

In the
Supreme Court of Ohio

TAMMY A. GREER-BURGER,

Plaintiff-Appellee,

v.

LASZLO TEMESI,

Defendant-Appellant.

Case No. 2006-1616

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

Court of Appeals Case
No. CA-05-087104

MERIT BRIEF OF THE OHIO CIVIL RIGHTS COMMISSION

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INTRODUCTION

Nothing chills the exercise of an employee's right to seek redress for discrimination more than a retaliatory lawsuit for punitive damages. Last year the United States Supreme Court interpreted the anti-retaliation provision of Title VII, 42 U.S.C. 2000e-3(a) broadly, approving its application to actions unrelated to the workplace. Retaliation under federal law occurs wherever an employer's actions are so harmful that they could dissuade a reasonable worker from pressing a discrimination claim. *Burlington Northern & Santa Fe Ry. Co. v. White* (2006), 548 U.S. ___, 126 S.Ct. 2405, 165 L.Ed. 2d 345. Though Ohio's anti-retaliation provision, R.C. 4112.02(I), is even broader than its federal counterpart, Defendant-Appellant Temesi urges this court to allow employers to file retaliatory lawsuits after every unsuccessful discrimination complaint. This rule would dissuade any worker from filing a discrimination lawsuit.

Temesi's first Proposition of Law is profoundly mistaken for a number of reasons. First, it flies in the face of R.C. 4112.02(I), which says that an employer may not discriminate against *any* person in *any* manner because that person has participated in *any* proceeding under Chapter 4112. Second, Temesi's argument runs counter to federal cases, which have prohibited retaliatory conduct of just this sort. Third, Temesi's position would allow employers to punish vulnerable employees who believe themselves to be the victims of discrimination. Ohio's anti-discrimination laws depend for their enforcement on employees who are willing to come forward and file charges. Only a singularly brave employee would come forward under Temesi's rule, knowing that, if unsuccessful, she could be subjected to punitive liability.

Nor does Temesi's invocation of the First Amendment and the guarantee of access to the courts support his position. His right to petition the courts to redress his grievances is not unlimited. As the Court of Appeals stated below, individuals may seek redress in the courts, but not in a retaliatory way. Op. p. 9. In this case, the Commission and the lower courts unanimously

found that Temesi had a retaliatory motive in filing suit. This factual finding is reviewable only for abuse of discretion. Any rule other than the one stated by the court below would invite punitive lawsuits to follow unsuccessful discrimination complaints, and effectively deter any enforcement of R.C. Ch. 4112.

And litigants have always had remedies for truly frivolous lawsuits. Such lawsuits are usually dismissed on motion for directed verdict, or are subject to sanctions under Civ. R. 11 or R.C. 2323.51. But in this case, Temesi did not avail himself of any of those well-established remedies.

Title VII and Chapter 4112 depend for their enforcement on the willingness of employees to file complaints. Many of these complaints ultimately prove to be unsuccessful, but employees must be free to file them. Allowing employers to then turn around and file retaliatory lawsuits seeking punitive damages would effectively end anti-discrimination enforcement in Ohio. This Court should join the other courts that have precluded this type of retaliatory conduct and overrule Temesi's First Proposition of Law.

Temesi's second Proposition of Law is untimely and should not be considered by the court. This issue is not properly before the Court because Temesi did not raise the defenses of equitable and judicial estoppel until the case was before the Eighth District Court of Appeals, thus waiving these defenses. Moreover, it is also meritless, as it depends on a mistaken factual premise. While Temesi alleges that Greer-Burger failed to schedule her retaliation claim as an asset in her bankruptcy filing, she *did* disclose the case to the bankruptcy court, as shown on Form 7 of her Voluntary Petition. Appellee's Rule VII Supplement ("Supp."), 87.

Because Temesi's appeal threatens the very foundation of anti-discrimination law in Ohio, this Court should affirm the court of appeals.

STATEMENT OF THE FACTS

After her boss, Laszlo Temesi, subjected her to unwelcome touching and sexual advances, Tammy Greer-Burger filed a complaint in common pleas court alleging that she was sexually harassed. Supp. 28. Her case went to a jury, which found in Temesi's favor.¹ Five months after the jury verdict, Temesi sued Greer-Burger for malicious prosecution, abuse of process, and intentional infliction of emotional distress. Supp. 34. Temesi sued to recoup the money he spent on attorney fees, but also for punitive damages for the "humiliation" he felt for being accused of sexual harassment in "court proceedings," and for Greer-Burger's "blatant disregard" for the law. Supp. 35, 36.

