

ORIGINAL

IN THE SUPREME COURT OF OHIO

DeWAYNE SUTTON,	:	
	:	
Plaintiff/Appellee,	:	Case No. 2010-0670
	:	
v.	:	
	:	
TOMCO MACHINING, INC.,	:	On Appeal from the
	:	Montgomery County Court of Appeals
Defendant/Appellant.	:	Second Appellate District

MERIT BRIEF OF APPELLANT TOMCO MACHINING, INC.

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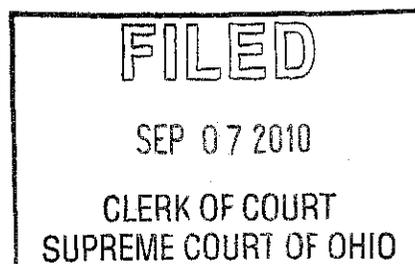


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STATEMENT OF FACTS

This case arises from the termination of the employment of plaintiff/appellee DeWayne Sutton (“Sutton”) by Sutton’s former employer, defendant/appellant Tomco Machining, Inc. (“Tomco”). The facts of the case are, for the purposes of the present appeal, very simple. As the trial court entered judgment on the pleadings in favor of Tomco, one must accept as true all the material allegations of Sutton’s complaint. *Corporex Development & Construction Management, Inc. v. Shook, Inc.*, 106 Ohio St. 3d 412, 2005-Ohio-5409, at ¶ 2. The material allegations of Sutton’s September 18, 2008 complaint may be summarized as follows.

In April 2008, Sutton was discharged from his employment by Jim Tomasiak (“Tomasiak”), the president of Tomco. Shortly before being discharged, Sutton had been injured while in the course and scope of his employment with Tomco, and had reported his injury to Tomasiak. Some time after being discharged, Sutton filed a claim for workers’ compensation benefits, ultimately receiving such benefits. Appx. 6.

On the basis of these allegations, Sutton asserted two causes of action against Tomco: (1) unlawful retaliation (wrongful discharge) in violation of Rev. Code § 4123.90, and (2) wrongful discharge in violation of Ohio public policy. Appx. 6. Tomco filed its answer to the complaint on October 16, 2008, essentially denying the material allegations of the complaint and asserting various affirmative defenses.

On December 9, 2008, before the parties had commenced discovery, Tomco filed a motion for judgment on the pleadings. Appx. 6-7, 21. After the parties had fully briefed the motion for consideration by the trial court, on April 15, 2009, the trial court filed its decision, order and entry on Tomco’s motion. Appx. 21-24. With respect to the statutory claim, the trial court held that Sutton’s alleged actions prior to his discharge were insufficient to constitute the

“institution” or “pursuance” of a workers’ compensation claim and, therefore, Tomco could not have violated Rev. Code § 4123.90 by discharging him. Appx. 22. With respect to the common law claim, the trial court held that it could not adopt such a cause of action in light of this Court’s decision in *Bickers v. Western & Southern Life Ins. Co.*, 116 Ohio St. 3d 351, 2007-Ohio-6751. Appx. 23. Accordingly, the Montgomery County Court of Common Pleas sustained Tomco’s motion in its entirety, entering judgment in favor of Tomco on both the statutory claim and the public policy claim. Appx. 24.

On May 7, 2009, Sutton filed his notice of appeal with the Second Appellate District. On March 5, 2010, the court of appeals filed its opinion and final entry. Appx. 3-20. As to the statutory claim, the court of appeals agreed with the trial court and overruled Sutton’s assignment of error. Appx. 19.

With respect to the public policy claim, by a 2-1 majority, the court of appeals disagreed with the trial court and sustained Sutton’s assignment of error. Specifically, having distinguished the *Bickers* case, the court of appeals held that a claim for wrongful discharge in violation of the public policy underlying Rev. Code § 4123.90 *does* exist. Appx. 17-18. Having held that Tomco was not entitled to judgment on the pleadings on the public policy claim, the court of appeals reversed the trial court’s judgment and remanded the matter to the trial court for further proceedings on the public policy claim. Appx. 19.

On April 16, 2010, Tomco filed its notice of appeal with the Supreme Court of Ohio. Appx. 1-2. On July 21, 2010, this Court accepted the appeal. Because the court of appeals upheld the trial court’s judgment with respect to the statutory claim, the statutory claim is no longer at issue. The present appeal relates *solely* to whether there is a common law claim for

wrongful discharge in violation of the public policy underlying Rev. Code § 4123.90. For the reasons set forth herein, Tomco submits that such a claim does not, and should not, exist.

ARGUMENT

The Workers' Compensation System

Because Sutton based his public policy wrongful discharge claim upon a provision within the Workers' Compensation Act, it is necessary to examine the origin and nature of the workers' compensation system and the compromise that it has represented for almost one hundred years.

It is an unfortunate fact that some employees suffer physical injuries as a consequence of their employment. Prior to 1913, in theory the common law permitted such employees to sue their employers and obtain compensation for their injuries, but only if they could establish negligence and avoid the application of the fellow-servant rule, the defense of assumption of the risk and the defense of contributory negligence. In practice, the common law generally encouraged contentious litigation and prevented such employees from obtaining prompt and adequate compensation for their injuries.

In response to this situation where the theoretical availability of common-law remedies and the practical adequacy and convenience of such remedies appeared not to be in synch, the people of Ohio adopted a constitutional provision authorizing the General Assembly to establish, by statute, a workers' compensation system. Section 35, Article II, Ohio Constitution. The provision became effective on January 1, 1913. The reasons for the establishment of a workers' compensation system had been described at the 1912 Constitutional Convention in the following terms:

In nearly every other state in the Union where the legislatures are in session this winter the legislators are considering similar measures of this kind and the general tendency of the time is to do away with the old, worn-out methods of compelling the worker to

sue for damages, and the long incidental delays that make it impossible for the cripple, the widow and the orphans to secure justice or adequate compensation for the loss of life and limb, and to replace it with a direct compensation system, to the end that those who suffer as the result of industrial injuries may be immediately relieved from suffering, due to the want of the necessities of life.

* * * *

Workmen's compensation laws also provide a definite and fixed liability on the employer, so that he knows that [sic] he will have to pay, and will prevent litigation on this subject which has proven detrimental to employer and employe and a matter of enormous and needless expense to both.

2 Proceedings and Debates of the Constitutional Convention of the State of Ohio (1913), 1346.

Thus it has always been clear that the constitutional provision was intended to authorize the abolition of the unsatisfactory common law remedies for injured employees and the creation of a statutory compensation scheme in their place. As this Court has recently stated, "[t]his statutory framework supplanted, rather than amended or supplemented, the unsatisfactory common-law remedies." *Bickers v. Western & Southern Life Ins. Co.*, 116 Ohio St. 3d 351, 2007-Ohio-6751, at ¶19. The statutory system supplanted those common law remedies as part of a compromise between employers and employees:

[W]orkers' compensation laws are the result of a unique mutual compromise between employees and employers, in which employees give up their common-law remedy and accept possibly lower monetary recovery, but with greater assurance that they will receive reasonable compensation for their injury. Employers in turn give up common-law defenses but are protected from unlimited liability.

Stetter v. R.J. Corman Derailment Services, 125 Ohio St. 3d 280, 2010-Ohio-1029, at ¶ 54

(citing cases). Any attempt to expand (or contract) the scope of employers' liability to injured

employees will upset the unique compromise inherent in the comprehensive framework of the workers' compensation system adopted in Ohio.

Proposition of Law No. I

In order to preserve the comprehensive framework of the workers' compensation system enacted by the General Assembly, there is no common law cause of action for employees claiming termination in violation of rights conferred by the Workers' Compensation Act.

