



## SUPREME COURT OF OHIO BARS PUBLIC POLICY CLAIMS BY EMPLOYEES DISCHARGED WHILE RECEIVING WORKERS' COMPENSATION

On December 20, 2007, the Supreme Court of Ohio ruled that an employee who is terminated while receiving workers' compensation benefits cannot bring a common-law cause of action for wrongful discharge in violation of public policy. Bickers v. W. & S. Life Ins. Co., slip. op. no. 2007-Ohio-6751, at ¶ 26 (Ohio 2007). Instead, the employee's exclusive remedy is to file a claim under Ohio Rev. Code § 4123.90. Id. The Bickers decision clarifies and significantly limits the Court's previous holding in Coolidge v. Riverdale Local Sch. Dist., 100 Ohio St. 3d 141, 2003-Ohio-5357. 797 N.E.2d 61 (Ohio 2003), the controversial decision that opened the floodgates for public policy claims by employees discharged while receiving temporary total disability benefits ("TTD"). By barring such claims, Bickers (1) prevents employees from bypassing § 4123.90's notice and timeliness requirements and (2) limits employees to recovery of only those equitable remedies specifically set forth in the Workers' Compensation Act. Bickers also appears to restore Ohio's pre-Coolidge law providing that discharging an employee pursuant to a neutral absenteeism policy is not *per* se retaliation.

In *Bickers*, plaintiff-appellee Shelley Bickers suffered a work-related injury while employed by defendant-appellant Western & Southern Life Insurance Company ("Western & Southern"). Bickers filed a workers' compensation claim that was ultimately allowed for multiple conditions involving her arms. For eight years following her injury, Bickers experienced numerous periods of disability during which work restrictions related to her injury prevented her from performing her usual job duties. During these periods, Western & Southern did not provide Bickers with alternative employment within the restrictions set by her physician and Bickers received TTD. Western & Southern terminated Bickers in 2002 while she was still receiving TTD.

In December, 2003 Bickers filed a wrongful discharge claim against Western & Southern. She alleged,

among other things, that she was wrongfully discharged in violation of public policy. She did not file a statutory wrongful discharge claim under § 4123.90, however, because she failed to comply with the statute's notice and timeliness requirements.<sup>1</sup>

In support of her public policy claim, Bickers relied on the Court's decision in Coolidge. In that case, a schoolteacher (Cheryl Coolidge) was assaulted by a student, and her injuries prevented her from returning to work. Once she exhausted all available leave, the school board terminated her due to her continued absence. The Court was asked to decide whether Coolidge's continued absence constituted "just cause" for her discharge under Ohio Rev. Code § 3319.16.2 The Court purported to hold that "an employee who is receiving TTD 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." 797 N.E.2d at 70, ¶ 46. Because of the broad language used, the Coolidge Court appeared to adopt a hard and fast rule preventing employers from discharging, due to absenteeism, employees receiving TTD.

Western & Southern filed a 12(B)(6) motion to dismiss Bickers' Coolidge claim. The company argued first that Bickers could not bring a public policy claim because § 4123.90 provided her exclusive remedy. Alternatively, Western & Southern contended that even if Bickers could bring a public policy claim, the claim was barred because Bickers was required but failed to comply with § 4123.90's notice and timeliness requirements. The company further argued that Bickers' circumstances were not sufficiently analogous to Coolidge to state the public policy claim allowed in that case. The trial court granted Western & Southern's motion and dismissed Bickers' claim. Bickers v. W. & S. Life Ins. Co., No. C-040342,

2006 WL 305442, at ¶ 4 (Ohio Ct. App. (1st Dist.) Feb. 10, 2006), rev'd, 2007-Ohio-6751, at ¶ 26. Bickers appealed, and the First District Court of Appeals reversed, allowing Bickers' Coolidge claim. The Supreme Court of Ohio heard the case on a discretionary appeal.

In a 5-2 decision, the Supreme Court of Ohio reversed and dismissed Bickers' claim. The Court first concluded that *Coolidge* did not apply to Bickers' situation. *Bickers*, 2007-Ohio-6751, at ¶ 11. The Court expressly limited *Coolidge* to holding that "terminating *a teacher* for absences due to a work-related injury while the teacher is receiving workers' compensation benefits is a termination without 'good and just cause' under R.C. 3319.16." *Id.* (emphasis added). Writing for the majority, Justice Robert R. Cupp explained that:

Because Bickers is not a teacher protected by a contract covered by R.C. 3319.16, Bickers is not entitled to the benefit of the holding in *Coolidge* and may not assert a wrongful-discharge claim in reliance on *Coolidge*. Bickers is an at-will employee. Because *Coolidge* does not create a cause of action for an at-will employee who is terminated for nonretaliatory reasons while receiving workers' compensation, the trial court properly dismissed Bickers' claim.

