Legal Opinion Letter

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202.588.0302 wlf.org

Third Circuit Applies Narrow Reading of the OSH Act's Private Right of Action

by Megan S. Shaked and Eric J. Conn

Under the Occupational Safety and Health Act of 1970 (the OSH Act), the Occupational Safety and Health Administration (OSHA) has exclusive jurisdiction for regulating safety in US workplaces. The OSH Act does not provide employees or other interested parties with a private right of action to enforce the law against employers, though it does allow employees to sue OSHA for failure to address workplace safety concerns under very limited circumstances.

In a case of first impression, the United States Court of Appeals for the Third Circuit in *Doe v. Scalia* agreed with OSHA's narrow reading of the OSH Act, holding that the OSH Act's limited private right of action does not continue after the Department of Labor completes its enforcement proceedings.

Background

Instead of providing a broad right to sue OSHA, the OSH Act creates an administrative enforcement process that considers employee complaints about workplace safety. Employees who observe workplace safety violations may request an OSHA inspection by giving notice to the Secretary of Labor. OSHA then makes the final determination on whether reasonable grounds support the existence of a violation or danger. In addition, the OSH Act authorizes the agency to issue citations for violations of the law or OSHA regulations that occurred within the previous six months.

When workplace hazards may require more immediate attention because they represent an imminent risk of death or serious harm, Section 662 of the OSH Act provides OSHA with expedited procedures for remedying such workplace hazards. Specifically, pursuant to Section 662(a), the Secretary of Labor, through OSHA, may seek injunctive relief in US District Courts against an employer to address the imminent hazard or cease operations; i.e., to restrain any workplace hazards "which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided." However, District Courts have jurisdiction only pending the outcome of an enforcement proceeding.

Only in these circumstances—where the risk of danger in the workplace is "imminent"—can an employee attempt to force their employers' and OSHA's hand by seeking a writ of mandamus against the Secretary of Labor to address "imminent danger[s]" if OSHA declines to act. Specifically, Section 662(d) of the OSH Act provides a limited private right of action for employees to compel the Secretary to seek relief should OSHA "arbitrarily or capriciously fail[] to seek relief" on its own pursuant to Section 662(a).

Megan S. Shaked is an associate in the San Francisco, CA office of Conn Maciel Carrey LLP, and **Eric J. Conn** is a founding partner of the firm and Chair of its national OSHA • Workplace Safety Practice Group.

The Litigation in *Doe v. Scalia*

The plaintiffs in the underlying matter were employees at the Maid-Rite Specialty Foods meatpacking plant. The plaintiffs argued that OSHA failed to compel the employer to remedy inadequate COVID-19 mitigation measures. The plaintiffs-employees sent OSHA an inspection request asking for an investigation based on conditions that posed a purported "imminent danger" to plant employees. OSHA notified the employer of the inspection request and asked for a written response within a week. Plaintiffs continued to send letters to OSHA expressing their dissatisfaction with the agency's investigation and the lack of changes at the plant. Following an announced inspection by OSHA at the plant itself, OSHA determined that conditions at the plant did not constitute an imminent danger. OSHA thus did not seek expedited relief permitted under Section 662.

The employees then filed a Complaint and Emergency Petition for Emergency Mandamus Relief against the Secretary of Labor and OSHA seeking relief under section 662(d). Plaintiffs alleged that OSHA failed to take action to address insufficient COVID-19 prevention procedures at the plant. Meanwhile, OSHA concluded its enforcement proceeding, declining to issue any citations.

The District Court Dismissed Plaintiffs' Case

The Middle District of Pennsylvania dismissed plaintiffs' case under Section 662(d). Since the OSHA inspector did not find an imminent danger in the plant and did not recommend that the Secretary take any action, the District Court found that there was no "Secretarial decision" to review and the court therefore lacked jurisdiction over the employees' claims.

The Third Circuit Affirmed the Dismissal

The Third Circuit affirmed the order dismissing plaintiffs' claim, ultimately concluding "that the private right embodied in § 662(d) is a narrow one, limited to combating imminent workplace dangers that cannot await the conclusion of OSHA's enforcement proceedings." The parties agreed that injunctive relief under Section 662 was unavailable because the statutory language is clear that the Secretary may not seek emergency injunctive relief after OSHA has completed its standard enforcement proceedings. Plaintiffs argued, however, that Section 662(d) authorizes them to seek "such further relief as may be appropriate" even after OSHA completes its enforcement proceedings. The Third Circuit rejected plaintiffs' argument and concluded that the Section 662(d) private right of action expires once OSHA completes its enforcement proceeding.

The Third Circuit reasoned that "[Section] 662 makes manifest that it is concerned with 'imminent dangers' that might exist 'pending the outcome of an enforcement proceeding.... This evinces clear congressional intent to establish in § 662 a limited mechanism to remedy imminent dangers that cannot await the conclusion of OSHA's standard enforcement process."

Takeaways

The private right of action under the OSH Act thus remains an extremely limited right, available only during the pendency of an enforcement proceeding and only where the Secretary has arbitrarily and capriciously rejected OSHA's recommendation to take legal action upon a finding of imminent danger in the workplace.

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