How Can Unions Protect Injured Workers?

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Workers injured on the job are vulnerable to several forms of reprisal from their employers. While safety standards under the Occupational Safety and Health Act ("OSHA") help prevent workplace injuries in the first place, workers who are injured may need to utilize an array of remedies provided by federal statutes, state law, and a collective bargaining agreement ("CBA"). This paper discusses some common problems faced by injured workers and the remedies available to them. First, workers are often blamed for their own injuries, and then disciplined or discharged for violating safety rules. Those covered by a CBA can contest those sanctions through arbitration. Second, workers who have recovered from their accident may be denied from returning to their jobs on account of their injury. In some cases, such a denial is unlawful under the Americans with Disabilities Act ("ADA"). Third, workers injured by unsafe workplaces may be retaliated against if they report the safety hazard to their employer. Retaliation can be challenged under OSHA § 11(c), and often also under state law. Finally, those assisting injured workers should always bear in mind the benefits available under workers' compensation law and the Family and Medical Leave Act ("FMLA").

I. Contesting Discipline or Discharge through Arbitration

A. General Principles

Management has the right to issue and enforce reasonable safety rules, subject to several important limitations. See Elkouri and Elkouri, How Arbitration Works, Fifth

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Ed., BNA 1997, pp. 975-77. Safety rules must be substantively reasonable, i.e. they must be reasonably related to safety and health considerations. As with other management rules, safety rules must be adequately communicated to the employees. Safety rules also must be consistently enforced and cannot be grounds for sanctions if they are applied in a discriminatory fashion.

Involvement in an accident may, in some circumstances, be cause for employee discipline. Brand, Discipline and Discharge in Arbitration, BNA 1998, p. 259. Arbitrators may require a thorough investigation of the accident and the employee's role in it. To discipline an employee for an accident, the employer has the burden of demonstrating that the employee was culpable. Generally, unless the accident is extremely serious, progressive discipline is appropriate. If an employee engages in unsafe conduct on multiple occasions, however, termination may be upheld by the arbitrator.

B. A Case Study

An arbitration between Noveon, Inc. and the International Union of Operating Engineers, Local No. 465 (Arbitrator Byars, Nov. 29, 2003), provides an example of these principles in practice. (The arbitrator's opinion is attached as Appendix A.) In this case, the grievant had worked for the company for eight years and was working in a resins production job at the time of his workplace accident. The grievant's job involved loading chemicals in drums, which travelled down a conveyer belt to a loading station. When the drums got stuck on the belt, it was the grievant's job to dislodge them.

On January 13, 2003, the grievant had to dislodge a drum on the belt. Wearing gloves, he leaned over the belt, grabbed the drum from the bottom, and pulled it forward.

In doing so, one of his gloves got caught in the rollers, and his hand was pinned between rollers. The grievant was able to pull the safety switch to shut down the belt, and his coworkers then freed him. The grievant was treated for a bruised hand and was out of work for three days.[2]

Following the accident, on the same day, the company convened a Board of Review where the grievant met with five management employees. On January 21, 2003, the company changed him with "willful violation of company safety policies and procedures," and terminated his employment. The union filed a grievance, challenging whether the discharge was for just cause.

The arbitrator ultimately concluded that the discharge was not for just cause. The arbitrator found that the company had discharged first-time violators of cardinal safety rules, and that employees were advised of this policy. He also found the grievant was trained on a safer "lockout/tagout" procedure for dislodging drums. More importantly, however, he found that prior to the accident, the lockout procedure had not been prescribed by management or ever used by resin operators.

Prior to the accident, resin operators had devised on their own several methods for dislodging drums. Only after the accident did the company perform a job safety analysis for the grievant's position, which established safe and unsafe methods for dislodging drums. The arbitrator found that prior to the accident, neither management nor operators knew the safe methods for dislodging drums, and further, that management knew or should have known that operators were performing the task in a manner that was later determined to be unsafe.

[2] The grievant filed a workers' compensation claim, which was resolved in a settlement for $10,000.

