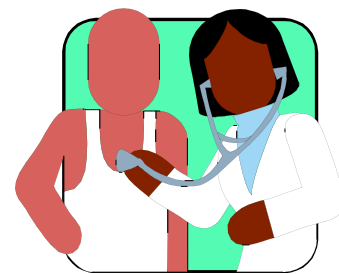




# *Glendale City Employees Association*

## *September 2007 News*

### **BUT I'M SICK... YOU MEAN THEY CAN FIRE ME??**



As too many employees have learned in recent years, the myth that "You Can't Fire a Public Employee" is false. There are three general reasons you can be separated from your "cushy" job: 1) disciplinary dismissal, 2) layoff, and 3) termination due to absenteeism caused by illness or disability. The first two scenarios are fairly well understood: If you're fired as discipline for bad behavior, you have the right to a "Skelly Hearing," and a full, evidentiary hearing, with the burden on the City to prove that you did something seriously wrong. If you are laid off due to cutbacks or contracting of services, the City must first show cause for the layoff, negotiate a seniority-based layoff procedure, and then, negotiate over such "impacts" as your severance package. You can always go to court if unsatisfied, and the "rules" for layoffs and discipline are fairly clear. But, if you are seriously ill or injured, the rules affecting your rights are very confusing. What follows is our best attempt to clarify these.

#### **TEMPORARY VERSUS PERMANENT 'DISABILITY'**

Many people operate under a false assumption that if they have a legitimate illness, they cannot be fired. Thanks to the Family Leave Act of 1993, this is somewhat true. You have the right to take **up to 12 weeks** off the job, for illness or non-work-related injury, before your employer can sever you. The City does NOT have to pay you during the Family Leave time, but you do have the right to use all accrued leave before going into unpaid status.

Many agencies also provide disability insurance, which can cover your loss of income for a period of time. But being 'on disability' is not a guarantee that your job will be held indefinitely. If your condition lasts longer than 12 weeks, or if you are really not able to perform your job after you return to work, you CAN be replaced by someone who IS able to do it.

While you're on Family Leave Time, the City

must continue to provide its regular medical contribution. After that, you may be required to pay your own monthly premiums.

### **IF YOUR INJURY IS WORK-RELATED...**

If your absence is due to a work-related injury, the law requires that you be paid Temporary Disability income of at least 66% of your base pay. Some employers provide *full pay* for a period time. This is a negotiable subject. During “Injured-On-Duty” time you are not required to use your own Sick Leave, and your medical benefits must continue.

You will not, generally, be terminated while on “IOD time” -- but this rule doesn’t extend indefinitely, either. If you are unable to work for months, the City can press for a medical determination as to when you’ll be able to return to work -- or if you should be declared “permanently disabled.” Under current Workers Compensation law (which changed radically for the worse in 1994) you *can* be terminated if you are not going to be able to return to work, at full capacity, within a year. If you are terminated due to “physical incapacity” you should have attorney representation in working out a permanent Workers Compensation settlement. Be aware, though, that it is usually much less than you would earn if you were capable of continuing to work...

Under the new Americans with Disabilities Act, the employer is now required to “accommodate” a permanently injured worker by offering a job that you CAN perform or modifying your current conditions (such as making your office wheelchair accessible.) This requirement applies whether your injury is work-related or not; however, the employer can evade it by arguing that it would cause “unreasonable hardship” or expense.

### **DON’T I HAVE ANY REAL PROTECTION AT ALL???**

YES. There are several legal “obstacles” we can throw in the path of an employer who wants to get rid of a sick or injured worker.

For example, under “Skelly” law, you have the right to a full hearing before you can lose the “property right” to your job for any reason, including illness. If you’re being terminated for this reason, the City has the burden of proving that you are either 1) not legitimately ill; 2) *so ill* that you can no longer do your job, and can’t even be ‘accommodated.’ At the “Skelly hearing” you have the right to try to prove that you *can* do your job. Your case would revolve around whether the arbitrator, judge or Personnel Board believes your doctor or the City’s.

