
In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
ERIE COUNTY, OHIO
CASE No. E-14-009

MICHAEL P. ONDERKO,
Plaintiff-Appellee,

v.

SIERRA LOBO, INC.
Defendant-Appellant.

NOTICE OF CERTIFIED CONFLICT

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COUNSEL FOR APPELLANT SIERRA
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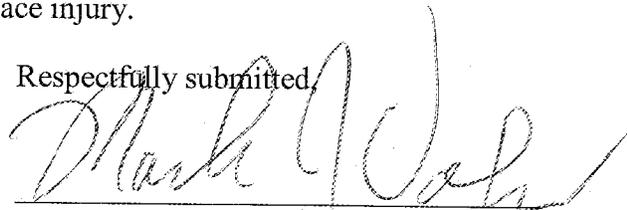
Appellant Sierra Lobo, Inc. hereby gives notice that on November 5, 2014, the Erie County Court of Appeals, Sixth Appellate District certified a conflict on a rule of law between its merit decision in *Michael P. Onderko v. Sierra Lobo, Inc.*, 6th Dist. Erie No. E-14-009, 2014-Ohio-4115, ---N.E.3d ---, and the Fifth District Court of Appeals' decision in *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist. 1997).

The November 5, 2014 decision and judgment of the Sixth District Court of Appeals granting Appellant's motion to certify a conflict is attached hereto as Exhibit A. Copies of the conflicting decisions of the Sixth District Court of Appeals' decision in *Michael P. Onderko v. Sierra Lobo, Inc.*, 6th Dist. Erie No. E-14-009, 2014-Ohio-4115, ---N.E.3d ---, and the Fifth District Court of Appeals' decision in *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist. 1997), are attached hereto as Exhibit B and Exhibit C respectively.

The legal issue certified by the Sixth District Court is as follows:

Whether, as an element of establishing a prima facie claim for retaliatory discharge under R.C. 4123.90, a plaintiff must prove that he or she suffered a workplace injury.

Respectfully submitted,



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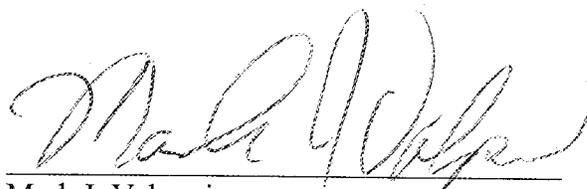
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Certified Conflict was sent by ordinary U.S. mail, pursuant to Civ.R. 5(B)(2)(c), this 11th day of November 2014 to the following counsel:

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Mark J. Valponi

COUNSEL FOR APPELLANT,
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EXHIBIT A

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ERIE COUNTY, OHIO
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LUVADA S. WILSON
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Michael P. Onderko

Court of Appeals No. E-14-009

Appellant

Trial Court No. 2013-CV-0187

v.

Sierra Lobo, Inc.

DECISION AND JUDGMENT

Appellee

Decided: **NOV 05 2014**

This matter is before the court on the App.R. 25 motion of appellee, Sierra Lobo, Inc., to certify a conflict between our court's decision in *Onderko v. Sierra Lobo, Inc.*, 6th Dist. Erie No. E-14-009, 2014-Ohio-4115, --- N.E.3d ---, and the decisions of several other district courts on the following question:

In *Wilson v. Riverside Hospital*, 18 Ohio St.3d 8 (1985) (syllabus), the Ohio Supreme Court held that "[a] complaint filed by an employee against an employer states a claim for relief for retaliatory discharge when it alleges that the employee was injured on the job, filed a claim for

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workers' compensation, and was discharged by that employer in contravention of R.C. 4123.90." Based upon this holding, must a plaintiff pursuing a claim for retaliatory discharge under R.C. 4123.90 prove that he suffered a workplace injury?

Appellant, Michael Onderko, has filed a response in opposition to appellee's motion.

Article IV, Section 3(B)(4) of the Ohio Constitution provides, "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." The Ohio Supreme Court has set forth three conditions that must be met before the certification of a conflict:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. (Emphasis sic.) *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

Upon careful consideration, we find that motion to certify the conflict must be granted.

In its motion, appellee argues that our decision is in conflict with *Young v. Stelter & Brinck, Ltd.*, 174 Ohio App.3d 221, 2007-Ohio-6510, 881 N.E.2d 874 (1st Dist.), *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist.1997); *Lawrence v. Youngstown*, 7th Dist. Mahoning No. 09 MA 189, 2012-Ohio-6237, *Balog v. Matteo Aluminum, Inc.*, 8th Dist. Cuyahoga No. 82090, 2003-Ohio-4937, *Goersmeyer v. General Parts, Inc.*, 9th Dist. Medina No. 06CA00045-M, 2006-Ohio-6674, *Brannon v. City of Warren*, 11th Dist. Trumbull No. 2003-T-0077, 2004-Ohio-5105.

We initially note that the decisions of the First, Seventh, Eighth, Ninth, and Eleventh Districts do not directly consider the issue of whether the failure to prove a workplace injury prevents a plaintiff from establishing a prima facie case of retaliatory discharge under R.C. 4123.90. In particular, the decisions of the First, Seventh, Eighth, and Ninth Districts involved situations where it was undisputed that the plaintiff suffered a workplace injury. Further, in the Eleventh District's decision, although the court noted that the plaintiff *allegedly* suffered a workplace injury, it did not address that issue in its analysis, instead focusing on the plaintiff's failure to show that the employer's proffered legitimate, non-retaliatory reason for discharge was merely pretext. Thus, even though those cases recited the language from *Wilson*, because the issue of a workplace injury was not addressed or determinative of the outcome, we do not find a conflict between those decisions and ours.

However, the Fifth District directly addressed the issue of whether proof of a workplace injury is a necessary element of a prima facie case of retaliatory discharge. In *Kilbarger*, the plaintiff's first assignment of error was that the trial court "applied an incorrect burden of proof by requiring [the plaintiff] to prove that he was injured at work." *Kilbarger* at 338. The Fifth District overruled this assignment of error, stating that the plaintiff had the burden to prove all the elements of the case at trial, and that the plaintiff failed to satisfy his burden to prove that he was injured at work. *Id.* at 338-339.

Therefore, upon due consideration, we find appellee's motion to certify a conflict well-taken. Our holding in *Onderko v. Sierra Lobo, Inc.*, 6th Dist. Erie No. E-14-009, 2014-Ohio-4115, --- N.E.3d ---, is in conflict with the Fifth District Court of Appeals' decision in *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist.1997). Accordingly, we certify the record in this case for review and final determination to the Supreme Court of Ohio on the following issue:

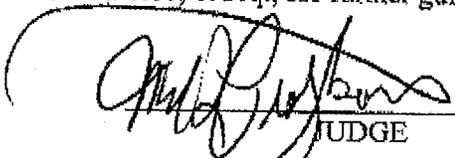
Whether, as an element of establishing a prima facie claim for retaliatory discharge under R.C. 4123.90, a plaintiff must prove that he or she suffered a workplace injury.

The parties are directed to S.Ct.Prac.R. 8.01, et seq., for further guidance.

Mark L. Pietrykowski, J.

Stephen A. Yarbrough, P.J.

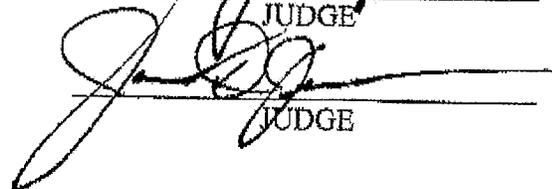
James D. Jensen, J.
CONCUR.



JUDGE



JUDGE



JUDGE

EXHIBIT B

MANDATE

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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Michael P. Onderko

Court of Appeals No. E-14-009

Appellant

Trial Court No. 2013-CV-0187

v.

Sierra Lobo, Inc.