Whenever the competing interests of two (or more) groups of people are to be balanced or compromised, public policy choices must be made. Courts, however, "have nothing to do with forming public policy and declare such public policy only after the policy has been formulated by the General Assembly." *Korr v. Thomas Emery's Sons, Inc.* (1950), 154 Ohio St. 11, 18-19. In the specific context of the workers' compensation system, this Court has explicitly recognized that only the legislature, and not the courts, may make policy choices:

[I]t is the legislature, and not the courts, to which the Ohio Constitution commits the determination of the policy compromises necessary to balance the obligations and rights of the employer and employee in the workers' compensation system.

Bickers v. Western & Southern Life Ins. Co., 116 Ohio St. 3d 351, 2007-Ohio-6751, at ¶ 24.

Therefore, this Court has steadfastly maintained that the judiciary may not override policy choices that have been made by the legislature in the workers' compensation arena:

"It is within the prerogative and authority of the General Assembly to make [choices] when determining policy in the workers' compensation arena and in balancing, in that forum, employers' and employees' competing interests. We may not override [those choices] and [impose our own preferences] on this wholly statutory system.

"Moreover, it would be inappropriate for the judiciary to presume the superiority of its policy preference and supplant the policy choice of the legislature."

Kaminski v. Metal & Wire Products Company, 125 Ohio St. 3d 250, 2010-Ohio-1027, at ¶¶ 74-75 (quoting *Bickers*; alterations in *Kaminski*; citations omitted).

Public policy choices in the context of the workers' compensation system take many forms. For example, should an employee be entitled to compensation for a mental disorder caused by job-related stress? Almost twenty years ago, this Court declined to invade the legislature's prerogative and address that particular public policy issue:

This is a public-policy issue which should be addressed by the General Assembly * * *. It is not a problem which should be addressed by this court in a sweeping public-policy statement.

* * * * *

It is the General Assembly which is charged with sole authority to determine workers' compensation coverage under Section 35, Article II, Ohio Constitution.

Rambaldo v. Accurate Die Casting (1992), 65 Ohio St. 3d 281, 288.

Also, should an employer be permitted to discharge an at-will employee who has been injured? As this Court correctly recognized, if such discharges were not permitted, employers of injured employees could very well have an inappropriate burden placed upon them:

Should the policy choice be to deny employers the exercise of their employment-at-will prerogative and require them to hold open the jobs of injured employees for indefinite periods of time, then employers will be burdened with employees unable to perform the work for which they were hired and an inability to obtain permanent replacements. This would be particularly onerous on small employers with few employees, who lack the ability to shift the duties of an injured employee to other employees.

Bickers, at ¶ 21. And, conversely, employees might argue that permitting such discharges would place an inappropriate burden upon injured employees:

Should the policy choice be to permit an employer to terminate a worker who is injured on the job and cannot work as a result, then the worker suffers not only the burden of being injured but also the

burden of unemployment at a time when seeking a new position is made more difficult by the injury.

Bickers, at ¶ 22. Just as it had done in the *Rambaldo* case, this Court declined to invade the legislature's prerogative. In *Bickers*, this Court recognized that the legislature had, in fact, addressed the precise public policy issue raised in that case, and also in the present case:

In addressing this difficult policy issue * * * the General Assembly chose to proscribe retaliatory discharges only. Employers may not retaliate against employees for pursuing a workers' compensation claim.

Bickers, at ¶ 23 (citing R.C. 4123.90). Because the legislature had determined that it would be appropriate to provide a limited wrongful discharge remedy and had statutorily provided such a remedy, this Court held that a common law cause of action for wrongful discharge could not be imposed into the workers' compensation arena:

Against this backdrop, it becomes apparent that the imposition of common-law principles of wrongful discharge into the workers' compensation arena runs counter to "the balance of mutual compromise between the interests of the employer and the employee" as expressed by the General Assembly within the Act. *Bickers*'s remedy must be found within the workers' compensation statutes.

Bickers, at ¶ 25.

While legal principles are universal, a court can only apply them to the facts before it. The plaintiff in *Bickers* had been terminated while receiving workers' compensation benefits, and this Court consequently summarized the law, as applied to the facts of the case before it, in these terms:

An employee who is terminated from employment while receiving workers' compensation has no common-law cause of action for wrongful discharge in violation of the public policy underlying R.C. 4123.90, which provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act.

Bickers, at syllabus. Of course, neither the syllabus nor the body of this Court’s opinion in *Bickers* limits the application of the rule set forth therein to Ms. Bickers’s particular factual situation.

Until the decision of the court of appeals in the present case, every Ohio appellate court that had considered the *Bickers* case had correctly applied this Court’s holding in *Bickers*, as set forth in the syllabus, that Rev. Code § 4123.90 “provides the *exclusive remedy* for employees claiming termination in violation of rights conferred by the Workers’ Compensation Act.” See *Sidenstricker v. Miller Pavement Maintenance*, Franklin App. No. 09AP-523, 2009-Ohio-6574, at ¶ 12 (in accordance with *Bickers*, discharged employees are barred from pursuing a public policy claim based upon the policies underlying Rev. Code § 4123.90 whether their discharge was “retaliatory” or “nonretaliatory”); *Carpenter v. Bishop Well Services Corp.*, Stark App. No. 2009CA00027, 2009-Ohio-6443, at ¶ 39 (public policy wrongful discharge claim based upon workers’ compensation claims are prohibited pursuant to *Bickers*); *Mortensen v. Intercontinental Chemical Corporation*, 178 Ohio App. 3d 393, 2008-Ohio-4723, at ¶ 23 (statutory wrongful discharge claim is the exclusive remedy, even if the claim is filed after the employee is discharged); *McDannald v. Robert L. Fry & Associates*, Madison App. No. CA2007-08-027, 2008-Ohio-4169, ¶ 31-32 (statutory claim is the exclusive wrongful discharge remedy for an employee discharged while temporarily totally disabled); *Cunningham v. Steubenville Orthopedics and Sports Medicine*, 175 Ohio App. 3d 627, 2008-Ohio-1172 (common law retaliatory discharge claim cannot be based upon workers’ compensation statute).

Federal courts applying Ohio law have reached similar conclusions. See *Amara v. ATK*, 3:08CV0378, 2009 U.S. Dist. LEXIS 76357, *6-9 (S.D. Ohio Aug. 5, 2009); *Helmick v. Solid Waste Authority of Central Ohio*, 2:07-CV-912, 2009 U.S. Dist. LEXIS 19301, *12 (S.D. Ohio

Mar. 10, 2009); *Trout v. FirstEnergy Generation Corporation*, 3:07CV00673, 2008 U.S. Dist. LEXIS 102803, *15 (N.D. Ohio Aug. 6, 2008); *Powell v. Honda of America Mfg.*, 2:06-CV-979, 2008 U.S. Dist. LEXIS 56991, *7-8 (S.D. Ohio Jul. 22, 2008); *Compton v. Super Swan Cleaners*, 08-CV-002, 2008 U.S. Dist. LEXIS 39526, *13-14 (S.D. Ohio Apr. 29, 2008); and *McDermott v. Continental Airlines*, 2:06-cv-0785, 2008 U.S. Dist. LEXIS 29831, *45-46 (S.D. Ohio Apr. 11, 2008).

