EMPLOYER'S RIGHTS AND OBLIGATIONS WHEN DEALING WITH EMPLOYEES ON WORKERS' COMPENSATION LEAVE

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Introduction

Prior to July 1, 1990, an employer who didn't discharge an employee for filing a workers' compensation claim and who treated workers' compensation injuries and absences in the same fashion it treated non-compensable injuries and absences, likely had no problems with workers' compensation discrimination. This status quo was disrupted in 1990, however, when the West Virginia legislature made sweeping changes to the Workers' Compensation statute. As a result, employers must now carefully examine their obligations under this statute when considering whether to discipline or terminate an employee out on workers' compensation leave.

Workers' Compensation Discrimination – Generally

Although certain specific right and privileges were granted to workers' compensation claimants in July of 1990, some general protections had been available for years. As early as 1980, the Supreme Court of Appeals of West Virginia ("Supreme Court of Appeals") ruled that an employer could not discharge an employee because he had filed a workers' compensation claim; that to do so violated the public policy of the State. *Shanholtz v. Monogahela Power Company*, 270 S.E.2d 178 (W. Va. 1980). Shortly thereafter, the Legislature enacted West Virginia Code § 23-5A-1 which provides that an employer shall not discriminate against any present or former employees because of his receipt of or attempt to receive workers' compensation benefits. It took nearly five years for a case to make its way to the Supreme Court of Appeals concerning the practical effects of this statutory provision.

In *Yoho v. Triangle PWC, Inc.*, 336 S.E.2d 204 (W. Va. 1985), the Court was faced with a discharge of an employee who had been absent from work for more than a year due to a compensable injury. The employer and the plaintiff's union had entered into a collective bargaining agreement which provided that seniority ceases to accrue after a twelve month absence from work for any reason. In Yoho's case, loss of seniority meant loss of a job and she was informed she was terminated. Although she claimed that the discharge violated § 23-5A-1, the Court disagreed on the ground that the employer's action was based on a facially neutral provision of the collective bargaining agreement and would have occurred regardless of the nature of her injury or whether or not she filed for workers' compensation benefits. Clearly, the *Yoho* court was preserving the sanctity of the collective bargaining process and did not wish to grant greater rights under such a process to workers' compensation claimants.

Workers' compensation discrimination law develops slowly – it was another five years after *Yoho* before our Court ruled on another discharge issue, and made some rudimentary attempts at determining exactly what a plaintiff had to prove under § 23-5A-1 to succeed on his discrimination claim. In *O'Dell v. Jenmar Corporation*, 400 S.E.2d 288 (W. Va. 1990) the Court rejected a claim of workers' compensation discrimination and ruled that a plaintiff must prove:

(1) that he is a member of a protected class; *e.g.*, that he filed a workers' compensation claim;
(2) that the employer made an adverse decision concerning the plaintiff; *and*
(3) BUT FOR the plaintiff's protected status, the adverse decision would not have been made.

The standard was one previously applied in the West Virginia Human Rights Act discrimination cases and was fairly stringent. "BUT FOR" is a difficult burden to prove, due to the fact that an employer can usually articulate legitimate reasons for the termination.

Realizing this, one year later, the Court refined and lightened the evidentiary burden on plaintiffs. In *Powell v. Wyoming Cablevision, Inc.*, 403 S.E.2d 717 (W. Va. 1991), the Court ruled that a plaintiff must prove:

(1) an on-the-job injury was sustained;

(2) proceedings were instituted under the Workers' Compensation Act; and

(3) the filing of the claim was a SIGNIFICANT FACTOR in the employer's decision to discriminate against the employee.

The "SIGNIFICANT FACTOR" test is clearly easier to prove than "BUT FOR," which implies a "SOLE FACTOR."

The Court also described the types of things which will be considered in determining whether the workers' compensation claim was a SIGNIFICANT FACTOR:

(1) proximity in time of the claim and discharge;

(2) evidence of satisfactory work performance and evaluations prior to the claim compared to those after the claim;

(3) evidence of harassing conduct;

(4) the severity of the injury as it relates to an employee's ability to perform his work – the Court said:

> "Obviously where the employee has suffered a severe injury that forever limits the employee's ability to perform his accustomed work, the employer should not be penalized for discharging the employee. Where the injury is less serious, further consideration must be given to what is a reasonable recovery period viewed again with the prospect of when the

> employee will be able to perform his accustomed work. In this regard, the employer is entitled to show that it is economically unfeasible to keep the job open or hire a temporary substitute."

