Absenteeism Due to a Work-Related Injury: A Critique of Ohio's Most Recent Public Policy Exception

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COMMENTS

ABSENTEEISM DUE TO A WORK-RELATED INJURY:
A CRITIQUE OF OHIO'S MOST RECENT PUBLIC POLICY EXCEPTION

INTRODUCTION

Workers' compensation laws were created to bring workplaces into compliance with the changes of the industrial revolution.\(^1\) On-the-job injuries became seen as inevitable occurrences in modern industry for which workers should not have to bear all the costs.\(^2\) Many states, including Ohio, have enacted workers' compensation acts.\(^3\) Several of these states have provided further protection for injured workers by outlawing employer retaliation against injured employees who pursue workers' compensation benefits.\(^4\) However, most courts have agreed that discharge pursuant to a neutral absentee policy does not constitute retaliation.\(^5\) As a result, the workers' compensation system creates a gap in protec--

\(^1\) 82 AM. JUR. 2D Workers' Compensation § 1 (2003) (citations omitted).
\(^2\) Id. (citations omitted).
\(^3\) See, e.g., ME. REV. STAT. ANN. tit. 39A (West 2001); N.J. STAT. ANN. § 34:15 (West 2000); OHIO REV. CODE ANN. § 4123 (West 2001); OKLA. STAT. ANN. tit. 85 (West 1992); WASH. REV. CODE ANN. § 51 (West 2002).
tion for injured workers. An employee cannot be discharged for filing a workers' compensation claim after suffering a compensable injury. However, if the employee's injury is severe, and he is forced to take a large amount of time off to recover, he may be discharged for violating the employer's neutral absentee policy. Solving this problem involves balancing the competing interests between employers and employees. On one hand, an employer can only run an efficient workplace when its employees are present and able to work. On the other hand, workers' compensation and anti-retaliation laws were created so that injured employees can obtain compensation without losing their employment.

Some courts have attempted to fill this gap by liberally interpreting anti-retaliation statutes. Other courts have ruled that the practice violates established public policy. In October 2003, the Ohio Supreme Court joined the minority of state courts and recognized a public policy exception for employees who have been absent due to a compensable work-related injury. The court's decision in Coolidge v. Riverdale Local School District abruptly changed decades of Ohio law as interpreted by lower courts. The decision is likely to have immediate effects upon employers, who must change their employment policies to comply with the new decision, and upon injured employees, who may now raise a new cause of action after discharge.

This Comment argues that the Coolidge decision, while logically justifiable, is severely flawed. The many unanswered questions create such immense practical problems that court inaction would have been preferable. Part I provides an overview of state workers' compensation systems, highlighting their purposes and common features. Part II outlines state approaches in prohibiting retaliation for filing workers' compensation claims, including statutory and common law tort. Part III outlines various state court approaches to creating causes of action for workers discharged due

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8 797 N.E.2d 61 (Ohio 2003).
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I. OVERVIEW OF WORKERS' COMPENSATION LEGISLATION

A. Purposes

Workers' compensation legislation developed as a result of industrial development in the United States. The legislation's purpose is to provide compensation to workers for "disability or death resulting from occupational injuries or diseases." Previously, injured workers were forced to rely on common-law remedies as their only source of recourse. Negligence principles, however, were often unjust to the worker because of their complexity. Such claims also added much expense and delay, forcing the injured worker to bear the brunt of economic loss. The new line of legislative reasoning was that industrial accidents are inevitable occurrences of modern industry, or inevitable "cost[s] of production." Therefore, injured accident victims should not face all of the burdens associated with those accidents.

Workers' compensation statutes do not rely on negligence or on a theory of damages for a wrong. Instead, workers' compensation is a statutory scheme providing strict liability for employers to compensate employees for work-related injuries. Workers' compensation liability results from work connection, rather than from fault.