In the present case, however, the Second Appellate District reached a completely different conclusion. In analyzing the four elements of a prima facie claim of wrongful discharge (clarity, jeopardy, causation, and (lack of) overriding justification), specifically the “clarity” element, the court of appeals held that the relevant public policy “against allowing an employer to discharge an employee solely in retaliation for filing a workers’ compensation claim” is manifested in Rev. Code § 4123.90. *Sutton v. Tomco Machining, Inc.*, 186 Ohio App. 3d 757, 2010-Ohio-830, at ¶¶ 9-13, 16 (quoting *Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 69-70 and citing *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St. 3d 141, 2003-Ohio-5357, at ¶ 149); Appx. 8-10. Therefore, the Second Appellate District stated affirmatively and unambiguously that Rev. Code § 4123.90 was “the *sole source* of the public policy” in this case. *Sutton*, at ¶ 18 (emphasis added); Appx. 11. Having held that Sutton was claiming that his employment was terminated in violation of a public policy based solely on Rev. Code § 4123.90, the correct disposition of Sutton’s public policy claim should have been clear to the majority based upon the law set forth in *Bickers*. Also, this Court had held ten years earlier that an employee claiming discharge in violation of a public policy expressed *solely* in a statute must have complied fully with the requirements of the statute in order to maintain a common law cause of action for wrongful discharge. *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d

134, paragraph 3 of the syllabus. In light of the disposition of his statutory claim, it is undisputed that Sutton did not comply fully with the requirements of Rev. Code § 4123.90.

Instead of following the law of Ohio as enacted by the General Assembly and set forth by this Court, the court of appeals considered the remaining three elements of the tort of wrongful discharge, and then sought to distinguish *Bickers*. Having pointed out that the plaintiff in *Bickers* was discharged while receiving benefits and Sutton, in the present case, was discharged after being injured and before even applying for benefits, the court of appeals stated that “*Bickers*’s holding does not encompass Sutton’s claim . . .” *Sutton*, at ¶ 36; Appx. 16. In effect, the court of appeals concluded that it was free to ignore this Court’s decision in *Bickers*, or at least to limit its application to “non-retaliatory” discharges:

In *Bickers*, the Court barred only common-law tort claims of wrongful discharge when the discharge is for reasons that are not retaliatory. The discharge of an employee while the employee is receiving compensation benefits, like the plaintiff in *Bickers*, is not prohibited because it is not retaliatory.

Sutton, at ¶ 38; Appx. 16.

The court of appeals quoted extensively from the judgment in *Bickers*, but believed that the “policy choice” referred to therein related only to “non-retaliatory” discharges. *Sutton*, at ¶¶ 38-39 (quoting *Bickers*, at ¶¶ 20-25); Appx. 16-18. As noted above, this Court unequivocally rejected this interpretation of *Bickers* in the *Kaminski* case. Even the Tenth District Court of Appeals in the *Sidenstricker* case, while clearly uncomfortable with the result that it felt constrained to reach, recognized that the rule set forth in *Bickers* is not limited to cases of “non-retaliatory” discharges.

The court of appeals in the instant case was not, however, unanimous. Donovan, P.J., dissenting, correctly recognized that this Court's holding in *Bickers* means what it says, and therefore applies to Sutton's claim:

I do not believe we are at liberty to overrule the syllabus of a Supreme Court opinion, *Bickers*, which is on point. As an appellate court, we are bound by Rule 1 of the Supreme Court Rules for Reporting of Opinions. ... Nothing in the *Bickers* syllabus indicates that the rule of law contained therein applies only to non-retaliatory discharges.

I would agree with the trial court the claim is barred based upon the *Bickers* holding which we are not free to modify.

Sutton, at ¶¶ 47-48 (Donovan, P.J., dissenting); Appx. 19-20.

In essence, the majority concluded that if an employer discharges an injured employee who has *not* sought workers' compensation benefits, then the *common law* may provide a remedy to that employee even though the workers' compensation system does not. The majority described this remedy as a common law claim for wrongful discharge in violation of the public policy underlying Rev. Code § 4123.90. By holding that a common law claim for wrongful discharge in violation of the public policy underlying Rev. Code § 4123.90 exists in Ohio, the majority created a cause of action where this Court had already determined that none exists.

The decision below requires reversal for several distinct but closely related reasons. First, the court of appeals reached a conclusion that is directly contrary to the law of Ohio, as set forth by this Court in *Bickers*, and since applied in other courts: Rev. Code § 4123.90 provides the *exclusive remedy* for employees claiming termination in violation of rights conferred by the Workers' Compensation Act. *Bickers*, syllabus.

Second, in reaching its conclusion, the majority identified a public policy in the workers' compensation arena and created a remedy for a violation of that public policy in spite of the

principles carefully enunciated by this Court in *Bickers* and confirmed by this Court in *Kaminski*: courts may not override the legislature's policy choices and impose their own preferences on the wholly statutory workers' compensation system. *Kaminski*, at ¶ 74. The public policy choice of the legislature to limit employees' wrongful discharge remedies is clear in Rev. Code § 4123.90.

Third, the public policy identified by the court of appeals, which essentially creates a new variant of the public policy exception to the doctrine of employment at will, in no way supports the clear purpose of the workers' compensation statute: the provision of compensation (*not* employment) to injured employees. By contrast, the statutory remedy in Rev. Code § 4123.90 *does* support this statutory purpose, because it ensures that workers are not prevented from making claims for compensation because they fear retaliatory discharge.

Fourth, the existence of a new variant of the public policy exception to the employment at will doctrine, based solely on conjecture regarding the employee's intentions and employer's motives, will directly undermine another of the purposes of the workers' compensation system: the avoidance of litigation between employers and their injured employees. It was clear one hundred years ago, and is still clear today, that contentious litigation, and the distractions, delays, expense and unpredictable results inevitably associated with such litigation, particularly when jury trials are permitted, benefit neither employers nor injured employees.

Fifth, the decision of the court of appeals suggests that a *prima facie* retaliatory discharge claim exists whenever an employee is injured and is subsequently discharged. Apparently, a causal connection would be implied whenever termination followed injury and before taking an affirmative step toward filing a claim for worker's compensation benefits. Therefore, an employer whose employee is injured may feel constrained to retain that employee or, as this Court previously recognized, the employer may be "... require[d] to hold open the [job] of [an]

injured [employee] for [an] indefinite [period] of time, [thus burdening the employer] with [an employee] unable to perform the work for which [the employee was] hired and an inability to obtain [a] permanent [replacement]. This would be particularly onerous on small employers with few employees, who lack the ability to shift the duties of an injured employee to other employees” *Bickers*, at ¶ 21.

Sixth, the decision of the court of appeals would create an anomalous situation: because a statutory claim pursuant to Rev. Code § 4123.90 allows a more limited range of remedies than a common law wrongful discharge claim, an injured employee who *does not* file a workers’ compensation claim before being discharged would be able to seek remedies not available to an injured employee who does file a workers’ compensation claim before being discharged. If the public policy choice (which would have to be the choice of the legislature) were to provide a retaliatory discharge remedy to both employees, there would surely be no logical reason to reward the employee who did *not* file a claim prior to discharge by providing *more* generous remedies to such an employee. This could even create an incentive for injured employees not to seek benefits, hoping instead to be discharged and claim retaliation. Again, the decision of the court of appeals undermines, rather than supports, the purpose of the workers’ compensation system.

Seventh, the negative practical consequences of the decision of the court of appeals could be significant. As part of the mutual compromise inherent in the workers’ compensation system, employers were relieved of certain burdens, such as the prospect of lengthy litigation with their injured employees and practically unlimited liability. After almost one hundred years, the decision of the court of appeals re-imposes such burdens on employers and eviscerates the benefits derived from the mutual compromise. Employers will not view Ohio as a welcoming

business environment. This is not the time to encourage current Ohio employers to move, or prospective Ohio employers to stay away. In today's economic climate, it is worth noting that the unemployment rate in Ohio now exceeds 10%. Ohio and U.S. Employment Situation (Seasonally adjusted), August 20, 2010 (available at <http://jfs.ohio.gov/releases/>).

