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EMPLOYMENT LAW

ADA Tension Highlighted in Return-to-Work Case

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Special to the Legal

Returning employees who are injured at work to their positions can leave employers navigating between “a rock and a hard place.” The often competing interests between obligations under the Americans with Disabilities Act competing with the workers’ compensation laws render most return-to-work situations a challenge. The recent decision of *McGlone v. Philadelphia Gas Works*, (PGW) No. 15-3262, 2017 U.S. Dist. LEXIS 7963 (E.D. Pa. Jan. 19), illustrates what is likely a typical scenario.

KNEE INJURY AND SUBSEQUENT RETURN TO WORK

Patrick McGlone began his employment with Philadelphia Gas Works (PGW) in 1981. His last position was as a service specialist, working in the field and helping to train new technicians. In January 2012, he was servicing a customer’s heater when he injured his knee. He underwent surgery in mid-February and was released to return to work with restrictions in mid-May 2012. He applied for, and was granted, workers’ compensation benefits related to this injury.

Upon McGlone’s return, he was initially assigned to “light duty” work,



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which included light sweeping duties and filing paperwork. Shortly thereafter, McGlone was transferred back to his former position, but was restricted to training employees in the position. He was specifically told to “adhere to his restrictions, not bend and keep his hands in his pockets.” This position was found to be “consistent with and within the scope of McGlone’s medical restrictions.”

In early July, McGlone changed treating physicians and his new doctor placed greater restrictions on McGlone’s performance than those under which he had been working. In early September, McGlone engaged in a verbal altercation with a co-worker and, rather than

participate in PGW’s investigation, he voluntarily retired—fearing that if he was terminated, he would lose his entitlement to life-time medical benefits.

McGlone subsequently applied for Social Security disability benefits, claiming a disability date of Jan. 9, 2012. His SSD claim was approved. McGlone subsequently brought suit against PGW claiming that he was discriminated against on the basis of his age and disability and retaliated against in violation of the Pennsylvania Human Relations Act.

In addressing PGW’s motion for summary judgment, the court first considered whether McGlone’s representation to the Social Security Administration that he was disabled as of Jan. 9 estopped him from claiming that he was “otherwise qualified” to perform the essential functions of his position (as necessary to state a claim under the ADA).

INCONSISTENCY NOT FATAL TO ADA CLAIM

In *Cleveland v. Policy Management Systems*, 526 U.S. 795, 807 (1999), the Supreme Court held that where an employee represents to the SSA that he is disabled, yet claims to be “qualified” during the same time period under the ADA, “the court should require an explanation of any apparent inconsistency

within the necessary elements of an ADA claim.” The U.S. Court of Appeals for the Third Circuit has found that in looking for this explanation, the court should “look for additional rationale to explain

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the plaintiff’s apparent about-face concerning the extent of the injuries ... such as detail regarding the facts of his case, demonstrating how the differing statutory contexts make his statements made under one scheme reconcilable with his claims under the other,” as in *Motley v. New Jersey State Police*, 196 F.3d 160, 165 (3d Cir. 1999).

Applying *Cleveland* and *Motley* to McGlone’s case, the court found that his ADA claim was not estopped because the only “factual assertion that he made to the SSA” was including his knee injury in a list of disabling conditions. The court found that because there was no extended discussion in the record of “why” he felt disabled due to his knee injury, “it is not implausible that the plaintiff in good faith felt that his back and knee injuries rendered him of incapable of performing the duties of his job without an accommodation, but that he felt he could have done so with an accommodation.”

However, McGlone was estopped from claiming that he continued to be “qualified” after the date of his retirement (September 2012) based upon his deposition testimony that he was “totally unable to work in any capacity ... as of the time that he retired.” Based upon this testimony, the court found that his testimony established that there was no

genuine dispute as to whether he was “qualified to perform the essential functions of his position as of the date of his retirement.”

PGW ACCOMMODATED CONDITION

The court next considered McGlone’s claim that PGW had failed to accommodate his injury—based upon his assertion that PGW failed to engage in the interactive process and to appropriately assign him work based upon the information at hand. The court rejected this contention based largely upon McGlone’s failure to complain about his return to work assignments at the time. The court noted that “if the plaintiff ever felt he was in a position where he was required to do things that he was physically incapable of doing, it was his responsibility to openly communicate with PGW about that.” Although McGlone claimed that a number of the duties with which he was tasked required that he work beyond his restrictions, the court found that “the law does not charge an employer alone with the responsibility of monitoring an employee’s restrictions and ensuring that all job assignments comport with them.”

It should be noted that in response to PGW’s motion for summary judgment, McGlone submitted an affidavit regarding his work assignments that conflicted with both his deposition testimony and his workers’ compensation hearing. Although the court did not go so far as to find this to be a “sham affidavit,” it gave no credence to the self-serving statements contained therein.

Finally, the court addressed McGlone’s claim that he was subjected to disability-related harassment upon his return to work. The court first rejected the allegation that PGW’s assignments to McGlone were, in themselves, harassing.

VAGUE HARASSMENT ALLEGATIONS NOT ENOUGH

McGlone also claimed that two co-workers called him derogatory names “at various points in the four months that

he was working prior to his retirement.” The court found, however, that the only harassing incident described with any specificity was a single occasion when a co-worker used the term “cripple” in a conversation. Other than that single statement, the court found that McGlone relied “on the generalized statement that, upon his return ... ‘he received a series of assignments that subjected him to being called derogatory names like “bum,” “cripple” and “handicapped.”” These vague allegations of harassment were insufficient to support his harassment claim as a matter of law.

The case, overall, highlights the difficulties in working with an employee whose medical restrictions create, as the court termed it, “a moving target.” However, because PGW was able to bring forward significant evidence of its efforts to accommodate McGlone and to provide him assignments within his restrictions, it was able to show that its accommodation efforts were sufficient under the ADA. The case is a reminder that documentation of accommodation efforts is key.

From a litigation standpoint, the estoppel discussion highlights the need for employers and their counsel to obtain specific testimony as to any potential inconsistency between representations made in different forums. Eliciting such testimony will heighten the chance of success in establishing that the employee’s inconsistent representations will defeat an ADA claim. •