B. Common Features

While workers' compensation laws vary among states, common features include the following:

1. a right to compensation for all work-related injuries;
2. abrogation of common-law negligence;
3. a simple and inexpensive scheme for claim settlement;
4. employer immunity from lawsuits, with certain exceptions;

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10 82 AM. JUR. 2D Workers' Compensation § 1 (2003) (citations omitted).
11 Id. § 5 (citations omitted).
12 Id. § 1 (citations omitted).
13 Id. §§ 1, 5 (citations omitted).
14 Id. § 1 (citations omitted).
15 Id. (citations omitted).
(5) a definite payment schedule of compensation, based on an employee’s loss of earning power; and
(6) payment for medical, surgical, hospital, nursing and burial services.\footnote{Id. § 6 (citations omitted). For examples of state workers’ compensation laws, see supra note 3.}

II. OUTLAWING RETALIATION

A. By Statute

Many state legislatures have enacted statutes that specifically outlaw employer retaliation against employees who pursue workers’ compensation benefits.\footnote{See supra note 4.} These statutes create necessary protection for the rights of injured employees. Ohio’s statute is typical. It states:

No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the worker’s compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer.\footnote{Ohio Rev. Code Ann. § 4123.90 (West 2001). For examples of various state anti-retaliation statutes, see supra note 4.}

Without anti-retaliation laws, an employee may have a right to apply for workers’ compensation; however, nothing would prevent the employer from discharging or disciplining the injured employee for pursuing compensation. Facing this possibility, an employee may be less likely to pursue compensation, or even medical attention, for his injuries.\footnote{See Coolidge v. Riverdale Local Sch. Dist., 797 N.E.2d 61, 68 (Ohio 2003) ("[Plaintiff]’s only recourse would have been to work despite his injury, an alternative clearly at odds with the beneficent purposes of the Act.").} Therefore, the purpose of these anti-retaliation statutes is to avoid a chilling effect.\footnote{See Galante v. Sandoz, Inc., 470 A.2d 45, 48 (N.J. Super. Ct. Law Div. 1983) (noting the employer’s ability to chill employee’s exercise of his rights).}

B. By Common Law Tort

Instead of, or in addition to, statutory protection, many courts have ruled that an employee’s discharge in retaliation for filing a workers’ compensation claim violates public policy.\footnote{See supra note 4 (listing cases that found a violation of public policy where an employer retaliates against an employee for filing a workers’ compensation charge).} The traditional presumption is that all employment relationships are consid-
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...the relationship at any time, with or without cause. This traditional presumption has been subject to some exceptions. For instance, termination is wrongful if it violates "a clear and substantial public policy."  

Although there is not one correct definition of "public policy," most courts agree that to find an exception, a right must be "so substantial and fundamental that there can be virtually no question as to [its] importance for promotion of the public good." Courts will generally recognize public policies that are based on prior statutes or judicial decisions. Typically, public policy exceptions fit into one of three categories of employee conduct: "(1) exercising a statutory right or obligation; (2) refusing to engage in illegal activity; [or] (3) reporting criminal conduct to supervisors or outside agencies." For states that have enacted workers' compensation statutes, a wrongful discharge claim based on retaliation would fit into the first category.  

In 1973, the Indiana Supreme Court was the first to hold that the discharge of an employee in retaliation for filing a workers' compensation claim violated public policy. Other courts have followed its lead. A Kansas appellate court provided a very rational explanation for recognizing this public policy exception. According to the court, workers' compensation laws were created to "provide[] efficient remedies and protection for employees." The laws were designed to promote the general welfare of the people in the state and are often the exclusive remedy for injured employees. Allowing an employer to influence an employee's free exercise of these rights would be contrary to the purpose of workers' compensation laws.

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23 Id. (citations omitted).
24 Id. § 54 (citations omitted); see also Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (III. 1981) ("[P]ublic policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions."); Painter v. Graley, 639 N.E.2d 51, 56 (Ohio 1994) ("The existence of... public policy may be discerned by the Ohio judiciary based on sources such as the Constitutions of Ohio and the United States, legislation, administrative rules and regulations, and the common law.").
26 Id. § 53 (citations omitted).
28 See supra note 4 (citing cases that found retaliatory discharge to be a violation of public policy).
29 See Murphy, 630 P.2d at 192.
30 Id.
III. ABSENTEEISM CAUSED BY A WORK-RELATED INJURY

An employee who suffers a serious work-related injury may miss several days of work while recovering. If the employee compiles several months of absenteeism, the employer may discharge the employee pursuant to its absentee policy. However, the employer will not violate the state's anti-retaliation statute because the discharge is in response to chronic absenteeism in violation of company policy, not to filing a workers' compensation claim. As demonstrated below, a small minority of state courts recognize a cause of action for injured workers who are absent due to a work-related injury and subsequently discharged. Some courts have decided that these situations fit within the liberally-construed language of their anti-retaliation statutes. Other courts have decided to create a public policy exception to protect these workers.

