That some good can be derived from every event is a better proposition than that everything happens for the best, which it does not.

–James K. Feibleman

INTRODUCTION

It can be said that perspective is everything when dealing with challenges in life and at our places of employment. As human resources professionals we realize there is no shortage of vexing situations which arrive at the most inopportune time. However, it’s important to embrace these “opportunities” so we continue to learn, grow and advance in experience. This enables us to be valuable strategic consultants to our management and labor partners. We understand that building and maintaining a good reputation is crucial, for with it we gain credibility which helps bridge proposals at the bargaining table and resolve personnel actions.

Given that the modern workforce is dynamic and diversified, it is not surprising that injured and ill employees continue to make up a growing segment. So, how can we effectively manage the numerous and varying situations that arise, requiring us to deal with the needs and rights of injured or ill employees? Cases of employee injuries and/or illnesses which affect employment can be extremely difficult and complex and at times they may seem deceptively simple. When faced with an employee request for time off, light duty, or telecommuting due to an injury or illness, what actions will we take? How do we balance management and employee rights and responsibilities in an even-handed approach? What will our actions say about our organization? What is our fiduciary responsibility toward management and labor? On what foundation can we base our actions to ensure a defensible and successful outcome?

There are many laws and regulations which govern our interactions regarding injured and/or ill employees. Some of these regulations are found in the Workers’ Compensation¹ system (WC), Family Medical Leave Act (FMLA), California Family Rights Act (CFRA), Americans with Disabilities Act (ADA), and Fair Employment and Housing Act (FEHA) to name a few. In addition, there are amendments and other leave laws that cover pregnant employees and military services. With so many laws, and the fact that they often overlap or apply concurrently, can be a daunting administrative process. So what good can we derived from these situations? Reacting proactively and taking care to follow all regulations can result in a beneficial outcome for everyone involved.

¹ California Labor Code Sections §3600-3602
BACKGROUND

The El Dorado Irrigation District is a public utility consisting of several water and wastewater treatment plants, a hydroelectric power facility, and recreational areas including parks, trails and lakes. Employees are represented by an Employee Association (Association) which has a membership of approximately 200. We have both a Memorandum of Understanding (MOU) and an Employee Handbook which contain the District’s employment rules and policies. Like most public agencies, we felt the impact of the recent recession which necessitated reorganizational changes to improve efficiencies and two rounds of employee lay-offs. Peak membership in the Association prior to the recession was near 300.

SCOPE

This paper will review several cases involving injured and/or ill employees and provide the following details;

1) The overall circumstances of each case,
2) Description of the standardized process utilized,
3) Employee considerations and requests, and
4) The outcome and/or final resolution.

Although no two cases had identical circumstances, a deliberate approach was used for the resolution of all three. In one case, the process was straightforward, while in another the circumstances were quite complex and challenging. However, what all three cases had in common was the utilization of a standardized process based on policies and procedures which focused on facts to resolve each case.

A 1980’s popular cartoon TV series wisely stated that “knowing is half the battle.”² Well defined policies, and clear procedures and/or practices are invaluable when dealing with the rights and needs of injured and/or ill employees. A good policy or practice can be likened to the immense network of roots that support a healthy tree. Attached to this paper are our agency’s current policies which have been used successfully to this point. Woven into the paper are lessons-learned from our interactions with injured and ill employees and steps our agency has taken to forge a stronger relationship between management and the Association.

AGENCY POLICIES (attached)

- Family Medical Leave Act and California Family Rights Act
- Medical Leave of Absence
- Workers’ Compensation
- Paid Time Off (PTO)
- Return To Work Medical Certification
- Transitional Duty Program
- Request For Reasonable Accommodation-Interactive Process

² G.I. Joe: A Real American Hero, Sunbow/Marvel TV
The First case: illustrates the difference between having good policies and procedures and not having them. An employee suffered a work-related injury and was ultimately released from care with a permanent lifting restriction. The restriction was significant given that the essential job functions required the employee to lift heavy objects.

The employee routinely lifted and removed sewer manhole covers (weighing on average 150 to 300 pounds). The task was accomplished with sheer leverage and a steel-hook. The removal of manhole covers is necessary in order to perform maintenance work on the sewer system. At the time, our agency did not have established and tested procedures in the management of permanent restrictions and long-term light duty assignments, so we did not initially manage this case efficiently or effectively. For starters, we allowed the employee to remain in the same “light duty/transitional duty” assignment for over a year. In addition, we ultimately entered into an interesting agreement that allowed the employee to remain in the position without the requirement to remove manhole covers. This agreement also exempted the employee from “standby” work, another essential function of the position. Note: this action took place prior to the two rounds of layoff. The agreement also lacked any meaningful reference to an accommodation resulting from the interactive process.

