

***Danyelle S.T. Wright<sup>1</sup> on the Employer's Redress: Prevailing Employer on Discrimination Claim Entitled to Pursue Legal Remedies, Without Fear of Employee Retaliation Claim: Greer-Burger v. Temesi (2007), 116 Ohio St.3d 324, 325, 879 N.E.2d 174.***

Common sense tells you that employers should be able to equalize a baseless discrimination claim initiated by an employee, which has the potential of damaging the employer's reputation and business. Until recently, however, employers were unable to seek such redress for fear that the employee would initiate a retaliation claim. On December 12, 2007, the Ohio Supreme Court recently restored the constitutional rights of employers, allowing them to file a lawsuit against an employee who has taken part in a protected, albeit unfounded, activity such as filing a discrimination lawsuit or charge with the Ohio Civil Rights Commission ("OCRC") so long as the claim against the employee is not objectively baseless.

## **I. Facts**

On June 10, 1998, Tammy Greer-Burger filed a sexual harassment suit against her employer, Laszlo Temesi.<sup>2</sup> Greer-Burger's suit went to trial and the jury found in favor of Temesi.<sup>3</sup> Five months later, Temesi filed suit against Greer-Burger claiming abuse of process, malicious prosecution, and intentional infliction of emotional distress.<sup>4</sup> Temesi sought compensatory and punitive damages, as well as the attorney fees and costs he incurred in defending the lawsuit.<sup>5</sup>

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<sup>1</sup> Ensuing expert commentary prepared with the very capable assistance of Jamielyne Jenkins, associate at Sebaly Shillito + Dyer, A LEGAL PROFESSIONAL ASSOCIATION, Dayton, Ohio.

<sup>2</sup> *Greer-Burger v. Temesi* (2007), 116 Ohio St.3d 324, 325, 879 N.E.2d 174.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Thereafter, Greer-Burger filed a claim with the Ohio Civil Rights Commission (“OCRC”), alleging that Temesi was retaliating against her because she pursued her sexual harassment claim, which was a protected activity.<sup>6</sup> The OCRC, based solely on the fact that Temesi had filed suit, agreed with Greer-Burger, finding “probable cause” that Temesi engaged in illegal retaliation.<sup>7</sup> An OCRC administrative law judge found that Temesi’s lawsuit was prohibited retaliatory conduct, and recommended that Temesi “cease and desist” all discriminatory practices and pay the \$16,000 Greer-Burger incurred in defending the lawsuit.<sup>8</sup> The OCRC adopted the cease and desist recommendation, which precluded Temesi from moving forward with his lawsuit, and ordered Temesi to pay Greer-Burger.<sup>9</sup> Temesi appealed the OCRC Order, however, the Cuyahoga County Common Pleas Court affirmed the OCRC’s decision, and the Eighth District Appellate Court affirmed the judgment, holding that because Temesi asked for punitive damages and Ohio law “essentially creates an absolute privilege for the filing of a discrimination suit or charge,” Temesi’s filing of the civil suit was retaliatory.<sup>10</sup>

## **II. The Supreme Court Decision**

The Ohio Supreme Court, in a case of first impression<sup>11</sup>, reversed holding that the “right to petition one’s government for the redress of grievances is enshrined within the First Amendment of the United States Constitution,” and that “the ability to seek redress in the courts is a fundamental right.”<sup>12</sup> The Court also recognized, however, that the First

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 325-326.

<sup>11</sup> *Id.* at 324.

<sup>12</sup> *Id.* at 326.

Amendment does not allow an employer to file “sham” litigation, which has been defined by the United States Supreme Court as a lawsuit that is “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.”<sup>13</sup>

The Court found that Temesi’s suit against Greer-Burger was not per se retaliatory, and explained that Temesi must be afforded an opportunity to show that there is an objective basis for his lawsuit.<sup>14</sup> The Court majority explained that the employer must demonstrate that its lawsuit presents “genuine issues of material fact”, in other words, that the evidence as presented by the employer (even if the employee disagrees with the evidence) could result in judgment for the employer.<sup>15</sup> This is the standard courts use when they decide to grant or deny a motion for summary judgment.<sup>16</sup>

In remanding the case to the OCRC to determine whether Temesi can establish that he had an objective basis for filing the claim, the Court stated that “employers who are truly aggrieved deserved the opportunity to have their cases be heard.”<sup>17</sup>

### **III. Practical Implications**

- While the Greer-Burger decision is a victory for employers, employers should carefully consider the risk and expense (time and attorney fees) of pursuing claims (defamation, malicious prosecution, intentional infliction of emotional distress) against an employee that has engaged in protected activity. Such claims are difficult to prove, as are the measure of damages associated with the claims.

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<sup>13</sup> *Id.*, citing *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (1993), 508 U.S. 49, 60, 113 S.Ct. 1920.

<sup>14</sup> *Id.* at 327-328.

<sup>15</sup> *Id.* at 328.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 329.

- Best practice dictates that an employer should not file a lawsuit against its employee unless it has an objective basis for initiating the suit, such as a meritless complaint filed by an employee **and** objective harm to the employer.
- Failure to identify an objective basis for the lawsuit may result in dire consequences to the employer, such as dismissal of the suit, or an order to pay the employee's legal expenses in defending the suit.

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Danyelle S.T. Wright is a shareholder in the law firm of Sebaly Shillito + Dyer and concentrates her practice in Labor & Employment and Workers' Compensation. Ms. Wright serves as a single point of contact for clients, providing guidance on various employment matters, including, but not limited to, wage-hour disputes. Ms. Wright received her Bachelor of Arts in Government and Africana Studies from Cornell University in 1993 and her J.D. from The Ohio State University College of Law in 1999. Ms. Wright is a member of the Dayton, Ohio State, American, National, and Federal Bar Associations. She is also a member of the American Association for Justice, Member-At-Large of the Dayton Bar Association, and serves on the Labor & Employment and Workers' Compensation Committees of the Dayton Bar Association. Danyelle also serves on the Personnel Committee for Daybreak, a local non-profit organization. Danyelle is on the Board of Trustees for the Dayton Contemporary Dance Company, Dayton Metropolitan Housing Authority, Clothes that Work!, and the National Conference for Community and Justice. She also is a member of the Leadership Dayton Class of 2007, and has been recognized as a 2006 and 2007 Ohio Super Lawyer, Rising Star, and Dayton Business Journal 40 under 40 honoree.