A. Statutory Interpretation—Minority View

Some courts have attempted to protect workers discharged pursuant to an absentee policy by broadening their workers' compensation statutes through liberal interpretation. In *Lo Dolce v. Regional Transit Service, Inc.*, an employer discharged an employee because of absenteeism resulting from an employment-related accident. New York's workers' compensation statute stated that no employer could "discharge or in any manner discriminate against an employee" for filing a worker's compensation claim. The New York Supreme Court ruled that the employer's absenteeism policy "explicitly" violated the statute. In *Griffin v. Eastman Kodak Co.*, under similar facts, the court clarified its stance. It ruled that the discharges in both the present case, and in *Lo Dolce*, violated the law because they were "triggered" by an absence due to a work-related injury. According to the court, a contrary result would cause a chilling effect on employees reporting injuries and receiving compensation. The New York Court of Appeals disapproved of these results, stating that such a broad interpretation "distort[s] the meaning and purpose" of the statute.

32 Id. at 505 (citing New York's workers' compensation statute).
33 Id.
35 Id. at 442.
36 Id.
In *Judson Steel Corp. v. Workers' Compensation Appeals Board*,

38 an injured employee received workers' compensation benefits under California law. His employer discharged him pursuant to a clause in the employee's union contract stating that an employee shall be terminated when he has not performed any work for twelve consecutive months. 39 A California statute prohibited employers from discharging or discriminating against employees who filed workers’ compensation claims. 40 The court noted that the California legislature had recently added another provision to its workers’ compensation act, which stated, “It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment.” 41 The court held that the situation in which an employee is “penalized solely because he was injured on the job” fit within the scope of these provisions. 42 The dissent argued that the majority misinterpreted the statute. According to the dissent, it is difficult to understand how an employer “discriminates” against an employee when it enforces a contract negotiated on the employee’s behalf by his union. 43

**B. Statutory Interpretation—Majority View**

Most courts have strictly construed their state anti-retaliation statutes. As a result, injured employees just beyond the reach of anti-retaliation statutes have been without redress. Ohio’s pre-

44 Coolidge law followed this pattern and was initiated by the Ohio Supreme Court case *Wilson v. Riverside Hospital*. 45 In that case, an employer discharged an injured employee pursuant to its ten-week leave of absence policy, and the employee challenged the discharge under Ohio’s anti-retaliation statute. 46 While the Ohio Supreme Court decided the case on a narrower issue, 47 both the dissenting and concurring judges agreed that terminations for lawful reasons, such as violation of a neutral absence policy, were not covered under the statute. 48 As a result, many lower appellate

38 586 P.2d 564 (Cal. 1978).
39 Id. at 566.
40 Id. (citing CAL. LAB. CODE § 132a).
41 Id. (citing CAL. LAB. CODE § 132a).
42 Id. at 569 (citations omitted).
43 See id. at 571 (Richardson, J., dissenting).
44 479 N.E.2d 275 (Ohio 1985).
45 Id. at 277; see also supra Part II.A (discussing Ohio’s anti-retaliation statute).
46 See Wilson, 479 N.E.2d at 277 n.2 (“[W]e do not determine or consider the validity of appellee’s leave of absence policy for its employees as it relates to R.C. 4123.90.”).
47 See id. at 277-78 (Wright, J., concurring) (stating that an absence policy “does not discriminate on any basis.”); id. (Holmes, J., dissenting) (“[N]o employee is guaranteed to return to his or her job if that employee’s leave exceeds [the term in the leave of absence policy].”).
Courts have used this language in support of the lawfulness of the discharge of injured workers pursuant to absenteeism policies.\(^4\)

Even though a provision in Ohio’s workers’ compensation act states that it “shall be liberally construed in favor of employees,”\(^4\) most of Ohio’s lower courts hold that an employer can lawfully discharge an employee for any lawful reason, including pursuant to a neutral attendance policy.\(^5\) According to these courts, not every unfavorable action taken against an employee is covered under the statute.\(^5\) An employee who files a workers’ compensation claim is not totally insulated from discharge.\(^5\) Instead, the statute is strictly limited to protect those who have been demoted or dismissed because of a workers’ compensation claim, not because of a work-related injury.\(^5\) An employer must take a “punitive action” against an employee for filing a claim.\(^5\) As a result, some evidence of retaliatory motive must exist.\(^5\)

Somewhat contrary language appears in two Ohio cases. In *Caldwell v. Columbus Developmental Center*,\(^5\) involving an injured worker discharged for failing to submit leave of absence papers, the Tenth District Court of Appeals stated that “if an employee is off work because of an industrial injury and is unable to return because of that injury, the employee does not need permission from the employer to be absent from work.”\(^5\) In *Oil Chemical & Atomic Workers International Union v. RMI Co.*,\(^5\) involving whether the phrase “leave of absence” in a collective bargaining agreement included leave due to a compensable injury, the Eleventh District Court of Appeals stated that public policy would not “allow an employer to force a worker to choose between going

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\(^{49}\) OHIO REV. CODE ANN. § 4123.95 (West 2001).

