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WORKERS' COMPENSATION AND THE RETALIATORY EMPLOYMENT DISCRIMINATION ACT: CAN AN EMPLOYER FIRE AN INJURED WORKER?

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Employers often ask whether they can terminate an employee who is out of work as a result of a compensable on-the-job injury. Almost always, the answer to this question is "It depends." The question of whether to terminate the employee is complicated by the fact that a myriad of state and federal laws apply to this situation, including the North Carolina Workers' Compensation Act,[1] the North Carolina Retaliatory Employment Discrimination Act (REDA),[2] the Americans with Disabilities Act (ADA),[3] and the Family and Medical Leave Act (FMLA).[4] The employer's own personnel policy may provide additional protection, which must also be taken into consideration. Employers attempting to analyze the maze of requirements imposed by these statutory schemes will find numerous questions with few absolute answers. This bulletin focuses on the circumstances under which the injured employee can be terminated without running afoul of the Workers' Compensation Act or REDA. It does not address the obligations imposed by the ADA and FMLA. [For a review of the employer's responsibilities under the ADA and FMLA, see "Navigating through ADA, FMLA, and Workers' Comp" by Cary Grant in the fall 1995 issue (vol. 61, no. 2) of *Popular Government*.]

Note: This bulletin was previously released under the title *Workers' Compensation and the Retaliatory Discharge Act: Can an Employer Fire an Injured Worker?*

1. N.C. Gen. Stat. §§ 97-1 through 97-101.1. (Hereinafter the General Statutes will be referred to as G.S.)
2. G.S. 95-240 through 95-245.
3. 42 U.S.C.A. §§ 12101–12213.
4. 29 U.S.C.A. §§ 2601–2654.

The North Carolina Workers' Compensation Act

Purpose of the Act

The North Carolina Workers' Compensation Act was enacted in 1929 for the purposes of providing swift compensation to the injured employee and limiting the liability of the employer.[5] Prior to the enactment of the statute, employees injured on the job had only the common law remedy of a civil suit for negligence and the right to trial by jury. If the employee prevailed, he or she could recover for complete damages, including pain and suffering. The employee's chances of success, however, were slim. First, the employee had to establish that the employer was negligent. Once this was proven, the employer could assert the affirmative defenses of contributory negligence, negligence of a fellow employee, or assumption of risk. The employer would prevail if it could show that the employee was injured as a result of his or her own negligence or that of another employee. Because many of the claims for injuries by employees would be barred by the employer's affirmative defenses, employees often had little recourse in the event of an employment-related injury.

The Workers' Compensation Act addressed this problem by requiring employers to compensate employees for work-related injuries without regard to the negligence or fault of the employer or the employee. In return for fairly swift and certain compensation, employees were required to give up their common law right of action against employers and would only be entitled to limited benefits under the statutory scheme. The act represented a trade-off of the rights and remedies between the employer and the employee, and became the exclusive remedy for most work-related injuries.

Benefit Eligibility and Computation

Employees are entitled to workers' compensation benefits if, while carrying out activities for the benefit of their employer, they suffer an injury by accident, a "specific traumatic incident" resulting in a hernia or back injury,[6] or an "occupational disease."[7]

5. Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 709, 295 S.E.2d 458, 460 (1982).

6. G.S. 97-2.

7. G.S. 97-52.

All injuries must "arise out of and in the course and scope of" the covered employment to be compensated.[8]

Once an injury is determined to be compensable, the employee is entitled to medical care and wage replacement. Employers must provide all medical, surgical, hospital, nursing, and rehabilitative services and all medicines as may reasonably be required to effect a cure, give relief, or lessen the period of disability.[9] The costs of medical compensation are in addition to cash benefits and do not offset or reduce them.

Compensation is based on the employee's average weekly wage, which is generally computed by averaging all wages earned by the employee in the employment in which the injury occurred (including overtime, paid holidays, special allowance for board and lodging, and so forth) during the fifty-two weeks prior to the injury. Injured workers are entitled to two-thirds of their average weekly wage or a maximum of $588.00 per week during the period of disability.[10]

The definition of disability under the Workers' Compensation Act focuses on the employee's post-injury earning capacity. Generally, an employee is disabled and eligible for workers' compensation benefits if he or she is unable to earn normal wages due to a work-related injury. The Workers' Compensation Act contemplates four types of disability: temporary total, permanent partial, temporary partial, and permanent and total disability. These types are distinguished as follows:

