Intersection of Work Comp and Employment Law Claims

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I. Return to Work Issues

An injured worker is entitled to temporary disability benefits if unable to return to work. Temporary total disability/healing period benefits are payable if the employee is not working for more than three days. Iowa Code § 85.33(1). Benefits are due until the injured worker is able to return to work. Additionally temporary partial disability benefit may be due if the injured worker is only able to return to partial hours or to a position which pays less than the wages at the time of injury. Iowa Code § 85.33(2).

Many employers prefer to manage their work comp claim costs by implementing a return to work program offering modified duty work to injured workers However, employers have options and are not required by workers' compensation law to provide temporary light duty work assignments. Rather than return an employee with temporary restrictions to a modified or alternative position, the employer may instead elect to pay an injured worker temporary total or partial disability benefits. See Iowa Code § 85.33. This may increase the cost of the work comp claims in terms of benefits paid. It may also impact outcomes and recovery.

As an alternative to paying temporary disability benefits, an employer may offer suitable work consistent with the injured worker's temporary disability. See Iowa Code § 85.33(3). In the employee refuses to accept the suitable work, the injured worker is not entitled to payment of temporary total disability benefits. Id. The work comp statute has specific requirements for providing written offers of light duty work with information regarding the injured workers' rights and an opportunity to accept or object in writing. Iowa Code § 85.33(3)(b). If the injured worker refuses to accept a suitable temporary work offer, temporary total disability benefits are not payable. Refusal to accept a light duty offer may also result in employment consequences.

II. Family and Medical Leave Act

Return to work situations may intersect with FMLA rights to take protected leave for a serious health condition for some employers and certain eligible employees, providing up to 12 weeks of job protected leave annually. Generally, the FMLA applies to a 1) public agencies, 2) school, or 3) private-sector employers with more than 50 or more employees for 20 or more workweeks in the current or previous calendar year. 29 C.F.R. §§ 825.104 and 825.105. Eligible employees are those who 1) have worked for the employer more than one year, 2) have worked at least 1250 hours of service during the last year, and 3) at a location where the employer employs at least 50 employees within 75 miles of the worksite at the time of the leave. See 29 C.F.R. § 825.110; 29 C.F.R. § 825.108 and 29 C.F.R. § 825.600.

Employers may designate a period of temporary total disability as FMLA if the reason for the leave is a "serious health condition" that makes the employee unable to perform the functions of his or her job. 29 C.F.R. § 825.112. A serious health condition is a illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. This includes conditions requiring multiple treatment such as surgery after an accident or conditions requiring a period of incapacity of more than three consecutive, calendar days without treatment. 29 C.F.R. § 825.113 to 29 C.F.R. § 825.121. When a period of temporary or permanent total or partial disability qualifies, the employer may designate the leave under FMLA to track job protected leave periods. Without designating, options may be limited for addressing ongoing employment status.

Under federal regulation 29 C.F.R. § 825.702(d), an injured worker is not required to accept a light duty position offered, and in such cases where there is a serious health condition, if the injured worker is an eligible employee, the employer must allow the injured worker to take unpaid FMLA leave until the worker is able to return to pre-injury job, an equivalent job, or until the 12-week FMLA leave entitlement is exhausted. For permanent disabilities which require ongoing treatment or absences from work, FMLA may provide ongoing protections and trigger the need for intermittent leave.

- The FMLA contains two types of provisions: substantive prescriptive rights interference claims and prescriptive protection.

    - The FMLA's prescriptive rights include an employee's right to restoration to the same or equivalent position "with equivalent benefits, pay, and other terms and conditions of employment" upon his return from FMLA leave. 29 C.F.R. § 825.214. To ensure the availability of these prescriptive guarantees, the FMLA declares it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right" provided under the FMLA. When proving a violation of an employee's prescriptive rights, the subjective intent of the employer is not relevant. *See Hanna v. Pay-and-Save, Inc.,* Civ. No. 5:00-cv-430-C, 2001 U.S. Dist. LEXIS 20095 (N.D. Tex. Dec. 6, 2001).

