IN THE SUPREME COURT OF OHIO

SHELLEY BICKERS,	:	**CASE NO. 06-0617**
Plaintiff/Appellee,	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District Case No. C-40342
vs.	:	
WESTERN SOUTHERN LIFE INSURANCE COMPANY, INC.,	:	
Defendant/Appellant.	:	

MERIT BRIEF OF AMICUS CURIAE, THE OHIO EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF/APPELLEE SHELLEY BICKERS

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FILED
OCT 30 2006
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae, The Ohio Employment Lawyers Association ("OELA"), has participated in many of the most important judicial proceedings affecting Ohio's laws governing discrimination and employment.[1] Collectively, OELA members have a great deal of experience and knowledge related to the vital role that the Workers' Compensation system plays in promoting workplace safety as well as family well-being. This Court's decision in *Coolidge v. Riverdale Local School Dist.* (2003), 100 Ohio St.3d 141, recognized that neither the General

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[1] *See, e.g.*, *Kish v. Akron* (2006), 109 Ohio St.3d 162, 846 N.E.2d 811; *Williams v. Akron* (2005), 107 Ohio St.3d 203, 837 N.E.2d 1169; *Wiles v. Medina Auto Parts* (2002), 96 Ohio St.3d 240, 773 N.E.2d 526; *Smith v. Friendship Village of Dublin, Ohio, Inc.*, (2001) 751 N.E.2d 1010; *Gliner v. Saint-Gobain Norton Indus. Ceramics Corp.*, 89 Ohio St.3d 414 (2000); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999); *Genaro v. Cent. Transport, Inc.*, 84 Ohio St.3d 293, 703 N.E.2d 782 (1999); *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3134, 138; *Byrnes v. LCI Communication Holdings Co.* (1996), 77 Ohio St.3d 125; *Fox v. City of Bowling Green* (1996), 76 Ohio St.3d 534, *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578; *Ohio Civ. Rights Comm. v. Case Western Reserve University* (1996), 76 Ohio St.3d 168, 173, 666 N.E.2d 1376, 1382; *Hood v. Diamond Products, Inc.* (1996), 74 Ohio St.3d 298, 301, 658 N.E.2d 738, 741; *Wright v. Honda of America Mfg., Inc.* (1995), 73 Ohio St.3d 571; *Haynes v. Zoological Soc'y of Cincinnati* (1995), 73 Ohio St.3d 245; *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St.3d 281, 281; *Ohio Civil Rights Commission v. Ingram* (1994), 69 Ohio St.3d 89 ; *Bellian v. Bicron Corp.*(1993), 67 Ohio St.3d 1435 (order granting leave to participate as *amicus curiae*); *Burnworth v. Ohio Bell Telephone Co.* (1993), 67 Ohio St.3d 1480 (same); *Ricciardi v. Babcock & Wilcox Co.* (1993), 66 Ohio St.3d 1490 (same); *Schwartz v. Comcorp, Inc.* (1993), 66 Ohio St.3d 1468 (same); *Elek v. Huntington National Bank* (1991), 60 Ohio St.3d 135, 573 N.E.2d 1056; *Baker v. Pease Co.* (1991), 60 Ohio St.3d 703 (order granting leave to participate as *amicus curiae*); *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143; *Kerans v. Porter Paint Co.* (1991), 58 Ohio St.3d 709 (order granting leave to participate as *amicus curiae*); *Little Forest Medical Center of Akron v. Ohio Civil Rights Commission* (1991), 57 Ohio St.3d 704 (same); *Manning v. Ohio State Library Board* (1991), 57 Ohio St.3d 713 (same); *Masek v. Reliance Electric Corp.*(1991), 57 Ohio St.3d 723 (same); *Kohmescher v. Kroger Co.*(1991), 61 Ohio St.3d 501; *Russ v. TRW, Inc.* (1990), 51 Ohio St.3d 708 (order granting leave to participate as *amicus curiae*); *Greeley v. Miami Valley Maintenance Contractors, Inc.*(1990), 49 Ohio St.3d 228; *Parsons v. Denny's Restaurants* (1989), 44 Ohio St.3d 704 (same); *Karnes v. Doctors Hospital* (1989), 44 Ohio St.3d 710 (order granting leave to participate as *amicus curiae*); *Helmick v. Cincinnati Word Processing, Inc.* (1989), 41 Ohio St.3d 719 (same).

Assembly nor the Ohio Constitution was intended to or should force employees who qualify for temporary total disability to accept compensation at the risk of continued employment. As this Court so elegantly explained in its unanimous decision, allowing injured workers receiving temporary total disability to be fired because of injury related absences undermines the policies which are the foundation of the entire workers' compensation system. Because this amicus believes this Court should stand by its decision in *Coolidge* and refuse to create favored and disfavored classes of workers compensation claimants by parceling job protection to select public employees as suggested by appellant, this brief is being submitted to the Court.

OELA is a state-wide professional membership organization comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have denied equal opportunity or fairness in the workplace. OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

II. STATEMENT OF THE CASE AND FACTS

Amicus Curiae adopt the statement of the case and facts set forth in the merit brief of Appellee Bickers.

III. LAW AND ARGUMENT

A. <u>Proposition of Law No. 1</u>: *Coolidge* Necessarily Applies to All Disabled Employees Receiving TTD Benefits under R.C. 4123.56 of the Workers Compensation System, Not Merely to Disabled Public Teachers.

1. R.C. 3319.16 has no relevance to the rights and remedies conferred upon Bickers, as set forth in *Coolidge.*

In *Coolidge v. Riverdale Local School Dist.* (2003), 100 Ohio St.3d 141, 2003 Ohio 5357, this Court's unanimous and unequivocal syllabus reads in its entirety:

> An employee who is receiving temporary total disability compensation pursuant to *R.C. 4123.56* may not be discharged solely on the basis of absenteeism or inability to work, when the absence or inability to work is directly related to an allowed condition.

