

Caution on Illinois Employers' Reliance on Independent Medical Exams

The June 17, 2009 Illinois Appellate Court (First District) decision in *Grabs v. Safeway, Inc.* limits an employer's right to rely on independent medical exams (IMEs) in requiring workers with work-related injuries to return to work. An employer may commit the tort of retaliatory discharge by terminating a worker who remains off work on the advice of a personal physician, despite an IME releasing him or her to return to work.

In *Safeway*, two employees injured at work were absent pursuant to notes from their physicians. Because the injuries were compensable under the Workers' Compensation Act, both submitted to IMEs, which released them to return to work immediately. Both chose, however, to stay off work based on their personal physicians' advice. The employer terminated them for not returning.

The workers sued under the tort of retaliatory discharge, claiming the employer terminated them for exercising their right under the Workers' Compensation Act to follow their physicians' medical advice. The appellate agreed that a jury could find the discharges to be retaliatory if the employer did, in the face of conflicting medical information, rely solely on the IMEs in requiring them to return to work and then discharging them for failing to do so. The IME results did not, according to the Court, trump the employees' right to follow the advice of their personal physicians.

Based on the decision, an employer should not terminate a worker for failing to return to work after being released by an IME if it has knowledge that the worker may be relying on medical advice from a personal physician. The employer needs to investigate further or defer requiring the worker's return until either the physician or Workers' Compensation Commission agrees that the employee is able to do so.

This decision does not affect the employer's right to terminate when a worker's permanent injuries cannot be accommodated through either job modifications or transfer. Nor does it prevent applying absenteeism and no call/no show policies to employees with work-related injuries, as long as they are applied in the same manner to workers who are absent for other reasons. However, due to the legal minefields that exist, an employer should consult counsel before terminating an employee who has a recent work-related injury or a pending or recently concluded claim for workers' compensation benefits.

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