From: Julie Juergens
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Gallagher Sharp Newsflash: Supreme Court of Ohio Recognizes Limited Exception to 90-Day Notice to File Workers' Comp. Retaliation Claim

Yesterday, September 20, 2012, the Supreme Court of Ohio recognized a limited exception to the mandatory 90-day notice requirement to file a workers' compensation retaliation claim in *Lawrence v. City of Youngstown,* Slip Op. No. 2012-Ohio-4247.

Lawrence was an employee who was suspended without pay on January 7, 2007. On January 9, 2007, the City prepared a letter addressed to Lawrence advising him of the termination of his employment, effective the day of the letter. The letter was not sent via certified mail to Lawrence. He maintained that he did not receive a copy of the letter and did not learn of his discharge until February 19, 2007, 41 days after the date of discharge.

On April 17, 2007, Lawrence's attorney sent a letter to the City advising that Lawrence intended to file suit against the City alleging workers' compensation retaliation under R.C. 4123.90 and race discrimination. Lawrence filed his complaint on July 6, 2007. The City moved for summary judgment as to all claims in the complaint.

With respect to the workers' compensation retaliation claim, the City asserted that Lawrence failed to notify it of his intent to file such a claim within 90 days of discharge. R.C. 4123.90 provides, in relevant part:

> The action [for workers' compensation retaliation] shall be forever barred unless filed within one hundred eighty days immediately following the discharge . . . and no action may be instituted or maintained unless the employee has received written notice of a claimed violation . . . within ninety days immediately following the discharge . . .

The trial court, in granting summary judgment, and the appellate court, in affirming, concluded that the notice period began on the date of actual discharge and not the notice of discharge. Thus, as Lawrence's notice of claimed violation, dated more than 90 days after his discharge, was untimely, the trial court lacked jurisdiction over the claim.

The Supreme Court of Ohio, after stating that in general discharge means date of discharge and not date of notification of discharge, nonetheless reversed the judgment of the court of appeals because the facts of this specific case may warrant an exception to the general rule. In reaching this conclusion, the Court noted that usually, employers communicate the fact of the employee's discharge to the employee promptly, and R.C. 4123.90 places an implicit affirmative responsibility on the employer to provide notice within a reasonable time period. R.C. 4123.90 anticipates the employee's awareness of his or her discharge. If the employee is not provided with reasonably prompt notice of discharge and the employee could not have learned of the discharge within a reasonable time with the exercise of due diligence, the 90-day time period for

written notification of a violation of R.C. 4123.90 commences on the date that the employee becomes aware of or should have become aware of the discharge, whichever occurs first.

To protect against such an extension of the notice requirement, employers should ensure that employees are promptly notified of termination and that the employer has proof of such a notification, especially if the termination is not done in person. For example, notification by certified mail, return receipt requested, will establish that the employee was notified. Of course, if the employee does not sign for the certified letter, the employer should notify the employee by some other verifiable means.

A link to the *Lawrence* opinion can be found at:
http://www.supremecourtofohio.gov/rod/docs/pdf/0/2012/2012-ohio-4247.pdf

If you have any questions, please contact:

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