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Responding to Workplace Injuries: Your Reaction Can Be Costly

By Alejandro Valle, Esq.

Employers should, of course, be very careful in how they respond to an employee's workplace injury. Recent developments in the law, at both the state and federal levels, have made this even truer than before.

Many states, and the federal government, have created avenues for employees to sue their employer for retaliatory discharge if the employee is terminated following a workplace injury. Workers' Compensation laws, the federal Family and Medical Leave Act ("FMLA"), and the Americans with Disabilities Act ("ADA") each protect employees from post-injury termination in a variety of circumstances. Even in circumstances where an employer had already made the decision to terminate an employee before the employee's injury, an employer still needs to be careful with regard to how it handles the termination.

Workers' Compensation

Employers in several states should beware of claims of retaliatory discharge based on actions taken by the employer after an employee pursues workers' compensation benefits. In Indiana, for example, employees can claim retaliatory discharge if their employment is terminated after pursuit of workers' compensation benefits. Recently, the Ohio Supreme Court allowed an employee who was discharged one hour after reporting a workplace injury but before actually filing for workers' compensation benefits to pursue a claim for wrongful discharge. *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153 (2011). One way that employers can help limit their

liability in these types of lawsuits is by avoiding making derogatory comments about an employee's injuries, or about the cost of an employee's pursuit of a workers' compensation claim.

FMLA

As virtually all employers know, the FMLA, generally speaking, requires covered employers to provide their employees up to 12 weeks of unpaid, job-protected leave. In addition to falling under the statutory definition of a "covered employer" under the FMLA, an employer can, in certain circumstances, be required to provide FMLA leave if they provide for such leave in their policy manuals, even if the employer would not otherwise be subject to the FMLA.

Legal issues arise when employees ask for leave and the FMLA-covered employer does not recognize or acknowledge that the employee's leave request qualifies for FMLA leave. Under these circumstances, it is the employer's responsibility to recognize that an employee's leave request qualifies for FMLA leave and to provide the employee with FMLA forms. The consequences of a leave request turning into FMLA leave include, generally speaking, the obligation to return the employee to his or her prior position upon return from leave. Employers face potential retaliation claims if an employee is terminated following FMLA leave, or potential interference claims if the employer somehow obstructs the employee's ability to take FMLA leave. As discussed above in the context of workers' compensation laws, employers with employees on FMLA leave should avoid making derogatory comments about the need for such leave or regarding the costs of such leave to the employer.

ADA

As with the requirements of the FMLA, it has become common knowledge for virtually all employers that the ADA protects disabled employees, otherwise qualified, from discriminatory treatment. Disabled employees include individuals who are substantially limited by an impairment, even now including some short-term impairments resulting from a workplace injury. Due to the recent amendments to the ADA, there has been an expansion of the definition of employees who qualify as "disabled." The Equal Employment Opportunity Commission ("EEOC") issued final regulations, effective this past May, based on the newly-amended ADA. The EEOC previously took the position that the duration or expected duration of an impairment should be considered in determining whether the impairment is disabling. That no longer appears to be the case under the new final regulations, which state that "an impairment lasting or expected to last fewer than six months can be substantially limiting." (Emphasis added.) The final regulations go even further than the proposed regulations on this point. In the proposed regulations, the EEOC identified a category of temporary, non-chronic impairments that usually would not be considered a disability - for example, the common cold, seasonal influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, a broken bone expected to heal completely, appendicitis, and seasonal allergies. However, the EEOC deleted this category in the final regulations, explaining that the provision caused confusion and

was too limiting.

The EEOC's position on the issue of temporary impairments is not the law; while courts look to EEOC regulations for guidance, courts are not bound by the EEOC's view of the ADA. Indeed, it is not clear from the language of the amendments to the ADA that Congress intended to extend ADA coverage to temporary impairments. Moreover, it is still likely that certain impairments of short duration that are expected to heal quickly, such as a common cold or a sprained ankle, will not be considered disabilities. However, the regulations make it clear that employers should consider all impairments, even short-term ones, on a case-by-case basis. That certainly brings into play temporary impairments such as those resulting from workplace injuries to employees.

Conclusion

Termination soon after a workplace injury, or soon after pursuit of workers' compensation benefits by an employee, can expose employers to a possible lawsuit based solely on the temporal proximity of the discharge to the injury and/or claim for benefits. Employees can bring these claims even if the termination was otherwise justified and legitimate. The same is true of adverse action against an employee soon after his or her pursuit of FMLA leave, especially if employers make derogatory comments about the employee's need for leave or the cost of that leave. Moreover, an employer has the obligation to treat a leave request as one for FMLA leave (if the employer otherwise qualifies for FMLA coverage) even if the employee does not specifically request FMLA leave by name. Finally, the employer of a disabled employee has the obligation to engage in a good faith interactive process with the disabled employee before making any final decisions regarding whether that employee can be reasonably accommodated. Given new developments in the law, all of these considerations can now arise even more than they did previously in the event of a workplace injury that results in the long-term - or even perhaps the short-term - impairment of the injured employee.

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