On November 6, 2000, shortly after Temesi filed his lawsuit seeking punitive damages, Greer-Burger filed a charge affidavit with the Ohio Civil Rights Commission (OCRC). Ms. Greer-Burger alleged that she was subjected to unlawful retaliation after participating in a protected activity. Specifically, she alleged that Temesi violated R.C. 4112.02(I) by filing a lawsuit against her in retaliation for having filed a sexual harassment suit against him.

The Commission conducted an investigation and determined that there was probable cause to believe that Temesi retaliated against Greer-Burger in violation of R.C. 4112.02(I). The case went to hearing before an Administrative Law Judge. As there were no disputed facts, the Commission and Temesi submitted their arguments to the judge through briefs. The Administrative Law Judge found that Temesi unlawfully retaliated against Greer-Burger by filing a lawsuit. She left the record open to allow the parties to introduce evidence regarding damages.

¹ There is not a shred of evidence in the record for the assertion made on page 11 of Temesi's brief that the jury was out "for just minutes."

Before the damages hearing, Greer-Burger filed a Chapter 7 bankruptcy. One of the forms she completed was Form 7, Statement of Financial Affairs.² Supp. 68, 87. On that form, Greer-Burger disclosed her retaliation case pending before the Ohio Civil Rights Commission. Greer-Burger testified before the Commission that she was forced to file bankruptcy, in part, because of Temesi's lawsuit against her. Supp. 24. The bankruptcy trustee issued a no-asset report on February 25, 2003. Supp. 67. At that time the report was accurate, as the OCRC had not yet awarded any damages in Ms. Greer-Burger's retaliation case.

On February 24, 2004 the hearing on damages was held. Temesi did not raise equitable or judicial estoppel as defenses. The Administrative Law Judge issued a recommendation on November 1, 2004 that Temesi be ordered to pay Greer-Burger the amount of sixteen thousand dollars (\$16,000), to reimburse her for attorney fees incurred in defending against Temesi's unlawful retaliatory lawsuit. Although Temesi filed objections to the recommendation, he did not raise the arguments of equitable or judicial estoppel. Supp. 5-21. Consequently, on December 16, 2004, the Commission adopted the recommendation and issued a Cease and Desist Order against Temesi. The Cease and Desist Order did not specifically enjoin Temesi's lawsuit, but it did require him to cease all discriminatory practices. Supp. 1-4.

Temesi filed a petition for judicial review appealing the Commission's final order to the Cuyahoga County Court of Common Pleas. While Temesi raised several arguments, equitable and judicial estoppel were not among them. Supp. 40-51, 64. The court of common pleas upheld the Commission's Cease and Desist Order.

² As explained below in more detail, Temesi failed to timely argue estoppel or submit evidence of the bankruptcy below, and has therefore waived his ability to do so here. However, if this Court does consider Temesi's arguments and evidence, then it should also consider additional evidence regarding Greer-Burger's bankruptcy. OCRC has included two certified copies of documents from the bankruptcy proceeding in its Rule VII Supplement.

Temesi then appealed the case to the Eighth Appellate District. In that court, for the first time, he raised the argument that Greer-Burger was estopped from recovering her attorneys fees because she had failed to disclose her lawsuit as a potential asset in the bankruptcy proceeding. The Appellate Court affirmed the Court of Common Pleas' decision, and this Court accepted Temesi's discretionary appeal.

ARGUMENT

Proposition of Law No. I:

Retaliatory lawsuits by employers undermine the strong public policy in favor of allowing employees to seek redress for discrimination.

A. Anti-retaliation statutes are vitally important to the enforcement of anti-discrimination and other employee-protection laws.

“The basic purpose of any anti-retaliation statute is to enable employees to freely exercise their rights without fear of retribution from their employers.” *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357. This bedrock concept cuts across most Ohio employee-protection statutes, including those relating to worker's compensation claims [R.C. 4123.90], minimum wage claims [R.C. 4111.13], whistle blowing claims [R.C. 4113.52], and, of course, discrimination claims [R.C. 4112.02(I)].

