EMPLOYERS’ RIGHTS IN DISCIPLINING
AND TERMINATING
WORKERS’ COMPENSATION CLAIMANTS:
NEW DEVELOPMENTS IN BUILDING YOUR CASE
IN THE EVENT YOU ARE SUED

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In 1978, the Illinois Supreme Court created an independent cause of action for employees who are workers’ compensation claimants in the case of *Kelsay v. Motorola*, 72 Ill.2d 172, 384 N.E.2d 353 (1978). In the *Kelsay* case, the plaintiff suffered a workers’ compensation injury. She sought the advice of counsel and filed a workers’ compensation claim. According to the evidence, the personnel manager told the plaintiff that it was the company’s policy to terminate employees who pursued workers' compensation claims. Despite the personnel manager’s warning, the plaintiff pursued her workers’ compensation claim and she was terminated. She subsequently filed a wrongful termination suit and she won both compensatory and punitive damages.

The employer defended the case, claiming that the plaintiff was entitled only to workers’ compensation benefits and that benefits under the Workers’ Compensation Act were the exclusive remedy of the plaintiff. The Illinois Supreme court rejected the employer’s argument. The court ruled that terminating a workers’ compensation claimant for exercising his workers’ compensation rights was a violation of the public policy of the state. The court held, “Retaliatory discharge is offensive to the public policy of this state as stated in the Workmen’s Compensation Act. This policy can only be effectively implemented and enforced by allowing a civil remedy for damages, distinct from any criminal sanctions which may be imposed on employers for violating the Act after 1975.”

The court held that not only compensatory but also punitive damages are available to plaintiffs who are wrongfully terminated. In awarding punitive damages, the court held, “The imposition on the employer of the small additional obligation to pay a wrongfully discharged employee compensation would do little to discourage the practice of retaliatory
discharge, which mocks the public policy of this state as announced in the Workmen’s Compensation Act. In the absence of other effective means of deterrence, punitive damages must be permitted to prevent the discharging of employees for filing workmen’s compensation claims.”

Not surprisingly, since Kelsay numerous civil lawsuits have been filed by workers’ compensation claimants who allege wrongful discharge. Workers’ compensation claimants frequently believe that as a result of their workers’ compensation injury, they are guaranteed a job for life. Claimants believe they have special privileges and rights because they had a work injury. Claimants act like they don’t have to follow company rules and regulations because they are protected by their injury claim.

These contentions are simply not true. A workers’ compensation claimant enjoys no more privileges than any other employee. An employer should not grant any additional concessions to workers’ compensation claimants than are granted any other employees. A workers’ compensation claimant who is an at-will employee can be discharged for any and all reasons so long as the reason for termination is not the workers’ compensation claim. Employers must expect that claimants may threaten or even pursue litigation for retaliatory discharge. Therefore, documentation as to the basis for the termination is essential.

The employer should enact a series of non-discriminating bases for terminating poor employees. These bases must be applied to all employees equally whether or not they have workers’ compensation claims. Examples of such policies are as follows:

1. Failure to return to work upon a doctor’s release.
2. Failure to show up at work or report in as to the reason you are not at work.

Example: no call no show for three days.
3. Failure to return to work within a prescribed time period for any reason. For example, off work more than 26 weeks or 52 weeks.

4. Failure to submit medical documentation as to disability.

5. Misconduct, any type from harassment to insubordination.

6. Failure to perform work duties properly.

7. Falsification of data/Fraud.

CASE DECISIONS SUPPORT TERMINATIONS

Every employer must reasonably expect that a workers’ compensation claimant who is terminated will file a retaliatory discharge claim. However, the prospect of such a claim should not deter an employer from terminating an employee who merits termination for reasons other than the workers’ compensation claim. Numerous case decisions support an employer’s right to terminate an employee even though the employee has a valid workers’ compensation claim.

In order to sustain a wrongful termination claim, the employee must prove: (1) that he was an employee before the injury; (2) that he exercised a right granted by the Workers’ Compensation Act; and (3) that he was discharge and that the discharge was causally related to his filing a claim under the Workers’ Compensation Act.

1. Termination allowed if claimant refuses to perform a valid job offered by the employer. The Workers’ Compensation Act does not guarantee a job for the claimant. The Workers’ Compensation Act does not require an alternate job be offered to a claimant with an injury or disability. If a claimant has an injury and a disability and refuses to take an alternate
job, the employee’s right to compensation ends and the termination is justified. See *McEwen v. Delta Airlines*, 919 F.2d 58 (1990).

