

**From:** Don Drinko

**Date:** Wed 6/27/2012 4:20 PM

**Gallagher Sharp Shop Talk: Workers' Compensation**

**Question: Can an employee maintain a claim for wrongful discharge as a matter of public policy if the employee is terminated in retaliation for filing a workers' compensation claim?**

Last year, the Supreme Court of Ohio held in *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 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, Third Appellate District, was presented with the question of whether a claimant may maintain a cause of action for wrongful discharge, outside of Ohio Rev. Code § 4123.90, against his employer where he is terminated after filing a workers' compensation claim.

*Arnett v. Precision Strip, Inc.*, 2012-Ohio-2693, involved a claimant that was injured on the job on March 3, 2009. The claimant filed a workers' compensation claim, which was approved. The claimant was terminated from his employment on June 29, 2009 and he alleged it was done in retaliation of his filing his workers' compensation claim. On July 27, 2011, the claimant filed a lawsuit alleging that he was terminated in violation of R.C. § 4123.90 **and** public policy. The employer filed a motion to dismiss arguing that the claimant failed to file his claim within the 180-day limitation found in R.C. § 4123.90 and the public policy claim was merely derivative of his time-barred R.C. § 4123.90 claim. The claimant argued that previous case law, most notably *Bickers v. Western & Southern Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, only bars his claim if he had alleged non-retaliatory reasons for his discharge. The trial court found in favor of the employer and dismissed the claimant's complaint as time-barred, which prompted an appeal.

The Third District affirmed, and while the court noted that the Supreme Court of Ohio, in dicta, has more recently questioned the expansive syllabus in *Bickers*, the Court has not modified or overruled it. Further, *Sutton* would not apply because the termination occurred **after** the claimant filed his workers' compensation claim. *Bickers* recognized that the General Assembly, as a matter of public policy, decided to proscribe retaliatory discharges alone, so judicially imposing a common-law public policy wrongful discharge claim for non-retaliatory discharges would be inappropriately substituting its policy preference for the General Assembly's enacted policy decision. Therefore, it is immaterial whether a claimant alleged retaliatory or non-retaliatory discharges, R.C. § 4123.90 precludes all common law claims for an employee's discharge resulting from his/her filing of a worker's compensation claim.

*Arnett* illustrates the importance of *Bickers* in protecting employers from stale claims of wrongful termination. The case was decided on June 18, 2012 and the claimant still has time to seek an appeal to the Supreme Court of Ohio. If you would like to submit a question to Shop Talk, 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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