Also, the Americans with Disabilities Act, which has generally been dismissed by employers, is now receiving some strength with test cases in the Courts. The ADA applies, by the way, whether your injury was work-related or not. The problem is that, if the employer refuses to accommodate you, you still have to sue.



### **THE HUMAN FACTOR- IS IT GONE FOREVER?**

Public employers used to be compassionate and generous employers: sick or disabled employees used to be reclassified, not fired. But the recession, coupled with the political attack on public employees, changed the picture. Most public agencies now employ “Risk Managers” whose key function is to determine whether the risk of keeping you is worth your value to the organization. The pressure to remove an “unproductive” worker from payroll is very real.

An effective union representative will know how to negotiate in your best interest. We can often toss enough legal shrapnel into the arena that the cost of terminating an injured worker gets very high, indeed. But the law is full of loopholes, and if you must actually go into Court, it’s very expensive. It’s best to make sure that your employer truly values you in the first place.

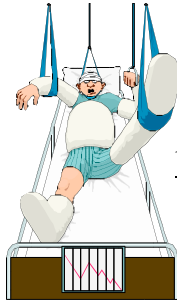
*The truth is that the human factor -- your own ability to convince your employer that they need*

*your contribution -- is probably your most important tool.* If your supervisor views you as a valuable, hard-working member of the team, he is more likely to



advocate that you be “accommodated” than if you are someone who grudgingly does your job. A “good employee” who becomes ill engenders sympathy. A less valued employee may be viewed as someone who is milking the system - or perhaps even cheating.

The problem is, it’s difficult to be a “good employee” when you are off the job, often in pain or worried about your future (often *because of* a injury at the job...) You may be frustrated in dealing with doctor’s bills or disability forms. And your employer keeps badgering you for medical information you can never provide. If you are having trouble



maneuvering through the bureaucracy, or if you believe that your rights are being violated, call your Association staff. We are experts at the ADA, the FMLA and Workers Compensation law, and this is what you pay dues for. Do NOT call an attorney unless you have already been permanently found incapable of working any longer -- and agree with this finding. A premature lawsuit could jeopardize your job.

Keep in mind, though: the City does not have to employ you forever. It is wise to try to be as cooperative as possible. Your union rep knows the local system, and can function as your liaison.



## State Disability Program Now Covers Family Leave – But Does It Cover YOU?

Several years ago, Governor Davis signed a new family leave law which extends the benefits of the State Disability Insurance system to employees who must take time off the job to care for ailing family members. Although the new law seems to have created much controversy, it is really not a great departure from the current SDI system, which provides income coverage when the employee, himself, is sick or injured. The program is NOT employer funded; it will be funded by additional employee contributions. To access the benefit, your employer must be participating in the State Disability Insurance system – and many public employers are NOT. The new law took effect July 1, 2004.

At the present time, most public employers in Southern California provide employees with privately funded long- and/or short-term disability plans. In some cases, the employees may purchase this insurance; in others, the City or District provides the benefit. The entire subject of disability insurances is negotiable, which means that, given the new state mandate for the SDI program, your Association may want to negotiate a change to SDI.

What the law specifically says is that SDI will provide “income replacement” not only for the employee’s own illness, but for the sickness or injury of a family member, or the birth, adoption, or foster care placement of a new child. Wage replacement benefits may last for a maximum of six weeks in a 12-month period and “family

members” include children, spouse, parents, and domestic partner. You may be required to provide a statement that a serious health condition warrants your need to provide family care. The employer can request a diagnosis and a time/date for expected return to work.

The new benefit does *not* provide a six-week period *in addition* to the current 12 weeks of (unpaid) FMLA time. The two programs may run concurrently. The new bill also allows the employer to require that employees utilize up to two weeks of their vacation pay before family SDI benefit – although “if there is a union contract in place” the required use of vacation pay must be negotiated. This is similar to the current FMLA law, which provides a “base” of 12 weeks of unpaid time, but allows the parties to negotiate other benefits around this framework...