While the grievant's decision to place his hand near the rotating equipment contributed to his injury, the company's failure to have a documented procedure for dislodging drums also contributed to the injury. Moreover, the lack of formal training on the task resulted in operators devising their own methods. While the company contended that it could train employees on the safe way to perform every task, its own actions after the accident demonstrated that safe procedures could be devised, and that employees could be trained and expected to follow them. Thus, the company could not discharge the grievant because it had not established clear safety procedures beforehand, though it had the opportunity to do so.

Finally, the arbitrator noted that the grievant had over eight years of service with the company, and had never been disciplined. Therefore, progressive discipline would have been far more appropriate than discharge for the grievant's actions. In cases where employees with long tenures and clean records had been justifiably discharged for a safety violation, they had intentionally violated known safety rules. This was not the case here, and the grievant was reinstated with full backpay and benefits.

II. Using the ADA to Return to Work

The ADA has not provided the protection for injured workers that advocates hoped for when it was enacted. Nonetheless, one circumstance where the ADA may be of help is when an injured worker seeks to return to work, but is rejected on account of an employer's "100% healed" policy, i.e. a requirement that a worker be totally recovered before she can return to work. In this section, we discuss basic ADA principles and how they apply to "100% healed" policies.

Generally, to be covered by the ADA, a worker must be a "qualified person with a disability." 42 U.S.C. § 12112(a); Sutton v. United Air Lines, 527 U.S. 471, 477 (1998). A disability is a long-term physical or mental impairment that "substantially limits" a major life activity. 42 U.S.C. § 12102(2)(A). Workers are also covered if they are "regarded as" disabled by their employer, even if they are not actually disabled. Id. § 12102(2)(C). "There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." Sutton, 527 U.S. at 489.

The most relevant limited life activity for an injured worker is their ability to work. "Working" is a major life activity under the statute, see 29 C.F.R. § 1630.2(i), but courts have narrowly interpreted the concept of being substantially limited in the ability to work. Specifically, an injured worker seeking to prove that she is disabled based on her inability to work must show that she cannot perform a "broad range" of jobs. See, e.g., Dovenmuehler v. St. Cloud Hosp., 509 F.3d 435, 440 (8th Cir. 2007) ("An individual is substantially limited in the major life activity of working if she is 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.'"); Sullivan v. Neiman Marcus Group, Inc., 358 F.3d 110, 116 (1st. Cir. 2004) (using the same standard, which is adopted from 29 C.F.R. § 1630.2(j)(3)(i)).

In order to determine whether a worker is barred from a "broad range" of jobs, courts consider the worker's "accessible geographic area, the numbers and types of jobs

in the area foreclosed due to the impairment, and the types of training, skills, and abilities required by the jobs." See Sullivan, 358 F.3d at 116 (utilizing factors set out in 29 C.F.R. § 1630.2(j)(3)(ii)(A)-(C)). Workers can present sufficient expert or medical evidence to meet this standard. See Webner v. Titan Distrib., 267 F.3d 828, 834-35 (8th Cir. 2001) (upholding jury finding of disability where vocational expert testified that plaintiff lifting restriction precluded him from performing work that fell in the heavy and very heavy industrial classifications); Cochrum v. Old Ben Coal Co., 102 F.3d 908, 911 (7th Cir. 1996) (finding disabled a worker who was restricted from performing overhead work, heavy lifting, pulling, and pushing). If this standard is met, an employer cannot discharge the worker based on her injury if she is "qualified" for the position, i.e. she can perform the "essential functions" of the job "with or without reasonable accommodation." 42 U.S.C. § 12111(8); Sutton, 527 U.S. at 478.

More often, however, courts have found that injured workers are only precluded from a narrow range of jobs, and thus are not disabled under the ADA. See, e.g., Bristol v. Bd. of County Comm'rs of Clear Creek, 281 F.3d 1148, 1163 (10th Cir. 2002) (finding plaintiff not disabled where he had a heart condition that prevented him from working in high-stress situations or doing physically strenuous work); Brunko v. Mercy Hosp., 260 F.3d 939, 942 (8th Cir. 2001) (stating that a nurse with a 40 pound lifting restriction "was only precluded from performing a narrow range" of jobs by her limitations); Gelabert-Ladenheim v. Am. Airlines, Inc., 252 F.3d 54, 61 (1st Cir. 2001) (finding plaintiff with carpel tunnel not disabled where she could not lift more than thirty pounds, push or pull more than twenty pounds, sit or stand longer than eight hours, or type more than one to two hours without a break, but had a college education); Williams v. Channel Master

Satellite Sys., 101 F.3d 346, 349 (4th Cir. 1996) (holding that an individual with a twenty-five pound lifting restriction is not substantially limited in their ability to work).

