

IN THE SUPREME COURT OF OHIO

WILLIAM WHOLF	:	
	:	Case No. 2015-0398
Plaintiff-Appellee,	:	
	:	On Appeal from the Cuyahoga
v.	:	County Court of Appeals, Eighth
	:	Appellate District
TREMCO INCORPORATED, <i>et al.</i>	:	
	:	Court of Appeals
Defendants-Appellants.	:	Case No. CA 13 100771
	:	

**MEMORANDUM IN RESPONSE OF JURISDICTION
OF APPELLEE WILLIAM WHOLF**

Robert M. Wolff, Esq. (COUNSEL OF RECORD)
rwolff@littler.com
Amy Ryder Wentz, Esq.
awentz@littler.com
LITTLER MENDELSON, P.C.
1100 Superior Avenue, 20th Floor
Cleveland, Ohio 44114
216.696.7600
216.696.2038 (facsimile)
*Counsel for Defendants-Appellants Tremco Incorporated,
Edward Nowak, and Timothy Sworney*

Charles V. Longo, Esq. (0029490)
cvlongo@cvsolongolaw.com
Matthew D. Greenwell, Esq. (0077883) (COUNSEL OF RECORD)
matt@cvsolongolaw.com
CHARLES V. LONGO, CO., LPA
25550 Chagrin Boulevard, Suite 320
Beachwood, Ohio 44122
216.514.1919
216.514.3663 (facsimile)
Counsel for Plaintiff-Appellee William Wholf

TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION IN THIS MATTER	1
STATEMENT OF THE CASE AND FACTS.....	3
ARGUMENT IN OPPOSITION TO APPELLANTS’ PROPOSITIONS OF LAW	10
 <u>Response to Position of Law No. 1:</u>	
A plaintiff cannot establish <i>but-for</i> causation to support a retaliation claim under R.C. 4112 where the alleged retaliatory conduct commenced prior to the protected activity	10
 <u>Response to Position of Law No. 2:</u>	
An anonymous complaint is insufficient to demonstrate but-for causation in a R.C. 4112 retaliation claim absent evidence that the decision-maker knew the identity of the complaint	11
 <u>Response to Position of Law No. 3:</u>	
Contrary to the lesser “motivating factor” standard, a plaintiff must prove that his protected activity was a determinative factor behind the adverse employment action to prove but-for causation under R.C. 4112.....	11
CONCLUSION.....	13
PROOF OF SERVICE.....	13

EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION IN THIS MATTER

Appellants Tremco Incorporated, Edward Nowak, and Timothy Sworney (“Appellants”) do not and cannot set forth compelling reasons that would justify this Honorable Court reviewing the present matter. This is *not* a case of public and great general interest. The Eighth District Court below did not drastically alter or muddy the waters as it relates to the causation element in employment retaliation claims. The Court simply held that the trial court erred in its application of the *McDonald-Douglas* burden shifting frame-work by requiring “Wholf to conclusively prove the causation element in his prima facie case, when his initial burden only required production of some evidence as to each element of the prima facie case.” *William Wholf v. Tremco Incorporated, et al.*, 8th Dist. No. 100771, 2015-Ohio-171, ¶56.

This case *does not raise* “the pertinent issue of the distinction between proving causation under a ‘motivating factor’ standard versus the more exacting ‘but for’ standard for retaliation claims under R.C. 4112.” (Appellants’ Memorandum in Support of Jurisdiction at 1). The Eighth District Court determined, at Appellants’ urging, that the “plain language of R.C. 4112.02(I) provides a ‘cause-in-fact’ causation standard rather than a mixed-motives standard” and “[u]nder *Nassar*, the plaintiff must ultimately prove, by a preponderance of the evidence, that the plaintiff’s protected activity was the determinative factor in the employer’s adverse employment action.” *Wholf*, 2015-Ohio-171 at ¶¶ 29, 43. “Despite Wholf’s argument to the contrary,” the Court determined, “the ‘but-for’ standard articulated in *Nassar* is not a new standard; it is a clarification of the standard that has been applied in retaliation cases since the Supreme Court decided *Price Waterhouse* in 1989.” *Id.* at ¶42.