# CHEMICAL DANGERS IN YOUR WORKPLACE

Twenty years ago, a congressional committee prepared a report entitled, "Chemical Dangers in the Workplace." The report said that "the threat posed to the health of workers by toxic substances ... causes an estimated 100,000 deaths and 390,000 illnesses every year." It noted that "most of these tragedies result from exposure to toxic substances, especially chemicals, in the workplace." The report commented that "advances in the American standard of living have been achieved at great cost to one group — workers who are exposed to toxic chemicals as they do their jobs."

Not much has changed in the last twenty years, except that new chemicals are being used in workplace procedures at an ever-increasing rate. Sometimes these chemicals aren't even tested, before employees are exposed to them.

In *city employment*, we may find people working with toxic chemicals in Police Departments (especially evidence technicians and fingerprinters,) in custodial work, in paint departments, in parks and gardens (i.e. pesticides and weed control,) and in water departments (sewers and treatment plants may be especially poisonous...) And, of course, asbestos is still a potential hazard in many, older work places.

You have the legal right to know what hazardous chemicals you are being exposed to. You should also be trained in the proper usage of known toxins, and what the symptoms of chemical poisoning might be. Under the federal Hazard Communication Standard, every chemical that a company supplies to your employer must provide the employer with a Material Safety Data Sheet for the chemical. This sheet must identify all the hazardous ingredients in the product (except for those that are trade secrets). It must also contain information regarding fire and explosion hazards, health hazards, reactivity, procedures for spills and leaks, respiratory protection and ventilation, etc. By law, your employer must make these material safety data sheets available to you for all chemicals in your work environment.

Further, the California Safe Drinking Water and Toxic Enforcement Act (Proposition 65) requires any company that exposes people to cancer-causing chemicals or reproductive toxins to give advance warning of these hazards. The courts have held that this warning must be given directly to persons exposed, and that all employees are persons and therefore must be given these warnings.

Finally, if you want to know whether a chemical you are exposed to is a carcinogen or reproductive toxin, you can check to see whether it is on the list published by the Governor [calepa.cahwnet.gov/oehha/docs/9-96lstb.htm](http://calepa.cahwnet.gov/oehha/docs/9-96lstb.htm).

# Whistleblowing & Rights of Probationary Employees

The following are some questions recently asked by public employees. **If you have a specific question or problem**, please talk to your Board representative, or call our professional staff, Robin Nahin, Mike Gaskins, or attorneys Michael Koskie or Dave Twedell at (562) 433-6983 or e-mail: cea01@charter.net. There is no charge for Association members, and all conversations are confidential.

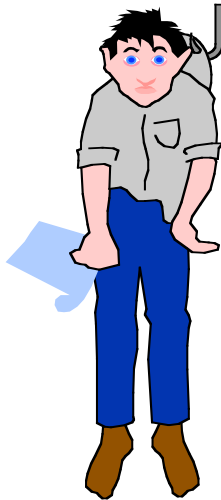
**QUESTION: I was told that I couldn't join my employees association until I passed probation. Is that true?**

ANSWER: Not at all! Unless the Association has passed some rule barring probationary employees from joining, you should join right away. The Association is obligated to represent you if you have ANY problem on the job – not just discipline.

**QUESTION: What good can the Association do me if I can be fired for any reason?**

ANSWER. First of all, you have all the rights of permanent employees, except the right of a "Skelly" hearing, in the case of major discipline. (And in some cases, you even DO have the right to a full hearing...) You are covered by all labor and employment laws: the Fair Labor Standards Act, the Family Medical Leave Act, the Americans with Disabilities Act, Workers Compensation Law, Harassment and Discrimination Law, ERISA, COBRA, etc. You're also covered by all local rules and ordinances, the City's Personnel Rules, and of course, your Labor Agreement (MOU.) If **any** of your rights is violated you have the ability to grieve, and be represented by the Association in your grievance, whether you're probationary or not! You also have the right to "due process" in the case of termination, under circumstances such as these.