For all these reasons, this Court should reverse the court of appeals and reinstate the trial court's dismissal of Sutton's public policy claim. In so doing, this Court would resolve the conflict among the various courts of appeals that has arisen solely because of the position taken by the Second Appellate District and reaffirm this Court's holding in *Bickers*, i.e., Rev. Code § 4123.90 provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act.

Proposition of Law No. II:

There is no common law cause of action for preemptive retaliatory discharge in violation of public policy; the retaliation must follow the protected activity.

If an employer discharges (or takes some other adverse employment action against) an injured employee who has sought workers' compensation benefits (by filing a claim or taking an affirmative step towards filing a claim), then the workers' compensation system may provide a remedy to that employee. Rev. Code § 4123.90. Undoubtedly, the public policy underlying Rev. Code § 4123.90 is to discourage employers from retaliating against employees who seek workers' compensation benefits, and thereby encourage workers to seek the workers' compensation benefits to which they may be entitled.

Of course an employer can only "retaliate" against an employee for something that the employee has done (or, perhaps, something that the employer believes that the employee has done). An employer cannot "retaliate" against an employee for something that the employer knows the employee has not done.

This Court has already reached this conclusion in the context of the anti-retaliation provision in Ohio's anti-discrimination laws. "To establish a claim of retaliation, a claimant must prove that (1) she *engaged* in a protected activity, (2) the *defending party was aware* that the claimant *had engaged* in that activity" *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶ 13 (citing *Canitia v. Yellow Freight Sys., Inc.* (C.A.6, 1990), 903 F.2d 1064, 1066) (emphasis added). Similarly, in the context of the anti-retaliation provision in Ohio's whistleblower statute, this Court held that an employee "may maintain a common-law cause of action against the employer ... so long as that employee *had fully complied* with the statute and was *subsequently* discharged or disciplined." *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, paragraph 3 of the syllabus (emphasis added).

The Second Appellate District, through its holding in the instant case, has created a common law "preemptive retaliatory discharge" or, perhaps, "preventative discharge" cause of action, holding in effect that Tomco retaliated against Sutton for conduct that Sutton had not undertaken and, indeed, might never have undertaken. The majority's decision sets a precedent that would create an entirely new cause of action for preemptive retaliatory discharge where none exists, and where none should exist.

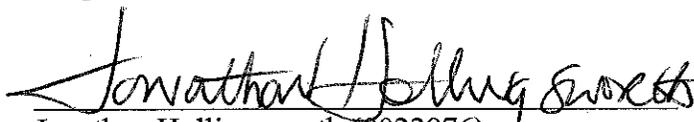
There is no common law cause of action for pre-emptive strike retaliatory discharge by an employee allegedly injured on the job and terminated thereafter, especially when there is no evidence that even suggests that the injured employee was prevented from pursuing a worker's compensation claim and receiving the benefits relating thereto. To suggest otherwise is to engage in sheer speculation as to what was in the mind of the employer at the time the employer exercised its legal rights under the employment at will doctrine and whether the injured

employee will be placed in the untenable position of deciding between the benefits to be derived from the worker's compensation claim and the wages associated with continued employment.

CONCLUSION

In the end, this appeal is about what this Court meant in the *Bickers* case. Tomco believes that it meant precisely what it said, i.e., Rev. Code § 4123.90 provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act.

Respectfully submitted,



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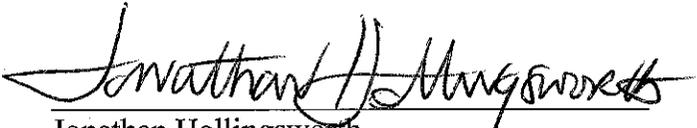
Counsel for Appellant Tomco Machining, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon:

Jeffrey M. Silverstein
Jason P. Matthews
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Dayton, Ohio 45408

by ordinary first class United States mail, postage prepaid, this 7th day of September, 2010.


Jonathan Hollingsworth.

ORIGINAL

IN THE SUPREME COURT OF OHIO

DeWAYNE SUTTON,	:	
	:	10-0670
Plaintiff/Appellee,	:	On Appeal from the
	:	Montgomery County Court of Appeals,
v.	:	Second Appellate District.
	:	
TOMCO MACHINING, INC.	:	Court of Appeals
	:	Case No. 23416
Defendant/Appellant	:	

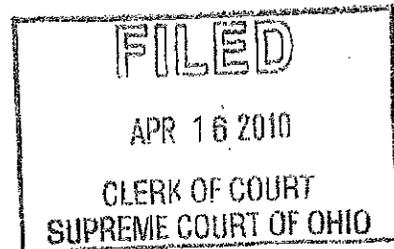
NOTICE OF APPEAL OF APPELLANT TOMCO MACHINING, INC.

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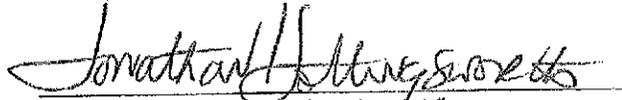


NOTICE OF APPEAL OF APPELLANT TOMCO MACHINING, INC.

Appellant Tomco Machining, Inc. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. 23416 on March 5, 2010.

This case is one of public or great general interest.

Respectfully submitted,



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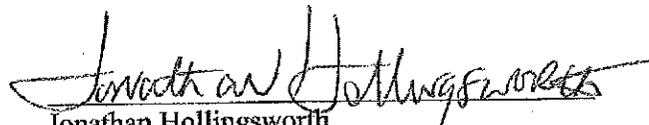
Counsel for Appellant Tomco Machining, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon:

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by ordinary first class United States mail, postage prepaid, this 16th day of April, 2010.



Jonathan Hollingsworth.



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GREGORY J. BRUSH
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IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

22

DeWAYNE SUTTON

Plaintiff-Appellant

v.

TOMCO MACHINING, INC.

Defendant-Appellee

: Appellate Case No. 23416
: Trial Court Case No. 2008-CV-8579
: (Civil Appeal from
: Common Pleas Court)
: **FINAL ENTRY**

Pursuant to the opinion of this court rendered on the 5th day
of March, 2010, the judgment of the trial court is **Reversed**, and this cause is
Remanded for further proceedings consistent with the Opinion.

Costs to be paid as stated in App.R. 24.

MARY E. DONOVAN, Presiding Judge

James A Brogan

JAMES A. BROGAN, Judge

Jeffrey E. Proelich

JEFFREY E. PROELICH, Judge

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GREGORY A. BRUSH
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MONTGOMERY CO. OHIO
39

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

DeWAYNE SUTTON

Plaintiff-Appellant

v.

TOMCO MACHINING, INC:

Defendant-Appellee

Appellate Case No. 23416

Trial Court Case No. 2008-CV-8579

(Civil Appeal from
Common Pleas Court)

.....
OPINION

Rendered on the 5th day of March, 2010.
.....

JEFFREY M. SILVERSTEIN, Atty. Reg. #0016948, and JASON P. MATTHEWS, Atty. Reg. #0073144, Jeffrey M. Silverstein & Associates, 627 South Edwin C. Moses Boulevard, Suite 2-C, Dayton, Ohio 45408
Attorney for Plaintiff-Appellant

JONATHAN HOLLINGSWORTH, Atty. Reg. #0022976, J. Hollingsworth & Associates, LLC, 137 North main Street, Suite 1002, Dayton, Ohio 45402
Attorney for Defendant-Appellee
.....

BROGAN, J.

I.

