ORIGINAL

IN THE SUPREME COURT OF OHIO

DeWayne Sutton, Plaintiff-Appellee, v. Tomco Machining, Inc., Defendant-Appellant.	:	Case No. 2010-0670 On Appeal from the Montgomery County Court of Appeals, Second Appellate District

BRIEF OF *AMICUS CURIAE* THE OHIO ASSOCIATION FOR JUSTICE ON BEHALF OF PLAINTIFF-APPELLEE DEWAYNE SUTTON

COUNSEL FOR *AMICUS CURIAE* THE OHIO ASSOCIATION FOR JUSTICE:
Paul Giorgianni (0064806)
(Counsel of Record)
Giorgianni Law LLC
1538 Arlington Avenue
Columbus, Ohio 43212-2710
Phone: 614-205-5550
Fax: 614-481-8242
E: Paul@GiorgianniLaw.com

COUNSEL FOR PLAINTIFF-APPELLEE DEWAYNE SUTTON:
Jeffrey M. Silverstein (0016948)
Jason P. Matthews (0073144)
(Counsel of Record)
Jeffrey M. Silverstein & Associates
627 S. Edwin C. Moses Boulevard, Suite 2-C
Dayton, Ohio 45408
Phone: 937-228-3731
Fax: 937-228-2252
E: jason@silversteinlaw.com

COUNSEL FOR DEFENDANT-APPELLANT TOMCO MACHINING, INC.:
Jonathan Hollingsworth (0022976)
(Counsel of Record)
J. Hollingsworth & Associates, LLC
137 North Main Street, Suite 1002
Dayton, Ohio 45402
Phone: 937-424 8556
Fax: 937-424 8557
E: jhollingsworth@jhallo.com

COUNSEL FOR AMICUS CURIAE *OHIO MANAGEMENT LAWYERS ASSOCIATION*
Barton A. Bixenstine (0034130)
Josephine S. Noble (0078410)
Ogletree Deakins Nash Smoak & Stewart P.C.
Key Tower, Suite 4130
127 Public Square
Cleveland, Ohio 44114
Phone: 216-241-6100
Fax: 216-357-4733
E: Bart.Bixenstine@ogletreedeakins.com
Josephine.Noble@ogletreedeakins.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

PROPOSITIONS OF LAW

Propositions of Law Accepted for Review:

1. In order to preserve the comprehensive framework of the workers' compensation system enacted by the General Assembly, there is no common law cause of action for employees claiming termination in violation of rights conferred by the Workers' Compensation Act

2. There is no common law cause of action for preemptive retaliatory discharge in violation of public policy; the retaliation must follow the protected activity.

Proposition of Law Proposed by the Ohio Association for Justice:

> If an employer terminates an employee in retaliation for the employee's workplace injury, and if the termination occurs before the employee has had a reasonable opportunity to seek relief under the Workers' Compensation Act, the employee has a claim against the employer for the common-law tort of wrongful termination.

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 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. The Association is devoted to strengthening the civil justice system so that deserving individuals can get justice and wrongdoers are held accountable.

The OAJ believes that the court of appeals decision in this case is both correct under existing law and just.

STATEMENT OF THE CASE

On April 14, 2008, Plaintiff-Appellee DeWayne Sutton was injured on the job. His employer, Defendant-Appellant Tomco Machining, Inc., terminated his employment the same day.

On September 18, 2008, Mr. Sutton filed a complaint against Tomco in the Montgomery County Court of Common Pleas, alleging a common-law tort of wrongful termination in violation of public policy.

On April 15, 2009, the court of common pleas granted Tomco's Civ.R. 12(C) motion for judgment on the pleadings, holding that Mr. Sutton could not state a claim against Tomco.

On March 5, 2010, the Second District Court of Appeals reversed. *Sutton v. Tomco Machining, Inc.*, 186 Ohio App.3d 757, 2010-Ohio-830.

On July 21, 2010, this court accepted Tomco's appeal. 2010-Ohio-3331.

STATEMENT OF FACTS

Mr. Sutton injured his back while disassembling a chop saw in the course of his employment with Tomco. He had been employed by Tomco for two and a half years. (Complaint ¶¶ 1, 3.) Within one hour of reporting the injury, Tomco terminated his employment. (Complaint ¶¶ 4-5.)

Tomco did not provide Mr. Sutton a reason for terminating his employment. Indeed, Tomco told Mr. Sutton that the termination was ***not*** due to his work ethic, job performance, or any allegation of violation of a company work rule or policy. (Complaint ¶ 6.) The reason Tomco terminated Mr. Sutton was that Tomco was trying to limit its exposure under the Worker's Compensation Act. (Complaint ¶¶ 7, 12-16.)

Mr. Sutton was awarded worker's compensation benefits for his injury. (Complaint ¶ 8.) Mr. Sutton seeks damages for lost earnings and related benefits. (Complaint ¶¶ 15 & A.)

