

IN THE SUPREME COURT OF OHIO

ORIGINAL

DeWAYNE SUTTON, :
 :
 PLAINTIFF/APPELLEE, : Case No. 10-0670
 :
 v. :
 :
 TOMCO MACHINING, INC., : On Appeal from the
 : Montgomery County Court of Appeals
 DEFENDANT/APPELLANT. : Second Appellate District
 :
 :

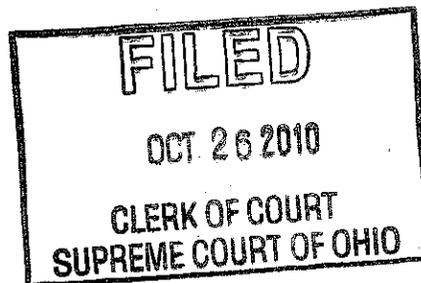
MERIT BRIEF OF APPELLEE, DeWAYNE SUTTON

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III. STATEMENT OF THE FACTS

DeWayne Sutton (hereinafter referred to as "Sutton") was formerly employed by Tomco Machining, Inc. (hereinafter referred to as "Tomco") at a machine shop in Harrison Township, Ohio. Sutton held the position of Operations Manager and at all times relevant to this action was an at-will employee under Ohio law. (Appx. 2; Complaint Para. 2).

On or about April 14, 2008, at approximately 7:30 a.m., Sutton injured his back during the course and within the scope of his employment with Tomco. (Appx. 2, Complaint Para. 3). Appellant reported his injury to Jim Tomasiak (hereinafter referred to as "Tomasiak"), Tomco's President. (Appx. 2; Complaint Para. 4). Within approximately one hour of reporting the injury to Tomasiak, Sutton's employment was terminated. (Appx. 2; Complaint Para. 5). Tomco terminated Sutton's employment because he was injured on the job and reported his injury to Tomasiak. (Appx. 3; Complaint Para. 14) Tomco did not provide a reason for terminating Sutton's employment. (Appx. 2; Complaint Para. 6). Following his termination, Sutton filed an application for workers' compensation benefits and later was awarded benefits. (Appx. 3; Complaint Para. 8).

Sutton agrees with the procedural history of this case as set forth on pages 2-3 of Appellant's Merit Brief.

IV. ARGUMENT

Standard of Review

"Civ.R. 12(C) motions are specifically for resolving questions of law. *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570, 1996-Ohio-459.

In ruling on a Civ.R. 12(C) motion, the court is permitted to consider both the complaint and answer. *Id.* at 569. A court must construe as true all of the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party. *State ex rel. Montgomery v. Purchase Plus Buyer's Group, Inc.*, Franklin App. No. 01AP-1073, 2002 Ohio 2014. To grant the motion, the court must find beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Pontious*, 75 Ohio St.3d at 570. cited in *Thornton v. City of Cleveland*, 176 Ohio App.3d 122, 125, 2008-Ohio-1709 A court reviewing a dismissal pursuant to Civ. R. 12(C) is required to independently review the Complaint and determine if the dismissal was appropriate. *Rich v. Erie County Dept. of Human Resources*, 106 Ohio App.3d 88, 91.

A. Terminating an employee for reporting a workplace injury in order to punish the employee for reporting the injury and to deter other employees from reporting injuries constitutes a public policy exception to the employment at will doctrine when the employee is terminated so quickly after reporting the injury that he or she has no reasonable opportunity to pursue a workers' compensation claim.

1. This court recognizes wrongful discharge claims which violate the public policy of the State of Ohio.

This Court first recognized a public policy exception to the employment-at-will doctrine and accompanying tort action in *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228. *Greeley* prohibited the discharge or discipline of an employee for a reason which violates a statute. In its Amicus brief in support of Appellant, the Ohio Management Lawyers Association asks this Court to overrule

Greeley. As this issue was not raised by Appellant on appeal or in its brief, it is not properly before this Court.

In *Painter v. Graley* (1994), 70 Ohio St.3d 377, 1994-Ohio-334, this Court extended coverage to include public policies expressed in statutory enactments, state and federal Constitutions, administrative rules and regulations, and the common law.

In *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 1995-Ohio-135, this Court defined the elements of a public policy wrongful discharge claim as follows: (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) That plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and (4) That the employer lacked overriding legitimate business justification for the dismissal (the overriding justification element). The first two elements are questions of law and the latter two are questions of fact. *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 69-70.

