

Blurring the Lines Between Workers' Compensation Retaliation and Disability Discrimination

November 2, 2010

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A new trend in Kentucky has recently emerged where plaintiffs are attempting to base their workers' compensation claims on evidence that their employers allegedly mistreated them while they were on light duty or exercising some other type of accommodation after a work-place injury. Whether purposeful or accident, plaintiffs are blurring the lines between workers' compensation retaliation and disability discrimination. When trial courts let this evidence in, they are essentially allowing plaintiffs to morph a workers' compensation retaliation claim into a disability discrimination claim in actions where plaintiffs would not otherwise be permitted to plead disability discrimination because they do not have a "disability" under the Americans with Disabilities Act ("ADA"). Instead of focusing their evidence on whether the pursuit of workers' compensation benefits was a substantial and motivating factor in the adverse employment action, plaintiffs are focusing on evidence that they were mistreated while on light duty or while exercising some other type of accommodation after a work related injury. And some Kentucky trial courts are permitting it. It is important to curtail this type of evidence from the very start of an action that includes a claim for workers' compensation retaliation but does not include a disability discrimination claim.

Imagine a situation where an employee slips and falls at work, injuring his back. He is diagnosed with a low back strain and the physician issues certain restrictions, forbidding him to squat or lift anything for several weeks, which prevents him from continuing his normal job duties. Essentially, the employee is put on "light duty" and is permitted to do administrative work for the employer until the restrictions are lifted. During this time period, he continues to receive his full wage and benefits from his employer. Meanwhile, because he is seeking medical treatment, he files a workers' compensation claim. Because the employer created a light duty position for him and he was not required to take any time off work, he receives no income benefits (i.e. total temporary disability ("TTD") or permanent partial disability ("PPD")) from the employer's workers' compensation carrier. The workers' compensation carrier only pays his medical bills, otherwise known as "medical benefits." The employee violates the employer's safety policy while engaging in his light duty position and is terminated as a result of the safety violation. The employee subsequently files suit alleging workers' compensation retaliation. Instead of alleging that he was terminated because he was pursuing workers' compensation benefits, the employee claims that he was mistreated by his supervisor while on light duty and terminated because the supervisor thought he had been on light duty too long.

The important question to pose to the trial court is:

Is accepting a light duty position from the employer and receiving a wage from the employer after a work-related injury a statutorily protected activity pursuant to KRS 342.197?

The answer to this question is no. While Kentucky has limited case law interpreting KRS 342.197, the published opinions that exist make it clear that the legislature intended for this cause of action to be a *narrow* public policy exception. Allowing plaintiffs to base their workers' compensation retaliation claims on benefits they are receiving from their employer and not from the workers' compensation carrier is

inconsistent with controlling law. It would also seem that this result is inconsistent with the spirit of KRS 342.197, which is to protect employees from being retaliated against when they are exercising their rights and receiving benefits under the Workers' Compensation Act - not benefits they are receiving from their employer.

The landmark case establishing a cause of action for workers' compensation retaliation, *Firestone Textile Company Division v. Meadows*, 666 S.W.2d 730 (Ky. 1983), held:

The only effective way to prevent an employer from interfering with **his employees' rights to seek compensation** is to recognize that the latter has a cause of action for retaliatory discharge when the discharge is motivated by the desire to punish the employee **for seeking the benefits** to which he is entitled by law. *Id.* at 732-734.

Therefore, to prevail, a plaintiff is required to prove that the alleged retaliation was based upon his or her collection of compensation or benefits that are provided to employees under Kentucky's Workers' Compensation Act. The assignment of an employee to a light duty position after a work-related injury is not a benefit provided under Kentucky's Workers' Compensation Act. KRS 342.001 defines "compensation" under the act as "all payments made under the provisions of this chapter representing the sum of income benefits and medical and related benefits." KRS 342.001(14). Income benefits under Kentucky's Workers' Compensation Act are defined as "payments made under the provisions of this chapter to the disabled worker or his dependents in case of death, excluding medical and related benefits." KRS 342.001(12). Medical benefits are defined as "payments made for medical, hospital, burial, and other services as provided in this chapter, other than income benefits." KRS 342.001(13).

These definitions of "compensation" and "benefits" make it clear that assignment to a light duty position after a work related injury is not a benefit within the scope of Kentucky's Workers' Compensation Act. This makes sense because, in the scenario described above, the employers' workers' compensation carrier is not paying the employee's wage or his or her "income benefits" while the employee continues to work on light duty. In this common scenario, the employee never applied for nor received income benefits due to a finding of temporary total disability, permanent partial disability, or permanent total disability.

This is an important distinction to point out to the trial court, because to make a *prima facie* case for workers' compensation retaliation, the employee *has* to prove that the retaliation stemmed from his or her collection of workers' compensation medical or income benefits. As defined under Kentucky's Workers' Compensation Act, accepting a light duty position does not fall under any of these categories of benefits. Therefore, employers should aggressively seek dismissals as a matter of law when plaintiffs in Kentucky base their workers' compensation retaliation claims on allegedly being mistreated while on light duty. If the trial court refuses to grant a summary judgment motion, employers should move to exclude this evidence at trial to ensure preservation of the issue on appeal.