Intersection of Workers Compensation and ADA

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ADA CLAIMS ARE RISING AS PERCENTAGE OF OTHER EEOC MATTERS

- 24,605 ADA cases (down from 26,838 in 2017)
  - 32.2% of all matters (compared to 31.9% in 2017)
  - $136.5 million recovery (not including litigation)
  - $353.9 million for all statutes

EEOC Statistics – 2017-2018

EEOC Class Action

EEOC v. Lowe's Home Centers, Inc., Lowe's HIW Settlement - Settlement

- The US District Court for the Central District of California approved of a $8.6 million dollars settlement entered into between the EEOC and Lowe's resolving EEOC's nationwide disability discrimination class action lawsuit against Lowe's.
- Class – individuals employed by Lowe's and terminated between January 1, 2004 and May 13, 2010, after having taken the maximum amount of leave then available under Lowe's leave of absence policies (180 days and later 240 days maximum leave policy).
- Lowe’s retained EEO Consultant to review policies and procedures, provide training on ADA compliance and ensure continued compliance with ADA

Recent Case

Hicks v. Les Schwab Tires (Oregon, 2018)

Court is signaling a shift away from idea of "temporary" or "transitory" injuries; now focusing more on whether one or more of employee's major life activities were substantially limited;

Takeaway – broader application of ADA, more cases, less inquiry on whether ADA applies.

Burden of showing "Undue Hardship" - Nature and cost of the accommodation in relation to the:

- Size;
- Resources;
- Nature; and
- Structure of the employer's operation.

The Basic Structure of the Idaho Workers' Compensation Act (the "Act")

- The Idaho Industrial Commission has exclusive jurisdiction over workplace injuries with few exceptions.
- The Act only applies to workplace injuries, occupational diseases, and death.
- The Act is a no-fault system wherein, with few exceptions, the actions of either the employer or employee in causing an injury are not considered.
- The Act is a body of state law and is not preempted by the ADA. The laws run concurrently.
- The Act itself governs the Idaho Industrial Commission, which is an administrative tribunal that enforces the Act.

Overlap of the Act and the ADA

- In a workers' compensation claim, the employer and the surety are both party-defendants. Therefore, the actions taken by an employer as a defendant in a work comp claim can have a direct impact on a future ADA claim.
- Why? During the pendency of a work comp claim, several issues are typically determined that can impact an ADA claim:
  - Whether the employee suffered a compensable industrial accident;
  - Whether the employee was entitled to time loss or light duty accommodations;
  - Whether the employee suffered a permanent injury;
  - Whether the employee suffered a permanent anatomical loss of functioning;
  - Whether the employee was entitled to permanent medical restrictions;
  - Whether the employee suffered permanent disability;
  - Whether and what type of future medical care will the employee require; and
  - Whether the employee is totally and permanently disabled.

The “Accident”

- Without an industrial accident and injury, the Act does not apply.
- Injury and accident are defined at Idaho Code §72-102(18)(a)-(c).
- “Injury” means a personal injury caused by an accident arising out of and in the course of any employment covered by the worker’s compensation law.
- “Accident” means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury . . . resulting in violence to the physical structure of the body.
- In practice, the bar is set very low for what the Industrial Commission will consider an industrial accident. In short, it is very commonplace for an employee to become injured at work.
- ADA Pointer: Suffering a compensable industrial accident/injury alone does not invoke ADA.

The “Reporting”

- After an employee suffers a workplace injury, the employee technically has 60 days to report it.
- In practice, the Industrial Commission may deem an employee non-credible if there is an allegation of a significant industrial injury that goes unreported for more than a week or two.
- ADA PROBLEM: Many employees who report disabling injuries in the work comp system hide/”don’t remember”/downplay pre-existing medical problems, have a history of filing similar work comp claims, have addictions to various drugs, and/or have psychological pain problems.
- ADA Pointer: The lifecycle of a work comp claim from reporting to decision is typically measured in years. A litigated case that is tried to a hearing will take at least 2 years to complete and often much longer than that.

The “Investigation”

- The workers’ compensation surety has a “reasonable” amount of time to decide whether to accept or deny an injury claim.
- Initial pre and post-accident medical records are obtained, employer statements are taken, an employee statement is taken, and a First Report of Accident/Injury form is supposed to be filled out.
- ADA POINTERS: 1) Employees often deny or downplay pre-existing conditions during recorded statements; and 2) most work comp surety’s obtain a 10-year history of medical providers during the investigation, but some then fail to obtain records from each of the providers—GET THE RECORDS.

