# *OVERVIEW OF OHIO EMPLOYMENT LAW*

***by***


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# OHIO WORKERS' COMPENSATION

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## I. OHIO COURT ESTABLISHES A DIFFERENT DISABILITY STANDARD

In Barreca v. Travco Behavioral Health, Inc., 2014-Ohio-3280, Kathleen Barreca applied for a job with Travco Behavioral Health, Inc. ("Travco") as a mental health counselor. She participated in two separate interviews with Travco; following which she was instructed to provide certain documents in order to complete her employment file, including a physical examination form that was to be completed by Barecca's personal physician. She was also asked to take a mental competency test.

Ms. Barecca submitted the completed physical examination report which listed "multiple sclerosis / no limitations" as a current medical condition.

She was advised that her file was still incomplete and she needed to complete a mental competency clearance form. She was instructed not to report to work until that form was complete.

She was subsequently never "offered" a position.

Ms. Barecca filed a charge of discrimination with the Ohio Civil Rights Commission and then a lawsuit. She alleged that Travco discriminated against her based on her disability: **multiple sclerosis**.

The trial court granted Travco summary judgment, concluding that Ms. Barecca's multiple sclerosis did not constitute a "disability" because there was no evidence that it had "substantially limited her ability to perform one or more major life activities."

In upholding the trial court's decision, the Appellate Court focused on a variety of decisions, all of which concluded that a physical impairment does not necessarily constitute a disability.

**A "physical impairment may affect an individual's life without becoming disabling."**

Here, Ms. Barecca and her physician specifically advised Travco that her multiple sclerosis imposed ***no limitations*** on her and had no substantial effect on her ability to walk, see or drive a car. Therefore, she was not viewed as being disabled under Ohio law.

**WHAT DOES THIS MEAN TO HUMAN RESOURCES?**

In the new ADAAA regulations, the EEOC stated that certain impairments would qualify individuals for coverage just by virtue of contracting the condition. Those impairments had been referred to as "categorical" or "per se" disabilities, which include:

> Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.

However, the Ohio 11th District Court of Appeals has chosen not to follow this ADA regulation. Instead, the 11th District explicitly held that in order to be disabled under Ohio's disability law, the individual must still be "substantially limited in a major life activity."

## II. OHIO SUPREME COURT: PERSONAL LIABILITY AND PUNITIVE DAMAGES

### A. Managers Can Be Sued Personally Under Ohio's Anti-Discrimination Law

Early in January of 1999, the argument was made before the Ohio Supreme Court that under Ohio's Anti-Discrimination Law, Ohio Revised Code Section 4112, managers should be held personally liable to employees they have wronged under the Act. (Genaro v. Central Transport, Inc. (1999), 84 Ohio St.3d 293)

On January 13, 1999, the Ohio Supreme Court agreed with this position and held that managers and supervisors could be sued personally under Ohio's Anti-Discrimination Law.

Previously, only employers could be sued for committing illegal discrimination under the Act. Now, under the Genaro decision, every supervisor, manager and human resource professional places their own assets at risk every time they make an employment-related decision in Ohio.

### B. The Ohio Supreme Court's Rationale

In making its decision, the Ohio Supreme Court first looked to the language of Section 4112, Ohio's Anti-Discrimination Law. Section 4112.02 of the Ohio Revised Code states that:

> "…it shall be an unlawful discriminatory practice: (A) [f]or an employer, because of race, color, religion, sex, national origin, handicap, age or ancestry of any person…to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or in any matter directly or indirectly related to employment."

Ohio Revised Code Section 4112.01(A)(2) defines an "employer" as being "any person employing four or more persons within the state, and **any person acting directly or indirectly in the interest of an employer**."

As a practical matter, it is a **very** difficult argument to make that an employer should be held liable for the illegal acts of their managers, but then let the manager who actually committed the unlawful act go free. Such logic carried a great deal of weight with the court in reaching its decision in this case.

Therefore, since Ohio's Anti-Discrimination Law prohibits illegal discriminatory acts by **any person**, the court ruled that not only could employers be sued for unlawful discrimination, but so could their supervisors and managers, which includes human resource professionals who approve such allegedly illegal decisions.

## III. OHIO FEDERAL COURT'S DECISION EXPANDS THE SCOPE OF PERSONAL LIABILITY FOR SUPERVISORS

In Kunkle v. Q-Mark, Inc., No. 3:13- cv-82 (S.D. Ohio, June 28, 2013), Patricia Kunkle worked for Q-Mark, Inc., through a temporary staffing agency. Kunkle alleged that in 2012, a supervisor, Roberta Gentile, threatened that employees would be terminated if President Barack Obama was reelected. Kunkle claimed that after the election, she announced to coworkers that "she had voted a 'straight Democratic ticket.'"

Kunkle alleged that Gentile fired her after she found out about her political affiliation and how she voted.

Kunkle filed a lawsuit against Q-Mark and Gentile alleging the common-law tort (wrongful act) of wrongful termination in violation of public policy. Essentially, the claim is an exception to the at-will-employment doctrine, under which courts will not

allow employers to fire employees for reasons that contravene clearly established public policy.

Kunkle relied on the public policy that prohibits employers from threatening or intimidating employees into voting for particular candidates. However, because the statutes do not explicitly provide for a wrongful termination claim (only criminal penalties), Kunkle alleged the common-law tort.

Q-Mark and Gentile asked the court to dismiss the claim, saying it should not be recognized.

The court disagreed with Q-Mark and Gentile.

The court found that if Q- Mark and Gentile terminated Kunkle for the reason she alleged, the Ohio statutes that prohibit employers from coercing or intimidating employees into voting for particular political candidates should allow for a claim under the common-law tort for wrongful termination in violation of public policy.

Significantly, the court rejected Gentile's argument that individual supervisors cannot be *personally liable* for claims of wrongful termination in violation of public policy. Gentile argued that a necessary element of proof in wrongful termination claims is the existence of an employment relationship and that supervisors are not "employers" in an employment relationship with a subordinate.

In support of her argument, Gentile cited a 2000 decision from an Ohio federal court that used the same rationale to reject personal liability for supervisors in wrongful termination claims.

However, in Kunkle's case, the court rejected Gentile's argument and the Ohio federal court's decision. Specifically, the court noted that since 2000, at least one Ohio state court has recognized personal liability for supervisors in wrongful termination claims. That made a difference in this case.

The court also noted that another Ohio federal court allowed wrongful termination claims against a supervisor to proceed. Thus, the court denied Gentile's request to remove her from the lawsuit.

## WHAT DOES THIS MEAN TO HUMAN RESOURCES?

An increasing number of state-law claims can be used to hold supervisors personally liable for workplace decisions that affect subordinates.

In this case, the court reasoned that an employment relationship is not synonymous with just the relationship between the corporate entity and the employee but also can include the relationship between supervisors and employees.

Of course, that conclusion is consistent with federal statutes that provide for personal liability for supervisors if certain criteria are met, such as with the Fair Labor Standards

Act (FLSA) and the Family and Medical Leave Act (FMLA).

It is also consistent with Ohio Revised Code Chapter 4112, which defines "employer" to include individual supervisors and therefore authorizes personal liability for supervisors. However, the court's decision is not necessarily consistent with how Ohio common-law employment claims have proceeded in the past.

The significant aspect of this case is that it extends the definition of employer and the employment relationship to common-law claims, which in this case was the common-law tort of wrongful termination in violation of public policy, which the Ohio Supreme Court created years ago. By changing how employer and employment relationship are defined for purposes of common-law claims, this decision may simultaneously change how those terms are defined for other common-law torts in the employment context. This case could affect such claims like tortious interference with an employment relationship, intentional infliction of emotional distress, negligent supervision and so on.

Can a person now tortuously interfere in an employee's relationship with her supervisor rather than just her relationship with her employer? Is there individual liability for supervisors for negligently supervising subordinates, a claim that also requires an employment relationship as an essential element of proof? Those questions are unanswered, but in light of this decision, they may end up being answered unfavorably for employers and supervisors.

## IV. PUNITIVE DAMAGES ALLOWED UNDER OHIO LAW

### A. The Rice Decision: Punitive Damages Are Now Allowed

In January of 1999, in a unanimous 7-0 decision, the Ohio Supreme Court also held in Rice v. CertainTeed Corporation (1999), 84 Ohio St. 3d 417 that employees who prevail in Section 4112 cases may not only be awarded compensatory damages, but they may also receive punitive awards. Previously, whether such damages were allowed under Ohio law was a matter of debate.

In reaching its decision, the court looked to Ohio Revised Code Section 4112.99. This section of the Ohio Revised Code states that individuals who are illegally discriminated against under Section 4112 may receive "**damages**, injunctive relief, **or any other appropriate relief**."

In analyzing this language, the court reasoned that since the term "damages" was used, Ohio's General Assembly must have intended to allow plaintiffs to recover all "legally recognized pecuniary relief." To the Ohio Supreme Court, this definition clearly included punitive damages.

### B. What Standard Will Be Used To Impose Punitive Damages?

The court stated that punitive damages will be imposed if the plaintiff can show that the employer, manager, supervisor or human resource professional acted with

"**actual malice**." Exactly what is meant by the term "actual malice" is a question of debate to different people.

In general, "actual malice" has been found to exist when someone **knows** their actions are illegal, yet they continue to perform their unlawful acts anyway. Of course, determining whether an employer, supervisor or manager acted with actual malice is a matter for the jury to decide in hindsight.

### C. The Biggest Problem With Punitive Damages

Punitive damages under Ohio's Anti-Discrimination Statute are not capped. There is no limit to how much a jury can award in punitive damages.

Also, under Ohio law, it is illegal for Employer Practices Liability Insurance to cover punitive damages. (O.R.C. §3937.182(B))

### D. Statute Of Limitations: 6 Years

In Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc. (1994), 70 Ohio St.3d 45, the Ohio Supreme Court ruled that since O.R.C. Section 4112.99 contains no specific statute of limitations for Ohio's Anti-Discrimination Law, then the six-year statute of limitations contained in O.R.C. Section 2305.07 governs Section 4112 claims.

Consequently, employees once again have **six years** to file employment discrimination claims against employers.

Further, even though O.R.C. Section 4112.02(N) states that aggrieved individuals must file their state **age** claims within 180 days after the alleged unlawful practice occurred, the court in Cosgrove ruled that the six-year statute of limitations applies to age claims as well.

## V. EMPLOYEES CAN WAIVE THEIR RIGHT TO A JURY TRIAL

In Kane v. Inpatient Medical Services, 2019-Ohio-1975 (5/22/2019), Inpatient Medical Services, Inc. ("IMS") provides physician services to hospitals and post-acute facilities. Katie Kane was hired by IMS in June 2014 as the regional vice president of operations. Ms. Kane took leave under the Family Medical Leave Act ("FMLA") due to her pregnancies from June 29, 2015 to October 5, 2015, and November 21, 2016 to February 13, 2017. Prior to Ms. Kane's second FMLA leave, Island Medical Management, LLC ("Island") purchased IMS. The purchase closed October 1, 2016. The morning Ms. Kane returned to work on February 13, 2017, Defendant Justin Meiser, the vice president of finance of IMS, told Ms. Kane she was terminated as her position was being eliminated.

In April 2017, Ms. Kane filed a complaint against IMS, Island, and Mr. Meiser alleging:

(1) FMLA interference and retaliation;

(2) gender discrimination;

(3) discrimination in violation of public policy; and

(4) promissory estoppel.

In addition, Ms. Kane's complaint included a jury demand.

Thereafter, IMS, Island, and Mr. Meiser filed a motion to strike Ms. Kane's **jury demand** based upon a waiver contained in Ms. Kane's employment agreement. The trial court granted the motion.

Ms. Kane appealed to the Ninth District Court of Appeals.

Ms. Kane argued that the jury trial waiver in her employment agreement did not encompass her claims and that her right to a jury trial was not voluntarily, knowingly, and intelligently waived. Ms. Kane has not argued that the presence of a jury trial waiver in an employment agreement is inherently problematic.

The waiver at issue is contained in Ms. Kane's employment agreement. It reads:

> Waiver of Jury trial. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY WHICH MAY ARISE UNDER THIS AGREEMENT IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES, AND THEREFORE EACH PARTY HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT SUCH PARTY MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT AND ANY OF THE AGREEMENTS DELIVERED IN CONNECTION HEREWITH OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY.

Ms. Kane asserted that her discrimination claims fell outside the scope of the waiver because the waiver does not expressly reference discrimination claims. However, Ms. Kane did not point to any authority that would require that a jury trial waiver be that specific in order to be valid.

The court held that the waiver provision is undoubtedly broad. It encompasses "any litigation directly or indirectly arising out of or relating to this agreement and any of the agreements delivered in connection herewith or the transactions contemplated hereby or thereby."

This court concluded that Ms. Kane's claims alleging discriminatory termination at the very least indirectly arose out of or were related to Ms. Kane's employment agreement. The employment agreement defines the parties' employment relationship and includes a section concerning termination. Ms. Kane's claims of discriminatory termination arose out that

employment relationship.

Ms. Kane additionally argued that she did not voluntarily, knowingly, and intelligently waive her right to a jury trial.

The court then held that the federal courts often use a **five-factor** test in evaluating whether a jury waiver was entered into knowingly, voluntarily, and intelligently. The court noted that this test has also been used in cases involving waivers contained in employment agreements.

Under this test, courts consider:

1) the conspicuousness of the provision of the contract;

2) the level of sophistication and experience of the parties entering into the contract;

3) the opportunity to negotiate terms of the contract;

4) the relative bargaining power of each party; and

5) whether the waiving party was represented by counsel."

The court reasoned that it must determine whether, in light of all the circumstances, the Court viewed the waiver to be unconscionable, contrary to public policy, or simply unfair.

The court held that even though this provision appeared at the end of the agreement, the provision was still conspicuous, especially since it was in all capital letters, while most of the agreement was not.

The court noted that Ms. Kane did not argue that she was unaware that this provision was in the agreement. Ms. Kane is a college-educated professional with experience negotiating contracts. In fact, there was evidence that Ms. Kane negotiated a higher salary prior to accepting an offer of employment. There was no evidence presented that would indicate Ms. Kane did not have a meaningful choice with respect to the waiver.

And while the record does not indicate whether Ms. Kane was represented by counsel at the time she was offered a job, the employment agreement does contains a clause indicating that Ms. Kane "had the opportunity for th[e] Agreement to be reviewed by counsel[.]"

Ms. Kane's mere assertions that she did not understand she would be waiving her right to a jury trial for these claims is insufficient under the circumstances to demonstrate that the waiver was not entered into voluntarily, knowingly, and intelligently. The court then found that the waiver was not unduly complicated or confusing such that someone of Ms. Kane's background would not have understood the scope of the right she was waiving.

**WHAT DOES THIS MEAN FOR HR?**

Juries are at best unpredictable. Therefore, this might be a very important clause to include in an employer's 'Employment Agreements." However, it is important to follow all of the various guidelines outlined by the court.

## VI. REQUIRING EMPLOYEES TO PAY ATTORNEY'S FEES UPHELD

In Kelly Services, Inc. v. DeSteno, Case No. 18-1118 (6th Circuit, January 10, 2019), Kelly Services, Inc., a staffing and consulting company, hired Dale DeSteno, Jonathan Persico, and Nathan Peters. They all signed employment agreements when they were hired.

DeSteno's agreement contained a noncompete clause that said he agreed not to compete against Kelly for one year after he left Kelly's employment in any market where he had worked for Kelly.

The agreement also contained an attorneys' fees clause that said:

> "If I break this Agreement, Kelly is entitled to recover as damages from me the greater of the amount of the financial loss which Kelly suffers as a result or the amount of the financial gain which I receive. I will pay Kelly's reasonable attorney's fees and costs **involved in enforcing this Agreement.**"

Persico and Peters signed similar employment agreements that also contained year-long noncompete and attorneys' fees clauses.

In early 2016, DeSteno, Persico, and Peters accepted employment offers from one of Kelly's competitors. It was undisputed that the offers they accepted were for positions similar to the jobs they held with Kelly and they were in the same market area where they had worked for Kelly.

Kelly sued, alleging breach of the noncompetition provisions. It requested a preliminary injunction, which sought to immediately prevent the three former employees from competing against it under the terms of the employment agreements.

On May 2, 2016, a federal district court granted Kelly's request for the preliminary injunction. It found:

1. Kelly was able to show that it might suffer irreparable harm if the injunction had not been granted,

2. The harm Kelly would suffer without the injunction outweighed the harm to the former employees;

3. Kelly showed that it would likely prevail on the merits at trial and

4. It was in the public interest to grant the injunction.

Accordingly, the district court enjoined DeSteno, Persico, and Peters from violating their noncompete agreements and determined the preliminary injunction would last for 60 days.

The three defendants filed an appeal with the 6th Circuit challenging the injunction.

On July 26, 2016, three days before the injunction was set to expire, Kelly requested a 60-day extension. The district court granted the extension until the 6th Circuit ruled on the appeal. Within a few weeks, however, the former employees voluntarily withdrew their appeal, so the lawsuit continued. In the spring of 2017, the district court lifted the preliminary injunction retroactively to May 29, 2017, one year from its entry.

The parties each requested summary judgment from the court.

Kelly stated that, by the time it filed its motion, it had been "granted all of the injunctive relief it sought in its Complaint against [its former employee] and [the] only issue remaining is the amount of attorneys' fees and costs owed" to it by them. The former employees' argued the noncompete agreements weren't enforceable in the first place, and the district court's grant of preliminary injunctive relief did not amount to Kelly prevailing on its claims.

The district court ruled Kelly was entitled to have the former employees reimburse it for its legal fees in enforcing the noncompete clauses. The court noted the agreements each of the three former employees signed stated they would pay the attorneys' fees "incurred" or "involved" by Kelly "in enforcing this Agreement." Unlike numerous similar agreements, the attorneys' fees provisions did not require the company to be a "**prevailing party**" in litigation as a condition for the award of fees. The district court ruled the company was entitled to have the provision enforced as written, and the enforcement was not contrary to public policy. It ordered the former employees to pay the company $72,182.90 for its attorneys' fees.

The employees appealed. However, the 6th Circuit upheld the district court's attorneys' fees award.

The 6th Circuit reasoned that the district court might have stated "too freely" that the contract required the former employees to pay attorneys' fees "if [Kelly] merely sought to enforce the contracts." The court said it could imagine cases where efforts to "seek enforcement" could, for instance, be unreasonable, made with little or no basis, or made for purposes of oppression or harassment, which would not be enforceable.

Still, the 6th Circuit enforced the district court's ruling because the record was clear that none of those situations existed in this case. The district court entered a preliminary injunction resulting in substantial relief, based on a determination that Kelly had shown a strong likelihood of success on the merits. The company was entitled to recover its attorneys' fees even though there had been no final liability determination in the lower court proceedings.

The 6th Circuit also ruled the former employees were not entitled to have a jury decide the attorneys' fees issue.

**WHAT DOES THIS MEAN FOR HR?**

Even though this case was decided under Michigan law, Ohio law is very similar to Michigan's with respect to enforcement of attorneys' fees provisions.

In Century Business Services, Inc. v. Barton, 2011 Ohio 5917, the Eighth District Court of Appeals enforced an attorneys' fees award of more than $950,000.00 for the employer against four former employees. In that case, all four employees had signed confidentiality and nonsolicitation agreements stating they agreed to reimburse the employer for "all expenses, including without limitation, attorneys' fees incurred in enforcing the provisions of this Agreement."

As the amount of the fees awarded in the Century Business Services case shows, funding lawsuits to enforce noncompete agreements can be very expensive. Companies that use the agreements should make sure they contain well-drafted attorneys' fees provisions, so they can be compensated for enforcing the agreement and not have to prove they prevailed in litigation.

## VII. EMPLOYEE CAN NO LONGER CONTRACTUALLY SHORTEN TITLE VII STATUTE OF LIMITATIONS

In Logan v. MGM Grand Detroit Casino, No. 18-1381 (6th Cir. September 25, 2019), Barbrie Logan began her employment as a culinary utility worker for MGM in August 2007. In the application process, Logan agreed to a six-month limitation period as a condition of employment:

> I agree that any claim or lawsuit arising out of my employment with, or my application for employment with, MGM Grand or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. While I understand that the statute of limitations for claims arising out of an employment action may be longer than six (6) months, I agree to be bound by the six (6) month period of limitations set forth herein, and I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY.

After several years working at MGM, Logan resigned on December 4, 2014. Logan's resignation was, she alleges, "due to discrimination caused by her employer" and therefore a constructive discharge.

On July 8, 2015, 216 days later, Logan filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) against MGM. In the Charge of Discrimination, Logan alleged that she "was subjected to different terms and conditions of employment based on [her] sex and in retaliation for participation in protected activity."

The EEOC investigated Logan's allegation and issued her a right-to-sue letter in November 2015. On February 17, 2016, 440 days after resigning, Logan sued MGM for discrimination under Title VII.

MGM moved for summary judgment, arguing that Logan's employment agreement required her to commence any action arising out of her employment within six months and that her failure to do so barred her claim. The magistrate judge assigned to the case agreed with MGM and issued a Report and Recommendation to that effect. The district court adopted the Report and Recommendation and entered summary judgment in favor of MGM. Logan timely appealed.

Resolution of this issue turns on consideration of both:

(1) the detailed enforcement scheme of Title VII and

(2) the national implications of congressional anti-discrimination policy.

These considerations led the 6th Circuit to hold that MGM cannot enforce the six (6) months statute of limitations under its contract to alter the Title VII limitation period.

The 6th Circuit reasoned that the EEOC process begins with a "charge" filed by the victim of discrimination. Generally, the charge must be filed with the EEOC "within 180 days of the occurrence of the alleged unlawful employment practice." However, the filing period may be extended to 300 days in jurisdictions that have "State or local law prohibiting the unlawful employment practice alleged and a State or local agency with authority to grant or seek relief from such practice."

Within such jurisdictions, known as "deferral jurisdictions," the 300-day limitation period applies so long as the complaining employee has "instituted proceedings with [the applicable] State or local agency." Michigan, the state where this case arises, is a deferral jurisdiction, and the Michigan Department of Civil Rights (MDCR) is the applicable agency in that state for investigating unlawful employment practices.

