

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

DeWAYNE SUTTON,

Plaintiff-Appellee

vs.

TOMCO MACHINING, INC.,

Defendant- Appellant.

CASE NO. 2010-0670

On Appeal from the Montgomery  
County Court of Appeals,  
Second Appellate District  
Case No. 23416

Discretionary Appeal (Non-Felony)

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**BRIEF OF AMICUS CURIAE  
OHIO EMPLOYMENT LAWYERS ASSOCIATION  
IN SUPPORT OF APPELLEE DEWAYNE SUTTON**

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## **I. STATEMENT OF INTEREST**

The Ohio Employment Lawyers Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA and OELA strive to protect the rights of their members' clients, and regularly support precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity.

As an organization focused on protecting the interests of workers who are subjected to workplace discrimination and retaliation, OELA has an abiding interest in ensuring that employees are not subjected to terminations in violation of clear Ohio public policy. Permitting employers to punish employees for simply reporting an injury, before they have any opportunity to file a workers' compensation claim, would jeopardize the compromise embodied in the workers' compensation system. OELA files this amicus brief to cast light on these issues and to call attention to the impact the decision in this case may have on preserving safe workplaces and protecting the right of employees to compensation when they are injured on the job.

## **II. INTRODUCTION AND SUMMARY OF ARGUMENT**

The arguments advocated by the Appellant, Tomco Machining, Inc. ("Tomco") and its amicus curiae, Ohio Management Lawyers Association ("OMLA"), if adopted, would permit unscrupulous Ohio employers to terminate employees at the first indication of a compensable workplace injury, and by doing so, make it clear to other employees that reporting workplace

injuries puts their jobs at risk. Tomco and OMLA are correct that the workers' compensation system is a careful compromise between the interests of employees in full compensation for their workplace injuries and the interests of employers in avoiding costly injury litigation. But that compromise could not have included permitting an employer to intentionally punish and deter the reporting of workplace injuries by firing an employee within an hour of the injury.

The notion that, as part of the compromise embodied in the workers' compensation system, the General Assembly authorized employers to fire employees for merely reporting workplace injuries, and pre-empted any common-law remedy in such circumstances, is without support in legislative history or common sense. In fact, the fundamental goal of the workers' compensation compromise would be utterly defeated by permitting discharges of the sort Appellee DeWayne Sutton suffered here. If employers can do whatever they wish to employees between the occurrence of an injury and the filing of a workers' compensation claim, meritorious, good-faith claims will be suppressed by employees who fear for their jobs, undermining the entire workers' compensation system.

Preventing the core public policies of the State of Ohio from being undermined through punitive and deterrent discharges is precisely the reason this Court recognized a public policy exception to the employment-at-will doctrine in *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St. 3d 228, 551 N.E.2d 981. That decision has stood for twenty years. In *Greeley* and its progeny, this Court has acknowledged that the termination of an individual's employment is among the most effective and devastating weapons unprincipled employers can use to thwart important public policies and the public interest.

Notably, the General Assembly has taken no action to reverse or overrule *Greeley* or its progeny, despite its power to do so. This is not surprising, considering the types of exceptions

recognized by Ohio courts, including: that employees cannot be terminated for complying with child support requirements—see *Greeley*; for refusing to commit perjury—see generally, *Sabo v. Schott* (1994), 70 Ohio St.3d 527, 639 N.E.2d 783; or for reporting a crime—see, e.g., *Powers v. Springfield City Schools* (2d Dist.), 1998 WL 336782 (reporting child abuse to authorities); *McKnight v. Goodwill Industries of Akron, Inc.* (9th Dist.), 2000 WL 1257810 (reporting threat of assault to police); *Trader v. People Working Cooperatively, Inc.* (1st Dist. 1994), 104 Ohio App. 3d 690, 663 N.E.2d 335 (reporting employee drug abuse). These exceptions to the presumption of at-will employment are so fundamental, and so inarguably consistent with the public policies adopted by the General Assembly, that *failing* to recognize them would usurp the legislature’s prerogative in the name of a wholly judicially-created doctrine: at-will employment. As the judiciary created the common law presumption of employment at will, it is the judiciary’s responsibility to recognize appropriate limits to the at-will doctrine to preserve and protect the public interest reflected in policies adopted by the legislature.