Accepting jurisdiction of any of Appellants' Propositions of Law would require the issuance of an advisory opinion since the Eighth District Court did not decide the legal issues alleged by Appellants. *State v. Chappell*, 127 Ohio St. 3d 376, 2010-Ohio-5991, 939 N.E.2d 1234, ¶1, fn.1. Appellants' First Proposition of Law is nothing more than a factual question which was properly reviewed and resolved by the Court below. The Eighth District Court did not discuss the employer's knowledge as it relates to anonymous complaints (Proposition 2)—in fact, Appellants' *conceded that they knew* Wholf engaged in protected activities under R.C. 4112.02. Finally, the Eighth District held nearly verbatim in accordance with Appellant Proposition of Law No. 3—that “a plaintiff must prove that his protected activity was a determinative factor behind the adverse employment action to prove but-for causation under R.C. 4112.” *Wholf*, 2015-Ohio-171 at ¶43. Simply, there is no case or controversy, let alone one that rises to a case of public or great general interest.

For this Honorable Court to exercise jurisdiction, the issues raised by an appellant must be “of public or great general interest” or involve “questions arising under the constitution of the United States or of this state.” *See* Ohio Constitution, § 2, Art. IV. In determining whether this Court should exercise jurisdiction, “*the sole issue for determination . . . is whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties.*” *Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876, 877 (1960) (emphasis sic). Issues of public or great general importance are those that impact a large number of Ohio residents and have a lasting impact. *See, e.g., In re H.W.* (2007), 114 Ohio St.3d 65, 868 N.E.2d 261 (removal of grandparents as parties in child custody hearing when minor parent reaches age of majority); *Derolph v. State of Ohio* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733 (constitutionality of state system for funding public education); *Franchise Developers, Inc. v. City of Cincinnati* (1987), 30 Ohio St.3d 28, 505 N.E.2d 966

(city's authority to use zoning regulations to preserve and protect character of certain neighborhoods). The issues raised by Appellants do not rise to this level of importance and are nothing more than a misguided attempt to appeal the merits of the case.¹

STATEMENT OF THE CASE AND FACTS

Appellants moved for summary judgment alleging that Wholf could not meet his *prima facie* case establishing a retaliation claim. For presenting a sexual harassment claim against Nowak and complaining of subsequent retaliation, Wholf was placed on a Performance Improvement Plan, stripped of his manager title and duties, stripped of key responsibilities, had his employee grade lowered, had his bonus potential lowered, had his cell phone removed, had less distinguished duties (data entry) assigned, and stripped as the key contact for OLI training. Tremco's proffered legitimate non-retaliatory justifications were nothing more than pretext to conceal Appellants' retaliatory animus.

The trial court issued an Opinion and Order granting Appellants' Motion for Summary Judgment holding that "Plaintiff's failure to show the requisite 'but for' causal link between his protected activity and Defendants' adverse action is fatal to his *prima facie* claim of retaliation under R.C. 4112.02(I)." (R.63-Trial Court Opinion & Order, 14) (emphasis added). The Eighth District Court of Appeals reversed holding,

{¶56} Wholf established his *prima facie* case of retaliation by producing evidence of his protected activity and of the adverse employment actions that were taken against him because of those activities. The trial court erroneously imposed the burden on Wholf to conclusively prove the causation element in his *prima facie* case, when his initial burden only required production of some evidence as to each element of the *prima facie* case. Therefore, the trial court misapplied the "but-for" standard of causation in this case, and as a result, erroneously concluded that Wholf failed to establish his *prima facie* case of retaliation in the first stage of the *McDonnell Douglas* analysis.

William Wholf v. Tremco Incorporated, et al., 8th Dist. No. 100771, 2015-Ohio-171, ¶56.

¹ Appellants do not raise any substantial constitutional questions.

The following facts of the case are taken directly from the Eighth District’s Decision below.

{¶1} Plaintiff-appellant, William Wholf (“Wholf”), appeals an order granting summary judgment in favor of defendants-appellees, Tremco Incorporated (“Tremco”), Edward Nowak, and Timothy Sworney (collectively “appellees”). We find merit to the appeal and reverse the trial court’s judgment.

