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. C040342**
	:	
vs.	:	
	:	
WESTERN SOUTHERN LIFE INSURANCE COMPANY, INC.,	:	
	:	
Defendant-Appellant.	:	

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FILED
NOV 16 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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REPLY

The *Amicus Curiae*, Ohio Management Lawyers Association, submits this reply memorandum for the limited purpose of clarifying misstatements of law contained in the merit briefs of Plaintiff-Appellee Shelley Bickers and the Ohio Employment Lawyers Association (collectively referred to herein as the "OELA").[1]

Misstatement of Law No. 1: "*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." (Merit Brief of OELA, p. 4 (emphasis in original)).

The OELA urge this Court to hold that *Coolidge v. Riverdale Local Sch. Dist.* (2003), 100 Ohio St. 3d 141, 2003-Ohio-5357, 797 N.E.2d 61, somehow creates a wrongful discharge public policy claim, as established by this Court in *Greeley*, despite the facts that (1) the plaintiff in *Coolidge* was not an at-will employee; and (2) the *Coolidge* Court made no effort to employ its own analysis adopted to review such claims. See *Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 67-68, 652 N.E.2d 653 (adopting four-element test of legal scholar Harry Perritt, Jr.). Nor did the court mention or attempt to distinguish or overrule *Haynes v. Zoological Soc. of Cincinnati* (1995), 73 Ohio St. 3d 254, 257, 652 N.E.2d 948, in which the Court declined to extend wrongful discharge public policy claims to union employees like Ms. Coolidge who are subject to collective bargaining agreements.[2] Thus, contrary to the assertion of the OELA, the *Coolidge* Court could not have "clearly concluded that the *Haynes* limitation on public-policy wrongful-

[1] Because the merit brief of the OELA was filed on October 30, 2006, beyond the time permitted by this Court, it should be stricken.

[2] The certified issue before the Court in *Haynes* was "whether R.C. 4113.52 preempts the formation of a *Greeley* public policy exception to the employment-at-will doctrine within the specific context of whistleblowing." Rather than directly address the certified issue, the Court in *Haynes* correctly held that, as a member of a union, the plaintiff in *Haynes* was not an at-will employee, and the public policy exception did not apply to her. 73 Ohio St. 3d at 257.

discharge claims was in conflict with the Act's purpose of assuring TTD and employment." If that were the case, the Court would have at least mentioned *Haynes* in reaching its allegedly clear conclusion.

Moreover, the one and only time the *Coolidge* Court even cited *Greeley* (or *Collins*), it noted that the law derived from such cases applies exclusively in the at-will employment context:

> A claim of wrongful discharge in violation of public policy, whether based on workers' compensation or other law, originated, and is generally conceived in Ohio and elsewhere, as an exception to the employment-at-will doctrine. See *Collins v. Rizkana* (1995), 73 Ohio St. 3d at 67-68, 1995 Ohio 135, 652 N.E.2d 653; *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St. 3d 228, 551 N.E.2d 981; *Frampton v. Cent. Indiana Gas Co.* (1973), 260 Ind. 249, 297 N.E.2d 425; *Peterman v. International Brotherhood of Teamsters* (1959), 174 Cal. App. 2d 184, 344 P. 2d 25; 80 American Jurisprudence 2d (2003), Wrongful Discharge, Sections 53 and 93; Discharge From Employment in Retaliation for Filing Workers' Compensation Claim (1988), 50 Am.Jur. Proof of Facts 2d 187.

2003 Ohio 5357, at ¶20. Recognizing the teacher in *Coolidge* enjoyed statutory job protections beyond that which is available to an at-will employee, the *Coolidge* court further stated:

> Coolidge is clearly not an employee at will, since R.C. 3319.16 affords her protection against termination without "good and just cause." But this does not mean that the board can legally terminate Coolidge's teaching contract for reasons that are repugnant to public policy. R.C. 3319.16 does not immunize the board from the dictates of state policy, and it certainly does not provide teachers with less protection against wrongful discharges than the common law generally affords to at-will employees. Thus, if Coolidge can show that her discharge contravened public policy expressed in the Workers' Compensation Act, she will have established that her discharge was without good and just cause under R.C. 3319.16. See, e.g., *Phillips v. Babcock & Wilcox* (1986), 349 Pa. Super. 351, 353-54, 503 A. 2d 36.