SUMMARY OF ARGUMENT

If an employer terminates an employee in retaliation for the employee's workplace injury, and if the termination occurs before the employee has had a reasonable opportunity to seek relief under the Workers' Compensation Act, the employee has a claim against the employer for the common-law tort of wrongful termination. The allegations of Mr. Sutton's Complaint satisfy the four elements for such a common-law claim, established by *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 69-70:

1. R.C. 4123.90, which prohibits employers from terminating employees in retaliation for filing a workers' compensation claim, manifests a clear public policy against terminating employees in retaliation for their workplace injuries.

2. Allowing employers to terminate employees in retaliation for their workplace injuries would jeopardize this public policy.

3. Tomco's motivation for terminating Mr. Sutton was related to this public policy – indeed, the motivation was to circumvent R.C. 4123.90 entirely by terminating Mr. Sutton before he could file a workers' compensation claim.

4. Tomco lacked overriding legitimate business justification for terminating Mr. Sutton.

R.C. 4123.90 creates a claim for wrongful termination when an employer terminates an employee in retaliation for the employee's filing a worker's compensation claim. R.C. 4123.90 does not preempt a common-law, wrongful-termination claim where the employer terminated the employee before the employee had a reasonable opportunity to file a workers' compensation claim. This Court's decision in *Bickers v. Western & Southern Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, does not suggest the contrary. In *Bickers* this Court concluded that by enacting R.C. 4123.90, the General Assembly preempted a common-law, wrongful-termination claim by employees ***who had already filed workers' compensation claims*** and ***who were terminated for***

non-retaliatory reasons. Here, in contrast, Tomco terminated Mr. Sutton before he could file a workers' compensation claim and did so in retaliation for Mr. Sutton's work-place injury.

Indeed, *Bickers* was based on a very different public policy concern. Ms. Bickers was terminated after receiving total disability workers' compensation benefits and not working for eight years. This Court was rightly concerned with the burden on employers of such long-term absenteeism – with employees being required to maintain totally disabled employees on their payrolls for years. In this case, however, the policy concern is a concern that employers might peremptorily terminate employees the moment they are injured, for the purpose of depriving the employees the protection of R.C. 4123.90.

Recognizing a common-law, wrongful-termination claim in this circumstance is necessary to the public policy underlying R.C. 4123.90. This Court should affirm.

ARGUMENT

If an employer terminates an employee in retaliation for the employee's workplace injury, and if the termination occurs before the employee has had a reasonable opportunity to seek relief under the Workers' Compensation Act, the employee has a claim against the employer for the common-law tort of wrongful termination.

A. Standard of review.

This Court reviews Civ.R. 12 dismissals *de novo*. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5.

B. Termination of employment in retaliation for workplace injury, before the employee has had an opportunity to seek relief under the Workers' Compensation Act, satisfies the four-prong test for common-law, wrongful termination.

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. Under this "employment at will" doctrine, employers may terminate employment for any reason or no reason at all. *Collins v. Riz-*

kana (1995), 73 Ohio St.3d 65, 68.

An exception to the employment at will doctrine is that employers may not terminate employment for reasons contrary to clearly established public policy:

> [A]n exception to the employment-at-will doctrine is justified where an employer has discharged his employee in contravention of a "sufficiently clear public policy." The existence of such a public policy may be discerned by the Ohio judiciary based on sources such as the Constitutions of Ohio and the United States, legislation, administrative rules and regulations, and the common law.

Painter v. Graley (1994), 70 Ohio St.3d 377, 384. This Court in *Collins* explained the rationale for this exception:

> [A]n overwhelming majority of courts have recognized this . . . cause of action [because] it is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out.

Collins, 73 Ohio St.3d at 68 (quotation marks and citations omitted).

Ohio courts have recognized common-law claims for wrongful termination "under a wide range of circumstances and based upon a wide variety of purportedly 'clear' public policies." Bradd N. Siegel & John M. Stephen, Ohio Employment Practices Law (West 2009) 706, Section 20:22 (collecting cases).

The four elements of a claim for common-law wrongful termination are:

1. A clear public policy manifest in a state or federal constitution, statute or administrative regulation, or in the common law.

2. Termination of employees under circumstances like those under which the plaintiff was terminated would jeopardize the public policy.

3. The plaintiff's termination was motivated by conduct related to the public policy.

4. The employer lacked overriding legitimate business justification for the dismissal.

Collins, 73 Ohio St.3d at 69-70. The first two issues are issues of law to be determined by the court. The third and fourth elements are issues of fact for the jury. *Id.*

Tomco's termination of Mr. Sutton satisfies all four elements:

1. A clear public policy manifest in a state or federal constitution, statute or administrative regulation, or in the common law. R.C. 4123.90 manifests a clear public policy against employers terminating an employee in retaliation for the employee being injured on the job. R.C. 4123.90 outright forbids such terminations after the employee has filed a workers' compensation claim:

> 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. Any such employee may file an action in the common pleas court of the county of such employment . . . .

