

**In the
Supreme Court of Ohio**

TAMMY A. GREER-BURGER,	:	Case No. 2006-1616
	:	
Plaintiff-Appellee,	:	
	:	On Appeal from the
v.	:	Cuyahoga County
	:	Court of Appeals,
LASZLO TEMESI,	:	Eighth Appellate District
	:	
Defendant-Appellant.	:	Court of Appeals Case
	:	No. CA-05-087104
	:	

**BRIEF OF *AMICI CURIAE* THE OHIO EMPLOYMENT LAWYERS ASSOCIATION
AND THE COMMITTEE AGAINST SEXUAL HARASSMENT IN SUPPORT OF
APPELLEE, TAMMY A. GREER-BURGER**

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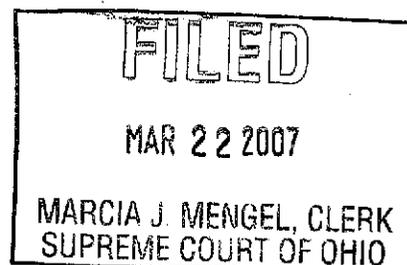
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TABLE OF CONTENTS

Statement of Interest of *Amici Curiae* 1

Introduction and Summary of Argument 3

Statement of the Case and Facts 7

 I. Proposition of Law 7

 Proof That an Employer Filed a Lawsuit Against a Former Employee to Retaliate for That Employee’s Sexual Harassment Suit Is Sufficient to Allow the Ohio Civil Rights Commission to Halt the Employer’s Lawsuit under Ohio’s Anti-retaliation Statute When the Employer Has Had a Previous Opportunity to Establish to a Court That the Employee’s Discrimination Claim Was Frivolous or in Bad Faith 7

 A. Ohio’s Strong Public Policy Against Employment Discrimination Relies on Employees’ Ability to Complain of Discrimination Without Fearing Retaliation 7

 B. Retaliatory Litigation by Employers Threatens Employees’ Freedom to Exercise Their Rights to Complain of Discrimination, and it Falls Squarely Within the Statutory Prohibition Against Retaliation 9

 C. *Bill Johnson’s* does Not Require Reversal of the Cease-and-desist Order Here, As Appellant Had The Opportunity to Petition the Court For Redress During The Pendency of Appellee’s Underlying Sexual Harassment Claim 11

 D. It Is An Open Federal Question Whether *Bill Johnson’s* Applies At All Under Title VII, Much Less R.C. 4112 17

Conclusion 19

Certificate of Service 21

TABLE OF AUTHORITIES

Arthur Young & Co. v. Sutherland (D.C. 1993), 631 A.2d 354 5, 17, 19

Bill Johnson's Restaurants, Inc. v. NLRB (1983), 461 U.S. 731 *passim*

Burlington N. & Santa Fe Ry. Co. V. White (2006), 548 U.S. ___, 126 S. Ct. 2405 8-9

California Motor Transport Co. v. Trucking Unlimited (1972), 404 U.S. 508 12

Coolidge v. Riverdale Local Sch. Dist., 100 Ohio St.3d 141, 203-Ohio5357 8

Durham Life Ins. Co. v. Evans (3d Cir. 1999), 166 F.3d 139 5, 17

EEOC v. Outback Steakhouse of Fla. (N.D. Ohio 1999), 75 F.Supp. 2d 756 9, 15-16

Genaro v. Centr. Transport, Inc. (1999), 84 Ohio St.3d 293, 703 N.E. 2d 782 7, 18

Greer-Burger v. Temesi, 8th Dist. No. 87104, 2006-Ohio-3690, at ¶ 24 8

Gliatta v. Tectum, Inc. (S.D. Ohio 2002), 211 F.Supp. 2d 1992 9

Harmar v. United Airlines (N.D. Ill. 1996), 1996 WL 199734 9

McDonald v. Smith (1985), 472 U.S. 479 12, 15

Robinson v. Shell Oil (1997), 519 U.S. 337, 346 9

Porter v. Natsios (D.C. Cir. 2005), 414 F.3d 13, 18 18

Price Waterhouse v. Hopkins (1989), 490 U.S. 228, 241 18

Sears Roebuck & Co. v. Swaykus (Ohio App. 7 Dist. 2002), 2002-Ohio-7183,
2002 WL 31859516 14

Yaklevich v Kemp, Schaeffer & Rowe (1994), 68 Ohio St. 3d 294, 626 N.E. 2d 115 14, 16

OTHER STATUTES

Civil Rule 11 13

R.C. 4112 *passim*

R.C. 2323.51 13

Title VII of the Civil Rights Act, 42 U.S.C. 2000e-3(a) *passim*

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus, the Ohio Employment Lawyers Association (OELA) is a chapter of the National Employment Lawyers Association (NELA), which is a nonprofit legal organization whose members represent individual employees in employment matters. Ohio has one of NELA's largest and most active chapters.

