

The Interplay of the ADA and the WCA

By Elisa M. Hatlevig and Marlene S. Garvis

It is well-known in Minnesota that workers' compensation is the exclusive remedy for employees making claims against employers for workplace injuries. However, as with most laws, there are exceptions. This "exclusive remedy" does not prohibit an employee's right to bring a disability discrimination claim under the Americans with Disabilities Act (ADA). To make matters more complex, the Minnesota Workers' Compensation Act (WCA) and the ADA are understood to have competing goals.

Under workers' compensation, an employee claims that he/she is unable to work due to a work-related injury. By comparison, under the ADA, an employee claims to be a disabled employee who would be able to work with reasonable accommodations. Employers must be cognizant of both laws when dealing with injuries in the workplace and the resulting disabilities, to avoid civil suits.

What Is Available To The Employee Under the ADA and Workers' Compensation?

The Americans with Disabilities Act (ADA) prohibits discrimination against disabled persons. In situations of employment, the ADA arises upon a worker making a claim of discrimination based upon his or her disability. The discrimination extends to all "qualified individuals with disabilities" in all employment practices. "Disability" under the ADA means: "a physical or mental impairment that substantially limits one or more of the major life activities of such individual..."

A "qualified individual with a disability" is an "individual with a disability who, with or without reasonable accommodation, can perform the **essential functions** of the employment position." Employers must reasonably accommodate employees, unless to do so would constitute an undue hardship to the employer.

The Minnesota Workers' Compensation Act (WCA) compensates individuals "in every case of personal injury or death of an employee arising out of and in the course of employment without regard to the question of negligence." There is not an exclusive list of applicable "personal injuries," and the definition of "personal injury" extends generally to repetitive and occupational diseases.

Permanent partial disability (PPD) claims account for approximately 65% of all claims filed. For PPD, besides wage loss payments, benefits are payable for the permanent functional loss of use of the body based upon a disability schedule. That amount will be paid out to an employee regardless of whether an employee is working. If a permanent injury does not fit within a specific category, medical testimony can establish its rating.

A general inference can be drawn that PPD qualifies as a disability under the ADA. For this reason, for purposes of comparison, the interface between the ADA and permanent partial disability will be considered.

What Can Employers Do: Accommodate Or Terminate?

Under the ADA, once an employee is classified as a "qualified individual with a disability," an employer must make certain accommodations. If leave was taken as an accommodation, an employee must be reinstated to his/her former position only if the employee is qualified to perform the essential functions of the position without reasonable accommodations. In the alternative, if an employer can reasonably accommodate a job for an employee, it must do so. But, if reinstatement to a former position and/or accommodation would cause an undue hardship on the employer, it is not required under the ADA. The financial burdens of reinstatement can be construed an undue hardship depending on the situation.

The ADA expressly permits employers to draft qualification standards to describe "essential functions" and descriptively exclude individuals

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Comments or inquiries may be directed to Shannon Banaszewski.

Retraining – The “Last Resort”

By Thomas L. Cummings

Under the Minnesota Workers’ Compensation Act (WCA), retraining is defined as “a formal course of study in a school setting which is designed to train an employee to return to suitable gainful employment.” Minn. Stat. § 176.011, subd. 23. Accordingly, the purpose of retraining is to return an injured employee to suitable gainful employment by developing new vocational skills through schooling.

Retraining generally does not come into consideration until all other avenues of returning an injured employee to work have been exhausted. Within the WCA, retraining is generally considered by employers and insurers to be the “last resort” in dealing with an injured employee.

Retraining usually follows an attempt or attempts at other forms of vocational rehabilitation. First, there is usually an attempt to return an injured employee to work with the pre-injury employer in the pre-injury job. If that is not feasible, an attempt is then made to return the injured employee to work with the pre-injury employer in a modified or different job. If that also is not feasible, then an attempt is made to find suitable alternative employment for the injured employee with another employer. Retraining is usually only considered after those attempts fail.

Employers and insurers typically try to avoid retraining an injured employee at all costs. There is a perception that retraining is extremely costly. This perception is generally accurate.

Many factors come into consideration when retraining is evaluated under the Minnesota WCA. This section will attempt to deal with the most important legal factors encountered in retraining cases.

Before retraining is to be considered, there must be a determination that other vocational rehabilitation services are not likely to lead to suitable gainful employment for the injured employee. Nevertheless, pursuant to Minnesota Rule 5220.0750, subp. 1, retraining is to be given equal consideration with other rehabilitation services, and proposed for approval, if other services are not likely to lead to suitable gainful employment for the injured employee. As such, retraining is, by definition, the “last resort” for returning an

injured employee to suitable gainful employment.