Id., ¶21 (emphasis supplied). Ms. Coolidge's "status as a teacher" subject to the strictures of R.C. 3319.16 was central to the Court's inquiry.

Based on the above-quoted language and contrary to the expansive interpretation of *Coolidge* urged by the OELA, *Coolidge* can only stand for the proposition that the good and just cause requirement of 3319.16 is not met where the discharge of a public school teacher contravenes the pubic policy expressed in the Workers' Compensation Act (the "Act"), since the existence of a wrongful discharge public policy claim was not before the Court.

A reading of *Coolidge*, which limits its holding to the interpretation of the good and just cause requirement of R.C. 3319.16, reflects the clear intent of the General Assembly when it enacted the Act to supplant the common law and restrict a claimant's access to the state court system. The Act strikes a balance between an employee's right to receive compensation for workplace injuries without engaging in protracted litigation and an employer's right to be immune from lawsuits premised on such injuries. See *Arrington v. Daimler Chrysler Corp.* (2006), 109 Ohio St. 3d 539, 544, 849 N.E.2d 1004 (quoting *Blankenship v. Cincinnati Milacron Chem., Inc.* (1982), 69 Ohio St. 2d 608, 614, 433 N.E.2d 572) (discussing the statutory compromise). Such a reading is thus in accord with the public policy of the state of Ohio, as expressed by the voting public that successfully amended the Ohio Constitution and enabled the General Assembly to create the Act. A wrongful discharge public policy claim could not have been recognized in *Coolidge* without deliberately disrupting the General Assembly's careful balancing of right and remedy.

Misstatement of Law No. 2: The Position Urged By Defendant-Appellant Western Southern Life Insurance Co., Inc. and the *Amicus Curiae* Violates the Constitution and the Equal Protection of the Law.

The OELA also claim that the interpretation of *Coolidge* urged by Western Southern Life Insurance Co., Inc. ("Western Southern") and the *Amicus Curiae* violates "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 OELA rely on *State ex rel. Nyitray v. Industrial Com. of Ohio* (1983), 2 Ohio St. 3d 173, to reach this conclusion. In *Nyitray,* however, the Court held that "the portion of R.C. 4123.60 which in effect denies accrued but unpaid workers' compensation to dependents of workers who died from work-related causes, while compensating dependents of workers who died from causes other than a compensable injury or occupational disease, violates the Equal Protection Clauses of the Ohio and United States Constitutions." *Id.* at 178. *Nyitray* thus had to do with an employee's receipt of benefits due and owing and struck down the statutory distinction that precluded certain employees from receiving such benefits simply because they died before receiving the check in the mail. *Id.*

In contrast to *Nyitray*, *Coolidge* does not create or expand an employee's statutory right to disability benefits under R.C. 4123.56; nor does it elevate the workers' compensation protections afforded one class of employees over another. There was no allegation that Ms. Coolidge (or Ms. Bickers) lost her right to benefits under R.C. 4123.56 or that the termination for absenteeism due to a work-related injury violated the Act. The *Coolidge* decision instead interpreted the teacher's right not to be terminated other than for statutorily proscribed reasons including for "good and just cause." The OELA's

constitutional challenge thus must relate to the statutory distinction between public school teachers like Ms. Coolidge and at-will employees like Ms. Bickers. Of course, the statutory job protections granted to public school teachers are necessarily greater than those available to at-will employees. See *e.g.*, R.C. Chapter 3319 (setting forth express procedures by which a school board can discharge a teacher). This fact alone does not create an equal protection violation. See also *Roseman v. Firemen & Policemen's Death Benefit Fund* (1993), 66 Ohio St. 3d 443, 446-47, 613 N.E.2d 574 ("Discrimination against individuals or groups is sometimes an inevitable result of the operation of a statute. The mere fact that a statute discriminates does not mean that the statute must be unconstitutional."). R.C. 3319.16, which requires "good and just cause" to terminate a teacher, sets up the difference between teachers with injuries and at-will employees with injuries—not any position urged by Western Southern or the *Amicus Curiae.*