NELA and OELA regularly sponsor continuing legal education programs and publish newsletters, including "The Employee Advocate," updating developments in employment and labor law. NELA's officers and committee chairs have authored and edited numerous articles, books and law journals related to the law of the workplace. OELA does not endorse political candidates.

Amicus, the Committee Against Sexual Harassment (CASH) is an Ohio voluntary association of individuals which focuses on the difficulties faced by female and male victims of sexual harassment. CASH operates as a service offered through the Young Women's Christian Association (YWCA) which provided counseling to victims of sexual harassment and workshops for employees seeking policies and procedures to avoid and remedy sexual harassment. Workshops and other assistance have been provided to a number of employers in the Central Ohio area where CASH is located. CASH has a profound interest in assuring that meaningful remedies for sexual harassment exist.

OELA and CASH have a wealth of experience with the practical realities of the administration of Ohio's civil rights laws. Indeed, they were directly involved in the adoption of §4112.99 and in almost every major case in which the Ohio Supreme Court interpreted or applied Chapter 4112. The counsel for *amici*, have participated (and in many instances argued) many of

the major employment/discrimination cases heard by the Ohio Supreme Court over the last fifteen years, including the Court's decisions in *Elek v. Huntington National Bank*, 60 Ohio St. 3d 135 (1991); *Smith v. Friendship Vill. of Dublin* (2001), 92 Ohio St. 3d 503, 751 N.E. 2d 1010; *Helmick v. Cincinnati Word Processing, Inc.* (1998), 45 Ohio St. 3d 131, 133, 543 N.E.2d 1212 and *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St. 3d 281, 281.¹

Amici are filing this brief to urge the Court to explicitly recognize the authority of the Ohio Civil Rights Commission to stop retaliatory lawsuits by employers. *Amici* recognize that

¹ See, e.g., *Kish v. Akron* (2006), 109 Ohio St.3d 162, 846 N.E.2d 811; *Williams v. Akron* (2005), 107 Ohio St.3d 203, 837 N.E.2d 1169; *Wiles v. Medina Auto Parts* (2002), 96 Ohio St.3d 240, 773 N.E.2d 526; *Smith v. Friendship Village of Dublin, Ohio, Inc.*, (2001) 751 N.E.2d 1010; *Gliner v. Saint-Gobain Norton Indus. Ceramics Corp.*, 89 Ohio St.3d 414 (2000); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999); *Genaro v. Cent. Transport, Inc.*, 84 Ohio St.3d 293, 703 N.E.2d 782 (1999); *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 138; *Byrnes v. LCI Communication Holdings Co.* (1996), 77 Ohio St.3d 125; *Fox v. City of Bowling Green* (1996), 76 Ohio St.3d 534, *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578; *Ohio Civ. Rights Comm. v. Case Western Reserve University* (1996), 76 Ohio St.3d 168, 173, 666 N.E.2d 1376, 1382; *Hood v. Diamond Products, Inc.* (1996), 74 Ohio St.3d 298, 301, 658 N.E.2d 738, 741; *Wright v. Honda of America Mfg., Inc.* (1995), 73 Ohio St.3d 571; *Haynes v. Zoological Soc'y of Cincinnati* (1995), 73 Ohio St.3d 245; *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St.3d 281, 281; *Ohio Civil Rights Commission v. Ingram* (1994), 69 Ohio St.3d 89; *Bellian v. Bicorn Corp.* (1993), 67 Ohio St.3d 1435 (order granting leave to participate as *amicus curiae*); *Burnworth v. Ohio Bell Telephone Co.* (1993), 67 Ohio St.3d 1480 (same); *Ricciardi v. Babcock & Wilcox Co.* (1993), 66 Ohio St.3d 1490 (same); *Schwartz v. Comcorp, Inc.* (1993), 66 Ohio St.3d 1468 (same); *Elek v. Huntington National Bank* (1991), 60 Ohio St.3d 135, 573 N.E.2d 1056; *Baker v. Pease Co.* (1991), 60 Ohio St.3d 703 (order granting leave to participate as *amicus curiae*); *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143; *Kerans v. Porter Paint Co.* (1991), 58 Ohio St.3d 709 (order granting leave to participate as *amicus curiae*); *Little Forest Medical Center of Akron v. Ohio Civil Rights Commission* (1991), 57 Ohio St.3d 704 (same); *Manning v. Ohio State Library Board* (1991), 57 Ohio St.3d 713 (same); *Masek v. Reliance Electric Corp.* (1991), 57 Ohio St.3d 723 (same); *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501; *Russ v. TRW, Inc.* (1990), 51 Ohio St.3d 708 (order granting leave to participate as *amicus curiae*); *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228; *Parsons v. Denny's Restaurants* (1989), 44 Ohio St.3d 704 (same); *Karnes v. Doctors Hospital* (1989), 44 Ohio St.3d 710 (order granting leave to participate as *amicus curiae*); *Helmick v. Cincinnati Word Processing, Inc.* (1989), 41 Ohio St.3d 719 (same).

protecting employees who bring sexual harassment complaints against retaliation is the only way to ensure that such complaints continue to see the light of day. Women who are subjected to workplace sexual harassment tolerated by their employers should not be further victimized by retaliatory lawsuits which destroy their economic survival and their families' well-being. Especially when an employer purposely waits to file suit separately instead of during a pending employee action, the Commission must have authority to enjoin the employer's suit when there is proof of its retaliatory purpose.