The specific factors to consider in determining eligibility for retraining include the following:

A. The reasonableness of retraining compared to the employee’s return to work with the employer or through job placement activities;

B. The likelihood of the employee succeeding in a formal course of study given the employee’s abilities and interests;

C. The likelihood that retraining will result in a reasonably attainable employment; and

D. The likelihood that retraining will produce an economic status as close as possible to that which the employee would have enjoyed without the disability.

Poole v. Farmstead Foods, 42 W.C.D. 970, 978 (W.C.C.A. 1989). In addition to the “*Poolé*” factors, a fifth factor is physical ability. In determining eligibility for retraining, consideration must be given not only to whether the employee will be successful in the retraining plan, but consideration must also be given as to whether the retraining plan will lead to physically appropriate employment. *Bauman v. Trevilla of Golden Valley*, 45 W.C.D. 89 (W.C.C.A. 1991).

During the period of retraining, an employee is entitled to wage loss benefits, payment of schooling costs, and payment or reimbursement of other incidental expenses. Minn. Stat. § 176.102, subs. 9 & 11. All necessary costs of the schooling program, including tuition, books, lab fees, uniforms, equipment, etc. are paid for by the employer and insurer. In addition, the employee is entitled to payment of reasonable incidental costs including mileage, parking, daycare, etc., which can be significant. It is not uncommon

for the costs of retraining to approach \$100,000.00.

The only substantial limitation is durational in nature. Retraining benefits are limited to 156 weeks. Minn. Stat. § 176.102, subd. 11. This applies both to the costs of the schooling program, as well as to the wage loss benefit component.

The wage loss component of retaining benefits is similar to either temporary total disability benefits or temporary partial disability benefits, depending on the circumstances. If the injured employee is not employed during the retraining plan, then the employee will receive retraining benefits paid at the temporary total disability rate (i.e., two-thirds of the employee’s pre-injury average weekly wage, subject to a statewide maximum compensation rate). If the employee is employed during the retraining plan, then the injured employee will receive retraining benefits payable in the same manner as temporary partial disability benefits.

Generally, employers and insurers do not voluntarily agree to provide retraining. If an employer and insurer are not in agreement with a retraining plan as submitted by a QRC, then the injured employee must either file a claim petition or rehabilitation request seeking approval of the retraining plan.

In determining whether to approve a retraining plan, the compensation judge will consider the “*Poolé*” factors. Generally expert testimony from both sides will be needed to address those factors. The injured employee will generally rely heavily on the QRC as his or her expert. The employer and insurer will rely on the opinions of an independent vocational expert.

Retraining is most likely to be an issue in those cases where an injured employee has a relatively high pre-injury wage and substantial

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NEWS FLASH

Minnesota courts continue to clarify the exceptions to the Workers’ Compensation Act (WCA):

- *Meintsma v. Loram Maintenance of Way, Inc.* 684 N.W.2d 434 (Minn. 2004) (in a case involving workplace birthday spankings, an employee could recover against an employer only under the WCA because “mere knowledge” of substantial injury to the employee did not trigger the intentional injury exception);
- *Stengel v. East Side Beverage*, 690 N.W.2d 380 (Minn. Ct. App. 2005) and *Kopet v. General Mills, Inc.*, 2005 WL 1021651 (Minn. App. May 3, 2005) (it is a question of fact whether a sexually motivated assault falls under the WCA);
- *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746 (Minn. 2005) (The WCA precludes liability of co-employee where the co-employee’s duty falls solely within the course and scope of employment).

Welcome

Jardine, Logan & O'Brien, P.L.L.P. welcomes to the firm, as a new associate, **Daniel Weatherly**. Dan will be practicing primarily in civil litigation. Prior to becoming a lawyer, Dan gained valuable experience working in the insurance industry handling all types of liability insurance and reinsurance claims. This experience provided him with significant exposure to the many unique legal challenges that insurance companies and other businesses face on a day-to-day basis.

Congratulations

Jardine, Logan & O'Brien, P.L.L.P. congratulates partner **Marlene Garvis** on her election as President of the Hennepin County Bar Association for 2005-06. Marlene is the first nurse-attorney and first graduate of Hamline University School of Law to hold the position.

Awards

Congratulations to **Alan Vanasek**, **Patti Skoglund**, and **Marlene Garvis** for being named Leading Health Care Attorneys in *Minnesota Physician* for 2005.

