



MEMORANDUM

January 30, 2019

To: Management-Labor Advisory Committee (MLAC)

From: Julia Hier, Policy Analyst

Subject: Reasonable and Unreasonable Discipline Under ORS 656.802(3)(b)

During the MLAC meeting on January 11, 2019, a member requested more information on what has been found to be reasonable discipline for the occupational disease law ORS 656.802. Under the current law, the employment conditions which produce the mental disorder must not be “generally inherent in ... reasonable disciplinary, corrective or job performance evaluation actions by the employer...” See ORS 656.802(3)(b). The determination of whether the act was reasonable is determined on a case by case basis. *Katherine Tatum*, 58 Van Natta 1774, 1777 (2006).

The following summaries provide a brief synopsis of facts where discipline was deemed reasonable or unreasonable by the Workers' Compensation Board¹. If the reader would like to rely on a specific case, please read the case in full since these are fact specific determinations and the information outlined below is an abbreviated summary. In addition, the cases below are only meant to provide examples of reasonable and unreasonable discipline. They are not a comprehensive compilation of the case law on this subject.

Reasonable Discipline

It was reasonable for the employer to respond to allegations against claimant by conducting an investigation. The employer had legitimate reason for not allowing claimant to contact others during the investigation to prevent undue influence on witnesses. The employer was reasonable

¹ The Court of Appeals has previously declined to offer an opinion on whether corrective action is reasonable or unreasonable. They have explained “[t]he reasonableness or unreasonableness of a corrective action is a matter for the Board, in the first instance, to determine.” *Liberty Northwest Ins. Corp. v. Shothafer*, 169 Or App 556, 564-565 (2000).

with the timing of the investigation and the manner in which it was conducted. [Lynn Woolfe](#), 58 Van Natta 2802 (2006).

The employer instituted progressively higher levels of discipline. During the later instances of discipline, the employer's response became more severe, with an escalation to a "level 3" discipline. Claimant alleged these later instances were not reasonable, but the Board disagreed. They explained the employer had documented numerous instances of communication problems and corrective action plans were implemented. The procedure for the higher level discipline was also consistent with prior discipline. Finally, claimant was represented by a union representative and had an opportunity to respond. [Melody Spiker](#), 64 Van Natta 1268 (2012).

Unreasonable Discipline

Claimant was an occupational therapist who worked with children. She was attempting to introduce new food to a three year old child who received their main nutrition via a feeding tube. While introducing the food, she supported the child's head in a standard feeding position for a child with low muscular tone. But, an educational assistant in the classroom alleged the child was held in a head-neck brace while being force fed potato chips. Ultimately, the Department of Justice investigated this case and concluded there was no wrongdoing. But, in the interim, the employer failed to complete a sufficient investigation, they contacted the parents of the child without sufficient information, they provided claimant with a letter of reprimand which had inaccurate findings, and the ultimate conclusion from the letter of reprimand was not supported by the evidence. The Board held these actions amounted to unreasonable discipline. [Katherine Tatum](#), 58 Van Natta 1774, 1777 (2006).

Claimant was employed with the employer for 18 years, with 10 of those years as a supervisor. Throughout his years as a supervisor, he did not attend the weekly manager meetings. While complaints were made about the claimant, they were not made to claimant. Claimant was instead commended for the quality of his work. Claimant was ultimately, and suddenly, terminated for his failure to attend the meetings. The Board held this discipline was unreasonable. They explained claimant was not told of the need to attend the meetings, he had not been given a reasonable opportunity to improve, he was being secretly supervised, and he was summarily removed from his position. [David Koeping](#), 46 Van Natta 751 (1994).