Notwithstanding the clarity of this sentence and its application to all Ohio employees, Appellant Western Southern and its *amicus curiae* urge this to Court limit *Coolidge* to public teachers subject to R.C. 3319.16. They urge this Court this reinterpretation of *Coolidge* based on the claim that coverage of non-public employees will wreak "havoc" on employers. As will be discussed below, this Court, in *Coolidge,* has already addressed and rejected this contention. In essence, they are arguing that public-policy *Greeley* protections be afforded to selected *non-at-will* employees but be denied *at-will* employees wrongfully discharged in violation of the Workers Compensation Act. This is an absurd reading of *Coolidge.* Indeed, the only reason the Court discussed R.C. 3319.16 at all was in the context of affording public policy/wrongful discharge protection under the Act to *non*-at-will employees who otherwise would not be

protected under *Greeley*.[2]

In other words, *Coolidge* shaped a public-policy-based remedy and then expressly provided an *exception to the requirement of at-will employment* for wrongful discharge claims because the underlying public policy was so compelling. *Id.* at P. 19-20. In particular, the Court emphatically stated that it would be against public policy to afford *lesser* protections to Coolidge than those afforded other (at-will) employees likewise subject to the protections of the Act. *Id.*, at P. 20-21. Coolidge's status as a teacher subject to 3319.16 was otherwise irrelevant to the discussion.

The Court's intent could not be more clear. Nothing in the opinion limits the holding to public teachers or public employees working under contract or subject to R.C. 3319.16. Rather, in the Court's own words, all of the employees under the Workers Compensation system are similarly situated:

> [W]orkers' compensation claimants are not similarly situated to other employees precisely because they are workers' compensation claimants. By virtue of sustaining a work-connected injury, the workers' compensation claimant enters a system "in which employers and employees exchange their respective common-law rights and duties for a more certain and uniform set of statutory

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[2] *Coolidge* did not cite *Haynes v. Zoological Society of Cincinnati* (1995), 73 Ohio St.3d 254 directly, but implied the public policy underlying the Act was so fundamental and essential that termination of the disabled employee pursuant to an internal policy could never be "just cause" or permitted under *any* scenario. The breadth of *Coolidge* is apparent for the very reason that *Haynes* does not afford public policy protection against wrongful discharge where there is any sort of collective bargaining agreement or just-cause protection under a statute or otherwise. Because of the constitutional dimensions of the Workers Compensation system and the Act creating it, this Court clearly concluded that the *Haynes* limitation on public-policy wrongful-discharge claims was in conflict with the Act's purpose of assuring TTD and employment. As this Court explained in *Coolidge*, "The system *redefines* the employment relationship with respect to injury-induced or disability-related discharges." *Coolidge* at P. 45 (emphasis added). This made *Haynes* inapposite.

> benefits and obligations." This system redefines the employment relationship with respect to injury-induced or disability- related discharges. Under this system, the workers' compensation claimant is entitled to whatever protection is accorded injured workers by the provisions and policies of the Workers' Compensation Act, ***regardless of whether comparable protections are provided to employees by other bodies of law.*** However "neutral" or "evenhanded" an employer's absenteeism policy may be, it cannot override the statutory protections.

Coolidge, 100 Ohio St. 3d at 150 (emphasis added and citations omitted).

The Court clarified with crystal precision the relative statuses of both employees and employers under the Workers Compensation system. Virtually all are subject to the system. All have entered a realm where rights and duties have been altered and shaped into a new relationship. This altered relationship necessarily includes *employers*, regardless of their public or private nature; they, too, are similarly situated with one another. *Id. See, also,* R.C. 4123.01 (setting forth the definitions of the respective members and also makes no differentiation as to types of employment and includes all public employers). No employee or employer under the system enjoys elevated privileges – or lesser protections – than any other. Justice under the Act is blind to the public or private nature of the employment involved in the claim or any public-policy violation based on it. This is precisely because all parties have given up certain rights in exchange for the blanket protections they gain under the system – and the Ohio General Assembly requires further that courts construe all laws in favor of the employee *over* the interests of the employer. See R.C. 4123.95.

In short, the unanimous opinion in *Coolidge* with regard to whom it applies is definitive and complete; there is no legitimate argument for Appellant's or its *amicus*' desired modification of *Coolidge*, and certainly no argument for their view being a reasonable interpretation of

existing law. *Coolidge* applies without limits to every employee in the Workers Compensation system who receives or has received TTD compensation. *Id.*, 100 Ohio St. 3d at 150, P. 45.

2. The proposition forwarded by Appellant and its *amicus* would violate equal protection.

Even if one were to ignore the clarity of *Coolidge*, Appellant's and its *amicus*' arguments are incongruous for they would violate equal protection by favoring one employee over another when both have the identical and legally defined *disability status* and come under the same umbrella of the Workers Compensation Act. The proposition that this Court can properly distinguish between recipients of TTD benefits under R.C. 4123.56 urges a direct violation of equal protection. Its implementation would be patently unconstitutional.

This Court already has held that to create distinctions and subcategories within the Workers Compensation structure, favoring or benefitting some participants within the same category to the detriment of others, is a violation of the Constitution and equal protection of the law. *State ex rel. Nyitray v. Industrial Com. of Ohio* (1983), 2 Ohio St. 3d 173, 175-176.