If the plaintiff makes his evidentiary showing, the employer then has the burden of **proving**, (as opposed to merely **articulating** as in civil rights cases) a legitimate, nonpretextual, nonretaliatory reason for its actions. In rebuttal, the employee must offer evidence that the proffered reasons are merely pretextual. Obviously, the Court has lightened the evidentiary burden of the plaintiff and placed a heavier burden on the shoulders of employers. *See Sayre v. Roop*, 517 S.E.2d 290 (W. Va. 1999), where the Court granted a new trial to plaintiff who had failed to convince a jury that he had been refused a transfer because he was off work due to a compensable injury. The Court ruled that the Workers' Compensation Act generally prohibits the termination of an injured employee while off work for a compensable injury, and that the plaintiff's evidence in support of his allegation was overwhelming. The Court concluded that the jury verdict for the employer was a miscarriage of justice and against the clear weight of the evidence. *But see, Napier v. Stratton*, 513 S.E.2d 463 (W. Va. 1998), where the court upheld summary judgment for the employer against an employee who claimed he was discharged for filing a workers' compensation claim. The Court ruled that an employee who was discharged for falsifying his time cards shortly after his return to work from a compensable injury failed to state a claim under 23-5A-1.

When a plaintiff claims that he was terminated and the employer knew or should have known that he was seeking benefits, his claim is defective – an employer simply possessing knowledge of an employee's receipt of or attempt to receive benefits is

insufficient to prove discriminatory treatment. *Thompson v. Anderson Equipment Company*, Civil Action No. 5:94-0785 (S.D. W. Va. Oct. 27, 1995; Hallanan, J.).

Moreover, an employer can violate § 23-5A-1 by discharging an employee BEFORE a workers' compensation claim is even filed. A compensation claim need not actually be filed so long as the employee suffered a work-related injury and was attempting to file a claim. *Powell v. Wyoming Cablevision, Inc.*, 403 S.E.2d 717 (W. Va. 1991); *Peter v. Ampak-Division of Gatewood*, 484 S.E.2d 481 (W. Va. 1997).

Although there have been multiple statutory amendments since the first cases recognizing a cause of action of workers' compensation discrimination, the general nondiscrimination provisions of § 23-5A-1 are still alive and are increasingly easier to prove by an employee – and must always be considered when taking any disciplinary or discharge action against an employee who has happened to have filed for workers' compensation benefits.

A. W. Va. Code § 23-5A-3

West Virginia Code §23-5A-1 prohibits employers from discriminating "against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under [the West Virginia Workers' Compensation Act]." Furthermore, an employer will be liable for unlawful retaliation where it discharges an employee while the employee is off-work due to a compensable injury and is receiving (or is eligible to receive) temporary total disability benefits, unless the employee has committed a separate dischargeable defense:

> (a) It shall be a discriminatory practice within the meaning of section one [§ 23-5A-1] of this article **to terminate an**

> **injured employee while the injured employee is off work due to a compensable injury within the meaning of article four [§§ 23-4-1 et seq.] of this chapter and is receiving or is eligible to receive temporary total disability benefits**, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

W. Va. Code § 23-5A-3(a).

While plaintiffs' lawyers have argued over the years that a violation of section 23-5A-3 is essentially strict liability, the case law authority does not exactly agree. In *St. Peter v. Ampak-Division of Gatewood Products, Inc.*, 484 S.E.2d 481, 485 (W.Va. 1997), the Supreme Court of Appeals of West Virginia ("Supreme Court of Appeals") analyzed a claim under section 23-5A-3 exactly as it analyzes claims under section 23-5A-1. In any event, the safest bet is not to terminate an employee who is off work receiving workers' compensation benefits (unless a separate dischargeable offense clearly exists). Instead, the best course of action is to replace the employee (when otherwise appropriate, as discussed herein), and then leave the employee on inactive status until such time as they are released / their workers' compensation claim is closed, and then proceed through the reinstatement steps (again, as discussed herein).

In any event, if a claim has already been made, the employer can argue that the same analysis applies as under 23-5A-1. Thus, the argument would be as follows. In order to make a *prima facie* case of discrimination under this section, the employee must

prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee. *Powell v. Wyoming Cablevision, Inc*., 403 S.E.2d 717 (W.Va. 1991); *Pannell v. Inco Alloys Int'l, Inc*., 422 S.E.2d 643 (W.Va. 1992); *Sizemore v. Peabody Coal Co*., 426 S.E.2d 517 (W.Va. 1992); *St. Peter v. AMPAK-Division of Gatewood Prods., Inc*., 484 S.E.2d 481 (W.Va. 1997).

As it pertains to the third element, the Supreme Court of Appeals has explained:

> What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of the protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. This evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision, or statistics in a large operation which show that members of the protected class received substantially worse treatment than others.

