

# WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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## CONTENTS

### 1 TACO GETS ITS BELL RUNG - IN AN EXPENSIVE RETALIATORY DISCHARGE AWARD

*Reinneck v. Taco Bell Corp.,  
App. No. 5-97-0365 (Ill. App.  
6/22/98)*

### 2 RESPONDENT NOT ENTITLED TO COPY OF ARBITRATOR'S DECISION WHERE NO ATTORNEY'S APPEARANCE FILED

*Robert Preston v. Bell Trucking,  
App. No. 4-97-0526 (Ill. App.  
4/9/98)*

### 3 NEW LEGISLATURE REVERSES VILLAGE OF WINNETKA CASE

### 4 ADA Corner: WHAT CONSTITUTES A "REASONABLE ACCOMMODATION?"

*Ceglarek v. John Crane, Inc.,  
1998 WL 164873 (N.D. Ill. 4/3/98)*

### 6 SECTION 19(B-1) REQUIREMENT OF MEDICAL REPORT DESCRIBING DISABILITY

*Sun Choi v. Industrial Commission,  
Sup. No. 82887 (Ill. Sup. 5/21/98)*

### 5 OUR LOSS IS COLORADO'S GAIN

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## TACO GETS ITS BELL RUNG - IN AN EXPENSIVE RETALIATORY DISCHARGE AWARD

In a recent retaliatory discharge case, a former employee of the Taco Bell Corporation received a surprisingly high damage award. In a bench trial, the trial court assessed damages in an amount of \$370,000 in compensatory damages, \$25,000 for mental anguish, and \$1,000,000 in punitive damages. A very sympathetic appellate court affirmed the result in Reinneck v. Taco Bell Corporation.

After the plaintiff, Vicki Reinneck, was terminated from her employment as an assistant manager of a Taco Bell outlet, she sustained a reduction of earnings from \$24,000 per year to approximately \$10,000 per year in her new employment. Taco Bell's rehabilitation expert produced 23 job leads in the restaurant business, which jobs paid salaries comparable to that of Taco Bell. The court down played the importance of the rehabilitation testimony when the counselor admitted that the prospective employers had not been told why plaintiff was fired at Taco Bell. Plaintiff testified she had made her own job search and produced a list of the prospective employers in her search. When the defendant produced witnesses to establish that the plaintiff had never contacted a number of these prospective employers, the court excused the plaintiff's untrue statements by stating that the plaintiff "possibly made some mistakes in retrospectively recording her list." Based on this testimony, the trial judge awarded the plaintiff \$370,000, which represented the approximate amount of her claimed wage loss until the plaintiff reached the age of 65.

With reference to the award for mental anguish, plaintiff's testimony that it "didn't feel well to be fired," that she had to forget about building a home and that she had wasted 14 years of her life while working at Taco Bell. Without any medical testimony, the judge awarded \$25,000 for mental anguish.

The final blow involved the assessment of punitive damages in the sum of \$1,000,000. The trial judge permitted testimony of former employees who described similar mistreatment after exercise of rights under the Workers' Compensation Act. The appellate court affirmed the use of such testimony stating:

*The ultimate issue to be decided in a retaliatory discharge action is the employer's motive in discharging the employee. Evidence of prior discriminatory conduct or of statement condoning or advocating discrimination is admissible to show motive.*

*The testimony of former Taco Bell employees who were fired for filing claims or who overheard management personnel discussing firing employees who filed compensation claims is directly relevant to one of the ultimate issues in this case--motive. Therefore, the testimony was properly admitted.*

The case involved another issue, that being the retaliatory damage firing based on the Illinois Act when the plaintiff had actually filed her workers' compensation claim in Missouri:

*The fact that a plaintiff has not filed a claim in Illinois prior to her discharge does not preclude her from bringing a retaliatory discharge cause of action; it is enough if she had sought medical attention for her injuries and that her employer discharged her for that assertion of her workers' compensation rights. Before she was terminated, plaintiff sought medical attention for her injuries, informed her Illinois supervisors about her injuries, and informed the same supervisors that she was hiring a lawyer to pursue her remedies.*

...