> The limitations placed upon governmental action by the Equal Protection Clauses are essentially the same. Equal protection of the laws requires the existence of reasonable grounds for making a distinction between those within and those outside a designated class. The "reasonableness" of a statutory classification is dependent upon the purpose of the Act.
>
> Ohio's workers' compensation system is predicated upon Section 35, Article II of the Ohio Constitution, which states that the purpose of workers' compensation is to compensate "workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment * * *."
>
> Clearly, the purpose of R.C. 4123.60 is to fulfill this objective of compensating dependents. However, the statutory classification which exists in R.C. 4123.60 as interpreted by Spiker precludes

> the class represented by appellant. . . . We view this classification which denies dependents of workers who died from work-related causes from obtaining compensation due, while paying the dependents of workers who died from other causes, as inherently unfair and contrary to the purpose of compensating dependents stated in the Constitution.

Id., 2 Ohio St.3d 175-176 (numerous citations omitted). *See, also, Kinney v. Kaiser Aluminum & Chemical Corp.* (1975), 41 Ohio St. 2d, 120, 124 (similar refusal to impose discriminatory distinction). Where a classification unreasonably favors one over another in the same class, then it by definition is a constitutional violation. *Id.*

Here, as clear under *Coolidge* and under the Act itself, the purpose of the Workers Compensation Act is to compensate workers injured on the job in accord with Ohio's Constitution. Section 4123.56, under which the rights of both Bickers and Coolidge originated, is to compensate disabled persons receiving TTD benefits. See *Coolidge* 100 Ohio St. 3d at 150, P. 44 ("Considering that the statute [4123.56] is designed to provide the injured worker solely *because of the disability* for which the employee is being compensated.") (emphasis added).

The relevant class of employees comprises "temporarily disabled persons"; it is not a class based on a different status derived outside of the Act or outside of R.C. 4123.56. Therefore, to carve out and benefit only certain public employees subject to unrelated "just cause" statutes would be a clear violation of equal protection. It would unreasonably discriminate between identically situated, disabled employees covered under the Act by virtue of their particular employer and unrelated statutory provisions. Such a distinction could not legally be upheld even if this *was* what was intended in *Coolidge* (which it clearly was not).

Moreover, it would also unfairly discriminate against *employers* by favoring one category

over others when the law applies equally to all. The Workers Compensation Act must apply regardless of public or private employment status. See R.C. 4123.01, the Act's definitions section, which includes both public and private employers and employees *without distinction.* The General Assembly saw no reason to provide different protections to certain classes subject to R.C. 4123.56; this Court has not done so, either, and should not do so now.

In fact, this Court should apply strict scrutiny to the Appellant's and its *amicus'* attempt to deny *Coolidge* protections to the majority of recipients of TTD benefits (at-will employees in the private sector) while granting *Coolidge* protection from discharge to a small segment of employees (select public employees, including public school teachers). This Court has held that strict scrutiny applies when similarly situated individuals are treated differently by government action affecting a fundamental right. See *Sorrell v. Thivener* (1994), 69 Ohio St.3d 415. This Court has repeatedly underscored the fundamental rights and values encompassed in Section 35, Article II of the Ohio Constitution and in Chapters 4121 and 4123. Interpreting the worker compensation laws to protect some disabled employees receiving TDD protection from discharges for injury-related absences while denying that same protection to employees receiving TTD benefits for the same injuries for distinctions unrelated to their workplace injuries serves no compelling state interest and, actually, frustrates the very purpose of workers compensation laws.

In short, Appellant's and *amicus'* proposition of law cannot be adopted. The holding in *Coolidge* and public policy necessarily include all employees subject to TTD compensation under Ohio's Workers Compensation Act, regardless of their at-will or non-at-will status.

B. Proposition of Law No. 2: *Coolidge* set forth an independent cause of action based on the clear public policy embedded in the Workers Compensation Act, and neither the claim nor remedy is dependent on R.C. 4123.90.

1. This Court has both the authority and duty to fashion a remedy based on public policy when necessary to effectuate legislative and constitutional purpose.

The *Bickers* court properly rejected Western Southern's attempt to bloat R.C. 4123.90 into including *Coolidge*-style claims brought by temporarily disabled employees who are fired based on a non-punitive, facially neutral policy. The public policy relied on in *Coolidge* derives from the purposes of the Workers Compensation Act itself, and the mandates of R.C. 4123.56.

The *Coolidge* Court unanimously held that it would be unreasonable to permit employers to fire disabled employees using the public system designed to keep them employed through the duration of their involuntary leave from work. It defeats the very purpose of the entire Act and, specifically, R.C. 4123.56 under which falls the class of disabled claimants including Bickers. The Court also found that such protections were part and parcel implicit in the entire Workers Compensation system even absent a specific provision encompassing this protection. The Court made this determination, concluding it was required as a matter of compelling public policy., citing *Greeley* and other jurisprudence.[3]

At least two courts have interpreted *Coolidge* as merely extending the coverage of the non-retaliation provision of R.C. 4123.90, despite the fact that no retaliatory motive is required

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[3] Incredibly, *amicus* states (at 7) "Notably absent from *Coolidge*, however, is any discussion of *Greeley* or of the four-step analysis of wrongful discharge public policy claims established in *Painter* and *Collins*." Yet *Coolidge*'s whole analysis has to do with wrongful discharge and public policy – and the decision directly cited to prior authorities, including *Greeley* and *Collins*, dealing with wrongful-discharge public-policy claims. See *Id.*, 100 Ohio St.3d 144, P. 19.

under *Coolidge*. See *Brooks v. Qualchoice, Inc.*, No. 85692, 2005-Ohio-5136 at Para. 11; *Kusens v. Pascal Co.*(2006), 448 F.3d 349, 365 (6th Cir.) (same). Both decisions discussed *Coolidge* in dicta. In *Brooks,* for example, the court's actual holding was that *Coolidge* did not apply:

> [W]hen Brooks was terminated by QualChoice, she was not absent from work on a permissible TTD claim through workers' compensation. Therefore, Brooks' reliance on *Coolidge, supra*, is misplaced, as she was not on an allowed claim for TTD at the time of her termination.