{¶2} Tremco manufactures and sells roofing installation and weatherproofing services for buildings such as schools, hospitals, and manufacturing facilities. As part of its warranty program, Tremco provides on-site roofing inspections and preventative maintenance services, which are supported through an Online Information System (“OLI”). Wholf worked in Tremco’s OLI department from January 3, 2006, until his resignation on May 20, 2011.

{¶3} Following his resignation, Wholf filed a complaint against Tremco in which he asserted two claims. In Count 1, a retaliation claim brought pursuant to R.C. 4112.02(I), Wholf alleged that (1) he engaged in a protected activity when he reported sexual harassment to company managers, (2) appellees were aware of the protected activity, (3) appellees took adverse actions against him, and (4) the protected activity was the cause of Tremco’s adverse actions against him. Count 2 alleged intentional infliction of emotional distress.

{¶4} Appellees filed a joint motion for summary judgment on Wholf’s claims. The facts, as set forth in affidavits and deposition testimony, are as follows: Tremco hired Wholf in 2006 as its primary OLI trainer under the title OLI Sales/Customer Support Manager. Employees in the OLI department receive roof inspection reports from field personnel and enter the information into online databases that customers may access to review detailed roofing inspection data and repair recommendations. OLI’s objective is to increase the number of customers and sales representatives who understand and use the OLI. Wholf was primarily responsible for training

customers and Tremco sales representatives on how to use OLI so that customers could understand and use the system. Wholf was also supposed to identify and contact customers and sales representatives who would benefit from OLI and offer them training.

{¶5} Wholf reported to the Inspection and Maintenance Service Manager. In 2010, Tremco hired Edward Nowak (“Nowak”) as the new Inspection and Maintenance Services Manager. From 2006 through 2010, Wholf received positive performance evaluations from his previous and current supervisors.

{¶6} Sometime after Nowak joined Tremco, some female employees complained that Nowak made sexually suggestive comments to them and stared inappropriately at their breasts. One of the alleged victims was Melissa Wholf (“Melissa”), Wholf’s wife, who worked part time performing data entry. At a Tremco-sponsored luncheon on November 4, 2009, Nowak stared at Melissa’s breasts for an extended period of time. Employees at the table commented on Nowak’s behavior, but he did not seem to hear them and continued staring. Melissa felt uncomfortable and raised a menu to hide her breasts in an effort to end the situation.

{¶7} Tremco’s non-harassment policy defines “harassment” as “any unwelcome or unsolicited verbal, visual, written, sexual or physical conduct that creates or contributes to a hostile or offensive work environment.” “Leering” is included as an example of harassment under the policy. The non-harassment policy provides that “if an employee observes or becomes aware of actual or perceived harassment of another employee, then the observing employee should immediately report the matter to a supervisor, manager, or officer (up to and including the President of the Company).” When harassment is reported, the policy provides that “Tremco will investigate all complaints promptly, thoroughly and fairly,” and “[n]o retaliation of any kind * * * will be taken against an employee for making a complaint.”

{¶8} On February 9, 2010, Nowak met with Wholf to discuss his inappropriate use of time spent fixing coworkers' computers instead of completing his assigned work. During this meeting, Wholf confronted Nowak about his conduct, which he believed violated Tremco's non-harassment policy, and secretly recorded the conversation. According to Wholf, Nowak ignored the allegations and continued to make inappropriate comments and leer at women's breasts. In March 2010, Wholf reported Nowak's conduct to a Tremco vice president, who reported the allegations to James Tierney ("Tierney"), Tremco's former General Counsel and Vice President of Human Resources. Meanwhile, Lisa Garcia ("Garcia"), another supervisor in the OLI department, reported harassment allegations from two other women to Tremco's Human Resources Manager, Karen Halkovics ("Halkovics"). Tierney informed Halkovics of Wholf's complaint at about the same time. As a result, the human resources department led an internal investigation into the complaint.

{¶9} Halkovics interviewed the alleged victims; Melissa, Garcia, and Val Giampietro to hear their versions of the facts. She also met with Maureen Greeves, another Tremco manager who worked with Nowak, to see if she had any similar experiences, but she had not. Halkovics met with Nowak, informed him of the complaints and advised him that the reported behavior was unacceptable. Halkovics also counseled Nowak on Tremco's non-harassment policy. There is no evidence that any more harassment occurred after Halkovics's investigation and meeting with Nowak.