DECISION AND JUDGMENT

Appellee

Decided:

SEP 19 2014

Margaret O'Bryon, for appellant.

Mark P. Valponi and Brian E. Ambrosia, for appellee.

YARBROUGH, P.J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Erie County Court of Common Pleas, which granted summary judgment in favor of defendant-appellee, Sierra Lobo, Inc., on plaintiff-appellant's, Michael Onderko, claims for retaliatory discharge and

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intentional infliction of emotional distress. For the following reasons, we affirm, in part, and reverse, in part.

A. Facts and Procedural Background

{¶ 2} On Thursday, August 9, 2012, appellant was moving a table and some cabinets in the course of his employment as an engineering tech for appellee when he felt some pain in his right knee. Appellant states that because of the pain, he left work early that day. On his way home, appellant stopped at a gas station. As he was stepping off a curb, his right knee “gave out.” Consequently, he went to the hospital. The handwritten notes from the emergency room records document that “[appellant] had R knee pain for a couple weeks, but today took a step off the curb & heard a ‘pop.’ Now painful to bear weight.” Appellant states that the emergency room doctor then recommended that he follow up with an orthopedic doctor.

{¶ 3} The next day, appellant saw Dr. Biro. A clinic note from Dr. Biro indicates that appellant had injured his right knee six weeks earlier, which injury resolved itself after several weeks of ice, rest, and walking on crutches. The note further indicates that appellant continued with daily living until the knee “completely let go” when he was climbing a curb.

{¶ 4} Notably, neither the hospital records nor Dr. Biro’s notes included any mention by appellant that he suffered an injury while at work. Appellant states in his affidavit that he did not mention work to the emergency room doctor because he was afraid of being fired since it was known that appellee was very concerned about its safety

record. In addition, appellant states that Dr. Biro's clinic note contained incorrect information in that appellant did not have a prior injury to his right knee, but rather had a prior injury to his left knee. Appellant also states that he tried to contact Dr. Biro to correct the clinic note, but that Dr. Biro refused to see him once Dr. Biro found out that it was a workers' compensation injury.

{¶ 5} Following his doctor visits, appellant contacted April Reeves, an employee in appellee's human resources department, and told her that he tore his right ACL.¹ Reeves states in her affidavit that appellant told her the injury did not occur at work, but appellant disputes Reeves' statement in his own affidavit. On August 13, 2012, after speaking with Reeves, appellant then contacted Dave Hamrick, appellee's corporate director of human resources, and inquired about receiving light-duty work. Hamrick informed appellant that appellant could not return to work due to the pain medication appellant was taking.

{¶ 6} Thereafter, still on August 13, 2012, appellant filed a First Report of Injury with the Bureau of Workers' Compensation ("BWC"). Appellant states in his affidavit that he filed the report because Hamrick told him he did not have a work injury but appellant wanted to ensure that it was filed as a work injury. The August 13, 2012 report claims a torn right ACL caused by lifting and pushing equipment. On August 28, 2012, appellant filed a second First Report of Injury, this time claiming a right knee sprain/strain. The BWC initially disallowed appellant's claim, but later vacated that

¹ Nothing in the record supports a medical diagnosis of a torn right ACL.

decision and entered a new decision that allowed appellant's claim on the medical condition of a right knee sprain.

{¶ 7} Appellee appealed the BWC's decision to the Industrial Commission. After a hearing, the Industrial Commission reversed BWC's decision and denied appellant's workers' compensation claim on November 6, 2012. In her decision, the Industrial Commission District Hearing Officer found that appellant's injury was not sustained in the course of his employment. Appellant did not appeal the November 6, 2012 decision. He states that he did not file an appeal because he was already back at work and just wanted the ordeal to be over.

{¶ 8} One month later, on December 12, 2012, appellee terminated appellant's employment. Prior to his termination, appellant had received three performance bonuses, had no discipline write-ups, and had no unexcused absences. Appellant states that Hamrick told him he was being terminated due to the workers' compensation outcome. Hamrick, for his part, states in his affidavit that appellant was terminated "for his deceptive attempt to obtain Workers' Compensation benefits for a non-work related injury."

{¶ 9} On March 8, 2013, appellant initiated his present claims for retaliatory discharge in violation of R.C. 4123.90, and for intentional infliction of emotional distress. As to the claim for retaliatory discharge, appellee moved for summary judgment solely on the basis that appellant could not satisfy the required element of having suffered a workplace injury. Specifically, appellee argued that the Industrial Commission

determined that the injury did not occur at the workplace, and that such decision was binding on appellant through the doctrines of res judicata and collateral estoppel. Thus, appellee concluded it was entitled to judgment as a matter of law. Appellant, on the other hand, argued that having an allowable workers' compensation claim is not a required element of retaliatory discharge under R.C. 4123.90. Rather, citing *Ammon v. Fresh Mark, Inc.*, 7th Dist. Columbiana No. 94-C-46, 1995 WL 472301 (Aug. 9, 1995), appellant contended it is the "mere filing of a compensation claim [that] trigger[s] the statutory protection from discharge."

{¶ 10} As to the claim for intentional infliction of emotional distress, appellee argued that it is entitled to summary judgment because its act of terminating appellant for deceptively attempting to collect benefits for a non-work-related injury is not "extreme and outrageous" conduct, especially where appellant is employed "at-will." Appellant responded by arguing that he did not lie about his workers' compensation claim, and that his claim was supported by the medical report of Dr. Ahn, and by the statements of three co-workers who reported that appellant told them he had aggravated his knee while moving cabinets in the shop.

{¶ 11} The trial court, in granting summary judgment to appellee, agreed that res judicata and collateral estoppel precluded appellant from re-litigating whether he suffered a workplace injury. Further, the trial court determined that "[appellee] did not terminate [appellant] for merely filing a workers' compensation claim and subsequently being denied benefits. Instead, [appellee] terminated [appellant] for engaging in deceptive

practices: engaging in deceptive behavior when he attempted to obtain BWC benefits for an injury that was not work related.” The court concluded,

Therefore, even in holding the evidence most favorable to [appellant], reasonable minds can only come to the conclusion that [appellee] did not violate R.C. 4123.90 as [appellant] did not suffer a work related injury and that [appellee] has proven with clear and convincing evidence that [appellee] terminated [appellant] for misrepresenting his injury as a work related injury. [Appellant] cannot bring forth a prima facie case of retaliatory firing.

{¶ 12} Finally, as it pertains to appellant’s intentional infliction of emotional distress claim, the trial court held that appellant could not prove that appellee’s conduct was extreme and outrageous. As support for its conclusion, the trial court noted that appellant did not suffer a work injury and appellee chose to terminate appellant based upon lawful reasons, i.e., “[appellant’s] dishonesty in filing a workers’ compensation claim for an injury that did not occur at work.”

B. Assignments of Error

{¶ 13} On appeal, appellant presents two assignments of error for our review:

1. The Trial Court Committed Error in Granting Appellee’s Motion for Summary Judgment on the Basis that *Res Judicata* and *Collateral Estoppel* prohibited Appellant from Prevailing on a Retaliatory Discharge Claim Regarding a Work Related Injury.

2. The Trial Court Committed Error in Granting Appellee's Motion for Summary Judgment on the Basis that the Employer's Conduct was not Extreme and Outrageous.

II. Analysis

{¶ 14} We review summary judgment decisions de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Applying Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and viewing the evidence in the light most favorable to the non-moving party, that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

A. Retaliatory Discharge

{¶ 15} A claim for retaliatory discharge under R.C. 4123.90 involves a burden shifting analysis. Initially, the employee bears the burden of establishing a prima facie case of retaliatory discharge. *Napier v. Roadway Freight, Inc.*, 6th Dist. Lucas No. L-06-1181, 2007-Ohio-1326, ¶ 12. Once an employee has set forth a prima facie case, the burden then shifts to the defendant to set forth a legitimate, non-retaliatory reason for the discharge. *Id.* "If the employer sets forth a legitimate, non-retaliatory reason, the burden again shifts to the employee to 'specifically show' that the employer's purported reason is pretextual and that the real reason the employer discharged the employee was because

the employee engaged in activity that is protected under the Ohio Workers' Compensation Act." *Id.*

{¶ 16} Here, the threshold issue we must decide in appellant's first assignment of error is what elements are required to prove a prima facie claim for retaliatory discharge under R.C. 4123.90. Specifically, we must determine whether appellant must prove that he suffered a workplace injury. We hold that he does not.

