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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Is a termination based upon a facially neutral attendance policy a sufficient defense to a wrongful discharge suit?

Last year, the Supreme Court of Ohio held in *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153 (2011), that a claimant may maintain a cause of action for wrongful discharge against his employer where he or she is terminated after sustaining a job-related injury, but before filing a workers' compensation claim. Recently, the Ohio Court of Appeals, Ninth Appellate District, applied *Sutton* in the context of whether an employee who was terminated under a "facially neutral" attendance policy after filing a workers' compensation claim was able to maintain a claim for wrongful discharge.

Scalia v. Aldi, Inc., 2011-Ohio-6596, involved a claimant who injured her elbow while working in a position that required occasional lifting up to fifty pounds. The claimant filed a workers' compensation claim and received temporary total disability payments. At an initial examination arranged by the employer, the claimant was found to have not reached "maximum medical improvement," and required lifting restrictions. Later, a dispute arose among doctors regarding whether lifting restrictions were still necessary. The employer filed a motion to have the claimant's temporary total benefits terminated, which was granted. After the termination of benefits, the claimant attempted to return to work without restrictions, but the employer terminated her based upon its attendance policy as she had not done any work for the employer in the last 12 months. The claimant sued the employer for workers' compensation retaliation, wrongful discharge in violation of public policy, and on the basis of a perceived disability. The trial court granted summary judgment in favor of the employer on all claims, and the claimant appealed.

The Ninth District affirmed in part, and reversed in part. The court agreed with the trial court that the employer's conduct was not retaliation *per se* due to the application of a "facially neutral" attendance policy. However, the court found that the trial court failed to consider the retaliation claim in a broader context. Looking to *Sutton*, the court found that no presumption of retaliation arises from the fact that an employee is discharged after an injury, but instead the employee must demonstrate a causal relationship between the action taken by the employer and the employee's participation in the workers' compensation system. If the claimant is successful, the employer must then articulate a legitimate, nondiscriminatory reason for the termination. In response, the claimant may demonstrate that the reason offered for the termination is a pretext for retaliation. In *Scalia*, the trial court had only considered whether the conduct was retaliation *per se*, and as such the determination resulted in a reversal. Lastly, the court also found that the

trial court failed to properly consider the disability claim and applied incorrect standards to the evidence.

Scalia is a very technical opinion, but it reflects a broadening of the protection given to employees terminated after being injured at work. Prior case law strongly favored employers who terminate an employee based on a facially neutral attendance policy. While the employer in *Scalia* will still be able to defend the claim by citing the attendance policy, the case illustrates that the defense is not as strong post-*Sutton*. If you have any questions, or would like to discuss this or any other workers' compensation issues, you can contact me or Adam Sadowski from our Toledo office.

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