

Context matters when firing for insubordination

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Arizona is an at-will-employment state, right? So it stands to reason that employers may fire someone "at will." Not necessarily. Increasingly, Arizona laws seem to be chipping away at the at-will employment concept.

For example, Arizona's paid sick time statute created a rebuttable presumption that an employee who is discharged within 90 days of taking paid sick time was discharged in retaliation for using that time. Laws preventing discrimination and retaliation (for any number of reasons) mean that, more often than not, employers must be able to demonstrate a legitimate business reason for a discharge.

Firing for insubordination tends to give courts pause about whether the reason is legitimate or pretextual (an excuse). So you must take care in documenting disciplinary matters, such as insubordination, that may result in discharge.

What constitutes insubordination in the workplace? Insubordination at work occurs when an employee refuses to obey an order from a supervisor. It can take many forms. In addition to a refusal to carry out work, it can be an eye roll, foul language, or confrontation, to name a few.

What factors should I consider when terminating an employee for insubordination? The decision maker should consider whether the conduct violated a company policy of which the employee was aware. If so, does violation of this policy generally result in discharge? Or, put another way, do you consistently enforce this policy for all employees? If you consistently enforce it, discharge is the obvious next step. If not, you should consider the range of discipline typically given and be prepared to justify why discipline isn't appropriate in this case when it was in the other cases.

Does the employee have a history of discipline or performance issues? If she doesn't have a history of discipline or performance issues, the employee who engaged in (real or perceived) insubordination should be given the opportunity to explain the situation. In some cases, a supervisor may have overreacted to a situation that doesn't rise to the level of a dischargeable offense.

If a disciplinary history exists, has the company previously and properly documented that history? If the performance and disciplinary history hasn't been properly documented, you will have an uphill battle demonstrating a legitimate nondiscriminatory basis for the discharge if you try to rely on the history. Employers with good documentation have more leeway in discharging based on a lesser level of insubordination.

What pitfalls should I consider? Context matters. You shouldn't make discharge decisions in a bubble. Instead, surrounding circumstances must be considered. A change in circumstances may have caused an otherwise good employee to act out. Determine whether she had a recent supervisory change or recently complained of safety concerns of discrimination. Adverse employment actions taken in close temporal proximity to complaints or supervisory changes are examined more closely by courts and in some situations are given a presumption of illegality.

Bottom line

Most discharge decisions won't result in a claim that the firing was unlawful. But when they do, you must be prepared. Thus, even with at-will employees, you should be mindful when making every discharge decision in the event a claim arises:

- Document the decision at the time of the decision. Subsequent documentation is

given less weight and viewed with disfavor by courts and juries.

- Ensure the discharge decision fits with the level of insubordination.
- When in doubt, contact employment counsel for advice.

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