

“I Wanted to Fire Him Long Before the Workers’ Compensation Injury”

Labor & Employment Law Update

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We often hear the above statement when providing advice on workers’ compensation and employment law to clients and prospective clients. The focus then always involves exposure for workers’ compensation retaliatory discharge lawsuits. The litigation costs and risks of paying the former employee for wrongful discharge warrant obtaining legal advice. Plaintiff attorneys confirm to me that the burden of proving such a case is still a challenge to them.

Notably, an Illinois appellate court has just reduced the incentive to such litigation for plaintiffs in *Dale v South Central Illinois Mass Transit District*. The court refused to allow recovery for lost wages following alleged retaliatory discharge when the employee recovered some of the disputed lost wages in a workers’ compensation settlement. The employee argued that the employer fired him because he could not work. He could not work because of the disputed workers’ compensation injury and the employer’s denial of treatment, which arguably would have facilitated a return to work. The court rejected that argument thus providing some precedent for an employer to dispute a workers’ compensation claim and deny benefits without concern about the lost wages stemming from the denial, serving as a basis for a retaliatory discharge judgment.

Generally, to prove retaliatory discharge for filing a workers’ compensation claim, the plaintiff must show that he or she was an employee before the injury, that he or she exercised rights granted by the state’s workers’ compensation law, and that he or she was discharged which was causally related to his or her asserting a claim under the law.

The most litigated aspect in these cases is the causation element which requires the plaintiff to affirmatively show that the discharge was primarily in retaliation for his exercise of a protected (workers’ compensation) right. The evidence of the employer’s motive is varied but there are valid reasons (“non-pretextual”) courts recognize for discharging the employee. These include absenteeism, physical inability to perform the job, legitimate RIFs, and poor job performance. Typically all of these valid reasons for discharge are documented to varying degrees and affect the strength of a legal defense if a claim arises, so legal advice is necessarily fact-specific. Obviously, when the employer has documented issues prior to an injury or illness being reported or claimed by the employee, the

stronger the defense in a retaliation case.

What's the business advice here?

Each situation has its own set of facts warranting careful legal advice while not giving up on the ability to run your business affairs. Employers need to protect themselves and the best defense is to ensure management appropriately, consistently and in real time confronts employee issues. Too often employers say "I wish I had documented the employee's poor performance before the injury." Also, employers must consider that if they terminate an employee who has reported a work-related injury or illness, the exposure for compensation can increase substantially.

With the current state of workers' compensation retaliatory discharge law, it is still possible to make solid business decisions that could result in terminating an employee who may have an open workers' compensation claim or who has reported an injury, but it's highly advisable to get legal help in navigating the potential landmines in doing so.

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