The key element of the public policy analysis at issue in this case is the jeopardy element. If Tomco and other employers are allowed to discharge employees immediately after reporting on-the-job injuries and retaliate against them due to the injury reports then the public policy underlying R.C. § 4123.90 is jeopardized.

This Court has made it clear that public policy claims which duplicate statutory claims or are brought in lieu of statutory claims because an employee unexplainably fails to fulfill the statutory requirements will not meet the jeopardy element; however, the case at bar is distinguishable from such cases because it was Tomco's intentional act of

terminating Sutton that prevented him from satisfying the elements of a R.C. § 4123.90 claim.

2. R.C. § 4123.90 lacks protection for employees who are terminated immediately after reporting on the job injuries.

R.C. § 4123.90 states, “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.”

This Court has found that “R.C. 4123.90 only applies when an employee has been discharged as a result of ‘taking some action which would constitute the actual pursuit of his claim[.]’ *Bryant v. Dayton Casket Co.* (1982), 69 Ohio St.2d 367, 371. The ‘mere oral communication of an intent to pursue a claim’ does not amount to ‘actual pursuit.’ *Roseborough v. N.L. Industries* (1984), 10 Ohio St.3d 142, 144, fn. 1, 10 Similarly, the mere reception of treatment for an injury, even if it is with the employer’s knowledge, does not constitute ‘actual pursuit.’ *Id. at 144, fn. 2.* quoted in *Pinkerton v. Thompson et al.*, 174 Ohio App. 3d 229, 242-234; 2007 Ohio 6546.

Under the controlling law, Tomco’s act of terminating Sutton’s employment immediately after he notified Tomco of his work-related injury divested him of his ability to “pursue” a workers’ compensation claim, as the term “pursue” has been defined by this Court in the R.C. § 4123.90 context. Therefore, Sutton lacked standing to file an action under R.C. § 4123.90, yet the public policy underlying R.C. § 4123.90 and Ohio’s workers’ compensation system remains jeopardized if employers are able to avoid liability by acting swiftly. The most plausible solution to this dilemma is for this Court to

recognize public policy protection in those rare circumstances when an employee is terminated so quickly after he or she reports a workplace injury that he or she has no reasonable opportunity to file a workers' compensation claim.

3. The public policy exception at issue is narrowly tailored to provide an employee a cause of action only when an employer attempts to circumvent Ohio's workers compensation system and liability under R.C. § 4123.90 by terminating the injured worker before he or she has a reasonable opportunity to pursue a workers' compensation claim.

Sutton is asking this Court not to disturb the appellate court's ruling and to recognize a common law public policy wrongful discharge claim only in circumstances such as his, when an employee is terminated so quickly after he or she reports a workplace injury that he or she has no reasonable opportunity to file a workers' compensation claim and the employer has no legitimate business reason for terminating the employee. This public policy exception was recognized by the court in *Moore v. Animal Fair Pet Center, Inc.*, 674 N.E. 2d 1269 (Franklin County Court of Common Pleas 1995), the only other Ohio reported case that addresses this legal issue.

In *Moore* the Court ruled that in "circumstances in which an employee is terminated *so quickly* after incurring an injury that the employee has no *reasonable* opportunity to file, institute, or pursue a workers' compensation claim, and the employer uses an immediate termination as a means to preclude an injury claim and higher premiums" an employee may bring a public policy claim. *Moore v. Animal Fair Pet Center, Inc.*, 674 N.E. 2d 1269, 1273 (Franklin County Court of Common Pleas 1995) The Court reasoned that, "If this exception is not permitted, employers could avoid statutory liability for wrongfully discharging injured workers by simply employing swift employment terminations, which would certainly violate public policy." *Moore v.*

Animal Fair Pet Center, Inc., 674 N.E. 2d 1269, 1273 (Franklin County Court of Common Pleas 1995) While the *Moore* decision is a common pleas court decision, it is well reasoned and addresses the unique factual situation that is present in the case at bar. *Moore* is the only other reported case in Ohio which addresses this issue. Absent this Court recognizing public policy protection for Sutton and those employees who are similarly situated, an employer can retaliate against injured workers and evade liability under R.C. § 4123.90 by employing swift employment terminations.

The factual prerequisites for pursuing the public policy claim at issue ensure that the policy is narrowly tailored to address the specific practice in which Tomco engaged, without opening the door to other types of public policy claims premised upon Ohio's workers' compensation laws.