{¶ 17} Our analysis centers on R.C. 4123.90, which provides, in relevant part,

No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer.

{¶ 18} Appellee argues that the statute requires proof of three elements: (1) the employee was injured on the job, (2) the employee filed a claim for workers' compensation, and (3) the employee was discharged by the employer in contravention of R.C. 4123.90. Similarly, our court on several occasions has stated the elements as, "(1) the employee suffered an occupational injury; (2) the employee filed a workers' compensation claim; and (3) the employee was subsequently demoted or discharged from her employment in retaliation for the filing of the claim for benefits." *E.g., Huth v. Shinner's Meats, Inc.*, 6th Dist. Lucas No. L-05-1182, 2006-Ohio-860, ¶ 17. This formulation of the elements derives from *Wilson v. Riverside Hosp.*, 18 Ohio St.3d 8, 10,

479 N.E.2d 275 (1985), in which the Ohio Supreme Court held “a complaint filed by an employee against an employer states a claim for relief for retaliatory discharge when it alleges that the employee was injured on the job, filed a claim for workers’ compensation and was discharged by that employer in contravention of R.C. 4123.90.”

{¶ 19} However, the Tenth District, in *Sidenstricker v. Miller Pavement Maint., Inc.*, 10th Dist. Franklin Nos. 00AP-1146, 00AP-1460, 2001-Ohio-4111, ¶ 58, restated the elements of a prima facie case for retaliatory discharge under R.C. 4123.90 as: (1) the employee was engaged in a protected activity, (2) he or she was the subject of an adverse employment action, and (3) a causal link exists between the protected activity and the adverse employment action. *See also Ferguson v. SanMar Corp.*, 12th Dist. Butler No. CA2008-11-283, 2009-Ohio-4132, ¶ 17 (adopting the Tenth District’s approach). An employee engages in a protected activity when he or she “file[s] a workers’ compensation claim or institute[s], pursue[s] or testifie[s] in a workers’ compensation proceeding regarding a workers’ compensation claim.” *Sidenstricker* at ¶ 58.

{¶ 20} In reformulating the elements of a prima facie claim under R.C. 4123.90 to clarify that proof of a workplace injury is not required, the Tenth District reasoned first that *Wilson* did not hold that proof of injury on the job is a necessary element of a retaliatory discharge claim. In *Wilson*, the parties did not dispute that the plaintiff was injured in a fall at her place of employment. *Wilson* at 8. As a result of her injury, the plaintiff was unable to work for 11 months. When she notified her employer of her

intention to return to work, the employer informed her that she no longer had a job. The employer explained in a letter that its leave of absence policy only guaranteed a position for ten weeks. Since the plaintiff had been gone for over eleven months, the employer had filled her position. *Id.*

{¶ 21} The plaintiff then filed a complaint against her employer, alleging a violation of R.C. 4123.90. Attached to the complaint was the letter from the employer explaining its leave of absence policy. The employer moved to dismiss the complaint under Civ.R. 12(B)(6) on the grounds that the complaint did not “specifically allege that the discharge was in retaliation for plaintiff’s workers’ compensation claim.” *Id.* On appeal to the Ohio Supreme Court, the employer argued that the attached letter demonstrates that the plaintiff was terminated pursuant to the leave of absence policy and that there was no retaliatory motive. *Id.* at 10. The Ohio Supreme Court rejected this argument, reasoning that the plaintiff’s material allegation with respect to the letter was that her employment relationship was terminated; the complaint did not allege that the plaintiff was discharged because of the leave of absence policy. Thus, the leave of absence policy could not be considered in determining whether the motion to dismiss should be granted. *Id.* The court continued, stating that the material allegations in the complaint were that the plaintiff “was employed by [the employer], she was injured on the job, she received workers’ compensation, she attempted to return to her job after recovering from the work-related injury, and she was discharged in contravention of R.C. 4123.90.” *Id.* The court concluded that “[b]y referring to R.C. 4123.90 in the complaint,

appellant sufficiently complied with the notice pleading requirements of Civ.R. 8(A).”
Id. Thus, the court held “that a complaint filed by an employee against an employer states a claim for relief for retaliatory discharge when it alleges that the employee was injured on the job, filed a claim for workers’ compensation and was discharged by that employer in contravention of R.C. 4123.90.” *Id.*

{¶ 22} A close examination of *Wilson* reveals that the element of “injury on the job” was not the focal point of the decision, as it was undisputed that the plaintiff suffered such an injury. Rather, the focus of the holding was that a reference to R.C. 4123.90 in a complaint for retaliatory discharge was sufficient to satisfy the notice pleading requirements, and that the plaintiff was not required to specifically allege that the discharge was in retaliation for her filing of a workers’ compensation claim.

{¶ 23} The Tenth District in *Sidenstricker* further noted that, although Ohio courts frequently cite *Wilson* for the elements of a retaliatory discharge claim under R.C. 4123.90, only one has directly addressed the element of “injury on the job.” In that single case, *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist.1997), the Fifth District held that the employee failed to satisfy the element of injury on the job, but also held that the employee failed to prove that the employer’s legitimate reason for discharge was pretextual. Thus, no Ohio case has been decided solely on the issue of injury on the job, as appellee requests that we do here.

{¶ 24} After examining *Wilson*, the Tenth District next looked to the language of the statute itself. In examining a statute, the initial question that must be resolved in

determining the intent of the legislature is whether the language is ambiguous. “Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.” *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus. “However, where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction.” *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96, 573 N.E.2d 77 (1991).

{¶ 25} Here, appellee, through its position, advances the interpretation that the phrase “injury or occupational disease which occurred in the course of and arising out of his employment” limits the type of claim and proceedings for which there is protection, and that the limitation is separate and in addition to the limitation that the claim or proceeding must be under the Workers’ Compensation Act. This interpretation results in the conclusion that an employee must prove both that the claim or proceedings are under the Workers’ Compensation Act, and that the claim or proceedings are for an injury that definitively occurred in the course of and arising out of the employment. An at least equally reasonable interpretation, however, is that the phrase is a continuation of the single limiting factor that the claim or proceeding be under the Workers’ Compensation Act, since all claims under the Workers’ Compensation Act are for injuries arising out of the course of employment. Thus, under this interpretation, an employee must prove only

that he or she filed a claim or initiated proceedings under the Workers' Compensation Act.

{¶ 26} Because there are two reasonable interpretations, we must turn to the rules of statutory construction, bearing in mind that “[t]he primary rule in statutory construction is to give effect to the legislature’s intention.” *Cline* at 97. Initially, we note that, in dealing with ambiguity, the legislature has stated its intention that “where a section of the Workmen’s Compensation Act will bear two reasonable but opposing interpretations, the one favoring the claimant must be adopted.” *State ex rel. Sayre v. Indus. Comm.*, 17 Ohio St.2d 57, 62, 245 N.E.2d 827 (1969), citing R.C. 4123.95 (“Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees.”).