Publications Available

- **Periodic Table of Workers' Compensation Elements**
- **The ADA/FMLA/WCA Comparison Chart**

The 2006 versions of JLO's Periodic Table of Workers' Compensation Elements and ADA/FMLA/WCA Comparison Chart are now available. The Periodic Table offers up-to-date information on benefit payments and schedules, while the Comparison Chart is essential for distinguishing between the ADA, FMLA and the WCA. If you would like to receive a copy of either of these publications, please call 651-290-6559.

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physical limitations resulting from the work injury. In those cases, it is helpful if the employer and insurer can identify the potential early on for the claim to turn into a retraining case.

First and foremost, the employer and insurer should, if possible, aggressively attempt to find a way for the employer to accommodate the injured employee's limitations. In doing so, the employer and insurer should maintain communication with the employee's QRC. The employer and insurer should attempt to convince the QRC to focus his or her efforts on returning the employee to work at the pre-injury employer or, in the alternative, to perform an extensive search for alternative employment. In effect, the employer and insurer should attempt to delay consideration of retraining by the QRC and by the injured employee, until other vocational rehabilitation alternatives are exhausted. •

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who will be a direct safety threat to themselves or others if the risk cannot be mitigated by a reasonable accommodation. An employee may be terminated for poor workplace performance or noncompliance with workplace standards, if the standards are job-related and consistent with business necessity.

Further, under the ADA, a disabled employee who is unable to maintain reasonable consistent attendance may not be recognized as a "qualified" individual with a disability. Regular attendance is generally considered an essential job function, and, thus, accommodating

tardiness may be an undue hardship to an employer. An employee must be a "qualified individual" at the time of termination in order to fall under the protective "umbrella" of the ADA.

Under the WCA, an employer cannot, without reasonable cause, refuse to offer continued employment to the employee when employment is available within the employee's physical limitations. The duty of an employer to offer continued employment only exists, however, while an employee is still employed.

An employee can continue to receive permanent partial disability payments even if they have returned to gainful employment. Factors affecting an employee's right to receive workers' compensation benefits includes an employee refusing suitable work, tardiness and/or an employee acting against the orders of an employer.

There are substantial civil penalties against an employer who discharges, threatens to discharge, or intentionally obstructs an employee from receiving workers' compensation benefits. Potential damages include compensation three times the amount of benefit for which an employee is qualified, punitive damages, one year's wages and attorney's fees.

Can Employers Protect Themselves?

Employers can protect themselves by considering the following:

**Clearly identify the difference between a mere workplace injury (workers' compensation only) and a disability resulting from a workplace injury (ADA and workers' compensation).*

**Draft qualification standards for each job position that identify the essential functions for the position,*

detailing physical requirements and whether there are safety concerns if an employee cannot meet the requirements.

**Keep detailed and accurate records for each employee regarding workplace conduct and performance, tardiness, conversations with the employee, and any physical complaints from the employee and the claimed cause.*

**Prior to offering an employee a "reasonable accommodation," meet with appropriate managers and staff, including a billing or accounting manager, to discuss the potential reasonable accommodations, what positions are possible, the financial burdens of each, the positions that would create an undue hardship and the causes of the hardship.*

**Offer a reasonably accommodating position to an employee coming back from a workers' compensation or disability leave in consideration of the accommodations and financial burdens discussed in the meeting prior to the return-to-employment offer.*

**Set forth in a workers' compensation settlement agreement that the employee agrees to settle any and all employment-related claims as well as the identified workers' compensation claims.*

**If concerned that discipline or termination of an employee who has a workers' compensation injury may violate the ADA, contact an attorney prior to making any employment decision.*

Considering the possible implications of both the ADA and the WCA on employment situations, an employer must be well-versed in the requirements of both laws. By understanding and taking affirmative and insightful action prior to encountering difficult employment situations, employers can handle them more effectively and efficiently and protect themselves from potential suits. •

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. All of our attorneys are qualified to handle matters in Federal Court. We are trial lawyers dedicated to finding litigation solutions for our clients.

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Marlene is a partner at Jardine, Logan and O'Brien, P.L.L.P., and focuses her legal practice on representing clients in professional liability, employment, product liability and licensing and disciplinary matters. Marlene practiced as an RN, MSN, prior to receiving her J.D. from the Hamline School of Law and is currently the President of the Hennepin County Bar Association.

If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

Coming in the Spring 2006 Issue...

*Construction Law
General Liability/Negligence*