

THE EMPLOYMENT RELATIONSHIP

Mark A. Fahleson
Rembolt Ludtke LLP
Lincoln, NE

The Employment Relationship

- ❖ Contract Employees
- ❖ Temporary Employees
- ❖ Independent Contractors
- ❖ Leased Employees
- ❖ Employees at Will

Employment at Will

- ❖ Absent a contractual or legal restriction, both the employer and employee are free to terminate the employment relationship at any time for any reason whatsoever without incurring liability

Employment at Will

- ❖ Most states recognize “employment at will”.
- ❖ Nebraska is an “at will” employment state.

Employment at Will

- ❖ Statutory

 - ❖ Title VII

 - ❖ ADA

 - ❖ FMLA

- ❖ Contractual

 - ❖ Implied in Fact

 - ❖ Promissory Estoppel

- ❖ Tort

 - ❖ Public Policy

 - ❖ Refusal to commit unlawful act

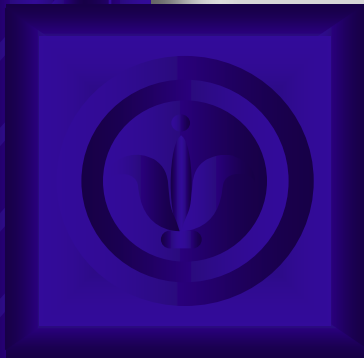
 - ❖ Fulfilling public obligations

 - ❖ Exercising right or privilege

 - ❖ Filing for Workers' Compensation Benefits

Employment at Will Managers/Supervisors

- ❖ Some courts permit terminated employees to sue their employer and their supervisor for wrongful discharge.
- ❖ Supervisors can be required to hire their own attorneys and pay any damages awarded out of their own pocket.
- ❖ Supervisors have the primary responsibility of complying with state and federal employment laws.
- ❖ You are the Company as far as the law is concerned.



THE INTERPLAY BETWEEN WORKERS' COMP, ADA & FMLA

Overview

- ❖ The History of Workers' Compensation Law.
- ❖ The Bermuda Triangle.
 - ❖ Workers' Comp
 - ❖ Americans with Disabilities Act (ADA)
 - ❖ Family and Medical Leave Act (FMLA)
- ❖ Getting Work Comp Claimants Back to Work.
- ❖ Disciplining and Terminating Work Comp Claimants.
- ❖ Case Studies.

The History of Work Comp

- ❖ First workers' compensation laws were adopted in the late 1800s.
- ❖ Predominantly state, not federal law.
- ❖ Nebraska adopted its workers' compensation laws in 1913.
- ❖ Prior to workers' compensation:
 - ❖ Employees brought "personal injury" claims for work-related injuries.
 - ❖ Employee claims were subject to multiple employer defenses:
 - ❖ Contributory negligence;
 - ❖ Fellow Servant Doctrine;
 - ❖ Cases were often tried to juries.
 - ❖ Employees rarely won, but when they did the jury verdicts were potentially large.

The History of Work Comp

- ❖ Workers' Compensation is the *exclusive* remedy for a work-related injury.
- ❖ Workers' Compensation is the ultimate compromise:
 - ❖ Employees are entitled to recover for all work-related injuries not resulting from willful negligence.
 - ❖ Recovery is limited.

Workers' Compensation Law Today

❖ When personal injury is caused to an employee by *accident or occupational disease arising out of and in the course of* the employee's employment, the employee shall receive workers' compensation benefits provided the employee was not willfully negligent at the time of injury.

Neb.Rev.Stat. §48-101

The Bermuda Triangle

- ❖ **Americans with Disabilities Act (ADA)**
- ❖ **Family Medical Leave Act (FMLA)**
- ❖ **Workers' Compensation Laws**

ADA

- ❖ ADA prohibits discrimination in employment against *qualified individuals with disabilities*.
 - ❖ Who is a “*qualified individual*”?
 - ❖ What is a “*disability*”?
- ❖ Requires employers to provide “reasonable accommodations” to qualified individuals with disabilities.
- ❖ Remedies for violations include:
 - ❖ Reinstatement;
 - ❖ Back pay;
 - ❖ Equitable relief;
 - ❖ Compensatory damages; or
 - ❖ Punitive damages.

