

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

Question: When does the written notice requirement for a claimant planning to file a workers' compensation retaliatory discharge claim begin to run?

It is illegal in Ohio to discharge an employee for filing a workers' compensation claim or participating in a workers' compensation proceeding. *See R.C. §4123.90*. Like most such causes of action, the statute creating this right imposes strict notice requirements on the aggrieved party, including a provision that the claimant must provide the employer with written notice of the alleged violation within ninety (90) days from the date of discharge. This has resulted in a conflict among Ohio courts regarding the meaning of "discharge" under *R.C. §4123.90* and when notice must be given, a conflict recently considered by the Supreme Court of Ohio.

Lawrence v. Youngstown, 133 Ohio St.3d. 174, 2012-Ohio-4247, concerned a claimant who brought suit alleging retaliatory discharge. At the time of the actual discharge, the employee was suspended, and claimed that he did not receive actual notice of the discharge for 41 days. (A letter was sent to the claimant, but it was not certified.) The claimant's attorney notified the employer and filed suit, but the employer moved for summary judgment, arguing that the 90-day notice requirement was not satisfied. The trial court agreed, concluding that the suspension and claimed lack of notice did not affect the running of the statute, and held that notice was untimely. The Seventh District affirmed, prompting the Supreme Court to certify a conflict and agreed to hear an appeal on the limited issue of whether the 90-day notice term begins to run on the effective date of discharge or upon the claimant's receipt of notice of the discharge.

A divided Supreme Court split the loaf, concluding that while the term "discharge" means the effective date of the discharge and not the date that the claimant received actual notice, it reversed the trial court's order stating that the particular facts in *Lawrence* may require an exception to this rule. The majority opinion refused to adopt a strict "discovery" (*i.e.* actual notice) rule but noted that the claimant in *Lawrence* was deprived of nearly half the already-brief notice period, and that the notice was timely as to the alleged date of discovery. The deciding factors in the majority opinion seemed to be the requirement in *R.C. §4123.90* to be "liberally construed" in favor of employees, and the employer's failure to provide "reasonably prompt" notice. In a concurrence as to judgment only, Justice Lanzinger lobbied for adopting the "discovery" rule, and thus placing the burden on employers to provide notice. While in a sharply-worded dissent, Justice O'Donnell would have affirmed, noting that even after the date notice was provided, the claimant still had 49 days to provide the requisite written notice to the employer.

Beyond the obvious (employers should always provide any type of written notice to employees in person or via certified mail) it appears that this decision may be limited to its unusual set of facts. 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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