

# Retaliation Claims Under ADA and Workers' Compensation Actions

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*Note: This article is part of a series of Guest Articles from well known employment lawyers and law firms throughout the country. Barry Urhman and Erin Byrnes are well known employment lawyers in Phoenix, Arizona. The firm of Jones Skelton & Hochuli is not only the home of cutting edge knowledge on employment issues but also the home of senior NFL Referee Ed Hochuli. This article is the second of a series of articles related to employment law issues which our membership should be knowledgeable. The articles will provide innovative strategies for prevention and handling of these claims. Charles F. Carr, Executive Director.*

The Americans with Disabilities Act (ADA) and state workers' compensation laws both apply to individuals with a "disability," but each law defines "disability" differently and requires different responses from employers. These differences obviously create a potential trap for employers. Workers' compensation laws generally focus on an employee's work-related injury and the employee is considered disabled when he is unable to work or is impaired, albeit temporarily, because of that injury. Under the ADA, individuals are disabled only if they have a physical or mental impairment that substantially limits a major life activity which prevents him or her from performing an activity that the average person can perform with little or no difficulty (such as walking, seeing, hearing, speaking or breathing). Temporary conditions, for instance, are not impairments for ADA purposes.

As you will see from the case studies, the ADA and workers' compensation laws are not mutually exclusive and often intersect at the issue of employer retaliation. The ADA and workers' compensation laws provide employees with protection from employer retaliation. Two federal courts recently issued opinions considering the interrelation between the federal and state statutory schemes regarding retaliation – Gomez v. Con-Way Central Express, Inc. and Williams v. AT&T, Inc. Both cases provide an in-depth analysis of the differing standards and applications between the ADA and state workers' compensation law and caution employers about the very real possibility of facing ADA violation

and retaliation claims by individuals who have been terminated after filing a workers' compensation claim. Gomez v. Con-way Central Express, Inc., 2009 WL 799243 (D.N.J.)

Herman Gomez was hired in August 2004 as a driver sales representative (DSR) for Con-Way which required loading and unloading freight and making deliveries and pick-ups. Mr. Gomez filed workers' compensation claims with the New Jersey Workers' Compensation Commission for three separate back traumas he alleged occurred in early 2005. Con-Way's workers' compensation insurance carrier denied all three of Mr. Gomez's claims. As a result of the injury, Mr. Gomez was restricted from lifting over 25 pounds and Con-Way placed Mr. Gomez on light duty at a reduced rate of pay. Mr. Gomez and his counsel began the "interactive process" required by the ADA and requested accommodations for his disability. The parties participated in several telephone conferences but the nature and purpose of those conversations is unclear.

Throughout this process Con-Way repeatedly asked whether Mr. Gomez's restrictions were temporary or permanent without response and negotiations stalled. Subsequently, Mr. Gomez's light duty ended and he was placed on a leave of absence. During Mr. Gomez's leave, Con-Way continually requested updated records justifying the leave and Mr. Gomez, in contrast, requested reassignment to a different job or additional accommodations. Con-Way responded that it could not consider the request without updated medical records and stated that Mr. Gomez had received the maximum amount of leave allowed by company policy and would be terminated should he not return. Con-Way terminated Mr. Gomez in March 2007. Thus, Mr. Gomez filed suit against Con-Way alleging violation of the ADA, the New Jersey Law Against Discrimination (NJLAD), and workers' compensation retaliation provision and Con-Way filed a motion for summary judgment. Williams v. AT&T, Inc., 2009 WL 938495 (S.D.Tex.)

Archie Williams began working for Southwestern Bell (SWBT) in August 1997 as a communications

technician which included making telephone connections and repairing equipment in the field. These jobs required moving and lifting material weighing up to seventy-five pounds, climbing ladders, working in manholes, and working for extended periods while kneeling, stooping, crouching and crawling. Throughout his employment with SWBT, Mr. Williams received negative job performance ratings and was disciplined regarding poor performance, conduct and time-keeping problems. At no time did Mr. Williams notify SWBT that he had injured his leg.

Mr. Williams filed a workers' compensation claim alleging he sprained his left leg on the job in early 2006, listing several dates of injury throughout the life of the claim. Mr. Williams continued to work and receive reprimands for poor performance. The Court heavily emphasized the fact that all disciplinary actions by SWBT were very well documented in its recitation of the facts. On July 10, 2006, Mr. Williams was involved in a major violation of company policy and was suspended. SWBT's workers' compensation insurance carrier subsequently denied his claim for failure to provide a specific date of injury. Mr. Williams remained suspended until SWBT terminated his employment. Mr. Williams filed suit alleging that SWBT denied him a reasonable accommodation that would have allowed him to fulfill his essential job functions as his leg injury "limited his ability to walk, stand, kneel, squat, push, pull, work and climb." Mr. Williams also alleged that SWBT violated the ADA by not engaging in the "interactive process" and violated Texas Workers' Compensation Law by terminating his employment in retaliation for filing a workers' compensation claim. SWBT filed a motion for summary judgment. Workers' Compensation Retaliation Claims

It is unlawful for an employer to discharge or discriminate against an employee who files a claim regarding a work-related injury. To support a retaliation claim, the employee must show a causal nexus between the claim and the employee's discharge. The claimant does not need to show that the filing of the claim was the sole reason for termination but present evidence that termination would not have occurred had the employee not filed the claim. In Gomez, the employer argued that the claimant was terminated because company policy limited the length of leaves of absence and the claimant responded that the employer conspired to deny his claim, reduce his rate of pay, and terminate his employment. On the other hand, the claimant in Williams alleged that the timing of his filing a claim and his termination was separated by only four days and that the timing alone was prima facie evidence of retaliation. Neither court found the claimants' argument convincing. The Gomez court found that the claimant was unable to set forth any facts which created a genuine issue as to whether the



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employer retaliated against the claimant for filing a claim. The Williams court found that the claimant had a lengthy and well-documented history of disciplinary issues that began long before the work-related injury occurred.

