

IN THE SUPREME COURT OF OHIO

CASE NO. 06-0617

**SHELLEY BICKERS,**

Plaintiff-Appellee,

vs.

**WESTERN SOUTHERN LIFE  
INSURANCE COMPANY, INC.**

Defendant-Appellant.

On Appeal from the Hamilton County  
Court of Appeals, First Appellate District

Court of Appeals Case No. C-040342

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**APPELLEE'S MOTION FOR RECONSIDERATION**

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Michael A. Kearns (0062817)  
Kearns Company, L.P.A.  
3028 Victory Parkway  
Cincinnati, Ohio 45206  
Telephone: 513-561-0900  
Fax: 513-561-2333

Frederick M. Gittes (0031444)  
Gittes & Schulte  
723 Oak Street  
Columbus, OH 43205  
Telephone: 614-222-4735  
Fax: 614-221-9655

Gregory J. Claycomb (0042236)  
William D. Snyder & Associates  
2115 Luray Avenue  
Cincinnati, Ohio 45206  
Telephone: 513-281-1544  
Fax: 513-281-1644

Attorneys for Plaintiff/Appellant,  
Shelley Bickers

George E. Yung (0017714)  
Joanne W. Glass (0063571)  
Kasey Bond (0078508)  
Frost, Brown, Todd, LLC  
2200 PNC Center  
201 East Fifth Street  
Cincinnati, Ohio 45202  
Telephone: 513-651-6800  
Fax: 513-651-6981  
Attorneys for  
Defendant-Appellant  
Western Southern Life  
Insurance Company, Inc.

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**MEMORANDUM IN SUPPORT OF APPELLEE'S  
MOTION FOR RECONSIDERATION**

**I. Introduction**

Pursuant to Supreme Court Prac. R. XI, Section 2, the Appellee asks this Court to reconsider its decision in favor of Appellant Western Southern Life. There are several grounds, not considered by the Court in its opinion, for reconsidering this case.

In its decision in this matter, the Court indicated that it was "clarifying" that its prior, unanimous decision in *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St. 3d 141, 2003-Ohio-5357, 797 N.E.2d 61, held only that termination for absence due to a work related injury covered by workers' compensation is not "good and just cause" under R.C. §3319.16.<sup>1</sup>

Having held that *Coolidge* addressed only what constituted good cause under R.C. §3319.16 for terminating public school teachers, this court proceeded to consider whether R.C. §4123.90 warranted recognizing the public policy wrongful discharge claim originally attributed to the *Coolidge* decision. In doing so, the Court: (1) failed to consider its own recent precedent concerning common-law wrongful discharge claims;

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<sup>1</sup> While appellee accepts the Court's characterization of its opinion in this case as a "clarification" of *Coolidge*, she must question its accuracy. The syllabus in *Coolidge* stated "An employee who is receiving temporary total disability compensation pursuant to R.C. 4123.56 may not be discharged solely on the basis of absenteeism or inability to work, when the absence or inability to work is directly related to an allowed condition." The very commentators, law journal articles and other case authority cited by this Court in its decision all understood that *Coolidge* did recognize a public policy wrongful discharge claim arising from terminations of at-will employees for absenteeism associated with the receipt of workers' compensation benefits. See Opinion at ¶¶ 13 and 14. Indeed, the Chief Justice as well as Justice Pfeiffer, both of whom joined in the *Coolidge* decision, emphasized in their dissent that *Coolidge* went far beyond the holding now attributed to it in this case. Nevertheless, the "clarification" of *Coolidge* left unanswered the questions raised by this appeal.

(2) misconstrued the nature of the historical compromise associated with the creation of the workers' compensation system; and (3) misstated the practical impact of recognizing a public policy wrongful discharge claim prohibiting the discharge of injured workers based on absences associated with receipt of workers' compensation benefits. The Court also failed to consider the issues of equal protection raised by providing protection to public employees absent from work due to covered injuries, while denying protection to at-will employees discharged under identical circumstances.