A worker who does not meet the disability standard may still have a claim under the ADA if her employer is discharging her on the basis that she is not "100% healed." Many employers have such policies, which impose harsh results on injured workers who are ready, willing, and able to work. Several courts have held that 100% healed policies violate the ADA. McGregor v. AMTRAK, 187 F.3d 1113, 1116 (9th Cir. 1999) (holding that a "100% healed" policy is a *per se* violation of the ADA); Warmsley v. MTA N.Y. City Transit Auth., 308 F. Supp. 2d 114, 122 (S.D.N.Y. 2003) ("Courts have consistently found that such '100% healed' or 'fully healed' policies violate the ADA.").

Two principles underlie these decisions. First, courts find that the ADA requires an individualized determination whether a worker is qualified and/or disabled, and that 100% healed policies preclude individualized review. See Sutton, 527 U.S. at 483 ("whether a person has a disability under the ADA is an individualized inquiry"); McGregor, 187 F.3d at 1116 ("A '100% healed' or 'fully healed' policy discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified individual is '100% healed' from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without reasonable accommodation."); Heise v. Genuine Parts Co., 900 F. Supp. 1137, 1154 & n.10 (D. Minn. 1995) (holding that a "must be cured" or "100% healed" policy is a *per se* violation of the ADA for the same reasons). Second, use of the 100% healed standard may be evidence that the employer regards the worker as disabled, even if she is not.

Henderson v. Ardco, Inc., 247 F.3d 645, 653 (6th Cir. 2001) ("Where the 100% rule is applied to mildly impaired persons to exclude them from a broad class of jobs, it may be treating them as disabled even if they are not, thereby qualifying them for protection under the ADA."); Sarsycki v. United Parcel Service, 862 F. Supp. 336, 341 (W.D. Okla. 1994) (holding that under the ADA, "individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices").

While these cases have consistently rejected 100% healed policies to date, they are somewhat in tension with general ADA law. In particular, unless workers are precluded or regarded as precluded from working in a broad range of jobs, they are not covered by the ADA. See A Helping Hand, LLC v. Baltimore County, 515 F.3d 356, 359 (4th Cir. 2008) ("To be eligible for any protection under the ADA, an individual must be disabled within the meaning of the Act."). Thus, an employer with a 100% healed policy may be able to argue that while it considers the employee unfit for her particular position, they still regard her as able to perform a broad range of jobs. See Chalfant v. Titan Distrib., 475 F.3d 982, 989 (8th Cir. 2007) ("If an employer believes that an employee is unable to perform 'one specific job,' then the employee is not regarded as disabled."). If the employee can, in fact, do so, they are not disabled, and no individualized assessment may be necessary. See Henderson, 247 F.3d at 653 ("a 100% rule is impermissible as to a disabled person – but one must first be disabled"). Nevertheless, 100% healed policies are at least highly suspect under the ADA, and should be challenged if they bar an injured worker from returning to work.

III. OSHA § 11(c) and Other Remedies for Retaliation

Injured workers are often pressured into not reporting their workplace injuries. As a result, they may fail to receive treatment and benefits that they need, and workplace hazards may remain dangerous for others. In this section, we will discuss a recent California State Auditor report to illustrate the for need anti-retaliation protection, and the possible remedies provided by OSHA and state law.

