

**IN THE SUPREME COURT OF OHIO**

MICHAEL P. ONDERKO,	:	
	:	CASE NO. 2014-1881
Plaintiff-Appellee,	:	& 2014-1962
	:	
vs.	:	On Appeal from the Erie
	:	County Court of Appeals,
SIERRA LOBO, INC.	:	Sixth Appellate District
	:	Case No. E-14-009
Defendant-Appellant.	:	

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**BRIEF OF AMICI CURIAE  
FRATERNAL ORDER OF POLICE OF OHIO, INC., AND  
OHIO EMPLOYMENT LAWYERS ASSOCIATION  
IN SUPPORT OF APPELLEE MICHAEL P. ONDERKO**

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Margaret A. O'Bryon (0062047)  
Walter Haverfield LLP  
36711 American Way, Suite 2C  
Avon, Ohio 44011  
(440) 652-1173  
(440) 652-1174 (facsimile)  
[mobryon@walterhav.com](mailto:mobryon@walterhav.com)  
COUNSEL FOR APPELLEE  
MICHAEL P. ONDERKO

Paul L. Cox (0007202)  
Chief Counsel  
Fraternal Order of Police of Ohio, Inc.  
222 East Town Street  
Columbus, Ohio 43215  
(614) 224-5700  
(614) 224-5775 (facsimile)  
[pcox@fopohio.org](mailto:pcox@fopohio.org)  
ATTORNEY FOR AMICUS CURIAE  
FRATERNAL ORDER OF POLICE  
OF OHIO, INC.

Mark J. Valponi (0009527)  
Brian E. Ambrosia (0079455)  
Jennifer B. Orr (0084145)  
Taft Stettinium & Hollister LLP  
200 Public Square, Suite 3500  
Cleveland, Ohio 44114-2302  
(216) 241-2838  
(216) 241-3707 (facsimile)  
[mvalponi@taftlaw.com](mailto:mvalponi@taftlaw.com)  
[bambrosia@taftlaw.com](mailto:bambrosia@taftlaw.com)  
[jorr@taftlaw.com](mailto:jorr@taftlaw.com)  
COUNSEL FOR APPELLANT  
SIERRA LOBO, INC.

Frederick M. Gittes (0031444)

[fgittes@gitteslaw.com](mailto:fgittes@gitteslaw.com)

Jeffrey P. Vardaro (0081819)

[jvardaro@gitteslaw.com](mailto:jvardaro@gitteslaw.com)

The Gittes Law Group

723 Oak Street

Columbus, Ohio 43205

(614) 222-4735

Fax: (614) 221-9655

ATTORNEYS FOR AMICUS CURIAE

OHIO EMPLOYMENT LAWYERS ASSOCIATION

Frederic A. Portman (0010382)

Portman & Foley LLP

766 Northwest Blvd.

Columbus, Ohio 43212

(614) 461-1234

(614) 461-9150 (facsimile)

[fportman@pfflaw.com](mailto:fportman@pfflaw.com)

COUNSEL FOR AMICUS CURIAE

FRATERNAL ORDER OF POLICE

CAPITAL CITY LODGE NO. 9

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## **I. STATEMENTS OF INTEREST**

The Fraternal Order of Police of Ohio, Incorporated (hereinafter “F.O.P. Ohio”), is an organization consisting of over 25,000 active and retired law enforcement officers in the State of Ohio. F.O.P. Ohio is dedicated to the representation of its membership for a multitude of purposes. The members of the F.O.P. Ohio are employed by law enforcement agencies in over 300 local political sub-divisions and the State of Ohio.

F.O.P. Ohio is an organization focused on protecting the interests of Ohio law enforcement officers who are subjected to workplace discrimination, retaliation and discipline without just cause. F.O.P. Ohio also has an interest in ensuring that its members are not subjected to discipline when they engage in protected activity, such as the good-faith reporting of workplace injuries and participation in workers’ compensation proceedings. The threat of such discipline may act as a deterrent to reporting potentially unsafe working conditions, could endanger the public, and could deter both the reporting of injuries and the willingness of officers to participate in proceedings of their fellow employees.

F.O.P. Ohio is interested in this case because its members will be directly affected by this Court’s determination. Will law enforcement employees be protected from consequences that arise as a result of pretextual discipline for filing subsequently disallowed worker's compensation claims? Law enforcement is an inherently dangerous profession, and engaging in a dispute with one’s employer about the nature and cause of an apparent on the job injury should not put officers at risk for their employment.

