

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)

**REPLY BRIEF OF AMICUS CURIAE
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IN SUPPORT OF APPELLANT**

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II. REPLY BRIEF ARGUMENT

Pursuant to Rule VI, Section 6(B) of the Practice Rules of the Supreme Court of Ohio, Amicus Curiae Ohio Management Lawyers Association (“OMLA”) respectfully submits this Amicus Curiae Reply Brief in support of Appellant Tomco Machining, Inc. and urges the Court to reverse the decision of the Second District Court of Appeals and thereby prevent Appellee DeWayne Sutton (“Appellee”) from circumventing the dictates of the Ohio General Assembly, and Ohio’s at-will employment doctrine, under the guise of public policy.

A. **Appellee’s Contention That *Bickers* Does Not Apply To Preclude His Retaliatory Discharge Claim Is Wrong.**

In *Bickers v. W. & S. Life Ins. Co.* (2007), 116 Ohio St.3d 351, 879 N.E.2d 201, this Court expressly ruled that: “R.C. 4123.90 . . . provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers’ Compensation Act.” *Bickers*, 116 Ohio St.3d at 351, syllabus. Though Appellee agrees that “Ohio’s workers’ compensation system provides the exclusive remedy for employees injured on the job” (Appellee’s Merit Br. at 6), Appellee attempts to circumvent *Bickers* by claiming that *Bickers* “is not applicable to the case at bar because it does not address the propriety of retaliatory discharges against employees who report workplace accidents.” (*Id.* at 9) (emphasis added). The decisions in *Sidenstricker v. Miller Pavement Maint., Inc.* (Ohio Ct. App. [10th Dist.] Dec.15, 2009), No. 09AP-523, 2009 WL 4809631, at *2 and *Amara v. ATK, Inc.* (S.D. Ohio Aug. 26, 2009), Nos. 3:08cv00378, 3:08cv00427, 2009 WL 2730528, at *4 show that Appellee is wrong.

In *Sidenstricker*, the plaintiff/appellant was immediately demoted after reporting to his supervisor that he had been diagnosed with a hernia. *Sidenstricker*, 2009 WL

4809631, at *2. When the plaintiff/appellant attempted to file a workers' compensation claim, the employer threatened to deny the claim and "make things hard on him" and when plaintiff/appellant kept coming back to work, despite the many hurdles placed in his path, he eventually was fired. *Id.* Like Appellee Sutton in this case, the plaintiff/appellee in *Sidenstricker* attempted to assert a wrongful discharge in violation of public policy claim arising from his alleged retaliatory discharge. However, the Tenth District Court of Appeals concluded that the plaintiff/appellant was barred from bringing a wrongful discharge in violation of public policy claim under *Bickers*. The court of appeals expressly rejected the argument that *Bickers* only precludes public policy claims based on nonretaliatory discharges. *Id.* at *3. The court of appeals reasoned that the syllabus of the *Bickers* decision does not indicate that the rule of law contained in that syllabus applies only to nonretaliatory discharges; accordingly, the syllabus holds that employees who are fired for retaliatory reasons are also barred from pursuing a public policy claim based upon the policies underlying § 4123.90. *Id.* (citing Rules 1(B)(1) and (2) of the Supreme Court Rules on the Reporting of Opinions).

In *Amara v. ATK, Inc.* (S.D. Ohio Aug. 26, 2009), Nos. 3:08cv00378, 3:08cv00427, 2009 WL 2730528, at *4, the plaintiff filed a workers' compensation claim after injuring himself by slipping on ice on company property on his way to work. *Id.* at *2. He was able to work during the pendency of his workers' compensation claim and only took a brief leave to have knee surgery following an appeal of the Bureau of Workers' Compensation's initial determination. *Id.* After his surgery, he was able to return to work, but was fired a few weeks thereafter. *Id.* He claimed that his discharge was in retaliation for his filing a workers' compensation claim and filed a statutory claim

under § 4123.90, as well as a common law public policy claim. *Id.* The Southern District of Ohio dismissed the plaintiff's public policy claim, reasoning that:

In *Bickers*, the Ohio Supreme Court does state [that] the statute precludes the ability to bring forth a common law public policy claim for dismissal for non-retaliatory reasons in one part of the decision; however, the weight of the argument made in *Bickers* indicates that the statute was intended to replace the common law cause of action. In furtherance, § 4123.90 specifically bans retaliatory discharges. Moreover, Ohio appellate courts have interpreted *Bickers* to completely ban all retaliatory common law claims for wrongful discharge in violation of public policy.

Amara, 2009 WL 2730528, at *4 (citations omitted).

Appellee and his Amici have failed to set forth any legal authority to support their contention that *Bickers* does not apply to preclude a wrongful discharge in violation of public policy claim based on an alleged retaliatory discharge, and the well-reasoned opinions set forth in *Sidenstricker* and *Amara* demonstrate that *Bickers* does, in fact, preclude such claims.

B. Appellee's Attempt To Circumvent the Exclusivity Of § 4123.90 By Analogizing His Discharge To An Intentional Tort Should Be Rejected.

Appellee attempts to escape the exclusivity of § 4123.90 by contending that his discharge was "a tortious act that was committed with intent to injure [Appellee]," and was therefore an intentional tort not covered by § 4123.90. (Appellee's Merit Br. At 8.)

Appellee's discharge does not amount to an intentional tort under any interpretation of Ohio law. The standards for establishing an intentional tort claim against an employer are set forth in Ohio Revised Code § 2745.01. *Kaminski v. Metal & Wire Prods. Co.* (2010), 125 Ohio St.3d 250, 274, 927 N.E.2d 1066, 1089 ("Because R.C. 2745.01 is constitutional, the standards contained in the statute govern employer

intentional-tort actions, and the statutory standards apply rather than the common-law standards of *Fyffe*.”). The statute requires that a plaintiff prove that “the employer committed a tortious act with the intent to injure [him] or with the belief that his injury was substantially certain to occur.” R.C. 2745.01(A). The statute defines “substantially certain” as acting with “deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.” R.C. 2745.01(B).

