# Bermuda Triangle -Where ADA, FMLA, & Work Comp Claims Intersect

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## Introduction

Employees will sometimes walk into their employer's office and begin to tell them about all the issues they are having at work because of a physical or emotional injury/illness. When that happens, there are three claims you need to make sure you can spot. (1) Work comp claim (including work comp retaliation under public policy if they were fired); (2) Disability Discrimination including Failure to Accommodate; and (3) FMLA. Often these claims go hand in hand.

Some employers forget that an employee can have all three claims. The employer may decide to pick one statute that they are focused on, and in the process, disregard the other statutes, thereby opening themselves up to liability. While they might follow all the rules of the FMLA leave requirements, they disregard or forget about the work comp statute or the disability discrimination/accommodation statute. All three statutes need to be addressed by the employer, and most have some overlap.

## Damages

Before we talk about the specifics of the claims, I want to address damages briefly. Recovering damages for all three claims for employees is great; terribly expensive for

employers. If the employee has all three types of claims, there are a lot of damages to be won. Besides the work comp benefits for the injury, if the employee was fired for pursuing rights protected under the work statutes, there is a wrongful termination in violation of public policy for pursuing statutory rights under Chapter 85. To pursue this claim, the employee actually has to be terminated, as there is no known case on file indicating anything other than a discharge is actionable under this common law. There are other states that are challenging this throughout the country, and it is likely just a matter of time before it is challenged in Iowa. But for now, the claim is called "wrongful *discharge* in violation of public policy." If the employee has a wrongful termination in violation of public claim, he or she can recover lost wages, emotional distress, and punitive damages. If there is an ICRA/ADA claim for disability discrimination, damages include lost wages, emotional distress, attorney fees, equitable relief and punitive damages. Punitive damages are only available under the ADA and are capped based on the size of the employer. For the FMLA claim, the employee will be permitted to recover lost wages, liquidated damages, equitable relief, and attorney fees. If the employee can prove all three claims, he or she has an excellent chance of recovering all the damages. For this reason, these types of claims can be desirable.

However, whether work comp claims and disability claims can be brought is currently up for debate. There is one Iowa Court of Appeals case that may throw a wrench into whether an employee can have a disability claim and a work comp claim. *See Delgado-Zuniga v. Dickey & Campbell Law Firm*, 2017 WL 4050285, at * 1 (Iowa Ct. App. September 13, 2017). *Delgado-Zuniga* seems to be somewhat contrary to *Greenland v. Fair Tron Corp.*, 500 N.W.2d 36 (Iowa 1993) where the Iowa Supreme Court held that an intentional infliction emotional distress claim is preempted by the ICRA because discrimination laws provide a remedy for emotional distress,

but claims for assault and battery are not preempted under the ICRA. “The claims are not separate and independent when, under the facts of the case, success in the [other claims] requires proof of discrimination.” *Id.* at 38. A claim for assault and battery does not require proof of discrimination and therefore permitted to be brought with a discrimination claim. More often than not, a claim for disability discrimination is not going to require the same proof as a work comp claim. The disability claim has an entirely separate analysis from a work comp claim because the disability analysis does not care in the least as to how the disability occurred. Whether the person was born with it, got it at work, or in a skiing accident has no bearing on whether the employer has a duty to provide a reasonable accommodation for an employee. The Court of Appeals did not consider *Greenland* in its analysis of *Delgado-Zuniga*. There is likely room for interpretation and future litigation.

**FMLA**

FMLA claims are extremely technical. There are so many rules that the employer must follow to ensure they are in compliance with the FMLA. FMLA simply is job protection. It is the statute that protects the employee’s job so that while the employee is on leave, they cannot be fired or written-up for taking that leave. The employee is given up to 12 weeks of unpaid leave. 29 C.F.R. § 825.200.

In order to qualify for FMLA, there are certain requirements that an employee must meet. They have to be employed for 12 months and have worked 1,250 hours. 29 C.F.R. §825.110. The reason for the leave must meet the requirements for a serious health condition. A serious health condition can include a lot of different conditions, including disabilities and work comp claims. Specifically, the FMLA regulations state an employee is entitled to protected leave, “Because of

a serious health condition that makes the employee unable to perform the functions of the employee's job" 29 C.F.R. §825.112. "For purposes of FMLA, serious health condition entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in §825.114 or continuing treatment by a health care provider as defined in §825.115." 29 C.F.R. 825.113.

