# CONSTRUCTIVE DISCHARGE IN LABOR ARBITRATION: SHIFTING BURDENS AND A DEFENSE TO ALLEGED CONTRACTUAL VIOLATIONS

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An employee/plaintiff claims that he or she has been terminated in violation of certain statutory protections. The employer in defending the claim asserts that the employee was not discharged but voluntarily resigned from his or her position. In order to be successful in asserting one's claim, the employee must now meet an additional burden of showing that he or she was forced out of work because of the violation. This additional burden must be met before one can establish liability under the applicable law. Even after an employee successfully proves that a termination occurred, the employee still has the burden of proving the violation.

However, in the arbitration of terminations under a collective bargaining agreement, the determination of whether a person was constructively discharged has a different impact on the burden of proof and ultimately on the resolution of the dispute. This short paper is intended to describe how the theory of constructive discharge arises in labor arbitration and its impact on the burdens advocates must meet to show the propriety of the employer's action.

It is quite clear that final and binding arbitration is the fundamental basis for resolving disputes that may arise during the term of a collective bargaining agreement. The vast majority of these agreements contain provisions that state that an individual employee covered thereunder may only be discharged or disciplined for just or good or reasonable cause.[2] Even in cases where the agreement does not contain such language, arbitrators have implied a just cause standard due to the collective bargaining relationship.

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[2] Sample language may read as follows: "The Company, in directing the working force, may exercise its right to invoke disciplinary measures for good cause, subject to the terms and conditions of this Contract."

The term "just cause" has a specific application in collective bargaining.[3] An employee who has been disciplined or discharged has the right to the employer's action through the contractual grievance procedure. However, once challenged, it is the employer who has the burden of showing that the action was for just cause. It is commonly accepted that since the employer initiated the disciplinary action, it carries the burden of showing why the action was taken and that it was proper under the collective bargaining agreement.

While there is no specific definitive test for just cause, most arbitrators have initially followed a permutation of seven elements which was first articulated in an arbitration award drafted by Arbitrator Caroll Daugherty.[4] According to Arbitrator Daugherty in order to establish just cause under a collective bargaining agreement, the employer has to answer seven independent questions. If the answer to any of those questions is "no" then in Arbitrator Daugherty's view just cause did not exist for discipline. The seven tests were as follows:

1. Notice; did the employer give the employee forewarning or fore knowledge of the possible or probable disciplinary consequences of the employee's conduct?

2. Is the rule reasonably related to the orderly, efficient and safe operation of the company's business?

3. Was there an investigation prior to discipline?

4. Was the investigation conducted fairly and objectively?

5. Was there sufficient proof that the employee committed the infraction for which he or she has been charged?

6. Has the employer applied the rules, orders and penalties evenhandedly and without discrimination to all employees?

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[3] Historically, the concept of just cause originated from the Statute of Laborers enacted in 1562. This statute prohibited employers from discharging employees without a "reasonable cause." While most American jurisdictions initially followed this rule, it was replaced by the Employment at Will doctrine in 1877. Delmendo, *Determining Just Cause: an equitable solution For the Workplace*, 66Wash.L. REV. 831, 832 (1991).

[4] *Grief Bros. Cooperage Corp.*, 42 LA 555, 557-59 (Daugherty, 1964)

7. Was the penalty appropriate given the infraction?

Admittedly, the application of these elements have evolved over time. Indeed, many arbitrators do not rigidly apply each element but modify, add or remove these rules based upon the facts and circumstances in each case. In general, under the collective bargaining agreement just cause for discipline can exist only when an employer can show that it based on a fair and reasonable application of its rules, that it conducted a fair investigation and applied a reasonable penalty. The employer must be expected to at least determine whether the termination could have been resolved through progressive discipline and whether it was implemented with due process and it met the employee's entitlement to industrial equal protection.

