

IN THE SUPREME COURT OF OHIO

TAMMY A. GREER-BURGER)
)
) Plaintiff-Appellee)
)
) vs.)
)
) LASZLO TEMESI)
)
) Defendant-Appellant)

CASE NO. 06-1616

Court of Appeals No. CA-05-087104

MERIT BRIEF OF DEFENDANT-APPELLANT LASZLO TEMESI

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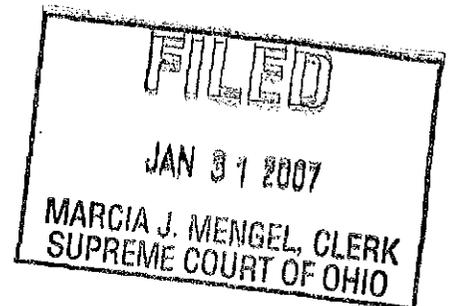


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INTRODUCTION

The issue central to this case is whether R.C. 4112.02(I), the anti-retaliation provision of Ohio discrimination law, supersedes an employer's fundamental right to petition the government for redress of grievances, guaranteed by the United States Constitution, Amendment I and the Ohio Constitution, Article I, Section XVI, thereby foreclosing a prevailing employer from pursuing a well-founded civil lawsuit against the employee for damages incurred while defending itself in an unmeritorious claim of sexual harassment.

Without considering the constitutional implications of its holding, the Eighth District Court of Appeals incorrectly agreed with the Ohio Civil Rights Commission ("OCRC") and Court of Common Pleas, Cuyahoga County, sitting as an appellate court, that the employer, Laszlo Temesi ("Temesi"), unlawfully retaliated against his former employee, Tammy Greer-Burger ("Greer-Burger"), by commencing a lawsuit alleging claims of malicious prosecution, abuse of process and intentional infliction of emotional distress. In so holding, the appellate court affirmed a cease and desist order of the OCRC, which *enjoined* Temesi from further prosecuting the lawsuit and assessed against Temesi the attorneys' fees that Greer-Burger allegedly incurred in the defense of Temesi's claims.

The decision of the appellate court threatens the Constitutionally-guaranteed rights of access to the courts. By its ruling, the appellate court created its own unsupported view that an employer falsely accused of sexual harassment may never obtain full compensation for injuries sustained in defending an unmeritorious lawsuit. The Ohio discrimination laws were not intended to be that selective, such as to deprive victims of false accusations from their only legally available remedies.

The second compelling issue in this case is whether Greer-Burger should be equitably and judicially estopped from recovering attorneys' fees incurred in defending against Temesi's civil lawsuit, because she failed to schedule the pending lawsuit as an asset in a bankruptcy action. The appellate court found that it lacked jurisdiction to adjudicate the matter and permitted Greer-Burger to recover \$16,000 in attorneys' fees. This aspect of the appellate court's decision, however, is contrary to well-settled law from the Eighth District itself, and from the Tenth District, and thus has created intra- and inter-district conflicts of law.

Further, the decision of the appellate court enabled Greer-Burger to defraud her creditors and illegally obtain a windfall profit at the conclusion of her bankruptcy proceedings. The doctrines of equitable and judicial estoppel preclude recovery in a civil lawsuit where a party has failed to schedule that lawsuit as an asset in a bankruptcy proceeding. Under such circumstances, to permit a party to prevail in his or her civil lawsuit undermines the confidence in both the federal and state judicial processes.

In summary, the appellate court erred when it affirmed the foregoing decisions of the OCRC and the trial court, enjoining Temesi from prosecuting a well-founded lawsuit and punishing him by forcing him to pay Greer-Burger's attorneys' fees, solely because Temesi exercised his constitutional rights to seek redress of his own grievances in a court of law. The appellate court has established two precedents which, if allowed to stand, will not only violate the State and Federal Constitutions—but will also overrule well-settled Ohio case law.

STATEMENT OF THE CASE AND FACTS

Tammy A. Greer-Burger commenced a lawsuit against her former employer, Laszlo Temesi, on June 10, 1998, alleging that, while she was employed by Temesi, he engaged in a pattern of sexual harassment which included sexually inappropriate comments and actions.

(*Tammy Greer v. Laszlo Temesi dba Village Square Jewelers*, No. 98-357206). The case proceeded to trial and the jury returned a verdict in Temesi's favor on December 7, 1999.

On May 5, 2000, five months after the jury verdict, Temesi commenced a lawsuit styled *Laszlo Temesi v. Tammy Greer*, Case No. CV-00-407479, in the Cuyahoga County Court of Common Pleas, against Greer-Burger in which he alleged malicious prosecution, abuse of process and intentional infliction of emotional distress. Greer-Burger moved to dismiss all of Temesi's claims pursuant to Civ. R. 12(b)(6). On July 5, 2000, the Cuyahoga County Court of Common Pleas issued an Order in which it dismissed Temesi's malicious prosecution claim and sustained his claims of abuse of process and intentional infliction of emotional distress.

Greer-Burger then filed a charge affidavit on November 6, 2000, with the Ohio Civil Rights Commission, alleging that Temesi, in violation of R.C. 4112.02(I), retaliated against her for filing the sexual harassment lawsuit. The OCRC conducted an investigation and determined on July 19, 2001, that probable cause existed to believe that Temesi did, indeed, retaliate against Greer-Burger by filing his civil lawsuit. The matter proceeded to conciliation and, on August 30, 2001, the OCRC issued a Complaint and Notice of Hearing. On July 19, 2002, an Administrative Law Judge determined that no factual dispute existed and ordered that the matter be submitted for decision via briefs.

On January 14, 2003, six months *after* the OCRC found probable cause and began to prosecute Greer-Burger's retaliation claims on her behalf, Greer-Burger, through counsel, filed for Chapter 7 relief in the United States Bankruptcy Court for the Northern District of Ohio, Case No. 03-10480-aih. A review of the bankruptcy docket (available at

<http://ecf.ohnb.uscourts.gov>)¹ shows that as part of her bankruptcy petition, Greer-Burger filed a “Schedule of Assets,” including a Schedule B, which required at question 20 that Greer-Burger list all “contingent and unliquidated claims of any nature,” Greer-Burger checked the box indicating “NONE.” (Bankruptcy Docket No. 1). On her Schedule F, which requires parties in bankruptcy to list all creditors holding unsecured nonpriority claims, Greer-Burger listed \$15,000 in legal fees owed to Ulmer & Berne (her counsel in Temesi’s civil lawsuit). (*Id.*). By signature dated January 8, 2003, Greer-Burger attested under penalty of perjury that the information submitted in the Schedule of Assets was true and correct. (*Id.*).

On March 12, 2003, the Administrative Law Judge issued Findings of Fact and Conclusions of Law with respect to Greer-Burger’s retaliation claim, in which the Administrative Law Judge ordered Temesi to cease and desist from all discriminatory practices in violation of R.C. 4112.02. The Administrative Law Judge further ordered that the record be left open to enable the parties to introduce evidence regarding damages.

On April 23, 2003, Greer-Burger moved to amend her bankruptcy Schedule F to include as unsecured nonpriority creditors Laszlo Temesi and his counsel, Summers & Vargas, Co.,

¹ Evidence of Greer-Burger’s bankruptcy proceedings is admissible as the subject of judicial notice under Ohio Evidence Rule 201, which states in pertinent part:

(B) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

* * * *

(D) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

See State ex rel. Downs v. Panioto, 1st Dist. No. C-040784, 2005-Ohio-778, P3 (“The record for that case is not before us on appeal, but we take judicial notice of its docket [under Evidence Rule 201] because it is capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned.”) Likewise, judicial notice may be taken of information contained (or, presumably, not contained) in the debtor’s bankruptcy schedules. *French v. Diller (In re Stauffer)* (Bankr. N.D. Ohio 1994), No. 91-33363, 1994 Bankr. LEXIS 394, *7.