The statute contemplates *physical* injuries suffered by the employee as a result of dangerous conditions existing in the workplace, or a plaintiff’s economic losses suffered as a result of the physical injury. An at-will employee’s termination from employment is not the sort of “injury” that can result in intentional tort liability under Ohio law. To conclude otherwise would completely undermine the at-will employment doctrine.

Accordingly, Appellee’s attempt to circumvent the exclusivity of § 4123.90 by analogizing his discharge to an intentional tort fails.

C. The Public Policy Underlying § 4123.90 Does Not Prohibit An Employer From Discharging An At-Will Employee Merely Because The Employee Has Reported A Work-Related Injury.

Appellee bases his common-law wrongful discharge claim solely on his view that the public policy underlying § 4123.90 shields an at-will employee from discharge if the employee merely reports a work-related injury to his or her employer, but has not taken any action to seek out workers’ compensation benefits. The public policy underlying § 4123.90 is not so broad, however. As this Court explained in *Bryant v. Dayton Casket Co.* (1982), 69 Ohio St.2d 367, 433 N.E.2d 142 and *Roseborough v. N.L. Indus.* (1984), 10 Ohio St.3d 142, 462 N.E.2d 384, the General Assembly’s intent in enacting § 4123.90 was to protect from retaliatory action those employees *who have exercised their rights under the Act by seeking workers’ compensation benefits*. A review of these cases makes

clear that the General Assembly did not intend for an employer to be held liable merely because an employee reports a work-related injury.

In *Bryant*, this Court analyzed the legislative intent underlying § 4123.90, concluding that the General Assembly's obvious intent in enacting the statute, as evidenced by the Act's clear and unambiguous language, was to shield from punitive action employees who have filed a claim or instituted or pursued a claim under the Act. *Bryant*, 69 Ohio St.2d at 371-72, syllabus ("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."). The *Bryant* Court rejected the notion that an employer could be held liable under § 4123.90 merely because an employee had informed his or her employer that the employee *intended* to file a claim for workers' compensation benefits, but had not actually done so. *Id.* at 371 ("It is our determination that the General Assembly's use of the specific and exclusive words . . . "pursued . . . any proceedings under the workers' compensation act" implies the exclusion of the interpretation as advanced by this appellant.") In reaching this conclusion, the Court noted that:

In viewing the Ohio statute in contrast to other states which have enacted legislation generally protecting employees from being discharged for seeking workers' compensation benefits for injuries, it should be pointed out that these other states have used language in their statutes which is considerably broader than R.C. 4123.90, and allows actions to be brought by the employee when he has been discharged after informing the employer of his intention to exercise some statutory right for recovery for his industrial injury. *See* West's California Labor Code, Section 132a; N.J.Stat.Ann. Section 34:11-56.39.

Id. at 371. The *Bryant* Court's interpretation of § 4123.90 demonstrates that the public policy underlying the statute is not as broad-reaching as Appellee and his Amici contend. This is further evident in reviewing this Court's subsequent decision in *Roseborough*.

In *Roseborough*, this Court addressed what constitutes the "institution" or "pursuit" of a workers' compensation claim or proceeding for the purpose of attaching liability under § 4123.90's anti-retaliation provision. While the *Roseborough* Court concluded that an actual filing of a written claim is not required to trigger the statute's protections, *Roseborough*, 10 Ohio St.3d at 143, the Court rejected the notion that merely receiving medical treatment with the employer's knowledge is sufficient to establish a claim under § 4123.90. *Id.* at 144. The Court reasoned that "an 'actual pursuit' of the claim must be made before the statute's protection attaches. Reception of treatment is not such an actual pursuit." *Id.*

Given that this Court, in *Bryant* and *Roseborough*, concluded that the General Assembly in enacting § 4123.90 did not intend to protect employees who merely express an intent to file a workers' compensation claim or who merely receive treatment with the employer's knowledge, Appellee and his Amici's contention that the public policy underlying the Act is the protection of employees who merely report a work-related injury to their employer is untenable. An employee who merely reports a work-related injury to his or her employer has no more "instituted" or "pursued" his or her rights under the Act than an employee who receives treatment with the employer's knowledge.

The General Assembly, in limiting the Act's protections to only those individuals who have filed a claim or instituted or pursued proceedings under the Act, made a public policy determination to restrict employer liability to those situations where an employee

in fact sought to exercise his or her rights under the Act. While Appellee and his Amici may disagree with where the legislature's line has been drawn, "[i]t 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.

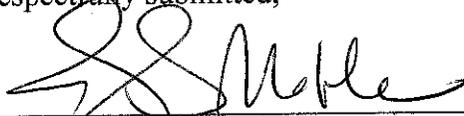
The legislative policy choice "is a difficult one, as it inevitably creates a burden of some degree upon either the employer or the employee," *Bickers*, 116 Ohio St.3d at 356, and one of the primary goals in striking this balance of sacrifices between employer and employee is to minimize litigation, "even litigation of undoubted merit." *Stetter*, 125 Ohio St.2d at 293.

As stated in *Stetter*, 125 Ohio St.3d at 289-90, ¶ 53, "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." As further explained by this Court in *Kaminski*: "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." *Kaminski*, 927 N.E.2d at 1082, ¶ 74.