Regardless of how the term just cause is interpreted and what elements must be established, the employer has a substantially greater burden of justifying its action to terminate under the collective bargaining agreement. Accordingly, the determination of whether a termination was constructive will have a substantial impact on the ultimate outcome of the dispute. If the Union grieves that an employee was terminated without just cause, there may be an issue of whether there was actually a discharge in the particular circumstance. In those instances, the Union must show that the termination was constructive. If the Union fails to meet this burden, then the employer simply does not have to establish just cause for its action.[5]

As in any matter where one has to determine whether a termination is constructive the factual issue usually boils down to whether an employee's separation was voluntary. In this regard, most arbitrators find that constructive discharge occurs when the employer, by statements

[5] However note that there may be a question of whether the employer's action was a violation of another term of the contract. In those instances it may become the *union's* burden to establish such violation, see below.

or conduct manifests an intent to terminate the employee's employment and the employee relies on those statements or conduct. The cases often focus on whether the employee reasonably believed that he was being terminated or whether the employee voluntarily quit.[6]

For example, an employer's statement that the employee must resign or be terminated has regularly been viewed as a constructive discharge.[7] An employee who tenders her resignation and then has a change of mind has been found to have been constructively discharged where her employer refused to allow her to withdraw her resignation but had taken minimal or no steps to replace her.[8] Clearly, the determination of constructive discharge is sensitive to the factual circumstances.[9]

In other instances, an employee may be involuntarily separated from the company but it is not deemed to be a disciplinary discharge subject to the just cause standard. Rather the issue may present as an issue of contract interpretation. By way of example, consider the following contract language:

> "An employee who cannot hereafter perform his regular duties due to the imposition of permanent medical restrictions and whose record has in all respects been satisfactory, will be assigned to some work function which the employee is capable of performing provided such other work is available and the employee is qualified."

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[6] Brand & Biren: *Discipline and Discharge in Arbitration, Third Edition,* Chaper 2. Section III.C.4;2-61.

[7] *Bureau of Indian Affairs,* 119 LA 1127 (Fields, Jr. 2003). *Cf. Cyannide Plaza Nursing Home, 122 LA 684 (Oberdank, 2006);* (Employee not compelled to resign where supervisor told her that she could lose certification and be able to work if she was discharged; absent evidence of intimidation or coercion, providing truthful information does not render resignation involuntary)

[8] *Lucas County Sheriff,* 118 LA 1673 (Weisheit, 2003). *Cf American Standard,* 124 LA 1537 (Franckiewicz, 2008) (Employee not allowed to retract resignation after replacement hired.)

[9] *Commodore Home Systems Inc,* 82 LA 395 (Schedler, Jr. 1984) (No constructive discharge even though the supervisor told grievant that her production was "killing him", Grievant had said she could not keep up, no one liked her and she was quitting. She then hit time clock and drove home.)

Assume however that an employee who cannot perform his regular dutes due to permanent medical restrictions is separated from employment because his record has not "in all respects", been satisfactory. The employee has prior discipline which was not grieved and remains on his record. Who has the burden of proof? May the union treat this as a constructive discharge for the purpose of forcing the employer to show just cause for the discipline? May the union now contest the prior discipline that was placed on the employees record? Finally, is the arbitrator limited to the construction of the above paragraph?

A review of some cases show that even though the decision will rest on the interpretation of contract language, the burden of proof may or may not be placed on the employer. For example, in *Orange County, Florida and IAFF Local 2057,* 124 LA 150 (Smith, 2007) the arbitrator found that the County did not violate the collective bargaining agreement or fedral or state disability discrimination laws when it refused to place a firefighter who had muscular dystrophy in altered lieutenant paramedic position in training or planning and research on grounds that he could no longer fulfill combat firefighting requirement, where that requirement was an essential function of the job. In that case, the arbitrator concluded that the "County did not take disciplinary action …. He was medically separated pursuant to the terms of Article 34 of the Collective Bargaining Agreement. Therefore, the Union bears the burden of proving that the action taken by management is in consistent with some limitation, contractual or otherwise, in the labor agreement…."

However, in some instances, the arbitrator may apply the terms of the agreement without imposing a just cause standard and still place the burden of proof on the employer. For example in *Penelec First Energy Company and Utility Workers of America, Local 102.* 133 LA 1238 (Miles, 2014) the arbitrator found that the employer violated the collective bargaining agreement

when it terminated its heavy equipment operator who had back problems, was unable to perform his old job, and failed the test for the job as a clerk. According to the arbitrator, the agreement provided that partially injured employees were to be retrogressed into the highest classification they can fill, and other employees had been retrogressed. More importantly, the arbitrator determined that the employer had the burden of proof, by clear and convincing evidence by providing the test results as if it is terminating the employment of partially incapacitated employee because of an unsuccessful result on that proficiency test for the light – duty position.

In many cases such a decision is based on the decision that since the employer made the ultimate decision it should go first just to hear why the decision was made.