

IN THE SUPREME COURT OF OHIO

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

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REPLY BRIEF OF DEFENDANT-APPELLANT LASZLO TEMESI

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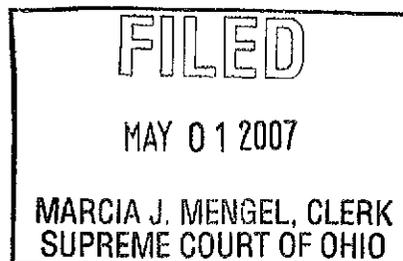
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## I. INTRODUCTION

Appellant Laszlo Temesi submits this reply brief for the limited purpose of clarifying the misstatements of fact and law contained in the merit brief of the Appellee, the Ohio Civil Rights Commission (“OCRC”), and the supporting brief of the *Amicus Curiae*, the Ohio Employment Lawyers Association (“OELA”).

## II. REPLY

### A. Adoption of a Rule of “Retaliation *Per Se*” Violates the Ohio and United States Constitutions

The OCRC and OELA urge this Honorable Court to hold that a prevailing employer’s pursuit of any civil lawsuit against a former employee for damages incurred while defending itself in an unmeritorious sexual harassment suit constitutes retaliation *per se*. Under the logic of the OCRC and OELA, any employee may libel, defame, maliciously prosecute, and financially and emotionally injure an employer without being held accountable, in a meaningful way, for such acts. Adoption of the view set forth by the OCRC and OELA would provide disgruntled employees with virtually unfettered access to the courts in order to injure an employer by fabricating a claim of discrimination or harassment without consequence. It must be remembered, moreover, that in any other legal situation, the perpetrator of such acts would face consequences which serve to deter the commission of such acts.

The OCRC and OELA contend that Temesi retaliated against Tammy Greer-Burger (“Greer-Burger”) simply by *commencing* an action against her for abuse of process, malicious prosecution and intentional infliction of emotional distress. This proposition is apparently based on the wholly unsupported presumption that, because Temesi did not utilize either Civil Rule 11 or R.C. § 2323.51, and instead sought make

whole remedies, Temesi's civil action constituted retaliation *per se*.<sup>1</sup> However, limiting Temesi's right to redress to the utilization of either Civil Rule 11 or R.C. § 2323.51 arbitrarily restricts the guarantees of the First Amendment to the United States Constitution and Article I, § XVI of the Ohio Constitution, and it fails to fully compensate Temesi for the injuries he suffered. In his civil action, Temesi has alleged that he endured extreme emotional distress and incurred extraordinary legal expenses as a result of Greer-Burger's unmeritorious sexual harassment action. Neither Civil Rule 11 nor R.C. § 2323.51 provides the means to make him whole again.

Furthermore, and perhaps more importantly, Temesi is not seeking to emasculate of the Ohio Civil Rights Act; he is asking this Court to recognize a system which truly balances the interests of both the allegedly wronged employee and the employer. Surely, the General Assembly could not have intended that the anti-retaliation provisions set forth in R.C. Chapter 4112 be enforced against an employer based upon *mere presumption*. On the contrary, like any other civil claim, the act of retaliation should have to be *proven*, by factual evidence, rather than *presumed* merely because an employer sought, through the utilization of tort law, to be made whole. In other words, the prosecution by an employer of a civil action against an employee who has previously engaged in protected activity should simply be considered factual evidence to be considered in the determination of the existence of retaliation. The OCRC would then be responsible for making specific evidentiary findings regarding whether the employer actually violated R.C. Chapter 4112. A contrary conclusion runs afoul of the First

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<sup>1</sup> The OELA also argue that Temesi could have sought redress by instituting a counterclaim. However, commencing a suit alleging a civil tort claim as a counterclaim or as a separate action appears to be a difference without a distinction. The gist of the argument in their brief is that Temesi should not have commenced his claims at all.

Amendment to the United States Constitution and Article I, § XVI of the Ohio Constitution in that it presupposes liability and cuts off an employer's access to the courts to be fully compensated for the injuries the employer has suffered.

