Below the Red Line

Heyl Royster

Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals *June 2009*

A Word from the Practice Group Chair

The calendar shows that summer is almost here, but the world of Illinois workers' compensation shows no signs of taking a summer vacation. As we did at our Bloomington seminar last month, our newsletter this month highlights the interplay between having a successful workers' compensation program and a successful employment law program in your business.

This month, the Chair of our Employment Law Practice Group, Brad Ingram, discusses employment law issues that can affect all of us, including those who handle workers' compensation issues exclusively. These two areas of the law continue to blend together and seem to do so at an accelerating pace in as we face current economic challenges. If you need counseling and advice in this area please do not hesitate to contact our workers' compensation and/or employment law attorneys.

Many thanks to those of you who attended our seminar in May! To those of you who could not make it, the excellent and practical written outlines prepared by our speakers are now online at www.heylroyster.com. If any of you would like an in-house presentation on workers' compensation or employment law matters, please let me know.

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Our Practice Group Offers:

- EEOC, OSHA, and Department of Labor Representation
- Workers' Compensation Training for Supervisors
- In-House Seminars
- Employment and Harassment Training and Testing
- Risk Management of Workers' Compensation Liability
- Appellate Court Representation

This Month's Author:

Bradford B. Ingram is a partner in the Peoria office of Heyl Royster and is the partner in charge of the firm's Employment Law Practice Group. He also manages the defense of workers' compensation cases and civil rights and municipal claims. He received his Bachelor of Arts degree in Political Science from Drake University in 1976 and his Juris Doctorate from Drake University Law School in 1980. He has authored a number of publications and is a frequent speaker on employment law before local and national bar associations and industry groups. He is active in the Employment Law Committees of the Defense Research Institute and the International Association of Defense Counsel, and he serves on the Board of Governors of the College of Workers' Compensation Lawyers.

AVOIDING RETALIATORY DISCHARGE CLAIMS

Retaliation claims are the fastest growing and most difficult to defend of all discrimination claims. The EEOC received nearly 23,000 retaliation claims in 2004 and these numbers have increased every year thereafter. The EEOC has recovered over $90 million for retaliation claims, not including monies obtained through litigation. As these claims continue to increase, they account for nearly one-fourth of all the EEOC charges.

This article will discuss the Illinois tort of retaliatory discharge as well as retaliation under federal statutes. The article will address strategies for prevention of retaliation claims and focus on the need for employers to resolve underlying discrimination claims in an appropriate manner, whether those claims are well-founded or not. Addressing the underlying discrimination claim without reprisals will help prevent the filing of a more difficult retaliation claim.

An employer is always best served by avoiding the retaliation claim altogether. This can be accomplished only by doing the right thing from the beginning. Many employers recognize the need today to provide specific training for managers and supervisors regarding retaliation in the workplace and instruct those managers on how to prevent such claims from developing.

RETALIATION FOR FILING A WORKERS' COMPENSATION CLAIM – ILLINOIS LAW

In a general sense, retaliatory discharge claims arise from a worker's discharge from employment for reasons of whistle-blowing, exercising protected rights (such as under the First Amendment), or for exercising rights protected under the Workers' Compensation Act. The Illinois Supreme Court first recognized the tort of retaliatory discharge in ***Kelsay v. Motorola, Inc.***, 74 Ill. 2d 172, 384 N.E.2d 353, 23 Ill. Dec. 559 (1978). In that case, the employer acknowledged that it maintained a practice of discharging workers who had filed workers' compensation claims, but defended that policy on the ground that the employee served at will. The Court held that the employee should have a cause for retaliatory discharge because Motorola's actions were inconsistent with the underlying purpose of the Act in providing a remedy for work-related injuries without fear of retaliation. ***Kelsay***, which was decided in 1978, followed on the heels of the 1975 amendment to the Act, which provides that it is a misdemeanor for an employer to retaliate for an employee's exercising his rights under the Act. 820 ILCS 305/4(h).