The “Decision”

- Claim *Acceptance*: The Surety determines that the injury arose out of an in the course of employment, the Claimant suffered a compensable industrial injury, and the accident/injury was properly reported.
- Claim *Denial*: The Surety denies the claim for a stated reason and refuses to pay benefits. Usually, claim denial is premised upon prior medical history or credibility concerns.
- ADA Pointer: The Employee is injured, possibly severely, is typically not being accommodated, no benefits are being paid, and this is often when employees end up being terminated. Remember, just because the work comp surety found a reason to deny the claim does NOT mean the ADA is no longer in play for whatever injury has been alleged by the employee. Avoid making termination decisions based upon work comp claim denials. It looks like retaliation for filing a work comp claim by an injured worker, i.e. terminating a worker for being injured and reporting it.

The “Benefits”: Temporary Total Disability Benefits (“TTDs”)

- Temporary Total Disability Benefits or “TTDs” are income loss benefits paid to injured workers under specific circumstances.
- TTDs are paid if 1) the worker suffers an industrial injury; 2) the worker is in a period of treatment; 3) the worker has temporary medical restrictions; and 4) the employer cannot accommodate the temporary medical restrictions.
- The worker will be paid TTD benefits until 1) light duty work is provided; 2) the employee turns down a reasonable offer of light duty work; 3) the employee is deemed to have reached Maximum Medical Improvement (“MMI”); or 4) termination for extreme cause, like workplace violence or sexual harassment.
- ADA POINTERS: 1) An employer cannot escape paying TTDs using an ADA accommodation; 2) if the claim is accepted, the employer must provide light duty work or pay TTDs regardless of injury severity;

The “Benefits”: TTDs continued

- 3) Even if the employer terminates an employee during a period of recovery, the Surety can continue paying TTD benefits at the Surety’s discretion; and 4) light duty work does not have to be (and typically is not) at all related to the time of injury position.

The “Benefits”: Permanent Partial Impairment (“PPI)

- When an employee reaches MMI, benefits change from TTD to PPI benefits.
- PPI benefits measure the permanent loss of anatomical functioning from a workplace injury.
- PPI opinions are based upon the 6th Edition to the AMA Guides.
- ADA Pointers:
  - MMI does not always mean the end of medical treatment. Radically different MMI opinions can and often do exist in a single case.
  - PPI reports are an excellent source of information regarding an employee’s anatomical loss of functioning from an injury if you are trying to figure out how disabled an employee actually is.
  - If you don’t agree with the rating, hire an expert to get a different rating.

The “Benefits”: Permanent Partial Disability benefits or “PPD”

- In the workers’ compensation system, PPD is a measurement of an employees disability, in excess of PPI (impairment), caused by the industrial injury.
- PPD is a determination of an employees loss of wage-earning capacity and loss of labor market access due to a combination of an employee’s medical and non-medical factors.
- Common medical factors include 1) the impact of prior medical conditions; 2) the impact of the industrial injury and resulting permanent medical restrictions and ongoing residual symptoms; and 3) the impact of any subsequently occurring medical conditions.
- Common non-medical factors include an employee’s age, educational history, work history, criminal history, wage history, residence, etc.

The “Benefits”: PPD continued

- The fight over an employees disability rating is the most contentious and frequently litigated topic in workers compensation in Idaho. It is not uncommon for the defense to argue that an employee is fairly nominally disabled and able to return to time of injury employment while the employee claims to be significantly or even totally and permanently disabled and never able to return to the time of injury employment.
- ADA Pointer: A workers compensation case, especially a litigated one, is a good vehicle for determining how disabled an employee may actually be. However, quite often, the employee and the employer are on the opposite sides of the Grand Canyon on the issue of disability in the work comp system.

Relevant Hot Topics in Work Comp

- The “Peyton Manning” consideration: Peyton Manning played in the NFL with a cervical spine fusion. Many employees with the same injury won’t lift a jug of milk. Some really seriously can’t lift the milk. Many others have other issues:
  - Addiction to narcotic pain killers, muscle relaxers, and anti-anxiety medications and the drug seeking behavior that comes with it is a problem. Addicts will often vastly overstate disabling symptoms to obtain narcotics.
  - Employees who have been approved for SSD often become “willfully disabled” and stop applying for jobs or even quit or go part-time at current jobs. Although some are truly totally and permanently disabled, for many others, SSD crushes career ambition.
  - Many injured employees will report much less severe symptoms to physical therapists than to treating physicians.