Id. at P. 10. Moreover, neither decision offered any substantive analysis of *Coolidge*.

Other courts, including the First District in this case, have rejected this interpretation, finding instead that the right to be protected from termination for absenteeism due to a temporary total disability is embedded more broadly in the Act itself, and in R.C. 4123.56 and R.C. 4123.95, and that the discussion of R.C. 4123.90 in *Coolidge* was by way of broadly showing legislative intent under the Act to protect the worker out on TTD. See *Bickers v. Western Southern Life Ins. Co., Inc.* No. C-040342, 2006-Ohio-572, Para. 10 (1st Dist.); *Hall v. ITT Automotive* (2005), 362 F.Supp. 2d 952, 962 (N.D. Ohio); *Welty v. Honda of Am. Mfg.* (2005), 411 F.Supp.2d 824 (S.D. Ohio); *Woody v. Sears, Roebuck & Co.,* (S.D. Ohio 2006), Unrep. No. C-3-05-368, 2006 LEXIS 36333. As such, there is a split of authority requiring this Court's input.

Even a cursory reading of the briefs of Appellant and its *amicus* reveals their circular reasoning: *Coolidge* cannot have intended to be rooted in public policy because it applies to non-at-will employees; and because *Greeley* involves only at-will employees *Coolidge* cannot possibly envelope a public policy issue. But, as argued *supra,* this belies the clear language in

Coolidge holding that *all* workers subject to R.C. 4123.56 are similarly situated, applying this public-policy remedy to even non-at-will employees because their status, like those of at-will employees is altered by the system itself.

In holding that a wrongful discharge claim will lie, this Court was necessarily recognizing that there was sufficient clarity of public policy embedded in the Act (and not solely in R.C. 4123.90) to prohibit discharge for absenteeism and likewise finding that the public policy would be jeopardized if certain aggrieved employees were foreclosed from having an enforcement vehicle to protect those rights. Had the Court intended to rewrite R.C. 4123.90, it would have simply said, in effect, "The coverage of 4123.90 is hereby extended to include employees fired without retaliatory motive, as well as those fired with retaliatory motive."

The Court did not do so. Instead, it engaged – unanimously – in an elaborate and compelling analysis of the purposes and public policy behind the Act, the disabled status of employees receiving TTD compensation, and that termination pursuant to an internal attendance policy while the employee was disabled was necessarily a wrongful discharge. Indeed, this Court expressly acknowledged that there need be no motivation at all in the employer's mind for the termination to be unlawful. *Coolidge* at P. 25 ("This court has never decided whether discharges for absenteeism caused by allowed workers' compensation injuries are violative of public policy in the absence of retaliatory motive."). The decision provides a required exception to the employer's internal policies and outside contracts just as strongly as it provides an exception to employment at will under *Greeley*.

2. Section 4123.90 is unambiguous and limited to intentional, retaliatory conduct.

While Section 4123.90 of the Revised Code stands the for proposition that workers asserting their rights under the Workers Compensation Act are protected, the statute is limited to retaliatory or punitive (i.e., intentional) conduct that falls under the rubric of 4123.90 and its attendant required punitive motivation. It would be error to expand the unambiguous language of R.C. 4123.90 to include all potential common-law public policy violations of the Act; this would be a codification of the common law in *Coolidge* where it not only is unnecessary (given that employees may rely directly upon common law for their claims or non-retaliatory unlawful firing) but also belies the General Assembly's requirement of retaliatory intent ("No employer shall discharge, demote, reassign, or take any punitive action against any employee *because* the employee filed a claim....") (emphasis added). This is why the Court stepped in to recognize a public policy violation in the first place.

As discussed above, *Coolidge* essentially recognized that termination of a worker, necessarily absent from work due to an on-the-job injury, is based on the worker's *status* as being temporarily disabled. The source of that public policy derives from the right to benefits, including lost wages, under the Act itself and not solely from R.C. 4123.90 but rather from the Act and R.C. 4123.56. *Id.* It presumes that the disabled worker has no control over being absent or violating any attendance policy:

> This court has time and again reiterated that the basic purpose of TTD compensation is to compensate an injure employee for the loss of earnings that he or she incurs while the injury heals. . . . A temporarily and totally disabled employee is by definition physically unable to perform the duties of his or her former position of employment. Considering that the statute [4123.56] is

> designed to provide the injured worker **solely *because of the disability*** for which the employee is being compensated.

Id. at P. 44 (emphasis added and citations omitted). And at P. 18 (emphasis added):

> The overriding issue in this case is whether public policy embodied in the Workers Compensation Act protects an employee who is receiving TTD compensation from being discharged **solely because of the disabling effects of the allowed injury, that is, absenteeism and inability to work.** The courts below have avoided this question by either deciding the cause on alternate grounds or completely ignoring the fact that Coolidge was discharged while suffering from a compensable disability. **However, there is no principle of judicial restraint that requires courts to refrain from deciding public policy questions.**

The Court's choice of words is not accidental: the issue involves the Act as a *whole*. The basis for discharge under *Coolidge* is *solely* because of the disabling effects of the injury; the employer's intent is irrelevant. The Court invoked its power to decide *public policy* questions – not to simply interpret an existing and unambiguous statute. Indeed, the opinion discusses the "Act" or "system" as a whole 20 times; R.C. 4123.90 is mentioned only six times – its value is for analogy only.