And this Court has repeatedly extended the prohibition against retaliation when it is contrary to public policy. “We concluded that retaliation against employees who file complaints regarding workplace safety clearly contravenes the public policy of Ohio.” *Pytlinski v. Brocar Prods.*, 94 Ohio St. 3d 77, 79-80, 2002-Ohio-66. “Henceforth, the right of employers to terminate employment at will for ‘any cause’ no longer includes the discharge of an employee where the discharge is in violation of a statute and thereby contravenes public policy.” *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St. 3d 228, paragraph 2 of the syllabus. “In order to more fully effectuate the state's declared public policy against sexual

harassment, the employer must be denied his generally unlimited right to discharge an employee at will, where the reason for the dismissal (or retaliation resulting in constructive discharge) is the employee's refusal to be sexually harassed. Although there may have been no actual crime committed, there is nevertheless a violation of public policy to compel an employee to forgo his or her legal protections or to do an act ordinarily proscribed by law." *Collins v. Rizkana*, 73 Ohio St. 3d 65, 70-71, 1995-Ohio-135.

The importance of the anti-retaliation provision under federal Title VII, which is similar to the provision in Chapter 4112³, was recently explained by the Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White* (2006), 548 U.S. ____, 126 S. Ct. 2405, 165 L. Ed 2d 345.

The Court found that effective enforcement depends on employees willing to file complaints:

Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." [Citation omitted]. Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.

126 S. Ct. 2405, 2414. Thus, an anti-retaliation provision should give broad protection to complainants. The Northern District of Ohio in *EEOC v. Levi Strauss & Co.* (N.D. Ohio 1999), 515 F. Supp. 640, similarly described the legislative purpose of the retaliation provision as preventing a "chilling effect" on discrimination claims:

The purpose of the proscriptions against retaliation is to ensure an employee's protected right to challenge discrimination under Title VII. Retaliation, whether in the form of a subsequent discharge or court proceeding, places an added cost on the exercise of those rights and as such has a "chilling effect."

³ Title VII provides, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge." 42 U.S.C. §2000e-3(a). Since the wording of these two statutes are similar, cases used to interpret retaliation issues under federal law can be used to interpret retaliation issues under R.C. 4112. *Little Forest Med. Ctr. v. Ohio Civ. Rights Comm.* (1991), 61 Ohio St.3d 607; *City of Columbus Civ. Serv. Comm'n v. McGlone*, 82 Ohio St.3d 569; 1998-Ohio-410.

515 F. Supp. at 642-643. This legislative mandate is accomplished by granting employees free access to the mechanisms provided by statute to protest discrimination in the workplace. *EEOC v. Virginia Carolina Veneer Corp.* (W.D.Va. 1980), 495 F. Supp. 775.

In this case, Greer-Burger accused Temesi of sexual harassment, conduct made unlawful under R.C. 4112.02. Supp. 28-33. In response, Temesi sued Greer-Burger for malicious prosecution, abuse of process, and emotional distress. Supp. 34-38. In short, Temesi sued Greer-Burger *because* she exercised her rights under R.C. Chapter 4112—which he does not deny. Permitting Temesi’s retaliatory lawsuit to go forward undermines Chapter 4112, which “was intended to add protections for victims of sexual harassment rather than reduce the protections and remedies for such conduct.” *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 131, 135.

A complainant is protected under federal law against retaliation even if the jury in the underlying case finds for the defendant. The importance of allowing an employee to seek a remedy is so great that the truth or falsity of her charge may not be considered in providing protection against retaliation. *Little v. United Technologies* (11th Cir. 1997), 103 F.2d 956, 960; *Pettway v. American Cast Iron Pipe Co.* (5th Cir. 1969), 411 F.2d 998. There is nothing in the wording of Title VII requiring a complainant’s charge to be valid or reasonable.

Ohio’s anti-retaliation statute is even broader than its federal counterpart, and courts are required to construe this already broad statute liberally. R.C. 4112.08. Likewise, Ohio’s law does not impose any test of reasonableness or good faith. R.C. 4112.02(I). That alone is a strong indication that the legislature meant the anti-retaliation statute to apply to all people who engage in a protected activity, including Greer-Burger. Greer-Burger is therefore protected against

retaliation even though the jury in the underlying harassment suit ultimately found in favor of Temesi.

B. Temesi's conduct was retaliatory, as by filing the lawsuit he sought to punish Greer-Burger for exercising her rights.

Simply by filing his lawsuit, Temesi engaged in retaliation. Ohio's anti-retaliation provision, R.C. 4112.02(I), states that it is unlawful for any person to take any action against another for opposing a discriminatory practice:

It shall be an unlawful discriminatory practice . . .

