

Termination for Refusing to Take Workers' Comp. Drug Test Found Not Retaliatory

Labor & Employment Law Update

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Recently, the Federal Seventh Circuit Court of Appeals (Illinois, Wisconsin, and Indiana) affirmed summary judgment for the employer in a Workers' Compensation retaliation claim. *Phillips v. Continental Tire The Americas, LLC*, — F.3d —, 2014 WL 572339 (Feb. 14, 2014). Employer Continental Tires ("Continental") had a written substance abuse policy which required drug testing for several enumerated reasons, including initiation of a workers' compensation claim. The policy further provided that an employee's refusal to be tested was grounds for immediate suspension pending termination.

Twenty-two year veteran employee Jeff Phillips presented to Continental's health services to report numbing fingers and to initiate a workers' compensation claim. Phillips refused to be drug tested because he felt it was not necessary to initiate his claim. Phillips was terminated, though he ultimately received workers' compensation benefits.

The Seventh Circuit held that a workers' compensation claimant must affirmatively show that an adverse employment action was causally related to seeking of rights protected under the Illinois Workers' Compensation Act, and not merely that a discharge was connected the filing of a claim. Here Phillips failed to show the nexus between his protected rights and termination because:

- Continental had in place (in advance) a written substance abuse policy;
- Continental consistently enforced the written substance abuse policy;
- Continental discharged other employees who failed to submit to drug testing under the policy;
- Phillips testified at his deposition that he (i) was terminated for failing to submit to drug testing, (ii) had no evidence or information that there was a different reason for his termination, and (iii) believed he would still be employed had he submitted to drug testing; and
- Other Continental employees (including Phillips previously) had initiated workers' compensation claims and received benefits without being discharged.

Best Practices:

This case shows the importance of maintaining and enforcing written employment policies – including work rules and employment handbooks. Employers will want to be able to demonstrate that policies are administered evenly, especially when the result is an adverse employment action such as termination. Best practices include:

- (1) Create, implement, and update your substance abuse and drug testing policies: consider the impact of medical marijuana under the Compassionate Care Act (*eff.* 1/1/2014) and whether you should implement zero tolerance policies;
- (2) Consistently and evenly enforce the substance abuse policy (and all other employment policies);
- (3) In union settings, get the buy-in of labor for a proactively safe work environment;
- (4) When discharging or otherwise disciplining employees for violation of a company policy, be clear on the basis – do not apologize or add other reasons;
- (5) Demonstrate that similarly situated employees who complied with the legitimate employment policy were not adversely impacted (*e.g.*, workers' compensation claimants who submitted to a drug test received benefits under the Act and were not subjected to employment discipline so long as they tested clean); and
- (6) Maintain state-mandated workers' compensation insurance, and confirm with the carrier whose responsibility it is to initiate and pay for substance testing – be sure to share the test results with each other to the extent necessary and permissible.

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