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IN THE SUPREME COURT OF OHIO

KEITH LAWRENCE, Plaintiff-Appellant vs. CITY OF YOUNGSTOWN, Defendant- Appellee.	:	CASE NO. 2011-0621 On Appeal from the Mahoning County Court of Appeals, Seventh Appellate District Case No. 09 MA 189

BRIEF OF AMICUS CURIAE OHIO EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT KEITH LAWRENCE

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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 who are subjected to retaliatory terminations are permitted an effective remedy at law. The time within which a terminated employee must protest a retaliatory termination that violates Section 4123.90 should not vary depending on the whim of an employer in deciding when, or even whether, to notify the employee of his or her termination. OELA files this amicus brief to cast light on this issue and 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

Can an employer fire an employee illegally and avoid all liability by simply failing to inform the terminated employee of the wrongful act? This case presents just such a scenario. It arises from a court of appeals decision holding that, in fact, an employer can defeat an

employee's claim under Ohio Revised Code Section 4123.90, the workers' compensation retaliation statute, by withholding or delaying notification of an employee's termination from the terminated employee. *Amicus curiae* OELA files this brief to urge this Court to reverse this erroneous interpretation of Section 4123.90.

Appellant Keith Lawrence ("Lawrence") was suspended without pay on January 7, 2007. Two days later, his employer, Appellee City of Youngstown ("the City"), claims it made the decision to terminate him. But Lawrence was not notified of his alleged termination until February 19, 2007, nearly six weeks later. Under Section 4123.90, Lawrence was required to submit written notice of a claimed violation of the statute within ninety days of his discharge. The City argued, and the court of appeals agreed, that the time period in which to submit the required notice begins running on the date the employer intends to terminate the employee, not the date the employee is informed of the decision. This left Lawrence with a period of only seven weeks in which to submit Section 4123.90's required notice of a violation, instead of the ninety days contemplated by the statute, and his written notice was deemed untimely.

The only basis for this conclusion was the lower court's assertion that the plain language of the statute required it. This was incorrect. The plain language of the statute does not provide a clear answer to the question of what date should be used in computing the time limits it contains. It simply states that a terminated employee's written notice of a violation must be received "within the ninety days immediately following the discharge." R.C. § 4123.90. But the statute does not define discharge or state when one has occurred. In the vast majority of cases, this question is academic: the employer tells the employee directly, face to face, that his or her employment is terminated, effective immediately. Even for employees on vacation or leave, there is usually a very clear indication of termination when an expected paycheck does not

arrive. When an employer terminates an employee who is on unpaid suspension or unpaid medical leave, however, a question arises as to when the discharge actually occurs.

The only reasonable answer to this question is that an employee's discharge occurs when the employer tells the employee he or she has been discharged and unequivocally ends the employment relationship. Any other answer would have absurd and unjust results. Holding that a discharge has occurred without any communication of the discharge to the employee would permit the employer to withhold notice indefinitely to prevent the employee from seeking recourse under the workers' compensation retaliation statute. There is no basis in Section 4123.90 for drawing a line between a minor delay in notification and a delay that approaches or exceeds the statute of limitations. An employee like Lawrence could believe he has merely been suspended, when in fact, he has been terminated for months—and he could continue in that mistaken belief even after the deadline for contesting a retaliatory termination has passed. This would utterly defeat the purpose of the workers' compensation retaliation statute.

Even beyond the workers' compensation statute, a rule that an employer can discharge an employee without informing the employee of the discharge would create chaotic and harmful effects. For instance, under the lower court's holding, the owner of a company could argue, without any documentation or corroboration, that the statute of limitations began to run on whatever date the owner decided, in his or her own mind, to fire the employee.

This Court has previously held, consistent with Revised Code Section 4123.95, that Section 4123.90 is to be liberally construed in favor of injured employees, to effectuate the remedial purposes of the workers' compensation statute. This Court has also acknowledged that there is more than one possible answer to the question of when an employee's discharge occurs. In *Oker v. Ameritech Corporation* (2000), 89 Ohio St. 3d 223, 729 N.E.2d 1177, this Court held

that when the date an employee is informed of his or her termination differs from the effective date of the termination, the employee's claim accrues on the later of the two dates. This was based in part on a liberal construction rule similar to Section 4123.95, and in part on the principle that, until an employee's termination becomes presently harmful, the employee will not have the full opportunity and incentive to pursue his or her claim. Of course, the same principle applies to an employee who is not yet aware of the employer's discharge decision.