OMLA has nevertheless taken this opportunity to advocate the invalidation of the entire concept of a public-policy exception to the employment-at-will doctrine. It could not have chosen a less appropriate vehicle than this case. Notably, the issue raised by OMLA is not even properly before this Court, as it has been raised for the first time in this appeal. Perhaps more important, this case, in which Sutton’s livelihood was taken away just because he reported a workplace injury, is a quintessential example of a discharge that fundamentally undermines a legislative priority. Employees and employers simply cannot participate in good faith in the workers’ compensation system if some employers are permitted to suppress meritorious claims through punishment, deterrence, and intimidation.

The exception to the common-law at-will doctrine at issue here is a narrow one. It addresses only those situations where, as alleged here: (1) the employer terminated the employee to punish him for reporting a compensable injury (and deter others from doing the same); (2) there was no excuse or overriding business justification; and (3) it did so under circumstances where the employee had no reasonable opportunity to pursue a workers' compensation claim and obtain the explicit protections of Revised Code Section 4123.90.

Contrary to the protestations of the Appellant and its amicus, such an exception is not precluded by this Court's prior decisions in *Bickers v. Western & Southern Life Insurance Company*, 116 Ohio St.3d 351, 2007-Ohio-6751, 879 N.E.2d 201, or *Kaminski v. Metal & Wire Products Company*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066. *Bickers*, which precluded a common-law remedy for employees who are terminated for *non-retaliatory* reasons while receiving workers' compensation, did not address the question of whether public policy permits discharges designed to punish employees for suffering or reporting workplace injuries so swiftly that they do not permit any reasonable opportunity to pursue a workers' compensation claim. *Kaminski*, which addressed the statutory provision governing the standard for workplace intentional torts, did not address retaliatory discharges at all; if anything, *Kaminski* is a reminder that a common-law cause of action addressing intentional employer conduct was necessary to supplement and reinforce the statutory provisions of the workers' compensation compromise—just as a common-law cause of action addressing intentional discharges under the circumstances of this case is necessary to preserve the integrity of the workers' compensation system.

Finally, the Appellant and its amicus raise the specter of a flood of employment litigation in the wake of the decision below. This proposition, which this Court no doubt recognizes, having seen it many times before, is unfounded. The only flood threatened in this case is a wave

of wrongful discharges by unscrupulous employers. Absent a decision of this Court overruling the decision of the Court of Appeals, no employer or employee would expect that employers could be permitted to terminate their employees at the first sign of a compensable injury in order to suppress good-faith accident reports and meritorious workers' compensation claims.

Overruling the decision below would permit systematic, open suppression of such reports and claims, so long as an employer acts swiftly enough to prevent the operation of Section 4123.90.

To grant unprincipled employers such a license to fire employees for reporting or suffering workplace injuries would unquestionably thwart the General Assembly's intent. To do so in the name of *protecting* the legislature's prerogative would be a cruel joke on injured workers, would work a profound injustice, and would make the compromise embodied in the workers' compensation system a charade. The decision of the Court of Appeals should be affirmed.

### III. STATEMENT OF FACTS AND THE CASE

Amicus OELA adopts the Statement of Facts and the Case presented by the Appellee.

### IV. LAW AND ARGUMENT

#### PROPOSITION OF LAW:

**An employer's termination of an employee for reporting a workplace injury, prior to any reasonable opportunity for the employee to file a workers' compensation claim, jeopardizes the clear public policy underlying Ohio's workers' compensation system and constitutes an actionable common law exception to the employment-at-will doctrine.**

#### A. **The Careful Compromise Between Employee and Employer Interests Underlying the Workers' Compensation System Cannot Survive if Employees Are Forced to Choose Between Reporting Injuries and Remaining Employed.**

The compromise encompassing the workers' compensation system will be defeated if employees believe that their employer will terminate them for reporting a workplace injury. The whole idea of that compromise was to allow employees to obtain remedies for covered injuries

without fear, and without having to prove fault, while sparing employers the costs and risks of litigation after every injury. This compromise-based framework, in which workers and employers must cooperate to remedy compensable injuries, inherently requires both employers and employees to comply in good faith with the operation of the system.

There is no question that the ability of employees to report injuries without fear of retaliation is a fundamental pillar of the workers' compensation system. For those employed by an unscrupulous employer who terminates employees within hours of a workplace injury for the purpose of deterring injury reports and compensation claims, the availability of a no-fault compensation system is a charade. Instead, employees of such an employer are faced with the awful choice between hiding injuries that are not obvious or catastrophic (and the dangerous conditions leading to such injuries) or else losing the livelihoods essential to supporting their families. It takes only a few instances of an employer rapidly terminating employees at the first sign of injury to send a clear message throughout that workplace: report an injury, lose your job.