Elements of the Tort

To state a cause of action for retaliatory discharge under Illinois law, the employee must show: (a) his status as an employee of the defendant employer prior to the injury; (2) his exercise of a right protected by the Workers' Compensation Act; and (3) his discharge causally related to the filing of the workers' compensation claim or other protected action. ***Groark v. Thorleif Larsen & Son, Inc.***, 231 Ill. App. 3d 61, 596 N.E.2d 78, 172 Ill. Dec. 799 (1st Dist. 1992). A retaliatory discharge claim can be brought by union and non-union workers. ***Midgett v. Sackett-Chicago, Inc***., 105 Ill. 2d 143, 473 N.E.2d 1280, 85 Ill. Dec. 475 (1984).

Despite the existence of several elements in the cause of action, the most significant and most heavily litigated issues concern the following points:

The Employee Must Exercise a Right Protected by the Act

The most basic element of the cause of action requires that the employee be discharged for exercising a right protected by the Act. The most obvious of these rights is the filing of a claim for compensation. Yet, courts have held that other actions just short of filing are also sufficient, including an employee's intention to file a claim, reporting a claim or seeking medical care for work-related injuries, and refusing to withdraw a claim. Cases have also deemed the following acts as protected: testifying at a co-workers' workers' compensation trial; making a claim to the employer's workers' compensation carrier rather than filing an action with the Commission; and filing a negligence suit against a third party, who in turn files suit against the employer seeking contribution. Regardless, the employee must prove that the employer was aware that the employee was pursuing some remedy in accordance with the work-related accident.

At least one case has held that an employee has a cause of action for retaliatory discharge where he is terminated for having filed prior claims with other employers. *See* ***Darnell v. Impact Industries, Inc.***, 105 Ill. 2d 158, 473 N.E.2d 935, 85 Ill. Dec. 336 (1984). "We perceive no distinction between the situation where an employee is discharged for filing a workers' compensation claim against the defendant employer

and one where the employer discharges the employee upon discovering that the employee had filed a claim against another employer… ".

In ***Hester v. Gilster-Mary Lee Corp***., 386 Ill. App. 3d 1104, 899 N.E.2d 589, 326 Ill. Dec. 372 (5th Dist. 2008), the appellate court held that a borrowed employee could maintain a cause of action for retaliatory discharge against a borrowing employer, where the borrowed employee was fired by the borrowing employer (and allowed to return to her temporary employment agency) after being subpoenaed to testify in a co-workers' workers' compensation trial.

The Employee Must Actually be Discharged; Constructive Discharge Generally Not Actionable

Although the question of what constitutes a "discharge" is subject to debate, the cause of action requires that the employee be discharged. "Constructive discharge," such as being terminated for harassment or for being reassigned to a less-desirable job, is insufficient to state a claim. ***Zimmerman v. Buchheit of Sparta, Inc.,*** 164 Ill. 2d 29, 645 N.E.2d 877, 206 Ill. Dec. 625 (1994). Nevertheless, at least one decision has commented on the meaning of discharge:

> There are no magic words required to discharge an employee: an employer cannot escape responsibility for an improper discharge simply because he never uttered the words "you're fired." So long as the employer's message that the employee has been involuntarily terminated is clearly and unequivocally communicated to the employee, there has been an actual discharge, regardless of the form such discharge takes.

Hinthorn v. Roland's of Bloomington, Inc., 119 Ill. 2d 526, 519 N.E.2d 909, 116 Ill. Dec. 694 (1988) (Coercing an employee to resign constituted a discharge).

A refusal to rehire or recall due to the employee having filed for benefits may likewise considered a discharge, at least in regard to seasonal workers. ***Motsch v. Pine Roofing Co., Inc.***, 178 Ill. App. 3d 169, 533 N.E.2d 1, 127 Ill. Dec. 383 (1st Dist. 1988). *But see* ***Webb v. County of Cook***, 275 Ill. App. 3d 674, 656 N.E.2d 85, 211 Ill. Dec. 893 (1st Dist. 1995). A refusal to rehire may still provide the basis for defeating summary judgment, as it has been held to "cast[] a shadow as to the purity of the [employer's] motive." ***Jones v. Burkart Foam, Inc.***, 231 Ill. App. 3d 500, 596 N.E.2d 882, 173 Ill. Dec. 258 (5th Dist. 1992).