Consistent with the logic of *Oker* and the liberal construction rule of Section 4123.95, this Court should adopt a definition of "discharge" that requires both the unequivocal termination of the employee's employment and communication of this decision to the employee. Any other interpretation would deprive employees of meritorious retaliation claims and transform the concept of at-will employment to the point that employees are unable to determine with certainty whether they are even employed. The decision of the Court of Appeals must be reversed.

III. STATEMENT OF FACTS AND THE CASE

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

IV. LAW AND ARGUMENT

PROPOSITION OF LAW:

A "discharge" occurs, for purposes of the time limits contained in Ohio Revised Code Section 4123.90, when the employer has unequivocally terminated the employer-employee relationship and the employee has received notice of this fact.

A. Revised Code Section 4123.90 States That Its Limitation Period Begins to Run Upon the Discharge of an Employee, But It Leaves the Question of When a "Discharge" Has Occurred Open to Construction.

The Ohio General Assembly, in crafting the workers' compensation system, explicitly commanded that the statutory provisions governing the system be "liberally construed in favor of employees and the dependents of deceased employees." R.C. § 4123.95. This liberal

construction rule applies not only to the workers' compensation provisions themselves, but also the anti-retaliation provision, Section 4123.90. *Id.* (applying liberal construction to "Sections 4123.01 to 4123.94, inclusive, of the Revised Code").

Instead of liberally construing the portion of Section 4123.90 pertaining to time limits, though, the lower court here applied a narrow interpretation, concluding that the time limitations of one hundred eighty days for filing an action and ninety days for notifying an employer in writing of a claimed violation are mandatory and jurisdictional, and that the starting date in every instance is not the date an employee is told of his or her discharge, but the date the employer decides to discharge the employee. *Lawrence v. City of Youngstown* (7th Dist.), 2011-Ohio-998, ¶¶ 25, 30. While the court acknowledged the liberal construction rule, it held that it was inapplicable here, since there is only one possible interpretation of the language of the statute. *Id.* at ¶¶ 30-31.

This conclusion was incorrect. Section 4123.90 does state that its time limits run from the date of discharge, but it does not answer the question of when a discharge has occurred. As this Court has previously acknowledged, there is more than one possible answer to this question, contrary to the lower court's claim. When an employer terminates an employee's employment, there are at least three separate moments that could be considered the time of "the discharge": the moment when the employer decides to terminate the employee's employment; the moment when the employer communicates this decision to the employee; and the moment when the termination goes into practical effect (that is, when the employee stops performing services and earning wages). In a classic "firing-on-the-spot," where the supervisor fires the employee face-to-face, effective immediately, all three of these events occur at once. But these three events can also occur separately, and they can be spread out over months. An employer can decide in

October to terminate several employees, notify the employees in November, and make the terminations effective at the end of December. Or, less commonly, as happened here, the employer may decide to terminate an employee, make the termination effective immediately, and notify the employee much later (such as when the employee seeks to return from an unpaid suspension or medical leave).

This Court's precedents demonstrate the ambiguity regarding whether a discharge occurs as of the effective date, the date of notice, or some other time. In *Oker v. Ameritech Corp.* (2000), 89 Ohio St.3d 223, 729 N.E.2d 1177, this Court was faced with the question of when an age-discrimination claim accrues pursuant to Chapter 4112 of the Revised Code. In that case, the plaintiff was informed in November that he was being terminated, effective on a date in January of the next year. The defendant argued that the statute of limitations under Revised Code Section 4112.02(N) should run from the date the plaintiff was told he was being terminated, while the plaintiff argued it should run from the date the termination became practically effective. The *Oker* Court acknowledged that there were two potentially valid interpretations. Federal courts have traditionally followed the defendant's proposed interpretation, using the notification date as the date of accrual, even if the employment relationship continues after this date. *Id.* at 225 (citing *Delaware State College v. Ricks* (1980), 449 U.S. 250). But the *Oker* Court, citing the liberal construction rule in Section 4112.08 held that the statute of limitations should run from the later of the two dates, after the employee has been notified of the termination and the employment relationship has ended. *Id.* at 225-26.