On the morning of April 14, 2008, DeWayne Sutton was working at Tomco Machining, disassembling a chop saw, when he injured his back.¹ Sutton went to Tomco's president, Jim Tomasiak, and told him about his injury. Within an hour of talking with Tomasiak, Tomasiak discharged Sutton from his employment as an at-will employee. Tomasiak gave Sutton no affirmative reason for discharging him, but he did tell Sutton that it was not because of his work ethic or job performance or because Sutton had violated any work rule or company policy. Following his discharge, Sutton filed a claim for workers' compensation benefits, ultimately receiving them. On July 1, 2008, Sutton sent a letter to Tomco telling it of his intent to file a claim under R.C. 4123.90, which prohibits an employer from retaliating against an employee for filing a claim or initiating proceedings under the Workers' Compensation Act.

On September 18, 2008, Sutton filed a complaint against Tomco alleging that Tomco discharged him in order to avoid Sutton's being considered its employee when he filed for workers' compensation so as to prevent potential higher workers' compensation premiums. In his complaint, Sutton asserted two claims for relief. The first is a statutory claim for unlawful retaliation against Sutton under R.C. 4123.90 for initiating or pursuing workers' compensation benefits. And the second is a tort claim for wrongful discharge in violation of public policy.

Tomco filed on December 9, 2008, a motion under Civil Rule 12(C) for judgment on the pleadings. It claimed that Sutton had not alleged facts that if true would entitle him to

¹The facts we recite in this opinion are taken from Sutton's complaint. We will consider them true for the purposes of our review. See *Perez v. Cleveland* (1993), 66 Ohio St.3d 397, 399.

relief based on either claim. The trial court agreed and on April 15, 2009, sustained Tomco's motion. Sutton filed a timely notice of appeal, and he now presents two assignments of error, one for each claim in his complaint.

II.

First Assignment of Error

"THE TRIAL COURT ERRED IN FINDING THAT *BICKERS* PRECLUDED APPELLANT FROM PURSUING A PUBLIC POLICY WRONGFUL DISCHARGE CLAIM."

Before exploring the issue raised here, we must explain the standard we will use to review the trial court's decision to sustain Tomco's Civil Rule 12(C) motion for judgment on the pleadings. When the non-moving party can prove a set of facts entitling him to his requested relief under the law, a trial court ought not grant a Civil Rule 12(C) motion for judgment on the pleadings. We will review the trial court's decision de novo. *Pinkerton v. Thompson*, supra, at ¶18, citing *Hunt v. Marksman Prod.* (1995), 101 Ohio App.3d 760, 762. And we will accept as true the alleged material facts in Sutton's complaint and all reasonable inferences drawn from them. *Pinkerton v. Thompson*, 174 Ohio App.3d 229, 2007-Ohio-6546, at ¶18, citing *Gawloski v. Miller Brewing Co.* (1994), 96 Ohio App.3d 160, 163. We will reverse the trial court's decision if we conclude the law permits Sutton to bring the claim and he has alleged facts that, when the law is applied, entitle him to the relief he seeks. See *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548.

The issue raised by Sutton in the first assignment of error is one of first impression: when an employee suffers a work-related injury, tells his employer of the injury, and is

discharged before having had an opportunity to file a claim or institute or pursue proceedings under the Workers' Compensation Act, does the law allow the former employee to bring a common-law claim against his former employer for wrongful discharge in violation of the public policy underlying R.C. 4123.90? We conclude that a narrow exception to the employment at-will doctrine exists in this situation, allowing such a plaintiff to bring the tort claim, because such a discharge would undermine the General Assembly's effort to proscribe retaliatory discharges.

Tomco argues first that the Ohio Supreme Court's opinion in *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, bars Sutton's common-law claim, and it argues second that even if it does not, the law does not allow such a claim.

Under the employment at-will doctrine in Ohio the law generally does not provide relief to at-will employees who are discharged without good cause. However, in *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228, the Ohio Supreme Court carved out an exception for discharges based on reasons inimical to public policy. Employees discharged for such reasons may bring a common-law claim for wrongful discharge in violation of public policy. A plaintiff must establish a prima facie claim based on the four elements, adopted by the Court in *Collins v. Rizkana*, that constitute the tort of wrongful discharge:

"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)."

(1995), 73 Ohio St.3d 65, 69-70. The first two elements are questions of law to be decided by the court, and the last two are questions of fact, decided by the factfinder. See *Collins*, at 70.

The Workers' Compensation Act proscribes retaliation for filing a workers' compensation claim in Section 4123.90 of the Revised Code, which provides in pertinent part, "No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act." Sutton cannot claim that Tomco violated this section by discharging him because Sutton had not yet filed a claim or instituted proceedings before Tomco discharged him. After reviewing Ohio law on the legality of a common-law claim under this section, a plaintiff was permitted to bring such a claim under this section for discharge in retaliation for his wife's pursuit of workers' compensation on her own behalf. See *Collins v. U.S. Playing Card Co.* (S.D. Ohio, 2006), 466 F.Supp.2d 954. The court noted that, while the Ohio Supreme Court has not decided the question, several Ohio appellate courts have considered the issue and recognized a common-law claim for wrongful discharge based on this statute. *Id.*, at 974 (citing six Ohio appellate-court cases). The court cited one contrary decision. *Id.*, at 974. It also found that several Ohio district courts have also analyzed Ohio law and concluded that such a common-law claim exists. *Id.* (citing four federal-district-court cases). It did find an

unpublished Sixth Circuit Court of Appeals decision to the contrary, but the court noted that such unpublished opinions are not binding upon it. *Id.*, at 974-975.

The question is whether, in the circumstances of this case, Sutton may bring a common-law claim against Tomco for violating the public policy that underlies Section 4123.90. As the Ohio Supreme Court has not decided this question, to find the answer we must examine each of the four elements of this claim.

The clarity element

The first element requires a manifest public policy. Section 4123.90 manifests a clear public policy against allowing an employer to discharge an employee solely in retaliation for filing a workers' compensation claim. This public policy is also expressed in *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357. The Court explained there that "[t]he recognition of a public-policy exception for wrongful discharge in retaliation for filing a workers' compensation claim, *whether derived from statutory or common law*, is built on the premise that inability to challenge retaliatory discharges would undermine the purpose of the workers' compensation statute by forcing the employee to choose between applying for the benefits to which he is entitled and losing his job." *Coolidge*, at ¶ 149.

The jeopardy element

The second element requires that the circumstances of the discharge jeopardize this public policy. Under the jeopardy element, we must determine whether the absence of a public-policy claim "would seriously compromise the Act's statutory objectives." *Wiles v.*

Medina Auto Parts, 96 Ohio St.3d 240, 2002-Ohio-3994, at ¶14 (referring to the FMLA). Permitting an employer to dismiss an employee before the latter has an opportunity to obtain the protections of R.C. 4123.90 would seriously compromise the Act's statutory objectives by giving employers a perverse incentive to discharge the injured employee before he had the opportunity to trigger the protection of the R.C. 4123.90.

We must also "inquir[e] into the existence of any alternative means of promoting the particular public policy to be vindicated by a common-law wrongful-discharge claim." *Wiles*, at ¶15. Because the sole source of the public policy here is R.C. 4123.90, which provides the substantive right and remedies for its breach, we must examine the adequacy of the remedies available. See *Wiles v. Medina Auto Parts*, Id., at ¶15 (saying that "[w]here * * * the sole source of the public policy opposing the discharge is a statute that provides the substantive rights *and* remedies for its breach, the issue of adequacy of remedies becomes a particularly important component of the jeopardy analysis."); see, also, *Bickers*, at ¶42 (Moyers, C.J., dissenting) ("[P]ublic policy is jeopardized only when there are no alternative means of enforcing the public policy or, if a particular statute applies, the remedies therein are inadequate."). We find that an employee discharged under the circumstances in which Sutton was discharged has no remedy. No statutory remedy, therefore, adequately protects society's interests. See *Wiles*, at ¶15 ("Simply put, there is no need to recognize a common-law action for wrongful discharge if there already exists a statutory remedy that adequately protects society's interests.").

