

Understand the Pitfalls of Dismissing Injured Employees

New ADA Amendments give employers more reason to take extra precautions when terminating employees with injuries or medical conditions.

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The U.S. Supreme Court recently declined to hear an Americans with Disabilities Act (ADA) case involving an employer's use of a "100-percent healed" or "no restrictions" policy in terminating an employee who was injured on the job. That type of policy is a blanket rule that prohibits employees from working if they have any medical restrictions.

Affirming the order of the lower court that dismissed the plaintiff's case, the Tenth Circuit in *Dillon v. Mountain Coal Co.* (10th Cir., 2009), 569 F.3d 1215 held that a "no restrictions" policy, in and of itself, is not sufficient to establish the elements of a claim that calls upon the "regarded as having an impairment" portion of the ADA disability definition.

A mine can be a physically demanding and dangerous place to work. It is understandable that a mining company would want to implement a policy prohibiting its employees with health-related work restrictions from working there.

And that is exactly what the defendant, Mountain Coal Co., did in the *Dillon* case. The company prohibited its employees with medical restrictions from working in any capacity at the West Elk Mine, where it conducted its operations.

The Case

Jared Dillon worked for Mountain Coal Co. as an underground maintenance mechanic for about a month in 1999 until a machine part fell on him, injuring his neck and back. His doctor imposed work restrictions that prevented him from being able to lift the amount required by his job description. Dillon was therefore not able to continue working. Dillon's doctor later determined he had reached "maximum medical improvement" and released him to work with permanent restrictions.

Mountain Coal Co. sent Dillon a letter advising that he was being terminated because the permanent restrictions rendered him unable to work, and he had used all of his short-term disability leave. Dillon sued Mountain Coal Co., alleging that he was improperly fired because the company regarded him as being disabled and had discriminated against him for that reason.

The Argument

Dillon argued that the company's "no restrictions" policy proved that it regarded him as being substantially limited in performing mining jobs and that the ADA protected him from being discriminated against.

The ADA prohibits discrimination against qualified individuals with disabilities. To establish a *prima facie* case of discrimination, the plaintiff must prove three elements:

- The plaintiff is "disabled" as defined in the ADA
- The plaintiff is qualified, with or without an accommodation, to perform the essential job functions of a job he holds or desires
- The defendant discriminated against the plaintiff because of the disability.

Under the ADA, a person is disabled if he, among other things, is "regarded as" having a physical or mental impairment that substantially limits a major life activity. To prove "regarded as" discrimination, an employee must show both of these things:

- The employer believed the employee was significantly unable to perform his specific job because of a disability.
- The employer believed the employee was significantly limited in performing either a class of jobs or a broad range of jobs in various classes in the employee's geographic area.

The Decision

The Tenth Circuit agreed with Dillon that Mountain Coal Co. believed he was disabled and significantly unable to perform his specific job. The court referred to the termination letter as proof that Dillon was fired because of a perceived disability and in accordance with Mountain Coal Co.'s "no restrictions" policy.

However, the court found that Dillon failed to produce sufficient evidence for a reasonable juror to conclude that the company believed he was significantly limited in performing either a class of jobs or a broad range of jobs in various classes in his geographic area. Dillon attempted to prove this by simply referring to the "no restrictions" policy. The court explained:

The policy . . . only speaks to whether Mountain Coal regarded Mr. Dillon as substantially limited in his ability to work at West Elk Mine. The policy does not reveal 'the number and types of jobs utilizing similar training, knowledge, skills or abilities' in the geographic area, as the EEOC regulations require. Mr. Dillon did not put on other evidence describing the jobs available in the area that fell into the class of 'mining jobs,' nor did he produce evidence demonstrating that mining jobs are, in fact, a class of jobs. He therefore produced no evidence from which a reasonable jury could conclude that Mountain Coal regarded him as substantially limited in his ability to perform a class of jobs.

Conclusion

Despite the result of the *Dillon* case, employers should be cautious when implementing a "no restrictions" policy and deciding to terminate an employee because of an injury. Since *Dillon* was decided, the ADA Amendments Act of 2008 has become effective. The Amendments Act provides greater protection to individuals "regarded as" disabled.

Moreover, while *Dillon* may stand for the proposition that a "no restrictions" policy, in and of itself, is insufficient to prove an ADA claim, it does not foreclose the possibility that such a policy, considered in light of other evidence, will create a jury question

whether an employer regarded an employee as disabled in his ability to work in a "class of jobs".

Indeed, other courts, including the Sixth Circuit Court of Appeals, which has jurisdiction to hear Ohio federal cases, have held this to be true. And at least one circuit has concluded that "no restrictions" policies are per se violations of the ADA (at least to the extent that the plaintiff is covered by the ADA).

An employer runs a risk when terminating an employee pursuant to a policy on the maximum sick leave available. An EEOC attorney speaking about the issue has been quoted as saying:

The era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodation requirements of the ADA is over. Just as it is a truism that never having to come to work is manifestly not a reasonable accommodation, it is also true that inflexible leave policies which ignore reasonable accommodations making it possible to get employees back on the job cannot survive under federal law.

The lesson to be learned from these recent cases is that whenever you are considering discharging an employee with any sort of disability or injury, including a work-related injury, or history of either, it is wise to seek legal advice even if the termination is consistent with a neutral company policy.

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