For *any person* to discriminate *in any manner* against another 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.

R.C. 4112.02(I) (emphasis added). A lawsuit filed against an employee because that employee filed a sexual harassment charge is discriminating against that employee for exercising her rights under Chapter 4112.

Federal courts from numerous jurisdictions have held that it is unlawful under Title VII for an employer to sue an employee who has complained about discrimination. *EEOC v. Outback Steakhouse of Fla.* (6th Cir. 1999), 75 F. Supp.2d 756 (a counterclaim filed by the defendant in a sexual harassment suit constituted unlawful retaliation); *Harmar v. United Airlines* (N.D.Ill. 1996), 1996 U.S. Dist. Lexis 5346 (the filing of a lawsuit can be a basis for a retaliation claim); *Beckham v. Grand Affair of N.C., Inc.* (W.D. N.C. 1987), 671 F.Supp. 415 (having employee arrested after filing EEOC charge found to be retaliatory under Title VII by an employer); *Berry v. Stevinson Chevrolet* (10th Cir. 1996), 74 F. 3d 980 (an employer's filing of criminal charges against a former employee after he had filed a Title VII charge was a violation of the Act's anti-retaliation provisions); *Gliatta v. Tectum, Inc.* (S.D.Ohio 2002), 211 F.Supp.2d 992 (an employer

counterclaim for tortious interference in employee's sexual harassment lawsuit could be retaliatory).

In a case directly on point here, the Northern District of Ohio held that 42 U.S. C. §2000e-3(a) outlaws retaliatory lawsuits:

Only by enjoining suits filed in retaliation for the exercise of protected rights can those rights be ensured. There is little doubt that a state court defamation action filed in retaliation for having engaged in conduct protected by §704(a), including the filing of a charge with the Commission, violates this section. A literal reading of the statute obviously outlaws all retaliatory acts *including lawsuits filed in state tribunals*. (Emphasis added).

EEOC v. Levi Strauss & Co. (N.D. Ohio 1999), 515 F. Supp 640, 642-643. Thus, under federal law, even state lawsuits are considered retaliatory.

The Western District of Virginia also found that an employer's filing of a defamation lawsuit after an employee's EEOC charge was "unquestionably retaliatory." *EEOC v. Virginia Carolina Veneer Corp.* (W.D. Va. 1980), 495 F. Supp. 775, 778. The court noted the chilling effect of such a lawsuit:

There exists an absolute privilege for the filing of a discrimination charge. Such absolute privilege is required to ensure the policy of nondiscrimination under Title VII. To entertain claims in the nature of malicious prosecution for the filing of a single Title VII complaint would seriously undermine the clear policy of Section 2000e-3(a) to protect an individual who utilizes the procedures provided by Congress for the vindication of his right to be free from unlawful discrimination in employment.

495 F. Supp. at 778. Thus, under Title VII, filing a defamation lawsuit is retaliatory.

Ohio courts have readily recognized that the filing of a complaint for discrimination in a court of law is a protected activity. *Many v. Erieview Joint Venture* (8th Dist.), 2001 Ohio App. Lexis 2531, *7; *Goad v. Sterling Commerce, Inc.* (10th Dist.), 2000 Ohio App. Lexis 2496, *27. This case offers to this Court the opportunity to take the next step and adopt the rule recognized by the courts quoted above: that allowing retaliatory lawsuits in the nature of malicious

prosecution, defamation, abuse of process, etc. would seriously undermine the strong public policy enacted in R.C. 4112.02(I) and are prohibited as retaliatory.

And finding retaliation is particularly appropriate here, as Temesi sought punitive damages against Greer-Burger. As the court of appeals aptly noted, the purpose of punitive damages is to punish and deter certain conduct. *Greer-Burger v. Temesi* (8th Dist.), 2006 Ohio App. Lexis 3646, 2006-Ohio-3690, ¶ 22, citing *Moskowitz v. Mt. Sinai Medical Ctr.*, 69 Ohio St. 3d 638, 651, 1994-Ohio-324. Punitive damages are awarded “not to compensate a plaintiff but to punish the guilty, deter future misconduct, and demonstrate society’s disapproval.” *Id.*, citing *Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St. 3d 488, 493, 2001-Ohio-1593. This Court should not countenance a rule that would allow an employer to punish an employee who has had the temerity to sue him for discrimination. Instead, the Court should, by affirming the Court of Appeals, join the many other courts that have held that retaliatory lawsuits violate anti-retaliation statutes.

