

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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RECONSIDERATION MEMORANDUM OF AMICUS CURIAE,  
THE OHIO EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF  
PLAINTIFF/APPELLEE SHELLEY BICKERS

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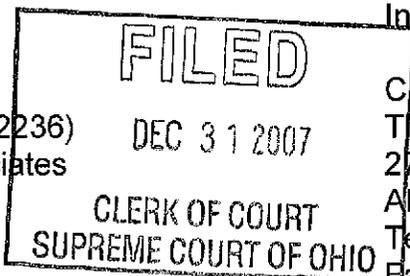
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**MEMORANDUM IN SUPPORT OF AMICUS CURIAE,  
THE OHIO EMPLOYMENT LAWYERS ASSOCIATION  
IN SUPPORT OF PLAINTIFF/APPELLEE SHELLEY BICKERS**

**I. Introduction**

Amicus Curiae adopts the arguments in Appellee's well-reasoned Motion for Reconsideration. Amicus further takes issue with the limited application of this public policy right to teachers already protected under a collective bargaining unit and/or a statute. This, in effect, renders the public policy right itself into a nullity. Indeed, it seems curious that the Court strove so hard to claim its faithfulness to *Coolidge* and Ohio's past jurisprudence on public policy, while at the same time eviscerating its meaning.

Despite the Court's troublesome explanation in *Bickers* that the wrongful discharge tort under *Coolidge* is limited to Ohio's teachers, the decision itself is clear that it applies broadly to all employees protected by Ohio's Workers Compensation System. Notwithstanding the syllabus of the case that indubitably declares the right of action applies to all employees equally, this Court emphatically stated just four years ago:

The overriding issue in this case is whether public policy embodied in the Workers' Compensation Act protects an employee who is receiving TTD compensation from being discharged solely because of the disabling effects of the allowed injury, that is, absenteeism and inability to work.

*Coolidge v. Riverdale Local Sch. Dist.* (2003), 100 Ohio St. 3d 141, 144.

There's no qualifying language here. There is no doubt or equivocation, as the dissent well-recognized.

As discussed by Amicus in its brief, and also by Appellee in its motion for reconsideration, workers compensation must by definition apply equally to all employees. *Coolidge* recognized that the system itself is a creation to attempt to strike a balance for master-servant. Those who enter into the system shed some of their rights, regardless of their status as

teachers, workers, craftsmen, or retail clerk. The system was set in place originally because employers were taking advantage of workers injured largely due to the employer's own negligence. As this Court has previously recognized, it has been the employer who has always had the upper hand, and this is why the common-law protections originally instituted broke down -- they were too easily manipulated, unpoliced, and did little to regulate employer abuses of employees under their control:

The common-law system proved incapable of dealing with **the often devastating social and economic consequences of industrial accidents**. It became undeniable that the tort system had failed as a regulatory device for distributing economic losses borne by **injured Ohio workers and their families** and that it should be replaced by a workers' compensation system in which those losses would be charged, without regard to fault or wrongdoing, to the industry rather than to the individual or society as a whole. See, e.g., *Goodman v. Beall* (1936), 130 Ohio St. 427, 5 Ohio Op. 52, 200 N.E. 470; *Indus. Comm. v. Weigandt* (1921), 102 Ohio St. 1, 4, 130 N.E. 38, 38-39; *State ex rel. Munding v. Indus. Comm.* (1915), 92 Ohio St. 434, 111 N.E. 299; *State ex rel. Yaple v. Creamer* (1912), 85 Ohio St. 349, 97 N.E. 602.

*Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St. 3d 115, 120 (emphasis added).<sup>1</sup>

Indeed, this Court has recognized the potentially devastating impact of injuries that temporarily debilitate a worker, and likely his or her family. See *Id.* Why, then, has it chosen to ignore these facts (particularly in this time of debilitating foreclosures in Ohio, and workers fleeing the state for better opportunities), and turn its back on precedent unanimously set only four years ago?