R.C. 4123.90. This Court has already acknowledged this policy:

> The recognition of a public-policy exception for wrongful discharge in retaliation for filing a workers' compensation claim, whether derived from statutory or common law, is built on the premise that inability to challenge retaliatory discharges would undermine the purpose of the workers' compensation statute by forcing the employee to choose between applying for the benefits to which he is entitled and losing his job.

Coolidge v. Riverdale Local School Dist. (2003), 100 Ohio St.3d 141, ¶ 43 (quotation marks, brackets, and citation omitted) (holding that an employee who is receiving temporary total disability compensation pursuant to R.C. 4123.56 may not be discharged solely on the basis of absenteeism or inability to work, when the absence or inability to work is directly related to an allowed condition), limited by *Bickers v. Western & Southern Life Ins. Co.*, 116 Ohio St. 3d 351, 2007-Ohio-6751. This Court in *Bickers* limited and clarified *Coolidge*, saying that the claim in *Coolidge* was not a common-law, wrongful-termination claim but rather an R.C. 3319.16 "no

good cause for termination" claim. Even so, *Bickers* did not repudiate *Coolidge*'s recognition of the public policy underlying R.C. 4123.90.

2. Termination of employees under circumstances like those under which the plaintiff was terminated would jeopardize the public policy. By definition, terminating injured workers in retaliation for their workplace injuries before they have the opportunity to seek relief under the Workers' Compensation Act jeopardizes the clear public policy against employers retaliating against employees for their workplace injuries.

Moreover, in *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, this Court indicated that courts should recognize common-law, wrongful-termination claims when the remedy provision of the statute upon which the plaintiff depends for the public policy protects neither the plaintiff nor society's interest in discouraging the employer's conduct:

> It is clear that when a statutory scheme contains a full array of remedies, the underlying public policy will not be jeopardized if a common-law claim for wrongful discharge is not recognized based on that policy. . . . . [I]t is unnecessary to recognize a common-law claim when remedy provisions are an essential part of the statutes upon which the plaintiff depends for the public policy claim and when those remedies adequately protect society's interest by discouraging the wrongful conduct.
>
> . . . .
>
> Based on the above, we hold that the jeopardy element necessary to support a common-law claim is not satisfied, because R.C. Chapter 4112 adequately protects the state's policy against age discrimination in employment through the remedies it offers to aggrieved employees.

Id. at ¶¶ 27, 33.

Mr. Sutton's claim, in contrast, satisfies this "jeopardy" element, because R.C. 4123.90 does not "adequately protect society's interest by discouraging" employers from terminating injured workers in retaliation for their injuries. Indeed, if this Court fails to recognize a wrongful-termination claim on these facts, the clear public policy – that employers should not terminate

workers in retaliation for their workplace injuries – would be seriously compromised. Such failure would ***encourage*** violation of the public policy. It would encourage employers to terminate injured workers at the moment of injury, before the employee could trigger the R.C. 4123.90 protection by filing a workers' compensation claim. A common-law claim is necessary to discourage such conduct.

3. The plaintiff's termination was motivated by conduct related to the public policy. This element concerns a question of fact. Because the trial court dismissed Mr. Sutton's complaint under Civ.R. 12, the body of facts for purposes of this appeal is Mr. Sutton's complaint and all reasonable inferences one might draw therefrom. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. This third element is satisfied for purposes of this appeal because Mr. Sutton's complaint alleges facts from which one might reasonably infer that Tomco was motivated to terminate him by his workplace injury and its desire to deny him the protection of R.C. 4123.90:

> 10. Ohio has a clear public policy embodied in its common law as well as O.R.C. § 4123.90 which prohibits employers from discharging employees because they were injured on the job.
>
> . . . .
>
> 12. A causal connection exists between Plaintiff's injury and Defendant's decision to terminate his employment.
>
> 13. Defendant lacked an overriding business justification for terminating Plaintiff's employment.
>
> 14. Defendant's decision to terminate Plaintiff's employment was motivated by Plaintiff's workplace injury and in order to prevent him from filing of [*sic*] a workers compensation.
>
> . . . .
>
> 16. The actions of Defendant were . . . in reckless disregard for Plaintiff's common law rights under the laws of Ohio.

(Complaint ¶¶ 12-16.)

4. The employer lacked overriding legitimate business justification for the dismissal. This element, too, concerns a question of fact. Mr. Sutton's complaint specifically alleges that Tomco lacked a business justification for terminating him. (Complaint ¶ 13.)

