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## EMPLOYMENT LAW

# Delayed Discipline in Employee Misconduct Results in Denial of Summary Judgment

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*Special to the Legal*

Employers are often faced with a conundrum after learning of employee misconduct. Summarily terminating an employee may appear harsh and may, in fact, lead to an unfair result. However, the longer an employer waits to take disciplinary action, the more opportunity there is for an employee to create (or, at a minimum, highlight) potential issues of fact that may undermine ultimate discipline. Such appears to be the case in the recent decision of *Worthington v. Chester Downs & Marina*, No. 17-1360, 2018 U.S. Dist. LEXIS 215726 (E.D. Pa. Dec. 21, 2018).

### FIGHTING CASINO WORKERS

Donald Worthington was a table games dealer at Harrah's Philadelphia Casino from April 2011 to July 6, 2016. On June 12, 2016, Worthington was involved in a physical altercation with a co-worker, Allen Glassman, during which Glassman "body checked" Worthington. Glassman and Worthington had a history of animosity.

Worthington immediately reported the incident to his immediate supervisor, William Totten. During the conversation, Worthington asked Totten



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about workers' compensation benefits. At some point after the incident, Worthington drove himself to the hospital and reported pain in his shoulder. After Worthington's report, Glassman was suspended immediately and was terminated on June 27, roughly two weeks later.

The day after the incident, Harrah's employee labor relations manager viewed surveillance video and reported that Worthington appeared to have initiated contact with Glassman and that "both dealers appeared to be at fault."

### MEETING WITH MANAGERS

On June 14 (two days after the incident), Worthington met with a

number of managers during which time he claims to have "disclosed his injury and to have expressed an intent to file a claim for workers' compensation." The next day, he requested FMLA leave, which was approved. At some point after the June 14 meeting, however, Totten (Worthington's immediate manager) re-reviewed the surveillance footage and determined that Worthington was at least partially at fault for the incident. Totten then placed numerous calls to Worthington (who was no longer at work) which Worthington believed to be harassing and intimidating. Harrah's terminated Worthington on July 6. He subsequently claimed disability discrimination and retaliation under the Americans with Disabilities Act and Pennsylvania Human Relations Act, as well as wrongful discharge in violation of public policy, as well as FMLA retaliation. Harrah's moved for summary judgment at the conclusion of discovery.

### INCONSISTENT DISABILITY ASSERTIONS

Initially, Harrah's argued that Worthington could not establish that he was a "qualified individual with a disability" because he provided "contradictory representations about his

ability to work” during his lawsuit “as compared to his parallel application for disability benefits.”

This is not, of course, the first time that courts have addressed inconsistencies in the ADA context. In *Motley v. New Jersey State Police*, 196 F.3d 160, 165 (3rd Cir. 1999), the U.S. Court of Appeals for the Third Circuit applied the Supreme Court’s decision in *Cleveland v. Policy Management Systems*, 526 U.S. 795 (1999), to require that a plaintiff provide “additional rationale to explain the plaintiff’s apparent about-face concerning the extent of the injuries, such as detail regarding the facts of his case, demonstrating how the differing statutory contexts make his statements under one scheme reconcilable with his claims under the other.” In this context, the court found that because the ADA requires only that Worthington be qualified to work “with a reasonable accommodation,” and the Pennsylvania workers’ compensation law has no such requirement, his representation to the Workers’ Compensation Bureau that he was incapable of working “is not so inconsistent with his representation before this court such that he should be estopped from asserting his claims under the ADA.”

## DELAYED DISCIPLINE

The court found that Harrah’s initially blamed the incident entirely on Glassman but, shortly after Worthington claimed injury and sought leave, his manager re-reviewed the surveillance tape, reconsidered the conduct and ultimately terminated his employment.

Once Worthington established that he was “disabled” and “qualified” under the ADA, the court reviewed the circumstances surrounding his termination. Specifically, the court considered

“the temporal proximity between his disclosure of his alleged disability and the termination decision” as well as what Worthington considered to be antagonistic phone calls and the company’s decision to re-review the surveillance footage after Worthington’s disclosure. Based upon these issues, the court found there to be genuine issues of material fact as to whether Harrah’s was motivated to take action against Worthington due to his disability, in violation of the ADA/PHRA. This same evidence defeated summary judgment on Worthington’s ADA/PHRA retaliation claim, as well as his FMLA retaliation and interference claims.

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Summary judgment was granted to Harrah’s on Worthington’s claim that Harrah’s failed to provide a reasonable accommodation under the ADA/PHRA. Assuming, without ruling, that Worthington’s request for FMLA leave was a request for a “reasonable accommodation” under disability law, the evidence was that Harrah’s engaged in the interactive process, which was the core requirement following the accommodation request. The court found, however, that Harrah’s termination of

Worthington during his approved period of leave did not “subvert” the interactive process or constitute a failure to accommodate.

## CONSISTENCY IS KEY

The case perfectly illustrates that delayed discipline may be problematic for employers. Had Harrah’s suspended Worthington immediately, as it did Glassman, and then concurrently terminated both employees, the posture of the case may well have been different. But by taking immediate action against only one of the employees, who appeared to be the perpetrator, Harrah’s opened the door to “issues of fact” about its subsequent discipline of Worthington. In retrospect, the employer would have been better positioned if it had suspended both employees immediately with the prospect that one, or both, could be reinstated with pay after a full investigation. The issue, as always, is “consistency” of discipline rather than “correctness.” •