Oker demonstrates that there is more than one answer to the question of when a discharge occurs for purposes of the accrual of a cause of action. At minimum, it can occur upon the announcement of a termination or upon the effective date of a previously announced termination.

The purpose of a liberal construction rule is to provide guidance to courts when they choose between such potential interpretations. The Court in *Oker* correctly chose the later date, liberally construing Chapter 4112 to further its remedial purpose. The lower court here would likely have done the same in light of the liberal construction rule in Section 4123.95, but it failed to recognize that there *are* multiple dates when a discharge can be deemed to occur.

But *Oker* was not based solely on the liberal construction rule. It also relied on the principle that a cause of action does not generally accrue until " 'the infringement of a right arises.' " *Id.* at 224 (quoting *State ex rel. Teamsters Local Union 377 v. Youngstown* (1977), 50 Ohio St. 2d 200, 203-04, 364 N.E.2d 18). This is because a plaintiff has the full opportunity and incentive to pursue a cause of action only once he or she begins to experience its harmful effects. An employee in Oker's situation, who is aware of his impending termination, but also knows that his employer might reconsider or compromise before he suffers any harm, could be lulled into a false sense of security, or could avoid much of the impending pecuniary harm by finding a new job before the effective date of the discharge. *Oker* acknowledges that a discharge becomes concrete from the employee's perspective, and thus fully actionable, only after the employee both knows of the employer's decision and experiences its harmful impact.

The same principle applies for an employee like Lawrence, who was aware of no reason at all to pursue his claim until he learned of the City's decision to terminate him. Just like Oker, Lawrence lacked the opportunity or incentive to investigate or pursue his claim until the City had made the decision to terminate him, unequivocally ended its employment relationship with him, and communicated its decision to him. Concluding that Lawrence's claim accrued prior to the occurrence of all of these events would contradict both the reasoning of *Oker* and the liberal construction rule of Section 4123.95.

B. Treating the Date of an Employer's Decision to Discharge an Employee as the Date of the Discharge Contravenes the Remedial Purpose of Section 4123.90 and Unreasonably Threatens Employees' Ability to Seek Recourse.

As was the case with Chapter 4112 in *Oker*, the remedial purpose of the workers' compensation retaliation statute here, and the interests of the employees it protects, can be protected only by an interpretation of the term "discharge" that contemplates both an unequivocal termination of the employee's employment by the employer and notice to the employee that the action has occurred. Where notice occurs prior to the action, *Oker* already holds that the termination is accomplished only after both events occur. The same must be true when the two events are reversed.

As the lower court acknowledged, under the interpretation it adopted, an employee might not learn he or she has been discharged until more than ninety days have passed. This would leave the employee without recourse under Section 4123.90. The court dismissed this patently unjust consequence of its holding, stating that in this particular instance, Lawrence had what the court deemed sufficient time (forty-nine days, instead of the ninety days granted by the statute) in which to provide written notice of a claimed violation to the City. In addition, the court found it relevant that there was no allegation that the City had intentionally concealed its decision to discharge Lawrence in an effort to suppress his claim. 2011-Ohio-998, at ¶ 32.

This Court cannot so casually dismiss this glaring flaw in the rule adopted below. The lower court concluded that forty-nine days is a sufficient limitations period, instead of the ninety days in the statute, by substituting its own judgment for that of the General Assembly. The only limitations period the statute identifies as sufficient to allow an employee to seek counsel, determine his or her rights, and deliver written notice of a claimed violation is ninety days. The court made the same substitution of its own judgment for the legislature's when it distinguished

between a notice of termination that merely shortens the statutory limitations period and notice so late that it extinguishes a claim entirely. The statute provides no basis for such a distinction.

Nothing in Section 4123.90, as interpreted by the lower court, would prevent an employer from intentionally or accidentally suppressing a meritorious retaliation claim by failing to inform an employee of a discharge decision until the limitations period has already passed. Nothing in the statute or the opinion would prevent an employer from issuing an employee a notice of termination that falls so close to the already brief limitations period that it prevents the employee, as a practical matter, from enforcing his or her rights.

