

Turning a Bad Claim into a Good Case: Utilizing Your WC Claim to Mitigate Damages or Win Cases

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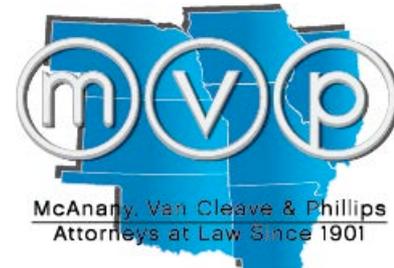
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Retaliatory Discharge Claims

Old Standard

The employee was required to prove that the exercise of the employee's rights under the workers' compensation statute was the "sole, exclusive factor" in the employee's termination or discipline. *See Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273 (Mo. Banc 1984) and *Crabtree v. Bugby*, 967 S.W.2d 66 (Mo. Banc 1998).



Retaliatory Discharge Claims

New Standard

Employees need only prove that the filing of a workers' compensation claim was a "contributing factor" to the employee's discharge, termination, or discipline rather than the "sole, exclusive factor." *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371 (Mo. Banc. 2014).



Retaliatory Discharge Claims

- ▣ Implications of *Templemire*
- ▣ Under this new standard, an employer may be held liable even if the employer had a legitimate, non-discriminatory reason for terminating or disciplining the employee.

Retaliatory Discharge Claims

- ▶ Recommendations:
- ▶ Employers must keep accurate records detailing the reasons why discipline is being taken against an employee.
- ▶ Employers must also be consistent in their progressive disciplinary actions against all employees.

Retaliatory Discharge Claims

- ▶ Recommendations:
- ▶ Employers need to take all disciplinary actions knowing that the action may be reviewed or second guessed in a subsequent proceeding should the employee claim retaliation.
- ▶ Like other types of employment litigation, employers must strive to make the reasons for disciplinary actions transparent and fair so they will be upheld if reviewed by a neutral third party.

Termination Letters

- ▶ The Bad:
- ▶ It has come to our attention that you are taking advantage of your employment with ABC Law by “milking” your injury.
- ▶ Multiple individuals, including your immediate supervisors, have come forward indicating that you are exaggerating your right foot injury and believe you can work well beyond Dr. Jekyll’s work restrictions.

Termination Letters

- ▶ The Good:
- ▶ On December 20, 2014, you met with group manager, John Doe, and plant manager, Jane Doe. In that meeting, you were advised that you engaged in horseplay while on the plant floor when you threw a fake spider at a co-worker on December 18, 2014.
- ▶ You were issued a formal warning letter on that date pursuant to Employee Handbook provision 45-101.

Termination Letters

- ▶ The Good:
- ▶ On January 3, 2015, you had a second meeting with Mr. and Mrs. Doe. You were advised that you violated Safety Rule 150 when you failed to lockout/tag out after working on hazardous machine on January 2, 2015.
- ▶ Finally, on January 30, 2015, you attended a third meeting with Mr. and Mrs. Doe.

Termination Letters

- ▶ Conclusion
- ▶ Identify and reference the written policy the employee violated or the performance expectation the employee failed to meet and the written penalty for the violation
- ▶ Reference specific events of the violation
- ▶ Reference any progressive discipline taken along the way if any including steps you've taken to counsel the employee

Note on Service Letters

- ▣ Missouri – Comply with the Service Letter statute set out in 290.140 and 36.470
 - Under 290.140, if an employee makes a proper written request by certified mail, the employer, within 45 days after receipt of the request, must write a Service Letter setting forth the nature and character of service rendered by the employee, the duration, and the cause, if any, the employee was fired, laid off, or resigned.

Note on Service Letters

- ▶ A good termination may be derailed by a bad Service Letter
- ▶ Service letter law applies if:
 - The employer was a corporation doing business in Missouri.
 - The employee worked at least 90 days for the employer,
 - The employer employs at least 7 people, and
 - The Service letter request was made within 1 year
- ▶ If an employee properly requests a Service Letter and the employer fails to issue one, the employee can sue for damages, including putative in some cases.

ADA – Americans with Disabilities Act

- ▶ Essentially requires employers to avoid discriminating against workers with disabilities and to make reasonable accommodations where it will not cause an undue burden
- ▶ Applies to employers who have 15 or more employees
- ▶ Applies to workers who have a “disability”

ADA – Americans with Disabilities Act

- ▶ Questions to ask during a workers compensation claim:
 - Does the claimant’s injury constitute a “disability”?
 - Does the employer have to accommodate the claimant’s disability?
 - Can the employer terminate the claimant if he / she cannot perform prior job?