This approach was problematic for several reasons:

- First, it was unclear, based on a lack of records what steps were taken, when the interactive process began, and if the exemption was the result of the interactive process.

- Second, allowing an employee to remain in the same light-duty assignment for well over a year may demonstrate that a suitable alternate position has been created. In addition, if the employee is not performing the essential functions of the job for an extended period of time, this fact can make it increasingly difficult for an employer to later demonstrate that the tasks really are “essential functions.” When a job exists to accomplish certain tasks, an employer should consider documenting how the work will get done while the injured employee is unable to do the work (i.e., hiring a temporary worker, shifting duties to other employees on a limited basis, etc.). Failure to do this may indicate to a third party (judge or jury) that your agency did not really need the work done to begin with, “why can’t the employee simply continue working light duty as an accommodation?”

As mentioned above, clear documentation was missing describing the efforts to accommodate. Our goal should have been to enable the employee to do the job with or without a reasonable accommodation. Exempting the employee from the essential functions was neither effective nor reasonable.

Since The First Case, the District has implemented and solidified its policies and procedures; we now follow a standardized process when we receive an employee’s request for accommodation, or when our agency becomes aware of an injury or illness (workers’ compensation claim or leave beyond FMLA/CFRA) which restricts an employee’s ability to perform the essential functions of their job. Our standardized procedure is as follows:
1. **Timely:** after the exhaustion of leave entitlements under FMLA/CFRA, and/or upon notice and/or knowledge of a potential work restriction, it is critical to evaluate the situation and engage, if appropriate in the ADA/FEHA interactive meeting process.

2. **Create a Record:** written notice is issued to the employee regarding the need to engage in interactive process. As a courtesy, Association is advised regarding need for interactive meeting with member. When drafting documentation regarding the ADA/FEHA process, it should be kept separate from FMLA/CFRA as much as possible.

3. **Interactive Meeting:** initial meeting involves a review of the essential functions of the position with the goal of reaching consensus on what functions are essential. Having accurate and up-to-date job descriptions facilitates this step. Information is exchanged regarding the functional-work restrictions and/or limitations (what work tasks are impacted, duration of restrictions, type of restriction) we do not ask for diagnosis or treatment plans. The employee is encouraged to provide recommendations and/or any ideas for potential reasonable accommodation(s).

4. **Medical Documentation:** our practice is to substantiate medical necessity of any request via a medical questionnaire which must be completed a Health Care Provider (HCP). Once received, additional meetings are scheduled with management and employee. Medical documentation should relate to employee’s functional restrictions and/or limitations so a determination can be made on employee’s ability to perform the essential functions with or without accommodation.

5. **Multiple Meetings:** more than one meeting is usually required to consider all facts and demonstrate a good-faith effort on the part of the employer. Notes are taken to capture the main points and recap letters are mailed out after each meeting to document all efforts in the interactive process.

6. **Leave as Accommodation:** if during this process, an employee’s need for time-off continues beyond both FMLA and CFRA a leave accommodation should be granted. Sometimes additional leave is all an injured employee needs to recover. However, all accommodations should be documented. This applies regardless if the need for leave stems from a workers’ compensation claim.

7. **Length of Leave as Accommodation:** although each case will be different, it is important to note that even under the law, leave as an accommodation ceases to be effective when the need for leave is indefinite. An agency is not obligated to “keep an employee on indefinite leave while recovering from a disability.”³

8. **Granting an Accommodation:** there are several elements an accommodation has to meet in order for the District to grant it. First, one has to be identified that will enable the employee to perform the essential functions of the job. Second, the accommodation has to be based on and consistent with business necessity. All accommodations are subject to periodic review for continued effectiveness and must be documented.

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³ Leave Rights for California Employees Workbook: Liebert Cassidy Whitmore (© 2012, p.93)
9. **Inability to Accommodate:** some cases will result in an inability to grant a reasonable accommodation. It may be that the employee has been off work for an indefinite period of time and continues unable to return to work, or despite attempts to identify an accommodation, none is found.

10. **Employer Initiated Disability Retirement:** if unable to accommodate, the District closes out the ADA/FEHA process with a determination that the employee is unable to perform the essential functions of his position. We then initiate a disability retirement on their behalf. During this process, we issue a Notice of Intent to file a disability retirement and keep the employee as active on our system until CalPERS makes their determination regarding the retirement application.  

With the above process in mind, fast forward a few years from the first case. Facing the financial downturn, our agency began implementing organizational changes to streamline efficiencies. Some positions would be eliminated, while others would take on additional work tasks. Our injured employee would be one of those affected by the changes. Therefore we knew that engaging in the interactive process was once again required.

