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Sent: Wed 6/14/2017 4:23 PM
Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: Can an employer be sued by its employee for the accidental disclosure of medical information to a third party?

Nearly every employer has been counseled on the importance of keeping employee information, including information regarding an employee's medical history, private and protected. In certain cases, employers can be sued for the unauthorized disclosure of an employee's private medical information. Recently, the Ninth District Court of Appeals considered a case involving a workers' compensation claim, the accidental disclosure of a psychological report by a co-worker, and whether the employer was liable for damages for the disclosure.

Templeton v Fred W. Albrecht Grocery Co., 2017-Ohio-282, arose from a work-related injury. During the course of the claimant's workers' compensation proceedings, the employer obtained a psychological report on the claimant. An individual responsible for managing the employer's workers' compensation claims attempted to forward the report to the employer's attorney, but instead accidentally directed her email (with the attached report) to other employees. Upon learning of the error, the employer immediately took action to mitigate, but the claimant nonetheless sued the company for unauthorized disclosure of medical information to a third-party, negligence, and invasion of privacy. The trial court dismissed the Plaintiff's claims for unauthorized disclosure and negligence, and then granted summary judgment in favor of the employer on the claim for invasion of privacy. The claimant appealed to the Ninth District Court of Appeals as of right, alleging among other things that the trial court erred in finding that negligence was not sufficient to support a claim for invasion of privacy under Ohio law.

The Ninth District affirmed, finding that the claimant could not succeed on a claim for "invasion of privacy" for the negligent disclosure of medical records arising from a workers' compensation claim. Ohio law recognizes the tort of "invasion of privacy," the appropriation or exploitation of someone's personality including the disclosure of private affairs or activities. *Welling v Weinfeld*, 113 Ohio St. 3d 464, 2007-Ohio-2451. However, in order to proceed, Ohio Courts overwhelmingly hold that a plaintiff must prove that the disclosure was intentional, not accidental. The Court cited decisions from appellate districts (with the exception of the First District) which agree that any disclosure must be intentional and not a result of negligence. While Ohio courts have recognized that a physician or hospital can be liable for the tort of unauthorized, unprivileged disclosure of medical information to a third-party, this cause of action has been limited to the physician or hospital, and the third-party that induces the disclosure. *Biddell v Warren Gen. Hosp.*, 86 Ohio St. 3d 395 (1999). While this decision has been extended to include attorneys in limited circumstances, the Court refused to extend that liability to employers. In a dissent, one Justice would have sustained the plaintiff's second assignment of error and found that employers should be liable for negligent dissemination of medical information.

Templeton stands firmly in the majority in finding that an employer's accidental disclosure of an employee's medical or psychological records to a third-party is not actionable in Ohio, but there

is a conflict with decisions arising from the First District. Employers must be vigilant in ensuring that employee medical information is kept confidential.

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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