A. Safety on the Bay Bridge

To ensure the seismic safety of the San Francisco-Oakland Bay Bridge, the California Department of Transportation contracted with Kiewit/FCI/Manson, a joint venture (KFM), to build a large section of replacement for the East Span of the Bay Bridge. Since construction began in February 2002, several issues relating to bridge worker safety and health have been alleged through the media and employee complaints. These allegations include questionably low injury rate statistics reported by KFM, pressure and incentives for workers not to report injuries, worker exposure to hazardous welding fumes and heat while working within confined spaces, and a lack of oversight by the public agency responsible for monitoring worker safety. As requested by a legislative committee, the California Bureau of State Audits issued an audit report concerning the need for better state oversight for the safety of workers on the new Bay Bridge project. (A copy of the report is attached as Appendix B)

Suspiciously, KFM's reported injury rate was approximately one-fourth the average injury rate of other prime contractors on other large Bay Area bridge projects and was approximately one-fourth to slightly more than one-third of state and national rates for highway, street, and bridge construction work. The audit found that the state's

Division of Occupational Safety and Health ("OSH") did not exercise sufficient control over the injury reporting process to ensure that KSM properly reported injuries, even after being alerted to potential under-reporting by several newspaper articles. The audit also found evidence of fifteen injuries that likely should have been reported by KFM, but were not.

The audit reviewed KSM's safety practices and found that it includes many elements identified by safety experts as necessary to promote a safe work site. "However, safety experts also indicate that incentives, which KFM uses and which have been shown to reduce injury rates in some studies, also could contribute to some managers and employees not properly reporting injuries." Specifically, KFM provides safety incentives for employees who do not experience a recordable injury or policy infraction and for supervisors whose crews do not experience a recordable injury, among other things. The acting chief of OSH indicated in a letter that if workers were disciplined for safety lapses when they were hurt and rewarded financially for not reporting injuries, these practices would be against state law.

Despite the position of OSH, the use of financial incentives, as well as the general threat of retaliation, had a significant impact on injured workers. Of the 139 current and former KFM employees who responded to the auditor's survey, 52 indicated they had been injured while working on the Skyway project, and 24 of these injured employees indicated they felt pressure to not report their injury. Although the auditor did not specifically ask about safety incentives in our survey, five workers mentioned them as a reason why injuries were not reported. However, a more frequent concern, expressed by

14 of the workers, was that they believed they would lose their jobs or face lesser forms of retaliation if they reported an injury.

B. OSHA's Anti-Retaliation Provision

Section 11(c) of OSHA protects employees from retaliation: "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." 29 U.S.C. § 660(c)(1). Its primary purpose is to ensure that violations of OSHA are reported. Marshall v. Intermountain Electric Co., Inc., 614 F.2d 260, 262 (10th Cir. 1980). The provision broadly protects individuals from discrimination, including applicants and employees of other employers. 29 C.F.R. § 1977.5.

OSHA regulations also broadly construe the types of activity that are protected by section 11(c). Filing a complaint with OSHA is expressly protected. In addition, an employee request for an OSHA inspection is protected. § 1977.9(a). Significantly, complaints made to other federal agencies, state agencies, and local agencies that regulate occupational health and safety are also protected. § 1977.9(b). Further, good faith complaints made internally to the employer are covered. § 1977.9(c); see also Lambert v. Ackerley, 180 F.3d 997, 1004-07 (9th Cir. 1998) (reaching same conclusion for similarly-worded anti-retaliation provision of the Fair Labor Standards Act ("FLSA"), and discussing other similar statutes).

In addition to testifying at OSHA proceedings, participation in and providing information for OSHA inspections and investigations are protected under the Act. §

1977.11. One court has extended these protections even further. In Donovan v. R.D. Andersen Constr. Co., 552 F. Supp. 249 (D. Ka. 1982), the court held that "an employee's communication with the media regarding the conditions of the workplace are protected by section 11(c) of the Act." Id. at 253. Note also that "the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place 'but for' engagement in protected activity, section 11(c) has been violated." 29 C.F.R. § 1977.6(b).[3]

Section 11(c) protects against all forms of retaliatory discrimination; it is not limited to terminations. See 29 U.S.C. § 660(c)(1). For example, section 11(c) prohibits a person from reprimanding, suspending, decreasing the pay, or refusing to hire someone in retaliation for protected conduct. See Darveau v. Detecon, Inc., 515 F.3d 334, 342 (4th Cir. 2008) (holding that FLSA's anti-retaliation provision, which uses the same language as section 11(c), covers the same adverse actions that are proscribed by Title VII).

