
IN THE SUPREME COURT OF OHIO

Trent Thomson,

Plaintiff-Appellee,

vs.

Boss Excavating & Grading, Inc.,

Defendant-Appellant.

Case No. 2021-1503

On Appeal from the Franklin County
Court of Appeals, Tenth Appellate
District

Court of Appeals Case No. 20AP-263

**PLAINTIFF-APPELLEE'S MEMORANDUM IN RESPONSE TO MEMORANDUM IN
SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT
BOSS EXCAVATING & GRADING, INC.**

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

This Court is again asked to accept jurisdiction and complicate what it not two years ago further clarified: Ohio’s common law tort of wrongful termination in violation of public policy. The Appellant asserts that the Tenth District invented a new claim, but the decision below represents nothing more than the faithful application of this Court’s prior precedent. The Tenth District Court of Appeals carefully and meticulously reviewed and applied this Court’s jurisprudence as articulated in *Greeley v. Miami Valley Maintenance Contrs.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990), *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 677 N.E.2d 308 (1997), *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E.2d 526 (2002), *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36 (2007), *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938 (2011), and most recently *House v. Iacovelli*, 159 Ohio St.3d 466, 2020-Ohio-435, 152 N.E.3d 178 (2020), among many others. There was no innovation or misinterpretation of this Court’s guidance. Appellant Boss Excavating & Grading, Inc. (“Boss”) suggests that the Tenth District improperly expanded the tort of wrongful discharge in violation of public policy, thereby compromising the integrity of Ohio’s prevailing wage statute, but really what Boss seeks is to appeal the merits of the Tenth District’s decision in a one-off case.

To be clear, the Tenth District’s decision does not expand the tort of wrongful termination in violation of public policy, a tort first enumerated in *Greeley*. Appellant argues that the Tenth District issued an erroneous decision, raising two questions for resolution: (1) whether a clear public policy exists in Chapter 4115 that protects the continued employment of employees, and if so, (2) whether the statutory remedies in the Chapter are adequate to protect that public policy, or whether the jeopardy element *Greeley* claim would be properly found in the factual context of this

case. These questions misconstrue the Tenth District decision. The Court of Appeals' judgment is simply an application of established law to a unique case. This is not a case of great public interest.

On Appellant's first proposition of law, Chapter 4115, Ohio's prevailing wage law, articulates a clear public policy interest in protecting the substantive right of employees to be paid a prevailing wage. Nowhere in the Tenth District decision did the Court hold that Ohio's prevailing wage law protects a public policy interest in continued employment. Indeed Appellant frequently characterizes an employee's substantive right to be paid prevailing wages as "an individual right to continued employment." Review of the Court of Appeals decision reveals no such holding, and further, there is no such implication in the decision either. As with all previous *Greeley* claims before this Court, and most recently, in *House v. Iacovelli*, the jeopardy question in a wrongful termination claim is *never* whether a particular statutory scheme contains a public policy protecting the continued employment of an employee; rather, the initial question is what is the public policy to be vindicated by the law: a societal interest, a substantive right of the employee, or both? No court to date in Ohio, to Appellee's knowledge, has held that the underlying public policy to be vindicated in a wrongful termination claim is continued employment; the termination of employment is *the jeopardy* (or potential jeopardy), not the policy the jeopardy endangers.

Appellant's second question proposes that the remedies under Ohio's prevailing wage statute are adequate to protect society's interest, and the employee's substantive rights, if any. As the statutory scheme establishes both substantive rights of employees and a societal interest, there must necessarily be adequate protection for both policies to bar a *Greeley* claim. Ohio's prevailing wage law provides for the payment of restitution and imposes penalties on employers who violate the statute. The penalties and sanctions of the law are sufficient to discourage the behavior that would otherwise undermine society's interest in supporting collective bargaining, as the Tenth

District appropriately found. However, crucially, the available remedies do not adequately protect the employee's interest in payment of the prevailing wage, nor do they provide for equitable relief in the form of reinstatement. Unlike most of the precedent before, Ohio's prevailing wage law lacks the broad personal remedies that preempt the need of employees to bring a wrongful termination claim. In cases prior, the presence of these remedies, including equitable relief and reinstatement, were held to adequately protect an employee's substantive interest, and therefore, prevented the need for a *Greeley* claim.

