

IN THE SUPREME COURT OF OHIO

DeWAYNE SUTTON,	:	
	:	CASE NO. 2010-0670
Plaintiff-Appellee,	:	
	:	
vs.	:	On Appeal from the Montgomery
	:	County Court of Appeals,
	:	Second Appellate District
TOMCO MACHINING, INC.,	:	Case No. 23416
	:	
Defendant-Appellant.	:	Discretionary Appeal (Non-Felony)

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**BRIEF OF AMICUS CURIAE  
OHIO MANAGEMENT LAWYERS ASSOCIATION  
IN SUPPORT OF APPELLANT**

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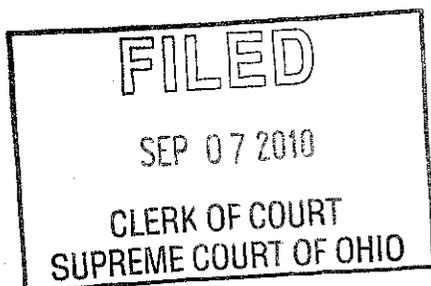
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## II. INTRODUCTORY STATEMENT ABOUT THE AMICUS CURIAE

Amicus Curiae Ohio Management Lawyers Association (“OMLA”) is an Ohio non-profit corporation. Its stated purpose is “[t]o provide an organization and forum for the exchange of information, discussion of common issues and problems, and promotion of the administration of justice with respect to employment, labor, and other areas of law affecting employers.” Pursuant to Rule VI, Section 6 of the Practice Rules of the Supreme Court of Ohio, OMLA respectfully submits this Amicus Curiae Brief because it believes the issue before the Court in this case is of critical importance to Ohio employers.

## III. INTRODUCTION

This case enables the Court to restore the necessary separation of powers between the legislature and the judiciary that has been frustrated by *Greeley v. Miami Valley Maint. Contractors, Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981; *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 652 N.E.2d 653; *Painter v. Graley* (1994), 70 Ohio St.3d 377, 639 N.E. 2d 51, and their progeny, which have inappropriately expanded the rights of plaintiffs in employment cases under the guise of public policy. The OMLA respectfully urges this Court to take its decision in *Bickers v. Western & Southern Life Ins. Co.* (2007), 116 Ohio St.3d 351, 879 N.E.2d 201 to its logical conclusion - namely, to finally and wholly eliminate the tort of wrongful discharge in violation of public policy, which is an inappropriate usurpation of the Ohio General Assembly’s legislative function.

Even if the Court determines that overruling *Greeley*, *Collins*, *Painter* and their progeny is not warranted in this case, the Court should reject the unfounded expansion of the public policy tort to injured employees who have not exercised any rights protected

under the Ohio Workers' Compensation Act, Ohio Revised Code § 4123.90. In the exercise of its legislative authority, the General Assembly has made § 4123.90 the exclusive remedy for employees injured on the job, and has limited the remedies available under the statute to only those employees *who file a claim, or institute, pursue, or testify in proceedings under the Act*. "It is one of the General Assembly's fundamental constitutional prerogatives to engage in line-drawing of this type." *Stetter v. R.J. Corman Derailment Servs., L.L.C.* (2010), 125 Ohio St.3d 280, 296, 927 N.E.2d 1092, 1109. This Court should not further expand the public policy tort to circumvent the clear dictates of the General Assembly expressed in § 4123.90, which would result in inappropriately carving out an exception to the at-will doctrine under the guise of public policy.

By its express terms, R.C. § 4123.90 does not shield an employee from termination or other adverse employment actions merely for being injured on the job. Thus, the public policy underlying the statute is directed at balancing the interests in protecting employees *who have exercised their rights* against the interest of employers in maintaining a productive workforce, as well as minimizing litigation. *Stetter*, 125 Ohio St.3d at 293 ("The two most important reasons for the exclusivity of the workers' compensation remedy are first, to maintain the balance of sacrifices between employer and employee in the substitution of no-fault liability for tort liability and, second, to minimize litigation, even litigation of undoubted merit.") (internal quotation marks omitted). Permitting employees to pursue a common law wrongful discharge, where the employees have not exercised any rights protected under the statute, would inappropriately "usurp the legislative function" by substituting the judiciary's judgment

for that of the General Assembly and would undermine rather than support the public policies underlying the statute, turning the employment-at-will doctrine on its head.

#### **IV. STATEMENT OF FACTS**

The OMLA adopts and incorporates herein by reference the Statement of the Case and Facts set forth in Appellant's Merit Brief.

#### **V. ARGUMENT**

##### **PROPOSITION OF LAW:**

An injured employee who has not instituted or pursued a claim for workers' compensation benefits has no common law cause of action for wrongful discharge in violation of the public policy underlying Ohio Revised Code § 4123.90, which provides the exclusive remedy for employees claiming termination in violation of the rights conferred by the statute.

