

THE ADA, FMLA & WORKERS' COMPENSATION

J. Griffin Morgan
Elliot Pishko Morgan, P.A.
426 Old Salem Road
Winston-Salem, North Carolina 27101
(336) 724-2828

I. INTRODUCTION

Prior to the last decade, many lawyers who practiced labor and employment law did so competently with little or no understanding of workers' compensation. Conversely, attorneys who represented injured workers under their state's workers' compensation systems were able to zealously protect and expand their clients' rights without expertise in federal labor and employment law. With the enactment of the Americans with Disabilities Act of 1990 (ADA) 42 USC § 12101 *et seq.*, and the Family Medical Leave Act of 1993 (FMLA) 29 USC § 2601 *et seq.*, these formerly independent spheres of practice have overlapped and intermeshed. This new interrelationship has often led to the confusion, bewilderment and dismay of many of us who were formerly comfortable in our isolated areas of practice.

As employment lawyers, we are not the only ones uncomfortable with the change thrust upon us. In 1994, a federal judge for the Western District of Arkansas had to decide whether to vacate the jury's verdict awarding \$62,500 to an over-the-road truck driver terminated after he suffered a heart attack. The driver underwent an angioplasty and was on medical leave for six months. He

was terminated because he could not perform his prior job due to his inability to pass a Department of Transportation physical. The issue at trial was whether the employer discriminated against the employee by failing to consider reassignment to a vacant position. *Pedigo v. P.A.M. Transport, Inc.*, 891 F.Supp. 482 (W.D.Ark. 1994), *vacated and remanded on other grounds*, 60 F.3d 1300, 1303-04 (8th Cir.1995).

Before upholding the jury's verdict, Chief Judge H. Franklin Waters expressed his views:

At the close of all of the evidence in this case the court advised counsel that it had a great deal of concern about this case and about whether the ADA, when properly interpreted, gave the plaintiff a cause of action. The court advised that the ADA as it was being interpreted had the potential of being the greatest generator of litigation ever, and that the court doubted whether Congress, in its wildest dreams or wildest nightmares, intended to turn every garden variety worker's compensation claim into a federal case.

Since making that statement, the court has learned that many have similar concerns. See for example Leslie Kaufman-Rosen with Karen Springen, *Who are disabled?*, *NEWSWEEK*, November 7, 1994, at 80. That article quotes statistics that are claimed to show that, rather than being used to protect the "handicapped," a "full 85 per cent of the discrimination claims under review have been brought by people already in the workplace. Half allege they have been wrongfully discharged. The most commonly cited disabilities are back pain and ailments like carpal tunnel syndrome and depression, which together account for 40 per cent of the cases. By contrast, the blind and the deaf have filed only 6 per cent of all the actions to date."

The court still finds it difficult to believe that Congress really intended to cover employees such as the plaintiff in this case and has a firm conviction that the Act, although having laudatory purposes, because of its ambiguities and intended or unintended broadness of coverage, has the potential of turning federal courts into worker's compensation commissions, deterring such courts from competently and expeditiously handling important, traditionally federal controversies.

The court doubts that the ultimate result of this law will be to provide substantial assistance to persons for whom it was obviously intended, and that one of the primary beneficiaries of it will be trial lawyers who will ingeniously manipulate such ambiguities to consistently broaden its coverage so that federal courts may become mired in employment injury cases, becoming little more than glorified worker's compensation referees.

Be that as it may, after considerable research, the court has concluded that it cannot, consistent with the statute, relevant case law, and intellectual honesty, grant the motion for a judgement as a matter of law in this particular case.

Pedigo v. P.A.M. Transport, Inc. at 485, 485 n.3, 486.

This case, decided in 1994 was an early interpretation of the ADA. Now, as employment lawyers trying to enforce the ADA, we wish for the same kind of intellectual honesty in interpreting the ADA. Following the Supreme Court's interpretation of the ADA, the issue now is not whether federal courts will become glorified worker's compensation referees, but whether injured workers who are unable to perform their prior jobs will have any

protection under the ADA. See *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 119 S.Ct. 2133, 144 L.Ed.2d 484 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S.Ct. 2162, 144 L.Ed.2d 518 (1999) and *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184, 122 S.Ct. 681, 686, 151 L.Ed.2d 615 (2002).

The purpose of this paper is to identify some of the critical points where the ADA, FMLA and workers' compensation laws converge or collide, and to direct the practicing attorney to some of the court decisions on these issues.

II. WORKERS' COMPENSATION, FMLA, AND THE ADA

A. Preemption and Exclusivity

Workers' compensation is compromise legislation which was passed to make it easier for an employee to collect compensation for an injury by accident that arose out of and in the course of employment. However, the employee's recovery is normally limited to medical expenses and partial compensation for lost wages. Damages available in tort, such as compensation for pain and suffering, are not available under most state workers' compensation systems. Furthermore, the employee cannot elect whether to proceed under the workers' compensation system or under the common law. The workers' compensation system is intended to be the exclusive remedy against the employer for industrial accidents and occupational diseases.

However, while workers' compensation may be the exclusive remedy to recover for industrial accidents and

occupational diseases, the ADA supersedes and **preempts** state workers' compensation laws. See *Wood v. County of Alameda*, 875 F.Supp. 659 (N.D.Cal. 1995), and EEOC Technical Assistance Manual at IX-7.

In *Wood*, the plaintiff sued her former employer for failing to return her to her former job, or a comparable position, after she was cleared to return to work following an on-the-job-injury. The court rejected the employer's defense that California's Workers' Compensation Act was the exclusive remedy for plaintiff's claims and was a bar to her ADA claim.

In light of the broad remedial purpose expressed by Congress and the fact that defendant's urged construction would significantly limit the scope of relief available to plaintiffs under the ADA, the Court finds that giving effect to the exclusive remedy provision in the state statute in a manner which limits the availability of federal remedies would clearly stand as an obstacle to the accomplishment of Congress' stated purpose in enacting the ADA. Congress expressly noted that the ADA was intended to provide a national mandate for the elimination of discrimination against the disabled, to establish strong and consistent standards addressing such discrimination.... Clearly, these purposes would be undermined by an interpretation of the ADA which would in effect allow each state to supersede the ADA with its own statutes simply by placing an exclusivity provision in those statutes.

Wood at 665.