This is exactly what happened in the present case inasmuch as the OCRC issued a cease and desist order effectively enjoining Temesi from pursuing a civil suit against Greer-Burger. While the OCRC and OELA are correct in recognizing that the state constitutional right to have access to the courts and the federal constitutional right to have one's grievances heard are not "absolute," that is not to say that these freedoms should never under any circumstances be afforded to employers charged with civil rights violations. 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.

*Greer-Burger v. Temesi*, 8th Dist. No. 87104, 2006-Ohio-3690, at P38.

**B. *Bill Johnson's Restaurants, Inc. v. Natl. Labor Relations Bd. Requires More Than a Finding of Retaliatory Motive***

Even if it could properly be assumed that the filing of a civil lawsuit against an employee who has initiated an unmeritorious claim of sexual harassment is *per se* retaliatory, the principles set forth in *Bill Johnson's Restaurants, Inc. v. Natl. Labor Relations Bd.* (1983) 461 U.S. 731, 748, provide that the employer's 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.*; *Real Estate Invest., Inc. v. Columbia Pictures, Indus., Inc.* (1993), 508 U.S. 49 (setting forth two-part test for discerning sham-litigation). *See also BE&K Constr. Co. v. NLRB* (2002), 536 U.S. 516, 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).

In *Bill Johnson’s Restaurants, Inc.*, 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.” 461 U.S. 731, 748, para. 1 of the syllabus. The Supreme Court went on to state:

[I]f there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, it cannot, in our view, be concluded that the suit should be enjoined. When a suit presents genuine factual issues, the state plaintiff’s First Amendment *interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State’s interest in protecting the health and welfare of its citizens*, lead us to construe the Act as not permitting the Board to usurp the traditional fact-finding function of the state-court or judge. \*\*\* If judgment goes against the employer in the state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the state in providing a forum for its citizens has been vindicated \*\*\*. *The employer’s suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees’ § 7 rights.* If a violation is found, the Board may order the employer to reimburse the employees whom he had

wrongfully sued for their attorneys' fees and other expenses. It may also order any other proper relief \*\*\*. [Emphasis added].

*Id.* at 745-46. In light of the foregoing, the OCRC's cease and desist order and award of attorneys' fees to Greer-Burger is, at a minimum, premature.

Moreover, public policy supports the adoption of the principles set forth in *Bill Johnson's Restaurant, Inc.* here, because such a holding would deter false and frivolous discrimination actions. A reasonable employee who is indeed subjected to discrimination would not be dissuaded from filing a charge. Application of the principles set forth in *Bill Johnson's Restaurants, Inc.* would instead strike a balance between the interests of the employee and the employer in that both parties, not only the employer, would be held accountable in a meaningful way for their actions.

The OELA, in a protracted analysis of the circumstances underlying *Bill Johnson's Restaurants, Inc.*, argue for limiting the constitutional principles articulated therein. The key word is "constitutional" and precisely frames the issue. Although constitutional guarantees certainly are not excepted from minor limitations, they should not be arbitrarily curtailed. In *Bill Johnson's Restaurants, Inc.*, the United States Supreme Court stated with respect to the NLRA in pertinent part:

[G]oing 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.

461 U.S. at 741. Like the employer in *Bill Johnson's Restaurants, Inc.*, Temesi's constitutional right to redress is too important to be enjoined solely on the ground that what is sought is to challenge Greer-Burger's exercise of protected activity. This Court

should adopt the principles of *Bill Johnson's Restaurants, Inc.* here and reverse the OCRC's cease and desist order against Temesi.