{¶10} Wholf was nevertheless frustrated by what he believed was an inadequate investigation and reported the harassment to the "NETWORK" in June 2010. According to the non-harassment policy, the NETWORK is "an independent and autonomous service devoted to collecting and reporting employee complaints regarding practices and behaviors that may be unethical or in violation of Company policies." In the NETWORK complaint, Wholf stated that

“Nowak has been making inappropriate and unwelcomed sexual comments” and “has also been caught staring [sic] at female employee’s breasts.” He further complained that the lack of investigation may have been impacted by Halkovics’s personal relationship with Jim Solether (“Solether”).² A week later, Wholf sent Randall Korach (“Korach”), then President of Tremco, an anonymous email once again reporting Nowak’s conduct and the ineffectual investigation.

{¶11} In response to the NETWORK complaint and the anonymous emails, Tierney met with Korach, and spoke with Halkovics and Solether about their alleged affair. Tierney also retained outside counsel to review Halkovics’s previous investigation. Following the review of the investigation, Tierney completed a report and sent it to RPM International Inc., Tremco’s parent company, as required practice when a NETWORK complaint is made.

{¶12} Wholf testified at deposition that after he complained about Nowak’s harassing behavior, he “felt a backlash” from Nowak beginning in March or April 2010. Wholf asserted that Nowak reassigned some of his projects to other employees and excluded him from meetings. Consequently, Wholf informed Todd Sworney (“Sworney”), Tremco’s Drafting Supervisor, that he believed Nowak was retaliating against him for reporting his harassing behavior even though Nowak gave Wholf a positive performance evaluation in late May 2010.

{¶13} In November 2010, Solether reorganized the management structure of the company. The OLI production department was reorganized such that Sworney became the supervisor of quality control and training personnel, and Garcia became the supervisor of data entry personnel. Nowak informed Wholf that Sworney would be his new supervisor, and removed some of Wholf’s core responsibilities and reassigned them to other employees. Prior to this change, Wholf and Sworney were equally ranked in management. As part of the

² Jim Solether is Tremco’s Director of Business Operations. Wholf believed Halkovic and Solether were involved in a romantic relationship.

reorganization, Wholf's former job title, OLI Sales-Customer Support Manager, was changed to OLI Sales-Customer Coordinator. Solether testified that at the time of the reorganization, he had no knowledge of any harassment complaints lodged against Nowak.

{¶14} On November 5, 2010, Sworney instructed Wholf that, in addition to his regular duties, he was now required to keep a detailed daily time sheet to account for his time throughout the day. Sworney's goal was for Wholf to generate enough outside interest in OLI training that he could train on a full-time basis. However, Wholf did not meet Sworney's production goals and did not increase his training workload. On November 11, 2010, Nowak informed Wholf that due to budget cuts, Tremco would no longer reimburse his personal cell phone, which he had used for work-related business.

{¶15} In December 2010, Sworney instructed Wholf that he must devote half of his workday to data entry. Two weeks later, Sworney placed Wholf on a "Performance Improvement Plan" ("PIP"), because he was not meeting his daily data entry quotas. The PIP subjected Wholf to more supervision by Sworney and Halkovics. In response, Wholf created an "action plan" to address concerns raised in the PIP. In the plan, Wholf stated that Sworney was motivated to issue the PIP by discrimination, retaliation, and workplace harassment. On January 27, 2011, Tremco lowered Wholf's job grade from level 10 to level 9. Although his salary was not affected, his bonus eligibility was reduced by the potential amount of \$1,300.

{¶16} Wholf complained to Tierney that he believed Sworney was retaliating against him. Tierney questioned Sworney about Wholf's retaliation claims and subsequently convinced Sworney to lower Wholf's data entry quota from 50 forms per half-day to 40 forms per half-day. Tierney also assigned another Human Resources Manager to work with Sworney and Wholf on the PIP, instead of Halkovics, whom Wholf did not trust.