III. CONCLUSION

For all the foregoing reasons, as well as those set forth in the Merit Briefs of Appellant and Amicus Curiae Ohio Management Lawyers Association ("OMLA"), the OMLA 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 19th day of November, 2010, a copy of the foregoing *Reply Brief of Amicus Curiae Ohio Management Lawyers Association In Support of Appellant* was served via regular U.S. Mail to:

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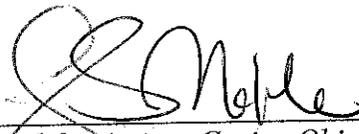
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Ayman S. AMARA, Plaintiff,

v.

ATK, INC., et al., Defendants.
 Nos. 3:08cv00378, 3:08cv00427.

Aug. 26, 2009.

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DECISION AND ENTRY

WALTER HERBERT RICE, District Judge.

*1 The Court has conducted a *de novo* review of the Report and Recommendations of United States Magistrate Judge Sharon L. Ovington (Doc. # 22), to whom this case was originally referred pursuant to 28 U.S.C. § 636(b), and noting that no objections have been filed thereto and that the time for filing such objections under Fed.R.Civ.P. 72(b) has expired, hereby **ADOPTS** in full said Report and Recommendations. It is therefore **ORDERED** that:

1. The Report and Recommendations filed on August 5, 2009 (Doc. # 22) is **ADOPTED** in full;
2. Defendants' Motion to Dismiss (Doc. # 4) is **GRANTED**. By agreement of the parties the following claims are **DISMISSED** with prejudice:
 - a. Plaintiff's claim for age discrimination in its entirety.
 - b. All of the Ohio public policy claims pled by Plaintiff except for Plaintiff's Ohio public policy claim for workers' compensation retaliation.
 - c. All claims against the individual Defendants predicated on Title VII, the Americans with Disabilities

Act, the Age Discrimination in Employment Act, and those based on Ohio Revised Code Annotated § 4123.90, or common law public policy that creates a cause of actions for retaliation for participation in Ohio's workers' compensation scheme.

d. Plaintiff's claim against any or all of the Defendants based on Ohio's criminal falsification statute, Ohio Revised Code Annotated § 2921.13.

2. The Ohio common law public policy claim for workers' compensation retaliation are **DISMISSED** with prejudice, and

3. Claims against Defendants Henderson, Comer, Barber, and Walstrum under Ohio Revised Code § 4112.02 are **DISMISSED** without prejudice to Plaintiff filing an Amended Complaint on or before September 14, 2009.

REPORT AND RECOMMENDATIONS^{FN1}

FN1. Attached hereto is NOTICE to the parties regarding objections to this Report and Recommendations.

SHARON L. OVINGTON, United States Magistrate Judge.

I. INTRODUCTION

Plaintiff, Ayman Amara, brings this case through counsel claiming his former employer, ATK, Inc. discriminated and retaliated against him in violation of his rights guaranteed under federal and state law during his fourteen-month tenure with the company. Plaintiff originally filed two *pro se* complaints addressing the same events.^{FN2} The Complaints name ATK, Inc. (ATK) as a defendant in addition to four other individual employees working at ATK: Robert Henderson, Brian Barber, Kevin Cromer, and Dennis Walstrum. Both cases were subsequently consolidated.

FN2. Case Number: 3:08 CV 0378, hereinafter referred to as ("Complaint 1"); Case Number: 3:08 CV 0427, hereinafter referred to as ("Complaint 2").

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This matter is before the Court upon Defendants Motion to Dismiss (Doc. # 4), Plaintiff's Response (Doc. # 16) and Defendants Reply (Doc. # 17). In his Response, Plaintiff, through counsel, concedes that the following claims should be dismissed: Plaintiff's claim for age discrimination in its entirety; all of the Ohio public policy claims pled by Plaintiff except for the common law claim of workers compensation retaliation; all claims against the individual Defendants (Henderson, Barber, Walstrum and Comer) that are predicated on Title VII, the American with Disability Act ("ADA"), the Age Discrimination in Employment Act ("ADEA") and those based on Ohio Revised Code § 4123.90 or common law public policy that creates a cause of action for retaliation for participation in Ohio's workers compensation scheme; and Plaintiff's claim against all Defendants based on Ohio's criminal falsification statute. (Doc. # 16 at 1-2).

*2 There are two remaining claims in contention: first, whether a claim under Ohio common law based on public policy addressing retaliation for filing a workers' compensation claim is precluded by Ohio Revised Code § 4123.90, and second, whether individual liability exists under Ohio law for violations of Ohio Revised Code § 4112.

II. BACKGROUND

Mr. Amara began working for ATK, Inc. in August 2005 as a senior structural and material engineer at ATK's Dayton location. On November 17, 2005, Mr. Amara reported slipping on ice on ATK property when he was coming to work that morning. This incident led to Mr. Amara filing a workers' compensation claim in December 2005. While Mr. Amara was waiting for a decision from the Bureau of Workers' Compensation (BWC), he continued to work, and he received excellent feedback from his May 2006 performance evaluation from the company. In June 2006, the BWC held a hearing about Mr. Amara's claim and eventually awarded his claim. ATK appealed the decision in July 2006. At the end of July, Mr. Amara went to Defendant Henderson's office to discuss his workers' compensation case, which ultimately led to Mr. Amara filing the false imprisonment claim against Mr. Henderson. On August 4, 2006, Mr. Amara went on ATK's short term disability plan, and in September 2006 he had knee surgery.

Mr. Amara returned to work on October 2, 2006. However, on October 30, 2006, ATK severed Mr. Amara's employment with the company claiming performance deficiencies. The complaints filed against Defendants are in response to events that occurred over the approximate fourteen month time period Mr. Amara worked at ATK.