*Illinois has long recognized the tort of retaliatory discharge for exercising rights to workers' compensation. It makes no logical difference, and is not an expansion of the tort, to hold that an employer*

*is subject to liability for retaliating against a worker who has exercised his or her rights under another state's workers' compensation law.*

In summary, the appellate court stated:

*In view of the evidence before us, the trial court could have found that: plaintiff received above-average evaluations at all times except after filing compensation claims or taking leave after on-the-job injuries; a supervisor could provide no documentary evidence of disciplinary action against or counseling sessions with plaintiff even though that supervisor was a stickler for details; plaintiff returned to work for a time and retained her title of assistant manager, but she was not given any keys, the alarm code, the combination to the safe, or her hepatitis shots; and Taco Bell used plaintiff's absenteeism due to child care difficulties as a pretext for firing her in retaliation for filing a workers' compensation claim in Missouri or over concern that she might file a claim in Illinois.*

**EDITOR'S NOTE:** APPARENTLY, TACO BELL FELT THAT IT WOULD BE ADVANTAGEOUS TO WAIVE THE JURY AND LET THE ISSUES BE DECIDED BY A TRIAL JUDGE. THIS MAY NOT HAVE BEEN THE WISE DECISION, PARTICULARLY SINCE THE CASE WAS HEARD IN ST. CLAIR COUNTY.

## **RESPONDENT NOT ENTITLED TO COPY OF ARBITRATOR'S DECISION WHERE NO ATTORNEY'S APPEARANCE FILED**

Upon receipt of Industrial Commission applications and notices of hearing, respondents will frequently postpone retaining an attorney to file an appearance at the Industrial Commission. The reasons are many. The parties have no areas of conflict since the petitioner is receiving TTD benefits while under active medical treatment. Even after the petitioner has completed his treatment and has returned to work, the parties may be in the process of obtaining independent medical evaluations. Even when settlement discussions seem to be at impasse, respondents assume that they will receive notices of any requests for hearing before the arbitrator. In most cases, when serving a notice for hearing, petitioner's attorneys provide notification to the employer or the claims representative of the date and place of such request. At that time, an attorney will be assigned the

case for defense.

Occasionally, there is a downside to this procedure. In the absence of the respondent's attorney's appearance, no notice needs to be sent to the respondent or its claims representative. If the matter becomes subject to an ex-parte hearing, the respondent will not receive any notice of the arbitrator's award. After 30 days, that award will become final. The respondent will be faced with the fact that the arbitrator did not have the benefit of the respondent's participation and the Industrial Commission review is not available because the respondent did not receive a copy of the arbitrator's award within the 30-day time limit.

Such a situation existed in the recent case of Robert Preston v. Bell Trucking. The court stated:

*Section 19(i) of the Workers' Compensation Act provides that a party "upon taking any proceedings or steps whatsoever" before the Commission shall file his name and address, or the name and address of an agent upon whom all notices shall be served. (Emphasis added.) This section further provides that "[i]n the event such party has not filed his address, or the name and address of any agent as above provided, service of any notice may be had by filing such notice with the Commission."*

...

*In the case at bar, the defendant failed to file an appearance with the Commission in clear violation of Section 19(i) of the Act. By doing so, the defendant allowed the filing of documents with the Commission to serve as its notice of those documents. Such documents would include memorandums of arbitrators' decisions. Because the defendant did not provide the Commission with a name and address where notices could be sent, the filing of the arbitrator's decision with the Commission was sufficient to notify the defendant of the decision. Thus, the defendant is held to have received notice of the arbitrator's decision on (the date the arbitrator filed the decision with the Commission.)*