1. **Temporary total disability** occurs when an employee is totally disabled for employment for a limited period. There is a presumption that the employee will eventually recover and return to work. During this period of disability, the employee is entitled to two-thirds of his or her average weekly wage after the first seven days of disability. If the disability continues for more than twenty-one days, the employee is entitled to receive compensation for the first seven days.
2. **Permanent partial disability** occurs when an employee has sustained a permanent injury that prohibits returning to the same type

8. G.S. 97-2(6).

9. G.S. 97-25; Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

10. The maximum weekly benefit is adjusted annually to equal approximately 110 percent of the average North Carolina wage. G.S. 97-29.

of job, resulting in a reduction in earning capacity. The employee is entitled to two-thirds of the difference between what he or she was earning before the injury and what he or she was capable of earning afterwards for up to 300 weeks. If the employee has sustained a permanent injury to a specific body member, which is considered a scheduled injury, the employee is entitled to benefits for a prescribed number of weeks pursuant to Section 97-31 of the North Carolina Gneral Statutes (hereinafter G.S.).

3. **Temporary partial disability** occurs when an injured worker can return to light-duty work at a reduced rate of pay. The employee is entitled to two-thirds of the difference between his or her post-injury and pre-injury average weekly wage for up to 300 weeks from the date of injury. Any number of weeks wherein temporary total disability benefits were paid will be deducted from the 300-week maximum.
4. **Permanent and total disability** occurs when an employee is incapable of earning wages on a permanent basis. If such a disability occurs, the employee is entitled to lifetime benefits of two-thirds of his or her average weekly wage. The loss of both hands, both arms, both feet, both legs, or both eyes, or any two thereof, constitutes total and permanent disability.

Effect of Injury on Employment

Under the Workers' Compensation Act, an employee who has sustained a compensable on-the-job injury can be terminated for reasons unrelated to the injury. For example, in *Seagraves v. Austin Company of Greensboro*,[11] the plaintiff developed carpal tunnel syndrome in connection with her employment as an assembly line worker and her employer accepted liability for her occupational disease. After undergoing several surgical procedures, the plaintiff was released to return to light-duty work that the employer provided. Shortly after her return, the plaintiff was fired for allegedly exposing her buttocks to two co-workers.

Section 97-32 provides that "if an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission, such refusal was justified." In *Seagraves*, the employer argued that the plaintiff's misconduct constituted a constructive refusal of suitable employment so as to bar her from receiving additional benefits. The court held that if the employee's loss of employment or diminution in wages is attributable to a wrongful act, further workers' compensation benefits may be barred. If, on the other hand, the loss or diminution in wages is attributable to the employee's work-related disability, the employee will continue to be entitled to benefits. To establish that an employee has constructively refused employment, the employer must show that

> the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated. If the employer makes such a showing, the employee's misconduct will be deemed to constitute a constructive refusal to perform the work provided and consequent forfeiture of benefits or lost earnings, unless the employee is then able to show that his or her inability to find or hold other employment of any kind, or other employment at a wage comparable to that earned prior to the injury, is due to the work-related disability.[12]

Where the employee's termination is related to the on-the-job injury, the law tends to favor the injured employee with respect to the continuation of workers' compensation benefits. Unlike some other states, however, North Carolina has no statute prohibiting employers from discharging workers who are on temporary total disability solely because of their absence from work. Moreover, the Workers' Compensation Act is silent on the issue of whether the employer must provide the injured employee with leave, paid or otherwise.[13] The amount of leave to grant to the injured employee is left to the discretion of the employer, with most favoring liberal leave policies for reasons discussed below. In the event that an employer chooses to terminate a worker who has sustained a compensable on-the-job injury due to his or her inability to work, this decision may have the

11. 123 N.C. App. 228, 427 S.E.2d 397 (1996).

12. *Id.* at 234, 472 S.E.2d at 401.

13. G.S. 97-28 provides that nothing therein shall prevent an employer from allowing an employee to use paid sick leave, vacation or annual leave, or disability benefits during the seven-day waiting period but does not *require* the employer to grant leave during the waiting period or at any other time that the employee is out of work due to the injury.

unintended effect of prolonging the period during which the employee is entitled to compensation,[14] as in the following example.