## II. Argument

### A. *This Court's Clear Precedent Indicates That All Discharges on the Basis of Absenteeism or Inability to Work of Employees on Temporary Total Disability Impermissibly Contravene Ohio's Public Policy*

The Court's issued opinion in this case rests on two premises: first, as discussed above, the Court stated that its opinion in *Coolidge* did not hold that an at-will employee discharged while receiving temporary and total disability payments has a cause of action for wrongful discharge; and second, it stated that no such cause of action may exist because the legislature did not create such a cause of action as part of the workers' compensation system. Accepting for the purposes of this motion the Court's former premise, the latter premise ignores the Court's own established precedent. There is simply no question that the General Assembly's failure to create an explicit cause of action in a piece of legislation is determinative of whether a common-law cause of action exists. Instead, in the wrongful discharge context, that question must be answered by the courts, using an equally established test for whether a discharge impermissibly violates public policy.

In *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228, 233-34, 551 N.E.2d 981, this Court recognized a common-law cause of action in tort for discharge in violation of public policy, stating that “[i]t is our job to enforce, not frustrate” policy enacted by the General Assembly. Since that time, the General Assembly has not overruled this Court’s creation of a public-policy wrongful discharge cause of action; nor did this Court’s issued opinion in this case purport to limit that cause of action in any way.

The elements of the public-policy wrongful discharge cause of action, as listed by this Court, are as follows:

1. That [a] clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element).
2. That dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the *jeopardy* element).
3. The plaintiff’s dismissal was motivated by conduct related to the public policy (the *causation* element).
4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).

*Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 69-70, 652 N.E.2d 653 (quotations and citations omitted) (emphasis in original).

It is these elements that are implicated by this Court’s recent, unanimous statement in *Coolidge* that an employee’s discharge for absence while receiving benefits for temporary total disability “constitutes a violation of public policy.” 2003-

Ohio-5357, at ¶ 52. Indeed, the Court openly premised its decision on the *Greeley* cause of action. *Id.* at ¶¶ 19-20. Regardless of whether the pronouncements in *Coolidge* should be considered as dicta or as fundamental to the Court's holding, there is simply no question that the same policy this Court identified in *Coolidge* in favor of protecting workers receiving temporary and total disability benefits under Ohio's workers' compensation scheme is equally clear and equally jeopardized by the discharge at issue in this case.

It is ironic that this Court's opinion based its "clarification" of *Coolidge* in part on the absence of any discussion in *Coolidge* of the Court's wrongful discharge jurisprudence, commenting, at paragraph 16,

A significant omission from the *Coolidge* opinion itself supports the view that its application is limited: it contains no discussion of the elements of a claim of wrongful discharge in violation of public policy as set forth in *Painter v. Graley*, 70 Ohio St. 3d 377, 639 N.E. 2d 51, and *Leininger v. Pioneer Natl. Latex*, 115 Ohio St. 3d 311, 2007-Ohio-4921, 875 N.E. 3d 36, ¶¶8-12.

Yet exactly the same is true of this Court's opinion as to the controlling issue: whether R. C. §4123.90 or some other statute, regulation, or constitutional provision is the basis for the wrongful discharge claim recognized by the court below. Instead, the Court eschewed any meaningful discussion of *Leininger*, *Painter*, or *Greeley* based on its inaccurate conclusion, discussed below, that the issue presented here had been resolved as part of a grand workers' compensation compromise.

The Court opines that R.C. §4123.90 protects only against retaliation for pursuing workers' compensation benefits as opposed to terminations for violation of

“neutral” attendance policies. Even if true, this fact does not determine whether the vital public policies embodied in the Workers’ Compensation Act, including §§4123.90 and 4123.56, warrant recognition of the common-law wrongful discharge claim for workers terminated for absences associated with covered workplace injuries. Nor, as discussed further below, does the existence of § 4123.90 preempt such a common-law claim, either because of the workers’ compensation compromise or the language of the statute itself. The Court failed to discuss or even mention, in this important context, *Wiles v. Medina Auto Parts, Inc.* (2002), 96 Ohio St. 3d 240, 2002-Ohio-3994, *Collins, Leininger*, or the legislature’s own directions, as reflected in R.C. § 4123.95 and recently passed statutory revisions to the workers’ compensation laws.

*Collins* would have been particularly instructive to the Court. There, the legislature had not recognized the applicability of a sexual harassment or gender discrimination claim as to employers with less than four employees. Nevertheless, this Court acknowledged that Ohio public policy was a basis for recognizing such a common-law wrongful discharge claim, and it found a common-law right even in the absence of an expressly applicable statute.