Here, the prevailing wage law fails to provide a remedy sufficient to make Thomson whole—to place him in the position he would have been in without the prevailing wage violation. See *Wiles*, 96 Ohio St.3d 240, ¶ 17. As such, a *Greeley* claim is the *only* method by which his substantive rights can be vindicated. Restitution is simply not sufficient to repair the harm caused by the retaliatory firing. He remains irrevocably fired. Additionally, as Thomson was not an employee upon the filing of this claim, the statutory remedies were not available to him. To hold that Ohio's prevailing wage law's statutory remedies are sufficient to protect an employee's substantive interest in payment of the prevailing wage, prohibiting the need for a wrongful termination claim, would destroy the integrity of law itself, because no employee would report violations, or even ask their employer for owed prevailing wage, for fear of retaliation. Appellant asks this Court to do exactly that: give the green light to employers to fire any employee who seeks, either privately with their employer or through the formal statutory process, to vindicate their right to wages owed.

This case does it involve the great novel issues of law that are of great interest to the public. This Court should deny jurisdiction.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellee Trent Thomson worked for Appellant Boss Excavating & Grading, Inc. for years, and for the relevant time period of May through November, 2018, as a supervisor at a construction site in New Albany, Ohio. Some labor at the project required Thomson and his crew be paid the prevailing wage. Thomson noticed he did not receive prevailing wage for the eligible labor, and he also received complaints from his subordinates that the wages were not being paid. Thomson relayed these concerns to Boss management. As a supervisor, one of Thomson's responsibilities was to ensure his employees were being paid their owed wages. After months of unsuccessful requests for the prevailing wage deficiency to be rectified for his subordinates, Thomson again complained. Boss supervisors offered to pay Thomson some of his outstanding prevailing wage, but Thomson threatened to bring the issue to the Ohio Department of Labor, Wage and Hour Division. Boss responded to Thomson's threat by terminating him on the spot. Thomson was fired before he could avail himself of any of the statutory remedies available under Chapter 4115, including reporting the violations to the director of the Ohio Department of Commerce.

Thomson filed suit on January 31, 2019, bringing a *Greeley* claim for wrongful termination. Plaintiff-Appellee's amended complaint asserted that Appellant violated the clear public policy of Chapter 4115, requiring payment of prevailing wages to employees, by terminating his employment for his threat to report the violations. On March 31, 2020, Appellant filed a Motion for Summary Judgment in the Franklin County Court of Common Pleas. The Trial Court granted summary judgment to Boss on April 28, 2020, determining that the jeopardy element of a *Greeley* claim could not be met as the prevailing wage law's public policy interest was solely

rooted in the societal interest in collective bargaining that was adequately protected by the statutory remedies. On May 13, 2020, Thomson timely appealed.

On appeal, Thomson asserted that the trial court had erred in holding the jeopardy element was not met. He argued that the prevailing wage statute contained multiple public policies, one of which included protecting the substantive right of employees to be paid the prevailing wage. As Thomson had been discharged for threatening to avail himself of the statutory protections, he was in a predicament where he was no longer an employee, and therefore, no statutory remedy was available to him. Even if the remedies were available to Thomson, he argued, the remedies would not be adequate to protect his substantive rights. The Tenth District Court of Appeals agreed, finding first that under its and this Court’s clear precedent, the public policy of the prevailing wage statute protects the substantive rights of employees to receive payment of prevailing wages owed, and not just the societal interest of supporting collective bargaining. Court of Appeals Decision, Appellant’s Appendix A001, at ¶¶20-21. The Tenth District also concluded that while the statutory remedies were sufficient to protect the societal interest, the remedies were not sufficient to protect Thomson’s substantive rights in payment of the prevailing wage. *Id.* at ¶¶ 37 & 44. In essence, the court found no personal remedy in the statute sufficient to rectify his termination. The Court of Appeals also opined that “the remedies set forth in R.C. Chapter 4115 are simply not available to appellant as he is no longer an employee,” affirming Thomson’s argument that he never had a chance to avail himself of the statutory remedies. *Id.* at ¶ 54.

Despite this logical and straightforward application of *Greeley* and this Court’s subsequent holdings to the case, Boss argues that this Court should rewrite its wrongful termination precedent to conflate the jeopardy and clarity elements, reverse the sound judgment of the Tenth District Court of Appeals, and give a stamp of approval to employers who withhold prevailing wages and

terminate employees who threaten to report violations in an attempt to vindicate their rights. Boss suggests that a terminated employee is adequately protected by a remedy that would enable them to recoup twenty-five percent of the owed prevailing wage. This position is contrary to the clear public policy expressed in Ohio’s prevailing wage law, and would fail to provide employees “with a meaningful opportunity to place himself or herself in in the same position the employee would have been absent the employer’s violation.” *Wiles*, 2002-Ohio-3994, at ¶ 17.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

Response to Proposition of Law No. 1:

Ohio’s prevailing wage law expresses a clear public policy interest in ensuring payment of prevailing wages to employees.

