

California Labor Federation AFL-CIO
Organizing for Safety - September 23, 2000
A Workplace Health & Safety Conference for Union Activists

What are your RIGHTS if you suffer
DISCRIMINATION or DISCHARGE for Safety & Health Activity?

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Labor Code § 6310 provides:

“(a) No person shall discharge or in any manner discriminate against any employee because the employee has done any of the following:

- (1) Made any oral or written complaint to [Cal/OSHA or another government agency dealing with safety or health].
- (2) Instituted or caused to be instituted any proceeding under or relating to his or her rights or has testified or is about to testify in the proceeding or because of the exercise by the employee on behalf of himself, herself, or others of any rights afforded him or her.
- (3) Participated in an occupational health and safety committee established pursuant to Section 6401.7.

(b) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has made a bona fide oral or written complaint to [Cal/OSHA or another government agency having statutory responsibility for or assisting Cal/OSHA] with reference to employee safety or health, his or her employer, or his or her representative of unsafe working conditions, or work practices, . . . , or has participated in an employer-employee occupational health and safety committee, shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.”

Labor Code § 6311 provides:

“No employee shall be laid off or discharged for refusing to perform work in the performance of which this code, including Section 6400, any occupational safety or health standard or any safety order of the division or standards board will be violated, where the violation would create a real and apparent hazard to the employee or his or her fellow employees. Any employee who is laid off or discharged in violation of this section or is otherwise not paid because he or she refused to perform work in the performance of which this code ... will be violated, where the violation would ... [has] a right of action for wages for the time the employee is without work as a result of the layoff or discharge.”

Labor Code § 6312 provides:

“Any employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of Section 6310 or 6311 may file a complaint with the Labor Commissioner pursuant to Section 98.7.”

I. Discrimination based on Protected OSH Activity - DLSE ADMINISTRATIVE REMEDIES

A. WHEN TO FILE with DLSE?

Labor Code §98.7 provides that complaints are to be filed within 6 months of the alleged discrimination. This period may be extended for good cause. DLSE policy is to accept all claims even if clearly filed after the statute of limitations (6 months) has run. The intake deputy must try to determine whether good cause exists for the late filing, and that should be discussed with the claimant.

Reasons for accepting a late filing might include:

- * The employer concealed or misled the employee re the discharge or adverse action
- * The discrimination is of a continuing nature
- * The employee made reasonable efforts to file the complaint within 6 months, but was unable to contact a DLSE representative or was given erroneous information by DLSE personnel
- * The employee has proof that within 6 months of the alleged violation he/she sent a letter to an official of the U.S. Department of Labor, his/her Senator, Congressperson, State Senator or Assembly Member, the Governor, the President of the United States, Cal/OSHA or Federal OSHA or a similar agency alleging the violation. Time would be extended from the time a rejection was received or from when a reasonable person would have learned that DLSE was the correct agency with which to file.
- * The complainant could not file due to illness or injury (apply reasonable person standard)
- * The complainant could not file due to natural disaster (apply reasonable person standard)

Reasons NOT acceptable:

- * Ignorance of the 6 month rule
- * Filing unemployment compensation claim in lieu of discrimination claim
- * Filing workers' compensation claim in lieu of discrimination claim
- * Filing private legal action in lieu of discrimination claim
- * Filing grievance or arbitrating under employment contract or collective bargaining agreement in lieu of discrimination claim

B. WHAT SHOULD YOU SAY IN YOUR COMPLAINT?

The worker must present evidence to show what is called a prima facie case:

- 1) He / she engaged in protected activity or activities;
- 2) The employer took adverse action against complainant; AND
- 3) There is a causal connection (nexus) between the protected activity and the adverse action.

1. What is Protected Activity and How do you Prove It?

DON'T ACT ALONE if at all possible

PROOF: documents and/or witnesses

ELEMENTS: The worker must show participation in a **PROTECTED ACTIVITY** such as:

Protected Activity Type 1: Complaining about a safety violation or unsafe conditions

- a. the complaint (oral or written) must be to the
 - 1) employer or an agent (supervisor)
 - 2) a government agency with statutory responsibility for or assisting Cal/OSHA with employee safety or health (**worker will need to prove the employer knew that he / she complained**) - other agencies that oversee health and safety include CHP, FAA, DOT, etc.
 - 3) worker's representative (**worker will need to prove the employer knew that he / she complained**)
- b. the worker must have a **reasonable belief** that the condition violated a health or safety order (worker should develop proof of the unsafe condition and suggest standards that were violated or at least be able to establish that the situation was unsafe - **calling Cal/OSHA to inspect is one way to show the worker met this requirement**)

Protected Activity Type 2: Involvement in a proceeding related or health and safety (whether related to the worker or a co-worker) - (**worker will need to prove the employer knew that he / she was involved**)