The Ohio Employment Lawyers Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National

Employment Lawyers Association (NELA) in Ohio. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA and OELA strive to protect the rights of their members' clients, and regularly support precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity.

As an organization focused on protecting the interests of workers who are subjected to workplace discrimination and retaliation, OELA has an abiding interest in ensuring that employees are not subjected to terminations when they engage in protected activity, such as the good-faith reporting of workplace injuries and participation in workers' compensation proceedings. Such terminations suppress reports of potentially unsafe working conditions and endanger the public, and could deter both the reporting of injuries and willing participation of employees in the proceedings of their co-workers. OELA files this amicus brief to cast light on these issues and to call attention to the impact the decision in this case could have on the functioning of the workers' compensation system.

## II. SUMMARY OF ARGUMENT

This case turns on whether an employer who discharges an employee because he “filed a claim \*\*\* for” a compensable workplace injury can avoid liability if the employee fails to prove the merits of his underlying compensation claim. There is no reason to believe the General Assembly intended such a result, either in the text of the statute (which speaks entirely in terms of “claims for” compensable injuries), or in the broader context of the workers’ compensation system (which contains an express liberal construction rule in favor of employees).

Nor is there a basis for the result Defendant-Appellant Sierra Lobo, Inc. (“Sierra Lobo”) advocates in the principles underlying that system—a system created through a “great compromise”, under which employees and employers sacrificed their respective common-law remedies and defenses in the interest of efficiency and predictability. See *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St. 3d 115, 119, 748 N.E.2d 1111. Sierra Lobo proposes a system in which employees’ decisions about filing claims for benefits are ruled principally by fear. Not all workers’ compensation claims are obviously valid or invalid at first glance. If they were, there would be no need for the system’s multi-tiered claims and appeals process, medical testimony, or legal briefing. Because the outcome of a workers’ compensation claim is inherently uncertain, an employee who believes he or she may have a valid claim must already consider the risk that the claim will fail or the award of benefits will be minimal. The employee should not also have to weigh the risk that an unscrupulous employer will take away the employee’s livelihood as a punishment for pursuing an unsuccessful claim.

Sierra Lobo’s propositions of law, if adopted, would ensure that fear of termination is the primary factor an employee considers when filing a claim (or even testifying in support of a co-worker’s claim). Employers could openly post signs throughout the workplace warning

employees they will be fired if they file unsuccessful workers' compensation claims. Under such a regime, many employees with strong workers' compensation claims would be deterred from filing because even a small risk of termination would outweigh the benefits of pursuing a claim.

Such a "win-or-get-fired" system would produce absurd and unjust results. An employee bringing a novel workers' compensation issue to the attention of this Court, and even convincing justices of this Court of the merits of his argument, like the claimant in *Armstrong v. John R. Jurgensen Co.*, 136 Ohio St. 3d 589, 2013-Ohio-2237, 90 N.E.2d 568, could be terminated with impunity based on the split decision denying his claim. An employee whose own doctor told her an injury arose from her employment could be terminated if the BWC credited her employer's medical expert instead. An employee could be terminated after withdrawing a good-faith claim based on additional medical testing that revealed his condition is not work-related, or merely aggravated a prior, non-work-related condition. And many employees would need to prove the merits of their injury claims twice, in expensive parallel proceedings establishing their right to benefits and their protection from retaliation.

Sierra Lobo's second proposition, which asks this Court to bar retaliation claims pursuant to *res judicata* when an employee's underlying claim has been rejected by the Industrial Commission, would only exacerbate the situation. Employees with weak or minor claims who might otherwise accept adverse judgments would be forced to appeal in order to avoid being fired—or at least delay their terminations during the pendency of their appeals.

There is no reason to risk these absurd results. An adverse ruling by the Commission, whether or not it is appealed, does not create a presumption that the employee's claim was knowingly fraudulent (much less the irrebuttable presumption Sierra Lobo seemingly proposes). The doctrine of issue preclusion bars parties from raising an issue only where it "has been

actually and necessarily litigated and determined in a prior action.” *Fort Frye Teachers Ass’n, OEA/NEA v. State Employment Relations Bd.* (1998), 81 Ohio St.3d 392, 395, 692 N.E.2d 140.

