IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO: 70,394

WILLIAM F. SCOTT,

Petitioner/Plaintiff,

vs.

OTIS ELEVATOR COMPANY,

Respondent/Defendant.
_____/

FILED
SID J. WHITE
JUN 18 1987
CLERK, SUPREME COURT
By _____ Deputy Clerk

BRIEF OF RESPONDENT

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CITATIONS OF AUTHORITY

PREFACE

This case is before this Court on a certified question. Petitioner was the Plaintiff/Employee in the trial court and Respondent was the Defendant/Employer. Herein the parties will be referred to as they stood in the lower court, or by proper name. The following symbol will be used:

(A -) Petitioner's Appendix

(R -) Record-on-Appeal

STATEMENT OF THE CASE

Scott sued his Employer, Otis Elevator Company, alleging wrongful discharge in retaliation for filing a worker's compensation claim. Otis answered and denied that Scott had been wrongfully discharged. Otis claimed that Scott had been rightfully discharged for assaulting a fellow construction worker with a gun (R692,727). Otis also raised as an affirmative defense the statute of limitations (R692).

Otis subsequently filed a Motion for Summary Judgment and Motion for Judgment on the Pleadings based upon its statute of limitations defense, which motions were denied (R725,736). Otis also filed a Motion in Limine to prevent evidence at trial regarding proof of future damages (R800).

The jury returned a verdict in favor of Scott and against Otis and assessed Scott's past lost wages at $100,000, and his future lost wages at $200,000 (R591-92). At the hearing on Otis' Motion for New Trial, the trial judge acknowledged that she disagreed with the jury's verdict as to liability and damages (R653), but she did not feel she should substitute her judgment for that of the jury (R653). Accordingly, Final Judgment was entered against Otis pursuant to the jury verdict (R831). Otis' Motion for Judgment in Accordance with Motion for Directed Verdict, Motion for New Trial, and Motion for Remittitur (R833-35,853-94) were denied (R898).

Otis appealed to the Fourth District Court of Appeal, and Scott cross-appealed. Otis raised six issues: (1) that Scott's claim was barred by the Statute of Limitations; (2) that Otis was entitled to a directed verdict because there was no wrongful discharge as a matter of law; (3) that Otis was entitled to a directed verdict or new trial on the $100,000 award for past lost wages; (4) that Otis was entitled to a motion in limine or directed verdict on the $200,000 award for future lost wages; (5) that the jury instructions were totally inadequate and; (6) that the trial court had erred in excluding the testimony of Willie Ferguson.

The Fourth District reversed the judgment against Otis and directed that judgment be entered in favor of Otis based solely upon the statute of limitations issue (A1). The court found it unnecessary to reach the other issues raised on appeal by Otis, which provided additional bases for reversal of the judgment against Otis.

The Fourth District certified the following issue to this Court as being of great public importance (A2):

> Are actions for wrongful discharge brought pursuant to section 440.205, Florida Statutes (1979), governed by BROWARD BUILDERS EXCHANGE, INC. v. GOEHRING, 231 So.2d 513 (Fla. 1970).

STATEMENT OF THE FACTS

Scott had worked for Otis Elevator for 19 1/2 years as an elevator mechanic/foreman (R229). On September 19, 1980 the police were called to the Otis' work site (Burdines' Galleria) by another workman who advised the police that Scott had assaulted him with a gun. The police talked with Scott who denied knowledge of the incident (R387). The police could not find a gun on the premises and asked to look in Scott's vehicle. The police found bullet casings on the floor board of Scott's truck, and a "clip" in the glove compartment that fit the type weapon the victim had described (R388). The police handcuffed Scott and took him in a patrol car to the police station,

where he was arrested (R389). Scott, who was subsequently prosecuted for the assault (R392), pled nolo contendere to the charge (R415).

As a result of this incident, the Vice President of Burdines requested that Scott not be allowed to work on this job in the future (R316,369-71). When Scott returned to work the day following his arrest, his supervisor, Mitchell, discussed the gun incident with Scott, and told him to take a few weeks off without pay (R257,312-14). After investigating the incident, on September 25, 1980, Scott was advised by Mitchell that his employment was being terminated because of the assault incident and the complaints of the Burdines' people (R319, 321). The Otis' personnel file indicated that Scott was terminated because of "customer complaints, absenteeism, tardiness" (R127).

Scott did not file a grievance contesting his discharge under the grievance procedure provided for in the collective bargaining agreement between the union and Otis (R339). In fact, he never complained to Otis about his discharge. The first time Otis knew that Scott was claiming that he had been wrongfully discharged was when Scott sued Otis four years later in September 1984 (R673-75).

In this lawsuit Scott contended he had been fired because he filed a worker's compensation claim. The evidence showed that in fact the worker's compensation claim was filed October 17, 1980, a month after Scott's employment was terminated (R326). Scott claimed, however, that he had actually injured his knee before he was terminated, on September 12, 1980, when he had fallen on some debris on the job site (R253-505). Scott admitted he had not reported the fall to Otis when it occurred (R273). Rather, the following week when his supervisor, Mitchell, made a routine visit to the jobsite (R501), Scott told him he had fallen and "reinjured" his leg (R124,273,253). Ten or so years before, Scott had broken his leg in a

non-work related accident, while he was playing baseball (R266). This had resulted in a 25% disability which had not prevented Scott from performing his job as a mechanic/foreman. Notwithstanding, Scott's supervisor, Mitchell, was well aware of the fact that Scott had had recurring problems with his leg over the years (R125,507).

Mitchell acknowledged that Scott told him he had fallen on some debris, and that Scott was limping and using a cane (R527). But Mitchell was emphatic about the fact that Scott merely indicated he had aggravated his old non-work related injury (R527). When Mitchell asked Scott if he wanted to fill out an accident report Scott said "no" because this was just a "recurring thing" and he was going to be all right (R505-06).

Scott admitted that Mitchell might have inquired as to whether he wanted an accident report filled out (R275). He admitted that he had not filled out an accident report, and had not mentioned to Mitchell that he wanted to go to a doctor or that he intended to file a worker's compensation claim (R275). Scott also admitted he told Mitchell he did not think the fall would prevent him from working (R274), and the matter was dropped. During Scott's final month at work, neither the fall nor any resulting injury was ever again mentioned (R507-08). A month after Scott was terminated, in October 1980, he filed a notice of injury (R326-27), and began receiving worker's compensation benefits, which he was still receiving at the time of this trial (R9).

The issue in this lawsuit was whether Otis wrongfully discharged Scott, contrary to §440.205 Fla. Stat., because he filed a claim, or attempted to file a claim, for worker's compensation. Mitchell testified that Scott was terminated because of the arrest incident (R367). Mitchell denied that Scott's injury had anything to do with his termination. In fact, by Scott's own testimony, Mitchell had been left with the impression that Scott was all right after the fall. He had no reason to believe that Scott might file a

worker's compensation claim (R133,519). And it was undisputed that Otis' District Manager, who was involved with Mitchell in making the decision to terminate Scott, had no knowledge that Scott had been injured on the job, because no one even mentioned it to him (R371).

Scott's own testimony did not support his claim that he was fired because of his injury. He testified that after his arrest, Mitchell told him that Burdines did not want him back on the jobsite, and that he should take some time off because he needed it (R312- 14,316,327-28). Scott testified that he "concluded" that he was "probably" being told this because of his knee injury (R278). When Scott was subsequently informed that he was being terminated, he admitted that Mitchell told him it was because of the arrest incident and because Burdines did not want him back on the jobsite (R319,321). Despite what Scott was told, he testified that he felt his accident "had a bearing on it" (R329). Scott had no facts to back up his contention that he was terminated because he had been injured on the job (R329-30). He simply testified he thought it was "implied" (R319).

The following is in response to specific statements contained in Scott's Statement of the Facts. Scott states that the investigating officer did not find any bullets matching the rifle that he had supposedly used in the assault. In fact, the evidence shows that the police found bullet casings on the floor of Scott's vehicle, and a clip in his glove compartment that fit the type weapon the victim had described (R388-89).

Scott states that he tried to contact Mitchell on the day he was injured but Mitchell was out of the office and that he spoke to him about the injury the following week when Mitchell came to the jobsite. Mitchell's testimony was that this occurred on a routine visit (R505), and not because he was visiting the jobsite as a result of Scott's injury.

Scott states in his brief that on the day he was terminated he had given Mitchell a form to fill out for an insurance disability policy that would cover his mortgage payments whenever he was sick or hurt. Scott implies that this put Otis on notice that he was injured badly enough to seek disability insurance, and resulted in his termination. In fact Scott himself testified that he gave this particular form to Mitchell after his termination, after he filed for worker's compensation payments and after he had seen a doctor (R351-52). The form that Scott gave to Mitchell on the day he was terminated was an entirely different form and had nothing to do with disability. Mitchell testified that the form he was presented with on that day was one pertaining to providing Scott with his house payments during his period of unemployment (R525). After the assault incident Scott had been told to take several weeks off without pay (R257,312-14). During that time period Otis investigated the assault incident and made a decision to terminate Scott. Because Scott knew he was going to be out of work for a few weeks, on September 25, 1980, he stopped by to see Mitchell and asked him to sign an unemployment form which would help him get his house payment paid for while he was out of work. It was at that point that Mitchell told Scott that a decision had been made to terminate him (R529).

Scott confuses the disability form and the unemployment form as if to make it appear that on the day he was fired he had notified Mitchell that he was applying for disability insurance. That is simply not the evidence.

Throughout his Statement of Facts, Scott states that although Otis claimed he was fired because of customer complaints, there was no documentation in his personnel file of customer complaints, only a notation on his termination notice that that was why he was being fired. Mitchell testified that up until 1979 they kept no personnel files on employees whatsoever (R521). In 1980 when Scott was terminated, while personnel files

were kept, Otis did not have a personnel office or a designated person in charge of keeping personnel files (R528-29). That responsibility was shared by Mitchell, the district manager and their secretary (R529). However, documentation or no documentation, it is not disputed that Scott was arrested for assaulting a co-employee with a gun on Otis' jobsite, that he pled nolo contendere to the charges arising out of that incident, and that Burdines had insisted that Scott not be allowed back on the jobsite.

Scott discusses incidents of tardiness and customer complaints which Mitchell had knowledge of in addition to the gun incident. Scott goes to great lengths to show that those incidents were insufficient to allow Otis to terminate him. Whether they were or were not is irrelevant. Scott did not sue Otis for firing him for these other incidents claiming they constituted an insufficient reason to terminate him. If that had been the case, Scott could have filed a grievance contesting his discharge under the grievance procedure provided for in the collective bargaining agreement. Rather, Scott sued Otis claiming that he was fired <u>because</u> he filed a worker's compensation claim.