INTRODUCTION AND SUMMARY OF ARGUMENT

Bringing a sexual harassment or discrimination charge against one's employer is a difficult process at best. Even when the complaint results in some remedy, the employee may be stigmatized publicly and at work, suffer great anxiety and uncertainty during years of litigation, and endure economic hardship until relief is actually received. At worst, alleging sexual harassment can have disastrous effects for an unsuccessful complainant, not only financially, through the expense of litigation and the potential impacts on future employment prospects, but also socially and emotionally. The law cannot protect employees from many of these effects, but it does seek to prevent employers from making matters worse by retaliating against those who bring good-faith complaints, even when the complaints are ultimately unsuccessful.

Retaliation threatens the entire framework of the anti-discrimination statutes, as it deters victims of discrimination from coming forward at all. To fight workplace discrimination, Ohio must not only enforce its laws against acts of discrimination, but also protect victims of discrimination against retaliation. Otherwise, there will be nothing to enforce, as the targets and witnesses of discrimination will never report employer misconduct.

In this appeal, Appellant urges a new evidentiary barrier to the Ohio Civil Rights Commission's ability to halt a lawsuit admittedly filed by an employer for the purpose of punishing an employee who filed a sexual harassment action. Ironically, in arguing for reversal of the decision of the Court of Appeals, the employer claims that his First Amendment right to petition the courts privileges him to sue his employee for exercising her rights under Ohio law. Appellant relies exclusively on a single United States Supreme Court decision, *Bill Johnson's Restaurants, Inc. v. NLRB* (1983), 461 U.S. 731, which has not previously been adopted or applied by this Court. In that case, the Court prevented the National Labor Relations Board ("NLRB" or "BOARD") from enjoining an employer's state court lawsuit without first finding that the suit was baseless.

Appellant argues that *Bill Johnson's* stands for the proposition that even overwhelming evidence of a retaliatory, punitive purpose for the filing of his claims of intentional infliction of emotional distress, abuse of process, and malicious prosecution against his former employee is not enough. He contends that unless there is independent, affirmative proof that his claims are entirely baseless, they cannot be enjoined without violating his First Amendment rights. Worse, the employer argues that his First Amendment rights allow him to retaliate even though he did not use state remedies available to him in the original sexual harassment lawsuit to obtain compensation for the injuries he allegedly suffered.

Appellant's attempt to immunize retaliatory lawsuits relies on a misplaced and misleading interpretation of *Bill Johnson's* and First Amendment jurisprudence. First, Appellant ignores the factual and legal context of the *Bill Johnson's* decision. That case involved federal labor laws, not state discrimination statutes, under circumstances where a federal agency was

attempting to intervene in state court proceedings. Appellant assumes, contrary to the ruling of at least one federal circuit court, that the rule in *Bill Johnson's* applies as strongly in the context of employment discrimination as it does in the context of federal labor relations. *Durham Life Ins. Co. v. Evans* (3d Cir. 1999), 166 F.3d 139, 157; *Arthur Young & Co. v. Sutherland* (D.C. 1993), 631 A.2d 354, 368 n.30.

Even if *Bill Johnson's* is applicable, Appellant's First Amendment right to petition a state court was not jeopardized by the Commission's order in this case. Unlike the employer in *Bill Johnson's*, Appellant had multiple opportunities to air his grievance and obtain a remedy before filing a separate lawsuit, and before the involvement of the Ohio Civil Rights Commission. The only remedy available in *Bill Johnson's* for the purported illegal labor activities, including alleged mass picketing, harassment of customers, blocking of its premises, and the distribution of libelous leaflets, was the state court action the employer initiated.

In addition, one of the *Bill Johnson's* Court's principal concerns was the potential for federal interference with state proceedings, especially in light of the fact that there was no alternative remedy for the injuries asserted available through the National Labor Relations Board. Such federalism concerns are simply not at issue here, where the cease-and-desist order was issued by a state entity and subject to review by state appellate courts, and there is no danger of federal government intrusion on issues of state law. Nor does this case present a situation where an employer is being denied the opportunity to seek a judicial assessment of purportedly frivolous or malicious filings. Appellant had that opportunity under Ohio law during the pendency of Appellee's sexual harassment case. Instead of availing himself of these remedies, he purposely filed a separate action, including obviously frivolous claims (some clearly rejected

by Ohio courts), in order to subject his former employee to costly and time-consuming subsequent litigation to punish her and deter other employees.

