

Trend Reversal: Disabled Workers Are No Longer Immune From Discipline

By Leonid M. Zilberman

Sixteen years after the Americans with Disabilities Act was enacted, disability claims continue to plague and perplex California employers. In recent years, the courts have whittled away at an employer's ability to take adverse action against any employee who either claims a disability or takes a leave of absence. Cases are often framed as an analysis of pretext, examining whether an employer's decision stemmed from discriminatory purposes and whether the reason for an adverse job action was untrue.

For too many years, California employers have believed that the pendulum has swung so far in favor of employee rights that, as long as an employee so much as believes he or she was discriminated against because of a disability, the case will go to trial. For the same reason, California employers, almost paralyzed by the prospect of a large jury verdict, have shied from taking adverse actions against employees who define themselves as "disabled." Some employers even operate under the mistaken belief that, if an employee discloses a disability, no matter how vague, the employer will be unable to address personnel problems or impose discipline without triggering a lawsuit.

'King v. UPS'

On June 22, 2007, the 3rd District Court of Appeal took one step toward reversing the trend that leaves any employee with a disability functionally immune from discipline. In *King v. United Parcel Service*, 2007 DJDAR 9360, the court held that, for disability discrimination claims, subjective beliefs and self-serving declarations are not enough to overcome summary judgment. The panel also held that a plaintiff must produce substantial nonspeculative evidence and prove an actual causal link between prohibited motivations and any adverse job action.

In *King*, the court had to decide whether the defendant, UPS, had an honest, good-faith belief that a driver had violated its integrity policy when the company fired him. Mind you, no one disputed that the driver falsified a timecard; the issue was whether the termination was motivated by disability discrimination or his violation of the UPS policy.

Disability and Deception

The story begins with a 30-year UPS veteran who the company admitted was a highly valued employee who competently performed his job, was respected by others and had no previous personnel problems.

The plaintiff had just returned to work following a four-month medical leave of absence for a blood disorder, which UPS knew about. The plaintiff also had complained about working long hours and had gone through an internal grievance proceeding, which caused animosity with some supervisors. Nevertheless, in UPS's view, he was fired for a direct violation of the company's integrity policy, nothing more.

The specific policy at issue related to monitoring drivers' hours. Federal law prohibits truck drivers from driving after they have been on duty for 60 hours in any seven consecutive days, and violations can result in severe fines, including the loss of UPS's operating rights. Thus, UPS vigilantly monitored compliance with the law and presented evidence that it had fired other employees who had violated the policy. According to the undisputed facts, one of UPS's division managers met with the plaintiff and emphasized that his job would be in jeopardy if he failed to prevent violations of the law. Moreover, the plaintiff signed a document acknowledging the importance of the rule, agreeing to comply with the UPS integrity policy and promising to implement procedures to eliminate violations. But within 30 days of meeting with the division manager, the plaintiff not

only violated the policy but also encouraged or assisted another driver in falsifying his time card. The plaintiff then engaged in a cover-up.

According to UPS, this case begins and ends with its integrity policy. According to the plaintiff, the case is all about pretext and bad faith, with his claim being that he was fired because he was disabled and had taken a leave of absence. The plaintiff made two main arguments to support his position: (1) he was fired less than two months after returning from a leave of absence because of a disability, which raised an inference that his blood disorder prompted his discharge and (2) his supervisors harbored a lingering resentment toward him because he previously complained about long hours and invoked the employee grievance procedure. After carefully analyzing the evidence from a light most favorable to the plaintiff, the court concluded that he was not terminated based on his disability. Here's why.

Rationale

First, the court held that, although it was not unreasonable to infer from the facts that certain supervisors harbored animosity toward the plaintiff, no evidence suggested that any of the UPS employees who the plaintiff claimed resented him participated in the decision to fire him. Indeed, the court held that "their bitterness or mistreatment, if any, is not material to whether [the] plaintiff was terminated because he was disabled." Thus, the court found no evidence to connect the feelings of employees who

allegedly wanted to "get rid of him" and the decision makers.