The *Wood* court opined that the purpose of the ADA as expressed at 42 USC § 12201(b), titled "Relationship to other laws" is to maximize the options available to plaintiffs. The ADA provides the minimum relief available. States may choose to increase the remedies and rights available to an injured worker, but they may not choose to reduce the rights provided by the ADA.

Wood at 663. Thus, state laws may supplement the rights provided by the ADA, but they cannot limit those rights.

The ADA preempts state workers' compensation laws to the extent they are in conflict with the ADA. See EEOC Technical Assistance Manual at IX-6,7. This preemption covers not only exclusivity provisions but also regulations upon which the employer might rely to deny an individual the opportunity to return to work. *Id.*

In *Cramer v. State of Florida*, plaintiffs brought a class action alleging that the wage loss and impairment benefits section of the Florida workers' compensation statutes violated the ADA. *Cramer v. State of Florida*, 885 F.Supp. 1545 (M.D.Fla. 1995). Plaintiffs claimed that the Florida law violated the ADA because injured workers with lower "impairment" ratings and thus lower benefits may be more disabled than injured workers with higher "impairment" ratings and higher benefits. *Cramer* at 1550. The *Cramer* court compared the purpose of the ADA with the purpose of the workers' compensation statutes.

The ADA was designed to prohibit employment decisions made because of fear, prejudice, and stereotypes, to require employers to make individualized determinations as to an individual's qualifications, and to require employers to consider an employee or job applicant's abilities, rather than his disabilities.

Workers' compensation, by contrast, was designed to protect workers and their dependents against the hardships that arise from a workers' injury or death arising out of and in the course of employment.

Cramer at 1551.

The court concluded that the Florida Compensation Act was expressly allowed pursuant to 42 USC § 12201(b), because it provided workers benefits in addition to the protection provided by the ADA. Further, the Florida law did not discriminate between workers with disabilities

and non-disabled workers. The *Cramer* court held that the ADA did not require that benefits extended to one category of disabled workers be expanded to all injured workers with disabilities. The court based its analysis on the decisions in *Traynor v. Turnage*, 485 U.S. 535, 108 S.Ct. 1372, and *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712.

Recent court decisions have followed the *Cramer* analysis. The Commonwealth Court of Pennsylvania held that the requirement that a claimant prove both (1) a psychic injury and (2) that the injury is other than a subjective reaction to normal working conditions, in order to receive workers' compensation benefits for a mental injury, does not violate the ADA, even though such standard is different than that for claimants with physical injuries.

[T]he ADA only applies to discrimination between non-disabled and disabled persons. Therefore, we find that the mental/ mental standard for establishing a psychic injury does not violate the ADA even though it is a different standard than that required to prove a physical injury. The [Workers' Compensation] Act distinguishes between types of disability not between disabled and non-disabled individuals. The ADA does not invalidate the dual burden imposed upon a mental/mental claimant.

Berninger v. Workers' Compensation Appeal Board, 761 A.2d 218 (Pa. 2000).

In *Morris v. Roche*, 182 F.Supp.2d 1260 (M.D. Ga. 2002), the court distinguished between compensation laws and the ADA. The *Morris* court stated that the Federal Employees' Compensation (FECA) was not intended to compensate only totally disabled employees of the federal government. Instead, FECA provided compensation for all work-related injuries, even those that have no bearing on the employee's ability to continue to perform the essential functions of his job. *Morris* at 1279.

Thus, based on court decisions and the EEOC Enforcement Guidance: Workers' Compensation and the ADA, the ADA will not be a tool to overhaul workers' compensation systems. However, the ADA and the FMLA still have the potential to expand rights for workers which are not provided by workers' compensation acts. Additionally, the ADA may be used to strike down sections of workers' compensation laws which disadvantage disabled workers.

B. Interview Questions and Medical Examinations

Prior to the passage of the ADA, an employer was free to ask a prospective employee about prior workers' compensation claims and occupational injuries or diseases. The ADA prohibits the employer from asking the applicant, or third parties, such as prior employers, state workers compensation bureaus, or insurance companies, about prior workers' compensation claims, occupational injuries and diseases until the employer has made a conditional offer of employment. 42 U.S.C. 12112(d)(3).

The post conditional job offer questions are only permissible if the employer asks the same questions of all the prospective employees in the same job category. 42 U.S.C. 12112(d)(3).

In April, 2002, the Court of Appeals for the Tenth Circuit held that an employer may not withdraw the conditional job offer based on unsubstantiated speculation about future risks from a perceived disability. In *Garrison v. Baker Hughes Oilfield Operations, Inc.*, the plaintiff untruthfully responded to a post conditional job offer medical questionnaire that he had no prior injuries. The employer then searched the state's workers' compensation records and learned that Mr. Garrison had suffered several prior workers' compensation injuries.

The employer then withdrew the job offer because of "possible future injuries," and because at trial the Human Resources Director explained "it was just the multitude of injuries in a short period of time." *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 2002 WL 652251, *4, ___ F.3d ___ (10th Cir. 2002). The *Garrison* court stated:

Under the Americans with Disabilities Act covered employers "may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of ... employment duties." 42 U.S.C. § 12112(d)(3).

Under § 12112(d)(3)(C), an employer's reasons for withdrawing a conditional job offer must be "job-related and consistent with business necessity." 29 C.F.R. § 1630.14(b)(3). Moreover, the employer may only withdraw the conditional job offer if "performance of the essential job functions cannot be accomplished with reasonable accommodation." *Id.* The Equal Employment Opportunity Commission further explains:

The results of a medical inquiry or examination may not be used to disqualify persons who are currently able to perform the essential functions of a job, either with or without an accommodation, because of **fear** or **speculation** that a disability may indicate a greater risk of future injury, or absenteeism, or may cause future workers' compensation or insurance costs.

Garrison v. Baker Hughes Oilfield Operations, Inc., 2002 WL 652251, *4, ___ F.3d ___ (10th Cir. 2002) (quoting Equal Employment Opportunity Commission, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act § 6.4 (1992).

Two years earlier, the Tenth Circuit reached the opposite result in an almost identical factual situation.

See *Baffoe v. W.H. Stewart Co.*, 211 F.3d 1277, 2000 WL 484878 (10th Cir. 2000)(unpublished). In *Baffoe*, the applicant lied about his past injuries and was discovered

when the employer searched the state's workers' compensation files. The critical factual difference between *Baffoe* and *Garrison* was that in *Baffoe* the employer's articulated reason for the withdrawal of the conditional job offer was the employee's misrepresentation on the medical history form and not the fear of future injuries. *Baffoe*, 2000 WL 484878 at *2-3.