C. Temesi’s right of access to the courts is not absolute.

Nor is Tamesi correct in arguing a right of access to the courts. Temesi invokes the First Amendment in claiming that he has a right of access to the courts even if his motive is retaliation. Temesi’s brief at 9. The right of access to the courts is an aspect of the First Amendment right to petition the government for redress of grievances. *Bill Johnson’s Restaurants, Inc. v. NLRB* (1983), 461 U.S. 731, 741. In *McDonald v. Smith* (1985), 472 U.S. 479, 485, the Supreme Court held that “the Petition Clause does not require the State to expand this privilege into an absolute one. The right to petition is guaranteed; the right to commit libel with impunity is not.” Just as the right to commit libel is not an absolute privilege, neither is the right to file a retaliatory lawsuit.

Temesi does not have an absolute right under the First Amendment to file a retaliatory lawsuit. In fact, permitting this retaliatory lawsuit under the guise of the First Amendment enables Temesi to use the legal process as a method to accomplish his goal of punishing Greer-Burger for accusing him of sexual harassment. The Supreme Court has held that the First Amendment cannot “be used as the means or the pretext for achieving ‘substantive evils’ which the legislature has the power to control.” *California Motor Co. v. Trucking Unlimited* (1992), 404 U.S. 508, 515. R.C. 4112.02(I) prohibits retaliation in broad and emphatic terms. Temesi should not be permitted to circumvent this law by using the judicial system as a means to perpetrate his retaliatory animus.

And Temesi’s reference to Art. I, §16 of the Ohio Constitution is equally inapposite. As this Court has said in a different context, Ohio’s open courts provision is not absolute:

We also cannot resolve this issue by simplistically viewing the phrase “[all] courts shall be open” as an absolute command applicable in all courts in all situations. It is a hallmark of American constitutional jurisprudence that many provisions of our Constitutions, though phrased in absolute terms, do not create absolute rights.

In re T.R., State ex rel. Dispatch v. Solove (1990), 52 Ohio St.3d 6, 13, (holding that the open courts provision does not allow unfettered access to court proceedings by the press). For example, there are exceptions even to the First Amendment:

[T]hough the First Amendment’s guarantee of freedom of speech is phrased in absolute terms, it “would not protect a man in falsely shouting fire in a theatre and causing a panic.” *Schenck v. United States* (1919), 249 U.S. 47, 52. Nor would it protect a seller of obscene material, *Roth v. United States* (1957), 354 U.S. 476, or one who defames another with actual malice, *New York Times Co. v. Sullivan* (1964), 376 U.S. 254.

Id. As Art. I § 16 of the Ohio Constitution was not absolute in the *In re T.R.* context, it is also not absolute where strong statutory provisions and policy considerations dictate otherwise.

And, as explained in more detail below, Temesi had access to the court as a defendant in Greer-Burger's lawsuit. He had remedies under Civ. R. 11 or R.C. 2323.51 if the lawsuit was frivolous or brought in bad faith. Thus, while Ohio's open courts provision remains an important one, R.C. 4112.02(I) prevents Temesi from gaining access to the courts for the purpose of using litigation as a retaliatory weapon.

D. *Bill Johnson's Restaurants v. NLRB* is distinguishable.

Nor is Temesi's reliance on *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board* (1983), 461 U.S. 731 appropriate. *Bill Johnson's* is limited to unfair labor practices under the National Labor Relations Act and has never been expanded outside the scope of the NLRA.

Bill Johnson's determined whether a "retaliation" lawsuit, which was otherwise meritorious, could properly be enjoined by the NLRB under the Board's power to issue injunctions for "unfair labor practices." The NLRB can enjoin behavior that constitutes an unfair labor practice. See 29 U.S.C. §158(a) (1) and (4).⁴ However, Temesi incorrectly states on page 10 of his brief that the anti-retaliation language of the NLRA is "virtually identical" to the language in R.C. 4112.02(I). The language that Temesi cites on page 10 is from the Fair Labor Standards Act (FLSA), an entirely different federal statute.⁵ 29 U.S.C. §215(a)(3). While similar, the language in R.C. 4112.02(I) is broader.

⁴ These provisions state:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section [7 of the Act];

* * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

⁵ "It shall be unlawful for any person . . . to discharge or in any 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).