> **EXAMPLE**: An employee sustains a work-related injury on March 31, 2000, that the employer acknowledges is compensable. The employee is temporarily unable to work while recuperating from the injury. During this period, the employee has a temporary total disability and is entitled to workers' compensation benefits following the seven-day waiting period. The employer fires this employee on April 14, citing unavailability and exhaustion of sick and vacation leave.
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> Until such time as the employer proves otherwise, the worker is presumed disabled and is entitled to continuing benefits.[15] Although there is nothing in the Workers' Compensation Act that prohibits the employer from terminating the employee, the employer may have violated REDA, the FMLA, and the ADA.

The Retaliatory Employment Discrimination Act

Development of the Law

The precursor to the Retaliatory Employment Discrimination Act was G.S. 97-6.1, which was repealed effective October 1, 1992. Section 97-6.1 overruled *Dockery v. Lampart Table Co*.,[16] in which the court refused to make an exception to North Carolina's employment-at-will rule for employees who were discharged in retaliation for filing workers' compensation claims. The ability of an employer to discourage an employee's exercise of his or her rights under the Workers' Compensation Act through retaliatory discharge or demotion motivated the legislature to enact G.S. 97-6.1.[17]

In 1992, G.S. 97-6.1 was replaced by the more comprehensive REDA. Motivated by a tragic fire that took the lives of twenty-five workers in Hamlet in 1991, the legislature sought to remedy unsafe and unlawful workplace conditions by providing employees a mechanism to report safety violations without being punished for doing so. In pertinent part, the law provides that "no person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to . . . file a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to" a workers' compensation claim.[18] Retaliatory action means the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment.[19] The statute provides an affirmative defense for employers who establish that they "would have taken the same unfavorable action in the absence of the protected activity of the employee."[20]

Proving a REDA Claim

To prevail under REDA, the employee must "show that [his] discharge was caused by [his] good faith institution of the workers' compensation proceedings."[21] In other words, the plaintiff must establish a causal connection between the protected activity and the termination. One of the factors that courts examining REDA claims look for is "a close

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14. *See* Flores v. Stacy Penny Masonry Company, ___ N.C. App. ___, 518 S.E.2d 200 (1999).

15. Once disability entitling the injured employee to workers' compensation benefits has been established, the employee is cloaked in the presumption of disability, and the burden is on the employer to rebut that presumption. The employer may do so through medical and other evidence, including evidence that suitable jobs are available to the employee and that the employee is capable of getting one, taking into account the employee's age, education, physical limitations, vocational skills, and experience. G.S. 97-2(9); Saums v. Raleigh Community Hosp., 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997).

16. 36 N.C. App. 244 S.E.2d, 272, *disc. review denied*, 295 N.C. 465, 246 S.E.2d 215 (1978).

17. Henderson v. Traditional Log Homes, 70 N.C. App. 303, 305, 319 S.E.2d 290, 292, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 923 (1984).

18. G.S. 95-241(a)(1). The law also prohibits discrimination or retaliation against persons who assert rights pursuant to the Wage and Hour Act, the Occupational Safety and Health Act, and the Mining Safety and Health Act. Additionally, discrimination against persons possessing sickle cell trait or hemoglobin C trait is prohibited under the Retaliatory Employment Discrimination Act.

19. G.S. 95-240(2).

20. G.S. 95-241(b).

21. Abels v. Renfro Corp., 335 N.C. 209, 215, 436 S.E.2d 822, 825 (1993) (decision based on G.S. 97-6.1, antecedent to G.S. 95-241).

temporal connection" between the plaintiff's instituting a claim and the adverse employment action.[22]

REDA "does not prohibit all discharges of employees who are involved in a workers' compensation claim; it prohibits only those discharges made because the employee exercises his compensation rights. The burden of proof in a retaliatory discharge action is on the employee."[23] The burden is not met by merely contending that the employee filed a complaint and his or her employment was coincidentally terminated.[24]

The North Carolina Supreme Court has recognized that federal decisions can offer guidance in establishing evidentiary standards in discrimination cases.[25] Accordingly, a plaintiff may establish retaliation by presenting direct evidence of retaliatory motive. In the absence of direct evidence, the plaintiff must pursue his or her claim under the inferential proof scheme set out in *McDonnell Douglas Corp. v. Green*.[26] A plaintiff can establish a prima facie case of retaliation under the *McDonnell Douglas* proof scheme by demonstrating by a preponderance of the evidence "(1) [that] the employer was aware of the plaintiff's participation in the protected activity; (2) that an adverse employment action was taken against the plaintiff engaged in the protected activity; and (3) that the two elements are causally related."[27] If the plaintiff presents a prima facie case and establishes that the filing of the workers' compensation claim was a substantial factor in the employer's adverse employment action, the burden shifts to the defendant to show that the same decision would have been made if the employee had not engaged in the protected activity.[28] Once the defendant articulates a nondiscriminatory reason for the adverse employment action, the burden then shifts back to the employee to show that the reason given was a pretext for retaliation.[29] The plaintiff always bears the ultimate burden of proving that the employer retaliated intentionally.[30]

