

WORKERS' COMPENSATION: HANDICAP REIMBURSEMENT: AN IMPORTANT TOOL FOR LOWERING CLAIM COST

By Nicole H. Farley

Effective claims management is very important in controlling the cost of workers' compensation claims. Receiving a Handicap Reimbursement, a program offered through the Ohio Bureau of Workers' Compensation, is one of several ways through which an employer may lower the cost of a claim. The main purpose of the program is to encourage employers to hire and retain employees with handicapped conditions by offering a reduction in the claim experience cost for those claims involving injured workers with handicapped conditions. It is important to note that the employer need not be aware of the employee's handicapped condition at the time of hiring or prior to the filing of the claim.

For the purposes of this program, the law defines a handicapped employee as one who has a physical or mental impairment, whether congenital or due to an injury or disease of such a nature that the impairment

actually or potentially hinders the employee in obtaining employment or reemployment. Additionally, the impairment must be one of the conditions or diseases outlined by the statute. Presently, the statute recognizes twenty-five conditions, including arthritis, diabetes, cardiac disease, ankylosis of the joints, and epilepsy.

In the event a handicapped employee suffers lost time due to a work-related injury and files a workers' compensation claim, the employer may file an application for handicap reimbursement to recoup claim costs. In order for an application to be filed in regards to a particular claim, one of the following types of compensation must have been paid in the claim: temporary total, death benefits or wages in lieu of temporary total compensation, permanent total disability or scheduled loss awards. Additionally, it is necessary for the employer to demonstrate the employee's handicapped condition pre-existed the

date of injury and that it either caused the claim or was a factor in the increased cost or delay in the employee's recovery. The application must also be completed by June 30th of the sixth year after the date of injury in the claim.

Upon receipt, the Bureau processes the application and a Bureau attorney conducts an informal conference to determine whether the Bureau should charge a certain percentage of the claim's cost to the statutory surplus fund instead of the employer's experience. The employer has the right to appeal the Bureau's determination to the Industrial Commission.

Are you curious what "ankylosis" means? If you are, or if you wish to obtain additional information regarding handicap reimbursement, please contact Nikki or any other of the workers' compensation attorneys at RBS.

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WORKERS' COMPENSATION: WHEN PUSH COMES TO SHOVE . . . IN THE WORKPLACE

By Tony Baucio

He who can suppress a moment's anger may prevent a day of sorrow.

- Tryon Edwards (1809-1894)

The workplace is filled with many diverse people with different backgrounds and personalities. That being the case, it can be difficult to get along with your co-workers, especially when working in close proximity to each other on an everyday basis. Tempers may flare up and inconsiderate words may be exchanged from time to time. Unfortunately, these disagreements don't always end with a peaceful resolution, or with both feuding parties retreating to their respective work areas to brood over what has just transpired. Occasionally, a heated disagreement in the workplace will unfortunately escalate into a physical confrontation and one party will be injured in the fight. Is this a compensable injury?

Ohio courts have consistently focused on two separate factors in determining whether or not the injury is compensable. An injury will be deemed compensable if the origin of the fight was work-related and if the injured worker bringing the claim was not the instigator of the fight. An injury is compensable only if both findings are made.

Deciding whether or not a fight is work-related can sometimes be a difficult analysis. Ohio courts will oftentimes analyze the proximity of the scene of the fight to the place of employment, the degree of control the employer had over the scene of the fight and the benefit the employer received from the injured worker's presence at the scene of the fight. Furthermore, Ohio courts have also

been known to analyze whether the cause of the fight was due to a personal animosity or domestic matter between the parties, completely independent of and unrelated to the injured worker's employment. Ohio courts will also look at the entire conflict from beginning to end, to determine if one continuous work-related conflict occurred. There may be a break in the initial disagreement and the reason for the subsequent argument and physical confrontation may no longer be considered work-related, but personal.

Likewise, deciding whether or not an injured worker is the instigator of the fight may also be difficult. Ohio courts have never provided a comprehensive definition of the term "instigate" for the purposes of workplace fights. However, a recent Ohio case defined the word as according to common usage. The court

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This publication is intended to inform clients and friends about labor and employment matters of current interest. The matters included were not given exhaustive treatments due to space limitations. This abridged information should not be construed as legal advice and is not a substitute for legal counsel. This publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship.

WORKERS' COMPENSATION: WHEN PUSH COMES TO SHOVE CONT'D

indicated that "instigate" is defined as to goad or incite someone to take action or course. It has also been defined as language which would have a tendency to provoke an assault. Whether or not the injured worker instigated the fight will therefore turn on the specific facts of the conflict, when viewed in totality from beginning to end.