Relevant Hot Topics in Work Comp Cont.

- Many employees will hit MMI, go back to work, and stop treating for months and then suddenly ask for follow-ups with renewed symptoms. More and more, we are seeing doctors putting "employee's attorney told them to come here" in the chart notes.
- Some employees are highly experienced with work comp injuries. They will come back with a new claim every few years, sometimes in different states even, trying to get a significant disability determination.
- Vocational experts, who assess a workers' ability to return to time of injury work, base disability determinations, in large part, upon the Dictionary of Occupational Titles ("DOTs"), which have not been updated in literally decades.
- The Point: Employers need to be very careful about determining how disabled a worker really is or is perceived to be from a work injury.

Responsibilities: WC v. ADA

- Evaluate temporary restrictions to determine appropriate Light Duty and WC Benefits.
- Evaluate permanent conditions to determine appropriate modified or alternative work.
- Determine whether there is a disability
- Evaluate physical or mental functional limitations vis-a-vis essential job functions
- Suggest reasonable accommodations
- Monitor effectiveness of accommodations

Workers Compensation and Disability

Threshold questions:

- WC – Is employee injured on the job; “course and scope” questions?
- ADA – Is the employee disabled?
  - ✓physical or mental condition that limits a major life activity;
  - ✓a record or history of such condition; or
  - ✓being regarded by the employer as such.

Workers Compensation and Disability

ADA provides protection even when the injured worker is no longer injured and has no actual impairment but:

- ✓ Has a history of an impairment; or
- ✓ The employer responds as if the worker has such an impairment

Other Questions

- What is the interrelation of WC and ADA during TD, when the worker can perform some of the functions within scope of duties?
- Is employee on TD disabled under the ADA?
- When should we start the “interactive process?”
- Could light duty and accommodation be considered the same?
- Could light duty be precedent for accommodation?

Gems from Cases

"An employer does not have an obligation to create a position for a disabled employee. By keeping him in this position (light duty), it would in effect be creating a position for him…it was not a reasonable accommodation to continue it and (Employer) was not required to show undue hardship."

Pasatiempo v. England
125 Fed. Appx. 794 (9th Cir. 2005)

Transitional Work Assignment

- WC –

  Light duty is discretionary. Good practice. Provided by policy or (in some cases) CBA.

- ADA –

  Different concept. Reasonable accommodation standard. Not discretionary.

  Queries:

  - ✓ Can the employee perform the essential functions with or without accommodation?
  - ✓ When should we start the interactive process?
  - ✓ What, if any, accommodations are required?

Recommendation for Light Duty

- Consider light duty as soon as employee is released to work with restrictions.
- Treat it as a matter of policy and not necessarily as an accommodation.
- Clarify that it will not be considered precedent.
- May want to consider the interactive process at this time.

ACCOMMODATIONS

- ADA – Reasonable accommodation:

  Modifications or adjustments that enable the disabled person to perform the essential functions of the position without undue hardship.

  - Mandatory.
  - May include reassignment.

Essential Functions

- ADA - Employer defines and determines – but must be actually performed and required.
- Difficult question:

  How do we assess capability before MMI determination?

Effect of Disability Income Qualification

- Caveat: Thresholds and definitions for disability insurance and gov't plans may be different from ADA disability determination.

"SSDI payments (do not represent that claimant) is completely disabled for work related purposes."

Smith v. Sears, 207 Fed. Supp 2d 1031 (2002)

The Interactive Dialogue (Dance)

How long?

How extensive?

Who Initiates the Process?

The *general rule* is that the employee must make the request for an accommodation to trigger the interactive process.

Gems from Real Cases

But sometimes the employer must initiate the interactive process, if the employer:

1. knows about the disability;

2. knows, or has reason to know, that the employee is experiencing workplace difficulties because of the disability; and

3. knows, or has reason to know, that the disability prevents the employee from requesting accommodations.

Barnett v. US Air, Inc. (9th Cir. 2000)

Gems from Real Cases

- ✓ The obligation to accommodate is ongoing.
- ✓ If the first accommodation does not work out, the employer must once again engage in the interactive process, which includes suggesting other accommodations.

Humphrey v. Memorial Hospital (2001)

Leave as an Accommodation

- Holding a job open for a disabled person is a form of reasonable accommodation, where it appears likely that the employee will be able to return to his/her position at some time in the foreseeable future.
  - The purpose of the reasonable accommodation is to enable the employee to receive treatment, recover and return to work.
  - But leave is not required when an alternative accommodation would be just as effective.