The 6th Circuit ruled that the 300-day limitation period to sue under Title VII is a **substantive**, rather than **procedural**, rule. The 6th Circuit therefore ruled that the limitation period of this statute is not **prospectively waivable** as it pertains to litigation.

Thus, enforcing the express limitation period of Title VII not only protects the scheme Congress created with that statute; it is also in harmony with our interpretation of similar statutes.

The 6th Circuit held that contractual clauses that purport to shorten the limitation period of Title VII to bring suit are not enforceable.

**WHAT DOES THIS MEAN FOR HR?**

Well, it was good while it lasted.

For years, employers have limited the time frame employees had to file a lawsuit against them to 6 months. However, with this new ruling, such contractual clauses are simply no more.

## VIII. LIQUIDATED DAMAGES IN EMPLOYEE CONTRACTS ALLOWED

In Physicians Anesthesia Serv., Inc. v. Burt, 2007-Ohio-6871, Physicians Anesthesia Services ("PAS") gave Heather Burt, then a registered nurse, a lump-sum student-support loan in the amount of $33,573.09 in exchange for her promise to work for PAS for three years following her graduation from the Masters Nurse Anesthetist program at the University of Cincinnati. Burt signed a "Tuition Reimbursement Agreement" with PAS.

Specifically, the Agreement stated:

> "[i]n the event [Burt] resigns anytime during the first three years of employment with PAS, for any reason other than illness, disability or death, the balance of the student support loan not forgiven shall become immediately due and [Burt] shall owe the balance to PAS plus interest calculated at 8% plus prime rate as it existed on the date of the lump sum student support loan payment made to [Burt]."

The next sentence of the Agreement cited Burt's obligation to pay liquidated damages:

> "[Burt] shall also owe PAS an additional 50% of the amount remaining as liquidated damages to compensate PAS for the loss of her services, the expense of holding a position for [Burt], the expense of recruiting another [student nurse anesthetist] or CRNA to fill the position, and expense of utilization of [a temporary replacement] CRNA until such time as another CRNA is hired to fill position left vacant by [Burt's] resignation. Payment shall be due within 5 days at PAS office."

On December 2, 2004, approximately two-thirds of the way through her required tenure with PAS, Burt, then an accredited CRNA, submitted her resignation to PAS. Burt had accepted a CRNA position in Northern California. Her last day of employment with PAS was February 11, 2005—the date of breach. When Burt left PAS, the unforgiven balance of the loan was $11,191.03. Burt repaid the balance of the loan.

Still, PAS demanded $5,595.52 in liquidated damages from Burt. Burt refused to pay the liquidated damages.

In January 2006, PAS brought suit for the unpaid amounts. Burt moved for summary judgment, asserting that the liquidated-damage provision of the contract was an unenforceable penalty under Ohio law. No genuine issue of fact remained to be determined, she claimed, and she was entitled to judgment as a matter of law.

The trial court ruled that the liquidated-damage provision was an unenforceable penalty. Therefore, PAS was not entitled to the additional damages it claimed.

PAS appealed.

PAS argued that the trial court erred in concluding that the liquidated-damage provision of the Agreement was an unenforceable penalty. The trial court determined that the provision served only to deter Burt from breaching the contract. In justifying its view, the trial court also noted, "PAS does not allege that it suffered any actual damages as a result of Ms. Burt's leaving."

When a party challenges a liquidated-damage provision, the court must "step back and examine it in light of what the parties knew at the time the contract was formed and in light of an estimate of the actual damages caused by the breach." Lake Ridge Academy v. Carney (1993), 66 Ohio St.3d 376, 382, 613 N.E.2d 183

The Supreme Court of Ohio has established a three-part test to determine the validity of a liquidated-damage clause. Where the parties have agreed upon an amount of damages in unambiguous terms, that amount is to be treated as liquidated damages and not as a penalty if:

1. Actual damages would be uncertain in amount and difficult to prove;

2. The contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to indicate that it does not express the true intentions of the parties; and

3. The contract is consistent with the conclusion that the parties intended that damages in the agreed-upon amount would follow the breach of the contract.

The evidence here indicated that any actual damages would be uncertain and difficult to prove. In opposition to Burt's motion for summary judgment, PAS offered the affidavit of its vice president, Alfonso Lopez, M.D. Dr. Lopez stated that the shortage of CRNAs had forced PAS and other practice groups to enter into multi-year agreements to sponsor the education of students seeking to become CRNAs in exchange for their future employment. The costs of replacing any nurse who breached such an agreement depended on market conditions at the time of breach and the availability of temporary replacement nurses. The CRNA shortage had made it difficult to obtain a replacement for breaching nurses on short notice. In the event of a breach, PAS would be forced to expend a significant but undeterminable amount of time and resources to seek out replacement CRNAs, to shift work schedules, and to locate temporary replacements hired at costs of 150% to 200% of a permanent CRNA employee's salary.

The court reasoned that the evidence indicated that Burt was a sophisticated party who had entered into the contract with knowledge of the liquidated-damage provision. Therefore, the court upheld that liquidated damages clause in favor of PAS.

**WHAT DOES THIS MEAN TO HUMAN RESOURCES?**

As most human resource people know, the true cost of a lawsuit is not losing … it is the cost of the litigation process itself, which are comprised of mostly legal fees. Using a liquidated damages clause in employee contracts can help to offset the losses suffered by an employer when employees fail to live up to their end of the bargain.

## IX. ABUSIVE TACTICS KILLS SEVERANCE AGREEMENT

In Jena McClellan v. Midwest Machining, Inc., No. 17-1992 (6th Cir., Aug. 16, 2018), Jena McClellan was hired by Midwest Machining, Inc. in 2008 as a telemarketer. She was soon promoted into a position in the inside sales department.

In August 2015, she notified her employer that she was pregnant. She claimed that after she announced her pregnancy, her supervisor began making negative comments about her and was irritated by her absences for prenatal appointments. Roughly three months after informing her employer about her pregnancy, she was terminated.

McClellan alleged that when she was terminated, Midwest's president called her into his office, shut the door, and presented her with a severance agreement, saying she "needed to sign if [she] wanted any severance." The two quickly reviewed the agreement together, but the president did not ensure that she understood it. McClellan testified that she felt bullied, she believed she was not permitted to ask any questions, and the president's voice was raised.

Part of the agreement said that McClellan waived "any and all past, current and future claims" she had against her employer. In exchange, Midwest would pay her $4,000 in weekly installments. Without having an attorney review the document and advise her, she alleged that she signed the severance agreement after being "pressured" to do so.

Despite signing the agreement and waiving her claims against the employer in exchange for receiving severance payments, McClellan filed a charge alleging Title VII and pregnancy violations with the Equal Employment Opportunity Commission (EEOC). The EEOC issued her a right-to-sue letter, and she filed a lawsuit alleging discrimination based on her pregnancy and violations of the EPA, among other claims.

Midwest then informed McClellan's counsel of the severance agreement. In response, McClellan's counsel sent a letter to Midwest, three weeks **after** filing her lawsuit, rescinding the agreement, enclosed with a check for the full $4,000 McClellan had been paid in severance.

Midwest returned the check to her, saying there was no basis for rescinding the agreement.

At trial, Midwest filed a request for summary judgment, arguing that McClellan's claims were barred because of the severance agreement and because of her failure to "tender back" (return) the severance money before filing her lawsuit. The district court granted summary judgment based on the tender-back doctrine.

Under the tender-back doctrine, an individual claiming duress must return severance payments within a reasonable time when seeking to void an agreement. Because McClellan did not return the $4,000 before filing suit, the district court ordered the case dismissed. McClellan appealed to the 6th Circuit.

The 6th Circuit reversed the district court, holding that a person is not required to return severance payments **before** filing claims under Title VII or the EPA. In making this determination, the court noted that the U.S. Supreme Court on several occasions held that employees don't need to tender back payments received before filing various employment-related lawsuits based on the remedial nature of federal equal employment laws. Instead, the 6th Circuit held that any amount paid to the employee would be deducted from any award granted to her.

The 6th Circuit sent the case back to the district court for further consideration of the facts.

## WHAT DOES THIS MEAN FOR HR?

Without a doubt, the biggest mistake in this case was the way the employer delivered the Severance Agreement to the employee.

Employers never want to pressure an employee to sign an agreement in any way. The employee much be given plenty of time to review the agreement, which includes letting the employee take the agreement with them to review it with a lawyer.

It is also a good idea to record the conversation to show that the employer was supportive, non-threatening and encouraged the employee to take his/her time and to seek the advice of legal counsel. Chances are actually very good that the employee is recording you.

## X. OHIO REQUIRES MILITARY FAMILY LEAVE

Ohio employers with 50 or more employees are required to provide two weeks of unpaid leave for any covered employee who is the spouse, parent, or who has or had custody of a member of the uniformed services when that member is deployed or injured during military service for at least 30 days. Under the Ohio Military Family Leave Act (O.R.C 5906), the requirement for such leave applies ***regardless*** of whether the employer has 50 employees within ***75 miles of the worksite***, as opposed to the coverage requirements of the Family and Medical Leave Act (FMLA).

Under the Act, which went into effect July 2, 2010, employees may take leave up to 10 days or 80 hours (whichever is less) once per calendar year. In order to qualify for coverage under the Act, employees must satisfy the following conditions:

1. Length of employment: The employee must be employed by the employer for at least 12 consecutive months and for at least 1,250 hours in the 12 months immediately preceding commencement of the leave.

2. Military Service: The law only covers full-time duty in the active military service for periods of longer than 30 days. It does cover training, or the period of time for which a person is absent from employment for an examination to determine fitness for military duty, unless it is contemporaneous with full-time military duty.

3. Family relationship: The employee must be the parent, spouse, or has or had legal custody of a person who is a member of the uniformed services when that member is called for active duty longer than 30 days or is injured while serving on active duty.

4. Notice: The employee must provide a 14-day notice to the employer before the employee is to be deployed for active duty. The employee must provide a one week notice after the deployment of the employee's spouse, child, or ward or former ward. A two-day notice is required when a covered person becomes injured due military services. No notice at all is required for taking such a leave due to critical or life-threatening injuries.

5. Time frame: Leave must be taken no more than two weeks prior to or one week after the date of deployment.

6. Calendar Leave: Leave is limited to once per calendar year.

7. Exhaustion of other leave: The employee must exhaust all available forms of leave, except sick leave or disability leave.

8. Benefits: Employers must continue to provide benefits to employees during the leave period. Employees remain responsible for their pro rata share of costs, if any.

9. Restoration: Upon the completion of the leave, employers must restore the employee to the position the employee held prior to taking that leave or a position with equivalent seniority, benefits, pay, and other terms and conditions of employment.

10. Certification: An employer may require an employee requesting to use leave to provide certification from the appropriate military authority.

Employers cannot require employees to waive their leave rights.

The act also includes an anti-retaliation provision which prohibits employers from interfering with, restraining, or denying an employee from taking leave under the law. Additionally, an employer may not discharge, fine, suspend, expel, discipline or discriminate against an employee with respect to any term or condition of employment because of the employee's actual or potential exercise, or support for another employee's exercise, of any right established under this law. Employers may, however, take an employment action against the employee that is independent of the exercise of a right under the new law.

Employees are permitted to sue employers who violate this law for injunctive relief and money damages to enforce their rights.

After July 2, 2010, Ohio employers are prohibited from entering into a collective bargaining agreement or employee benefit plan that limits or requires an employee to waive the rights established under the Act. As for those employers that are subject to a current collective bargaining agreement with military leave provisions that conflict with the Act, the conflicting agreement will control until its expiration date. Upon expiration of the conflicting agreement, the employer must comply with the military leave provisions under the Act.

## XI. OHIO SUPREME COURT: TEMPORARY EMPLOYEES ARE ELIGIBLE FOR UNEMPLOYMENT BENEFITS

In Lorain County Auditor v. Ohio Unemployment Compensation Review Commission, (2007) 113 Ohio St.3d 124, Kristie Brinkman was employed as a registered nurse by the Lorain County Sheriff's Department. At the start of her employment, she signed a contract stating that she would serve as an "intermittent employee." As an intermittent employee, it was agreed that she would work less than 1,000 hours during the year. After working nearly 1,000 hours, the department removed her from the schedule in accordance with the agreement. Brinkman wasn't fired. Instead, she simply was not assigned any additionally work because she had reached her 1,000 hour per year limit.

Brinkman then filed for unemployment compensation benefits. The Ohio Department of Job and Family Services decided that Brinkman was entitled to receive benefits and the Unemployment Compensation Review Commission affirmed the decision. The sheriff's department appealed the decision to the Lorain County Court of Common Pleas, which reversed the commission's decision and took away her benefits.

On appeal, the court of appeals upheld the trial court's decision, holding that an employee who voluntarily enters into a “fixed-term contract” is not “involuntarily unemployed” when the agreement ends and therefore is not entitled to receive unemployment benefits. Brinkman appealed this decision to the Ohio Supreme Court.

The Ohio Supreme Court first looked to Ohio law, which states that an employee is entitled to receive compensation for a "loss of remuneration due to involuntary total or partial unemployment."

The sheriff's department argued that Brinkman wasn't entitled to benefits because she abandoned her job voluntarily. Because she had signed a contract providing that she wouldn't be scheduled for work at a definitive point, the sheriff’s department argued that Brinkman’s unemployment was voluntary. The court disagreed, noting that Brinkman did not have much bargaining power with her employer when she originally signed the contract. Therefore, once she had worked her requisite 1,000 hours, her assignments ended, which was not voluntary on her part.

The court also stated that Ohio Revised Code § 4141.32 prohibits any attempt to contractually waive the right to unemployment benefits. The court determined that the agreement between the sheriff's department and Brinkman therefore could not constitute a waiver of her unemployment benefits.

As a result of this decision, you should be aware that temporary employees are eligible for unemployment compensation when the term of their employment ends. Even if an employee signs a contract that states when her employment will end, the contract will not prevent her from being awarded unemployment compensation. It should be noted, however, that this decision does not affect the exception for employees of academic institutions, who aren't eligible for unemployment benefits between academic terms.

## XII. OHIO’S NEW MEDICAL MARIJUANA LAW

Ohio’s new medical marijuana law (HB 523) became effective on September 6, 2016. The law was passed by the Ohio General Assembly at the end of May and signed by Governor Kasich on June 6.

This law makes Ohio the 25th state to pass a medical marijuana law. The new law will have far-reaching effects on the business community but it is silent on many issues that concern employers.

### A. Who can legally use medical marijuana?

Only people with the following medical conditions can legally use medical marijuana:

1. HIV/AIDS

2. ALS (Amyotrophic Lateral Sclerosis)

3. Alzheimer's Disease

4. Cancer

5. CTE (Chronic Traumatic Encephalopathy)

6. Crohn's Disease

7. Epilepsy or other seizure disorders

8. Fibromyalgia

9. Glaucoma

10. Hepatitis C

11. Inflammatory Bowel Disease

12. Multiple Sclerosis

**13. Pain (Chronic, and severe or intractable (This can be a vague criteria.)**

14. Parkinson's Disease

15. PTSD (Post-Traumatic Stress Disorder)

16. Sickle Cell Anemia

17. Spinal Cord Disease or injury

18. Tourette's Syndrome

19. Traumatic Brain Injury

20. Ulcerative Colitis

**B. How will this law affect employers?**

The new law expressly addresses employment issues, resolving each of these issues clearly in favor of employers. Specifically:

- Employers are not required to permit or accommodate an employee's use, possession, or distribution of medical marijuana;

- Employers are permitted to terminate or discipline an employee or refuse to hire an applicant based on the use, possession, or distribution of medical marijuana;

- Employers are permitted to establish and enforce a drug testing policy, a drug-free workplace policy, or zero-tolerance drug policy;

- Employers may still obtain Workers' Compensation premium discounts or rebates for participating in the drug-free workplace program established by the Ohio Bureau of Workers' Compensation;

- Employers have "just cause," for purposes of unemployment compensation, to terminate an employee for use of medical marijuana in violation of the employer's drug-free workplace policy, zero-tolerance policy, or other applicable policy; and

- An employee is not entitled to receive Workers' Compensation benefits if the employee was under the influence of marijuana at the time of injury and the use of marijuana was the proximate cause of that injury.

In addition, the law offers protection to Ohio employers from a broad range of potential lawsuits that might otherwise be filed by employees who use medical marijuana under the new law and then suffer adverse employment actions as a result. The law states that it does not permit a person to sue an employer for refusing to hire, terminating, disciplining, discriminating, retaliating, "or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment related to medical marijuana."

In short, Ohio employers are not required to make any changes as a result of the new law. Employers operating in the state may continue to require testing as required by their policies and may discipline or discharge for policy violations, even where an employee uses medical marijuana pursuant to the law. Employers may not, however, make employment decisions or take actions against an employee or applicant based on the individual's underlying medical condition.

However, just as before, actions based on the underlying medical condition may violate the Americans with Disabilities Act or corresponding state law.

### C. How and where do patients get medical marijuana?

Patients will need a **recommendation** from a doctor to receive a medical marijuana prescription. They must have an ongoing relationship with the doctor. However, the law does not say where patients will get medical marijuana. Patients will have to receive the marijuana from approved dispensaries.

### D. What are the rules and regulations for medical marijuana?

The law does not say anything about direct rules and regulations. The law calls for the formation of a bipartisan Medical Marijuana Advisory Committee within the Board of Pharmacy. The Committee must include two pharmacists, two physicians, a nurse, a researcher, and a member from each of a listed interest

group. The committee will issue recommendation related to the Medical Marijuana Control Program.

Additionally, the Department of Commerce, Ohio State Pharmacy Board, and Ohio State Medical Board will need to determine how many licenses to issue and the guidelines for writing a marijuana prescription and filling that prescription.

## XIII. STATE MEDICAL MARIJUANA LAWS DO NOT TRUMP EMPLOYER POLICIES

In Casias v Wal-Mart Stores, Inc., No. 11-1227 (6th Cir. 2012), Joseph Casias was an employee of Wal-Mart for the previous 5 years and was named "associate of the year" in 2008. Casias, who suffered from sinus cancer and an inoperable brain tumor, was required to take a drug after injuring himself at work. As expected, due to his status as a medical marijuana patient, Casias failed the drug test and his employment was terminated. Mr. Casias sued Wal-Mart in state court for wrongful discharge, claiming that Wal-Mart's application of its drug use policy to him violated the Michigan Medical Marihuana Act ("MMMA"). Wal-Mart had the case transferred to federal court and moved to dismiss the case for failure to state a claim.

The Federal District Court found that the MMMA does not regulate private employment and granted Wal-Mart's motion to dismiss. Casias appealed to the 6th Circuit Court of Appeals. The 6th Circuit found for Wal-Mart.

The 6th Circuit Court found that the MMMA merely provides a defense to criminal prosecution or other adverse actions by the state:

> **All the MMMA does is give some people limited protection from prosecution by the state, or from other adverse state action in carefully limited medical marijuana situations.**

The court further explained that adopting Casias' argument would create an entirely new protected employee class in Michigan and "mark a radical departure from the general rule of at-will employment in Michigan."

Casias argued Section 4′s use of the term "business" expands the MMMA protections to private employment. Section 4, in relevant part, states:

> **A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act . . .**

The Court disagreed, finding that the word "business" is not meant to stand alone, but instead, modifies the phrase "occupational or professional licensing board or bureau."

Thus, the statute was intended to protect against disciplinary actions by state board or bureaus, not regulate all private employers.

## XIV. OHIO'S REFERENCE CHECKING LAW

In recent years, many states have passed "Reference Checking Laws" which grant added protections to employers who give reference information to other employers on former employees. Such laws may be used to express the seriousness to employees of having a written warning paced into their files. Employees must understand that if their performance does not improve, not only is their future with the company in danger, but these written warnings will be placed into their personnel files, which may in turn be released to future prospective employers.

Although these Reference Checking Laws vary from state to state, it is important to understand what protections are typically provided.

Ohio's Reference Checking Law (O.R.C. § 4113.71), was signed into law by Governor George Voinovich on April 2, 1996, which gave the law an effective date of July 2, 1996.

Ohio's Reference Checking Law codified the **"qualified privilege"** employers previously enjoyed under Ohio's common law against claims of defamation whenever they provide references to prospective employers regarding the performance of their current or former employees...with one noted improvement in the law for employers.

First, the law defines an "employer" as being anyone who employs one or more persons within Ohio, which includes private and state public employers, as well as any political subdivisions.

Next, the law states that an employer supplying a reference on either a current or former employee is not liable to that employee, to the prospective employer, or to anyone else for any harm that may result from disclosing this information **UNLESS** it can be shown by a "preponderance of the evidence" (the greater weight or 51%) that either:

- The employer disclosed information it **knew** was false, deliberately intending to mislead the prospective employer, or anyone else, in bad faith or with malicious purpose, **OR**

- The information disclosed by the employer constituted unlawful discrimination against the individual's protected class status under O.R.C. § 4112.02 or § 4112.022 (i.e., race, color, religion, sex, national origin, handicap, age or ancestry) or the disclosure violated the employee's rights under Ohio's Credit Transactions Act (i.e., credit checks) (O.R.C. § 4112.021).

Requiring plaintiffs to prove that an employer **knew** the information it was providing was false, if no illegal discrimination exists, is quite different from the common law standard previously used in Ohio.

At common law, employees could prevail in such actions if they could show that the employer acted with "actual malice," which means that the employer either "knew **or should have known**" that the information it was providing was false. ("Actual malice" has also been referred to as the "reckless disregard" for the truth standard.)

Under Ohio's Reference Checking Law, it appears that aggrieved employees must now show that the employer actually **knew** it was providing false information...not that the employer merely **should have known** the information it was providing was false. This new standard and type of proof required is therefore a stricter standard for aggrieved employees to meet than was the case under the "actual malice" formula.

Additionally, Ohio's Reference Checking Law allows employers to collect **reasonable attorney's fees and court costs** from plaintiffs if the court finds "by a preponderance of the evidence" that the lawsuit brought against the employer constituted frivolous conduct.

Still, it is advisable to continue to obtain written permission from job applicants to obtain and release their previous employment information, as well as a release of liability from these individuals, as described above.

## XV. IF YOU WANT TO KNOW ABOUT "SEALED CONVICTIONS," YOU MUST ASK

In Gyugo v. Franklin Cty. Bd. of Dev. Disabilities, Ohio St.3d___, Slip Opinion No. 2017-Ohio-6953, an Ohio common pleas court sealed the criminal record of Michael Gyugo's prior conviction in 1992.