Workers' compensation claims stemming from workplace fights are usually complicated and involve significant factual issues. It is therefore important to immediately procure witness statements and incident reports following the fight, in addition to following normal post-accident procedure.

Let's hope your workplace doesn't host the next Wrestlemania, but should you have any questions regarding claims stemming from workplace fights, please contact Tony or any of the workers' compensation attorneys at RBS.

LABOR: GENERAL COUNSEL URGES CHANGES IN LAW GOVERNING CONSTRUCTION INDUSTRY

By David S Farkas

On June 15, 2006 the new General Counsel of the NLRB, Ronald Meisburg, published a report on case developments from his first three months in office. Meisburg's name may be familiar to regular readers of this space as, prior to being appointed General Counsel, Meisburg served as one of the Labor Board members. During his tenure I had the opportunity to meet with him and bend his ear on items of interest to many of our readers. We shall see if I have a similar impact and influence on his activities as General Counsel.

One case in particular that he discussed may prove to be of significant interest to our readers. It concerned a case decided under the term of the former General Counsel, where the Board held that contract language, standing alone, is sufficient to establish a "9(a)" relationship in the construction industry, if the language unequivocally indicated that the Union requested recognition as a majority representative, the employer recognized the Union as the majority representative, and the employer's recognition was based on the Union's showing or offer to show majority support. Construction industry employers may also have an "8(f)" relationship with a union, whereby an employer becomes signatory even without the majority support of its employees. A key distinction between a 9(a) relationship and an 8(f) relationship is that, under certain circumstances, the former makes it far more difficult for an employer to

extricate itself from the obligation to bargain with a union.

What prompted the General Counsel to request reconsideration was a case where an employer signed a document agreeing to be bound by collective bargaining agreements and certain side agreements between a Union and a Multi-Employer Association. The association agreement expired in March 2004 and the employer provided timely notice to the Union indicating that it would not be bound by any successor agreement between the Union and the Association. The employer refused to enter into separate negotiations, claiming that its earlier notice terminated its 8(f) relationship with the Union. The Union then filed an unfair labor practice charge alleging that the employer violated the law by withdrawing recognition.

During the investigation, the employer presented evidence that the Union had never told the employer that it represented a majority of the employees or that it had cards to substantiate that claim. Further, the Union itself was also unable to produce evidence that it had majority support. Nevertheless, under current law, a simple contractual clause in the side agreement was sufficient to establish a 9(a) relationship. Thus, the General Counsel felt compelled to issue a formal complaint. However, the new General Counsel has asked the Board to modify its holding. Mr. Meisburg feels that the "virtual certainty" that the

employer would be able to show the Union lacked majority support at the time of recognition raised issues of whether the Board's current test serves the principle of employees' free choice in the construction industry. The General Counsel noted that the D.C. Circuit Court of Appeals has already rejected the Board's existing policy holding that contract language alone could establish a 9(a) relationship in the construction industry. Instead, the General Counsel proposed that the contractual language would be sufficient to establish a rebuttable presumption of 9(a) status, but the employer would be able to rebut that presumption by providing evidence that the Union did not actually enjoy majority support at the time of the purported 9(a) recognition.

This column has frequently needled both the Board and the General Counsel for its timidity in setting precedent, and in reversing poorly decided precedent of previous Board administrations. However, the move of the General Counsel in this case is certainly a healthy step forward. "Baby steps, baby steps," indeed.

Questions or concerns about the ever-changing world of labor law? Alan Ross and David Farkas are standing by!

EMPLOYMENT: FEDERAL COURT FINDS SEXUAL ORIENTATION DISCRIMINATION UNLAWFUL

By Jerry P. Cline

Sexual orientation, unlike race, color, religion, sex, national origin, age and disability, is not a protected class under federal and Ohio civil rights laws. As such, barring certain municipal civil rights laws, no statute prevents discrimination against a person based upon his sexual orientation.

However, in the recent case of *Beall v. London City School District Board of Education*, the Federal District Court for the Southern District of Ohio ruled that homosexuals, as an "identifiable group," were considered a *protected class* for purposes of a 14th Amendment equal protection discrimination claim against a *government* employer. While an equal protection claim can only be brought against a government agency, such as a school board, and not a private employer, the court's analysis essentially mirrored the analysis used in discrimination actions against private employers under the rubric of Title VII of the Civil Rights Act of 1964.

In *Beall*, the plaintiff, a lesbian, was given a one-year limited teaching contract by the London City School Board of Education. Beall's annual teaching contract was subsequently renewed for the next two years. After receiving positive performance reviews, Beall was recommended by the principal to be rehired again under a three-year contract. Soon thereafter, Beall advised the principal that she would be starting a unit on Civil Rights/Civil Liberties in her Government class and that this unit would encompass several "controversial" topics, including affirmative action, women's rights and other forms of discrimination. Subsequently, Beall showed a power point presentation to her classes concerning the "National Day of Silence," a day

where certain individuals remain absolutely silent in an effort to bring attention to what they perceive as sexual orientation discrimination. Beall remained silent during the presentation. The principal, upon discovering the presentation, expressed his concern. Soon thereafter, the school board declined to renew Beall's contract.

