

THE ADA AND WORKERS' COMPENSATION: A MARRIAGE MADE - IN COURT

By Gard Estes

Two recent federal court cases ruled that Workers' Compensation return-to-work practices must be compatible with the standards of the Americans with Disabilities Act (ADA) workplace accommodations.

On September 29, 2009, The U.S. Equal Employment Opportunity Commission (EEOC) announced a consent decree (settlement \$6.2 million) resolving a class lawsuit against Sears, Roebuck and Co. (Sears). The consent decree, approved by Federal District Judge Wayne Andersen, represents the largest ADA settlement for a single lawsuit in EEOC history. The suit alleged that Sears maintained an inflexible Workers' Compensation leave-exhaustion policy and terminated employees instead of providing them with reasonable accommodations for their disabilities.

The EEOC Chicago District Director John Rowe, who supervised the agency's administrative investigation preceding the lawsuit, said that the case arose from a charge of discrimination filed with the EEOC by a former service technician, John Bava. According to Rowe, Bava was injured on the job, took Workers' Compensation leave, and, although remaining disabled as a result of injuries from his work-related accident, repeatedly attempted to return to work.

Rowe said that Sears could not see its way clear to providing Bava with a reasonable accommodation and instead fired him when his leave expired.


This case highlights the importance of having a return-to-work program that not only satisfies the Workers' Compensation exposure but addresses the ADA accommodation requirements. Simply stated: when employees are injured on the job, employers must have a predefined plan in place that addresses return-to-work options as well as ADA accommodations.

Perhaps even more serious implications for the employer are to be found in the recent ruling pertaining to medical examinations. In *Kris Indergard vs. Georgia-Pacific Corporation*, the Ninth U.S. District Circuit Court of Appeals held that the employer's condition of employment requiring a physical capacity evaluation (PCE) violated the ADA prohibition on medical exams. Many of our clients use these exams to determine if an employee is physically able to perform the essential functions of a job.

The court considered these medical exams to be excessively broad and was not persuaded by arguments that such evaluations can be important in determining a worker's fitness to

This issue of *You Should Know* is one in a series of brief articles designed to keep our clients abreast of significant breaking news in the claim and loss control areas that could affect their operations or exposures. Additional information about this and other topics can be obtained from your Regional Strategic Outcomes Practice Associate.





return to work as well as helping prevent re-injury. The court determined that the ADA standard applied and that such evaluations must be confined to physical agility tests only. In remanding the case to a lower court, the ruling narrowed the scope within which employers can conduct such evaluations to the specific function(s) whose loss initially prevented the worker from remaining on the job. Related considerations of health and safety cannot be explored.

A DISABILITY IS A DISABILITY - OR NOT?

The key difference between disability in the Workers' Compensation sense and disability as defined by the ADA is that Workers' Compensation was designed to provide injured employees with medical and financial assistance following a work-related accident. The ADA was enacted by Congress to protect individuals from discrimination associated with their disability and to provide reasonable work accommodation if the employee qualifies for this protection.

The ADA exposure starts when an employer is notified that the employee has restrictions that would limit his ability to perform his regular job. The key point for employers: the ADA exposure can start with the injury itself, because the injury can meet the definition of "disabled" under the ADA (for example, a severed arm).

In essence, Workers' Compensation is the gateway to ADA accommodation. Employers often incorrectly assume that the Workers' Compensation system will protect them from ADA litigation; however, it will not! In fact, it does little to explain the exposure and it will not provide employers with a defense for inadequate ADA policies – the two systems are separate but co-dependent.

We recommend you:

- Consult with your employment law counsel to discuss your current program's compliance
- Make certain your Human Resources personnel are aware of these requirements
- Review your current return-to-work policies and procedures
- Review your company's protocols for employing outside vendors
- Ask your carrier/TPA how they will be addressing these issues
- Make certain vendors understand your procedures
- Educate your supervisors and managers regarding these issues
- Consult with your Willis insurance professionals for advice and assistance in directing you to valuable resources

CONTACT

For additional information on this or other claim and loss prevention issues, please visit **our website** at willis.com or contact:

Gard Estes

207 688 1201
gard.estes@willis.com

Joe Picone

804 967 2066
joe.picone@willis.com

Jeff Seibert

757 628 2304
jeff.seibert@willis.com

The observations, comments and suggestions we have made in this publication are advisory and are not intended nor should they be taken as legal advice. Please contact your own legal adviser for an analysis of your specific facts and circumstances.