Acts such as a demotion or threats of discipline, however, are not actionable. ***Melton v. Central Illinois Public Service Co.***, 220 Ill. App. 3d 1052, 581 N.E.2d 423, 163 Ill. Dec. 472 (4th Dist. 1991) (threats of discipline); ***Graham v. Commonwealth Edison Co.***, 318 Ill. App. 3d 736, 742 N.E.2d 858, 252 Ill. Dec. 320 (1st Dist. 2000) (demotion). Threats alone, without actually cutting off the employee's compensation benefits or terminating the employee, will not support the filing of a retaliation claim.

The Causation Element – The Employee Must Affirmatively Show That His Discharge Was Primarily in Retaliation for His Exercise of a Protected Right

The most frequently litigated issue in retaliatory discharge cases involves the causation element. An employee must affirmatively show that the discharge was in retaliation for his exercise of a protected right under the Workers' Compensation Act. *See* ***Roger v. Yellow Freight Systems, Inc.***, 21 F.3d 146, 149 (7th Cir. 1994).

The Employee Must Establish a Retaliatory Motive for the Termination

An employer must have actual knowledge that the employee has filed a workers' compensation claim or otherwise taken actions protected by the Act before the employer can have the requisite retaliatory notice. ***Beckman v. Freeman United Coal Mining Co.,*** 123 Ill. 2d 281, 527 N.E.2d 303, 122 Ill. Dec. 805 (1988). The key point here is that the employer must have *actual* awareness, as opposed to constructive awareness, of the filing or other action. An employer is not on notice of an employee's potential intention to file a workers' compensation claim simply because an employee has incurred a work-related injury. ***Beckman***, 123 Ill. 2d at 287.

Likewise, the law is clear that only statements from those persons who have the authority to discharge the employee can be used to show a retaliatory motive. ***Marin v. American Meat Packing Co.***, 204 Ill. App. 3d 302, 562 N.E.2d 282, 149 Ill. Dec. 818 (1st Dist. 1990).

Evidence of retaliatory motive typically cannot be circumstantial, although when such evidence is considered it

is commonly in the form of sequential evidence – the filing of a claim or taking of a protected action followed by the employee's termination, thereby creating the inference that the termination was related to the protected action. *See, e.g.*, ***Wolcowicz v. Intercraft Industries Corp.***, 133 Ill. App. 3d 157, 478 N.E.2d 1039, 88 Ill. Dec. 431 (1st Dist. 1985) (Illinois law); ***Mercil v. Federal Express Corp.***, 664 F.Supp. 315 (N.D. Ill. 1987) (generally not sufficient under federal law).

Valid Non-Pretextual Reason

Even if the employee can show a retaliatory motive, the claim fails if the employer shows that it had a valid non-pretextual basis for discharging the employee. A pretext has been defined as "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs." ***Marin v. American Meat Packing Co.***, 204 Ill. App. 3d 302, 562 N.E.2d 282, 149 Ill. Dec. 818 (1st Dist. 1990). An employer is not required to reveal its valid non-pretextual basis until after the employee has presented a *prima facie* case of retaliatory discharge.

Valid non-pretextual grounds include, but are not limited to:

- An employee's excessive absenteeism, even if from a work-related injury
- The employee's physical inability to perform his job duties
- An economic layoff or plant closing
- The employee's poor job performance or violating company rules
- The filing of a fraudulent claim

If you have any questions about whether a certain act justifies termination, please feel free to contact our offices.

Damages

The damages available in a retaliatory discharge claim include pain and suffering and aggravation of the underlying injury and punitive damages, but typically not lost wages or medical care that flow from the underlying injury. Recovery of TTD, medical, and permanency are under the Act. Most insurance policies do not cover claims for retaliatory discharge.

Burden of Proof

The employee must prove his retaliation case by a preponderance of the evidence. The employee must show that the sole reason for his termination was his exercise of a protected right under the Act. Illinois has declined to follow the three-tiered analysis used by the federal courts and set forth in ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 93 S.Ct. 1817 (1973), and continues to utilize a traditional tort analysis. ***Clemons v. Mechanical Devices Co.***, 184 Ill. 2d 328, 704 N.E.2d 403, 235 Ill. Dec. 54 (1998).