Where FMLA claims overlap with ADA and Work Comp claims is that the FMLA can provide that protected leave for the employee if they are recovering from a work comp injury or have a disability. This leave is not paid, but it certainly can provide job protection so that the employee is not fired while they are trying to get themselves healthy. The issue with FMLA is that it is only good for 12 weeks. Under the FMLA, the employer can discharge the employee after the employee has exhausted the 12 weeks. However, that is not the end of the analysis. If the employee needs additional time off from work, the employer and employee will need to look at accommodation laws under the disability statutes, which is discussed below.

Another problem that can sometimes pop up is when employers try to deny insurance benefits during the time the individual is on leave. FMLA also protects employees from having their benefits cut. The employee may have to make arrangements to pay their portion of the premium if it normally is deducted from the paycheck, but the employer still has to pay for their percentage of the insurance benefits and cannot cancel the employee's insurance.

The important part to remember about FMLA, is that so long as the employer is required to offer FMLA leave -meaning they have more than 50 employees in a 75-mile radius 29 C.F.R. § 825.111 -there is a good chance the employee's work comp claim or disability claim are likely going to be covered under FMLA. FMLA protects employees from leave related to the serious health condition itself, the treatment needed for the serious health condition, and recovery

therefrom. "The term incapacity means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom. 29 C.F.R. 825.113

**ADA/ICRA**

In the disability statutes, disability protection overlaps with FMLA or work comp rights in the accommodation area. The Iowa regulations on what constitutes a disability are broad.

> a. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; endocrine; or
> b. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.,

Iowa Admin Code 161-8.26(2)(a-b). As far as the ADA is concerned, the Iowa Supreme Court has held that the Iowa Civil Rights Act is at least as broad as federal law in regard to its coverage of what constitutes a disability. *See Goodpaster v. Schwan's Home Service, Inc.*, 849 N.W.2d 1, 9-10 (Iowa 2014) (holding the ICRA shall be construed broadly to effectuate its purposes while the ADA had previously been interpreted strictly).

Most of the cases that end up in litigation are a result of the failure to accommodate provisions of the disability statutes. Employers have a duty under both state and federal law to accommodate employees who have a disability, unless it would cause an undue hardship.

There are many types of reasonable accommodations for which both the employer and employee should be on the lookout. Reasonable accommodations can include job restructuring, such as shifting minor job tasks to other employees and giving different minor job tasks the employee that he or she can perform. Reassignment to a *vacant* position can also be a reasonable

accommodation. Employers do not have to displace another employee so that the employee can work. Providing a part-time or modified schedule can be reasonable. *See* https://www.eeoc.gov/facts/accommodation.html. Things like telework can also be a reasonable accommodation. *See* https://www.eeoc.gov/facts/telework.html. The key to it being a reasonable accommodation is to look at whether other employees perform these jobs or tasks, whether the employee is qualified to perform them, and whether the work is available. Employers do not have to disrupt their entire system to bend over backwards to accommodate an employee. But moving a few minor job duties around so the employee can work is reasonable.

One of the more important accommodations that an employer can provide is leave. This leave is often additional to leave already granted under FMLA. The disability laws do not require that employers give continuous leave indefinitely. However, if the employee is not quite ready to go back to work after 12 weeks, but the health care provider believes two more weeks might be reasonable, that will quite possibly be a reasonable accommodation under the disability statutes. Where it starts to slip is when employees have no idea when they will be well enough to come back to work. There is no bright line as to how much leave is too much leave for it to be a reasonable accommodation. However, a few weeks after the employee's FMLA has expired has been deemed to be reasonable. It will simply depend upon the facts of the case and if the employer is able to show that the employee being gone is too disruptive to the business. The burden to prove whether any accommodation is an undue hardship is on the employer.

Where most litigation occurs is when the employee states they need the accommodation and the employer does not provide the employee with one. Both the employee and the employer have to engage in the interactive process to find a reasonable accommodation. What sometimes will happen is that the employee suggests an accommodation, the employer says no and that is

the end of the discussion. That is not engaging in the interactive process in good faith, which is a requirement when determining whether accommodations can be given. So, if an employee is required to work in light duty and tells the employer that he can do his regular work if he is able to take a break every 90 minutes, that could be a reasonable accommodation. This provides the employee with the chance to not have to take less pay while being forced on light duty because of a work injury. Also remember that the employee does not need to specifically say the word "accommodation" or disability to have the protections. They simply need to provide enough information regarding the disability and that they need something changed about their job because of their disability.

One thing employers will sometimes do is exclude people with disabilities from certain jobs because they are considered light duty jobs for employees who have work comp claims. This sort of exclusion is not permitted. The EEOC has indicated employers cannot save jobs for people with work comp claims, thereby excluding a class of people -those with disabilities -from being able to perform the same jobs. However, an employer is not required to "create" light duty jobs or new jobs as a reasonable accommodation.