The *Garrison* court did not condone the falsification of medical questionnaires but found that there was evidence of a discriminatory motive.

We do not hold the Americans with Disabilities Act forbids withdrawing conditional job offers from entering employees who lie on medical questionnaires. See Equal Employment Opportunity Commission Technical Assistance Manual § 9.8. Rather, we hold sufficient evidence existed in this case of an alternative discriminatory motive to sustain a jury verdict in favor of Mr. Garrison.

Garrison at *4, n 5.

[E]mployers may not use gathered workers' compensation information however it chooses. Employers may only withdraw job offers for reasons "in accordance" with subchapter I of the Americans with Disabilities Act. 42 U.S.C. § 12112(d)(3)(C). Where substantial evidence shows an employer used entrance examination information to withdraw a job offer for reasons not in accordance with the act, a jury verdict favoring an entering employee will stand.

Garrison at *5, n 7.

Therefore, it appears that once a conditional job offer is made, the employer is permitted to search for a history of prior injuries and diseases, including

workers' compensation claims. The final employment decision must then be based on whether the applicant can objectively perform the job, with or without reasonable accommodations. The employment decision may not be based on an unsubstantiated fear of future injuries and the perceived risk of future workers' compensation claims.

In a strange twist on this issue, an applicant who was given a conditional offer of employment and then was injured during a pre-employment physical was denied workers' compensation on the basis that the employee-employer relationship had not yet been established. *Gephardt v. Dixie Carbonic*, 261 Neb. 715, 625 N.W.2d 207 (2001).

C. Confidentiality of Medical Information

An employer may require new employees to undergo a medical exam under certain circumstances provided that the "information obtained regarding the medical condition or history of the applicant ... is treated as a confidential medical record." 42 U.S.C.A. § 12112(d)(3). Pursuant to 42 U.S.C.A. § 12112(d)(4)(A), an employer may require an employee to undergo a medical exam if the exam "is shown to be job-related and consistent with business necessity." *Id.* An employer must keep information obtained pursuant to such an exam confidential. 29 C.F.R. § 1630.14 (2000). Finally, under 42 U.S.C.A. § 12112(d)(4)(B), an employer may "conduct voluntary medical examinations, ... which are part of an employee health program available to employees," but the employer must treat information obtained as confidential. All medical records are to be maintained in separate confidential files, including medical information

obtained FMLA and workers' compensation purposes. An employee need not be disabled to state a claim for the unauthorized gathering or disclosure of confidential medical information. *Cossette v. Minnesota Power and Light*, 188 F.3d 964 (8th Cir. 1999); *Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1181-82 (9th Cir.1999); *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 593-94 (10th Cir.1998). An employer's disclosure of an employee's back injury and lifting restrictions to a prospective employer was a violation of the ADA. So disclosure of confidential medical information subjected the disclosing employer to liability for damages for lost wages. *Cossette v. Minnesota Power and Light*, 188 F.3d 964, 969-70 (8th Cir. 1999).

D. Return to Work Decisions and Reasonable Accommodations

An employer's policy that refuses to allow an injured worker to return to work until the injured worker is 100% healed violates the ADA because it does not allow for an assessment of whether the injured worker can perform the job.

A "100% healed" or "fully healed" policy discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified individual is "100% healed" from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation. See *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 699 (7th Cir.1998); *Weigel v. Target Stores*, 122 F.3d 461, 466 (7th Cir.1997) (stating that the determination whether one

qualifies as a qualified individual with a disability "necessarily involves an individualized assessment of the individual and the relevant position"); *Norris v. Allied-Sysco Food Servs., Inc.*, 948 F.Supp. 1418, 1437 (N.D.Cal.1996); see, e.g., *Heise v. Genuine Parts Co.*, 900 F.Supp. 1137, 1154 & n. 10 (D.Minn.1995) (holding that a "must be cured" or "100% healed" policy is a *per se* violation of the ADA because the policy does not allow a case-by-case assessment of an individual's ability to perform essential functions of the individual's job, with or without accommodation); *Hutchinson v. United Parcel Serv., Inc.*, 883 F.Supp. 379, 397 (N.D.Iowa 1995) (same); *Sarsycki v. United Parcel Service*, 862 F.Supp. 336, 341 (W.D.Okla.1994) (holding that under the ADA "individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices").

McGregor v. National Railroad Passenger Corporation, 187 F.3d 1113, 1116 (9th Cir. 1999).

Even the Supreme Court's decision in *Sutton* has been used to support damages against an employer who refused to return a workers' compensation claimant to work. The Kentucky Court of Appeals upheld a jury award of \$350,000 in compensatory damages, \$50,000 for emotional distress, and \$100,000 in punitive damages for an injured truck driver that was not returned to work because of lifting restrictions arising out of a work place accident. *Howard Baer, Inc., v. Schave*, 2001 WL 929990 (Ky.App. 2001).

As the Supreme Court stated in *Sutton*, "[a]n employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity." *Sutton* at 490, 119 S.Ct. 2139. The evidence of record supports Schave's position that Howard Baer did run afoul of the law when it prevented Schave from working if he had any lifting restrictions at all. When an employee is

prevented from returning to his job because of a restriction, it is reasonable to regard lifting as a major life activity; for Schave, it was certainly part of his job at Howard Baer and an activity he had to perform on a daily basis. It is clear Howard Baer discriminated against Schave based on the partial restriction Dr. Burke placed on Schave and Howard Baer's belief that he would no longer be able to perform his duties due to the lifting restriction. The decision of the jury is supported by substantial evidence and will not be disturbed on appeal.

Howard Baer, Inc., v. Schave, 2001 WL 929990 at *2.

The ADA has also provided protection to injured workers returned to work, but subject to harassment because of their disability and ensuing restrictions. *Fox v. General Motors Corp.*, 247 F.3d 169, 173 (4th Cir. 2001).

On the second day, Dame approached Fox, who was working at the light-duty table, and, in a loud voice, using profane language, asked Fox to perform a task that was beyond his physical ability. When Fox responded that he could not perform the requested task, Dame asked "Why the F--- can't you do it?" Fox explained that his abilities were medically limited because of his back. Dame then stated "I don't need any of you handicapped M-----F-----'s. As far as I am concerned you can go the H--- home."