LPA. (Bankruptcy Docket No. 7). Greer-Burger made no attempt to amend her Schedule B on April 23, 2003, or at any other time. On April 26, 2003, based upon the representations in Greer-Burger's bankruptcy petition, the bankruptcy trustee recommended a no asset discharge of all of Greer-Burger's obligations, including her attorneys' fees (and the potential damages, costs and fees that could be incurred if Temesi ultimately prevails on his civil claims). (Bankruptcy Docket Nos. 4 & 10). On May 12, 2003, in reliance on the trustee's certification, the bankruptcy court ordered that the trustee be dismissed from the proceedings and the case closed. (Bankruptcy Docket No. 11).

On February 24, 2004, the Administrative Law Judge held a damage hearing and, on November 1, 2004, recommended that Temesi pay Greer-Burger approximately \$16,000 for attorneys' fees which she allegedly incurred in defending against Temesi's civil lawsuit. Of course, Greer-Burger's attorneys' fees had already been discharged by the bankruptcy court. The OCRC adopted the recommendations of the Administrative Law Judge, issued the cease and desist order, and ordered Temesi to pay \$16,000 to Greer-Burger for attorneys' fees on December 16, 2004. Upon judicial review, in *Laszlo Temesi v. Tammy Greer*, Case No. CV-00-407479, the Cuyahoga County Court of Common Pleas affirmed the orders of the OCRC. Temesi then appealed to the Eighth District Court of Appeals.

On appeal, Temesi argued, *inter alia*, that (1) he did not retaliate against Greer-Burger but, rather, commenced his lawsuit to recover his economic losses and seek redress for the emotional distress which she inflicted upon him; and (2) because Greer-Burger failed to disclose, in her bankruptcy petition and schedules, her pending retaliation claim against Temesi, she was equitably and judicially estopped from prevailing on that claim.

The appellate court found that Temesi did retaliate against Greer-Burger and affirmed the award of attorneys' fees. With respect to the retaliation issue, the appellate court held:

Upon review of the briefs, we find that Temesi's reasoning is merely a pretext for retaliation. Had Temesi filed suit solely to recoup attorneys' fees he incurred in defending the sexual harassment suit, the result might have been different. However, he also sought punitive damages for malicious prosecution, abuse of process, and intentional infliction of emotional distress. The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct. *** The award of punitive damages would defeat the overriding purpose of anti-retaliation legislation: to prevent employers from deterring victims from pursuing discrimination claims. By seeking punitive damages, Temesi has asked the court to punish Greer for pursuing her sexual harassment claim. Absent any indication that Greer's complaint was blatantly frivolous and contained no colorable claim, we cannot find that punishment overrides the underlying purpose of the anti-retaliation provisions.

Greer-Burger v. Temesi, 8th Dist. No. 87104, 2006-Ohio-3690, at P22. With respect to the estoppel issue, the appellate court erroneously held:

The disposition of the \$16,000 is not for this court to consider. Whether Greer's bankruptcy trustee pursues the money judgment for payment of creditors is not within the purview of this court's jurisdiction. *** Therefore, the fact that Greer's attorneys' fees were discharged in a bankruptcy neither hinders nor precludes a money judgment against Temesi for a violation of R.C. 4112.02(I).

Id. at P36.

Temesi now prays that this Court reverse the court below and allow him to pursue his claims against Greer-Burger.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Enjoining the prosecution of a well-founded lawsuit, commenced in response to the prosecution of an unsuccessful sexual harassment lawsuit, as retaliatory, in violation of R.C. 4112.02(I), violates the right to petition the government for redress of grievances as guaranteed by the First Amendment to the United States Constitution.

Temesi has been deprived of his constitutional rights to assert and maintain a cause of action against Greer-Burger without fear of such cause of action being the basis of a retaliation claim. The First Amendment's petition clause protects a citizen's right of access to governmental mechanisms for the redress of grievances, including the right of access to courts for that purpose. U.S. Const. amend 1. According to the United States Supreme Court, the right to assert civil claims represents one of "the most precious of the liberties safeguarded by the Bill of Rights." *BE&K Constr. Co. v. NLRB* (2002), 536 U.S. 516, 524. This right is "cut from the same cloth as the other guarantees of [the First Amendment], and it is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). Similarly, unless otherwise proscribed by statute, the Ohio Constitution also provides citizens with a constitutional right of access to the courts to secure remedies for common law injuries. Ohio Const. art. 1, § 16.

In *Bill Johnson's Restaurants, Inc. v. NLRB* (1983) 461 U.S. 731, 748, para. 1 of the syllabus, the United States Supreme Court addressed the very same issue presented here with respect to federal labor law and held that the First Amendment prohibits the National Labor Relations Board from enjoining "the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law." In that case, an employee charged the employer with unfair labor practices. *Id.* at 733. The employer responded by filing a civil lawsuit in state court against the employee and other employee-defendants which

included, *inter alia*, a libel count seeking compensatory and punitive damages. *Id.* at 734. The employee-defendants then charged that the employer had filed the civil lawsuit in retaliation for the employees engaging in protected activity. *Id.* at 734-35. As in R.C. 4112.02(I), retaliation is prohibited by the National Labor Relations Act (“NLRA”). The Board ordered the employer to withdraw its lawsuit and to reimburse the employee-defendants for their legal expenses in connection with that lawsuit.² *Id.* at 737. A court of appeals enforced the Board’s order in its entirety. *Id.*

The United States Supreme Court thereafter vacated the judgment of the appellate court and stated:

[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. *** “going to a judicial body for redress of alleged wrongs ... stands apart from other forms of action directed at the alleged wrongdoer. The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right.”

Id. at 741; *see also* *BE&K Constr. Co.*, 536 U.S. 516, 436-437 (reaffirming the principles of *Bill Johnson’s Restaurant, Inc.* where the employer’s suit was deemed to be reasonably based but unsuccessful); *Johnson & Hardin Co. v. NLRB* (6th Cir. 1995), 49 F.3d 237, 243 (same).

In reaching its holding, the *Bill Johnson’s* Court first noted that a retaliatory suit would most likely force the employee to incur legal expenses in defending against the civil claims. 461 U.S. at 740. In addition, the prospect of damages liability might have a “chilling effect” on an employee’s exercise of his or her labor rights. *Id.* The *Bill Johnson’s* Court recognized, however, that “there are weighty countervailing considerations *** that militate against allowing

² While the matter was under review before the Administrative Law Judge, the state court issued an order granting the defendants-employees’ motion for summary judgment on all of the plaintiff-employer’s claims, except the libel claim, which the court found contained genuine issues of fact for trial. *Bill Johnson’s Restaurants, Inc.*, 461 U.S. at 736, n.2.

the Board to condemn the filing of a suit as an unfair labor practice and to enjoin its prosecution” based on the First Amendment right to petition the government for redress. *Id.* at 741. The Court thus held:

The filing and prosecution of a well-founded lawsuit *may not be enjoined* as an unfair labor practice, *even if it would not have been commenced but for the plaintiff’s desire to retaliate against the defendant for exercising rights protected by the Act.*

Id. at 743 (emphasis supplied). Accordingly, the Court concluded, the Board inappropriately rendered a decision *before* the state-court proceedings concluded. *Id.* at 748-49. “If the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief.” *Id.* at 749.