It is helpful, by way of analogy, to refer to the recent jurisprudence of the United States Supreme Court holding that, despite the absence of explicit retaliation provisions in longstanding federal statutes, such as Title IX of the Education Amendments of 1972 (prohibiting sex discrimination by federally-funded educational institutions) and 42 U.S.C. Section 1981 (prohibiting race discrimination in private contracts), individuals nevertheless have a private cause of action on the basis of retaliation. The Supreme Court has held that even where Congress has not chosen to include an explicit prohibition against conduct that inherently undermines the purpose and policy embodied in a statutory scheme, it is appropriate to recognize a cause of action prohibiting such conduct. See *Jackson v. Birmingham Bd. of Educ.* (2005), 544 U.S. 167, 180 (stating that preventing sex discrimination through Title IX "would be

difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation. If recipients were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of Title IX violations might go unremedied as a result.” (citations omitted)); see also *CBOCS West v. Humphries* (2008), 553 U.S. 442 (applying *Jackson’s* reasoning to § 1981). By the same token, if employers were permitted to fire employees freely at the first sign of an injury, individuals who are injured at work “would be loath to report it, and all manner” of compensable workplace injuries “might go unremedied as a result.”

**B. In Light of the Extensive Legislation Designed to Preserve the Viability of the Workers’ Compensation System and Minimize Workplace Injuries, It Is Inconceivable That the General Assembly Intended to Permit Employers to Terminate Employees Merely for Suffering or Reporting Injuries.**

The Appellant and its amicus are essentially asking that the Court allow them to unilaterally rescind the compromise enacted by the General Assembly. They do so by paying lip service to the very compromise they seek to subvert, relying on incredibly broad readings of two recent decisions of this Court, *Bickers v. Western & Southern Life Insurance Company*, 116 Ohio St.3d 351, 2007-Ohio-6751, 879 N.E.2d 201, and *Kaminski v. Metal & Wire Products Company*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066.

In *Kaminski*, the more recent of the two cases, this Court upheld the constitutionality of the General Assembly’s statutory adjustment to the common-law definition of “intentional tort” as it applies to workplace injuries. The Court pointed out in that case that it was the legislature’s prerogative to overrule, amend, or modify the common law, and it deferred to the General Assembly’s judgment in upholding the statutory provision. 2010-Ohio-1027, at ¶ 60. *Kaminski*, however, also traced the history of the common-law intentional workplace tort—the very existence of which demonstrates that, in the absence of a conflicting statutory provision, the

courts *do* play a role in defining the rights and interests of employers and employees with respect to the workers' compensation system. As Section 4123.90 does not explicitly protect employees from retaliation prior to taking some step toward the initiation of a workers' compensation claim, there is no statutory provision here that precludes or modifies any common-law claim. It is solely for the courts to decide if a common-law claim is necessary or appropriate in this instance.

The Appellant and its amicus rely even more heavily on *Bickers*, in which this Court “determine[d] whether the tort of wrongful discharge in violation of public policy applies to a nonretaliatory discharge of an injured worker receiving workers' compensation benefits.” 2007-Ohio-6751, at ¶ 1. While the syllabus of the case stated, dramatically, 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,” the facts of the case, and the Court's explicit holding, implicated only *non-retaliatory* discharges, and only discharges of workers who were already receiving benefits. See Ohio Supreme Court Rule for the Reporting of Opinions 1(C): “A syllabus of an opinion \*\*\* is not the controlling statement of the points of law decided, but is merely a research and indexing aid.” As important, this case falls outside even the broadest reading of the syllabus, as Sutton was not receiving workers' compensation at the time of his termination, and his discharge did not violate any “rights conferred by the Workers' Compensation Act.” In point of fact, it is precisely because the Act does not confer an explicit right against a pre-emptive discharge that a common-law cause of action is necessary.

This court's decision in *Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 652 N.E.2d 653, is instructive in this regard. In *Collins*, an employee brought an action against her employer for

sexual harassment and discrimination. The action was premised on the common law public policy exception to the employment-at-will doctrine recognized in *Greeley*. Just as Section 4123.90 does not, by its terms, encompass Sutton's claims in this case, Collins's claims were not encompassed by Section 4112.02 (A) of the Revised Code (prohibiting sexual harassment and discrimination). Section 4112.02(A) excluded the harassing employer in *Collins* because he did not meet the definition for an employer under the statute based on the number of his employees.