Despite the breadth of the coverage of section 11(c), the provision has two significant limitations. First, there is no private right of action; claims can only be brought through the Secretary of Labor. Dougherty v. Parsec, Inc., 824 F.2d 1477, 1478 (6th Cir. 1987). An employee, or their representative, who seeks to initiate a section 11(c) claim should file a complaint with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was

[3] On the other hand, section 11(c) does not protect employees who refuse to comply with valid safety rules implemented by the employer. "Disciplinary measures taken by employers solely in response to employee refusal to comply with appropriate safety rules and regulations, will not ordinarily be regarded as discriminatory action prohibited by section 11(c)." § 1977.22.

employed. 29 C.F.R. § 1977.15(c). No particular form of complaint is required. § 1977.15(b).

Second, a complaint must be filed within 30 days after the retaliation occurs. 29 U.S.C. § 660(c)(2). This is a far shorter statute of limitations than is provided in similar statutes such as Title VII. This statute of limitations is subject to equitable tolling, but only is very extenuating circumstances. 29 C.F.R. § 1977.15(d)(3); Donovan v. Hahner, Foreman & Harness, Inc., 736 F.2d 1421, 1424-27 (10th Cir. 1984) (holding that the 30-day limit is not jurisdictional, equitable tolling is available, and may be appropriate if an employer actively misleads a plaintiff).

Once a complaint is filed, the Secretary of Labor is supposed to conduct an investigation and then notify the complainant within 90 days with a determination of whether prohibited discrimination occurred. 29 U.S.C. § 660(c)(3). The Secretary of Labor may then elect to bring suit on behalf of the employee in federal court. Id. § 660(c)(2). As with other anti-retaliation provisions, the Secretary must initially make out a prima facie case that the employee engaged in protected activity, the employee was subject to an adverse employment action, and that there is evidence of a causal connection between the protected activity and subsequent adverse action. Reich v. Hoy Shoe Co., 32 F.3d 361, 365 (8th Cir. 1994). The familiar McDonnell-Douglas framework is then employed to examine the employer's justification for the adverse action. Id. If the Secretary is successful, the full array of remedies is available to the court, including punitive damages. Reich v. Cambridgeport Air Sys., 26 F.3d 1187, 1194 (1st Cir. 1994).

Although it has not been tested in court, there is a strong argument that safety incentives, which effectively decrease compensation if an employee reports a safety hazard, violate section 11(c). Therefore, workers who suffer the adverse consequences of reporting injuries in a workplace with safety incentives should strongly consider filing a section 11(c) complaint. Moreover, they should consider if other state remedies are available, as discussed below.

While safety incentives may be attacked under section 11(c), regulation of incentive programs by OSHA would likely be more effective. During the Clinton administration, OSHA began to take a hard look at safety incentives. In 1999, OSHA fined a company called USA Waste $65,000 for having a safety incentive program. OSHA also issued the "Draft Proposed Safety and Health Program Rule: 29 C.F.R. 1900.1," which proscribed, in part, the hiding of workplace injuries: "The employer must not discourage employees from making reports and recommendations about fatalities, injuries, illnesses, incidents, or hazards in the workplace, or from otherwise participating in the workplace safety and health program." Unfortunately, the proposed rule was withdrawn in August 2002 and no further action has been taken.

C. State Remedies for Retaliation

State law can provide additional remedies for safety-related retaliation, and may be more effective as they create privately enforceable causes of action. A common objection to such remedies, of course, is that they are preempted by OSHA. Courts, however, have rejected such arguments. In Schweiss v. Chrysler Motors Corp., 922 F.2d 473 (8th Cir. 1990), plaintiff was terminated shortly after she had contacted OSHA about possible safety violations at her plant. Id. at 473. Plaintiff brought a claim under

Missouri state law, alleging that she had been wrongfully discharged for being a whistle-blower. Id. The Eighth Circuit rejected defendant's argument that the claim was preempted by OSHA section 11(c), relying on a similar preemption case, English v. Gen. Elec. Co., 496 U.S. 72 (1990). Id. at 474-76. The court concluded that Congress did not intend the administrative remedy of section 11(c) to preempt state claims. Id. at 476; see also Flenker v. Willamette Indus., 266 Kan. 198, 204-10 (1998) (holding that OSHA section 11(c) is not an adequate remedy to preclude a state wrongful discharge claim, and citing many other cases on the same issue).