Protected Activity Type 3: Involvement in a health and safety committee (**worker will need to prove the employer knew that he / she was involved**)

Protected Activity Type 4: Refusing unsafe work

- a. The worker must show the WORK
 - 1) creates a real and apparent hazard re safety and health to the worker or co-workers
 - 2) violates a Cal/OSHA standard or order or violates the Labor Code - at the very least the worker must reasonably believe this to be true - GOOD proof of your reasonable belief includes a call to Cal/OSHA

Although certainly not an element of the case, to win these cases, the worker must ACT REASONABLY by:

- 1) telling his or her supervisor about the hazard and asking for it to be corrected (documents are the best evidence - so put something in writing - but a witness is helpful if that's all you can get)
- 2) telling his or her supervisor BEFORE he or she refuses the work that the work a) creates a hazard (endangers safety or health)
b) violates a Cal/OSHA standard etc. - CALL Cal/OSHA
- 3) offering to work elsewhere until the hazard is abated

2. What is an Adverse Action and How do you Prove It?

PROOF: documents and/or witnesses

- * Generally, the initial proof will simply be the sworn statement (declaration of the worker) supported by any documents readily available to the worker. If, however, the adverse action is disputed by the employer, the DLSE will have to subpoena the correct records to prove the adverse action alleged by the worker. The worker will not generally have the ability to do this. Alternatively, the worker will need to produce witnesses to support his / her version of the adverse action.

ELEMENTS: The worker must show an adverse action was taken such as:

- * Dismissal
- * Demotion
- * Less desirable duties, hours, etc.
- * Loss of seniority
- * An unfavorable evaluation
- * Surveillance or harassment
- * An unfavorable recommendation for subsequent employment (LC 1050)
- * Transfer
- * Blacklisting

3. What is a Connection between the Adverse Action and the Protected Activity? What is the “Causal” connection or “Nexus”?

PROOF: documents and/or witnesses

ELEMENTS: The worker must show there is a relationship between the protected activity and the adverse action:

- * the employer had **KNOWLEDGE** of the protected activity¹ (see above for ways to assure proof of such knowledge - keep in mind that assuring employer knowledge is a two-edged sword)
- * there was a connection
 - ** usually if the adverse action takes place shortly after the protected activity, that is enough to start the process
 - ** signs of “animus” or employer animosity or anger directed at you related to the protected activity is important

C. What Happens Next? Employer’s Defenses

After the worker files a complaint where he or she has established the prima facie case, the DLSE will assign the case to one of their discrimination investigators. There is a set of procedures that DLSE must follow when it investigates your case, and you have a right to see those procedures according to Labor Code §98.7. **ASK FOR THEM.**

¹The employer need NOT KNOW the activity was protected. The employer must know, however, the worker engaged in an activity and the discriminatory action taken by the employer will have to be linked to that activity.

At this point, the Deputy Labor Commissioner will get the employer's side of the story.

PROOF: documents and/or witnesses

- * Generally, the employer will simply give their reason for the adverse action via a statement or declaration supported by any documents readily available to the employer.

ELEMENTS:

- * **The employer will generally assert a business justification or legitimate reason for the adverse action.** Usually, the employer will say the worker was incompetent, was insubordinate, was late, etc.

Other defenses might include:

- * Protected activity was not the substantial or motivating factor
- * Statute of limitations has run
- * No adverse action occurred
- * Worker quit (constructive discharge issue)²
- * Worker's protected activity so interfered with employer's legitimate business interests that the adverse action was warranted³

D. What Happens Next? Rebutting the Employer's Defenses

The burden now shifts back to the worker to show that the employer's defense is pretext.⁴ So the worker must be prepared to REBUT the EMPLOYER DEFENSES.

The worker will also probably need some assistance to figure out how logically to prove the employer's excuse was a pretext. **This will probably involve producing circumstantial evidence - rarely is there DIRECT evidence.** If the worker believes there are documents in the employer's control to rebut the employer's justification or show disparate treatment, the worker should insist the DLSE subpoena those records to rebut the employer's excuse.⁵

²Constructive discharge is established only when the conditions under which one is working are so intolerable that a reasonable person in the same situation would have resigned. If the conditions are not so intolerable, then the worker must remain on the job and fight the discrimination through administrative or judicial procedures. See *Heagney v. U. of Wash.* (9th Cir. 1980) 642 F2d 1157.

³See *EEOC v. Crown Zellerbach Corp.* (9th Cir. 1983) 720 F.2d 1008 at 1015. The law is not clear about what will be considered disruptive or detrimental. However, illegal acts will be. DLSE says for situations that fall between absolutely protected rights (participation in complaints, etc.) and illegal activities that the "law should be broadly construed to protect individuals from retaliation, so the DCI will scrutinize closely any affirmative defense of this type raised by the employer." Further, the disciplinary action taken for the "disruptive" action must be compared to discipline taken for other similar infractions.