Beall filed suit, arguing that the Board's refusal was based upon her sexual orientation and that such action violated her equal protection rights under the 14th Amendment. Nevertheless, the court, using the same framework for analyzing claims of private employment discrimination under Title VII, ruled that the plaintiff was a member of a *protected class* and entitled to proceed to trial because, as a lesbian, she was "entitled to at least the same protection as any other identifiable group which is subject to disparate treatment by the state."

The holding of this case obviously applies to government employers, but it may also have implications for private sector employers, such as contractors. While this decision does not make homosexuality a protected class under Title VII, it appears, based upon this and other recent decisions, that homosexuality is well on its way to becoming a protected class for private employment discrimination claims as well.

As this article shows, employment law can change in the blink of an eye. To stay on top of the game, call any of our employment attorneys with your questions.

self-insured [corner]

The Workers' Compensation Resource Network is an association for self-insured employers in Ohio. The purpose of the association is to provide a unique forum, opportunity and resource for the educational benefit of self-insured employers.

The Resource Network dialogues ideas, resources and information with member peers by identifying and addressing issues which self-insured employers face. This includes engaging in dialogue focused on outcomes that enhance self-insured administration. Some topics thus far covered include the development and maintenance of a transitional work program, ergonomics, the importance of written job descriptions, the economic impact of business failures on self-insured employers, and medically managing claims for self-insured employers.

If you are a self-insured company, consider becoming a member of the Workers' Compensation Resource Network. Members pay no additional cost for two representatives from your company to attend regularly scheduled seminars and meetings.

Call Thomas Wyatt at (216) 447-1551 for additional information and membership details.

EMPLOYMENT LAW BREAKFAST BRIEFINGS

*Presented by Lynn Schonberg & David Andrews, in conjunction with Nick Phillips
of HR Department Unlimited*

- Location:** 6000 Freedom Square Drive, Independence
In the Ground Floor Amphitheatre
- Time:** 8:30 a.m. to 10:30 a.m.
- Registration:** Please contact Melody at (216) 447-1551 for information,
or register online at www.rbslaw.com
- (No cost to RBS clients and HRDU Members)

September 14, 2006

Hiring the Perfect Employee

Okay, maybe we can't promise the perfect employee, but we can definitely make sure that you are doing all that the law will allow to help you find just the right employee. We'll cover all the aspects of hiring from developing your applicant pool, to screening applicants, interviewing and the post-offer/pre-hire process.

December 7, 2006

2006 and beyond – Annual HR Legal Update

This annual year-end session will review all the employment law developments of 2006 and look forward to what is coming for employers in '07.

RBS ATTORNEY SPEAKING ENGAGEMENTS

August 4 – Lynn Schonberg will be featured as part of an all-day presentation of the National Business Institute, and will speak on the topic of advanced employment law. The event will take place at the Holiday Inn in Independence.

August 24 – David Andrews will be a featured speaker for Lorman Educational Services, and will speak on the FMLA (Ohio) related topic of “Plugging the Dam: Intermittent and Reduced Schedule Leave.” Among the items to be discussed are the employer's responsibility to permit intermittent leave, and strategies for limiting abuse. The one-day seminar will take place at the Lakeshore Holiday Inn in Cleveland.

October 19 – Lynn Schonberg will address the Lake/Geauga Society of Human Resources Managers, and will present a review and update of current law regarding employment handbooks. The event will be located at the Radisson Hotel in Eastlake, and Lynn will speak from noon to 1:30 p.m.

ABC, NORTHERN OHIO CHAPTER SEMINARS

ABC conducts an ongoing series of safety training for employers, including the popular OSHA 10-Hour and OSHA 30-Hour classes. All training participants must register one week in advance with Jennifer at (440) 717-0389.

Location: All Cleveland training will be held at the NOC-ABC Training Center, 9255 Market Place West, Broadview Heights, Ohio 44147. For Perrysburg locations, call for details.

ABC also offers apprenticeship and training for a variety of crafts in 2006. The next upcoming program is the medical gas certification program, to be held between August 7 and 10.

Many of these programs and more are offered at a special discounted rate for ABC members.
Please call Jennifer for more information.

SAFETY COURSES ARE AVAILABLE ONLINE THROUGH ABC!

Employees can take the course from any computer – at work, home, or the library. This can result in significant savings to companies, in both time and travel costs!

SAVE THE DATE!

August 25, ABC Golf Outing