The *Bill Johnson's* court also grounded its decision on the long-standing principle that the NLRA does not preempt state laws that provide a remedy for conduct touching interests 'deeply rooted in local feeling and responsibility,' citing *San Diego Building Trades Council v. Garmon* (1959), 359 U.S. 236, 244. *Bill Johnson's*, 461 U.S. at 741.

Here, Ohio has a strong and deeply rooted policy interest in preventing discrimination in general, and protecting discrimination claimants from retaliation in particular. R.C. 4112 "is comprehensive legislation designed to provide a variety of remedies for employment discrimination in its various forms." *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 131, 133. After all, there is a strong public policy for redressing discrimination "no matter its size, shape, or form or in what clothes it might masquerade." *Genaro v. Central Transport, Inc.* (1999), 84 Ohio St.3d 293, 296. And, as expressed in R.C. 4112.02(I), the prohibition against retaliation is equally strong. Conversely, Ohio does not have a strongly-rooted policy favoring malicious prosecution claims. *Trussell v. General Motors Corp.* (1990), 53 Ohio St. 3d 142.

Because the prohibition against retaliation for discrimination is so explicit, courts have specifically rejected the *Bill Johnson's* analysis in cases involving employer retaliation for filing *discrimination* claims. Instead of an "unqualified right to sue," as Temesi claims, these courts hold that the filing of a subsequent lawsuit in retaliation for a prior *discrimination* claim is per se unlawful. The most significant case is *Durham Life Ins. Co. v. Evans* (3rd Cir. 1999), 166 F. 3d 139.

In *Durham Life*, the employer, making the same argument Temesi advances, cited *Bill Johnson's* in support of its assertion that it had a First Amendment right to take all claims, even retaliatory ones, to the courts. The employer argued that the filing of a breach of contract lawsuit

in retaliation for an employee's complaint of discrimination could not form the basis of a retaliation claim unless the breach of contract lawsuit lacked merit. The Third Circuit flatly rejected this argument, distinguishing *Bill Johnson's* as a case that "construed a specific, ambiguous provision of the NLRA defining unfair labor practices." *Id.* at 157. The *Durham Life* Court further held that "[the *Bill Johnson's*] reasoning has not been extended to Title VII, in part because the prohibition on retaliation is so explicit and the public policy behind the retaliation provision so compelling." *Id.*

Just last year, the U.S. Supreme Court cited *Bill Johnson's* approvingly in support of its expansive view of Title VII's anti-retaliation provisions as reaching employer activities outside the workplace. *Burlington Northern & Santa Fe Ry. Co.* (2006), 548 U.S._____, 126 S.Ct. 2405, 2414; 165 L.Ed. 2d 345, 359, citing *Bill Johnson's* as "construing anti-retaliation provisions to 'prohibit a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of protected activities, including the retaliatory filing of a lawsuit against an employee.'" *Bill Johnson's*, 461 U.S. 731, 740. Indeed, the *Bill Johnson's* case has some of the strongest language to be found anywhere concerning the chilling effect of a retaliatory lawsuit:

A lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation . . . [B]y suing an employee who files charges . . . or engages in other protected activity, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit . . . [T]he chilling effect of a state lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages . . .

Id. Thus, even the *Bill Johnson's* Court recognized the coercive effect of a retaliation lawsuit.

And of course, this Court is not constrained to follow the *Bill Johnson's* analysis because R.C. 4112.02(I) is not federal, but Ohio law. To the extent that *Bill Johnson's* applies to allow retaliatory lawsuits like *Temesi's*, this Court should follow *Durham Life* and hold that *Bill*

Johnson's is inapplicable to retaliation claims under R.C. 4112.02(I). As in *Durham Life*, the prohibition against retaliation in Ohio law is explicit and its policy is compelling. Temesi has not cited a single case showing that the filing of a separate lawsuit for malicious prosecution, abuse of process, and intentional infliction of emotional distress against an unsuccessful discrimination claimant has *not* been deemed retaliation.

As the Eighth Appellate District here also acknowledged, contrary to Temesi's view, he was not denied access to the judicial system. A retaliatory lawsuit is not the proper mechanism for making claims of frivolous conduct:

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. [citation omitted] . . . [T]here 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, seeking damages in excess of attorney fees.

