

IN THE SUPREME COURT OF OHIO

Michael Onderko)	
)	Nos. 2014-1881, 2014-1962
Plaintiff-Appellee,)	
)	On Appeal from the Erie
vs.)	County Court of Appeals,
)	Sixth Appellate District
Sierra Lobo, Inc.)	
)	
Defendant-Appellant.)	

BRIEF OF *AMICUS CURIAE*
 THE OHIO ASSOCIATION FOR JUSTICE
 ON BEHALF OF THE PLAINTIFF-APPELLEE
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PROPOSITION OF LAW ACCEPTED FOR REVIEW

It is not necessary for a plaintiff to prove that he or she suffered a workplace injury to establish a prima facie claim for retaliatory discharge under R.C. § 4123.90.

INTEREST OF *AMICUS CURIAE* THE OHIO ASSOCIATION FOR JUSTICE

The Ohio Association for Justice (“OAJ”) is Ohio’s largest victims-rights advocacy association, comprised of approximately 1,500 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace and quality health care. For sixty years OAJ has worked to strengthen the civil justice system so that deserving individuals receive justice and wrongdoers are held accountable. Our member practice in several specialty areas including workers’ compensation and wrongful discharge law.

The OAJ recognizes that this case carries important implications for employees who, if the appeals court ruling is overturned, will be terminated for the act of filing for benefits under the workers compensation act. The OAJ believes that the court of appeals decision in this case is both correct and just under existing law.

OAJ adopt the statement of facts set forth in Appellee Onderko’s merit brief.

SUMMARY OF ARGUMENT

Last year, 108,549 workers filed claims asserting an injury sustained in the course and scope of employment with an employer insured through the workers' compensation fund.¹ Ohio Bureau of Workers' Compensation *Fiscal year 2014 Report*, www.bwc.ohio.gov/downloads/blankpdf/AnnualReport.pdf (accessed May 10, 2015). 10,977 of those claims were disallowed and dismissed by the BWC. *Id.*

Appellant-employer seeks to compel this Court to create -- through judicial activism -- an exception to R.C. 4123.90 that would allow employers to terminate at least 10,977 employees who failed to meet their burden of establishing an injury in the course of and arising out of employment. Specifically, Sierra-Lobo asks this court to pervert the statutes plain language and ignore its' protection of employees who file a claim, testify, or institute proceedings under the Act.

Three appellate jurisdictions in this state have declined to interpret R.C. 4123.90 in the manner proposed by Sierra-Lobo. Moreover, in the one and only appellate jurisdiction to adopt this approach, a concurring judge noted: "...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..."

¹ These figures represent state-fund claims only. An additional 25,942 (19%) claims were filed by the employees of self-insured employers. Industrial Commission, *2014 Production Activity Report*, www.ic.ohio.gov/news/report_pdfs/productionreport14.pdf (accessed May 10, 2015). The BWC annual report does not include an allow-disallow rate of these claims.

In effect, Sierra Lobo seeks to compel this Court to create a “win your claim or lose your job” rule of law. This proposal is, as a matter of law, contrary to both law and public policy. Consequently, OAJ would urge this Court to affirm the sound decision of the Court of Appeals.

ARGUMENT

The fundamental rule of employment law in Ohio is that in the absence of an agreement to the contrary, employment is at the will of the employer and the employee. Under this “employment at will” doctrine, employers may terminate employment or any reason or no reason at all. *Phung v. Waste Mgt., Inc.* 23 Ohio St.3d 100 (1986).

An exception to the employment at will doctrine is that employers may not terminate employment based upon the employee’s exercise of rights under the Workers’ Compensation Act. R.C. § 4123.90 provides:

“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...”

About one half of all states have enacted similar “anti-retaliation” statutes that prohibit discharging an employee for asserting rights to workers’ compensation.² A small minority provide a remedy only to employees who suffer compensable injuries.³

In *Wilson v. Riverside Hospital* this 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.” 18 OhioSt.3d 8,10 (1985).

