

TEXAS WORKERS' COMPENSATION
Education Conference



Employment Law Issues for Workplace Safety

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Book: www.twc.state.tx.us/news/efte/tocmain2.html

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Brief Background History

- In researching this topic, I discovered that a bunch of stuff happened before I was born.
- One of those things was that people were created with many different tendencies, some of which were undesirable.
- Undesirable traits coinciding with employees create job security for HR professionals and employment law attorneys.



Employment at Will

- Basic rule of employment law in Texas:
absent an specific agreement or a law to the contrary, either party in an employment relationship may modify or terminate any of the terms and conditions of employment at any time for any reason, with or without notice
- There are only a very few exceptions
- Differs from “right to work”, which prohibits discrimination based on membership or non-membership in a union

Relevant Statutes

- Employment discrimination – race, color, religion, gender, national origin, age, disability (including workers' comp history or status)
- Workplace safety laws – OSHA
- Statutes against criminal conduct
- Employers have the right to make compliance with all relevant statutes a condition of employment and to discharge any employee who violates a law



Employment Discrimination

- Main thrust of all such laws - don't treat employees or applicants adversely on the basis of something about themselves that they cannot change, or should not be expected to change
- “immutable characteristics” - race, color, religion, age, national origin, gender, or disability
- An employee's status is generally not a legal basis for action, but the person's conduct may be a basis for action

Minimizing Workplace Tensions

- Zero tolerance of hostile work environment
 - stray remarks
 - offensive jokes, pictures, and conduct
- Periodic training for all staff
- Review of policies and procedures

Background Checks - Criminal History

- criminal history information is generally in public records
- do not ask only about “convictions”, but rather if the person has ever been convicted or has pleaded guilty or no contest to a criminal offense
- best bet is to hire an outside agency to do such checks – be aware of Fair Credit Reporting Act requirements
- keep “job relatedness” in mind when using criminal history to screen applicants

Weapons at Work

- Private employers may allow or bar weapons from the premises and in company vehicles
- May cover any type of harmful item
- May prohibit any possession, display, or mention of such an item if someone else would reasonably feel threatened thereby
- Employees may store legal firearms and ammo inside their own locked vehicles on company-supplied parking spaces
- Handgun signage for guests and other visitors

Searches

- Landmark case is K-Mart v. Trotti, 677 S.W.2d 632 (1984) – employee won because she had a reasonable expectation of privacy in her locker. Even though it was K-Mart’s locker, the company allowed her to put her own lock on it and didn’t insist on a way to get into the locker.

Search Policy

- To establish compliance with safety and work rules
- All employees are subject to the policy
- Request to search is not an accusation of wrongdoing, but merely part of an investigation
- Search may include all work areas, lockers, vehicles, and personal containers
- All of those areas are subject to search at any time
- If employee uses personal lock, give key or combination to the employer
- Refusal to submit to search may lead to disciplinary action – make sure prior warnings are given!

Metal Detectors – X-Ray Machines

- No restrictions on use of machines to detect metal objects or to “see into” employees’ bags, purses, briefcases, and other objects brought to work
- Use in conjunction with a search policy
- Can be a condition of continued employment
- Illegal items should not be handled further – notify local authorities

Drug Testing

- Federal law allows drug testing of employees in safety-sensitive positions
- Nothing under Texas law prohibits an employer from instituting a drug-testing policy
- Such a policy is best restricted to safety-sensitive positions
- Common question: can an employer release test results to TWC in defense of an unemployment claim?
- Yes, according to both the DOL and the DOT – this comes under the exception for administrative agencies and courts
- Cite: 49 C.F.R. 40.323.