Greer-Burger v. Temesi, 2006-Ohio-3690, ¶ 28. The language highlighted above illustrates the main, and obvious, characteristic of an unlawful retaliatory lawsuit—retaliatory animus.⁶ Temesi's retaliatory motive was further shown by his demand for punitive damages—designed to punish and deter conduct. If, however, the employer does not have a retaliatory motive, it can lawfully seek to recover its attorney fees within the bounds of the original discrimination action brought by the plaintiff, using the methods provided under Civ. R. 11 or R.C. 2323.51.

Both Rule 11 and R.C. 2323.51 involve motions to the court during an *already-existing original* discrimination action—provisions that any defendant has access to when defending

⁶ See also *Gliatta v. Tectum Inc.* (S.D. Ohio 2002), 211 F. Supp. 2d 992, 1009 (“Certainly, 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.”).

against a discrimination lawsuit. The instigation of an entirely new lawsuit seeking punitive damages, however, simply further evinces a defendant's retaliatory motive. In this case, if the underlying sexual harassment suit had been truly frivolous, the common defense strategies of summary judgment or directed verdict would have prevented it from getting to the jury. But Greer-Burger's 1998 lawsuit survived all such motions, and went to the jury. A retaliatory lawsuit seeking to punish her for bringing her claims has no place in Ohio law.

In short, in the proceedings below, OCRC correctly found that Temesi filed his lawsuit in retaliation against Greer-Burger for charging him with sexual harassment.⁷ This Court should find that such a lawsuit is prohibited by law as retaliatory and discriminatory, and uphold the decision below.

Proposition of Law No. II:

The doctrines of equitable and judicial estoppel do not apply where a party takes consistent positions in two legal proceedings.

The Court should disregard and refuse to rule on Temesi's second Proposition of Law because he failed to raise equitable and judicial estoppel when the case was before the Commission. He compounded his error by not raising the issue when he appealed the case to the court of common pleas. In fact, it was not until the case was on appeal to the Eighth Appellate District that Temesi first argued equitable and judicial estoppel.⁸ As this Court has held, issues not raised administratively cannot be considered on appeal. *State ex rel. Quarto Mining Co. v.*

⁷ Appellate review of common pleas decisions affirming the OCRC is limited. Appellate courts may reverse only upon a showing that the common pleas court abused its discretion. *Ohio Civ. Rights Comm. v. Case Western Reserve Univ.*, 76 Ohio St. 3d 168, 1996-Ohio-53.

⁸ Equitable and judicial estoppel is akin to an affirmative defense. An affirmative defense is waived if not timely asserted. *Jones v Village of Chagrin Falls*, 77 Ohio St.3d 456, 1997-Ohio-253.

Foreman, 79 Ohio St.3d 78, 1997-Ohio-71. Indeed, a specific provision in Chapter 4112 precludes arguing issues not previously raised before the Commission:

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.

R.C. 4112.06(C).

While Temesi argues that only objections, not defenses, are subject to this statute (Brief, p. 16), this is a distinction without a difference. He raised neither an objection, nor a defense regarding estoppel when the case was before the Commission even though Greer-Burger made her bankruptcy disclosure on January 8, 2003, some twenty-five (25) months before the Commission's final decision on December 16, 2004. Temesi had ample opportunity to address this issue before the Commission. After the ALJ issued Findings of Fact and Conclusions of Law, Temesi filed objections before the Commission. Supp. 5-21. Although the objections were filed long after Greer-Burger's bankruptcy, Temesi failed to raise the issue of equitable or judicial estoppel at that time.

Next, Temesi had an opportunity to raise the issue in his petition for judicial review in the common pleas court. R.C. 4112.06(D) provides a mechanism to admit additional evidence in such an appeal. Temesi again remained silent on the issue of equitable and judicial estoppel, and failed to present the evidence he wants the Court to consider here regarding Greer-Burger's bankruptcy. Supp. 40-51. As Temesi can offer no valid explanation for failing to raise his estoppel argument before both the Commission and common pleas court, his second Proposition of Law should not be considered by this Court. See *Davenport v. Bur. of Worker's Comp.* (10th Dist.), 2002 Ohio App. Lexis 2610, 2002-Ohio-2768.