Notably, just as there is no principle of judicial restraint forbidding a court to "decide public policy questions," there is no principle of legislative restraint that forbids the legislature from overruling judicial decisions it disagrees with. Three years after the *Coolidge* decision, Ohio's General Assembly (effective June 30, 2006) overhauled the Workers Compensation Act, including adding to 4123.56. *Coolidge* was not superseded by any statute; nor was R.C. 4123.90 rewritten to include *Coolidge*-style claims. Likewise, the requirement of liberal construction of

the entire Act remains unaltered. This is tacit agreement with the Court's considered opinion applying public policy within the Act consistent with its purpose.

Moreover, unlike the situation in *Coolidge* and the instant case, R.C. 4123.90 applies to all persons participating in the system whether disabled, or on TTD, or not. In other words, disability status or the receipt of TTD benefits is not a prerequisite under R.C. 4123.90. It affords both participation- and opposition- clause protections under the Act, regardless of whether or not the protected individual is even disabled or entitled to benefits. It is *irrelevant* to actual disabled status or being absent from work because of such status, and is intended solely to prohibit purposeful, retaliatory behavior. In this respect, then, R.C. 4123.90 is very similar to R.C. 4112.02(J) than to the common-law situation described in *Coolidge* and present here.

Indeed, Ohio courts continue to cling to the requirement of proving retaliation through the familiar burden-shifting analysis (assertion, legitimate reason for termination, pretext) on actions brought *solely* under 4123.90. *See, e.g., Bowers v. Swagelok Co.* 2006-Ohio-3605 (8th Dist) (finding discharge pursuant to absentee policy for disabled person not receiving TTD compensation was not actionable because the employer offered a neutral, non-retaliatory motive); *Rollison v. Ball* 2006-Ohio-5153 Para. 18-19 (3rd Dist.) (employee who files directly pursuant to R.C. 4123.90 must prove retaliatory intent and facially neutral application of absentee policy defeats such intent). Simply put, R.C. 4123.90 does not include actions based on an employer's application of a facially neutral attendance policy equally to all employees.

In short, a claimant in Ohio must invoke R.C. 4123.56, the Act as a whole, and *Coolidge* in order to be protected when she is fired because of her disability status and involuntary absence from work. *Coolidge* acknowledged separate sources of public policy protections, recognizing

the need to supply an interstitial gap for a class of persons who had *rights* but no existing *remedy*. *See, also,* discussion in *Dunwoody v. Handskill Corp.* (2003), 185 Ore. App. 605, 613 (Or. Ct. App.) (explaining purpose of requiring wrongful discharge protection where no or inadequate remedies exist to cover an "interstitial" gap); Section 16, Article I of the Ohio Constitution, which provides that every person, for an injury done, "shall have remedy by due course of law."

Nor did this Court's unanimous holding mean that the "Huns are over the wall" or that the employer's interests are paramount, as Appellant Western Southern and its *amicus* are arguing. This Court already addressed this when it stated:

> [T]he argument that employers should not be required to treat a workers' compensation claimant more advantageously than other absent workers may well suffice as a galvanizing slogan, but it has no value in the present inquiry. To complete the analogy to discrimination and equal protection law, workers' compensation claimants are not similarly situated to other employees precisely because they are workers' compensation claimants.

Id., 100 Ohio St. 3d at 150, P. 45.[4]

Moreover, it is the express intent of the legislature that the economic interests of the employer be subjugated to the rights and protections of employees injured in the act of performing services for them. See R.C. 4123.95. This is particularly true because, as the Court recognized in P. 45 of *Coolidge*, employees are giving up rights to sue the employer outright for injuries; this in turn benefits the employer. An employer to try to take additional advantage of

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[4] Indeed, it is undisputed that, without *Coolidge*, the employer who fires the temporarily disabled employee for absenteeism not only circumvents the purpose of the Act, but also deprives the employee not just of her job but also of the awarded benefits themselves because it can be deemed a "voluntary abandonment" under the Act. Thanks to the protections recognized by *Coolidge* under the common law, this is prevented. *See, e.g., State ex rel. Gross v. Indus. Comm'n,* 2005 Ohio 3936, P. 11-14 (10th Dist.) (finding that benefits had to be paid even after involuntary termination, relying on *Coolidge*).

the employee's involuntary disability, or attempt to navigate loopholes around the Act, deserves a stern reproach.

An employer will be able to eliminate in most cases liability and potential liability simply by temporary suspension of its attendance policy with respect to the affected employee until such time as the employee is recovered sufficiently to return to work at the employer. Thus, such *Coolidge* claims are necessarily limited in duration as well as class and scope of coverage, and the opposition's vague assertions of "guaranteed continued employment" are entirely inaccurate.

Nor has *Coolidge* had a devastating impact on the pension contributions of small employer- members of the system who enjoy its protections. Many employers either do not have pension plans or have a plan typical of most pension plans, which define participants to exclude persons not actually working and receiving wages from the employer. In other words, to the extent that a pension plan is offered at all by an employer, typically no employer contributions are made during the period of incapacity.

A broad view of the independence of *Coolidge* and its reliance on the purpose of the Act as a whole will help protect the integrity of the Act and assist Ohio public policy by providing temporary protections to workers involuntarily off work and preventing more unemployment than the state already has. A temporary inconvenience to an employer – who subjects itself to the Act as a cost of doing business – is insufficient to defeat the very purpose of the Act itself, particularly in light of the broad applicability of R.C. 4123.95 and the importance of R.C. 4123.56.

Finally, reading *Coolidge* as providing a common law source and remedy independent from the source and remedies embodied in R.C. 4123.90 prevents running afoul of clear

"legislating" by rewriting an intent-based statute, where the Court already has, pursuant to its constitutional Article III powers and duty to uphold public policy, the power to effect common-law protections to persons subject to Ohio law. See *Coolidge,* 100 Ohio St.3d at 144, P. 18-19.