Thus, Tomco's termination of Mr. Sutton satisfies all four elements for a common-law claim of wrongful termination in violation of public policy.

In addition to the Second District Court of Appeals in this case, at least two other courts have agreed with the foregoing analysis, holding that an employee has a common-law, wrongful-termination claim if the employer terminated the employee in retaliation for the employee's workplace injury and the termination occurred before the employee had a reasonable opportunity to seek relief under the Workers' Compensation Act. *Moore v. Animal Fair Pet Ctr. Inc.* (Franklin C.P. 1995), 81 Ohio Misc.2d 46; *Welty v. Honda of America Mfg., Inc.* (S.D. Ohio 2005), 411 F.Supp.2d 824, 833-834. It appears that prior to *Bickers*, no court ever denied the existence of such a common-law, wrongful-termination claim. (All of the post-*Bickers* cases are inventoried in Part D-2 below.)

Termination of employment in retaliation for work-place injury, before the employee has had an opportunity to seek relief under the Workers' Compensation Act, satisfies the four-prong test for common-law wrongful termination.

C. "Full compliance" with the statute that is the source of the public policy is not an element of a common-law, wrongful-termination claim.

Tomco contends that an "employee claiming discharge in violation of a public policy expressed *solely* in a statute must have complied fully with the requirements of the statute in order to maintain a common law cause of action for wrongful discharge." (Tomco Brief at 9-10 (citing *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134).) Tomco argues that Mr. Sutton has

not "complied fully" with R.C. 4123.90 because he failed to file a workers' compensation claim before Tomco terminated him.

Tomco's argument is flawed for three reasons.

First: The only reason Mr. Sutton "failed to comply" with R.C. 4123.90 is that Tomco terminated him within minutes of his injury, making it impossible for him to "comply" by filing a workers' compensation claim. Workers' rights are meaningless if they can be so easily erased by employers.

Second: Because Tomco rendered it impossible for Mr. Sutton to "comply," the more sensible application of R.C. 4123.90 to the facts of Mr. Sutton's termination is that R.C. 4123.90 simply does not apply. The only question should be whether the four elements of the tort are satisfied – and in this case they are.

Third: Tomco's proposition has only a tenuous basis in this Court's precedents. Although Tomco cites only *Kulch*, the case that best supports Tomco's proposition is *Contreras v. Ferro Corp.* (1995), 73 Ohio St.3d 244. But even in *Contreras*, the Court expressly declined to consider whether a wrongful-termination claim could be based upon the R.C. 4113.52 whistleblower statute. The Court held that even if it could, this particular plaintiff could not prove such a claim, because such a claim required compliance with the statute's procedural requirements:

> If appellant was entitled to maintain a *Greeley* [*Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, common-law] claim, an issue that today we do not decide, then that claim would have to be based upon the public policy embodied in R.C. 4113.52. Since appellant did not comply with the statute in the first instance he would have no foundation for a *Greeley* claim if, in fact, he was entitled to assert such a claim. Therefore, in this case the issue is moot.

Id. at 251. Mr. Contreras's lack of compliance was a failure to notify his superiors of the illegal activity. *Id.* at 249. That notice requirement was a fundamental policy choice of the legislature. It is not surprising that with regard to that particular statute, the Court ruled against any com-

mon-law claim that lacked such a requirement. In this case, in contrast, there is no reason to believe that the legislature intended to protect employers who peremptorily terminate workers the moment they are injured.

Kulch, decided two years later, produced a plurality opinion that seems to contain diametrically opposed holdings:

> [A]ppellant is entitled to maintain a *Greeley* claim against appellees ***whether or not he complied with the dictates of R.C. 4113.52*** in reporting his employer to OSHA. We also hold that R.C. 4113.52 does not preempt a common-law cause of action against an employer who discharges or disciplines an employee in violation of that statute. We further hold that an at-will employee who is discharged or disciplined in violation of the public policy embodied in R.C. 4113.52 may maintain a common-law cause of action against the employer pursuant to Greeley and its progeny ***so long as that employee had fully complied with the statute*** and was subsequently discharged or disciplined.

Kulch, 78 Ohio St.3d at 162 (emphasis added).

In *Pytlinski v. Brocar Prod., Inc.*, 94 Ohio St.3d 77, 2002-Ohio-66, the Court held that compliance with R.C. 4113.52 was not necessary to sustain a common-law claim based on the public policy underlying that statute:

> In *Kulch*, we . . . concluded that retaliation against employees who file complaints regarding workplace safety clearly contravenes the public policy of Ohio. *Id.*, 78 Ohio St.3d at 152-153, 677 N.E.2d at 322.
>
> Specifically, we held:
>
> "[A]n at-will employee who is discharged or disciplined for filing a complaint with OSHA concerning matters of health and safety in the workplace is entitled to maintain a common-law tort action against the employer for wrongful discharge/discipline in violation of public policy pursuant to *Greeley*, 49 Ohio St.3d 228, 551 N.E.2d 981, and its progeny. Thus, appellant is entitled to maintain a *Greeley* claim against appellees ***whether or not he complied with the dictates of R.C. 4113.52*** in reporting his employer to OSHA." (Emphasis added.) *Id.*, 78 Ohio St.3d at 162, 677 N.E.2d at 328-329.
>
> We disagree with any contention on appellees' behalf that Pytlinski's claim fails because his complaints were not filed with OSHA [as R.C. 4113.52 requires].

