

SMITH O'CALLAGHAN & WHITE
33 NORTH LA SALLE STREET
SUITE 3800
CHICAGO, ILLINOIS 60602

TELEPHONE (312) 419-1000 FACSIMILE (312) 419-1007 WEBSITE www.socw.com

**Seventh Circuit Court of Appeals
Strengthens Key Defense in Termination of
Employee with Workers' Compensation Injury**

On March 21, 2008, the Seventh Circuit Court of Appeals upheld the termination of an employee who exhausted his FMLA leave and whose continued absence due to a workplace injury violated his employer's attendance policy. In Dotson v. BRP US Inc., 520 F.3d 703 (7th Cir. 2008), the Seventh Circuit held that FMLA leave may run concurrently with an employee's workers' compensation absence, and an employer may lawfully terminate an employee after all available FMLA leave is used – subject to possible further protections under the ADA or state workers' compensation statutes.

The Dotson case strengthens a potential important defense for employers because of the unique circumstances in this case – the employee *had not been released* back to work from his on-the-job injury when he was terminated for absenteeism. Typically, in cases involving attendance policy violations, the employee is released back to work following a workplace injury, but fails to return and is subsequently terminated for absenteeism.

Key Facts and Points of Law

The employee suffered a compensable workplace injury and was unable to work for eight months. Although the employee was receiving workers' compensation benefits and had not yet been released back to work by his doctor, the employer terminated the employee, pursuant to its attendance policy, when the employee exhausted his twelve weeks of FMLA leave (which the employer ran concurrently with his workers' compensation absence).

The Seventh Circuit did not make new law by rejecting the employee's workers' compensation retaliation claim, but clarified existing law and addressed certain misconceptions about workers' compensation and the FMLA. In so doing, the Court strengthens the law for employers by permitting the termination of an employee with a workers' compensation injury on absentee/attendance grounds, where the employee has exhausted FMLA leave but has not yet been released to work at the time of termination.

Implications for Employers

- FMLA regulations allow employers to designate an absence as FMLA leave and run such leave simultaneously with the time an employee is off work for and collecting workers' compensation, provided they give the employee notice that the absence is being designated as FMLA leave and running concurrently with the workers' compensation absence. 29 C.F.R. §§ 825.702(d)(2); 825.207(d)(2).

- FMLA regulations further provide: “If the employee has been on a workers’ compensation absence during which FMLA leave has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer has the protections of the FMLA and must look to the workers’ compensation statute or ADA for any relief or protections.” 29 C.F.R. § 825.216(d).
- In the Dotson case, the employee’s leave was only protected by the FMLA. The Seventh Circuit observed that the Illinois Workers’ Compensation Act did not provide for a leave of absence, but only compensation for a work-related injury. The employee did not assert an ADA claim, presumably because his impairment was temporary and not covered by the ADA. Accordingly, under Illinois law, the Seventh Circuit found that the employer could lawfully terminate the employee for excessive absenteeism.
- In Dotson, the Seventh Circuit emphasized that there was no evidence of retaliation because the employer consistently enforced a uniform and pre-existing attendance policy which provided, in writing, that any employee absent more than 12 weeks in a year would be automatically terminated. Accordingly, the employer had a legitimate basis for terminating the employee under the attendance policy which left no discretion to the decision-maker.
- *Caveat*: the defense asserted in the Dotson case is not an absolute defense that will always justify terminating an employee who is injured at work and exhausts FMLA leave. Employers must examine the specific circumstances of each case, including, but not limited to, provisions of the employer’s attendance policy, its past application of FMLA leave, notice to the employee on how the leave is being treated and other protections the employee may have under the ADA, workers’ compensation statutes and other federal, state or local laws.

Smith O’Callaghan & White

www.socw.com

Terry J. Smith

Robert R. Duda Jr.

Maureen A. Quann

terry.smith@socw.com

robert.duda@socw.com

maureen.quann@socw.com

May 15, 2008

This is an update provided for informational purposes to our clients and friends.

©2008 Smith O’Callaghan & White