The First Amendment right to petition the government for redress exists even where there is a retaliatory motive. A lawsuit may not be enjoined unless: (1) the employer acted with retaliatory motive; *and* (2) “the suit lacks a reasonable basis in fact or law.” *Id.* at 748. Following its decision in *Bill Johnson’s Restaurant, Inc.*, the United States Supreme Court set forth a detailed two-part test for discerning sham-litigation in *Prof’l Real Estate Invest., Inc. v. Columbia Pictures, Indus., Inc.* (1993), 508 U.S. 49, 60-61:

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. *** Only if the challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationship of a competitor.

Id. (internal quotations omitted). *See also BE&K Constr. Co.*, 536 U.S. at 526-29 (asserting that this two-part test applies to matters under the NLRA); *Rosania v. Taco Bell of America, Inc.* (N.D. Ohio 2004), 303 F.Supp. 2d 878, 888 (applying same analysis to review propriety of

retaliation claim under the FMLA, which sought to challenge the defendant-former employer's assertion of counterclaims).

The principles of *Bill Johnson's Restaurant, Inc.* and *Prof'l Real Estate Invest., Inc.* can and should be applied to the case *sub judice*. R.C. 4112.02(I) states, in pertinent part, "It shall be an unlawful discriminatory practice: *** For any person *to discriminate in any manner* against any other person because that person has opposed any unlawful discriminatory practice defined in this section ***. OHIO REV. CODE § 4112.02(I) (2006) (emphasis supplied). The anti-retaliation provision of the NLRA contains virtually identical language. It states: "It shall be unlawful for any person *** to discharge or *in any other manner discriminate* against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act. 29 U.S.C. § 215(a)(3) (2006) (emphasis supplied). *See also Thaddeus-X v. Blatter* (6th Cir. 1999), 175 F.3d 378, 386 (while retaliation claims arise in a number of contexts, "e.g. ADA, Title VII, NLRA, etc.," "the essential framework remains the same."). Both statutes are to be liberally construed in light of their remedial purposes. *See Genaro v. Cent. Transp.* (1999), 84 Ohio St. 3d 293, 297 (recognizing that R.C. 4112.08 mandates that R.C. Chapter 4112 "shall be construed liberally" to accomplish its broad remedial purposes); *Emporium Capwell Co. v. Western Addition Community Organization* (1975), 420 U.S. 50, 66 ("national labor policy embodies the principles of nondiscrimination as a matter of highest priority, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), and it is a commonplace that we must construe the NLRA in light of the broad national labor policy of which it is a part"). It is thus appropriate to look to cases involving the NLRA (and other similar anti-retaliation provisions) for guidance. *See Rosania*, 303 F.Supp. 2d at 883.

Furthermore, application of *Bill Johnson's Restaurant, Inc.* and *Prof'l Real Estate Invest., Inc.* commands reversal of the court below, as there has been no finding that the challenged litigation is "objectively meritless." Greer-Burger engaged in a protected activity, *viz.*, filing a civil lawsuit against Temesi for sexual harassment. Rather than file a counterclaim against Greer-Burger, Temesi waited until the sexual harassment case ended and a jury found in his favor after deliberating for just minutes. Five months after the jury reached its verdict in Temesi's favor, he commenced a civil lawsuit against Greer-Burger seeking damages, including punitive damages for the emotional harm he suffered. Greer-Burger immediately moved to dismiss the civil lawsuit pursuant to Civ. R. 12(b)(6). The trial court (without opinion) dismissed Temesi's malicious prosecution claim but permitted his abuse of process and intentional infliction of emotional distress claims to proceed. The trial court therefore concluded from the face of the pleadings that Temesi's claims were not "baseless."

The OCRC's subsequent decision to enjoin Temesi from prosecuting the civil lawsuit and the assessment of Greer-Burger's attorneys' fees incurred in the defense of the suit thus runs afoul of Temesi's constitutional rights to seek redress against Greer-Burger in the courts. His action would not be barred except for its allegedly retaliatory motivation.

As the appellate court in this case recognized in its concurring opinion:

I understand and agree with the need to protect from retaliation those who seek the protection of our discrimination laws. Nevertheless, I find it difficult to understand how we advance these purposes when we refuse to permit those falsely accused of being discriminators from seeking legal redress. As it is currently interpreted, the retaliation law permits a claimant to engage in any kind of slander or defamation, and possibly even perjury, without consequence. This advances no purpose that I can think of, particularly in a case like this where the employer actually prevailed on the claimant's merit cases of discrimination.

2006 Ohio 3690, at P38. Under the principles of *Bill Johnson's Restaurant, Inc.*, the appellate court's order affirming the OCRC must be reversed.

The cases cited by the OCRC in its brief opposing jurisdiction are inapposite, as they fail to look beyond the statutory provisions at issue and fail to consider the employer's constitutional right to petition the government for redress as outlined in *Bill Johnson's Restaurant, Inc.* In *EEOC v. Outback Steakhouse, Inc.* (N.D. Ohio 1999), 75 F. Supp. 2d 756, 758, for example, the court decided the narrow issue of whether, for purposes of Title VII retaliation, "adverse actions" need to be employment related. Answering the question in the negative (*i.e.*, adverse employment actions need not be employment related), the *Outback Steakhouse* court concluded that the defendant's counterclaim filed against the plaintiff in a prior case constituted adverse action under Title VII. *Id.* at 760. The rule set forth in *Outback Steakhouse* was later affirmed by the United States Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White* (2006), 126 S.Ct. 2405, 2414. While both *Outback Steakhouse* and *White* resolved the issue of whether adverse employment actions need to be employment related in order to be actionable, neither case discussed a party's constitutional right to pursue civil claims after being falsely accused of sexual harassment. More importantly, in *White*, the United States Supreme Court cited *Bill Johnson's Restaurants, Inc.*, in support of its decision, without any attempt to distinguish or overrule its holding. 126 S.Ct. at 2414. *Bill Johnson's Restaurants, Inc.* is clearly well-settled law.

Finally, Greer-Burger urges the Court, without legal support, to focus on what she believes Temesi *should have* done, *i.e.*, either file a Civ. R. 11 motion against Greer-Burger for sanctions *or* file suit under Ohio's frivolous claim statute, R.C. 2323.51. Each of these provisions provides successful parties with an award of attorneys' fees and, at times, costs

incurred in defending unmeritorious lawsuits. In addition to the fact that there is no authority for the proposition that Temesi should be required to select the least invasive and/or least costly methods of recouping his losses, Greer-Burger's theory disregards the actual damages (including emotional distress damages), which Temesi alleges to have suffered by being falsely accused of sexual harassment. Furthermore, under Greer-Burger's logic, and again without explanation or legal support, the filing of a motion for sanctions under Civ. R. 11 or a separate suit under R.C. 2323.51 *is not* retaliation, but the filing of civil lawsuit *is* retaliation. Implicit in Greer-Burger's argument is that Temesi had a right to a remedy after Greer-Burger's sexual harassment case terminated in his favor, but merely used the "wrong" procedural device in attempting to assert that right. Given the lack of precedent in support of Greer-Burger's argument, Temesi requests that this Court allow him the opportunity to assert claims designed to make him whole for the harm he suffered.

Proposition of Law No. II: A party who fails to schedule, in a bankruptcy proceeding, a pending or impending non-bankruptcy lawsuit, is equitably and judicially estopped from pursuing the non-bankruptcy lawsuit.

In addition to his being enjoined from pursuing his claims, Temesi was ordered to pay approximately \$16,000 to Greer-Burger for attorneys' fees she incurred defending against his lawsuit. However, in a concurrent bankruptcy proceeding, Greer-Burger failed to schedule as an asset her pending retaliation claims against Temesi. And, Greer-Burger listed her attorneys' fees as a debt which was discharged by the bankruptcy court on May 12, 2003. By requesting that the Administrative Law Judge award the very fees that the bankruptcy court discharged just eight months prior, Greer-Burger successfully assumed a position in a legal proceeding inconsistent with one previously asserted. Accordingly, Greer-Burger should be equitably and judicially estopped from recovering the award of attorneys' fees.

