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The Roulette Wheel of an Accident

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I. Compensation claim comes in

Plaintiff	Defendant
Facts of injury	Facts of Injury

II. Discrimination on the basis of Disability - ADA / 4112.01 et seq.

Plaintiff	Defendant
Light Duty	Light Duty
- Otherwise qualified definition can apply to temporary injuries. - Reasonable accommodation	- Do you have a duty to provide? o Otherwise qualified analysis o Reasonable accommodation

Race/Gender/Ethnic Discrimination - ADA and 4112.02

Plaintiff	Defendant
Similarly situated treated the same?	Employee and supervisor training

III. FMLA

Plaintiff	Defendant
TTD/Was FMLA offered	TTD – were FMLA certification papers offered

IV. Wage and Hour

Plaintiff	Defendant
Classification	Compliance audit
Lunch Breaks	Do NOT rely on ADP or payroll services
Rounding on clock in/clock out	
Class/Collective Action	

V. Retaliation – 4123.90

Plaintiff	Defendant
Demotion	Supervisor Education
Discharge Constructive Adverse Action	Non-punitive/Good Faith light duty work offer

VI. Whistleblower Statutes/VSSR

Plaintiff	Defendant
VSSR	VSSR
OSHA (29 CFR 1904.35)	OSHA
EPA/Environmental	Compliance Audit

VII. Final thoughts

A. Every Workers' Compensation claim has the potential to develop into multiple state and federal claims.
B. Almost all of these other claims provide for payment of Plaintiff's attorney fees which drives settlement.
C. Plaintiff's counsel – issue spot and refer
D. Defendant counsel – advise and educate clients to prevent these claims. Raise the questions in every claim (at a minimum, ADA, FLMA and Retaliation)

I. Facts of the Case

Every workers compensation and employment law case turns on the facts. Employment law attorneys frequently say "It was just a workers compensation case."

But Then: The Who, What, Where, When and How of not only the injury but the whole work environment reveal other multiple claims or issues that could lead to more causes of action.

Both the Injured Worker's and the Employer's Counsel need to ask some base line questions to issue spot potential claims and causes of action.

What are the facts surrounding the specific injury?
Was a good investigation done?
Is there an incident report?
Were witness statements signed and preserved
Were photos of the site taken and evidence preserved?
Is FMLA applicable?
Was the injured worker paid properly? Questions about pay are more than just to establish AWW and FWW.
Was the injured worker treated the same as everyone else?
Does the injured worker belong to any protected classes?
Was light duty/ accommodation offered?
Was any adverse action taken?

II. Americans With Disabilities/ Ohio Revised Code 4112.01 et seq.

a. Is the injured worker an otherwise qualified individual with a disability who can perform all the essential functions of the job with or without accommodations?

b. Does he/she have a disability?
   i. Actual
   ii. Record
   iii. Perceived

c. Temporary Disability can result in protection under the ADA
   i. The court held that the employer may have violated its duty to interact where it simply stood “firm” on its policy that employees could not telecommute regardless of circumstances where the court found that allowing an attorney to telecommute for 10 weeks could have been a reasonable accommodation. Mosby-Meachem v. Memphis Light, Gas & Water Division, 883 F.3d 595 (6th Cir. 2018)

d. Otherwise qualified

i. For the job they were doing at the time of the injury – yes

ii. For a job they may be requesting as an accommodation- maybe

iii. Employers do not have to offer a light duty job within the injured worker's restrictions if the injured worker is not qualified to do the job [Williams v. AT&T Mobility Servs, 847 F.3d 384 (6th Cir. 2017)]

Employee was terminated after exceeding the allowable absences under AT&T's strict attendance policy. Court held that "this case reflects the reality that there are some jobs that a person with disabilities is simply unable to perform.

e. Reasonable Accommodation

Important when the injured worker reaches MMI and has permanent restrictions or is requesting a reasonable accommodation for a temporary disability

i. The employee's "initial burden on this issue" [reasonableness] is to show that the accommodation is reasonable in that it is both "efficacious" and "proportional to costs." Steward v. New Chrysler, 2011 U.S. App. LEXIS 2267 (6th Cir. 201l)(unpublished)

ii. The EEOC has stated that, in general, it is the responsibility of the employee with a disability to inform the employer of the need for an accommodation. Appendix to 29 CFR Sec. 1630.9; EEOC Enforcement Guidance on Reasonable Accommodation and Undue (Hardship, No. 915.002(10/17/02) at "General Principles" and Question 40.

