

IN THE SUPREME COURT OF OHIO

SHELLEY BICKERS,

Plaintiff-Appellee,

vs.

WESTERN SOUTHERN LIFE  
INSURANCE COMPANY, INC.,

Defendant-Appellant.

CASE NO.: 06-0617

On Appeal from the Hamilton  
County Court of Appeals, First  
Appellate District Case No. C040342

**AMICUS CURIAE OHIO MANAGEMENT LAWYERS ASSOCIATION'S  
RESPONSE TO APPELLEE'S MOTION FOR RECONSIDERATION**

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

Gregory J. Claycomb (0042236)  
WILLIAM SNYDER & ASSOCIATES  
2115 Luray Ave.  
Cincinnati, OH 45206  
(513) 281-1544  
Fax: (513) 281-1644

Frederick M. Gittes (0031444)  
GITTES & SCHULTE  
723 Oak Street  
Columbus, Ohio 43205  
614-222-4735  
Fax 614-221-9655

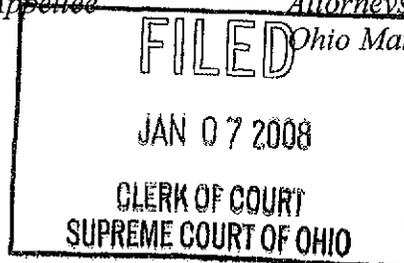
George E. Yund (0017714)  
Joanne W. Glass (0063571)  
Kasey Bond (0078508)  
FROST BROWN TODD, LLC  
2200 PNC Center, 201 East Fifth Street  
Cincinnati, Ohio 45202  
(513) 651-6800  
Fax: (513) 651-6981

*Attorneys for Defendant-Appellant  
Western Southern Life Insurance Co., Inc.*

Keith A. Ashmus (0014586)  
Michael J. Frantz (0019418)  
Kelly S. Lawrence (0074970)  
FRANTZ WARD LLP  
2500 Key Center, 127 Public Square  
Cleveland, Ohio 44114-1230  
(216) 515-1660  
Fax: (216) 515-1650

*Attorneys for Plaintiff-Appellee  
Shelley Bickers*

*Attorneys for Amicus Curiae  
Ohio Management Lawyers Association*



Christy B. Bishop  
THOMPSON & BISHOP  
2719 Manchester Rd.  
Akron, Ohio 44319  
330-753-6874  
Fax 330-753-7082

*Attorneys for Amicus Curiae  
Ohio Employment Lawyers Association*

## **I. INTRODUCTION**

The *Amicus Curiae* Ohio Management Lawyers Association (“OMLA”) respectfully submits this Response Memorandum for two limited purposes: (1) to emphasize that the Court’s holding comports with the sound historical notion that pure policy decisions are appropriately relegated to the legislative process; and (2) to address Appellee’s claims regarding the effect of the Court’s ruling on small businesses and other entities who are not parties to this action.<sup>1</sup>

As set forth more fully below and in the Response Memorandum of Appellant Western Southern Life Insurance Company, Inc., this Court should deny Appellee’s Motion for Reconsideration.

## **II. ARGUMENT**

### **A. The Court’s holding comports with the sound historical notion that pure policy decisions are appropriately relegated to the legislative process.**

Appellee’s Motion for Reconsideration asks this Court to substitute its policy beliefs for the collective public policy of the state of Ohio, which has been communicated through the enactment of Article II, Section 35 of the Ohio Constitution and the subsequent legislation of the Ohio General Assembly codified in R.C. Chapter 4123. To make this argument, Appellee claims that the Court’s opinion “seems to be based in large part on totally false premises about the impact of *Coolidge* on small employers.” *See Appellee’s Motion for Reconsideration*, p. 10. This statement is not accurate.

Rather, the Court properly recognized that the issue raised in this case presents a “difficult policy choice,” the resolution of which “inevitably creates a burden of some

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<sup>1</sup> Because Appellee’s Motion for Reconsideration merely rehashes arguments raised on appeal, pursuant to Sup. Ct. Prac. R. XI, Section 2(A), Appellee’s motion should be denied for that reason also.

degree on either the employer or the employee.” *Bickers v. Western Southern Life Inc. Co., Inc.*, Slip Opinion No. 2007-Ohio-6751, at ¶¶ 20, 23. After discussing, in *dicta*, some of the potential burdens on *both* employers and employees, the Court held that policy interests of employers, employees (and, presumably, other non-party interest groups in the state of Ohio) can only be balanced by the careful work of the legislative process. *See Id.* at ¶¶ 20-25.

In *Burton v. Exam Center Industrial & General Medical Clinic, Inc.* (Utah 2000), 994 P.2d 1261, 1266, the Utah Supreme Court refused to recognize a wrongful discharge public policy claim premised on the federal and state age discrimination statutes where the defendant-employer did not have the requisite number of employees to fall within the statutes’ reach. In so holding, the *Burton* Court explained why such policy debates belong in the legislature.