**C. The Cases on which the OCRC and OELA Rely are Inapposite**

The OCRC and OELA rely heavily upon *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006) in support of a variety of propositions of law. However, *Burlington Northern* decided the sole question of law, viz., whether application of the Title VII anti-retaliation provision is limited only to an employer's employment-related or workplace actions. 126 S.Ct. at 2414. The United States Supreme Court held that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. *Id.*

Moreover, the OCRC and OELA argue that the filing of a civil tort action against an employee who has engaged in protected activity *per se* constitutes prohibited retaliation and that such presumption is not rebuttable. In support of this proposition, the OCRC and OELA cite to *EEOC v. Levi Strauss & Co.*, 515 F.Supp. 640 (N.D. Ill. 1981). However, the Honorable Illinois District Court stated in relevant part:

There is no authority for the proposition that Title VII, *sub silentio*, preempts all state defamation proceedings. Rather, the exact opposite was recognized in *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969). In *Pettway*, the Fifth Circuit considered the filing of charges with the Commission protected activity under § 704(a) and held that an employer who discharged an employee for filing false and malicious charges with the EEOC violated the Act. The *Pettway* Court stated however: *We in no way imply that an employer is preempted by Section 704(a) from vindicating his reputation through resort to a civil action for malicious defamation. ... An accommodation between the federal interest in preventing retaliation and the state interest in protecting against malicious defamation may be achieved by reference to the labor law analogue ...* In *Power Systems, Inc. v. NLRB*, 601 F.2d 936 (7th Cir. 1979), the Seventh Circuit had occasion to consider whether the filing of a malicious prosecution action against a former employee who had filed repeated unfair labor practice charges against his employer was

itself a violation of the National Labor Relations Act. The NLRB concluded that it was, but the Seventh Circuit denied enforcement of the Board's order. Judge Tone, writing for the panel, concluded that *where there was no basis for concluding that the employer's action was filed without a reasonable basis and for an improper purpose, the employer's conduct could not be considered a violation of the NLRA. ... By analogy here, it cannot be concluded that all defamation actions in the wake of sexual harassment charges filed before the Commission are violations of Title VII. Rather, those suits initiated in state court in good faith and as an attempt to rehabilitate the employer's reputations which may have been tarnished by the charges are not necessarily violations of the Act.*

*Id.* at 644 (emphasis supplied; internal citations omitted).

Furthermore, each and every one of the following cases, cited by the OCRC, are either inapposite to the case *sub judice* or do not support the contended proposition of law. For example, *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 131 did not involve the issue of retaliation.

In *Little v. United Technologies, Carrier Transicold Division* (11th Cir. 1997), 103 F.3d 956, 961, the plaintiff did not prevail upon his claim of prohibited employer retaliation.

As already noted, in *Pettway, supra*, the United States Court of Appeals for the Fifth Circuit did not preclude the filing of a civil tort action *where there was no basis for concluding that the employer's action was filed without a reasonable basis and for an improper purpose.* 411 F.2d 998, 1007, n.2.

In *EEOC v. Outback Steakhouse of Florida, Inc.* (N.D. Ohio 1999), 75 F.Supp.2d 756, 758, the United States District Court for the Northern District of Ohio distinguished between those tort actions filed "in good faith" and those "motivated by retaliation."

Of particular import is *Gliatta v. Tectum, Inc.* (S.D. Ohio, 2002), 211 F.Supp.2d 992 , 1009, where United States District Court for the Southern District of Ohio stated in relevant part:

The Court notes, however, that neither party has addressed what an employer-defendant must show in summary judgment proceedings or at trial, to establish that its counterclaim is brought for legitimate purposes other than as a means of retaliation. ***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.***

*Id.* (emphasis supplied).

In both *Many v. Erievue Joint Venture* (Cuyahoga Cty. June 7, 2001), No. 78281, 2001 Ohio App. LEXIS 2531, \*12, and *Goad v. Sterling Commerce, Inc.* (Franklin Cty. Jun. 13, 2000), No. 99AP-321, 2000 Ohio App. LEXIS 2496, \*29, the Cuyahoga and Franklin County Courts of Appeal, respectively, found that the employer did not retaliate against the employee. The *Many* Court did not address the issue of a retaliatory lawsuit but, rather, determined whether an employer retaliated by withdrawing the offer of a severance package to a terminated employee.

Thus, it can be seen that the OCRC purports to base Greer-Burger's proposition of law, *i.e.*, any and all tort actions commenced by an employer against an employee who has engaged in protected activity are *per se* retaliatory, upon a tenuous legal foundation. On the contrary, the findings of both the United States District Court for the Northern District of Illinois, in *Levi Strauss & Co.*, *supra*, and our own United States District Court for the Southern District of Ohio, in *Gliatta*, *supra*, belie the foregoing proposition of law.