This time around, we notified the employee and the Association of the need for an interactive meeting. During the meeting we discussed that circumstances had changed significantly (fewer employees performing necessary work) and of course, the essential functions of the position. All agreed that lifting manhole covers and working the standby shift continued to be essential functions of the position. Once again the injured employee requested an exemption from removing manhole covers and standby work as the preferred accommodation.

With the goal of ensuring the injured employee would be able to perform the essential functions of the position, we considered various ideas. We knew that exempting the injured employee from the necessary work was not consistent with business necessity, and therefore ineffective as an accommodation. The outcome was extremely important because if no accommodation was found, and no suitable vacant position existed for which the injured employee was qualified, it could well mean the end of the employee’s employment. However, the ultimate outcome proved to be good for both management and labor. In just three interactive meetings spanning a few weeks, a reasonable and effective accommodation was identified, purchased, and implemented. The accommodation was a mechanized device which could be mounted on a vehicle and used to lift the manhole covers without the need for physical straining or pulling. This allowed the injured employee to perform both standby and all of the essential functions of the position.

The device proved so useful in the field that two additional units were purchased for use by non-injured employees. This mitigated the potential for job related injuries, improved morale and built up our relationship with the Association. With clear goals in mind we successfully balanced the needs of management and labor.

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4 Disability Retirement pursuant to Government Code §21153
The Second Case: This case was an aberration. I could write twelve pages on it alone, but I will be spare the reader the grueling details. The case involved an employee with a history of numerous workers’ compensation claims and performance issues. Throughout their employment and due to the multiple work injuries, the employee required time off to recover. The employee also returned to work between recovery periods with work restrictions and as a result was granted several different transitional duty assignments.

During a reorganizational change, the employee’s job duties were amended to include the need to obtain and maintain a commercial driver’s license. The employee was subsequently issued a written directive to obtain the initial commercial drivers’ license permit within a reasonable time. On the day the directive was due, the employee gave human resources a note indicating indentifying a work restriction of “no operating heavy equipment.” The employee failed to mention any concern or medical condition months earlier when the directive was issued. Also the employee submitted the note on the final due date of the directive despite even though he had had it for weeks.

Clearly, when dealing with injured or ill employees, they can and should be treated like any other similarly situated non-injured employee. Therefore, the employee was issued a disciplinary penalty for failing to act in good faith regarding the management directive. The discipline was appealed and ultimately upheld. At the same time, the District notified the employee and the Association of the need to engage in the interactive process based on the medical note provided.

The employee, the Association and their attorney participated in the interactive meetings. The District followed the above-described procedures. The employee provided additional documentation greatly limiting their ability to perform most of the essential functions of the position. During this time, the employee had been granted sedentary transitional duty based on the work restrictions. After several weeks on this transitional duty assignment, the work ran out so the employee was offered more transitional work (non-sedentary) in a different location. The employee declined the District’s offer of additional transitional work and was subsequently sent home. Because the employee’s restrictions were a result of a work related injury (serious health condition), the employee’s time off was also recorded under both FMLA and CFRA.

During the interactive process meetings, the employee was granted several leaves as an accommodation while the District considered the employee’s preference of a promotion into a position for which the employee was not qualified. After five leave accommodations totaling approximately six months without any change in the employee’s condition, the District determined that it was unable to reasonably accommodate and/or enable the employee to perform the essential functions of the position.

Before, during and after the interactive process, the employee initiated the following actions and allegations against our agency; (1) age discrimination, (2) disability discrimination, and (3) retaliation. There were other allegations and legal actions which I will not include here. The District kept the lines of communication open with the Association while maintaining our ability to effectively respond to the allegations. This method proved useful since it eliminated any surprises in the process. Several investigations were conducted and arrived at the same conclusion; no wrong doing on the part of the District. In addition, after the EEOC issued the employee a “Right-to-Sue” letter we effectively put the allegations to rest.
Although earnest time and consideration were expended in trying to accommodate this employee, a reasonable accommodation could not be identified despite the best efforts of the Association and our agency. Therefore, after approximately six months from the commencement of the interactive process, the employee was issued a Notice of Intent that a disability retirement application would be filed on the employee’s behalf, which the employee opposed. The CalPERS application was filed and ultimately approved. Although the disability determination by CalPERS took approximately one year, the employee remained off work until his retirement date.

A lesson learned: This case proved extremely valuable because it emphasized the need to document, document, document all actions and steps taken in the interactive process. The District’s process was driven by facts and conclusions based on business necessity which strengthened the defensibility of our final decision.

The Third case: involved a management employee who began utilizing “intermittent” FMLA/CFRA leave. We all know and love intermittent leave don’t we? The intermittent leave was substantiated by a medical certification and designated under FMLA/CFRA. For approximately one year, the employee was consistently absent from work for a few days every month. The impact on the employee’s work unit was low morale and frustration. During the first twelve months, accurate records were kept detailing the frequency of the leave. A pattern also began to manifest, that of Monday and Friday absences (Friday Monday Leave Act?). This pattern also created another issue; “leave in perpetuity” since at this rate, the employee would never exhaust the FMLA or CFRA allotments in any given year.