iii. There is no duty to accommodate where the individual is only covered under the ADA's "regarded as" category. ADDAAA, S. 3406 Sect. 6 (2008)

iv. Indefinite leave is not a reasonable accommodation. This applies to multiple extensions of a leave. Maaat v. County of Ottawa 2016 U.S. App. LEXIS 14882(6tlt Cir.20l 6)(unpublished)

v. Unfortunately, there is no "bright line" defining a maximum duration of leave that can constitute a reasonable accommodation (6 months was held to be reasonable) Cleveland v. Federal Express Corp. 2003 U.S. App. LEXIS 24786 (6th Cir. 2003) (unpublished).

vi. Part time work may be a reasonable accommodation. Hostettler v. Coll. of Wooster, 895. F.3d 844(6th Cir. 2018) Court held that "full time presence at work is not an essential function of a job simply because an employer says it is." Rather "[a]n employer must tie time-and-presence requirements to some other job requirement."

vii. Gunter v. Bemis Co., Inc, 906 F.3d 484 (6th Cir.2018) Plaintiff injured

his right shoulder while working as a press assistant. Returned to duty with permanent restrictions. Employer fired injured worker months later saying it could no longer accommodate these restrictions. Jury found for the Plaintiff. The 6th Circuit Court affirmed noting that although an employer's job description provides evidence of a job's essential functions, it is not dispositive. (Be sure the job description matches the actual work required and being performed)

f. Damages

   i. Back pay with reinstatement and in some cases front pay and attorney fees.

III. Family Medical Leave

While an employer may not require that an injured worker use his or her FMLA leave time while on temporary total disability or intermittently for absences caused by treatment appointments or reduced work schedules, the employer MUST notify the injured worker of his or her right to take FMLA in these circumstances.

a. Once an employee has put the employer on notice of the possible need for FMLA eave, the employer must provide the employee with a **Notice of Eligibility and Rights & Responsibilities Notice** within five (5) business days, absent extenuating circumstances. 20 CFR Sec. 825.300(2).

   i. The Eligibility Notice must include the reason for the leave request and whether the employee satisfies the eligibility requirements and if not, why the employee is ineligible.

   ii. Employer must be able to prove that the Notice was given and a determination of eligibility provided to the injured worker.

   iii. Department of Labor statistics for 2018 show a year over year decline, FMLA termination cases continued to be the primary basis for filed complaints, accounting for over 40% of all cases. While the number of cases found to have violations declined from FY 2017 to FY 2018, <u>the amount of back pay recovered increased.</u>

   iv. <u>Reasonable Attorney Fees are also recoverable for the plaintiff</u>

IV. Fair Labor Standards Act

a. Is the injured worker covered under FLSA? Are they an employee or an independent contractor?

Courts generally look to the Economic Realities Test focusing on five factors. Absolute Roofing & Const. Inc. v Sec'y of Labor, 580 Fed.Appx. 357 (6th Cir. 2014)

i. The degree of control exerted by the alleged employer over the worker.
ii. The worker's opportunity for profit or loss
iii. The worker's investment in the business
iv. The permanence of the working relationship
v. The degree of skill required to perform the work

Often courts consider a sixth factor, "the extent to which the service rendered is an integral part of the alleged employer's business." Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1535(7th Cir. 1987).

b. Is the injured worker properly classified as exempt or nonexempt under the FLSA?

c. Do they meet the salary basic and duties test for a white collar exemption? 29 CFR Pt. 541, Section 13(a)(1)

i. Salary Basis – Are they paid a salary of at least $455 per week?
ii. Duties Test – this test is specific to each of the white collar exemptions and very fact specific

d. Do they perform duties which fit the FLAS's test for the exemption?

- Administrative
- Executive
- Professional
- Outside sales employees
- Computer professionals

e. Is the work being tracked correctly?

- Must be paid for any break under 20 minutes
- Must be paid one and one half REGULAR RATE OF PAY for every hour worked over 40 in one work week. No comp time is permitted in non-public sector

- Is the rounding for clocking in early or late correctly applied?