Appellant’s first proposition of law misstates the holding of the Tenth District, and, moreover, invites this Court to inject new confusion ambiguity to its prevailing wage jurisprudence. The Tenth District did not hold that Chapter 4115 of the Ohio Revised Code embodies a clear public policy in favor of *individual rights*; rather, the court of appeals held that the prevailing wage statute clearly requires the payment of prevailing wages. *See* R.C. 4115.05. The substantive right to receive this pay is vested in the employee, despite the fact that in general, payment of the wage supports society’s interest in collective bargaining. An employee’s personal right to wages owed, and society’s interest in supporting the collective bargaining process are not mutually exclusive concepts; this particular case presents a situation where the prevailing wage law embodies public policies that *both* protect substantive rights and societal interests.¹ It is

¹ See *House v. Iacovelli*, 159 Ohio St.3d 466, 2020-Ohio-435, 152 N.E.3d 178, ¶ 19. This Court was careful to draw distinctions between cases dealing with policies that protect a societal interest and public policies that protect employees. There is no precedent known to the Plaintiff-Appellee that asserts societal interests and/or employee substantive rights are mutually exclusive and cannot be vindicated by the same statutory scheme.

undisputed by the parties in this case that Ohio's prevailing wage law has a public policy intention to support collective bargaining, giving the law a societal interest to vindicate. The question at dispute then is does the law also have a public policy basis in protecting an employee's right to receive prevailing wages owed?

Both this Court and Tenth District have held that Chapter 4115 does indeed articulate a clear public policy interest in protecting the substantive rights of employees to payment of prevailing wages. *Sheet Metal Workers' Internatl. Assn. v. Gene's Refrig., Heating & Air Conditioning, Inc.*, 122 Ohio St.3d 248, 2009-Ohio-2747, 910 N.E.2d 444, ¶ 30; *Robbins Sound, Inc. v. Ohio Univ.*, 70 Ohio App.3d 212, 220 (10th Dist.1990). Employers are directed to pay employees prevailing wages, and in fact, are not to "permit any worker to accept wages less than the prevailing rate of wages," implying employees have an unqualified and inalienable entitlement to the wages. O.A.C. 4101:9-4-20(A). Case law cited by Appellant also supports this proposition: "prevailing wage law evidences a legislative intent to 'support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private sector.'" Appellant Brief, at 9 (citing *State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88, 91, 431 N.E. 2d 311 (1982)) (emphasis added). The means by which the societal interest is upheld is by defending the substantive right of employees to payment of the prevailing wage. There is no ambiguity in all of this precedent that would suggest an employee has no substantive right to payment of the prevailing wage.

The plain language of the statute, agency interpretations in the Ohio Administrative Code, and case law precedent dictate that Ohio employees are entitled to the payment of prevailing wages when working on eligible job sites. If Boss's logic were to be followed, and employees had no substantive right to payment of prevailing wages, then there would be no need for any enforcement

mechanisms in the statute relative to employees, because payment of the prevailing wage to the employer would be sufficient to protect society's interest in collective bargaining, as unionized and non-unionized contractors would bid on equal footing. Employees must be paid the prevailing wage because that is a public policy purpose of the law. Failure to protect this substantive right of employees would undermine the public policy interest in collective bargaining too.

Boss contends that the public policy goals of the law would not be violated "by the termination of a disgruntled employee who complains about it." Appellant Brief, at 10. In reality, the public policy goals are violated by cutting off the path to remedies in the statute by preemptively terminating a complaining employee. While the employer may ultimately face liability if claims are brought pursuant to the statute, permitting termination of any complaining employee would have a chilling effect on future reporting, and the terminated employee is injured beyond the statute's protection. It is a simple matter of arithmetic in this scenario: what is worth more to an employee; additional wages he is entitled to, or his base pay and livelihood? A finding in favor of Boss's position would vastly increase prevailing wage administrative claims and litigation; employees would be disincentivized to resolve prevailing wage issues privately with their employer, even accidental omissions, for fear that internal complaints would result as they did here: in a retaliatory firing, blessed by this Court. Instead, in order to be afforded adequate protection, employees would be forced to take to the courts of the Commerce Department for every violation, even if the employer would have been willing to correct any mistakes in employee pay had it simply been brought to its attention.