{¶17} On February 15, 2011, Sworney informed Wholf that he would be assuming another employee’s responsibilities while she was on maternity leave. These responsibilities included closeouts and mail for the OLI department. “Mail” involved receiving large bankers boxes full of roof-inspection forms, which had to be opened, logged into several databases, and folders created for each form. Closeouts entail tallying all the time worked on the roof-inspection forms and closing out that job in various databases. Wholf’s PIP was modified to reflect these additional responsibilities.

{¶18} On April 15, 2011, Sworney expressed concerns that Wholf was not meeting the expectations listed in his PIP. On May 3, 2011, Wholf was offered a position with another company. Wholf submitted a two-week notice to Sworney in which he stated that the harassment and retaliation against him resulting from his complaints about Nowak forced him to leave the company.

{¶19} The trial court granted appellees’s motion for summary judgment and found that Wholf failed to establish that the alleged retaliation was the “but-for” cause of appellees’s adverse employment action. It also found there was no evidence to support his intentional infliction of emotional distress claim because appellees’s alleged actions were not “extreme and outrageous.” Wholf does not appeal the judgment on his intentional infliction of emotional distress claim. He appeals the judgment in appellees’s favor on his retaliation claim and raises two assignments of error.

Wholf, 2015-Ohio-171, ¶¶ 1-19.

ARGUMENT IN OPPOSITION TO APPELLANTS' PROPOSITION OF LAW

Appellants' Position of Law No. 1: A plaintiff cannot establish *but-for* causation to support a retaliation claim under R.C. 4112 where the alleged retaliatory conduct commenced prior to the protected activity.

Appellants' First Proposition of Law does not even raise an issue of law, but rather involves the Court's application of the facts to the already established law. Appellants inaccurately characterize *all* of the retaliatory acts in this case as having occurred prior to the "protected activity." Appellants also incorrectly imply that there was only *one instance* of protected activity. These assertions are simply false. Wholf repeatedly levied complaints about the sexual harassment in the work place and also levied complaints about Appellants' subsequent retaliation. Appellants' retaliatory treatment of Wholf was not an isolated incident, but rather an ongoing and prolonged course of conduct that culminated in Wholf's constructive discharge.

The Eighth District Court fully addressed and rejected Appellants' factual arguments. *Wholf*, 2015-Ohio-171 at ¶¶ 48-55. Regardless, Appellants ask this Court to hold that if a claimant complains that he or she was being treated unfairly, singled out, or retaliated against before or during the protected activity, the claimant cannot establish the causation element of a retaliation claim at any point in time as a matter of law. This proposition is nothing more than an attempt to immunize employers for all subsequent unlawful discriminatory or retaliatory claims. The fact that Wholf accused Appellant Nowak of engaging in some of the same type of retaliatory conduct he alleged to have occurred in the months following his protected activity is not fatal to Wholf's ability to establish causation. *See Imwalle v. Reliance Med. Prod.*, 515 F.3d 531, 549 (6th Cir. 2008), citing *Toth v. Yoder Co.*, 749 F.2d 1190, 1194 (6th Cir. 1984) (adverse actions constituting removal from various business decisions before the plaintiff engaged in protected activity does not negate the plaintiff's ability to establish retaliation; rather, such evidence is to weighed by the jury). Using the Appellants' proposition, a prior retaliatory act

will bar all subsequent claims of retaliation.

The undisputed evidence demonstrated that Appellants' retaliatory conduct was ongoing and began immediately after and *because* Wholf engaged in protected *activities*, creating a presumption that the acts were retaliatory. Therefore, Wholf produced sufficient "evidence from which *an inference* could be drawn that the adverse action would not have taken place had the Appellant not engaged in the protected activity" thereby establishing "an existence of a causal connection between the protected activity and the adverse action."

Response to Appellants' Position of Law No. 2: An anonymous complaint is insufficient to demonstrate but-for causation in a R.C. 4112 retaliation claim absent evidence that the decision-maker knew the identity of the complaint.