V. Court Actions

a. Private Cause of Action
b. Collective Actions – named plaintiff sues on behalf of himself and "other employees similarly situated". Employee must give consent in writing to become a party. 29 USC Sec. 216.
c. Class Actions – consent of class members is not required. They have the right to be notified and opt out and pursue a private cause of action. F.R.C.P. 23
    - Penalties
    - Unpaid wages for the last two years for all plaintiffs
    - Treble damages
    - Attorney fees

VI. State Law

Ohio Civil Rights Act:

Mattessich v. Weathersfield Township, 2016-Oio-458 (Ohio App. 11 Dist. 2016), 89 N>E>3d 629

ADA:
Smith v. Dillard Department Stores, Inc. 139 Ohio App.3d 252 (Ohio App. 8 Dist. 2000), 744 N.E. 2d 1198
Matasy v. Youngstown Ohio Hospital Co., LLC, 2017-Ohio-7159 (Ohio App. 7 Dist. 2017), 95 N>E> 3d 744
Moscato v. The Ohio State University, 2013-Ohio-3631, Court of Claims of Ohio
Ray v. The Ohio Department of Health, 2018-Ohio-2163, 17AP-526 (Ohio App. 10th Dist. 2018)
Price v. Carter Lumber Co., 2015-Ohio-1522, (Ohio App.9th Dist. 2015)
Johnson v. Cleveland City School Dist., 2011-Ohio-2778, (Ohio App. 8th Dist. 2011)

FMLA:

Cortiolilio v. Etech Ohio Commission Resources, 2105-Ohio-5655 Court of Claims of Ohio
Hartman v. Ohio Dept. of Transportation, 2016-Ohio-5208 (Ohio App. 10 Dist. 2016), 68 N.E. 3d 1266 (also addresses disability discrimination and retaliation).
Barnett v. Ohio State University Medical Center, 2007-Ohio-5424, Court of Claims of Ohio
Randolph v. Grange Mutual Casualty Co., 185 Ohio App.3d 589 (Ohio App. 10th Dist 2009), 925 N.E. 2d 150
Evert v. The Ohio State University, 2014-Ohio-5934, Court of Claims of Ohio
Sammons V. Cherryhill Management, Inc., 2018-Ohio-3403, (Ohio App. 2d Dist. 2018)
Geter v. Ohio Dept. of Rehabilitation and Corrections, 2018-Ohio-4148, Court of Claims of Ohio (also addresses discriminatory discharge)

Change of Occupation:

Cordle v. Industrial Commission of Ohio, 2009-Ohio-1551, (Ohio App. 10th Dist. 2009)

Wage and Hour:

Ohio Constitution, Article II, Section 34a

Wrongful Discharge/Retaliation:

OAC3364-15-04 – University of Toledo

McGee v. Gateway Healthcare Centre, LLC, 2019-Ohio-9988 (Ohio App. 8th Dist. 2019)
Onderko v. Sierra Lobo, Inc., 148 Ohio St. 3d 156 (2016)

Barber v. Chestnut Land Co., 63, N.E. 3d 609 (Ohio App. 7th Dist. 2016)
DeLong v. Thompson, 17 CA 21 (Ohio App. 5th Dist. 2018)

Discrimination:

Pitts-Badd v. Valvoline Instant Oil Change, 2012-Ohio-4811 (Ohio App. 5th Dist. 2012)
Housden v. Wilke Global, Inc. 2018-Ohio-3959 (Ohio App. 10th Dist. 2018)
Vogt v. Total Renal Care, Inc., 2016-Ohio-4955, (Ohio App. 8th Dist. 2016)
Meyer v. United Parcel Service, Inc., 122 Ohio St.3d 104 , 909 N.E. 2d 106 (2009)
Smith v. Superior Prod., LLC ., 2014-Ohio-1961 (Ohio App. 10th Dist. 2014)

VII. Whistleblower Statutes/ VSSR

A. VSSR

i. Did the employer violate a specific safety regulation?
ii. Did the violation cause the injury?
iii. Get a copy of the complete employer investigation report early
iv. Do not include opinions on potential causes of the accident or potential remedial actions in the incident reporting form

B. OSHA 29 CFR 1904.35

i. Section 11(C) of the Act protects employees from retaliation for reporting work related injuries or illnesses. No private right of action.
ii. The employer must inform employees of the right to report work related injuries and illnesses free from retaliation
iii. The employer must have reporting procedures that are reasonable and must not deter or discourage employees from reporting.
    a. The final version of the new reporting rules was effective February 2019 and makes clear that employers may still drug test post accident without fear of a claim of retaliation.
iv. An employer may not retaliate against employees for reporting work related injuries or illnesses
v. An OSHA investigation file is available through a FROI request but will be redacted as to names of witnesses. Can be helpful in VSSR claims to either side. Exculpatory

language should be included in every informal settlement document but must be requested in some area offices.

vi. Employers should have counsel present when the OSHA investigation is taking place to create a separate investigation file for potential use in VSSR claims that may arise in the distant future.

C. EPA and Environmental Statutes

i. All these statutes have separate retaliation provisions that can be invoked individually or in conjunction with an OSHA retaliation claim

ii. May not all be adjudicated by the Department of Justice resulting in confusion and duplicative litigation