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PROFESSIONAL EXPERIENCE

CRANFILL, SUMNER & HARTZOG, L.L.P. **1994 TO PRESENT**
Raleigh, North Carolina

***Partner*, Litigation and Federal Law Practice Group**

Defend businesses and individuals in litigation matters, including, among other things, business tort and trademark matters, Equal Employment Opportunity ("EEO"), Family and Medical Leave Act/Americans With Disabilities Act issues, workers' compensation retaliation ("REDA"), Constitutional retaliation, covenant-not-to-compete and workers' compensation disputes.

- Represent employers in litigation concerning state and federal law discrimination claims, wage and hour issues and all other employment matters.
- Advise corporate clients on employee and supervisor handbooks and policies, including among other things, light duty programs, ADA and FMLA policies and harassment policies.
- Represent businesses in covenant not-to-compete, unfair trade practice and trademark infringement litigation.
- Lecture frequently to companies and Human Resource professionals about all aspects of employment law, with a recent emphasis on the intersection of the Americans With Disabilities Act, the Family and Medical Leave Act and workers' compensation.
- Represent companies in administrative forums such as the Equal Employment Opportunity Commission, the Employment Security Commission, the Industrial Commission and the State and Federal Department of Labor.
- Advise companies on defending against sexual harassment matters, including in-house training and harassment investigations.
- Act as Human Resource Manager for several small- and medium-sized clients (under 150 employees). Helped organize Human Resource Department for one such client.

HUNTON & WILLIAMS **1988 TO 1994**
Raleigh, North Carolina

***Associate Attorney*, Litigation Group and Member of Labor and Employment Team**

Represented management in employment law matters, including EEO, OSHA, labor relations and workers' compensation disputes. Assisted in firm's public utilities work, including litigation of two major electric utility rate cases.

- Successfully represented large and small-sized employers in various EEO litigation, including NRC whistle blowing, age, race, disability, gender, harassment and retaliation charges.

- Advised unionized employers on NLRA matters and assisted non-union employers in several union avoidance campaigns.

- Totally managed quality assurance, nuclear fuel procurement and nuclear regulatory aspects of nuclear power plant litigation in a $2B case, 1993. Developed witness preparation and strategies to respond to concerns about the company's quality assurance, fuel procurement and nuclear regulatory programs.

***Research and Teaching Assistant*, Duke University School of Law** **1986**
Durham, North Carolina

- Performed research and assisted in evaluation and grading of students' legal memoranda and briefs.

- Additionally performed major research on new trends in laws of Peoples' Republic of China concerning international investment and trade.

EDUCATION

J.D., *Honors*, and L.L.M., International Law
Duke University School of Law, Durham, North Carolina, 1988

B.A., Economics and Management, Chinese Studies
Gerald R. Ford Institute in Public Service Study Concentration
Summa Cum Laude, Phi Beta Kappa

Albion College, Albion, Michigan, 1984

PUBLICATIONS

Davis, Raymond M., et al., "Rule 11 in Employment Litigation," *The Business Lawyer*. August, 1993

David, Raymond M. and Willsman, Christopher, "Impact of the ADA on Employee Benefits," *Employee Management Services*. February, 1993.

Davis, Raymond M., "Workplace Safety After Hamlet," Presented at DuPont Senior Management Seminar, November, 1992.

Davis, Raymond M., "The Bhopal Litigation," *Indian Law Institute Journal*. July - September, 1987.

PROFESSIONAL AFFILIATIONS

Defense Research Institute
American Bar Association
ABA Labor and Employment Law Section
North Carolina State Bar
NC State Bar and Employment Law
Wake County Bar Association

Proceed with Care at Intersection of ADA and Workers' Comp Laws

Employers attempting to analyze the maze of requirements imposed by the Americans With Disabilities Act (ADA) and North Carolina Workers' Compensation Act (NCWCA) will find numerous questions with few absolute answers. The Equal Employment Opportunity Commission, the federal agency that oversees the ADA, has recently published two guidance statements examining pitfalls experienced by employers attempting to abide by both regulatory schemes. Yet few comprehensive articles exist offering practical guidance.

This article focuses on three difficult issues at the intersection of these two laws and offers tips for handling them. Naturally, the information presented is general; questions concerning specific employment situations should be discussed with legal counsel.

The two laws contain different definitions of disability. Their competing goals can cause conflicts for employers.

Different definitions of disability

The ADA and the North Carolina Workers' Compensation Act both apply to individuals with a "disability." However, each law defines "disability" differently. The differences create a potential trap for employers.

The NCWCA definition focuses on the employee's post-injury earning capacity. In general, an employee is disabled and eligible for workers' compensation benefits if he is unable to earn his normal wages due to a work-related accidental injury or occupational disease.

Under the ADA, individuals are disabled only if they have a physical or mental impairment that substantially limits a major life activity. An individual is "substantially limited" if a physical or mental impairment prevents him from performing a major life activity that the average person can perform with little or no difficulty (such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working). Temporary conditions (such as broken bones) for the most part are not impairments for ADA purposes.