Fox at 173. As a result of this conduct and substantially more abuse, the court upheld an award of \$200,000 in compensatory damages and \$3,000 in medical expenses.

The *Fox* court did not find that the employee's claim of temporary total disability in his workers' compensation claim barred his recovery under the ADA because Fox proffered a sufficient explanation for any apparent contradiction between his ADA and workers' compensation claims. *Fox* at 177, (citing *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 800-02, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999)). Additionally, the court held that there is no offset between the injured worker's workers compensation benefits and his recovery of compensatory damages under the ADA. "The compensatory damages award was designed to compensate

Fox for his non-pecuniary losses, such as pain and suffering, because of harassment from October 1994 to mid-August 1995, whereas the workers' compensation benefits Fox received compensated him for the wages he lost due to his inability to work after mid-August 1995." *Fox* at 180, n 4.

E. Second Injury Funds

Second Injury Fund statutes, often contained within workers' compensation acts, promote the same purpose as does the ADA: to encourage the employment of people with disabilities. Second Injury Funds (SIF) help reduce the cost to an employer of hiring a worker with a preexisting disability, by requiring the employer to only pay the cost of the disability resulting from the workplace injury. The SIF pays the additional amount of compensation, required by the workplace injury combining with the preexisting condition to create a more severe injury. Thus, SIFs encourage employers to hire workers with disabilities when they might otherwise be reluctant to do so because of their increased workers' compensation liability. Second Injury Fund payments are financed by a common fund to which many employers contribute.

Often, Second Injury Fund statutes require that an employer certify that it knew of the workers' preexisting disability at the time it made the hiring decision. Thus, many employers asked questions regarding prior injuries and disabilities before the hiring decision was made in order to be able to benefit from the second injury fund. These pre-employment questions are not allowed by the ADA. However, such inquiries can be made after a conditional offer of employment has been made and before the person begins working, so long as the medical

examination or medical inquiry is made of all applicants in the same job category. See EEOC Technical Assistance Manual at IX-6. Although pursuant to the ADA, medical information obtained from such examinations or inquiries must be kept confidential, that information may be submitted to second injury funds in order to comply with second injury fund requirements. *Id.*

If an employer has certified an employee as being disabled to a second injury fund, the employer will likely be prohibited from later arguing that the employee is not disabled, in order to avoid liability under the ADA. See *Anzalone v. Allstate Insurance Co.*, 1995 Dist. LEXIS 588 (E.D.La. 1995) (Defendant's certification to the second injury fund was equivalent to a "record of having such an impairment" or was evidence that defendant regarded plaintiff as having an impairment.).

F. ADA Liability of Insurance Carriers and Rehabilitation Specialist

In a growing number of workers' compensation proceedings, the employer or its insurer will assign a medical rehabilitation specialist to (1) gather medical records and information concerning the worker; (2) attend doctors' visits and confer with the doctors concerning the worker's condition; (3) suggest treatment; and (4) request functional capacity examinations. All of these acts are apparently taken as a necessary condition to the employer's obligation to provide medical and rehabilitative care. N.C. Gen. Stat. § 97-25. The purported objective of the involvement of the medical rehabilitation specialist is to determine whether and

when the worker can return to work in her prior position with the employer.

Often, the worker and her attorney may legitimately question the true objectives of the medical rehabilitation specialist who seems more concerned about building a defense for the insurance company than assisting the worker in her treatment and rehabilitation.

When such "experts" seem determined to delve into a worker's entire medical past, to influence the worker's physicians towards the insurance company's goals, and to push for treatment or rehabilitation which is designed to further those goals or to dishearten the worker, there may be reason to question whether such efforts can be restricted under federal law, and particularly the ADA.

It appears that the ADA covers the actions of the medical rehabilitation specialist assigned by the insurance carrier to the case since it covers the actual employer and "any agent of such person." 42 U.S.C. § 12111(5)(A). See also 42 U.S.C. § 12112(b)(2). There is little case law on this subject. However, the First Circuit's decision in *Carparts Distribution Center, Inc., v. Automotive Wholesalers Association of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994) is helpful by analogy. In *Carparts*, the court held that a medical reimbursement plan could be deemed an employer under the ADA because it functioned as the "employer" with respect to the plaintiff's health care coverage and thus exercised control over an important aspect of his employment. The First Circuit relied on interpretations of "employer" under Title VII and found the term "employer" to be sufficiently broad to include any party who significantly affects access to employment opportunities. *Id.*

In *Cannon v. Principal Health Care of Louisiana, Inc.*, 1995 U.S. Dist. LEXIS 3693 (E.D.La. 1995), the injured worker alleged a violation of the ADA, based on the workers' compensation insurer refusing to pay for a diagnostic procedure and thus interfering with her return to work. *Cannon* at *2. The diagnostic procedure was delayed for nine months and then ultimately approved and performed. *Id.* The employer filed a motion for summary judgment contending that the employee was not a qualified individual with a disability because in her deposition she had repeatedly testified that she was continuously unable to work. *Id.* The employer's motion was granted.

Unfortunately, the granting of the employer's motion made moot the necessity to rule on the insurance carrier's motions to dismiss. Therefore, the question of the insurance carrier's liability under the ADA was not reached.

The ADA's prohibitions against discrimination "include medical examinations and inquiries." 42 U.S.C. § 12112(c)(1). Specifically, the law states the following:

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C. § 12112(c)(4)(A) (emphasis provided). The regulations explain that such examinations and inquiries may be performed "to determine whether an employee is still able to perform the essential functions of his or her job," or to determine what reasonable accommodations

may be necessary to enable the employee to return to work. 29 C.F.R. § 1630.14(c), Appendix. See also EEOC Technical Assistance Manual at IX-4.

Accordingly, if the goals of the medical rehabilitation specialist are, in fact, to determine whether the worker can perform the essential functions of the job; and to determine whether any reasonable accommodations may be necessary to enable the worker to return to work, then it appears that the specialist's efforts in investigating the worker's injury are permissible under the ADA. This should include gathering medical records concerning the injury in question, talking to the physicians involved in the presence of the worker,¹ and inquiring of the treating physician as to the appropriateness of alternative procedures or a functional capacity examination. Information gathered in this process should be held in a confidential separate file as required by 42 U.S.C. § 12112(c)(3).