\(^{50}\) See supra note 9.


\(^{56}\) 547 N.E.2d 417 (Ohio Ct. App. 1989).

\(^{57}\) Id. at 419. The Sixth Circuit called this decision an “anomaly” in Ohio law. Copper, 1994 U.S. App. LEXIS, at *4.

\(^{58}\) 534 N.E.2d 110 (Ohio Ct. App. 1987).
back to work or being terminated.” These statements hint that injured employees may be entitled to greater protection in Ohio than the plain language of the anti-retaliation statute allows.

State courts in New York and Oklahoma, however, agree with the majority of Ohio lower courts, interpreting similar anti-retaliation statutes as requiring a causal connection between the discharge and the filing of a workers’ compensation claim. Some courts have noted that this majority rule creates the potential for employer abuse. For example, employers may use their attendance policies as pretext to discharge employees for filing a workers’ compensation claim. However, according to the courts, only the legislature can broaden the statute if it wishes to protect these workers. The court’s job is only to apply the statute as written.

C. Public Policy Exception—Majority View

The majority of courts have refused to find a public policy exception for absenteeism caused by a work-related injury. For example, in *Weinzetl v. Ruan Single Source Transportation Co.*, two employees were not released to return to work until ten months after they were injured. The Iowa Supreme Court determined that the employer should be able to ensure a “steady, reliable, and adequate work force.” Therefore, such a lengthy absence would be too disruptive to the employer’s business. Citing the “weight of the authority,” the court aligned itself with other courts that have rejected a public policy exception. State courts in Michigan and New Jersey have issued similar rulings.

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59 Id. at 114.
61 See *Metheney v. Sajar Plastics, Inc.*, 590 N.E.2d 1311, 1314 (Ohio Ct. App. 1990) (“It is certainly within the realm of possibility that an employer could discharge an employee under the guise of an attendance policy when the company's actual motivation is to punish the worker for filing a claim.”); *Zazo v. City of Akron*, 540 N.E.2d 733, 734 (Ohio Ct. App. 1987) (“The potential for abuse in an absentee-control policy ... is noted.”).
63 *Metheney*, 590 N.E.2d at 1314.
64 587 N.W.2d 809 (Iowa 1998).
65 Id. at 812.
66 Id. at 813.
67 Id.
68 See *Clifford v. Cactus Drilling Corp.*, 353 N.W.2d 469, 471 (Mich. 1984) (“We cannot agree ... that an employee's protection from discharge in retaliation for filing a workers' compensation claim necessarily includes protection from discharge because of an absence from work because of a work-related injury.”); *Galante v. Sandoz, Inc.*, 470 A.2d 45, 49 (N.J. Super. Ct. Law Div. 1983) (“[T]o expand the breadth of this statute ... is to confer upon the employee a benefit not contemplated by the legislature; namely, unlimited absences from work with impunity.”).
D. Public Policy Exception—Minority View

At least two states recognize a public policy exception for discharged employees with work-related injuries: Kansas and Maine. In Coleman v. Safeway Stores, Inc.,\(^69\) the Kansas Supreme Court recognized such a claim.\(^70\) It stated that Kansas' workers' compensation act was designed to promote the welfare of the state's people.\(^71\) Allowing employers to chill employees in exercising their rights would subvert the act's purposes.\(^72\) Therefore, state public policy prohibited employers from even "indirectly" firing employees for filing a workers' compensation claim.\(^73\)

In Lindsay v. Great Northern Paper Co.,\(^74\) the Maine Supreme Court also recognized an absenteeism claim based on state policy. The court stated that, in enacting the workers' compensation act, the legislature recognized that "accidents are inevitable incidents of modern industry" and that employees should not bear the burden of those accidents.\(^75\) According to the court, an injured employee must receive not only compensation, but also the necessary time-off to complete recovery. Although the statutes did not explicitly recognize this latter right, the court held it was "implicit" in the act.\(^76\)

