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The intersection between workers' comp claims and employment claims

HOW THE WORKERS' COMP CLAIM MORPHS INTO AN EMPLOYMENT ACTION WHEN EMPLOYERS VIOLATE THE FEHA RULES

When an employee has an injury on the job, often the issue is not just about workers' compensation, it often also turns into an employment issue. Crossover issues are often inevitable. That is why, as a practitioner, it is important to identify these issues and understand why and how these two practice areas overlap; to ensure our clients or prospective clients are protected by both workers' comp laws and employment laws.

This article explores how one set of facts and circumstances can lead not only to a workers' comp case, but also an employment-disability discrimination case, a failure-to-accommodate case or a wrongful-termination case. This article will also stress the importance of having good communication between the workers' comp attorney and the employment attorney, if the client has two separate attorneys.

How a workers' comp claim can give rise to an employment case

Consider this common set of facts: A long-term employee starts having pain in his back as a result of his repetitive job duties. He reports the injury to Human Resources (HR). Immediately we know it is a workers' comp case because it is arising out of and within the course and scope of his employment. The injured worker is sent to an industrial clinic and hires a workers' comp lawyer to help him litigate the workers' comp claim. The lawyer files the Application for Adjudication of a Claim before the Workers' Compensation Appeals Board (WCAB), and the injured worker begins treatment.

In this scenario, the primary treating physician returns the employee back to work with modified duties of no lifting, pushing, or pulling more than 20 pounds. The employee takes the work status report to HR and is told he needs to be 100% to return to work. Simultaneously, the workers' comp adjuster, upon receiving the same work status report, contacts the employer to inquire about the possibility of accommodations.

The employer then informs the adjuster there are no modified duties available. The injured worker starts receiving temporary total disability benefits (TTD). The injured worker is placed on modified work duty by his primary treating physician for six months, during which time he receives work-status reports with various weight restrictions between 20 pounds and 50 pounds throughout the six-month period. The primary treating physician then releases the injured worker with permanent work restrictions of no lifting more than 75 pounds. The workers' comp carrier will begin paying permanent disability benefits.

Throughout the entire process the adjuster, the doctor, and the injured worker are providing the work-status reports to the employer. Upon receiving the permanent work restrictions, the employer sends a letter to the injured worker stating the employee has exhausted his allowed leave and employment will be terminated immediately.

Now what?

Under workers' compensation and pursuant to Labor Code section 4650, within 14 days the insurance carrier must commence permanent disability benefits if the injury caused permanent disability and the employer has not offered a position that pays at least 85% of the wages and compensation paid to the employee at the time of injury. Under Labor Code section 4658.7, unless the employer has made an offer of regular, modified, or alternative work, within 60 days of receiving either the primary treating physician's report, Qualified Medical Evaluator's (QME) report, or Agreed Medical Evaluators' (AME) report, the claims administrator must issue a supplemental job displacement voucher (SJDV).

The purpose of the SJDV is for retraining purposes. If all this happens, the insurance carrier has complied with the law. However, that is not the end of it. While the carrier has complied, the employer in the above scenario has not. Simply because the employee has a workers' comp claim does not mean the

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employer does not have separate and distinct obligations under the law. This is where most employers violate the Fair Employment and Housing Act (FEHA). This is where your typical workers' comp case turns into a FEHA disability discrimination, failure-to-accommodate, failure-to-engage-in-a-good-faith-interactive-process, and wrongful-termination claim.

How has the employer violated the FEHA but not workers' comp laws?

A violation of the FEHA occurred once the employer received the work-status report from the injured worker, the claims adjuster, or the doctor, and simply filed the work-status reports away without engaging in the interactive process.

Government Code section 12940, subdivision (n) states it is an "unlawful employment practice" for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." This provision imposes an additional and independent duty on the employer to engage in an "interactive process" regarding reasonable accommodation. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 103.)

What is the interactive process?

The interactive process is a mandatory obligation for employers, which requires communication and good-faith exploration of possible accommodations between employers and individual employees, with the goal of identifying accommodations that allow the employee to perform their job. (*Jensen v. Wells Fargo*, 85 Cal.App.4th at 261, *citing Barnett v. U.S. Air, Inc*. (9th Cir. 2000) 228 F.3d 1105.) A disabled employee is not required to speak any magic words, or request a specific accommodation before the employer's duty to engage in the interactive process is triggered. (*Prilliman v. United Airlines*, Inc. (1997) 53 Cal.App.4th 935, 954.)

It is also important to understand that the duty to engage in the interactive process is a continuing one. "[T]he fact that an employer took some steps to work with an employee to identify reasonable accommodations does not absolve the employer of liability under section 12940(n). If the employer is responsible for a later breakdown in the process, it may be held liable." (*Nadaf-Radov v. Neiman Marcus Group, Inc*., (2008) 166 Cal.App.4th 952, 985.)

This means every time the employer received a work-status report with new or different restrictions, the employer was under a duty to contact the injured worker and engage in a good-faith interactive process. It is important for the injured worker to ensure the employer receives the work-status report; however, if the injured worker does not send it to the employer directly, note that every workers' comp report will have a proof of service showing that the doctor served the employer, the claims adjuster, and the applicant's counsel. This is sufficient to trigger the employer's duty to engage in a good-faith interactive process. Make sure to not ignore the last page of the workers' comp report; it will show the employer received or should have received a copy of it.