In *Bruck Mfg. Co. v. Mason* (1992), 84 Ohio App.3d 398, 400-401, *jurisdictional motion overruled in Bruck Mfg. Co. v. Mason* (1993), 66 Ohio St.3d 1475, the Eighth District Court of Appeals explained the doctrines of equitable and judicial estoppel, stating in pertinent part:

“A long-standing tenet of bankruptcy law requires one seeking benefits under its terms to satisfy a companion duty to schedule, *for the benefit of creditors*, all his interests and property rights. *** It has been specifically held that a debtor must disclose *any litigation likely to arise in a non-bankruptcy context*” *** *Such cause of action is property of the estate* ***. “*The result of a failure to disclose such claims triggers application of the doctrine of equitable estoppel, operating against a subsequent attempt to prosecute the actions.*” ***

Moreover, the doctrine of judicial estoppel applies to preclude a party from *assuming a position in a legal proceeding inconsistent with one previously asserted.*

Id. (emphasis supplied; citations omitted).

Additionally, in *Advanced Analytics Laboratories, Inc. v. Kegler, Brown, Hill & Ritter, L.P.A.* (2002), 148 Ohio App.3d 440, 455-56, the Tenth District Court of Appeals reached the same conclusion, under similar facts involving a prior bankruptcy proceeding, after applying the doctrine of judicial estoppel. The *Advanced Analytics* Court stated, *inter alia*, that the doctrine of judicial estoppel precludes a litigant from assuming a position in a legal proceeding, which position is inconsistent with a position taken in a prior action. *Id.* at 452. The Court further noted that the doctrine of judicial estoppel protects the integrity of the judicial process. *Id.*

Further, in *Edwards v. Aetna Life Ins. Co.* (1982), 690 F.2d 595, 599, the Sixth Circuit Court of Appeals stated in relevant part:

The essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery. *** Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. If the second tribunal adopted the party’s inconsistent position, then at least *one court has probably been misled.*

Id. (emphasis supplied). See also *Lewis v. Weyerhaeuser Co.* (6th Cir., July 6, 2005), No. 04-5675, 2005 U.S. App. LEXIS 13598 (holding that Chapter 13 debtor who failed to disclose her discrimination action in her bankruptcy schedules is judicially estopped from later pursuing such action); *Burnes v. Pemco Aeroplex, Inc.* (11th Cir. 2002), 291 F.3d 1282, 1285 (judicial estoppel is an equitable doctrine, which precludes a party from assuming a position in a legal proceeding that is inconsistent with one previously asserted, especially when the inconsistency would allow the party to “play fast and loose with the courts”).

In the case *sub judice*, Greer-Burger’s claim for \$16,000 in attorneys’ fees constituted property belonging to her estate. If successful in that claim, as she was, she would not have to pay her attorney from her own funds, and would accrue income equal to that amount. Thus, that claim constituted an asset which she was required to schedule. Greer-Burger owed a duty to her creditors to schedule her assets in their entirety, including her claim against Temesi. Had she declared the claim, the bankruptcy court would have had the opportunity to list it as an asset, and, upon her award of the amount, the bankruptcy court could have ordered it paid to her attorney or another creditor upon final entry of judgment. The doctrine of equitable estoppel is applied precisely to prevent a party from profiting in this manner *i.e.*, through failure to disclose estate assets. Pursuant to *Bruck, supra*, she is equitably estopped from prevailing on her claim for attorneys’ fees.

Greer-Burger went one step further in her efforts to potentially defraud the courts. Although Greer-Burger did not schedule as an asset any potential damages award that could (and eventually did) result from the OCRC’s pursuit of her retaliation claim, she made sure that she scheduled her attorneys as unsecured creditors and indicated a debt amount of \$15,000. The adjudication of the bankruptcy proceeding discharged Greer-Burger’s debts, including the fees

she owed her attorneys.³ The failure to schedule the claim thus permitted Greer-Burger to profit in the amount of \$16,000 by defrauding the bankruptcy court and to be released from the additional \$15,000 in fees, as indicated in her Schedule F. Greer-Burger therefore assumed a position before the Administrative Law Judge (and before the trial court and appellate court) of a party who is entitled to receive \$16,000, which is wholly inconsistent with the position she asserted in her bankruptcy proceeding. Pursuant to *Bruck, supra*, *Advanced Analytics, supra*, and *Edwards, supra*, Greer-Burger is judicially estopped from assuming that inconsistent position, and she should not be permitted to proceed on her claims for against Temesi.

Citing R.C. 4112.06(C), Greer-Burger will likely request that this Court overlook her successful efforts to mislead the courts and her creditors by arguing that the Temesi failed to raise the estoppel issues in the proceedings below. Greer-Burger's argument in this regard fails for several reasons. First, R.C. 4112.06(C) provides, "An *objection* that has not been urged before the commission shall not be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances." OHIO REV. CODE § 4112.06(C) (emphasis supplied). Based on the plain language of the statute, R.C. 4112.06(C) relates to *objections* not raised in the proceedings below, and not to equitable *defenses* such as estoppel. If the General Assembly wanted to include defenses as items waived if not asserted, it would have explicitly done so. *C.f.*, Civ. R. 12(H), which lists certain objections *and* defenses that are waived if not properly asserted. This distinction is further reflected in *Davenport v. Bureau of Workers' Comp.*, 10th Dist. No. 87104, 2002-Ohio-2768, cited by the OCRC in its Memorandum in Response to Temesi's Motion for Jurisdiction. In *Davenport*, the Tenth District Court of Appeals declined to review the appellant's claim that a five-day suspension constituted

³ Greer-Burger has also attempted to discharge any future debts, including damages and attorneys' fees, that may be incurred if Temesi ultimately prevails against her in his civil claims.

unlawful race discrimination. *Id.* at P37-41. Noting that the appellant failed to object to a hearing officer's findings, which were silent as to the suspension, the *Davenport* court concluded that the issue of the suspension was not properly before the court.⁴

Here, in contrast to *Davenport*, no new "objection" has been raised. Throughout the proceedings below, Temesi *objected* to the pursuit of Greer-Burger's retaliation claim, to the OCRC's issuance of a cease and desist order, and to the assessment against him of Greer-Burger's attorneys' fees. While Temesi may have waited to assert the equitable defenses of judicial and equitable estoppel in support of his objections, the language of R.C. 4112.06(C) does not preclude him from raising such defenses now.

Furthermore, even if the Court were to assume that R.C. 4112.06(C) applies to the failure to raise defenses in addition to objections, Temesi's failure to raise the estoppel defenses should be excused, because the very nature of Temesi's estoppel defenses present extraordinary circumstances. These defenses seek to preclude Greer-Burger from double recovery based upon her efforts to *conceal* the fact of the bankruptcy not only from Temesi, but from all of her creditors and the courts. Once an independent investigation of the bankruptcy court docket revealed that Greer-Burger successfully discharged her attorneys' fees in bankruptcy and engaged in fraud upon the court system with respect to her alleged assets, Temesi brought the issue to the Eighth District Court of Appeals for review. Although the appellate court declined to accept Temesi's estoppel arguments, it did so on other grounds unrelated to his alleged failure

⁴ *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St. 3d 78, and the cases cited therein are inapplicable. This Court in *Foreman* considered whether an employer's failure to raise "voluntary termination" as a defense to the claimant's award of temporary total disability compensation would preclude the employer's ability to raise such a defense in court. In reaching its conclusion, the Court relied on a variety of cases, each of which was reviewed under the workers' compensation laws. The Ohio Workers' Compensation Act, however, contains no provision similar to R.C. 4112.06(C), which specifically limits that which will be waived if not raised below.

to raise the defenses below. This court should not now award Greer-Burger for her success in evading her financial responsibilities and possibly committing fraud upon the courts.

