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Common pitfalls and landmines in mediating employment claims

COMPLICATIONS PRESENTED BY WORKERS' COMP CLAIMS, SSDI AND EDD CLAIMS, LABOR BOARD CLAIMS AND BANKRUPTCY

When I first started practicing 42 years ago, mediating cases was so simple. You were called down to a Mandatory Settlement Conference where a settlement judge talked to the attorneys and defense representatives while the plaintiff cooled his heels in the corridor. Plaintiff's counsel carried settlement offers and the case resolved in a few hours. Since then, the landscape has changed drastically. For the most part, employment cases these days are resolved in private mediation with a skilled mediator and substantial pre-mediation work-up. This article will address some of the potential pitfalls and landmines that can either derail a mediation or tank the process during the post-mediation settlement-agreement phase.

The first thing that should be done before you even show up at the employment-claim mediation is a final discussion with your client to make sure there are no other claims in existence that can be compromised during the mediation process, and confirm that your client has not filed for bankruptcy since their employment claims arose.

The effects of workers' comp claims on an employment case

Hopefully you are aware of any workers' compensation claims your client has or had with the defendant-employer, but it is not unheard of to have a client not confide in you about the claim. Generally, workers' compensation claims

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are not affected by settlement of employment claims, however, defense attorneys are getting more aggressive in trying to limit recoveries. For instance, if the settlement agreement in the employment case spells out payment for medical treatment, you may find that the workers' compensation defense attorney will try to claim that the medical expenses in a workers' compensation Compromise and Release Agreement ("C&R") will need to show a credit for those expenses to prevent a double recovery. Therefore, if there is a pending workers' compensation claim, make sure to add language in the settlement agreement in the employment case that states that no portion of the settlement of the employment claims can be used as a credit, set-off, or exclusion for any relief in the employee's workers' compensation case.

A workers' compensation claim can resolve by one of several ways: 1) trial; 2) settling by Stipulation and Request for Award (which leaves open the future medical care for the employee's injury); or 3) settling by C&R (which typically results in a lump sum payment to the injured employee and nearly always entails the employment relationship terminating as part of the settlement, if it has not already ended).

Settling the workers' compensation claim via C&R Agreement requires utilizing a preprinted form to detail the settlement terms, and which ultimately must be approved by the Workers' Compensation Appeals Board ("WCAB"). (Lab. Code, § 5001; *Stellar v. Sears, Roebuck & Co.* (2010) 189 Cal.App.4th 175, 180-181.) But, the WCAB's approval of the C&R as a "fair" and "adequate" settlement for your client does *not* mean your client's employment claims are safe. There may be significant, adverse implications on your client's employment claims based upon the language and terms of the C&R. For that reason, if your client already settled their workers' compensation claim by C&R, make sure you are aware of the terms contained within the C&R *and* all corresponding settlement documents.

While the C&R in a workers' compensation case normally does not resolve or foreclose claims outside of workers' compensation, there are two specific instances where that may not be true.

"Voluntary resignations"

We are increasingly seeing resignations included as part of the settlement of our clients' workers' compensation claims – either with a "letter of resignation" being attached as an addendum to the C&R, or unofficially by way of the workers' compensation defense attorney's refusal to settle the workers' compensation case in full unless the employee "voluntarily" resigns. Either way, when there is a purported "resignation," it could *seriously* affect the claims and damages in your client's employment case.

For one thing, defense counsel will argue that front pay damages are cut off as of the "resignation" date. And, where your client's claims are dependent on establishing that the employer fired your client for a discriminatory or retaliatory reason, defense counsel will argue that there was no unlawful termination because your client *voluntarily* resigned. Hopefully you have a good relationship with your client's workers' compensation attorney to ensure that language about your client "voluntarily resigning" is not included as part of the C&R.