{¶ 27} One of the aids of construction in determining the intent of the legislature is the object sought to be attained by the statute. R.C. 1.49(A). To that end, the Ohio Supreme Court has stated that the basic purpose of the anti-retaliation provision in R.C. 4123.90 is “to enable employees to freely exercise their rights without fear of retribution from their employers.” *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938, ¶ 22, quoting *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357, 797 N.E.2d 61, ¶ 43. Under appellee’s interpretation, that purpose would be frustrated in situations such as this where the precise cause of the injury is unknown at the time, and multiple incidents may have substantially aggravated a condition resulting in an injury. Requiring an employee to successfully prove that the

injury occurred at work for purposes of a retaliatory discharge claim would have a chilling effect on the exercise of his or her rights because the employee would be forced to choose between a continuation of employment and the submission of a workers' compensation claim. This choice must be made by the employee knowing that if he or she fails to prove that the cause of the injury was work related, not only will his or her claim be denied, but the employer would then be free to terminate the employment simply because the claim was filed. As recognized by the Nevada Supreme Court, "In the absence of an injury resulting in permanent total disability, most employees would be constrained to forego their entitlement to industrial compensation in favor of the economic necessity of retaining their jobs." *Hansen v. Harrah's*, 100 Nev. 60, 64, 675 P.2d 394 (1984).

{¶ 28} Therefore, in accordance with R.C. 4123.95 and the basic purpose of the anti-retaliation provision, we construe R.C. 4123.90 to require that an employee must prove only that he or she "filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act." The employee is not required to prove definitively that the injury occurred and arose out of the course of employment. In so doing, we agree with the reasoning of the Tenth District, and adopt its holding that to prove a prima facie case of retaliatory discharge, the employee must show:

- (1) the employee filed a workers' compensation claim or instituted, pursued or testified in a workers' compensation proceeding regarding a workers' compensation claim (the "protected activity"), (2) the employer discharged,

demoted, reassigned or took punitive action against the employee (an “adverse employment action”), and (3) a causal link existed between the employee’s filing or pursuit of a workers’ compensation claim and the adverse employment action by the employer (“retaliatory motive”).

Sidenstricker, 10th Dist. Franklin Nos. 00AP-1146, 00AP-1460, 2001-Ohio-4111 at ¶ 58.

{¶ 29} Our holding today, however, does not grant employees the power to file frivolous workers’ compensation claims with impunity. “The scope of R.C. 4123.90 is narrow and protects only against adverse employment actions in direct response to the filing or pursuit of a workers’ compensation claim.” *Ayers v. Progressive RSC, Inc.*, 8th Dist. Cuyahoga No. 94523, 2010-Ohio-4687, ¶ 14; *see also Oliver v. Wal-Mart Stores, Inc.*, 10th Dist. Franklin No. 02AP-229, 2002-Ohio-5005, ¶ 10. “R.C. 4123.90 does not prohibit a discharge for just and legitimate termination of employment. It does not suspend the rights of an employer, nor insulate an employee from an otherwise just and lawful discharge.” *Markham v. Earle M. Jorgensen Co.*, 138 Ohio App.3d 484, 493, 741 N.E.2d 618 (8th Dist.2000), quoting *Brown v. Whirlpool Corp.*, 3d Dist. Marion No. 9-86-20, 1987 WL 16261 (Sept. 1, 1987).

{¶ 30} Several Ohio courts have found that committing fraud in the pursuit of a workers’ compensation claim is a legitimate, non-retaliatory reason for discharge. In *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, 697 N.E.2d 1080 (5th Dist.1997), the employer terminated the employee for falsification of records in

connection with the filing of a workers' compensation claim. In that case, the employee's ex-girlfriend testified that the employee injured himself while painting houses during the plant's summer shutdown, but told her that he would claim the injury occurred while carrying buckets at the plant. Following a bench trial, the trial court found in favor of the employer on the employee's claim for retaliatory discharge, which the Fifth District affirmed. *Id.* at 336, 343. In *Kent v. Chester Labs Inc.*, 144 Ohio App.3d 587, 761 N.E.2d 60 (1st Dist.2001), the employer terminated the employee for dishonesty based on the statement of the employee's co-worker that her injury "was fake as fake could be," and on the fact that the employee had previously injured herself while lifting a bale of newspapers outside of work. The trial court granted summary judgment in favor of the employer, but the First District reversed, and remanded the matter for a trial to determine the motive for the discharge. *Id.* at 593-594. In another case from the First District, *Kelly v. Coca-Cola Bottling Co.*, 1st Dist. Hamilton No. C-030770, 2004-Ohio-3500, the employer fired the employee for dishonesty relating to lifting weights in excess of the doctor's recommendation. The trial court granted summary judgment, but the First District reversed, finding that a genuine issue of material fact existed on whether the employer's stated reason for termination was pre-textual. *Id.* at ¶ 42. Finally, in *Ayers, supra*, the employer terminated the employee for violating the company's code of conduct policy against deceit. In that case, the employee answered on a workers' compensation questionnaire that she had never been involved in an automobile accident. However, the employee had actually been involved in at least five automobile accidents.

Further, testimony was presented that the employee called the doctor's office directly to reschedule her independent medical examination, in violation of the company policy that only the employer can reschedule an examination, and that the employee represented herself as someone else in order to reschedule. The trial court granted summary judgment in favor of the employer, and the Eighth District affirmed finding that the employee failed to establish a prima facie case and failed to demonstrate that the stated reason for discharge was mere pretext. *Ayers*, 8th Dist. Cuyahoga No. 94523, 2010-Ohio-4687 at ¶ 18.

{¶ 31} These cases are informative in that in each of them, the question of the employee's honesty regarding the workers' compensation claim was determined within the framework of the burden shifting analysis pertaining to the true motivation behind the adverse employment action. If the employer can show that the basis of the discharge was fraud or dishonesty, the employee has the opportunity to prove that the stated reason is pretextual, and that the true motivation was the filing of the workers' compensation claim itself. An employee can prove pretext by showing that the employer's proffered reason "(1) had no basis in fact, (2) did not actually motivate the adverse employment action, or (3) was insufficient to motivate the adverse employment action." *Ferguson*, 12th Dist. Butler No. CA2008-11-283, 2009-Ohio-4132 at ¶ 21, citing *Wysong v. Jo-Ann Stores, Inc.*, 2d Dist. Montgomery No. 21412, 2006-Ohio-4644, ¶ 13; *King v. Jewish Home*, 178 Ohio App.3d 387, 2008-Ohio-4724, 898 N.E.2d 56, ¶ 9 (1st Dist.). We think that such an approach is appropriate in this situation as well.

{¶ 32} However, we do not reach the issue of whether appellee put forth a legitimate, non-retaliatory reason for discharge, or whether appellant demonstrated that the proffered reason was pretext through evidence showing that he did not in fact lie or commit fraud in the filing of his workers' compensation claims. It is well-settled in Ohio that "a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of *informing the trial court of the basis for the motion*, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." (Emphasis added.) *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *see also Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus ("A party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."). "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Dresher* at 293. Here, with respect to the retaliatory discharge claim, appellee made no argument that it provided a legitimate, non-retaliatory reason for discharge or that appellant failed to provide evidence demonstrating that the reason was merely pretext. Instead, appellee argued solely that by failing to appeal the Industrial Commission's decision disallowing benefits, appellant was collaterally estopped or barred by res judicata from establishing the workplace injury element of his claim. Because we have determined that a workplace injury is not a required element of a retaliatory discharge claim under R.C. 4123.90, and because no

other grounds were offered, we conclude that summary judgment for appellee on the retaliatory discharge claim was inappropriate.

{¶ 33} Accordingly, appellant's first assignment of error is well-taken.

B. Intentional Infliction of Emotional Distress

{¶ 34} "In a case for intentional infliction of emotional distress, a plaintiff must prove (1) that the defendant intended to cause the plaintiff serious emotional distress, (2) that the defendant's conduct was extreme and outrageous, and (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress." *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (1994).

{¶ 35} In its motion for summary judgment, appellee argued that it was entitled to judgment because its conduct was not extreme and outrageous as a matter of law.

Extreme and outrageous conduct has been described as:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community

would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 6 Ohio St.3d 369, 374-375, 453 N.E.2d 666 (1983), quoting Restatement of the Law 2d, Torts, Section 46(1), Comment d (1965).