The inability to bring a tort claim would frustrate the legislative intent of R.C. 4123.90 to proscribe retaliatory discharges. As we point out in our review of the second assignment of error, the Ohio Supreme Court has held that an injured employee need not actually file

a claim in order to claim the protections of the statute. See *Roseborough v. N.L. Industries* (1984), 10 Ohio St.3d 142, 143. In *Roseborough* the Court adopted the reasoning of Justice Brown's concurrence in *Bryant v. Dayton Casket Co.* (1982), 69 Ohio St.2d 367. There, Justice Brown expressed his concern that "a requirement that an actual filing of a claim is the only means by which a proceeding can be instituted or pursued would frustrate the legislative intent as evinced in R.C. 4123.90." *Bryant*, at 372 (Brown, J., concurring). "If such a requirement was mandated," he continued, "an employer could, upon receipt of an employee's request to complete the form prior to filing, fire the claimant and thus avoid the consequences of R.C. 4123.90. * * * [S]uch a requirement would also result in a footrace, the winner being determined by what event occurs first—the firing of the employee or the filing of the claim with the bureau." *Bryant*, at 372-373 (Brown, J., concurring). He concluded, "[t]his scenario, in light of the fact that R.C. 4123.95 provides that R.C. 4123.90 should be liberally construed in favor of the employee, should not be encouraged by a decision from this court." *Bryant*, at 373 (Brown, J., concurring). The same is true here. Were a tort claim not permitted, an employer upon hearing that an employee was injured could fire the employee to avoid the consequences of R.C. 4123.90. The exact footrace that Justice Brown identified would result between the injured employee running to file a claim, or initiate proceedings, and the employer's running to fire the employee. And the employer may have a head start: upon learning of the injury the employer can discharge the employee almost immediately; an employee may not have time to file a claim or initiate proceedings. The perverse incentive such a rule creates would most hurt those workers most likely to be injured and therefore most in need of the statute's protection. Those working in physically demanding jobs often have an inherently greater chance for injury.

The causation element

The third element requires the dismissal to have been motivated by conduct related to that prohibited by the public policy. According to the facts alleged in Sutton's complaint, his dismissal was motivated by the nexus created by Sutton's on-the-job injury and the right of injured employees to workers' compensation. This is related to retaliatory discharge, prohibited by public policy.

The overriding justification element

The fourth element requires that the employer lacked business justification for the discharge. Sutton's complaint alleges that Tomco lacked any business justification for discharging him. As this is a question of fact, we accept, as we must, the allegation in the complaint as true.

The narrow exception

Therefore we will recognize a very narrow exception to the at-will employment doctrine similar to the one recognized in *Moore v. Animal Fair Pet Center, Inc.* (1995), 81 Ohio Misc.2d 46. The exception must be narrow because, ordinarily, "merely asserting that the discharge was in violation of a statutory right is insufficient." Cavico, *Employment At Will and Public Policy* (1992), 25 Akron L. Rev. 497, 514. A tort claim for wrongful discharge is "premised on protecting employees who actively pursue rights and benefits they are entitled to by virtue of statutes." *Id.* An employee is not compelled to exercise this right but has the option to do so. So when the injured employee delays in exercising his right, he may not avail himself of this exception. Yet where the injured employee is

discharged before he has an opportunity to exercise this right, the public policy underlying R.C. 4123.90 requires courts to give him the chance to obtain relief. The Court has noted that "[t]he basic purpose of any antiretaliation statute is to enable employees to freely exercise their rights without fear of retribution from their employers." *Coolidge*, at ¶ 149. Were an employer permitted to discharge an employee to circumvent the antiretaliation statute, the basic purpose of the statute would be frustrated. Incorporating all four elements of the tort of wrongful discharge, we conclude that when an employee suffers a work-related injury he may bring a claim of wrongful discharge if his employer discharges him so quickly that he has no reasonable opportunity to file a claim or institute proceedings under the Workers' Compensation Act when the employer lacks an overriding business justification for the discharge.

Here, the material allegations in Sutton's complaint satisfy the requirements of the exception. First, Sutton was discharged so quickly after being injured that he had no reasonable opportunity to exercise his rights under the Workers' Compensation Act. In Sutton's complaint he states:

"3. On or about April 14, 2008, at approximately 7:30 a.m., Plaintiff injured his back while disassembling a chop saw. Plaintiff's injury occurred during the course and within the scope of his employment with Defendant.

"4. Plaintiff reported his injury to Jim Tomasiak * * *, Defendant's President.

"5. Within approximately one hour of reporting the injury to Tomasiak, Plaintiff's employment was terminated."

September 18, 2008, Complaint with Jury Demand, p.2. Although the complaint does not state the length of time between the injury and the report to Tomasiak, we think it is

reasonable to infer that the second event came on the heels of the first. Sutton plainly had no reasonable opportunity to take the first step toward obtaining compensation benefits. Second, the allegation is that Tomco discharged Sutton to avoid paying higher premiums, which we do not believe qualifies as an overriding business justification. The complaint alleges:

"1. Plaintiff began his employment with Defendant on or about August 22, 2005.

"* * *

"6. Tomasiak did not provide Plaintiff a reason for terminating his employment; however, he stated that it was not due to Plaintiff's work ethic or job performance. Additionally, Tomasiak stated that Plaintiff did not violate any work rule or company policy.

"7. Defendant used immediate termination as means to preclude Plaintiff's Workers Compensation injury claim and higher Workers Compensation premiums.

"* * *

"13. Defendant lacked an overriding business justification for terminating Plaintiff's employment.

"14. Defendant's decision to terminate Plaintiff's employment was motivated by Plaintiff's workplace injury and in order to prevent him from filing of a workers compensation [sic]."

September 18, 2008, Complaint with Jury Demand, p.2-3. Accepting these allegations as true for purposes of evaluating Tomco's Civil Rule 12(C) motion, we find that the facts alleged in Sutton's complaint, if true, entitle him to his requested relief, meaning that the trial court erred in sustaining Tomco's motion.

Tomco argues that the trial court correctly concluded that in *Bickers v. W. & S. Life Ins. Co.*, supra, the Court barred all common-law tort claims of wrongful discharge under the Workers' Compensation Act. We disagree. We find that *Bickers's* holding does not encompass Sutton's claim because the policy at issue there differs from the one here.

Unlike Sutton, the plaintiff in *Bickers* was discharged for non-retaliatory reasons while she was receiving workers' compensation benefits. She was injured in 1994 and filed a claim for workers' compensation soon after. Because of the injury, she was unable to work for stretches of time. The employer did not discharge her until 2002, a decision based primarily on *Bickers's* inability to do her job effectively. The issue in *Bickers* was "whether the tort of wrongful discharge in violation of public policy applies to a nonretaliatory discharge of an injured worker receiving workers' compensation benefits." *Bickers*, at ¶1. The Court held that "[a]n employee who is terminated from employment while receiving workers' compensation has no common-law cause of action for wrongful discharge in violation of the public policy underlying R.C. 4123.90, which provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act." *Id.*, at the syllabus. Sutton's claim falls outside this holding. Sutton was not discharged by Tomco "while receiving" compensation benefits. Nor had Sutton filed a claim before he was discharged.