In essence, Appellant claims that his First Amendment interest prevents the Commission from enjoining his claims unless they are not only illegally motivated, but also lack any reasonable basis in fact or law. But the *Bill Johnson's* Court's concern about affirmative evidence of absence of a reasonable basis for an employer's retaliatory lawsuit was premised on the factual circumstances of that case, particularly the lack of any prior access to state judicial protection. The Court in *Bill Johnson's*, as it has for decades, stressed that First Amendment rights, including the right to petition, are not absolute, and may be limited under appropriate circumstances. Here, Ohio has established an appropriate balance, and one that is acceptable under First Amendment jurisprudence, between an employer's right to petition for judicial remedies for frivolous discrimination complaints and the vital state interest in protecting employees who expose discriminatory conduct. That balance requires only that an employer have an opportunity, during the pendency of a sexual harassment action, to petition for relief. Just as the right to free speech may be limited by reasonable time, place, and manner restrictions, proof of retaliatory motive is sufficient to enjoin an employer's lawsuit when that employer has foregone previous opportunities to establish that an employee's discrimination claim was frivolous or in bad faith.

STATEMENT OF THE CASE AND FACTS

Amici adopt the statement of case and facts contained in the appellee's brief.

PROPOSITION OF LAW:

Proof That an Employer Filed a Lawsuit Against a Former Employee to Retaliate for That Employee's Sexual Harassment Suit Is Sufficient to Allow the Ohio Civil Rights Commission to Halt the Employer's Lawsuit under Ohio's Anti-retaliation Statute When the Employer Has Had a Previous Opportunity to Establish to a Court That the Employee's Discrimination Claim Was Frivolous or in Bad Faith.

A. Ohio's Strong Public Policy Against Employment Discrimination Relies on Employees' Ability to Complain of Discrimination Without Fearing Retaliation.

Preventing discrimination in the workplace is among Ohio's most fundamental public policies. As this Court has stated, "[T]here is no place in this state for any sort of discrimination no matter its size, shape, or form or in what clothes it might masquerade." *Genaro v. Centr. Transport, Inc.* (1999), 84 Ohio St.3d 293, 296, 703 N.E.2d 782. The policy against discrimination in the workplace is reflected not only in this Court's opinions, but in the state's statutory framework. *Id.* at 297. Ohio's protections against workplace discrimination are embodied in R.C. Chapter 4112, which this court construes liberally for the accomplishment of the statute's remedial objectives. See *id.* at 296 (citing R.C. 4112.08).

R.C. 4112 includes not only substantive protections against discriminatory acts in the workplace, but also an explicit provision prohibiting retaliatory acts by employers against those who file or participate in complaints against them. R.C. 4112.02 states:

It shall be an unlawful discriminatory practice:

- (1) For any person to discriminate in any manner against another person because that person has opposed an unlawful discriminatory practice defined in this section or because that person has made a charge in any manner in any

investigation, proceeding, or hearing under [this chapter].

The purpose of this provision could not be plainer: it is intended to protect discrimination complainants and witnesses from retaliation. Without such protection, employers could reassign complainants to less desirable tasks, slash their pay, fire them, or use any other aspect of their control of the workplace and economic power to punish those who attempt to avail themselves of the substantive protections of the statute. R.C. 4112.02(I) draws no distinction between successful and unsuccessful discrimination complaints—if it did, the uncertainty of its protection would deter even employees with the most egregious and straightforward claims of discrimination from bringing complaints. In the absence of confidence in the protection of Ohio’s anti-retaliation statute, working Ohioans could not take the risk of challenging even the most offensive discriminatory behavior, as it would put their careers and their families in jeopardy.

The purpose and importance of anti-retaliation protections was articulated recently by the United States Supreme Court, in its interpretation of the anti-retaliation provisions of Title VII of the Civil Rights Act, 42 U.S.C. 2000e-3(a):

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. 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.

Burlington N. & Santa Fe Ry. Co. v. White (2006), 548 U.S. ___, 126 S.Ct. 2405, 2414 (internal citations and quotations omitted); see also *Coolidge v. Riverdale Local Sch. Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357, 797 N.E.2d 61, at ¶ 43 (“The basic purpose of any anti-retaliation

statute is to enable employees to freely exercise their rights without fear of retribution from their employers.”). To ensure this protection, both Title VII and R.C. 4112 have created, as the Court of Appeals noted below, “an absolute privilege for the filing of a discrimination suit or charge.” *Greer-Burger v. Temesi*, 8th Dist. No. 87104, 2006-Ohio-3690, at ¶ 24.

B. Retaliatory Litigation by Employers Threatens Employees’ Freedom to Exercise Their Rights to Complain of Discrimination, and it Falls Squarely Within the Statutory Prohibition Against Retaliation.