An employer’s termination was held to be valid where the employer had offered petitioner restricted work eight hours a day and petitioner refused to work. See *Paz v. Commonwealth Edison*, 247 Ill. Dec. 641, 732 N.E.2d 696, 314 Ill.App.3d 591 (2000).

2. **Termination is allowed if claimant violates an employer’s attendance policy.** It is valid to terminate a workers’ compensation claimant for poor attendance. See *Contreras v. Suncast Corp.*, 129 F.Supp.2d 1173 (N.D. Ill 2001). An employee who had 28 absences over a four-month period and accumulated more than 15 points for her absences over a six-month period as required under collective bargaining arrangement was justifiably terminated. See *Borcky v. Maytag Corporation*, 248 F.3d 691 (2001).

The employee’s failure to follow the employer’s absenteeism policy was a valid basis for discharge. See *Walker v. Borg Warner Automotive*, 88 F.Supp.2d 878 (2000).


An employer is permitted to terminate an employee for excessive absenteeism even if the absenteeism is caused by a compensable injury. See *Cross v. Ryder Integrated Logistics*, 140 F.Supp.2d 933 (2001).

The filing of a workers’ compensation claim does not insulate an employee from being disciplined for failing to meet his obligation to obey personnel rules including those that pertain

3. **Termination is allowed as to an employee who fails to comply with an employer’s policy to call the employer to notify the employer as to the employee’s absence and the reason for the absence.** A termination for excessive absenteeism which was neutral and applied to all employees was a justifiable basis for termination. *Hess v. Clarcor, Inc.*, 177 Ill. Dec. 888, 603 N.E.2d 1262, 237 Ill.App.3d 434.

The failure to return to work or provide the employer with significant documentation regarding the injury and the authorization off work is a sufficient basis for terminating the employee. See *Walker v. Doctors Hospital of Hyde Park*, 110 F.Supp. 2d 704 (2000).

4. **Termination is proper as to an employee for violating safety rules.** See *DePluzer v. Village of Winnetka*, 203 Ill. Dec. 31, 638 N.E.2d 1157, 265 Ill.App.3d 1061 (1994). Plaintiff claimed exposure to loud noise caused him hearing loss. The employer insisted that he wear two forms of hearing protection as a safety measure. Plaintiff refused to wear both devices. Plaintiff had been suspended twice for failure to abide by the safety regulations imposed by management. Plaintiff was informed that his continued failure to comply with safety measures would result in termination. He again refused to wear the devices and he was terminated. He filed a WC claim and then a retaliatory discharge lawsuit. Summary judgment was granted in the favor the employer. Termination for violating a safety rule is proper even if that rule was related to and created for the claimed injury.

Terminating an employee for violating a safety rule which CAUSED the accident for which the WC claim is filed is also proper. Sometimes you can even deny the case if the violation takes the employee outside the scope of employment.
5. **Termination is proper for employee misconduct.** A convalescent center employee who was discharged on allegations that she hit a patient could not maintain a retaliatory discharge claim. See *Klinkner v. County of DuPage*, 264 Ill. Dec. 429, 770 N.E.2d 734, 331 Ill.App.3d 48 (2002).

A retaliatory discharge claim cannot stand where uncontested evidence indicated that the employee was repeatedly disciplined for violating workplace rules prohibiting insubordination and use of profane language and for excessive absenteeism. See *Gombash v. Vesuvius USA*, 380 F.Supp.2d 977 (2005).

A termination is valid if the termination was based on the employee’s falsifying employment application. In this case, the employee prepared a false employment application denying a previous back injury. Petitioner then injured his back (a recurring injury) while working for the employer. The employer paid the claim but then terminated the employee for lying on his employment application. The termination was valid and non-pretextual precluding employee’s retaliatory discharge claim brought under Illinois law. The employee’s application and the employee manual warned that any misrepresentation or omission could justify termination. See *Carter v. Tennant Co.*, 383 F.3d 673 (2004).

6. **Termination is proper where the employer does not have work within the employee’s restrictions.** An employer is not required to create a job for an employee under the Workers’ Compensation Act. An employer was held to be justified in not rehiring a licensed practical nurse on the grounds that the nurse was not physically able to perform the minimal physical requirements of her former position. See *Wright v. St. John’s Hospital*, 171 Ill. Dec. 250, 593 N.E.2d 1070, 229 Ill.App.3d 680 (1992).
Illinois law does not require employers to retain workers who cannot work and it does not require that an employer offer injured persons alternate employment commensurate with their reduced capabilities. Employers may act on the basis of their employees’ physical disabilities. Such an employee may be terminated so long as the basis is not the request for benefits. *Hiatt v. Rockwell International*, 26 F.3d 761 (1994). See also *McEwen v. Delta Airlines, Inc.*, 919 F.2d 58 (1990).