The respondent attempted to file a petition for review but this was found to be tardy. When the petitioner filed a complaint for enforcement for the arbitration award in the circuit court, the respondent filed a motion to dismiss. Eventually, the respondent

withdrew its motion to dismiss and was compelled to pay the award, plus penalties and attorney's fees. In denying all of the respondent's complaints of unfairness, the appellate court waxed philosophically, stating:

*In law, as in life, a few simple rules make everything run more smoothly. Two of these rules would have made a world of difference in the instant case: Read the instructions. Play by the rules. The defendant, Bell Trucking, failed to follow either of these rules. It failed to file an appearance with the Illinois Industrial Commission (Commission) before taking any action in a workers' compensation case. And it definitely did not follow the statute's mandate. As a result, we affirm the judgment of the circuit court in favor of the plaintiff, Robert Preston.*

## **NEW LEGISLATURE REVERSES VILLAGE OF WINNETKA CASE**

Article 22, Division 3 of the Pension Code authorized municipalities to enact ordinances which would provide the following:

- 1) Payment of a death benefit, not to exceed \$15,000, to the survivors of a police officer or firefighter where the death was duty related.
- 2) Payment for part or all of the medical or hospital expenses of police officers and firefighters payable for a duty-related injury.

That provision of the Pension Code also provided that when the municipality enacted the above described ordinance, the police officer or firefighter was prohibited from pursuing any "common law or statutory" right to recover damages against such municipality. Utilizing this provision, the Village of Winnetka contended that the Workers' Compensation Act should be construed as a "statutory right to recover damages" and that the police officer or firefighter would not be entitled to workers' compensation benefits. The appellate court agreed that the workers' compensation benefits could be construed as "damages" and held that the police officer or firefighter did not have a remedy under the

Workers' Compensation Act.

Subsequently, a number of municipalities enacted similar ordinances, particularly because the death benefits under workers' compensation were far greater and because the Compensation Act required that all medical benefits, not merely a portion thereof, be paid. The legislature has now amended the pertinent provision of the Pension Code by

## ADA Corner

### **WHAT CONSTITUTES A "REASONABLE ACCOMMODATION?" NORTHERN DISTRICT OF ILLINOIS FINDS THAT AN EMPLOYER DID ITS BEST TO REASONABLY ACCOMMODATE ITS DISABLED EMPLOYEE**

The recent case of Ceglarek v. John Crane, Inc., 1998 WL 164873 (N.D.Ill., April 3, 1998), is an excellent example of how an employer can prevail on a motion for summary judgment against the claims of a disabled employee by showing that the employer complied with the ADA's requirement to reasonably accommodate disabled employees. Plaintiff, Connie Ceglarek, was terminated in an across-the-board layoff. Starting in 1989, Ms. Ceglarek began having difficulty seeing, and she was eventually diagnosed by her ophthalmologist as having progressive bilateral optic atrophy.

Plaintiff held the position of dispatcher/scheduler, which required her to frequently move about the machine shop floor. In May 1992, the plaintiff planned to change the physical layout of the department, which prompted concerns for the safety of the plaintiff. The defendant's supervisors determined that they could minimize the risk of harm to the plaintiff by transferring her to its marketing department as a sales coordinator. Plaintiff's rate of pay remained the same.

Plaintiff requested that the defendant purchase a computer software package, "Zoomtext," to magnify the images on a computer so as to allow her to read the correspondence she would be sending to the sales personnel. Defendant complied with this request. As well, the plaintiff was able to enlarge incoming correspondence via a copy machine.

eliminating this defense when the employee exercises his "statutory right to recover damages" under the Workers' Compensation Act. The recent bill was initially vetoed by Governor Edgar but the legislature overruled the veto.

