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INSURANCE BROKERAGE INCORPORATED

Workers' Compensation Discrimination

In addition to the basic benefits of workers' compensation, the law provides an anti-retaliation provision that prohibits employers from taking adverse employment actions against employees for filing for benefits under workers' compensation.

Section 120 of the Workers' Compensation Law

If the Board finds that an employer has taken some deleterious action against an employee because the employee has claimed benefits under workers' compensation, attempted to or may attempt to file a claim for benefits, and/or testified in a workers' compensation proceeding, the employer will be found in violation of Section 120 of the Workers' Compensation Law. Such determination must be based upon "*substantial evidence*." The Board has been given great latitude in ferreting out the employer's motives. The claimant does not need to produce a "smoking gun" that directly established discrimination. If the Board's decision is supported by substantial evidence, the courts will not disturb this. Although Section 120 protects the employee from discrimination on the basis of claim filing, it should be noted that it does not serve to otherwise guarantee the continued employment of an injured employee.

Any employer found guilty of discrimination against an employee shall be directed to restore his or her employment, compensate the employee for any loss of wages arising out of such discrimination, provide any pay raise, promotion, or enhanced seniority to which the employee would otherwise have been entitled to, as well compensate the employee for lost retirement, health and other benefits. **Employers cannot be insured for claims under this section of the WCL. The employer – not the insurance company – must pay all awards and penalties.**

An injured employee has **two** years from the "commission of such practice" to file a claim of discrimination against an employer.

Discrimination in Hiring Based Upon Prior Claim for Compensation:

New York State Workers' Compensation Law Section 125 makes it unlawful for any employer to: (1) inquire into whether a job applicant has previously filed a claim for compensation benefits, or (2) discriminates in hiring a job applicant who has filed a claim. Unlike Section 120 of the WCL, Section 125 confers jurisdiction on the Supreme Court of the State of New York to address an aggrieved party's claim for damages rather than pursue a claim before the Board. If such discrimination is found, it is classified as a misdemeanor punishable by a fine of not more than $1,000.

Employers must also be mindful of the New York State Executive Law. Article 15 is known as the Human Rights Law. This prohibits unlawful discriminatory practices.

Case Review – Discrimination Found

The following are examples of where the courts found discrimination pursuant to New York Workers' Compensation Law Section 120.

Buzea V. Alphonse Hotel Corp., 734 N.Y.S.2d 337:
Claimant sustained a head injury in the course of his employment, which was witnessed by a co-employee and reported to the employer's wife, also a co-employee. Employer's wife warned the claimant that the employer would terminate him if he were seen injured, or left to seek medical treatment. Claimant did seek medical treatment on the following day. When the employer learned of this, he immediately terminated the claimant. The board found that N.Y. Comp. Law Section 120 had been violated. The appellate Division affirmed.

Gillen V. U.S. Air Inc., 260 A.D. 2d 853, 854, 688, N.Y.S. 2d 761, 762 3d
Claimant sustained a work related back injury prior to the July 4th weekend. Employer, suspicious of claimant's absence, conducted surveillance that revealed the claimant driving his car, riding on a boat, and attending a family gathering. Thereafter, the claimant was terminated as the employer questioned whether his injuries were genuine. The Board found the employer had violated N.Y. Comp. Law Section 120, and the court affirmed.

Gizowski V. Pacos Const. Co., Inc., 158 A.D.2s 868 551 N.Y.S.2d 660

Claimant, a truck driver, sustained a compensable arm injury. Upon reporting to work following his convalescence, the employer advised the claimant that his services were no longer needed since the employer already had a driver. The record contained evidence to the effect that the claimant was told by the company bookkeeper that perhaps his arm was sore from completing workers' compensation forms. The Board found unlawful discrimination and the Appellate Division affirmed, noting that the claimant had met his burden of producing evidence of retaliatory intent.

O'Malley V. N.Y. City Transit Auth., 158 A.D. 2d 822, 822-823, 551, N.Y.S 2d

Claimant was terminated shortly after returning to work from surgery to repair a work related hernia. During his absence, the claimant's supervisor suggested that his injury was feigned. Upon reporting to work, claimant was assigned a "filthy desk," was shunned by supervisors, and was denied differential pay. Claimant was ultimately discharged without explanation. Board finding of discrimination was affirmed.

Cozzy V. Movers, Inc., 157 A.D.2d 897,550 N.Y.S 2d 167 3d

Board found violation of N.Y. Work Comp Law Section 120 when employer terminated the claimant after a compensable arm and shoulder injury. The Appellate Division affirmed, noting that Board had considered testimony that the claimant's termination was due to the employer's opinion that the "injury took too long to heal, the employer had to save face with the other employees, and the insurance carrier was causing problems about the claimant's lengthy absence." Board was within its discretion to reject employer's proffered explanation that the claimant was terminated due to tardiness and absenteeism.

Wesp V. Liberty Nat'l Bank & trust Co. 119 A.D. 2d 934, 934-935, 501 N.Y.S. 2d 207

Claimant, a bank teller, was held at gunpoint in the course of her employment. She was taken out of work by an attending psychiatrist for work related anxiety. The employer, upon learning that the claimant had attended a beauty pageant and worked as an usherette at a professional football game, terminated her due to being observed doing "things that were inconsistent with being out on disability." The court affirmed that Board's finding of discrimination, noting that such a medical determination was "not within the province of the employer."

Prevention

These cases reflect a fair number of the discrimination cases reviewed by the Appellate Division. One particular trend is clear: the Appellate Division will likely defer to the Board's factual determination as to whether or not the employer's actions are motivated by retaliatory intent. In no reported cases has the Appellate Division reversed a Board's decision finding, or failing to find, discrimination since 1984.

Among several of the cases where discrimination was found, another trend is revealed. In cases where the employer terminates the claimant due to its belief that the claimant is feigning disability, discrimination has been found. (Gillen V. USAir, O'Malley V. N.Y. City Transit Auth, Wesp. V. Liberty Nat. Bank & Trust).

The Workers' Compensation Law does not prohibit an employer from terminating an employee due to work-related absences so long as the employer's personnel decisions regarding absences do not discriminate between work-related and unrelated absences.

***** Employers should be cautious in seeking to terminate employees solely because they doubt the validity of the claimant's injury or the merits of the compensation claim.**