In 1995, Gyugo applied for employment as a training specialist with the Franklin County Board of Developmental Disabilities ("FCBDD"). Gyugo answered "No" to each of three questions on the employment application regarding whether he had been convicted of any felonies. The application told Gyugo that he would be subjected to a criminal-background investigation if he was under final consideration for employment.

FCBDD's investigation did not reveal any convictions.

From 1995 to 2013, the FCBDD employed Gyugo as a training specialist. Gyugo's position required him to maintain registration with the department as an adult-services worker. In his registration documents, Gyugo again claimed he did not have any prior felony convictions.

In 2013, the FCBDD learned that Gyugo's had a sealed conviction in his past as part of completing routine criminal-background check on all of its employees. Following a pre-disciplinary hearing, the FCBDD terminated Gyugo for falsifying his employment application and multiple applications for certification. Gyugo appealed the decision to the State Personnel Board of Review, which upheld his termination.

This decision was affirmed by the Franklin County Court of Common Pleas, the Tenth District, and ultimately the Ohio Supreme Court.

When a court orders a criminal record sealed, the proceedings in the underlying case

"**shall be considered *not* to have occurred**," R.C. 2953.32(C)(2), and order restores the offender "**to all rights and privileges otherwise restored**" by termination of the sentence or community-control sanction or final release on parole or post-release control, R.C. 2953.33(A).

According to R.C. 2953.33(B)(1), "In any application for employment, license, or other right or privilege * * *, a person may be questioned only with respect to convictions not sealed * * * **unless the question bears a direct and substantial relationship to the position for which the person is being considered**."

In this case, R.C. 5126.28(E)(1) and (E)(2) ***prohibited*** the FCBDD from employing a person who had been convicted of certain specified criminal offenses, as well as unspecified felonies that bore a direct and substantial relationship to the duties and responsibilities of the position.

Additionally, R.C. 5123.081(B)(2) prohibited the FCBDD from employing a person who has been convicted of a "disqualifying offense."

Gyugo stipulated that his sealed offense was listed in R.C. 5126.28(E)(1), and, had it not been sealed, would have disqualified him from employment with the FCBDD.

The Court rejected Gyugo's argument that the order sealing his conviction removed the statutory disqualification. This argument is contrary to the plain language of R.C. 2953.33(B), which itself permits application questions about sealed convictions if the questions bear a direct and substantial relationship to the position sought.

**WHAT DOES THIS MEAN FOR HR?**

In the case, the FCBDD prevailed because they were legally prohibited from hiring someone with Mr. Gyugo's criminal past. However, had the FCBDD not been prohibited from hiring and retaining Mr. Gyugo due to his criminal record, the law regarding his sealed conviction would have protected him from termination.

If an employer wants to know about someone's criminal past, as well as any convictions that have been sealed, then the employer must ask about those on the application. While an employer cannot use a sealed conviction against someone applying for a job in Ohio, the employer can ask about such issues if the sealed conviction "direct and substantial relationship to the position for which the person is being considered."

Therefore, it is important for Ohio employers to include on their employment applications something related to following:

Have you been convicted of a felony or misdemeanor, whether sealed or unsealed, (other than traffic violations) that might have a direct and substantial relationship to the job for which you are applying?

NOTE: A conviction will not necessarily be a bar to employment. Factors such as date, nature and number of offenses, age at the time of offense and rehabilitation will be considered.

☐ YES ☐ NO If Yes, explain:

## XVI. LACK OF PROPER RELEASE COSTS EMPLOYER IN NEGATIVE REFERENCE

In Kienow v. Cincinnati Children's Hospital Medical Center, 2015-Ohio-4396 (1st Dist. Hamilton, Oct. 23, 2015), while Gloria Kienow was an employee at Cincinnati Children's Hospital, she discovered that her supervisor had placed, according to her, "false, negative, and misleading information" into her personnel file. Although Human Resources agreed to remove the information from her file, it was never removed.

Kienow resigned in July 2011.

About six months after her resignation, Kienow received an oral offer of employment from Dayton Children's Hospital. The offer was rescinded just a week later.

A year after that, Kienow learned the job offer had been withdrawn because her former manager at Cincinnati Children's had provided "negative, misleading, and false statements" about her to the Dayton hospital.

Kienow sued Cincinnati Children's in Hamilton County Common Pleas Court, claiming defamation, negligent supervision, and tortious interference with business relations due to the statements provided to Dayton Children's Hospital by her former manager.

The court dismissed all three of Kienow's claims on grounds that her claims had passed the statute of limitations.

Kienow appealed to the First District Court of Appeals.

The appeals court agreed that the trial court had properly dismissed Kienow's defamation and negligent supervision claims because they were filed too late under their respective statutes of limitations.

Under R.C. 2305.11, a defamation claim must be filed within one year of the publication of the false information. In other words, Kienow had to file her lawsuit within one year of the day her manager shared the allegedly false information with Dayton Children's. Because she failed to do that, her defamation claim was properly dismissed.

Her claim for negligent supervision was also dismissed as untimely because it was based on events that occurred after the applicable four-year statute of limitations had expired.

However, the appellate court found that Kienow's tortious interference claim should not have been dismissed.

First, the court held that a four-year statute of limitations applied to the tortious interference claim, distinguishing it from a "disguised defamation" claim for which a one-year statute of limitations would apply. The court found that Kienow's tortious interference claim went beyond mere damage to her reputation, stating the claim "does

not hinge simply on [the supervisor's] disseminating information but on her hindering a prospective and known business relationship -- Kienow's pending employment with Dayton Children's."

As a result, the court held that Kienow's claim for tortious interference was filed timely and was allowed to proceed.

However, even more important, the court found that Kienow was not required to present facts in her complaint to overcome Ohio's statutory privilege that generally allows employers to provide negative employment references without risk of liability.

Under R.C. 4113.71(B), "an employer who is requested by . . . a prospective employer of an employee to disclose . . . job performance" is not liable for damages unless that information was disclosed **maliciously with an intent to mislead or as an unlawful discriminatory practice.**

Cincinnati Children's argued that Kienow's tortious interference claim should be dismissed because her complaint did not contain sufficient facts to overcome the statutory privilege.

However, the court disagreed. The court held that Kienow was not required to plead those facts specific facts. As a result, the tortious interference claim should not have been dismissed, and the case was sent back to the trial court for litigation.

## WHAT DOES THIS MEAN FOR HR?

Ohio's statutory privilege for employers is not "blanket" protection for employers allowing them to say whatever they want, even if they feel the information they provide is true.

However, employers are often put into a "catch-22" when it comes to giving and receiving references. In many instances, if an employer does not give references to potential employers, then they cannot expect to get any in return later. This is especially true in specific industries, such as in the world of health care.

As a result, employers often fail to "give or get" reference information on their candidates, so they make "bad" hiring decisions, which can easily cost an employer more than any lawsuit.

Also, many states have "Negligent Hiring" and "Negligent Retention" laws, such as Ohio. These laws require employers to be diligent and at least try and secure references or perform some sort of background check.

The facts of this case will be very damaging for the employer because it was placed on notice that the information in Kienow's file was "false, negative, and misleading information." As a result, HR agreed to remove the information from her file. However, it was never removed.

As a result, Kienow had every reason to believe that this "erroneous" information had been removed. This was a major error by the employer.

If HR tells an employee that certain damaging information has been removed from an employee's file, then it had better be removed immediately.

Also, clearly, supervisors and managers had not been developed here. Employees are typically promoted into supervision because they were very good technicians. This is especially true in hospitals.

If an organization does give out reference information, all references should go through a Human Resource professional. A real HR professional will know what can and cannot be said. A real HR professional will also make sure that a proper release is acquired before any reference information is provided.

A proper release for providing reference information will contain at least the following protections:

1. **Permission** to release information and

2. A **full release of liability** for releasing reference information.

A proper release for providing reference information would look something like this:

> **Candidate authorizes the Company to investigate Candidate's background, qualifications and/or any other information on Candidate as it deems appropriate. Candidate also authorizes anyone the Company contacts as part of its investigation to release any information they have regarding Candidate or Candidate's employment to the Company or its representatives. Candidate also authorizes the Company to release the results of any background checks conducted on Candidate and any other information related to Candidate or Candidate's employment as it deems appropriate. Candidate also releases all parties, including the Company, from all liability for any damage that may result from either releasing or furnishing any such information.**

Whenever an employer receives a request for a reference and the employer intends to respond, employers should make sure they get a full release from the former employee before they provide any information to the potential employer.

In an effort to secure such a release, the former employer can email one over to the requesting employer to have the employee sign. The former employer can make it clear that it will only provide reference information once this release is endorsed by the former employee. (Yes, scanned electronic signatures are valid.)

Employers can also have all exiting employees either sign this release … or they can refuse to sign it. The employer can then let any inquiring employers know if the exiting employee gave his/her permission to release information or not.

I often advise my clients to secure such a release from their own job candidates as part of the interview process.

First, such a release does not expire. It is enforceable even after the employee exits the organization.

Second, such a release can go a long way in getting a former employer to provide reference information. When a former employer sees that it will have protection under this release, they might be more willing to provide information and save a potential employer the disaster of making a bad hiring decision.

Securing such a release as part of the hiring process also helps to protect the employer in case a rogue supervisor decides to give a bad reference on a former employee without the direction of a real HR professional.

## XVII. OHIO'S "SMOKE-FREE WORKPLACE ACT"

On November 7, 2006, Ohio voters approved the "Smoke-Free Workplace Act." The new law established a statewide smoking ban that applies to almost every public place in Ohio … with a few exceptions. Ohio's new indoor smoking ban went into effect on December 7, 2006.

### Where Will Smoking Be Banned Under The New Law?

The statewide ban prohibits the owner of a public place or place of employment from permitting smoking in enclosed areas directly or indirectly under the control of the proprietor and areas immediately adjacent to locations of ingress or egress of the building.

The term "enclosed area" is defined as "an area with a roof or other overhead covering of any kind and walls or side coverings of any kind, regardless of the presence of openings for ingress and egress, on all sides or on all sides but one." This includes outdoor areas of a public place or place of employment, excluding an outdoor patio.

A "public place" is an enclosed area to which the public is invited or permitted. The term "places of employment" is defined as "an enclosed area under the direct or indirect control of an employer that the employer's employees use for work or any other purpose, including but not limited to offices, meeting rooms, sales, production and storage areas, restrooms, stairways, hallways, warehouses, garages, and vehicles."

### What Are The Exceptions To This Ban?

The exceptions to this law include:

- Private residences, except during hours of operation as a child care or adult care facility for compensation,
- Designated rooms in hotels and motels, except that no more than 20% of sleeping rooms may be designated as smoking rooms,
- Separately enclosed areas within nursing homes,
- Retail tobacco stores under certain conditions,
- Physically separated outdoor patios,
- Certain not-for-profit, private clubs under specific circumstances,
- The burning of incense in a religious ceremony,
- Family-owned and operated businesses.

**What Are My Posting Requirements Under The Law?**

All "public places" and "places of employment" **must post conspicuous signs at each entrance by December 7, 2006.** The signs must be clearly legible and must contain a toll-free number for reporting violations.

**What Else Must I Do To Comply?**

All "public places" and "places of employment" must remove all ashtrays and other smoking receptacles by December 7, 2006.

**Can I Have A Separate "Smoking Room" In Some Isolated Section Of My Building?**

No. The Smoke-Free Workplace Act bans smoking in all enclosed areas of a public place or place of employment, except for specified exempted areas.

## XVIII. OHIO'S NEW VEHICLE CONCEALED CARRY LAW

As of March 20, 2017, Ohio's new Vehicle Concealed Carry Law took effect. As a result, employees and visitors to your facility who possess their "Concealed and Carry Permits" will be allowed to bring their guns to your property and leave these weapons in their cars.

Specifically, the new law says:

> Sec. 2923.1210. (A) A business entity, property owner, or public or private employer may not establish, maintain, or enforce a policy or rule that prohibits or has the effect of prohibiting a person who has been issued a valid concealed handgun license from transporting or storing a firearm or ammunition when both of the following conditions are met:

(1) Each firearm and all of the ammunition remains inside the person's privately owned motor vehicle while the person is physically present inside the motor vehicle, or each firearm and all of the ammunition is locked within the trunk, glove box, or other enclosed compartment or container within or on the person's privately owned motor vehicle;

(2) The vehicle is in a location where it is otherwise permitted to be.

Therefore, as long as an employee keeps his firearm and ammunition in a locked compartment of his vehicle while he is away from the vehicle, an employer may not take any action against him for bringing the firearm or ammunition onto its property.

**WHAT DOES THIS MEAN FOR HR?**

Review your workplace violence and firearm policies. If your policies currently prohibit firearms in employees' locked personal vehicles, they must be modified to make them consistent with the new law before March 19. You are still free to prohibit employees who do not possess valid concealed carry licenses (or who are otherwise excluded from the licensing requirement) from keeping firearms in their vehicles, even if they are otherwise in compliance with the law. In addition, you may still prohibit employees from carrying firearms inside company premises or taking them out of privately owned vehicles while on company premises.

Many business interest groups opposed the legislation because it makes access and proximity to firearms in the workplace easier. Now that the bill has passed, you are well-advised to revisit your workplace violence policies to make sure they state clearly the prohibitions on violence and threats of violence.

## XIX. WHAT IS "CONSIDERATION" FOR A CONTRACT? NOT FIRING YOU!

In Lake Land Employment Group of Akron v. Columber, 101 Ohio St.3d 242 (2004), Lee Columber was employed by Lake Land Employment Group when he was asked to sign a non-compete agreement. The agreement said that for three years after his termination of employment, Columber would not compete with Lake Land Employment Group of Akron within a 50-mile radius of Akron. Columber was not offered any type of consideration to bind the contract other than his continued employment. Columber signed the agreement in September of 1991.

In 2001, Columber left Lake Land's employ. Columber then started his own business and went into competition with his former employer, Lake Land, within the Akron area. Lake Land argued that Columber therefore violated his non-compete agreement.

Columber argued that the non-compete agreement he signed with Lake Land was not effective since he was never offered any type of consideration to bind the agreement. Columber argued that he was already employed by Lake Land when he was required to sign the contract, so Lake Land was obligated to offer him some sort of raise, bonus or other form of consideration in order to make the contract binding. Therefore, reasoned Columber, the non-compete agreement was invalid.

Lake Land argued that Columber was in fact given ample consideration in the form of continued employment. Since Columber was employed at-will, continued employment was sufficient consideration to bind the new agreement.

The trial court agreed with Columber. The court said there "was no increase of salary, benefits, or other remunerations given as consideration for Columber signing the non-compete agreement" and "no change in his employment status in connection with the signing of the non-compete agreement." Lake Land appealed to the appellate court.

The court of appeals agreed with the trial court. The case therefore went to the Ohio Supreme Court to resolve this conflict among the Ohio courts on this issue.

In contract law, "consideration" must be given in order to support a contract. Most of the appellate courts in Ohio had already concluded that continued at-will employment was sufficient consideration for a non-compete agreement. However, on March 10, 2004, the Ohio Supreme Court resolved this matter, holding 4-3 that "consideration exists to support a non-compete agreement when, in exchange for the [employee's non-compete agreement], the employer continues an at-will employment relationship that could legally be terminated without cause."

Nevertheless, the courts look at non-competes differently than they do other contracts. With most contracts, a "deal is a deal" regardless of whether or not the deal is reasonable. In its earlier decisions, the Ohio Supreme Court established that a covenant not to compete that imposes "unreasonable restrictions" on an employee will be enforced only to the extent necessary to "protect an employer's legitimate interests." A non-compete restriction is reasonable if the restraint is no greater than what is required for the protection of the employer, it does not impose undue hardship on the employee, and it does not injure the public.

Therefore, even though the Ohio Supreme Court held that there was sufficient consideration paid by Lake Land to bind the non-compete (continued employment), it sent the case back to the trial court to determine if the provisions of the agreement were reasonable under the above standards.

**WHAT DOES THIS MEAN TO EMPLOYERS?**

It is now clear in Ohio: Continued employment for "at-will" employees is sufficient consideration to bind a contract. This ruling will not only apply to non-compete agreements, but to other agreements as well, such as confidentiality agreements, inventory control agreements, etc.

## XX. EMPLOYER'S POLICY RENDERS PTO FORFEITED

In Majecic v. Universal Development Management Corporation, 2011-Ohio-3752, Jerry Majecic worked for Universal Development Management Corporation as a maintenance technician at its apartments. He was terminated after a tenant accused him of stealing pain medication.

Majecic had worked at Universal for just over three years when he was terminated and was entitled to 80 hours of PTO under company policy. At the time of his termination, he had used 42.5 hours of PTO and had 37.5 hours remaining. There was no dispute that he was an at-will employee of Universal.

Like many employers, Universal addressed the accrual and use of PTO in its handbook. Company policy provided:

> **"Employees will be given [PTO] days after one year of employment. . . . All unused [PTO] will be forfeited upon an employee's resignation or termination."**

Majecic signed his acknowledgement that he had in fact received a copy of the handbook and understood its contents.

Majecic sued Universal in small claims court for payment of his unused PTO. The magistrate judge, focusing only on whether the PTO had been accrued, ruled in favor of Majecic for the 37.5 hours of unused PTO. The trial court affirmed the magistrate's decision and entered judgment for Majecic for $540.37 (his rate of pay for the unused PTO).

Universal filed an objection to the decision. A hearing was held, and the trial court denied the company's objection.

Universal then appealed to the Ohio Court of Appeals for the Eleventh Appellate District, arguing that the magistrate judge and the trial court disregarded its policy providing for forfeiture of PTO upon resignation. The company argued that was an abuse of discretion that warranted reversal. The Eleventh District agreed with Universal.

The Eleventh District reasoned that PTO is a deferred payment of an earned benefit, not a gift or gratuity, and that wrongfully withholding earned PTO is no different from wrongfully withholding an employee's final paycheck. The Eleventh District reasoned that the trial court erred when it failed to address the impact of the forfeiture provision in the handbook.

The appellate court examined recent cases in which courts held that an employee can forfeit his right to PTO upon resigning when there is a clear policy addressing forfeiture in the handbook. **The court was clear, however, that unless the vacation policy states otherwise, earned but unused PTO is to be paid out upon resignation or termination**

**because it is a deferred payment of an earned benefit. The court clarified that this doesn't mean the handbook is a contract of employment. It merely defines the terms and conditions of an employment relationship.**

**WHAT DOES THIS MEAN TO HUMAN RESOURCES?**

If you intend for PTO to be forfeited upon resignation or termination, you should examine your PTO policy and make sure it includes a clear forfeiture provision. In the absence of such a provision, any earned but unused PTO will be treated as an earned benefit and must be paid. This is a critical provision in your policies if you hope to withhold such monies for any reason at all.

## XXI. PROMISSORY ESTOPPEL AND EMPLOYMENT – AT WILL

In Zeltner v. Univ. of Northwestern Ohio, 159 Ohio App.3d 310, 2004, Jamilee Zeltner, who worked for the University of Northwestern Ohio in Lima, reported to Cheryl Mueller. When Zeltner started having problems with her supervisor, Mueller, she followed the procedure described in the company's policy manual and complained to the human resource department. Human resources recommended that Zeltner speak with the president of the university, Jeff Jarvis. Zeltner was reluctant to meet with Jarvis, because she feared how Mueller would react. Jarvis, however, assured Zeltner that he had an open-door policy and she would not lose her job by coming to him.

The conflict between Zeltner and Mueller then continued. When Mueller later disciplined her employee and put her on probation, Zeltner refused to sign the disciplinary notice and instead went directly to Jarvis. Mueller eventually discharged Zeltner for failing to follow the chain of command by speaking to Jarvis first rather than directly with her.

Zeltner sued the university for wrongful discharge. Because she did not have a specific employment contract, the university argued that Zeltner was an at- will employee and could be discharged at any time for any reason as long as her discharge did not violate a statute or recognized public policy.

Zeltner claimed, however, that the doctrine of promissory estoppel prevented her termination.

Under the doctrine of promissory estoppel, an employer may be prevented from discharging an employee if the employer has made promises on which the employee has reasonably relied. The key question to ask in such cases is whether the employer should have **reasonably** expected the employee to rely on the statements and assurances given, and if so, whether the employee **actually** relied on those statements to his/her detriment. These statements cannot be some vague assertion made by the employer. Instead, in order to have any legal significance, these statements must amount to a specific promise of continued employment.

In short, an employee must prove:

1. A clear and unambiguous promise was made to the employee,

2. By the employer,

3. Which the employer should have reasonably and foreseeably expected to induce reliance by the employee, and

4. Upon making this promise, the employee must have **actually** relied on the promise and actually **suffered injury** as a result of this reliance.

In this case, the employee had been assured by the university president that she could come to him with her employment concerns without losing her job as a result. Although she had not in fact followed the proper chain of command, she had approached the president instead of speaking directly with her supervisor based on his earlier assurance that she was free to do so.

Therefore, the court of appeals decided that Zeltner had a valid claim for wrongful discharge based on promissory estoppel.

## XXII. "SILENCE" CAN SUPPORT A PROMISSORY ESTOPPEL CLAIM

In Trehar v. Brightway Center, Inc., 2015-Ohio-4144, Jennifer Trehar was employed at Brightway Center, a Christian non-profit, since 2010. In June 2012, she informed Brightway on **two different occasions** that she planned to move in with her boyfriend. She claimed that on the first occasion, **she was congratulated by her boss on the move**.

On the second occasion, she was **granted permission to miss a work function** in order to make arrangements for her boyfriend to move.

In July 2012, Trehar again informed Brightway of her move. However, this time Brightway responded by sending Trehar a letter suspending her for the month of July and providing her one month to determine if she wished to get married, stop living with her boyfriend, or be terminated. The letter cited the organization's religious ideals as the basis for the decision. Trehar did not change her living situation and was terminated.

Trehar sued, alleging **promissory estoppel**, claiming that Brightway knew about her living arrangement in advance of her formally moving in with her boyfriend, approved of it on two different occasions and assured her that she would remain employed. She claimed that she relied on those promises of continued employment and moved.