Under this principle, an adverse ruling on the merits of a workers’ compensation claim should have no effect on a retaliatory discharge claim, as Industrial Commission hearings address the nature and cause of an employee’s injury, not the employee’s motives for reporting the injury.

As a practical matter, the questions of whether an employee suffered a compensable injury and why the employee was terminated are entirely independent. An employee with a valid injury claim may be terminated for entirely legitimate reasons, while an employee who files an unsuccessful injury claim may be subjected to a retaliatory discharge. For instance, an unscrupulous employer who automatically fires every single employee who files a workers’ compensation claim would surely violate the law with each such termination, even if some of the terminated employees’ underlying injury claims are unsuccessful.

The sensible alternative—which has the advantage of comports with both the language and purpose of Section 4123.90 and its liberal construction rule—is to treat retaliation claims under this statute the same way they are treated under the nearly identical federal and state discrimination statutes, Title VII and Chapter 4112, which bar retaliation against anyone who “opposes” unlawful discrimination. These statutes do not condition protection from retaliation on proof of underlying discrimination claims; merely opposing discrimination in good faith is considered protected activity. *Johnson v. Univ. of Cincinnati* (6th Cir. 2000), 215 F.3d 561, 579-80; *Robinson v. Quasar Energy Grp., L.L.C.* (8th Dist.), 2014-Ohio-4218, ¶ 20.

Similarly, where an employer in a discrimination case claims it has terminated an employee for misconduct—such as making false allegations of discrimination—the employee may prevail, even if the employer proves the misconduct, if the employee shows his misconduct

“did not actually motivate his discharge.” *Manzer v. Diamond Shamrock Chems. Co.* (6th Cir. 1994), 29 F.3d 1078, 1084. There is no textual or policy reason to depart from this basic evidentiary framework in Section 4123.90 cases. Using this framework would avoid a chaotic system that would undermine the fundamental purpose of the great workers’ compensation compromise by deterring the reporting of injuries, punishing unsuccessful claimants, and encouraging unnecessary appeals.

### **III. STATEMENT OF FACTS AND THE CASE**

*Amici curiae* F.O.P. Ohio, *et al.*, adopt the Appellee’s Statement of Facts and the Case.

### **IV. LAW AND ARGUMENT**

**PROPOSITION OF LAW I: Revised Code Section 4123.90 does not permit an employer to punish an employee for filing an unsuccessful workers’ compensation claim.**

**A. The Plain Language of Section 4123.90 Does Not Require that an Employee Prove the Merits of an Underlying Workers’ Compensation Claim in order to be Protected against Retaliation.**

This Court can begin and end its inquiry by simply applying the plain language of Ohio Revised Code Section 4123.90. The statute reads, 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.” R.C. § 4123.90. As applied to the facts here, the statute can be reduced to the operative words, “No employer shall discharge any employee because the employee filed a claim under the workers’ compensation act for an injury which occurred in the course of and arising out of his employment with that employer.”

These words mean exactly what they say: that an employee cannot be punished for alleging (“filing a claim for”) a workplace injury. Sierra Lobo prefers an interpretation of the statute under which, to be protected from retaliation, Plaintiff-Appellee Michael P. Onderko must prove that he both suffered a compensable injury and filed a claim for that injury. Such an interpretation must either ignore the words “filed a claim for,” add a word to that phrase so it reads “filed a successful claim for,” or rewrite the entire sentence to read, in relevant part, “No employer shall discharge any employee who suffered an injury in the course of his employment because he filed a claim under the workers’ compensation act for such an injury.”

The General Assembly could easily have drafted the statute in any of these ways, but it did not. Strategically revising the actual statutory text is neither appropriate nor permitted by this Court’s jurisprudence. See, e.g., *State ex rel. Carna v. Teays Valley Local School District Board of Education*, 131 Ohio St. 3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶¶ 18-20 (“[W]e must accord significance and effect to every word, phrase, sentence, and part of the statute, and abstain from inserting words where words were not placed by the General Assembly. \*\*\* When we conclude that a statute’s language is clear and unambiguous, we apply the statute as written, giving effect to its plain meaning.” (citations omitted)).