Scott argues that Mitchell was aware that state law requires every work-related accident, no matter how slight, to be reported to the State within 10 days. However, Mitchell was also aware of the fact that Scott had an old leg injury and that he had had a recurring problem with that leg on several occasions (R125). This was not the first time that Scott's leg had bothered him over the years (R507). And Scott admitted that Mitchell had inquired as to whether this incident was one that necessitated filling out an accident report and Scott told him it was not (R275). Nothing else was ever said about it.

Scott states that over the years Burdines had requested that he work on all their jobs. Regardless, it is undisputed that after this assault

incident, Burdines requested that Otis never send Scott back to one of their jobs (R316,369-371).

Scott refers to the fact that after he received medical treatment and was released from the doctor's care to return to work, he called Otis regarding work, but he was told they had no position available. In Scott's brief he makes it appear that this all occurred before his termination. In fact, all of this occurred long after his termination. After being terminated with cause, Otis had no responsibility to rehire Scott once he recuperated from his knee injury, as Scott wishes to imply.

Scott states that he did not see a doctor or file a compensation claim when he was first injured because he knew Otis' attitude about injuries and "did not want to be a party to it". The evidence showed this vague statement merely referred to Otis' legitimate attempts to try to get the workmen to be more careful on the job. Scott testified that the workmen were "always told to hold the accidents down" (R265), but he admitted that it was fairly normal on any jobsite for an employer to want as few accidents as possible (R264). He admitted Otis always emphasized that they should be careful on the job, work safely and maintain a safe working area (R264). Scott said that at some point Otis had had a "rash of accidents" (R252), which resulted in Otis making the workers meet every Friday morning for a safety meeting (R252). That is when Scott claims Mitchell told them that the next workman who got injured was going to lose a week's work. Scott admitted he did not feel Mitchell was saying anything that should not be said by an employer on any job (R264).

Scott also testified that he had no idea when this meeting occurred in relationship to his own accident, but it was not within a short time of his accident, and he admitted that it could have been years before his accident (R265). Scott had no criticism of Mitchell's wanting to hold down the

accidents on the job. Importantly, Scott never claimed that Mitchell had told the workmen that if they filed a worker's compensation claim they would be fired. He simply claimed Mitchell said if they got injured they would lose a week's work, obviously in an attempt to try to get the workmen to be more careful. Scott produced no other workmen to testify that Otis had, in fact, ever made any workman lose a week's work because of an injury, much less that Otis had terminated a workman as a result. Moreover, Scott did not relate Mitchell's statement about losing a week's work to his own firing because, of course, Scott was terminated, not laid off for a week, and this occurred a month before he filed a worker's compensation claim.

Scott states that he testified that he "felt" his accident had a bearing on his termination but, of course, he could substantiate this feeling with no evidence of any sort. Scott also refers to his trial testimony to the effect that he believed the Otis employee who filled out Scott's accident report was fired. In point of fact this was simply more of Scott's speculation and conjecture since he prefaced this so-called belief with "I believe, but I'm not sure, I cannot substantiate with fact" (R330).

Scott concludes by once again misstating the evidence as to the different "forms"presented to Mitchell. Contrary to Scott's contention, Mitchell never admitted that on the date he terminated Scott, Scott had presented him with a disability insurance mortgage form. In fact Mitchell testified that Scott presented him with some kind of unemployment form, to provide him with house payments while he was out of work for two weeks, not a disability form (R525). Scott's own testimony made it clear that it was only after he was under his doctor's care that he later obtained a disability form which he asked Mitchell to fill out (R351). It is undisputed that Scott only started seeing a doctor for this knee injury after he filed the worker's compensation claim on October 22, 1980 and that was a month after he was terminated. Accordingly, pursuant

to Scott's own testimony the disability form came about only after his termination, and therefore could not have been the cause of his termination, as he implies.

Much of what is discussed in Scott's Statement of the Facts simply has no bearing on the issues in this lawsuit. Importantly, Scott does not demonstrate anywhere in his Statement of the Facts that he ever presented any evidence or testimony to support his claim that he was fired because of the injury he sustained in September 1980. He admitted that Mitchell told him he was being fired because of the gun incident. He admitted that at the time he was terminated he had not missed a day of work because of his leg injury, nor had he advised Mitchell that he needed medical care, nor that he intended to file a worker's compensation claim. In fact he filed a claim one month after his termination, and there was no evidence presented even by Scott that Otis knew that a worker's compensation claim was imminent. In fact, the evidence was to the contrary. All the evidence demonstrated Otis had no reason to believe Scott was going to file a claim, and therefore his termination could not have been in anticipation of such a claim.

Scott's case was nothing more than unsupported, and unjustified speculation on his part. He simply testified that when he was fired he concluded it was "probably" because of his knee injury (R278) and that he "felt" the injury had a bearing on it (R329). Scott has cited to no facts to create an issue in this regard except his sheer speculation and guess work which did not rise to the level of creating an issue of fact in this regard.

SUMMARY OF ARGUMENT

The Fourth District correctly ruled that the applicable statute of limitations is the two year statute of limitations for actions to recover "wages or overtime or damages or penalties concerning payment of wages and

overtime", rather than the four year statute pertaining to an action founded on a statutory liability. If this Court agrees that the two year statute of limitation is applicable to a wrongful discharge claim, then the other points presented to the court become moot. If the court disagrees with the Fourth District, then Scott still cannot recover for a variety of reasons the Fourth District never considered, and raised in Points IV - VIII.

First, Scott was not wrongfully discharged as a matter of law. The undisputed evidence indicates he was discharged subsequent to being arrested on the job and charged with assaulting another employee with a deadly weapon, to which Scott pled nolo contendere. Moreover, Scott failed to prove a prima facie case in that he failed to prove that he had filed, or was attempting to file, a worker's compensation claim when discharged, or that there was a causal connection between his discharge and an attempt to seek worker's compensation benefits. He also failed to meet his burden of proving that Otis' claimed legitimate reason for the discharge was nothing more than a pretext for firing him for attempting to seek worker's compensation benefits.

Scott's award of $100,000 for past wages should be set aside, remitted or a new trial granted because those damages were proximately caused by Scott's inability to work at a comparable job as a result of his knee condition, rather than as a result of his discharge. The award of $200,000 for future lost wages should likewise be set aside as not recoverable as a matter of law in a wrongful discharge case, as not proximately caused by Scott's discharge, as speculative and not reasonably certain.

The instructions given the jury on "wrongful discharge" were totally insufficient to instruct regarding the elements of the cause of action, the burden of proof, proximate case, mitigation, damages, etc.

The trial court erred in excluding the testimony of Otis' witness, Willie Ferguson, where his name had been given to Scott as a witness two weeks before trial.

The trial court did not err in failing to award Scott prejudgment interest where he did not plead it, it was not listed as an issue on the pretrial stipulation and his counsel advised the court during trial that he was not seeking prejudgment interest.

The trial court did not err in failing to instruct the jury on mental pain and suffering and humiliation, and in striking this claim. There was no legal or factual basis for the claim.

ARGUMENT

POINT I - CERTIFIED QUESTION

> ARE ACTIONS FOR WRONGFUL DISCHARGE BROUGHT PURSUANT TO SECTION 440.205, FLORIDA STATUTES (1979), GOVERNED BY BROWARD BUILDERS EXCHANGE, INC. v. GOEHRING, 231 So.2d 513 (Fla. 1970).

Scott sued Otis on September 10, 1984 alleging that he had been wrongfully discharged from his employment on September 26, 1980 in contravention of §440.205 Fla. Stat. which provides:

> No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Worker's Compensation Law.

Scott sought, and the jury awarded, $100,000 in "damages" for past lost wages and $200,000 in damages for future loss of wages (R591-92). The Fourth District Court correctly held that Scott's claim for wrongful discharge was governed by the two year statute of limitations dealing with wage claims.

In BROWARD BUILDERS EXCHANGE, INC. v. GOEHRING, 231 So.2d 513, 515 (Fla. 1970) the plaintiff brought suit to recover the balance of monies which she claimed she was owed under an employment contract. The defendant had allegedly breached the contract by wrongfully discharging the plaintiff before the expiration of the term of her employment. The trial court dismissed the plaintiff's complaint holding applicable the one year statute of limitations

for lawsuits for wages contained in §95.11(7)(b) Fla. Stat., [the predecessor to the two year statute of limitations presently contained in §95.11(4)(c)]. The Fourth District reversed holding that the statute of limitations for recovery of wages did not apply where a contract was involved. The Fourth District felt that the statute of limitations for contracts, written, or oral, was applicable. The Florida Supreme Court, in overruling the Fourth District's decision, did not find it important that a contract was involved:

> ...[i]t is difficult to conceive of a claim for wages which does not in some manner arise from a contract expressed or implied.

The Court recognized policy reasons for the legislature's enactment of a statute of limitations to deal with all wage claims between employers and employees, whether based on contract or not:

> The compelling reasons for the legislation difficulty in preserving the evidence, the high mobility of the labor force, the harassment of management by a multiplicity of suits brought years after the fact are the same regardless of what gives rise to the cause of action.

The court concluded that in enacting the statute of limitations for the recovery of wages, the legislature:

> ...did indeed intend to treat the whole field of suits for wages, overtime, etc....
>
> Thus we hold that §95.11(7)(b) was intended to apply to all suits for wages or overtime, however accruing, as well as to suits for damages and penalties under the laws respecting payment of wages and overtime.

Since the present case indisputably involved a law suit for wages, the statute of limitations issue is controlled by GOEHRING. Scott incorrectly argues that Otis convinced the Fourth District that it must look to the damages claimed, rather than the cause of action to determine which statute of limitations applies. In fact Otis argued that so long as the claim was for recovery of wages and/or damages concerning that claim, §95.11(4)(c) was applicable under GOEHRING. As stated supra, in GOEHRING the Florida Supreme

Court held that the predecessor to §95.11(4)(c) applied to all suits for wages "regardless of the nature of the cause of action" and was intended to apply to all suits for wages "however accruing". Therefore, the type cause of action brought is not determinative.

Scott next argues that his claim is not simply for wages, but also for damages "for mental distress and loss of morale and self-esteem arising from his discharge." Regardless, §95.11(4)(c) is applicable since it covers:

> (c) An action to recover wages or overtime or damages or penalties concerning payment of wages and overtime (emphasis added).