There is no need to rewrite or stretch the unambiguous language of R.C. 4123.90. The Court already has recognized that the primary rights flow from R.C. 4123.56 and the overall Act itself, when it went with the minority of courts and implicitly followed Ohio's dictate of liberal construction of the entire Act:

> Contrary to the majority view, these courts perceive their holdings to be basic expressions of the policy that undergirds the workers compensation structure.

Coolidge, 100 Ohio St.3d at 146, P. 28. And at P. 46 (emphasis added):

> In our opinion, the policy of protection embodied in the **Worker's Compensation Act** can be effectuated only if an employer is not permitted to discharge an employee from being absent. . . . We hold, therefore, that an employee who is receiving TTD compensation **pursuant to R.C. 4123.56** may not be discharged solely on the basis of absenteeism or inability to work, when the absence or inability to work is directly related to the allowed condition.

3. *Wiles* does not apply to or limit *Coolidge* claims based on public policy wrongful discharge protections because there is no existing statutory remedy to vindicate the rights embodied in the Act and in R.C. 4123.56.

The foregoing arguments and law show that claims pursuant to R.C. 4123.90 and claims that violate the Act pursuant to the public policy discussed in *Coolidge* are entirely independent, focused on different purposes and upholding different rights. As such, it is axiomatic that this Court's decision in *Wiles v. Medina Auto Parts, Inc.* (2002), 96 Ohio St.3d 240, 2002-Ohio-3994 does not apply, for there is no statutory remedy directly available to a claimant in Bickers' or

Coolidge's position.

Likewise, R.C. 4123.90 applies to a different class of persons – those who are retaliated against regardless of whether they receive TTD compensation or are even disabled. Like *Coolidge* itself, most courts, including the appellate court in this case, have applied the decision in non-retaliatory contexts. This is a faithful reading of *Coolidge* and the overall purpose of the Act itself. It should be affirmed.

C. <u>Proposition of Law No. 3</u>: The limited, equitable remedies in R.C. 4123.90 do not provide adequate compensation to employees injured by violations of public policy existing for the benefit of the employee and requiring liberal construction of that policy.

1. Failure to recognize a public-policy action independent of R.C. 4123.90 would jeopardize society's interests.

As made clear in the previous sections, *Wiles* is actually irrelevant to the instant case, and nearly all cases discussing *Wiles* in the context of *Coolidge* do so only in *dicta. See, e.g., Bickers,* 2006 Ohio 572 at P. 11 (finding that *Coolidge* alone applied and was independent of R.C. 4123.90, but discussing *Wiles arguendo* because the trial court had relied on it as a secondary argument); *Brooks v. Qualchoice, Inc.,* 8th Dist. 2006, No. 85692, 2005 Ohio 5136 at P. 11 (finding the plaintiff did not fall under R.C. 4123.56 but discussing *Wiles* in *dicta)*; *Kusens v. Pascal Co.* (6th Cir. 2006), 448 F.3d 349, 365 (same).

Nonetheless, because Appellant and its *amicus* rely so heavily on *Wiles, Amicus Curiae* for Appellee must discuss, abstractly, its application in this context.

Appellant and its *amicus* appear to be arguing that *Wiles* stands for the proposition that as long as there is a remote statute that affords any remedy at all (perhaps even merely a penalty against the offending employer) then public policy it is vindicated. In essence, their argument is

that this Court lacks power to fashion any complementary remedy that best serves the public policy, that this is solely the legislative prerogative, and the court has no business butting in with public-policy issues under any circumstances. (See *amicus* brief at 15).

This is not the holding of the plurality in *Wiles*. *Wiles* did not overrule *Greeley* and its progeny in favor of any and all remedial legislative enactments (i.e., pre-emption of the common law altogether). Rather, it fleshed out the common law vis-a-vis statutory remedies, evaluating the comprehensiveness of the remedies provided by the FMLA, and likewise held that an action premised *solely* on a remedial statute that affords comprehensive remedies should not give rise to a separate public policy-based action. *Id.*, 96 Ohio St.3d at 246-249, P. 18-22.

Contrary to Appellant's and *amicus'* arguments, the limitations in R.C. 4123.90 render it ready-made for application of *Greeley* and public policy, and such is needed to vindicate the objectives of the Workers Compensation Act. See *Coolidge,* 100 Ohio St.3d at 144, P. 18-19. Moreover, "[t]here is no principle of judicial restraint that requires courts to refrain from deciding public policy-questions." *Id.,* P. 18.

There seems to be no dispute that there is sufficient clarity of public policy embodied in the Act as a whole, as well as in R.C. 4123.90, as the unanimous *Coolidge* Court recognized. The issue, then, is whether the remedies under R.C. 4123.90 are insufficient to effectuate the public policy of the Act as a whole, jeopardizing that public policy and requiring a broader, common-law remedy. Appellee Bickers and *Amicus Curiae* urge this Court to find, as a majority of courts have in Ohio, both state and federal, that the bare-bones, equitable remedy in R.C. 4123.90 is inadequate to vindicate the public policy of the Act.

Under no view can the remedy be viewed as adequate, and it is far more limited than that

offered under the FMLA. As the *Wiles* Court noted, the FMLA provides both compensatory and liquidated damages, including back pay, lost benefits, other income, and actual monetary losses. *Id.* P. 17, n.2. The only category of compensatory damages missing is emotional distress damages. *Id.* *Wiles*'s focus was particularly on the compensatory and liquidated damages, neither of which is available under R.C. 4123.90. There is only limited equitable relief and no jury trial – hardly the stuff that will serve society's interests, permit vindication of statutory rights, or adequately discourage an employer from engaging in the unlawful conduct – all requirements of any adequate remedy. *Id.* at P. 15. Moreover, the FMLA provides a very complicated and "comprehensive" remedial scheme under federal law with numerous statutory sections that the *Wiles* Court was loath to disturb; but the equitable remedy found in R.C. 4123.90 comprises a merely a single, terse sentence. The Court also noted the public policy relied on in *Wiles* was solely premised on the remedial statutory scheme in question, and not the public policy embodied in the entirety of the Act itself, as here.