The Court’s opinion contains no language seeking to resolve the question of whether a claim for wrongful discharge should apply under the circumstances. This Court should reconsider its opinion, at minimum, to explain why the discharge here did not violate public policy, when a nearly identical discharge in *Coolidge* plainly did. It is not enough, in light of *Greeley* and its progeny, for this Court to state that the legislature has resolved this question.

B. *Ohio's Workers' Compensation Compromise Cannot Be Interpreted to Preempt Wrongful Discharge Claims*

As this Court has repeatedly acknowledged, the common-law is the province of this Court. While it is true that the legislature may preempt common-law claims, any such preemption must be clear. In fact, this Court has repeatedly held that there is a presumption that the legislature does not intend to take away common-law rights unless the purpose is clearly expressed in the statute. See *Helmick v. Cincinnati Word Processing* (1989), 45 Ohio St. 3d 131.

The doctrine that an existing common-law remedy may not be extinguished by statute except by direct enactment or necessary implication is especially pertinent in connection with statutes subject to a direction from the General Assembly that they are to liberally construed in favor of their purpose or the particular class of individuals that the statute was designed to benefit, as is the case with the Workers' Compensation Act and Revised Code 4123.90. See R.C. §4123.95 ("Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees."). Just as the core important policies related to workers' compensation discussed in *Coolidge* are absent in the Court's opinion, there is not a single word in the Court's opinion in this case regarding the legislature's direction that the workers' compensation statutes are to be liberally construed, demonstrating that the legislature has not preempted or limited this Court's authority to provide injured workers the common-law remedy sought by Ms. Bickers and recognized by the Court below.

As noted above in reference to *Collins v. Rizkana*, this Court has also emphasized the mere existence of limited statutory remedies does not operate to bar recognition of a *Greeley* type claim. See also *Karens v. Porter Paint Co.* (1991), 61 Ohio St. 3d 486, 488-90, 575 N.E.2d 428.

Here, there is no evidence of the General Assembly's intent to preclude a public-policy claim for wrongful discharge. As this Court noted, the underlying compromise that led to the workers' compensation system involved the elimination of employees' common-law tort claims arising from workplace injuries in return for a "system charging the economic losses incurred by injured Ohio workers and their families, without fault or wrongdoing, to the industry . . ." Opinion at ¶ 18. Section 35, Article 2 of the Ohio Constitution, as this Court explained, supplanted the common-law remedies available to workers, offering greater assurance of recovery but at lower levels. *Id* at § 19. In return, employers were protected from unlimited liability.

The compromise, however concerned only the common-law claims of every Ohio worker for workplace-related physical injuries. Indeed, Article II, Section 35 states that the compensation is ". . . in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease." The compromise did not involve employee terminations or discharges, as there were no such common-law claims at the time of the adoption of the constitutional amendment. Indeed, employment at-will was the state of the common-law with no exceptions recognized at the time.

Nothing in the language of the constitutional provision creating workers' compensation directly addressed, much less controlled, any common-law wrongful discharge claims that might evolve in the common-law—whether derived from the constitutional change in Article II, §35, subsequent legislative enactments, or the workers' compensation system as a whole. As a result, this Court's recent precedent regarding common-law wrongful discharge claims must be applied to this dispute. There is no basis for any conclusion that the issue was resolved as part of the original adoption of the workers' compensation amendment.

There is absolutely no indication in R. C. § 4123.90 of any intent by the legislature to preempt or prohibit recognition of a common-law wrongful discharge claim by this Court to protect injured workers receiving workers' compensation benefits from termination of their employment. Indeed, the very nature of the workers' compensation compromise indicates the necessity of such protection. The need for protecting injured workers, to make sure they have sufficient time to recover from injuries, is one of the main focuses of the unanimous opinion in *Coolidge*. This Court's clarification does not change the relevance and accuracy of the discussion in *Coolidge* concerning the public policies underlying the workers' compensation system (and the broader policies reflected in the anti-retaliation provisions).