    - The FMLA also prohibits employers from discriminating against an employee for exercising his FMLA rights. 29 U.S.C. § 2615(a)(2); 29 C.F.R. § 825.220(c) (prohibiting employers from using an employee's exercise of FMLA rights as "a negative factor" in employment decisions). When an employer takes adverse action against an employee because he exercised rights to which he is entitled under the FMLA, he can sue for discrimination. *Pulczinski v. Trinity Structural Towers, Inc.,* 691 F.3d 996, 1005-06 (8th Cir. 2012).

III. Disability Discrimination

A work injury can also be a disability protected by state and federal law. During the period of recovery and healing, conditions are temporary and issues of disability discrimination

should not arise. Temporary modifications of job duties or light duty work are a matter of discretion for the employer, but statutory disability protections may apply after an employee has recovered from a work injury and has a permanent disability and/or restrictions.

When an employee reaches maximum medical improvement and has permanent disability, limitations and restrictions, the employer may be concluding the temporary light duty offered during recovery and expecting the employee to go back to the same job. The employer must consider the essential functions of the regular duty job and evaluate any functional testing, fit for duty exams, or other evidence of ability to continue working in the same or a similar position held at the time of injury. The employer may need to consider whether the disability protections under the Iowa Civil Rights Act or the Americans with Disabilities Act apply. For an injured worker returning to work with a permanent disability or work restrictions, the employer will need to evaluate the employee's job description and determine whether the employee can do the essential functions of the job with or without reasonable accommodation. When accommodation may be needed, the employer will need to engage in the interactive process.

Through that process, the employer may determine that reasonable accommodation should be approved, a job change needs to occur, or that there is no reasonable accommodation that is feasible or would not cause undue hardship. A direct threat situation may also arise in some circumstances. If there is nothing available and no other available or open positions, the employer is not required by the ADA to make or create a new position.

- The ICRA defines a "disability" as "the physical or mental condition of a person which constitutes a substantial disability." Iowa Code § 216.2(5). Regulations promulgated by the Iowa Civil Rights Commission elaborate on this definition. See Iowa Admin. Code r. 161—8.26 (providing definitions for various terms related to disability discrimination in employment). They provide that the term "substantially handicapped person" shall mean any person who (1) has a physical or mental impairment which substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. Id. r. 161—8.26(1).

- A record of an impairment that substantially limits or limited a major life activity. An individual meets this prong "if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more life activities." Documents such as medical records and employment records can establish a history of a disability and meet the broad "record of a disability" standard. *EEOC v. Midwest Reg'l Med. Ctr.*, No. CIV-13-789-M, 2014 U.S. Dist. LEXIS 108898, at *13 (W.D. Okla. Aug. 7, 2014); *see also Mestas v. Town of Evansville*, 786 Fed. Appx. 153, 157 (10th Cir. 2019) (reversing summary judgment for employer, holding doctor's documentation about plaintiff's back injury, medical leave records, requests for time off for steroid injections and accommodation request for back pain supported record of a disability).

- *Bearshield v. John Morrell & Co.*, 570 N.W.2d 915 (Iowa 1997) – courts should consider (1) nature and severity of the impairment; (2) duration or expected duration of the

impairment; (3) permanent or long term impact or expect permanent or long term impact resulting from impairment

- An accommodation is simply some change or modification in the work environment which allows an individual with a disability to participate on an equal footing with non-disabled employees. 29 C.F.R. § 1630.2(o)(1)(iii).

    - Reasonable accommodations may include:

> making existing facilities used by employees readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C.A. § 12111(9)(B), 29 C.F.R. § 1630.2(o)(2) (emphasis added).

