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## The GSH 60-Second Memo

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### When Can You Terminate an Employee Who Has Alleged A Work-Related Injury?

By: Felicia Miller-Watson, Esq.

Suppose you have an employee who allegedly injured herself on the job and she has given you proper notice of her injury. You forward the claim to your insurance company, and your insurance company denies workers compensation benefits because it believes that her injury was not work-related. The employee is aware of the denial. The employee continues to seek medical treatment for her injury, but does not acknowledge this to you. The employee is out of work, no call - no show for over a week. You terminate her employment for violation of your attendance policy, which requires employees to call in each absence on the day of the absence. After receiving her termination notice, the employee contacts you and offers a doctor's excuse for time missed from work. Did you do the right thing in terminating her employment so soon?

Some states expressly prohibit the termination of an employee who reports a workplace injury or files a workers compensation claim. Most states also prohibit refusing employment for having filed a previous workers compensation claim. The penalty for terminating an employee because of a work-related injury can

include up to one year's salary, back wages, future wages and even, in some circumstances, punitive damages. Are your hands tied, as the employer, regarding termination of this employee because she has not returned to work? Furthermore, will the decision by the insurance company to deny benefits be enough to successfully defend a retaliation or wrongful termination claim by an employee?

In some states, the burden lies with the injured employee to first establish the fact that they have filed a workers compensation claim, they are ready and able to work and the employer terminated their employment. Other states follow the standard set out in *McDonnell Douglas* by initially placing the burden on the employee to prove by a preponderance of the evidence that there was a *prima facie* case of retaliation. The employee must present evidence that implies causation between the filing of the workers compensation claim and the termination. In either instance, if the employee can establish this initial burden, it is presumed that the employer has wrongfully terminated the injured worker's employment. The burden then shifts to the employer to offer a legitimate reason for the discharge, one unrelated to the work-related injury. Once the employer has articulated a legitimate reason for the discharge, the burden then shifts back to the employee to prove that the reasons offered by the employer were pre-textual.

Who has the final say in determining if an injury is work-related or not? Not the insurance company. In most states, an Administrative Law Judge, after a hearing, decides that question.

Here are a few suggestions that an employer should follow before terminating an employee who has an alleged work-related injury when the insurance company has denied the workers compensation claim:

1. An employer should have an absence control policy which clearly provides that, after a specific amount of time has lapsed without a return to work, the employment relationship will be severed. In many states, the courts have concluded that this type of policy, when evenhandedly applied to all individuals, regardless of whether their injuries are work-related, is a legitimate reason for which employment may be terminated.
2. Keep track of all communication (via telephone, email and written correspondence) with employees who are out on leave due to an alleged work-related injury. If termination becomes inevitable, having evidence of documented communication with an employee will help in defending against a claim of wrongful termination by providing evidence of what information the employer and employee provided each other.
3. Prior to termination, an employer should also provide written correspondence to the employee regarding its expectations regarding the employee's return to work. In this correspondence, the employer should state that if the employee is not able to provide the proper medical

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documentation within a reasonable time period, the employee will be terminated.

4. Finally, whenever there are issues with employee leave, remember to reference the Federal Family Medical Leave Act and any state equivalent, if applicable. The employee may be eligible for family and medical leave regardless of whether the employee has suffered an injury covered by workers compensation.

Please make sure that your policies and/or guidelines are reviewed and amended on a continual basis, including review by experienced legal counsel. Having these types of policies in place does not guarantee that an employer will be immune from a wrongful discharge claim, but taking these extra steps will significantly help in defending a claim for wrongful termination.

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