An analogy to the employment discrimination context is helpful here. Title VII of the Civil Rights Act of 1964 bars discrimination against an employee “because he has opposed any practice made an unlawful employment practice by this subchapter,” 42 U.S.C. § 2000e-3(a), while Ohio law makes it unlawful “to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section.” R.C. § 4112.02(I). Both statutes, like Section 4123.90, define protected activity using references to the substance of an underlying claim, yet courts interpreting both statutes have uniformly held

that employees subjected to retaliation need not prove the merits of the underlying claim. See, e.g., *Johnson v. Univ. of Cincinnati* (6th Cir. 2000), 215 F.3d 561, 579-80 (“[A] violation of Title VII’s retaliation provision can be found whether or not the challenged practice ultimately is found to be unlawful.”); *Robinson v. Quasar Energy Grp., L.L.C.* (8th Dist.), 2014-Ohio-4218, ¶ 20 (“A claimant may seek protection under the opposition clause [of R.C. § 4112.02(I)] regardless of whether the conduct or policy he was opposing was, in fact, unlawful.”).

The words “filed a claim for” in Section 4123.90 serve the same purpose as the word “opposed” serves in Section 4112.02(I) and Title VII: explicitly protecting employees who file claims or make allegations, not just those who act based on conclusively proven facts.

**B. Construing Section 4123.90 to Require Proof of the Merits of an Underlying Workers’ Compensation Claim Would Violate the General Assembly’s Express Liberal Construction Rule.**

Ohio’s workers’ compensation system was created through a “great compromise,” under which employees and employers sacrificed their respective common-law remedies and defenses in the interest of efficiency and predictability. See *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St. 3d 115, 119, 748 N.E.2d 1111 (describing system as bargain through which “employers and employees exchange their respective common-law rights and duties for a more certain and uniform set of statutory benefits and obligations”). Part of this great compromise was the General Assembly’s conclusion that “[e]mployers may not retaliate against employees for pursuing a workers’ compensation claim,” *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, 879 N.E.2d 201, at ¶ 23.

The General Assembly further expressly commanded that the statutes governing the workers’ compensation system, including Section 4123.90, be “liberally construed in favor of employees and the dependents of deceased employees.” R.C. § 4123.95. Because Section

4123.90 unambiguously protects employees from retaliation for filing injury claims, the Court does not need to rely upon this express liberal construction rule. But in order to reach the conclusion urged by Sierra Lobo, the Court would need to disregard not only the language of the statute, but also the General Assembly's directive to construe ambiguity in favor of employees.

Sierra Lobo's argument focuses on the statutory phrase "an injury or occupational disease which occurred in the course of and arising out of his employment with that employer." But it cannot stop there, since the other phrases in the same sentence (most notably the phrase "filed a claim \*\*\* for") point toward the protection of *claims* of injuries, irrespective of the merits of these claims. Even if the Court concludes that the use of the phrase "filed a claim for" is not unambiguously protective of all employees who file injury claims, at minimum, one of the potential meanings of the statute is that it bars retaliation against all employees who file claims, not just those who prove an underlying compensable injury. Where there are multiple possible interpretations, the liberal construction rule requires an interpretation favorable to the employee.

Accordingly, Sierra Lobo's efforts to persuade this Court to adopt its interpretation—including its repeated reliance on out-of-context syllabus language from *Wilson v. Riverside Hospital* (1985), 18 Ohio St. 3d 8, 479 N.E.2d 275, which addressed a totally unrelated question, and its policy argument that "the entire workers' compensation system is predicated on compensating only those workers who are injured on the job"—are fruitless. Adopting a holding that narrows the scope of the statute's protections based on policy arguments or the application of judge-made rules would be a clear violation of the liberal construction rule.

**C. The Appellant's Interpretation Would Render the Statute Ineffective and Procedurally Unworkable.**

Sierra Lobo's proposed construction of Section 4123.90 runs afoul of not just the statute's plain language and the liberal construction rule of Section 4123.95, but also the

principle that “statutes must be construed, if possible, to operate sensibly and not to accomplish foolish results.” *Carna*, 2012-Ohio-8174, at ¶ 19 (quotations omitted). Permitting an employer to retaliate against an employee with impunity unless the employee proves his or her underlying workers’ compensation claim would impair the functioning of the workers’ compensation system and make retaliation claims completely unworkable, undermining the principles of predictability and efficiency at the core of the great workers’ compensation compromise.

