

**K**AMER  
**Z**UCKER  
**&**  
**A**BBOTT  
ATTORNEYS AT LAW

*6<sup>th</sup>* ANNUAL  
**LABOR &  
EMPLOYMENT**  
**SEMINAR**

**K**amer Zucker & Abbott is pleased to announce its 6<sup>th</sup> Annual Labor and Employment Seminar. This year's program will provide important information on a wide variety of topics affecting employers, including some of the most recent legal developments at both the federal and state levels. Specifically, this year's presentation will focus on leave of absence issues, discipline and discharge, wage and hour, and workplace privacy.

In addition, we have brought back this year, by popular demand, our mock trial which has traditionally enjoyed overwhelming positive feedback from our attendees. This year's twist, however, is that we will be presenting a mock arbitration hearing, presided over by Arbitrator Gregory J. Kamer. The cast of characters for the arbitration will feature many of our support staff and attorneys, and it should be a very entertaining and informative presentation.

We anticipate a very successful program this year, and we hope that you can make arrangements to join us.



**Friday, October 17, 2003**  
**Caesars Palace**  
**8:00 a.m. to 3:30 p.m.**

BUT WHY CAN'T I FIRE HIM? --  
STRATEGIES FOR DISCIPLINE &  
DISCHARGE

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Jody M. Florence

# GENERAL STRATEGIES

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- Stop and analyze the situation
- Have rules or procedures been violated?
- If so, how have you addressed such violations in the past?

# GENERAL STRATEGIES

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- Is the employee's behavior protected, or is the employee protected, by the law?
- If so, what does the law require of you?
- Document decisions and actions carefully

# Fact Pattern A

## Disability Related Misconduct

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### Ron

- Exceptional performer
- Recently is frequently late or absent
- Close to termination



# Fact Pattern A

## Disability Related Misconduct

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### Joyce

- Change in behavior
- Angry and disgruntled
- Difficult to work with
- Coworkers worried about violence



# Fact Pattern A - Approach

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## Investigate

- Talk to both employees
- Talk to supervisors and coworkers
- Determine problem, length, and causes

# Fact Pattern A – Now what?

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## **Ron**

- Distracted by menial tasks
- Cannot leave home within reasonable time
- Feels compelled to wash and re-wash his hair
- Feels compelled to check and re-check his clothes for holes, etc.



# Fact Pattern A – Now what?

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## **Joyce**

- Diagnosed with depression
- Taking medication
- Spaced out during interview
- Engages in violent behavior during interview

# FACT PATTERN A

## Revised Approach

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ARE RON AND JOYCE  
DISABLED?

# Fact Pattern A

## Are Ron and Joyce disabled?

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- Physical or mental condition
- Substantially limit ability to perform major life activities
- Significantly restrict the condition, manner, or duration under which the individual can perform the major life activity as compared to the average person

# FACT PATTERN A

## Revised Approach

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GATHER MEDICAL  
INFORMATION

# Fact Pattern A

## Gather Medical Information

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- Obtain information from employees or their physicians
- Are corrective measures or treatments in progress?

# Fact Pattern A

## Gather Medical Information

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- Obsessive compulsive disorder
- Depression



# Fact Pattern A

## What Are Your Obligations and Rights?

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- Essential functions of job with or without a reasonable accommodation
- Interactive process and accommodations
- **CAN YOU DISCIPLINE RON OR JOYCE?**

# Fact Pattern B – Retaliation and Religious Accommodation

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## ■ Sue

- Below standard performance
- No discipline and positive evaluations
- Disclosed membership in alternative faith of Org and her name-change to Balrock
- Requests change in schedule on Mondays to attend Org Sabbath which begins at 5 p.m.
- Supervisor Jed harassing her about religion since disclosure



# Fact Pattern B - Issues

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- Lack of documentation of poor performance
- Claim of religious harassment by Jed
- Request for religious accommodation
- **Potential for retaliation**

# Fact Pattern B

## Religious Accommodation

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- Is Sue's "religion" covered by Title VII?
- If so, is she entitled to an accommodation?
- If so, what type of accommodation is required?



# FACT PATTERN B

## Religious Harassment

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- Title VII prohibits discrimination on the basis of religion
- Includes harassment
- What is the harassing conduct?
- What is the basis for Jed's conduct?

# FACT PATTERN B

## Retaliation Potential

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- Has Sue engaged in protected conduct?
  - Opposed an unlawful employment practice
  - Made a charge or participated in an investigation
- How do you guard against retaliation?
- **Can you discipline Sue?**

# Fact Pattern C – Disloyalty, Disparagement and Protected Conduct

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- Proposal to eliminate spa by Sally Stiffner, Director of Operations
- Bob Snooper, Assistant to Director, wrongfully discloses proposal to Spa Manager, Enya
- Enya shares with staff

# Fact Pattern C – Disloyalty, Disparagement and Protected Conduct

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- Therapists discuss issue frequently at work
- Circulate petition
- Present petition to coworkers during working times
- Post leaflets in break rooms

# Fact Pattern C – Disloyalty, Disparagement and Protected Conduct

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- Helga posts cartoons mocking Stiffner
- Therapists call Stiffner names
- Lars tells customers Spa is closing
- Lars tells customers products are substandard



# Fact Pattern C - Issues

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- Disclosure of confidential memo by Snooper and Enya
- Therapists' "Save the Spa" campaign
- Personal attacks on Sally Stiffner
- Public disclosure by Lars
- Public disparagement of Company product by Lars



# Fact Pattern C

## Breach of Confidentiality

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- Confidential memo
- Highest management level
- Sensitive subject matter
- Confidential position – Bob
- Supervisor – Enya
- Therapists – Lars

# Fact Pattern C

## Solicitation and Distribution

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- Solicitation – oral discussions
  - Only during nonworking time
  - Breaks, meals, before and after work
- Distribution – written materials
  - Only during nonworking times and in nonworking areas

# Fact Pattern C

## Disparagement – Conflict of Interest

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- Stiffner Cartoon and name calling
  - Unpleasant and boorish criticisms and attacks
  - Malicious and obscene personal attacks
- Campaign v. disparagement
  - Gripes are protected if concerted and for mutual aid and protection
  - Public disparagement of product

# SUMMARY

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- You can discipline and discharge employees for misconduct
- Care must be taken to fully evaluate each situation and potential legal ramifications
- Understand and balance scope of responsibilities and rights
- Document procedures, decisions, and actions

THANK YOU FOR  
YOUR  
ATTENTION

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