Scott next argues that the Fourth District's interpretation of GOEHRING requires that §95.11(4)(c) be applied in any case in which a plaintiff is claiming loss of wages, including claims for personal injury, products liability, medical malpractice, intentional torts, etc. This "parade of horribles" argument ignores the fact that GOEHRING limited the application of Fla. Stat. §95.11(4)(c) to actions for recovery of wages between an employee and an employer.

The controlling effect of GOEHRING in cases such as this has been noted in numerous federal cases applying Florida law. In McGHEE v. OGBURN, 707 F.2d 1312 (11th Cir. 1983), an employee brought an action against his former employer for wrongful termination of employment. The complaint alleged a due process violation as well as racial discrimination on the part of the employer. The employee argued that the appropriate limitations' period was the four year period provided in Fla. Stat. §95.11(3)(f), which applies to an action founded on a statutory liability, or alternatively Fla. Stat. §95.11(3)(o), which applies to intentional torts. Those are the identical statute of limitations provisions argued by Scott in this case.

Since 42 U.S.C.§§1981 and 1983 do not provide a limitations period, when McGHEE was decided the federal courts looked to the limitations period for the

most closely analogous state law action in the state in which the §1981 or 1983 action was filed. In McGHEE the court held that the appropriate statute of limitations under Florida law for a wrongful discharge case was the two year period provided in Fla. Stat. §95.11(4)(c), "even when the plaintiff seeks equitable and other relief in addition to back wages." The Court rejected the contention that the statute of limitations relating to statutory liability or intentional torts applied. While noting that an employee's action for wrongful discharge shares the "pertinent characteristics" of a statutory liability and an intentional tort, the Eleventh Circuit determined that the most analogous statute of limitations was the one relating to an action for wages, overtime, damages, and penalties, 707 F.2d at 1314. Relying on GOEHRING the court stated:

> The spirit of the Florida law appears to be that employee/employer cases are governed by the two-year period. We have been cited to no case that applies a longer statute than §95.11(4)(c) to a suit based on the termination of employment.

After discussing the GOEHRING case, the Eleventh Circuit concluded:

> Thus, no matter the theory or legal basis for the cause of action, the two year statute applies.

Since McGHEE, in WILSON v. GARCIA, 105 S.Ct. 1938 (1985) the United States Supreme Court has held that in regard to actions brought pursuant to 42 USC §1983 the state statute of limitations regarding tort claims for personal injuries would apply in order to accomplish uniformity. WILSON would alter the result of McGHEE since that was a §1983 case, whereas the present case is not. WILSON does not detract from McGHEE's holding that under Florida law the applicable statute of limitations in a wrongful discharge case is the one relating to an action for wages and damages concerning the payment of wages.

Before the Fourth District, Scott summarily dismissed the federal cases relied upon by Otis on the basis that they have all been overruled by WILSON v. GARCIA, 105 S.Ct. 1938 (1985). However, WILSON did not supersede any of

the federal cases as to their interpretation of the applicable statute of limitations under Florida law for a wrongful discharge case. In WILSON, the Supreme Court simply held, as a matter of federal law, that the appropriate statute of limitations for civil rights actions brought pursuant to 42 U.S.C. §1983 would in the future be governed by the State statute of limitation for tort actions.

In BURNEY v. POLK COMMUNITY COLLEGE, 728 F.2d 1374 (11th Cir. 1984), an employee filed an action against his employer alleging that he had been discharged in violation of his First Amendment rights of free speech and association. The court determined that the applicable statute of limitations was Fla. Stat. §95.11(4)(c) even though the action was based on a statutory liability and could also be characterized as an intentional tort. The court relied on McGHEE, and its construction of Florida law as reflected in GOEHRING is making that determination.

Similarly, in LAKE v. MARTIN MARIETTA CORPORATION, 538 F.Supp. 725 (N.D. Fla. 1982), the court determined that Fla. Stat. §95.11(4)(c) was the applicable statute of limitations period for a wrongful discharge suit brought against an employer under the Labor Management Relations Act of 1947, 29 USC §185. Even though the nature of the claim was a statutory liability the court determined that the applicable statute of limitations was the two year statute relating to actions involving wages, overtime, damages or penalties, Fla. Stat. §95.11(4)(c). The court observed: "By applying the two-year statute relating to wage claims, the federal policy favoring rapid disposition of labor disputes is adequately served along with the employee's interest in a reasonable period for judicial review."

Numerous other federal cases have held that Fla. Stat. §95.11(4)(c) applies to employees' claims of wrongful discharge regardless of whether the liability is premised on a statute and/or a tortious cause of action, see

ARNOLD v. DUVAL COUNTY SCHOOL BOARD, 549 F.Supp. 25 (N.D. Fla. 1981), aff'd., 693 F.2d 1051 (11th Cir. 1982) cert. den. 461 U.S. 909 (1983) (action for wrongful discharge brought against employer under 42 USC §1983); CORKERY v. SUPER-X DRUGS CORPORATION, 602 F.Supp. 42 (N.D. Fla. 1985) (claim under employee retirement income security act, 29 USC §1140 alleging constructive discharge).

The only Florida case relied upon by Scott for the assertion that the statute of limitations for an action founded on a statutory liability should apply is SMITH v. PIEZO TECHNOLOGY & PROFESSIONAL ADMINISTRATORS, 427 So.2d 182 (Fla. 1983). However, that case does not address any issue involving statute of limitations. SMITH involved three certified questions involving whether §440.205 created a cause of action for wrongful discharge and whether it was cognizable before a deputy commissioner or a circuit court. The Supreme Court determined that Fla. Stat. §440.205 created a cause of action for "wrongful discharge" where an employer is terminated in retaliation for pursuit of worker's compensation, and that the proper forum for the resolution of that claim was the circuit court. Those questions are not at issue in this case.

Moreover, as noted in the numerous federal cases discussed above, the fact that an action is brought pursuant to a statute does not automatically compel the conclusion that the statute of limitations for an action founded on a statutory liability applies. The Supreme Court specifically held in GOEHRING, supra, that the legislature intended the statute of limitations for wage claims to apply to "all suits for wages, or overtime, however accruing". Nothing in the SMITH case addresses GOEHRING or suggests any conclusion to the contrary. The statute of limitations for wage claims and/or resulting damages is equally applicable to a cause of action under Fla. Stat. §440.205 and the policy considerations are also equally compelling.

In addition to the rationale discussed in GOEHRING, there is another basis for applying Fla. Stat. §95.11(4)(c) in this case. The construction of statutes of limitation are controlled by the general rules applicable to statutory construction, see 51 Am.Jur., Limitation of Actions, §48, citing, inter alia, FOREMOST PROPERTIES, INC. v. GLADMAN, 100 So.2d 669 (Fla. 1st DCA 1958). A standard canon of statutory construction applied in Florida is that where two or more statutes could apply in a certain situation, the more specific statute will be applied over the more general statute(s), see ADAMS v. CULVER, 111 So.2d 665 (Fla. 1959). Applying that principle in this case, it is clear that Fla. Stat. §95.11(4)(c), which relates to employee/employer suits is more specific than the two statutes of limitations suggested by the employee, (i.e.), Fla. Stat. §95.11(3)(f) and §95.11(3)(o) which apply to all form of statutory liability and all intentional torts, respectively.

This principle was implicitly applied in the federal cases discussed above, McGHEE, supra, and BURNEY, supra. While the courts in those cases noted that the employee's claims could be construed as being based on statutory liability and intentional torts, the courts determined that the "most analogous" statute of limitations was the statute relating to suits for wages, overtime, penalties, and damages. Therefore, under accepted principles of statutory construction Fla. Stat. §95.11(4)(c) applies to Scott's claim.

Scott alternatively argues that his action under §440.205 Fla. Stat. is an action for an intentional tort and therefore the statute of limitations for intentional torts applies. Scott cites out-of-state cases which have characterized wrongful discharge cases in those states as intentional tort cases. Otis does not deny that those cases exist. But in SMITH v. PIEZO TECHNOLOGY AND PROF. ADM'RS, 427 So.2d 182 (Fla. 1983) this Court discussed the fact that generally where a term of employment is discretionary, no action can be maintained for terminating an employee. This Court acknowledged that

some jurisdictions had recognized exceptions to this rule and one exception was to create a common law tort for retaliatory discharge, but stated "Florida has not followed that path."

Rather, this Court found that the legislature had carved out a very narrow area in which an employee could sue his employer (i.e.), where he is wrongfully discharged for pursuing a worker's compensation claim. There is no reason to believe that the employee would be entitled to recover tort damages under §440.205 Fla. Stat. Generally the breach of an employment contract gives rise to a cause of action for damages for breach of contract. DANAI JAI ALAI INTERNATIONAL, INC., 375 So.2d 57 (Fla. 4th DCA 1979). In CATAVIA v. EASTERN AIRLINES, 381 So.2d 265 (Fla. 3d DCA 1980) the court rejected an employee's attempt to "describe a tort arising out of the contracts of employment".

To summarize, the suit brought by Scott was based on a claim of wrongful discharge, as the Complaint specifically stated. Additionally, the only measure of damages was based on loss of wages, past and future, and the jury was so instructed (R583). Therefore, the GOEHRING case is controlling and the two year statute of limitation period mandated by Fla. Stat. §95.11(4)(c) applies in this case. Since it is undisputed, and apparent on the face of the Complaint that this action was brought more than two years after Scott's termination, the Fourth District was correct in holding that Scott's lawsuit was time barred.

POINT II
(RAISED BY THE EMPLOYEE)

WHETHER THE EMPLOYEE WAS ENTITLED TO RECEIVE DAMAGES FOR PAIN AND SUFFERING.

Scott claims he was entitled to recover damages for mental pain and suffering. He was not for several reasons. The out-of-state case law is in conflict. But since this State has not adopted a tort theory of recovery when

an employee sues an employer for wrongful discharge, there would be no recovery for mental pain and suffering. See CATAVIA v. EASTERN AIRLINES, INC., 381 So.2d 265 (Fla. 3d DCA 1980) which held that there could be no recovery in a wrongful discharge case for damages for mental pain and suffering. See also VAZQUEZ v. EASTERN AIRLINES, INC., 579 F.2d 107 (1st Cir. 1978); ROGERS v. EXXON RESEARCH AND ENGINEERING COMPANY, 550 F.2d 834 (3d Cir. 1977), cert den. 434 U.S. 1022, 98 S.Ct. 749, 54 L.Ed.2d 770 (1978); SLATIN v. STANFORD RESEARCH INSTITUTE, 590 F.2d 1292 (4th Cir. 1979); DEAN v. AMERICAN SEC. INS. CO., 559 F.2d 1036 (5th Cir. 1977); cert den., 434 U.S. 1066, 98 S.Ct. 1243, 55 L.Ed.2d 767 (1978).