Brightway claimed in response that it was aware Trehar was moving and that her boyfriend was also moving, but was unaware she would be living with her boyfriend and his children until just prior to sending the suspension letter.

While Ohio is an at-will employment state, promissory estoppel is an exception to that doctrine. The elements necessary for a promissory estoppel claim are "(1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) injury by the reliance by the party claiming estoppel."

In this case, Brightway filed a motion for summary judgment on the basis that there was **no specific and explicit promise of continued employment**.

The trial court agreed and dismissed the case.

Trehar appealed the trial court's decision to the Seventh District Court of Appeals.

Trehar argued on appeal that an explicit promise of continued employment was not required and that **silence could be interpreted as a promise capable of reliance**.

The court found that the promises allegedly made were different from "praise with respect to job performance, discussion of future career development, or promises of future opportunities," which are insufficient to support a claim of promissory estoppel.

In Trehar's case, **by remaining silent** while Trehar discussed her move plans, Brightway and its CEO "**silently assented** to Trehar moving in with her boyfriend and [Brightway's CEO's] **silence can be construed as a promise that no adverse employment action would come as a result of her move**."

The Seventh District Court of Appeals noted that the Ohio Supreme Court has stated that promissory estoppel claims can result from **silence** where there is an obligation to speak. Accordingly, the Seventh District Court of Appeals remanded Trehar's case to the trial court and instructed that her promissory estoppel claim be presented to a jury.

The court also reviewed a handbook provision that disclaimed any contractual arrangement and reaffirmed at-will employment but held that promissory estoppel could still serve as an exception to at-will employment where the specific promise applied. The court interpreted these policies as meaning that Brightway could fire Trehar for any reason **except** for her moving in with her boyfriend.

**WHAT DOES THIS MEAN TO HUMAN RESOURCES?**

Supervisors who remain silent when employees discuss taking a particular action (where one would normally be expected to speak) could lead to promissory estoppel liability after the employee takes action in reliance. Employers should keep this in mind as promissory estoppel claims can exist even in the ***absence*** of actual intent.

Therefore, a promissory estoppel claim can be created **even without an explicit promise.** ("Remaining silent where an ordinary person would speak up or take action.")

Also, it simply does not matter if an employee is employed at will. Employment at will is not a defense to a promissory estoppel claim.

## XXIII. "NO REHIRE" RECOMMENDATION STATEMENT IS NOT DEFAMATORY

In Byrne v. University Hospitals, No. 95971, Shellie Byrne was employed as a nurse at University Hospitals Geneva Medical Center. In 2007, she accepted one of two open supervisory positions, even though she truly wanted and was better qualified for the other

position. However, Byrne didn't get along with her direct supervisor and was allegedly engaged in an improper relationship with a member of management. After only two months, Byrne elected to resign from the supervisory position and transfer to a staff nursing position. Five days later, she voluntarily resigned altogether.

After Byrne's resignation, her direct supervisor filled out a termination form that is completed whenever an employee leaves University Hospitals. On the form, she checked a box indicating she wouldn't recommend Byrne for rehire. She gave no reason for this statement on the form.

By affidavit, Byrne's direct supervisor asserted the following reasons for the no-rehire recommendation:

- Byrne continually complained about errors in her compensation despite an investigation finding no errors;
- She resigned from a supervisory position after only two months without attempting to learn the new duties; and
- She took excessive time off with little advance notice after accepting a new position.

Byrne sued for defamation, tortuous (wrongful) interference with a business relationship (her subsequent employment opportunities), and invasion of privacy. The trial court found in favor of the employer on all claims.

Byrne then appealed to the Eighth District Court of Appeals. The Eighth District agreed with the trial court's decision.

Regarding the defamation claim, **expressions of opinion** generally are protected under Ohio law and are not defamatory. The court's inquiry focused on whether the no-rehire recommendation was fact or opinion. Byrne argued that the recommendation disparaged her work performance and was fact, not opinion, because the supervisor's opinion was based on facts.

The court held that the no-rehire recommendation was **opinion, not fact**. Because it was based on the supervisor's subjective opinion, it was impossible to be objectively verified, and it put a reader on notice that it was the supervisor's subjective opinion. The court noted that just because an opinion is based on facts does not transform it into fact and that evidence of a malicious motive doesn't transform an opinion into a defamatory statement.

The court distinguished a Second U.S. Circuit Court of Appeals case, decided under New York law, in which the court held that a no-rehire recommendation was actionable because it was conditioned on the employee's work habits being unacceptable, a fact that was alleged to be untrue. Byrne's no-rehire recommendation didn't specify the underlying reasons, and any reader of the document was left to speculate about them.

The court dismissed the tortuous interference with business relations claim because there was no evidence of any damages. Byrne had no evidence that any future employment prospects actually had been affected by the statement. The court held that her claim couldn't be based on the potential that employment prospects might be affected. It also dismissed the invasion of privacy claim because there was no evidence of public dissemination (or any dissemination) of the termination document.

**WHAT DOES THIS MEAN TO HUMAN RESOURCES?**

Although the employer prevailed in this case, this entire lawsuit could have been easily avoided. Before releasing any reference information on an employee, the employer should get a full release of liability AND permission to release information from the employee. ***Ideally, this release should be in the form of a contract.*** Therefore, whenever receiving a reference request from an employer, you should fax or email over a contract for the former employee to sign that secures your protections.

## XXIV. OHIO DAS ADOPTS THE "BAN THE BOX"

On May 15, 2015, Ohio Department of Administrative Services announced that it will adopt the "Ban the Box" standard for all employment applications for state employers.

Effective June 1, 2015, the Ohio Civil Service Employment Application no longer has a question asking applicants to disclose any felony convictions. Consequently, questions regarding prior convictions were removed from thousands of applications for state government positions, which include highway workers, prison guards, social workers and lawyers.

Under this standard, applicants with past criminal convictions can only be disqualified from a position when their employment is prohibited by state or federal law or other federal restrictions.

Criminal convictions may also disqualify an applicant if the **appointing authority** analyzes the facts and circumstances surrounding the conviction and the nature of the duties associated with the position in question.

DAS states that when posting vacancies, agencies should analyze whether any state or federal law or other federal restriction would prohibit the hiring of an individual because of past criminal violations. When an agency determines that there is a restriction based on a type of conviction, **it must include a statement on the job posting indicating the specific violations that may disqualify an applicant from consideration.**

However, applicants are not prohibited from voluntarily disclosing criminal convictions.

Therefore, DAS' Ban the Box policy still allows public **employers to ask their civil service applicants about any relevant past criminal records during job interviews.**

**Employers are allowed to perform criminal background checks on their civil service finalists.**

If the applicant is qualified for the position but has any criminal convictions in his past, **he must be given an opportunity to explain the conviction or criminal background as well as any post-conviction rehabilitation**.

Also, the applicant can be rejected based on a criminal background check **only after a careful analysis of the requirements of the position, the nature of the conviction, and any other pertinent information are considered**. Agencies should therefore work with their legal counsel to adopt policies and procedures to ensure that proper consideration is given to a candidate's disclosure of a past conviction.

DAS's change to the Ohio Civil Service Employment Application is the first statewide move toward banning the box in Ohio, although a number of Ohio counties and cities already have such restrictions in place.

## XXV. OHIO's "FRIVOLOUS LAWSUIT" OVER PUBLIC RECORDS REQUEST

In State ex rel. Davis v. Metzger, 139 Ohio St.3d 423 (June 4, 2014), Mrs. Peggy Davis sued the West Licking Joint Fire District (FD), for wrongful termination. Mr. John Davis (Relator), her husband, made the following public records request.

> "On **Thursday, December 8, 2011, at approximately 9:00 p.m.,** Relator [Mr. Davis] served Respondent [FD] with a public records request for personnel records for six employees of the West Licking Joint Fire District (hereinafter 'WLJFD'). Respondent is the Human Resources Technician for the fire district. As to these six employees, each request sought to 'secure any and all records' that would support the employee's work performance, any disciplinary actions in his or her file, and any other document 'that would give us any indication that he is unable to perform the job at hand.'

The records request stated that Mr. Davis wanted the records emailed to him.

The FD's Human Resources Office was closed on Saturday, December 10, and Sunday, December 11, 2011. On Tuesday, December 13, 2011, at approximately 11:30 a.m., Mr. Davis telephoned Ms. Terra Metzger (HR Technician and Respondent) to ask about the status of his public records request. She advised Mr. Davis that the requests were being reviewed by counsel for the FD before they would be released.

At 1:59 p.m. that afternoon, Mr. Davis filed a complaint against the FD asking the court to order the FD to release these records; which is referred to as a mandamus action.

The records were provided to him at 3:46 p.m. the same afternoon after the mandamus action had been filed by Mr. Davis' attorney, Wesley Fortune.

The question that went before the Ohio Supreme Court was whether the FD took too long to respond to Mr. Davis' Public Records request. Mr. Davis claimed the District took an **unreasonable amount** of time in supplying the records to him.

However, the Ohio Supreme Court disagreed.

The Court specifically rejected Mr. Davis' objections to the FD taking extra time to provide him with the records he requested in order to have its legal counsel review the records. The Court reasoned that having counsel review the records before they were released to Mr. Davis had a "minimal impact" on the timeliness in which the fire district produced the records to Davis.

Moreover, the Court held that personnel files require a careful legal review to redact sensitive personal information about employees that does not have anything to do with the organization or functions of the FD. The FD was therefore justified in allowing its legal counsel a short time to review the records before they were released.

The Court held that allowing three days to gather and review these documents before releasing them was not an unreasonable amount of time to provide personnel records for six employees.

Then, in State ex rel. Davis v. Metzger, 5th Dist. Licking No. 11-CA-130, after the Ohio Supreme ruled against Mr. Davis, the FD sued Mr. Davis and his attorney, Wesley Fortune, for pursuing frivolous actions against it.

Under ORC Section 2323.51:

(2) "Frivolous conduct" means **either** of the following:

> (a) Conduct of an inmate or other party to a civil action, of an inmate who has filed an appeal of the type described in division (A)(1)(b) of this section, or of the inmate's or other party's counsel of record that satisfies any of the following:
>
> > (i) It **obviously serves merely to harass or maliciously injure** another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.
> >
> > (ii) It is **not warranted under existing law**, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
> >
> > (iii) The conduct consists of allegations or other factual contentions that have **no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery**.
> >
> > (iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

The FD contended that even after these records had been released to Mr. Davis, his attorney, Wesley Fortune, continued to engage in discovery in order to enforce his mandamus action to compel the FD to release these records. This frivolous included conducting **seven hours** of deposing the Chief, **three and one-half hours** of deposing the Board President, and **seven hours** of deposing Ms. Metzger.

Attorney Fortune therefore conducted **17 hours of depositions in an attempt to force the FD to release these requested public records after they had already been released**.

Both Mr. and Mrs. Davis claimed that the responses they received in the public records document requests given were incomplete. However, their attorney, Wesley Fortune, readily admitted the **public records request was a way of achieving discovery in Mrs. Davis's lawsuit for wrongful termination, which was not the purpose of the mandamus action these depositions were based upon**.

Despite attorney Fortune's extensive arguments to the contrary, the court held that this case was no longer about the lag time between when the request was made and when the FD provided Mr. Davis with these records, nor was it about any potential deficiencies in the response by the FD.

Instead, this case was about Attorney Fortune **continuing with unnecessary discovery** in the mandamus action he filed against the FD. **He continued to pursue this mandamus action even <u>after</u> the records were released.**

The court held that conducting some 17 hours of depositions based on his mandamus action alone without attaching any additional amendments to the action warranting additional discovery was frivolous.

The court therefore concluded that Mr. Davis was not liable to the FD for "frivolous conduct" against the fire department because he was acting on the advice of counsel, Wesley Fortune.

However, the court held that it was well established by the evidence that the actions of Attorney Fortune were frivolous and warranted the finding of sanctions.

The court therefore granted the fire department's request for attorney fees and ordered Attorney Fortune to pay Respondent $28,332.05 in attorney fees.

## WHAT DOES THIS MEAN TO HUMAN RESOURCES?

This case tells Ohio's public employers that it is permissible to take a "reasonable" amount of time to gather any public records requested by the public and to have them review by legal counsel before they are released. In this case, considering the types of records requested, three (3) business days not unreasonable.

Also, this case reminds us of the requirements ORC Section 2323.51 establishes for frivolous actions committed by either the party to a lawsuit or the party's attorney.

Too many times, unscrupulous attorneys will try to hold another party for "ransom" through the cost of attorney's fees.

**REMEMBER:** There is an Ohio statute that protects us from frivolous legal actions. It is always a good idea to keep this statute in mind if you feel you are being harassed by a party to lawsuit or his/her attorney.

## XXVI. OHIO "COBRA" LAW FOR SMALL EMPLOYERS

Ohio has a separate health care continuation law to cover small employers who have less than the 20 employees, as is the threshold for coverage under required under COBRA. Employees and their qualified dependents may be permitted to continue health insurance coverage under the company's health insurance policy for up to six (6) months after the employee's employment terminates as long as the following conditions are met:

1. The employee and the employee's qualified dependents were continuously covered under the employer's health policy for the three (3) months prior to the employee's termination,

2. The employee is entitled to receive unemployment insurance benefits under Chapter 4141 of the Revised Code,

3. The employee and the employee's qualified dependents are not eligible for coverage under Title XVIII of the Social Security Act as amended and

4. The employee and the employee's qualified dependents are not eligible for coverage under any other insured or uninsured arrangement that provides hospital, surgical or medical coverage for individuals in a group and under which they were not covered immediately prior to their termination.

Under Ohio law, continuation of coverage need not include dental, vision care, prescription drug benefits, or any other benefits provided under the policy other than hospital, surgical, or major medical benefits.

The employer is required to notify the employee of the right of continuation at the time the employer notifies the employee of the termination of employment. This notice must also inform the employee of the amount of contribution required by the employer and where to send the payments.

In order to continue the insurance coverage for the six months required by law, the employee must make full payment by the last day of each month for coverage for the following month. The employer may cancel coverage is payment is not made by the end of each month.

Employees can be required to return a Health Care Continuation Enrollment Form to the employer **within ten (10) days of receiving this notice**. Also, failure to return the form by the due date may be construed by the employer as an election not to continue coverage under the company's health insurance policy.

## XXVII. BEWARE: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In Tenney v. General Electric (Ohio Ct App 06/29/2007), Barry Tenney, a homosexual, was harassed because of his sexual orientation during his 25 year employment with General Electric. In 2000, Tenney filed lawsuits against General Electric and two other employees, Terry Larson and Joanna O'Neil, for Intentional/Reckless Infliction of Emotional Distress ("IIED") based upon the following incidents.

- In 1996, Tenney was working with two other General Electric employees, Diane Lissi and Denise Hivick, inspecting glass lenses for use in automobile headlights. Each employee was inspecting lenses at separate tables. Tenney testified that he was hit in the chest "real hard" by a stack of glass. When he looked up, Tenney saw Lissi and Hivick laughing and looking at him. About eight minutes later, Tenney was hit by another stack of glass. This time, some of the glass hit his groin area causing his penis to bleed. Again, Lissi and Hivick were looking at Tenney and laughing. Tenney asked the women why they had hurt him. According to Tenney, Lissi replied to the effect that, if she were going to cut off his penis, she would use a knife, not glass.

  Tenney reported the incident to a foreman but, to Tenney's knowledge, no disciplinary action was taken against Lissi or Hivick. Tenney testified that, as a result of the attack, he suffers from a continuous injury in his groin. Tenney also testified that the attack terrorized and humiliated him so that he is afraid to work at the plant.

- Also in 1996, Tenney's partner, Larry Carr, came to the plant because of an emergency at home. When Terry Larson, Tenney's foreman, saw Carr he told Carr to leave. Larson then berated Tenney, calling him numerous obscenities, and warning Tenney that Carr should not ever come to the plant again.

  Tenney went to Doug Lowery, who works in the offices at General Electric, and complained about Larson's behavior. However, about a half-an-hour later, Tenney noticed Larson and Lowery running in and out of the men's restroom and laughing. Tenney went inside and found graffiti to the following effect: "[c]ome to Barry's ship of fools. You can "F" him up the – and he'll give you [oral sex} and he'll be your first mate."

- Other testimony in the record demonstrates that graffiti, generally about homosexuals and sometimes about Tenney specifically, including references to AIDS, was common in the plant's bathrooms.

- During 1996 and 1997, various General Electric employees ridiculed Tenney by making pig noises and simulating homosexual sex. Tenney testified that this was done in front of his shift supervisor, John Ealy. Daniel Thomas Robbins, another GE employee, testified that an employee named Greg Dominic continued to make

pig noises around Tenney for "quite a while" before being told to stop by management.

- Tenney testified to other instances where General Electric employees referred to him as "fag" or "queer."

- In 1999, Tenney went to see the plant nurse, Joanne O'Neil, about obtaining replacement safety glasses. Tenney testified that O'Neil made several offensive remarks to him on this occasion. According to Tenney, O'Neil told him that she had instructed her pregnant daughter to talk to her fetus so that the child would not become a homosexual.

- O'Neil also allegedly told Tenney that a man becomes a homosexual if he is raped as a child and that if Tenney had better parents, he would not have been a homosexual.

- Later in 1999, Tenney went to O'Neil because he had chest pains. Tenney testified that O'Neil apologized for her previous comments and asked if she could give Tenney a "motherly hug." Tenney agreed, since O'Neil was blocking the doorway. Tenney testified that O'Neil gave him an erotic embrace, pressing her breasts into him, putting her lips to his neck and his ear, and rubbing her hands up and down his back and "tailbone." Tenney told O'Neil that he wanted to return to work, but O'Neil pressed into him harder and pushed him backwards. Tenney tried to break free and O'Neil kissed his neck and ear and told him that she loved him and that God had sent him to her. Finally, O'Neil allowed Tenney to leave. Tenney described the incident as an "erotic encounter."

Tenney testified that these incidents have depressed him, made him suicidal, and have caused extreme psychological distress. He has had to see a therapist and a psychiatrist, who prescribed medication for his anxiety.

In making a claim for Intentional/Reckless Infliction of Emotional Distress, Tenney must prove that the treatment he suffered from his co-workers and management was "extreme and outrageous conduct" that "intentionally or recklessly" caused him serious emotional distress. Specifically, Tenney must prove:

(1) That the defendant **intended** to cause the plaintiff serious emotional distress,

(2) That the defendant's conduct was **extreme and outrageous**, and

(3) That the defendant's conduct was the proximate cause of plaintiff's serious emotional distress.

With respect to the requirement that the conduct alleged to be "extreme and outrageous," the Supreme Court of Ohio has adopted the following position:

> "'Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond

> all possible bounds of decency, and to be regarded as **atrocious,** and **utterly intolerable in a civilized community**. *** The liability clearly does not extend to **mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities**. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind.'"

In reviewing these incidents, the court then addressed the claims Tenney made against the individual defendants, Larson and O'Neil.

**LARSON**

Tenney alleged that Larson shouted obscenities at him without cause and was involved in writing graffiti about Tenney on the bathroom wall, ridiculing his homosexuality. By themselves, these actions do not rise to the level of "extreme and outrageous conduct" that would support a claim for intentional infliction of emotional distress. The law is clear that liability does not attach to mere insults and indignities, such as Larson's conduct.

In short, the courts have failed to find mere offensive and insulting conduct actionable even when directed at a particular individual. Consequently, the lawsuit against Larson was dismissed.

**O'NEIL**

In reviewing the claim Tenney made against O'Neil, the court examined derogatory comments she made about homosexuals to Tenney and the incident in which she groped him. Again, as with Larson, O'Neil's comments to Tenney were merely offensive, which do not constitute an IIED claim. Even though these comments were offensive, they are not so outrageous as to be deemed "utterly intolerable in a civilized community."

However, O'Neil's groping of Tenney presents a different issue. This is the kind of conduct that is truly "extreme and outrageous." Tenney's claim that O'Neil groped him, put her lips to his neck and ear, rubbed up against him and pushed into him in an erotic manner, exceed all possible bounds of decency in a civilized society, whether committed by a male or a female. Clearly, such actions toward Tenney would constitute intentional acts of offensive touching. The most offensive aspect of this incident lies in the fact that O'Neil was aware of Tenney's homosexuality, which demonstrates the inherently offensive nature of the contact.

When viewed in that light, it is clear O'Neil was not seeking personal sexual gratification for herself, but was instead deliberately humiliating and inflicting emotional distress on Tenney. The touching was incidental to the mental abuse in this case.

## GENERAL ELECTRIC

The remaining claim is General Electric for Intentional/Reckless Infliction of Emotional Distress. General Electric does not contest that it had knowledge of the harassing incidents suffered by Tenney. Still, General Electric argues that it cannot be held liable for the conduct of its employees toward Tenney because such conduct was outside the scope of their employment.

However, the court reasoned that the Supreme Court of Ohio decided Kerans v. Porter Paint Co., that:

> "An employer has a duty to provide its employees with a safe work environment and, thus, may be independently liable for failing to take corrective action against an employee who poses a threat of harm to fellow employees, *even where the employee's actions do not serve or advance the employer's business goals."*

Under Kerans, General Electric could be held liable for failing to take corrective action regarding the harassment of Tenney where such failure rose to the level of intentional conduct and was of such an extreme and outrageous character such that it would be considered utterly intolerable in a civilized community.

The court then reasoned that the incident that stands out in this case is the sexual groping of Tenney by O'Neil, which is the very definition of "extreme and outrageous." In addition, when considering the other harassing incidents committed in this case along with O'Neil's groping of Tenney, a pattern of inaction by General Electric emerges. General Electric stood by when Tenney was struck by glass in the incident involving Lissi and Hivick; it allowed sexually explicit graffiti to remain on its walls for months; it allowed some employees to make pig noises at Tenney for months before putting a stop to it; and, finally, the incident in which O'Neil gave her obtuse opinions about Tenney's homosexuality.

These multiple acts over a period of time, combined with General Electric's failure to effectively address these acts have the cumulative effect of creating an atmosphere of "extreme or outrageous conduct."

General Electric may not have officially condoned the actions against Tenney, but it allowed the actions to persist and accumulate over the years Tenney has been employed there. There is nothing in the record which suggests that management ever fired, demoted, transferred, or even meaningfully disciplined certain employees in response to these reports.

Consequently, the court also found in favor of Tenney against General Electric for IIED.