If terminating the employment relationship is a requirement for the C&R or to settle the workers' compensation case in full, our firm aims for language that simply says our client *acknowledges* that he or she is no longer employed (as opposed to stating that he or she *voluntarily resigns*). If the workers' compensation defense counsel insists the issue is nonnegotiable and that your client must sign a "voluntary resignation" letter, then be prepared for opposing counsel in your client's civil case to argue that the wrongful termination claims are without merit due to the "voluntary resignation." In opposition, you may be able to argue that the "resignation" was really a constructive termination due to your client's disability and the employer's refusal to accommodate your client; however, there are several hurdles you may face in arguing a constructive discharge claim in connection with your client's "resignation."

First, if you have not pleaded constructive wrongful termination in your client's civil complaint, then you will need to seek leave to amend the pleading to include that legal theory; otherwise, you may be barred from arguing it in opposition to a motion for summary judgment or at trial. But, take solace in knowing that if your client's case does not settle that day, you'll likely be permitted to amend your client's complaint, and defense counsel may even stipulate to allow the amendment. (*Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746 ["Courts must apply a policy of great liberality in permitting amendments to the complaint at any stage of the proceedings, up to and including trial, when no prejudice is shown to the adverse party"].)

Second, if the resignation is officially a part of the C&R, then the court will likely find that your client negotiated the settlement and resignation, and cannot thereafter invalidate it because your client is disappointed with the amount of the settlement or has "buyer's remorse" about resigning in order to obtain an earlier settlement. This is especially true if your client was represented by an attorney during the workers' compensation settlement negotiations. Moreover, if your client tried to rescind the resignation in the workers' compensation case but the WCAB held that the resignation was valid and enforceable as part of the C&R, then your chances of successfully arguing a constructive termination in the employment lawsuit are even more dismal. (See, e.g., *De La Cruz v. El Pollo Loco* (2016) 2016 WL230572 (unpublished) [affirming award of attorney fees to defendant-employer, following summary judgment for employer, because plaintiff's employment claims lacked merit where she had voluntarily resigned as part of a negotiated workers' compensation settlement while represented by counsel].) Therefore, if your client was represented by counsel during the workers' compensation settlement negotiations and the resignation was an express and material term of the settlement, then it is unlikely that the validity of the "resignation" can be negated.

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Third, if the employer refused to return your client to work even though your client could perform the essential functions of the job with reasonable accommodation, and your client's written "voluntary resignation" was *not officially* part of or incorporated into the C&R, then you *may* be able to argue that the resignation was effectively a discriminatory constructive discharge. (*Velente-Hook v. Eastern Plumas Health Care* (E.D.Cal. 2005) 368 F.Supp.2d 1084, 1102 [district court found triable issue of fact precluding summary judgment on whether plaintiff was forced to resign due to the employer's continual refusal to explore reasonable accommodations and participate in the interactive process, which caused plaintiff to conclude that her employer would not accommodate her to allow her to return to work, and that she therefore had no choice but to resign]; *Perez v. Proctor & Gamble Mfg.* (E.D.Cal. 2001) 161 F.Supp.2d 1110, 1124 [employer's MSJ denied on plaintiff's constructive termination claim because a reasonable juror could conclude that plaintiff was reasonable in believing he was forced to resign due to the employer's failure to engage in the interactive process with him for over a year; "plaintiff concluded that P&G was never going to allow him to return to work, and that he had no choice but to resign, as his disability payments were about to cease."].)

"[C]onstructive discharge occurs when, looking at the totality of the circumstances, a reasonable person in [the employee's] position would have felt that he was forced to quit because of intolerable and discriminatory working conditions." (*Thomas v. Douglas* (9th Cir. 1989) 877 F.2d 1428, 1434.) That being said, "an employee cannot simply 'quit and sue,' claiming he or she was constructively discharged." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1246.) Rather, the employee must show "that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Id.*, at 1251.)

Therefore, if you learn your client signed a resignation letter, be prepared to argue that the resignation was not voluntary, but rather, was coerced by the aggravated workplace conditions or by the employer's continuous pattern of intolerable conduct, such as repeated refusals to provide reasonable accommodations to allow your client to return to work.

Fourth, if your client "voluntarily resigned" concurrently with settling his or her workers' compensation case, then your client likely waived his or her right to unemployment insurance benefits from the EDD. To avoid such a waiver, the settlement agreement should provide that the employer will not dispute or contest your client's application for unemployment insurance benefits.