Furthermore, even if the Court were to accept the OELA's argument that the position urged by Western Southern and the *Amicus Curiae* expands, rather than interprets, the statutory rights of certain employees, a lower level of judicial scrutiny (the rational basis test) is applicable, since neither a suspect classification nor a fundamental right is at issue. See *Liposchak v. Admr., Ohio Bur. of Workers' Comp.* (Jefferson Cty. 2000), 138 Ohio App. 3d 368, 386 (citing, *Nyitray,* 2 Ohio St. 3d at 176). This Court has set forth the standards for determining whether a statute violates the equal protection guarantees of the Ohio Constitution under the "rational basis" test. Class distinctions in legislation are permissible if they bear some rational relationship to a legitimate government objective." *State ex rel. Vana v. Maple Hts.* (1990), 54 Ohio St. 3d 91, 92, 561 N.E.2d 909. "In a rational-basis analysis, we must uphold the statute unless the classification is wholly

irrelevant to the achievement of the state's purpose." *Id.* In other words, "the statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective." *Denicola v. Providence Hosp.* (1979), 57 Ohio St. 2d 115, 119, see also, *St. Ann's Hosp. v. Arnold* (Franklin Cty. 1996), 109 Ohio App. 3d 562, 566, 672 N.E.2d 743 (statute must be upheld if "any state of facts, either known, or which can reasonably be assumed, supports the classification. If the question is at least debatable, then the decision is a legislative one and the classification will be upheld.").

Here, a clear rational basis exists to protect certain public sector employees from termination without cause, while otherwise recognizing the doctrine of employment at-will in the private sector (which can of course be altered by individual or collective bargaining contracts). No violation of equal protection has occurred.

Misstatement of Law No. 3: Ms. Bickers' *Coolidge* Claim is Based Upon The Workers' Compensation Act as a Whole.

The OELA argue that R.C. 4123.90 does not control Ms. Bickers' claim and instead seek to adopt a blanket public policy doctrine for violations of the Act as a whole. Based on this esoteric premise, they then assert that employees terminated under circumstances like those alleged by Ms. Bickers are left without a remedy.

However, out of all of the statutory provisions that make up the Act, the present case and *Coolidge* even arguably implicate only R.C. 4123.90. <u>The harm alleged by Ms. Bickers is the termination of her employment and not the loss of injury-related compensation or benefits or any other object of the Act</u>. She does not allege (nor is it the case) that the benefits granted to her under R.C. 4123.56 were eliminated or compromised because of the decision to terminate the employment relationship. Of course, by using the

vague, nebulous "entire statute," the possibility opens up for limitless speculation about what the "public policy" of the statute is. Indeed, one looks in vain for any specific statement in the OELA briefs as to what that is. The result is that a public policy is whatever a party says it is. The courts are not the proper forum in which to engage in such scholastic debates. The courts should interpret law—not manufacture public policy out of fog. Thus, to the extent Ms. Bickers can maintain a wrongful discharge public policy claim at all, review of such a claim must focus on R.C. 4123.90 rather than the Act as a whole.

One reason why the OELA seeks to distance Ms. Bickers from a public policy claim that would be premised on 4123.90 is because the remedies available under the statute are comprehensive and exclusive to remedy the harm alleged. In *Wiles v. Medina Auto Parts* (2002), 96 Ohio St. 3d 240, 248, 2002-Ohio-3994, 773 N.E.2d 526, 535, the Court limited the circumstances under which a plaintiff may maintain a separate wrongful discharge public policy action based upon a statute. The *Wiles* Court cautioned against creating additional remedies when the legislature has already spoken on the issue, unless the remedies available are insufficient to protect society's interests. *Id.* at 244.