In evaluating the adequacy of a remedy, it follows that one must look not only to the clarity or existence of the public policy, but its importance in society and purpose for existence. In discussing the application of the plurality's decision in *Wiles*, Appellant and its *amicus* completely ignored the Court's unanimous discussion in *Coolidge* of the public policy embodied in the Workers Compensation Act and directly derived from Ohio's Constitution – perhaps the most important source of public policy of all. They also cited to *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St. 3d 115, 119, 2001-Ohio-109, for the argument that R.C. 4123.90 strikes a constitutional "balance" between employer and employee. This is not accurate.

The "balance" the Court refers to is a "mutual compromise between the interests of the

employer and the employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability," quoting *Blankenship v. Cincinnati Milacron Chem., Inc.* (1982), 69 Ohio St. 2d 608, 433 N.E.2d 572, 577. However, the Court noted that the history of the Act was to benefit employees and counteract the utter failure of common-law tort actions in regulating employers' behavior and countering the "devastating effects" of such injuries to employees and their families. *Holeton*, 92 Ohio St.3d at 118-199. As such, while there may be a balance of sorts in the Act itself, the system was begun and continues to be run with *employees'* welfare in mind. This is the primary purpose of the Act as discussed at length in *Coolidge* and codified in R.C. 4123.95 requiring liberal construction "in favor of employees" of virtually all provisions of the Act. Thus any "balance" is not necessarily *equal* but is to be expressly viewed at all times in the employee's favor. See R.C. 4123.95.

Firing employees because they sought or obtained workers compensation benefits is repugnant to society's interests in regulating dangerous conditions and ensuring that employees are protected and not forced onto welfare for reasons beyond their control. There is no "balance" when an employer wrongfully fires an employee for the very offense of asserting her rights and/or being disabled as a direct result of working for the employer. Nor does this create a "no fault" situation when since it involves proof of the employer's motive and/or knowledge.[5]

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[5] Moreover, contrary to Appellant's *amicus'* argument (at p. 10), a disabled person fired pursuant to an attendance policy *does* face the loss of her benefits, and not just her job, under the "voluntary abandonment" doctrine in R.C. 4123.56. In other words, the industrial commission (as it has in the past) can view even involuntary absence due to total incapacity as "voluntary" if there is an applicable policy. *See, e.g., State ex rel. Hammer v. Indus. Comm.* (2003), 99 Ohio St. 3d 334 (barring payments where termination was pursuant to a written attendance policy). Only *Coolidge* has impacted some courts into reversing this view favoring the employer.

Section R.C. 4123.90 simply cannot vindicate these vital societal interests, nor can it vindicate the rights of an employee actively involved in the Workers Compensation system, who already has given up her rights to sue the employer directly for the injury. Its nearly impotent equitable remedy virtually invites employers to fire injured employees as needed, as a preferred cost of doing business. It is unable to adequately deter an employer and serve the laudable regulatory purpose of the Act, as discussed in *Holeton* and first expressed in the Constitution. Section 4123.90 also is woefully inadequate to remedy the wrong done to an employee – injury upon injury. To hold otherwise, would be essentially to destroy this Court's entire line of public policy jurisprudence, from *Greeley* through *Coolidge* – which notably was decided the year after *Wiles*.

Greeley was decided by this Court over 16 years ago. The legislature has never limited or overturned *Greeley*'s holdings despite the General Assembly's authority to modify or pre-empt common law remedies within constitutional limits. If anything, the legislature's conduct over the last 16 years supports this Court's continuing to exercise its independent authority to maintain the vitality and integrity of *Greeley* and other common-law remedies, which are the province of this Court.

2. The General Assembly did not require or intend that R.C. 4123.90 be an exclusive remedy.

In another circular argument, Appellant and its *amicus* argue that the remedy provided in R.C. 4123.90 is intended by the legislature to be the sole remedy, relying solely on the mere existence of the statute itself. Yet, there is nothing in the text of the statute that admonishes it is an exclusive remedy. Indeed, the existence of R.C. 4123.95 directly conflicts with their

argument and underscores that the Act in its entirety must be construed liberally in favor of employees – this liberal construction is necessarily remedial in nature. Thus, R.C. 4123.95 statute better encapsulates legislative intent with respect to the Act.

In addition, this Court in *Coolidge* unanimously recognized that the purposes of the act and of upholding them even via public policy were crucial for both employees and society's interests in general. Virtually every employee is presumptively a member of the system. Thus, a public policy exception is in every employee's interests, as well as those of his or her family, and society's concern for the regulation of employers and, indirectly, safety in the workplace. There is no substitute for the requirement of a public policy vindication of these interests and section 4123.90 simply cannot suffice.

Moreover, the legislature has been aware of *Coolidge's* the common-law public policy exception with respect to the Act in the three years since *Coolidge*. It is again noteworthy that the General Assembly recently modified a substantial number of statutes in the Workers Compensation Act, effective June 30, 2006. See 2005 Ohio SB 7. Yet, *Coolidge*, like R.C. 4123.95, remains good law and so clearly is in harmony with both the Act and its purpose. Section 4123.90 therefore is not exclusive and common-law remedies under the Act are not only proper, but necessary.