Accordingly, Temesi respectfully requests that this Court accept the decisions of the Eighth and Tenth District Courts of Appeals and hold that Greer-Burger is estopped from receiving any damages award, even if she would have been successful in her claims.

CONCLUSION

Based upon the foregoing analysis, Appellant Laszlo Temesi prays that this Court reverse the decision of the appellate court below and remand the case to the OCRC with an order to stay proceedings until Temesi's civil claims against Greer-Burger are fully adjudicated. Temesi additionally requests that the Court invoke the doctrines of equitable and judicial estoppel to preclude Greer-Burger from personally receiving any monetary award if the OCRC eventually prevails in its retaliation claim.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served this 31st day of January, 2007 by regular U.S. Mail, postage prepaid upon the following:

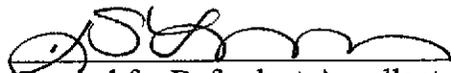
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APPENDIX

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IN THE SUPREME COURT OF OHIO

CASE NUMBER

06-1616

TAMMY A. GREER-BURGER,

Plaintiff-Appellee,

v.

LASZLO TEMESI,

Defendant-Appellant.

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District

Court of Appeals
Case No. 87104

ON COMPUTER - TAI

NOTICE OF APPEAL
OF DEFENDANT-APPELLANT LASZLO TEMESI

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FILED
AUG 28 2006
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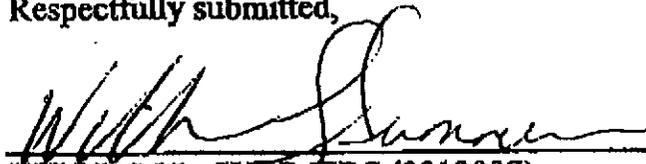
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**NOTICE OF APPEAL
OF DEFENDANT-APPELLANT LASZLO TEMESI**

Defendant-Appellant Laszlo Temesi hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case No. 87104 on July 20, 2006.

This case raises a substantial constitutional question and is one of public interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that copies of this *Notice of Appeal of Defendant-Appellant Laszlo Temesi* was sent by ordinary mail, postage pre-paid, to Mark D. Katz, Ulmer & Berne Co., L.L.P., 1660 West 2nd Street, Suite 1100, Cleveland, Ohio 44113, Jim Petro, Office of the Ohio Attorney General, 30 East Broad Street, Columbus, Ohio 43215, and Wayne D. Williams, Office of the Ohio Attorney General, 615 West Superior Avenue, Cleveland, Ohio 44113, on this 25th day of August, 2006.



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Citation: **2006 Ohio 3690**

*2006 Ohio 3690, *; 2006 Ohio App. LEXIS 3646, ***

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TAMMY A. GREER-BURGER, Plaintiff-Appellee vs. LASZLO TEMESI, Defendant-Appellan

NO. 87104

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2006 Ohio 3690; 2006 Ohio App. LEXIS 3646

July 20, 2006, Date of Announcement of Decision

SUBSEQUENT HISTORY: Discretionary appeal not allowed by Greer-Burger v. Temesi, 2006 Ohio 6447, 2006 Ohio LEXIS 3434 (Ohio, Dec. 13, 2006)

PRIOR HISTORY: **[**1]** CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court. Case No. CV-552404.

DISPOSITION: AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: After appellee employee unsuccessfully sued appellant employer for employment discrimination, the employer sued the employee for damages, and she filed a complaint with appellee Ohio Civil Rights Commission, which ordered the employer to cease all discrimination and pay the employee's attorney fees incurred in defending the employer's suit. The Cuyahoga County Court of Common Pleas (Ohio) affirmed this order, and the employer appealed.

OVERVIEW: The employer said the employee quit before suing him, so his suit against her was not an adverse employment action. The appellate court held retaliation could occur post-employment. The Ohio Civil Rights Commission showed prima facie retaliation. The employee's suit was a protected activity which was known to the employer, after which he sued her for claims related to filing the suit. His claim that he sought to recoup economic loss and redress for emotional distress shifted the burden to the Commission to prove these reasons were a pretext for retaliation. They were a pretext because, in addition to trying to recoup attorney fees, he also sought punitive damages, which would defeat the anti-retaliation legislation's purpose to keep employers from deterring victims from pursuing discrimination claims, absent a showing that her complaint was blatantly frivolous. He could have used other ways to claim her suit was frivolous and recover attorney fees. The fact that the employee's attorney fees were discharged in bankruptcy did not bar a judgment for them against the employer for retaliation.

OUTCOME: The trial court's judgment was affirmed.

CORE TERMS: retaliation, sexual harassment, prima facie case, protected activity, assignment of error, anti-retaliation, non-discriminatory, intentional infliction of emotional distress, malicious prosecution, punitive damages, abuse of process, civil suit, participated, affirming, probative, defending, reliable, lawsuit, pretext, adverse action, employment-related, substantial evidence, announcement, discriminate, retaliatory, claimant, shifted, punish, abuse of discretion, money judgment

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[Administrative Law](#) > [Judicial Review](#) > [Standards of Review](#) > [Substantial Evidence](#) 

[Civil Rights Law](#) > [Practice & Procedure](#) > [Civil Rights Commissions](#) > [General Overview](#) 

[Governments](#) > [Legislation](#) > [Interpretation](#) 

HN1  A trial court must affirm a decision of the Ohio Civil Rights Commission if the court finds there is reliable, probative, and substantial evidence in the record to support the decision. [Ohio Rev. Code Ann. § 4112.06\(E\)](#). Appellate review of the trial court's judgment is more limited. An appellate court may reverse a determination of the trial court only on a showing that the court abused its discretion. However, as a matter of law, the appellate court reviews matters of statutory construction de novo. [More Like This Headnote](#)

[Civil Rights Law](#) > [Civil Rights Acts](#) > [General Overview](#) 

[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Elements](#) > [Protected Activities](#) 

HN2  Title VII of the Civil Rights Act of 1964, [42 U.S.C.S. § 2000e](#) et seq., and Ohio's corresponding "civil rights" statute, [Ohio Rev. Code Ann. ch. 4112](#), make it unlawful to retaliate against a person because they have participated in a protected activity. [More Like This Headnote](#)

[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Elements](#) > [General Overview](#) 

HN3  See [42 U.S.C.S. § 2000e-3\(a\)](#).

