



## I. INTRODUCTION

Appellee's Motion for Reconsideration should be denied. The Motion is simply a reargument of points previously raised by Appellee and Amicus Curiae. Appellee's arguments in the Motion for Reconsideration urge the Court to override the legislature's policy determination regarding the appropriate balance of rights and remedies for employers and employees in the workers' compensation system. There is no basis for the Court to reconsider its opinion in this case.

## II. ARGUMENT

### A. Appellee's Motion for Reconsideration is Merely a Reargument of Claims in Her Merit Brief.

The Court should dismiss Appellee's Motion for Reconsideration because it merely reargues the points raised by Appellee and her Amicus in their merit briefs and oral argument. Thus, Appellee's Motion and Amicus' Memorandum are improper. *See Sup. Ct. Rule XI, Sec. 2(A)* ("A motion for reconsideration . . . shall not constitute a reargument of the case").

A clear example of Appellee's and Amicus' attempt to reargue this case is their discussion of equal protection. Indeed, Amicus acknowledged in its Memorandum that it was simply rehashing its previous arguments:

The arguments have already been made—though not addressed—that favoring teachers in a public policy setting over others similarly situated . . . runs afoul of equal protection.

Memo. at p. 4. As explained in Appellant's Reply Brief, Appellee's equal protection concerns are not warranted because the legislature obviously is entitled to enact a statute protecting teachers from discharge without "good and just cause" and not extend the same protections to private sector employees. In any event, a rehashing of this issue does not justify reconsideration. Appellee's Motion should be denied because it is merely a reargument and presents nothing new.

**B. Appellee's Reliance on the Court's Prior Cases is Misplaced.**

Appellee argues that the Court's rulings in previous cases require the conclusion that terminating any employee who is receiving temporary total disability benefits is a violation of public policy. This argument is simply wrong. None of the cases cited by Appellee as binding precedent – *Leininger*, *Painter*, *Greeley*, *Collins*, and *Wiles* – address the issue before this Court: whether an employee terminated while receiving temporary total disability benefits can maintain a wrongful discharge tort claim based on the public policy embodied in the workers' compensation statute.

Moreover, the workers' compensation statute is not analogous to the statutes involved in the cases cited by Appellee, such as the Family and Medical Leave Act and R.C. 3113.213(D) (the statute forbidding employers from discharging an employee because he is subject to a withholding order for child support). To the contrary, the workers' compensation statute represents a comprehensive system that balances rights and remedies for employees and employers – a "compromise of employer and employee interests." *Bickers*, Slip Opinion No. 2007-Ohio-6751, at ¶ 17. Thus, Appellee's reliance on the various cases it cites is misplaced.

**C. Appellee Asks this Court to Ignore the Legislature's Intent Regarding Remedies Available Under the Workers' Compensation Statute.**

Appellee argues that the remedies available pursuant to R.C. 4123.90 are inadequate and therefore a public policy claim must be recognized. This argument ignores what should be obvious: no examination of the adequacy of remedies is warranted where no right exists. The Court held in this case that no right exists under R.C. 4123.90 to be free from discharge for non-retaliatory reasons. *Id.* at ¶ 17, 20-23. Indeed, Appellee acknowledges that R.C. 4123.90 does not prohibit non-retaliatory discharges. Motion For Reconsideration at p. 9. Appellee nevertheless – and once again – argues that the Court should recognize a public policy tort claim

so that non-retaliatory discharges will become unlawful. As the Court's decision properly holds, however, the Court cannot recognize such a tort claim without disregarding the legislature's intent concerning the rights created by the workers' compensation statute.

The Court held in *Bickers* that a public policy claim is "preclude[d] . . . when an employee files a workers' compensation claim and is discharged for nonretaliatory reasons" because the legislature chose not to give such a right to workers. *Id.* at ¶ 17, 20-23. As the Court noted, the legislature made the policy decision that *only* retaliatory discharges should be prohibited. Thus, the legislature provided no remedy for non-retaliatory discharges, such as when an employee is terminated for violating a neutral attendance policy. Appellee cannot rely on this lack of remedy to bootstrap a public policy claim. To do so would thwart the legislature's intent "to proscribe retaliatory discharges only." *Id.* at ¶23 (emphasis added).

Appellee's impassioned plea for reconsideration is in the wrong forum. Her argument belongs in the legislature. She disagrees with the policy choice to prohibit only retaliatory discharges. But as this Court stated, "[i]t is within the prerogative and authority of the General Assembly to make this choice when determining policy in the workers' compensation arena and in balancing, in that forum, employers' and employees' competing interests." *Id.* at ¶23. Thus, Appellee's argument does not justify reconsideration by the Court.

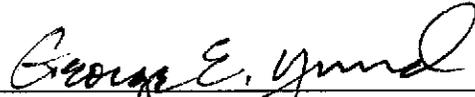
Appellee claims that the workers' compensation statute cannot preclude public policy tort claims because such claims did not exist at the time the workers' compensation statute was implemented. Motion for Reconsideration, at p. 7-8. This argument misses the point. The Court did not hold in *Bickers* that the implementation of the workers' compensation statute displaced a preexisting public policy claim. To the contrary, the Court held that the legislature, through "the balance of mutual compromise between the interests of the employer and the employee," chose

not to prohibit non-retaliatory discharges. The *legislature* made the policy choice with which Appellee disagrees, and only the *legislature* can change that policy choice.

### **III. CONCLUSION**

The Court should deny Appellee's Motion for Reconsideration. The Motion is a reargument and therefore does not comply with the Court's rule regarding such motions. Additionally, the Motion urges the Court to override the legislature's intent regarding the workers' compensation system. For these reasons, Appellant respectfully requests that the Court deny Appellee's Motion for Reconsideration.

Respectfully submitted,



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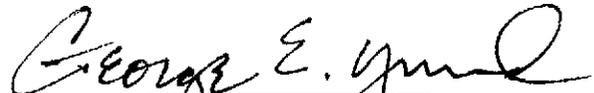
**PROOF OF SERVICE**

I hereby certify that a copy of this Memorandum in Support of Jurisdiction of Appellant Western Southern Life Insurance Company, Inc. was served by ordinary U.S. mail, postage prepaid, on January 7, 2008 on the counsel listed below.

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