There are several types of state law claims for safety-related retaliation. As in Schweiss, some states have wrongful discharge claims based on a public policy of protecting whistleblowing. See, e.g., Flenker v. Willamette Indus., Inc., 68 F. Supp. 2d 1261, 1268-69 (D. Ka.) (allowing retaliatory discharge claim for reporting to OSHA to proceed, including possible punitive damages and damages for emotional distress). Other states recognize wrongful discharge claims in violation of public policy, which is established by state workplace safety statutes. See, e.g., Weatherford v. Radioshack Corp., 339 F. Supp. 2d 670, 682 (E.D. Pa. 2004) (recognizing wrongful discharge claim based on public policy derived from OSHA and the Pennsylvania Worker and Community Right-to-Know Act). Finally, some states have enacted anti-retaliation statutes. For instance, North Carolina's Retaliatory Employment Discrimination Act specifically proscribes retaliatory discrimination based on activities protected by the state Occupational Safety and Health Act. See N.C. Gen. Stat. § 95-241(a)(1)(b).

IV. Other Benefits to Keep in Mind

Injured workers should always be fully informed of their rights under their state's workers' compensation scheme. Even in simple cases, care must be taken to ensure that workers receive the indemnity, disability, and medical benefits that they are owed under the law. A review of workers' compensation is beyond the scope of this paper, but one point is worth emphasizing here.

Although workers' compensation will preempt almost all tort claims against the employer, other possible claims should be considered. First, suits against third parties, such as for products liability, are not precluded. Second, torts for intentional conduct, including willful safety violations, can be pursued. See, e.g., Woodson v. Rowland, 329 N.C. 330 (1991) (allowing tort claims when employee was directed to work in a trench that was very likely to, and did in fact, cave in); Gulden v. Crown Zellerbach Corp., 890 F.2d 195, 196-97 (9th Cir. 1989) (allowing tort action under Oregon law when employees alleged that employer intended to injure them when it ordered them to clean up a PCB spill without protective clothing). Finally, most states protect workers from being retaliated against because they file workers' compensation claims.

Injured workers should also utilize the FMLA if they need to take leave due to an injury. The FMLA entitles qualifying employees to take up to twelve weeks of unpaid leave, without fear of termination, when the leave is taken for, *inter alia*, "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. §§ 2612(a)(1)(D), 2614(a)(1). A "serious health condition" is "an illness, injury, impairment, or physical or mental condition that involves – (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B)

continuing treatment by a health care provider." 29 U.S.C. § 2611(11). Qualifying employees who return to work within that twelve-week period are entitled to be reinstated to their previous position, or "to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1).

There are types of claims available under the FMLA: the interference theory, pursuant to 29 U.S.C. § 2615(a)(1), and the retaliation theory, pursuant to 29 U.S.C. § 2615(a)(2). Edgar v. JAC Prods., Inc., 443 F.3d 501, 507 (6th Cir. 2006). For interference claims, "the issue is simply whether the employer provided its employee the entitlements set forth in the FMLA – for example, a twelve-week leave or reinstatement after taking a medical leave." Id. If the employer fails to provide the required benefits, its reasons for doing are irrelevant. Id. In contrast, "retaliation claims impose liability on employers that act against employees specifically because those employees invoked their FMLA rights." Id. at 508.

Note that the scope of the FMLA is both broader and narrower than the ADA or workers' compensation. Serious health conditions that qualify under the FMLA are a far broader class of injuries that those that constitute disabilities under the ADA. In addition, unlike workers' compensation, the FMLA also covers injuries that are not caused by the workplace. On the other hand, the FMLA only applies to companies with 50 or more employees within a 75-mile radius and to employees with more than one year's tenure working more than 1,250 hours in the prior year. 29 U.S.C. § 2611(2)(A).