[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Elements](#) > [Protected Activities](#) 

HN4  [Ohio Rev. Code Ann. § 4112.02\(I\)](#) states that it is an unlawful discriminatory practice for any person to discriminate against any other person because that person has made a charge, testified, or participated in any investigation, proceeding, or hearing under [Ohio Rev. Code Ann. §§ 4112.02](#) to [4112.07](#). [More Like This Headnote](#)

[Labor & Employment Law](#) > [Discrimination](#) > [Title VII of the Civil Rights Act of 1964](#) > [General Overview](#) 

HN5  Federal case law interpreting Title VII, [42 U.S.C.S. § 2000e](#) et seq., is generally applicable to cases involving alleged violations of [Ohio Rev. Code Ann. ch. 4112](#), regarding employment discrimination. [More Like This Headnote](#)

[Labor & Employment Law](#) > [Discrimination](#) > [General Overview](#) 

HN6  In cases involving discriminatory treatment by an employer against an employee, the law engages in an evidentiary burden-shifting mechanism between the parties. The first step requires that the complainant or the civil rights commission prove a prima facie case of discrimination. [More Like This Headnote](#)

[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Elements](#) > [Adverse Employment Actions](#) 

[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Elements](#) > [Causal Link](#) 

[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Elements](#) > [Protected Activities](#) 

HN7  In order to establish a prima facie case of retaliation under [Ohio Rev. Code Ann. § 4112.02\(I\)](#), the law typically requires the Ohio Civil Rights Commission to demonstrate that: (1) the complainant engaged in protected activity, (2) the respondent knew of complainant's participation in the protected activity, (3) the respondent thereafter took adverse employment action against the

complainant, and (4) a causal connection exists between the protected activity and the adverse employment action. [More Like This Headnote](#)

[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Burdens of Proof](#) 

HN8  The burden of establishing a prima facie case of retaliation in employment is not onerous and is easily met. Once a prima facie case of retaliation is established, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its adverse employment action. If the respondent meets his burden, the burden then shifts back to demonstrate that the respondent's proffered reasons were a pretext for retaliation. At all times, the complainant or the Ohio Civil Rights Commission retain the ultimate burden of persuasion. [More Like This Headnote](#)

[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Burdens of Proof](#) 

HN9  Ohio Rev. Code Ann. [§ 4112.02\(I\)](#) does not require that an employer retaliate against an employee; rather, it provides that it is an unlawful discriminatory practice "for any person" to discriminate against "any other person" in retaliation for participating in an investigation, proceeding, or hearing. Therefore, the fact that the retaliation occurs post-employment does not affect the Ohio Civil Rights Commission's ability to satisfy its burden of making a prima facie case for retaliation. Moreover, it is not necessary that the adverse action suffered be employment-related or that the person suffering it be the employer's current employee. [More Like This Headnote](#)

[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Statutory Application](#) > [General Overview](#) 

HN10  The term "employees" under the anti-retaliation provisions of Title VII, [42 U.S.C.S. § 2000e](#) et seq., includes former employees. Inclusion of former employees is consistent with the broader context of Title VII and the primary purpose of [§ 704\(a\)](#) ([42 U.S.C.S. § 2000e-3](#)). [More Like This Headnote](#)

[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Elements](#) > [General Overview](#) 

HN11  In a case in which an employer's retaliation is alleged, the adverse action taken by the employer need not be employment-related. [More Like This Headnote](#)

[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Elements](#) > [General Overview](#) 

HN12  The scope of the anti-retaliation provision of Title VII, [42 U.S.C.S. § 2000e-3](#) extends beyond workplace-related or employment-related retaliatory acts and harm. To hold otherwise would only limit the provision's broad protection from retaliation and impede Title VII's primary purpose of "maintaining unfettered access to statutory remedial mechanisms." Accordingly, an adverse action taken by an employer against an employee or former employee, need not be employment-related. [More Like This Headnote](#)

[Civil Procedure](#) > [Remedies](#) > [Damages](#) > [Punitive Damages](#) 

HN13  The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct. A punitive damages award is more about defendant's behavior than the plaintiff's loss. Punitive damages are awarded not to compensate a plaintiff but to punish the guilty, deter future misconduct, and to demonstrate society's disapproval. [More Like This Headnote](#)

[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Elements](#) > [Protected Activities](#) 

HN14  Ohio Rev. Code Ann. [§ 4112.02\(I\)](#) expressly prohibits a person from discriminating "in any manner" against a person who has participated in a protected activity. This language essentially creates an absolute privilege for the filing of a discrimination suit or charge. Although this language is rather unsettling, it is nevertheless the law, and surely the general assembly had a purpose in establishing such a broad privilege. [More Like This Headnote](#)

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[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Burdens of Proof](#) 

[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Elements](#) > [Protected Activities](#) 

HN15 Although individuals who are wrongfully sued for employment discrimination based on frivolous claims may seek redress, the individuals may not do so in a retaliatory way. [More Like This Headnote](#)

[Labor & Employment Law](#) > [Discrimination](#) > [Retaliation](#) > [Elements](#) > [Protected Activities](#) 

HN16 The purpose behind any anti-retaliation provision, either under [Ohio Rev. Code Ann. § 4112.02](#) or Title VII, [42 U.S.C.S. § 2000e-3](#), is to prevent employers from deterring victims of discrimination from complaining to the Ohio Civil Rights Commission or the Equal Employment Opportunities Commission. It is certainly true that a lawsuit may be used by an employer as a powerful instrument of coercion or retaliation and that such suits can create a "chilling effect" on the pursuit of discrimination claims. The primary purpose is maintaining unfettered access to statutory remedial mechanisms. [More Like This Headnote](#)

Available Briefs and Other Documents Related to this Case:

◆ [OH Court of Appeals Brief\(s\)](#)

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For Defendant-Appellant: WILLIAM L. SUMMERS, EDWIN J. VARGAS, Summers & Vargas Co., L.P.A., Cleveland, Ohio.

JUDGES: COLLEEN CONWAY COONEY, PRESIDING JUDGE. PATRICIA ANN BLACKMON, J., CONCURS. MICHAEL J. CORRIGAN, J., CONCURS IN JUDGMENT ONLY.

OPINION BY: COLLEEN CONWAY COONEY

OPINION: JOURNAL ENTRY and OPINION

COLLEEN CONWAY COONEY, P.J.:

[*P1] Defendant-appellant, Laszlo Temesi ("Temesi"), appeals the common pleas court's decision affirming the order of the Ohio Civil Rights Commission that Temesi cease and desist from all discriminatory practices in violation of [R.C. Chapter 4112](#) and pay plaintiff-appellee, Tammy A. Greer-Burger ("Greer"), \$ 16,000 for attorney fees. Finding no merit to the appeal, we affirm.

[*P2] In 1998, Greer filed a sexual harassment suit against Temesi based on alleged inappropriate **[*P2]** comments and actions while she was employed by Temesi. A jury returned a verdict in favor of Temesi.

[*P3] In May 2000, five months after the jury verdict, Temesi filed a civil suit against Greer alleging malicious prosecution, abuse of process, and intentional infliction of emotional distress. In response, Greer filed a charge affidavit with the Ohio Civil Rights Commission ("Commission") alleging that she was subject to unlawful retaliation after participating in a protected activity. Specifically, she alleged that Temesi violated [R.C. 4112.02\(I\)](#) by filing a lawsuit in retaliation for her filing a sexual harassment suit against him.

[*P4] The Commission conducted a preliminary investigation and found that probable cause existed to believe that Temesi engaged in illegal discrimination in violation of [R.C. 4112.02\(I\)](#). In 2003, the administrative law judge ("ALJ") issued findings of fact, conclusions of law, and a recommendation that

Temesi cease and desist from all discriminatory practices. Following a damages hearing, the ALJ recommended that Temesi pay Greer \$ 16,000 to reimburse her for attorney fees incurred in defending **[**3]** against Temesi's suit. In December 2004, the Commission adopted the recommendations and issued a cease and desist order against Temesi and ordered him to pay Greer \$ 16,000 in attorney fees.

[*P5] Temesi filed a petition for judicial review pursuant to R.C. 4112.06 with the common pleas court. The court affirmed the Commission's order, finding that it was supported by reliable, probative, and substantial evidence and was in accordance with the law.

[*P6] Temesi appeals, raising three assignments of error.

Standard of Review

[*P7] ^{HN1} The court of common pleas must affirm the Commission's decision if the court finds there is reliable, probative, and substantial evidence in the record to support the decision. R.C. 4112.06(E); Plumbers & Steamfitters Comm. v. Ohio Civil Rights Comm. (1981), 66 Ohio St.2d 192, 421 N.E.2d 128, paragraph two of the syllabus.