## XXVIII. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS *CAN* NOW BE BASED SOLEY ON TESTIMONY OF EMPLOYEE

In Kassay v. Niederst Mgmt., Ltd., No. 106016 (8th Dist., May 24, 2018), John Kassay was employed by Niederst Management, Ltd., as a pest control technician. Niederst is a property management company that owns a number of apartment buildings and Kassay worked with other technicians to exterminate bedbugs in its buildings.

Technicians are required to lift heavy equipment, including power cords weighing 75 pounds and, along with a technician, furnaces weighing 240 pounds.

After working for Niederst for over a year, Kassay reported to work wearing a wrist brace, which he wore occasionally because of a disabling injury he had suffered while working for a previous employer. One of his coworkers alerted Lisa Weth, their supervisor, about the brace. Weth told Kassay that she would have to speak to the HR department about his brace because she was concerned that his injury could put him or others in danger. She consulted with Denise Pacak, Niederst's HR director, who instructed Weth that Kassay would need to complete **Family and Medical Leave Act** (FMLA) paperwork to be able to work without any limitations, even though he had not requested any time off.

Kassay repeatedly expressed frustration about these instructions to Weth, who told him to speak to Pacak. He made multiple attempts to speak to Pacak but received no response. Five days after he first reported to work wearing the brace, Weth told him that he was being taken off the schedule and prohibited from working until he returned completed FMLA paperwork and received a "return-to-work note" from his doctor.

The next day, Kassay met with Pacak, who reiterated Weth's directive and, consistent with Niederst's policy that employees must be able to work full-time, full duty, with no restrictions, told him his medical documentation must indicate he could work with no restrictions.

Kassay testified at trial that he was unable to get an immediate appointment with his doctor, who was out of the country. During that time, he regularly attempted to contact someone at Niederst every day or every other day but did not get a response. When he finally got in to see his doctor, the doctor refused to complete the FMLA paperwork because he did not need any time off work and the doctor did not want to commit fraud.

After being off work for approximately a week, Kassay contacted Weth to tell her that he had met with his doctor. Weth told him that his employment had already been terminated because he failed to report to work or to report his absence for two straight days in violation of Niederst's attendance policy.

Kassay filed suit against Niederst, Weth, and Pacak, alleging that he had been unlawfully discriminated and retaliated against on the basis of his disability and that Niederst failed to provide him with a reasonable accommodation for his disability.

The jury found in his favor against all three defendants and awarded him a total of almost $800,000, which was made up of approximately $32,000 in economic damages for back pay, $250,000 in noneconomic damages for emotional distress, $250,000 in punitive damages, $200,000 in attorneys' fees, one year of front pay, and prejudgment interest.

Niederst appealed.

On appeal, Niederst didn't argue that the jury's decision finding in Kassay's favor was incorrect, but instead that there was insufficient evidence supporting the awards for noneconomic and punitive damages. The jury's award of $250,000 in noneconomic damages for emotional distress was based **entirely on Kassay's testimony about how the loss of his job affected him**. He testified at trial that the loss of his job made him feel like "less of a man," made him feel like he was letting down his family, caused him to have trouble sleeping and led to arguments with his family because of the financial problems it caused.

Kassay presented no expert testimony about his emotional distress and admitted that he never had any medical treatment for it, nor did he consult any doctor about it. This lack of medical evidence corroborating his testimony, Niederst argued, prevented him from proving the existence of emotional distress that would justify such a substantial noneconomic damages award.

The court disagreed.

**Evidence of medical treatment, it reasoned, is not required to prove the existence of emotional distress**. Because the assessment of damages is determined solely by the jury, and because Kassay's testimony provided some credible evidence of emotional distress, there was a sufficient basis for the jury's noneconomic damages award.

Niederst's argument that the jury's award of punitive damages wasn't supported by the evidence also failed. According to the company, Kassay failed to prove that the defendants acted with actual malice, proof of which is required to support a punitive damages award.

The court disagreed, identifying plenty of evidence of malice.

For example, the testimony of Weth and Pacak was, at times, contradictory. Neither admitted that she made the decision to require completed FMLA paperwork, and neither admitted being involved in the decision to terminate Kassay's employment. Weth testified that she believed the FMLA did not apply to Kassay but told him to complete the paperwork anyway. Both Weth and Pacak admitted disregarding his

attempts to reach them, joking about his termination, and doing nothing when they realized their mistakes.

Kassay testified that his doctor believed he was being asked to commit fraud when Kassay gave him the FMLA paperwork and that Niederst's owner seemed to be more concerned about being sued than about the impact the employment termination had on him.

All of this testimony, according to the court, amounted to clear and convincing evidence that allowed the jury to infer the existence of **actual malice**. Most notable, however, was the court's approval of an instruction given by the lower court to the jury. The instruction allowed the jury to find malice based only on the existence of retaliation. In other words, according to the instruction, a finding that Niederst unlawfully retaliated against Kassay was sufficient support, without any additional evidence, for a finding that **Niederst had acted with ill will, hatred, and a conscious disregard for Kassay's rights.**

**WHAT DOES THIS MEAN FOR HR?**

While this case reminds employers that a "100 percent healed" policy is unlawful, that employment decisions must have a reasonable basis and that the way employees are treated matters, its most important lesson relates to the damages that may be awarded in employment litigation. If a jury finds the existence of unlawful discrimination or retaliation, **very little, if any, additional evidence will be required to support an award compensating the employee for his emotional distress and an award of punitive damages**.

This potential for substantial damages must be considered by employers and their counsel when they make adverse employment decisions, evaluate risk, and determine the settlement value of ongoing litigation.

## XXIX. NEGLIGENT HIRING AND NEGLIGENT RETENTION

### A. General Theory

Under the theory of **respondeat superior**, employers are responsible for the acts of their employees that are committed **within the scope of their employment**. However, within recent years, legal theorists have wondered if employers can be held liable for the acts of their employees which are committed **outside** the scope of their employment, such as when an employee physically assaults a customer. This concept was the beginning of the negligent hiring and negligent retention causes of action against employers.

Under the theories of negligent hiring and negligent retention, an employer may be held liable to third parties for the injuries they suffer as a result of the tortious acts committed by the employer's employees. The general theory at work under these theories is that employers have a duty to exercise reasonable care in both

their employee hiring and employee retention practices in order to protect the public from individuals who might foreseeably cause harm to others.

**B. Duty Of Care**

In order for the employer to be held liable for the violent acts of one of its employees under a negligent hiring or a negligent retention theory, the employer must first owe the plaintiff a duty of care. In general, a duty of care is usually owed to third parties by the employer when:

1. Both the employee and the plaintiff were in places where each had a right to be when the wrongful act occurred,

2. The plaintiff met the employee as a direct result of the employee's employment, and

3. The employer received some benefit, even if only potential or indirect, from the meeting that occurred between the employee and the plaintiff.

If these three requirements are met, then the employer will most often owe a duty of care to the third party, or the plaintiff.

In Stephens v. A-Able Rents Co. (Cuyahoga Cty. 1995), 101 Ohio App. 3d 20, the employer, A-Able Rents, hired Taylor, who had a history of abusing illegal drugs. The court stated that Taylor's history of drug use would have been discovered if the employer had performed a background check on Taylor, such as by contacting Taylor's former employer, Kroblin's. Taylor later used illegal substances while on duty for A-Able Rents, and then assaulted a female customer. The court held that:

> "Taylor abused drugs, which is criminal conduct in Ohio. This information was known to Kroblin's, Taylor's former employer. With a reasonable amount of care, A-Able Rents could have known of Taylor's criminal propensity. By its own admission, A-Able Rents stated that had it known of Taylor's abuse it would not have hired him. . . . Consequently, a reasonable jury could have found the failure to inquire into Taylor's employment history before hiring is causally connected to and may have proximately caused the attack on Marie Stephens. Taylor was in Marie Stephens' home to provide work for A-Able Rents. Had Taylor not been an employee, this attack would not have happened." (Stephens at 27.)

Thus, where an employer does not exercise reasonable care in hiring or maintaining an employee, liability may arise under a theory of negligent hiring.

## C. Foreseeability

Whether the injury inflicted upon the plaintiff was foreseeable is also a very fact-specific determination. For example, in Gaines v. Monsanto Company, 655 S.W.2d 568 (Mo. Ct. App. 1983), a mail clerk worked in the same building as a certain secretary, although each worked for different employers. One night, the mail clerk followed the secretary home from work one night and killed her.

The parents of the secretary filed suit against the mail clerk's employer. The employer then filed a motion to dismiss the suit based on the reasoning that aside from the fact that the mail clerk learned of the secretary's home address through his employment, no real connection with the employer existed.

However, the court dismissed the employer's motion based on the fact that the mail clerk had previously made advances toward this secretary, that this mail clerk had a reputation for harassing female employees, and the employer failed to take any action to remedy this employee's behavior. Therefore, the court reasoned that it was foreseeable that someone with a background like this mail clerk would commit such an act and the employer failed to act "appropriately" in dealing with these previous incidents.

## D. Various Potential Solutions

In an effort to both avoid potential problems and protect themselves from either negligent hiring or negligent retention lawsuits, the following is a list of practices that may be adopted by proactive employers:

1. All applicants are required to complete an application.

2. No applicant is to be hired until all the required pre-employment checks have been completed.

3. The proper background checks that are needed for each position should be determined, based largely on the amount of contact the employee will have with the public, or other employees, such as criminal checks, drug tests, driving records, if driving is a part of the position, and so on.

4. All employment applications are to be reviewed uniformly, looking for gaps in employment, suspiciously short terms of employment, any unusual entries or omissions, and, of course, any criminal convictions related to violent behavior.

5. The written permission of each applicant to check references is obtained by signing the employment application disclaimer, thus allowing the employer to inquire with any company or person it desires regarding the applicant. The applicant should also release all parties from liability for providing such information.

6. Check with each reference and with each former employer regarding the applicant. Written notes should be taken and retained. Specific questions regarding the applicant's character traits should be asked relevant to the position for which the applicant has applied.

7. If the application or background check raises any questions in the employer's mind, either the applicant should be disqualified from consideration or further inquiries should be made into the applicant's background. However, since a uniform ban on hiring applicants with criminal records has been held by some courts to have a disparate impact on minorities, employers should disqualify an applicant due to a criminal conviction only if the conviction is related to the candidate's fitness for the particular position.

   (It is also important to note that in most states, employers may refuse to hire an applicant based on a previous conviction related to the applicant's fitness for the position, but employers are not allowed to use previous arrests as the basis for such decisions.)

8. Review all complaints made regarding employees and address these problems immediately. If the misconduct involves an act of violence, failure to discharge the employee may very likely lead to employer liability for the future acts of the employee.

9. Of course, the abusive or violent acts of supervisors should not be tolerated.

10. Implement Employee Assistance Programs to help employees deal with stress, marital problems, substance abuse, and so on.

11. Consider performing additional background checks whenever employees change jobs within the organization.

12. Train managers in workplace violence issues and how people deal with stress and burnout, particularly regarding layoff and reorganization situations, as well as how to spot signals which may indicate possible employee violence.

13. Establish, publicize and enforce a strong anti-violence and anti-threat policy, which includes requiring employees to report any acts of violence or threats made towards others in the workplace. Additionally, a "threat of violence" assessment team should be established to investigate such reports. This team should be comprised of employees from human resources, legal counsel and security.

14. An anonymous or confidential hotline for employees should be established through which employees can report such incidences.

15. If an incident does occur, it should be determined whether the offending employee should be required to undergo assessment before being allowed to return to work.

16. Seek the assistance of legal counsel before acting.

## XXX. WHEN IS AN EMPLOYER LIABLE FOR ACTS AGAINST CUSTOMERS?

In Thomas v. Speedway Superamerica, LLC, 2006-Ohio-5068 (9th Dist., 2006), Katie McVay was a cashier at a Speedway Superamerica service station. One of McVay's frequent customers, Bruce Thomas, apparently came to irritate her immensely.

One day, Thomas asked McVay for a glass of water. McVay saw this as her chance to take revenge on Thomas for the way he had treated her, so she poured chemical cleaner into the cup of water she gave to him. Both Thomas and his wife drank the water and became violently ill. McVay was later arrested for contaminating a substance for human consumption, which is a violation of Ohio's Pure Food and Drug Law. McVay plead guilty.

Thomas and his wife then filed lawsuits against McVay and Speedway. Ultimately, McVay settled the claims against her out of court. The trial court granted Speedway's request to dismiss the charges against it without a trial, finding that the service station was not liable for McVay's action even though it was committed during the course of her employment. Thomas' wife appealed the trial court's decision in favor of Speedway. The appellate court found for Speedway.

In reaching its decision, the court examined two theories of employer liability:

### Respondeat Superior and Negligent Hiring/Retention

### Respondeat Superior Theory

Thomas' wife first argued that Speedway should be held generally liable because McVay's actions occurred **during the course of her employment**, and thus, the company is responsible for her actions. That theory of liability often is referred to as "respondeat superior." Under the theory of **respondeat superior**, employers are responsible for the acts of their employees that are committed **within the scope of their employment**. The reasoning behind this theory is if employees are acting within the scope of their employment, these employees are furthering the business of their employer. As a result, the employer is liable for the negligent acts of the employee because the employee was acting on behalf of the employer when the injury was inflicted upon the customer.

The court disagreed with Thomas' wife and held that before an employer can be held liable for the actions of its employees under the respondeat superior theory, the injured party must show that:

(1) An employee/employer relationship existed and

(2) The employee's wrongful conduct was committed within the scope of her employment.

In this case, there is no dispute that an employee/employer relationship existed or that McVay's conduct occurred during the course of her employment. However, the court also found that even though McVay's actions occurred within the course of her employment; poisoning Mr. and Mrs. Thomas was clearly **outside the scope of her employment**.

In other words, when she placed the chemical cleaner into the Thomas' cup of water, she was no longer furthering her employer's business.

The court therefore held that willful and malicious acts committed by employees during the course of their employment are generally not considered to be within the scope of their employment. The only way that such acts could be considered within the scope of employment is if they were somehow "calculated to facilitate or promote the business for which the employee was employed."

As a result, Speedway could not be held liable for McVay's actions under a **respondeat superior theory**.

## Negligent Hiring/Retention Theory

The court then turned its attention to the theory of Negligent Hiring/Retention. Within recent years, the Ohio courts have held employers liable for the acts of their employees that are committed **outside** the scope of their employment, such as when an employee physically assaults a customer, as happened in this case.

Under the theories of negligent hiring and negligent retention, an employer may be held liable to third parties for the injuries they suffer as a result of the tortious acts committed by the employer's employees. The general theory at work here is that employers have a duty to exercise **reasonable care** when they hire and retain employees in order to keep the public and their other employees safe from individuals who might foreseeably cause harm to others.

In examining the Negligent Hiring/Retention claim, Thomas' wife argued that because McVay was an employee of Speedway, the company also should be found negligent under Ohio's Pure Food and Drug Law. The court recognized that an employer can be held liable for ordinary employee negligence when the employee's actions are "reasonably foreseeable" by the employer. In such cases, the employee's conduct is typically attributed to the employer.

However, when an employee **intentionally** harms another person, such criminal conduct is **not** foreseeable, so the employer is not liable to the injured party. In order for Speedway to be found negligent in this case, McVay's actions against the Thomas' would have to be "reasonably foreseeable." However, McVay gave Speedway no previous indication that she intended to poison Thomas … and she had never engaged in similar conduct in the past.

In short, there was simply no way that Speedway could have anticipated such an event or taken steps to prevent it from occurring, so it could not have been negligent. Thus, McVay's conduct could not be attributed to the service station.

**WHAT DOES THIS MEAN FOR HUMAN RESOURCES?**

In general, employers are not liable for the intentionally committed criminal acts, such as the one committed by Ms. McVay. Just because an employee commits some bad act does not mean the employer is automatically liable, as Mrs. Thomas and her attorney obviously thought in this case.

Of course, if Ms. McVay had had some prior incident in her past that would have made her criminal act against the Thomas' foreseeable, or if her had made some type of blatant or veiled threats against the Thomas' or other customers, this case would have most likely had a very different ending. Such acts of "reasonable" foreseeability were all Mrs. Thomas would have needed to most likely prevail.

## XXXI. NEGLIGENT HIRING & RETENTION: LIABILITY ENDS WHEN THE EMPLOYMENT RELATIONSHIP ENDS

In Abrams v. Worthington, 169 Ohio App.3d 94, 2006-Ohio-5516, Charles M. Worthington and Michael Worthington owned and operated a business named "A Family Moving Company," which primarily provided household moving services. In mid-2001, the Worthington's employed Chad Sullivan as one of their movers.

During the hiring process, Sullivan completed an application form that asked for his personal data, his employment history, and his driving experience. Sullivan was also interviewed by a manager of the Worthington's. However, neither the application form nor the interview uncovered Sullivan's criminal record, which included convictions for theft, burglary, and receiving stolen property.

At the time the Worthington's hired Sullivan, they already employed Sullivan's brother, Shawn Scott, as a mover. The Worthington's considered Scott a hard-working, well-mannered employee.

A few months after Sullivan was hired, Jeffrey and Joyce Abrams hired the Worthington's to move their belongings into their newly-built house in Pataskala, Ohio. Chad Sullivan was one of the movers who helped move the Abrams into their new home.

But unlike his brother, Chad Sullivan did not prove to be a good employee. So, in January 2002, the Worthington's terminated Sullivan's employment because of his bad attitude, poor work performance, and unreliability.

Approximately two months after Sullivan was fired, on the night of March 14, 2002, Sullivan and four or five accomplices attacked Jeffrey Abrams in his backyard. They dragged him into his home, where they bound him and his wife. These assailants beat Jeffrey Abrams' and stole items from their home, including Joyce Abrams' engagement ring, before driving away in the Abrams' car.

Ultimately, the Pataskala Division of Police arrested Sullivan for his participation in the home-invasion robbery.

On March 11, 2004, the Abrams filed a lawsuit against the Worthington's for negligent hiring and negligent retention. The Abrams alleged that they were injured because the Worthington's failed to exercise reasonable care in hiring and retaining Sullivan.

Although Ohio has long recognized negligent hiring and negligent retention claims as being legitimate causes of action, the court found for the Worthington's.

Under Ohio law, if an employer employs an incompetent person in a job that brings him into contact with others, then the employer is subject to liability for any harm the employee's incompetency causes if the employer did not exercise "reasonable care" in hiring the person. Liability for negligent hiring and negligent retention occurs when an employer hires an individual with "a past history of criminal, tortious, or otherwise dangerous conduct … which the [employer] ***knew or could have discovered*** through reasonable investigation."

In order to prevail on a negligent hiring or negligent retention claim, the Abrams had to prove the basic elements of negligence, which include:

- That the Worthington's owed them a duty to keep them safe from Sullivan,
- The Worthington's breached this duty,
- This breach was the proximate cause of their injuries and
- The Abrams suffered damages as a result of the Worthington's negligence.

In Ohio, whether or not one party owes a "duty" to another person depends upon whether or not the injury to the plaintiff was "foreseeable." The test for foreseeability is whether **"a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act."**

However, foreseeability alone does not necessarily mean that the Worthington's owed the Abrams a duty to keep them safe from Sullivan. Even if an injury is foreseeable, a defendant has no duty to protect a plaintiff from or to control the conduct of a third person. In such situations, a duty only arises if the defendant shares a "special relationship" with the plaintiff, which in this case were the Abrams, or with the third person, which in this case was Sullivan. These "special relationships" include the employer and employee relationship.

Therefore, due to the nature of the employer/employee relationship, an employer has a duty to prevent foreseeable injury to others by exercising reasonable care when it hires its employees, which includes performing background checks.

However, in this case, the employment relationship between the Worthington's and Sullivan was over by the time Sullivan robbed the Abrams. Without this "special

relationship," the Worthington's did not owe a duty to the Abrams. Therefore, the court found for the Worthington's.

It is important to note that in order to owe a "duty" to another party in negligent hiring and negligent retention cases, there must be an employment relationship ***and*** a foreseeable injury. Even though Sullivan's actions might have been foreseeable due to his history of violent and larcenous criminal behavior, since he was no longer an employee, the Worthington's did not owe the Abrams any duty to keep them safe from Sullivan.

**WHAT DOES THIS MEAN TO HUMAN RESOURCES?**

**CLEARLY**, employers must take "reasonable measures" to ensure that they are not exposing their customers, employees or vendors to any foreseeable risks from the people they hire and retain. This case is important not only because it reiterates that fact, but it also tells employers that they can minimize their exposure to risk by acting when they discover that a current employee does in fact pose a foreseeable ("reasonable") risk to others. Therefore, not only should employers be diligent when they hire new people, but they should also act appropriately in the future if they discover a current employee poses such a risk. In doing so, employers can limit their liability.

## XXXII. OHIO BARS CITIES FROM SETTING MINIMUM WAGES AND OTHER POLICIES

On December 19, 2016, Governor John Kasich signed Senate Bill (SB) 331, which prohibits political subdivisions in Ohio from setting minimum wage rates that differ from the rates set by the Ohio Constitution. The bill was passed in reaction to efforts in Cleveland to hike the local minimum wage to $15 and similar proposals in other Ohio cities.

However, the new law also prohibits political subdivisions from regulating any of the following wage and hour aspects of employment for ***private-sector employees:***

- The number of hours an employee is required to work or be on call for work;
- The time when an employee is required to work or be on call for work;
- The location where an employee is required to work;
- The amount of notification an employee receives for work schedule assignments or changes to work schedule assignments, including any addition to or reduction in hours, the cancellation of a shift, or changes in the date or time of a work shift;
- Fluctuations in the number of hours an employee is scheduled to work on a daily, weekly, or monthly basis;
- Additional payment for reporting time when work is or becomes unavailable, for being on call, or for working a split shift;

- Whether an employer must provide advance notice of an employee's initial work or shift schedule, notice of a new schedule, or notice of a changed schedule, including whether an employer must provide employees with predictable schedules;

- Whether an employer must offer additional hours of work to employees it currently employs before employing additional workers; and

- Whether an employer will provide employees fringe benefits and the type and amount of those benefits.

The law states that the issues included in the above list are exclusively a matter of policy or agreement between employees and employers. Employers are not required to adopt policies addressing these issues.