In finding that Collins had a viable public policy claim, this court stressed two critical legal principles. First, the court explained that the fact that Collins could not obtain remedies directly under Section 4112.02(A) did not bar her action. Indeed, it was the fact that Section 4112.02(A) did not confer any rights upon Collins that highlighted the need for a common law alternative, provided that her treatment jeopardized important public policies reflected in legislative or constitutional enactments. 73 Ohio St. 3d at 74.

Second, the court looked beyond Section 4112.02(A) to determine whether there was a clear public policy prohibiting the employer's conduct. Just as this Court must recognize the numerous statutory and constitutional provisions in Ohio law reflecting the important public policy of preserving the viability of the workers' compensation system and minimizing workplace injuries relevant to this case,<sup>1</sup> the *Collins* Court enumerated the many criminal and civil statutes which reflected the clear public policy in Ohio against sexual harassment and

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<sup>1</sup> See, e.g., Sections 34 and 35, Article II of the Ohio Constitution; R.C. § 4101.11 (reflecting employer's duty to protect employees); R.C. § 4101.12 (reflecting employer's duty to provide safe workplace); R.C. § 4121.13 (describing safety and investigative duties of the Administrator of Workers' Compensation); R.C. § 4121.17 (describing duty of BWC to investigate unsafe workplaces); R.C. § 4121.47 (stating that no employer shall violate a specific safety rule adopted by the Administrator or a statute to protect employee safety); and R.C. § 4121.48 (loans to reduce employment hazards); R.C. § 4113.52 (Ohio Whistleblower Statute); 29 U.S.C. § 651 et seq. (federal Occupational Safety & Health Act). Individually and collectively, these statutes, among others, strongly support the policy implicated here, as they recognize the importance of reporting, preventing, and compensating workplace injuries.

discrimination. 73 Ohio St. 3d at 73. The fact that any single statute (whether it be Section 4123.90 or Section 4112.02 (A)) may not be the basis for a common law public policy claim is not controlling, especially where, as here and in *Collins*, the public policy involved is derived from a whole complex of interrelated civil, criminal and constitutional provisions.

The Appellant and its amicus argue, however, that such principles do not apply under circumstances where “it was the legislature’s intent in enacting the statute to preempt common-law remedies.” *Collins*, 73 Ohio St. 3d at 73. The Appellant and its amicus argue that this is the case here, relying on the lengthy exposition in *Bickers* of the “the constitutionally sanctioned, and legislatively created, compromise of employer and employee interests reflected in the workers’ compensation system.” *Bickers*, 2007-Ohio-6751, at ¶ 17. According to their reasoning, the scope of that compromise, including Section 4123.90, is that of total pre-emption, meaning that *any* judicial action affecting the rights of employers and employees would be an unwarranted intrusion on the prerogative of the legislature.

As intuitively appealing as the concept of total legislative pre-emption of the common law in the workers’ compensation field might be, this concept falls apart upon application to these facts. First, it should be reiterated that the workers’ compensation system’s pre-emption of the common law is plainly *not* total, as the exception for intentional torts shows. But more important, the legislature simply could not have intended Section 4123.90 to affirmatively preclude claims like Sutton’s. In *Bickers*, the Court was able to articulate the careful balancing of employer and employee interests that necessitated restraint in protecting employees from termination while on temporary total disability: on the one hand, job protection during the period of disability would alleviate the burden caused by the injury; but on the other hand, it would shift that burden to employers, and force them to continue employing workers who could

not perform their duties. 2007-Ohio-6751, ¶¶ 20-22. It was conceivable, in other words, that the General Assembly considered and balanced these interests such that workers could continue receiving benefits throughout the period of disability, but without guaranteed job protection.

Such a compromise was plainly not implicated in the creation of the workers' compensation system. While employees have a straightforward interest in protection against being terminated at the first indication of a compensable injury, there is no conceivable corresponding interest of employers in the ability to terminate employees for the purpose of deterring or punishing good-faith reports of compensable injuries—at least, there is no *legitimate* interest of that sort. The only interest advanced by permitting pre-emptive terminations in response to injury reports is the interest of unscrupulous, abusive employers in suppressing good-faith injury reports and deterring other employees from reporting their injuries. Legislators did not wrestle with the prospect of drafting Section 4123.90 to cover circumstances in which an employee is terminated so quickly after being injured that he or she has no opportunity to pursue a workers' compensation claim prior to the termination. Pretending such a debate occurred is insulting to the very wisdom of the General Assembly that the Appellant so vigorously defends.