On the other hand, upon discovery of any activities of the specialist which reveal a purpose which is not truly "job-related" and which is contrary to the purposes of the ADA, the worker's attorney should seek a termination of the relationship either through the Industrial Commission or the EEOC. For example, an all-

¹ Attorneys for workers should not consent to a medical specialist working for the insurance company to talk to the physician outside the presence of the worker or her attorney on the ground that such ex parte communications are in violation of the physician/patient and perhaps the attorney/client relationship.

inclusive effort by the specialist to obtain all past medical records, including those unrelated to the injury or to any disability affecting the worker's performance, would not appear to be "job-related" or consistent with business necessity, 42 U.S.C. § 12112(4); and such efforts should be challenged under the ADA.

These principles call for assertive action on the part of the worker's attorney. Prior to consenting to any relationship between the worker and the medical rehabilitation specialist, the attorney must impose specific conditions on that relationship to ensure compliance with the ADA, as well as the relevant workers' compensation statute.

The same principles that apply to working with a medical rehabilitation specialist also apply to working with a vocational rehabilitation specialist. A Vocational rehabilitation specialist can, on occasion, be helpful in returning an injured worker to the workforce.

Regrettably, most rehabilitation specialists hired by insurance companies are neither interested in, nor authorized to, rehabilitate, train or educate an injured worker so that she may return to a meaningful, productive career. Rather, rehabilitation specialists are glorified job hunters, whose only mission is to relieve the employer or insurance carrier of its obligation to pay workers' compensation benefits by placing an injured worker in a minimum wage, dead-end job.

Rehabilitation specialists are often prohibited by the instructions they receive from the insurance carriers or the employers from looking for jobs within the employer's facilities. It is in these situations that attorneys representing injured workers must struggle to

insure that their client's rights under the ADA supersede and preempt the standard practice under the workers' compensation system.

D. Injured Employee's Right to Convalescence Prior to Termination

On occasion, a worker who has been injured may require an extended period out of work for convalescence because he is totally unable to work. Under workers' compensation law, in the absence of any retaliatory motive, there is nothing to prohibit an employer from terminating an employee under these circumstances. An employer (particularly a small employer) may contend that it cannot hold a position open indefinitely, and proceed to fill the position within a short period to minimize any loss of production².

The ADA and the FMLA provide protection to workers who have to remain out of work for reasonable periods because of their injuries. While the ADA is not explicit on this point, its broad and open-ended prescription for reasonable accommodations require an employer to provide some convalescence time to a disabled employee without threat of termination. 42 U.S.C. § 12111(9). Specifically, the ADA requires, as reasonable accommodations, "job restructuring, part-time or modified work schedules... and other similar accommodations for

² Obviously, employers may have an incentive to hold a position open and return the employee to work to minimize its workers' compensation exposure. Peoples v. Cone Mills, 316 N.C. 426, 342 S.E.2d 798 (1986). In addition, some larger companies through personnel policies or collective bargaining agreements have established maximum periods during which an employee's job will be held open during disability.

individuals with disabilities." Id.³ The FMLA is explicit, and permits an employee to take up to 12 weeks leave for any "serious injury or illness" upon proper certification by the doctor. 29 U.S.C. §§ 2612, 2613.

The real issue in this respect, which will likely have to be determined on a case-by-case basis, is how much time an employer must provide for convalescence prior to termination of the employee. Employers may contend that any period established by policy, which is consistently enforced may be adequate to meet their obligations under the ADA. Thus, a smaller employer may argue that it can only leave a position open for six weeks without severe disruption to its production schedule, and that this period is reasonable considering the company's circumstances regardless of the nature of the employee's injury; and that it would be an undue hardship for it to hold a job open for a longer period. 42 U.S.C. § 12111(10). Larger employers may incorporate the leave provided by the FMLA into their own policies, and argue that twelve weeks leave is a reasonable accommodation as evidenced by the FMLA.

³ There is also language from which employers may argue to minimize their obligations to provide time off to a disabled employee. As an example of other reasonable accommodations which are not expressly included in the statute, EEOC suggests permitting employees to use accrued paid sick leave (which they presumably should have a right to do under state law), or providing additional unpaid leave for medical treatment. 29 C.F.R. § 1630.2(o). See also, 29 C.F.R. § 1630.16(f), Appendix.

Employees should counter that what is a "reasonable accommodation" can only be determined on a case-by-case basis with some consideration to the nature of the injury, the particular position held by the employee, and the availability of other employees (either within the company or through temporary services) who are qualified to fill in for the disabled worker. Accordingly, the leave time allowed for temporary total disability would vary from case to case depending on all of these factors and the twelve week period provided by FMLA should be viewed as a "minimum standard", not a Congressional mandate as to what period of time constitutes a reasonable accommodation under the ADA.

To date, courts have not shown a willingness to require employers to accommodate employees by modifying leave of absence policies or absentee policies. The Fourth Circuit held that an employer was not required to grant an indefinite leave of absence to a diabetic employee who was attempting to bring his disabling condition under control. *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995). The same court also held that a part-time instructor in a business college was not a "qualified individual with a disability" if she could not meet the attendance requirements of her job. *Tyndall v. National Education Centers, Inc.*, 31 F.3d 209 (4th Cir. 1994).

The Eleventh Circuit reached the same conclusion in *Jackson v. Veterans Administration*, 22 F.3d 277 (11th Cir. 1994). The plaintiff in *Jackson* alleged that his termination for absenteeism violated the Rehabilitation Act. Jackson was a housekeeping aid for the VA hospital in Birmingham, Alabama. In his first two and a half

months of employment, he was absent six times. His work was satisfactory and his days missed from work did not exceed his accrued leave. The majority ruled as a matter of law that "there was no reasonable accommodation for Jackson's numerous unpredictable absences in the first few months of work as a temporary employee." *Jackson* at 279. The dissent disagreed, arguing that since Jackson had not been absent in excess of his allotted leave, it may be reasonable to require an employer to accommodate unpredictable but not excessive absences. *Jackson* at 282. The dissent noted that an employer's sick leave policy may be a helpful indicator of how many unpredictable absences the employer deems acceptable. *Id.*

Plaintiff's attorneys can glean some hope from *Hogue v. MQS Inspection, Inc.*, 875 F.Supp. 714 (D.Co. 1995). In *Hogue*, the plaintiff was absent from work as a supervisor due to a work related injury, from late April, 1992 until September 1, 1992, when he was allowed to return parttime and then scheduled to return fulltime on December 1, 1992. Much of the case centers on whether the employee could perform the essential functions of the job if provided with reasonable accommodation.