Leave as an Accommodation

- Leave is not required if it would not enable the employee to resume work at some point with or without a reasonable accommodation.
- Ninth Circuit affirmed summary judgment for employer that terminated employee after one year of medical leave, at a point where the employee remained unable to perform the essential job functions.

Department of Fair Employment and Housing v. Lucent Technologies, Inc. (9th Cir. 2011)

Leave as an Accommodation

(Continued)

- Several months after the one year mark, the employee's doctor cleared him to work, but Lucent would not reinstate him.
- The court noted that the employer clearly and regularly engaged in the interactive process and reasonably accommodated the employee with a 12-month leave of absence, and at the end of that period, the employee remained unable to perform his job, or any other available job.
- The employer lawfully terminated the employment and was not required to provide indefinite leave.

What Constitutes Indefinite Leave?

Thomas v. Federal Express (9th Cir., May 11, 2011)

- Ninth Circuit affirmed summary judgment for the employer, finding the employer's refusal to hold jobs open did not violate the ADA, where the employee was not released to return to work, when she expressed interest in the positions and provided no indication when she might be released.
- Court also ruled that it was not an ADA violation for the company to refuse to extend a 30-month medical leave period where, according to the medical documentation, the leave could have helped the employee to find a suitable position.

Inflexible Leave Policies

- Beware rigid interpretation of leave policies.
- EEOC takes the position that an employer may be required to provide a leave that is longer than the maximum permitted under its policy.
- Leaves may be required as a “reasonable accommodation” beyond the 12-week requirement under the FMLA.
- Barring undue hardship, leave should be granted whenever it could plausibly allow the employee to recover and return to work.

Attendance and Reasonable Accommodation

- Regular attendance may (or may not) be an essential function of the job, depending on the individual's job.

- ADA: No-fault attendance policy may not be enforced against an employee taking disability leave, if leave is a reasonable accommodation and does not pose an undue hardship.

Attendance and Reasonable Accommodation

- FMLA: Family and medical leave cannot be counted under a no-fault attendance policy.

- *EEOC v. Verizon Del LLC*: Case filed by EEOC and settled in 2011. $20 million where Verizon maintained a no-fault attendance program with progressive discipline. Excluded FMLA absences, but not those caused by disability that did not otherwise qualify for FMLA.

Attendance and Reasonable Accommodation

Carmona v Southwest Airlines Co (5th Cir. 2010) 604 F3d 848

- Fifth Circuit held that where employee had managed to meet employer's attendance requirements for a number of years while taking intermittent FMLA leave, the employer could not demonstrate that regular attendance was an essential job function.
- Employee's frequent disability-related absences therefore do not render him unqualified to perform the job.

Attendance and Reasonable Accommodation

Humphrey v. Memorial Hosp. Assoc. (9th Cir. *2001)*

- Court found that the employer failed to reasonably accommodate a transcriptionist who was disciplined and ultimately terminated for absenteeism.
- Showing up to work may not be an essential function of job, where hospital may have been able to reasonably accommodate employee working from home.

Attendance and Reasonable Accommodation

Sampler v. Providence St. Vincent Med. Ctr.

(9th Cir. 2012) 675 F.3d 1233

- Neo-natal intensive care unit nurse, with fibromyalgia, sought exemption from attendance policy for unplanned absences from work as needed. Hospital tried several accommodations: e.g., shifts not on consecutive shifts per week, would not be scheduled on consecutive days, but finally discharged RN for "general problems with absences."

Attendance and Reasonable Accommodation

The court stated that regular attendance might be an essential function of a job for a variety of reasons. The particular job may require:

- The employee to work as part of a team.
- Face-to-face interaction between the employee and patients/customers or other employees.
- On-site use of items and equipment.

