

Workers' Compensation...

When can employer terminate a worker with a claim?

Have you ever had an employee who needed to be terminated, only to discover that they recently filed a worker's compensation claim? Can an employer terminate an employee who is out on workers' comp leave – or recently back from it? Can a worker already on disciplinary action be terminated, even if they subsequently file a worker's compensation claim? Can a worker be disciplined while out on disability?

Sometimes employers find themselves in the difficult position of having to wrestle with these questions and wondering what to do. The best advice...*don't make a move before considering all the angles*. There are times when discipline or even termination is definitely warranted, just as it would be for any other employee, but workers' compensation adds another layer of risk that must be managed.

Can a workers' Compensation claimant be terminated?

Most state workers' compensation laws protect employees from being discharged, discriminated against, or retaliated against in any way because they either sought workers' compensation benefits or because they testified at a worker's comp hearing. However, an employer may be able to lawfully discipline or terminate employees with pending or former workers' comp claims as long as it is not retaliatory and as long as it is based on misconduct that is unrelated to the workers' compensation claim says Adele Abrams.¹

But, the key to successful discipline or termination in such a situation will be whether or not the employer's basis for taking action is credible (e.g. based on objective facts and circumstances) and not simply a pretext for getting rid of a problem employee.

Can a workers' compensation claimant be disciplined?

Can you discipline an employee with a workers' comp claim? Most attorneys will tell you yes. The employer can proceed with disciplining – just as they can proceed with terminating – a workers' compensation claimant if it can show good cause.² In determining whether there was good cause, the court can consider the business judgment of the employer, or the fairness to the employee of the decision to discharge or discipline, while still giving substantial weight to managerial discretion. As long as there's evidence that the employer acted in "good faith" the Court is unlikely to substitute their judgment as the court for the judgment of a manager.

¹ Adele Abrams, Esq., CMSP, is recognized as a national expert on occupational safety and health. She heads a nine-attorney firm, the [Law Office of Adele L. Abrams PC](#), which represents employers and contractors nationwide in OSHA and MSHA litigation, and provides safety and health training, auditing, and consultation services.

² ([John Templemire v. W & M Welding Inc.](#), Supreme Court of MO, No. SC93132, 4/15/14)

“Good Faith”

For an employer to show they acted in good faith, it is critical the employer follow their own progressive discipline system carefully and to the letter, avoiding any variation from the process or giving harsher discipline for workers’ compensation claimants only. Skipping a step is going to increase the likelihood that the courts will find that there was discrimination or retaliation. And remember, all of your employee disciplinary records going back a number of years are fair game for discovery so keep good records and use them to help you consistently apply discipline across the organization.

Basically, discipline can be imposed on “protected workers” whenever warranted, but the same standards must be applied to all workers – no departures from the employer’s normal practices and policies. Be very careful to be consistent in the application of existing rules. If conduct was tolerated prior to the workers’ compensation claim, subsequent discipline will almost certainly be seen as retaliatory, even if it is in line with established policy.

The bottom line is that you cannot retaliate against employees because they exercise their rights.³

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This material is presented with the understanding that the author is providing basic information only, and assumes no liability whatsoever in connection with its use. Tax laws are constantly changing, are subject to differing interpretations, and the facts and circumstances in any particular situation may not be the same as those presented here. Therefore, we urge you to do additional research and make sure that you are fully informed and knowledgeable before using the information contained herein.

³ It is recommend that you always seek professional assistance from an attorney who practices in the area of employment law in all cases involving termination or disciplinary actions involving employees with Workers compensation claims.