- 1. The Industrial Commission’s decision to deny Onderko’s workers compensation claim was a finding that he failed to sustain his burden of proof and not a conclusion that he did not sustain an injury in the course of and arising out of his employment.**

In this case appellant-employer advances the position that a terminated employee may not assert a claim under R.C. § 4123.90 unless his or her workplace injury claim has been allowed and/or recognized as valid. The Tenth, Twelfth, and Sixth District Court of Appeals have rejected this position. *Sidenstricker v. Miller Pavement*

² **Alabama:** Ala Code § 25-5-11.1; **California:** Cal Lab Code § 132a(1),(3); **Connecticut:** Conn Gen Stat § 31-290(a); **District of Columbia:** DC Code § 36-342; **Florida:** Fla Stat § 440.205; **Illinois:** 820 ILCS 305/4; **Kentucky:** KRS § 342.197(1); **Louisiana:** LaRS § 23:1361; **Maryland:** Lab & Emp § 9-1105(a); **Massachusetts:** Mass Ann Laws, Ch 152, § 75B(2); **Michigan:** MCL § 418.301(11); **Minnesota:** Minn Stat § 176.82; **Missouri:** RS Mo § 287.780; **Montana:** Mont Code § 39-71-317(1); **New Jersey:** NJ Stat § 34:15-39.1; **New Mexico:** NM Stat §§ 52-1-28.2, A; 52-3-45.2, A; **New York:** NY Work Comp Law § 120; **North Carolina:** NC Gen Stat § 97-6.1(a); **Oklahoma:** 85 Okla Stat § 5; **South Carolina:** SC Code § 41-1-80; **Texas:** Tex. Rev. Civ. Stat. Ann. Art. 8307c § 1; Tex Labor Code § 451.001; **Vermont:** 21 VSA § 710(b); **Virginia:** Virginia Code § 65.2-308; **Washington:** RCW § 51.48.025.

³ **Hawaii:** HRS § 386-142; **South Dakota:** SD Code § 62-8-27; **West Virginia:** W Va Code § 23-5A-3(a).

Maint., Inc., 10th Dist. Franklin Nos. 00AP-1146, 2001-Ohio-4111; *Ferguson v. SanMar Corp.*, 12th Dist. Butler No. CA2008-11-283, 2009-Ohio-4132; and, the case *sub judice*.

Likewise, other states have protected an employee's right to file for workers' compensation even in the event a claim is denied.⁴

The only Ohio court to adopt appellant-employer's position was the Fifth District Court of Appeals in *Kilbarger v. Anchor Hocking Glass Co.* 120 Ohio App.3d 332 (5th Dist., 1997). Even so, the *Kilbarger* decision failed to generate a unanimous opinion. In his concurring opinion, Judge Hoffman declined to adopt the point of law advocated by appellant-employer:

...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 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.

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

Throughout their brief, Appellant-Employer falsely suggests that a claim denial is tantamount to a finding that no injury occurred in the course of and arising out of employment. This is erroneous. Section 4123-3-09(C)(3)⁵ of the Administrative Code

⁴ *Smalbein v. Volusia County School Bd.* 801 So.2d 169 (Fla. App., 5th Dist., 2001); *Springer v. Weeks and Leo Co., Inc.* 429 N.W.2d 588 (Iowa, 1988); *Pytlík v. Professional Resources, Ltd.* 887 F.2d 1371 (10th Cir., 1989)

⁵ (C) Proof...

specifies the quantum of proof that an injured worker must introduce to prevail in a workers' compensation claim.

This section provides examples of circumstances that can result in a claim denial that are absent either fraud or deception. They include for example, a lapsed statute of limitation⁶, a finding that an aggravation to a pre-existing condition is not "substantial,"⁷ or a finding that a work-related injury resulted from intoxication.⁸ These are, in fact, injuries that occur in the course of and arising out of employment that are statutorily excluded from coverage under the workers' compensation act.