However, even if this Court decides to consider Temesi's second Proposition of Law, a review of the same bankruptcy court docket that Temesi cites in his brief (pages 3 and 4) reveals that Greer-Burger disclosed her lawsuit pending before the Commission, on page two of the Statement of Financial Affairs. Supp. 87. Thus, Temesi's argument in his Proposition of Law No. II is factually inaccurate. The purpose of equitable and judicial estoppel is to prevent fraud and preserve the judicial process. Greer-Burger's disclosure of her pending lawsuit eliminates any inference of fraud or abuse of the judicial process.

Moreover, equitable estoppel does not apply here because the necessary elements are absent. This Court set forth the elements of equitable estoppel in *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St. 3d 143:

The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice. It is available only in defense of a legal or equitable right or claim made in good faith and should not be used to uphold crime, fraud or injustice. (citation omitted) The party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that the reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading.

51 Ohio St. 3d at 145. Thus there must be reasonable reliance on a statement the party could not have known was misleading, and there must have been a change in position for the worse. There is no evidence in the record that Temesi relied on Greer-Burger's bankruptcy petition, much less that he changed his position to his detriment. In addition, Temesi can not demonstrate that any statement was misleading, as Greer-Burger disclosed her claim pending before the Commission in her bankruptcy petition.

In addition, a party invoking an equitable principle must present himself with "clean hands." The clean-hands doctrine specifies that "he who seeks equity must do equity, and that he must come into court with clean hands." *Christman v. Christman* (1960), 171 Ohio St. 152, 154.

Temesi's retaliatory lawsuit caused Greer-Burger's bankruptcy. Supp. 24. Now, seeking to take advantage of the bankruptcy proceeding that he caused, Temesi should not be permitted to invoke equitable estoppel.

Nor is the doctrine of judicial estoppel relevant to this case. *Bruck Mfg. Co. v. Mason* (6th Dist. 1992), 84 Ohio App.3d 398, relied on by Temesi, is inapposite. In *Bruck*, the party bringing the claim for damages was judicially estopped from doing so because he had made no disclosure whatsoever of a counterclaim in his Chapter 13 filing. The court applied judicial estoppel when the debtor tried to assert a monetary counterclaim that had not been disclosed in the bankruptcy case. But here, Greer-Burger disclosed her lawsuit.

And does the reasoning of *Advanced Analytics Laboratories, Inc. v. Kegler, Brown, Hill & Ritter, L.P.A.* (10th Dist.), 148 Ohio App.3d 440, 2002-Ohio-3328 does not apply. In that case the plaintiff asserted a successful argument that UCC statements were valid before the bankruptcy court and then, in another forum, attempted to assert that those same UCC statements were negligently prepared by the defendant's attorneys. The *Advanced Analytics* court held that "the doctrine of judicial estoppel precludes a party from assuming a position in a legal proceeding inconsistent with a position taken in a prior action." *Id.* at ¶ 37. The position that Greer-Burger took in her bankruptcy filing was that she had a civil rights action pending against Temesi, which was not inconsistent with any position taken here.

Finally, on the merits, the Eighth District Court of Appeals properly refused to apply estoppel, recognizing that disposition of Greer-Burger's assets in her bankruptcy proceeding was not a matter within the court's jurisdiction. *Greer-Burger v. Temesi*, 2006-Ohio-3690, ¶ 36. Moreover, the fact that Greer-Burger's attorney fees may have been discharged in bankruptcy does not absolve Temesi of a judgment that he retaliated in violation of R.C. 4112.02(I). *Id.*

Regardless of Greer-Burger's bankruptcy, overriding public policy demanded that Temesi be adequately punished and deterred for his conduct. In its opinion at ¶ 33 the Court noted that the purpose of an anti-retaliation provision is protecting victims of discrimination:

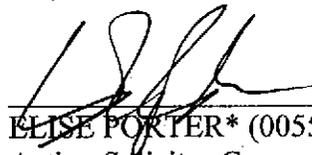
The purpose behind any anti-retaliation provision, either under R.C. 4112.02 or Title VII, is to prevent employers from deterring victims of discrimination from complaining to the Ohio Civil Rights Commission or the Equal Employment Opportunities Commission In keeping with the purpose of anti-retaliation legislature, the Commission found that the award of attorney fees served as a necessary deterrent.

Id. The holding of the Court below must be affirmed to vindicate this important public policy.

CONCLUSION

The Ohio Civil Rights Commission urges this Court to affirm the judgment of the Eighth District Court of Appeals.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of the Ohio Civil Rights Commission was served by U.S. mail, postage prepaid, this 22nd day of March, 2007, upon the following counsel:

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