Telephone Monitoring

- It is legal for an employer to monitor employees' use of the company's phones for business purposes
- Let employees and outside callers know in advance that such monitoring will take place
- Stop listening as soon as it is apparent that personal, private details are being discussed – handle from there as a disciplinary matter

Recording of Conversations

- As long as one party to a conversation knows it is being recorded, it is legal to record it
- Be on guard against surreptitious recording of conversations in the workplace
- Frank B. Hall Company v. Buck case – company hit with defamation lawsuit after bad statements were made in context of job reference calls

Video Surveillance

- Same basic rules as for telephone monitoring
 - if audio is also recorded, notice of such monitoring is needed
- Only authorized personnel should ever view surveillance tapes – defamation and invasion of privacy suits can result if tapes are shown to unauthorized persons

Camera Phones

- Risk: invasion of privacy, theft of company secrets, improper photography
- Sexual harassment claims have been filed based on coworkers' use of such devices
- Employer may limit use or possession of such devices in the workplace

Electronic Surveillance

- With the right kind of policy, employers have the right to monitor the following:
 - Employees' e-mail at work
 - Employees' use of the Internet
 - Employees' use of company computers

Monitoring and Use Policy

- Every employer needs to have a detailed policy regarding use of company computers
- Each employee must sign – it can be made a condition of continued employment
- Company has right to monitor all computer usage at all times for compliance
- Right to inspect any electronic data or media at any time
- Right to withdraw access to computers, Internet, e-mail if needed
- No reasonable expectation of privacy in any use of the company's electronic resources, since it is all company property and to be used only for job-related purposes

Tracking of Vehicles via GPS

- No law against using such a system in company vehicles in Texas
- No notice needed under current law, but might as well let all employees know that all use of company vehicles is monitored that way
- If misconduct is detected, preserve the data files for use as evidence in the event of an unemployment claim or lawsuit
- Before taking action, give the employee a chance to comment on the information in writing and keep whatever statement the employee gives

Responsibilities of HR Staff and Managers

- Promote an open-door policy
- Educate rest of company staff
- Encourage prompt airing of workplace problems, including harassment
- Facilitate proper company response
- Be supportive toward employees, but protect employer's interests as well
- Bottom line: advise top staff to do the “right thing”

Identifying Key Issues

- Safe workplace (OSHCAN is a fantastic resource for employers)
- Trained staff
- Spotting problems as they arise
 - Discipline
 - Performance
 - Morale
- Investigating and documenting problems and corrective actions

Coworker Disputes

- Left unaddressed, disputes between coworkers can lead to harassment claims and workplace violence
- Zero tolerance toward workplace violence
- Zero tolerance toward abusive, threatening, demeaning, bullying, or otherwise intimidating conduct toward others
- Management must be able to get off the fence

Documentation and Confidentiality

- Documentation is key to tracking problems, solving them, and protecting the company's position
- Fully-documented investigation = fewer worries about claims and lawsuits
- Confidentiality should be stressed both in the employee handbook and in management's dealings with employees

Documentation is Key

- Good documentation can help prove that
 - a particular employee was treated fairly and was not singled out;
 - the employer acted according to known rules;
 - what happened was predictable both from the policy and from past practice; and
 - the alleged violation or problem occurred just as the employer has said.

Document Problems

- Witnesses
- Pictures / video
- Written statements
- Logs / journals
- Time sheets
- Complaint letters
- Memos to file
- Written warnings

Gathering Evidence

- Statements from complainants
- Surveillance
- Searches
- Background checks
- Personnel files

Corrective Action

- Verbal warning, written warning, final written warning (may be combined with unpaid suspension and/or disciplinary pay cut), and discharge
- Have a witness present
- Let the employee sit with his / her back to the door
- Keep arguments to a minimum
- Be ready to have a cooling-off period
- Inappropriate response to corrective action may result in stricter action on that basis

Emergency Plan of Action

- If trouble is anticipated, have contingency plan(s) ready
- Two-deep management presence
- Train managers on emergency response and procedures for giving notice to law enforcement
- Train all employees on safety measures in case of workplace violence

Emergency Response Measures

- Train all employees in what to do in the event of a dangerous event at work
- Have emergency responder numbers on speed dial
- Designate “safe rooms” and have safety drills
- Know who the people are who can help defend others
- Let employees know they do not have to put up with harassing or threatening callers or visitors
- Employers have a right to bar unwelcome visitors from the premises (that can include obnoxious or dangerous current or former spouses, etc.)