III. MOTIONS TO DISMISS

To determine whether a Complaint states a claim upon which relief can be granted, the Court accepts the plaintiff's factual allegations as true and construes the Complaint in the light most favorable to the plaintiff. Gunasekera v. Irwin, 551 F.3d 461, 466 (6th Cir.2009). "[T]o survive a motion to dismiss a complaint must contain (1) 'enough facts to state a claim to relief that is plausible,' (2) more than 'a formulaic recitation of a cause of action's elements,' and (3) allegations that suggest a 'right to relief above a speculative level.'" Tackett v. M & G Polymers, USA, LLC, 561 F.3d 478, 488 (6th Cir.2009) (quoting in part Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1974, 1965, 167 L.Ed.2d 929 (2007)).

To state a plausible, non-speculative claim, the Complaint need only set forth a short and plain statement of the claim showing that the plaintiff is entitled to relief. See Fed.R.Civ.P. 8(a). This does not require detailed factual allegations, yet it does require "more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (*Twombly* citations omitted); see Eidson v. State of Tn. Dept. of Children's Svs., 510 F.3d 631, 634 (6th Cir.2007) ("[A] complaint must contain either direct or inferential allegations respecting all material elements to sustain recovery under some viable legal theory.... Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice.").

*3 "In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of

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truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, --- U.S. at ---, 129 S.Ct. at 1950.

IV. ANALYSIS

A. Ohio public policy common law claim for workers' compensation retaliation

Plaintiff argues that he is entitled to both statutory and public policy common law relief in regard to his claim that ATK retaliated against him for filing a workers' compensation claim. Defendants contend that dismissal of the Ohio public-policy claim is appropriate because § 4123.90 of the Ohio Revised Code provides the sole relief to the claim. Defendants are correct. The Ohio Supreme Court has declared that § 4123.90 is the exclusive remedy for employees wrongfully terminated while receiving workers' compensation. In *Bickers v. Western & Southern Life Ins. Co.*, the Ohio Supreme Court held:

we hold 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.

Bickers, *supra* at 116 Ohio St. 3d 351, 357, 879 N.E. 2d 201, 207 (2007). Prior to reaching this conclusion, the Ohio Supreme Court analyzed the Workers' Compensation Act and recognized the intent to balance the interests of employees with the interest of the employers. The Court stated:

the Act operates as a balance of mutual compromise ... 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.

Id. at 356, 879 N.E. 2d 201. The court recognized that the Ohio General Assembly chose to ban retaliatory discharges, and stated, “[w]e may not override this choice and superimpose a common-law, public policy tort remedy on this wholly statutory system.” *Id.* at 357, 879 N.E. 2d 201.

Plaintiff asserts two arguments explaining why *Bickers* does not apply to this case, and therefore, should not block the common law remedy. First, Plaintiff distinguishes that the plaintiff in *Bickers* failed to meet the statutory procedural requirements thus banning the ability to bring forth either claim. (Doc. # 16, 7). Plaintiff argues that he did meet the procedural requirements of § 4123.90 and has a right to bring both claims against Defendants. (*Id.*) However, the main focus of the Ohio Supreme Court in *Bickers* contradicts Plaintiff's distinction. *Bickers* explained that when the Ohio General Assembly decided to establish a workers' compensation statute, the statute was supposed to “[supplant] rather than [amend] ... the ... common-law remedies.” 116 Ohio St. 3d at 356, 879 N.E. 2d 201. The Workers' Compensation Act created a compromise between the employee's and employer's interests, and again, this compromise required employees to “relinquish their common law remedy.” *Id.* The fact that the plaintiff in *Bickers* did not meet the statutory procedural requirements is irrelevant to this case because that only means she lost her chance to assert her claim under the statute. And the fact that Plaintiff did meet the statutory requirements just guarantees he can make a claim under the statute.

*4 Next, Plaintiff asserts that *Bickers* only applies to “dismissals of employees due to non-retaliatory reasons.” (Doc # 16, 8) In *Bickers*, the Ohio Supreme Court does state the statute precludes the ability to bring forth a common law public policy claim for dismissal for non-retaliatory reasons in one part of the decision^{FN3}; however, the weight of the argument made in *Bickers* indicates that the statute was intended to replace the common law cause of action. In furtherance, § 4123.90 specifically bans retaliatory discharges.^{FN4} Moreover, Ohio appellate courts have interpreted *Bickers* to completely ban all retaliatory common law claims for wrongful discharge in violation of public policy. See, *Mortenson v. Intercont'l Chem. Corp.*, 178 Ohio App.3d 393, 898 N.E.2d 60 (1st Dist.2008); *McDannald v. Robert L. Fry & Assocs.*, No. CA2007-08-027, 2008 Ohio App. Lexis

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3522, 2008 WL 3823696 (12th Dist. Aug. 18, 2008);
Cunningham v. Steubenville Orthopedics & Sports
Med. Inc., 175 Ohio App.3d 627, 888 N.E.2d 499
(7th Dist.2008).

FN3. “we also hold that the constitutionally sanctioned, and legislatively created, compromise of employer and employee interests reflected in 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, 116 Ohio St. 3d at 355-56,
879 N.E. 2d 201.

FN4. “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 ... which occurred in the course of and arising out of his employment with that employer.”

The ruling in *Bickers* and the interpretation and application of that case by Ohio appellate courts indicate that dismissing the common law claim based on public policy is appropriate.

B. Claims against individual Defendants under O.R.C. § 4112

Plaintiff's second argument in contention alleges that both Complaints contain sufficient facts that demonstrate the individual Defendants discriminated against Plaintiff based upon national origin and disability in violation of Ohio Revised Code Annotated § 4112.02. This argument is not well taken. The applicable statute, Ohio Revised Code Annotated § 4112.02, forbids an employer from taking any discriminatory actions against a person relating to employment.^{FN5} The Ohio Supreme Court in *Genaro v. Central Transport, Inc.* stated that individual managers and supervisors can be held accountable for their own discriminatory actions taken against a person in violation of § 4112.02. 84 Ohio St.3d 293, 703 N.E.2d 782 (1999). Both parties agree that the individual supervisors and managers can be accountable

if they discriminated against Plaintiff on their own. However, the issue at this early stage in the litigation is whether or not Plaintiff pled sufficient facts in both Complaints to reasonably infer that these individuals acted unlawfully. After carefully reading both Complaints, it is evident that the Complaints are void of sufficient factual allegations to reasonably infer the individuals discriminated against Plaintiff based on a disability or national origin.