However, the court in denying summary judgment, noted that there was a factual dispute regarding whether plaintiff's job was available in September when he returned, or whether the job had been permanently given to the temporary replacement. *Hogue* at 722-23. By deciding that there was a factual dispute regarding the availability of the job, the court apparently infers that it was not unreasonable to require the employer to hold the job open for more than four months.

III. PROBLEMS WITH INCONSISTENT CLAIMS

The case of *Reigel v. Kaiser Foundation Health Plan of North Carolina*, 859 F.Supp. 963 (E.D.N.C. 1994) is thoroughly discussed in the accompanying manuscripts. However, a brief review of the case may prove beneficial.

Dr. Reigel was an internist practicing with an HMO. In 1991, Dr. Reigel suffered an injury to her shoulder which developed into reflex sympathetic dystrophy. *Reigel* at 964-65. She went on sick leave in August, 1991. In November, 1991, her sick leave was converted to disability leave. In December, 1992, Dr. Reigel was terminated. *Reigel* at 965.

In supporting their motion for summary judgment on Dr. Reigel's ADA claim, defendants submitted numerous statements by Dr. Reigel, Dr. Reigel's physicians, and Dr. Reigel's attorneys that she was totally disabled and unable to perform the essential functions of her job. *Reigel* at 967-69. Judge Fox, the Chief Judge for the Eastern District of North Carolina, was clearly impressed with, not only the multitude of statements certifying plaintiff's disability, but with the effect those statements had on other entities.

The court notes that, not only did plaintiff present numerous certifications to this effect [her disability], plaintiff succeeded in convincing these entities of the truth of her assertions, as evidenced by the benefits and disability payments she has received from them since the termination of her employment.

Reigel at 967 n.4.

In analyzing and weighing these statements, the court is assured that plaintiff, her physicians and attorneys accurately and truthfully completed these forms which served as the basis for plaintiff's receipt of disability benefits from various entities,

including the Federal Government. In fact, any attempt by plaintiff to rebut the accuracy or veracity of these statements may serve as a foundation for the instigation of an insurance fraud investigation.

Reigel at 969 n.7. To really understand the Court's ire, read footnote 8, where the court discusses its ethical concern regarding the relationship of one of the plaintiff's expert physicians, who undisclosed to the court, was also an attorney with an "of counsel" relationship with one of plaintiff's attorneys. *Reigel* at 970. After reviewing these facts the court then states its oft quoted holding:

Plaintiff in the case *sub judice* cannot speak out of both sides of her mouth with equal vigor and credibility before this court. Plaintiff now seeks money damages from the Medical Group on her assertion that she was physically willing and able to work during the same period of time that she was regularly collecting disability payments on her assertions that she was physically unable to work.

Reigel at 970.

Reigel is a good example of bad facts making bad law. Luckily, other courts have been presented with better facts and have established better precedent. In *Anzalone, supra*, the plaintiff was a claims adjuster who injured his back when he fell from the roof of a house he was inspecting. *Anzalone v. Allstate Insurance Co.*, 1995 U.S. Dist. LEXIS 588 (E.D.La. 1995). Upon his initial return to work, plaintiff was assigned phone duty, handling the claims that were phoned in to the company. *Id.* The phone duty aggravated his condition

and plaintiff requested to be accommodated by being assigned to the field, but without doing any climbing. *Id.* Plaintiff supported his request with a doctor's note. Defendant refused plaintiff's request, asserting it could not sort assignments requiring climbing from those that did not require climbing. *Id.*

Plaintiff then resigned. In August, 1992, he certified that he was disabled and began receiving workers' compensation and disability benefits. Two months later plaintiff learned that defendant had a flexible employment policy that allowed employees to work out of their home. *Anzalone* at *2. Plaintiff then requested that he be accommodated by allowing him to work out of his home. His request was supported by his doctor, but the employer again refused.

Defendant argued that "[p]laintiff is not covered by the ADA because he certified in his application for disability insurance that he was unable to work." *Anzalone* at *6. The court concluded that the note by plaintiff's doctor releasing plaintiff to perform some work with certain restrictions created an issue of fact as to whether plaintiff could perform the essential functions of the claims adjuster job, despite his disability. *Id.*

In Oswald v. Laroche Chemicals, Inc., 1995 U.S. Dist. LEXIS 10749 (E.D.La. 1995), the court rejected defendant's attempt to use *Reigel* in support of its motion for summary judgment. In *Oswald*, the employer's medical review officer refused to release plaintiff to return to work. The company doctor's conclusion that

plaintiff could not perform any of the jobs available formed the basis for plaintiff's receipt of disability retirement benefits. *Id* at * 23. The court found that there was a genuine issue of material fact as to whether the company doctor had properly assessed plaintiff's ability to perform the functions of one of the available jobs. *Id*. The court then cited to *Anzalone* for the proposition that the receipt of disability benefits was relevant to, but not dispositive of, the question of whether plaintiff could perform the essential functions of the job, with or without reasonable accommodation. *Id*.

Not directly on point is *Ross v. Boeing Co.*, 1995 U.S. Dist. LEXIS 7722 (D.Kan. 1995). In *Ross*, the court granted defendant's motion for summary judgment on the grounds that plaintiff was not qualified for the job for which he applied because of his lack of training and experience. The court noted that in subsequent applications for workers' compensation and social security benefits, plaintiff stated that he was unable to perform any work of any kind. However, the court did not rely on these statements in reaching its decision.

More akin to *Reigel* is *Cheatwood v. Roanoke Industries*, 891 F.Supp. 1528 (N.D.Al. 1995). In *Cheatwood*, the plaintiff was successful in obtaining workers' compensation benefits based on his testimony at the hearing:

2. At his August 19, 1993 hearing, plaintiff testified: "This arm is limited to about five pounds of sugar, that's about the maximum I can pick up with it. The pain

radiates. ... It's like I'm being shocked or something. If I try and pick something up, I loose grip on it. My muscles don't really work. If it's something light, I can pretty well hang on to it. But if it's something over five pounds, I don't have any control over it. The pain is so intense." (Transcript at p. 20).