If an employee ultimately prevails on a REDA claim, damages may include injunctive relief; reinstatement to the same or an equivalent position; compensation for lost wages, benefits, and other economic losses; and reasonable costs and expenses, including attorney's fees. The amount of economic damages may be trebled if the employee establishes that the employer's discriminatory action was willful.[31]

Terminating an Employee Who Has Filed a Workers' Compensation Claim

The statute and existing body of case law make it clear than an employee who engaged in protected activity is not shielded from all subsequent disciplinary action for reasons totally unrelated to the exercise of his or her rights under the Workers' Compensation Act.[32] The law is unclear, however,

22. Shaffner v. Westinghouse Elec. Corp., 101 N.C. App. 213, 216, 398 S.E.2d 657, 659 (1990) (finding no close temporal connection when three months had passed between filing claim and ultimate termination in light of evidence plaintiff had received benefits for prior compensable injury), *disc. review denied*, 328 N.C. 333, 403 S.E.2d 839 (1991) (decision based on G.S. 97-6.1, antecedent to G.S. 95-241).

23. Morgan v. Musselwhite, 101 N.C. App. 390, 393, 399 S.E.2d 151, 153, *disc. review denied*, 329 N.C. 498, 407 S.E. 536 (1991) (decision based on G.S. 97-6.1, antecedent to G.S. 95-241).

24. *Id.*

25. Thomas v. Eaton Corp., No. 1:95CV00660, 1996 U.S. Dist. LEXIS 16158 at *11 (M.D.N.C. Oct. 7, 1996).

26. 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

27. Strickland v. MICA Info. Sys., 800 F. Supp. 1320, 1323 (M.D.N.C. 1992) (case involved claim of retaliatory discharge pursuant to the Fair Labor Standards Act); Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985) (case involved Title VII retaliation action).

28. Brooks v. Stroh Brewery Co., 95 N.C. App. 226, 382 S.E.2d 874, *disc. review denied*, 325 N.C. 704, 388 S.E.2d 449 (1989) (case involved claim of retaliatory discharge by employee who had filed complaint under Occupational Safety and Health Act).

29. Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996) (applying *McDonnell Douglas* inferential proof scheme in a sex and age discrimination case).

30. Mitchell v. Data Gen. Corp., 12 F.3d 1310,1317 (4th Cir. 1993).

31. G.S. 95-243.

32. *See* Wiley v. United Parcel Service, Inc., No. 1:98CV00126, 1999 U.S. Dist. LEXIS 16806 (M.D.N.C. Aug. 17, 1999) (where the defendant-employer's new manager fired the plaintiff for failure to work as instructed and for gross insubordination, and where the manager did not know of the plaintiff's prior workers' compensation claims, the plaintiff was not fired in retaliation for filing workers' compensation claims); and Watkins v. Martin Mills, Inc., No. 3:96CV178, 1996 WL 1132745 (M.D.N.C. Dec. 13, 1996) (where the forecast of evidence shows that the plaintiff was paid workers' compensation benefits, given a one-year leave of absence to care for her son, and fired when

when it comes to terminating an employee due to unavailability or inability to perform the job because of the underlying injury. In *Conklin v. Carolina Narrow Fabrics Company*,[33] the court addressed the issue of whether the dismissal of an employee who was unable to perform his job constituted a retaliatory discharge. This case was decided pursuant to REDA's predecessor, G.S. 97-6.1. In *Conklin*, the plaintiff injured his back as he helped his co-workers lift two steel beams. Approximately four months later, Conklin's doctor released him to return to work, but he was unable to perform his job duties due to the pain from his back injury. Section 97-6.1(c) provided that "an employer shall have as an affirmative defense . . . [the employee's] failure to meet employer work standards not related to his workers' compensation claim." Here, the court held that the employer may not avail itself of this defense because if the employee's failure to meet the defendant's work standards was due to the injury that was the subject of the workers' compensation claim, then failure to meet these standards was related to the workers' compensation claim.[34]