When the General Assembly created the narrow, ninety-day window for initiating claims of workers' compensation retaliation, it had to have assumed that the entire ninety-day period would be available for terminated employees, to allow them to seek counsel and investigate their potential claims. This is even clearer in light of the fact that the statute provides a cause of action not only for unlawful discharge, but also for retaliatory "demotion, reassignment, or punitive action." Employees who are reassigned will have the entire ninety-day limitations period available to them, as a change in duties will always be immediately apparent to an employee. The same is true of nearly all demotions and formal discipline, such as suspensions. Retaliatory discharges are significantly more harmful than any of these other adverse actions, but under the "silent discharge" rule adopted below, the window in which a discharged employee can contest the employer's conduct could be much shorter than the window for contesting lesser retaliatory acts—or even nonexistent. The General Assembly surely did not intend to make it more difficult for illegally discharged employees to pursue their claims than illegally suspended or demoted employees, and it just as surely did not intend to allow unscrupulous employers to retaliate with impunity against the very employees Section 4123.90 was enacted to protect.

The only way to prevent these absurd and unjust consequences is to interpret the term "discharge" to mean a decision to terminate an employee that is both put into practical effect *and* communicated to the employee. Any other interpretation would allow employers to engage in retaliatory terminations of employees who are on suspension or medical leave and prevent those employees from ever contesting their discharges under Section 4123.90. Such an interpretation would contravene not only the liberal construction rule and the core purpose of Section 4123.90, but fundamental notions of justice and fairness.

C. Defining "Discharge" in a Manner That Does Not Include Notice to the Discharged Employee Would Produce Other Absurd and Unjust Consequences Beyond the Context of Workers' Compensation Retaliation.

The lower court's interpretation carries the potential for a disruptive impact throughout the entire system of at-will employment in Ohio. Beyond its effects on Section 4123.90 and the workers' compensation system, a rule that an employer can accomplish the termination of an employee without telling the employee would be an invitation to mischief and chaos.

This rule would have particularly strange effects with respect to sole proprietors, who often make personnel decisions without involving human resources officers or department heads. The lower court here set the date of Lawrence's "discharge" based on the date of an internal communication about his termination. But if a company's owner wrongfully terminates an employee who is on an extended, unpaid medical leave, but never makes a written record of the decision or discusses it with anyone, does the employee's claim accrue on whatever date the owner claims he or she decided, in his or her own mind, to discharge the employee?

What should happen under the lower court's rule when an employer "discharges" an employee, but does not tell the employee, allowing the employee to continue performing services until payday arrives and the employee realizes no paycheck has been deposited? Is the employee

entitled to his or her customary wages? The wages of a new hire? The prevailing wage for comparable services in the marketplace? Will there be a new body of law to address the compensation of such "zombie workers," who have been fired, yet keep coming back to work day after day under the mistaken belief that they are still gainfully employed?

The effects of the lower court's holding would reach even beyond the context of discharges. The established rule in Ohio is that an employer cannot retroactively revoke benefits that have already been earned by an employee. E.g., *Ebert v. Stark County Bd. of Mental Retardation* (1980), 63 Ohio St.2d 31, 33-34, 406 N.E.2d 1098. But using the lower court's reasoning, an employer could reduce its employees' sick leave accrual rate in January, tell the employees in February, and then claim that this action was not retroactive, as its effect was prospective from the date of the actual "decision," irrespective of the employees' lack of notice.

Such absurd and unjust results can easily be avoided using a sensible interpretation of the term "discharge." Under ordinary principles of contract law, there are contracts that specify they can be terminated unilaterally "without notice," but that does not mean one party can decide that the contract has ended and not even tell the other party. In *Gray v. American Express Company* (D.C. Cir. 1984), 743 F.2d 10, a contract between a credit card company and its cardholder stated that the contract could be terminated at any time without notice to the cardholder. The court, though, refused to carry this provision to its logical extreme by permitting the company to cancel the contract and saddle the cardholder with the consequences of dishonored transactions, stating:

> Commonly understood, the function of notice is to provide forewarning of an event. Similarly, in the context of contractual relations, notice allows the party notified to contemplate, and to prepare for, an action that will occur. By contrast, and reasonably interpreted, a contract that is cancellable without notice implies that it can be terminated without forewarning. Such a contract provision ordinarily does not suggest, however, that the

> cancellation is effective retrospectively to events that transpired prior to notification of the decision to cancel.