4. The public policy at issue is not preempted by Ohio's workers' compensation system.

Sutton acknowledges that Ohio has a comprehensive workers' compensation system which is a compromise that is designed to benefit employees and employers. Sutton agrees that Ohio's workers' compensation system provides the exclusive remedy for employees injured on the job as a result of unintentional actions by their employers. As stated by this Court in *Blankenship v. Cincinnati Milacron Chemicals, Inc.*(1982), 69 Ohio St.2d 608, "The workers' compensation system is based on the premise that an employer is protected from a suit for negligence in exchange for compliance with the Workers' Compensation Act. The Act operates as a balance of mutual compromise between the interests of the employer and the employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are

protected from unlimited liability.” 2A Larson, Workmen's Compensation Law 12-1, Section 65.10, at 12-4 and *Mandolidis v. Elkins Industries, Inc.* (W.Va.1978), 246 S.E.2d 907, 913, cited in *Blankenship v. Cincinnati Milcronic Chemicals, Inc.*(1982), 69 Ohio St.2d 608, 614.

Contrary to Tomco’s arguments, Sutton’s public policy claim is not part of the employer-employee compromise under the workers’ compensation system because: (1) It involves the intentional act of his employer punishing him for reporting a workplace injury; and (2) The employer acted before Sutton had a reasonable opportunity to pursue a claim under the workers’ compensation laws.

a. Tomco acted with the intent to harm Sutton

In *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, at paragraph three of the syllabus, this Court held that R.C. § 2745.01 does not eliminate the common-law cause of action for an employer intentional tort. In *Kaminski v. Metal and Wire Products Company*, 125 Ohio St.3d 250, this Court recognized that an employee may maintain a common law intentional tort action pursuant to R.C. § 2745.01 if the employee “proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.” R.C. § 2745.01 (A). *Kaminski* and *Stetter* do not overrule *Blankenship* and clearly articulate that common law claims, which would otherwise be barred by the workers’ compensation system, are available when an employer commits an act intended to harm an employee.

In fact the legislature reinforces the appropriateness of common law remedies for intentional acts in the workers’ compensation arena and intentional torts are part of the employer-employee compromise. As this Court stated in *Blankenship*, “The protection

afforded by the Act has always been for negligent acts and not for intentional tortious conduct. Indeed, workers' compensation Acts were designed to improve the plight of the injured worker, and to hold that intentional torts are covered under the Act would be tantamount to encouraging such conduct, and this clearly cannot be reconciled with the motivating spirit and purpose of the Act." 2A Larson, Workmen's Compensation Law 12-1, Section 65.10, at 12-4. and *Mandolidis v. Elkins Industries, Inc.* (W.Va.1978), 246 S.E.2d 907, 913, cited in *Blankenship v. Cincinnati Milcron Chemicals, Inc.*(1982), 69 Ohio St.2d 608, 614.

The conduct giving rise to the public policy at issue in this case is analogous to an intentional tort because it is not part of the employee-employer compromise under the workers' compensation system. Tomco's termination of Sutton was a tortious act that was committed with intent to injure Sutton. In addition to acting intentionally, Tomco acted swiftly in terminating Sutton's employment.

b. Sutton was discharged prior to having a reasonable opportunity to file a worker's compensation claim.

Sutton's failure to meet the prerequisites for filing a claim under R.C. § 4123.90 was not caused by his delay in filing a workers compensation claim or conscious decision to pursue a public policy claim in lieu of a R.C. § 4123.90 claim. Sutton was unable to satisfy the requirements of R.C. § 4123.90 because he was terminated within about one-hour of sustaining and reporting his injury.

Tomco does not dispute the timing of Sutton's termination and agrees with the appellate court's finding that Sutton's actions were not significant enough to trigger the protection of R.C. § 4123.90. As discussed above, Sutton had not "instituted or pursued" a workers' compensation claim or availed himself of the rights and remedies afforded

under the workers' compensation laws as defined by this Court in *Bryant v. Dayton Casket Co.* (1982), 69 Ohio St.2d 367, 372. Sutton did not commit any act which would preempt his public policy claim.

5. The *Bickers* decision is not applicable to the case at bar because it does not address the propriety of retaliatory discharges against employees who report workplace accidents.