**C. The Flood of Employee Lawsuits Warned Against by the Appellant and Its Amicus is a Rhetorical Device Without Substance: Employers and Employees Already Expect Terminations Like the One at Issue to Be Illegal.**

In place of the carefully constructed compromise that actually was reached between employer and employee interests, the Appellant and its amicus ask the Court to license unprincipled employers to intimidate their workforce by quickly (in this case, within sixty minutes) terminating individual employees who report workplace injuries. Absent a decision of this Court overruling the decision of the Court of Appeals, no one would expect or believe that employers could have such a license.

Both the Appellant and its amicus posit that upholding the decision below would “open the floodgates” to employee lawsuits. OMLA argues that recognizing a cause of action of this sort would lead every employee who is terminated after an injury to file a lawsuit claiming wrongful discharge in violation of public policy. This kind of argument is transparently excessive and unfounded. The reason there has been no flood of lawsuits is because *everyone already believes it is illegal* to terminate an employee for no other reason than his or her good-faith report of a compensable workplace injury, and most employers have acted accordingly by refraining from terminating employees at the first sign of injury, absent a legitimate business reason. The belief that such conduct is illegal, which will rightfully persist in the absence of a contrary decision of this Court, is the best protection against systematic efforts by unscrupulous employers to prevent injury reports and deter valid workers’ compensation claims.

The other reason no flood of lawsuits is imminent is the extremely narrow nature of the Appellee’s cause of action: it covers only claims where the employee can prove that the employer has acted with the intent to punish a report of an injury or deter workers’ compensation claims by its workforce.<sup>2</sup> And even where the evidence of causation is sufficient, the cause of action adopted by the appellate court would apply only where there is no “overriding business justification.” Such a cause of action would apply to few terminated employees—Shelley Bickers, for instance, would not have been covered, as her termination was not retaliatory, she *had* instituted a workers’ compensation claim, and her termination was sufficiently removed in

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<sup>2</sup> This is no minor hurdle—while some courts have recognized that suggestive timing can be enough to support a prima facie case of retaliation, that is so only in the most obvious cases, where the termination occurs so quickly after the precipitating event that no other explanation is possible. See *Mickey v. Zeidler Tool and Die Co.* (6th Cir. 2008), 516 F.3d 516, 524-25 (acknowledging that in most cases, temporal proximity alone is not sufficient to prove retaliation, but, where timing of termination is “exceptionally close” in time to protected activity, it suffices, as immediate termination allows neither alternative explanation by employer nor additional evidence of discrimination by employee).

time from her injury that it was clear she could not attend work and perform her duties. In Sutton's circumstances, he was fired so quickly that he had no opportunity to violate a neutral attendance policy, or give Tomco any other plausible reason for terminating him.

And, of course, it is unreasonable to suggest, as the Appellant actually has, that employees with valid workers' compensation claims will withhold them, and forego their benefits, in hopes of being terminated, filing lawsuits, and spending years in litigation in an attempt to obtain compensatory damages through this cause of action. Such a scenario is not only inconsistent with common sense and experience, it would also fall outside the scope of Sutton's cause of action, as such devious employees could not show they were terminated prior to any reasonable opportunity to pursue their workers' compensation claims.

The only disastrous consequences that this Court needs to be concerned about in this case are the risks of reversing the Court of Appeals decision. What protection do employees have against workplace injuries if employers are permitted to suppress injury reports, and deter compensation claims, through swift terminations at the first indication of an injury? What protection do *principled* employers have against unequal treatment under the workers' compensation system if their less principled competitors are reducing their premiums by suppressing their workers' valid claims?

**D. OMLA's Challenge to the Entire Existence of the Critically Important Public Policy Exception to the Common Law Presumption of Employment At Will Is Not Properly Before This Court, and Must Be Rejected**

Perhaps in part because it recognizes the uphill battle it faces in convincing this Court that the General Assembly intended to protect the right of abusive employers to terminate employees at the first indication of a compensable workplace injury, the Appellant's amicus seeks to change the subject, advocating the proposition that the public policy exception to the

employment-at-will doctrine should be eliminated entirely. It should first be noted that this proposition is being raised for the first time here, and is thus not even properly before this Court. See, e.g., *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, at ¶ 34 (“[I]t is well settled that a party who fails to raise an argument in the court below waives his or her right to raise it here.” (quotations omitted)). Amicus OELA addresses this issue here because it is instructive to consider the nature and purpose of the *Greeley* exception to the common law employment-at-will doctrine in analyzing the specific exception advocated here.

