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Labor & Employment Update

Conflicting Medical Exams and Workers' Compensation Retaliation: Don't Take Sides

By Nicholas Anaclerio

Most employers know it is unlawful to fire an employee in retaliation for a workers' compensation claim. But irrespective of their commitment to comply with the law, to meet their staffing needs, employers must assess when, if at all, an injured employee will return to work. Employers are also entitled to defend workers' compensation claims by evaluating the nature, origin and progress of their employees' medical impairments. Consequently, employers and their workers' compensation insurers routinely use independent medical examiners to evaluate the work-relatedness of employees' injuries, the status of their conditions and their fitness for returning to work. Independent examiners' opinions often conflict sharply with treating doctors' opinions.

So does the prohibition on firing an employee for making a workers' compensation claim require the continued employment of someone who will not or cannot return to work based on a treating doctor's advice, though an independent examiner has cleared the employee for work? And is it even wise for employers to take sides in this medical debate while they try to run their businesses and limit their exposure to retaliatory discharge claims?

A recent Illinois Appellate Court decision offers some pointed guidance: employers aren't required to perpetually employ those who cannot or will not resume work based on their doctors' advice, but neither should they base a discharge decision solely on an independent examiner's opinion that an employee's refusal to work is medically baseless.

In *Grabs v. Safeway, Inc.*,¹ the Illinois Appellate Court reviewed summary judgments for two employees whose workers' compensation retaliation suits accused their employer of illegally firing them for following treating doctors' advice to remain off work. The lower court granted summary judgments for the employees, found their employer liable for retaliation as a matter of law, and decided that they had a right to continued employment while following their treaters' advice to stay off work, at least until the Illinois Industrial Commission resolved the medical dispute between their treating doctors and their employer's independent examiners over their fitness for duty. On appeal, the *Grabs* court disagreed, finding that the employees' burden of proving that their firings were retaliatory could not be sustained merely with proof that their employer discharged them after independent examiners found them fit for work. While such proof is consistent with retaliation, it does not alone prove retaliation, particularly if there is no evidence that the employer considered a workers' compensation claim fraudulent, groundless or exaggerated based on its independent examiner's opinion.

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The *Grabs* court rejected the lower court's imposition of a *per se* rule that retaliation is established whenever an employer is shown to have relied on an independent examiner's return-to-work clearance and discharged an employee for violating its attendance policy though a treating physician deemed the employee unfit for work. The Court re-iterated established law that "an employer may terminate an employee for excessive absenteeism, even if the absenteeism is caused by a compensable injury."² But the mere existence of such a valid justification also does not defeat a retaliation claim. The ultimate issue remains whether the employer's motive for discharging the employee was to punish him/her for seeking workers' compensation. In proving that illegal motivation, the employee must show more than that an independent examiner's clearance for work preceded or supported the termination decision.

In this analysis, evidence that an employer relied upon an independent exam to deem a discharged claimant a malingerer, or his/her injuries unrelated to work, can be strong proof of retaliation and fatal to an employer's defense. So while employers may lawfully discharge and replace employees who decline to work based on their physicians' advice, employers need not, *and should not*, base discharge decisions solely on independent medical examiners' fitness-for-duty opinions or their conclusions that an employee's injuries are fabricated, exaggerated, or unconnected with a workplace accident.

1 *Grabs v. Safeway, Inc.*, 2009 WL 1709570 (Ill. App. 1st. Dist.)

2 *Hartlein v. Illinois Power Co.*, 151 Ill.2d 142, 160, 601 N.E.2d 720 (1992).

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