

From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: When an employee is discharged for violating written work rules while on light duty, can this be construed as an "abandonment" of the employee's position?

The status of the doctrine of "abandonment" - whether a termination for cause precludes an award of temporary total disability compensation - is an ongoing question in Ohio. In a recent decision, the Tenth District Court of Appeals in *State ex rel. Restaurant Mgt. Inc. v. Indus. Comm.*, 2010-Ohio-5626, considered whether evidence that a management employee falsified her time sheets while working on "light duty" was sufficient to terminate temporary total disability compensation.

Restaurant Mgt. concerned a manager at an Arby's who suffered a fractured ankle on May 15, 2008, and filed a workers' compensation claim. The claim was allowed and temporary total was granted, during which the restaurant continued to pay her full salary. On August 15, 2008, the claimant's physician released her to work no more than six (6) hours per day, or thirty (30) hours per week. At some point, the claimant began to work more than the prescribed hours, and altered her time sheets for the next day to reflect that time. When it learned of this action, the restaurant owner fired the claimant and argued that her violation of written rules prohibiting the alteration of time sheets to be an "abandonment" of her position, precluding additional temporary total. The employer filed a motion, and a DHO concluded (erroneously) that the claimant could not abandon her position while on light duty. On appeal, an SHO pointed out that the employer testified that alteration of time sheets was permissible in certain circumstances, and that the employer did not make its case for abandonment. The employer initiated a *mandamus* action, arguing that the DHO applied the wrong standard, that the policy did not permit alterations of this type, and that other case law (*State ex rel Smith v. Superior's Brand Meats, Inc.*) was controlling.

The Tenth District denied the writ and sided with the claimant, finding that the employer failed to demonstrate an abuse of discretion worthy of reversal. Evidence adduced at hearing was contradictory as to whether the policy was even violated, and the claimant's testimony and status as a manager were cited as strong evidence in support of her arguments that no violation occurred. While the DHO applied the wrong standard, this was corrected by the SHO, and *Smith* was distinguished as involving knowing and willful violation of a clear work rule, something that the employer was unable to demonstrate in the case at bar.

Restaurant Mgt. illustrates that in a *mandamus* action, disputed facts will often preclude a writ. While the claimant had clearly edited records, there was evidence that the employer often permitted this, and she may have done so to stay within her restrictions.

If you have any specific questions, or would like to discuss this or any other workers' compensation issue, you can contact me or Adam Sadowski from our Toledo office.

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