Work Separations: By the Book

- Establish clear employee policies
- Put them into writing
- Follow them as consistently as possible
- Avoid exceptions
- Fairness and due process are the main considerations - fair and appropriate treatment = fewer claims and lawsuits
- Give consistent treatment according to known standards

Final Warning

- Do not give a final warning until and unless the company is truly ready to sever ties
- A real final warning lets the employee know:
 - that it is the employee's last chance,
 - that no further chances will be given,
 - and that if the complained-of problem occurs even one more time, the employee will be subject to immediate discharge
- Have the employee sign it (or a witness in the employee's place), and give the employee a copy

Final Straw?

- If the circumstances allow, consider asking the employee to explain the final incident in his or her own words and handwriting on a blank piece of paper
- This allows both sides one last opportunity to stave off a final work separation
- If the employee supplies what amounts to a written admission of misconduct, that would be relevant in any response to an unemployment claim

Terminations for Cause

- “Cause” is unnecessary for purposes of avoiding wrongful discharge liability (Texas is an at-will state), but proof of “misconduct” is necessary to avoid an unemployment claim
- Misconduct can be anything bad that an employee does that was within the employee’s power to control, and was something that the employee either knew or should have known would result in discharge

“No-warning” Offenses

- Most companies have a list of immediately-terminable offenses – examples:
 - Fighting on the job
 - Theft or other forms of misappropriation
 - Insubordination
 - Discourtesy or hostility to customers
 - Illegal discrimination toward coworkers
 - Use, possession, sale, or transfer of controlled drugs or alcohol
- Employer still has the burden of proof!

Notice of Discharge

- Texas law does not require an explanation of why an employee is being discharged
- Have a reliable witness
- Keep any explanation short and factual
- Avoid arguing, but allowing a few minutes for the employee to vent could be helpful in avoiding problems later
- Try to end things on a positive note to the extent possible
- If danger is anticipated, the employer may give notice of discharge over the phone or via text or e-mail and bar the former employee from returning to the premises

Minimizing the Risk of Wage Claims

- ★ Have clear written wage agreements
 - Best evidence rule: whoever has the best evidence of the wage agreement or of time worked will prevail on those points
 - Written wage agreement and good time records avoid confusion and misunderstandings
- ★ Get written authorization for any deduction that is not ordered by a court or required by a law (“salary reduction agreement” in laws pertaining to public employees)
- ★ Get receipts for all wage payments, especially cash!

Final Pay

- Involuntary work separation: six calendar days
- Voluntary work separation: next regular payday
- Paycheck cannot be held pending return of company property or submission of documentation
- Final pay = all remaining pay, except for commissions, bonuses, and severance pay
- Severance pay is owed only if promised in writing
- Both severance pay and wages in lieu of notice will disqualify a claimant from benefits for the period covered by such a payment

What Does An Employer Need to Show?

- Voluntary work separation
 - Show how a reasonable employee would not have quit for such a reason
- Involuntary work separation
 - Show that the discharge resulted from a specific act of misconduct connected with the work that happened close in time to the discharge, and
 - That the claimant either knew or should have known that discharge could occur for such a reason.
- Evidence needed: documentation of problems, and firsthand testimony from eyewitnesses

Violence or Threats

If proven with documentation or eyewitnesses, definitely misconduct!



Destruction of Property

- Eyewitnesses or video evidence needed
- Prior to termination ask the employee to sign a statement explaining what happened



Insubordination

- Insubordination is a direct refusal to submit to authority
 - Not the same as failing to follow instructions
 - Also not the same as making mistakes

Failing to Observe Dress Codes and Grooming Standards

In addition to policy and firsthand testimony, explain how the rule is related to legitimate business interests