The *Burlington Northern* Court determined that Title VII’s anti-retaliation provisions do more than protect employees against retaliation in the workplace, holding that those provisions, which are, if anything, narrower than the protections found in R.C. 4112,² extend even to retaliatory acts outside the employment context.³ 126 S.Ct. at 2414. In fact, by citing favorably the decision in *Bill Johnson’s Restaurants, Inc. v. NLRB* (1983), 461 U.S. 731, the Court confirmed that retaliatory litigation against a Title VII complainant can be characterized as retaliation. See *Burlington Northern*, 126 S.Ct. at 2414 (stating that *Bill Johnson’s*, among other cases under the National Labor Relations Act, “provides an illustrative example” of the types of retaliation prohibited by federal anti-retaliation provisions). See also *Gliatta v. Tectum, Inc.* (S.D. Ohio 2002), 211 F.Supp. 2d 1992; *EEOC v. Outback Steakhouse of Fla.* (N.D. Ohio 1999), 75 F.Supp. 2d 756; *Harmar v. United Airlines* (N.D. Ill. 1996), 1996 WL 199734.

In *Bill Johnson’s*, the Supreme Court engaged in a detailed analysis of the anti-retaliation

² Most notably, the anti-retaliation language in Title VII does not explicitly contain the words “discriminate in any manner,” as R.C. 4112 does. 42 U.S.C.A. § 2000e-3(a).

³ As the Court of Appeals pointed out in response to Appellant’s argument below, which he has not raised in this Court, Title VII’s provisions also protect former employees against retaliation. *Robinson v. Shell Oil* (1997), 519 U.S. 337, 346.

provision of the National Labor Relations Act (NLRA) to determine whether the National Labor Relations Board (NLRB) could enjoin an employer's retaliatory state court lawsuit against its employee. The Court reached two conclusions: first, that retaliatory litigation can be an unfair labor practice, and can thus be enjoined under certain circumstances; and second, that the specific state litigation at issue could not be enjoined, given the circumstances of the case, because of the employer's right to petition the government under the First Amendment to the United States Constitution. *Bill Johnson's*, 461 U.S. at 749.

The *Bill Johnson's* Court made it clear that litigation filed with a retaliatory motive posed a grave threat to the rights of complainants, stating:

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 with the [NLRB] or engages in other protected activities, 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. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it.

461 U.S. at 740-41. It is self-evident that the same concerns are present in the employment discrimination context. The threat of a lawsuit is just as likely to deter an employee from filing a charge as the threat of firing or demotion, if not more so. While a complainant who loses his or her job may be able to find alternative employment, a complainant who is subjected to a retaliatory lawsuit has no choice but to defend against it. The costs of such a defense could result in financial ruin, regardless of the ultimate outcome. It is thus critically important to protect complainants from such suits whenever possible.

C. *Bill Johnson's Does Not Require Reversal of the Cease-and-Desist Order Here, As Appellant Had the Opportunity to Petition the Court For Redress During the Pendency of Appellee's Underlying Sexual Harassment Claim.*

Appellant relies heavily on the *Bill Johnson's* Court's two-part standard for a federal agency to enjoin a state court proceeding. The Court held that a federal agency must make two determinations before enjoining an employer's state court lawsuit against an employee: first, that the suit has a retaliatory motive; and second, that it is objectively baseless. *Id.* at 748-749 (“Retaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease-and-desist order against a state suit.”).

Appellant interprets this test as a universal rule in all retaliatory litigation cases, but ignores the specific interests the Supreme Court was attempting to protect in crafting it. The Court reached its ultimate conclusion after balancing several interests against the rights of the complainant, including the employer's interest in petitioning for redress of its grievances and its interest in having its state law claims decided by a state court. *Id.* at 741, 746. In examining the employer's right to petition for redress, the Court emphasized that if the employer's lawsuit was enjoined, it would have no alternative means of airing its grievance. *Id.* at 742. It also focused on the inappropriateness of a federal agency cutting off state court proceedings at the risk of interfering with the state's prerogative to protect its citizens from harms by ensuring compensation for their injuries. *Id.* The Court stated, however, that even these interests fail to justify allowing a retaliatory suit to continue when that suit lacks a reasonable basis in law or fact, as such a lawsuit would fall outside the First Amendment's protections. *Id.* at 743-44. In addition, if an employer has already had an opportunity to air its grievance in court, the employer is not protected from prosecution under the anti-retaliation statutes, as the First Amendment right

to petition has been satisfied once “the employer has had its day in court.” *Id.* at 747.

Thus, even under *Bill Johnson’s*, the question of whether to enjoin a lawsuit is not as simple as determining whether there is a First Amendment interest at stake. Rather, it was the nature of the First Amendment interest, the unavailability of adequate mechanisms for protecting this interest, and the relative weight of competing constitutional and statutory interests, that prevented the federal agency in *Bill Johnson’s* from enjoining that state lawsuit. Under different circumstances, with a different balance of these factors, the reasoning of *Bill Johnson’s* would allow an injunction against retaliatory litigation without an additional finding that the litigation is baseless.