{¶ 36} In particular, appellee contended that appellant did not pursue a valid workers' compensation claim, but rather attempted to collect benefits for a non-work related injury. Appellee stated that "[s]uch deceptive conduct constituted a legitimate, non-discriminatory, non-retaliatory business reason to terminate [appellant's] employment and cannot be found to be 'extreme and outrageous' conduct," so as to support an intentional infliction of emotional distress claim. Further, appellee contended that the termination of an at-will employee is an exercise of the employer's legal rights and does not constitute extreme or outrageous conduct. Appellee relies on *Jones v. Wheelersburg Local School Dist.*, 4th Dist. Scioto No. 12CA3513, 2013-Ohio-3685, ¶ 42, for the proposition that

"Termination of employment, without more, does not constitute the outrageous conduct required to establish a claim of intentional infliction of emotional distress, even when the employer knew that the decision was likely to upset the employee." * * * Moreover, an employer is not liable for a plaintiff's emotional distress if the employer does no more than "insist upon his legal rights in a permissible way, even though he is well aware

that such insistence is certain to cause emotional distress.” (Internal citations omitted.)

{¶ 37} Appellant responded by arguing that he never lied about his workers’ compensation claim, and that his claim was supported by the medical report of Dr. Ahn, who examined him as part of his workers’ compensation claim, and by three employees who acknowledged that appellant said he aggravated his knee while moving cabinets at work.

{¶ 38} Upon our review of the facts, viewed in the light most favorable to appellant, we conclude that no reasonable fact-finder could find that appellee’s conduct rises to the level of outrageousness sufficient to support a claim for intentional infliction of emotional distress. We hold that, under the circumstances, appellee’s actions in terminating an at-will employee do not go beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community. Therefore, appellee’s actions are not extreme and outrageous as a matter of law, and summary judgment in favor of appellee on appellant’s intentional infliction of emotional distress claim is appropriate.

{¶ 39} Accordingly, appellant’s second assignment of error is not well-taken.

III. Conclusion

{¶ 40} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed, in part, and reversed, in part. The matter is remanded to the

trial court for further proceedings on appellant's claim for retaliatory discharge under R.C. 4123.90. Costs of this appeal are to be split evenly between the parties pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

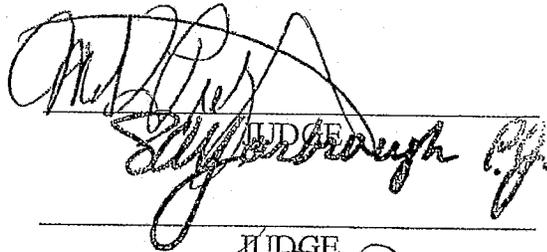
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

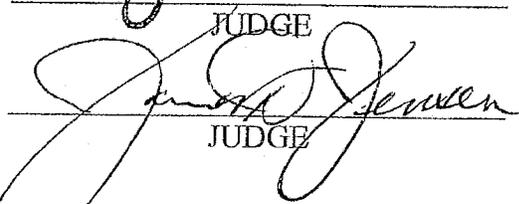
Mark L. Pietrykowski, J.

Stephen A. Yarbrough, P.J.

James D. Jensen, J.

CONCUR.


JUDGE


JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

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Erie County, Ohio

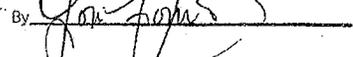
By 

EXHIBIT C

physical harm is implausible. As for using such an "inept" firebomb, the state has no duty to distinguish between intelligent criminal plans and imprudent criminal plans as part of proving intent to commit a criminal act. See *State v. Stoudemire* (1997), 118 Ohio App.3d 752, 694 N.E.2d 86. Defendant did not counter the state's evidence showing a real and immediate threat of serious physical harm presented by the thrown plastic bottle. Accordingly, we find that the state presented sufficient evidence to prove the elements of aggravated arson. The third assignment of error is overruled.

Judgment affirmed.

NAHRA, P.J., and ROCCO, J., concur.



120 Ohio App.3d 332

1332KILBARGER, Appellant,

v.

ANCHOR HOCKING GLASS
COMPANY, Appellee.*

No. 96 CA 44.

Court of Appeals of Ohio,
Fifth District, Fairfield County.

Decided June 20, 1997.

Former employee brought action against his former employer for workers' compensation retaliatory discharge. Summary judgment granted in favor of former employer was reversed, 107 Ohio App.3d 763, 669 N.E.2d 508, and case was remanded. Following bench trial, the Court of Common Pleas, Fairfield County, entered judgment in favor of former employer. Former employee appealed. The Court of Appeals, Wise, J., held that: (1) former employee had burden of

proving at trial that he was injured at work; (2) former employee failed to establish that former employer's proffered reasons for discharging him were pretext for retaliation; (3) testimony concerning former employer's consistent enforcement of work rule regarding falsification of records and that no other employees had been discharged for filing workers' compensation claim was admissible; and (4) it was not abuse of discretion to refuse to allow former employee to review notes used by witness to refresh her memory.

Affirmed.

1333Gwin, P.J., concurred with opinion.

William B. Hoffman, J., concurred with opinion.

1. Master and Servant ⇌43

Trial court's decision concerning claim of workers' compensation retaliatory discharge is question of fact. R.C. § 4123.90.

2. Appeal and Error ⇌1001(1)

Court of Appeals must not substitute its judgment for that of trial court when competent, credible evidence supports trial court's factual findings.

3. Master and Servant ⇌30(6.20)

Initially, employee setting forth claim for workers' compensation retaliatory discharge must plead prima facie case in order to state claim, and this requires employee to allege following elements: (1) that employee was injured on job, (2) that employee filed claim for workers' compensation, and (3) that employee was discharged in contravention of anti-retaliation statute. R.C. § 4123.90.

4. Master and Servant ⇌40(1)

If employee makes prima facie case of workers' compensation retaliatory discharge, burden shifts to employer to set forth nondiscriminatory reason for discharge. R.C. § 4123.90.

* Reporter's Note: A discretionary appeal to the Supreme Court of Ohio was not allowed in

(1997), 80 Ohio St.3d 1436, 685 N.E.2d 546.

5. Master and Servant ⇐40(1)

Once employee establishes prima facie case of workers' compensation retaliatory discharge, although employer has burden of setting forth reason for discharge, which it must establish before burden again shifts back to employee, such burden does not require employer to prove absence of retaliatory discharge; rather, it merely requires employer to set forth legitimate, nonretaliatory reason for employee's discharge, and employer does not have to prove this reason. R.C. § 4123.90.

6. Master and Servant ⇐40(1)

In workers' compensation retaliatory discharge case, if employer sets forth legitimate, nonretaliatory reason for discharging employee, burden shifts to employee who must then establish that reason articulated by employer is pretextual and that real reason for discharge was employee's protected activity under Workers' Compensation Act. R.C. § 4123.90.

7. Master and Servant ⇐30(6.20)

If employer fails to set forth legitimate, nonretaliatory reason for employee's discharge, employee can establish claim for workers' compensation retaliatory discharge; however, if employer does set forth legitimate, nonretaliatory reason¹³³⁴ and employee is unable to prove that reason articulated by employer was pretextual and that real reason is that employee filed claim for workers' compensation, employee's claim for retaliatory discharge must fail. R.C. § 4123.90.

8. Master and Servant ⇐40(1)

Former employee claiming workers' compensation retaliatory discharge had burden of proving at trial that he was injured at work. R.C. § 4123.90.

9. Master and Servant ⇐40(1)

In workers' compensation retaliatory discharge case, employer's burden does not require employer to prove, by clear and convincing evidence, absence of retaliatory discharge; rather, employer merely has to set forth legitimate, nonretaliatory reason for employee's discharge. R.C. § 4123.90.