More importantly, this Court does not have to reach the issue of whether damages for mental pain and suffering are recoverable in a wrongful discharge case generally. For in this case, the trial court ruled that Scott failed to plead or prove any alleged mental pain and suffering so as to allow this issue to go to the jury (R216-17,335). Accordingly, there was no factual basis for Scott to recover damages for mental pain and suffering, even if they were recoverable in this case.

POINT III
(RAISED BY THE EMPLOYEE)

WHETHER THE EMPLOYEE WAS ENTITLED TO PREJUDGMENT INTEREST.

Scott claims he was entitled to prejudgment interest on his past lost wages. Scott did not plead prejudgment interest and it was not listed on the pretrial stipulation. During the middle of trial Scott's attorney specifically advised the court that he was not seeking prejudgment interest (R150). The first time Otis ever heard anything about prejudgment interest was in Scott's brief before the Fourth District. Prejudgment interest was raised for the first time on appeal and therefore was waived.

Scott relies upon ARGONAUT INSURANCE v. MAY PLUMBING CO., 474 So.2d 212 (Fla. 1985). Not having sought prejudgment interest below, Scott is not

entitled to the benefit of ARGONAUT INSURANCE v. MAY PUMBLING COMPANY on appeal. Moreover, ARGONAUT is inapplicable here because ARGONAUT held that where a verdict liquidates damages on a "plaintiff's out-of-pocket pecuniary losses" the plaintiff is entitled as a matter of law to prejudgment interest at the statutory rate from the date of the loss. In this case, Scott's lost wages were not out-of-pocket losses. Scott's contention would mean that prejudgment interest is awardable on all past lost wages in Florida, which is not the law.

POINT IV
(RAISED BY THE EMPLOYER)

WHETHER THE EMPLOYER WAS ENTITLED TO A DIRECTED VERDICT SINCE THERE WAS NO WRONGFUL DISCHARGE AS A MATTER OF LAW.

No Wrongful Discharge as a Matter of Law.

§440.205 Fla. Stat., under which this case is brought, establishes liability for "wrongful discharge" where the employer discharges an employee for seeking worker's compensation benefits. It is the Otis' position that under the facts of this case Scott did not prove a cause of action for wrongful discharge under §440.205 Fla. Stat. as a matter of law.

The undisputed evidence demonstrated that the police were called to the Otis' work site (Burdines' Galleria) by another workman who advised the police that Scott had assaulted him with a gun. The police talked with Scott who denied all knowledge of the incident (R387). The police could not find a gun on the premises and asked to see Scott's vehicle. Scott showed them to a truck in which the police found bullet casings on the floor board, and a "clip" in the glove compartment that would fit the type weapon the victim had described to them (R388). The police placed Scott in handcuffs and took him in the patrol car to the police station, where he was arrested (R389). Otis adduced evidence that as a result of this incident, the Vice President of Burdines requested that Scott not work on this job (R316,369-71). This was not disputed by Scott.

The undisputed evidence also showed that when Scott returned to work the day following the above incident, his supervisor told him to take a few weeks off, without pay (R257,312-313). Scott was thereafter advised by Otis that his employment was being terminated because of the above incident and the complaints of the Burdines' people, who did not want Scott back on the job (R319,321). Scott was subsequently prosecuted for the assault (R392) and pled nolo contendere to the charge (R415).

Case law holds that undisputed facts may justify discharge of an employee as a matter of law. ROCHESTER CAPITAL LEASING CORP. v. MC CRACKEN, 295 N.E.2d 375 (Ind. App 1973). And whether the facts are such as to warrant an employer discharging an employee is a question of law for the court, not a question of fact. BERRY v. GOODYEAR TIRE & RUBBER CO., 242 SE 2d 551 (SC 1978). LA FONTAINE v. DEVELOPERS & BUILDERS, INC., 156 N.W.2d 651 (Iowa 1960); HAIMAN v. GUNDERSHEIMER, 177 So. 199 (Fla. 1937).

In the present case, the undisputed facts were sufficient as a matter of law to warrant Otis in terminating Scott. In other words, different inferences cannot be drawn as to whether Otis was justified in terminating Scott. See THOMAS v. BOURDETTE, 608 P.2d 178 (Or. App 1980). In JOHNSON v. GENERAL MOTORS CORP., 241 S.E.2d 30 (Ga. App. 1977), cert denied 98 S.Ct 3092, two employees were arrested and charged with a crime to which they pled nolo contendere. General Motors gave them the option of resigning or being terminated. The employees resigned and then sued General Motors for wrongful discharge. The trial court granted a summary judgment in favor of General Motors which was affirmed on appeal, with the court stating:

> ...even without the resignations, which were in fact given, General Motors would have been justified in terms of law to terminate the employment. It was not until three months afterwards that the provisions of the First Offenders Act were invoked. Although the order thereunder eradicated the record of the criminal charges, discharged the appellants without any adjudication of guilt, exonerated them of any criminal

> purpose and intent, and asserted that no civil rights shall be affected, it could not eradicate the facts of arrest and sentencing, and it could not erase their resignations. See MORRIS V. HARTSFIELD, 186 Ga. 171, 197 S.E. 251 (1938).
>
> We find no authority that entry of a plea of nolo contendere to a felony charge cannot be a basis for discharge by a private employer. Generally, a plea of nolo contendere stands upon the same footing as a plea of guilty. MARSHAL v. STATE, 128 Ga.App. 413(1), 197 S.E.2d 161 (1973). Conviction of a crime is accepted as just cause for an employee's discharge as a matter of law. NLRB v. FEDERAL BEARINGS CO., 109 F.2d 945 (2d Cir. 1940). (Emphasis added.)

In the present case, as in JOHNSON, Scott's on-the-job arrest was sufficient to warrant Otis' termination of Scott's employment.

In S.J. GROVES & SONS v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, 581 F.2d 1241, (4th Cir. 1978) an employee got into a heated verbal argument with some other employees. He went to his truck and returned with an ax handle and used it to twice hit one of the employees. The employee's discharge was held to be warranted as a matter of law and summary judgment was entered for the Employer:

> The rationale for allowing employers to discharge employees for fighting is that such violence threatens the employer's legitimate concerns in job safety and in employee discipline and morale. We find that where an employee engaged in a heated dispute with another employee on the job site during working hours and repeatedly struck the other employee with a dangerous weapon, once on the back and a second time while the victim was on the ground, the discharge is fully justified.

In SMITH v. DEPT. OF HEALTH & HUMAN RESOURCES, 408 So.2d 411 (La. App. 1981), an argument occurred which resulted in a kitchen employee chasing a co-worker with a knife. The employee denied having a knife and claimed she was wrongfully discharged. The Appellate Court affirmed the Civil Service Commission's approval of the discharge finding that "pursuing a fellow employee while armed with a knife would seem to be a most serious offense" and that the fact that the employee "chose to arm herself with a dangerous weapon" supported her termination.

It is anticipated that Scott will argue that he did not, in fact, assault the co-worker with a gun, despite the fact that he was arrested, charged with a crime and pled nolo contendere. Or at least, he will argue, whether he assaulted the co-worker was a fact question. Whether he did or did not is irrelevant. As a matter of law, Otis clearly was warranted in believing that Scott was guilty as charged. JOHNSON v. GENERAL MOTORS CORP., supra. Moreover, even if Scott had not pled nolo contendere, and even if he had been subsequently found innocent, that would have no bearing on whether Otis was justified in terminating Scott, mistakenly believing him to be guilty of the crime with which he was charged. Even an employer's erroneous belief cannot be the basis for a wrongful discharge action, where, if true, it would have justified the employer in terminating the employee. See for example, ZUNIGA v. SEARS, ROEBUCK & CO., 671 P.2d 662 (NM App 1983), where the court held that an employee had no cause of action for wrongful discharge against an employer who terminated him on the belief, apparently erroneous, that the employee had taken an item of merchandise belonging to the store.

It is also anticipated that Scott will argue that despite the fact that Otis would have been warranted in terminating him as a result of his being arrested on the job, in fact he was terminated for an entirely different reason, i.e., filing a worker's compensation claim. However, case law provides that where an employer establishes sufficient legitimate grounds for dismissing an employee, the alleged motive of the employer for discharging the employee for other non-legitimate reasons is immaterial. BARISA v. CHARLOTTE RESEARCH FOUNDATION, 287 A.2d 679, (Del. Sup. 1972); GASBARRA v. PARK-OHIO INS., 382 F. Supp 399, affd. 529 F.2d 529 (D.C. Ill 1974); HEYMAN v. KLINE, 344 F. Supp 1088, affd. in part and rev'd. in part 456 F.2d 123, cert den. 93 S.Ct. 53; LANG v. OREGON NURSES ASSOC., 632 P.2d 472 (Or App. 1981). In LANG, the court quoted an Oregon Supreme Court case as follows:

> ...The motives which activate the master in discharging the servant are wholly immaterial, for the act is justified if any legal grounds therefor existed at the time. ...

Where there are legitimate non-discriminatory reasons for an employee's discharge, the employee has the overall burden of showing a retaliatory discharge, BOHM v. L.B. HARTZ WHOLESALE CORP., 370 N.W. 2d 901 (Minn. App. 1985); HUBBARD v. UNITED PRESS, 330 N.W. 2d 418, 445 (Minn. 1983), which Scott did not do in this case. Scott admitted that his supervisor told him he was terminating him because of the on-the-job arrest incident (R319,321). Scott presented no evidence to demonstrate otherwise. Accordingly, Scott did not meet his burden of proving a wrongful discharge.

In CHIN v. AMERICAN TEL. & TEL. CO., 410 NY S.2d 737 (NY Sup. 1978), an employee sued his employer for wrongful discharge. The employer took the position that the employee was terminated because he was arrested and charged with driving a van into three police officers during a political demonstration in which he was a participant. The court granted a summary judgment for the employer finding that the employee had failed to demonstrate a prima facie case:

> Assuming, arguendo, that part of defendant's motivation was malicious, plaintiff has failed to establish that the defendant did not act for legitimate purposes or for business considerations. Thus, he has failed to demonstrate the required elements for prima facie tort. ATI, INC. v. RUDER & FINN, INC., 42 NY 2d 454, 393 NY S.2d 864, 368 NE 2d 1230 (1977); REALE v. INTERNATIONAL BUSINESS MACHINES CORP., supra.

As in the above cases, it is undisputed that in this case, Otis had a legitimate reason warranting the termination of Scott's employment, i.e., the fact that Scott was arrested and charged with a serious crime which allegedly occurred on the jobsite (i.e.), the assault of a co-worker with a deadly weapon. For this reason alone, judgment should be entered in favor of Otis as a matter of law.

