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Nos. 2014-1881, 2014-1962

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.

REPLY BRIEF OF APPELLANT SIERRA LOBO, INC.

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INTRODUCTION

Appellee Michael Onderko ("Onderko") is wrong when he argues that a plaintiff need not demonstrate that he or she suffered a workplace injury in order to establish a *prima facie* case for retaliatory discharge under R.C. 4123.90. In so arguing, Onderko, as well as the four amici curiae[1] ("Amici") ignore the plain language of the statute, which explicitly requires such a showing. This requirement is essential, especially in cases such as this one, where an employee pursues a R.C. 4123.90 retaliation claim after the Ohio Industrial Commission ("OIC") has conclusively adjudicated that the employee did not suffer a work-related injury.

Realizing that the statutory language does not support his position, Onderko and the Amici instead assert that a requirement that a retaliation-plaintiff must truthfully allege a workplace injury would have an alleged "chilling effect" on employees who are considering whether or not to file such a claim. However, the fact Onderko and his supporters ignore is that this chilling effect, to the extent it exists, is imposed by the statute, not the courts, and therefore lies solely within the purview of the Ohio General Assembly to address, should it see fit to do so.

The legislature chose the specific wording of R.C. 4123.90 for a reason, and to pretend an entire phrase of the statute does not exist, as Appellee requests, would be improper. *See East Ohio Gas Co. v. Public Utilities Comm. of Ohio*, 39 Ohio St.3d 295, 530 N.E.2d 875, 879 (1988). The phrase ***"injury or occupational disease which occurred in the course of and arising out of his employment"*** was placed in the statute to differentiate between false and valid claims under the Workers' Compensation Act (the "Act"), and to prevent the exact situation permitted by the court below in this case – where an employee whose injury was fully and finally

[1] The Ohio Association for Justice and Fraternal Order of Police Capital City Lodge No. 9 each filed a brief in support of Onderko. The Fraternal Order of Police, Inc. and the Ohio Employment Lawyers Association jointly filed a third brief in support of Onderko.

adjudicated ***not*** to have occurred in the workplace is nevertheless permitted to force his employer to defend a suit claiming retaliatory discharge.

Moreover, if Onderko's erroneous interpretation, is permitted to stand, it would put an onerous burden on Ohio's employers, requiring them to defend countless frivolous claims by employees who were terminated after filing fraudulent claims under the Workers' Compensation Act. In order to protect Ohio employers and to be consistent with well-settled principles of statutory construction, this Court should overturn the Court of Appeals' erroneous decision and keep intact the first element of the test for a R.C. 4123.90 claim announced by this Court in *Wilson v. Riverside Hospital*, 18 Ohio St.3d 8 (1985).

LAW AND ARGUMENT

Proposition of Law No. 1: 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.

Onderko's position in this Court is premised on a complete misstatement of the law. In his brief, Onderko incorrectly claims that "R.C. 4123.90 does not require the employee to win his hearing at the Industrial Commission in order to avail himself of the protection of R.C. 4123.90; it just requires that the employee *filed a claim or instituted, pursued, or testified* in any proceedings under the Act for a work-related injury." (Appellee's Brief at 5-6) (emphasis in original). However, in so arguing, Onderko simply ignores the language of R.C. 4123.90. That statute 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).**

Onderko's argument also ignores this Court's decision in *Wilson*, which provides that an employee bringing a claim for Workers' Compensation retaliation must prove 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." *Wilson*, 18 Ohio St.3d 9 (1985) (syllabus) (emphasis added). The *Wilson* holding not only gives full meaning and effect to all words in the statute, but it also provides protection to employees with legitimate workplace injuries, while protecting employers from fraudulent claims, something Onderko's position ignores. Instead, Onderko – who has already been adjudicated ***not*** to have been injured on the job – would have this Court undercut *Wilson* by eliminating "injured on the job" as an element of a retaliation claim under R.C. 4123.90, so that he can pursue a Workers' Compensation retaliation action against Appellant, Sierra Lobo, Inc. ("Sierra Lobo"), even though it is beyond dispute Onderko suffered no workplace injury.