##### **A. Public Policy Claims for Wrongful Discharge Are An Inappropriate Usurpation Of The Legislative Function Of The General Assembly**

The Ohio Constitution vests legislative authority exclusively within the Ohio General Assembly, and no other body. Ohio Const., Art. II, Sec. 1 ("The legislative power of the state shall be vested in a general assembly . . ."). When the General Assembly creates a right and then sets forth a remedy or enforcement procedure, that is the entire expression of public policy as to that right. The courts should not expand the statutory right or remedy under the guise of public policy.

Yet, this is precisely what the Court has done by recognizing the tort of wrongful discharge in violation of public policy. Under the guise of advancing policies created by legislation, this tort creates additional unstated rights and remedies beyond those enacted by the legislature, which usurps the legislative function of the General Assembly.

The inappropriate judicial legislation that occurs in the context of public policy wrongful discharge claims is particularly evident in this case, where the Second District Court of Appeals has created a common law cause of action for employees who have not exercised any rights protected under the Ohio Workers' Compensation Act, Ohio Revised Code § 4123.90, even though the General Assembly has made § 4123.90 the exclusive remedy for employees injured on the job and has limited the remedies available under the statute to only those employees *who file a claim, or institute, pursue, or testify in proceedings under the Act*. “It is one of the General Assembly’s fundamental constitutional prerogatives to engage in line-drawing of this type.” *Stetter*, 125 Ohio St.3d at 296. Permitting employees to pursue a common law wrongful discharge claim based on the public policy underlying §4123.90 where the employees have not exercised any rights protected under the statute inappropriately “usurp[s] the legislative function” by substituting the judiciary’s judgment for that of the General Assembly.

The Court now has the opportunity to restore the appropriate balance of judicial and legislative functions that has been frustrated by the judicial creation of public policy wrongful discharge claims. This Court should overrule *Greeley* and its progeny, and restore the balance of judicial and legislative functions reflected in the pre-*Greeley* employment-at-will doctrine, with its common law exceptions relating to contractual relationships and promissory estoppel, and its exceptions arising from specifically delineated statutory rights.

1. The power to legislate rests solely with the General Assembly.

The Ohio Constitution vests legislative authority exclusively within the Ohio General Assembly, and no other body. Ohio Const., Art. II, Sec. 1. (“The legislative power of the state shall be vested in a general assembly . . . .”); *see also Arbino v.*

*Johnson & Johnson* (2007), 116 Ohio St.3d 468, 472, 880 N.E.2d 420 (“A fundamental principle of the 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, 736 N.E.2d 462 (Resnick, J., concurring) (recognizing that “the courts are neither authorized nor properly equipped to make public policy determinations”).

The public policy underlying a statute is entirely embodied in the language of the statute as enacted by the General Assembly. The creation of additional unstated rights and remedies usurps the legislative function of the General Assembly. See *Brunswick v. Brunswick Hills Twp. Bd. of Trustees*, 81 Ohio App. 3d 252, 256, 610 N.E.2d 1054 (“Courts may not judicially rewrite legislation under the guise of ‘statutory construction.’”); “Will the Real Legislature Please Stand Up? A Response to *Kulch v. Structural Fibers, Inc.*: Clarifying the Public Policy Exception,” 46 Clev. St. L. Rev. 19, 41 (“For a court to add remedies to those available under the statute on the basis that they are merely ‘complementary’ is to rewrite the statute, which is beyond the scope of its authority.”).

2. The tort of wrongful discharge in violation of public policy impermissibly usurps the legislative authority of the General Assembly.

Before this Court’s ruling in *Greeley*, the only exceptions to the employment-at-will doctrine in Ohio were for claims based on statute, contract, or promissory estoppel. In *Greeley*, the Court carved out an exception for discharges in violation of public policy; permitting employees discharged for such reasons to file common law claims. In *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 652 N.E.2d 653, the Court adopted a four-part test for establishing a prima facie case of wrongful discharge in violation of public policy,

requiring: (1) the existence of a clear public policy (the clarity element); (2) that dismissing employees under circumstances like those involved in plaintiff's dismissal would jeopardize the public policy (the jeopardy element); (3) that the plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and (4) that the employer lacked an overriding legitimate business justification for the dismissal (the overriding justification element). *Collins*, 73 Ohio St.3d at 69-70.

In actual application, the clarity element, as set forth by the Court in *Collins*, and as expanded upon by the Court in *Painter*, inappropriately allows courts to invent new entitlements that frustrate the balance of rights and remedies contained in Constitutional or statutory language. *See Collins*, 73 Ohio St.3d at 73 (“[T]he statute containing the right and remedy will not foreclose recognition of the tort on the basis of some other source of public policy, unless it was the legislature’s intent in enacting the statute to preempt common-law remedies.”); *Painter*, 70 Ohio St.3d at 384 (“‘Clear public policy’ sufficient to justify an exception to the employment-at-will doctrine is not limited to public policy expressed by the General Assembly in the form of statutory enactments. . . . The existence of such a public policy may be discerned by the Ohio judiciary based on sources such as the Constitutions of Ohio and the United States, legislation, administrative rules and regulations, and the common law.”).

