

## **WORKERS' COMPENSATION SHOP TALK**

### **QUESTION: Can I be sued for firing an employee based upon an inability to work due to limitations from a work-related injury with a previous employer?**

R.C. 4123.90 clearly prohibits employers from making adverse employment decisions against a current employee, including termination, reassignment, demotion or any other punitive action, because that employee pursued a workers' compensation claim for an injury with that employer. *R.C. 4123.90*. In interpreting that statute, the Supreme Court of Ohio has noted that it is the pursuit of workers' compensation benefits, and not the allowance of a claim, that is protected, and therefore it is not necessary that a claim be recognized for a cause of action to lie. *Onderko v. Sierra Lobo, Inc.*, 2016-Ohio-5027. Recently, the Ohio Court of Appeals, Eighth Appellate District, considered a case involving a claimant who alleged that she was terminated as a result of limitations arising from a work-related injury with a previous employer, and whether the statute supports a cause of action for such a termination.

*McGree v. Gateway Healthcare Ctr.*, 2019-Ohio-988, involved an employee who was hired in February, 2016 and terminated in April, 2016. The employee claimed that she was terminated for reasons related to a workers' compensation claim she filed against her previous employer in 2014. The employer (Gateway) maintained that the employee was not injured on the job, had not pursued a claim against it, and she was terminated because she did not obtain pre-employment medical clearance from her physician. The employee brought suit alleging a number of causes of action, including wrongful termination under R.C. 4123.90 and violation of public policy, as well as retaliatory discharge, and disability discrimination. The trial court ruled that the claims were sustainable under Ohio law, and the case proceeded to trial, wherein the trial court denied the employer's motions for directed verdict and judgment notwithstanding verdict. The jury found in favor of the employer on the disability claims, but found in favor of the employee for retaliatory discharge and wrongful termination, awarding \$71,300 in compensatory damages, \$142,600 in punitive damages, and nearly \$150,000 in attorney's fees and costs. The employer appealed as of right to the Eighth District Court Appeals, arguing that R.C. 4123.90 permits workers' compensation discrimination claims against an employer only when a claim is pursued or allowed against that employer.

The Eighth District agreed, vacated the jury verdict, and ordered judgment in favor of the employer. Applying a *de novo* standard, the Court of Appeals relied heavily on the language of the statute, which states that causes of action may lie for injury or disease which occur in the course of and arising out of his employment "with that employer." By its terms, this statute provides for the exclusive remedy for termination in violation of rights conferred by the Workers' Compensation Act, and the General Assembly chose to proscribe adverse action by an

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employer against whom a claim is pursued. Citing *Onderko*, the court noted that when applying a statute, a court must give effect to all of the statute's words, and those words specify that the employer must be the one against whom a claim is pursued. The court also distinguished *Sutton v. Tomco Machining, Inc.*, 2011-Ohio-2723, which recognized a “very limited exception” for employees who have not filed a claim, but who might pursue such benefits against their employer in the future, which did not apply to this matter. The employee provided no evidence of any current or potential workers' compensation claims against the defendant, and therefore R.C. 4123.90 simply does not apply, and the question never should have been submitted to the jury.

The panel in *McGee* seemed to bend over backwards recognizing the seriousness of the claims, and the “extensive efforts made by....counsel in this case to compensate her,” and the termination clearly did not sit well. This would seem to indicate that if there was any statutory basis for such a claim, it would have affirmed the jury verdict. Ultimately, the basis for the reversal of the jury award of nearly \$350,000 in damages was the total absence of statutory authority.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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