Onderko and the Amici argue that this Court should accept the interpretation of R.C. 4123.90 given by the Sixth District Court of Appeals, which either finds an entire phrase of the statute to be redundant, or alternatively, inserts words in the statute that are not present. (App. at 19-20). The court below interpreted the phrase "injury or occupational disease which occurred in the course of and arising out of his employment" as being a "redundant" continuation of the requirement that the claim or proceeding be under the Act. Id. However, in so doing, the court ignored a fundamental rule of statutory construction, which holds that "words in statutes should not be construed to be redundant, nor should any words be ignored." *East Ohio Gas Co. v. Public Utilities Comm. of Ohio*, 39 Ohio St.3d 295, 530 N.E.2d 875, 879 (1988). If the General Assembly had intended to allow all employees, whether or not they had filed a false claim, to be protected, the last phrase of R.C. 4123.90 would be redundant. But inclusion of this phrase in the statute conclusively demonstrates that the legislature intended what this Court held in *Wilson*: a workplace injury is an element of a retaliation action under R.C. 4123.90, and without a workplace injury, a retaliation claim must fail.

In support of Onderko, amicus curiae the Ohio Association for Justice relies on Ohio Administrative Code 4123-3-09, which attempts to articulate what a claimant must prove to succeed on a Workers' Compensation claim. Tellingly, this code provision states that one of the essential elements of such a claim is "[t]hat the alleged injury or occupational disease was sustained or contracted in the course of or arising out of employment." O.A.C. 4123-3-09(C)(3) (emphasis added). Although this code provision uses the phrase "alleged injury", the word "alleged" does not appear in R.C. 4123.90, which demonstrates that the legislature intended to limit R.C. 4123.90 claims to those involving actual workplace injuries. Moreover, this argument is irrelevant to the present case, since, before filing his retaliation claim, Onderko's injury was adjudicated to have occurred other than at work, and he therefore could not lawfully have "alleged" a workplace injury as an element of his retaliation claim.

Onderko incorrectly argues that because the Act must be liberally construed in favor of employees, his broad and sweeping interpretation of R.C. 4123.90, ignoring key language of the statute, must be accepted. However, even the most liberal construction cannot justify ignoring a statute's plain language. Both Section 35, Article II of the Ohio Constitution and R.C. 4123.54 evidence that anti-retaliation protection is afforded only to employees who suffer an on-the-job injury. *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 10th Dist. Nos. 00AP-1146, 00AP-1460, 2001-Ohio-4111, 2001 WL 1286419, at *9. As such, employees such as Onderko, who indisputably have ***not*** suffered a workplace injury, fall outside the protection of the Workers' Compensation system of laws.

Onderko and the Amici spend much of their briefs arguing that requiring proof of a workplace injury as an element of a retaliation claim would cause a "chilling effect" on Ohio workers, who, they posit, should be permitted to file and pursue a Workers' Compensation retaliation claim even when they can neither plead nor prove that the "retaliation" at issue was

triggered by a workplace injury. While prohibiting such claims – as the language of R.C. 4123.90 and this Court's holding in *Wilson* currently do – may be distasteful to Onderko and the Amici, their argument for a change should be made to the Ohio General Assembly, not the courts.

It is not the job of the courts to address policy issues caused by the language in a statute. As this Court has held,

> "[I]t would be inappropriate for the judiciary to presume the superiority of its policy preference and supplant the policy choice of the legislature. For it is the legislature, and not the courts, to which the Ohio Constitution commits the determination of the policy compromises necessary to balance the obligations and rights of the employer and employee in the workers' compensation system." *Bickers v. W. & S. Life Ins. Co.*, 2007-Ohio-6751, ¶ 24, 116 Ohio St. 3d 351, 357, 879 N.E.2d 201, 207.

