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The Ohio Supreme Court recognizes a new common-law tort claim for wrongful termination in violation of public policy when an employee suffers a retaliatory discharge after being injured on the job, but prior to pursuing a workers' compensation claim.

Ohio Supreme Court Expands Scope of Wrongful Termination in Violation of Public Policy Claim

By Bonnie Kristan and Alex Frondorf

Since 1990, the Ohio Supreme Court has recognized exceptions to the employment-at-will doctrine when “an at-will employee is discharged or disciplined for reasons that contravene clear public policy” as expressed by the state legislature. In the years since, the Ohio courts have recognized an ever-growing list of public policy exceptions, and *Sutton v. Tomco Machine, Inc.*, 2011-Ohio-2723, is the latest development of this trend.

In *Sutton*, the Ohio Supreme Court recognized a new public policy exception to the employment-at-will doctrine, finding that an employee who suffers a retaliatory termination after an on-the-job injury, but before filing a workers' compensation claim, may now file a common-law tort claim for wrongful discharge in violation of Ohio public policy.

Background

The plaintiff was a machine worker who injured his back while disassembling a chop saw at work. He reported the injury to the company president, and, within one hour, he was terminated. The company president, according to the court's opinion, “did not give [plaintiff] a reason for the firing but did state that the firing was not because of [his] work ethic or job performance or because [he] had broken any work rule or company policy.” Following his termination, the plaintiff filed a lawsuit, alleging: (1) a statutory claim for unlawful termination in violation of the Ohio workers' compensation statute, R.C. 4123.90; and (2) a common-law tort claim for wrongful termination in violation of public policy.

Public Policy Exceptions and the Supreme Court's Decision

To prevail on a cause of action for wrongful termination in violation of public policy, a plaintiff must prove that: (1) a clear public policy exists as manifested in a state or federal constitution, statute, or administrative regulation, or in the common law (the “clarity element”); (2) dismissing employees under the circumstances presented would jeopardize the public policy (the “jeopardy element”); (3) the plaintiff's dismissal was motivated by conduct related to the public policy (the “causation element”); and (4)

the employer lacked an overriding legitimate business justification for the dismissal (the “overriding-justification element”). The first two elements are questions of law for the court, while the latter two elements are questions of fact for the finder of fact. On appeal from lower court rulings, the Ohio Supreme Court did not address the latter two elements concerning question of fact and focused on the legal questions presented in the first two elements.

The court found that the clarity element was satisfied by the Ohio workers’ compensation law, R.C. 4123.90, which prohibits retaliation against injured workers who have filed, instituted, or pursued a workers’ compensation claim. The statute is silent, however – and therefore does not expressly prohibit – retaliation against injured workers *before* they file, institute, or pursue a workers’ compensation claim. Therefore, the court determined, “a gap exists in the statute for conduct that occurs between the time immediately following an injury and the time in which a claim is filed.” Since the injury in *Sutton* occurred during that “gap,” the court found that the employee could not pursue a claim under R.C. 4123.90.

However, the court found that it was not the intention of the Ohio legislature to “leave a gap in protection during which time employers are permitted to retaliate against employees who might pursue workers’ compensation benefits.” As R.C. 4123.90 does not protect a worker during the “gap,” the court found that the statute “does not provide adequate remedies and thus the jeopardy element is satisfied.” Accordingly, the court recognized a public policy exception for workers terminated during the “gap” period, allowing them to pursue a common-law tort claim even though they cannot pursue the statutory claim.

Remedies Under the New Exception

The court next addressed the question of what relief is available to a plaintiff pursuing the public policy claim. Recognizing that the relief provided under the common law is greater than that available under the statute, the court further held that “the remedies available for the tort are limited to those provided by R.C. 4123.90,” which are reinstatement, back pay (offset by earnings, total temporary compensation and/or unemployment compensation) or lost wages, and attorneys’ fees. The court held that “Ohio’s public policy as established by the legislature is to limit remedies for retaliatory employment actions against injured employees to those listed in R.C. 4123.90.” To hold otherwise and to allow common-law remedies, the court reasoned, “would undermine the entire workers’ compensation scheme, purpose, and operation.”

Practical Effect of *Sutton*

This new exception to the at-will presumption may present many factual and legal issues for employers, especially as employees commonly are disciplined or terminated for dangerous work activity that results in injury. A termination following a work injury, regardless of fault, may now give rise to a common-law tort for wrongful termination in violation of public policy. Employers should continue to exercise careful judgment when terminating an employee injured at work by ensuring there is a documented, legitimate business reason for the termination and that they are consistent in their treatment of similarly-situated employees.

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