Id. at 17-18 (citations omitted). The court held that the company did not need to give advance notice of cancellation, but it did have to at least communicate its decision to the cardholder before the cancellation could take effect. As the court concluded, "To allow cancellation without any communication of the decision is to turn the contract into a snare and deceit." *Id.* at 19.

Gray's reasoning is instructive here. This Court has recognized that at-will employment is an essentially contractual relationship. *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, at ¶¶ 17-20 (noting contractual nature of alterations to terms or conditions of at-will employment). It is true that an employer can terminate an at-will employee without giving the employee *advance* notice, but it cannot be true that the employer can terminate the employee without notifying the employee at all, any more than one party to a contract can terminate the contract without telling the other party. If a party does attempt to terminate the contract without communicating the termination to the other contracting party, the termination is deemed prospective from the date of notice, to avoid harm to the terminated party—in *Gray*, that harm took the form of expenses incurred prior to notice of termination, and here, it was the expiration of a substantial portion of the statute of limitations.

While it is important that a credit card user be informed when the cardholder agreement has been terminated, this pecuniary interest pales in comparison to how crucial it is that an employee know when his or her employment has been unequivocally terminated. An employee who is on unpaid medical leave, a leave of absence, or suspension likely expects that his or her employment will resume. In contrast, a terminated employee who is not immediately informed of a discharge decision will not realize he or she needs to start seeking alternative employment, apply for unemployment compensation (which, pursuant to Section 4141.29(A)(1), cannot be

awarded retroactively for any week in which a claimant did not file a claim), adjust retirement or investment plans, or attempt to obtain health insurance. Depending on an employee's finances and job prospects, the employee may need to begin contemplating relocation or retraining, pursue different living arrangements, seek loans, or change his or her family's spending patterns.

And, of course, employees terminated under suspicious or clearly illegal circumstances cannot begin quickly enough the often difficult and time-consuming process of seeking legal counsel and determining their legal rights—particularly when the statute of limitations for some causes of action are as short as the ninety-day period in Section 4123.90. Employees without prior experience in the legal system may not even realize there is a workers' compensation statute, much less a statute of limitations; they will often approach an attorney with only the basic notion that what happened to them was unjust. Depriving these employees of the full benefit of the limitations period places an additional, unreasonable burden on top of the extreme pressures already faced by discharged employees. In contrast, the rule OELA advocates would have almost no effect on the rights of employers. Employers exercise complete control over the timing of their own discharge decisions, the date those decisions take effect, and the time and manner in which they communicate these decisions to their employees.[1] The only benefit employers gain from the lower court's rule is an illegitimate benefit: the unwarranted ability to commit illegal retaliatory discharges with impunity.

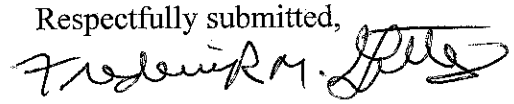
V. Conclusion

A "discharge" for purposes Section 4123.90 of the Revised Code must be interpreted to occur only when the employer has both unequivocally terminated the employee's employment

[1] While there may be instances where an employer cannot easily reach an employee to convey notice of the discharge decision, ordinary legal principles, such as constructive notice, are sufficient to accommodate such circumstances where the employer shows it made reasonable efforts to communicate its discharge decision to an employee.

and communicated this action to the employee. Adopting a narrower interpretation would violate the General Assembly's liberal construction rule, undermine the remedial purpose of Section 4123.90's prohibition of workers' compensation retaliation, and produce absurd and unjust consequences far beyond this case. For the reasons stated above, *amicus curiae* OELA urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2011, a copy of the Brief of Amicus Curiae Ohio Employment Lawyers Association in Support of Appellant Keith Lawrence was served by postage-paid U.S. Mail upon the following:

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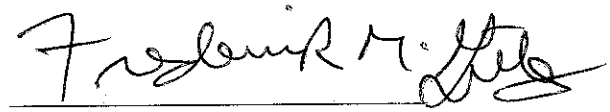

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