Because the tort of wrongful discharge in violation of public policy allows for the judiciary’s creation of additional unstated rights and remedies based on public policies derived from sources other than the General Assembly’s statutory enactments, the tort usurps the legislative function of the General Assembly. As this Court explained in *Bickers*: “it would be inappropriate for the judiciary to presume the superiority of its

policy preference and supplant the policy choice of the legislature. For it 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 . . . .” *Bickers*, 116 Ohio St.3d at 357; *see also Provens v. Stark County Bd. of Mental Retardation* (1994), 64 Ohio St.3d 252, 261, 594 N.E.2d 959 (“[T]he more appropriate course for this court is to defer to the legislative process of weighing conflicting policy considerations and creating certain administrative bodies and processes for providing remedies . . . .”).

It is the General Assembly’s (and not the Court’s) “prerogative and authority” to determine public policy, and to balance “employers’ and employees’ competing interests.” *Bickers*, 116 Ohio St.3d at 357, ¶ 23. Yet, this is precisely what the judiciary has done with respect to the tort of wrongful discharge in violation of public policy. Accordingly, *Greeley*, *Collins*, *Painter* and their progeny should be overruled and this Court should reaffirm the pre-*Greeley* principle that, in the absence of an applicable statute, a contract, or promissory estoppel, a plaintiff is not permitted to bring a cause of action for wrongful discharge against a former employer.

**B. Creation of a common law wrongful discharge cause of action for employees who have not exercised any rights protected under § 4123.90 inappropriately substitutes the judiciary’s judgment for that of the General Assembly.**

If the Court determines that overruling *Greeley* and its progeny is not warranted, this Court should preclude the unjustified expansion of the tort to employees who have not exercised any rights protected under § 4123.90. Particularly relevant to this case is the fact that the General Assembly has made § 4123.90 the exclusive remedy for employees injured while working on the job, supplanting the common law. *See Bickers*

116 Ohio St.3d at 357, ¶¶ 18-19 (stating that § 4123.90 “supplanted, rather than amended or supplemented, the unsatisfactory common-law remedies” available for workers’ compensation claims); *Stetter*, 125 Ohio St.3d at 289, ¶ 54 (stating that Ohio’s workers’ compensation statute is “the result of a unique 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”) (emphasis added).

The General Assembly also has limited the remedies available under the statute to only those employees who institute or pursue a workers’ compensation claim. *Bickers*, 116 Ohio St.3d at 357, ¶ 23 (stating that in enacting § 4123.90, “the General Assembly chose to proscribe retaliatory discharges only”) (emphasis added). Under the plain language of the statute: “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.” R.C. § 4123.90 (emphasis added).

Accordingly, the public policy underlying the statute is the protection of employees *who have exercised their rights*, not employees who have merely been injured on the job, such as Appellee. See *Bryant v. Dayton Casket Co.* (1982), 69 Ohio St.2d 367, 371-72, 433 N.E.2d 142, 145 (“R.C. 4123.90 is unambiguous in providing that a claim must either have been filed or proceedings must have been instituted or pursued in order for there to be liability.”); see also *Bickers*, 116 Ohio St.3d at 357, ¶ 23 (“Employers may not retaliate against employees for pursuing a workers’ compensation

claim.”) (emphasis added). “It is one of the General Assembly’s fundamental constitutional prerogatives to engage in line-drawing of this type.” *Stetter*, 25 Ohio St.3d at 296.

Nothing in the statute allows for an extension of its protections to employees such as Appellee who have not exercised their rights under the statute by instituting or pursuing a claim under the Act and the courts are not equipped to create such rights. By using specific and exclusive language such as “instituted, pursued or testified in any proceedings under the . . . act,” the General Assembly has stated a clear policy with respect to the law on this issue that implies the exclusion of any remedy for employees such as Appellee who have not exercised their rights under the statute. *See Bryant*, 69 Ohio St.2d at 371 (“It is our determination that the General Assembly’s use of the specific and exclusive words as ‘pursued . . . any proceedings under the workers’ compensation act’ implies the exclusion of the interpretation as advanced by this appellant. The doctrine of *expressio unius est exclusio alterius* is applicable here, and would limit our application of the statute to that which the General Assembly obviously intended.”)