IV. THE COOLIDGE DECISION

A. Facts

Ohio recently joined the minority of courts to create protection for injured workers discharged due to absenteeism. In Coolidge v. Riverdale Local School District,\(^77\) the court was faced with a very sympathetic plaintiff. Coolidge was a continuing-contract teacher who was assaulted and seriously injured by one of her students.\(^78\) She remained off-work for over two years.\(^79\) Since the date of the injury, Coolidge collected temporary total disability

\(^69\) 752 P.2d 645 (Kan. 1988).
\(^70\) Id. at 652.
\(^71\) Id.
\(^72\) Id.; see also Clifford, 312 N.W.2d at 381 ("Permitting an employer to fire an employee for absences due to a compensable claim... would have a chilling effect on the filing of such claims. Public policy, therefore, dictates the opposite result.").
\(^73\) Coleman, 752 P.2d at 652.
\(^74\) 532 A.2d 151 (Me. 1987).
\(^75\) Id. at 153.
\(^76\) Id.
\(^77\) 797 N.E.2d 61 (Ohio 2003).
\(^78\) Id. at 62.
\(^79\) Id. at 62-63.
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("TTD") compensation under Ohio law.\textsuperscript{80} The school board voted to terminate her contract because she had exhausted all leave and was unable to perform her teaching duties.\textsuperscript{81} At a hearing requested by Coolidge, the referee determined that Ohio law allowed employers to terminate teachers for "other good and just cause."\textsuperscript{82} The referee found that "other good and just cause" included absenteeism even if due to a compensable injury.\textsuperscript{83}

\textbf{B. Precedent—Or Lack Thereof}

Coolidge conceded that the employer's conduct did not fall within Ohio's anti-retaliation statute.\textsuperscript{84} Therefore, in order for her to be protected, the Ohio Supreme Court had to carve out a public policy exception.\textsuperscript{85} The court recognized that Ohio law previously ran counter to this line of reasoning,\textsuperscript{86} but cited approvingly the language from Caldwell v. Columbus Developmental Center\textsuperscript{87} and Oil Chemical & Atomic Workers International Union v. RMI Co.,\textsuperscript{88} which hinted at public policy protection for injured employees with chronic absenteeism.\textsuperscript{89} The court also cited approvingly language from other state court decisions, including Coleman (Kansas) and Lindsay (Maine), that have recognized public policy exceptions.\textsuperscript{90} The court declared that these positions are more consistent with the purposes of the workers' compensation laws.\textsuperscript{91} The court held that a contrary view would produce an "anomalous" result: an employer could not fire an employee for pursuing a claim but could fire the employee for the absenteeism that enables him to receive the compensation in the first place.\textsuperscript{92}

\begin{footnotesize}
\textsuperscript{80} Id. at 63; see also OHIO REV. CODE ANN. § 4123.56 (West 2001) (setting forth the requirements for receiving temporary total disability compensation).
\textsuperscript{81} Coolidge, 797 N.E.2d at 63.
\textsuperscript{82} Id. (citing OHIO REV. CODE ANN. § 3319.16 (West 1999) (which governs the board of education's termination of teachers' contracts)).
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 65.
\textsuperscript{85} Ohio has recognized public policy exceptions to the employment-at-will doctrine since the Ohio Supreme Court's decision in Greeley v. Miami Valley Maintenance Contractors, Inc., 551 N.E.2d 981 (Ohio 1990).
\textsuperscript{86} Coolidge, 797 N.E.2d at 65-66.
\textsuperscript{87} 547 N.E.2d 417 (Ohio Ct. App. 1989).
\textsuperscript{88} 534 N.E.2d 110 (Ohio Ct. App. 1987).
\textsuperscript{89} Coolidge, 797 N.E.2d at 67-68.
\textsuperscript{90} Id. at 66-69.
\textsuperscript{91} Id. at 68.
\textsuperscript{92} Id. at 69.
\end{footnotesize}
C. Public Policy Support

The court used two Ohio statutes as public policy support. The first source of policy was Ohio's anti-retaliation statute. The court stated that the basic purpose of a retaliation statute is to allow employees to exercise their rights to compensation without fear of employer retribution. Employers must not force an employee to choose between applying for benefits and retaining his job. The court argued that the same type of coercion exists with absenteeism due to a work-related injury, except an employer forces an employee to choose between enjoying benefits and retaining his job.