An employer need not retain an at will employee who is medically unable to return to his assigned position merely because the employee has filed a workers’ compensation claim as long as the employee’s filing of the claim does not form a basis for the employment decision. *Hartlein v. Illinois Power Co.*, 176 Ill. Dec. 22, 601 N.E.2d 720, 151 Ill.2d 142 (1992).

Moreover, excess absenteeism even if caused by an injury compensable under the Workers’ Compensation Act may be a valid reason for dismissal and an employer is under no obligation to retain an at will employee who is medically unable to return to his assigned position. See *Paz v. Commonwealth Edison*, 247 Ill. 2d 641, 732 N.E.2d 696, 314 Ill. App.3d 591 (2000). See *Hess v. Clarcor, Inc.*, 177 Ill. Dec. 888, 603 N.E.2d 1262, 237 Ill.App.3d 434.

Medical inability to work is a legitimate non-discriminatory reason for discharging an employee which will be sufficient to refute claims of retaliatory discharge for exercise of workers’ compensation rights, even though medical inability results from an accident at work. See *Miller v. J. M. Jones Co.*, 167 Ill. Dec. 385, 587 N.E.2d 654, 225 Ill.App.3d 799 (1992).

An employer is not required by the Workers’ Compensation Act’s retaliation provision to retain an at will employee who is medically unable to return to his or her assigned position. An employer may terminate an employee for excessive absenteeism even if the absenteeism is


In addition to actual fraud with respect to the claim itself, the presentation of a false purchase receipt for which reimbursement is sought was justified as the basis for termination. See *Hiatt v. Rockwell International Corp.*, 26 F.3d 761 (1994).


8. **Termination is proper if an employee is off work more than an allotted period of time prescribed by the employer as to all employees.** An employee’s termination is proper who is off work more than 26 weeks only if there is a documented policy authorizing the termination of all workers who are off work more than 26 weeks. See *Kritzen v. Flinder Corp.*, 168 Ill. Dec. 509, 589 N.E.2d 909, 226 Ill.App.3d 541 (1992).

An employee who is terminated 13 months after his accident was not entitled to a retaliatory discharge claim where the employer presented evidence that its policy was to terminate all employees who have been off work more than 12 months. See *Cross v. Ryder Integrated Logistics*, 140 F.Supp.2d 933 (No. Dist. Ill. 2001).

**WATCH OUT CASES**


It is especially important to remember that it is not a good basis for terminating an employee where there is a dispute over the nature and extent of the employee’s injury. Therefore, in a case where the employer obtains surveillance evidence which is inconsistent with an employee’s restriction, it is dangerous to terminate that employee for falsifying a claim. See *Clark v. Owens-Brockway Glass Container*, 232 Ill. Dec. 1, 697 N.E.2d 743, 297 Ill.App.3d 694 (1998).

Where there is a dispute in workers’ compensation cases between an independent medical examiner and an employee’s physician with no evidence of fraud, the employer cannot discharge the employee on the basis of suspected laziness or malingering. It is for the Industrial Commission to settle such disputes where there are conflicting medical opinions. See *Hollowell v. Wilder Corp. of Delaware*, 252 Ill. Dec. 839, 743 N.E.2d 707, 318 Ill.App.3d 984 (2001).
RECOMMENDATIONS

Don’t be afraid to terminate the employee who has a workers’ compensation claim. Don’t treat that employee any differently or any better than you would treat any other employee. There is no obligation to treat WC claimants fairly. There is an obligation to not terminate the employee for filing the workers’ compensation claim. The workers’ compensation claim gives the employee no additional rights greater than any other employee. The claimant has all the obligations and responsibilities of every other employee.

It is wise to enact rules and regulations to protect yourself from long-term absences. Establish policies and procedures for automatic termination following any long-term absence. Enact procedures requiring employee to call in regularly and provide medical documentation regularly.

Document all failings of the claimant including absenteeism, a failure to provide medical documentation, as well as violations of any established practices and procedures. Employee misconduct cannot be accepted and can still serve as a basis for termination. A work injury gives no justification for violations of justified policies and procedures.

Finally, falsification and fraudulent activity cannot be tolerated. It will always serve as a basis for termination.