UFF UNITED FACULTY OF FLORIDA
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Right to Refuse Unsafe Working Conditions

UFF guidance on employees' rights to refuse to work in unsafe conditions

"I do not feel safe returning to a face-to-face work environment during an ongoing pandemic, but my employer is still making me do it. Can I refuse?"

The short answer is **maybe, depending on the circumstances**. The long answer is discussed below.

Refusal to comply with directives may result in discipline for insubordination

In general, an employee may be disciplined for *insubordination* if the following elements are present:

(1) The employee has consciously refused to obey an order (note: a *request* is not an *order*);
(2) The order was reasonably specific and understood by the employee;
(3) The order was reasonably work-related;
(4) The order was given by one with—and known to the employee to have—proper authority;
(5) The employee was (or should have been) aware of consequences for failure to comply; and
(6) The employee has had time (where practical) to correct the refusal and failed to do so.

In general, if a faculty member or graduate assistant were to refuse to (for example) teach a course as assigned by a department chair, dean, etc., elements (1)-(4) would immediately be present. The employer would most likely respond by warning the faculty member of possible disciplinary action (which could include termination) and issuing the directive again, establishing element (5). If the employee refused to comply again, element (6) would be established, and the employer would be within its rights to discipline or even terminate the employee. **Employees are expected to "obey now, grieve later" in situations where they disagree with the employer's directive.**

However, refusal of an *unsafe* directive is not insubordination

The usual venue through which the United Faculty of Florida challenges employee discipline is the grievance procedure in the relevant UFF chapter's Collective Bargaining Agreement. The grievance procedure ends in *arbitration*: a formal hearing before a neutral third party (an *arbitrator*) who issues a final and binding decision to either uphold discipline, reduce its severity, or overturn it altogether.

Even where all of the elements (1)-(6) above are established, arbitrators will overturn discipline where an employee has a reasonable belief (i.e., one adequately supported by objective evidence) that the directive is *unsafe*, that is, that compliance with the directive would pose a real and imminent danger to the health and safety of the employee and/or the employee's family. This is known as the *safety and health exception*.

Generally, invocation of the safety and health exception is more likely to be successful where the employee can demonstrate an actual hazard in following the directive as opposed to mere *belief* in a hazard. However, the safety and health exception will usually *not* apply to a hazard inherent to the industry in general or to the employee's job in particular. Arbitrators do show deference to specific orders and recommendations issued by a credible physician, particularly when the employer was aware in advance and had previously accommodated the employee's limitations.

Arbitrators do not hesitate to rule against employees if it appears that the safety and health exception serves only as a pretext for refusal to comply, therefore they also consider whether an employee acts in good faith when refusing to comply. An employee can show good faith by:

(1) Quickly and specifically articulating the nature of the safety and health concerns; and
(2) Indicating willingness to cooperate with the employer to find ways to do the work safely.

The principles discussed here are general. There is no "litmus test" for whether an employee can successfully invoke the safety and health exception; a detailed, fact-specific analysis must be undertaken.

Is a directive to work face-to-face during the COVID-19 pandemic "unsafe"?

The vast majority of insubordination cases in arbitration dealing with the safety and health exception arise out of manufacturing, construction, and transportation, and tend to revolve around disputes over whether the air quality on a shop floor is hazardous, the weather is too poor for driving or other outside jobs, heavy machinery is insufficiently demonstrated to be in good working order, manual labor contravenes a physician's orders against heavy lifting, etc. There is simply no directly comparable body of cases from which robust conclusions can be drawn regarding the likelihood of success using the safety and health exception to defend oneself against a charge of insubordination for refusal to comply with a directive to work in a face-to-face environment while the COVID-19 pandemic is ongoing.

That said, based on the principles commonly used when the safety and health exception is raised, it is not difficult to imagine circumstances in which it *might successfully* be raised in response to such a directive. If you are (or one of your UFF member colleagues is) financially secure and would rather resign than work face-to-face in the spring 2021 semester, please contact UFF to discuss your options. Depending on the specific facts of your situation, UFF may be interested in using your situation as a test case to see whether faculty and graduate employees may refuse to put their and their students' lives at risk in order to satisfy a political agenda.

ADA Toolkit from the Florida Education Association Dept. of Legal Services

The FEA Department of Legal Services has created an ADA Toolkit to assist members in obtaining reasonable accommodations under the Americans with Disabilities Act (ADA) which have arisen due to COVID-19. The toolkit is designed to assist you in requesting reasonable accommodations if you think you have an underlying medical condition that places you at risk and qualifies as a disability.