FN5. “It shall be an unlawful discriminatory practice ... [f]or any employer, because of ... national origin, [or] disability ... of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.”

In regards to discriminating based on national origin, Plaintiff has not pled sufficient facts in either Complaint to infer liberally in favor of Plaintiff that the individual Defendants discrimination based on national origin. The only person that seemed to even address Plaintiff's nationality is not a Defendant in this case. (Compl.2, ¶ 35). The allegation these individuals discriminated based on national origin seems to be just that, an allegation with no support.

*5 Next, Plaintiff has not pled sufficient facts in either Complaint to infer that he was discriminated by the Defendants based on a disability. Plaintiff does not refer to any specific disability he was laboring under in either Complaint. There is no doubt Plaintiff had negative consequences after falling in the work related incident^{FN6}, but the Complaints are devoid of alleging a disability he may have had before the incident or resulting from the incident. In regard to a possible injury or disability, Plaintiff alleged he felt pain in his hip and knee after he fell in the November 17, 2005 incident, and in Complaint 2, Plaintiff alleged his workers' compensation claim related to a shoulder injury. (Compl.2, ¶ 36-37). Then, Plaintiff alleges he had surgery on his knee in September. (Compl. 1, ¶ 40; Compl. 2, ¶ 60). At this stage of the litigation it is unnecessary for Plaintiff to prove he had a disability recognized under the statute^{FN7}; however, it is necessary for this Court to be able to point to something Plaintiff is claiming to be a disability that led the individual Defendants to treat him in a discriminatory

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way, separate and distinct from the retaliation he may have received for filing a workers' compensation claim. Even if it is liberally inferred that Plaintiff suffered from a disability, the Complaints do not sufficiently meet the pleading standard against each Defendant.

FN6. Compl. 1, ¶ 15, 16, 18, 24; Compl. 2, ¶ 26, 27, 30, 41, 59.

FN7. Under Ohio Revised Code Annotated § 4112.01, disability is defined as

a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing speaking, breathing, learning, and working....

The conclusory statements alleging each individual defendant was a decision maker in Plaintiff's termination is not enough under *Twombly* or *Iqbal* to reasonably assume he was terminated because of national origin or disability. Paragraphs 102-105 from Complaint 2 are cited in Plaintiff's Response to Defendants' Motion to Dismiss claiming these statements alone are enough to defeat a 12(b)(6) motion. (Doc. # 16, 10). Essentially each paragraph states that "upon information and belief" each individual defendant was a decision maker in Plaintiff's termination. These paragraphs read alone do not connect Defendants' discriminatory conduct with Plaintiff's termination, but only plainly state Plaintiff believes each Defendant played a role in his termination. These allegations point to the adverse action Plaintiff believed to be taken against him based on national origin or disability, but based on *Iqbal* and *Twombly*, these statements are no longer sufficient to satisfy the notice pleading requirements. Again, the Supreme Court has stated that courts are not bound to assume legal conclusions are true; conclusive statements must be accompanied by factual allegations. *Iqbal*, 129 S.Ct. at 1950 (Citing *Twombly*, 550 U.S. at 570).

Plaintiff next points to specific allegations in his Response to Defendants' Motion to Dismiss that he claims is enough to defeat the Motion and show each Defendant acted adversely and created adverse conditions of employment. (Doc. # 16, 10-12). Plaintiff states that Defendant Kevin Comer was a decision

maker in his termination in addition to creating adverse conditions of employment against Plaintiff because of his disability. However, it cannot be inferred from the factual allegations made against Defendant Comer that he was discriminating against Plaintiff in any way. Plaintiff cites Complaint 2 paragraphs 60-61 to support his assertion. (Doc. # 16, 12). Paragraph 61 states, "[a]fter surgery, Mr. Amara showed at ATK on a [rumor] about his critical employment. Comer had advised him to get home and obtain a release from doctor." Without more background information regarding the incident that produced this statement, it cannot be assumed that this statement is evidence of Defendant Comer's own discriminatory conduct based on Plaintiff's disability that contributed to any adverse condition, privilege, or matter directly or indirectly related to Plaintiff's employment at ATK. On its face, the statement seems to indicate that Plaintiff needed to get a release from his doctor to be at work. There is no other allegation made in either Complaint against Defendant Comer that suggests that he discriminated against Plaintiff on his own account. This sole factual allegation coupled with the conclusion Plaintiff believed Defendant Comer was a decision maker is not enough to make it facially plausible, and without more, Plaintiff has not met the pleading standard regarding this particular claim against Defendant Comer.

*6 Both Complaints allege that Defendant Robert Henderson was also a decision maker in Plaintiff's termination. However, the facts pled regarding Defendant Henderson do not allow for a reasonable inference that he played any role in his termination or that he acted adversely toward Plaintiff based on a disability. Rather, the facts seem to imply Defendant was acting adversely toward Plaintiff in retaliation for filing a workers' compensation claim. Defendant Henderson is the head of the Human Resources division at Dayton's ATK branch. Paragraphs 30-38 in Complaint 1, specifically address Defendant Henderson's behavior toward Plaintiff. Paragraph 30 states that Defendant Walstrum informed Plaintiff that he directed Defendant Henderson to reverse the appeal on the workers' compensation claim; however, the next paragraph asserts that Plaintiff believed Defendant Henderson still had not notified the Bureau of Workers' Compensation three days after he was told to reverse the claim. In paragraphs 50-55 in Complaint 2, Plaintiff addresses an encounter with Defendant Henderson in his office regarding the delay of reversing the appeal. These paragraphs seem to indi-

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cate that Defendant Henderson was threatening him for asserting his rights under the workers' compensation system. Following up these factual allegations, Plaintiff states that Defendant Henderson resented that he had filed a workers' compensation. All the factual allegations in both complaints assert Defendant Henderson was retaliating against Plaintiff for filing a workers' compensation claim. There are no facts pled that could reasonably imply Defendant Henderson had discriminated against Plaintiff because of an alleged disability.