[*P8] Appellate review of the trial court's judgment is more limited. This court may reverse a determination of the court of common pleas only on a showing that the court abused its discretion. Ohio Civ. Rights Comm. v. Case W. Res. Univ., 76 Ohio St.3d 168, 177, 1996 Ohio 53, 666 N.E.2d 1376,

[4]** citing Cleveland Civil Serv. Comm. v. Ohio Civil Rights Comm. (1991), 57 Ohio St.3d 62, 65, 565 N.E.2d 579.

[*P9] However, as a matter of law, we review matters of statutory construction de novo. Ritchie v. Weston, Inc. (2001), 143 Ohio App.3d 176, 179, 757 N.E.2d 835, citing State v. Wemer (1996), 112 Ohio App.3d 100, 103, 677 N.E.2d 1258.

[*P10] With these principles in mind, we turn to Temesi's assigned errors.

Discrimination Liability

[*P11] In his first assignment of error, Temesi argues that the trial court erred in affirming the Commission's decision "because there was no liability for discrimination." Temesi's main argument is that Greer failed to establish a prima facie case of retaliation and, thus, it was error for the ALJ to find that Temesi violated R.C. 4112.02.

[*P12] ^{HN2} Title VII of the Civil Rights Act of 1964, Section 701 et seq., as amended Section 2000e et seq., Title 42 U.S. Code ("Title VII") and Ohio's corresponding "civil rights" statute, R.C. Chapter 4112, make it unlawful to retaliate against a person because they have participated in a protected activity. **[**5]** 42 U.S.C. § 2000e-3(a) provides that, ^{HN3} "[I]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, * * * because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." ^{HN4} R.C. 4112.02(I) states that it is an unlawful discriminatory practice "for any person to discriminate * * * against any other person because that person has made a charge, testified, * * * or participated * * * in any investigation, proceeding, or hearing under sections 4112.02 to 4112.07 of the Revised Code." In addition, ^{HN5} "Federal case law interpreting Title VII is generally applicable to cases involving alleged violations of Chapter 4112." Plumbers & Steamfitters, supra at 196.

[*P13] ^{HN6} In cases involving discriminatory treatment by an employer against an employee, the law engages in an evidentiary burden-shifting mechanism between the parties. The first step requires that the complainant, or, as in the instant case, the commission, prove **[**6]** a prima facie case of discrimination. McDonnell Douglas Corp. v. Green (1973), 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668.

[*P14] ^{HN7} In order to establish a prima facie case of retaliation under R.C. 4112.02(I), the law typically requires the Commission to demonstrate that: (1) the complainant engaged in protected activity, (2) the respondent knew of complainant's participation in the protected activity, (3) the respondent thereafter took adverse employment action against the complainant, and (4) a causal connection exists between the

protected activity and the adverse employment action. Chandler v. Empire Chem., Inc. v. Midwest Rubber Custom Mixing Div. (1994), 99 Ohio App.3d 396, 402, 650 N.E.2d 950. Powers v. Pinkerton, Inc., Cuyahoga App. No. 76333, 2001 Ohio 4119

[*P15] ^{HN8} The burden of establishing a prima facie case of retaliation is not onerous and is easily met. Nguyen v. City of Cleveland (6th Cir. 2000), 229 F.3d 559, 563. Once a prima facie case of retaliation is established, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for the adverse **[**7]** employment action. Chandler, supra at 402. If the respondent meets his burden, the burden then shifts back to demonstrate that the respondent's proffered reasons were a pretext for retaliation. Id. At all times, the complainant or Commission retains the ultimate burden of persuasion. Texas Department of Community Affairs v. Burdine (1981), 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207.

[*P16] In the instant case, Temesi argues that no evidence exists demonstrating that he took an employment action adverse to Greer. Instead, he argues that Greer quit her job prior to the filing of the sexual harassment suit and, thus, no adverse employment action was or could be taken.

[*P17] ^{HN9} R.C. 4112.02(I) does not require that an employer retaliate against an employee; rather, it provides that it is an unlawful discriminatory practice "for any person" to discriminate against "any other person" in retaliation for participating in an investigation, proceeding, or hearing under this section. Therefore, the fact that the retaliation occurred post-employment does not affect the Commission's ability to satisfy its burden of making **[**8]** a prima facie case for retaliation. Moreover, it is not necessary that the adverse action suffered by Greer be employment-related or that she be a current employee of Temesi's.

[*P18] The United States Supreme Court has expressly stated that ^{HN10} the term "employees" under Title VII's anti-retaliation provisions includes former employees. Robinson v. Shell Oil (1997), 519 U.S. 337, 346, 117 S.Ct. 843, 136 L.Ed.2d 808. Inclusion of former employees is "consistent with the broader context of Title VII and the primary purpose of § 704(a)." Id.

[*P19] Furthermore, ^{HN11} the adverse action taken by the employer need not be employment-related. Although no state court in Ohio has reviewed this issue, the United States Supreme Court recently addressed this issue in Burlington Northern & Santa Fe Railway Co. v. White (2006), 548 U.S. , 126 S. Ct. 2405, 165 L.Ed.2d 345. In Burlington Northern, the court concluded that ^{HN12} the scope of the anti-retaliation provision of Title VII "extends beyond workplace-related or employment-related retaliatory acts and harm." Id. at _____. To hold otherwise would only limit the provision's broad protection from retaliation and impede Title VII's primary **[**9]** purpose of "maintaining unfettered access to statutory remedial mechanisms." Id., quoting Robinson, supra at 346. Accordingly, the adverse action taken by the employer against an employee or former employee, need not be employment-related. Id. at _____.

[*P20] Applying the prima facie test to the instant case, we find that the Commission established a prima facie case for retaliation discrimination. Greer engaged in a protected activity, i.e. filing a sexual harassment suit against Temesi, which was obviously known to him. After the jury found in Temesi's favor, he filed a civil suit against Greer for malicious prosecution, abuse of process, and intentional infliction of emotional distress, which related to the filing of the sexual harassment suit.

[*P21] Once the Commission established a prima facie case, the burden shifted to Temesi to establish a legitimate, non-discriminatory reason for the adverse action. Temesi makes no argument on appeal that the filing of the action was non-discriminatory. Moreover, he does not make any argument concerning his burden of proof or the Commission's burden once it shifted. Nevertheless, Temesi argued before the Commission **[**10]** that the filing of the lawsuit was to recoup economic loss and seek redress for emotional distress caused by the filing of the sexual harassment suit. Under McDonnell, supra, and Board of Trustees of Keene State College v. Sweeney (1978), 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216, this reasoning is sufficient to satisfy Temesi's burden.

[*P22] Because Temesi satisfied his burden, the burden then shifted to the Commission to prove that Temesi's non-discriminatory reasons were merely a pretext for retaliation. Upon review of the briefs, we find that Temesi's reasoning is merely a pretext for retaliation. Had Temesi filed suit solely to recoup attorney fees he incurred in defending the sexual harassment suit, the result might have been different. 9

However, he also sought punitive damages for malicious prosecution, abuse of process, and intentional infliction of emotional distress. **HN13** The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 651, 1994 Ohio 324, 635 N.E.2d 331. "A punitive damages award is more about defendant's behavior ****11** than the plaintiff's loss." *Wightman v. Consolidated Rail Corp.*, 86 Ohio St. 3d 431, 439, 1999 Ohio 119, 715 N.E.2d 546. Punitive damages are awarded "not to compensate a plaintiff but to punish the guilty, deter future misconduct, and to demonstrate society's disapproval." *Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St.3d 488, 493, 2001 Ohio 1593, 756 N.E.2d 657.

