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RETALIATORY AND WRONGFUL DISCHARGE CLAIMS

I. L.R.S. 23§1361 Unjust Dismissal Claims

The purpose of a statute prohibiting unlawful discharge in workers' compensation cases is to allow employees to exercise their right to workers' compensation benefits without fear of retaliatory action by their employers and to prevent unjust dismissals. *See Sampson v. Wendy's Management, Inc.*, 593 So. 2d 336 (1992). L.R.S. 23§1361 specifically prohibits this unlawful discrimination. Pursuant to L.R.S. 23§1361(A), no person, firm or corporation shall refuse to employ any applicant for employment because of such applicant having asserted a claim for workers' compensation benefits under the provisions of this Chapter or under the law of any state or of the United States. Nothing in this Section shall require a person to employ an applicant who does not meet the qualifications of the position sought. (B) No person shall discharge an employee from employment because of said employee having asserted a claim for benefits under the provisions of this Chapter or under the law of any state or of the United States. Nothing in this Chapter shall prohibit an employer from discharging an employee who because of injury can no longer perform the duties of his employment.

II. Burden of Proof

Louisiana jurisprudence has held that termination because of the employee's inability to work due to injury is not retaliatory. Thus, the plurality of employees that appealed 23§1361 claims in the past two decades have had difficulty meeting their evidentiary burden. This is a result of Louisiana courts strictly construing L.R.S. 23§1361. Additionally, the appellate courts have established the standard that “the employee must prove, by a preponderance of the evidence, that he was terminated because he asserted a claim for workers' compensation benefits.” *Graham v. Amberg Trucking, Inc.*, 969 So. 2d 718, 721 (La. Ct. App. 2007) (citing *Penn v. La.-1 Gaming*, 954 So. 2d 925. (La. Ct. App. 2007)). The employee must meet this burden by, “presenting direct evidence that the assertion of a workers' compensation claim was the reason for the discharge or presenting circumstantial evidence sufficient to establish more probable than not that the reason for the discharge was the assertion of the workers' compensation claim.” *Chivleatto v. Sportsman's Cove, Inc.*, 907, So. 2d 815, 818 (La Ct. App. 2005); *Kendrick v. Hercules Concrete Pumping Services of Mississippi, Inc.*, 216 So. 3d 261, 265-66 (La. Ct. App. 2017). If the employer gives a non-discriminatory reason for the discharge, and presents sufficient evidence to prove more probable than not that the real reason for the employee's discharge was something other than the assertion of the workers' compensation claim, the plaintiff is precluded from recovery. *Nicholson*, 781 So. 2d at 669. If the employer offers another reason for firing the workers' compensation claimant, the trial court must ascertain the employer's true reason or motive based on the facts presented. *Id.* Therefore, an employer cannot circumvent 23§1361 by stretching the facts out of context or inventing an excuse for firing the claimant. See *Hooker*, 870 So. 2d at 1136.

III. Damages and Penalties Awarded

Pursuant to L.R.S 23§1361(C) any person who has been denied employment or discharged from employment in violation of the provisions of this Section shall be entitled to recover from the employer or prospective employer who has violated the provisions of this Section a civil penalty which shall be the equivalent of the amount the employee would have earned but for the discrimination based upon the starting salary of the position sought or the earnings of the employee at the time of the discharge, as the case may be, but not more than one year's earnings, together with reasonable attorney's fees and court costs. See *Turner v. Winn Dixie Louisiana, Inc.*, 474 So. 2d 966, 970 (La. Ct. App. 1984) (holding that evidence was sufficient to support trial court's conclusion that employee was discharged because of employee's workers' compensation claim, rather than employee's failure to report to employer and failure to keep employer apprised of employee's physical condition; damages awarded to employee equal to one year's salary from employment with employer were not excessive, even though employee had earnings from other employment; and the award of \$5,000 for attorney's fees was not abuse of trial court's discretion); *Smith v. Holloway Sportswear, Inc.*, 704 So. 2d 420, 423-24 (La. Ct. App. 1997) (holding that \$7,500 was more appropriate than the \$3,500 awarded in attorney's fees by the trial court was insufficient because the claimants attorney actively represented her in pursuing the claim for approximately seven years, prevailed in both the lower court and appellate court on the issue of wrongful termination, handled the case at every stage of the proceedings, conducted numerous depositions and engaged in full discovery).

In considering reasonable attorney fees the Court must first consider these factors in awarding attorney fees, namely: (1) the ultimate result obtained; (2) responsibility incurred; (3)

the importance of the litigation; (4) the amount involved; (5) the extent and character of the labor performed; (6) the legal knowledge and attainment and skill of the attorney; (7) the number of appearances made; (8) the intricacies of the facts and law involved; (9) the diligence and skill of counsel; and (10) the Court's own knowledge. *State of Louisiana, Dept. of Transportation & Development v. Tynes*, 433 So. 2d 809 (La. Ct. App. 1983).

Lastly, pursuant to L.R.S 23§1361(E), any party found by a workers' compensation judge or a court of competent jurisdiction to have brought a frivolous claim under this Section shall be held responsible for reasonable damages incurred as a result of this claim, including reasonable attorney's fees and court costs.”