Chapter 16

EMPLOYMENT ISSUES

§ 16.01 Introduction.

It is common for workers' compensation claimants attorneys to be faced with issues concerning employment matters, such as those surrounding a claimants' efforts to return to work after recovering from a workplace injury. This chapter is intended to provide a very brief overview of certain state and federal laws that may have particular impact upon workers' compensation claimants. This chapter is not intended to provide detailed analysis of employment law in general or to guide the user of this manual in handling employment-related matters. Many employment-related laws are not discussed at all here. An excellent source for more detailed substantive information on South Carolina as well as federal employment law is the recent two-volume treatise on the subject published by the South Carolina Bar CLE Division, Labor And Employment Law For South Carolina Lawyers (M. Malissa Burnette, et al., eds., 1999).

§ 16.02 The Employment-At-Will Doctrine.

The case of Prescott v. Farmers Telephone Cooperative, Inc., 335 S.C. 330, 516 S.E.2d 923 (1999) represents the South Carolina Supreme Court's most recent reaffirmation of the continued vitality of the employment-at-will doctrine. The court stated:

> *South Carolina has long recognized the doctrine of employment at-will. Pursuant to this doctrine, "a contract for permanent employment, so long as it is satisfactorily performed which is not supported by any consideration other than the obligation or service to be performed on the one hand and wages to be paid on the other, is*

terminable at the pleasure of either party." At-will employment is generally terminable by either party at any time, for any reason or for no reason at all. The termination of an at-will employee normally does not give rise to a cause of action for breach of contract.

Although this Court has recognized exceptions to employment at-will, the doctrine remains in force in South Carolina. We find the policy of employment at-will provides necessary flexibility for the marketplace and is, ultimately, an incentive to economic development. Accordingly, we affirm and adhere to the employment at-will doctrine in South Carolina. 335 S.C. at 334 (footnote and internal citations omitted).

An exception to the at-will doctrine has been found when an employee handbook contained promises of continued employment and disciplinary procedures stated in language sufficiently mandatory in nature to give rise to a contractual obligation. See, e.g., Small v. Springs Industries, Inc., 292 S.C. 481, 357 S.E.2d 452 (1987). The court has also recognized an exception to the at-will rule where allowing discharge would be contrary to public policy. See, e.g., Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985) (finding an exception to the at-will rule when the employer discharged the employee for complying with a subpoena).

§ 16.03 South Carolina Statutes Providing Exceptions To The At-Will Rule.

After the South Carolina Supreme Court issued its ruling in Ludwick, supra, the General Assembly enacted a statute protecting workers from demotion or discharge for serving on jury duty or complying with a subpoena. South Carolina Code Ann. § 41-1-70. Damages are limited to one year's lost wages in the case of discharge, and to one year's diminution of wages in the case of demotion. Punitive damages and attorney's fees are not recoverable.

The General Assembly enacted similar protections to prohibit employers from retaliating against workers' compensation claimants for making claims. South Carolina Code Ann. § 41-1-80. While the statute provides some protection for claimants, the cap on recoverable damages and the lack of any statutory provision for recovery of attorney's fees and costs make it economically infeasible to bring action under the statute in most cases.

§ 16.04 The Americans With Disabilities Act.

Title I of the Americans with Disabilities Act, 42 U.S.C.A. § 12101, et. seq., extends to employees of private employers protections similar to those made available to employees of government entities and government contractors under the Rehabilitation Act of 1973. In theory, the Act prohibits discrimination against employees based upon his or her having a disability, having a record of a disability, being perceived as having a disability, or associating with a disabled person. In order to qualify for protection under the Act, a person must be able to perform the essential functions of the job, with or without a reasonable accommodation.

In practice, the ADA's protections against discrimination have been narrowly enforced, especially within the Fourth Circuit. The hurdles that ADA plaintiffs must clear in order to recover, while not insurmountable, are substantial. Certain threshold questions must be answered in the affirmative in order for a plaintiff to recover:

- Is the individual against whom adverse employment action was taken qualified?
- Does the subject condition substantially limit a major life activity?
- Can the individual perform the essential functions of the job?
- If an accommodation is needed in order to enable the individual to perform the essential functions of the job, is the accommodation reasonable?

Disability for purposes of the ADA is not controlled by the same standards as impairment ratings for workers' compensation. Likewise, claims of disability for social security purposes are not determinative of disability for the purposes of the ADA. Whether a condition is a "disability" triggering the protections of the ADA depends upon whether it substantially limits a major life activity. The E.E.O.C. regulations interpreting the Act list the following major life activities: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. § 1639.2(i).

The United States Supreme Court severely limited the scope of protected disability in two decisions issued in 1999. In Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S.Ct. 2139, 144

L.Ed.2d 450 (1999), the court held that vision impairment which is ameliorated with corrective lenses does not rise to the level of a disability protected by the ADA. The court reasoned that the major life activity of seeing is not substantially limited by myopia where corrective lenses restore normal sight. Applying similar reasoning in an opinion issued on the same day as Sutton, the court held in Murphy v. United Parcel Service, 527 U.S. 555, 119 S.Ct. 2162, 144 L.Ed.2d 518 (1999), that a truck mechanic who was fired because he had high blood pressure was not entitled to protection under the Act because his hypertension was effectively controlled by medication, and therefore did not limit any major life activity.

Sutton and Murphy appear to point to an absurd result. Under these cases, if a condition is subject to ameliorative measures, it is not a disability, and an employer may therefore discriminate on the basis of that condition with impunity. In the extreme example given by Justice Stevens in his dissent in Sutton, an amputee who uses a prosthesis to walk would not be entitled to assert that he is disabled for purposes of the Act, so an employer who has an irrational prejudice against amputees could fire him without liability. At the same time, those individuals who have impairments which cannot be made better by medication, corrective lenses, prosthetics, or other ameliorative measures may not be able to perform the essential functions of the job, either with or without accommodations which must be determined to be reasonable. As a practical matter, few individuals qualify for protection from discrimination by the ADA under the courts' current restrictive view.

If the plaintiff is able to surmount the obstacles to recovery, he can receive reinstatement, back pay for lost wages, compensatory damages, litigation costs, and attorney's fees. Jury trials are available.

§ 16.05 The Family And Medical Leave Act.

The FMLA requires employers, as that term is defined at 29 U.S.C.A. § 2611(4)(A)(i) (having 50 or more employees for each working day during twenty or more calendar work weeks in the current or preceding calendar year), to provide up to twelve weeks of unpaid leave in any twelve-month period to facilitate the birth or adoption of a child, the care of an immediate family member with a serious health condition, or the convalescence of the employee himself from a serious health

condition. In order to be eligible to receive FMLA benefits, the employee must have worked for the employer for at least twelve months, and during the twelve months immediately preceding the leave, the employer seeking leave must have worked for the employer for at least 1,250 hours.

Upon return from FMLA leave, the employee is entitled to restoration to the same position, or a position substantially equivalent to his position before leave was taken. The employee is further entitled to collect any unconditional pay increase or bonus that was given during the leave period. The employer is required by the FMLA to maintain coverage for the employee during the leave period if the employer normally provides health insurance.

In the event of a violation of the FMLA by the employer, the employee may recover lost wages, monetary losses resulting directly from the violation, liquidated damages equal to back pay, and interest.