The mere fact that the legislature provided that section 4123.90 should be limited to equitable remedies does not mean that the statute preempts or excludes the application of this Court's common-law jurisprudence regarding public-policy wrongful discharge torts. This Court has repeatedly held that the there is a presumption that the legislature does not intend to take away common-law rights unless that purpose is clearly expressed in the statute. See *Helmick v.*

Cincinnati Word Processing (1989), 45 Ohio St. 3d 131. The doctrine that an existing common-law remedy may not be extinguished by statute except by direct enactment or necessary implication is especially pertinent in connection with statutes which are subject to a direction from the General Assembly that they are to liberally construed in favor of their purpose or the particular class of individuals that the statute was designed to benefit, as is the case with the Workers' Compensation Act and Revised Code 4123.90. This Court has also emphasized the mere existence of limited statutory remedies does not operate to bar recognition of a *Greeley* type claim. See *Karens v. Porter Paint Co.* (1991), 61 Ohio St. 3d 486; *Collins v. Rizkana* (1995), 73 Ohio St. 3d 65.

Given the statutory requirement to construe 4123.90 and other provisions of the Workers' Compensation Act liberally in favor of protecting employees, along with the absence of any explicit language clearly indicating the legislature's intention to preempt any common-law claims bars any preemption argument. Even more important, the General Assembly's acceptance of *Greeley* and its progeny over the last sixteen (16) years, along with its failure to include any legislative limitation or overruling of the *Coolidge* decision in the overhaul of the Workers' Compensation Act just recently passed, further demonstrates that the protection afforded by *Coolidge* was within the panoply of protections contemplated by the General Assembly.

3. Notice under R.C. 4123.90 or any common-law remedy is not required.

Appellant's final argument is that Bickers is bound by the notice/reporting requirements found in R.C. 4123.90. Not true. Unlike Ohio's Whistleblower statute, the employer here certainly does not need to be told by the employee it is violating the law. It is different from the reporting requirement found in R.C. 4113.52, which is specifically designed to give the employer

– who may not know about dangerous conditions at its premises – time in which to correct the offending problem without bringing in outside agencies.

There logically can be no notice requirement in the instant case because this Court already has unanimously held that it is a violation of the law *anytime* an employee is fired for absenteeism when s/he is involuntarily absent and entitled to TTD benefits. *Coolidge* in itself provides sufficient notice of wrongdoing to any employer aware of the employee's situation, thus dispensing of any need to "inform" the employer what it already knows as a matter of law. The key is not to fire the injured employee to begin with. *See, e.g., Smith v. Children's Aid Soc'y* (8th Dist. 2006), 2006 Ohio 4754, P45-P46 (no notice requirement applies because employer already on notice employee receiving benefits).

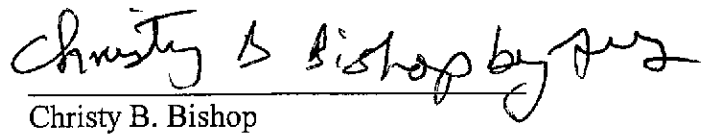
IV. CONCLUSION

This Court's decision in *Coolidge* applies equally to all injured workers receiving temporary total disability benefits, whether they are public employees protected by civil service or employees-at-will in the private sector. The distinctions that the Appellant and its *amicus* ask this Court to make among employees suffering from the same covered workplace injuries is arbitrary, undermines the very purposes of the Workers Compensation system, violates the liberal interpretation directives of the General Assembly, and ignores the bargain between employers and employees, which is the underpinning of our workers compensation laws. The difference in treatment urged by Appellant and its *amicus* is irrational, and certainly serves no compelling state interest, in light of the purposes of the Workers Compensation system.

In *Coolidge* this Court, applying the policies which are part and parcel of the entire Workers Compensation system, provided an important and much-needed protection to workers

who were losing their employment and their future livelihood simply for availing themselves of the right to recover from covered workplace injuries. This Court rightly determined that such discharges were inconsistent with the purpose and effectiveness of Workers Compensation. The salutory, unanimous, and clear decision should be reiterated, removing any doubt that injured workers may use the Workers Compensation system to recover without jeopardizing their employment. For these reasons, the Court of Appeals should be affirmed.

Respectfully submitted,



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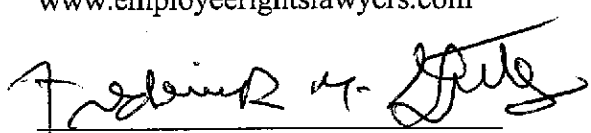

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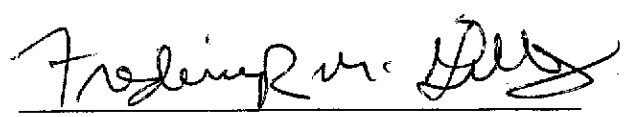
CERTIFICATE OF SERVICE

I hereby certify that a copy of the Foregoing Merit Brief of Amicus Curiae, The Ohio Employment Lawyers Association in Support of Plaintiff/appellee Shelley Bickers was sent via regular U.S. mail, postage prepaid, to George E. Yung, Esquire, and Kasey Bond, Esquire, FROST, BROWN & TODD, LLC, 2200 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202, attorneys for the Defendant, Appellant, Western Southern Life; and to Michael J. Frantz, Esquire, Keith A. Ashmus, Esquire, and Kelly S. Lawrence, Esquire, FRANTZ WARD, LLP, 2500 Key Center, 127 Public Square, Cleveland, Ohio 44114-1230; attorneys for Amicus Curiae, Ohio Management Lawyers Association; Michael A. Kearns, KEARNS COMPANY, LPA, 3028 Victory Parkway, Cincinnati, OH 45206-1542 and Geogory J. Claycomb, WILLIAM D. SNYDER & ASSOCIATES, 2115 Laray Avenue, Cincinnati, OH 45206-2605, Attorneys for Plaintiff/Appellee, Shelley Bickers, this 30th day of October, 2006.



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