Id. at 80 (footnotes omitted).

Most recently, in *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, the Court seemed to indicate that compliance/non-compliance is irrelevant, and that the lodestar issue is whether the statute provides remedies adequate to vindicate the public policy. *Id.* at ¶¶ 24-28. In Mr. Sutton's case, the statute, R.C. 4123.90, does not even apply; Mr. Sutton has no remedy under the statute. R.C. 4123.90 manifests a clear public policy but does not provide the remedy necessary to vindicate that policy in the egregious circumstance of an employer terminating a worker the moment the worker is injured.

The Court should abandon the unfortunate "statutory compliance" rubric of some prior opinions and adhere to the four-prong test of *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 69-70.

D. R.C. 4123.90 does not preempt a common-law, wrongful-termination claim where the employer terminated the employee in retaliation for a workplace injury before the employee had a reasonable opportunity to seek relief under the Workers' Compensation Act.

1. The General Assembly has not preempted a common-law claim based on these facts.

The only way the analysis in Part B above fails is if the General Assembly preempted, or prohibited, a common-law, wrongful-termination claim covering the circumstance of an employer terminating a worker the moment the worker is injured.

The General Assembly has not done so expressly.

Nor is there reason to believe that the General Assembly intended to do so, as Tomco argues.

First: If the General Assembly intended to preempt common-law claims, it would have

done so expressly, as it has in other instances.[1] The General Assembly knows how to preempt the common law and has not done so with respect to pre-claim-filing retaliatory terminations.

Second: There is nothing in the legislative record to suggest an intention to preempt. Paragraph 2 of R.C. 4123.90 was enacted in 1978, Am.H.B. 1282, 137 Ohio Laws 3934, 3961-3962, and has not been materially amended.

Third: There is no reason to believe that any one legislator, much less the entire majority that enacted Paragraph 2 of R.C. 4123.90, intended for the new statute to protect an employer who terminates an employee the moment the employee is injured. It is difficult to imagine any legislator taking such a position.

Fourth: The Equal Protection guarantees of the United States and Ohio Constitutions prohibit governmental classifications that lack a rational basis. *Modzelewski v. Yellow Freight Systems, Inc.*, 102 Ohio St.3d 192, 2004-Ohio-2365 (voiding subrogation rule, R.C. 4123.93(D), of the Workers' Compensation Act, because it irrationally created two classes of claimants); *State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3923 (voiding sentencing statute because it irrationally created two classes of convicts). At least with respect to workplace injuries that are, from

---

[1] The General Assembly has preempted common-law claims in

- R.C. 124.341(D), expressly preempting all other remedies for state-employee whistleblowers, *see Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 158 (distinguishing R.C. 124.341 from R.C. 4113.52, and recognizing a common-law claim based on R.C. 4113.52);
- R.C. 2317.56, expressly preempting all other remedies for persons, or the representatives of estates of persons, who allegedly sustain injury, death, or loss to person or property as a result of a failure to provide abortion patients with specified information;
- 5145.163(F), expressly preempting all other remedies when a prison inmate accepts a disability benefit award; and
- R.C. 5313.10, expressly preempting all other remedies when a land installment contract is terminated.

the moment of injury, obviously compensable under the workers' compensation system, there is no rational basis for ***protecting*** employers who terminate an employee while the employee is lying on the ground immediately after a workplace injury while ***punishing*** employers who terminate an employee after the employee files a workers' compensation claim. With respect to such injuries, failure to recognize a common-law, wrongful-termination remedy for ***pre***-claim-filing termination to parallel the R.C. 4123.90 remedy for ***post***-claim-filing termination would by constitutionally suspect.

2. *Bickers v. Western & Southern Life Ins. Co.* does not suggest that the General Assembly preempted a common-law claim against employers who terminate employees the moment they are injured.

In *Bickers v. Western & Southern Life Ins. Co.*, 116 Ohio St. 3d 351, 2007-Ohio-6751, this Court concluded that by enacting R.C. 4123.90, the General Assembly preempted a common-law, wrongful-termination claim by employees ***who had already filed workers' compensation claims*** and ***who were terminated for non-retaliatory reasons***. *Bickers* suggests nothing about a common-law, wrongful-termination claim by employees terminated ***before*** they had a chance to file workers' compensation claims and ***in retaliation*** for the workplace injury.