Appellants' Second Proposition of Law does not present a matter of public or great general interest. This Honorable Court has already resolved the presented proposition by holding that a decision-maker must know that the claimant engaged in a protected activity. In *Greer-Bruger*, this Court held that to establish a case of retaliation, a claimant must prove that "(1) claimant engaged in a protected activity; (2) *claimant's engagement in the protected activity was known to the opposing party*; (3) the opposing party thereafter took adverse action against the claimant; and, (4) there exists a causal connection between the protected activity and the adverse action." *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶13 (emphasis added). Moreover, Appellants did not challenge and in fact admitted that they *knew* Wholf had engaged in activities protected under R.C. 4112.02(I). There is no need for this Court to resolve this already settled area of employment law.

Response to Appellants' Position of Law No. 3: Contrary to the lesser "motivating factor" standard, a plaintiff must prove that his protected activity was a determinative factor behind the adverse employment action to prove but-for causation under R.C. 4112.

Appellants' Third and final Proposition of Law does not present a matter of public or great general interest. The Eighth District Court held almost verbatim to Appellants' Third

Proposition of Law—namely that the “plain language of R.C. 4112.02(I) provides a ‘cause-in-fact’ causation standard rather than a mixed-motives standard” and “[u]nder *Nassar*, the plaintiff must ultimately prove, by a preponderance of the evidence, that the plaintiff’s protected activity was the determinative factor in the employer’s adverse employment action.” *Wholf*, 2015-Ohio-171 at ¶¶ 29, 43. The Eighth District Court below is one of only two courts that have interpreted *Nassar* as it applies to Ohio employment retaliation claims—the other being the Tenth District Court in *Smith v. Ohio Dept. of Public Safety*, 10th Dist. No. 12AP-1073, 2013-Ohio-4210. The Eighth District Court determined that Ohio has consistently required an employment retaliation claimant to prove that “but-for” engaging in the protected activit(ies), the adverse action(s) would not have occurred. *See Wholf*, 2015-Ohio-171 at ¶42 (“Despite Wholf’s argument to the contrary,” the Court determined, “the ‘but-for’ standard articulated in *Nassar* is not a new standard; it is a clarification of the standard that has been applied in retaliation cases since the Supreme Court decided *Price Waterhouse* in 1989.”).

Appellants’ Third Proposition of Law suffers from a fundamental misunderstanding of the Eighth District Court’s Decision. The Court did not hold that Wholf had met his ultimate burden of persuasion and was entitled to judgment as a matter of law. The Court simply held that the trial court erred in its application of the *McDonald-Douglas* burden shifting frame-work by requiring “Wholf to conclusively prove the causation element in his prima facie case, when his initial burden only required production of some evidence as to each element of the prima facie case.” *Wholf*, 2015-Ohio-171 at ¶56. In so holding, the Court found “a genuine issue of material fact as to whether [Appellants] retaliated against Wholf because of his protected activity.” *Id.* at 55. A jury will ultimately decide whether Appellants’ retaliatory acts directed toward Wholf were done *because of* his involvement in the Nowak sexual harassment claim and his subsequent complaints of retaliation.

CONCLUSION

For the foregoing reasons, Appellee William Wholf respectfully requests that this Honorable Court decline to exercise jurisdiction over the present matter because this case does not present issues of important public policy or of general interest.

Respectfully Submitted,

CHARLES V. LONGO CO., L.P.A.

/s/ Matthew D. Greenwell

CHARLES V. LONGO (0029490)
MATTHEW D. GREENWELL (0077883)
25550 Chagrin Blvd., Suite 320
Beachwood, Ohio 44122
216-514-1919
216-593-0914 (facsimile)
cvlongo@cvtlongolaw.com
matt@cvtlongolaw.com
Counsel for Appellee William Wholf

CERTIFICATE OF SERVICE

A true copy of the foregoing Memorandum in Response to Appellants' Memorandum in Support of Jurisdiction has sent by e-mail on this 6th day of April, 2015, to the following:

Robert M. Wolff, Esq.
rwolff@littler.com
Amy Ryder Wentz, Esq.
awentz@littler.com
LITTLER MENDELSON, P.C.
1100 Superior Avenue, 20th Floor
Cleveland, Ohio 44114

*Counsel for Appellants Tremco Incorporated,
Edward Nowak, and Timothy Sworney*

/s/ Matthew D. Greenwell

CHARLES V. LONGO (0029490)
MATTHEW D. GREENWELL (0077883)