...(3) The burden of proof is upon the claimant (applicant for workers' compensation benefits) to establish each essential element of the claim by preponderance of the evidence. Essential elements shall include, but will not be limited to:

- (a) Establishing that the applicant is one of the persons who under the act have the right to file a claim for workers' compensation benefits;
- (b) That the application was filed within the time period as required by law;
- (c) That the alleged injury or occupational disease was sustained or contracted in the course of and arising out of employment;
- (d) In death claims, that death was the direct and proximate result of an injury sustained or occupational disease contracted in the course of and arising out of employment; the necessary causal relationship between an injury or occupational disease and death may be established by submission of sufficient evidence to show that the injury or occupational disease aggravated or accelerated a pre-existing condition to such an extent that it substantially hastened death;
- (e) Any other material issue in the claim, which means a question must be established in order to determine claimant's right to compensation and/or benefits.

'Preponderance of the evidence' means greater weight of evidence, taking into consideration all the evidence presented. Burden of proof does not necessarily relate to the number of witnesses or quantity of evidence submitted, but to its quality, such as merit, credibility and weight. The obligation of the claimant is to make proof to the reasonable degree of probability. A mere possibility is conjectural, speculative and does not meet the required standard."

⁶ R.C. § 4123.84

⁷ R.C. § 4123.01(C)(4)

⁸ R.C. § 4123.54(B)(1)

This Court should recognize that some claims are inherently uncertain. A decision to deny a claim is merely a finding that a litigant failed to meet his or her burden of proof. Nevertheless, Appellant falsely uses terminology to imply that Onderko's attempt to receive workers' compensation was fraudulent.⁹ Notwithstanding Appellant's rhetoric, there is nothing in the record before this Court to substantiate Appellant's claim of fraud. See, *State ex rel. Koonce v. Indus. Comm.* 18 Ohio St.3d 60 (1985). Instead, the record demonstrates that Onderko filed a claim and abandoned it after realizing that the recorded recollection of his medical providers differed from his own.¹⁰

Injured workers can abandon the pursuit of their claims for a variety of reasons. They can grow anxious over the prospect of participating in unfamiliar legal proceedings where their veracity is repeatedly called into question. They can grow frustrated over the loss of more and more time from work to attend hearings and depositions. They can also, perhaps, grow fearful that their continued pursuit of a

⁹ "...employees seeking to take advantage of the system by filing **false** Workers' Compensation claims..." Merit Brief of Appellant Sierra Lobo, Inc. at pg. 9 "...where, as here, the employer has already proven that the Claim was **fraudulent**..." *Id.* "...brought by an employee, such as Onderko, who has already been adjudicated to have **wrongfully sought benefits** under the act..." *Id.* at 10 "...especially where, as here, there is already a binding, legal determination of **deceptive conduct**..." *Id.* "...this protection should not and cannot be allowed to extend to employees who seek to **exploit and defraud** the system..." *Id.* at 14

¹⁰ Despite any contradiction found by the Industrial Commission's hearing officer, Nicholas Ahn, M.D. – a board certified orthopedic surgeon, wrote on behalf of the Ohio BWC at the conclusion of his report dated September 6, 2012, "...As such, I believe that the claimant does have a right knee sprain/strain. I believe that this condition is related to the injury from 08/09/2012 via direct causation" Exhibit F to Plaintiff's Response to Summary Judgment.

workers' compensation claim will cause their employer to find a pre-textual basis for discipline and/or termination. The decision to abandon the pursuit of a meritorious claim is even more likely where, as here, the compensable lost time from work is minimal. These are valid and non-fraudulent reasons to drop the pursuit of a claim.

There is little doubt in the record before this Court that Appellant terminated Onderko for no other reason than his pursuit of relief under the Workers' Compensation Act. Appellant's Human Resource director concedes this point in his sworn affidavit.¹¹ Appellant terminated Onderko less than three weeks after the deadline for filing an appeal before the Industrial Commission. Should an employee with a poorly documented injury face the prospect of either win their claim or lose their job?

