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Gallagher Sharp Shop Talk: Workers' Compensation

Question: In order to qualify as a “voluntary termination” pursuant to *Louisiana-Pacific*, must the behavior that resulted in the termination be intentional?

As we have often discussed, Ohio law is clear that termination for cause can constitute “voluntary abandonment” of employment, which precludes future awards of temporary total disability (“TTD”) compensation. *State ex. rel Louisiana-Pacific Corp v. Indus. Comm.*, 72 Ohio St.3d 401, 650 N.E.2d 468 (1995). It is equally clear that to constitute abandonment, the behavior which led to the termination must be "voluntary," which has been defined as “willingly undertook.” *Id.* Recently, the Supreme Court of Ohio considered a case in which the claimant, while acknowledging the behavior, claimed that it was "negligent" and not intentional, and therefore did not constitute "voluntary abandonment."

State ex. rel Parraz v. Diamond Crystal Brands, Inc., Slip Opinion No. 2014–Ohio–4260, involved a claimant who was injured at work and received treatment, but did not receive TTD because she returned to work within 8 days on restricted work duties. The union to which the claimant belonged had a contract containing a points-based attendance policy which could result in termination upon accumulating 14 points. Before the accident, the claimant had accumulated 10.5 points. Shortly after the injury, she accumulated 12 points and received a written warning. About 7 months after the injury, she accumulated her 14th point and was terminated. The claimant subsequently sought TTD starting 3 days after her termination, which was contested by the employer under *Louisiana-Pacific*, noting that she was terminated pursuant to a written policy that she was made aware of, and therefore was not eligible for TTD. The claimant appealed, alleging that her admitted attendance issues were due to a flat tire and an illness and therefore not “voluntary,” and that she should be eligible for TTD. Both the DHO and SHO affirmed the denial. A mandamus action was filed, but the 10th District Court of Appeals (in a split decision) affirmed, prompting an appeal as of right to the Supreme Court.

The Supreme Court affirmed the denial, concluding that the claimant had voluntarily abandoned her position and therefore was not entitled to TTD. The Court noted that the claimant’s argument that her repeated violations of the written attendance policy were “negligent,” and therefore not voluntary, but rejected this interpretation of *Louisiana-Pacific*. In order to find that an employee had “voluntarily” abandoned his or her employment, it is not necessary that the conduct be malicious or willful, or that the employee intended to be terminated. Instead, it is only necessary to demonstrate that the conduct in question constitute a voluntary act (or omission) that was clearly defined to be prohibited and grounds for discharge. In this case, there was no dispute that the claimant was aware that she had violated the attendance policy, that the violations could result in her termination, and that her absences were not related to her work-related injury. Therefore, the termination effectively concluded her right to TTD under Ohio law.

Parraz is a sensible response to a creative, but ultimately futile argument. The "volunteering" provision of *Louisiana-Pacific* refers to the voluntariness of the action itself, not the intent of the claimant. The Court also stressed that at least some of the behavior that led to the termination occurred before the injury, she was warned repeatedly, and that she was aware that she was close to the mandatory number

for discharge. The burden of proof is on the employer to demonstrate that the claimant violated the written rule and its consequences, both of which were demonstrated here.

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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