**WHAT DOES THIS MEAN TO HUMAN RESOURCES?**

Many employers, particularly retailers and other businesses operating in more than one city in Ohio or nationwide, are likely to welcome this new law. It will prevent the patchwork of minimum wage and scheduling laws that exists in many states, including California, and will make compliance efforts easier in Ohio.

# OHIO WORKERS' COMPENSATION

## I. OHIO SUPREME COURT: UNCERTAINTY IN COOLIDGE REDUCED BY BICKERS

In Bickers v. W. & S. Life Ins. Co., (2007) 116 Ohio St.3d 351, Shelley Bickers was injured on the job with Western & Southern Life Insurance Company in 1994 and was awarded Workers' Compensation. While Bickers was off on leave, Western & Southern didn't provide her with a job within her medical restrictions. The company later terminated her in 2002 while she was still receiving temporary total disability benefits.

Relying on the Ohio Supreme Court's Coolidge decision, Bickers filed a lawsuit against Western & Southern alleging she was wrongfully discharged in violation of public policy. At the trial court, the case was dismissed in favor of the company. However, the court of appeals reversed the dismissal based upon the Ohio Supreme Court's decision in Coolidge. Western & Southern appealed to the Ohio Supreme Court.

In the Coolidge case, a public schoolteacher was discharged while she was off work and receiving temporary total disability benefits for a work-related injury. In Coolidge, the court held that an employer couldn't terminate an employee who was receiving temporary total disability compensation on the basis of absenteeism or inability to work if the absence or inability to work was ***directly related*** to an allowed medical condition in his or her Workers' Compensation claim.

However, Coolidge wasn't an at-will employee but was employed under a contract governed by R.C. 3319.16, which protected her from termination without "good and just cause." The court agreed with her argument that the good-and-just-cause provision protected her from being discharged solely because of her absence for her work- related injury. Afterward, many lower courts in Ohio, relying on its very general language, interpreted the Coolidge decision as an expansion of the public policy exception to the employment-at-will doctrine.

The Ohio Supreme Court found that unlike the teacher in the Coolidge case, Bickers was an at-will employee and therefore was not protected by the good-and-just-cause provision of R.C. 3319.16. The Ohio Supreme Court therefore held that its previous decision in Coolidge was limited to more narrow finding "that terminating a teacher for absences due to a work-related injury while the teacher is receiving Workers' Compensation benefits is a termination without 'just cause' under R.C. 3319.16." The court then found that "because **Bickers** is not a teacher protected by a contract covered by R.C. 3319.16, she is not entitled to the benefit of the holding in Coolidge and may not assert a wrongful-discharge claim in reliance on Coolidge."

Therefore, the Ohio Supreme Court reversed the court of appeals' decision in Bickers and

held that the Coolidge decision did not create a cause of action for an ***at-will employee*** who is terminated for non-retaliatory reasons while receiving Workers' Compensation.

The Ohio Supreme Court specifically noted that the Ohio legislature had only prohibited employers from terminating employees in retaliation for filing and/or pursuing Workers' Compensation claims.

The Ohio Supreme Court's decision in the Bickers case represents a key victory for Ohio employers because it tells us that at-will employees who are terminated while receiving temporary total disability benefits may not succeed on claims of wrongful termination in violation of public policy so long as they aren't fired in retaliation for pursuing Workers' Compensation claims.

## II. S.B. 334 HELPS OHIO EMPLOYERS PAYING OUT-OF-STATE WORKERS' COMPENSATION COVERAGE

In the past, if an Ohio employer assigns its employees to work in another state and they became injured, in many cases, the "foreign state" often insisted that the workers' compensation claim is to be covered by its workers' compensation insurance and not by the workers' compensation of the "home" state, even though the worker was fully insured by the state of Ohio. As a result, the Ohio employer often had to pay the employee's claim on a "dollar-for-dollar" because the Ohio employer usually did not have any workers' compensation coverage in that foreign state.

In an attempt to correct this problem for Ohio employers, the General Assembly passed S.B. 334. Under the new law, which became effective January 1, 2009, employers who have employees working across state lines may reduce the payroll they report to the Ohio Bureau of Workers' Compensation by the amount paid to the employees for work performed in a foreign state, ***if*** the employer has workers' compensation coverage for the employees working in a foreign state. Ohio employers can take advantage of this particular change in the law when payroll reports are submitted to the Bureau of Workers' Compensation for the period of coverage beginning January 1, 2009.

S.B. 334 also prevents injured workers from receiving workers' compensation benefits in more than one state for the same injury or occupational disease. The injured worker must now select a specific state in which to file a claim.

Finally, the law requires out-of-state employers with employees working in Ohio to obtain Ohio workers' compensation coverage, unless the state from which they work has some degree of reciprocity with the state of Ohio for workers' compensation purposes. This provision applies even if the employer has workers' compensation coverage in its home state.

## III. OHIO SUPREME COURT REJECTS "PURE PSYCHOLOGICAL" INJURIES

In McCrone v. Bank One Corp. (2005) 107 Ohio St.3d 272, Kimberly McCrone was an employee of Bank One from 1998 to 2001. Throughout this period of time, the branch where she worked robbed twice. The first time the bank was robbed, on December 20, 2000, Ms. McCrone was working in the bank, but she was not the teller actually involved with the robbery. After this first robbery, she was able to return to work without any lingering effects.

However, on August 4, 2001, Ms. McCrone was working as a teller when her branch was robbed a second time. Ms. McCrone was diagnosed with Post-Traumatic Stress Disorder, or "PTSD," and was not able to return to work afterwards.

McCrone then filed a Workers' Compensation Claim for her PTSD, but her application was denied by the Industrial Commission on the grounds that she had not suffered a physical injury in either of these robberies. The Industrial Commission held that Ms. McCrone could not receive benefits for a pure psychological or psychiatric condition as outlined in the Ohio Revised Code §4123.01(C)(1). That section specifically excluded purely psychological or psychiatric conditions from the definition of "injury" unless there was also a physical injury involved.

McCrone then appealed to the courts. Ms. McCrone challenged ORC §4123.01(C)(1) on constitutional grounds under both the U.S. Constitution and Ohio's Constitution.

In making her argument, Ms. McCrone relied on a previous Ohio Supreme Court case, Bailey v. Republic Engineered Steel, Inc. (2001), 91 Ohio St.3d 38. In Bailey, the claimant, a forklift operator, accidentally crushed a co-worker to death with a forklift and claimed to suffer from severe depression as a result. The Ohio Supreme Court in Bailey held that "[a] psychiatric condition of an employee arising from a compensable injury or an occupational disease suffered by a third party is compensable under R.C. 4123.01(C)(1)." Therefore, since there was a physical injury suffered by a third party, Mr. Bailey's co-worker, Mr. Bailey's claim was allowed.

Both the Common Pleas Court and the Stark County Court of Appeals found that denying Ms. McCrone's claim for purely psychological injuries under ORC §4123.01(C)(1) was in fact unconstitutional under the constitution of the United States and Ohio.

Bank One appealed to the Ohio Supreme Court. The Ohio Supreme Court reversed the lower courts and held for Bank One.

The court first looked to its previous decision in Bailey, which Ms. McCrone relied upon in her argument. However, the facts of Bailey differed from Ms. McCrone's situation. In Bailey, a physical injury was in fact suffered by an employee of Republic Steel, which was the employee who was crushed to death by Mr. Bailey. Mr. Bailey's psychological injury arose out of this physical injury suffered by a co-worker.

However, in Ms. McCrone's case, no physical injury existed to any Bank One employee.

The court then looked at the entire definition of the term "injury" in R.C. 4123.01(C). The court reasoned that the term "'Injury' includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. 'Injury' does not include: (1) Psychiatric conditions except where the conditions have arisen from an injury or occupational disease."

However, only three years before Bailey, the Ohio Supreme Court limited Workers' Compensation claims to those involving only a physical injury to the claimant in Bunger v. Lawson Co. (1998), 82 Ohio St.3d 463

In Bunger, the court stated: "The Workers' Compensation system was not designed to resolve every dispute that arises between employers and employees. It was designed to manage the compensation of individuals who suffer **physical** injuries or contract occupational diseases on the job."

The court held that the facts in Bunger are more similar to those in Ms. McCrone's case. In Bunger, the claimant was seeking benefits for mental stress she suffered as a result of a robbery she witnessed at her workplace. The court held that Ohio's General Assembly has yet to make pure psychological injuries compensable under Ohio's Workers' Compensation law.

Therefore, even under Bailey, a physical injury is still required, even if to a co-worker, before a claimant's mental condition becomes compensable. In McCrone's case, there was no physical injury whatsoever. Any reliance by the lower courts on Bailey was misplaced.

The Court found there was a legitimate governmental interest in the General Assembly's definition of "injury" in ORC §4123.01(C)(1), and declined to find the statute violated McCrone's equal protection rights under either Ohio's or the United States Constitution.

## IV. STUPID IS AS STUPID DOES: WORKERS' COMPENSATION FOR BREAKING THE RULES

In State ex rel. Gross v. Industrial Commission of Ohio, 2007-Ohio-4916 (Ohio, 2007), David Gross was employed by Kentucky Fried Chicken ("KFC") when he was injured cleaning a deep fryer. As a result of his injuries, he received temporary total disability (TTD) compensation.

In a subsequent investigation of the accident, KFC discovered that Gross was injured because he had violated a safety rule that forbade employees from placing water into a deep fryer. The investigation also revealed that Gross had previously been warned repeatedly to not put water into the deep fryers. As a result, KFC fired Gross and the Ohio Industrial Commission terminated his TTD compensation on the basis that he had voluntarily abandoned his employment by violating this workplace rule.

Gross filed suit and in December of 2006 his case was heard by the Ohio Supreme Court. However, in a 5-2 ruling, the Ohio Supreme Court determined that Gross' termination for disobeying written safety rules and ignoring repeated warnings constituted a voluntary abandonment of his employment. The court therefore held that Gross was ineligible to receive TTD compensation.

This decision by the Ohio Supreme Court was viewed at the time as a major reversal of the "No-Fault" doctrine under workers' compensation law. As a result, Gross asked the Ohio Supreme Court to reconsider its holding. In 2007, the court granted Gross' request to reconsider its decision and, in a 5-2 decision, the Ohio Supreme Court did in fact reverse its earlier ruling against Gross.

In reaching its decision, the court noted that it had no intention of altering either the "No-Fault" doctrine of the workers' compensation system in its previous decision. The Ohio Supreme Court therefore held that employees are entitled to receive workers' compensation benefits even if they cause their own injuries by repeatedly violating workplace rules.

**WHAT DOES THIS MEAN TO HUMAN RESOURCES?**

In short, it appears as if an employee does anything short of bobbing for apples in a deep fryer in order to intentionally injure him or herself, the injury will most likely be covered by workers' compensation. "Stupid" is not a defense, which is all the more reason to enforce safety rules strictly and terminate employees who apparently cannot refrain from breaking them.

## V. EMPLOYERS MUST PAY BWC WAGES FOR INJURED EMPLOYEES WHO WORK FOR MULTIPLE EMPLOYERS

In The State ex rel. FedEx Ground Package System, Inc. v. Industrial Commission of Ohio, et al., 126 Ohio St.3d 37, 2010-Ohio-2451, Christopher Roper worked multiple jobs, including a part-time job at FedEx Ground Package System, Inc., where he earned between $190 and $250 per week. In April 2006, he started working at Integrated Pest Control, earning considerably more than he did at FedEx. He also operated a side business, Affordable Animal Removal.

In October, Roper was injured while working at FedEx. His average weekly wage for temporary total disability benefits was set at $160 and his full weekly wage at $250. He asked the Ohio Bureau of Workers' Compensation to reset his average and full weekly wages using the total income of all of his jobs. A district hearing officer reset his average weekly wage at $417 and his full weekly wage at $457, citing the "special circumstances" provision of R.C. 4123.61. The Industrial Commission of Ohio affirmed the decision.

FedEx appealed the commission's decision to the Tenth District Court of Appeals for Franklin County. When the court denied the appeal, FedEx sought an opinion from the Ohio Supreme Court.

The Ohio Supreme Court affirmed the commission's decision. The court cited R.C. 4123.61, explaining that the average weekly wage "should approximate the average amount that the claimant would have received had he continued working after the injury as he had before the injury." The court also noted that "special circumstances" may warrant an adjustment in the average weekly wage to effectuate "substantial justice."

FedEx argued that it was unfair to require an employer to pay more in temporary total disability benefits than it paid when the employee was working and argued for excluding secondary employment. In the alternative, it argued that secondary employment must be "similar" to be included in the calculation and contended that the ruling discouraged Roper from continuing to work at his second job, provided he was medically able to do so.

The court disagreed and found no statutory support for FedEx's arguments. It held that R.C. 4123.56(A)'s requirement, which prohibits temporary total disability benefits when work is available that the employee is medically able to perform, adequately encourages employees to continue working a second job if they are medically able to do so.

The court disagreed that the ruling was unfair because it was the injury incurred while working at FedEx that prevented Roper from continuing to work at all of his jobs. The court held that the alternative would be unfair to the employee who is precluded from earning all previous income. Further, the court reasoned that it is no different from the requirement that income earned from a previous employer within the past 52 weeks be included in the average weekly wage calculation.

The court also approved of the Industrial Commission's formula for calculating the full weekly wage, as defined in Joint Resolution R80-7-48, as within the commission's discretion and not superseded by any statute.

### WHAT DOES THIS MEAN TO HUMAN RESOURCES?

This is an important ruling because it means employer liability for temporary total disability benefits could exceed an employee's actual weekly wages. The decision will likely have the biggest effect on employers with a large number of part-time employees who may be working multiple jobs.

Therefore, you would want to make sure you are aware of what jobs your employees are working aside from with you … and then determine if you approve of them moonlighting in these other jobs.

## VI. OHIO SUPREME COURT UPHOLDS STATUTE REGARDING WORKPLACE INTENTIONAL TORTS

For decades, Ohio’s legislature and courts have battled to find the balance between employers and employees in the context of Workers’ Compensation and intentional tort claims. Ohio’s Constitution provides that an employer that complies with Ohio’s Workers’ Compensation system is not liable for common law and statutory claims in connection with the work-related injuries of its employees.

In 1982, the Court in Blankenship v. Cincinnati Milacron Chems., Inc. carved out Ohio's present exception to that rule, holding that an employer can be sued by an employee outside the protection of the Workers' Compensation system for workplace injuries resulting from the employer's "intentional conduct." The reasoning behind this decision was that an employer's intentional acts are outside of the employment relationship.

The Blankenship decision left open the question of what constitutes "intentional conduct" by an employer. In an effort to define what the court meant by the term "intent," as well as an effort to provide boundaries and limitations to employer intentional tort claims, Ohio's legislature passed two different employer intentional tort statutes, both of which were struck down as unconstitutional.

In 1991, the Ohio Supreme Court attempted to better define what it meant by "intentional conduct." In Fyffe v. Jeno's, Inc., the court held that in order for an employee to prevail on an intentional tort claim, the employee must to prove:

1. Knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation,

2. Knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty and

3. That the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

Despite the phrase "intentional tort," the employer did not actually have to ***intend*** to harm the employee. The Fyffe court noted that in some instances, the probability of harm is so great that an employer knows that injury is certain or substantially certain to occur. If, in these instances, the employer nevertheless proceeds or directs the employee to proceed, then the employer should be treated as though he intended the injury to occur.

Therefore, this three prong test from Fyffe was often liberally construed in favor of the employee.

In its third attempt to define "intentional tort," Ohio's General Assembly passed O.R.C. §2745.01 in 2005, which states:

- In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

- As used in this section, "substantially certain" means that an employer acts with ***deliberate intent*** to cause an employee to suffer an injury, a disease, a condition, or death.

Thus, substantial certainty under the statute has, by definition, been presumed to have the "intent to injure." In other words, the statute now requires the employee to show that the employer acted "with the intent to injure" or "with deliberate intent to cause an employee to suffer an injury, disease, condition or death."

**Ohio Supreme Court Case**

In Kaminski v. Metal & Wire Products Co. No. 2010-Ohio-1027, Rose Kaminski was a press operator who needed to load an eight-hundred-pound coil of rolled steel on to her machine. Unable to find her supervisor, she requested that a co-worker help her do so. While Kaminski tried to stabilize the coil so it could be placed on a forklift, the co-worker struck the coil with the forklift, dislodging it. The coil fell on Kaminski's legs and feet causing serious injuries which prevented her from returning to work.

Kaminski applied for and received Workers' Compensation benefits. In addition, she brought a case against her employer, Metal & Wire Products Company.

Kaminski filed a lawsuit in district court, asserting that Metal & Wire committed an intentional tort against her under R.C. 2745.01. Additionally, Kaminski claimed that R.C. 2745.01 is unconstitutional, stating that the legislature was without authority to modify the common law regarding workplace intentional torts. Therefore, she asked the court to consider her claim under the Ohio common law standard.

Metal & Wire asked the court to decide, without going to trial, the issue of the constitutionality of the statute. After the court found the statute constitutional, Metal & Wire moved for summary judgment on Kaminski's complaint. The employer asked the court to rule that Kaminski had not stated a claim because she could not meet the statutory requirement that the employer **intended** to injure Kaminski.

The district court found the statute constitutional and granted summary judgment to Metal & Wire. Kaminski appealed to Ohio's 7th District Court of Appeals. The appellate court found the statute unconstitutional, stating that the legislature did not have the authority, under the Ohio constitution, to enact R.C. 2734.01 and thereby modify the common law standard.

Metal & Wire appealed to the Ohio Supreme Court, which held 6-1 that the General Assembly did not exceed its authority in enacting R.C. 2745.01.

**WHAT DOES THIS MEAN TO HUMAN RESOURCES?**

In his dissent in the Kaminski case, Justice Pfeifer wrote that "General Assembly has found a court that agrees with it: ***workers have no constitutionally protected right to seek redress for injuries suffered from their employer's intentional torts***." While this may be an overstatement, the threshold injured workers must meet in order to recover in court is clearly higher now R.C. 2734.01 than it was under the Fyffe decision.

## VII. WORKERS' COMPENSATION & INTENTIONAL TORTS TODAY

In order for employees to prevail in a lawsuit against their employer for an injury they incur in the course of their employment, which is commonly referred to as an Intentional Tort, they must have a cause of action under R.C. 2745.01.

In short, R.C. 2745.01 spells out what is required for an injured employee to prevail in an Intentional Tort lawsuit:

> Subsection (A) states that an employer shall not be liable for an intentional tort unless plaintiff proves that the employer committed the tortious act with the **intent to injure** another or with the **belief that the injury was substantially certain to occur**.
>
> Subsection (B) defines substantial certainty to mean "**that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.**"
>
> or
>
> Subsection (C) creates a rebuttable presumption of intent to injure by the employer in the event of a **deliberate removal by an employer of an equipment safety guard**.

Therefore, when the employer "deliberately" removes "an equipment safety guard," that employer can be held liable for "intentionally" harming the employee.

In Downard v Rumpke of Ohio, Inc., No. CA2012-11-218 (OH Ct. App., Dist. 12, Oct. 28, 2013), Scott Johnson worked as a temporary employee at Rumpke's tire shredding facility loading tires onto a tire shredder's inclined conveyor belt. Once the tires were loaded onto the conveyor belt, the tires would then be dropped into a cutter box that housed the feeder gears and cutting knives that cut the tires into two-by-two inch pieces. It is undisputed that as originally manufactured, the tire shredder had an observation platform, a jib crane, as well as a hinged hood and an interlock switch. All of these safety devices were removed, bypassed, or somehow modified by Rumpke.

On the afternoon of April 26, 2007, the overload beacon light on the tire shredder illuminated indicating a possible blockage of the drum discharge chute. Noticing the overload beacon light, Craig Stidham, the foreman at the Rumpke tire shredding facility, stopped what he was doing and approached the tire shredder. Although there is some dispute about what transpired next, all parties agree that Johnson then climbed onto the observation platform where he peered into the cutter box and confirmed that there was a tire blocking the discharge chute.

Upon shutting down the machine, Stidham then turned and began talking with Joseph Retherford, another temporary employee assigned to work at Rumpke's tire shredding

facility. While speaking with Stidham, Retherford noticed that Johnson was no longer on the observation platform. Thinking Johnson may have fallen off the side of the machine, Retherford went around to the side of the tire shredder, but was unable to locate Johnson. Sensing something was amiss, Stidham then climbed onto the inclined conveyor belt up to the edge of the cutter box where he found Johnson entangled within the tire shredder's feeder gears and cutting knives.

Johnson had somehow fallen into the cutting machine.

Emergency crews were immediately dispatched to the scene to remove Johnson from the tire shredder, a process which took approximately 50 minutes to complete. During that time, Johnson remained conscious and proclaimed that he had fallen into the cutter box when he tried to unjam a tire from the machine. Johnson later reiterated the same to medical personnel as he was being transported to the hospital. After spending 52 days in the hospital, Johnson succumbed to his devastating injuries that had effectively removed the entire left side of his body. As a result of this incident, Johnson's estate received Workers' Compensation benefits totaling $387,761.29.

On November 23, 2010, Racheal Downard, Johnson's niece and Administratrix of Johnson's estate, filed suit against Rumpke asserting a claim of employer intentional tort under R.C. 2745.01, Ohio's Employer Intentional Tort statute. As part of her complaint, Downard argued Rumpke had violated R.C. 2745.01 by directing Johnson to operate the tire shredder after it had deliberately removed, bypassed, and modified the machine's safety devices and safety guards.

The trial court found for Rumpke.

Downard appealed to the Ohio 12th District Court of Appeals.

The Ohio Court of Appeals reversed in part and affirmed in part.

The court found that the trial court erred in finding that the interlock switch on the tire shredding machine was not an equipment safety guard. The court also held that an affidavit from the employer's manufacturing engineer that said that there was no intent to injure employee is **insufficient** to rebut the presumption found in R.C. 2745.01(C).

In other words, the Ohio Court of Appeals held that the trial court erred by finding the employer could successfully prevail as a matter of law by establishing that Rumpke had no intent to injure Johnson. No "**intent to injure**" requirement exists when "equipment safety guards" are at issue.

However, the court found no error in the trial court's decision for the employer by finding that the jib crane and platform ***were not*** "equipment safety guards" under R.C. 2745.01(C).