***P23** The award of punitive damages would defeat the overriding purpose of anti-retaliation legislation: to prevent employers from deterring victims from pursuing discrimination claims. By seeking punitive damages, Temesi has asked the court to punish Greer for pursuing her sexual harassment claim. Absent any indication that Greer's complaint was blatantly frivolous and contained no colorable claim, we cannot find that punishment overrides the underlying purpose of the anti-retaliation provisions.

P24** Moreover, **HN14** R.C. 4112.02(I) expressly prohibits a person from discriminating "in any manner" against a person who has participated in a protected activity. This language essentially creates an absolute privilege for the filing of a discrimination suit or charge. Although *12** this language is rather unsettling, it is nevertheless the law, and surely the General Assembly had a purpose in establishing such a broad privilege. Therefore, we find that the Commission satisfied its burden in proving that Temesi's non-discriminatory reasons were merely a pretext to retaliation.

***P25** Accordingly, Temesi's filing of the civil suit was retaliatory and, thus, a violation of R.C. 4112.02 (I) and Title VII. The first assignment of error is overruled.

Assessment of Attorney Fees

***P26** In his second assignment of error, Temesi argues that the trial court erred in affirming the ALJ's findings to award Greer attorney fees because Temesi had a right to assert a claim against Greer for her actions in unsuccessfully suing him for sexual harassment.

P27** In support of his claim, Temesi cites a plethora of federal case law for the proposition that a claimant may be penalized for improperly lodging a discrimination complaint against an employer. However, Fed.Civ.R. 11 constituted the mechanism to recover attorney fees in each of the cases cited. Temesi has not cited a single case to support *13** his argument that the filing of a separate suit for malicious prosecution, abuse of process, and intentional infliction of emotional distress after successfully defending a sexual harassment claim is not deemed retaliation under Title VII and R.C. 4112.02(I).

P28** **HN15** Although we recognize that individuals who are wrongfully sued based on frivolous claims may seek redress, the individuals may not do so in a retaliatory way. *Gilatta v. Tectrum, Inc.*, (S.D. Ohio 2002), 211 F. Supp. 2d 992, 1009 ("the fact that an employee files a charge of discrimination does not immunize such employee from a suit brought by the employer, provided that the employer's motivation is not one of retaliation"). As the Commission noted, there were other avenues available for Temesi to assert a frivolous claim argument and recover attorney fees. Temesi could have filed a motion for sanctions and attorney fees pursuant to Civ.R. 11 and R.C. 2323.51 in the original suit in which he prevailed. However, Temesi failed to pursue that option. Instead, he filed a separate suit five months after the jury verdict in his favor, *14** seeking damages in excess of attorney fees.

***P29** Therefore, we find no abuse of discretion in the trial court's determining that reliable, probative, and substantial evidence supported the Commission's assessment of attorney fees against Temesi.

***P30** Accordingly, we overrule the second assignment of error.

Attorney Fees Awarded

***P31** Temesi argues in his final assignment of error that Greer was not damaged and should be judicially estopped from attempting to collect attorney fees because they were discharged in her bankruptcy. In the instant case, the Commission ordered Temesi to pay Greer \$ 16,000 for attorney fees she incurred in defending the civil suit filed against her.

[*P32] Temesi argues that he should not be punished for using the incorrect procedure to recover his attorney fees for the sexual harassment suit and, further, the cease and desist order was a sufficient deterrent.

[*P33] ~~HN16~~ The purpose behind any anti-retaliation provision, either under R.C. 4112.02 or Title VII, is to prevent employers from deterring victims of discrimination from complaining to the Ohio Civil Rights Commission or the Equal Employment **[**15]** Opportunities Commission. EEOC v. Outback Steakhouse of Florida (N.D. Ohio 1999), 75 F.Supp.2d 756, 758, citing Robinson, supra. "It is certainly true that 'a lawsuit * * * may be used by an employer as a powerful instrument of coercion or retaliation' and that such suits can create a 'chilling effect' on the pursuit of discrimination claims." Id., quoting Bill Johnson's Restaurants Inc. v. National Labor Relations Bd. (1983), 461 U.S. 731, 740-741, 103 S.Ct. 2161, 76 L.Ed.2d 277. The primary purpose is "maintaining unfettered access to statutory remedial mechanisms." Robinson, supra at 346.

[*P34] In keeping with the purpose of anti-retaliation legislation, the Commission found that the award of attorney fees served as a necessary deterrent. The trial court found that this decision was supported by reliable, probative, and substantial evidence. Accordingly, we find no abuse of discretion.

[*P35] Temesi also claims that Greer is essentially receiving a windfall because her attorney fees were discharged in her bankruptcy proceeding. According to Temesi, Greer should be estopped from receiving a money judgment **[**16]** because she failed to disclose the lawsuit in her bankruptcy.

[*P36] The disposition of the \$ 16,000 is not for this court to consider. Whether Greer's bankruptcy trustee pursues the money judgment for payment of creditors is not within the purview of this court's jurisdiction. See, 11 U.S.C.S. § 704(2). Therefore, the fact that Greer's attorney fees were discharged in a bankruptcy neither hinders nor precludes a money judgment against Temesi for a violation of R.C. 4112.02 (I) for retaliation. We find no abuse of discretion in the trial court's affirming the Commission's order.

[*P37] Accordingly, the final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, J. CONCURS **[**17]**

MICHAEL J. CORRIGAN, J. CONCURS IN JUDGMENT ONLY (SEE SEPARATE CONCURRING OPINION)

PRESIDING JUDGE

COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

CONCUR BY: MICHAEL J. CORRIGAN

11

CONCUR: CONCURRING OPINION

MICHAEL J. CORRIGAN, J., CONCURRING IN JUDGMENT ONLY:

[*P38] I concur with the majority's disposition of this appeal, but only with the greatest reluctance. I understand and agree with the need to protect from retaliation those who **[**18]** seek the protection of our discrimination laws. Nevertheless, I find it difficult to understand how we advance these purposes when we refuse to permit those falsely accused of being discriminators from seeking legal redress. As it is currently interpreted, the retaliation law permits a claimant to engage in any kind of slander or defamation, and possibly even perjury, without consequence. This advances no purpose that I can think of, particularly in a case like this where the employer actually prevailed on the claimant's merit case of discrimination.

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

CASE NO: 03-10480
CHAPTER: 7

SSN/TAX ID: 288-68-4866

DEBTOR: Tammy A Burger
CO-DEBTOR:

FINAL DECREE

THE COURT, IN RELIANCE UPON THE CERTIFICATION OF THE UNITED STATES TRUSTEE, FINDS THAT THE ESTATE OF THE WITHIN DEBTOR(S) HAS BEEN FULLY ADMINISTERED.

THE DEPOSIT REQUIRED BY THE PLAN HAS BEEN DISTRIBUTED.

IT IS THEREFORE ORDERED THAT:

- X THE TRUSTEE IS HEREBY DISCHARGED AS TRUSTEE OF THE ESTATE OF THE ABOVE-NAMED DEBTOR AND ANY BOND REQUIRED PURSUANT TO 11 U.S.C. SECTION 322 IS CANCELLED.

- X THE CHAPTER 7 CASE OF THE ABOVE-NAMED DEBTOR(S) IS CLOSED; AND

OTHER PROVISION AS NEEDED.

/s/ Arthur I Harris
Judge Arthur I Harris

DATED: May 12, 2003

UNITED STATES CONSTITUTION, Amendment I - Freedom of Religion, Press, Expression. (Ratified 12/15/1791).

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

OHIO CONSTITUTION, Article I, Section XVI – Redress in Courts. (As amended September 3, 1912).

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Ohio Rev. Code § 4112.02. Unlawful discriminatory practices.

It shall be an unlawful discriminatory practice:

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

Ohio Rev. Code § 4112.06. Judicial review of commission order.

(C) An objection that has not been urged before the commission shall not be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.