Claxton *releases*

More rare, though more problematic, is the situation where your client signs what is known as a "*Claxton* release." As mentioned above, when workers' compensation claims are settled for a lump sum, the parties execute a C&R, which is a preprinted form that releases only those claims that are within the scope of the workers' compensation system, and does not apply to claims asserted in separate civil actions. (8 C.C.R. § 10874; *Claxton v. Waters* (2004) 34 Cal.4th 367, 376.) Because use of the preprinted C&R form is intended to "safeguard the injured worker from entering into unfortunate or improvident releases as a result of, for instance, economic pressure or bad advice, the worker's knowledge of and intent to release particular benefits must be established separately from the standard release language of the form." (*Id.* at 373.) As such, a "*Claxton* release" is a separate document (i.e., an addendum to the C&R) whereby the employee gives a general release of claims that fall *outside* of workers' compensation jurisdiction. (*Id.* at 378.) In holding that a document separate from the standard C&R form is required to release civil claims, the California Supreme Court explained that "the separate document need not identify precise claims; it would be sufficient to refer generally to causes of action outside the workers' compensation law *'in clear and non-technical language.'*" (*Ibid.* (emphasis added).)

The Court of Appeal recently analyzed the language of one such C&R addendum to determine whether the separate document released the plaintiff's civil claims when the workers' compensation case settled. (*Camacho v. Target Corp.* (2018) 24 Cal.App.5th 291, 302-312.) The *Camacho* court held that the settlement documents signed by the parties to the workers' compensation case did *not* release the employee's civil claims because there was "*no reference* in either the C&R or Addendum A to any causes of action *outside* the workers' compensation system, much less to a release of such claims in 'clear and nontechnical language,' as is required under *Claxton*." (*Id.*, at 306.)

Carefully read *Claxton* and *Camacho* to determine whether the release your client signed passes muster. If a valid *Claxton* release presents itself, it will be a death knell for your client's employment case. As such, if you believe your client signed a *Claxton* release which released your client's other claims, it would be incumbent to advise your client that his or her workers' compensation attorney may have committed malpractice if the attorney failed to inquire whether the applicant (your client) had other potential claims.

At the outset of our representation, our firm sends correspondence to our new client's workers' compensation attorney, notifying them that we are handling a civil claim for the client and that no workers' compensation settlement should be negotiated without our knowledge and approval. To protect your client's interests, it is imperative that you do the same as early as possible.

Effect of a Social Security Disability Insurance ("SSDI") claim

Suppose you have a client with a strong claim for wrongful termination and good front pay damages. Your client was a substantial wage earner and you show up to mediation with a big demand.

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Then, the mediator walks into the room and presents you with an SSDI application showing that your client stated, under oath, that he or she is totally disabled and will never work again. The value of your case suddenly begins collapsing all around you. Again, you really should have learned about this before the mediation, but clients are not always honest or completely forthcoming.

The defense will typically argue "judicial estoppel" anytime your client has provided a sworn statement or testimony in one proceeding stating that he or she is totally unable to work (e.g., in an application for disability benefits, or in a workers' compensation deposition), but then takes the opposite position or testifies contrary to that in the civil case in which you represent your client. In arguing against the "judicial estoppel" defense, the key is determining whether the position of your client in the employment case is "clearly inconsistent" with the earlier statement or declaration by your client (or by your client's health care provider). (*Prilliman v. United Air Lines* (1997) 53 Cal.App.4th 935, 960 (judicial estoppel applies only against a party who has taken positions or made statements that are totally inconsistent; in other words, the party must have taken positions that are so irreconcilable that "one necessarily excludes the other."); *Bell v. Wells Fargo Bank* (1998) 62 Cal.App.4th 1382, 1387-1389 [summary judgment was inappropriate where the parties produced conflicting evidence showing that various statements made by plaintiff were "not utterly irreconcilable" and that the issue of judicial estoppel therefore could not be decided as a matter of law].)