There can be no question that the Workers Compensation constitutional amendments and later statutory schemes were created to protect workers while at the same time giving employers some semblance of immunity for their negligence leading to injury – a “no-fault” system. It was not intended to permit employers carte blanche control over, or loopholes around, the system --

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<sup>1</sup> The rights derived under the Act not only implicate Chapter 4123 of the Ohio Revised Code, but also other statutes invoking the requirement of workplace safety for which there are not direct protections. See, e.g., the statutes invoked in *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St. 3d 134.

indeed, adjustments to the scheme have been required along the years. Yet that is exactly what the majority decision has rendered, for there is now created a right for employers (except those of schoolteachers) to discard workers for becoming injured on the job – often due to the employer’s own negligence. All an employer need do is adopt a draconian attendance policy under which an employee can be legitimately fired, though incapacitated beyond her control. As argued below, the employee cannot utilize, under these conditions, the intent-based and limited protections of 4123.90. She is doomed from the start. Thus, this Court’s decision in *Bickers* has gone round-robin, robbing workers of rights, and also diminishing the Court’s right to fashion remedies as gap-fillers as they may be needed to serve the public at large. The lone winners are employers.

As pointed out by amicus previously, the Court’s reliance on the General Assembly is mitigated by the fact that the General Assembly has had the opportunity in revamping the Act to alter the implications of *Coolidge* – and has chosen not to do so.

**II. Any wrong recognized but unrequited by the Court runs afoul of the American Rule that: “for every right there is a remedy” and the role of public policy protections in general.**

One of the ironies of the *Bickers* decision is that the Court implicitly recognizes that firing someone for getting sick or injured and being necessarily absent is inherently wrong. “Good and just cause” for any firing clearly implicates that a showing be made that the employer’s act was unjust – but not necessarily “intentional.” Firing someone for being legitimately off work because of injury on the job is *inherently wrong*. See *Coolidge, supra*.<sup>2</sup> Thus, firing a person under a so-called neutral absenteeism policy is unjust – but only as long as (and only if) the person is a public school teacher in Ohio. Wherefore all the other Ohio

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<sup>2</sup> It is understood that any worker must prove the elements of the tort to satisfy the inflated fears of apologists for employers that increased “malingering” might occur. See, e.g.,

workers? And if the Court recognizes an injustice not required – i.e., going unpunished – and does nothing, then it turns its back on its right and duty to fashion remedies where no adequate remedies currently exist.

In its current *Bickers* opinion applauding a public policy exception for teachers, the Court likewise failed to apply the elements of finding wrongful discharge while at the same time arguing that *Coolidge* never addressed these things and using this as a justification for essentially vacating the decision. However, it is clear from the *Coolidge* opinion that both the clarity and jeopardy elements for a wrongful discharge tort were present. This was *in spite of—and not because of* the teacher’s status as a non-at-will employee. It was because it is an affront to public policy to fire a person who legitimately uses his or her rights when injured on the job.<sup>3</sup>

The arguments have already been made – though not addressed – that favoring teachers in a public policy setting over others similarly situated (since all strip their cloaks and enter into the “balancing” system of workers compensation) runs afoul of equal protection. This already is in the record and need not be reiterated here. Yet their consideration in this case is certainly warranted. Amicus respectfully requests this Court do so in looking at the *Bickers* decision in context and its potential adverse impact on Ohio workers, who already are burdened with simply trying to survive in, and contribute towards, Ohio’s economy. It is employees, and not employers, who suffer the most and throughout history from bad law or loopholes that allow employer abuses. Employment laws generally exist to protect the employee, who wields little or no power at all, unlike the master, who carries both financial and political clout. This case

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<sup>3</sup> Amicus notes some of the quotes in the law review articles and employer book chapters cited by the Court. Notably, the primary fear is: What is an employer to do if ordered to reinstate a recovered employee under the system after the employee has been gone an extended period? But it is axiomatic under the law that this is a risk the employer takes, and “reinstatement” after litigation or extended leave is the most equitable and proper form of restitution, along with other losses wrongfully caused. *See, e.g.*, R.C. 4123.90. *See also* cases recognizing torts for firing for jury duty and military service. Again, this Court inherently recognizes that firing an injured person who is pursuing his or her rights under the law is unlawful and repugnant.

should be reconsidered in context of workers' rights and the intent overall of workers compensation, and reversed in favor of Bickers.