In *Bickers* this Court reviewed a case in which an injured employee who was receiving workers' compensation benefits was terminated for violating the company attendance policy and examined the boundaries of its decision in *Coolidge v. Riverdale Local School Dist.* (2003), 100 Ohio St.3d 141, another case involving an injured employee who was terminated for violating attendance standards while receiving workers' compensation benefits. In *Bickers*, this Court determined "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 v. Western & Southern Life Insurance Co.* (2007), 116 Ohio St. 3d 351

In *Bickers* this Court ruled that, "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" and that "the workers' compensation system precludes a common-law claim of wrongful discharge in violation of public policy when an employee files a workers' compensation claim and is discharged for nonretaliatory reasons. *Bickers v. Western & Southern Life Insurance Co.* (2007), 116 Ohio St. 3d 351, 353-354, 355-356

Tomco is asking this Court to apply the same reasoning that the appellate court applied in *Mortensen v. Intercontinental Chemical Corporation*, 178 Ohio App.3d 93 (1st Dist. 2008) to support its argument that *Bickers* precludes Sutton from bringing a public policy claim; however, there is a key factual distinction which renders the *Mortensen* decision inapplicable to the case at bar.

In *Mortensen* the employee was terminated over eleven months after sustaining the on-the-job injury and had placed the employer on notice of the injury approximately eleven months prior to his discharge. The employee had ample time to file a workers' compensation claim prior to his discharge, but failed to file. Sutton was terminated approximately one-hour after being injured. (Appx.2; Complaint Para. 5)

In the case at bar, in striking contrast to *Mortensen*, the employee was terminated immediately after notifying the employer of his injury. The key component of Sutton's public policy claim, is that immediate termination legalizes an employer's retaliation against injured workers, thereby undermining the public policy behind Ohio's workers' compensation system and R.C. § 4123.90.

In reaching its decision, in *Bickers*, this Court also considered the encumbrance that the alleged policy would have on employers to "hold open the jobs of injured employees for indefinite periods of time" and "be burdened with employees unable to perform the work for which they were hired" against the impact that not recognizing such a policy would have on an employees. *Bickers v. Western & Southern Life Insurance Co.* (2007), 116 Ohio St. 3d 351, 356-357 Sutton is not asking that his position be held open indefinitely, merely that Tomco not be permitted to terminate his employment because he

reported his on-the-job injury. In *Bickers*, this Court did not address any specific issues which would have an impact on Sutton's public policy claims.

Unlike the public policy in *Bickers*, the public policy at issue in this case does not place an unreasonable burden on employers and contrary to Tomco's argument, does not discourage businesses from coming to or remaining in the State of Ohio. In fact, the circumstances giving rise to the public policy claim rarely occur as is evidenced by *Moore* being the only other reported case in Ohio that addresses this legal issue. The impact of this Court not recognizing the public policy at issue would adversely impact Ohio's workers' compensation system and the private insurance system.

An essential component of Ohio's workers' compensation system is to protect the right of employees to report workplace injuries and avail themselves to the workers' compensation laws without fear of retribution. As a practical matter, most employees do not know what rights they have when they become injured in the workplace. In most cases the employee's first step after suffering an injury is to report that injury to his or her employer, seeking guidance. This also allows the employer to make a record of the injury. Encouraging employees to immediately report workplace injuries to their employers serves three purposes: First, it allows an employer to investigate the circumstances giving rise to the injury to determine if the injury actually occurred during the course and within the scope of the employee's employment; Second, it allows the employee to obtain prompt medical examination and treatment, if necessary; and Third, it leads to more efficient use of the employer, employee, and Bureau of Workers' Compensation's (hereinafter referred to as "BWC") resources by reducing the time and expense involved in litigating stale claims. In short, the system operates most efficiently

and the parties benefit from employees immediately reporting workplace injuries to their employers. A finding that no public policy protection exists for employees who are immediately discharged after reporting on-the-job injuries would discourage employees from reporting injuries to their employers and facilitate delay in reporting injuries to employers until after formal claims have been filed with BWC.

Many employers have policies and procedures that require employees to immediately notify their employers of all injuries suffered in the workplace. Without public policy protection, many employees will be reluctant to abide by such policies and rather than file workers' compensation claims and risking disciplinary action for not following policy, will forego medical treatment. A failure to recognize the public policy at issue in this case will undermine the fundamental components of Ohio's workers' compensation system.