Harbolt v. Steel of W. Va., Inc., 640 F. Supp. 2d 803, 815 (S.D. W.Va. 2009) (quoting *Conaway v. E. Associated Coal Corp*., 358 S.E.2d 423, 430 (W. Va. 1986)).

The Supreme Court of Appeals has noted that determining a nexus between the filing of a workers' compensation benefits claim and an employee's discharge usually lacks direct evidence, and courts have implemented a variety of factors to establish the connection, including: (1) proximity in time of the claim and the firing; (2) evidence of satisfactory work performance and supervisory evaluations before the accident/injury can rebut an employer's claim of poor job performance; and (3) any evidence of an actual

pattern of harassing conduct for submitting the claim is persuasive. *Powell*, 403 S.E.2d at 721.

Close proximity between a workers' compensation claim and an adverse employment action may alone be sufficient to create a *prima facie* case. For example, in *St. Peter v. Ampak-Division of Gatewood Products, Inc.*, 484 S.E.2d 481, 483-486 (W.Va. 1997), the Supreme Court of Appeals held that the fact that only two weeks passed between the filing of a workers' compensation claim and the plaintiff's discharge helped establish a *prima facie* case of discrimination.

Once the employee has made a *prima facie* showing of discrimination, the burden shifts to the employer to prove a legitimate, nonpretextual, and nonretaliatory reason for the discharge, with the employee being allowed to rebut with evidence that the proffered reason for termination is merely a pretext for the discriminatory act. Syllabus Point 2, *Sizemore v. Peabody Coal Co.*, 426 S.E.2d 517 (W.Va. 1992).

Moreover, the Supreme Court of Appeals has held that the legislature's intent in passing this section was not create a mechanism for workers' compensation claimants to unreasonably delay their return to work. *Bailey v. Mayflower Vehicles Sys., Inc.*, 624 S.E.2d 710 (W. Va. 2005). Accordingly, employees must not be dilatory in their return to work following injury.

Furthermore, in order to state a claim under this section, an employee must be receiving or be eligible to receive temporary total disability benefits. Accordingly, if an employee's claim has been denied, he is likely not entitled to protection under the statute. Employer must be cautious, however, of the situation where a claim is initially denied

and then overturned. Thus, arguably, under that scenario, the employee was eligible to receive benefits the whole time.

B. When can you terminate an employee who is on workers' compensation leave?

Employment in West Virginia is presumed to be at will. *See Williamson v. Sharvest Management Company*, 415 S.E.2d 271 (W.Va. 1992). Where the employment is at will, the employer may discharge an employee for any reason or no reason, except for when the discharge violates a clearly mandated public policy or is otherwise prohibited by law. *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 340 (W.Va. 1995). Where an employee is out on workers' compensation leave, however, an employer's options are more limited.

West Virginia Code § 23-5A-3(a) forbids an employer from terminating an employee while he is out on workers' compensation leave, unless he has committed a separate dischargeable offense, which is discussed below. Case law in West Virginia has (arguably) provided, however, that in order to state a claim of workers' compensation discrimination under § 23-5A-3(a), an employee must prove that "the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge." *Powell v. Wyoming Cablevision, Inc*., 403 S.E.2d 717 (W.Va. 1991). Further, even if the employee can show some evidence linking his termination to his workers' compensation claim, an employer may rebut this by proving that it had a legitimate, nonretaliatory reason for his termination. Syllabus Point 2, *Sizemore v. Peabody Coal Co.*, 426 S.E.2d 517 (W.Va. 1992).

Moreover, the Supreme Court of Appeals has also held that "[o]bviously where the employee has suffered a severe injury that forever limits the employee's ability to perform his accustomed work, the employer should not be penalized for discharging the employee." *Powell v. Wyoming Cablevision, Inc.*, 403 S.E.2d 717, 723 (W. Va. 1991).

To summarize, an employee who is currently on workers' compensation leave may be terminated in following situations:

1. Where he has committed a separable dischargeable offense.

2. Where the employer can prove a legitimate, nonretaliatory reason for his discharge [this one is arguable].

3. Where the employee suffered a severe injury that forever limits the employee's ability to perform his accustomed work.

C. What is a separate dischargeable offense?

West Virginia Code § 23-5A-3(a) states that "it shall be a discriminatory practice within the meaning of section one [§ 23-5A-1] of this article to terminate an injured employee while the injured employee is off work due to a compensable injury . . . and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense." A "separate dischargeable offense" is defined as "misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. ***A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.***" *Id*. (emphasis added).

Accordingly, under this provision, an employer is not liable for discrimination if it can show that the employee was terminated for misconduct unrelated to his absence due to injury. For example, if an employer discovers that an employee has been embezzling money from it, that would clearly be an example of a separate dischargeable offense.