The circumstances presented in this case are strikingly different than those in *Bill Johnson’s*, and do not call for the same balance between public policy and constitutional interests as that reached by the *Bill Johnson’s* Court. In *Bill Johnson’s*, enjoining the employer’s lawsuit would have thwarted its only opportunity to obtain any state judicial relief. There, the employer’s state action sought to enjoin and recover damages for alleged mass picketing, harassment of customers, blocking of its premises, and the distribution of libelous leaflets. *Id.* at 734. As there was no pre-existing litigation filed by the employees in that case, a federal agency order cutting off the employer’s state lawsuit would literally have denied the employer any ability to present its grievance to a state court. This is the critical factor stressed by the Court in *Bill Johnson’s*, and the singular circumstance that led the Court to conclude that more than proof of retaliatory motive was required in light of total abrogation of the employer’s First Amendment right to petition.

This case presents no such concern. Appellant’s only First Amendment interest in this

matter was in presenting his grievance to a court.⁴ See *id.* at 741 (“[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.”). See also *McDonald v. Smith* (1985), 472 U.S. 479, 482; *California Motor Transport Co. v. Trucking Unlimited* (1972), 404 U.S. 508, 510. Appellant had an opportunity to do this in the underlying sexual harassment action. The effects of the Ohio Civil Rights Commission’s cease-and-desist order are limited to the time, place, and manner of Appellant’s right to petition. It was not the Commission’s order that prevented Appellant from petitioning. Rather, it was Appellant’s desire to maximize the retaliatory impact of his lawsuit by filing it as a separate action.

Appellant’s lawsuit contained three causes of action, all arising directly from his former employee’s sexual harassment suit against him. While malicious prosecution, abuse of process, and intentional infliction of emotional distress are three distinct causes of action, they express the same essential grievance under these circumstances: that Appellant was subjected to wrongful, frivolous, and malicious accusations of sexual harassment. Appellant had multiple opportunities to air this grievance during the course of the original litigation, so there was no constitutional need to protect his right to air it again through separate, additional litigation.

First, Appellant had the opportunity to defend himself against the substance of the alleged

⁴ Appellant appears to conflate this interest with his interest in recovering for his alleged emotional and pecuniary losses. *Bill Johnson’s* does consider that interest, but only in addressing the prospect of a federal agency interfering with the role of state courts in enforcing state laws protecting state citizens. See *id.* at 742 (discussing the denial of compensation for an actual injury as a concern in light of “the substantial State interest in protecting the health and well-being of its citizens”) (internal quotations omitted). Federalism concerns are simply not at issue here, where the cease-and-desist order was issued by a state entity and subject to review by state appellate courts, and there is no danger of federal government intrusion on issues of state law.

wrongful accusations, and he did so before a jury. In fact, when the jury ruled in his favor, his grievance was vindicated to at least some extent. It should also be noted that Appellant was not prevented from petitioning the court regarding this issue prior to trial, through motions to dismiss and for summary judgment. Nor was Appellant in any way barred from moving for a directed verdict using the same argument. At each stage, Appellant was afforded a full opportunity to express his opinion to the court and the public that the accusations against him were false and that Appellee brought her harassment complaint with the intent to harm him.

Second, Appellant had, and waived, the opportunity to allege the impropriety of the action and accusations against him through the procedures of Civil Rule 11 and R.C. 2323.51. This would have afforded him the opportunity to express the same grievance as his subsequent litigation, and would have offered the potential for recovery of his costs and fees. That he chose not to do so reflects not only the baselessness of his subsequent claims, but also the illusory nature of his claimed interest in expressing his grievance to a court. Appellant was simply not interested in expressing his grievance until he could do so with maximum retaliatory effect on Appellee.

Finally, Appellant could have brought the action in question as a counterclaim at the time of the original sexual harassment lawsuit. While malicious prosecution requires a showing that the previous litigation terminated in the plaintiff's favor, "an abuse of process claim may be raised as a permissive counterclaim in the underlying litigation in the appropriate case."

Yaklevich v. Kemp, Schaeffer & Rowe (1994), 68 Ohio St.3d 294, 299, 626 N.E.2d 115.⁵ A

⁵ Note that the malicious prosecution claim here was dismissed prior to the cease-and-desist order, so Appellant cannot claim his First Amendment rights were denied with respect to that claim. Indeed, this Court would be justified in holding that Appellant's claims are all

counterclaim would have subjected Appellee to significantly fewer costs than Appellant's attempt to bring his claims following the conclusion of the original litigation.⁶ Again, Appellant's choice to air his grievance after failing to do so earlier demonstrates the retaliatory nature of his action and his lack of urgency in expressing himself.

Appellant's interpretation of the right to petition would go beyond simply allowing him access to a court to pursue a retaliatory claim. It would allow him to choose a time, place, and manner of petitioning the court that would undermine the purposes of Ohio's anti-retaliation laws, and thus, employees' equal rights to petition for redress of discriminatory conduct. Such an interpretation would make Appellant's right to petition absolute, an outcome the United States Supreme Court has explicitly rejected. In fact, it is a fundamental aspect of First Amendment jurisprudence that the right to petition is not absolute. *McDonald v. Smith*, 472 U.S. at 485

baseless as a matter of law. It seems highly unlikely that Appellant could succeed on the merits of an abuse of process claim, given the fact that Appellee's original suit was substantial enough to overcome summary judgment and reach a jury. It has also been held by Ohio appellate courts that the mere filing of a lawsuit cannot be characterized as intentional infliction of emotional distress. *e.g. Sears Roebuck & Co. v. Swaykus*, 7th Dist. No. 02 JE 8, 2002-Ohio-7183, at ¶¶ 11-13 (citing cases).