Less Obvious Forms of Retaliation

- Performance evaluations, pay raises, and promotions
- Job references
- Acts against relatives and friends

IMPLICATIONS UNDER FEDERAL RETALIATION LAW

In ***Burlington Northern & Santa Fe R.R. Co. v. White***, 458 U.S. 53, 126 S.Ct. 2405 (2006), the Supreme Court created the right of action for retaliation even where the employee suffered no tangible adverse action (one causing an economic loss) and was not subjected to a hostile work environment. Under ***Burlington Northern***, an employee may recover if he can identify a "materially adverse employment action," which is defined as an action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Federal discrimination claims must follow the three-tiered analysis of ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 93 S.Ct. 1817 (1973), which requires that the plaintiff first establish a *prima facie* case. If the plaintiff does, the burden shifts to the defendant to show a lawful reason for the discharge (a non-pretextual ground), after which the burden shifts back to the plaintiff to rebut the proffered reason.

Americans with Disabilities Act of 1990 (ADA)

The Americans with Disabilities Act (ADA) outlaws any form of discrimination based on an employee's disability. ADA allegations often accompany a retaliatory discharge claim

because workers' compensation injuries may be considered a disability under the ADA. Essentially, the employee must show that he was discriminated against because of his disability. The presence of an ADA claim also allows filing in federal court.

Employee Retirement Income Security Act of 1974 (ERISA)

Some employment terminations can potentially affect an employee's pension rights. ERISA claims seek to protect the employee's pension rights and are often seen in workers' compensation retaliatory discharge claims.

OUR ADVICE TO EMPLOYERS TO AVOID RETALIATION CLAIMS

Invest in Employee Training

Employers today must educate their workforce on the prohibition against retaliation toward employees who engage in protected activity. It is human nature to contemplate retaliation against an individual for allegations of wrongdoing, particularly if those allegations are false. Training employees that retaliation is illegal and creates exposure for the employer is crucial. Employers must take steps to stop an employee's natural instinct to retaliate under such circumstances. Education and training are essential.

Conduct a Proper Investigation

Employers must objectively conduct an appropriate investigation of any complaints of discrimination, harassment or retaliation. If a senior member of management is involved, an employer must consider retaining an outside or independent investigator. Employees interviewed during an investigation, including the complaining employee, should be told that the investigation and interviews cannot be kept confidential, but will only be disclosed to those with a need to know.

Avoid Direct Communication

Employers should not discuss with an employee his participation in any protected activity. An employer should not discuss allegations with the employee. The employer should never express disappointment or criticize the employee directly or indirectly for engaging in a protected activity.

Clearly Designate who has Discharge Authority

Designating the precise chain of authority as to who can and cannot discharge employees can help limit exposure for retaliation claims, since the case law looks to the individual with termination power when determining intent to retaliate.

Enforce Work Rules Consistently

Employers must act consistently and avoid inconsistent treatment of different employees under similar circumstances. This is typically why retaliation claims are made and the way causation is established in a discrimination case. For example, employers must avoid suddenly enforcing policies or work rules that were previously overlooked or treated lightly. Application of an attendance policy more strictly than it was enforced prior to the protected activity can support an employee retaliation claim.

Proper Documentation

Employers must keep accurate and detailed records for their employees and should not hesitate to document violations of policy or poor performance.

Absenteeism Policies

Establishment and enforcement of a written absenteeism policy can serve as a valid non-discriminatory reason for discharge. However, the employer must consistently and uniformly apply the policy to all employees.

Make Good Faith Effort to Return Employee to Work

An employer should make well-documented attempts to return the employee to work. Such actions show a lack of retaliatory intent and can also assist in reducing the value of the underlying workers' compensation claim by eliminating wage differential and permanent total disability scenarios.

We invite you to contact us for assistance with your employment law needs or any questions concerning how to handle a problem employee so as to minimize the potential for a retaliation claim.

For More Information

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The cases or statutes discussed in this newsletter are in summary form. To be certain of their applicability and use for specific situations, we recommend that the entire opinion be read and that an attorney be consulted. This newsletter is compliments of Heyl Royster and is for advertisement purposes.