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Sent: Thu Sep 23 16:24:43 2010
Gallagher Sharp Shop Talk: Workers' Compensation

Question: Can an employee bring an action against his employer for wrongful discharge in violation of "public policy" arising from a workers' compensation claim?

In general, Ohio adheres to the "employment at-will" doctrine. In the workers' compensation context, an exception to this doctrine exists in R.C. §4123.90, which permits an employee to bring an action against his employer for retaliatory conduct arising from filing a workers' compensation claim or instituting proceedings under the Workers' Compensation Act. But what if a discharge occurs before a claim had been filed or proceedings are initiated? Does R.C. §4123.90 still apply? Does an employee have other remedies? The Ohio Court of Appeals, Second Appellate District recently considered this issue in a case involving a "public policy" argument.

Sutton v. Tomco Machinery, Inc., 186 Ohio App.3d 757, 2010-Ohio-830, concerned an employee who injured his back at work. When the employee reported the injury to his employer on the date it occurred, he was immediately fired. The employee later brought a workers' compensation claim, which was allowed, then filed a Complaint against his employer alleging both a claim for retaliatory termination in violation of §4123.90, and wrongful discharge based upon the "public policy" inherent in that statute. The employer filed a motion for judgment on the pleadings claiming that neither cause of action was permitted under Ohio law. This motion was granted by the trial court, prompting an appeal to the Second District. In its brief, the employee claimed that it had alleged sufficient facts to establish prima facie claims under both causes of action. The employer maintained that the Supreme Court of Ohio's decision in *Bickers v. W&S Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, which barred all common-law tort claims for wrongful discharge under the Workers' Compensation Act, precluded both claims.

The Second District Court of Appeals affirmed in part and reversed in part, holding that, while the Plaintiff could not proceed with a §4123.90 claim because the employee had not yet filed a claim or "initiated proceedings," he could proceed under a "public policy" theory. The Court discussed at length the four-prong test for "public policy" claims under Ohio law, and reasoned that Plaintiff's Complaint satisfied the "clarity" and "jeopardy" elements of such a claim, precluding judgment on the pleadings. Cautioning that its order does not mean that the claim will be successful, the Court also distinguished *Bickers* because it did not involve a "retaliatory" claim. The matter was sent back to the trial court for further proceedings.

This is a decision that bears watching, because the Court seemingly bends over backwards to distinguish *Bickers*, which seems to be directly on point. I would expect an appeal on this issue will eventually need to be considered by the Supreme Court of Ohio.

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