On plaintiff's first job evaluation in this new position, she received numerous criticisms for her poor writing skills. Plaintiff contended to her supervisors that these shortcomings were attributable to her visual impairment, and she requested a more sophisticated device, a "Visualtek," a desk-size device under which writing can be enlarged. Because of the \$3,000 cost of the machine, plaintiff's requests were denied. Plaintiff was eventually terminated in October 1993 as part of a layoff. Plaintiff then filed a Charge, and later a Complaint under the Americans with Disabilities Act, claiming a failure to accommodate her on the part of her employer.

The defendant moved for summary judgment, based upon the fact that they provided her a "reasonable accommodation" by providing her the "Zoomtext" package and the copier to magnify incoming correspondence. Plaintiff responded that these accommodations were not reasonable because she had to share her computer with the other employees. Plaintiff did not respond to defendant's claims about the copier.

Chief Judge Posner held that an employee claiming a failure to accommodate must show that the proposed accommodation is reasonable in both efficiency and proportionality of cost. As well, "reasonable accommodation does not require an employer to provide literally everything the employee requests, and an employee is not entitled to a particular reasonable accommodation." Therefore, as long as the employer offers an accommodation that is reasonable, the employer has satisfied its obligation under the ADA.

The plaintiff then complained that she was terminated as part of a "conspiracy" to remove her from her position based upon her disability. However, the court has historically looked upon such conspiracy theories with disfavor. The plaintiff could not claim that she was somehow singled out in the overall layoff, which resulted in layoffs across the

defendant's facilities in the United States and Canada, including 73 other employees at the particular facility in which plaintiff worked.

**MICHAEL S. SIMON**

### **SECTION 19(b-1) REQUIREMENT OF MEDICAL REPORT DESCRIBING DISABILITY**

A Section 19(b-1) petition is to be utilized by office employees who are not receiving temporary total disability benefits. Section 19(b-1)(x) requires that the petition be accompanied by a medical report "relating to the employee's current inability to return to work." The report must include "the physical activities which the employee cannot currently perform as a result of any impairment or disability due to such injury, and the prognosis for recovery."

In Sun Choi v. Industrial Commission, the medical report stated that the claimant "was capable only of sedentary clerical work." The respondent contended that the "inability to return to work" should be construed as meaning a total inability to perform all work and, therefore, that the report was inadequate. The appellate court agreed but the supreme court reversed:

*We must also presume that in enacting paragraph (x), the legislature did not intend to produce absurd, inconvenient or unjust results. In light of these principles, we believe that the phrase "inability to return to work," as used in paragraph (x), should be construed to equate to the term "temporarily totally disabled." This interpretation of the phrase "inability to return to work" avoids the inconsistencies and contradictions which are created by respondent's proposed construction of the phrase. In addition, equating the phrase "inability to return to work" with the term "temporarily totally disabled" insures that full effect is given to the underlying purpose of the statute.*

### **OUR LOSS IS COLORADO'S GAIN**

We regret to announce that John Sandberg, who has been with the firm for 14 years, has accepted

**EDITOR'S NOTE:** THIS ILLINOIS CASE IS EXCELLENT PRECEDENT FOR THE DEFENSE THAT THE STATUTE REQUIRES ONLY "REASONABLE" AND NOT "UNLIMITED" ACCOMMODATION.

employment with the law firm of White & Steele in Denver, Colorado, beginning September 1, 1998. John will be doing the same type of work there and for a number of the same clients. He expressed his leaving in his letter of resignation:

*Over the past several months, Laura and I have decided that we want to live and raise our family in Colorado. As you might imagine, this is a huge life change for Laura, me and the boys. It comes after much thought, reflection and prayer. From a professional standpoint, I readily accept the challenge that a new environment will bring. Personally, Laura and I are thrilled to have the opportunity to chase a dream, even at the age of 39. The possibilities of enrichment, new beginnings and growth are endless. We truly believe that there is a purpose in our "Colorado vision" and that our family unit will benefit the most out of all of this.*

We share John's feeling that they are not actually "leaving" their family and our firm and that they will always be a part of us. Our best wishes to a great family.

**FRANK J. WIEDNER**  
Editor