The *Bickers* syllabus reads:

> An employee who is terminated from employment ***while receiving workers' compensation*** has no common-law cause of action for wrongful discharge in violation of the public policy underlying R.C. 4123.90, which provides the exclusive remedy for employees claiming termination ***in violation of rights conferred by the Workers' Compensation Act***. (*Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357, 797 N.E.2d 61, limited.)

Id. at syllabus (emphasis added). This sentence contains two independent propositions, neither of which bars Mr. Sutton's common-law claim.

The first proposition is that an employee who is terminated from employment ***while receiving workers' compensation*** has no common-law cause of action for wrongful discharge in

violation of the public policy underlying R.C. 4123.90. The body of the *Bickers* majority opinion echoes the syllabus in this regard:

> We hold that *Coolidge* [*v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357], is limited to considerations of "good and just cause" for termination under R.C. 3319.16 and does not create a claim of wrongful discharge in violation of public policy for ***an employee who is discharged while receiving workers' compensation***.

Id. at ¶ 2 (emphasis added). That proposition is no bar to Mr. Sutton's claim, because Tomco terminated him while he was ***not*** receiving workers' compensation – indeed, just an hour after his workplace injury.

The second proposition is that R.C. 4123.90 provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act. That proposition is no bar to Mr. Sutton's claim, because his claim for termination does not rely upon "rights conferred by the Workers' Compensation Act." Because Tomco terminated Mr. Sutton before Mr. Sutton filed a worker's compensation claim, Mr. Sutton does ***not*** have the rights conferred by R.C. 4123.90. *Bryant v. Dayton Casket Co.* (1982), 69 Ohio St.2d 367, (holding that R.C. 4123.90 "applies only if the employee had been discharged after taking some action which would constitute the actual pursuit of his claim, not just an expression of his intent to do so"). Mr. Sutton's claim relies instead upon the common law.

This analysis is comparable to the statute of limitations analysis for common-law, wrongful-termination claims. When a common-law claim for wrongful termination is based upon a statute that contains a limitations period, the applicable statute of limitations is not that statute but rather R.C. 2305.09(D), the general limitations period for tort claims. *Pytlinski* 94 Ohio St.3d at 80-81. Similarly, although Mr. Sutton's common-law claim is based upon the public policy underlying R.C. 4123.90, the claim is not "conferred by" the statute.

The *Bickers* holding is inapplicable here for another reason: the *Bickers* holding concerns non-retaliatory termination, while Mr. Sutton was terminated in retaliation for his workplace injury.[2] R.C. 4123.90 is an "antiretaliation statute." *Id.* at ¶ 10. *Bickers* "determin[ed] whether the tort of wrongful discharge in violation of public policy applies to a ***nonretaliatory*** discharge of an injured worker receiving workers' compensation benefits." *Id.* at ¶ 1 (emphasis added). Accord *id.* at ¶ 17 ("[W]e also hold that the constitutionally sanctioned, and legislatively created, compromise of employer and employee interests reflected in the workers' compensation system precludes a common-law claim of wrongful discharge in violation of public policy ***when an employee*** files a workers' compensation claim and ***is discharged for nonretaliatory reasons***" (emphasis added).); *id.* at ¶ 23 ("[T]he General Assembly chose to proscribe retaliatory discharges only."). Because Ms. Bickers was terminated for ***non***retaliatory reasons, the antiretaliation public policy underlying R.C. 4123.90 did not support a common-law, wrongful-termination claim. Here, in contrast, Tomco did violate the antiretaliation policy underlying R.C. 4123.90.

Indeed, this Court's *Bickers* decision was based on a very different public policy concern. Ms. Bickers was terminated after receiving total disability workers' compensation benefits and not working for eight years. This Court was rightly concerned about the burdens such long-term absenteeism imposes upon employers, including retaining totally disabled employees for years. Such a question is better left to the General Assembly:

> The policy choice between permitting and prohibiting the discharge from employment of an employee who has been injured at work is a difficult one, as it inevitably creates a burden of some degree upon either the employer or the employee.

---

[2] Tomco's Brief states: "The court of appeals . . . believed that the 'policy choice' referred to [in *Bickers*] related only to 'non-retaliatory' discharges. [T]his Court unequivocally rejected this interpretation of *Bickers* in the *Kaminski* case [*Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027] (Tomco Brief 10 (citation omitted).) *Kaminksi* says no such thing.

> Should the policy choice be to deny employers the exercise of their employment-at-will prerogative and require them to ***hold open the jobs of injured employees for indefinite periods of time***, then employers will be burdened with employees unable to perform the work for which they were hired and an inability to obtain permanent replacements. This resolution would be particularly onerous on small employers with few employees, who lack the ability to shift the duties of an injured employee to other employees.