**WHAT DOES THIS MEAN TO HUMAN RESOURCES?**

Employers must understand that there are really two different ways they can be liable under the Intentional Tort Statute (R.C. 2745.01)

1. The deliberately intends to "**cause an employee to suffer an injury, a disease, a condition, or death,**" which is an extremely high standard for the employee to meet

or

2. That the employer deliberately removed "**an equipment safety guard**."

Clearly, employers have much more liability when they remove or fail to provide "safety guards" under the Intentional Tort Statute. Employers must therefore make sure all of its "equipment safety guards" are intact and fully functional.

## XXXIII. WHAT IS AN INTENTIONAL TORT NOW?: NOT REPLACING HANDGUARD

In Thompson v. Oberlander's Tree & Landscape, LTD., 2016-Ohio-1147, on October 6, 2011, Bret Thompson injured his left hand while working for Oberlander's Tree & Landscape.

Thompson was injured when he was cutting a tree using a chainsaw where the handguard had been removed. The handguard is supposed to protect against "kickbacks," which happens when the tip of a chainsaw blade hits an obstruction, which causes the blade to "kick back."

When a chainsaw has the handguard attached, then the chainsaw's brake will trigger if anything makes contact with the handguard during a kickback. Both federal and state regulations require that these handguards remain in place on chainsaws, and they are recommended by all manufacturers in their user manuals.

Thompson claimed that his injury occurred because the required handguard was not on the chainsaw he was using. Thompson's Workers' Compensation claim was granted.

Thompson filed a lawsuit against Oberlander's claiming intentional tort and sought punitive damages. He alleged that Oberlander's intended to injure him by requiring him to use a chainsaw without a handguard.

Oberlander's filed a motion to dismiss the case without a trial (Summary Judgment). Oberlander's argued that Thompson failed to present any evidence of how it intended to injure him or how it deliberately removed a safety guard.

Thompson, on the other hand, argued that by deciding not to replace or repair the handguard, Oberlander's deliberately removed it.

The trial court ruled that Thompson failed to present any evidence that Oberlander's committed any a deliberate act by removing the handguard. Consequently, the court found that there were no genuine issues of material fact, so it dismissed the case.

Thompson appealed to the Third Appellate District Court.

In reviewing the case, the Third Appellate District Court said that Ohio's intentional tort law has been limited many times over the years by the Ohio Supreme Court. An employer may be liable only if an employee proves that the employer acted with the intent to injure him or with the belief that injury was substantially certain to occur. "Substantially certain" has been defined to mean that an employer acts with a "deliberate intent to cause an employee to suffer an injury."

However, the deliberate removal of an equipment safety guard creates a rebuttable presumption that the employer acted with the intent to injure the employee.

In recent years, the Ohio Supreme Court has shed light on the exact standard for what an employee must establish in order to succeed on an intentional tort claim. The Ohio Supreme Court has defined "equipment safety guard" as a device that is designed to shield the operator from injury. Further, the court has found that an employer deliberately removes a safety guard when it lifts, pushes aside, takes off, or otherwise eliminates a guard from a machine.

Therefore, "deliberate removal" includes not only taking a guard off a machine but also **failing to attach a guard provided by the manufacturer**.

In this case, Thompson argued his employer knew perfectly well that the chainsaw he was using did not have a handguard. He submitted affidavits from his coworkers stating they had informed supervisors of the fact that the chainsaw did not have a safety guard. Oberlander's supervisors simply told their employees to continue using the chainsaw or they would be fired.

Thompson argued that Oberlander's decision to not replace the handguard, which was provided by the manufacturer and was required by federal and state law, equated to the deliberate removal of a safety guard.

On the other hand, Oberlander's argued that even if it was aware of a dangerous situation, that did not mean it deliberately removed the guard or intended to injure Thompson.

In short, the Third Appellate District Court held that Oberlander's did in fact intend to injure Thompson.

In reaching that conclusion, the court found that for a deliberate removal of a safety guard to occur, the safety guard must first be required by the manufacturer of the equipment, laws, or regulations. In this case, the handguard was provided by the manufacturer, and both state and federal regulations require chainsaws to have a front handguard.

Further, Oberlander's knew that the handguard was missing and could have replaced it. Thompson submitted evidence that Oberlander's had previously sent the chainsaw in for repairs, so it could have easily replaced the handguard at that time. Based on that evidence, the court found that Thompson had presented sufficient evidence to establish a presumption that Oberlander's intended to injure him.

The court then evaluated whether Oberlander's presented sufficient evidence to rebut the presumption. The only evidence the employer submitted in opposition were affidavits from management. The court rejected the affidavits as being "self-congratulatory" and insufficient to rebut the presumption. The court found that Thompson established that Oberlander's intended to injure him.

**WHAT DOES THIS MEAN TO HR?**

While it is true that Ohio's intentional tort laws have been greatly limited over the last few years, when it comes to "deliberately removing safety protections from equipment," which according to the courts really includes "gross negligence" in failing to replace safety guards, employers still have tremendous liability. Training supervisors to make sure that all safety guards remain intact and in good working order is critically important to not only maintaining a safe environment, but also to avoiding intentional tort claims.

## VIII. OHIO SUPREME COURT EXAMINES WORKERS' COMPENSATION RETALIATION CLAIMS

In Sutton v. Tomco Machining, Inc., 186 Ohio App.3d 757, 2010-Ohio-830, in April 2008, DeWayne Sutton was working at Tomco Machining, disassembling a chop saw, when he injured his back. He reported his injury to Tomco's president. Within an hour, the president discharged him as an at-will employee. He gave Sutton no particular reason for discharging him, but he did say that it wasn't because of his work ethic, job performance or because he had violated any work rule or company policy.

Following his discharge, Sutton filed a claim for Workers' Compensation benefits, and he ultimately received them. He later filed a lawsuit against Tomco for Workers' Compensation retaliation in violation of Ohio's public policy. The company asked the trial court to dismiss his claims, arguing that he hadn't alleged facts that, if true, would entitle him to relief based on either claim.

The trial court agreed, finding that a previous Ohio Supreme Court case, Bickers v. W. & S. Life Ins. Co. 116 Ohio St.3d 351 (2007), 2007-Ohio-6751, precluded Sutton from pursuing a public policy wrongful discharge claim and that his actions reporting his injury to the president of the company were insufficient to constitute the institution or pursuit of a claim for Workers' Compensation retaliation under the Ohio statute. The trial court granted Tomco's request for dismissal, and Sutton appealed, challenging the trial court's findings on both claims.

The court of appeals agreed that Sutton's act of reporting the injury to the company president didn't constitute "pursuit" under the Ohio Workers' Compensation retaliation statute, nor could any of his other actions before being discharged be construed as filing a

claim or instituting or pursuing proceedings under the Workers' Compensation Act. However, the court of appeals disagreed with the trial court's conclusion on the tort claim for wrongful discharge in violation of public policy.

The court concluded that a narrow exception to the employment-at-will doctrine exists when an employee suffers a work-related injury, tells his employer about the injury, and is discharged before having an opportunity to file a claim or institute proceedings under the Workers' Compensation Act. According to the court, the exception allows the employee to file a tort claim for wrongful discharge in violation of public policy because such a termination undermines the Ohio General Assembly's effort to proscribe retaliatory discharges.

The court cited other Ohio cases in which a common-law claim for wrongful discharge was permitted based on the Workers' Compensation retaliation statute. For example, in Collins v. U.S. Playing Card Co., a 2006 federal district court decision, an employee was permitted to file such a claim for discharge in retaliation for his wife's pursuit of Workers' Compensation on her own behalf. The court emphasized that it was seeking to avoid the footrace, described in a previous opinion, between an employee running to file a claim and initiate proceedings and an employer running to fire the employee to avoid the consequences of R.C. § 4123.90.

The court also distinguished Sutton from the employee in the Bickers case. In that case, the Ohio Supreme Court held that an employee who is terminated while receiving Workers' Compensation has no common-law claim 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. Bickers was discharged for non-retaliatory reasons while she was receiving Workers' Compensation benefits. Because Sutton wasn't receiving Workers' Compensation when he was discharged and hadn't yet filed a claim, the court found his case distinguishable from the Bickers case.

Sutton appealed to the Ohio Supreme Court. In 2011, the Ohio Supreme Court ruled for Sutton.

In reaching its decision, the Court reasoned that Ohio's Workers' Compensation statute did not offer protection for an employee who was terminated after being injured but before the employee could file a Workers' Compensation claim. Therefore, the Court found there was an obvious gap that needed to be filled.

As a result, the Ohio Supreme Court held that Ohio now recognizes a common law wrongful termination of public policy claim where an employee is fired ***after*** reporting a workplace injury, ***but before*** the filing of a Workers' Compensation claim related to that injury.

The Court concluded that because Sutton did not have a remedy available under R.C. 4123.90, he would be allowed to pursue his ***common law*** wrongful discharge claim.

The Court put it succinctly:

**It is not the public policy of Ohio to permit retaliatory employment action against injured employees in the time between injury and filing, instituting, or pursuing workers' compensation claims.**

In remanding the case to the lower court, the Ohio Supreme Court noted that Sutton was not home free. To prevail on his claim, Sutton still must prove that his discharge was retaliatory, and that his employer lacked an overriding business justification for firing him.

The Court also limited Sutton's remedies. While a wrongful termination in violation of public policy generally would allow an employee to recover a full assortment of remedies, including punitive damages, the Supreme Court here limited Sutton's remedies to only those provided in R.C. 4123.90. He could be awarded reinstatement, back pay (with an offset for any Workers' Compensation payments) and attorneys' fees, but no punitive damages.

Unclear from the Court's decision is whether the same 90-day notice requirement, and the 180-day statute of limitations provided in R.C. 4123.90, will apply to this new common law claim. What is now clear is that an employer that terminates an injured employee before the filing of a related workers' compensation claim will no longer be insulated from potential liability.

### WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The Ohio Supreme Court has given a new avenue for employees to follow in pursuing retaliation claims under Workers' Compensation. Therefore, it is just all that more important for employers to document why they taking any type of corrective or disciplinary action against employees because any employee who has had a workplace injury can later file a Workers' Compensation claim in an effort to establish a retaliation claim under Workers' Compensation … as you will see in the next case.

## IX. WORKERS' COMPENSATION RETALIATION CLAIMS UNDER SUTTON

In Howard v. Bobby D. Thompson, Inc., 2nd Dist. No. 24357, 2011-Ohio-3503, David Howard began working for Bobby D. Thompson, Inc. (BDT), in 1996. BDT is a subcontractor for Rumpke Consolidated Companies, Inc., which performs waste management services. On April 22, 2009, Howard suffered a work- related injury to his shoulder. Howard claimed he informed his supervisor, Ron Head, of the injury. However, Head never documented the injury and he never submitted an accident report, which typically follows a work-related injury. More importantly, Howard never informed his supervisor that he intended to file a workers' compensation claim, nor did he file a claim at that time.

Bobby Thompson, the owner of BDT, alleged that he wasn't aware of any work-related injury that Howard had suffered. Specifically, he stated that none of his supervisors had told him that Howard had suffered a work- related injury on **April 22, 2009**. Instead, Thompson was aware only of a "shoulder injury" that Howard told him he incurred "one weekend in March 2009."

On September 11, 2009, Thompson called Howard to his office to discuss disciplinary action against him based on two unexplained absences in August. After hearing Howard's explanations for the absences, Thompson suspended him pending verification of his explanations.

On September 25, 2009, Thompson again called Howard to his office, this time to tell him that his employment was being terminated. In the meeting, Thompson demanded that Howard sign a statement acknowledging that he had lied about the reasons for his unexplained absences. Howard refused, and Thompson fired him.

On January 28, 2010, Howard filed a lawsuit against BDT and Thompson alleging, among other things, wrongful termination in violation of the public policy underlying the workers' compensation anti-retaliation statute, which prohibits employers from terminating an employee because he has filed a workers' compensation claim. Howard alleged that on September 9, 2009, he told Thompson that he intended to file a Workers' Compensation claim. However, by the time Thompson terminated Howard, Howard had not yet filed the claim. It wasn't until **December 10, 2009,** more than two months after his termination, that Howard actually filed his Workers' Compensation claim.

On October 27, 2010, the Montgomery County Court of Common Pleas dismissed Howard's claim against BDT and Thompson. The court held that since Howard didn't file his Workers' Compensation claim until after his discharge, BDT and Thompson couldn't have unlawfully retaliated against him.

Howard appealed the decision to the Second District Court of Appeals.

The appeals court reversed the trial court's decision based entirely on the Ohio Supreme Court's June 2011 decision in Sutton v. Tomco Machining. In that case, the Ohio Supreme Court determined that it is unlawful under the public policy of the Workers' Compensation statute to terminate an employee because he procrastinates in filing a Workers' Compensation claim after stating his intention to do so.

In other words, the court expanded the anti-retaliation part of Ohio's Workers' Compensation statute to retaliatory terminations occurring before the employee files a Workers' Compensation claim. Before the Sutton decision, an employee generally wasn't protected from retaliatory termination if he was discharged before he filed a Workers' Compensation claim.

On that basis, the court of appeals reversed the trial court even though the facts indicated a substantial gap between April and December 2009 (before Howard filed his Workers' Compensation claim). Additionally, the court found that a jury should hear the case based on Howard's allegation that during the termination meeting, he allegedly informed Thompson of his intention to file a claim. Thompson denied that ever occurred, but according to the appellate court, Howard's allegation was enough to potentially hold the employer liable under the new directive established by the Sutton decision that employees are protected before filing a Workers' Compensation claim.

## WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The primary lesson to take from this decision is that implementing disciplinary action against an employee who has suffered an injury is much more precarious than it used to be. If an injury is at all work-related, great care must be taken to avoid retaliation claims.

In this case, the employee established a case simply by filing a Workers' Compensation claim almost three months after his termination and alleging that he told his employer of his intention to do so. It didn't matter that the employer denied that the employee ever made his intentions to a claim known to the employer. It also didn't matter that the timing of the claim appeared suspect because the alleged work-related injury occurred several months earlier, but the employee, for some reason, waited until after his termination to file.

In sum, HR should be keenly aware of the issues it now faces in the wake of the Ohio Supreme Court's decision in Sutton v. Tomco Machining. That means documenting all employee issues. It also means giving fair notice to employees regarding which offenses might result in immediate termination.

As a reminder, I also recommend to my clients doing business in Ohio to include in the disciplinary section wording along the following:

> **Employees should also understand that if they are terminated under this policy that they will have voluntarily abandoned their positions and will therefore be ineligible for claiming certain workers' compensation benefits under applicable law.**

This way, employees will be on notice that they could lose certain Workers' Compensation benefits if they are terminated under this policy.

## X. FAILURE TO COMMUNICATE "VOLUNTARY ABANDONMENT" POLICY CAN COST YOU WORKERS' COMPENSATION CLAIMS

In Saunders v. Cornerstone Foundation Systems, Inc., 123 Ohio St.3d 40, 2009-Ohio-4083, Harold Saunders injured his knee at work on April 13, 2005. He returned to work two days later.

On May 13, 2005, however, Saunders refused his supervisor's order to run a bulldozer, who was Walt Sberna. Saunders claimed that he refused this order because of medical restrictions that prohibited his use of foot pedals. However, that limitation was not contained in any of the restrictions ordered by his attending physician. Saunders also alleged that he had a written agreement with Sberna that excused him from operating heavy machinery. However, Saunders was never able to produce that written agreement.

Cornerstone fired Saunders for insubordination when he refused to operate the bulldozer. When his subsequent knee surgery generated a request for temporary total disability

compensation, Saunders' request was denied after a staff hearing officer at the Ohio Industrial Commission ruled that Saunders' refusal to follow orders constituted a voluntary abandonment of his former position of employment within the meaning of Louisiana-Pacific, 72 Ohio St.3d 401, 650 N.E.2d 469.

Specifically, the staff hearing officer found:

> "The employer presented evidence that [the] injured worker signed for an Employee Handbook on 1/22/2004. Within the Handbook, the employer indicates violation of any of the work rules may lead to termination. One of the work rules is listed as follows: 'Insubordination (refusal to follow any order given by an employee's supervisor or management, or the refusal or failure to perform work assigned.)"
>
> "Therefore, this Staff Hearing Officer finds that the injured worker was terminated for violation of a known, written, work rule, that clearly indicated termination could result."

Saunders' request for a further appeal with the Ohio Industrial Commission was refused. So, Saunders filed a lawsuit with the Court of Appeals for Franklin County, alleging that the commission had abused its discretion by:

1. Finding that his termination constituted a voluntary abandonment of his job under the Ohio supreme Court's previous decision in Louisiana-Pacific and

2. Denying his temporary total disability compensation.

However, the court of appeals disagreed with Saunders and held for the employer and the OIC.

Saunders appealed to the Ohio Supreme Court.

The court first reasoned that it has long been the law in Ohio that an employee's voluntary abandonment of his or her former position can bar any recovery for temporary total disability compensation. State ex rel. Watts v. Schottenstein Stores Corp. (1993), 68 Ohio St.3d 118, 121, 623 N.E.2d 1202. Therefore, terminating an employee "for cause" can qualify as a voluntary abandonment of the employee's job because an individual "may be presumed to tacitly accept the consequences of his voluntary acts." State ex rel. Ashcraft v. Indus. Comm. (1987), 34 Ohio St.3d 42, January Term, 2009 5 44, 517 N.E.2d 533.

However, in order for this legal principle to apply, it must be shown that the employee knew, or should have known:

1. That the conduct that prompted the termination was proscribed by the employer and

2. What consequences would follow.

(Louisiana- Pacific, 72 Ohio St.3d at 403, 650 N.E.2d 469; State ex rel. Liposchak v. Indus. Comm. (1995), 73 Ohio St.3d 194, 196, 652 N.E.2d 753.)

The court reasoned that the Ohio Industrial Commission based its decision in favor of the employer on the January 2004 Employee Acknowledgement Form that Saunders signed. The OIC saw this as evidence that Saunders knew, or should have known, that insubordination was:

1. A violation of work rules and

2. A dischargeable offense.

However, the court held that the Ohio Industrial Commission erred in assuming that Cornerstone's "insubordination rule" was contained in the January handbook. It was not. It was added to Cornerstone's employment policy in June 2004. Consequently, Saunders' signature on a January 2004 form is not evidence that he knew, or should have known, of the rule. In other words, Saunders was never put on notice of this "insubordination rule."

Further, the court also reasoned that this appears to have been a first-time violation of this offense by Saunders. Since such an offense as "insubordination" is listed as an immediately "dischargeable offense," Saunders did not have any prior experiences with this rule.

The court then reasoned that there is a "great potential for abuse in allowing a simple allegation of misconduct to preclude temporary total disability compensation." State ex rel. Smith v. Superior's Brand Meats, Inc. (1996), 76 Ohio St.3d 408, 411, 667 N.E.2d 1217. For that reason, Louisiana-Pacific demands a clear, written articulation of workplace rules and the penalties for their violation. In this case, the only employment manual/handbook that Saunders apparently ever received ***did not*** include a rule addressing insubordination and its consequences. He could not, therefore, have known that he was violating any rule or that the violation would lead to dismissal.

As a result, the criteria of Louisiana-Pacific were not met in this case, and the commission abused its discretion in finding that Saunders' discharge was a voluntary abandonment of his former position of employment.

The Ohio Supreme Court therefore awarded Saunders his Workers' Compensation claim.

Employers should take notice: Documentation should be specific and thorough. Vague warnings that do not list the specifics of the employee's offense, or the people who witnessed the offense, might end up being worthless.

## XI. OHIO SUPREME COURT RE-ENFORCES "VOLUNTARY ABANDONMENT" POLICY

In State ex rel. Robinson v. Indus. Comm., (2014) 97 Ohio St.3d 423, Parma Care Nursing and Rehabilitation hired Shelby Robinson in 1995. Parma Care gave Robinson a written job description that set out her job duties and responsibilities. Parma Care also gave her a copy of an employee handbook detailing its policies and procedures.

Over the years, Robinson was disciplined for violating various work rules.

In a written warning given to her on February 29, 2008, she acknowledged that she had been warned that any future violations would result in her termination from employment.

On April 10, 2008, Robinson was injured at work and subsequently filed a Workers' Compensation claim. She was granted benefits for multiple low back conditions and returned to work in a light-duty capacity.

However, on April 15, a state surveyor reported to Parma Care that Robinson had violated state rules. Based on that infraction, Parma Care terminated her employment.

Robinson's physician subsequently certified that she was temporarily and totally disabled from all employment beginning on the date of her injury.

However, the Industrial Commission determined that her termination amounted to a **voluntary abandonment** of her employment and she was ineligible for benefits. Robinson appealed, but the court of appeals declined to reverse the commission's finding.

Robinson appealed to the Ohio Supreme Court, which affirmed the decision. The court held that she voluntarily abandoned her employment as a result of her termination for violating a written work rule and therefore wasn't entitled to receive TTD compensation.

### Ohio Supreme Court's decision

In Ohio, when an employee is injured at work and unable to return to her job, she is entitled to receive TTD compensation. However, when the ***employee's own actions***, rather than the work injury, take her out of the workforce, ***she isn't entitled to compensation.*** A voluntary abandonment of the workforce precludes payment of TTD benefits.

Although being fired is usually considered an involuntary separation from employment, when the discharge arises from conduct the ***employee knows will result in termination***, the termination may be considered a voluntary abandonment of employment and bar any receipt of compensation.

Under State ex rel. Louisiana-Pacific Corp. v. Indus. Comm., 72 Ohio St.3d 401 (1995), a discharge from employment is considered voluntary abandonment **only** when the discharge arises from a violation of a written work rule that

(1) Clearly defined the prohibited conduct,

(2) Identified the misconduct as a dischargeable offense, and

(3) Was known or should have been known to the employee.

In this case, Robinson argued that Parma Care didn't meet all the parts of the test because it didn't identify a written work rule that ***clearly defined the prohibited conduct for which she was terminated***.

Both the Ohio Supreme Court and the Industrial Commission found that Robinson knew her actions violated Parma Care's standard of conduct and could result in her termination.

The Industrial Commission also noted that she had received an **employee handbook** that contained her employer's **policies, rules, and disciplinary processes**.

Further, her job responsibilities were articulated in her job description.

