

# Top Ten Things That Employment Lawyers Should Know About Long Term Disability Insurance Claims

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The jobs of an employment lawyer and a disability lawyer intersect when a disabled worker complains of discrimination. Such a worker, let's call her Jane, may simultaneously have a possible claim under the ADA and a possible claim for long term disability benefits under the employer's LTD policy. How should you advise her? Should Jane seek an accommodation or settlement with her employer? Should she apply for disability benefits? Can she do both?

I would like to share with you the top ten things that you should know about long term disability benefits before giving your advice to Jane.

## 1. Requests for Accommodations

Requests for accommodations raise the bar for obtaining disability benefits. This is the case whether or not they are granted. If they are granted and Jane later applies for LTD benefits, the insurer will in the future use her accommodated job in order to determine whether she is disabled. This makes it more difficult to establish disability because the accommodated position is presumably easier to do. On the other hand, if they are not granted and Jane applies for LTD benefits, they will use the request as an admission that she could perform the duties of her job.

## 2. Exit Strategy from Work

If Jane wants to apply for disability benefits right away, she needs an exit strategy from work. The first question that the insurer will ask her is, "why was she able to work yesterday, but not today?" In other words, "what has changed?" The way to avoid/answer this question is to arrange for a transitional event between Jane's work and disability. I usually do this by having the client fully examined and test-

ed by her treating physician. What has changed?—Jane's doctor has now thoroughly examined her and has advised her to stop working. Please note that it is very important that Jane not go back to work again after the examination. If she does, it only confirms that she is not disabled and that the doctor's opinion was wrong.

When arranging an exit strategy, you should do this behind-the-scenes. If the insurer knows Jane has an attorney, they will be immediately suspicious of the claim.

## 3. Active Employment

Jane is only "covered" under the LTD policy when she is in active employment, which will end on her last day of actual work. It is therefore very important for Jane to go out on disability **prior** to her anticipated termination. If Jane has already been terminated, the claim is much more difficult, and she could expect a challenge by the insurer. To obtain benefits, Jane will have to establish that even though she worked a full day on her last day of work, she was disabled on that day. This can be done by establishing that she was not effectively doing her job or showing that she was desperate. Surprisingly enough, in **Hawkins v. First Union**, 326 F.3d 914 (7th Cir. 2003), Chief Judge Posner himself found that there was no logical incompatibility between working full time and being disabled from working full time.

## 4. Partial Disability

Jane may want to transition her disability by first going out on partial disability. Partial disability, however, is almost always problematic, even if Jane's employer were willing to let her work part time. To support partial disability, Jane would need her doctor to opine that she only could work a specified number of hours per day or week. This is problematic because it deals in shades of grey. If Jane's doctor says she could work 20 hours per week, the insurer will then want to know why she cannot work 24 or 26 hours per week. It is very difficult for any doctor to

say Jane could work 20 hours per week, but not 24. I always prefer my clients to go out on total disability, which is much more concrete.

## 7. The Arbitrary & Capricious Standard of Review

The standard of judicial review affects not only the outcome in court, but also the chances that the insurer initially will grant or deny the claim. The standard of review is determined by the policy language. If the Policy grants the insurer discretionary authority to interpret the policy or determine eligibility for benefits, the court will only reverse the insurer's determination if it is arbitrary and capricious. You may have heard that the NYS Department of Insurance has recently banned these clauses, but that ban is now being challenged by the insurers.

Although most well supported claims are granted by insurers, Jane should know that applying for benefits is not without significant risk—even if she has strong evidence. Moreover, it often takes several months for the insurer to make a decision. Jane's job guarantee under the FMLA may run out prior to her hearing from the insurer.

## 6. Definitions of Disability

Definitions of disability vary considerably. You should therefore check it to make sure that Jane would be eligible. The best policies provide benefits if Jane is unable to perform the material duties of her "own" occupation. Most policies, however, only provide this protection for two years. Thereafter, Jane would have to establish that she was unable to perform the material duties of "any" occupation to which she is qualified by education, training and experience.

It is more difficult to establish disability under the "any" occupation standard because Jane would have to establish that she could not do a whole universe of jobs,

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incidents at her deposition, the question I often hear is: "what effect did these events have on you, if any?"