D. What reinstatement rights do employees returning from workers' compensation leave have?

In 1991, the West Virginia legislature codified the rights employers have to replace employees who are off work due to a compensable injury, and the reinstatement obligations an employer has toward those employees.

Under W. Va. Code §23-5A-3, an employer may replace an employee who is off work due to a work-related injury and is receiving temporary total disability benefits. The statute does not specify how long the employer must wait before replacing the injured worker; however, the Family Medical Leave Act, which is also applicable, requires a job to be held open for twelve (12) weeks.

As a general rule once the employer can make the argument that it is economically unfeasible or inappropriate to continue to keep the job open or continue to fill the job with a temporary employee, the employer may replace the injured worker. The general rule assumes the injured worker has not submitted either a return to work slip or notified the company of a legitimate and definite return to work date in the near future. In the situation where an employee has notified the company of a date certain for return to work and that date is in the near term, the Americans with Disabilities law would require the employer to consider holding the job open a little longer as a reasonable accommodation.

W.Va. Code §23-5A-3, "Termination of Injured Employee Prohibited: Re employment of Injured Employees," defines an employee's right to reinstatement following injury. It states:

> (b) ***It shall be a discriminatory practice*** … for an employer to fail to reinstate an employee who has sustained a compensable injury to the ***employee's former position*** of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position.
>
> ***If the former position is not available, the employee shall be reinstated to another comparable position*** which is available and which the employee is capable of performing. A comparable position for the purposes of this section shall mean a position which is comparable as to wages, working conditions and, to the extent reasonably practicable, duties to the position held at the time of injury. A written statement from a duly licensed physician that the physician approves the injured employee's return to his or her regular employment shall be prima facie evidence that the worker is able to perform such duties. ***In the event that neither the former position nor a comparable position is available, the employee shall have a right to preferential recall to any job which the injured employee is capable of performing which becomes open after the injured employee notifies the employer that he or she desired reinstatement.*** Said right of preferential recall shall be in effect for one year from the day the injured employee notifies the employer that he or she desires reinstatement: Provided, that the employee provides to the employer a current mailing address during this one year period.

W.Va. Code § 23-5A-3(b) (emphasis added).

Thus, under this statute, an employer must return to work an employee who has been out on workers' compensation leave and then is released to return to work by his physician and makes a demand to return. The employee is entitled to the same position, a comparable position if the same position is not available, or, if neither are available, to be placed on a preferential recall list for one year. The statute defines a comparable position

as "a position which is comparable as to wages, working conditions and, to the extent reasonably practicable, duties to the position held at the time of injury." *Id.*

If no such open job exists, the injured employee must be put on a preferential hire list for one year for any job the injured worker is capable of performing which becomes open after the injured employee notifies the employer that he or she desired reinstatement. It is the injured worker's obligation to keep the employer advised of his current mailing address for purposes of preferential recall. The Code specifies that any civil action brought under §23-5A-3 shall be subject to the seniority provisions of a valid and applicable collective bargaining agreement, or arbitrator's decision there under, or to any court or administrative order applying specifically to the injured employee's employer, and shall further be subject to any applicable federal statute or regulation (W. Va. Code §23-5A-3(c)). The significance of W. Va. Code §23-5A-3(c) is that an injured worker's right to preferential recall does not trump the job bidding provisions of a collective bargaining agreement.

To summarize:

1. When an injured worker requests reinstatement to his former position, if the position is available and the injured worker is physically able to perform the duties of the position, you must reinstate him/her.

2. If the injured worker requests reinstatement to his former position, but the former position is unavailable, you must reinstate the injured worker to any comparable position that is available, which the injured worker is capable of performing. A position is comparable to the injured worker's former position if it is comparable in terms of wages, working conditions, and to the extent possible, duties.

3. If neither the former position nor a comparable position is available, the injured has a right to preferential recall to any job which he/she is capable of performing which becomes open after he/she notifies the employer that he/she desires reinstatement. This right to preferential recall lasts for a period of one year. Injured workers on the

preferential recall list should be sent a bid sheet and all job postings by certified mail. If someone on the preferential recall list bids on a job, the job bidding provisions of the collective bargaining agreement must be followed. If the employee bids on a job he is capable of performing, and no other employee with higher seniority qualified to perform the job bids on it, he must be given the job. In other words, the injured worker must be given the job in preference to another employee bidding on the job who has the same seniority as the injured worker.

Conclusion

Employers must proceed with caution when taking an adverse action against an employee out on workers' compensation leave. As described above, the rules regarding when an employee may be terminated and when an employee is entitled to reinstatement are complex and highly fact-driven. Failing to fully consider these issues can quickly lead to claim of workers' compensation discrimination by the employee.