Often, the declaration made by your client (or their doctor) in an application for state or federal disability benefits did not take into consideration whether your client could perform the *essential* functions of the job *with reasonable accommodation.* Government disability benefit determinations, workers' compensation claims, and disability insurance policies typically only take into account whether the employee can perform his or her existing job, and *not* whether the employee can perform the job with reasonable accommodation. Accordingly, when facing a judicial estoppel challenge, focus on how reasonable accommodations would have allowed your client to return to work.

In *Cleveland v. Policy Management Systems Corporation* (1999) 526 U.S. 795, the ADA plaintiff applied for and received SSDI benefits. (*Id*. at 802.) The court explained that the ADA defines a "qualified individual" as a disabled person "who … can perform the essential functions" of her job "*with reasonable accommodation*." (*Id.* at 803.) "By way of contrast, when the SSA determines whether an individual is disabled for SSDI purposes, it does *not* take the possibility of 'reasonable accommodation' into account, nor need an applicant refer to the possibility of reasonable accommodation when she applies for SSDI." (*Ibid.*) The Supreme Court noted the reality that "the nature of an individual's disability may change over time, so that a statement about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision." (*Id.* at 805.) Therefore, an SSDI claim and an ADA claim do not inherently conflict, as there are "many situations in which an SSDI claim and an ADA claim can comfortably exist side by side." (*Id.* at 802-803; see also, e.g., *Bell*, 62 Cal.App.4th at 1387-1388; *Saffle v. Sierra Pacific Power Co.* (9th Cir. 1996) 85 F.3d 455, 459-460.) However, an SSDI claim *can* negate an essential element of an ADA claim, so where it appears that a genuine conflict exists between the two claims, the plaintiff must explain how the SSDI contention of inability to work is *consistent* with the ADA claim of ability to perform the essential functions of the job. (*Cleveland,* 526 U.S. at 805-806.)

Getting ahead of these SSDI applications is important to try to shield your client's claims from a judicial estoppel defense. If you have the opportunity to provide input before your client files the SSDI application, you can draft language that should hopefully get around the employer's anticipated judicial estoppel defense. In drafting such language, emphasize that your client is only disabled under SSDI because the employer refused to accommodate your client or has stopped providing the necessary accommodations. It is important to be familiar with your client's medical records to ensure that your client's doctor has not made express statements contrary to the language you propose for the SSDI application. (See, e.g., *Drain v. Betz Laboratories* (1999) 69 Cal.App.4th 950, 960 [affirming judgment against employee who obtained monetary settlement through workers' compensation based on his claim, certified by his doctor, of his "total inability to perform *any* of his job functions or *any other occupation,*" which was completely inconsistent with the position he took in his lawsuit].)

Case law has also developed another argument that you may be able to assert to try to avoid any adverse rulings based on a judicial estoppel defense. Courts have now repeatedly held that it is a question of fact whether the employee's decision to file for SSDI was brought about because the employer put the employee in a position where that was the only way the employee could financially survive. For instance, in a failure to accommodate case, you may need to argue that your client could have worked with an accommodation, but that after being fired, it was realistic to assume that your seriously disabled client would not get hired anywhere else or would remain unemployed for a substantial length of time. It is therefore incumbent on you to have the case law available to combat the judicial estoppel defense from this angle as well.

In *Fredenburg v. Contra Costa County Department of Health Services* (9th Cir. 1999) 172 F.3d 1176, 1180, the court refused to apply judicial estoppel to the plaintiff's claims where it found no evidence of plaintiff playing "fast and loose" with the court or trying to commit fraud upon the court, but rather, found an employee who was in a financial predicament:

> Her case illustrates the problems faced by a worker in her position. Her employer concluded that she could not perform her job, and placed her on unpaid leave. She disagreed

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with her employer's determination and unsuccessfully challenged it. Then, without pay because of her asserted disability, she applied for temporary disability benefits and received them. What else was she to do? When those benefits were terminated because the state decided she was no longer disabled, she disagreed but was unsuccessful in challenging that determination. She then asked her employer to take her back, and the employer refused. So she brought suit under the ADA, claiming that she was able to perform her job. It is true that Fredenburg took inconsistent positions during this saga, but her employer and the state, considered together, were not treating her consistently either. She has not denied any of the representations she made; the court has not been misled.