The second source of public policy was the Ohio statute that provided TTD compensation. The court stated that the basic purpose of TTD compensation was to "compensate an injured employee for the loss of earnings that he or she incurs while the injury heals." Allowing an employer to discharge such a worker because of the compensable disability would be inconsistent with this purpose.

D. Notable Aspects

One notable aspect of the Ohio Supreme Court's decision is the breadth of its public policy exception. While a public policy exception is an exception to the employment-at-will doctrine, in Coolidge, the court applied the public policy exception to a teacher covered under a collective bargaining agreement. Other courts are less generous in applying public policy exceptions. For example, Pennsylvania courts only recognize a wrongful discharge public policy exception for at-will employees. One Pennsylvania court reasoned that its public policy exception was created to provide a remedy for employees with no other recourse. Public policy also favors the right of parties to enter into contracts.

Furthermore, other state courts that have recognized protection for workers absent due to a work-related injury, including
California, Maine, and Kansas have limited such protection to workers who are able to return and perform the functions of their jobs. The Coolidge court neglected to set any limits on how long an employee can remain absent before an employer can lawfully discharge him.

Another notable aspect of the Coolidge decision is the court’s expansion of its basic holding. In dicta, the court disapproved of certain seemingly “independent grounds” for discharge other than absenteeism. The court stated that an employee receiving temporary total disability compensation “may not be discharged for failing to complete forms required for a leave of absence, or for failing to notify his or her employer as to the length of the absence, where the employer is otherwise on notice of the employee’s condition and status.”

While not explicitly placing any limits on its decision, the court’s holding contains at least three implicit limitations. First, the exception only applies when an employee is discharged. In contrast, Ohio’s anti-retaliation statute protects workers from not only discharge but also demotion, reassignment, or any other punitive action. Second, the exception applies only to an employee discharged after receiving TTD compensation under Ohio law. Therefore, it would not cover employees receiving other forms of compensation. Third, the exception applies only to discharges based solely on absenteeism or inability to work. Therefore, if the employer has reasons for termination other than absenteeism, failure to complete required forms, or failure to provide notice, the employer may lawfully discharge the employee.

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104 See Judson Steel Corp. v. Workers’ Comp. Appeals Bd., 586 P.2d 564, 569 (Cal. 1978) (noting that the statute “does not compel an employer to ignore the realities of doing business by ‘reemploying’ unqualified employees or employees for whom positions are no longer available”).

105 See Jandreau v. Shaw’s Supermarkets, Inc., 837 A.2d 142, 146 (Me. 2003) (“Neither the Act nor our decisions require an employer to keep an employee on the books indefinitely when the employee can no longer meet the requirements of a job.”).


107 Coolidge, 797 N.E.2d at 70.

108 Id.

109 See id. at syllabus.

110 See OHIO REV. CODE ANN. § 4123.90 (West 2001).

111 Coolidge, 797 N.E.2d at syllabus.

112 See id.
V. A CRITIQUE OF COOLIDGE

A. Coolidge Is Theoretically Defensible

Consider the following simplified hypothetical: A seriously injured employee is forced to take several months off to recover from his injury. His employer fires him for violating its neutral absenteeism policy. The Ohio General Assembly has not offered the employee any protection from losing his job, so the court steps in to protect him. Ignoring the practical consequences of Coolidge for the time being, the court's decision appears to be a very generous and logical extension of workers' compensation rights for injured workers.

1. The Court Has the Authority to Declare Policy

One argument against the Coolidge decision is that the Ohio Supreme Court overstepped its bounds by creating a new cause of action. In fact, many state courts specifically reject any role in creating public policy exceptions to the employment at-will doctrine.113 According to this view, the job of the legislature is to create policy; the judicial branch is only supposed to interpret and apply the law as written.114 If the legislature had wanted to protect chronically-absent injured workers, it would have written explicit protection for them into the anti-retaliation statute. Plus, lower courts have been deciding cases involving chronically-absent employees since the early 1980s. The legislature was certainly aware of the issue. If the legislature wanted to protect these workers, it could have easily amended the statute.