Furthermore, the OCRC notably cites *McDonald v. Smith* (1985), 472 U.S. 479, 485 where the United States Supreme Court stated that the First Amendment to the Federal Constitution *does not* guarantee a right to commit libel without impunity.

In *Durham Life Ins. Co. v. Evans* (3rd Cir. 1999), 166 F.3d 139, 157, the United States Court of Appeals for the Third Circuit merely noted that *Bill Johnson's Restaurants, Inc.*, 461 U.S. 731 (1983), upon which Temesi relies, has not as yet been extended to Title VII. The *Evans* court further noted that the employer “took” other post-employment actions besides filing the lawsuit against Evans,” and this, the Court “need not rely on the lawsuit to find retaliatory conduct.” *Id.* Moreover, other courts have extended *Bill Johnson's Restaurants, Inc.* to claims of retaliation outside of the NLRA. In *Martinez v. Deal Smith County Grain Processors, Inc.* (N.D. Tex. 1984), 583 F.Supp. 1200, 1209-10, for example, the United States District Court for the Northern District of Ohio reached the same results as in *Bill Johnson's Restaurants, Inc.* under the Fair Labor Standards Act.

Temesi therefore urges this Honorable Court to hold that enjoining the prosecution of a well-founded tort action against Greer-Burger violates his right to petition the government for redress of grievances as guaranteed by the First Amendment to the Federal Constitution and limits his access to the Courts as set forth in Article I, § XVI of the Ohio Constitution.

**D. Greer-Burger Should be Estopped From Receiving Attorneys' Fees When the Corresponding Obligation to Pay Her Attorneys was Discharged in Bankruptcy.**

Greer-Burger also continues to pursue approximately \$16,000 in attorneys' fees which she purportedly incurred in defending against Temesi's 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 her attorneys' fees eight months after the bankruptcy court discharged that same obligation, Greer-Burger successfully assumed a position in a legal proceeding under oath that is inconsistent with one previously asserted. Accordingly, Greer-Burger should be judicially estopped from recovering the award of attorneys' fees. *See Lewis v. Weyerhaeuser Co.*, 141 Fed. Appx. 420, 427 (6th Cir. 2005) (quoting *In re Colvin*, 288 B.R. 477, 481 (Bankr. E.D. Mich. 2003) (The disclosure obligations of consumer debtors are at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge"); *In re Coastal Plains, Inc.* 179 F.3d 197, 208 (5th Cir. 2005) ("the importance of this disclosure duty cannot be overemphasized")); *Advanced Analytics Laboratories, Inc. v. Kegler, Brown, Hill & Ritter, L.P.A.* (2002), 148 Ohio App.3d 440 (recognizing that the doctrine of judicial estoppel protects the integrity of the judicial process); *Randelson v. Kennametal, Inc.*, No. 1:05CV1978, 2006 U.S. Dist. LEXIS 80319, \*3-7 (N.D. Ohio Nov. 1, 2006) (applying judicial estoppel to dismiss the plaintiff's racial discrimination and harassment claims where plaintiff failed to schedule the lawsuit as part of her assets in her Chapter 7 bankruptcy proceedings); *Wallace v. Coca Cola Bottling Group, Inc.*, No. 1:06-cv-875, 2007 U.S. Dist. LEXIS 21170, \*11 (S.D. Ohio Mar. 26, 2007) (same); *Salyer v. Honda of America Mfg., Inc.*, No. 2:04-CV-988, 2006 U.S. Dist. LEXIS 80928, \*21 (S.D. Ohio Nov. 6, 2006) (same regarding

plaintiff's FMLA, workers' compensation retaliation, intentional tort and public policy claims).

### **III. CONCLUSION**

For each of the foregoing reasons as well as those set forth in his Merit Brief, 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 an award of attorneys' fees since the corresponding obligation to pay such fees has already been discharged by the bankruptcy court.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing was served this 30<sup>th</sup> day of April, 2007 by regular U.S. Mail, postage prepaid upon the following:

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