It is important to work closely with the workers' comp attorney because they can subpoena the claim file and it will have important information sent to the employer, notably the medical reports. If the employer cannot accommodate the restrictions, the claims adjuster is under the obligation to commence temporary disability or permanent disability benefits within 14 days. (Lab. Code, § 4650.)

Accordingly, to commence temporary disability benefits and/or permanent disability benefits, the claims adjuster is in constant communication with the employer regarding the work restrictions and/or temporary disability status. If the claims adjuster fails to commence benefits within 14 days, they are liable for penalties. Therefore, they will always communicate with the employer about the work status to avoid paying penalties on owed benefits.

By paying the temporary disability or permanent disability benefits, the carrier has complied with the Labor Code and workers' comp laws, but if the employer has failed to communicate with the injured worker and engage in a good-faith interactive process, the employer has violated FEHA by doing absolutely nothing else but communicate with the claims adjuster.

FEHA and its governing regulations "clearly contemplate not only that employers remove obstacles that are in the way of the progress of the disabled, but that they actively restructure their way of doing business in order to accommodate the needs of their disabled employees." (*Prilliman*, *supra*, 53 Cal.App.4th at p. 948.)

Termination for exhausting the employers' leave-of-absence policy

The FEHA protects California workers from discrimination. It makes it an "unlawful employment practice" for an employer to discharge a person "because of . . . [his] physical disability." (Gov. Code, § 12940, subd. (a).) Furthermore, it is important to understand that the Ninth Circuit has recognized that "if the trier of fact finds that Plaintiff was disabled for purposes of FEHA, Defendant's firing of Plaintiff on the basis of absences incurred as a result of that disability would not constitute a legitimate, non-discriminatory reason for terminating Plaintiff, and Plaintiff would be able to establish disability discrimination on the basis of Plaintiff's prima facie case." (*Diaz II*, *supra*, 373 F.Supp.2d at 1064-65.)

Often, the employer will terminate an employee with the pretext that the employee has exhausted the employee's available leave; however under FEHA, a leave of absence beyond any other leave available may

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be a reasonable accommodation if the leave is likely to be effective in allowing the employee to return to work at the end of the leave, with or without further accommodation, and the leave does not create an undue hardship for the employer. (Cal. Code Regs., tit. 2, § 11068, subd. (c).)

An employer is not required to provide indefinite leave of absence as a reasonable accommodation. (*Ibid.*) "[T]he FEHA does not have a fixed limit on the amount of leave required as a reasonable accommodation. '[A] disabled employee is entitled to a reasonable accommodation, which may include leave of no statutory fixed duration, provided that such accommodation does not impose an undue hardship on the employer. *Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1338." (*Zamora v. Security Industry Specialist, Inc.* (2021) 71 Cal.App.5th 1, 28.)

Therefore, even if the employee has been out for a year or longer, under FEHA that leave is still considered a reasonable accommodation. The employer will often argue the leave is indefinite, however, the leave is "definite" if there appears to be a reasonable likelihood that the leave will permit the employee to return to work at some point in the foreseeable future. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226.)

How do we have retaliation under workers' compensation and under FEHA?

The FEHA protects California workers from discrimination, including on the basis of disability. It also protects workers from retaliation such as invoking the right to take a medical leave and for requesting an accommodation for disability, which happens all the time when an employee suffers an industrial injury.

Similarly, under Labor Code section 132, subdivision (a), any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of discrimination and retaliation. A violation of this section entitles the employee to an increase in compensation, but no more than $10,000, and also entitles the employee to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.

Both remedies can be pursued. A workers' comp retaliation claim gives an injured worker an increase in benefits, and a FEHA case gives rise to economic and non-economic damages and attorney fees.

Work closely with the workers' comp lawyer

As you can see, the crossover issues are inevitable. At some point, the employer will violate FEHA. Three issues arise when settling the workers' comp claim:

1) The carrier will almost always ask for a voluntary resignation;
2) As part of the settlement documents, sometimes you will see a general release;
3) The language on the Compromise & Release (C&R) will at times be used against the Plaintiff in the FEHA case.

Always make sure the workers' comp attorney does not allow the applicant to sign a voluntary resignation. Instead, have them sign an acknowledgment that they are no longer employed with the employer.

Never allow the workers' comp attorney to agree to sign a general release. This will bar your employment case.

The C&R, page 9, will have all the issues that can potentially be settled. Watch out for earnings, employment, and discrimination. Always make sure there is some language on the C&R that indicates that the workers' comp settlement does not affect the potential FEHA claim or potential wage-and-hour claim. Also, make sure in the comments section there is no language that says "this C&R settles all known or unknown injuries against Employer" because defendants in an employment case will often use that language to argue that you have settled your client's emotional-distress injuries by way of the C&R. Always ensure the C&R clearly says it does not settle any potential claims under FEHA or that it does not settle any claims outside of the workers' comp injuries outlined in paragraph 1 of that C&R.

Conclusion

It is important to understand that a workers' comp case is not *just* a workers' comp case, because there will likely be employment-disability discrimination issues. It is also important to understand that working closely with the workers' comp attorney will give you additional information and tools to litigate an FEHA case, and to ensure the FEHA case is not barred by a workers' comp settlement. If you have any further questions regarding crossover issues, please do not hesitate to contact the author of this article.

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