In an unpublished opinion, the Fourth Circuit Court of Appeals addressed a similar issue but reached a different conclusion under the current law regarding retaliatory discharge, G.S. 95-241.[35] Lorie Sanhueza sued her former employer, Dillard's Department Stores, claiming that it fired her in retaliation for filing a workers' compensation claim. Suffering from carpal tunnel syndrome, the plaintiff filed a claim on June 23, 1993, and took a six-month leave of absence effective July 6, 1993. Following corrective surgery, Sanhueza attempted to return to her former position at Dillard's distribution center. Because no work was available, Dillard's placed the plaintiff in the shipping department at one of its department stores. Shortly thereafter, Sanhueza's pain returned and her doctor restricted her from using her hands for lifting, pulling, pushing, or carrying in a repetitive manner. Dillard's and Sanhueza discussed other jobs within her restrictions in which she might be interested. None of these positions were available, and therefore Sanhueza remained on leave. When her six-month leave expired on January 7, 1994, and she still could not return to work, Sanhueza was terminated.[36]

Sanhueza filed a charge of discrimination with the North Carolina Department of Labor, the agency responsible for investigating alleged violations of REDA. The agency found that there was cause to believe Sanhueza had been discriminated against and subsequently issued her a right to sue letter. She originally filed suit in the Superior Court of Mecklenburg County. Dillard's removed the case to federal district court based on diversity jurisdiction. The district court granted summary judgment to Dillard's on the plaintiff's retaliatory discharge claim and the appellate court affirmed the decision. In the court's opinion, Dillard's did not spurn Sanhueza but instead tried to accommodate her. Ultimately, Sanhueza was fired because Dillard's had no work she could perform, not because she filed a workers' compensation claim.

The Commissioner of Labor has brought a similar case against Dillard's on behalf of Beverly Cleaver, an employee who was terminated after exhausting the maximum of six months leave following an on-the-job injury. The case is currently pending in Forsyth County Superior Court (Dillard's unsuccessfully sought to have the case removed to federal district court). This is a case to watch, as it will also address the question of whether and when an employer can fire an injured worker for unavailability and/or inability to perform his or her job without violating REDA.

Two cases from the Tenth Circuit Court of Appeals also provide guidance on the issue of whether an injured worker can be fired because of inability to return to work. The first case is *Wiles v. Michelin North America Inc*.[37] Wiles was injured in a work-related accident on January 28, 1994, while employed by Michelin as a tire builder. He filed a workers' compensation claim under which he was placed on temporary total disability. Under Michelin's medical leave policy, the maximum duration of any medical

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she failed to return from the leave of absence, the plaintiff has not made out a prima facie case of retaliatory discharge).

33. 113 N.C. App. 542, 439 S.E.2d 239 (1994).

34. *Id.* at 544, 439 S.E.2d at 241. *But see* Thomas v. Eaton Corp., No. 1:95CV00660, 1996 U.S. Dist. LEXIS 16158 at *18 (M.D.N.C. Oct. 7, 1996) (court said in dicta that the plaintiff's allegation that his medical condition was a motivating factor leading to his discharge does not constitute a claim under G.S. 95-241).

35. Sanhueza v. Dillard Department Stores, Inc., 1999 WL 253602 (4th Cir. 1999).

36. Dillard's had a leave of absence policy that provided as follows: "Should an employee be forced to utilize a Leave of Absence, the maximum length of any such absence is six months, regardless of the reason for the Leave of Absence. If the employee cannot return to work at the end of the six-month period, the employee may be terminated."

37. 173 F.3d 1297 (10th Cir. 1999).

absence or light-duty assignment was twenty-four months. If the employee was unable either to return to his or her former position or find another position within this twenty-four-month period, then the employee would be terminated. In accordance with this policy, Wiles was terminated on January 28, 1996, while receiving temporary total disability compensation under the Oklahoma Workers' Compensation Act.

The Oklahoma Workers' Compensation Act is similar to the North Carolina act prior to the repeal of G.S. 97-6.1 in 1992. While the Oklahoma law prohibited employers from discharging employees who were on temporary total disability solely because of their absence from work, it allowed an employer to dismiss an employee who was physically unable to perform assigned job duties.[38] Additionally, the Oklahoma act expressly prohibited any employer from "discharg[ing] any employee because the employee has in good faith filed a claim, or has retained a lawyer to represent him in said claim, instituted or caused to be instituted, in good faith, any proceeding under the provisions of this title, or has testified or is about to testify in any such proceeding."[39]

In *Wiles*, Michelin successfully argued that it did not fire the plaintiff because of his absence but because the medical information it possessed at the time of his termination showed that he had permanent injuries that prevented him from performing his job duties. The appellate court noted that temporary total disability was not an absolutely protected status and that the statute explicitly preserved the employer's ability to terminate an employee who is physically unable to perform his job.[40]

Although North Carolina employers cannot avail themselves of this statutorily provided defense, this case is useful nonetheless. Note that Michelin had a flexible policy that allowed an employee twenty-four months to return to his or her regular job or another full duty, regular assignment. Courts appear to look favorably upon employers who give their employees reasonable time to recuperate and those who try to facilitate the employees' return to work in some capacity.