Plaintiff asserts that Defendant Brian Barber also committed personal acts of discrimination in violation of § 4112.02. Defendant Barber was Plaintiff's supervisor when Plaintiff returned from leave after his knee surgery. Plaintiff alleges on October 25, 2006, Defendant Barber asked him to meet at a time that conflicted with a therapy session. Also, Plaintiff alleges that Defendant Barber told him he "had to stay for the meeting or he would face the consequences." (Compl. 1, ¶ 52; Compl. 2, ¶ 73). Plaintiff went to the therapy session. (Compl. 1, ¶ 53; Compl. 2, ¶ 74). In Complaint 2, Plaintiff then states he was told to leave by both Defendant Barber and Defendant Walstrum on October 30, 2006 after Plaintiff received word his latest job performance for ATK was unsatisfactory. (Compl. 2, ¶ 74, 75, 78). He was terminated from the company on that day. The Complaints do allege facts that allow for a reasonable inference that Defendant Barber played a role in Plaintiff's termination considering he was his supervisor at the time and he was present at the time Plaintiff was asked to leave, but the factual allegations by Plaintiff fall short of indicating these acts had anything to do with Defendant's discriminatory intent. These allegations may be consistent with discrimination if they were connected to an identified disability or further accompanied by other allegations, but without more, it is not reasonable to assume Defendant Barber was acting in a discriminating manner toward Plaintiff. Although conceivable, these factual allegations are not enough to make the claim of discrimination plausible. (Quoting *Iqbal*, 129 S.Ct. at 1951 (citing *Twombly*, 550 U.S. at 570)).

*7 Lastly, Plaintiff asserts that Dennis Walstrum personally violated § 4112.02. Mr. Walstrum is the Vice President of Dayton's branch of ATK and is the individual that fired Plaintiff. The facts pled regarding Defendant Walstrum do not allow for a reasonable

inference that he fired Plaintiff based on his disability. In both Complaints, Plaintiff alleges that Defendant Walstrum was disinterested and rude when Plaintiff approached him about his workers' compensation case. (Compl. 1, ¶ 29; Compl. 2, ¶ 47). Plaintiff then asserts he did not feel welcome back after he returned from leave after having surgery. (Compl. 1, ¶ 42; Compl. 2, ¶ 63). Plaintiff alleges that Mr. Walstrum called him into a meeting on October 2, 2006 where he called him a "troublemaker, causing trouble for everybody in the company." (Compl. 1, ¶ 43; Compl. 2, ¶ 64). Plaintiff alleges he was given a work assignment, which he felt was a "no-win situation" for him. In addition, Plaintiff claims he believed Defendant Walstrum was ready to fire him once he had an excuse. (Compl. 1, ¶ 57; Compl. 2, ¶ 78). Defendant Walstrum fired Plaintiff on October 30, 2006 after his supervisor, John Norman, found his work on a project unsatisfactory. (Compl. 1, ¶ 56-57; Compl. 2, ¶ 75-78). Again, without identifying a disability and alleging a fact that Defendant Walstrum acted in an adverse manner because of the disability, it is not sufficient to merely state he was terminated because of a disability.

However, Plaintiff correctly observes that Defendants have yet to file an Answer in this matter and Fed. R. Civ. R. 15 provides for an amendment of the Complaint as a matter of course. Accordingly, Plaintiff should file an Amend Complaint addressing the deficiencies set forth herein.

IT IS THEREFORE RECOMMENDED THAT:

1. Defendants' Motion to Dismiss (Doc. # 4) should be **GRANTED**. By agreement of the parties the following claims should be dismissed with prejudice:
 - a. Plaintiff's claim for age discrimination in its entirety.
 - b. All of the Ohio public policy claims pled by Plaintiff except for Plaintiff's Ohio public policy claim for workers' compensation retaliation.
 - c. All claims against the individual Defendants predicated on Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and those based on Ohio Revised Code Annotated § 4123.90, or common law public policy that creates a cause of actions for retaliation for participation in

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Ohio's workers' compensation scheme.

d. Plaintiff's claim against any or all of the Defendants based on Ohio's criminal falsification statute, Ohio Revised Code Annotated § 2921.13.

2. The Ohio common law public policy claim for workers' compensation retaliation be **DISMISSED** with prejudice, and

3. Claims against Defendants Henderson, Comer, Barber, and Walstrum under Ohio Revised Code § 4112.02 be **DISMISSED** without prejudice to Plaintiff filing an Amended Complaint.

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CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Tenth District, Franklin County.
James A. SIDENSTRICKER, II, Plaintiff-Appellant,
v.
MILLER PAVEMENT MAINTENANCE, INC.,
Defendant-Appellee.
No. 09AP-523.

Decided Dec. 15, 2009.

Background: Former employee sued employer alleging he was discharged in retaliation for seeking workers' compensation benefits. After jury trial, the trial court directed verdict in favor of employer. Employee appealed. The Court of Appeals reversed and remanded. After bench trial, the trial court entered judgment for employer. Employee appealed. The Court of Appeals, 158 Ohio App.3d 356, 815 N.E.2d 736, reversed and remanded. On remand, the Court of Common Pleas, Franklin County, No. 98CVH-10-7775, granted summary judgment to employer. Former employee appealed.