⁴The DLSE manual states that, "As set forth above, the burden is not actually placed on the complainant, but the DC I uses this structure in analyzing the evidence and determining what evidence to collect."

⁵If the employer alleges the worker was late several times, the worker was not competent, etc. and the worker knows this was not true, ask DLSE to subpoena records re whether the worker was ever given notice of bad behavior (warnings or info to help the worker improve, copies of manuals outlining the disciplinary procedures for the company, etc.). EVEN IF IT IS TRUE, the worker should demand DLSE subpoena records **if such can show** other workers acted similarly badly but were not subjected to adverse action (DISPARATE TREATMENT for the worker who engaged in PROTECTED ACTIVITY).

The law provides the "Labor Commissioner shall issue, serve, and enforce any necessary subpoenas." See Labor Code §98.7 (b).

PROOF: documents and/or witnesses

- * The worker will need to produce witnesses to support his / her version of the facts that show the employer's excuse is a pretext.

ELEMENTS: Some things that will be useful include evidence of:

- * other workers who did not meet the employer's stated standards BUT were not treated adversely
- * other workers who met the employer's standards BUT who engaged in protected activity were treated adversely
- * the adverse action **occurred VERY shortly after** the protected activity came to the attention of the employer
 - ** **Look at the timing of the adverse action in relation to employer knowledge of the protected activity.** The adverse action need not occur the very next day, but obviously it must occur after employer knowledge. Use documents as well as interviews of workers and the employer to gather evidence.

AN EXAMPLE: If the employer laid off the worker because there "was no more work"⁶:

- 1) Did the employer subsequently hire other workers on that job?
- 2) Did the employer make other workers work overtime after the worker was laid off?
- 3) Did the job take longer than expected (bid), assuming no one replaced the worker and there was no overtime?

THINGS TO THINK ABOUT:

- 1) What other employer's actions occurred after the employer had knowledge of the protected activity that indicate the worker was now being treated differently (not necessarily adversely at that moment)?
- 2) What other employer safety and health violations existed? If an employer disregards safety in one area, it is reasonable to argue they would disregard other aspects of the law or regulations - thus the involvement in protected activity may have a serious financial impact on the employer increasing the employer's motive to keep other workers in the future from raising concerns about safety and health.
- 3) Look at the employer's motive, at financial pressures on the employer. Was the employer trying to cut corners and save money on safety? Look for evidence the job was bid with a low profit margin, that the contractor had fallen behind with respect to the general contractor's or owner's schedule, etc.

⁶In many union construction contracts, once a worker is dispatched, the contractor is obligated to put him/her to work or to return him/her to the union hall and pay 2 hours of "show-up" time. **The employer may arbitrarily hire and fire, SO LONG AS NO DISCRIMINATION OCCURS (cannot discriminate based upon union activity, protected activity, race, gender, age, etc.).** When a worker is returned immediately, having been given 2-hours show-up pay, the worker does not lose his/her place on the dispatch list. If the worker is laid off due to protected activity, s/he will have lost the opportunity for work that was called out after s/he took the dispatch to the job where the discrimination occurred. **More seriously, however, the worker will go to the bottom of the list. It may be weeks or months before s/he has an opportunity to work again.**

E. What Happens Next? A Hearing? Maybe

When you submit more evidence to rebut, the Deputy Labor Commissioner will then look once more to the employer to justify the action taken.⁷

The Deputy Labor Commissioner will then take the material the worker and the employer provided and “prepare and submit a report to the Labor Commissioner based on an investigation of the complaint.” The investigation **shall, if appropriate, [this probably means it is not mandatory for them to do any of these things]** include interviews with the complainant, the employer, and with witnesses, and may also review documents.

After the Labor Commissioner or his or her designee reviews the report, he or she **MAY** hold an investigative hearing if such “is necessary to fully establish the facts.” The complainant and respondent shall be able to present further evidence at this hearing. Labor Code §98.7 (b).

F. Finally - the REMEDY!

If the Labor Commissioner determines a violation has occurred (with or without a hearing?), you and the employer will be notified and the employer told to cease and desist, and other remedies will be ordered. **REMEMBER: DLSE requires the employee to mitigate damages.**

The remedy is in the nature of make whole and should restore the complainant to his or her status before the adverse action. This includes, but is not limited to:

- * Reinstatement with back pay and benefits
- * Purging adverse statements from personnel file
- * Pay raise, transfer, or replacement of other benefit(s)
- * Posting a notice

G. Win or Lose - More Procedures

WIN: If the employer doesn’t comply with the order within 10 working days after notice by the Labor Commissioner, the Labor Commissioner shall bring an action promptly in an appropriate court to compel action. The worker may be permitted to intervene as a party plaintiff in the court action.