Similarly, the district court in *Norris v. Allied-Sysco Food Services* (N.D.Cal. 1996) 948 F.Supp. 1418, 1448, expressed concern that "given the serious financial constraints that an ill or injured employee often may face," it may not be equitable to force plaintiffs to choose "between applying for disability benefits or filing an ADA lawsuit that may not be resolved for years." Other jurisdictions have likewise recognized the Catch 22 that employees may face when their employer refuses to accommodate them and thereby leaves them without the ability to earn a paycheck. (See, e.g., *Smith v. Dovenmuehle Mortgage* (N.D.Ill. 1994) 859 F.Supp. 1138, 1142 [forcing plaintiffs to choose between benefits and disability claims would place them in an "untenable position" and require them to choose between what should be independent rights].)

Effect of a bankruptcy claim

Picture the following: you are in the middle of a mediation and your client is telling you how damaging his termination has been on his life. Then, suddenly, he proclaims that his life was turned upside-down and that as evidence of it, he filed for bankruptcy.

In our office, we tell clients not to file for bankruptcy without our knowledge. But, of course, not every client listens. If you are faced with the above scenario and find out during the mediation that your client already filed for bankruptcy, then you do not have much in the way of options. Your client's claim is probably barred if his bankruptcy petition failed to list the employment claims/lawsuit as an asset. Your options then will be to have your client (or his bankruptcy attorney) amend the bankruptcy petition to include the employment claims as an asset, or, if it is too late to do that, then to have your client (or his attorney) try to reopen the claim and notify the bankruptcy trustee that a claim exists.

In the latter instance, the bankruptcy trustee should be more than happy to work with you because the trustee knows that will probably mean he or she can get some of the creditors paid and earn his or her own fees for doing so. The problem may be that your client will get nothing out of the settlement. More problematic is when the defense attorney in your client's employment case gets wind of the bankruptcy and tries to settle the claim directly with the trustee. You really should not find yourself in this predicament, however, if you do your homework. There are plenty of search engines that allow you to investigate your own client to locate such a claim, and you can also conduct searches through PACER or using WestlawEdge's docket search feature.

Effect of settlement on a pending Labor Board claim

Many employment lawsuits have wage claims as part of the case. Or, you may have a case where you are not bringing a wage claim, but your client has one pending with the Labor Commissioner. Sometimes, the client may not tell you of a pending wage claim out of fear that you will make a claim for fees on that wage claim, but if you are unaware of the wage claim and settle the employment case while the wage claim is pending, then you may effectively dismiss your client's wage claim. For that reason, it is imperative that you are aware of any other claims your client has against the employer, such as a Labor Board claim (or a judgment against the employer resulting from the Labor Board claim), and that you explain the potential impact of a settlement in the employment case on any other claims your client has against the employer.

If your client has other claims, it is also important for you to be aware so that you can propose language for the settlement agreement to carve out that claim from the release of all known claims, or so you can negotiate for an increased settlement amount to compensate your client for that claim. Alternatively, if you are not able to extricate your client's other claims from the general release, then you must carefully go over the general release language to make sure your client understands that all of his or her potential other claims against the employer will be dismissed.

Effect of settlement if your client is on some form of government relief

Not only can a client's receipt of government disability benefits negatively affect his claims (e.g., the judicial estoppel defense discussed above), but the reverse is also true. A settlement can seriously and detrimentally affect your client's government benefits (e.g., food stamps, Medicare under SSDI, welfare assistance) because a settlement for your client can act to end such relief. For example, a settlement which apportions part of the settlement funds as wages reported on a W-2 will result in the EDD seeking reimbursement from your client for unemployment benefits it paid to your client.

For that reason, you need to investigate this with your client *before* the mediation, as you may need to include language in the settlement agreement to avoid this, such as stating that the settlement amount was contemplated to be in excess of the amount EDD paid, i.e., the wages were calculated to give the employer a set-off for the EDD.

Conclusion

Before mediation, confer with your clients about any other potential or pending claims they have, and warn

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them that settlement of their employment case will likely have some adverse consequences on their other pending claims and/or on their receipt of government relief.

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