ADA – Americans with Disabilities Act

- ▶ Does the claimant’s injury constitute a “disability”?
 - a past, current or perceived physical or mental impairment that substantially limits a major life activity
- ▶ “Major Life Activities” include:
 - seeing, hearing, talking, eating, sleeping, breathing, learning, standing, bending, lifting, working, communicating, reading, concentrating and thinking

ADA – Americans with Disabilities Act

- ▶ Is the employer required to accommodate the disability?
 - Must provide reasonable accommodations UNLESS they would result in an undue burden on the employer.
- ▶ Can the employer terminate the claimant if he / she cannot perform the prior job?
 - If he / she is not physically capable of working for the employer with or without accommodation

FMLA – Family and Medical Leave Act

- ▶ Where applicable, requires an employer to provide up to 12 weeks of leave during a 12-month period for birth / adoption or serious health condition of claimant or family member
- ▶ At the end of the FMLA leave the employer must reinstate the injured worker to the job he / she had before the leave (or a job that is substantially the same).

FMLA – Family and Medical Leave Act

- ▶ Covers employers who have at least 50 employees
- ▶ To be eligible, employee must:
 - work at a location where employer has at least 50 employees within 75 mile radius.
 - have completed at least 12 months of employment (not necessarily consecutive)
 - have worked at least 1,250 hours with employer during the 12 months immediately preceding leave

FMLA – Family and Medical Leave Act

- ▶ Questions to ask during a workers compensation claim:
 - Does the injured worker have to accept an accommodated light-duty position within his / her restrictions?
 - Can the employer fire the injured worker if unable to return to work after 12-weeks of FMLA leave?
 - May possibly violate the ADA

FMLA – Family and Medical Leave Act

- ▶ Questions to ask during a workers compensation claim:
 - Should employer provide FMLA paperwork during a work comp claim?
 - If / when injury qualifies as a “serious health condition”
 - Inpatient treatment
 - 3 or more absences for outpatient treatment
 - Chronic medical condition causing absence

FMLA, ADA & WORK COMP

▶ Tips:

- It is important to analyze each case under each set of laws when making decisions
- Best practice is to comply with whichever law is most demanding
- Involving work comp and employment law attorneys is wise

FMLA, ADA & WORK COMP

- ▣ Employer sends Claimant to the Occupational Clinic for alleged injuries to the bilateral hands. Claimant is unhappy with their treatment and hires an attorney. Employer sends the claimant to an Orthopedic Surgeon. The surgeon issues temporary restrictions while sending the claimant to therapy. The Employer offers accommodated work. Claimant shows up but complains bitterly about the assignment, now claiming his neck hurts more and leaves work early on a regular basis. He has exhausted all FMLA leave.
 - Should the employer terminate the claimant?
Consequences?
 - ▣ ADA?
 - ▣ Lawsuit Exposure?
 - ▣ The Workers' Compensation claim regarding:
 - Temporary Total Disability Exposure

FMLA, ADA & WORK COMP

- ▶ Claimant now has low back complaints which he has not yet brought into the Workers' Compensation claim. He has surgery under his health insurance. He is temporarily restricted from working. Treatment for the hands, wrists and neck are put on hold.
 - Should the Employer terminate the claimant?
 - What would the impact of termination be on the Workers' Compensation Claim?
 - Temporary Total Disability and Permanent Partial Disability
 - What should the Employer do to fill the claimant's position while he is off work?

FMLA, ADA & WORK COMP

- ▶ Claimant finishes treatment for his low back which restricts him from returning to his normal job. He wants to return to the Orthopedic Surgeon for his upper extremities and neck.
 - Does the Employer have to authorize treatment?
 - Does the Employer offer accommodated work?
 - Does the Employer owe Temporary Total Disability?

FMLA, ADA & WORK COMP

▶ Global Settlements

- Common in cases where claimant has sustained multiple or serious injuries or has a high risk of re-injury
- Pay additional consideration for an agreement to voluntarily resign and waive the right to bring any employment lawsuits
- Agreement can include admission that claimant is physically incapable of performing the essential functions of the job

Questions???

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