement may be wise.
- If new factual allegations are raised, the employer should consider investigating them.
- No attempt should be made to dissuade the employee from taking advantage of company benefits or unemployment insurance.
- Continuation of health benefits should be confirmed in writing.
- Confirm all wages have been paid including commissions, as well as accrued unused vacation.
- Confirm policy regarding references. Consider providing a neutral letter confirming employment or providing references if these can be crafted candidly describing the employee's good qualities.

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