It is within the prerogative and authority of the General Assembly to make this choice when determining policy in the workers’ compensation arena and in balancing, in that forum, employers’ and employees’ competing interests. *Kaminski v. Metal & Wire Products Co.* (2010), 125 Ohio St.3d 250, 927 N.E.2d 1066, 1082, ¶ 74 (citing *Rambaldo v. Accurate Die Casting* (1992), 65 Ohio St.3d 281, 288, 603 N.E.2d 975). The courts may not override this choice and superimpose a common-law, public policy tort remedy on this wholly statutory system. *Id.* It 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.

This court would encroach upon the Legislature's ability to guide the development of the law if we invalidated legislation simply because the rule enacted by the Legislature rejects some cause of action currently preferred by the courts. . . . Such a result would offend our notion of the checks and balances between the various branches of government, and the flexibility required for the healthy growth of the law. *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 118, quoting *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 202, 551 N.E.2d 938, quoting *Klein v. Catalano* (1982), 386 Mass. 701, 712-713, 437 N.E.2d 514, and *Freezer Storage, Inc. v. Armstrong Cork Co.* (1978), 476 Pa. 270, 280-281, 382 A.2d 715.

*Stetter*, 125 Ohio St.2d at 289-90, ¶ 53.

**C. Permitting injured employees who have not instituted or pursued a claim for workers' compensation benefits would undermine, not promote, the public policy underlying § 4123.90.**

Ohio's Workers' Compensation Act is the result of "a unique 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*, 125 Ohio St.2d at 289-90, ¶ 54 (citing *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, 879 N.E.2d 201, ¶ 19; *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, ¶ 19; *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115, 119, 748 N.E.2d 1111; *Blankenship*, 69 Ohio St.2d at 614, 23 O.O.3d 504, 433 N.E.2d 572).

"The two most important reasons for the exclusivity of the workers' compensation remedy are first, to maintain the balance of sacrifices between employer

and employee in the substitution of no-fault liability for tort liability and, second, to minimize litigation, even litigation of undoubted merit.” *Stetter*, 125 Ohio St.2d at 293, ¶ 74. These key public policies would be undermined if this Court were to recognize a common law cause of action for wrongful discharge in violation of the public policy underlying § 4123.90 for injured employees who suffer an adverse employment action but who have not exercised any rights under the statute.

The balance of sacrifices between employer and employee would be compromised because employers would now be subject to liability merely because an employee suffered an adverse employment action following an injury. Such a result directly contravenes the goal of shielding employers from unlimited liability. Moreover, the differences in the remedies available to the employee at common law versus the remedies available under § 4123.90 would lead to an unjust result. Injured employees who were terminated without taking any steps to exercise their rights would be afforded a full range of remedies, including full monetary recovery, while employees who have in fact taken action to protect their rights would be limited to the remedy provided under R.C. 4123.90, which allows equitable relief only, in the form of reinstatement with back pay and lost wages.

With respect to the Workers’ Compensation Act’s fundamental public policy of minimizing litigation, “every presumption is on the side of *avoiding the imposition of the complexities and uncertainties of tort litigation on the compensation process*. One of the fundamental pillars supporting Section 35, Article II is the exclusivity of the no-fault compensation system. The inclusion of this feature in Section 35, Article II underscores the importance the Constitution places on avoiding litigation over workplace injuries.”

*Stetter*, 125 Ohio St.2d at 294, ¶ 76. Permitting an injured employee to pursue a common law cause of action for wrongful discharge in violation of public policy merely because the employee suffered an adverse employment action after the injury would open the floodgates to the exact complexities and uncertainties of tort litigation § 4123.90 is designed to avoid. This, in turn, would hamper the employer's ability to operate its business efficiently and profitably by potentially forcing employers to avoid taking adverse actions against injured employees for fear of potential litigation. Such a result is inconsistent with the clear public policy underlying § 4123.90.

## **VI. CONCLUSION**

The decision to extend a statutory cause of action is for the legislature, not the courts. This Court should take this opportunity to overturn the line of cases creating public policy wrongful discharge claims and restore to the legislature its exclusive Constitutional function to determine the rights, remedies, and enforcement procedures in the employment context. Alternatively, this Court should preclude the unwarranted and unfounded creation of a tort of wrongful discharge in violation of the public policy underlying § 4123.90 in favor of employees who have not exercised any rights protected under the statute. Any other result would undermine, not foster, the statute's main goals of balancing employer and employee interests and minimizing litigation.

For all the foregoing reasons, Amicus Curiae Ohio Management Lawyers Association respectfully requests that the Court reverse the decision of the Second District Court of Appeals and reinstate the trial court's judgment.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

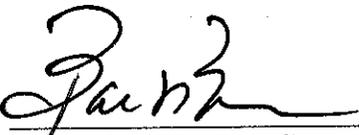
The undersigned hereby certifies that on this 7<sup>th</sup> day of September, 2010, a copy of the foregoing *Brief of Amicus Curiae Ohio Management Lawyers Association In Support of Appellant* was served via regular U.S. Mail to:

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