Sierra Lobo portrays workers’ compensation claims as a simple black and white issue: either a claim is based on a compensable workplace injury or it isn’t. This does not reflect the shades of gray inherent in both the workplace and the workers’ compensation system. Some employees suffer injuries at home but exacerbate them at work, or vice versa. Others suffer from chronic injuries that build over time to the point that they need treatment. Others have no idea what caused their injuries and must rely on the advice of medical professionals, not all of whom may agree about the cause. Others suffer from conditions that were obviously work-related, but may not be compensable (e.g., psychological conditions). Sierra Lobo proposes that instead of relying on the best advice they can get from their doctors and lawyers, employees facing these situations must decide whether or not to seek compensation based on the fear that if their claims fail, they will lose not just their workers’ compensation benefits, but their livelihoods.

To use a recent example, Shaun Armstrong filed a claim based on a psychological condition arising from an on-the-job accident. The psychological portion of his claim was rejected, and he appealed. This Court ultimately affirmed the denial of benefits because Armstrong’s psychological condition did not fit within the statutory definition of “injury.” See generally *Armstrong v. John R. Jurgensen Co.*, 136 Ohio St.3d 589, 2013-Ohio-2237, 90 N.E.2d 568. According to Sierra Lobo, upon the issuance of this Court’s opinion, Armstrong’s

employer would have been perfectly entitled to fire him because, despite convincing two justices of this Court that he should be awarded full benefits, see *id.* at ¶¶ 31-46 (JJ. Pfeifer & O’Neill, dissenting), the bottom line was that he pursued benefits he was not entitled to receive.

Though not at issue here, to the extent Section 4123.90 protects those who *testify* in support of a co-worker’s claim, such co-workers would also be left in limbo if this Court rules in Sierra Lobo’s favor. Testimony in favor of a claim that ultimately fails for any reason would no longer be protected activity, since it would not be testimony in a proceeding for a compensable workplace injury. There is no basis in the text of the statute for distinguishing between filing an unsuccessful claim and merely supporting an unsuccessful claim through testimony.

Under the scheme Sierra Lobo envisions, an employer could actually have an explicit policy, posted throughout the workplace or published in the employee handbook, that any employee who files, pursues, or supports an unsuccessful workers’ compensation claim will be subject to automatic termination. The effects of such a policy cannot be overstated. No sensible employee in such a system would file a disputed workers’ compensation claim, except for a truly catastrophic injury, because the risk of losing would outweigh any potential award of compensation. The careful balance the General Assembly established through the workers’ compensation system would be disrupted, and the obvious purpose of Section 4123.90—to ensure that workers can file claims for benefits without fear of retaliation—would be defeated.

Sierra Lobo’s proposed anti-retaliation regime would also be woefully impractical. Instead of addressing the question of whether an employee’s termination was improperly motivated, each Section 4123.90 claim would also have to address the underlying injury. Medical experts would need to be called in nearly every case. Based on the exceptionally short filing deadlines for retaliation claims and the multi-phase appeal process for underlying

compensation claims, most employees would need to prove the merits of their injury claims twice—sometimes at the same time, and presumably, sometimes with conflicting results from different decision-makers. Injury determinations would often be made by judges or juries instead of the experienced and specialized agency employees the General Assembly entrusted with initial injury determinations, often leading to unnecessarily complex agency and court disputes about the collateral estoppel effect of the parallel proceedings.

**PROPOSITION OF LAW II: The failure of an underlying workers’ compensation claim has no *res judicata* effect on a Section 4123.90 retaliation claim.**

**D. The Appellant’s Proposition that an Unsuccessful Workers’ Compensation Injury Claim Should Preclude a Retaliation Claim Is Contrary to this Court’s Jurisprudence and Common Sense.**

1. *Workers’ Compensation Injury Claims and Retaliation Claims are Different and Independent of Each Other: An Employee Could Be Improperly Retaliated Against for Filing an Unsuccessful Claim or Fired for Legitimate Reasons after a Successful Claim.*

Sierra Lobo’s second proposition of law accepts that “it is true that the protections of R.C. 4123.90 are triggered at the filing of a Workers’ Compensation claim” (which appears inconsistent with its first proposition of law), but urges that “[i]f it is later conclusively proven that an employee submitted a falsified claim, an employer can be justified in terminating that employee.” In one sense, this is not even controversial: everyone agrees that an employer can terminate an employee because the employee falsified a workers’ compensation claim. But Sierra Lobo seeks to take this principle much further by asserting immunity from suit based on *res judicata* whenever an employee’s underlying workers’ compensation claim fails. Such blanket immunity is inconsistent with Section 4123.90’s protective purpose.