**QUESTION: I'm an environmental planner, hired four months ago. One of my jobs is to oversee the City's compliance with various**

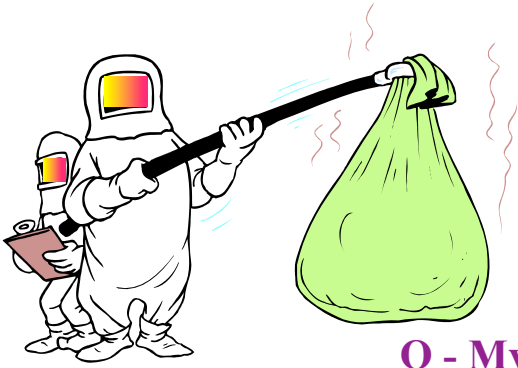


**laws. Soon after being hired, I discovered that the City was severely OUT of compliance. I wrote a letter to my supervisor and the department head, identifying the problems and the work to be completed to fix them. Three days later I was terminated, without cause. Do I have any recourse?**

ANSWER: Various laws provide you with "whistleblower protection" and you may also have what we call a "public policy defense." If you are aware of some wrongdoing on the part of your employer or a co-worker, on a situation that could threaten public health and safety, or shows misuse of public funds or fraudulently covers-up violations of laws, **and you report such situations** you are generally protected against retaliation by the employer. Whistleblowing generally has to do with providing information to authorities. A public policy defense argues that you had to do whatever you did because your responsibility to the public's safety was greater than your obligation to follow orders.

In order to argue that you were fired for whistleblowing or defending the interests of the public (rather than just being a poor employee) you need to show a "nexus" (connection) between your discipline and the offending action.. The fact that you were terminated just three days after overtly identifying major violations seems to draw a pretty good connection. Your performance reviews would probably also come into play at this point.

Your Association should now provide you with professional representation, to take you through a full evidentiary hearing. If the City refuses to provide a hearing (because you were probationary) you would have a good wrongful termination case.



## *When Are Public Employees “Liable” for Damages?*

**Q - My wife is working with disabled children. As part of her duties, she has to ferry them around to various public facilities. Is she liable if something happens to one of them?**

**A - No. The legal doctrine of 'respondent superior' means that an employer is responsible for the acts of its employees. Three different factors are at work here. First, if the action is reasonably foreseeable, the employer is liable and the employee is not. For example, if there is a traffic collision when the employee is transporting children, is this a foreseeable event? Even if it is foreseeable that the employee might be responsible for the accident, the employer bears the responsibility because it set the employee on this task.**

**Second, the Courts look at whether the action is in the 'course and scope of employment.' If it is, then the employer is responsible even if the event is not foreseeable. For example, if somebody is engaging in criminal conduct (like robbing a store) and one of the employee's students is hurt, the employer is responsible. (This is NOT true if the employee is the one engaging in criminal the criminal conduct, however. In this case, the employee would definitely be acting outside the scope of the job.)**

**The third factor which often raises concerns is that recent legal decisions have raised the question of personal liability for certain employees in certain situations. For example, in the areas of sexual harassment and on-the-job safety, personal misconduct can trigger liability for the guilty employee. But these cases are a small exception to the general rule. A conscientious employee who does not act inappropriately on the job need not be concerned with liability issues.**

**The general rule is that the employer -- *not the employee* -- is responsible for mishaps on the job. This situation is generally upheld by another, practical factor: employees are not very good targets for lawsuits. They do not have the “deep pockets” of large, public employers. Thus, members of the public who believe that they have sustained damage because of the actions of an employee will still file suit against the employer.**