10. Master and Servant ⇐40(4)

Former employee claiming workers' compensation retaliatory discharge failed to establish that his former employer's proffered reasons for his discharge were pretext for retaliation by merely attacking validity of such reasons; nothing in record established that proffered reasons were pretextual and that real reason for former employee's discharge was his filing of workers' compensation claim. R.C. § 4123.90.

11. Appeal and Error ⇐1003(7)

In reviewing weight-of-evidence claim, judgment supported by some competent, credible evidence will not be reversed by reviewing court as against manifest weight of evidence.

12. Appeal and Error ⇐994(2), 1003(3)

Court of Appeals defers to findings of trial court since it is in best position to observe witnesses and weigh their credibility.

13. Master and Servant ⇐40(2)

Testimony concerning employer's consistent enforcement of work rule regarding falsification of records and that no other employees had been discharged for filing workers' compensation claim was admissible, in former employee's workers' compensation retaliatory discharge action, to show that employer acted in conformity with such habit or routine practice when dealing with former employee. R.C. § 4123.90; Rules of Evid., Rule 406.

14. Witnesses ⇐256

Trial court acted within its discretion in refusing to allow plaintiff to review notes used by defense witness to refresh her memory, despite plaintiff's claim that discrepancy existed regarding date witness first spoke to certain third party; ¹³³⁵plaintiff failed to conduct proper discovery prior to trial when he could have clarified dates in question. Rules of Evid., Rule 612.

15. Courts ⇐26

"Abuse of discretion" connotes more than error of law or judgment, it implies

court's attitude is unreasonable, arbitrary or unconscionable.

See publication Words and Phrases for other judicial constructions and definitions.

16. Witnesses \Leftrightarrow 288(2)

Plaintiff's trial counsel's questioning of defense witness, on cross-examination, regarding her opinion as to credibility of certain non-witness opened door to witness' testimony on redirect examination about same issue. Rules of Evid., Rule 608(A).

Perry-Dieterich & Assoc. Co., L.P.A., and Eric R. Dieterich, Columbus, for appellant.

Frost & Jacobs L.L.P., Thomas V. Williams and Jeffrey N. Lindemann, Columbus, for appellee.

WISE, Judge.

Appellant Mark Kilbarger appeals the decision of the Fairfield County Court of Common Pleas that entered judgment in favor of Anchor Hocking Glass Company ("Anchor Hocking") on his claim for retaliatory discharge pursuant to R.C. 4123.90.

Appellant began working for appellee Anchor Hocking in July 1978. In late June 1991, Anchor Hocking began its summer shutdown for three weeks. During that period, appellant worked as a painter helping other family members. Anchor Hocking's summer shutdown ended on July 13, 1991, and appellant returned to work on that date. On July 17, 1991, appellant reported to Anchor Hocking that he had injured his shoulder and upper arm while attempting to move a heavy bucket of "batch," the raw material used to make glass products.

Appellant subsequently filed a workers' compensation claim requesting benefits due to his injury. Anchor Hocking contested appellant's workers' compensation claim because of the manner in which appellant injured himself. In November 1991, Vicky Jarrell, appellant's common-law wife, informed Vern Montgomery, manager of the Mix and Melt Department at Anchor Hocking, that appellant had injured himself during summer shutdown while he was painting a

house with his uncle. Jarrell also stated that appellant told her that he intended to return to work and claim that he had suffered the injury while working at Anchor Hocking, in connection with the use of the buckets.

¹²³⁶Karen Feisel, Safety Manager at Anchor Hocking, asked the workers' compensation service company for Anchor Hocking to contact Vicky Jarrell to verify her allegations concerning appellant's injury. Karen Feisel also personally interviewed Vicky Jarrell, on two separate occasions, concerning appellant's statements regarding the workers' compensation claim.

Anchor Hocking contested appellant's workers' compensation claim through all three levels of the administrative hearing procedure based upon the information provided by Vicky Jarrell. However, appellant prevailed at all three levels of the administrative process. Anchor Hocking subsequently appealed the workers' compensation claim to the Fairfield County Court of Common Pleas. A trial was conducted on June 22, 1993. Following deliberations, the jury returned a verdict rejecting appellant's claim that his injury was job-related and therefore determined that appellant was not eligible to participate in the State Insurance Fund.

Following the trial, Anchor Hocking's management conducted a meeting to review appellant's workers' compensation claim. All of the managers at the meeting agreed that appellant should be discharged for falsification of records in connection with his workers' compensation claim. Falsification of records is a violation of Anchor Hocking's Plant Rules, Class 1, Rule 4.

Pursuant to the terms of the collective bargaining agreement, Anchor Hocking suspended appellant for seven days pending discharge. Anchor Hocking informed appellant that the reason for his suspension was for falsification of records. On July 1, 1993, Anchor Hocking informed appellant that he was discharged for record falsification.

On December 21, 1993, appellant filed a complaint in which he alleged that Anchor Hocking had terminated him in violation of R.C. 4123.90 and that Anchor Hocking had wrongfully discharged him. Following dis-

covery, Anchor Hocking filed a motion for summary judgment. On December 30, 1994, the trial court granted Anchor Hocking's motion. Appellant appealed the trial court's decision to this court. On February 21, 1995, we reversed the trial court's grant of summary judgment, finding that reasonable minds could differ regarding whether or not appellant had been terminated in contravention of R.C. 4123.90. *Kilbarger v. Anchor Hocking Glass Co.* (1995), 107 Ohio App.3d 763, 669 N.E.2d 508

Upon remand to the trial court, a bench trial was conducted on April 25 and 26, 1996. Prior to trial, appellant dismissed the second count of his complaint, which alleged wrongful discharge. The trial court issued its judgment entry on June 4, 1996, finding in favor of Anchor Hocking on appellant's claim for retaliatory discharge.

Appellant timely filed a notice of appeal and sets forth the following assignments of error:

¹³³⁷"I. The trial court applied an incorrect burden of proof on appellant by requiring appellant to prove that he was injured on the job.

"II. The trial court used on [*sic*] incorrect standard of proof in failing to require appellee to show by clear and convincing evidence that appellant filed a falsified claim.

"III. It was error for the trial court to allow appellee to admit information on other workers' compensation decisions and employee terminations as evidence that appellee did not discharge appellant in violation of 4123.90.

"IV. The trial court committed error by refusing to allow the appellant to inspect the writing used by Karen Feisel to refresh her memory.

"V. The court erred in admitting testimony of witnesses concerning their opinion of Vicky Jarrell's credibility.

"VI. The decision of the trial court is against the manifest weight of the evidence."

Standard of Review

[1, 2] A trial court's decision concerning a claim of retaliatory discharge, pursuant to R.C. 4123.90, is a question of fact. *Eye v.*

Babcock & Wilcox Co. (Dec. 13, 1995), Summit App. No. 17229, unreported, 1995 WL 734027, at 4. As an appellate court, we must not substitute our judgment for that of the trial court when competent, credible evidence supports the trial court's factual findings. *Id.*, citing *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352, 353, 617 N.E.2d 1136, 1137.

Therefore, we must affirm the decision of the Fairfield County Court of Common Pleas, dismissing appellant's cause of action for retaliatory discharge, if the record in this matter contains competent, credible evidence to support the decision. It is upon this standard of review that we analyze appellant's assignments of error.

Burden of Proof

[3] Appellant's first, second and sixth assignments of error each concern the burden of proof used by the trial court. Before we review appellant's assignments of error concerning the burden of proof, we will first address how and when the burden of proof shifts under a claim for retaliatory discharge. Initially, a plaintiff setting forth a claim for retaliatory discharge must plead a prima facie case in order to state a claim under R.C. 4123.90. This requires a plaintiff to allege the following elements: (1) that the employee was injured on the job, (2) that the employee filed a claim for workers' compensation, and (3) that the ¹³³⁸employee was discharged in contravention of R.C. 4123.90. *Wilson v. Riverside Hosp.* (1985), 18 Ohio St.3d 8, 18 OBR 6; 479 N.E.2d 275, syllabus.