Indeed, if legislative silence is to be considered as an expression of the General Assembly's intent, it must be noted that the legislature's silence on this question since *Coolidge* is much more telling than its failure to consider this question before it ever arose. It has been only four years since *Coolidge* issued, but even in this short time,

the General Assembly has spoken on the subject of workers' compensation, revisiting and modifying many substantive provisions within Ohio's workers' compensation scheme, effective June 30, 2006. In doing so, however, the legislature took *absolutely no action* to modify, overrule, or "clarify" the Coolidge decision. The General Assembly's apparent acceptance of *Coolidge* calls into question this Court's assertions concerning the preemption of § 4123.90.

Further undermining the Court's analysis, the opinion issued in this case contains no discussion as to the adequacy of the remedies available to injured workers terminated for absenteeism associated with receiving workers' compensation. Yet, this Court's recent decision in *Leininger* mandates such a discussion, as it is clear that § 4123.90 does not provide adequate protection to such injured workers. The statute permits employers to terminate employees simply for missing work while recovering from covered workplace injuries and receiving workers' compensation benefits. Unlike the family medical leave act at issue in *Wiles*, the statute provides no compensatory remedy whatsoever. Indeed, relief under § 4123.90 is limited to back-pay and reinstatement only—it does not even afford remedies commonly available related to compensation other than wages, other proximately caused economic losses or non-economic damages. R.C. § 4123.90 does not even approach a make-whole remedy.

Even if Appellee had attempted to avail herself of the very limited remedies under § 4123.90, she would not have even reached trial, given the lack of retaliation in this case, as § 4123.90 provides no remedy absent evidence of retaliation. Simply put, § 4123.90 is not duplicative in this case because it is wholly inapplicable.

C. *This Court's Issued Opinion in This Case Relies on Unsupported Factual Assertions as to the Impact of Coolidge on Employers*

Finally, the Court's issued opinion seems to be based in large part on totally false premises about the impact of *Coolidge* on small employers. Notably, there was nothing in the record upon which this Court could base any conclusion about the impact of *Coolidge* or recognizing a public policy wrongful discharge claim for employees fired for absenteeism associated with workers' compensation benefits. Contrary to the Court's speculation that recognizing such a common-law action would prevent employers from running their businesses, the impact of such a wrongful discharge claim is actually de minimis.

Indeed, no evidence of the demise of small businesses because of the *Coolidge* decision over the past four years has been submitted. Most small business already accommodate injured workers and have no difficulty finding temporary replacements or other means of fulfilling the work duties of absent employees. Nor is the exposure of employers under such a wrongful discharge claim substantial. Obviously, injured workers have no claim to lost wages so long as they are receiving temporary total disability benefits through workers' compensation and their injuries would have disabled them from working in any event. As a result, wage damages only begin to accrue for such employees after they have recovered from their injuries, if they have been wrongfully discharged prior to their recovery.

Additionally, an employer can eliminate any potential liability simply by temporary suspension of its attendance policy with respect to the affected employee until such time as the employee is recovered sufficiently to return to work at the employer. Thus,

such *Coolidge* claims are necessarily limited in duration as well as class and scope of coverage.

In similar fashion, *Coolidge* has not visited any substantial impact on the pension or health-care contributions of small employer members of the system who enjoy its protections. Many employers either do not have pension plans or have a plan typical of most pension plans, which define participants to exclude persons not actually working and receiving wages from the employer. In other words, to the extent that a pension plan is offered at all by an employer, no employer contributions are typically made during the period of incapacity. The practical impact on health-care contributions by employers during temporary total disability is also insignificant, as the costs of care are part of workers' compensation coverage.

Moreover, in examining the respective hardships to be borne by the employer and the employee, this Court has failed to appreciate the potentially ruinous burdens it has placed squarely upon the shoulders of injured workers. As noted above, an employee who is terminated for absenteeism has no remedy under the Court's ruling. As noted above, and as the Chief Justice's dissent points out, quoting *Coolidge*, the underlying purpose of the Workers' Compensation Act—shifting the economic burden of workplace injuries from employees and the public to employers—will be utterly defeated if an employer can terminate an employee for missing work as a direct result of temporary total disability recognized through a workers' compensation claim, as

§ 4123.90 does not provide *any* remedy to employees whose employment has been terminated for absenteeism, absent retaliatory intent.<sup>2</sup>

### III. Conclusion

Section 4123.90 has not preempted the common law wrongful discharge claim recognized by the court below. Indeed, under this court's common law wrongful discharge jurisprudence, it clearly establishes public policy supporting recognition of such a common-law remedy. As is well explained throughout the *Coolidge* decision, the workers' compensation system as a whole, and particularly R.C. § 4123.56, embodies public policy which requires protecting injured workers from being discharged simply because they miss work in order to recover from workplace injuries with the help of workers' compensation benefits. As this Court stated only four years ago, "the policy of protection embodied in the Workers' Compensation Act can be effectuated only if an employer is not permitted to discharge an employee for being absent from work due to an allowed injury for which the employee is receiving TTD compensation." *Coolidge*, 2003-Ohio-5357, at ¶ 46.