Both workers' compensation retaliation claims were dismissed. The courts set pro-employer precedent in holding that the simple fact that an employee has filed a workers' compensation claim does not immunize him from being fired for poor performance or misconduct. Employers have legitimate grounds to fire an employee, for example, who has filed a claim when the employee has a history of unexcused absences, violates the employer's absence-control policy, was insubordinate, or has an unsatisfactory safety record. The lesson to be learned by employers regarding retaliation claims is the level of detailed records kept by each employer during the disciplinary process can be the cornerstone of a good defense to such a claim.

### **ADA Claims for Work-Related Injuries**

The ADA prohibits discriminating against a disabled individual unless the nature of the disability precludes

the performance of the particular employment. If possible, the employer must provide the disabled employee with reasonable accommodation(s) to perform the job, unless the provision of such accommodation(s) would result in an undue hardship on the business. A discrimination claim under the guise of the ADA requires a four-part review consisting of: 1) whether the employer knew or should have known about the employee's disability, 2) whether the employee requested accommodation for his disability, 3) whether the employer made a good faith effort to provide accommodation(s), and 4) whether the employee could have been reasonably accommodated but for the employer's lack of good faith.

The protection of the ADA may apply to employees that have either an "actual disability" or a "perceived disability." With an "actual disability," it is not enough that the employee merely has impairment; the individual must be prevented or even severely restricted from performing the activities of daily life. Conversely, with a "perceived disability" the actual capabilities of the individual are not at issue. Rather, if the employer entertains some misperception regarding the individual – either that he has a substantially limited impairment that he does not have or the impairment is not so limiting as believed – the employee is "perceived" as disabled. This essentially requires that the employer excludes the employee from a broad range of jobs because of this perceived disability. Additionally, under the ADA, when an employee is disabled – actual or perceived – both the employee and the employer are required to be involved in an "interactive process" to reach an agreement about the employee's abilities to perform the required duties of his employment and any reasonable accommodations necessary to perform those duties. If either party that fails to communicate during this "interactive process" that party may be acting in bad faith in violation of the ADA. Thus, employers should consider engaging the "interactive process" of providing accommodations and reviewing modifications (where possible and if feasible) as a good rule to follow whether the employer believes the employee has a legitimate ADA claim or not.

### **Preventing Retaliation Claims**

Employers should create a working environment in which employees feel they can alert management to potential problems and participate in investigations without fear of reprisal. Ensuring consistent administration of policies and responding appropriately and promptly once a complaint is made are the best ways to prevent retaliation claims. Management should reassure the employee lodging the complaint or participating in the investigation that he will suffer no retaliation as a result.

Thus, to reduce the likelihood that an employee or former employee will have grounds to assert a retaliation claim for opposing an allegedly discriminatory



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practice or participating in an agency proceeding or court case, employers should be encouraged to:

1. Have a credible complaint procedure and promptly and thoroughly investigate all complaints. Assure the employee the complaint is being taken seriously and all efforts will be made to conduct the investigation promptly and discreetly.
2. Be sensitive and thank the employee for the information provided. Remind the employee of the company's commitment to equal employment opportunity and let the employee know he or she has done the right thing in coming forward.
3. Confidentiality is paramount. Explain to the employee that the claim and all information provided as a result shall remain confidential during the investigatory process.
4. Assure employees that retaliation will not be tolerated. Ask the employee to report any further experiences or events resulting from the complaint or participation in the investigation.
5. Put yourself in the employee's shoes. Bear in mind the employee may be more sensitive after lodging a complaint. Incidents of little consequence may appear retaliatory. Therefore, develop sensitivity to subtle nuances and make a conscious effort to keep the employee involved in the everyday business of the workplace.

So what is an employer to do when the line between the state workers' compensation law and the ADA seems blurry and it is unclear which standard to apply? Firstly, it is important to remember that not every person with a work-related injury or illness that is covered by workers' compensation law is disabled under the ADA. In fact, it is likely that most are not. For example, an employee who sprains their neck at work is generally entitled to workers' compensation benefits but is typically not entitled to a workplace accommodation under the ADA.

Nonetheless, while most injured workers will not have a qualified disability under the ADA, employers must be aware of the possible implications of requests for accommodations and termination of employees who insist they have a disability. This is not to say in any way that Employers are handcuffed in their employment and termination decisions; rather, Employers should simply understand the delicate balance of entertaining an employee's claim or complaint while thoroughly documenting the history of the claim and the process the parties undergo to resolve any disputes or requests.

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