At-will employees like Ms. Bickers should not be able to maintain public policy claims premised on an alleged violation of R.C. 4123.90, because that statute already provides an adequate remedy for such a violation. See, *Brooks v. Qualchoice, Inc.*, Cuyahoga App. No. 85692, 2005-Ohio-5136, ¶18; *Coon v. Technical Constr. Specialties, Inc.*, 9th Dist. No. 22317, 2005-Ohio-4080, ¶26; *Jakischa v. Cent. Parcel Express* (C.A.6, Sept. 1 2004), No. 03-3976, 2004 U.S. App. LEXIS 18965, at *10; *Burress v. Sears* (S.D. Ohio July 18, 1995), No. C-1-95-110, 1995 U.S. Dist. LEXIS 22408, *7; *Anderson v.*

Lorain County Title Co. (Lorain Cty. 1993), 88 Ohio App. 3d 367, 373, 623 N.E.2d 1318. R.C. 4123.90 provides successful plaintiffs with reinstatement and back pay damages and attorneys' fees. This combination of remedies was designed by the legislature to place an aggrieved employee back in the exact same position he or she would have been in absent the alleged retaliation. See, *Wiles,* 96 Ohio St. 2d at 245. The remedies available also serve to deter employers from engaging in retaliatory conduct, since the employer will later be forced to reinstate the employee and provide him or her with back pay without having the benefit of the employee's labor during the back pay period. The temporarily and totally disabled employee who cannot work during a period of disability would not otherwise be harmed under these circumstances. Thus, the remedies contemplated in R.C. 4123.90 adequately protect against the harm alleged.

Furthermore, and perhaps more importantly, the remedies set forth in R.C. 4123.90 were intended to be exclusive. See R.C. 4123.90 ("the relief which may be granted *shall be limited to* reinstatement with back pay, if the action is based upon discharge, or an award for wages lost if based upon demotion, reassignment, or punitive action taken ..."). The mandatory language in the statute reflects the General Assembly's clear intent to limit the relief available to employees who bring claims premised on R.C. 4123.90. Only by urging the Court to disregard Ms. Bickers' reliance on R.C. 4123.90 in asserting her public policy claim can the OELA get around this fatal deficiency.

Misstatement of Law No. 4: The Notice and Time-for-Filing Requirements of R.C. 4123.90 Do Not Apply.

The OELA are also motivated to side-step R.C. 4123.90 so that the procedural requirements of the statute would not apply to Ms. Bickers' *Coolidge* claim. In order to file a claim pursuant to R.C. 4123.90, a plaintiff must give notice of the alleged violation

within ninety days of the adverse action taken and must file a lawsuit within 180 days of the alleged adverse action. R.C. 4129.90. Failure to respect either of these requirements serves to "forever bar[]" a plaintiff from bringing suit to remedy the alleged violations. *Id.*

Since Ms. Bickers failed to comply with *both* of the statutory prerequisites to suit, she can revive her claim only by distancing herself from the statute. See *Contreras v. Ferro Corp.* (1995), 73 Ohio St. 3d 244, 251, 652 N.E.2d 940 ("If appellant was entitled to maintain a *Greeley* claim, an issue that today we do not decide, then that claim would have to be based upon the public policy embodied in R.C. 5113.52. Since appellant did not comply with the statute in the first instance he would have no foundation for a *Greeley* claim if, in fact, he was entitled to assert such a claim."). However, if the Court were to accept the view urged by the OELA and allow employees terminated while on temporary total disability to bring public policy causes of action under the Act as a whole without regard to the requirements of R.C. 4123.90, the employer protections in R.C. 4123.90 would be eviscerated. Employees would no longer have any motivation to provide early notification of potential claims, thus affording their employers the opportunity to take prompt corrective action or to negotiate resolution of the apparent violations of the statute. Plaintiffs could (and would) allow claims to linger until potential stakes were high enough that amicable resolution in the interest of both parties would be nearly impossible. Such a holding would be contrary to the public policy expressed by the General Assembly when it enacted R.C. 4123.90 to include such requirements, and it would render the statute completely meaningless. No plaintiff would ever attempt to bring an action under the statute if he or she could bring a public policy claim with elevated damages and without

procedural limitations. The public policy of the State of Ohio thus favors a result opposite to that urged by the OELA.

Respectfully submitted,

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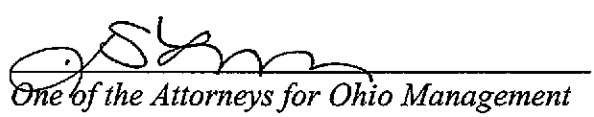

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