Scott Failed to Prove a Prima Facie Case

Even assuming the issue of wrongful discharge was a factual issue, rather than a legal issue, under the facts of this case Scott failed to prove a prima facie case of wrongful discharge. Accordingly, Otis' Motion for Directed Verdict should have been granted (R423-30)

The Florida Supreme Court has held that implicit in §440.205 is a cause of action for damages where an employee is discharged in retaliation for filing a worker's compensation claim. SMITH v. PIEZO TECHNOLOGY, supra. The Florida courts have not yet addressed the elements of this new cause of action. However, the Florida courts have held that in cases of first impression, it is helpful to look to similar statutes in other jurisdictions - both state and federal. PASCO COUNTY SCHOOL BOARD v. PERC, 353 So.2d 108, 116 (Fla. 1st DCA 1978).

Cases throughout the country have held that an employee must prove the following elements in a wrongful discharge case in order to establish a prima facie case: (1) that the employee was engaged in statutorily protected activity, i.e., that he had filed a valid claim or had attempted to claim compensation under the Worker's Compensation Law; (2) that the employer has taken adverse employment action, such as discharge; and (3) that a causal connection exists between the two. If the employee meets the burden of establishing a prima facie case of wrongful termination, the burden of going forward with the evidence to demonstrate a legitimate reason for the discharge shifts to the employer. Once the employer demonstrates a legitimate reason for the discharge, it is incumbent upon the employee to then prove by a preponderance of the evidence that the employer's reasons for the discharge are a pretext for what was otherwise an unlawful discharge. The ultimate burden of proving wrongful termination remains with the employee. The above elements of a prima facie case and the allocation of proof thereof are

contained in McDONNELL DOUGLAS CORP. v. GREEN, 411 U.S. 792, 802-807, (1973), 93 S.Ct. 19818, 1024-26, 36 L.Ed.2d. 668, and have been applied to wrongful discharge cases.[1] PUGH v. SUE'S CANDIES, INC., 171 Cal Rptr 917, 116 CA 3d 311 (Cal. App 1981).

In the present case, Scott clearly failed to prove the essential elements of his cause of action. At best, the evidence established that Scott tripped over some debris on the floor while working at the Burdines' project. He made no efforts to contact his supervisor and report the injury at that time. When Scott did finally mention the incident to his supervisor, it was done when the supervisor was at the jobsite in the normal course of his business. By Scott's own testimony he admitted he told his supervisor that he did not think the incident would interfere with his work, and he made absolutely no mention of the possibility of seeking benefits under the Worker's Compensation Law. An actual claim for worker's compensation benefits was not filed until almost four weeks after Scott was discharged from his employment.

The undisputed evidence further established that Scott was arrested at the jobsite for pulling a gun on a fellow worker, although Scott denied he had done so. Representatives of Burdines' and the general contractor on the job contacted officials of Otis requesting that Scott not be allowed back onto the jobsite. The District Manager of all Otis' operations, who was directly involved in the decision to terminate Scott, had no knowledge whatsoever that

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1/ The foregoing elements of a prima facie case are similar to those followed in claims of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000-e; the age Discrimination in Employment Act, 29 USC §621 et seq., and the Florida Human Rights Act, Florida Statutes 760.02 et seq. Each of these laws also proscribes retaliatory discharge for an employee who has made a charge against an employer, or participated in any manner in an investigation, proceeding or hearing under those laws. See CANINO v. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 707 F.2d 468 (11th Cir. 1983); JONES v. LUMBERJACK MEATS, INC., 680 F.2d 98 (11th Cir. 1982); LINDSEY v. MISSISSIPPI RESEARCH AND DEVELOPMENT CENTER, 652 F.2d 488 (5th Cir. 1981); and SCHOOL BOARD OF LEON COUNTY v. HARGIS, 400 So.2d 103, 108 (Fla. 1st DCA 1981).

Scott had been injured on the job or was otherwise contemplating filing for worker's compensation benefits. Otis' reason for terminating Scott was the incident resulting in his arrest at the Burdines' jobsite.

Looking at the above evidence in a light most favorable to Scott, it must be concluded that Scott failed to establish that he was engaged in statutorily protected activity when he was discharged. Therefore, he failed to prove the very first element of his cause of action. The evidence showed that at the time of Scott's discharge, he had not filed a claim for worker's compensation, nor had he indicated that he intended to do so. Merely having reported to his supervisor that he tripped over some debris is insufficient to establish that he was attempting to claim compensation under the Worker's Compensation Law. In fact, all indications by Scott to his supervisor were that he would not be seeking compensation since he did not believe the incident would have any impact on his ability to perform his job. Scott did not seek any medical treatment or indicate any desire to do so; nor did he complete an accident report prior to his discharge.

Scott clearly failed to establish that Otis had sufficient knowledge or belief that he intended to file a worker's compensation claim. Cf. SKYLINE HOMES, INC. v. NLRB, 323 F.2d 642 (CA Fla. 1963). In this case, even Scott's own evidence indicated Otis had no reason to believe he would attempt to claim worker's compensation benefits.

Scott also failed to present evidence of the third element of his cause of action (i.e.), the causal connection or nexus between his discharge and engaging in the protected activity. Thus, even assuming the Court were to conclude that the mere reporting of the injury to his supervisor was sufficient to satisfy the first element of the cause of action, there was absolutely no evidence to connect the reporting of that injury with the Otis' decision to discharge Scott.

The necessity of proving a causal connection as a key element in a wrongful discharge case is supported by the one Florida case that has touched upon the issue of the necessary proof required under Section 440.205. In SOUTHERN FREIGHTWAYS v. REED, 416 So.2d 267 (Fla. 1st DCA 1983), the First District Court of Appeal made clear that proof of a nexus or causal connection between the employee's claim for worker's compensation and the termination of his employment was required, stating:

> This portion of the award apparently was predicated on the employer's allegedly wrongful firing of Reed, an act that would be prohibited by Section 440.205, Florida Statutes (1979) if it came "by reason of" Reed's claim for compensation. However, Reed did not establish, and significantly, the deputy did not find, a relationship between the claim and the termination of employment.
>
> Absent a connection to Worker's Compensation matters, an employer's ill-motivated firing of an employee cannot be recompensed under Chapter 440. 416 So.2d at 26.

Other than mere speculation or conjecture, there is no evidence to establish a causal connection or nexus between Otis' decision to terminate Scott and any efforts by Scott to claim worker's compensation benefits. All Scott established was that he reported an injury to his supervisor and that he was later discharged. There was no evidence presented connecting the two. Case law is clear that the mere discharge of an employee who files a worker's compensation claim does not in and of itself give rise to a cause of action against the employer for discriminatory discharge. Rather, the employee must prove a causal relationship between the exercise of his statutory rights and the discharge. DAVIS v. RICHMOND SPECIAL ROAD DISTRICT, 699 S.W.2d 252 (Mo. App. 1983).

Other jurisdictions, like Florida, require proof of a causal connection or nexus. For example, in DAVIS v. RICHMOND, supra, the employee sustained a minor injury in May of 1977 and then in June of 1977 he was seriously injured.

He received medical treatment during the early part of July. On July 11, he returned to work, but passed out on the job. On July 12, the employer decided to terminate the employee. It was not until July 20, that the employee filed his formal claim for worker's compensation. The court found that there was no direct evidence that the employee was discharged for exercising his rights under the worker's compensation law. The court refused to permit proof of discriminatory discharge by indirect evidence or inference arising simply from the combined facts of the employee's claim for compensation and his discharge from employment. The court held that the required causal connection must arise precisely from the exercise of the employee's worker's compensation rights, and that the employee must prove that his discharge resulted from the exercise of those rights:

> The statute predicates recovery upon the discharge or discrimination of an employee for the exercise of his or her workers' compensation rights. By its wording, the statute does not convey an intent that mere discharge of an employee gives rise to a claim against the employer. On the other hand, the statute reveals the legislative intent that there must be a causal relationship between the exercise of the right by the employee and his discharge by his employer arising precisely from the employee's exercise of his rights, and upon proof, that the discharge was related to the employee's exercise of his or her rights. ... Stated another way, the legislative intent conveyed by the statute is to authorize recovery for damages, if upon proof, it be shown that the employee was discriminated against or discharged simply because of the exercise of his or her rights regarding a workers' compensation claim. DAVIS, supra, at 255. (Emphasis added.)

Thus, the fact that Davis had filed a claim for worker's compensation and that he was later terminated, standing by itself, was held not to be sufficient. Scott's facts in the present case are no better. Just as in DAVIS, Scott herein failed to establish the necessary causal link between his termination and his filing for worker's compensation.

Another case finding insufficient evidence of a "causal link" is SOLOMON v. COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL, 468 N.Y.2d 86 (1983). The court

refused to find that the employer had wrongfully discharged the employee. The court, stating that the burden of proof lay with the employee, found that the employee had at most established that her employment was terminated a few days following an illness which kept her out of work for three days. She was unable to point to any "specific acts or statements of her employer" that indicated her illness, or the filing of a worker's compensation claim, was the cause of her discharge. Just as in the SOLOMON case, Scott was unable to point to any specific acts or statements of Otis that in any way indicated that he was discharged for seeking worker's compensation benefits.

In HUGHES TOOL CO. v. RICHARDS, 624 S.W.2d 598, (Tex. Civ. App. 1981), cert denied 456 U.S. 991, the jury found that the employer had wrongfully discharged an employee and awarded him $15,000. The appellate court reversed finding that from a reading of the entire record, the evidence failed to establish the necessary causal link, and therefore, was insufficient to uphold the jury's finding that the employee was fired because he instituted a claim for worker's compensation benefits, stating:

> Richards himself, when asked what made him feel he was fired because he instituted a claim for worker's compensation benefits, stated that he took this position because Hughes never would accept the fact that he was hurt and because they denied him the right to go and see a doctor. Even were these allegations true, they are insufficient proof, in our view, to support the finding of the jury that Hughes fired Richards because he instituted proceedings to collect worker's compensation benefits.

The Court in HUGHES TOOL, supra, made it clear that it was only after an employee established the causal link that the employer was required to go forward in establishing a legitimate reason for the discharge:

> [T]he plaintiff has the burden of establishing a causal link between the firing and the employee's claim for worker's compensation benefits. Once the link has been established, the employer must rebut the alleged discrimination by showing there was a legitimate reason behind the discharge. HUGHES TOOL, supra, at 599. (Emphasis added.)

