Retail Industry Update

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Avoiding Charges Of Workers' Comp Retaliation

By Ed Harold (New Orleans)

In October, the U.S. Court of Appeals for the 10th Circuit upheld a jury's decision that a package delivery company had retaliated against one of its workers for filing a workers' compensation claim. Fortunately for the company, the Court reduced the jury's $2 million verdict to about $630,000. In July, an Illinois jury awarded a workers' compensation retaliation plaintiff $4.2 million including $3.6 million in punitive damages.

Reviewing news reports about these verdicts suggests punitive damages are normally awarded when a jury finds for the employee. That makes these cases one of the hottest fields in employment law. A Google search for "workers' compensation retaliation lawyer" reveals that employment law firms all over the country are actively promoting themselves and seeking clients in this field.

Why The Big Increase?

Several factors seem to have generated this wave of litigation. One of the major factors is that these claims arise under state law and are brought in state court. Even if diversity jurisdiction exists, in some states the cases are not removable under the workers' compensation exception. State courts remain more reticent to grant summary judgment, so more of these cases actually make it to trial.

Another factor appears to be a predisposition on the part of jurors to presume that employers are willing to retaliate. While this is a factor in all forms of retaliation cases, it seems heightened in the workers' compensation arena. Everyone seems to have their own story about how a family member or friend was treated badly by their employer when they were hurt on the job.

Workers' compensation insurers and risk managers have also engaged in advertising designed to encourage employees to report fraud in the system. The unintended consequence of these efforts is to suggest to employees that employers believe all workers' compensation claims are fraudulent, a concept with which they do not agree.

Finally, there is the double whammy present in many of these cases where the employee's underlying claim was denied right before the employee was terminated. No conduct is likely to inflame a jury as much as an employer's complete destruction of the employee's economic support after the employee gave up physical health in the employer's service.

"I Think He's Faking It"

Another problem is that managers and supervisors are much freer with their opinions of an injured worker's plight than they would be discussing an employee's religion, race, or age. The injured worker is an easy target for an unhappy manager. Managers often express their frustrations out loud when an injured employee is unable to accomplish the tasks he or she would ordinarily perform. Evidence that the manager expressed skepticism toward the employee's injury and wanted to get rid of him for not being at work, or for being at work and doing less than normal, is hard to overcome when trying to prove a termination was not related to the claim.

Even if managers have never expressed a negative word toward an employee's injury, they have probably at least discussed it. Evidence of your managers' awareness of the injury can be easily morphed into a prejudice against that injury. Jurors will simply never distinguish between animosity and frustration at the injured employee's performance, and the hardships created by it and animosity toward the fact the employee made a workers' compensation claim.

Of course, an employee suffering an on-the-job injury is not protection against being terminated for conduct or performance issues – including being terminated for simply no longer being able to do the job. But terminating an employee who was injured on the job does require added effort in making sure the termination will withstand scrutiny.

How These Cases Get Tried

In order to understand the steps to take to avoid claims, it is important to understand the evidence that employees use to prove their claims. The most common form of evidence is the timing between the injury and the termination. If an employee is fired within days or weeks of making a claim, courts may allow a jury to draw the inference that the two events were connected. Another form of evidence is to show that the employee had no disciplinary history or record of problems prior to the injury and only after the injury, began to be counseled.

As mentioned above, comments about the injury by the manager can also suggest a retaliatory motive. The employee could also show retaliatory motive through classic disparate-treatment evidence that similarly situated employees were not terminated for the same conduct. Not following the ordinary progressive discipline policy also can suggest an illicit motive. If a supervisor recommends terminating a workers'

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compensation claimant, and any of these factors are present, the termination must be carefully scrutinized.

Timing is not always a matter that can be cured simply by waiting for several months to pass to take action. If the employee is stealing or sexually harassing another employee, the matter cannot go unaddressed. The key is that the investigation into the behavior and the proof of the behavior must be solid. If an employee can show significant flaws in the investigation, or the evidence of wrongdoing is weak, a jury may presume that the employee was being set up.

If the problem is performance (as opposed to misconduct) swift action is rarely necessary. In this regard, you must first ascertain whether the performance issue is a product of the injury. If so, the employer should engage its accommodation process under the Americans with Disabilities Act (ADA). Unlike counseling and coaching, the accommodation process is not a path to termination and will exhibit the employer's good faith in working with the employee. If the performance issue is not related to the injury, then you should follow your ordinary practices for addressing performance. While the employee might not be saved, allowing the time to pass to try will naturally diminish any connection between the two events.

A Look In The Mirror

If a supervisor recommends the termination of an employee with no record of problems prior to the injury, and that recommendation is not related to an employee's diminished functioning because of the injury, there is a good chance the supervisor was not performing his duties. Human nature being what it is, it would be rare for an employee to become a bad employee after the injury. The supervisor likely allowed the now unwanted behaviors to go on for a long period of time.

No amount of counseling and discipline can overcome the fact the conduct was not an issue prior to the injury. In this situation, sometimes the only cure is the removal of the supervisor from the store. A new supervisor, with no history with the employee, can establish new standards and not countenance behavior that went unchallenged before. Of course, the standards must be applied equally to all employees, not just the injured one. But in the right circumstance, the new supervisor need not even be advised of the fact of the workers' compensation claim.

You should also train supervisors that talking about an employee's workers' compensation claim, or the injury, or its resulting limitations, is not appropriate. A good rule of thumb is to tell supervisors to treat this information with the same respect it would treat any other medical information. In this regard, supervisors should also not be tasked with any responsibility for gathering or receiving any claim-related information from the employee. If there is a belief the employee's claim is fraudulent, having a supervisor involved in the investigation will destroy his ability to be viewed as impartial toward the employee. Any action later taken by that supervisor will be tarred by the brush of his or her trying to prove the employee a fraud. More importantly, the individuals handling the workers' compensation claim should never intrude upon or involve themselves in any question related to the employee's continued employment.

The most damning type of evidence in a workers' compensation retaliation case is that similarly situated employees were treated differently. In discrimination cases, federal courts often allow fine distinctions to differentiate situations and reject their validity as evidence. Juries do not paint with such a fine brush. Any modicum of similarity between two employees will be enough to allow a comparison if the two were treated differently. Telling a jury that the reason the injured employee did not get the same second chance as a manager was his status as an hourly employee, can be a recipe for disaster.

Given the current litigation trends, monitoring the employment of employees with workers' compensation claims demands resources. It is worth investing extra time in analyzing all the factors and scrutinizing the evidence supporting a termination before the decision is made.

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