Above and beyond these other claims, appellant's demand for punitive damages demonstrates that the nature of his actions was not an attempt to recover for his losses, nor an expression of any grievance, but rather an effort to terrorize and punish his former employee. The Court of Appeals summed this up effectively, stating, "The award of punitive damages would defeat the overriding purpose of anti-retaliation legislation: to prevent employers from deterring victims from pursuing discrimination claims." *Greer-Burger*, 2006-Ohio-3690, at ¶ 23.

⁶ It is important to note that a plainly retaliatory counterclaim would still subject an employer to anti-retaliation enforcement. A discrimination plaintiff could amend the original complaint to include a retaliation claim, and because the employer's right to petition the court would not be threatened by an injunction in that case, there would be no need for a finding of objective baselessness for the employee to prevail on such a claim. See, *e.g., EEOC v. Outback Steakhouse of Fla.* (N.D. Ohio 1999), 75 F.Supp. 2d 756, 758 (allowing retaliation claim to proceed against employer who filed a counterclaim against its employee and allegedly "had a retaliatory motive in doing so," without inquiry into baselessness of claim).

(rejecting claim that First Amendment right to petition grants absolute immunity against claim of libel).

Appellant essentially asks this Court to conclude that the United States Supreme Court, in *Bill Johnson's*, ruled that the First Amendment requires not only proof of illicit motive, but lack of a reasonable basis, to support any claim of malicious or retaliatory litigation, regardless of the circumstances. Such an absolutist interpretation would wreak havoc on Ohio's legal system and the common law in virtually every state in the nation. Consider the common-law cause of action of abuse of process raised by Appellant here. Abuse of process *assumes*, and indeed includes as one of its elements, that the defendant's original lawsuit was filed with probable cause—that is, that it was not baseless. *Yaklevich v. Kemp, Schaeffer & Rowe* (1994), 68 Ohio St.3d 294, 298, 626 N.E.2d 115. It is only the use of the lawsuit “to accomplish an ulterior purpose for which it was not designed” that makes the suit abusive. *Id.* Appellant's interpretation of *Bill Johnson's* would mean that there could be no such cause of action because the original lawsuit was not entirely baseless. This absurd result demonstrates the dangers of recognizing an absolute right to petition.

Bill Johnson's and First Amendment jurisprudence require no such cataclysmic change in the statutory and common law of the states. *Bill Johnson's* makes clear that if an employer has already had access to a court (as was the case here), an employee (or the Commission) need only prove that the employer's proceedings are motivated by a retaliatory purpose. As *Bill Johnson's* and other cases have indicated, an employer who has unsuccessfully asserted retaliatory claims against an employee by initiating a lawsuit or by way of a counterclaim in a suit filed by an employee, can be held liable for retaliation without a showing that the employer's claims were

entirely baseless. See *Bill Johnson's*, 461 U.S. at 747; *Outback Steakhouse*, 75 F. Supp. 2d at 758.

A more reasonable application of *Bill Johnson's* to the circumstances here would be to determine, first, whether Appellant's claims were improperly motivated, and second, whether enjoining his lawsuit would deny him the right to petition the courts for redress. This second prong would obviously be satisfied if Appellant's grievance lacks a basis in fact or law, but it could also be satisfied, as it was here, if Appellant has already had an opportunity to petition a court prior to raising the claims at issue. Appellant's right to petition would not be threatened by a cease-and-desist order against retaliatory litigation in either circumstance.

D. It Is An Open Federal Question Whether *Bill Johnson's* Applies At All under Title VII, Much Less R.C. 4112.

Even apart from Appellant's misreading of the First Amendment principles at work in *Bill Johnson's*, it is not clear that the *Bill Johnson's* approach is as applicable in the discrimination context as it is in the labor relations context. At least one federal circuit court has held that the retaliation provisions of Title VII are more explicit, and the interest in protecting discrimination complainants is stronger, than the provisions and interests at issue under the NLRA. See *Durham Life Ins. Co. v. Evans* (3d Cir. 1999), 166 F.3d 139, 157 (holding that employer's retaliatory claim could be enjoined without a finding that it was baseless, stating, "*Bill Johnson's* * * * construed a specific, ambiguous provision of the NLRA defining unfair labor practices. Its 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"); see also *Arthur Young & Co. v. Sutherland* (D.C. 1993), 631 A.2d 354, 368, 368 n.30

(interpreting federal court decisions to conclude that, while *Bill Johnson's* holds otherwise in the labor relations context, in the area of anti-discrimination, “the fact that the employer may have a valid legal claim does not preclude the employee from establishing that the employer’s motive in asserting the claim was impermissible retaliation”). This conclusion seems especially reasonable given the extreme hesitancy of many sexual harassment victims in bringing their complaints to light, as well as Ohio’s previously expressed interest in eliminating workplace discrimination.