In the present case, Scott's own testimony attested to the fact that he had no proof of a casual connection. He testified that after the arrest incident, his supervisor told him that Burdines did not want him back on the jobsite, so he should take some time off because he needed it. (R312-314, 316, 327-8). From this, Scott testified he simply concluded that he was "probably" being told this because of his knee injury (R278). When Scott was subsequently informed that he was being terminated, he admitted that his supervisor told him it was because of the arrest incident and because Burdines did not want him back on the jobsite (R319,321). Scott had no facts to back up his contention that he was terminated because he had been injured on the job (R329-30). Rather, he felt it was "implied" (R319).

In MITCHELL v. ST. LOUIS COUNTY, 575 SW2d 813 (Mo. App. 1978), the trial court granted a directed verdict against the employer in her wrongful discharge case for failure to establish a "causal link":

> Plaintiff rests her case on the fact that she was discharged several months after filing a claim for compensation. But the record amply supports the basis for her discharge for excessive absenteeism - a valid and not pretextual motive.

Also, in SWANSON v. AMERICAN MANUFACTURING CO., 511 S.W.2d 561 (Tex. Civ. App. 1974), a suit charging discrimination by reason of a workmen's compensation claim was dismissed, as the record established that the ground for discharge - as here - was based on a legitimate reason, vis-a-vis, any showing of discrimination.

And finally, in DeFORD LUMBER CO., INC., v. ROYS, 615 S.W.2d 235 (Tex. App. 1981), the jury returned a verdict for the employee in a wrongful discharge case. The appellate court reversed because of a lack of proof of a causal link:

> The only circumstantial evidence we find in the record to support his theory is his response when his attorney asked him why he brought this lawsuit. His answer, by way of summary, was that he was fired without a reason. ... This answer provides no

> reasonable basis for an inference that he was discharged because he filed a worker's compensation claim. There being no testimony of any witness, including Roys' testimony, that his discharge was a result of his filing a worker's compensation claim, or hiring a lawyer to represent him in the claim, we conclude that the jury based their affirmative answer to special issue No. 1 on speculation, conjecture, or by drawing inferences, all of which constitute no evidence. An inference based on an inference will not support a jury finding of a vital fact.

As in DeFORD LUMBER, supra, there was no direct evidence or testimony in this case that Scott was discharged because he had sustained an injury on the job. Scott's conclusion in this regard, and therefore the jury's conclusion in this regard, could only have been based on speculation, conjecture, and pyramiding inference upon inference.

The role of circumstantial evidence in a wrongful discharge case was discussed in VOLLENWEIDER v. NEW ORLEANS PUBLIC SERVICE, 466 So.2d 804 (La. App. 1985).

> The test of sufficiency in a circumstantial evidence case is that the evidence, taken as a whole, must exclude other reasonable hypotheses with a fair amount of certainty. ...
>
> We conclude that the circumstantial evidence presented in this case does not exclude other reasonable hypotheses. It is evident from the facts of this case that it is very likely that plaintiff was asked to resign because he failed to follow company policy regarding attendance at work.
>
> The evidence presented by plaintiff is not sufficient under the law to meet his burden of proof.

In the present case the circumstantial evidence did not exclude a reasonable hypothesis that Otis had terminated Scott because of the arrest incident. It is clear that the burden of proving that Scott was fired for another non-legitimate reason, (i.e.), because he had sustained an on-the-job injury, was on Scott. HENDERSON v. ST. LOUIS HOUSING AUTHORITY, 605 S.W.2d 800 (Mo. App. 1979); CLEARY v. AMERICAN AIRLINES, INC., 168 Ca. Rptr. 722, 111 CA 3d 443, (Cal. App. 1980). Scott clearly failed to meet this burden.

To summarize, there is absolutely no record evidence to support a finding of a causal connection or nexus between Scott's discharge and any efforts on his part to claim worker's compensation benefits. Even assuming the evidence could somehow be construed to have established a causal connection, the burden then shifted to Otis to articulate a legitimate, nondiscriminatory reason for the discharge, which Otis clearly did. Otis presented evidence that the only reason Scott was discharged was the incident at the Burdines' store relating to his assaulting a fellow worker with a gun and being arrested. The company officials responsible for the decision to discharge Scott so testified and Scott made no effort to rebut or otherwise challenge that testimony. The failure to do so was fatal. DeFORD LUMBER CO., INC., v. ROYS, supra. There is no evidence in the record to establish that the legitimate reason given by Otis for discharge was merely a pretext or otherwise a coverup to terminate Scott in violation of his rights under §440.205 F.S.

This Court should not hesitate to overturn a jury verdict that is based upon sheer speculation and conjecture without the necessary underlying factual basis. The evidence before the jury was totally insufficient to establish the necessary elements of a cause of action under §440.205 Fla. Stat. This legal insufficiency requires entry of a directed verdict in Otis' favor as a matter of law.

POINT V
(RAISED BY THE EMPLOYER)

WHETHER THE EMPLOYER WAS ENTITLED TO A DIRECTED VERDICT, NEW TRIAL OR REMITTITUR ON THE $100,000 AWARD FOR PAST LOST WAGES.

Ten or more years before this incident Scott had sustained a leg injury in an accident unconnected with his work (R266). He broke his leg playing baseball which required an operation (R266-7). This resulted in Scott having a 20% disability, but he was able to hold down his job with Otis despite that disability (R396). Scott's job with Otis as an elevator mechanic/foreman

required him to actually be out on the jobsites performing physical labor (R120-23,263).

Scott was terminated by Otis on September 25, 1980 (R502). He subsequently began work for his present employer in 1981 or 1982 (R86,258), after recovering from an operation in early 1981 on his knee, which he claimed he had reinjured when he slipped on the debris at the Burdines' jobsite (R339-40,256). Scott's job with his new employer (Mowry Elevator Co.), a non-union job, is restricted because of Scott's knee problem (R343). Scott had been told by his doctors, who inserted an artificial knee, that he could do no heavy lifting, squatting, bending, or excessive walking. Scott testified that that was basically what an elevator mechanic/foreman does every day, and that was what he had been required to do with Otis (R256,344). Scott admitted he could no longer work as an elevator mechanic/foreman (R344).

As a result of the fall at Burdines, and Scott's subsequent knee replacement, Scott claimed his disability had increased to 30 or 35%. Scott admitted this had affected his ability to perform the duties of an elevator mechanic/foreman (R344). Scott also admitted that when he was hired by Mowry Elevator Co., it was understood that he would not be able to function in the capacity of an elevator mechanic/foreman (R343).

The Vice President of Mowry Elevator Co., Frank Warrenburger, testified that he had hired Scott not as a mechanic/foreman, but as his administrative assistant (R87). Scott checked the installations in the field and reported to him regarding job conditions, work problems, etc. (R85-87). Scott, who used a cane most of the time, did not perform physical labor in the field because of his bad knee (R87-89,91). Warrenburger testified that he was aware of Scott's physical disabilities when he hired him (R86). He agreed to work around Scott's problem and give him time off when needed because of his disability (R86). At first Scott could not even put in a full week's work (R90-91).

According to Warrenburger, Scott had missed work off and on up until the last six or eight months, when he had begun to miss less work (R90-1).

The evidence showed that at the time of trial Scott was making $300 a week, plus he was provided with a company vehicle and gas by Mowry Elevator Co. (R89). In contrast, the union rate for a mechanic/foreman in 1980, when Scott was terminated by Otis, was $13.36 an hour, which had increased to $19.35 an hour in 1984 (R174). At the time of trial in 1985, the union pay for a mechanic was $17.10 an hour and for a foreman was $19.25 an hour (R119).

Based upon the above evidence, the jury award of $100,000 for past lost wages was improper. The $100,000 represents the difference between what Scott was making with Otis ($750 a week or $39,000 a year) and what he is now making with Mowry Elevator ($300 a week, or $15,600 a year) for a four year period.

A cause of action for wrongful discharge allows the employee to recover compensation for damages sustained during the period of his unlawful discharge. RYAN v. SUPERINTENDENT OF SCHOOLS OF QUINCY, 373 N.E.2d 1178 (Mass. 1978). In other words, the measure of the employee's damages is for the period of his unemployment. A.J.FOYT CHEVROLET, INC., v. JACOBS, 578 S.W. 2d 445 (Tex. Civ. App. 1979). In this case that would be from Scott's discharge in September, 1980, until his new job with Mowry Elevator in 1981 or 1982. However, the evidence showed that the reason Scott was not working during that period was because of his knee injury, his ensuing knee replacement operation, and recovery period. The fact that Scott was not working during that period was <u>not</u> because he could not find a comparable job. Therefore, Otis would not be responsible for lost wages during that period in any event, particularly since Scott was receiving monthly workmen's compensations benefits during that period because of his inability to work.

Moreover, Scott should not be allowed to recoup the difference in the income he was previously receiving with Otis (as a mechanic/foreman) and the

income he is presently receiving with Mowry Elevator. The income differential is not as a result of Scott being unable to find a job providing a comparable income. Rather, Scott is relegated to a different, less remunerative job because of his knee injury. Therefore, the difference in income does not result from the Otis' firing Scott. It is the result of the fact that Scott can no longer physically perform a comparable job. Even if Scott was still employed by Otis, he would not now be receiving an income of $17.10 to $19.25 per hour as an elevator mechanic/foreman, because he would be unable to work in that position.

Scott should not be allowed to recover the difference between what he made before and what he is making now. In order to recover that differential, he would have to demonstrate that he can perform the duties of the job he had before his injury, Cf. SCHRODER v. ARTCO BELL CORP.,579 S.W.2d 534 (Tex. Civ. App. 1979), and can apply the same ability and devotion in a comparable job, Cf. LINES v. CITY OF TOPEKA, 577 P2d 42 (Kan. 1978), but was prevented from doing so because a comparable job is not available. In other words, to be recoverable, the income differential must be proximately caused by the alleged wrongful discharge. Here it was caused by Scott's own physical disability. Certainly, if Scott were entirely disabled as a result of his knee injury, he could not reasonably take the position that his recoverable damages in this case would be his entire past income of $39,000 a year. To allow Scott to recover the difference in income for a job he can no longer physically perform provides a windfall to Scott.

Another argument similar to the proximate cause argument is the mitigation of damages argument. An employee has a duty to mitigate his damages by reasonably seeking other employment of like nature subsequent to a wrongful discharge by his employer. JUVENILE DIABETES RESEARCH FOUNDATION v. RIEVMAN, 370 So.2d 33 (Fla. 3d DCA 1979); FALLS STAMPING & WELDING CO. v.

