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Sent: Wed Mar 17 16:21:37 2010  
Gallagher Sharp Shop Talk: Workers' Compensation

**Question: Does the absence of a written "handbook" preclude a finding that an employee's termination constituted a "voluntarily abandonment" of her job?**

Over the last several years, the Supreme Court of Ohio has severely limited its holding in *State ex rel. Louisiana-Pacific Corp v. Industrial Comm.* (1995), 72 Ohio St.3d 401, and the concept that the termination of an employee for misconduct can be a basis for terminating temporary total disability benefits. Recently, the Court revisited this issue, when presented with a case where the employer failed to introduce a set of written work rules as a basis for termination.

*State ex rel. v. Galligan v. Industrial Comm.*, 124 Ohio St.3d 233, 2010-Ohio-3, concerned an employee of a security firm who was hired in February, 2006, and injured in August, 2006. In November, 2006, after a series of disciplinary problems, the employee was warned, in writing, that "any future violations of company policy" would result in immediate termination. On at least three (3) occasions over the following three (3) months, a supervisor found the employee asleep at her post. In February, 2007, she was fired. A month later, the employee made a motion to the BWC seeking temporary total disability compensation. The request was denied by the employer and affirmed by Industrial Commission, citing *Louisiana-Pacific*. The employee filed a *mandamus* complaint, and the Tenth District Court of Appeals reversed, relying on the fact that the administrative record did not contain a copy of the written work rule which was a basis for the termination (e.g., a handbook), a necessary component under *Louisiana-Pacific*. The Court also questioned whether the violations (sleeping on the job, questionable remarks of a sexual nature, time card irregularities) were "too insignificant to merit foreclosure of compensation." The security company filed an appeal as of right.

The Supreme Court of Ohio reversed, finding that the violations were sufficiently serious to merit a finding of "abandonment," and that the Commission did not necessarily need the "handbook" to comply with *Louisiana-Pacific*. The Court cited the three-pronged analysis of *Louisiana-Pacific* (written work rules with clearly defined conduct, identified as a dischargeable offense, known or should have known to employee) and backed away from recent decisions that seemed to indicate that a written handbook was "automatically" needed to support an "abandonment" argument. Instead, the Court focused on the fact that the employee's disciplinary file was in the record, and that it included written "Employee Consultation" forms which were sufficient to support the defense.

While not really an expansion of *Louisiana-Pacific*, the Court's decision in *Galligan* affirms the discretion given to the Industrial Commission to interpret its three-pronged test. Employers should introduce written work rules when possible, but the disciplinary file can serve as an effective substitute.

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