Id. at ¶¶ 20-21 (citation omitted). In this case, however, the policy concern is that of employers immediately terminating workers to deprive them of the protection of R.C. 4123.90.

The *Bickers* decision is grounded in judicial deference to the "constitutionally sanctioned, and legislatively created, compromise of employer and employee interests reflected in the workers' compensation system." *Id.* at ¶ 17. Such judicial deference was a consideration in *Bickers* only because the Workers' Compensation Act had been triggered by Ms. Bickers filing a workers' compensation claim:

> In addition to concluding that *Coolidge* is inapplicable to Bickers's situation, we also hold that the constitutionally sanctioned, and legislatively created, compromise of employer and employee interests reflected in the workers' compensation system precludes a common-law claim of wrongful discharge in violation of public policy ***when an employee files a workers' compensation claim*** and is discharged for nonretaliatory reasons.

Id. (emphasis added). This case is different. Tomco terminated Mr. Sutton for the very purpose of avoiding the "constitutionally sanctioned, and legislatively created, compromise of employer and employee interests reflected in the workers' compensation system" – specifically, R.C. 4123.90.

The reason that Ms. "Bickers's remedy must be found within the workers' compensation statutes," *id.* at ¶ 25, was that Ms. Bickers already was within the workers' compensation system when she was terminated. The reason that Mr. Sutton's remedy must be found within the common law is that he was ***not*** within the workers' compensation system when he was terminated – and because such terminations jeopardize the public policy underlying that system.

In only one case has *Bickers* ever been construed as categorically forbidding a common-law claim for wrongful termination in retaliation for workplace injury, even when R.C. 4123.90 does not apply because the termination occurred before the worker's compensation claim was filed. That lone case is *Mortensen v. Intercontinental Chemical Corp.*, 1st Dist., 178 Ohio App.3d 393, 2008-Ohio-4723, ¶¶ 13-15. Two post-*Bickers* cases are ambiguous:

- The court in *Sidenstricker v. Miller Pavement Maintenance,* 10th Dist., 2009-Ohio-6574, ¶ 12, rejected the plaintiff's argument for a common-law claim, but it is unclear whether R.C. 4123.90 applied. The plaintiff, prior to termination, completed an accident report form he believed initiated a worker's compensation claim, but he completed the worker's compensation claim form after termination. *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 10th Dist. 2001-Ohio-4111, ¶¶ 7-9.

- In *Trout v. FirstEnergy Generation Corp.* (N.D. Ohio Aug. 6, 2008), No. 3:07CV00673, 2008 U.S. Dist. LEXIS 102803, *15, affirmed (C.A.6 2009), 339 Fed. Appx. 560, 2009 U.S. App. LEXIS 16954, the trial court's opinion rejects the plaintiff's argument for a common-law claim but does not state whether the plaintiff was terminated before or after she applied for workers' compensation benefits.

None of the other post-*Bickers* cases upon which Tomco relies[3] is instructive, because those cases are indistinguishable from *Bickers*. The plaintiffs in those cases were terminated ***after*** they had filed a worker's compensation claim and thus had the protection of R.C. 4123.90.

This Court can affirm the Second District Court of Appeals decision in this case without overruling or limiting *Bickers*. The Ohio Association for Justice would argue that *Bickers* was wrongly decided and that Chief Justice Moyer in dissent was correct that the unanimous Court in

[3] These uninstructive post-*Bickers* cases are: *Carpenter v. Bishop Well Services Corp.*, 5th Dist., 2009-Ohio-6443, ¶ 39; *McDannald v. Robert L. Fry & Associates*, 12th Dist., 2008-Ohio-4169, ¶¶ 31-32; *Cunningham v. Steubenville Orthopedics and Sports Medicine*, 7th Dist., 175 Ohio App. 3d 627, 2008-Ohio-1172; *Amara v. ATK, Inc.* (S.D. Ohio Aug. 5, 2009), No. 3:08CV0378, 2009 U.S. Dist. LEXIS 76357, *6-11; *Helmick v. Solid Waste Authority of Central Ohio* (S.D. Ohio Mar. 10, 2009), No. 2:07-CV-912, 2009 U.S. Dist. LEXIS 19301, *12; *Powell v. Honda of America Mfg.* (S.D. Ohio July 22, 2008), No. 2:06-CV-979, 2008 U.S. Dist. LEXIS 56991, *7-8; *Compton v. Super Swan Cleaners* (S.D. Ohio Apr. 29, 2008), No. 08-CV-002, 2008 U.S. Dist. LEXIS 39526, *13-14; *McDermott v. Continental Airlines* (S.D. Ohio Apr. 11, 2008), No. 2:06-cv-0785, 2008 U.S. Dist. LEXIS 29831, *45-46.