**III. Relegating “neutral” firings to claims under R.C. 4123.90 guarantees an employee fired for so-called “absenteeism” will lose.**

As laid out by Amicus in its brief, the case law governing R.C. 4123.90 sets forth the requirements for finding “retaliation” in any action taken after a workers compensation claim is filed. The analysis follows the traditional foreplay of prima facie case (protected activity, adverse action, causation), legitimate excuse by employer, and burden of pretext on employee. It is axiomatic that any employer who claims that an employee is fired for “attendance” (regardless of the strictness of the attendance policy) compromises any claim of “intent.” This Court has already held it to be so in *Coolidge*. Lack of attendance is by definition a legitimate employer defense under this tort and R.C. 4123.90 in general. Thus, any “claim” under R.C. 4123.90 for such firings is necessarily defeated at the outset.

Thus, again, the Court has gone round-robin: An employee fired for being injured and debilitated is wrongfully and unjustly fired, according to *Coolidge*; this conclusion of the opinion remains intact. But employees wrongfully fired who are not teachers are not protected by public policy, who largely comprise Ohio’s workforce and are private, non-union employees, are left naked and in jeopardy.<sup>4</sup>

Moreover, their only recourse is suing pursuant to a limited statute that requires proof of intentional retaliation. This creates an impossible situation for the wounded employee who seeks

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<sup>4</sup> Recently a factual scenario arose in which a seriously injured employee was warned by his employer that he could 1) either seek medical treatment for the work-related injury, or, 2) just rough it out and hope for the best. Ironically, there is no cause of action under *either* R.C. 4123.90 or “wrongful discharge” for this scenario. Yet, this Court has long recognized its ability to serve as a gap filler and to **adjust** to new situations not anticipated by the legislature. See *Coolidge, supra*, (There is no principle of judicial restraint that precludes considerations of that which serves the public policy). Ironically, *Bickers* eliminates any hope for such protections and empowers employers to the detriment of the workers compensation act itself..

to retain his or her job until recovery of the injuries suffered at the worksite. *Bickers*, if left in place, completely erases the Court's unanimous opinion in *Coolidge*, only a few years prior.

Even more, the decision would leave a window of utter vulnerability for those citizens who attempt to use a system in place in which they are supposed to be co-contractors. The system supposedly frees the employer from immunity for negligence and severely limits an employee's rights to sue for injury in exchange for protection for themselves and their families – and their livelihoods from being fired or otherwise additionally harmed by the employer.

That system does not work under the Court's current decision in *Bickers*. Therefore, Amicus respectfully requests the Court reconsider and find in favor of Ms. Bickers and against her insurance-company employer.

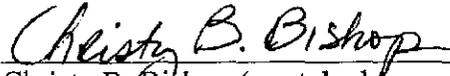
Respectfully submitted,

  
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Foregoing Reconsideration Memorandum of Amicus Curiae, The Ohio Employment Lawyers Association in Support of Plaintiff/Appellee Shelley Bickers 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; Michael A. Kearns, KEARNS COMPANY, LPA, 3028 Victory Parkway, Cincinnati, OH 45206-1542 and Geogory J. Claycomb, WILLIAM D. SNYDER & ASSOCIATES, 2115 Laray Avenue, Cincinnati, OH 45206-2605, Attorneys for Plaintiff/Appellee, Shelley Bickers, this 31th day of December, 2007.

  
Christy B. Bishop (per telephone approval)  