Due respect for the legislative prerogative in lawmaking requires that the judiciary not interfere with enactments of the Legislature where disagreement is founded only on policy considerations and the legislative scheme employs reasonable means to effectuate a legitimate object. In matters not affecting fundamental rights, the prerogative of the legislative branch is broad and must by necessity be so if government is to be by the people through their elected representatives and not by judges.

*Id.*; *see also* *Arbino v. Johnson & Johnson*, Slip Opinion No. 2007-Ohio-6948, at ¶ 21 (“A fundamental principle of constitutional separation of powers among the three branches of government is that the legislative branch is the ultimate arbiter of public policy.”) (internal quotations omitted); *In re Blackshear* (2000), 90 Ohio St. 3d 197, 202 (Resnick, J., concurring) (recognizing that “the courts are neither authorized nor properly equipped to make public policy determinations”); R.C. § 1.47 (setting forth presumption

that, in enacting legislation, the General Assembly has intended a just and reasonable result).

In this case, based on the foregoing principles, the Court properly concluded that resolution of the issue of whether a wrongful discharge claim premised on Ohio's workers' compensation statutes exists should remain within the "prerogative and authority of the General Assembly," which is equipped to hear from all entities that may have an interest in such rule making. *Bickers, supra*, at ¶ 23. Based on testimony before it, and assuming the General Assembly were satisfied that there existed sufficient justification, the General Assembly could take any number of actions, for example, providing leave rights beyond those which have been prescribed by the Family Medical Leave Act of 1993 (the "FMLA"); requiring that employers maintain a preferential rehire list for employees off on temporary total disability ("TTD"); committing the issue to the Bureau of Workers' Compensation or Industrial Commission; or extending TTD benefits for a longer time for employees whose employment is terminated while on TTD. It also could decide that the lines already have been drawn where they need to be and make no new law. As noted by the Court, the General Assembly has so far "chose[en] to proscribe retaliatory discharges only." *Id.* In the absence of any further action by the General Assembly, "it would be inappropriate for the judiciary to presume the superiority of its policy preference and supplant the policy choice of the legislature." *Id.* at ¶ 24.

**B. Appellee’s unsupported claims regarding the lack of effect of a public policy tort action on small businesses do not warrant reconsideration of this case and instead demonstrate the need for courts to tread lightly in the area of public policy torts.**

Appellee also takes issue with the Court’s supposed finding regarding the impact of a rule extending common law tort claims to non-retaliatory discharges that occur while employees are on TTD. In particular, Appellee claims that the impact of such a rule on small business is not supported by record evidence. Appellee then devotes two pages of her brief to unsupported statements about the lack of effect on small business as opposed to the “potentially ruinous burdens” purportedly placed on employees. *See Motion for Reconsideration*, pp. 10-11. Appellee boldly (and quite falsely) claims, for example, that: (1) the impact of a wrongful discharge public policy claim premised on an employer’s application of a neutral attendance policy to employees on TTD has a “de minimis” impact on small employers; (2) “most small businesses already accommodate injured workers and have no difficulty finding temporary replacements;” and (3) small employers’ pension and healthcare contributions would not be substantially impacted. *Id.* Appellee’s argument ultimately culminates in the specious claim that an employer can eliminate potential liability simply by suspending its rules. *Id.*, p. 10. Under Appellee’s logic, in order to avoid claims of wrongful discharge, all an employer has to do is cease disciplining employees – or hold open their jobs indefinitely – regardless of their misconduct, fault or inability to work. What safe, productive workplaces Ohio would have then! Appellee’s wholly unsupported argument is completely divorced from the reality of workplace life in Ohio, where both employers and employees in the state compete on a world-wide basis.

Appellee's argument also ignores the General Assembly's consistent attempts to balance the interests of all Ohio's citizens, including the interests of employers who are the source of innovation, jobs, income, benefits, capital improvements, taxes and growth, thereby providing a substantial portion of the state's economic sustenance. The General Assembly is not charged with creating the "perfect" job for certain employees at the expense of millions of "good" jobs, but rather, with providing a fair balance among competing interests.

Moreover, aside from the fact that *all* workers compensation issues are committed to the legislature by Ohio's Constitution, Appellee's argument further demonstrates *why* the public policy tort is pernicious unless kept under strict control. It is undeniable, for example, that small business has an interest in the resolution of the issue in this case. However, small business *is not* a party to this litigation. Aside from the arguments presented through the *amicus* process, small business does not have a means by which to present its position to the Court.