LOSE: If the Labor Commissioner finds no violation, you and the employer will be told and they will dismiss the complaint. You presumably have 10 days to file an appeal within the Department of Industrial Relations.

CONSEQUENCES of BRINGING CASES that have ABSOLUTELY NO MERIT: The Labor Commissioner may order you to pay reasonable attorney’s fees associated with any hearing held if he/she finds the complaint was frivolous, unreasonable, groundless, **and** was brought in bad faith **[presumably all these must be found since the conjunction is AND]**. The worker may then go to court to determine if a violation occurred and get relief.

⁷The DLSE manual states that, “Once again, this is not a burden actually placed on the employer, but rather the DCI should use this “burden shifting” framework to analyze the collected information and insure that all the necessary information has been collected.”

The Labor Commissioner must tell the worker of his/ her right to go to court after an adverse finding.

The Labor Commissioner must also tell the worker of his/her right to file a complaint against the state program (CASPA) with the United States Department of Labor.⁸

H. Keeping Track of your Case

Keep track of your case. **Don't rely on DLSE to make your case for you. ALSO BE AWARE, DLSE must act within 60 days of your filing your complaint.** See Labor Code § 98.7(e).

But unless you remind them constantly and meet every intermediate deadline they set, you probably won't have a decision within 60 days. Even if you do all those things, you probably won't have a decision within 60 days.

There are remedies you can seek if they don't act on time, but these remedies are not terribly effective (a court will simply order DLSE to do it's job and Federal OSHA will just tell them to do their job or lose the California program) and will take an incredibly long period of time to achieve.

I. SEEK HELP

Get help from everyone possible as early as possible in the development of a case. Feel free to call on me as well. (See my name, phone number and e-mail at the top of this document). Don't forget the labor law attorneys who represent unions; they will also be interested in helping protect member's rights. Contact them and contact your union representative first. **Many of your collective bargaining agreements have grievance procedures which require action in as short as 10 days. DON'T DELAY!**

Labor Code § 98.7 (f) provides that the rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other provisions of law. You may have labor or employment law rights under state or federal law or under your collective bargaining agreement. Don't just rely on one approach, and be sure to file all the possible actions on time so you don't lose your chance to pursue them.

⁸When the worker filed the original complaint, the Labor Commissioner must tell him or her of the right to file a separate concurrent complaint with the United States Department of Labor. However, that complaint must be filed within 30 days of the occurrence of the violation, and so if the complainant files with DLSE too late, this notice becomes meaningless.

II. Prohibition against Discrimination against INJURED WORKERS - Labor Code § 132a

Although there is only a \$10,000 penalty, that is more than what DLSE has to offer for osh related discrimination cases. More importantly, the Workers' Compensation Appeals Board has jurisdiction over these claims, and as of now, they are "good guys." When back pay is computed, the WCAB can award substantial amounts, particularly when the employer stalls at returning the injured worker to work.

I have been told that quite a few of these cases are filed, but not too many go to trial. Those that go to trial are heavily contested, but workers generally do well at the trials.

Labor Code § 132a prohibits discrimination exercised against injured workers for filing a claim or making known his or her intention to file a claim. Section 132a states:

"It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment."

The specific enumeration of discriminatory acts set forth in § 132a does not preclude a finding that other discriminatory acts violate § 132a. *Judson Steel Corp. V. WCAB (Maese)* 43 Cal. Comp. Cases 1205 (1978). In *Judson Steel* the employer used language contained within a collective bargaining agreement to strip an injured worker of his seniority rights, and thus cause his layoff. This occurred as a result of a 12 month absence due to an industrial injury. The standard practice had been not to apply this provision where the absence was due to an industrial injury. Even where such language is even-handedly applied to both the industrially and the non-industrially injured, a violation of § 132a may be found. In other words, an employer's mere reliance on collective bargaining agreement language to terminate an industrially injured worker, without justifying the action as being required by the realities of doing business, may result in a finding of a violation of Labor Code § 132a. See *Albertson's Inc. V. WCAB (Gordon)* 59 Cal. Comp. Cases 430 (Writ Denied - 1994).

In order to establish a violation of § 132a, the injured worker must establish that the employer has taken some detrimental action against him or her and that this action was related to an industrial injury. If this is established, the burden then shifts to the employer to establish that the detrimental action was necessitated by the realities of doing business. *Barns v. WCAB* 54 Cal. Comp. Cases 433 (1989).

If a violation of § 132a is found, the injured worker is entitled to a penalty in the amount of 50% of all benefits paid, up to \$10,000 and, if appropriate, reinstatement and back pay.