



# Wrongful Termination and Workers' Compensation: Firing an Employee With an Open Claim

Once a quarter, the *Journal* features a TDIC risk management case study, which provides analysis and practical advice on a variety of issues related to liability risks.

Authored by TDIC risk management analysts, each article presents a case overview and real-life outcome, and reviews learning points and tips that everyone can apply to their practice.

A former employee filed a lawsuit against a dentist alleging wrongful termination when the dentist fired her after she opened a workers' compensation claim. The dentist claimed she fired the employee due to poor performance and excessive absenteeism.

A dentist hired Sally Smith as an office manager on Sept. 9, 2002. Over the next year, the dentist noted several job-related issues including insurance billing mistakes and generally, poor job performance in Ms. Smith's personnel file. On May 12, 2003, Ms. Smith hit her right knee against a piece of wood underneath the counter-top of her desk. The dentist and another employee saw the injury happen. Ms. Smith did not seek medical attention until May 16 when her knee became stiff and painful. Her physician diagnosed trauma to her right knee and prescribed Celebrex. Ms. Smith did not take any time off work.

Two weeks later, on May 30, Ms. Smith told coworkers she fell while coming out of the office's storage area. Since she fell during the lunch hour, there were no witnesses. She said she injured

her right foot when she tripped over boxes in the storage room doorway. A staff person called the dentist and asked her to return to the office immediately. When she arrived, she instructed Ms. Smith to go to the emergency room, but Ms. Smith refused. Even though the injury was bothering her, Ms. Smith did not seek medical care until one week later. Radiographs indicated no fracture, and her physician diagnosed bruising to the right foot but did not prescribe medication or therapy for her foot.

Ms. Smith returned to her physician at the end of June for back, knee, and foot pain. She underwent physical therapy for one month. At that time, Ms. Smith determined the therapy was not helping and elected to stop treatment. During her August performance review, Ms. Smith presented the dentist with a disability note from her physician stating she would need extended time off for her nonwork related injury. The note did not indicate a return to work date. The employee manual stated, "Employees must put all requests for time off work in writing indicating the start and end dates." Even

though the dentist reminded her of the policy, Ms. Smith refused to do this.

Ms. Smith filed a workers' compensation claim during the third week of her leave of absence. She alleged she hurt her right knee on May 12, 2003, had back problems that started after the May 30 fall, and cumulative trauma injuries to her neck, back, and shoulders since she began working for the dentist in 2002. After the fourth week, the dentist terminated Ms. Smith for poor performance and excessive absences. Subsequently, Ms. Smith filed a wrongful termination claim alleging retaliation for filing the workers' compensation claim.

### During Discovery

It is important to realize a workers' compensation claim is separate from the wrongful termination claim. Each claim has its own insurance coverage. However, each insurance carrier has access to the other's investigation information and often share information while defending the same policyholder. Since the dentist had the Employment Practices Liability Insurance endorsement, TDIC initiated an investigation into the wrongful termination allegation.

The investigation revealed Ms. Smith had been in a car accident in 1986, which injured her neck. According to testimony given at the workers' compensation deposition, Ms. Smith reported complete recovery from that injury. She claimed that she first noticed problems with her neck, back and shoulders after her May 30, 2003, fall.

The extent of her injuries was questionable. Reports from several physicians revealed differing diagnosis and treatment recommendations. Her actions also contradicted her allegations. While she claimed her right knee continued to bother her after she hit it on May 12, she never requested

## It is important to realize a workers' compensation claim is separate from the wrongful termination claim.

time off work. Additionally, Ms. Smith sought treatment one week after her alleged fall in the storage room when she claimed she hurt her right foot on May 30. Even though she refused the dentist's suggestion to go to the emergency room that day, the dentist should have completed an incident report addressing this fall and the steps she took to offer medical care to Ms. Smith.

Ms. Smith's employee file noted that approximately one month after she starting working for the dentist, Ms. Smith requested four days off. She wrote a letter to the dentist saying she was getting migraine headaches due to stress at work and family issues. The letter also claimed that the dentist was not allowing her to complete her duties as the office manager by not permitting her to discipline two employees. Furthermore, there were several entries where the dentist noted Ms. Smith taking unapproved time off.

Ms. Smith's employee file contained several entries including the August 2003 performance evaluation, which noted:

- Her poor job performance,
- Many patients had not received a bill since February, and
- An inquiry regarding the inconsistency in the decrease in office earnings when the daily schedule was busier than ever.

There is no record of Ms. Smith's response. The dentist placed Ms. Smith on probation pending an improvement in her job performance.

Ms. Smith went to a doctor's appointment mid-August. She returned with a note from her physician stating she would have to take time off, but

offered no timeline. She picked up her check and returned her office key to the dentist without an explanation on Aug. 25. The dentist terminated Ms. Smith, in writing, on Sept. 4 stating the termination was due to excessive absenteeism, poor job performance, and numerous errors and omissions that affected the practice. The dentist attached Ms. Smith final paycheck to the letter.