However, many states, including Ohio, recognize that the judicial branch plays a role in deciding public policy.115 According to the Ohio Supreme Court, "[t]he existence of . . . public policy may be discerned by the Ohio judiciary based on sources such as the Constitutions of Ohio and the United States, legislation, administrative rules and regulations, and the common law."116 Further, the court has noted that "when the common law has been out of step with the times, and the legislature, for whatever reason, has

113 See, e.g., Gil v. Metal Serv. Corp., 412 So. 2d 706, 708 (La. Ct. App. 1982) ("Broad policy considerations creating exceptions to employment at will and affecting relations between employer and employee should not be considered by this court.").
114 See, e.g., Metheney v. Sajar Plastics, Inc., 590 N.E.2d 1311, 1314 (Ohio Ct. App. 1990) ("[I]t is the job of this court to apply the law as written.").
115 See Coolidge, 797 N.E.2d at 64 ("[N]o principle of judicial restraint . . . requires courts to refrain from deciding public-policy questions.").
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not acted, we have undertaken to change the law, and rightfully so. After all, who presides over the common law but the courts?117 If the legislature wanted to limit the role of the courts in creating public policy exceptions, it could have taken the same action as the legislature in Alabama, which has specifically codified only two exceptions to the employment-at-will presumption.118

One can argue that the court’s lack of balance in Coolidge was flawed because the court favored seriously injured workers over an employer’s business interests. Had the legislature considered this question, it may have balanced employee and employer interests more carefully. However, nothing dictates that legislatures have to create totally balanced legislation. The court’s decision was a legitimate policy choice within the realm of possible policy choices.

2. Change in the Law Is a Certainty

Another argument against the Ohio Supreme Court’s decision is that even if the court can create public policy, it should refrain from doing so to avoid creating great uncertainty in the law. Ohio businesses have relied on previous workers’ compensation law for nearly two decades and have expended resources in creating employee handbooks and policies to comply with that law. The Ohio Supreme Court’s new decision will cause employers to expend more resources to conform to the new policy.

Before Coolidge, only statutes governed Ohio’s workers’ compensation system. Therefore, it was a relatively stable area of law. However, employment law in general is less stable. New employment laws always create change, whether created by the legislature or the court. For example, employers all over the country must keep up-to-date with changes in federal employment practices based on U.S. Supreme Court decisions, congressional legislation, and administrative agency rules and adjudications, as well as state employment practices based on state supreme court decisions, state legislation, and state administrative agency regulations. Updating employee handbooks, workplace policies, and training methods is a legitimate and foreseeable cost of doing business for the modern employer. Thus, the Coolidge decision does not create any new burdens for employers.

3. Coolidge Is a Logical Extension of Workers' Compensation Laws

The court’s decision furthers the goals of workers’ compensation laws and is a logical extension of the anti-retaliation statute. The Ohio Constitution authorizes a system to “provid[e] compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of . . . employment.”119 As indicated above, the Ohio legislature enacted statutes entitling injured employees to compensation and protecting their ability to apply for it without fear of discharge.120 It is logical for the court to conclude that an injured employee entitled to compensation should also be able to enjoy the compensation without fear of discharge.

B. Coolidge Is a Practical Nightmare

In theory, Coolidge is defensible. In application, it is a nightmare. The unanswered questions that linger after the court’s decision have serious consequences for Ohio employers. As a result, the court should have either declined to create the public policy exception or at least severely limited its holding to avoid major damage.

1. Statute of Limitations

Under Ohio’s workers’ compensation anti-retaliation statute, workers must satisfy two jurisdictional conditions before filing a complaint.121 First, workers must provide their employer with written notice of an alleged violation within ninety days following the retaliatory action.122 Second, the employee must file a complaint within 180 days of the retaliatory action.123 This statute carefully balances the interests of the employer and the employees. The legislature granted the employees the benefit of a cause of action but placed limits on its application for the employer’s benefit.

In Coolidge, the court did not specify what type of statute of limitations should govern its new public policy exception. Under Ohio law, the statute of limitations for bringing an action for wrongful termination in violation of public policy is four years.124

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119 OHIO CONST. art. II, § 35.
120 See supra Parts I.A and II.
121 See Cross v. Gerstenslager Co., 580 N.E.2d 466, 467 (Ohio Ct. App. 1989) (“Compliance with the time of filing, the place of filing, and the content of the notice as specified in the statute are all conditions precedent to jurisdiction.”).
122 See OHIO REV. CODE ANN. § 4123.90 (West 2001).
123 See id.
124 See OHIO REV. CODE ANN. § 2305.09(D) (West 1994) (“An action . . . for an injury to the rights of plaintiff not arising on contract . . . shall be brought within four years after the
Since *Coolidge* involves a wrongful termination tort, the statute of limitations must be four years. Yet, the court in *Coolidge* took great efforts to demonstrate how employer coercion involving application for benefits (retaliation situation) and enjoying benefits (absenteeism situation) were virtually the same. However, discharge due to retaliation is arguably more egregious than discharge due to a neutral absenteeism policy because employers have a harmful motive. Therefore, it is illogical and ill-considered to allow the statute of limitations for this new cause of action to be as lengthy as the statute of limitations for a retaliation cause of action.