- An employer must make a reasonable accommodation for a disability unless it would be an undue hardship to do so. *Frank v. Amer. Freight Sys.,* 398 N.W.2d 797, 802 (Iowa 1987). Consistent with the ADAAA, the ICRA requires employers to make a good faith effort to assist disabled employees in seeking reasonable accommodations. *Smith v. State,* 759 N.W.2d 812, at *4 (Iowa Ct. App. 2008). They must do so by engaging in good faith in an "interactive process" with the employee to exchange information about the nature of the employee's limitations and to discuss potential accommodation options before resorting to termination.

- The failure to make reasonable accommodations in the employment of a disabled employee is prohibited discrimination. *Peebles v. Potter,* 354 F.3d 761, 766 (8th Cir. 2004). "Such discrimination occurs if 'a covered entity [does] not . . . make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.'" *Id.*, citing 29 C.F.R. 1630.9(a) (2003); accord *Ballard v. Rubin,* 284 F.3d 957, 960 (8th Cir. 2002); *Dropinski v. Douglas County,* 298 F.3d 704, 707 (8th Cir. 2002).

- The traditional *McDonnell Douglas* burden-shifting analysis that courts apply in disparate treatment discrimination cases does not apply in ADA reasonable accommodation cases. *Peebles,* 354 F.3d at 766, citing *Fenney v. Dakota, Minn. & R.R. Co.*, 327 F.3d 707, 712 (8th Cir. 2003) (collecting cases holding *McDonnell Douglas* analysis is inapplicable). "This is so because a claim against an employer for failing to reasonably accommodate a disabled employee does not turn on the employer's intent or actual motive." *Peebles* at 766 (internal citations omitted).

IV. Wrongful Termination

The Iowa Workers' Compensation Act does not guarantee an employee their position of employment. The workers' compensation statute also does not absolve an employee from following an employer's legitimate employment policies and expectations. There may arise situations in which an employer may need to discipline or terminate during or following a workers' compensation claim. The statutory provisions do not create a shield that prevents an employer from taking employment actions necessitated by legitimate business interests.

Iowa Code § 85 provides employees with the right to pursue compensation for work-related injuries regardless of an employee's employment status after the injury occurs. The work comp statute guarantees the right to compensation, but not ongoing employment. After termination, pending work comp claims continue without changes other than certain benefits may become payable following termination. An employee is entitled to pursue compensation for injuries that arose out of and in the course of employment prior to termination.

The Iowa Supreme Court recognized "that discharging an employee merely for pursuing the statutory right to compensation for work-related injuries offends against a clearly articulated public policy of this state" in *Springer v. Weeks & Leo Co.,* 429 N.W.2d 558, 560 (Iowa 1988). In *Springer*, the Iowa Supreme Court recognized the common law tort of retaliatory discharge in violation of public policy for an injured worker who is discharged in retaliation for filing a workers' compensation claim.

- Protected conduct includes intent or threat to file a workers' comp claim. *Niblo v. Parr Mfg., Inc.,* 445 N.W.2d 351, 353 (Iowa 1989) (employee intending or threatening to file workers' compensation claim is protected activity); *Hansen v. Sioux By-Products,* 988 F.Supp. 1255, 1267 (N.D. Iowa 1997) ("As a matter of law, actual filing of a workers' compensation claim before termination is not required to trigger the claim. Such a claim may be based on interference with workers' compensation claims, such as by terminating an employee when the employee reports or seeks treatment for a work-related injury or when it is apparent that the employee wants or needs workers' compensation coverage for a work-related injury") (internal citations omitted); *Fogel v. Trustees of Iowa College,* 446 N.W. 2d 451, 454-55 (Iowa 1989) (for activity to be protected, employee must give employer "reason to believe workers' compensation claim was contemplated").

- It does not extend to require an employer to offer light duty or compel particular actions taken in return to work situations. Huffman v. AADG, Inc., 781 N.W.2d 101 (Iowa Ct. App. 2010) 2010 WL 624855 at *4.