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Employment releases and disability

Employees who are unable to continue working due to medical issues often accept severance payments in exchange for releasing their employers from liability. However, by doing so, acceptance of a severance payment in exchange for a release may preclude a subsequent claim seeking disability benefits.

In *McGhee v. Aetna Life Insurance Co.*, 2014 WL 5475042 (W.D. N.C., Oct. 29), the court addressed the issue of the effect of a general release on a claim for disability benefits. While the court concluded that the release did not bar the claim, the plaintiff nonetheless lost on the merits.

Plaintiff Martin McGhee was an employee of Bank of America who had worked for BOA from 2004 until October 2011 in a variety of high-level positions. On Oct. 18, 2011, McGhee requested short-term disability benefits retroactive to Oct. 4, asserting disability on account of depression, anxiety and post-traumatic stress disorder. Because the attending physician noted that the plaintiff was “normal but stressed,” the claim was denied.

McGhee appealed and submitted additional information from his personal physician, a psychiatrist and a psychotherapist. However, Aetna upheld its decision based on a report obtained from a consulting psychologist. McGhee filed suit one year later.

Two weeks prior to filing his lawsuit, McGhee signed a general release and program agreement with BOA in exchange for a severance package, which included a general release waiving and releasing all claims relating to his employment. The agreement also recited that McGhee had not brought — and would not bring — any claims against BOA.

Nonetheless, the court found the release did not bar McGhee's claim because the agreement

contained a provision excluding claims subject to ERISA. Although BOA argued that the exclusion was limited to pension benefits because they fall within ERISA's anti-alienation protections, and that the disability claim was not encompassed within that provision, the court pointed out that no such limitation was written into the plan. Hence, the court found that the plaintiff could proceed with his claim.

However, that finding did not win the day for McGhee. The court determined that Aetna did not abuse its discretion in denying benefits because McGhee failed to provide “sufficient objective medical evidence of disability” showing that he was unable to perform the functions of his occupation. Although McGhee provided substantiation for his diagnoses, the records did not contain any documentation that evaluated whether he suffered from functional limitations relating to such diagnoses. Thus, the court determined that Aetna had properly denied the claim.

It is often the case that signing a release in exchange for a severance payment will bar claims for disability benefits according to cases such as *Bordonaro v. Union Carbide Corp.*, 2002 WL 32824, 27 EBC 1584 (E.D. La. 2002), where the court ruled that a release signed as part of a settlement of employment discrimination claims barred a subsequent disability benefit claim. Likewise, *Mastrianni v. Bayer Corp.*, 2006 U.S. Dist. LEXIS 11943 (D. Conn., March 21, 2006), dismissed a claim for disability benefits based on a release.

In that case, though, the employee had requested an exclusion of disability benefits from the release, the employer refused, and the employee signed the release anyway. However, questions raised about the employee's mental capacity have permitted disability benefit

WORKPLACE ISSUES

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claims to go forward despite the employee's release of all claims.

For example, in *Masonheimer v. Colonial Penn Group Inc.*, 2002 U.S. Dist. LEXIS 18106 (E.D. Pa. Sept. 25, 2002), because the plaintiff suffered from a brain tumor when she released her claims, the court permitted the disability benefit claim to proceed. Likewise, in *Goepfert v. Trustmark Insurance Co.*, 2008 U.S. Dist. LEXIS 26895 (E.D. Wis. March 21, 2008), the court pointed to evidence of an early onset of Alzheimer's disease as a basis for questioning the release.

Although the court concluded that the release was invalid as to claims subject to ERISA, it appears that no one raised any question as to whether McGhee's claim even fell within ERISA's scope. According to *Bassiri v. Xerox Corp.*, 463 F.3d 927 (9th Cir. 2006), short-term disability payments constitute a payroll practice exempt from ERISA pursuant to a Labor Department regulation.

Short-term disability is considered a payroll practice, rather than a benefit, because it constitutes “payment of an employee's normal compensation, out of the employer's general assets, on account of period of time during which the employee is physically or

mentally unable to perform his or her duties, or is otherwise absent for medical reasons.” 29 C.F.R. Section 2510.3-1(b)(2).

In addition to *Bassiri*, the same conclusion was reached in *Marshall v. Whirlpool Corp.*, 2009 U.S. Dist. LEXIS 57206 (N.D. Okla., July 6, 2009), where the court found that short-term disability payments constituted a payroll practice and was not subject to ERISA. *Garner v. Sedgwick Claims Management Services Inc.*, 2012 U.S. Dist. LEXIS 129231 (D. Utah, Sept. 10, 2012), also made the same finding.

As to the merits, this ruling highlights a growing trend in which psychological testing is becoming almost mandatory in disability claims involving mental health issues to meet “objective proof” requirements. However, such testing is open to more interpretation than X-rays and blood tests and tests that ostensibly detect invalid claims are not necessarily objective in that regard.

An example is the accuracy of the so-called fake bad scale on the Minnesota Multiphasic Personality Inventory, or MMPI, the most widely administered psychological test. While that subtlet has been used to undermine the credibility of personal injury and disability claimants, noted experts have questioned its validity. See, Friedman, et al., “Psychological Assessment with the MMPI-2/MMPI-2-RF” (3d ed. 2014). The fake bad scale has also failed to survive evidentiary challenges in rulings such as *Davis v. Bellsouth Short Term Disability Plan for Non-Salaried Employees*, 2012 U.S. Dist. LEXIS 33395 (M.D. N.C., March 12, 2012).

However, psychological testing may be the only means of objectively establishing functional impairment due to behavioral health conditions, particularly within the realm of cognitive impairment, which is capable of objective assessment through neuropsychological testing.