Defense counsel would be very happy if the plaintiff confined herself to a two minute answer that mentioned feeling sad, headaches and difficulty sleeping. This is where you want to let your adversary know that they have a potentially huge EP&S award to contend with. It is important that your client be extremely well prepared to go back over all of the incidents of illegal conduct and testify, as to what happened, how she felt when it happened, the things that she did that exemplified how she felt (showering immediately, wearing a sack dress to work the next day), when and where she cried, and with whom.

It is very difficult to answer this question in the abstract. It is a lot easier for the witness to review the events in her answer to remind herself of what she felt when the discrimination was happening.

### **Trial**

Your client's trial testimony should present a complete before, during and after picture of how the discrimination ruined her life. Have the client testify about what her life was like before the discrimina-

tion, how she relaxed with her family, friends and coworkers, how she enjoyed her work, the sacrifices she made to get where she was, working a second job, thrift, extra hours on the job. Let her paint a complete picture of her life, including the difficulties she overcame, and the pride and dignity she felt as a result.

Have the client testify about going through the discrimination, with whom she shared her pain and fears (some of these people may make effective witnesses), what it was like to make her complaints to an incredulous employer, how she felt when the discrimination continued, whom she cried with, how often, and how this stress affected her family.

Then have the client testify about how the discrimination changed her. Clients should build on their previous testimony about what had meaning for them in their lives, and explain how the discrimination destroyed all of the enjoyment and fulfillment they obtained from their lives. The client should explain how the discrimination invaded family relationships, including the bedroom, if applicable, how the anxiety and depression made it impossible for her to function as a mother, and as friend to her friends. She should explain how she withdrew as a result of the discrimination, and its effects, and stopped

functioning, including on the job as a result. Have the client remind the jury about her goals, and passions and sources of self worth and dignity, and how all of these were destroyed.

In a sexual harassment case, a woman may experience flashbacks in the bedroom, and lose the ability to enjoy intimacy with her partner. It is important for her first to build the story of the relationship, and it's success, and then show how it was destroyed. I had a client who was sexually assaulted by her employer. She had explained in her earlier testimony how long it had taken her to find her husband and a relationship in which she was fulfilled. After the assault and associated flashbacks, she testified that she was first unable to be intimate with her husband, and then unable to enjoy relations with him, which led to her divorce. This led to a large EP&S award.

This type of injury can be an issue for men or women in racially hostile work environment. Men and women can experience a loss of self worth and confidence that invades the bedroom.

Whether racial, sexual or any other type harassment, victims stop functioning as parents, and sometimes regret how they

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not just her own. Jane should be made aware that in two years, when the definition of disability becomes "any" occupation, she will face a re-review and possible benefit termination by her insurer.

### **7. Notice of Claim**

Almost all LTD policies have a notice of claim requirement. To satisfy this requirement, a letter must be sent to the insurer usually within 20 or 30 days of becoming disabled. The notice should specify that Jane has been disabled as of a specific date and specify the nature of her illness or injury. The notice should also request the applicable forms that must be completed.

If you are in the process of negotiations with Jane's employer, it is important not to let this date slip by if Jane has already left work.

### **8. Insurance Forms**

The LTD application has three sections to be completed by Jane, her doctor and her employer, respectively. If you thought that you could keep Jane's reasonable accommodation negotiations secret, forget about it! Often, the employer form asks whether an accommodation was requested, granted or could be granted. The form almost always requests the reason for the claimant's termination. Here's where your negotiation skills are crucial. The quickest way for Jane's application to be denied is if the employer's form says that she was terminated or retired. You want it to say "disability."

### **9. Benefit Offsets**

Jane may think that she is entitled to a LTD benefit equal to 60% of her salary. Read the small print. All employer LTD policies provide for offsets of various kinds,

which usually include Social Security disability benefits, workers compensation benefits, retirement benefits, severance benefits, and third party settlements. This means that the settlement that you worked so hard for may provide no benefit to Jane. Check the policy language carefully.

The way an offset works is as follows:  
Monthly Salary (\$10,000) x 60% - Social Security benefit (\$2,000) = Actual benefit (\$4,000).

### **10 Taxability of Benefits**

Some LTD benefits are taxable and some are not. If Jane paid the premiums of the policy on an after tax basis, then the benefits are tax free. Under all other circumstances, the benefits are taxable. If Jane paid a percentage of the premium on an after tax basis, then the benefits will be tax free in the same percentage as the premium. ■