OMLA presents the concept of the public policy exception to the employment-will-doctrine as an “inappropriate usurpation of the legislative function of the General Assembly.” But in fact, it is the public policy exceptions themselves that protect the legislature’s prerogative to create policy. What OMLA ignores is that the employment-at-will doctrine itself is a common-law presumption, establishing the almost unlimited right of employers to terminate employees for any reason or no reason at all. It is a judicial invention, albeit a well-established one. See generally, e.g., *Henkel v. Educational Research C’cil of Amer.* (1976), 45 Ohio St.2d 249, 344 N.E.2d 118 (tracing Ohio’s adoption of common law presumption of at-will employment in indefinite term employment contracts). Refusing to allow exceptions to this common law, judicially created construct to protect the public policies embodied in the Ohio constitution and the General Assembly’s statutory enactments would allow employers to terminate employees even for reasons that could thwart the purposes of legislative enactments. In short, it would be the employment-at-will doctrine, not its exceptions, that would intrude on the legislature’s prerogative and undermine legislative intent.

It was for this reason that—consistent with the general principle of contract law that contracts in violation of established public policies or statutes are void, e.g., *Bell v. N. Ohio Tel.*

Co. (1948), 149 Ohio St. 157, 158, 78 N.E.2d 42—this Court first established the public policy exception to employment at will in *Greeley* in 1990, over twenty years ago. Since *Greeley*, two important trends have developed. First, and most important, this Court and the other courts of Ohio have developed workable principles for recognizing public policy exceptions to the common law presumption of at-will employment, and have used these principles to acknowledge a limited number of exceptions where terminations have violated fundamental Ohio public policies. For instance, in *Greeley* itself, this Court recognized that an employer cannot terminate an employee for complying with the laws governing child support payments. 49 Ohio St. 3d 228. In *Sabo v. Schott*, this Court held that it is unlawful to terminate an employee simply because he or she refuses to commit perjury by testifying consistent with his or her employer's wishes in legal proceedings. 70 Ohio St.3d 527. And in a series of appellate decisions, it has been established that an employer cannot terminate an employee for reporting a crime, as this would violate a myriad of fundamental public policies to the contrary. See *McKnight v. Goodwill Industries of Akron, Inc.* (9th Dist.), 2000 WL 1257810 (reporting threat of assault to police); *Powers v. Springfield City Schools* (2d Dist.), 1998 WL 336782 (reporting child abuse to authorities); *Trader v. People Working Cooperatively, Inc.* (1st Dist. 1994), 104 Ohio App. 3d 690, 663 N.E.2d 335 (reporting employee drug abuse).

The second trend that has developed since *Greeley* is also critically important: the General Assembly has consistently chosen not to reverse any decision of this Court recognizing a public policy exception to at-will employment. Nor has it taken any action to reverse *Greeley* itself and eliminate the public policy exception altogether, as OMLA argues the Court should do here. In twenty years, the legislature has responded to what OMLA paints as a massive judicial intrusion on the General Assembly's domain with total silence—and this, despite this Court's

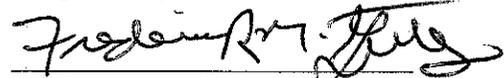
clear pronouncements that the legislature is plainly empowered to “ ‘alter, revise, modify, or abolish the common law.’ ” *Kaminski*, 2010-Ohio-1027, at ¶ 60 (quoting *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 121 (Cupp, J., concurring)).

There is no battle of wills occurring between the judiciary and the legislature over the employment-at-will doctrine and its public policy exceptions. The courts have respected the General Assembly’s legislative enactments, and the General Assembly has chosen to accept the critically important common law causes of action recognized by the courts.

## V. Conclusion

To preserve the General Assembly’s legislative achievement in establishing the workers’ compensation system and the public policies it embodies, employers cannot be permitted to use the common law employment-at-will doctrine to punish employees for reporting or suffering workplace injuries. Certainly, when an employer terminates an employee within sixty minutes of reporting a compensable injury, depriving the employee of any opportunity to pursue a workers’ compensation claim, in the absence of an overriding business justification by the employer, a public policy exception must exist to the judicially created doctrine of employment at will. For the reasons stated above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2010, a copy of the Brief of Amicus Curiae Ohio Employment Lawyers Association in Support of Appellee DeWayne Sutton was served by postage-paid U.S. Mail upon the following:

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