Because employees are entitled to receive prevailing wage payment on public construction sites, a substantive right is created and intended to be protected by the prevailing wage statute. There are two public policy goals of the statutory scheme that are necessarily dependent on the

existence of the other: to uphold the integrity of the collective bargaining process, employees must be paid a prevailing wage. Paying employees a prevailing wage supports the societal interest in collective bargaining. Appellant misconstrues the holding of the Tenth District to propose a radical question that is not implicated by the Court of Appeals' decision.

Response to Proposition of Law No. 2:

The statutory remedies of Ohio's prevailing wage law do not adequately protect the public policy interest in mandated payment of wages, and therefore, the jeopardy element of a *Greeley* claim is met.

It is undisputed by both parties that the Tenth District was correct in its analysis that the statutory remedies in Ohio's prevailing wage law adequately protect the societal interest in collective bargaining. Appellant argues that the Tenth District erred, however, in holding that Ohio's prevailing wage statutory remedies do not adequately protect the substantive rights of an employee. While it is true the statutory remedies have been characterized as "comprehensive" by this Court and others, all courts have made such assertions in the context of the remedies' ability to protect the societal interest.² No court has opined on whether the remedies are adequate to protect an employee's substantive right to prevailing wages.

² See, e.g. *Evans v. Moore*, 69 Ohio St. 2d 88, at 91 (1982). "*The state's interest in supporting the collective bargaining process* provides an additional justification for the conclusion that the challenged ordinance is beyond the scope of municipal power. The prevailing wage law evidences a legislative intent to provide a comprehensive, uniform framework for, *inter alia*, worker rights and remedies vis-a-vis private contractors, sub-contractors and materialmen engaged in the construction of public improvements in this state. The prevailing wage law delineates civil and criminal sanctions for its violation." (emphasis added).

This Court discussed the prevailing wage remedies in the context of their ability to protect society's interest, not the individual worker's interest in payment of the prevailing wage. This limited context is further supported by the discussion of "sanctions," which are a deterrent to publically undesirable behavior, and a matter between government and employer, as opposed to damages, which would make an injured employee whole. See *Greeley v. Miami Valley Maintenance Contrs.*, 49 Ohio St.3d 228, 231, 551 N.E.2d 981 (1990).

Appellant takes issue with the Tenth District analysis regarding three deficiencies identified in the remedies of the statute. First, in a private action, an aggrieved employee can recover any unpaid prevailing wages, and reasonable attorney fees, but cannot recover liquidated damages in the full amount of wages lost. R.C. 4115.10(A). In *Wiles*, an employee discharged for using FMLA leave could recover such liquidated damages, drawing a significant distinction. Additionally, the employees in *Wiles* were statutorily entitled to equitable relief, such as reinstatement, making the remedies in *Wiles* adequate. *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E.2d 526 at ¶ 16-17.

The restitution remedies contained in Ohio's prevailing wage laws are insufficient as well. As pointed out by Appellant, the apportionment of the wages ultimately may result in an employee only receiving twenty-five percent of the wages that were owed. Certainly the Ohio Legislature did not intend for an employee to lose his job, and then receive only twenty-five cents on the dollar of the prevailing wage he was owed. This is simply not an adequate remedy.

Moreover, in cases decided before this Court where the jeopardy element was not met, one of the statutory remedies generally available to the aggrieved employee was equitable relief and reinstatement. As mentioned above, *Wiles* was one such case. In *Leininger v. Pioneer Natl. Latex*, an employee terminated on the basis of age discrimination could not meet the jeopardy element of a wrongful termination claim where Ohio's age discrimination statute provided for "any legal or equitable relief that will effectuate the individual's rights" and "other action that will effectuate the purposes of [R.C. Chapter 4112], including, but not limited to, hiring, reinstatement, or upgrading of employees with or without backpay...." 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36, ¶ 29. These remedies are entirely absent from Ohio's prevailing wage statute.