What is a “disability”?

- ❖ A physical or mental impairment that:
 - ❖ Substantially limits a major life activity.
 - ❖ A record of such an impairment exists.
 - ❖ Being regarded as having such an impairment.
- ❖ Cause of disability can be work or non-work related.

What is a “disability”?

- ❖ “Substantially limits” one or more major life activity.
- ❖ Life Activity: caring for oneself, walking, seeing, hearing, speaking, learning, reproduction & working.
- ❖ “Substantially limits” depends on:
 - ❖ Nature & severity of impairment;
 - ❖ Duration of impairment; and
 - ❖ Permanency/long-term impact of impairment.
- ❖ Major life activity of “working”:
 - ❖ Geographical area;
 - ❖ Types of jobs individual is disqualified from; and
 - ❖ Disqualification from one particular job is not enough.

ADA

- ❖ **Duty to reasonably accommodate.**

- ❖ Accommodation = any change in the work environment or the way things are customarily done.

- ❖ Examples:

- ❖ Job restructuring;

- ❖ Modified work schedule;

- ❖ Modifying work status;

- ❖ Assignment to vacant position.

- ❖ **Duty to reasonably accommodate doesn't exist where:**

- ❖ Accommodation would be an “undue hardship” on employer.

- ❖ Employee poses a “direct threat” to health or safety

- ❖ Requires significant risk of substantial harm.

Recent Development: You be the judge!

- ❖ Ella Williams worked for Toyota on the assembly line & developed carpal tunnel syndrome.
- ❖ Williams was placed on permanent work restrictions severely restricting what she could lift & repetitive hand movement.
- ❖ A couple years later, Williams' duties changed to include work that required her to hold her hands & arms up around shoulder height for several hours at a time.
- ❖ Williams began to suffer from pain in her neck & shoulders, & after seeking care for her neck & shoulder pains, Williams asked to be returned to her previous duties which involved minimal use of her hands & arms. Williams was eventually placed under a no-work-of-any-kind restriction by her treating physicians.
- ❖ A little over a month later, Toyota terminated Williams' employment, citing her poor attendance record as the reason.
- ❖ Williams claimed she was "disabled" under the ADA because her carpal tunnel prevented her from engaging in the major life activity of working.
- ❖ Ruling:
 - ❖ Williams was not "disabled" under the ADA.
 - ❖ Could still perform many jobs, if not the particular job she held.

FMLA: The Basics

- ❖ Adopted in 1993

- ❖ Covered employers:

- ❖ All public employers, regardless of size; and
 - ❖ Private employees who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year.

- ❖ Eligible employees:

- ❖ Worked for the employer for at least 12 months;
 - ❖ Worked at least 1,250 hours during the 12 months prior to the FMLA leave; and
 - ❖ Work at a location where at least 50 employees are employed at that location or within 75 miles of the location.

When does an “eligible employee” qualify for FMLA benefits?

- ❖ For the birth of a child or to care for a newborn;
- ❖ For the placement of a child with the employee for adoption or foster care, and to care for the child;
- ❖ To care for an immediate family member with a “serious health condition”; and
- ❖ When the employee is unable to work because of a “serious health condition”.

What is a “serious health condition”?

- ❖ An illness, injury, impairment or physical or mental condition that involves:
 - ❖ Any period of incapacity or treatment with inpatient care;
 - ❖ Overnight stay at hospital.
 - ❖ A period of incapacity requiring absence of more than 3 calendar days from work, school or other regular activities that also involves continuing treatment by a health care provider;
 - ❖ Any period of incapacity due to pregnancy or prenatal care;
 - ❖ Any period of incapacity due to a chronic serious health condition;
 - ❖ Asthma
 - ❖ Epilepsy
 - ❖ A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective; or
 - ❖ Any absences to receive multiple treatments that would likely result in incapacity of more than 3 consecutive days if left untreated.