Indeed, in *Bickers*, this Court held that an employer could terminate an employee for non-retaliatory business reasons, even while that worker was receiving Workers' Compensation benefits. In so doing, this Court held that it was for the General Assembly to make decisions regarding difficult public policy issues and that the courts cannot override the choices of the legislature on such matters. *Id.* at ¶¶ 23-24. This Court has long adhered to this proposition. *See, e.g., Rambaldo v. Accurate Die Casting*, 65 Ohio St. 3d 281, 288, 603 N.E.2d 975, 980 (1992); *State ex rel. Gross v. Indus. Comm.,* 115 Ohio St. 3d 249, 254, 2007-Ohio-4916,874 N.E.2d 1162, 1167, ¶ 20.

The statute's requirement for proof of a workplace injury as a precursor to pursuit of a Workers' Compensation retaliation claim makes sense, especially given the substantial costs that will be imposed on employers if forced to defend a flood of baseless claims. If the Ohio General Assembly is concerned that this causes a "chilling effect" on legitimate claims, as espoused by the Court of Appeals and Onderko, the legislature can choose to amend the statute. Until then,

however, any employee who has been finally adjudicated not to have suffered a workplace injury should not be permitted to file a retaliation claim under R.C. 4123.90 premised upon that injury.

<u>Proposition of Law No. 2:</u> As a matter of law, an employee who fails to appeal a decision of the Industrial Commission that his or her injury was not work-related cannot bring a R.C. 4123.90 retaliation claim based upon that claimed injury.

Onderko misstates Sierra Lobo's second proposition of law when he argues that "it would be contrary to public policy to fire an employee because he did not win his workers' compensation claim." (Appellee's Brief at 8). In its second proposition of law, Sierra Lobo is not making the argument that an employee must win his or her claim, but rather, that, in the relatively rare case where – as here – the employee is not terminated until after a final and unfavorable adjudication of his injury claim, the plain language of R.C. 4123.90 precludes that employee from pursuing a Workers' Compensation retaliation claim because, as a matter of law, the employee has suffered no workplace injury. All of the other scenarios put forth by Onderko and the Amici are hypotheticals that have no bearing on the issue here, which is whether proof of a workplace injury is required to pursue a retaliation claim under R.C. 4123.90.[2]

In *Wilson,* this Court held that a plaintiff makes out a *prima facie* case for R.C. 4123.90 retaliation by demonstrating an on the job injury, the filing of a Workers' Compensation claim and a discharge in violation of R.C. 4123.90. *Wilson, supra.* Here, the OIC conclusively found that Onderko's injury was not work-related, Onderko did not appeal that decision, and his termination did not occur until after all of that had occurred. Thus, Onderko cannot establish a *prima facie* claim under R.C. 4123.90.

Nor is there merit to Onderko's assertion that because the question of why Onderko was

[2] Many of the hypotheticals set forth in the briefs in support of Onderko describe a battle of the experts, where doctors differ as to the origin of the injury. Here, the OIC's determination was based upon Onderko's credibility and his own contradictory statements regarding the origin of his injury, not the medical testimony. (App. at 66-67).

terminated was not decided by the OIC, Sierra Lobo's second proposition of law would bar him from the opportunity to demonstrate that the reason for his firing was pretextual.[3] (Appellee's Brief at 9). This argument misses the point – under R.C. 4123.90 and *Wilson,* lacking a workplace injury, Onderko cannot sue Sierra Lobo for retaliation. As a result, Onderko's fraudulent conduct is a moot issue.