Notably, there is no reasoning in this Court's issued opinion for providing such protection to teachers, but not to other Ohio workers. Ohio's school systems are plainly not so financially secure as to exclude them from the list of employers that would supposedly suffer as a result of the rule in *Coolidge*. Nor are teachers substantially

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<sup>2</sup> Worse, this opinion re-opens the possibility that an employee might lose not only his or her job, but also his or her temporary total disability benefits, based on the violation of an absenteeism policy that is deemed a "facially neutral" work rule. See *State ex rel. Delany v. Indus. Comm.*, Franklin App. No. 05AP-281, 2006-Ohio-427, at ¶¶ 4, 11 (describing situation where absenteeism was treated as voluntary abandonment).

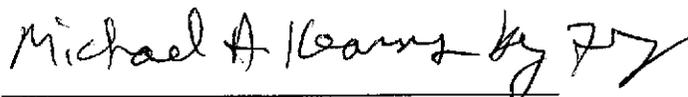
more vulnerable to the devastating impacts that this Court's opinion, as issued, will have on at-will employees who are temporarily and totally disabled. This Court's artificial distinction raises important considerations of equal protection of law that are not addressed or answered in its opinion.

This Court should reconsider the fundamental issues presented by this case. Those issues involve whether the working men and women of Ohio should have to choose between their jobs and their health in order to receive workers' compensation benefits. The ability of Ohioans to keep and maintain their employment to support their families should not be jeopardized simply because they miss work in order to avail themselves of the opportunity to recover from workplace injuries as part of the workers' compensation system.

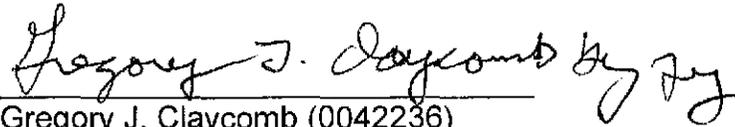
Respectfully submitted,



Frederick M. Gittes (0031444)  
Gittes & Schulte  
723 Oak Street  
Columbus, OH 43205  
Telephone: 614-222-4735  
Fax: 614-221-9655



Michael A. Kearns (0062817)  
PER TELEPHONE AUTHORITY  
KEARNS COMPANY, L.P.A.  
3028 Victory Parkway  
Cincinnati, Ohio 45206-1542  
(513) 561-0900  
Fax: (513) 561-2333

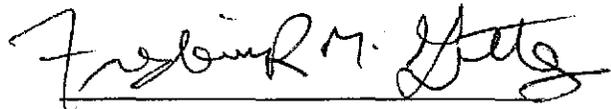


Gregory J. Claycomb (0042236)  
PER TELEPHONE AUTHORITY  
KIRCHER, ROBINSON & WELCH  
1014 Vine Street, Suite 2520  
Cincinnati, OH 45202-1116  
(513) 381-3525  
fax: (513) 381-5665

Attorneys for Plaintiff/Appellant,  
Shelley Bickers

### PROOF OF SERVICE

I hereby certify that a copy of the foregoing was sent via regular U.S. mail, postage prepaid, to George E. Yung, Esquire, and Kasey Bond, Esquire, FROST, BROWN & TODD, LLC, 2200 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202, attorneys for the Defendant, Appellant, Western Southern Life; and to Michael J. Frantz, Esquire, Keith A. Ashmus, Esquire, and Kelly S. Lawrence, Esquire, FRANTZ WARD, LLP, 2500 Key Center, 127 Public Square, Cleveland, Ohio 44114-1230; attorneys for Amicus Curiae, Ohio Management Lawyers Association, this 31th day of December, 2007.



Frederick M. Gittes (0031444)