Contrary to popular misconception, not every person with a workplace injury or illness (covered by workers' compensation) is disabled under the ADA. For example, an individual who breaks an arm by occupational accident is not entitled to any "reasonable accommodation" under the ADA if the fracture heals normally.

Under the ADA, the law looks at the individual and asks what the worker can do with reasonable accommodation. Under NCWCA, the law looks at what a worker is no longer able to do. While many injured workers will not have a qualified disability under the ADA, employers still must be aware and avoid a trap in this gap. Specifically, because of the different focuses of the two laws, employers may attempt to prove different, inconsistent factual circumstances depending on which law is the subject of the dispute.

For example, let's assume your company terminated an employee with a work-related back injury because he can no longer perform the essential functions of his job. During a workers' compensation hearing, the employer may be tempted to argue that the employee is still able to work (in order to decrease disability benefit exposure).

However, to successfully defend against an ADA claim, the employer will probably need to argue that the employee can no longer perform the essential functions of his job and, therefore, no reasonable accommodation can be made for the employee. If the employer has already argued in the workers' compensation hearing that the employee is able to work, the employer will have asserted inconsistent arguments that will make it difficult for the employer to credibly defend the ADA claim.

In sum, employers must pay close attention to these different statutory definitions of disability when presented with a NCWCA claim and an ADA charge. The respective human-resource professionals in charge of the employee's workers' compensation and ADA claims must meet early and frequently to assure that the organization is consistent in handling the matters. This also goes for the lawyers — make sure that the

workers' compensation attorney is communicating with the employment defense attorney so that the organization presents a consistent defense in all forums.

The light-duty option

One way employers have historically mitigated liability under the NCWCA has been to offer light-duty work to the injured employee. By paying the injured employee his pre-injury wage for performing these light-duty functions, his post-injury earning capacity was restored, eliminating the claim for additional disability benefits. While returning an injured employee to light duty may still end or reduce future NCWCA disability liability, it may simultaneously trigger obligations under the ADA.

The ADA requires employers to provide "reasonable accommodation" to employees with disabilities, and light-duty positions may be viewed as reasonable accommodation. But employers should be aware that the ADA does not mandate that light-duty positions be created to accommodate disabled employees.

To satisfy ADA requirements and to limit the company's workers' compensation exposure, it is advisable to return an employee to suitable work as soon as possible. If the injured worker is unable to perform the essential job functions held at the time of injury (with or without reasonable accommodation), an employer can transfer the employee to a vacant, comparable position or to a temporary light-duty assignment. It is permissible under ADA to limit the amount of time a worker may hold a light-duty job. Time limits should be clearly stated prior to assignment.

Employee preference is not a deciding factor in determining the amount of time an injured employee spends on light duty in this case. The employer is not obligated to keep a disabled employee on light duty just because the employee prefers it.

Dealing with the injured employee

While the ADA requires that employers make reasonable accommodations for applicants and employees who are otherwise qualified for a job, disabled and workplace-injured employees should be held to the same performance standards as others on the job. This concept applies to alcohol and drug abusers even though ADA protects individuals seeking rehabilitation for alcohol and drug use. Employers are allowed to hold an individual who abuses alcohol or illegal drugs to the same qualifications and performance standards as applied to all other applicants and employees.

ADA and NCWCA do not require an employer to tolerate insubordination, poor performance, violations of company policy or abusive behavior. No physical or mental condition excuses inappropriate behavior in the workplace.

This conclusion is re-enforced by judicial precedent and recent case law. If an injured employee violates a company standard, counsel and discipline the employee pursuant to the normal disciplinary process. Be sure to research disciplinary action administered to other employees who committed similar offenses and treat the injured worker the same. Be decisive.

If a decision is made to enter a compromise settlement agreement (clincher agreement) in a workers' compensation claim, consider obtaining a general release of all other matters for additional consideration. If you are concerned that negotiations for a general release might plant a seed with the injured employee that he has a viable ADA claim, then attempt to get the employee to agree in the clincher that he "cannot perform the essential functions of his job even with reasonable accommodation." By paying attention to ADA issues when settling a NCWCA claim, you can save your organization the disruption and cost of defending a civil lawsuit.

Conclusion

The intersection of ADA and workers' compensation often results in questions that practically and conceptually are difficult to answer. Human-resource professionals who are experts in one area often actively avoid getting involved in the other. However, proactively obtaining information and guidance in both areas when handling injured workers' claims will significantly limit overall costs to your organization.

Raymond M. Davis

Raymond M. Davis practices employment law with Cranfill, Sumner & Hartzog LLP, a 45-lawyer firm with offices in Charlotte and Raleigh. A graduate of Albion College, he earned his law degree at Duke University. He has represented management of large and small employers in OSHA, labor relations, workers' compensation and EEO litigation, including age, race, disability, harassment and retaliation charges. He frequently lectures to companies and human-resource professionals about all aspects of employment law, with a recent emphasis on the Americans With Disabilities Act and the Family and Medical Leave Act.