An adverse workers’ compensation benefits ruling—whether or not it is appealed—does not create a presumption that the employee’s claim was knowingly fraudulent, yet Sierra Lobo

proposes an irrebuttable presumption to that effect. An employee can be denied benefits by the Industrial Commission for many reasons without a determination that the claim was fraudulent. As noted above, an injury may be determined to have been suffered at home and merely aggravated at work, the cause may be unknown, or a condition may not qualify for coverage.

In Onderko's case, his claim was actually approved by the BWC before it was reversed on appeal by an Industrial Commission hearing officer. The hearing officer did not need to (and did not) find that Onderko committed fraud in order to conclude that the injury was not compensable. This is fatal to Sierra Lobo's *res judicata* argument. The doctrine of issue preclusion bars parties from raising an issue only where it "has been actually and necessarily litigated and determined in a prior action." *Fort Frye Teachers Ass'n, OEA/NEA v. State Employment Relations Bd.* (1998), 81 Ohio St.3d 392, 395, 692 N.E.2d 140. Workers' compensation benefits proceedings involve the litigation of the nature and cause of an injury. An employee's good or bad faith in reporting his or her injury would never be "actually and necessarily litigated and determined" through such proceedings.

As important, Sierra Lobo fails to recognize that Section 4123.90—unlike most aspects of the no-fault workers' compensation system—focuses on the employer's conduct and the reasons for that conduct. An employer simply must not discharge an employee because the employee filed a claim for benefits. An employer who fires an employee because the employee sought to defraud the workers' compensation system does not run afoul of that principle, but reaching that conclusion depends on the employer's motives, not just the employee's actions.

Once again, the employment discrimination context is helpful. Under the familiar "indirect proof" framework for analyzing discrimination cases, an employee contesting an employer's proffered reason for its actions, such as claimed misconduct by the employee, can

contest the employer's credibility by showing "(1) that the [employer's] proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge." *Manzer v. Diamond Shamrock Chems. Co.* (6th Cir. 1994), 29 F.3d 1078, 1084 (emphasis in original). The second method is particularly relevant here: it means that an employee whose employer claims he or she was terminated for misconduct can prevail *even if the employee actually committed the misconduct*, where there is evidence that it was not the real reason for the employee's termination.

Consider, for example, a scenario in which an employer decides to terminate every employee who files a workers' compensation claim, and it summarily fires three employees with recently filed claims, having conducted no analysis of their claims. When all three employees' underlying compensation claims are decided, one prevails, one withdraws his claim for technical reasons, and one contests his claim but is found to have been injured at home. If all three employees bring actions under Section 4123.90, all three should prevail; the employer's motive for firing each of them was the same, and it was unlawful. If the employer then argues (as Sierra Lobo has below) that its motive for firing the third employee was different and was based on his efforts to defraud the system, it should lose based on the evidence that it applied a uniformly retaliatory policy to all three employees and never considered the merits of their claims.

If, instead, the employer does not fire any of these employees after they file their claims, but later fires the successful claimant for unrelated misconduct, it could very well prevail if that claimant brings a retaliation action, since its motivation for the employee's termination had nothing to do with workers' compensation and everything to do with the subsequent misconduct.

These scenarios demonstrate the problem with using claim or issue preclusion to bar claims under Section 4123.90. The questions of whether a compensable injury occurred and

whether retaliation occurred are entirely independent. An employee may have a perfectly valid workers' compensation claim, but her retaliation claim may fail because the employer's reason for her discharge was unrelated. Or an employee may have an invalid workers' compensation claim, but the employer may have unlawfully retaliated anyway. And of course, there may be many more cases where an unscrupulous employer retaliates against an employee with a valid claim or an honest employer legitimately punishes a claimant for faking an injury. These separate questions are properly answered through the separate processes the General Assembly established for administrative benefits proceedings and court actions for retaliation.

2. *The Win-or-Get-Fired System Proposed by the Appellant Would Force Employees to Fight Their Workers' Compensation Claims to the Bitter End for the Sole Purpose of Protecting Their Jobs.*

As with Sierra Lobo's first proposition of law, its second proposition would wreak havoc in the workplace and the workers' compensation system by encouraging employees to prolong and appeal proceedings that should be abandoned.