The very precedent giving rise to Thomson's claim supports the assertion that an adequate remedy should be available to a Plaintiff if a substantive right is at issue. In *Greeley*, the Ohio General Assembly amended Ohio's child support withholding statute, removing a provision providing a remedy for reinstatement and backpay to an aggrieved employee. 49 Ohio St.3d 228, 230, 551 N.E.2d 981 (1990). This Court examined the legislative history of said amendment and determined the express purpose of the amendment "was to conform the existing child support enforcement withholding mechanism to certain mandates" of the federal Child Support Enforcement Amendments of 1984. *Id.* at 231. Expanding, this Court asserted that there was "[n]othing in the legislation or its history indicat[ing] that it was the intent of the General Assembly to foreclose the rights of an affected employee." *Id.* The fact that the child support withholding law provided for a fine against a violating employer, just as Ohio's prevailing wage law does, was immaterial to this Court, as a fine is "a matter between the employer and the government. Whether a remedy is available to an aggrieved employee is a wholly separate matter." *Id.* As Appellant states, Ohio's prevailing wage law's enforcement mechanisms are "significant and onerous penalties," but not remedies for an affected employee.

As in *Greeley*, Thomson is dealing with a statute that does not provide an adequate remedy to effectuate his rights. There is no indication anywhere in nearly a century of the law's legislative history that it was the intent of the Ohio General Assembly to foreclose the rights of an employee to reinstatement and backpay. While Boss argues the reinstatement and backpay remedies are solutions unrelated to the public policy of protecting an employee's right to prevailing wage pay, several of the above-mentioned cases include these remedies where the public policy at issue was not a substantive interest in job protection. In fact, none of the statutes at issue in *Greeley*, *Wiles*,

Leininger, or any of the other noteworthy wrongful termination in violation of public policy cases had “continued employment” as one of the recognized public policy goals.

Finally, Appellant argues that after termination, Thomson could have still brought suit to recover prevailing wages owed despite his then-status as a former employee. The Court of Appeals disagreed with Boss’s assertion that the definition of “employee,” as defined in the prevailing wage section of the Ohio Administrative Code, does not include *former* employees.³ Exclusively, an “employee” is referred to in the present tense in the Revised Code and Administrative Code. The statutory and administrative law on this issue is unambiguous and clear.⁴

Ohio’s prevailing wage laws do not provide an adequate remedy to protect the substantive rights of employees, and therefore, an aggrieved employee may bring a *Greeley* claim. Meticulously, carefully, and faithfully applying this Court’s precedent, the Tenth District Court of

³ O.A.C. 4101:9-4-02(K) states in whole “‘Employee’ means any person in the employment of an employer who performs labor or work of the type performed by a laborer, workman, or mechanic in the construction, prosecution, completion or repair of a public improvement and includes owners, partners, supervisors, and working foremen who devote more than twenty per cent of their time during a work week to such labor or work for the time so spent. Employee does not include an individual who is a sole proprietor. Employee also does not include full-time employees of a public authority who have completed their probationary periods in the classified civil service of the public authority, except such persons are employees if performing work outside the classification specifications of the civil service position for which the probationary period has been served. Employee does not include any person in a program administered by a public authority approved at the discretion of the director in writing prior to work on any project or program, including, but not limited to, local workfare or community action programs.”

⁴ This simple matter of grammar is misguided by Appellant’s assertion that cases before have involved former employees. Citing *Harris v. Atlas Single Ply Sys., Inc.*, 64 Ohio St.3d 171, 593 N.E.2d 1376 (1992), Appellant fails to address the procedural history of the case. In the preceding Court of Appeals case decided prior to this Court’s decision, the plaintiffs are characterized in the present tense as “employees,” and not former employees. 5th Dist. Guernsey No. 90-CA-32, 1991 Ohio App. LEXIS 3198 (June 25, 1991). It would not be unfathomable for the employees to have filed the claim, and then in the following years of litigation, left their employer for opportunities elsewhere. As the claim was filed when they were employees, they had the appropriate standing at that time to file suit. Simply stated, the facts are not fully developed relative to the issue in the cases cited by the Appellant.

Appeals decided this case correctly. There is no issue of great public or general interest that demands resolution by this Court.

CONCLUSION

This Court's discretionary jurisdiction is limited to cases presenting issues of great public or general interest. There is no great confusion or difficulty in Ohio's judiciary in applying this Court's *Greeley* precedent to prevailing wage claims, and the decision of the Tenth District is supported by the logical application of precedent to the facts at hand. Appellant seeks a rewriting of *Greeley* that is unsupported by law. Appellee respectfully requests that this Court decline jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was served upon the following via ordinary U.S. mail, postage prepaid, and/or via email, this 7th day of January, 2022:

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