2. **Prospective or Retrospective Application**

The court in *Coolidge* did not declare when its public policy exception applied. Many stages of litigation exist in which the new decision could apply. For instance, the decision could apply to (1) only new cases initiated after the decision; (2) only new cases and cases in a specified stage of litigation; (3) new cases and all cases still pending at the time of the decision; or (4) all cases regarding the issue, past, present, and future.

The United States was founded with suspicion towards retrospective legislation. The reasoning is that people should be governed by the law in effect at the time of their actions. This gives a person the opportunity to bring his behavior in accordance with the law. If the Ohio legislature drafted a statute to protect injured employees discharged for absenteeism, the Ohio Constitution would require the statute to apply only to future employer conduct. A common law cause of action, however, does not contain this limitation. When one considers the possible real world consequences of *Coolidge*'s retrospective application, employers across the state could face serious harm.

For example, before *Coolidge*, employers relied in good faith on previous Ohio law that allowed discharge of injured employees...
for violating a neutral absenteeism policy. Many employers were likely involved in retaliation litigation while the Ohio Supreme Court decided Coolidge, and these cases may still be involved in litigation. After Coolidge, can plaintiffs now amend their complaints to take advantage of the new cause of action? What about employees terminated years ago who had no cause of action at the time? Will employers suddenly be flooded with claims from all discharged employees in the past four years who were previously lawfully discharged pursuant to applicable law? Although these possibilities may not strongly affect small employers, large employers, who have fired hundreds of employees within the last four years according to neutral employment policies, face a very frightening prospect if they are found liable for previously lawful conduct.

3. Available Remedies

The Coolidge court also neglected to set forth the remedies available after a successful claim. Under Ohio's anti-retaliation law, a successful plaintiff can obtain only reinstatement with backpay and reasonable attorney fees. However, common law tort remedies can run the full gamut of damages, including punitive and compensatory damages. In Coolidge, the court ordered that employee's teaching contract be "restored to its previously effective status." This, in effect, is reinstatement. Is an employee entitled to tort remedies in addition to reinstatement or only to the anti-retaliation remedies under Ohio statute?

More seriously, assume that an employer loses a Coolidge claim to several former employees who were discharged within that last four years. Assume further that the judge orders reinstatement of some or all of them. How must the employer accommodate these employees? Must the employer reinstate them to their former positions? What is the employer's required response when the positions are filled or no longer exist? Lower courts should expect to keep busy with litigation for the next decade attempting to answer these questions and more.

CONCLUSION

Workers' compensation laws reflect sound and decent public policy to provide for employees injured in the course of their employment. Anti-retaliation laws are a necessary extension of

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129 See OHIO REV. CODE ANN. § 4123.90 (West 2001).
130 Coolidge, 797 N.E.2d at 71.
workers' compensation laws. The effectiveness of workers' compensation is hampered unless employees can freely pursue their entitled benefits. However, anti-retaliation laws do not solve all of the problems in this area. The effectiveness of workers' compensation is also hampered unless employees can freely enjoy their entitled benefits. Therefore, protecting seriously injured employees from discharge while they are recovering is another logical extension of workers' compensation laws.

The Ohio legislature should have extended its anti-retaliation statute to protect these workers. Had it done so, it could have considered the various issues left unanswered by the Coolidge decision and could have created a fair, balanced, and workable solution. The Ohio legislature is most likely unwilling to address this problem, at least in the near future. In certain instances, the Ohio Supreme Court should step in to protect individuals when the legislature is unresponsive. In this case, however, the Ohio Supreme Court's action creates more problems than it solves. Had the court answered these questions, its holding would have resembled a complex statutory scheme, which of course only the General Assembly has the authority to draft. Therefore, the state would have been better served if the court had not acted at all.

The Ohio Supreme Court recently refused reconsideration of its Coolidge decision. While the court may not be willing to back down on its holding, the court should prepare for an influx of litigation aimed at clarifying it.

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