[4, 5] If the employee makes a prima facie case, the burden shifts to the employer to set forth a nondiscriminatory reason for the discharge. *Wilson v. Hupp Co.* (Nov. 25, 1987), Cuyahoga App. No. 54176, unreported, 1987 WL 20474, at 4, citing *Butler v. Square D Co.* (June 29, 1984), Butler App. No. CA84-03-036, unreported, at 6. Although the employer has this burden of proof, which it must establish before the burden again shifts back to the employee, the burden does not require the employer to prove the absence of a retaliatory discharge. *Gallaher v. W.S. Life Ins. Co.* (Dec. 19, 1986), Hamilton App. No. C-860062, unreported, 1986 WL 14063,

at 4. It merely requires the employer to set forth a legitimate, nonretaliatory reason for the employee's discharge. *Wilson v. Hupp* at 4. The employer does not have to validate this reason.

[6] Finally, if the employer sets forth a legitimate, nonretaliatory reason, the burden once again shifts to the employee. The employee must then establish that the reason articulated by the employer is pretextual and that the real reason for the discharge was the employee's protected activity under the Ohio Workers' Compensation Act. *Wilson* at 4, citing *Butler* at 6.

[7] Therefore, if the employer fails to set forth a legitimate, nonretaliatory reason for the employee's discharge, the employee can establish a claim for retaliatory discharge. However, if the employer does set forth a legitimate, nonretaliatory reason and the employee is unable to prove that the reason articulated by the employer is pretextual and that the real reason is that the employee filed a claim for workers' compensation, the employee's claim for retaliatory discharge must fail. It is under this burden-shifting analysis that we review appellant's first, second, and sixth assignments of error.

I

[8] Appellant contends, in his first assignment of error, that the trial court applied an incorrect burden of proof by requiring appellant to prove that he was injured at work. Specifically, appellant refers to the trial court's judgment entry wherein the trial court found that appellant "failed with his burden of proof to show that the injury occurred at work, consistent with the jury finding in the workers [*sic*] compensation case."

We overrule appellant's first assignment of error. Although appellant pled a prima facie case in his complaint, by alleging the three elements necessary to state a claim under R.C. 4123.90, appellant still had the burden of proving all the ¹elements of his case at trial. Appellant failed to establish, at trial, that he was injured at work. The trial court did not apply an incorrect burden of proof.

Appellant's first assignment of error is overruled.

II

Appellant contends, in his second assignment of error, that the trial court used an incorrect burden of proof when it failed to require Anchor Hocking to show, by clear and convincing evidence, that appellant filed a false claim. Appellant argues that although Anchor Hocking set forth a legitimate, nonretaliatory reason for his discharge, it failed to demonstrate that the reason was valid by clear and convincing evidence.

In support of this assignment of error, appellant refers to this court's language in *Kilbarger v. Anchor Hocking Glass Co.* (1995), 107 Ohio App.3d 763, 669 N.E.2d 508, where this court stated:

"At the first trial, appellant was required to prove by a preponderance of the evidence that he was injured on the job. In the case at bar, it will be appellee's burden of proving fraud by clear and convincing evidence." *Id.* at 767, 669 N.E.2d at 511.

[9] In *Kilbarger*, this dicta placed a heavier burden upon Anchor Hocking than is required by law. An employer's burden does not require the employer to prove, by clear and convincing evidence, the absence of retaliatory discharge. *Gallaher* at 4. The employer merely has to set forth a legitimate, nonretaliatory reason for the employee's discharge. *Wilson v. Hupp Co.* at 4, citing *Butler* at 6.

However, even though the trial court applied this more stringent burden upon Anchor Hocking, it still found that appellant failed to establish he was discharged for bringing the workers' compensation action. Specifically, the trial court stated as follows:

"[T]he evidence was clear and convincing that Plaintiff was not fired in retaliation for bringing the workers' compensation action but rather for falsifying his claim in the first place. Under the evidence presented by the employer the claim was at first suspicious in that it happened with no witnesses around. Upon investigation the conclusion was reasonable that the nature of the injury was not consistent with the work that was being per-

formed. Then Jarrell's statement left management no alternative."

Thus, even though appellant argues that the trial court did not require Anchor Hocking to establish by clear and convincing evidence that appellant filed a false workers' compensation claim, we find that the trial court did hold Anchor Hocking to this higher burden. However, even under this higher burden, the 1340 trial court still found that Anchor Hocking did not terminate appellant because he filed a workers' compensation claim.

Appellant's second assignment of error is overruled.

III

[10] In his sixth assignment of error appellant contends that the trial court's verdict is against the manifest weight of the evidence. Appellant essentially argues that the trial court's findings on employer's reasons for terminating his employment were against the manifest weight of the evidence.

[11, 12] In reviewing a weight-of-evidence claim, a judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus. We defer to the findings of the trial court since it is in the best position to observe the witnesses and weigh their credibility. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d, 77, 80, 10 OBR 408, 410-411, 461 N.E.2d 1273, 1276.

Appellant refers to the testimony of Karen Feisel and the three reasons set forth by Feisel for appellant's termination. Feisel testified that Vern Montgomery believed that the injury could not have occurred in the manner appellant stated it did. Second, in deciding what action to take against appellant, Anchor Hocking considered the jury verdict in the workers' compensation case. Third, Anchor Hocking considered the testimony of Vicky Jarrell. Appellant attempts to discredit these reasons by referring to other evidence presented at trial.

In doing so, appellant attacks the validity of Anchor Hocking's reasons for his discharge, which is required under his burden of proof. However, appellant fails to cite evidence in the record, nor can we find any, which would establish that the reasons articulated by the employer were pretextual and that the real reason for the employee's discharge was the filing of a workers' compensation claim.

If appellant sought merely to attack Anchor Hocking's reasons for discharge, he should have pursued his claim for wrongful termination instead of dismissing it prior to trial. A situation similar to the case *sub judice* was addressed in *Hartwig v. Zeller Corp.* (Nov. 2, 1990), Defiance App. No. 4-89-12, unreported, 1990 WL 178954, wherein the court stated:

"We find nothing in the statute [R.C. 4123.90] that suspends the rights of the employer to discharge for a cause that is just other than the condition that the employee files a claim or participates in workers' compensation proceedings. Causes for discharge, other than that described in the statute, are not governed by this legislation. Further, there is no reference in this section of the statute to 1241 an otherwise just and legitimate termination of employment at any time." *Id.* at 5.

Thus, the proper inquiry under a retaliatory discharge claim is whether a filing of a workers' compensation claim was the reason for his termination, not whether appellant's treatment under Anchor Hocking's work rules was fair.

We find, based upon the record in this matter, that the trial court's verdict was not against the manifest weight of the evidence.

Appellant's sixth assignment of error is overruled.

IV

[13] In his third assignment of error appellant contends that it was error for the trial court to allow Anchor Hocking to admit information of other workers' compensation decisions and employee terminations as evidence that it did not discharge appellant in violation of R.C. 4123.90. Under this assign-

ment of error, appellant refers to the testimony of Karen Feisel. Feisel testified that one other employee had been discharged for falsification of records. Feisel also testified that fifteen employees whose workers' compensation claims had been denied were not terminated.

Appellant contends that this testimony was not admissible pursuant to Evid.R. 406, which provides as follows:

"Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

Appellant argues that the testimony presented by Feisel was insufficient to establish habit or routine. We disagree. This court, in *Gardner v. Kelsey Hayes Co.* (Aug. 10, 1995), Knox App. No. 94CA000015, unreported, 1995 WL 557004, stated that in considering a claim for handicap discrimination, it was proper to consider the fact that other nonhandicapped employees were retained or not disciplined for conduct similar to that which resulted in the plaintiff's discharge. *Id.* at 8-9.