In *Bickers*, the Court barred only common-law tort claims of wrongful discharge when the discharge is for reasons that are not retaliatory. The discharge of an employee while the employee is receiving compensation benefits, like the plaintiff in *Bickers*, is not prohibited because it is not retaliatory. The policy choice in *Bickers* is "between permitting and prohibiting the discharge from employment of an employee who has been injured at

work." *Bickers*, at ¶20. Deny employers the ability to discharge injured workers by requiring them to hold open such workers' jobs indefinitely and "employers will be burdened with employees unable to perform the work for which they were hired and an inability to obtain permanent replacements." *Id.*, at ¶21. But permit employers to terminate workers who are injured and cannot work as a result and "worker[s] suffer[] not only the burden of being injured but also the burden of unemployment at a time when seeking a new position is made more difficult by the injury." *Id.*, at ¶22. *The choice* of the General Assembly, reflected in R.C. 4123.90, was "to proscribe retaliatory discharges only." *Id.*, at ¶23. Deferring to the General Assembly's choice, the Court said that "[i]t is within the prerogative and authority of the General Assembly to make *this choice*." *Id.* (Emphasis added). "We," the Court continued, "may not override *this choice* and superimpose a common-law, public policy tort remedy on this wholly statutory system." *Id.* (Emphasis added). Also, "it would be inappropriate for the judiciary to * * * supplant *the policy choice* of the legislature." *Id.*, at ¶24. Finally, said the Court, "the imposition of common-law principles of wrongful discharge into the workers' compensation arena runs counter to the balance of mutual compromise between the interests of the employer and the employee as [the balance represented by *this choice* is] expressed by the General Assembly within the Act." *Id.* "Bickers's remedy," concluded the Court, "must be found within the workers' compensation statutes." *Id.*, at ¶25.

The General Assembly's *policy choice* discussed by the Court in *Bickers* is not the policy choice raised here. Tomco is entirely correct when it says that the public policy embodied by R.C. 4123.90 does not extend beyond the language of the statute. This is why the Court barred common-law claims for wrongful discharge under this statute when

the plaintiff was discharged "while receiving workers' compensation." Such a plaintiff undoubtedly filed a claim but was not "discharged for retaliatory reasons." A discharge in these circumstances does not jeopardize the public policy of the statute, which proscribes only retaliatory discharges. Conversely, a discharge under the circumstances of this case does directly threaten this public policy by allowing an employer to prevent an employee from obtaining protection against retaliation.

To be sure, we do not mean to suggest that Sutton will or should prevail on his claim. Rather, we conclude only that neither *Bickers* nor other law bars Sutton from bringing the claim. However, "[i]n order to prevail on his claim, [Sutton] must carry his burden to prove the remaining elements of a wrongful-discharge claim." *Dohme v. Eurand Am., Inc.*, 170 Ohio App.3d 593, 2007-Ohio-865, at ¶38.

The first assignment of error is sustained.

Second Assignment of Error

"THE TRIAL COURT ERRED IN FINDING THAT APPELLANT'S ACTIONS WERE INSUFFICIENT TO CONSTITUTE THE INSTITUTION OR PURSUANCE OF A CLAIM UNDER R.C. § 4123.90."

Here Sutton alleges that the trial court erred by finding that he may not bring a statutory claim. Sutton argues that if we conclude that the Ohio Supreme Court's decision in *Bickers* does bar his tort claim, as the trial court concluded, we should construe the statutory words "pursued" and "instituted" more broadly than they were construed before *Bickers*. Sutton contends that his act of reporting the injury constituted "pursuit" under the statute. Without a broader understanding of these words, Sutton asserts, the intent of R.C.

4123.90 will be undermined by employers immediately discharging employees after they report an injury.

In the first assignment of error we concluded that *Bickers* does not bar Sutton's tort claim. And we there addressed Sutton's concern about the undermining of the statute's intent. Finally, Sutton cites no authority for the contention that reporting an injury satisfies the statute, nor does he provide an argument for why reporting his injury satisfies the statute in this case. Thus, the complaint does not allege that, before being discharged, Sutton took any action that could be construed as filing a claim or instituting or pursuing proceedings under the Workers' Compensation Act.

The second assignment of error is overruled.

III.

We overruled the second assignment of error regarding Sutton's claim based on Tomco's violation of R.C. 4123.90, so we will not disturb this part of the trial court's judgment. But we sustained the first assignment of error regarding Sutton's claim for wrongful discharge, so we will reverse the court's judgment regarding this claim. Therefore, the trial court's judgment is Reversed and is Remanded for further proceedings.

FROELICH, J., concurs.

DONOVAN, P.J., dissenting:

I disagree. I do not believe we are at liberty to overrule the syllabus of a Supreme Court opinion, *Bickers*, which is on point. As an appellate court, we are bound by Rule 1

of the Supreme Court Rules for Reporting of Opinions. Rule 1(B)(1) and (2) indicate: "(1) The law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes. (2) If there is disharmony between the syllabus of an opinion and its text or footnotes, the syllabus controls." Nothing in the *Bickers* syllabus indicates that the rule of law contained therein applies only to non-retaliatory discharges.

I would agree with the trial court the claim is barred based upon the *Bickers* holding which we are not free to modify. I would affirm.

.....

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Hon. Michael T. Hall

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Montgomery County Common Pleas Court
General Division

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

DEWAYNE SUTTON,
Plaintiff(s),

CASE NO.: 2008 CV 08579
JUDGE MICHAEL T. HALL



-vs-

TOMCO MACHINING,
Defendant(s).

**DECISION, ORDER AND ENTRY
SUSTAINING DEFENDANT'S MOTION
FOR JUDGMENT ON THE PLEADINGS
ON ALL OF PLAINTIFF'S CLAIMS**

This matter is before the Court upon Defendant's Motion for Judgment on the Pleadings on all of Plaintiff's Claims filed on December 9, 2008. Plaintiff's Memorandum Contra Defendant's Motion for Judgment on the Pleadings was filed on January 5, 2009. Defendant's Reply Memorandum in Support of its Motion for Judgment on the Pleadings on all of Plaintiff's Claims was filed on January 16, 2009.

FACTS

For the purpose of deciding the instant Motion only, this Court adopts the statements of fact as set forth in the Complaint of DeWayne Sutton (hereinafter "Plaintiff"), in which Plaintiff alleges that the actions of Tomco Machining, Inc. (hereinafter "Defendant") violated R.C. 4123.90 and constituted a wrongful discharge in violation of public policy.

STANDARD OF REVIEW

Civ.R. 12(C) provides that "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." These motions are used to resolve questions of law. *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570, 1996-Ohio-459, 664 N.E.2d 931. "Under Civ.R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving

party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief. Thus, Civ.R.12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law." (Citations omitted.) Id.

LAW AND ANALYSIS

R.C. 4123.90 provides, in relevant part: "No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer."

In the present case, Plaintiff alleges that he was injured within the scope of his employment, was terminated within one hour of reporting his injury, and filed an application for Workers' Compensation benefits *after* he was terminated. Plaintiff argues that due to the short period of time between the injury report and termination, a reasonable finder of fact could conclude that Plaintiff's report of the injury constituted pursuit of a claim. Plaintiff's argument is contrary to case law. In *Bryant v. Dayton Casket Co.* (1982), 69 Ohio St.2d 367, 372, 433 N.E.2d 142, the Ohio Supreme Court held that although the physical filing of a claim is not the only means by which a proceeding can be instituted or pursued, something more than an expression of intent to file a claim is required. See also *Roseborough v. N.L. Industries* (1984), 10 Ohio St.3d 142,143, 462 N.E.2d 384. Therefore, even though it can be inferred in this case that Plaintiff expressed his intent to file a claim when he reported his injury, Plaintiff's actions are insufficient to constitute the "institution" or "pursuance" of a claim under R.C. 4123.90.

Defendant's Motion for Judgment on the Pleadings regarding Plaintiff's claim alleging violations of R.C. 4123.90 is hereby **Sustained**.

