

Blurred Lines in Employee Injuries

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An artificial, practice-based barrier often separates workers' compensation issues and employment law issues for attorneys. For many jurisdictions, this is in part based on the different venues for such claims. In practice, issues employers face in employment and workers' compensation matters are often intertwined, sometimes with respect to the same employee. To best advise your client in both of these areas of the law, it is important to recognize where the lines between the two are blurred and how best to develop a solution that is practical for the employer and that will avoid the problems that can come from a singular approach to either type of issue.

In many cases, the primary goal in a workers' compensation claim is to find a way to address an injured worker's claim with regard to a specific injury. This perspective is in part due to the employer-carrier relationship and associated limitations as to what matters coverage may apply. For some carriers (or self-insured employers), where a complete resolution of the claim is reached, the employer or carrier will provide sufficient consideration for an injured employee to resign and release an employer from all other claims related to his or her employment. However, this is not always an option for an injured employee. Where a release and resignation is not an option, the employer will have to contend with the possibility that the employee's conditions from the injury will cause a documented, permanent impairment that will affect the employer-employee relationship going forward.

Even with the most dedicated employee, the permanent condition or conditions he or she sustains may result in decreased performance. An employer's inquiries that frequently result from such a situation can range from "How do I best work with the limitations the employee has?" to "How long do I have to wait before I can fire this person?" Such potential issues that are related to the workers' compensation claim, if not carefully considered, can expose the employer to liability under other federal and state employment laws depending on how the situations are handled.

One of the first areas to address is the potential liability from a state statute prohibiting retaliation for making a claim for workers' compensation. Not all states have specific statutory provisions addressing retaliation against an employee for making a workers' compensation claim. However, as an example, Florida specifically addresses that issue with a statute stating "No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law." Fla. Stat. § 440.205 (2011). Similarly, other states have recognized through judicial interpretation that impairment of statutory benefits, such as provided by workers' compensation laws, simply because the employee has exercised those rights, is improper and can result in civil liability for the employer. See, e.g., *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984). Accordingly, it is imperative to know whether such a cause of action exists for the state in which you practice.

In jurisdictions that prohibit retaliation for asserting a workers' compensation claim, counsel must discuss this exposure with the employer. At a minimum, this will inform the employer as to the potential exposure to such a claim and any proposed significant personnel action can be discussed before a decision is made. This conversation should also address whether insurance coverage under a workers' compensation policy exists for a retaliation claim. Without careful review of an applicable policy, an employer may be under the mistaken impression that any workers' compensation claim, including one based on retaliation, is within the purview of its workers' compensation policy. Although not universal, many workers' compensation policies specifically exclude coverage for what are deemed to be "employment actions," including retaliation, even if it is alleged to be based on an employee's workers' compensation claim.

Assuming an employee has returned to work after an injury, employers often have to address how to deal with performance or disciplinary issues. In some circumstances, employers may feel that any action taken against the injured employee, valid or not, will subject them to liability for retaliation. Certainly, any action has the potential to subject an employer to a lawsuit, but this does not always mean that liability is certain, even if litigation costs are a major concern.

As with many other employment issues, uniformity and documentation are the most valuable means of avoiding liability for actions taken against an injured employee. All injured employees represent different considerations, but the process an employer has used in the past and intends to use going forward can dramatically affect the potential for an employer's exposure. Where an injured employee is demonstrating poor performance, it is important to document as clearly as possible the basis for such poor performance.

In addition to the issue of retaliation, it is important for an employer to understand the specific medical conditions, affected parts of the body and specific limitations in order to assess whether continued employment can expose the employer to liability under the Americans with Disabilities Act. The concept of "perceived disabilities" is a prominent issue following a workplace injury because the employer cannot deny knowledge of the injured employee's conditions or limitations. Accordingly, having specific information as to the injured employee's conditions and limitations, combined with the treating physician's opinions and recommendations, enables the employer to make an objective and informed decision about whether the employee can perform the essential functions of his or her job and the extent and duration of any reasonable accommodations.

If the performance deficit is directly related to the injured employee's injury, be certain to work with the employer to obtain specific restrictions from the injured employee's physicians to be able define the affected body parts and how those injuries affect the employee's position. This can be done with a job description for the employee and a conference with the treating physician, if permitted in your jurisdiction. If no job description exists, it may be the best opportunity to create one in order to establish the requirements of the position and assess what accommodations may be necessary. The job requirements, combined with documented physical restrictions, can allow an employer to determine what accommodations are reasonable and what accommodations, even if valid, cannot be incorporated into the position.

If the performance or discipline issue is peripherally related to the injury, it is important to be aware of to what extent such peripheral issues may give rise to additional treatment under the workers' compensation claim. An example would be addiction issues related to pain medication. In many jurisdictions, an employee's addiction to medication may result in the employer or workers' compensation carrier bearing the responsibility of treatment for that addiction. Further, such an addiction may affect an employee's attendance or ability to perform his or her job. However, the likelihood is high that any discipline based on that issue would be framed as solely the result of the workplace injury and, therefore, could be an illegitimate basis for discipline when the employer's physicians prescribed the medication resulting in addiction. In such instances, it is important to investigate the behavior at issue and any potential connection between prior behavior, such as drug use, to determine if the injury is being asserted as a shield.

Finally, where there does not appear to be any legitimate link between the performance or discipline issue and the workplace injury, it is necessary to ensure the employer is taking disciplinary action consistent with any prior injured employees, as well as non-injured employees. Although retaliation can always be claimed, it becomes much more difficult to establish retaliation as the basis of adverse personnel action if the employer is able to demonstrate a consistent disciplinary process before the injury and that the same disciplinary process applied to an injured employee. Absent a reasonable accommodation, an employee is generally not entitled to disregard established job requirements. Although this issue may require investigation of the employer's practices, such an investigation can most likely assess the potential exposure and avoid additional claims before an employer takes action. Even if not covered under a workers' compensation policy, the investigation is likely to be beneficial to the employer to assist in the preparation of a uniform, documented process to address such issues in the future.

In conclusion, many questions arising out of disciplining an underperforming injured employee will be answered with "it depends." However, being able to advise an employer of the potential pitfalls that exist outside the workers' compensation process will allow the employer to appreciate the actions it can take and those to be avoided. It will also allow you to aid the employer in establishing a proper disciplinary and documentation process in general that would apply equally to any injured employees. Finally, if a full resolution of an injury claim can be reached, knowledge of both the workers' compensation and employment issues related to an injured employee will help to communicate the value of including a general release in the settlement to extinguish as much of the employer's exposure as possible.