3. Plaintiff testified, "I might wash a glass or something, but as far as standing at the sink and washing dishes, the stooping over the sink is what kills me. It hits me in my back and someone will tell me to get out of the way." (Transcript at p. 30).
4. Plaintiff testified, "[b]ending is a serious problem. If I try to bend over a bed or something, I fall onto the bed. So, that kills that." (Transcript at p. 30).
5. Plaintiff stated: "The only exercise I'm to do is walking. I'm not supposed to sit, stand, stoop, bend, or anything for long periods of time. And, as his honor will find out in there, I'm limited to lifting 25 pounds. And, I'm not supposed to do it even once a day." (Transcript at p. 17).
6. Plaintiff testified "[g]oing through the day, like I say all I'm allowed to do is walk. Any extended periods of sitting like this or standing or anything becomes uncomfortable. The pain is constant no matter what I do. Whether I'm standing, sitting, walking, there is no way I've been able to make the pain stop." (Transcript at p. 16). When asked how long he could stand plaintiff replied, "15 minutes, if I'm allowed to move around. Standing still, I can't do that much because I lean to the left." (Transcript at pp. 17-18).
7. Plaintiff's testimony regarding his ability to work around the house is as follows:

Q. Are you able to do any work during the day?

A. If you call emptying ashtrays for my mother or opening the door for her as she takes the garbage out doing something, yeah. But, is that a life for a human being?

Q. Do you do any labor, any jobs, anything like that?

A. I can water the dogs if the water hose is drug down to the dog lot for me so I don't have to pull on it. That's one joy I have.

Q. Anything else?

A. No sir. My family won't let me do anything because they've talked to my-my mother and brother were present at the surgery and Dr. Rainer told them that he's not to do anything-

Cheatwood at 1534 n.2-7.

Plaintiff's plant manager was present at the hearing and heard this testimony. Six months after the hearing, plaintiff received his favorable workers' compensation decision. The next day, with the Judgment in his hand, plaintiff went to the plant at 8 or 9 a.m. and reported to the plant's human resources director that he was ready to return to his former job. *Cheatwood* at 1536. Plaintiff was informed that he had been terminated because there were no jobs in the plant which could accommodate an employee with a 25-pound lifting restriction. Plaintiff's ADA claim was dismissed. The court relied on *Reigel*, and *Garcia-Paz v. Swift Textiles, Inc.*, 873 F.Supp. 547 (D.Kan. 1995), in determining that plaintiff was not a "qualified individual with a disability" and would not be allowed to "speak out of both sides of his mouth with equal vigor and credibility." *Cheatwood* at 1538.

In a strange twist on the same issue, the Tenth Circuit relied on an award by the Oklahoma Employment Security Commission, based on medical evidence that the plaintiff could "perform work duties in keeping with his work experience, education and training with limitations with standing, walking and lifting overhead", to deny plaintiff's ADA claim because he was not an "individual with a disability" pursuant to 42 USC § 12112(a). *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994).

In *Bolton*, plaintiff suffered a compensable work injury. He was given a medical leave of absence. In order to return to work he had to be examined and approved by the company physician. *Bolton* at 941. The company doctor refused to approve him for his job. The court concluded that plaintiff was not substantially limited from the major life activity of working, even though he was not able to return to his former job, had been awarded temporary total disability under workers' compensation for approximately six months, and had received a permanent disability rating of nine percent to his right foot and twenty-nine percent to his left foot. *Bolton* at 942-44.

The lesson is that unemployed plaintiffs and their counsel must carefully walk a tightrope when attempting to keep some income flowing into plaintiff's household. A plaintiff attempting to secure alternative employment can lose the pending ADA claim because she is not "disabled". See *Bolton, supra*. A plaintiff attempting to secure other sources of income, such as disability insurance or workers' compensation, can lose the pending ADA claim because he is too disabled and thus not a qualified individual with a disability. See *Reigel, supra*.

IV. DAMAGES

There are three theories regarding the receipt of workers' compensation benefits and the subsequent right to obtain benefits under the ADA. The theory most often propounded by counsel for plaintiffs is that there should be no reduction in an ADA award because of the prior receipt of workers' compensation benefits due to total disability. This theory is founded on the collateral source rule.

The theory most often articulated by management counsel is that the receipt of workers' compensation benefits is a complete bar to recovering under the ADA, because the employee was totally disabled and thus not a

qualified individual with a disability. The third theory is that there should be a credit given to the employer for workers' compensation benefits received, for the same period back pay is awarded, in order that the plaintiff not benefit from a double recovery and the employer not have to pay twice.

There is a lengthy discussion of the collateral source rule in *Kohnke v. Delta Airlines, Inc.*, 1995 U.S. Dist. LEXIS 3519 (N.D.Ill. 1995) (Report and Recommendation of Magistrate Judge). The Magistrate Judge in *Kohnke*, first discusses that plaintiff's declarations on his application for disability benefits may be used as admissions to establish that he was totally disabled during certain periods of time and thus bar him from recovering back pay for that period of time. *Kohnke* at *8-9.

The Magistrate Judge then turned his attention to that period of time when plaintiff claimed he was not disabled and only prevented from working by defendant's discriminatory conduct. The defendant wanted a credit for any disability benefits paid to plaintiff as an offset against any back pay award under the ADA. After a lengthy analysis of the collateral source rule the Magistrate Judge opined:

It is my recommendation in this case that the disability payments received by the plaintiff be considered collateral source payments. Because the payments have nothing to do with the alleged discriminatory conduct and resulting damages to the plaintiff and are not being advanced to offset loss of earnings due to wrongful termination, but rather are being paid by statutory mandate and for a purpose that has nothing to do with this case, they should not be deducted from the plaintiff's damages. To deduct these payments would give the defendant an undeserved windfall for complying with the state's statutory mandate. The net effect would be to dilute the deterrent effect of the enforcement of the Americans with Disabilities Act.

Kohnke at *18.

In *Oswald v. Laroche Chemicals, Inc.*, 1995 U.S. Dist. LEXIS 10749 (E.D.La. 1995) the court rejected defendant's argument, at summary judgment, that the

receipt of workers' compensation benefits was a complete bar to obtaining back pay benefits pursuant to the ADA. *Oswald* at *20-24. The rejection of defendant's argument was because there was a material issue of fact as to whether plaintiff was disabled from working for the employer during the relevant period.

The *Oswald* court then discussed whether there should be a reduction of any back pay awarded because of plaintiff's receipt of workers' compensation benefits. The court noted that the collateral source rule has not been adopted as law in the Eleventh Circuit and that the reduction of any back pay award was within the discretion of the trial court. *Oswald* at *24-25. In its discussion however, the court referred to the Eleventh Circuit opinion in *Brown v. A. J. Gerrard Mfg. Co.*, 715 F.2d 1549 (11th Cir. 1983) (en banc) (holding as a matter of law that unemployment compensation benefits paid from a state fund may not be deducted from Title VII back pay awards).