Coolidge "enunciated a clear public policy . . . that transcends the differences between at-will and contract employment." *Bickers*, ¶ 30 (Moyer, C.J., dissenting). But *Bickers* being as distinguishable from this case as it is, this Court can affirm without overruling *Bickers*.

3. Conclusion.

The General Assembly has not preempted a common-law, wrongful-termination claim against employers who, in an effort to skirt their workers' compensation obligations, terminate employees the moment they are injured. The legislature has the power to abrogate the common law but has not done so with respect to Mr. Sutton's claim.

The position of Tomco and *amicus* OMLA that R.C. 4123.90 effects such preemption is rich with two great ironies. First: The common-law tort of wrongful termination in violation of public policy is merely an exception to another common-law rule: employment at will. Second: Tomco and OMLA wrongly portray the court of appeals opinion as the product of an over-active judiciary invading the province of the legislature. In fact, the common-law tort of wrongful termination does not interfere with legislation but rather brings the common law into line with legislation. The General Assembly has chosen not to preempt wrongful-termination claims such as Mr. Sutton's. It is the position of Tomco and OMLA that would require the judiciary to ignore the plain text of a statute and imagine legislative action where there is none.

E. This Court should not categorically eliminate the common-law tort of wrongful termination by overruling *Painter v. Graley*.

Amicus curiae the Ohio Management Lawyers Association advocates for the categorical elimination of the common-law tort of wrongful termination and the wholesale overruling of *Painter v. Graley* (1994), 70 Ohio St.3d 377, and its progeny. The Court should decline to do so for three reasons.

First: The doctrine of judicial restraint recommends that courts decide only the questions necessary to decide the case: "[T]he cardinal principle of judicial restraint [is:] if it is not necessary to decide more, it is necessary not to decide more." *State ex rel. Hamilton Cty. Bd. of Commrs. v. Hamilton Cty. Court of Common Pleas*, 126 Ohio St.3d 111, 2010-Ohio-2467, ¶ 39 (quotation marks and citations omitted). No party to this case advocates so much as limiting *Painter*, much less categorically eliminating the common-law tort of wrongful termination. It is only *amicus curiae* the OMLA that does so. Thus, this case is not an appropriate vehicle for doing so.

Second: The facts of this case demonstrate the need for the common law. Advancing the public policy manifest in legislation and executive-branch administrative regulations is one of the fundamental obligations of the common law. The policy underlying R.C. 4123.90 is that employers should not terminate workers in retaliation for their workplace injuries. The common law should promote this policy by providing a remedy when employers terminate workers in retaliation for their workplace injuries. Otherwise, the common law (specifically, the employment-at-will doctrine) would impair this public policy.

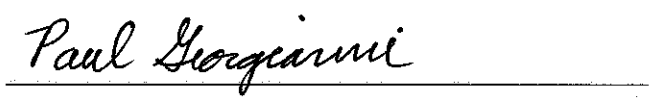
Third: the tort of wrongful termination in violation of public policy has been the law of Ohio for fourteen years and has been recognized by "an overwhelming majority of courts," *Collins*, 73 Ohio St.3d at 68. The OMLA's plea for the Court "to restore the appropriate balance of judicial and legislative functions that has been frustrated by the judicial creation of public policy wrongful discharge claims" (OMLA Brief at 4) is a red herring. "[T]he General Assembly has the authority, within constitutional limitations, to change the common law by legislation." *Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 303, 1999-Ohio-267, limited by *Stetter v. R.J. Corman Derailment Services, L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, ¶ 30. The General

Assembly could do away with the tort of wrongful termination any time it wished. For fourteen years it has chosen not to do so. If there now is to be such a cataclysmic change in the law, such change should be effectuated by the legislature.

CONCLUSION

This Court should affirm.

Respectfully submitted,

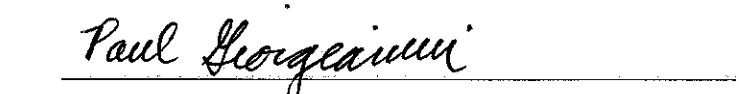


Paul Giorgianni (0064806) (Counsel of Record)
Giorgianni Law LLC
1538 Arlington Avenue
Columbus, Ohio 43212-2710
Phone: 614-205-5550
Fax: 614-481-8242
E: Paul@GiorgianniLaw.com
Counsel for Amicus Curiae
The Ohio Association for Justice

CERTIFICATE OF SERVICE

A PDF electronic version of this document was sent by e-mail on October 27, 2010 to:

Jason P. Matthews, jason@silversteinlaw.com,
Jeffrey M. Silverstein, jeffrey@silversteinlaw.com,
Jonathan Hollingsworth, jhollingsworth@jhallo.com,
Barton A. Bixenstine, Bart.Bixenstine@ogletreedeakins.com, and
Josephine S. Noble, Josephine.Noble@ogletreedeakins.com.



Paul Giorgianni