

Firing With Cause

by Quenda Behler Story

A call from your client brings your attention to trouble at your job site. It seems that Larry, your apprentice carpenter, has been drinking on the job and threatened another employee with the business end of a nail gun. Larry is fired. Case closed.

But you feel sorry for Larry's family, and you don't want to upset his best buds and former coworkers, Curly and Moe, so you don't object to his claim for unemployment benefits. Good move?

Nice Guys Finish Last

Let us suppose that Larry has a bone to pick with you. After he receives his unemployment, he sues you for wrongful discharge, claiming that he was fired because you are prejudiced against left-handed Lithuanians. This should be easy to refute, right? All you have to do is tell the court about the threats with the nail gun. Your client and the threatened employee will surely back you up.

But when you get into court, you find you aren't allowed to introduce that testimony. The court says that, since you failed to oppose a claim for unemployment benefits by raising the drinking and the nail gun incident, you have waived your right to that defense altogether.

Scenario #2

Let's change the facts a little and say that you clearly smell alcohol on Larry's breath when he comes over to say hello during your job-site visit. A clause in your employees' handbook says that drunkenness on the job site is grounds for instant dismissal, so you fire Larry on the spot. A good thing, too, because if he'd gone out on the highway with your company truck and caused a traffic accident, you could be looking at millions of dollars of liability. As before, you feel sorry for Larry and his family and allow his unemploy-

ment claim.

However, Larry finds a clever attorney and sues you under the ADA rules, admitting that he's an alcoholic but holding that he has his problem under control. And anyway, he says, he was not intoxicated at that time but only had bad breath. Since you didn't mention his drinking on the job when he applied for unemployment benefits, can he claim that when you talk about it now, you must be lying? Yes, he can.

Your failure to raise the reasons for termination from the beginning can make it look like you are fabricating the drinking and nail gun stories. Because if they were true, you surely would have mentioned them at the time of the unemployment claim.

Employer Beware

So what do you need to do to protect yourself? First of all, you need to know how to contest an unemployment claim. How much time do you have to file an objection to Larry's claim? Does it have to be in writing? Are you allowed to bring in witnesses? Can you have a lawyer present? Your local unemployment benefits office will have a handbook that you can use as a guide to prepare for the hearing.

Supporting evidence. Your evidence includes Larry's personnel records and your company handbook, especially the page about alcohol use on the job. When Larry was hired he should have been given a copy, and he should have signed a statement that he read it and accepted all the provisions in it.

Larry's personnel records should reveal any problems you have had with him, like a drinking problem. A record of sitting down with Larry to discuss those problems, including what he said and what warnings he was given, would be invaluable. Larry's signature on the paper

summarizing the conference with him about his problems would be best of all.

Put all your evidence together and take it to the hearing with you.

Bring witnesses. In preparation for the hearing, line up any witnesses you need and make sure they will attend. It's okay to discuss their testimony with them in advance. It's also okay, if their testimony wouldn't be friendly, *not* to bring them. Leave Moe and Curly on the job site. Remember, though, that Larry can ask them to come in his defense. If Moe and Curly want to testify for Larry, that's their right. Do not threaten them or retaliate against them later.

Sometimes, especially with long-term employees, the hearing can be emotionally difficult for the employer. If that's the case, or if you're just too busy to go yourself, ask someone else from the company to go, or ask your lawyer to go. Sit down with that person to outline your key points and discuss the testimony that might be presented at the hearing.

Keep cool. At the hearing, don't argue with Larry or the witnesses, or especially with the hearings officer. Larry gets his say, and then you get yours. Let it go at that. If the only record to be preserved is the finding of the hearing officer, insist that your claim about Larry's drinking and threatening the other employee be mentioned in the finding, even if the ruling is not in your favor.

Is it a big problem if you don't win? No. What's important is that, by stating your case and presenting your evidence, you have preserved your right to bring up Larry's behavior in the future, just in case things get worse. Which, of course, they always can.



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