Additionally, 100% healed policies are a huge sign that there is a violation of the ADA. The ADA requires that the employer engage in the interactive process to determine whether there is a reasonable accommodation. Perhaps the employee does not even need an accommodation, but the employer still says that they have to be 100% healed. This will likely violate the ADA because the standard is whether the employee can do the job with or without a reasonable accommodation. How healthy the employee is may have no bearing on the work at all. For instance, if the employee has a lifting restriction of not over 20 pounds for the next three months, they may not be 100% healed if they can normally lift 50 pounds. However, if the work does not

require them to lift over 20 pounds, that 100% healed policy has no bearing whatsoever on the employee and disproportionally affects workers with disabilities. So, if the employer has a 100% healed policy in regard to a work comp injury, look to the disability laws. If the work comp claim qualifies as a disability, the employee may have the right to demand a reasonable accommodation to get back to work. The ADA requires an individualized assessment with every employee who requests the accommodation. The 100% healed policy does not allow that assessment. If there is no individualized assessment of what accommodation could work, then there is a violation of the disability laws.

**Work Comp**

Most of employees' more serious work injuries are going to rise to the level of being eligible for FMLA. If the employee needs surgery because of the injury, it will almost always qualify under FMLA. If they need continuing treatment, or if they get an infection that requires medication or continuing treatment, they are eligible for FMLA. Sometimes employers require the employee to take the FMLA and sometimes they do not. This usually should be spelled out in the handbook as to what their normal practice is to avoid any confusion or disparate treatment by employers.

FMLA needs to be considered by employers when employees need time off from work to seek medical treatment for their work place injury. The public policy laws do not protect employees from discipline for pursuing work comp benefits, but FMLA leave likely would. If an employee is written up for missing work based upon leave he or she needs for medical treatment, and the employer has more than 50 employees, the employer should provide FMLA. The employer is likely aware the employee needs the FMLA leave because of the work comp

treatment. The FMLA protection can be given retroactively. Once the employee is approved for the FMLA, any writeups related to the need for leave the employee has received should be rescinded. FMLA is an equitable statute so if the employee's writeup is not rescinded, the employee has a right file a claim for FMLA interference and retaliation. It is definitely worth a letter to the company attorney to try to get it resolved, because if the employee is forced to file a lawsuit, the court can order the company to remove the writeup and pay attorney fees.

Ideally the employee and employer would work together to determine whether leave is the best route or if light duty is better. This is a bit of a gray area in the law. It is likely better to default to the wishes of the employee and what they want to do. Generally, the employee can decide, so long as they have the proper medical certification, whether to turn down light duty under work comp and elect to go on FMLA leave. This can present some problems because it is normally better to remain in the workplace, because once the employee is out of the workplace, it is always harder for them to come back in later. However, if the injury can be healed in the 12-week time period, the employee may be able to turn down light duty work to go on FMLA. The downside for the employee is that if they elect to take FMLA leave instead of light duty, they will not be entitled to any of the wage benefits that work comp provides because FMLA leave is unpaid.

Many of the work comp claims are also going to be covered by the ADA. If the employee is unable to work because of the workplace injury, they could likely be disabled in the major life activity of working, making them eligible for accommodations. They also are likely disabled in other areas such as walking, talking, lifting, bending, etc. The employee has protections under the accommodations provisions of the disability laws, so they are not just stuck in a room

somewhere with nothing to do for hours on end. The employer will have to work with them to have them perform their normal job duties with an accommodation.

**Best Practices**

There are certainly best practices that employers should have in order to ensure that they are not discriminating against employees based on a disability, not interfering with their work comp statutory rights, and not retaliating against the employee because they requested FMLA. One thing to look at is the handbook. The policies should be clear. Does it spell out that FMLA and work comp leave will run concurrently? If it does not state that, there is room for the employer to pick and choose who gets leave and who does not. Generally, that will impact employees with the work-related injury more. Are supervisors warned about discouraging employees from taking FMLA? Is there clear training that is given both orally and in writing to supervisors about what to do when there is a workplace injury? Does the employer have a clear path for who to request accommodations from? Do they have clear boundaries for what supervisors should know about a confidential medical condition verses getting the supervisor involved to make sure the employee can safely do the job? Does the employer have a clear job description depicting the essential functions? Do the job descriptions list essential functions of the job that the employee does not regularly perform? Has the job description changed since the employee was injured? As an example, I once saw job descriptions that required the person have two hands in order to do every single job in the company. The job descriptions prior to the employee losing his hand never said anything about having two working hands, much less having two hands in general.