In cases where plaintiff is seeking back pay and has already obtained workers' compensation benefits for being totally disabled, it is imperative that counsel clarify the period of time plaintiff was actually disabled from working, from the period of time plaintiff was prevented from working by defendant's discriminatory conduct. This distinction has two-fold importance: (1) it is critical to avoid the *Reigel* and *Cheatwood* dilemma; and (2) it is critical in order to preserve and maximize damages.

V. MISCELLANEOUS CONCERNS

A. Alleging Disability Discrimination and Workers' Compensation Retaliatory Discharge

In discharge cases, where the employee also filed a workers' compensation claim, there will often be the opportunity to file a multiple claim complaint alleging that the discharge was: (1) discrimination based on the employee's disability; and (2) retaliation based on the

employee's filing a workers' compensation claim. The benefit of linking these two claims can be seen in *Fink v. Katzman*, 881 F.Supp. 1347 (N.D.Iowa 1995).

In *Fink*, the court concluded that plaintiff's carpal tunnel syndrome was not a disability within the meaning of the ADA, because there was no evidence that the resulting lifting restriction substantially limited any major life activity. *Fink* at 1377. The court relied on the highly publicized decision in *McKay v. Toyota Motor Mfg., USA, Inc.*, 878 F.Supp. 1012 (E.D.Ky. 1995), which held that carpal tunnel syndrome is not a disability under the ADA as a matter of law. The *Fink* court also relied on *Feliberty v. Kemper Corp.*, 1995 WL 35398 (N.D.Ill. 1995), which held that a worker suffering from carpal tunnel syndrome was not a "qualified individual with a disability" because he could no longer use a keyboard, and the use of a keyboard was an essential function of the job.⁴ *Fink* at 1376-77.

The holdings in *Fink*, *McKay*, and *Feliberty* point to the dilemma facing attorneys representing injured workers. The same disability is either so minimal as to not require an accommodation, or is so severe as to render the worker "unqualified" for an accommodation. Our job is to guide our clients onto that narrow path between the two disqualifying mine fields.

Fortunately, the *Fink* court found that there were material issues of fact regarding whether plaintiff was discharged for filing her compensation claim. *Fink* at

⁴ Whether keyboarding is an essential function of any job should be disputed. This manuscript was prepared on a voice recognition computer with almost no use of the keyboard. I learned of the voice recognition system when searching for a reasonable accommodation for a client suffering from carpal tunnel syndrome.

1382. Thus, the addition of retaliatory discharge claim preserved her case.

In denying defendant's motion for summary judgment, on both an ADA discharge claim and workers' compensation retaliatory discharge claim, the court in *Smith v. Kitterman* determined that plaintiff's carpal tunnel syndrome did not disqualify her from ADA protection. *Smith v. Kitterman, Inc.*, 1995 U.S. Dist. LEXIS 12569 (W.D.Mo. 1995). The plaintiff in *Smith* worked for her employer for 25 years, 15 as an injection operator and 10 as a secondary operator. She suffered work-related carpal tunnel syndrome. She underwent surgery to her right hand in 1989 and to her left hand in 1992. She was then restricted from the use of tools requiring repetitive grasping, sustained strong gripping, and the use of small hand tools. *Kitterman* at *3-4. "The Court is not persuaded for purposes of summary judgment that Plaintiff's medical restrictions do not create 'a significant barrier to employment in positions that are comparable in stature to her former position at Kitterman'". *Kitterman* at *10-11. The court then went on to perform an excellent analysis on the issues of whether plaintiff was a "qualified" individual and what would constitute a reasonable accommodation. *Kitterman* at *7-20.

B. Harassing Injured Workers as an ADA Violation

For a discussion of when harassment of a plaintiff performing light duty work following a workers' compensation injury constitutes a violation of the ADA, see *Haysman v. Food Lion, Inc.*, 893 F.Supp. 1092 (S.D.Ga. 1995) (at summary judgment court dismissed plaintiff's ADA claim based on defendant's refusal to return plaintiff to his former job as assistant manager or to transfer him to another fulltime position, but denied summary judgment based on harassment of plaintiff in his light duty position) and *Lawrence v. IBP, Inc.*, 1995 U.S. Dist. LEXIS 6118 (D.Kan. 1995) (court grants summary judgment on plaintiff's claim of retaliatory discharge

for filing workers' compensation, and on ADA discriminatory discharge claim, based on allegation that defendant assigned plaintiff to "exit job" known throughout the plant as where the company assigns you when they want to fire you.).

C. Settlement Agreements and Releases

Counsel for injured workers need to carefully review settlement agreements resolving compensation claims to insure the agreement does not contain language which would relinquish and release a potential or ongoing ADA claim. In *Johnson v. Hanes Hosiery*, 1995 U.S. App. LEXIS 13705 (6th Cir. 1995), the plaintiff signed a release of his state workers' compensation case after he filed a complaint under Title VII and the ADA against the same employer-defendant. The release expressly waived "any claims which I now have or might have in the future against said Employer arising out of the Americans with Disabilities Act or any claim for sex, age or racial discrimination." The district court dismissed his case at a scheduling conference without an evidentiary hearing. The Sixth Circuit affirmed.

In *Oswald v. Laroche Chemicals, Inc.*, the court denied defendant's motion in limine to preclude plaintiff from presenting evidence of emotional distress in his ADA case, based on plaintiff's settlement of his workers' compensation claim. *Oswald v. Laroche Chemicals, Inc.*, 1995 U.S. Dist. LEXIS 10742 (E.D. La. 1995). Plaintiff's settlement agreement resolved "any and all claims under the Louisiana Worker's Compensation Benefits including any and all past, present and future claims for such benefits". The court found that such a settlement was limited in nature and did not preclude plaintiff from presenting evidence as to his mental anguish arising from the alleged discrimination. *Oswald* at *8-9.

VI. CONCLUSION

In summary, the interrelationships between the ADA, the FMLA and the Workers' Compensation Act are numerous and confusing. As we represent our disabled and injured clients, we must attempt to sort through the various provisions of these acts and be creative in our use of each piece of legislation to obtain for our clients what they most want: the ability to work at a decent job, for a decent wage, under fair and humane conditions.