

**From:** Don Drinko  
**Date:** Wed 3/19/2014 4:10 PM  
**Gallagher Sharp Shop Talk: Workers' Compensation**

**Question:** When alleging a “voluntary abandonment” of employment due to termination, is it necessary that the commission of the offense be sufficient to terminate the claimant in and of itself?

It is well-settled that a claimant “voluntarily abandons” his right to temporary total disability (TTD) compensation when he is terminated as a result of conduct the employee knows will result in termination. *State ex rel. Brown v. Hoover Universal, Inc.*, 132 Ohio St.3d 520, 2012-Ohio-3895. Recently, the Supreme Court of Ohio considered a case involving “voluntary abandonment” and whether the offense which was the basis must be one that on its own would support a termination for cause.

*State ex rel. Robinson v. Indus. Comm.*, Slip Opinion No. 2014-Ohio-546, involved a health care worker who was disciplined at work on multiple occasions, the last of which resulted in a warning that any future violations of work rules would result in her termination. On April 10, 2008, she injured her back at work, and a claim was filed and allowed for “sprain, lumbar, herniated disc L3-L4, herniated disc with fragment L5-S1,” and she returned to work on light duty. On April 11, 2008, the claimant allegedly failed to properly communicate a dietary order change, and failed to check a resident’s feeding tube, both of which violated written work rules. A decision was then made to terminate the claimant on April 16, but the claimant did not return telephone calls to her home until April 18, by which time she had seen her doctor, who declared her totally disabled on April 21, 2008. The employer formalized the termination in a letter dated April 30, 2008, and contested a request for TTD because the claimant was terminated “for cause” and has thus voluntarily abandoned her position. The claimant argued that the offense she was terminated for did not specify that it could be a basis for termination, and that the firing was pretextual, but lost administratively. A *mandamus* complaint was filed, but the court of appeals denied the writ, prompting an appeal as of right to the Supreme Court.

The Supreme Court affirmed, concluding that the claimant had abandoned her employment and right to TTD. The claimant was duly informed in February that any further violation of work rules would result in termination, and had violated a written work rule. *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401. The Court noted that, while the specific offense was not a “fireable offense,” the claimant knew that any future violation of work rules would result in her termination, a fact that was made clear to her in writing. The court also rejected the claimant’s argument that the timing of the termination demonstrated pretext because it came after the employer learned of her disability, but the record was clear that the employer tried to call the claimant to inform her of the termination without success. In a concurrence, Justice Lanzinger stressed the fact that the claim remained allowed, and that only one type of compensation was being denied. Justice O’Neil vigorously dissented, stating the majority seemed to be injecting an element of fault into the equation.

*Robinson* stands for the proposition that, even in cases where a termination occurs very near the time of injury, a well-documented termination and abandonment claim will likely survive a court challenge. 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.

Donald G. Drinko, Esq.  
Certified Workers' Compensation Specialist,  
Ohio State Bar Association  
Gallagher Sharp  
1501 Euclid Avenue  
Cleveland, OH 44115  
Direct: 216.522.1326  
[ddrinko@gallaghersharp.com](mailto:ddrinko@gallaghersharp.com)  
[www.gallaghersharp.com](http://www.gallaghersharp.com)