6. Sutton's dismissal was motivated by conduct which implicates Ohio's workers' compensation system and R.C. 4123.90

Appellant's Proposition of Law No. 2 is without merit. Sutton's public policy claim specifically alleges that he reported his workplace injury to Tomco and Tomco punished him because he reported his injury. (Appx. 2; Complaint Para. 4, 5, 14) Under *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, an employee is not specifically required to engage in a "protected activity" as is required by statutory retaliation claims, but rather that his or her, "dismissal was motivated by conduct related to the public policy." Sutton's complaint clearly alleged a causal connection between the report of his injury and his termination. (Appx.2, 3; Complaint Para. 4, 12; 14).

IV. CONCLUSION

For the reasons set forth above, the public policy underlying Ohio's workers' compensation system, including R.C. § 4123.90, prohibits employers from terminating employees for reporting on-the-job injuries and that policy will be jeopardized if employers can avoid liability for retaliatory actions by terminating employees immediately after they report workplace injuries.

Respectfully submitted,



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V. CERTIFICATE OF SERVICE

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

Jonathan Hollingsworth, Esq.
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by regular U.S. mail this 26th day of October 2010.


Jason P. Matthews

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CLERK OF COURTS
MONTGOMERY CO. OHIO
4

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY
CIVIL DIVISION

'08

8579

DeWAYNE SUTTON
2460 NATIONAL ROAD
FAIRBORN, OH 45324

: CASE NO. _____

: JUDGE _____

PLAINTIFF,

V.

: COMPLAINT WITH
: JURY DEMAND

TOMCO MACHINING
4962 RIVERTON ROAD
DAYTON, OH 45414

DEFENDANT.

PRELIMINARY INFORMATION

This is an action for damages and injunctive relief arising from Defendant's act of unlawful retaliation against Plaintiff in violation of O.R.C. § 4123.90, and wrongful discharge in violation of the public policy of the State of Ohio.

Plaintiff, DeWayne Sutton, is an individual citizen residing in Greene County, Ohio and was formerly employed by Defendant.

Defendant, Tomco Machining, Inc., is an Ohio corporation. Defendant operates a machine shop in Harrison Township, Ohio which is located in Montgomery County, Ohio.

Plaintiff's claims arose and all relevant events occurred within Montgomery County, Ohio.

FACTUAL BACKGROUND

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

2. Plaintiff held the position of Operations Manager. Plaintiff earned a salary of \$1,025.00 per week at the time that his employment ended.

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 (hereinafter referred to as "Tomasiak"), Defendant's President.

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

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.

8. Following his termination Plaintiff filed an application for Workers Compensation benefits and later was awarded benefits.

9. On or about July 1, 2008, Plaintiff sent a letter, through counsel, advising Defendant of his intent to pursue legal action under O.R.C. § 4123.90.

10. Ohio has a clear public policy embodied in its common law as well as O.R.C. § 4123.90 which prohibits employers from discharging employees because they were injured on the job.

11. If Defendant is permitted to terminate Plaintiff's employment, the public policy articulated in Paragraph 10 of this Complaint will be jeopardized.

12. A causal connection exists between Plaintiff's injury and Defendant's decision to terminate his employment.

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.

15. As a direct and proximate result of Plaintiff being unlawfully discharged he has suffered injuries in the form of loss of earnings and benefits and other damages.

16. The actions of Defendant were wanton and malicious and/or in reckless disregard for Plaintiff's common law rights under the laws of Ohio.

FIRST CLAIM FOR RELIEF

17. Plaintiff reasserts and realleges all the claims set forth in paragraphs one through 16, as if fully rewritten herein.

18. The actions of Defendant are in violation of O.R.C. § 4123.90

SECOND CLAIM FOR RELIEF

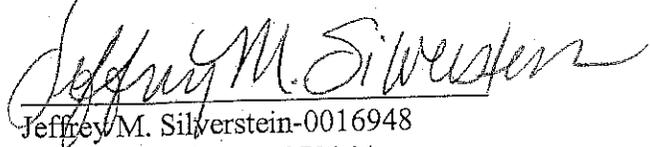
19. Plaintiff reasserts and realleges all the claims set forth in paragraphs one through 18 as if fully rewritten herein.

20. The actions of Defendant constitute a wrongful discharge in violation of the public policy of the State of Ohio.

WHEREFORE, Plaintiff demands judgment as follows:

- A. Compensatory and punitive damages in an amount exceeding \$25,000.00;
- B. Reasonable attorney fees and costs of suit;
- C. Appropriate equitable relief.

Respectfully submitted,



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JURY DEMAND

Plaintiff hereby demands a trial by jury in this matter.



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