Id. Thus, Bickers limits Coolidge to its specific facts and "considerations of whether 'good and just cause' support[] the termination of an employee protected under R.C. 3319.16." Id. at ¶ 15.

The *Bickers* Court also ruled that "R.C. 4123.90... provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act." *Id.* at ¶ 26. In reaching this conclusion, the Court

<sup>1.</sup> Under § 4123.90, an employee may bring a wrongful discharge claim only if the employee (1) provides the employer with written notice of the claim within 90 days of termination and (2) files suit within 180 days of termination. Ohio Rev. Code Ann. § 4123.90 (West 2007) ("The action shall be forever barred unless filed within one hundred eighty days immediately following the discharge, . . . and no action may be instituted or maintained unless the employer has received written notice of a claimed violation . . . within the ninety days immediately following the discharge. . . .").

Section 3319.16 provides that "[t]he contract of any teacher employed by the board of education of any city, exempted village, local, county, or joint vocational school district may not be terminated except for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause."

recognized that the Ohio General Assembly replaced, rather than supplemented, common-law remedies when it enacted the statutory workers' compensation system. *Id.* at ¶ 19. The Court acknowledged that it could not "override this choice and superimpose a common-law, public policy tort remedy on this wholly statutory system. . . . 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." *Id.* at ¶¶ 23-24.

Bickers does not eliminate an employer's liability for wrongful discharge altogether. Employees may still bring wrongful discharge claims under § 4123.90. Barring common-law public policy claims, however, has several significant practical implications that are favorable for employers. First, employees will no longer be able to bypass § 4123.90's 90-day notice and 180-day filing requirements. Second, employees will be limited to the equitable remedies available under § 4123.90 (namely, reinstatement with back pay and lost wages and reasonable attorneys' fees); employers will no longer be exposed to additional damages available under the common law, such as front pay, and compensatory and punitive damages.

In addition, Bickers appears to restore Ohio's pre-Coolidge law providing that discharging an employee pursuant to a neutral absenteeism policy does not give rise to a retaliation claim. In Coolidge, the Court acknowledged in dicta that the majority of Ohio courts "invariably conclude that public policy does not exempt the disabled workers' compensation claimant from the provisions of a neutral absenteeism policy or practice that is applied evenhandedly to all employees." 797 N.E.2d at 66, ¶ 27. Coolidge, however, seemed to reject this prevailing view, agreeing instead with the minority view that "it is a violation of public policy for an employer to discharge or otherwise penalize a temporarily and totally disabled employee pursuant to a 'neutral' absenteeism or attendance policy, when the absence or inability to work is directly related to a compensable injury." Id. at ¶ 28. The Court reasoned that its analysis was more consistent with the purposes of the Workers' Compensation Act and that employees have a right not only to the compensation provided by the Act but also whatever period of time is medically necessary to recover from their injuries. *Id.* at ¶¶ 42-44.

In limiting Coolidge, the Court now appears to reject the notion that a public policy claim exists where an at-will employee is discharged pursuant to a neutral absenteeism policy. Bickers, however, does not address this issue. Bickers also does not address whether an employer must exclude the time period during which an employee is receiving TTD in computing the employee's compliance with a neutral absenteeism policy. See Woody v. Sears, Roebuck & Co., No. C-3-05-368, 2006 WL 1580220, at \*5 (S.D. Ohio June 5, 2006) (finding employee was discharged in violation of public policy where employer included several months during which employee received TTD in terminating employee for violating 12-month maximum for workers' compensation leave) (relying on Coolidge).3 Thus, an employer's liability under § 4123.90 for terminating an employee pursuant to a neutral absenteeism policy is probably an open issue.

Bickers is one of several recent decisions by the Court limiting the tort of wrongful discharge in violation of public policy in Ohio. In 2002, the Court concluded that "Ohio does not recognize a cause of action for wrongful discharge in violation of public policy when the cause of action is based solely on a discharge in violation of the [Family Medical Leave Act "FMLA"]. An aggrieved employee's proper recourse for an employer's FMLA violation is to bring the cause of action authorized by Congress under Section 2617." Wiles v. Medina Auto Parts, 96 Ohio St. 3d 240, 2002-Ohio-3994, 773 N.E.2d 526, at ¶ 17 (Ohio 2002). Similarly, in September, 2007, the Court held that "a common-law tort claim for wrongful discharge based on Ohio's public policy against age discrimination does not exist, because the remedies in R.C. Chapter 4112 provide complete relief for a statutory claim for age discrimination." Leininger v. Pioneer Nat'l Latex, 2007-Ohio-4921, 875 N.E.2d 36, at ¶ 34 (Ohio 2007). Taken together, these cases, along with Bickers, suggest that no action for wrongful discharge in violation of public policy will lie where a statutory scheme already exists to discourage the wrongful conduct.

<sup>3.</sup> Although a federal court decision, Woody applied Ohio's substantive law.

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