

August 20, 2009

RE: Recent Law Court Decision in *Lavoie v. RE-Harvest, Inc.*

The Maine Workers' Compensation Act ("Act") provides employees who are on medical leave as a result of a workplace injury with certain reinstatement rights. An injured employee retains a limited right to reinstatement for one year if the employer has 200 or fewer employees and for three years if the employer has over 200 employees. However, an employer need only return an employee to work during the applicable reinstatement period if 1) the employee's former position is available and suitable to the employee's physical condition or 2) any other position is both available and suitable if the employee's former position is no longer available or suitable. Although an employer is not obligated under the Workers Compensation Act to hold open an employee's job until the employee is able to return to work, employers must make sure generally that the employee's position is held open for any FMLA leave period available to the employee. Employers must also be mindful of obligations under the Americans With Disabilities Act and the Maine Human Rights Act.

An employer may, under certain circumstances, terminate the employment of an employee on workers compensation leave. However, even after such termination, the employee can still exercise his or her reinstatement rights if a suitable position subsequently becomes available.

In the recent Maine case of *Lavoie v. Re-Harvest, Inc.*, the employee slipped while on the job and aggravated two pre-existing conditions. The injury was substantial and the employee was unable to perform his ordinary job duties or light duty assignments designated for him. Less than four weeks after the injury, the employer terminated Lavoie's employment resulting in Lavoie's loss of employer-paid health insurance. However, the employer did continue to pay Lavoie total incapacity benefits voluntarily and without prejudice. Lavoie responded by filing with the Workers Compensation Board a Petition to Remedy Discrimination, claiming that he retained reinstatement rights and that his termination constituted workers' compensation discrimination.

Though a workers' compensation hearing officer found in favor of Lavoie and awarded Lavoie damages, Maine's Supreme Court reversed the decision and found in favor of the employer. The Court held that:

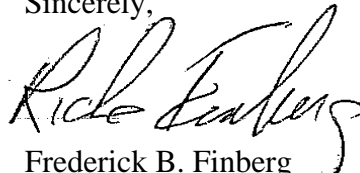
It simply cannot be the law that an employer necessarily commits discrimination whenever the employer terminates an employee whose injuries prevent him from working....Where the employer has complied with the Act and has paid benefits timely, we will not read into the Workers' Compensation Act an additional requirement that employers maintain people who are completely unable to work on their employment rolls or face claims for discrimination under the Act.

In *Lavoie*, the Court gave considerable weight to the fact that 1) Lavoie could not perform *any* work functions after the injury and 2) there was no evidence at the time of termination that Lavoie's health was likely to change in the near future. The employer's decision to terminate Lavoie was based on legitimate employment considerations directly bearing on Lavoie's inability to return to work in any capacity.

Though the Court found the Lavoie termination appropriate, the Court did indicate that hearing officers must approach discrimination claims on a case by case basis and that some employment terminations may still constitute discrimination under the Workers Compensation Act and/or discrimination under some other employment related law such as the FMLA, ADA or the Maine Human Rights Act.

In an effort to avoid discrimination claims, we recommend that our clients develop a return to work policy. We also encourage our clients to work closely with our office prior to making a decision to terminate an employee who is on a medical leave or who has recently taken a medical leave. We have almost fifty years of experience helping employers carefully navigate past a number of potential minefields when dealing with workplace injuries and medical leaves. If you have any questions regarding this issue, please give Peter Bennett or me a call.

Sincerely,



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