Holdings: The Court of Appeals, Tyack, J., held that:
(1) delays in resolving suit, in and of themselves, were not reversible error, and
(2) former employee had no common law cause of action for retaliatory discharge based on his pursuit of workers' compensation benefits.

Affirmed.

Sadler, J., concurred in part and concurred in judgment.

Kline, J., concurred in judgment only.

West Headnotes

[1] Appeal and Error 30  1046.1

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)7 Conduct of Trial or Hearing

30k1046.1 k. Practice in General. Most

Cited Cases

Delays in resolving suit brought by former employee against employer alleging that he was fired in retaliation for seeking workers' compensation benefits, in which employer had been granted summary judgment following two prior appeals, in and of themselves, were not reversible error, as it could not be known what a trier of fact would decide ultimately or would have decided and therefore it could not be said that former employee had been harmed by the delays. (Per Tyack, J., with one judge concurring in part and concurring in judgment, and one judge concurring in judgment only.)

[2] Labor and Employment 231H  852

231H Labor and Employment

231HVIII Adverse Employment Action

231HVIII(B) Actions

231Hk852 k. Existence of Other Remedies;

Exclusivity. Most Cited Cases

Former employee had no common law cause of action for retaliatory discharge based on his pursuit of workers' compensation benefits; rather, Workers' Compensation Act provided former employee exclusive remedy for his claim of retaliatory discharge in violation of rights conferred by the Act. (Per Tyack, J., with one judge concurring in part and concurring in judgment, and one judge concurring in judgment only.) R.C. § 4123.90; Sup.Ct.Rules, Rule I(B)(1), (2).

Appeal from the Franklin County Court of Common Pleas. Ferron & Associates, John W. Ferron, Lisa A. Wafer and Jessica G. Fallon, for appellant.

Dinsmore & Shohl, LLP, and Jan E. Hensel, for appellee.

Thompson & Bishop, and Christy B. Bishop, for amicus curiae Ohio Employment Lawyers Association.

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TYACK, J.

*1 {¶ 1} This is the third appeal of this case. The prior appeals ultimately resulted in a remand of the case for trial on the merits. The trial court delayed conducting the trial and then granted summary judgment for Miller Pavement Maintenance, Inc. ("Miller Pavement") based upon a finding that the case of *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St. 3d 351, 879 N.E. 2d 201, 2007-Ohio-6751, dictated that result. James A. Sidenstricker, II ("appellant"), has appealed, assigning two errors for our consideration:

Assignment of Error No. 1:

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING AND REFUSING TO PROMPTLY COMPLY WITH THE ORDERS OF THIS COURT AND THE OHIO SUPREME COURT TO RETRY THIS CASE TO A JURY.

Assignment of Error No. 2:

THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING APPELLANT'S CLAIMS UPON APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

[1] {¶ 2} Addressing the first assignment of error, counsel for appellant's frustration with the delays in resolving this case is easy to understand. The case has been pending since 1998 and no resolution favorable to his client is in sight. However, we cannot find reversible error based solely upon the delays. We cannot know what a trier of fact would decide ultimately or would have decided in this case and therefore cannot say that appellant has been harmed by the delays. As a result, we have no choice but to overrule the first assignment of error.

[2] {¶ 3} The second assignment of error presents a more difficult legal question. The question centers upon the impact of the *Bickers* case on this particular fact situation. The syllabus for *Bickers* reads:

An employee who is terminated from employment while receiving workers' compensation has no common-law cause of action for wrongful dis-

charge 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. (*Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357, 797 N.E.2d 61, limited.)

{¶ 4} The facts of the *Bickers* case indicate that Shelley Bickers was fired because she was unable to do her work. She was unable to work due to injuries she received on the job. She was receiving workers' compensation benefits as a result of her injuries. Specifically, she was receiving temporary total disability compensation. After she was fired, she filed a lawsuit in which she alleged that firing her was against public policy and that public policy was the basis for a tort claim. Her counsel relied upon *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 797 N.E.2d 61, 2003-Ohio-5357, in pursuing the litigation.

{¶ 5} The Supreme Court of Ohio issued its opinion in the *Bickers* case with the syllabus set forth above. The body of the Supreme Court opinion makes it clear that the court was addressing situations where a person is discharged for nonretaliatory reasons. The court stated:

*2 In addition to concluding that *Coolidge* is inapplicable to *Bickers*'s situation, we also hold that the constitutionally sanctioned, and legislatively created, compromise of employer and employee interests reflected in 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 non-retaliatory reasons.

Id. at ¶ 17, 879 N.E. 2d 201.

{¶ 6} The facts in appellant's case, as alleged for purposes of summary judgment, are far different. Appellant was a construction worker for appellee Miller Pavement between 1996 and 1998. In April 1998, he began experiencing pain in his lower abdomen, which a doctor later diagnosed as a hernia. Appellant initially tried to work through the pain, but after telling his supervisor about the hernia, he was immediately demoted to a more labor-intensive position, and advised to file a workers' compensation claim. When

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appellant attempted to file the claim, the company's owner, Pete Miller, threatened appellant that he would deny the claim and "make things hard on him." Appellant continued to work for Miller Pavement, despite the many hurdles that Miller Pavement placed in his path, and when appellant kept coming back to work, Pete Miller had him fired. The reasons appellant's supervisor gave for his termination were poor work performance and bad attitude.