Attendance and Reasonable Accommodation

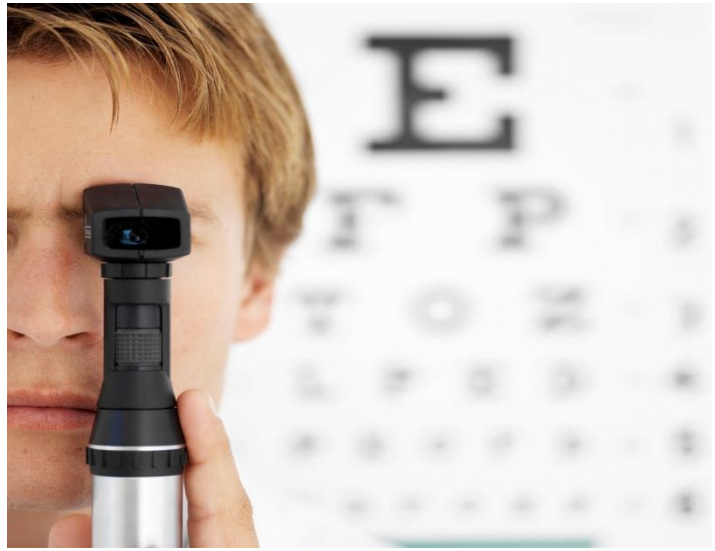
When applying reasoning of this case, remember that this employer developed particularly good facts:

- Employer tried several accommodations. The job description stated attendance was an essential job duty.
- No evidence that RN would improve.
- Work not "fungible" and highly skilled position (employees could not easily be "swapped out")
- Actual job duties required regular attendance (contrast with *Humphrey v. Memorial Hosp. Assoc*. case involving transcriptionist, where Court found that attendance not per se essential function of job.)

“Intermittent Leave” as ADA Accommodation (no FMLA)

- Determine whether regular, predictable attendance is an essential job function and, if so, the consequences of not requiring it for this employee.
- Determine whether the accommodation is reasonable or whether there are other possible accommodations.
- Determine whether the accommodation would cause undue hardship, e.g., the impact of intermittent leave upon the operation of the department.

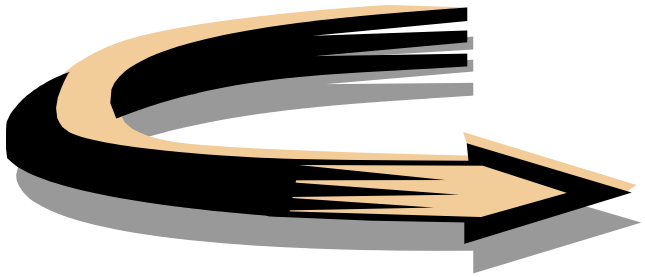
Reassignments as Accommodation



Employer's Responsibility

The Problem

- An employee returns from leave, after being determined MMI, with restrictions or limitations such that she can no longer do her former job.
- The ADA lists as a reasonable accommodation “reassignment to a vacant position.”



What is a suitable, vacant, equivalent alternative?

- ✓ Same salary
- ✓ Same shift
- ✓ Same level of responsibility

Gems from Real Cases

- There is a duty to reassign the disabled employee if an already funded position at the same level exists.

Spitzer v. The Good Guys (2000)

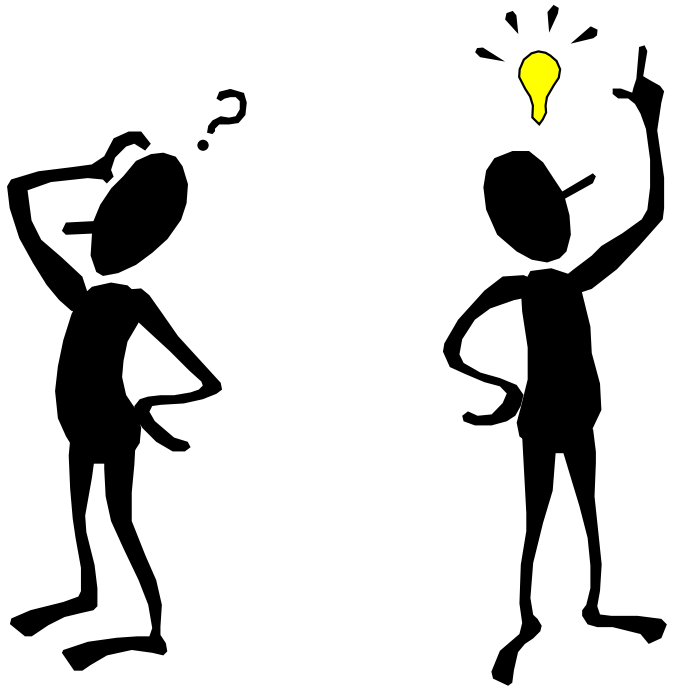
- Reassignment means that the employee gets the vacant position if she is qualified for it.

Jensen vs. Wells Fargo (2000)

Where should we look?

- ✓ Reasonable Commute Distance?
- ✓ Region-wide?
- ✓ System-wide?

Questions and Answers



Thank you