After twelve months, the employee submitted a second medical certification which indicated an increase to the frequency or need of the intermittent leave (from previous certification) for another twelve month period. In adherence with FMLA/CFRA, the second medical certification was also accepted and the leave designated as FMLA/CFRA qualifying. Tracking of this leave became crucial in the defensibility of the District’s overall strategy. A few weeks after receipt of the second medical certification, our tracking of the employee’s leave indicated that the amount of leave described in the second certification was being exceeded. The employee was therefore required to provide another medical certification to substantiate the increased need. 5

The third medical certification provided for yet more intermittent, self-determined leave for another twelve month period. Since this employee was responsible for overseeing the day-to-day functions of a work group, this would cause an undue hardship upon most employers. After a review of the regulations, we determined that the employee had effectively exceeded the “period of time” someone can reasonably use intermittent leave during a recovery. In essence, the employee was changing a full time position to a part time position on an indefinite basis. This is inconsistent with the intent of the law. 6

Given these facts, the District initiated the interactive process with the employee. During the initial stages we discussed and implemented a stop-gap measure to ensure that the day-to-day functions of the employee’s work continued to occur.

5 Under the Family Medical Leave Act; an employer can request another medical certification when the circumstance of the previous certification have changed (§825.308(c) (2))

6 Under the Family Medical Leave Act; an employee’s intermittent leave or “A reduced leave schedule is a change in the employee’s schedule for a period of time, normally from full-time to part-time.” (§825.202(a))
We documented the stop-gap measure of assigning an additional supervisor to the unit. Though this action resulted in additional cost, it substantiated two critical facts, that both the day-to-day functions of a management employee along with regular, predictable attendance were true essential functions of the position. The stop-gap measure was strictly based on business necessity and was never challenged throughout the interactive process.

After several interactive meetings and continued requests by the employee to be granted indefinite, intermittent leave of up to seven days per month as the preferred accommodation, we closed out the interactive process. The employee was notified that the essential functions of the position could not be fully performed given the employee’s need for sporadic, unpredictable, and self-determined leave. We subsequently issued a Notice of Intent to file an employer initiated disability retirement with CalPERS. During the disability application process the employee failed to cooperate with CalPERS and thus they cancelled the application which resulted in the termination of the employee.

CLOSING

The positive working relationship with our labor group is at an all time high as a direct result of our current leadership. We have observed the example of our Director of Human Resources and her ability to effectively collaborate, engage, and obtain results for both management and labor. This has allowed our agency to build upon successes and reach consensus on a number of issues. Our team has seen first-hand employee interactions improve as a more inclusive environment with labor representatives is fostered. More of an “art” than “standard operating procedure” is the ability to strategically select when to include a labor group in the early stages of a developing situation that may affect members in their ranks.

Based on our practice to elicit input and buy-in from our labor group in matters related to ADA/FEHA, problematic FMLA/CFRA situations, and/or workers’ compensation cases, we have experienced a more productive outcome for management and labor. When policies and procedures focus on providing a predictable and transparent approach, all those involved grow accustomed to the methods which result in greater collaboration between management and labor. Granted, it will not always be possible to come to complete agreement on all matters. But by taking steps to ensure consistent application of the rules, procedures and processes, regardless of the outcome, our credibility will be enhanced.

I believe that a good Transitional Duty program is a valuable tool in dealing with ill and injured employees. This program can decrease the total cost of a workers’ compensation claim and prove instrumental in an employee’s recovery. Transitional duty should be based on the likelihood that it will improve an employee’s recovery from an illness or injury. Transitional duty should not be granted for an indefinite period of time. We believe it to be a good practice to rotate transitional duty assignments on a periodic basis and grant it for short periods of time (30 days per assignment).

When transitional duty is unavailable and/or not within work restrictions, all time away from work due to medical restrictions should be recorded as FMLA/CFRA qualifying. This should be the standard approach to the management of any leave program.
This practice can limit the total amount of leave an injured or ill employee can take. Otherwise, an employee could conceivably take several weeks of leave under a workers’ compensation injury and upon their return still have an entire 12 week allotment available under both FMLA and CFRA. FMLA and CFRA leaves should always run concurrently when applicable.\footnote{Recording CFRA and FMLA leave concurrently is not always possible; for example, medical conditions relating to pregnancy may not be covered under CFRA (CCR 2, §7297.6(b))}

Because of the District’s partnership with labor and our proactive approach of systematically tracking leave, communicating frequently with employees and their representatives in a timely and open manner, our agency has successfully resolved the most difficult cases involving injured and ill employees.

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