{¶ 7} Appellant sued Miller Pavement for various employment violations, including wrongful discharge, and workers' compensation retaliation, under R.C. 4123.90. The matter was tried to a jury in August 2000, but at the conclusion of the plaintiff's case-in-chief, Miller Pavement moved for, and the trial court granted, a directed verdict for the defendant on all counts. (Decision & Entry Granting Defendant's Motion for Summary Judgment, April 30, 2009, at 2.) Appellant appealed to this court, and we reversed the trial court as to the wrongful discharge and retaliation counts, and remanded the case for a new trial. See *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 10th Dist. No. 00AP-1460, 2001-Ohio-4111 (hereafter "*Sidenstricker I*"). On remand, the trial court initially failed to adhere to this court's instructions, and held a special hearing to determine whether appellant had a prima facie wrongful discharge claim sufficient to go to the jury. Then, the trial court decided to hold a bench trial on the statutory claim (retaliation), and only if appellant prevailed on the statutory claim would the trial court allow the public policy claim of wrongful discharge to be heard by the jury. The trial court proceeded with the bench trial, and summarily determined that appellant had not met his burden of proof, granted judgment for Miller Pavement, and kicked the remaining claim as well.

{¶ 8} Appellant again appealed to this court, and again we reversed the trial court: "The trial court's determination that the first two elements of the public-policy claim are established as a matter of law is res judicata, the court's determination having been properly made[.]" *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 158 Ohio App.3d 356, 815 N.E.2d 736, 2004-Ohio-4653, ¶ 16 (hereafter "*Sidenstricker II*").

*3 {¶ 9} Miller Pavement appealed this court's ruling in *Sidenstricker II* to the Ohio Supreme Court, which

accepted the appeal for review on January 26, 2005, but dismissed the appeal as having been improvidently granted on August 16, 2006. See *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 110 Ohio St.3d 1258, 853 N.E.2d 666, 2006-Ohio-4203, ¶ 1. Immediately after the case returned to the trial court for re-trial as instructed by this Court in *Sidenstricker II*-Miller Pavement filed a motion to stay trial, pending the Supreme Court of Ohio's ruling in another case, which was *Bickers*. (See Final Order, at 3.) Appellant opposed the stay, but six months later, the trial court granted Miller Pavement's motion. On December 20, 2007, the supreme court released the *Bickers* case, which prompted Miller Pavement to file a motion for summary judgment two months later. Appellant again opposed Miller Pavement's motion for summary judgment. The trial court granted Miller Pavement's motion about 13 months later. It is from the trial court's entry of summary judgment for Miller Pavement on appellant's claims for wrongful discharge and retaliation on May 1, 2009 that appellant now appeals.

{¶ 10} The theory in appellant's case has always been that he was fired for retaliatory reasons, namely his pursuit of a workers' compensation claim as a result of injuries he sustained on the job. Thus, the body of the *Bickers* opinion makes it clear that the Supreme Court of Ohio was not intending to address the very situation presented by appellant's case and indicates that the *Bickers* case should not dictate the outcome of appellant's case.

{¶ 11} However, we, as an appellate court, are bound by Rule 1 of the Supreme Court Rules for the Reporting of Opinions. Rule 1(B)(1) and (2) reads:

(B)(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.

{¶ 12} Since the syllabus for the *Bickers* case does not indicate that the rule of law contained in that syllabus applies only to nonretaliatory discharges, the syllabus holds that persons who are fired for retaliatory reasons are also barred from pursuing a public policy claim based upon the policies underlying R.C.

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4123.90. In short, the syllabus for the *Bickers* case, as read through the lens of Rule 1 of the Supreme Court Rules for the Reporting of Opinions, supports the trial court's ruling ending appellant's case. We note the substantial differences in the facts of appellant's case from those of the *Bicker* case. We also note that R.C. 4123.90 is a statutory remedy and provides only equitable relief. Therefore there is no right to a jury trial. See *Sidenstricker II* at ¶ 10 citing *Hoops v. United Tel. Co. of Ohio* (1990), 50 Ohio St.3d 97, 553 N.E.2d 252 ("Section 5, Article I, Ohio Constitution preserves 'inviolable' the right to a jury trial for those civil actions where the right existed prior to the adoption of the state Constitution.") Where a statute sets forth a new civil right that affords equitable relief for which there was no right to trial by jury at common law, there is no right to a jury trial for an action brought under the statute unless the legislature specifically grants such a right. *Hoops* at 98-100, 553 N.E.2d 252. On the other hand, the common-law claim of wrongful discharge sounds in tort; it is a purely legal claim, insofar as it seeks money damages only (i.e., does not seek reinstatement with back pay, etc.). There is a right to trial by jury for such a common-law wrongful discharge claim. See, e.g., *Sidenstricker II*, ¶ 11 (citing *Boyd v. Winton Hills Med. & Health Ctr., Inc.* (1999), 133 Ohio App.3d 150, 162, 727 N.E.2d 137; *Brunecz v. Houdaille Indus., Inc.* (1983), 13 Ohio App.3d 106, 468 N.E.2d 370; *Kent v. Chester Labs, Inc.* (2001), 144 Ohio App.3d 587, 761 N.E.2d 60; *Collins v. Rizkana*, 73 Ohio St.3d 65, 70, 652 N.E.2d 653, 1995-Ohio-135).

*4 {¶ 13} However, we are not at liberty to overrule the syllabus of a Supreme Court opinion which is on point on the determinative legal issue. We therefore overrule the second assignment of error.

{¶ 14} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER, J., concurs in part and concurs in judgment. KLINE, J., concurs in judgment only.

KLINE, J., of the Fourth Appellate District, sitting by assignment in the Tenth Appellate District. SADLER, J., concurring in part and concurring in judgment.

{¶ 15} While I agree with the disposition of the case

and concur that the trial court's judgment be affirmed, I write separately to express my rationale with regard to each assignment of error. With respect to appellant's first assignment of error, the trial court did not abuse its discretion in its handling of this case, in light of its particular circumstances. With respect to the second assignment of error, I agree that we are bound to follow the syllabus set forth in *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St. 3d 351, 879 N.E. 2d 201, 2007-Ohio-6751. For these reasons, I respectfully concur in part and concur in judgment.

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