FMLA

- ❖ **Benefits granted to eligible employees:**
 - ❖ Up to 12 weeks of unpaid leave;
 - ❖ Maintenance of health insurance benefits during leave;
 - ❖ Reinstatement to the same or equivalent job.

ADA, FMLA & Workers' Comp

The Bermuda Triangle

- ❖ A work-related injury can be:
 - ❖ An “accident & injury” for workers’ compensation;
 - ❖ A “disability” under the ADA; and
 - ❖ A “serious health condition” under the FMLA.
- ❖ Which law applies determines:
 - ❖ Whether the “disability” must be reasonably accommodated;
 - ❖ What limitations exist to terminate the employee;
 - ❖ What benefits must be paid; and
 - ❖ Whether reinstatement is guaranteed.

Disciplining & Terminating Employees- Work Comp

- ❖ You cannot terminate an employee simply for having a work-related injury.
- ❖ You cannot terminate an employee for filing for workers' compensation benefits.
- ❖ You can hold employees who sustain an work-related injury to the same rules & policies as all other employees.

Return to Work- Light or Full Duty

- ❖ Start with a detailed job description.
- ❖ Use a “Fitness for Duty” form.
 - ❖ Requires doctor to answer specific questions:
 - ❖ Condition/Injury;
 - ❖ Impairment;
 - ❖ Duration;
 - ❖ Functional abilities of employee; and
 - ❖ When is the employee’s next doctor’s appointment.
- ❖ If injury is job related, you may communicate with the doctor.
 - ❖ If FMLA only, you may not.

Employee Medical Information

- ❖ Numerous reasons why employee information must be kept confidential:
 - ❖ Common law invasion of privacy; and
 - ❖ ADA requires it.
- ❖ ADA requires that it be kept in a separate file.
 - ❖ Includes workers' compensation medical information.

Light Duty

❖ Benefits:

- ❖ Better for employee's mental & physical health;
- ❖ Generally accelerates recovery process;
- ❖ Helps coworkers who are filling in during employee's absence;
- ❖ Especially important where vocational rehabilitation is at issue.

❖ Detriments:

- ❖ Can prolong length of disability;
- ❖ Can hurt coworker morale;
- ❖ If light duty is done in one instance, may limit company's ability to decline light duty in another.

Light Duty- Things to remember

- ❖ All employees must be eligible for light duty, regardless of cause of injury.
- ❖ All light duty should be temporary
- ❖ Employees should generally be held to the same policies.
- ❖ Do not allow employees to harass employees on light duty.

Return-to-work

Light Duty/Accommodating restrictions

❖ Case Study:

- ❖ Susan works as a laborer, a position that requires repetitive bending & frequent lifting of objects 50 lbs or more. Today, Susan injures her back while lifting a stack of steel at work. After reporting the accident to her supervisor, she is sent for medical treatment, and does not return to work today. Susan reports for work tomorrow morning, with a note from her doctor releasing Susan to return to work, light-duty only for 4 weeks, with a 20 lb lifting restriction & no repetitive bending.
- ❖ What would you do?

Return-to-work

Light Duty/Accommodating restrictions

❖ Case Study:

❖ Rick injures his lower back while tying down a tarp. After undergoing back surgery, Rick's doctor has declared Rick to be at "maximum medical improvement" with a permanent lifting restriction of 20 lbs, & only occasional bending, twisting & lifting. Rick's previous position required frequent lifting, twisting, & lifting of material of 75 lbs or more.

❖ What would you do?

Return-to-work

Accommodation v. Seniority System

❖ Case Study:

- ❖ Barnett injured his back while working in cargo-handling position with U.S. Airways. Barnett was able to transfer to a less demanding mail room job because of his seniority. The mail room job was subject to periodic bidding based on seniority under U.S. Airways seniority system. Barnett's mail room job came up for bidding, & two other employees with more seniority intended to bid. Barnett asked U.S. Airways to make an exception & let him stay in the position as an accommodation under the ADA for his injury. U.S. Airways opened the position for bidding, & Barnett lost the position.
- ❖ Barnett sues U.S. Airways.
- ❖ Ruling?