- 2. To require a plaintiff to prove that he or she suffered a workplace injury to establish a prima facie claim for retaliatory discharge under R.C. § 4123.90 is contrary to the express language of the statute.**

Appellant urges this court to focus solely on the phrase "injury or occupational disease which occurred in the course of and arising out of his employment." In doing so, Appellant ignores the preceding text. This text protects an employee who "...filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act..." If the right to institute or pursue a claim under the act is to be

¹¹ "On December 12, 2012, Onderko was terminated from SLI for his deceptive attempt to obtain Workers' Compensation benefits for a non-work-related injury." Affidavit of David Hamrick at paragraph five.

protected, then it is axiomatic that this applies to all claims – even those that fail. Would Sierra Lobo assert a right to terminate a witness who testifies in a claim that is ultimately denied?

Throughout its brief, Sierra Lobo asserts that the Sixth District has “judicially re-written” R.C. 4123.90 by protecting from termination those who initiate or pursue workers’ compensation. In fact, it is Appellant that seeks a judicial re-write of the statute. Other states have, through legislation, expressly protected only those claims filed “in good faith.” Alaska Stat § 23.30.247(a); NC Gen Stat § 97-6.1(a); 85 Okla Stat § 5; SC Code § 41-1-80; Tex. Rev. Civ. Stat. Ann. Art 8307c § 1; Tex Labor Code § 451.001(1). The Massachusetts statute forbids retaliation “unless the employee knowingly participated in a fraudulent proceeding.” Mass Ann Laws, Ch 152 § 75B(2). In these states it is the legislature, and not the courts, that have included the requirement of good faith or the absence of fraud as a pre-requisite to filing for retaliation. More important, these states fail to adopt the expansive “lose your claim lose your job” rule proposed by Appellant.

Even if we assume ambiguity, then appellant’s interpretation perverts the plain meaning of R.C. § 4123.90. Workers’ Compensation is for the benefit of the employee. It

is well established that the Workers' Compensation Act is to be liberally construed in favor of the employee¹² so as to not negate the Act's humane purposes.

Appellant's interpretation is contrary to the legislative intent of R.C. § 4123.90. In determining legislative intent, this Court must first look to the statutory language and the purpose to be accomplished. See *Rice v. CertainTeed Corp.* 84 OhioSt.3d 417, 419 (1999), citing *State ex rel. Richard v. Bd. Of Trustees of Police & Firemen's Disability & Pension Fund*, 69 Ohio St.3d 409, 411 (1994). This Court has previously held that the legislative intent of this anti-retaliation provision is "to enable employees to freely exercise their rights without fear of retribution from their employers." *Coolidge v. Riverdale Local School Dist.* 100 Ohio St.3d 141, 2003-Ohio-5357. In *Sutton v. Tomco Machining, Inc.* 129 Ohio St.3d 153, 2011-Ohio-2723, this Court held that the underlying purpose of the Workers' Compensation Act must be served by establishing a common law tort of wrongful termination for employees who suffer a retaliatory termination before they have an opportunity to file for benefits.

The Act creates a duty to compensate employees for work-related injuries and a right in the employee to receive such compensation. But in order for the goals of the Act to be realized, and for public policy to be effectuated, the employee must be able to exercise his or her right in an unfettered fashion without being subject to reprisal. If

¹² R.C. § 4123.95 provides, "[s]ections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees."

employers are permitted to penalize employees for filing workers' compensation claims, a most important public policy will be undermined. The fear of being discharged will have a chilling effect on the exercise of this statutory right.

CONCLUSION

An employee's right to file a workers' compensation claim is not protected if an employer can directly or indirectly intimidate the worker not to file a claim. Appellant-employer asks this Court to impose a rule of law that permits any employer to fire a worker whose workers' compensation claim is unsuccessful. Yet, as discussed, a claim denial is not the equivalent to a finding of fraud, deception or deceit. As a matter of public policy Ohio must protect employees from retaliation who, for whatever reason, choose to abandon an unsuccessful claim for workers compensation.

WHEREFORE, this Court should affirm the judgment of the Sixth Appellate District.

Respectfully submitted,



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CERTIFICATE OF SERVICE

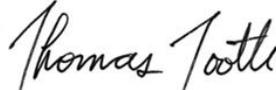
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