In addition, the extensive jurisprudence of the federal courts, including the United States Supreme Court, recognizes that in many cases, there may be mixed motives for discriminatory acts, some legitimate, others prohibited, and that there is liability where the prohibited motives made a difference. *Price Waterhouse v. Hopkins* (1989), 490 U.S. 228, 241 (holding that “Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations”). These cases include those where the illicit motive is retaliation. *e.g.*, *Porter v. Natsios* (D.C. Cir. 2005), 414 F.3d 13, 18 (stating that under the mixed-motive framework, “an employee could establish a prima facie case of an unlawful employment practice by demonstrating that discrimination *or retaliation* played a motivating part or was a substantial factor in the employment decision” (emphasis added) (internal quotations omitted)). Such cases recognize that the paramount concern is to prevent the pernicious influence of bias and stereotypes in our social, economic, and political institutions. The essence of a mixed-motive analysis is that an employer may have had reasonable bases for acting against an employee, but that the employer took action only because of the employee’s race, sex, or other protected characteristic, or to retaliate for the employee’s exercise of protected rights. Taken literally, the

Appellant's notion of proof of retaliation would ban mixed-motive cases because an employee could prove only that illegal motive made a difference, not that the employer had no basis at all for its actions.

It should also be noted that this Court is not constrained to interpret R.C. 4112's anti-retaliation provision in accordance with the federal courts' interpretation of Title VII, and certainly not in accordance with their interpretation of the NLRA. See *Genaro*, 84 Ohio St.3d at 297-98 (stating that while this Court "has ruled that federal case law interpreting and applying Title VII is *generally* applicable to cases involving [R.C. 4112]," this is not so when R.C. 4112 requires a different interpretation) (emphasis in original); see also *Arthur Young*, 631 A.2d at 368 n.30 (acknowledging potential conflict between federal interpretations of NLRA and Title VII and stating, "We need not decide how or whether these cases can be reconciled * * * , leaving that task instead to the federal courts."). As noted *supra*, the language of R.C. 4112.02(I) is broader than that of Title VII's anti-retaliation provisions, and it would thus be reasonable to interpret its protections to be stronger.

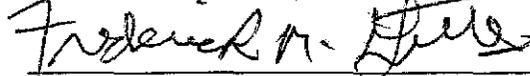
CONCLUSION

If this Court permits claims like Appellant's to be brought following the conclusion of an unsuccessful discrimination complaint, it is reasonable to expect many employers to subject complainants to expensive subsequent litigation following unsuccessful discrimination action. By doing so, employers will effectively deter employees from seeking to hold their employers accountable for discriminatory acts. Requiring the Commission to test the merits of employers' after-the-fact suits against employees, despite overwhelming evidence of their retaliatory purposes, is both unnecessary and contrary to the very purposes of R.C. 4112. When an

employer's claims are plainly retaliatory, and they do not raise any grievance that could not have been aired in an original discrimination action filed by an employee, R.C. 4112's anti-retaliation provision requires that the employer's action be enjoined. Enjoining a retaliatory lawsuit under such circumstances violates no First Amendment principles and actually vindicates the constitutional and statutory rights of employees who have claims under R.C. 4112. In the alternative, this Court should hold that Appellant's claims are baseless as a matter of law, reserving the question of whether such a determination is necessary to a cease-and-desist order for a more appropriate case.

For these reasons, *amici* respectfully request this Court affirm the Eighth District's decision.

Respectfully submitted,

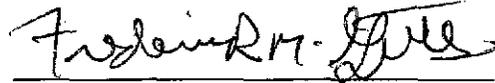


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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of *Amici Curiae* the Ohio Employment Lawyers Association and the Committee Against Sexual Harassment in Support of Appellee, Tammy A. Greer-burger was sent this 22nd day of March, 2007, to Mark D. Katz, Esq. at Ulmer & Berne, Skylight Office Tower, 1660 West 2nd Street, Suite 1100, Cleveland, Ohio 44113-1448 Plaintiff-Appellee Tammy A. Greer-Burger; William L. Summers, Esq., Summers & Vargas, 2000 Illuminating Building, 55 Public Square, Cleveland, Ohio 44113; Kelly Summers Lawrence, Franz Ward, LLP, 127 Public Square, 2500 Key Center, Cleveland, Ohio 44114; Counsel for Appellant Laszlo Temesi and Marc Dann Attorney General of Ohio, Elise Porter Acting State Solicitor, *Counsel of Record*, Susan M. Sullivan, Assistant Solicitor, and Wayne D. Williams, Senior Assistant Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, Counsel for Ohio Civil Rights Commission by regular U.S. mail, postage prepaid.



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