Return-to-work

Interactive Process/Reasonable Accommodation

- ❖ Humphrey worked as a medical transcriptionist for Memorial Hospitals. She developed obsessive compulsive disorder which caused her to do such things as wash her hair for up to three hours, dress very slowly, & check continually for papers for work. These actions would cause Humphrey to be late for work or miss work all together. The Hospital allowed her an accommodation for coming to work any time during the day, so long as she worked 8 hours per day. Humphrey still missed work, & requested a different accommodation of working from home. It was Hospital policy that any employee involved in disciplinary action, which Humphrey was, was not eligible to work at home. Humphrey was denied her request.
- ❖ Humphrey sued under the ADA alleging Memorial Hospital failed to reasonably accommodate her disability.
- ❖ Ruling?

Return-to-work Workers' Compensation

❖ Case Study:

- ❖ Sally is a welder. While lifting a metal to weld, she falls to the floor & injures her back. Following extensive physical therapy, Sally is released to return to work. She is temporarily released with a 50 lb weight restriction. You find her a job painting screw heads. After one day of this work, Sally says that it is too mentally stressful for her to paint screw heads (the only job available with a 50 lb restriction) and wants to go home.
- ❖ Do you have to put her back on workers' compensation leave?

Return-to-work Workers' Compensation

❖ Case Study:

- ❖ On March 1, Jerry injures his knee when he trips as a result of wrapping a power cord around his waist while using a drill. He goes to see Dr. Kwak who schedules him for arthroscopic knee surgery on March 16. He will then have 2 weeks of physical therapy after the surgery. He may be able to work part of the time- he doesn't know. On April 1, Jerry reports to work at 7:30 am. He has to go to physical therapy every day. He wants to go from 9:30 am to 11:00 am. However, 10:00 am is your busiest time of the day.
- ❖ What do you do?

Return-to-work

❖ Case Study:

- ❖ Nicole is a typist for Old Man Inc. She breaks her wrist while trying to move a desk with a coworker. Nicole is unable to work for six weeks & receives workers' compensation. After Nicole's wrist completely heals, she asks to return to work. A physician indicates that there is little risk that repetitive motion will damage Nicole's wrist. However, the Company refuses her request to return to the typist position because it believes that any repetitive motion will cause serious & permanent re-injury to her wrist.
- ❖ Does the Company have to return Nicole to her former position?

Hiring Employees

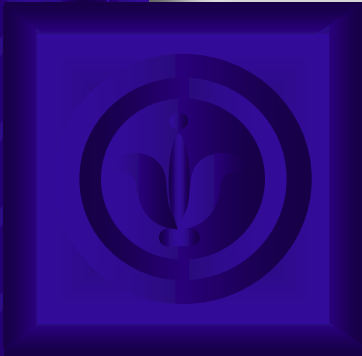
Risk of Work Comp Injury?

❖ Case Study:

- ❖ Mario applied for a job at Chevron's refinery; after a pre-employment medical exam revealed that Mario had liver damage as a result of Hepatitis C. Mario was not offered a job. Chevron argued that exposing Mario to the toxins at the refinery would constitute a significant risk of substantial harm to Mario's health.
- ❖ Mario sued Chevron.
- ❖ Ruling?

Recap

- ❖ ADA, FMLA & Workers' Comp laws must always be considered.
 - ❖ Not every injury is a “disability” under the ADA.
 - ❖ Not every injury is a “serious health condition” under the FMLA.
- ❖ Employees with work-related injury can be held to standard company policies & rules.
 - ❖ *Caveat*: Unless necessary for reasonable accommodation.
- ❖ Documentation is critical.
- ❖ When in doubt, ask yourself: What would a jury of employees think about our decision to terminate?



Mark A. Fahleson

Lincoln, NE

www.remboltludtke.com