Employees like Onderko who lose at any level of the claims process, from the BWC up to the court of appeals, have the option of accepting the adverse judgment or appealing it. Such decisions are generally made by considering the legal and factual grounds for appeal, and, as a practical matter, by weighing of the value of the claim against the investment of time, effort, and money in further proceedings. Onderko himself alleges that he did not appeal the Industrial Commission's ruling because he had already returned to work and "just wanted the ordeal to be over." *Onderko v. Sierra Lobo, Inc.* (6th Dist.), 2014-Ohio-4115, ¶ 7.

Avoiding the stress or cost of further proceedings is a perfectly valid reason to abandon a claim, particularly for employees with minor injuries, difficult-to-prove claims, or limited resources. It is easy to imagine an employee proceeding pro se to the point of a BWC ruling,

realizing that going any further would require hiring an attorney, and discovering that doing so is financially infeasible or impractical. An employee might even file a claim, realize after consulting with counsel or medical experts that there is no hope (or legal basis) for success, and then simply abandon the claim before or after a ruling from the BWC or Industrial Commission (particularly if, like *Onderko*, the employee has already recovered from the injury).

A decision of this Court supporting either of Sierra Lobo's propositions of law would force these employees into a cruel and sometimes impossible situation: win or get fired. Perhaps even worse, such a situation would give these employees a strong incentive to prolong marginal, but good faith claims, fighting to the bitter end because by doing so, they will at least delay the likely termination of their employment. Some may even seek to slow down agency proceedings or appeal adverse rulings strictly for the purpose of avoiding the effect of claim or issue preclusion on a pending Section 4123.90 claim—raising, once again, the specter of parallel agency and court proceedings with conflicting results.

## **V. Conclusion**

Section 4123.90 explicitly protects employees who make and pursue claims for injuries, not just employees who prove they have been injured, and it is to be liberally construed to protect employees. Sierra Lobo's interpretation would authorize employers to punish and intimidate employees who pursue their rights under the statute in good faith and make it more complicated and expensive to vindicate these rights before an agency or a court. There is no indication in the plain language or clear purpose of Section 4123.90 that the General Assembly intended such a draconian and chaotic scheme of non-retaliation enforcement.

For the reasons stated above, *amici curiae* F.O.P. Ohio, *et al.*, urge this Court to affirm the decision of the Sixth District Court of Appeals that a retaliation claim under Section 4123.90 does not require proof of the merits of the underlying workers' compensation claim.

Respectfully submitted,

/s/Frederick M. Gittes  
Frederick M. Gittes (0031444)  
[fgittes@gitteslaw.com](mailto:fgittes@gitteslaw.com)  
Jeffrey P. Vardaro (0081819)  
[jvardaro@gitteslaw.com](mailto:jvardaro@gitteslaw.com)  
The Gittes Law Group  
723 Oak Street  
Columbus, Ohio 43205  
(614) 222-4735  
Fax: (614) 221-9655  
Attorneys for Amicus Curiae  
Ohio Employment Lawyers Association

/s/Paul L. Cox  
Paul L. Cox (0007202) (per e-mail consent)  
Chief Counsel  
Fraternal Order of Police of Ohio, Inc.  
222 East Town Street  
Columbus, Ohio 43215  
(614) 224-5700  
(614) 224-5775 (facsimile)  
[pcox@fopohio.org](mailto:pcox@fopohio.org)  
Attorney for Amicus Curiae  
Fraternal Order of Police of Ohio, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of May 2015, a copy of the Brief of Amici Curiae F.O.P. Ohio, *et al.* in Support of Appellee Michael P. Onderko was served by postage-paid U.S.

Mail upon the following:

Margaret A. O'Bryon (0062047)  
Walter Haverfield LLP  
36711 American Way, Suite 2C  
Avon, Ohio 44011  
COUNSEL FOR APPELLEE  
MICHAEL P. ONDERKO

Frederic A. Portman (0010382)  
Portman & Foley LLP  
766 Northwest Blvd.  
Columbus, Ohio 43212  
COUNSEL FOR AMICUS CURIAE  
FRATERNAL ORDER OF POLICE  
CAPITAL CITY LODGE NO. 9

Mark J. Valponi (0009527)  
Brian E. Ambrosia (0079455)  
Jennifer B. Orr (0084145)  
Taft Stettinium & Hollister LLP  
200 Public Square, Suite 3500  
Cleveland, Ohio 44114-2302  
COUNSEL FOR APPELLANT  
SIERRA LOBO, INC.

/s/Frederick M. Gittes  
Frederick M. Gittes (0031444)