INTERNATIONAL UNION, UNITED AUTO, AIRCRAFT & AGR. IMPLEMENT WORKERS OF AMERICA, 485 F.Supp. 1097 (D.C. Ohio 1980); HADEA v. HERMAN BLUM CONSULTING ENGINEERS, 632 F.2d 1242, (CA Tex. 1980), cert. den. 101 S.Ct. 1983. The penalty for failing to comply with that duty is reduction in his recoverable damages in the amount he could have earned in comparable employment. JUVENILE DIABETES RESEARCH FOUNDATION v. RIEVMAN, supra.

In the present case, Scott went to work for Mowry Elevator at a job that was not comparable to his former job. The vocational rehabilitation counselor testified that she had placed Scott with Mowry Elevator, that he was satisfied with that job, and therefore there had been no effort to upgrade his job or find him a better paying job (R199). In effect, Scott never looked for a comparable job as a mechanic/foreman because he knew he could not perform that job any longer because of his artificial knee. Accordingly, Scott has failed to meet his duty to obtain comparable employment. FALLS STAMPING & WELDING CO. v. INTERNATIONAL UNION, AUTO, AIRCRAFT & AGR. IMPLEMENT WORKERS OF AMERICA, supra. It follows that Scott is not entitled to recover for the difference between what he is now making with Mowry Elevator and what he had been making with Otis Elevator.

It should be noted that Scott has received worker's compensation benefits over the last seven years as a result of his fall at Burdines in 1980 (R9). He also has a pending lawsuit against Federated Department Stores, which is the parent company of Burdines, seeking to recover personal injury damages for the injury he received to his knee in the fall on the debris (R404). In that lawsuit Scott is claiming that Burdines caused his damages and here he is arguing that Otis caused his damages. In fact, there was no evidence presented in this case that Scott's damages were proximately caused by his alleged wrongful discharge. Rather, as stated repeatedly, Scott's past lost wages were caused by his own disability.

To summarize, Scott was entitled to no past lost wages. From his 1980 discharge until he began his job with Mowry Elevator, he was not working because of his leg operation and recuperation. Since beginning his job with Mowry Elevator, Scott has been working at a job with reduced income because of his knee injury and because he can no longer perform the job he had with Otis. His reduced income is not because he cannot find a job as an elevator mechanic/foreman. Rather, it is because he can no longer physically perform that job. Accordingly, Otis' post-trial motion for directed verdict and/or remittitur and/or new trial should have been granted as to the $100,000 award for past wages and benefits.

POINT VI
(RAISED BY THE EMPLOYER)

WHETHER THE EMPLOYER WAS ENTITLED TO A DIRECTED VERDICT OR MOTION IN LIMINE ON THE EMPLOYEE'S CLAIM FOR FUTURE LOST WAGES.

Scott's Future Damages Not Recoverable:

Prior to trial, Otis filed a Motion in Limine to prohibit Scott from presenting evidence of future damages, which was denied (R797-799). At trial, over Otis' objection (R147-62), Scott presented an economist who testified as to Scott's future loss of earnings to age 65 (R174-176). Post-judgment Otis asked for a directed verdict/remittitur of the future damages which motions were denied (R833-35, 898).

It is the Otis' position that Scott was not entitled to recover future damages as a matter of law for several reasons. First, Scott was not entitled to future lost wages for the same reason he was entitled to no past lost wages. Any diminution in income, past or future, did not result from Scott's alleged wrongful discharge resulting in his inability to find a comparable paying job. Rather, the cause of Scott's reduced income was his knee injury which resulted in a disability preventing him from performing the duties of an

elevator mechanic/foreman. Scott's remedy for loss of wage earning capacity is a worker's compensation claim, not a wrongful discharge claim. Scott is in fact receiving worker's compensation benefits to compensate him for that loss (R9).

A second, and alternative, reason that Scott was not entitled to recover furture lost wages is because future lost wagesare not recoverable in a wrongful discharge action, and particularly not in this case. Section 440.205 does not provide the Court with any guidance as to what damages are available for its violation, and there are no Florida cases on point. A federal case on point is JETER v. JIM WALTER HOMES, INC., 414 F.Supp, 791 (W.D. Okla. 1976), where the court held that when employment is not for a specified period, an employee will not be entitled to recover for loss of future wages.

In accord with JETER, Otis submits that the only appropriate damages in a wrongful discharge case would be past lost wages and benefits which resulted from the wrongful discharge. And, if the employee were still unemployed at the time of trial, he would be entitled to reinstatement to his old position if he was still able to perform the duties of his old job. See SCHRADER v. ARTCO BILL CORP., 579 S.W. 2d 534 (Tex. Civ. App., 1979). In this case, Scott is unable to perform his old job because of his physical disabilities. Therefore, he would not be entitled to reinstatement to his old job, although perhaps he would be entitled to be reinstated to a position comparable to the one he presently holds with Mowry Elevator, if Scott so elected.

Section 440.205 F.S. is nothing more than an anti-discrimination statute which proscribes retaliation against an employee for attempting to claim benefits under the State's Workers' Compensation Law. See SMITH v. PIEZO TECHNOLOGY, supra, at 184. Other statutory provisions, whether federal or state, which proscribe discrimination for any number of reasons, provide for a remedy that includes reinstatement and back pay but no future damages. Of

course, once an employee is reinstated, he would sustain no future damages because he would be restored to his same wages and placed in the same position as he would have been had he never been discharged in the first place. Therefore, the reinstatement order would completely remedy any future lost wages.

Reinstatement and back pay is the normal remedy under Title VII of the Civil Rights Act of 1964 which protects against discrimination for race, sex, religion, national origin, etc.; under the Age Discrimination in Employment Act, which prohibits discrimination on the basis of age; under the Florida Human Rights Act, Section 760.01, Florida Statutes, which similarly proscribes discrimination on the basis of age, sex, religion, national origin, age, handicap or marital status; and under the Public Employees Relations Act, Section 447.201, Florida Statutes, which proscribes discrimination against an employee on the basis of his union or concerted activities.

The area of discrimination law where the concept of front pay has been considered and discussed is in the area of age discrimination. Some courts have permitted the award of front pay in age cases, but only in very limited circumstances - circumstances which are not present in this case. For example, in WHITTLESEY v. UNION CARBIDE CORP., 742 F.2d 724 (2d Cir. 1984), the court concluded that front pay was an available remedy in appropriate cases brought under the ADEA and found that those circumstances were only where reinstatement was inappropriate.[2] The court further stated that in many cases an employee can be made whole through an award of back pay coupled with an order of reinstatement. The court noted such remedies involved the least amount of uncertainty because they re-established the prior employment

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2/ The court noted that reinstatement may not always be possible. For example, there may be no position available at the time of judgment or the employer/employee relationship may have been irreparably damaged by animosity associated with the litigation.

relationship between the parties and at the same time insured employment free of discrimination. WHITTLESEY at 728. In the WHITTLESEY case, the court concluded that front pay for four years was appropriate in view of the fact that the court found the animosity between the employee and the company to be so intense that reinstatement was impossible and also because the time period involved was relatively short, approximately four years, and "thus did not involve some of the uncertainties which might surround a pay award to a younger worker."

Similarly, the Third Circuit Court of Appeals in GOSS v. EXXON OFFICE SYSTEMS, 747 F.2d 885, (3d Cir. 1984), found a front pay award in lieu of reinstatement was appropriate but only where the likelihood of continuing disharmony in a sensitive job and the difficulty of policing an ongoing relationship precluded reinstatement. Moreover, the front pay award was for only four months. The court rejected a claim for front pay for six years as requiring excessive speculation.

The Eleventh Circuit Court of Appeals has also concluded that front pay is a permissible remedy under the ADEA, see O'DONNELL v. GEORGIA OSTEOPATHIC HOSPITAL, 748 F.2d 153 (11th Cir. 1984), but that front pay may be awarded "only after reinstatement was dismissed as a realistic alternative." O'DONNELL v. at 155.

In the present case, Otis at all times represented to the trial court that if Scott prevailed, he could be reinstated (R293). Therefore, there was no reason to submit the issue of future damages to the jury even under the above cases that have allowed future damages. Permitting Scott to recover future damages in this case was both legally and factually improper.

Scott's Future Damages Speculative and Not Reasonably Certain:

Even assuming damages for future lost wages and benefits are recoverable, which Otis denies, the $200,000 awarded by the jury is clearly based upon

sheer speculation and conjecture, rather than sufficient proof. Speculative damages are not recoverable. Florida case law is clear that future damages must be capable of proof to a reasonable certainty and not left to speculation or conjecture. NEW AMSTERDAM CASUALTY CO. v. UTILITY BATTERY MANUFACTURING CO., 166 So. 856, 860 (1935), and KENCO CHEMICAL & MANUFACTURING CO., INC. v. RAILEY, 286 So.2d 272, 274 (Fla. DCA 1973).

Here, the award of $200,000 in future lost wages is totally speculative. It fails to recognize a number of speculative circumstances over the next 20 years which would make that figure an absolute absurdity. For example, one reason Scott is making less than he was making while working for Otis is the fact that he is now working at a non-union elevator job and therefore he is not being paid according to the union wage scale. However, there is absolutely no reason Scott cannot in the future obtain a position with a unionized elevator company and start earning an increased income.

There are numerous other variables which may enter the picture over the next 20 years, not the least of which is the Scott's own physical state. All the testimony presented at the trial, including that of Scott, was that his biggest handicap, work wise, is his knee. It is possible that Scott will be totally prevented from working in the future as a result of his knee condition. That possibility of total disability is not accounted for. An award of future damages also does not take into account such things as possible promotions, changes in employment positions, termination for lawful reasons, death or other disability. When the jury heaps inference upon inference in order to reach its verdict, it is obvious that the award is based on sheer speculation and cannot stand.

To allow an award of damages over the next 20 years for future lost wages clearly requires sheer speculation and conjecture on the part of the jury. This is obvious from the amount of the award itself. Scott's economist

testified that his net future earnings loss until age 65 was $424,230. The jury essentially just awarded one-half that amount ($200,000), a figure unrelated to anything. It is clear that the jury simply picked a number out of the air. Such speculative awards cannot be permitted.

POINT VII
(RAISED BY THE EMPLOYER)

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE ELEMENTS OF WRONGFUL DISCHARGE, THE BURDEN OF PROOF, PROXIMATE CAUSE, MITIGATION, DAMAGES, ETC.

The court's instruction on the substantive aspects of the case was simply:

> The issue for your determination on the claim of William Scott against Otis Elevator Company is whether William Scott has shown by the greater weight of the evidence that he was discharged by reason of his claim or pending claim for workmen's compensation benefits and, if so, whether this discharge was the cause of loss or damage to the plaintiff. You need not determine that Mr. Scott's attempt to file compensation was the only reason for his discharge if the evidence shows that the substantial reason, that this was the substantial reason for his discharge.