Second, the court held that the plaintiff had failed to submit substantial evidence that UPS did not honestly believe that he had violated its integrity policy when it fired him. The court reasoned that the mere fact that UPS fired the plaintiff for breaching its integrity policy shortly after returning to work from his medical leave was insufficient to raise an inference that his disability prompted the discharge. The court further reached the common-sense conclusion that "a disabled employee has no greater prerogative to compromise his integrity than any other employee."

Importance of Intentions

In other words, the court held that "good cause" existed for the plaintiff's termination. The court reaffirmed a previous decision by the California Supreme Court in *Cotran v. Rollins Hudig Hall International*, 17 Cal.4th 93 (1998), that UPS's liability hinges not on whether the plaintiff in fact violated UPS's integrity policy but on whether UPS had a good-faith belief that he had done so.

In *Cotran*, the Supreme Court rewarded employers who fairly investigated allegations of wrongdoing by refusing to second-guess the employer's termination decision. The court did not compel employers to undertake specific procedures to investigate wrongdoing, so long as the process was inherently fair and thorough and the accused employee had an opportunity to respond to the allegations. In this case, when

confronted with evidence that he had falsified a timecard, the plaintiff simply stated "you got me," which was interpreted by UPS as an admission.



Because the *Cotran* case does not compel a "formal proceeding" or "process" by which to judge wrongdoing, the court held that UPS conducted an adequate investigation and was not required, as suggested by the plaintiff, to hold a formal hearing or provide advance notice of the alleged wrongdoing. Consequently, the court held that the plaintiff failed to present sufficient evidence that the decision to fire him was either substantively or procedurally flawed or was made in bad faith.

Finally, the court addressed the plaintiff's claim that UPS failed to provide him with a reasonable accommodation to enable him to perform his job. Under

California's Fair Employment and Housing Act, an employer's failure to provide a reasonable accommodation or engage in an interactive process with an employee who is seeking a workplace accommodation is a violation of the statute, even in the absence of an adverse employment action.

In this case, the court assumed that the plaintiff was disabled. However, the undisputed facts showed that, after the plaintiff's four-month medical leave, his doctor released him to perform "his regular duties." UPS contended that, because the plaintiff made no further accommodation requests, it was not required to provide any to him. The court agreed. The court reasoned that "fashioning an appropriate accommodation lies primarily with the employee." An employee cannot demand "clairvoyance of his employer." Moreover, "an employer ordinarily is not liable for failing to accommodate a disability of which it had no knowledge." Further, the employee has the responsibility to "understand his or her own physical or mental condition well enough to present to the employer at the earliest opportunity a concise list of restrictions which must be met to accommodate the employee."

Because the plaintiff never made any request for an accommodation or provided a doctor's note that contained any work-related restrictions, the plaintiff never informed UPS that he needed any accommodations. UPS was entitled to rely on the plaintiff's doctor's note as a release for him to work his "regular hours" without restrictions. Moreover, the plaintiff admitted

in his deposition that he was able to "get the job done." Although the court agreed that no "magic words" are required from an employee in order to necessitate an accommodation, the interactive process requires participation from both parties. Here, the plaintiff's failure to get additional clarifications from his doctor or make a clear and unambiguous statement regarding any work restrictions precluded any dispute regarding the alleged lack of accommodation. Accordingly, the court upheld the trial court's grant of summary judgment to UPS.

Returning to Normal

This case reaffirms several widely held beliefs that California employers were beginning to question.

First, courts are not empowered to sit as human resource departments in order to determine whether a plaintiff deserved to be discharged, so long as an employer believed he or she committed the wrong. Even if, as the plaintiff said, he was innocent of the charges leveled against him, the law does not condemn managerial mistakes so long as the employer honestly believes the reasons for the termination.

Second, in order to create an issue of fact to overcome summary judgment, a plaintiff must present substantial evidence that a termination decision was more than a mistake, by showing pretext, bad faith or malice. Subjective beliefs and self-serving declarations are not enough to create a causal link between a prohibited discriminatory motivation and termination.

Finally, in order to prevail in a claim

for failure to accommodate a disability, the employee must engage and participate in the interactive process. If the employer does everything in its power to find a reasonable accommodation but the interactive process breaks down because the employee fails to engage in discussions in good faith or provide necessary medical documentation, the employer cannot be held responsible.

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