With the documentation the dentist took during Ms. Smith's employment, TDIC argued the merits of the wrongful termination allegation. Ms. Smith's lack of performance and failure to fulfill her job requirements supported the dentist's decision to terminate her employment. However, the timing of the termination did affect the case outcome. Since it occurred shortly after Ms. Smith filed the workers' compensation claim, it appeared the dentist was retaliating against Ms. Smith.

The case ended up settling for a small amount due to the dentist's consistent entries regarding Ms. Smith's poor performance.

### Lessons Learned

#### WHAT CAN WE LEARN FROM REVIEWING THIS CASE?

##### *Workplace injuries and incident reports*

Providing immediate access to a physician provides the injured employee needed care and lessens the possibility of further harm. It also provides documentation as to the extent of the injury. Delaying treatment may exacerbate the injury exposing the dentist to continued risk. Document and report to your workers' compensation carrier all employee injuries whether or not they sought medical attention.

Similar to the documentation in patient charts, proper documentation of an

## CASE STUDY, CONTINUED FROM 772

incident can be an excellent defense to a workers' compensation or general liability lawsuit. Complete a report when patients, staff, or visitors are involved in an incident that has caused injury, loss, or damage to them or their personal property. This includes incidents where no obvious injury occurred. The person completing the report should be the individual who witnessed or is the most familiar with the incident. The report should include:

- The date, time and location of the incident. Factually explain what happened but do not include a judgment as to the cause of the incident or the extent of any injuries.
- A brief description of the incident, including injuries.
- Names of witnesses along with their contact information.
- All action taken, including whether medical services were needed. If so, by whom. Also, note whether medical services were offered and denied by the injured party.
- The signature of the injured party, if possible.

File the report in a readily accessible folder separate from the personnel file and give a copy to the injured person. Workers' compensation insurance is a federal requirement; however, some states opt for requirements that are more stringent. To find if your state follows federal or state requirements, go to [www.dol.gov/esa/owcp\\_org.htm](http://www.dol.gov/esa/owcp_org.htm) for workers' compensation information or ask your workers' compensation carrier.

In this case, the dentist should have filled out incident reports after Ms. Smith hit her knee and again after she claimed to have fallen in the storage room. Both reports would have documented the dentist's inquiry about medical care and Ms. Smith's refusal. Further, when an employee suffers a work injury, seeking

## It is illegal to terminate an employee in retaliation of or to avoid a workers' compensation claim.

medical care should not be an option. Some employees may want to go to their own physician. This may or may not be acceptable to your workers' compensation carrier. Contact your carrier to discuss or set an appointment for a medical evaluation. This evaluation memorializes the injury and its extent, which discourages the employee from adding further injuries onto a future claim.

### *Employee Manual*

The dentist had a current employee manual that detailed the office's policies and procedures. It emphasized that employment in the office was "at-will" and either party may terminate employment at any time. In the event the dentist terminates the employee, the dentist must pay all wages earned by the employee on the final day of employment. The manual also detailed that employees were expected to arrive at the office at their scheduled time and gave instructions about what to do in the event the employee was sick or late to work. The dentist's policy stated employees must submit requests for leaves of absence in writing. Except in the case of accident or illness, employees were to give two months notice if they required an extended leave of absence.

### *Personnel Records*

The dentist kept excellent personnel records on all of her employees. She regularly gave performance evaluations and counseled employees who were not fulfilling their employment obligations. The files also reflected

recognition awards she gave employees who were doing their jobs well.

Among other things, Ms. Smith's file reflected the extent of her unexcused absenteeism and tardiness, failure to produce satisfactory quantity and quality work, attending to personal affairs during office hours, and failure to follow office policies. This documentation supported Ms. Smith's termination and would have been sufficient justification for her termination had she not filed a workers' compensation claim.

### *Workers' Compensation*

The timing of Ms. Smith's termination is the real issue in this case. The dentist should have written a letter to Ms. Smith accepting her resignation when she voluntarily turned in her office key. Unfortunately, she terminated Ms. Smith after Ms. Smith opened a workers' compensation claim. It appears the dentist retaliated against Ms. Smith because she opened the claim. It is illegal to terminate an employee in retaliation of or to avoid a workers' compensation claim.

Workers' compensation law allows employees to seek medical care when injured while performing job duties. They have a right to medical care and the employer has an obligation to provide it. Because of this obligation to provide medical care, it stands to reason that employers will be diligent in providing a safe working environment for their employees and avoid workplace injuries.

Do not terminate an employee who is out on a workers' compensation claim. Contact your workers' compensation carrier or an employment attorney for assistance with performance issues of employees who have open or active workers' compensation claims.

— JAIME DAVENPORT

TDIC RISK MANAGEMENT ANALYST