The second pertinent Tenth Circuit case, *Sanjuan v. IBP, Inc.*,[41] is based on the Kansas Workers' Compensation Act. Sanjuan was employed by IBP as a flanker. His job entailed removing the hide and hair from carcasses of cattle that had been slaughtered. In May 1992 he experienced pain in his shoulder, arm, and back. Sanjuan's doctor subsequently restricted him to light-duty work. After being assigned to light duty, Sanjuan claimed that his supervisors retaliated against him by writing him up for disciplinary violations without explanation, yelling at him, and threatening him with further disciplinary action unless he returned to his original position. Sanjuan was fired on December 23, 1992, for allegedly over-shocking a cow with a cattle prod. A jury subsequently found in his favor on his retaliatory discharge claim and awarded him $39,000 in damages. Two important factors were that prior to his injury, Sanjuan did not have any problems with his supervisors, and that the subsequent problems were closely linked in time to his injury. According to the court, "close proximity in time may provide some probative evidence of retaliatory intent."[42]

Other factors cited by the jury were IBP's accident-free incentive program, whereby groups of employees would receive prizes if no injuries were reported for a period of time, and its "costs per injury" goals, by which the employer set a specific annual goal that was an average cost of workers' compensation for all employees. The court held that these were valid bases on which the jury could rely as circumstantial evidence relevant to IBP's motivation to discourage the reporting of injuries.

Conclusion

In determining whether the employer has a retaliatory motive, the courts appear to be willing to examine the circumstances of each case and to dismiss REDA claims when sufficient evidence of retaliatory motivation is lacking. While there is little jurisprudence in state courts, the Fourth Circuit's decision in *Sanhueza* suggests that REDA is not violated when an employer dismisses an employee who is unable to return to work within a reasonable period following a compensable on-the-job injury, even if the work-related injury is the reason for the employee's absence. While REDA does not require

38. The now repealed G.S. 97-6.1(e) provided that "the failure of an employer to employ, either in employment or at the employee's previous level of employment, an employee who receives compensation for permanent total disability, or a permanent partial disability interfering with his ability to adequately perform work available, shall in no manner be deemed a violation of this section." *See* Johnson v. Builder's Transport, Inc., 79 N.C. App. 721, 723, 340 S.E.2d 515, 517 (1986).

39. 173 F.3d at 1299.

40. *Id.* at 1302.

41. 160 F.3d 1291 (10th Cir. 1998).

42. *Id.* at 1299.

reasonable accommodation, this case also illustrates that the court will consider the employer's efforts to return the employee to work in some capacity.

Because of the potential for litigation, it is almost always dangerous to terminate an employee after he or she has filed a workers' compensation case. Therefore, employers are encouraged to take the following precautions before embarking on this course:

- Have a written policy that allows for termination after a certain period of time and enforce it consistently.
- Allow a reasonable period for the injured employee to recuperate. The period of time allowed for work-related injuries should be no less than the period allowed for absence for any other reason.
- Comply with the applicable workers' compensation laws and avoid disparaging remarks or stray comments about the employee's injury or workers' compensation claim.
- Ensure that employees who have asserted a workers' compensation claim are not treated less favorably than other disabled employees.
- Document the legitimate, job-related reasons for the employee's dismissal.

Employers must also continue to be mindful that the Workers' Compensation Act and REDA are not the only laws to be considered when contemplating disciplining or discharging an employee who has been injured on the job. Before taking any action, the employer must determine whether the employee is covered by the ADA and/or the FMLA, and, if so, ensure that the employee is afforded all rights and protections provided by these laws.

The intersection of all of these laws often results in questions that practically and conceptually are difficult to answer. When dealing with an injured employee, it is always best to seek information and guidance before taking action. By doing so, employers are likely to limit their organization's risk and exposure if an employee decides to pursue legal action under any of the available theories.

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