The above instruction fails to inform the jury of the elements Scott was required to prove in order to establish a prima facie case for wrongful discharge, discussed supra, under Point IV. It also failed to inform the jury that Scott was required to prove a causal link between his discharge and filing a worker's compensation claim, after which Otis was required to demonstrate a legitimate reason for the discharge, after which Scott was then required to prove that Otis' reasons for his discharge were merely pretextual (Def's Ex. #11-14).

The jury instruction likewise fails to inform the jury that Otis cannot be held responsible for a wrongful discharge when there exists a legitimate reason for discharge, regardless of the motives, in line with the cases cited under Point IV, supra. Accordingly, the Court erred in refusing to instruct the jury that in order for Scott to recover he must prove that "but for" his

claim or attempt to claim worker's compensation, he would not have been discharged. Cf. COLUMBIA CITY BOARD OF PUBLIC INSTR., LAKE CITY v. PERC, 353 So.2d 127 (Fla. 1st DCA 1977). Rather, the court instructed the jury to the contrary under the last sentence in the above quoted instruction.

The Court also erred in refusing to instruct the jury that Scott's damages must be proximately caused by his wrongful discharge (Def's Ex.#19), that Scott had an obligation to mitigate his damages (Def's Ex. #17), or that worker's compensation benefits must be deducted (Def's Ex.#17).

POINT VIII
(RAISED BY THE EMPLOYER)

WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF WILLIE FERGUSON.

At trial Otis called as a witness Willie Ferguson, one of its employees, who had worked at the Burdines Galleria jobsite with Scott (R397). Because Ferguson's name was not listed on the pretrial stipulation, the court required him to be questioned outside the presence of the jury to determine whether Scott would be "prejudiced" if Ferguson were allowed to testify (R397). In the proffer, Ferguson testified he had observed the incident involving Scott and the gun (R399). He testified that prior to that incident, Scott had been involved in an altercation in a bar with John Veltri (R399). Subsequently, Scott happened to see Veltri, a tile setter, on this jobsite. Ferguson testified (R399-400):

> A few weeks after that [the incident in the bar], Mr. Scott noticed that this guy was a tile setter on the same job. He took me up and pointed the guy out and he told me that, well, he said in essence, he said that one of these days I'm going to catch him off guard and I'm going to pull a gun on him and ask him, how do you like it.

Ferguson testified that on September 19, 1980, he was walking toward the escalator at the jobsite when his helper told him to look behind him (R400). He looked back and saw Scott turn away from the tile setter with a gun in his

hand and put it in the "game box" (R400). Ferguson saw what happened to the gun; his helper took it, showed it to Ferguson, and then put it in his car (R401). When inquired of, Ferguson told his superintendent about what he had seen (R401).

After an extended colloquy involving the extent and manner of notice to Scott of Ferguson's testimony, the trial court ruled that Ferguson's testimony could not be presented to the jury because he had not been listed on the pretrial stipulation (R417). The court rendered this ruling despite the fact that it recognized that Ferguson's testimony was "extremely relevant" (R420).

As has been noted numerous times, the exclusion of a witness is a drastic remedy and should be invoked "only under the most compelling circumstances", LoBUE v. TRAVELERS INSURANCE COMPANY, 388 So.2d 1349, 1351 (Fla. 4th DCA 1980), quoted in IN RE ESTATE OF LOCHHEAD, 443 So.2d 283, 284 (Fla. 4th DCA 1983). The court also stated in LoBUE, supra, that:

> The right to present evidence and call witnesses is perhaps the most important due process right of a party litigant.

In BINGER v. KING PEST CONTROL, 401 So.2d 1310 (Fla. 1981), this Court outlined the considerations which a trial court must evaluate in making a decision regarding the exclusion of a witness whose name has not been disclosed in accordance with a pretrial order. While the court noted that the trial court has the discretion to exclude a witness under such circumstances, the court went on to state (401 So.2d at 1314):

> The discretion to do so must not be exercised blindly, however, and should be guided largely by a determination as to whether use of the undisclosed witness will prejudice the objecting party. Prejudice in this sense refers to the surprise in fact of the objecting party, and it is not dependent on the adverse nature of the testimony. Other factors which may enter into the trial court's exercise of discretion are: (i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (ii) the

> calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the order and efficient trial of the case (or other cases). [Footnotes deleted.]

An analysis of the factors noted above clearly demonstrates that the trial court abused its discretion in excluding the testimony of Willie Ferguson. The first factor to consider is the existence of any surprise to Scott's counsel that Otis intended to call Willie Ferguson as a witness. Defense counsel stated that he had provided Scott's counsel with verbal notice two weeks prior to trial that he intended to call Ferguson as a witness, and he had followed up that verbal notice with a letter with Ferguson's name and address (R405-406,408-409). Scott's counsel, who admitted he had already been aware of the existence of Ferguson (R411), did not make any requests to depose Ferguson, although he nonetheless was on constructive notice as to his testimony. He excused his failure to depose Ferguson by arguing that he was in another trial during the two weeks prior to this trial (R406). Yet, three attorneys were representing Scott in this lawsuit and surely one of them could have set and attended Ferguson's deposition. In fact, Ferguson had already been deposed in Scott's criminal case and Scott's lawyer was present at that deposition (R403). While Scott's lawyer in the criminal case was a different lawyer than the lawyer on this case, it is clear that Scott and his agent (criminal lawyer) were well aware of Ferguson's testimony.

Additionally in Otis' pretrial stipulation filed in this case on March 25, 1985, Otis listed as item 7 on its exhibit list:

> Police and court records relating to the arrest, conviction and sentencing of Plaintiff arising out of an incident which occurred on September 19, 1980 (R730).

The criminal file included Ferguson's deposition in that case. Scott's counsel admitted that he had taken no steps to review the criminal file until the day before Ferguson was to testify in this trial (R412). Clearly, Scott

was not, in fact, surprised by Otis' attempt to call Ferguson as a witness or as to the nature of the testimony that would be elicited.

In light of the ample notice provided to Scott's counsel as to Otis' intent to call Ferguson, there was ample opportunity to cure the existence of any prejudice. However, as noted above, Scott's counsel made no effort to depose Ferguson nor to review his testimony which had been given in the criminal case. Furthermore, Scott himself had independent knowledge of Ferguson and his relationship to the case since Scott knew Ferguson personally and was his foreman on the Burdines' Galleria jobsite (R414-415).

Additionally, in the case entitled William Scott v. Federated Department Stores, in which Scott is suing Burdines for his personal injuries resulting from the fall on the debris, Ferguson was listed on the witness list (R403,410). Scott's lawyers in that case were the same lawyers that were representing him in this case. Therefore, not only did Scott have independent knowledge of the existence of Ferguson as a witness, he also had ample opportunity to cure any possible prejudice by either taking Ferguson's deposition or by reviewing his testimony in the criminal case.

There is no suggestion in the record that Scott's failure to list the witness on the pretrial stipulation was intentional or in bad faith, another factor referred to in BINGER. The pretrial discovery in this cause was completed in a very brief period of time due to the fact that the trial court denied Otis' motion for continuance of the trial (R711). The trial court had set aside a default entered against Otis' on February 25, 1985 (R707). The trial date had been previously set for April 1, 1985 (R690). On March 5, 1985, Otis moved for a continuance of the trial date noting the brief period of time available for discovery and the fact that as of that date no pretrial discovery had yet occurred (R708-710). Nonetheless, the trial court denied the motion for continuance on March 12, 1985 and thereby allowed less than one

month for all pretrial discovery in the case to be concluded. Under these circumstances, it is obvious that the failure to previously depose and/or list Ferguson as a witness was the result of the limited period of time for discovery and preparation for trial. Furthermore, as noted above, there is no suggestion in the record of any bad faith or intentional violation of the pretrial order Otis' counsel relating to the failure to list Ferguson as a witness.

A final consideration noted in BINGER, supra, is the possible disruption of the orderly and efficient trial of the case. There was no contention made below that the calling of Ferguson as a witness would disrupt the trial in any way. At the time the trial court made its ruling, Otis had proffered all of the relevant testimony it intended to elicit from Ferguson, and Scott had had an opportunity to inquire into any areas of testimony that he wished. The trial court did not cite any disruption of the trial as a basis for its exclusion of Ferguson's testimony but simply stated that "I think they [Scott's attorneys] should have a chance to check out Mr. Noon." (R417). Mr. Noon was Ferguson's helper who had been with him at the time of the incident and who, Ferguson testified, had disposed of the gun.

This was an improper and irrelevant basis for justifying the exclusion of Ferguson's testimony. Apparently, the trial court concluded that Scott's attorneys should have access to Mr. Noon's testimony in order to test the credibility of Ferguson's testimony. However, nowhere in BINGER does it indicate that a condition precedent to allowing a witness who has not been previously listed to testify is whether another witness can be called to verify that witnesses' testimony or to provide evidence as to his credibility. Furthermore, Scott had access to Ferguson's deposition in the criminal case, which would be one means of testing his credibility. To simply exclude his testimony because another witness was not available to test his credibility

has no basis in logic or case law. (It should be noted that defense counsel had previously attempted to locate Mr. Noon but had been unable to find him, see R417.)

Since none of the factors noted in BINGER were present in this case, the necessary conclusion is that the trial court abused its discretion in excluding the testimony of Willie Ferguson. There was no surprise as to Otis calling Ferguson as a witness because two weeks before the trial Otis advised Scott that it intended to call Ferguson as a witness. Accordingly, there was no prejudice under the BINGER analysis. The fact that Scott chose to sit idly by and not depose Ferguson before trial was Scott's choice.

As the trial court recognized, Ferguson's testimony was highly relevant to Otis' case as it provided an impartial witnesses' testimony to the effect that Scott did, in fact, have a gun and display it at the Burdines' Galleria jobsite, which Scott had emphatically and repeatedly denied. As stated, supra, the exclusion of Ferguson's testimony simply because another witness was unavailable is without support and logic or case law. Therefore, the trial court's ruling was both in error and prejudicial to Otis, and justifies reversal of this case.

CONCLUSION

The Fourth District's decision should be affirmed. Alternatively, judgment should still be entered in Otis' favor based upon Points IV - VIII, supra.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: EARLE LEE BUTLER, 1995 E. Oakland Park Blvd., Suite 100, Ft. Lauderdale, FL 33306; CATHY JACKSON BURRIS, P. O. Box 030067, Ft. Lauderdale, FL 33303; EDWARD J. DEMPSEY, United Technologies Corporation, United Technologies Bldg., Hartford, CT, 06101, this 15th day of JUNE, 1987.

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