Therefore, Anchor Hocking's evidence concerning consistent enforcement of the work rule regarding falsification of records and the fact that no other employees had been discharged for filing a workers' compensation claim is admissible under Evid.R. 406.

Appellant's third assignment of error is overruled.

1342V

[14] Appellant contends in his fourth assignment of error that the trial court committed error by refusing to allow appellant to inspect the writing used by Karen Feisel to refresh her memory. Feisel testified that she used notes to refresh her memory prior to testifying.

Evid.R. 612 addresses this issue and provides:

"[I]f a witness uses a writing to refresh his memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interest of justice, an adverse party is entitled to have the writing produced at the hearing. He is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness."

Appellant maintains that he was entitled to review the notes used by Feisel because a discrepancy existed concerning the date when Feisel first spoke to Vicky Jarrell concerning what appellant told her he intended to do. We disagree. Under Evid.R. 612, it was within the trial court's discretion whether to require Feisel to produce the documents, reviewed by her, prior to testifying. Therefore, in order to prevail under this assignment of error, appellant must establish that the trial court abused its discretion in not requiring Feisel to produce these documents.

[15] An abuse of discretion connotes more than an error of law or judgment; it implies the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 482, 450 N.E.2d 1140, 1142. We do not find that the trial court abused its discretion when it denied appellant's request under Evid.R. 612, especially since appellant failed to conduct proper discovery prior to trial, when he could have clarified the dates in question.

Appellant's fourth assignment of error is overruled.

VI

[16] Appellant contends in his fifth assignment of error that the trial court erred when it permitted other witnesses to testify concerning the credibility of Vicky Jarrell. Appellant argues that this testimony was not admissible under Evid.R. 608, because Vicky Jarrell did not testify in the case *sub judice* and her character for truthfulness was not attacked at the workers' compensation trial.

Evid.R. 608(A) addresses opinion and reputation evidence and provides:

"The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence ¹³⁴³may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."

We find that the trial court properly permitted the testimony of Karen Feisel concerning her opinion of Vicky Jarrell's reputation for truthfulness. The record indicates that appellant's trial counsel opened the door by questioning Feisel about her opinion of Vicky Jarrell's credibility. After appellant's trial counsel asked those questions, the trial court permitted, on redirect examination, Feisel's opinion as to Vicky Jarrell's credibility. We will not address this assignment of error as it relates to Karen Moyer because it does not relate to an objection concerning Vicky Jarrell's credibility.

Appellant's fifth assignment of error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas, Fairfield County, Ohio, is hereby affirmed.

Judgment affirmed.

GWIN, P.J., and WILLIAM B. HOFFMAN, J., concur separately.

GWIN, Presiding Judge, concurring.

I concur in the judgment, but write separately to clarify certain issues.

In the first appeal on this case, I authored the opinion, which reversed the granting of a summary judgment in favor of appellee employer. In that opinion, we correctly held that the fact that appellant was unsuccessful in his workers' compensation claim was not dispositive of the issue whether appellant had filed the claim fraudulently. However, we also held that appellee had the burden of proving fraud by clear and convincing evidence. I now believe that this was an error. I do not think that the appellee had a burden of proving anything.

In this case, the other judges discuss the burden of proof and the burden of production. Both cite *Wilson v. Riverside Hosp.* (1985), 18 Ohio St.3d 8, 18 OBR 6, 479 N.E.2d 275. *Wilson* dealt with a motion to dismiss pursuant to Civ. R. 12(B)(6). The *Wilson* court outlines what a plaintiff must do to survive a Civ. R. 12(B)(6) motion. Here we are far beyond that stage. The parties here have tried this case.

I believe that the appellant had the burden of proving all the elements of his case, and here, he failed to prove that he was injured on the job.

¹³⁴⁴WILLIAM B. HOFFMAN, Judge, concurring.

I fully concur in the majority's analysis and disposition of appellant's second, third, fourth, fifth, and sixth assignments of error. I write separately to clarify what I believe to be the appropriate burden of proof to be applied to retaliatory discharge cases under R.C. 4123.90. In addition, I wish to separately express my position with respect to appellant's first assignment of error.

BURDEN OF PROOF

I essentially concur with the majority's statement as to the burden of proof. I recognize that my disagreement may well be more a matter of semantics than substance.

Once an employee establishes a prima facie case for retaliatory discharge, the burden of going forward with the evidence shifts to the employer to set forth a legitimate, nonretaliatory reason for the discharge. The burden of going forward with the evidence is different from the burden of proof. The burden of proof never shifts.

If the employer meets its burden of going forward, the employee must prove that the nonretaliatory reason for discharge proffered by the employer is pretextual in nature and that the real reason for discharge was retaliation for the employee's pursuit of his workers' compensation claim. The burden of proof does not shift back to the employee. The burden of proof remains on the employee at all times. What changes is that the employee now must prove that the nonretali-

atory reason for discharge proffered by the employer is pretextual and that the real reason for his discharge was retaliation for pursuing his workers' compensation claim.

I

At issue herein is whether the trial court erred in requiring the appellant/employee to prove that he was injured on the job. The majority affirms this assignment of error pursuant to *Wilson v. Riverside Hosp.* (1985), 18 Ohio St.3d 8, 18 OBR 6, 479 N.E.2d 275. By so doing, I presume, the majority concludes that an employee is not required to prove that he was injured on the job in order to establish a claim for retaliatory discharge under R.C. 4123.90. With that conclusion, I readily agree.

The majority bases its decision on *Wilson*. I find that reliance misplaced. The majority states in its discussion of burden of proof that one of the elements a plaintiff is required to allege pursuant to *Wilson* is that the employee was injured on the job. It is axiomatic that a plaintiff is required to prove at trial any element that he is required to allege in his complaint. Despite the majority's ¹³⁴⁵conclusion that the appellant was required to allege that he was injured on the job, it concludes that the trial court erred in requiring him to prove it at trial. I find that reasoning logically inconsistent.

I believe that the majority misinterprets *Wilson*. The syllabus in *Wilson* reads:

"A complaint filed by an employee against an employer states a claim for relief for retaliatory discharge when it alleges that the employee was injured on the job, filed a claim for workers' compensation, and was discharged by that employer in contravention of R.C. 4123.90."

There is a difference between what the Ohio Supreme Court found sufficient to state a claim under the facts in *Wilson* and what is required to state a claim for retaliatory discharge under R.C. 4123.90. The procedural posture of the *Wilson* case is significant. *Wilson* came to the Ohio Supreme Court as a result of the dismissal of the employee's complaint under Civ.R. 12(B)(6) for failure to state a cause of action. To the extent that

the majority reads *Wilson* to require an injury on the job to be alleged (and, I contend, therefore necessarily proved at trial) as an element in a retaliatory discharge claim, *Wilson* is inapposite to the majority's conclusion.

Unlike the majority, I do not find that *Wilson* requires an allegation or proof of an injury on the job before a claim based upon R.C. 4123.90 can be maintained. *Wilson* held that the employee's complaint stated a claim. To find that the employee stated a claim is different from establishing what an employee is required to allege before he can state a claim for relief under R.C. 4123.90.

The issue becomes whether an employee can assert a successful claim for retaliatory discharge under R.C. 4123.90 even though the employee cannot prove that he sustained an injury on the job. I submit that a close reading of the statute reveals that the employee can maintain such a claim. R.C. 4123.90 states:

"No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer." (Emphasis added).

Nothing in the statute requires the employer to have sustained an injury on the job, be it compensable or not. All the statute requires is that the employee has filed a claim or instituted, pursued, or testified in any proceeding under the Workers' Compensation Act for an injury or occupational disease that occurred in the course of and arising out of his employment with that employer. I find no language in the statute to support the trial court's apparent requirement that the employee prove that an injury occurred at work.

¹³⁴⁶Accordingly, I would sustain this assignment of error, not pursuant to *Wilson*, but rather based on the plain language of the statute.