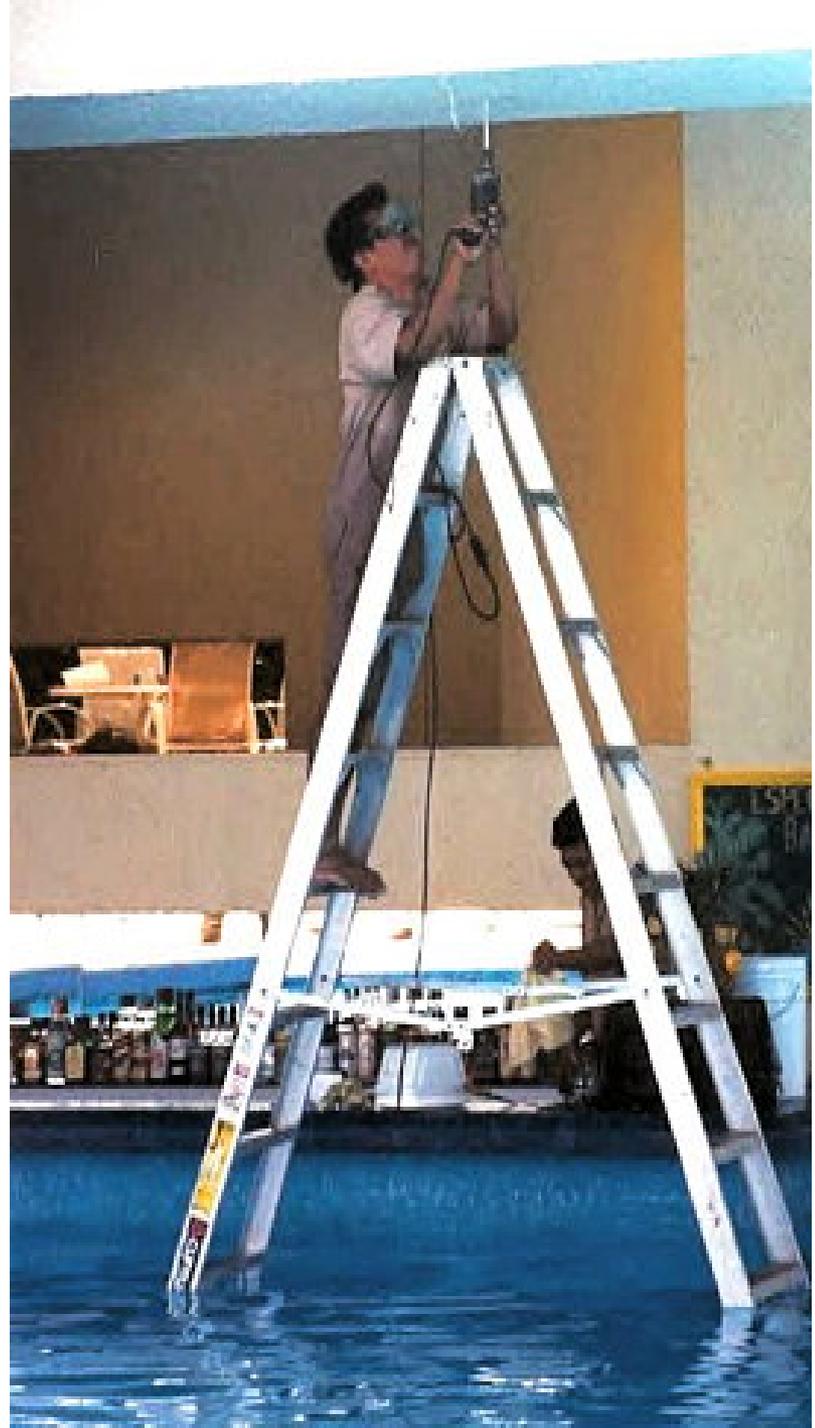
Negligence Can Be Misconduct

Prior warning or warnings + firsthand testimony



Failing to Do the Work Safely or According to Training

In addition to policy and firsthand testimony, document the safety rules or what the training provides for



Unluckiest Claimant

- Feared failing a drug test due to marijuana usage
- Borrowed unflushed urine from another urinal
- Kept test tube in pocket to make it warm
- While in toilet stall, dropped vial lid into blue toilet water, got blue dye on hands and underwear
- False sample submitted tested positive for cocaine
- His excuse that he was really only guilty of marijuana use did not impress the employer or TWC

Thanks!

Thanks for your attendance
and
Good Luck!

Remember the toll-free hotline for employers:
1-800-832-9394

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www.twc.state.tx.us/news/efte/tocmain2.html
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