Similarly, employees as a group have an interest, but only one such employee is a party in this case. Ms. Bickers is not a class representative, and there has been no finding that she can adequately represent the interests of the employees of the state of Ohio. The adequacy of Ms. Bickers' representation is particularly suspect as it relates to employees of small businesses who arguably have an interest in keeping jobs filled. If positions are left open indefinitely for injured workers, extra work inevitably falls on the small business employee. An individual plaintiff like Ms. Bickers thus cannot adequately represent the interests of the employees in the state of Ohio. Indeed, nowhere does Ms. Bickers inform the Court of the protections provided to absent employees by the FMLA

(up to 12 weeks in 12 months), the ADA and the Ohio Civil Rights Act. This omission further demonstrates the danger of relying on litigants to present all facets of the real-life situation to a court in a plaintiff-versus-defendant setting.

The economy of the State is likewise important, but it is nowhere represented in this case. It would, however, be a central concern of the legislature and the executive branch, as demonstrated by the ongoing rulemaking process on pregnancy leave in the Ohio Civil Rights Commission, the Governor's office and the Joint Committee on Agency Rule Review. *See e.g.*, Andrew Welsh-Huggins, *Maternity Leave Plan Sent Back to Agency*, Associated Press, Dec. 4, 2007; "Civil Rights Commission Plans to Press for Revised Pregnancy Leave Rule Despite Governor's Requested Delay," Gongwer's Ohio Report, Vo. 76, No. 230, Nov. 23, 2007; *Proposed Amended Rule 4112-5-05 of the Administrative Code: Hearings Before the Ohio Civil Rights Commission*, Testimony of the Ohio Chamber of Commerce, August 1, 2007.

Moreover, the tort system itself is not free. The act of creating a new cause of action creates costs for employers and the economy in developing and implementing preventative actions, retaining unproductive or miscast employees, and record keeping. The state of Ohio absorbs significant transaction costs wholly apart from relief. *See Arbino, supra*, Slip Opinion No. 2007-Ohio-6948, at ¶ 53 (discussing in the context of SB 80 the General Assembly's consideration that the current tort system "represents a challenge to the economy of the state of Ohio," as is evidenced by, among other things, "testimony from Ohio Department of Development Director Bruce Johnson on the rising costs of the tort system, which he believed were putting Ohio employers at a disadvantage and hindering development.").

Finally, the ability of a court to act is very limited (in this case, for example, to the determination of whether or not a tort exists). Unlike the legislative process, administrative solutions or compromises are not available to the courts.

In short, the public policy of the state of Ohio is appropriately crafted from testimony, debate, adequate representation and balancing of interests of the state's citizens – all of which can only be accomplished in the legislature. The Court therefore properly declined to “override” the “prerogative and authority of the General Assembly” in setting the public policy of the state of Ohio as it relates to the termination of injured workers. Reconsideration is neither warranted nor necessary here.

### III. CONCLUSION

For each of the foregoing reasons and those set forth in Appellant Western Southern Life Insurance Company, Inc.'s Response to Appellee's Motion for Reconsideration, *Amicus Curiae* Ohio Management Lawyers Association respectfully urges the Court to deny Appellee's Motion for Reconsideration.

Respectfully submitted,

Keith A. Ashmus (per authority EJS #0077000)  
Keith A. Ashmus (0014586)  
Michael J. Frantz (0019418)  
Kelly S. Lawrence (0074970)  
FRANTZ WARD LLP  
2500 Key Center, 127 Public Square  
Cleveland, Ohio 44114-1230  
(216) 515-1660  
Fax: (216) 515-1650

*Attorneys for Ohio Management  
Lawyers Association*

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Management Lawyers Association was served, via regular U.S. Mail, this 7<sup>th</sup> day of January, 2008, upon the following:

Michael A. Kearns (0062817)  
KEARNS COMPANY LPA  
3028 Victory Parkway  
Cincinnati, Ohio 45206-1542

Gregory J. Claycomb (0042236)  
WILLIAM SNYDER & ASSOCIATES  
2115 Luray Ave.  
Cincinnati, OH 45206

Frederick M. Gittes (0031444)  
GITTES & SCHULTE  
723 Oak Street  
Columbus, Ohio 43205

*Attorneys for Plaintiff-Appellee*  
*Shelley Bickers*

Christy B. Bishop  
THOMPSON & BISHOP  
2719 Manchester Rd.  
Akron, Ohio 44319

*Attorneys for Amicus Curiae*  
*Ohio Employment Lawyers Association*

George E. Yund (0017714)  
Joanne W. Glass (0063571)  
Kasey Bond (0078508)  
FROST, BROWN & TODD, LLC  
2200 PNC Center  
201 East Fifth Street  
Cincinnati, Ohio 45202

*Attorneys for Defendant-Appellant*  
*Western Southern Life Insurance Co., Inc.*

Keith A. Ashmus (per authority)  
EJS #00779000  
One of the Attorneys for Ohio Management Lawyers Association