Therefore, the Ohio Supreme Court found that Robinson was on notice that her actions in failing to abide by state rules could result in termination of her employment.

Robinson argued that because she had been released to work in a light-duty capacity and was unable to return to her former position at the time of her termination, her discharge couldn't be deemed a voluntary abandonment of employment.

The Ohio Supreme Court rejected that argument based on the fact that because she was working at the time of the infraction, she was capable of voluntarily abandoning her position. The court held that her discharge from employment for a violation of written work rules constituted a voluntary abandonment of employment precluding any receipt of TTD compensation.

**WHAT DOES THIS MEAN TO HUMAN RESOURCES?**

This decision highlights the importance of conveying to employees their exact responsibilities and the consequences for failing to abide by your rules, policies, and procedures. The employer's detailed job description and handbook protected it from liability in this case.

Job descriptions and handbooks containing policies, procedures, rules, and disciplinary processes should be reviewed and updated as necessary.

## XII. OHIO SUPREME COURT *LIMITS* "VOLUNTARY ABANDONMENT" DOCTRINE

In State ex rel. Haddox v. Indus. Comm., 2013-Ohio-794, George Haddox was a truck driver for Forest City Technologies, Inc. He was injured during the course of his employment in a 2005 traffic accident for which he was cited. Because the citation was his third in one year, his employer's liability insurance company refused to cover him.

Forest City required all truck drivers to be covered by the liability insurance policy. Therefore, Haddox was terminated.

Haddox filed a request for TTD compensation that was to begin on his date of injury. The Industrial Commission concluded that his discharge constituted a **voluntary abandonment** of employment because he violated a company policy that required termination for a third traffic violation. Haddox appealed the denial of compensation to the Court of Appeals for Franklin County, which concluded that the Industrial Commission had abused its discretion.

The court held that Haddox's discharge couldn't be considered a voluntary abandonment of his employment since the moving violations that resulted in his inability to work occurred ***before and contemporaneously with his work-related injury***.

An appeal was filed to the Supreme Court of Ohio.

The Ohio Supreme Court held in a 4-3 decision that under its 2006 ruling in Gross II, Haddox was entitled to TTD benefits because he was discharged **for the same misconduct that caused his work-related injury.**

According to the majority opinion, TTD benefits are intended to compensate injured workers for lost earnings during a period in which they are unable to return to work because of their injuries. To qualify for TTD compensation, an injured worker must demonstrate that he is unable to return to his former position and that the work-related incident caused the inability to return to work.

An injured worker isn't entitled to TTD benefits if he voluntarily leaves the workforce. A voluntary abandonment of employment is defined as "**aris[ing] from the employee's decision to engage in conduct that he or she knows will result in termination**."

However, an injured worker will remain eligible for TTD compensation when his ***departure from employment is causally related to the work incident***.

In this case, the court held that Haddox was entitled to TTD compensation dating back to the day of his injury because his discharge was involuntary. The court found that because he was discharged for the **same misconduct** that caused his injury, he didn't voluntarily abandon his employment and remained eligible for and entitled to TTD compensation.

## WHAT DOES THIS MEAN TO HUMAN RESOURCES?

This decision places a new restriction on the "voluntary abandonment" defense for denying Workers' Compensation disability benefits. Still, in certain situations, this defense can still be quite valuable for employers.

Employers should not forget that they have several other defenses to Workers' Compensation claims, such as preexisting conditions, lack of causation between the period of disability and the allowed conditions in the claim, and the injured worker reaching maximum medical improvement (MMI).

## XXXIV.RESIGNING POSITION MAY BE VOLUNTARY ABANDONMENT

In State ex rel. Klein v. Precision Excavating & Grading Co., 155 Ohio St.3d 78, 2018 Ohio-3890 (2018), after he sustained a work-related injury on November 5, 2014, John Klein did not return to work at Precision Excavating & Grading Co. According to a doctor's note, Klein was unable to perform any work through January 5, 2015. Based on his doctor's report, he filed a request for TTD benefits with the Ohio Bureau of Workers' Compensation (BWC).

Before his work injury, Klein informed his employer on October 31 that he was moving to Florida and wanted to understand the proper procedures for quitting his job. On November 3, he told a coworker that he intended to quit his job in two weeks and move to Florida. On November 13, he informed the BWC that he was moving to Florida on November 20.

The Industrial Commission awarded Klein TTD benefits for the period from November 6, which was the day after he was injured on the job, through November 19, which was the day before he planned to move to Florida. The commission determined that he voluntarily abandoned his employment on November 20 when he moved to Florida and was not eligible for workers' compensation benefits beyond that date.

Klein appealed the commission's decision.

The court of appeals relied on case law to conclude that because Klein was medically unable to work on November 20, 2014, he remained entitled to TTD benefits. The Industrial Commission appealed, and the Ohio Supreme Court reversed, holding that Klein's move to Florida was a voluntary abandonment of his employment unrelated to his workplace injury.

Therefore, he was not entitled to TTD benefits after the date of his move to Florida.

A long-standing tenet of workers' compensation law, TTD benefits are intended to compensate an injured worker who is temporarily unable to work because of a work-related injury. To be entitled to TTD benefits, an injured worker must be medically unable to work, and his inability to work must be caused by a job-related injury.

One exception to that rule, and a defense routinely used by employers, is the "voluntary abandonment of employment" doctrine. An employer relying on that defense argues that due to the injured worker's own actions, rather than the work-related injury, caused his loss of compensation. Therefore, he isn't entitled to workers' compensation benefits.

Previously, the Ohio Supreme Court limited the scope of the defense when it held that if an injured worker was disabled because of a work-related injury at the time of his separation from employment, he remained entitled to TTD benefits even after he was no longer employed.

In this case, the Ohio Supreme Court overturned its own precedent and held that when an injured worker voluntarily removes himself from the workplace for reasons unrelated to a work-related injury, he is prevented from receiving TTD benefits even if he remains disabled by the injury at the time of his separation from employment.

In other words, the Ohio Supreme Court found no distinction between being discharged for cause and voluntarily resigning for purposes of determining eligibility for TTD benefits since both scenarios sever the link between the work-related incident and the loss of earnings.

**WHAT DOES THIS MEAN FOR HR?**

This case clears up any discrepancy that existed in the law whenever injured employees were discharged for cause or if employees voluntarily resigned their positions in determining if they were excluded from receiving benefits under the voluntary abandonment doctrine. The two are now treated the same.

This case directly overturns two notable appellate court cases in Ohio:

State ex rel. Reitter Stucco v. Indus. Comm., 117 Ohio St.3d 71, 2008-Ohio-499

> "A claimant whose departure from employment is deemed voluntary does not lose eligibility for temporary total disability compensation if, at the time of departure, the claimant was temporarily and totally disabled."

State ex rel. OmniSource Corp. v. Indus. Comm., 113 Ohio St.3d 303, 207-Ohio-1951

> "Eligibility for TTD continues despite discharge for reasons unrelated to the disability."

This decision makes it clear that employers limit the scope of their workers' compensation costs when an injured employee either abandons their job through resignation or is terminated for cause, even if the injured worker remains disabled because of the work-related incident.

## XIII. POSITIVE TEST FOR DRUGS *MAY NOT* PRECLUDE WORKERS' COMPENSATION AWARD

In Cordell v. Pallet Companies, Inc., et al. 149 Ohio St.3d 483 (Ohio Supreme Court 12/29/2016) James F. Cordell, was terminated from his employment with appellant Pallet Companies, Inc. ("Pallet") after he failed a routine drug test administered soon after he was injured in a workplace accident. Pallet agreed that that Cordell's drug use ***did not cause the accident***.

Initially, Cordell's Workers' Compensation claim for temporary-total-disability (TTD) benefits was allowed, but the Industrial Commission reversed this decision. The Industrial Commission found that Cordell was ***not*** eligible for TTD compensation

because he ***voluntarily abandoned*** his employment by using marijuana prior to the accident.

The Ohio Court of Appeals reversed the Industrial Commission's decision and granted Cordell TTD compensation.

Pallet appealed to the Ohio Supreme Court. However, the Ohio Supreme Court found for the employee.

On appeal, the Ohio Supreme Court considered whether an employee's conduct that occurs ***prior*** to a workplace injury can sustain an employer's defense of voluntary abandonment of employment and preclude temporary-total disability ("TTD") benefits.

The majority held when an employee is terminated after a workplace injury for conduct ***prior to and unrelated to the workplace injury***, his termination does not amount to a voluntary abandonment of employment for purposes of temporary-total-disability compensation when:

(1) The dischargeable offense was discovered because of the injury and

(2) At the time of the termination, the employee was medically incapable of returning to work as a result of the workplace injury.

However, the dissents argued that Cordell's use of illegal drugs in violation of the company's written drug-free-workplace policy, severed the causal connection between the injury and the wage loss, precluding temporary-total-disability (TTD) compensation.

**WHAT DOES THIS MEAN FOR HR?**

Even though the "Voluntary Abandonment" is still alive in Ohio, it has been greatly limited when it comes to terminating employees for substance abuse. According to this case, the days of terminating an employee for violating your substance abuse policy and relying on the "voluntary abandonment" doctrine to prevent the employee from collecting lost wages under Workers' Compensation are gone. Instead, the Ohio Supreme Court is now looking to see if there is also an element of "Reasonable Suspicion" present in the facts.

Therefore, whenever there is a workplace accident and a subsequent substance abuse test is imminent, supervisors must be trained in how to spot "suspicious" behavior or facts. Of course, this also means DOCUMENTING whatever suspicious behavior the supervisor observes.

The Ohio Industrial Commission's "REASONABLE SUSPICION CHECKLIST" form is an excellent resource for Ohio employers.

## XXXV. VOLUNTARY ABANDONMENT AND MINOR WORK RULE INFRACTIONS

In State ex rel. Demellweek v. Indus. Comm., 2018-Ohio-714.Lowe's hired Robert Demellweek in February 2015. As part of his onboarding, he signed a three-page document titled "Key Responsibilities Guide" and received an employee handbook detailing categories of unacceptable performance and prohibited conduct.

Demellweek injured his right shoulder at work on October 31, 2015, and filed a workers' compensation claim in connection with the injury. In April 2016, Lowe's terminated his employment after he operated an order picker without using a safety harness and tether, in violation of the company's written work rules.

On June 1, 2016, Demellweek underwent right shoulder surgery, which had already been approved in his workers' compensation claim. After his physician indicated that he couldn't return to work, he requested TTD benefits from his former employer. Lowe's contested his claim.

The Industrial Commission determined that Demellweek had voluntarily abandoned the workforce when he was terminated for violating a written work rule and denied his request for TTD compensation. He appealed the Industrial Commission's decision to the Franklin County Court of Appeals.

The court of appeals overturned the Industrial Commission's decision, finding that Lowe's shouldn't have terminated Demellweek for a **minor infraction**. The court concluded that he didn't voluntarily abandon his employment and was therefore entitled to TTD compensation.

In Ohio, it has been a long-standing principle that an employee may lose eligibility for TTD compensation when he is terminated by his employer for violating a written work rule. **The written work rule must clearly define the prohibited conduct and identify it as a dischargeable offense, and the employee must have known or should have known about the rule.**

Lowe's handbook places offenses into different categories with separate ramifications. Violations of safety rules or hazardous materials procedures are defined as occurrences that will subject an employee to immediate termination. However, "working in an unsafe manner" is defined as an occurrence that will subject an employee to a written warning for a first offense.

Although Demellweek admitted he operated the order picker without a safety harness and tether, he disputed whether the safety equipment was necessary and whether his actions rose to the level of a dischargeable offense. He claimed that the picker was only **a few inches off the ground** and a safety harness wouldn't have protected him from injury.

Lowe's argued that it had the discretion to determine when conduct rises to the level of a dischargeable offense and it properly discharged Demellweek for violating a written work rule.

The court evaluated Lowe's decision to terminate Demellweek and concluded that his actions were not the type of serious violation of a safety rule that would normally result in an immediate discharge. **The court concluded that Demellweek was not aware that operating a picker a few inches off the concrete was conduct that would warrant immediate termination**. As a result, the court rejected Lowe's position that his termination amounted to a voluntary abandonment of employment that precluded his receipt of TTD benefits.

Although it conceded that the voluntary abandonment of employment doctrine still exists, the court notably stated that it is "not meant to be a vehicle [that] allows a self-insured employer to rid itself of injured workers for a minor violation of a work rule, written or not."

**WHAT DOES THIS MEAN FOR HR?**

The voluntary abandonment of employment doctrine remains a defense when an employee challenges his termination for violating a written work rule. However, the decision in this case whittles away some employer discretion for determining which offenses are dischargeable offenses. Going forward, employers should be prepared to support the defense with evidence that includes things such as video recordings, safety records, and documents showing that the organization has clearly classified the offense as a terminable one.

## XIV. OHIO SUPREME COURT REJECTS "DUAL INTENT" DOCTRINE FOR WORKERS' COMPENSATION

The "Dual Intent Doctrine" allows an employee who is injured while traveling for both business and personal purposes to file a Workers' Compensation claim.

While many jurisdictions recognize the dual intent doctrine, the Ohio Supreme Court has ruled that Ohio does not.

In Friebel v. Visiting Nurse Assn. of Mid-Ohio, Slip Opinion No. 2014-Ohio-4531 Tamara Friebel was employed by Visiting Nurse Association of Mid-Ohio ("VNA") as a home health nurse to provide in-home healthcare services to VNA clients. Ms. Friebel traveled from her home to clients' homes using her personal vehicle. While on the way to a patient's home, Friebel decided to also transport her children and family friends to a local mall. Before dropping off her passengers, Friebel's car was hit from behind while she was stopped at a traffic light.

Friebel filed an application for Workers' Compensation benefits. The Industrial Commission allowed her claim.

VNA filed an appeal into common pleas court on the basis that Friebel was on a personal errand and therefore not injured within the course and scope of her employment. The court found for VNA.

Friebel then appealed, and the court of appeals reversed the trial court's order for VNA. The appeals court found that Friebel's accident and injury arose out of and occurred in the course of Friebel's employment. The court of appeals indicated that Friebel had the dual intent to drop her passengers off at the mall and then travel to her patient's home. When she was injured, Friebel had not yet diverted from that path to her patient's home.

VNA appealed to the Ohio Supreme Court, which reversed the court of appeals' decision.

In a 5-2 decision, the Court cited a prior Ohio Supreme Court case (Cardwell v. Indus. Comm., 155 Ohio St. 466, 99 N.E.2d 306 (1951)) and commented that a claim's compensability should focus on the objective standard of "**in the course of**" and "**arising out of**" a person's employment, not the ***subjective intent*** of an injured worker.

**WHAT DOES THIS MEAN TO HUMAN RESOURCES?**

This case is good news for Ohio employers. The Oho Supreme Court has made it clear that employees traveling with both personal and employment purposes are not eligible to receive Workers' Compensation coverage.

## XV. DRAFTING POLICIES TOO RESTRICTIVE COSTS EMPLOYER WORKERS' COMPENSATION CLAIM

In State of Ohio ex rel. Clevenger v. Ohio Staff Leasing, Inc., Slip Opinion No. 08AP-828, 2009-Ohio-3085, Ohio Staff Leasing had a "Substance Free Workplace Policy" in place that stated if an employee tests positive on a post-accident drug or alcohol test that would be grounds for immediate discharge, which would constitute a voluntary termination of employment.

Clevenger was employed at Ohio Staff Leasing. He had also signed an acknowledgment that he had received a copy of the SFWP and was aware of what it said.

When Clevenger was injured at work, he took the required post-accident alcohol and drug test. Clevenger tested positive for marijuana and was terminated. Clevenger applied for TTD, arguing that he could not have voluntarily abandoned his employment because he was disabled as a result of the work-related injury.

The court held that Clevenger was entitled to TTD.

The court specifically noted that the employer's SFWP contained a provision that workers' compensation benefits could only be withheld if after a thorough investigation was conducted, it was found that the consumption of alcohol or drugs was the direct cause of the accident. Here, there was no evidence that the employer conducted any such investigation and therefore was not able to prove that the claimant's consumption of

marijuana was the direct cause of his accident.

This decision provides guidance in fashioning a proper Substance Free Workplace Policy:

**Employers should avoid including language that requires restrictive procedures or increases their burden of proof.**

Ohio law provides a rebuttable presumption that intoxication causes an industrial injury if the employee tests positive or refuses the test, assuming the employer gave appropriate notice of the test and consequences of refusing it and the employer proves it had "reasonable cause" to test. All of these provisions can be included in your formal policy. In this case, the employer required itself to prove the intoxication directly caused the accident. Had it not done so, the employer would have enjoyed a rebuttable presumption that the intoxication caused the accident.

## XVI. MANAGEMENT'S COMMENTS SINK EMPLOYER IN WORKERS' COMPENSATION RETALIATION CLAIMS

In Stanfield v. United States Steel Corp., 2013 Ohio 2378 (9th District Appellate Court), Laura Stanfield, an employee in U.S. Steel Corporation's lubrication department, was injured on July 6, 2010, when she slipped on steps and grabbed a handrail. She immediately reported the incident to the Workers' Compensation section of the company's HR department. She was examined by the plant doctor and then returned to the plant.

Before leaving for the day, Stanfield had a discussion with the head of security, who allegedly asked her whether she would return to work in an office position in exchange for not filing a Workers' Compensation claim. The head of security suggested that accommodations could be made so the situation wasn't considered a "recordable incident." She interpreted the security chief's comments to mean that if she filed a Workers' Compensation claim, she would be fired.

Stanfield returned to work in an office position and continued to seek medical treatment for ongoing shoulder pain. She eventually returned to the lubrication department. However, she informed her supervisor that she was unable to perform her job duties and was returned to the office position. She alleged that one of her shift managers informed her that merely filing a Workers' Compensation claim could result in her termination. Nevertheless, she filed a claim for benefits.

U.S. Steel informed Stanfield that her claim was being contested and scheduled her for an independent examination. During the exam, she informed the doctor that her hobbies included showing and riding horses and that she planned to attend the county fair.

U.S. Steel hired a private investigator, who filmed Stanfield's activities at the fair, which included climbing ladders and using her allegedly injured arm to cut down portable ceiling fans. The plant doctor reviewed the video and expressed concern that she was claiming worse symptoms at work than what she appeared able to do on the video.

U.S. Steel conducted a disciplinary meeting with Stanfield and several managers. Stanfield alleged that the department manager in charge of personnel and labor relations called her a “liar” and stated that “she was a one-armed person that couldn't do the job.”

Following the meeting, U.S. Steel terminated her.

Stanfield subsequently filed a lawsuit against U.S. Steel alleging retaliatory discharge following her filing of a Workers’ Compensation claim, as well as intentional infliction of emotional distress. The trial court dismissed her claims, finding she did not present evidence of retaliatory discharge because the employer terminated her for misrepresenting her medical condition.

Stanfield appealed, and the 9th District Court of Appeals reversed the trial court's decision.

The appellate court reasoned that Ohio law prohibits employers from retaliating against employees who exercise their right to file a Workers’ Compensation claim or pursue Workers’ Compensation benefits. An employee alleging retaliatory discharge must demonstrate that there is a **causal connection** between an **on-the-job injury and her termination.**

In this case, Stanfield argued that the comments made by the ***head of security, a shift manager, and a member of the labor relations department*** was proof that the employer terminated her because she filed a Workers’ Compensation claim.

U.S. Steel, on the other hand, relied on the private investigator's video to assert that Stanfield engaged in physical activities that demonstrated she was misrepresenting her medical condition and her ability to work. The employer alleged those ***misrepresentations*** were the reason for her termination.

However, the court found that the statements made by U.S. Steel’s supervisors were enough to allow Stanfield to pursue a claim for retaliatory discharge, even though none of them worked in the Workers’ Compensation department or was Stanfield's direct supervisor.

Additionally, after reviewing the investigator's video, the court wasn't convinced it demonstrated that Stanfield was undertaking physically taxing activities. As a result, the court was unconvinced by U.S. Steel's arguments.

In addition, the court also found the supervisors' statements could be evidence of the employer's extreme and outrageous conduct. Stanfield therefore could pursue a claim for intentional infliction of emotional distress.

## WHAT DOES THIS MEAN TO HUMAN RESOURCES?

It ***VITAL*** to train your entire management team to watch what they say. Any statements made by any supervisor, in any capacity, may be evidence of retaliatory discharge. It does not matter if the supervisor making the offensive comment has any direct authority

over the terminated employee. In this case, the court placed great emphasis on the head of security's statements even though he wasn't Stanfield's supervisor.

Supervisors should also not tell employees that they shouldn't file Workers' Compensation claims.

Also, whenever an employee gets injured, supervisors need to refer the employee to the human resource department or whoever regularly handles Workers' Compensation claims.

Also, in any disciplinary meeting, supervisors should not even mention an employee's Workers' Compensation claim.

## Notice: Legal Advice Disclaimer

**The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.**

**Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.**

**Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.**

**Therefore, whenever such issues arise, the advice of an attorney should be sought.**

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Scott Warrick, JD, MLHR, CEQC, SHRM-SCP (www.scottwarrick.com & www.scottwarrickemploymentlaw.com) is both a practicing Employment Law Attorney and Human Resource Professional with almost 40 years of hands-on experience. Scott uses his unique background to help organizations get where they want to go, which includes coaching and training managers and employees in his own unique, practical, entertaining and humorous style.

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Scott combines the areas of law and human resources to help organizations in "Solving Employee Problems ***BEFORE*** They Happen." Scott's goal is ***NOT*** to win lawsuits. Instead, Scott's goal is to ***PREVENT THEM*** while improving ***EMPLOYEE MORALE***.

Scott's book, **"Solve Employee Problems Before They Start: *Resolving Conflict in the Real World"*** is #1 for New Releases on Amazon for Conflict Resolution books!

Scott's "**Employment Law Videos**" on the ADA, FMLA, FLSA and Harassment, **"The Human Resource Professional's Complete Guide To Federal Employment And Labor Law" &** Scott's **"Do It Yourself HR Department"** are favorites for anyone wanting to learn Employment Law and run an HR Department.

Scott has been named one of Business First's 20 People To Know In HR, CEO Magazine's 2008 Human Resources "Superstar," a Nationally Certified Emotional Intelligence Instructor and a SHRM National Diversity Conference Presenter in 2003, 2006, 2007, 2008 and 2012.

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