The mere filing of a Workers' Compensation claim should not trigger complete protection from discharge under R.C. 4123.90, as Onderko proposes. The statute's protection is not and cannot be absolute. If it is later conclusively proven that an employee submitted a false claim, an employer can be justified in terminating that employee. *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332 (5th Dist. 1997). To find otherwise would result in a situation that is both unfair and costly to Ohio employers, in that any employee filing a Workers' Compensation claim, including those filing fraudulent claims, would be protected from termination by the specter of the cost of retaliation litigation. Such a result would simply lead to at-risk employees filing frivolous Workers' Compensation claims in order to avail themselves of the termination-immunity which Onderko and the Amici urge this Court to adopt. But the statute does not afford protection to employees who are not injured at work, and this Court should not

[3] In the trial court, Sierra Lobo's David Hamrick submitted an affidavit stating that Onderko was fired for his deceptive conduct (App. at 34-35). Sierra Lobo argued that this was a legitimate, non-retaliatory reason for the discharge. Onderko argued in his brief opposing summary judgment that the firing was pretextual. (Onderko's Brief in Opposition to Defendant's Motion for Summary Judgment, filed on October 21, 2013, at 1, 5-7). The trial court rejected the pretext argument, holding that the discharge was based on a legitimate reason and it did not rise to the level of conduct necessary to support a claim for intentional infliction of emotional distress. (Trial Court's Opinion and Judgment Entry, Dated January 13, 2014, at 7). The Court of Appeals affirmed the trial court's decision on the intentional infliction of emotional distress claim. (App. at 28). Thus, even if this Court were to affirm the Court of Appeals' decision as to the elements of a *prima facie* case for a R.C. 4123.90 claim, the trial court has already upheld the legitimacy of Sierra Lobo's decision to terminate Onderko, and under the law of the case doctrine, Onderko's retaliation claim must fail.

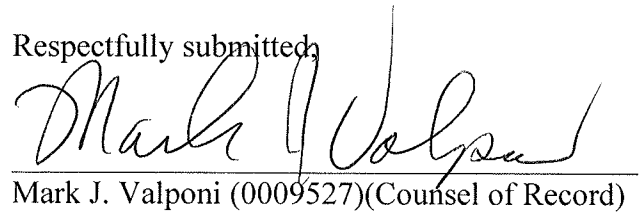
interpret it as if it did.

While the protection of employees from retaliation for legitimate claims under the Act is important, this protection should not and cannot be allowed to extend to employees who seek to exploit and defraud the system. The Court of Appeals suggested that the burden should be on the employers to defend against any and all claims under the Act, whether truthful or not. (App. at 24). Sierra Lobo did successfully defend against just such an "untruthful" claim by Onderko. But having been successful in that defense, Sierra Lobo should not now be subjected to defending yet another claim from Onderko – this time for retaliation – where the statute and this Court have held that one of the elements of that claim is proof of an issue already adjudicated in Sierra Lobo's favor in the first claim. Simply put, when it is clear that employee has deceived his employer, R.C. 4123.90 does not grant the employee immunity from adverse consequences from the deception, simply because the deception was about a workplace injury instead of something else.

CONCLUSION

The unambiguous language of Revised Code § 4123.90 requires the existence of a work-related injury in order for a plaintiff to prosecute a claim for retaliation, especially where, prior to termination, the plaintiff's injury was conclusively adjudicated as not work-related. For these reasons the decision below should be reversed and judgment entered in favor of the Appellant, Sierra Lobo, Inc.

Respectfully submitted,



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I certify that a copy of Appellant Sierra Lobo, Inc.'s Merit Brief was sent by ordinary U.S. mail and electronic mail, pursuant to Civ.R. 5(B)(2)(c) and (f), this 28th day of May, 2015 to the following counsel:

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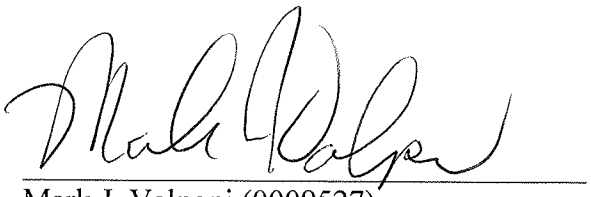

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