Plaintiff alleges, in the alternative, a claim for wrongful termination in violation of public policy. Plaintiff, citing *Moore v. Animal Fair Pet Center, Inc.* (C.P.1995), 81 Ohio Misc.2d 46, 674 N.E.2d 1269, argues that public policy embodied in common law and R.C. 4123.90 prohibits employers from discharging employees because they were injured on the job. In *Moore*, Judge John A. Conner of the Franklin County Court of Common Pleas held that a claim for wrongful discharge in violation of public policy exists if the subject circumstances do not fall within the scope of R.C. 4123.90. Judge Conner wrote "it is evident through the legislation that Ohio has a clear public policy to *** protect [injured workers] from retaliation

for being injured." This Court finds that due to the recent Supreme Court decision, *Bickers v. Western & Southern Life Insurance Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, 879 N.E.2d 201, *Moore* is not controlling legal authority and Plaintiff's arguments are without merit.

In *Bickers* the Supreme Court held that R.C. 4123.90 provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act. The Supreme Court explained that the General Assembly, which had the "choice between permitting and prohibiting the discharge from employment of an employee who has been injured at work *** chose to proscribe retaliatory discharges only." Id. at 356-357. See also *Barker v. Dayton Walther Corp.* (April 25, 1989), 56 Ohio App.3d 1, 3, 564 N.E.2d 738 (stating that R.C. 4123.90 does not prevent an employer from discharging an employee who is unable to perform his duties.) The Court further stated that "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 357. Accordingly, it would be inappropriate for this Court to adopt, as the public policy of this state, a right to a wrongful discharge in violation of public policy cause of action for Plaintiff.

Defendant's Motion for Judgment on the Pleadings regarding Plaintiff's claim for wrongful discharge in violation of public policy is hereby **Sustained**.

CONCLUSION

For the reasons detailed herein, the Court hereby **Sustains** the Defendant's Motion for Judgment on the Pleadings.

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NOT JUST CAUSE FOR DELAY FOR PURPOSES OF CIV. R. 54. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED:


MICHAEL T. HALL, JUDGE

To the Clerk of Courts:

Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.


MICHAEL T. HALL, JUDGE

Copies of this Order were sent today by ordinary mail to all persons listed below.

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ARTICLE II: LEGISLATIVE

licenses to employers authorizing payment of a wage rate below that required by this section to individuals with mental or physical disabilities that may otherwise adversely affect their opportunity for employment.

As used in this section: "employer," "employee," "employ," "person" and "independent contractor" have the same meanings as under the federal Fair Labor Standards Act or its successor law, except that "employer" shall also include the state and every political subdivision and "employee" shall not include an individual employed in or about the property of the employer or individual's residence on a casual basis. Only the exemptions set forth in this section shall apply to this section.

An employer shall at the time of hire provide an employee the employer's name, address, telephone number, and other contact information and update such information when it changes. An employer shall maintain a record of the name, address, occupation, pay rate, hours worked for each day worked and each amount paid an employee for a period of not less than three years following the last date the employee was employed. Such information shall be provided without charge to an employee or person acting on behalf of an employee upon request. An employee, person acting on behalf of one or more employees and/or any other interested party may file a complaint with the state for a violation of any provision of this section or any law or regulation implementing its provisions. Such complaint shall be promptly investigated and resolved by the state. The employee's name shall be kept confidential unless disclosure is necessary to resolution of a complaint and the employee consents to disclosure. The state may on its own initiative investigate an employer's compliance with this section and any law or regulation implementing its provisions. The employer shall make available to the state any records related to such investigation and other information required for enforcement of this section or any law or regulation implementing its provisions. No employer shall discharge or in any other manner discriminate or retaliate against an employee for exercising any right under this section or any law or regulation implementing its provisions or against any person for providing assistance to an employee or information regarding the same.

An action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any

court of competent jurisdiction, including the common pleas court of an employee's county of residence, for any violation of this section or any law or regulation implementing its provisions within three years of the violation or of when the violation ceased if it was of a continuing nature, or within one year after notification to the employee of final disposition by the state of a complaint for the same violation, whichever is later. There shall be no exhaustion requirement, no procedural, pleading or burden of proof requirements beyond those that apply generally to civil suits in order to maintain such action and no liability for costs or attorney's fees on an employee except upon a finding that such action was frivolous in accordance with the same standards that apply generally in civil suits. Where an employer is found by the state or a court to have violated any provision of this section, the employer shall within thirty days of the finding pay the employee back wages, damages, and the employee's costs and reasonable attorney's fees. Damages shall be calculated as an additional two times the amount of the back wages and in the case of a violation of an anti-retaliation provision an amount set by the state or court sufficient to compensate the employee and deter future violations, but not less than one hundred fifty dollars for each day that the violation continued. Payment under this paragraph shall not be stayed pending any appeal.

This section shall be liberally construed in favor of its purposes. Laws may be passed to implement its provisions and create additional remedies, increase the minimum wage rate and extend the coverage of the section, but in no manner restricting any provision of the section or the power of municipalities under Article XVIII of this constitution with respect to the same.

If any part of this section is held invalid, the remainder of the section shall not be affected by such holding and shall continue in full force and effect.

(2006)

WORKERS' COMPENSATION.

§35 For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon

ARTICLE II: LEGISLATIVE

which payment shall be made therefrom. Such compensation shall be 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. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

(1912, am. 1923)

CONSERVATION OF NATURAL RESOURCES.

§36 Laws may be passed to encourage forestry and agriculture, and to that end areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation. Notwithstanding the provisions of section 2

of Article XII, laws may be passed to provide that land devoted exclusively to agricultural use be valued for real property tax purposes at the current value such land has for such agricultural use. Laws may also be passed to provide for the deferral or recoupment of any part of the difference in the dollar amount of real property tax levied in any year on land valued in accordance with its agricultural use and the dollar amount of real property tax which would have been levied upon such land had it been valued for such year in accordance with section 2 of Article XII. Laws may also be passed to provide for converting into forest reserves such lands or parts of lands as have been or may be forfeited to the state, and to authorize the acquiring of other lands for that purpose; also, to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts; and to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and all other minerals.

(1912, am. 1973)

WORKDAY AND WORKWEEK ON PUBLIC PROJECTS.

§37 Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract, or otherwise.

(1912)

REMOVAL OF OFFICIALS FOR MISCONDUCT.

§38 Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the General Assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution.

(1912)

REGULATING EXPERT TESTIMONY IN CRIMINAL TRIALS.

§39 Laws may be passed for the regulation of the use of expert witnesses and expert testimony in criminal trials and proceedings.

(1912)

4123.90 Discrimination against alien dependents unlawful.

The bureau of workers' compensation, industrial commission, or any other body constituted by the statutes of this state, or any court of this state, in awarding compensation to the dependents of employees, or others killed in Ohio, shall not make any discrimination against the widows, children, or other dependents who reside in a foreign country. The bureau, commission, or any other board or court, in determining the amount of compensation to be paid to the dependents of killed employees, shall pay to the alien dependents residing in foreign countries the same benefits as to those dependents residing in this state.

No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer. Any such employee may file an action in the common pleas court of the county of such employment in which the relief which may be granted shall be limited to reinstatement with back pay, if the action is based upon discharge, or an award for wages lost if based upon demotion, reassignment, or punitive action taken, offset by earnings subsequent to discharge, demotion, reassignment, or punitive action taken, and payments received pursuant to section 4123.56 and Chapter 4141. of the Revised Code plus reasonable attorney fees. The action shall be forever barred unless filed within one hundred eighty days immediately following the discharge, demotion, reassignment, or punitive action taken, and no action may be instituted or maintained unless the employer has received written notice of a claimed violation of this paragraph within the ninety days immediately following the discharge, demotion, reassignment, or punitive action taken.

Effective Date: 11-03-1989