Accepted - See order 7-15-87

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 70,394

FOURTH DCA CASE NO. 85-1995

FLA. BAR NO.: 338788

WILLIAM F. SCOTT,

Petitioner/Plaintiff,

v.

OTIS ELEVATOR COMPANY,

Respondent/Defendant.

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE FACTS

We do not wish to belabor the controverted "facts" of this case or the evidence submitted at trial. However, We would be neglect in our duty if We did not provide this Court with a proper overview of the facts as dictated by several judicially adopted policies concerning appellate review applicable to the proper statement of facts in an appellate brief. Indeed, the brief of Defendant OTIS ELEVATOR COMPANY (hereinafter OTIS) makes one wonder whether OTIS is aware of these appellate presumptions and judicially made policies which are controlling herein. Nevertheless, so that this Court may clearly and accurately review the record presented, Plaintiff will respond to the "facts" presented in the brief submitted by OTIS and the actual facts as they must be construed by this Court.

First of all, We must point out the obvious. The "facts" submitted by OTIS contain numerous improper argumentative comments (Brief of Respondent at 6, 7, 8, 9, 10). Moreover this brief does not designate the areas of disagreement with the facts contained within our initial brief but rather restates the facts and sets forth "additional" facts favorable to OTIS. These facts should be stricken since they are in violation of Rule 9.210 (c), Fla. R. App. P.

OTIS in its "facts" has taken contradictory testimony and presented that as the only testimony in the record. However, it is well settled in this State that an appellate court must view the evidence in the light most favorable to the prevailing party and cannot reweigh the evidence or redetermine the credibility of the witnesses. Helman v. Seaboard Coast Line Railroad Company, 349 So. 2d 1187 (Fla. 1977); Crain & Crouse, Inc. v. Palm Bay Towers Corporation,

326 So. 2d 182 (Fla. 1976).

We submit the following facts which either clarify OTIS' inaccurate facts or include testimony and inferences favorable to MR. SCOTT not contained in the facts submitted by OTIS:

The vehicle in which the bullet casings and clips were found belonged to MR. SCOTT'S son not MR. SCOTT (R. 390). The record is unclear as to whether MR. SCOTT was receiving workers' compensation benefits at the time of trial (R. 9-11).

MR. SCOTT did try to report his injury of September 12, 1980 to Mitchell but he was unable to reach Mitchell because he was out of the office. Therefore he told Mitchell about the injury the following week when Mitchell came to the job site (R. 272). It is undisputed that Mitchell was designated by OTIS as the person to whom on the job injuries were to be reported and that he approved all reports.

MR. SCOTT testified he did not remember whether Mitchell asked him if he wanted to fill out an accident report (R. 275). MR. SCOTT did not go to the doctor when he was injured because he did not feel that he could take off time from work. He stated that if he did have to go to the doctor he would go at night (R. 275).

MR. SCOTT explained at trial that since he knew nothing about the filing of a workers' compensation claim or filling out an accident report, he was not familiar enough with the process to even discuss it with Mitchell (R. 276). This is the reason MR. SCOTT did not request that a workers' compensation claim be filed by Mitchell for him.

In order that the Court may understand the chronology of events, Plaintiff would set forth the following:

1.	MR. SCOTT falls on debris and sustains injury	Sept. 12, 1980
2.	The Burdines' incident occurs	Sept. 19, 1980
3.	SCOTT is terminated by Mitchell (R. 317-318)	Sept. 25, 1980
4.	Mitchell goes on three week vacation (R. 519)	End of Sept. 1980
5.	MR. SCOTT goes to OTIS' office and fills out notice of injury form in order to receive medical treatment (R. 255, Plaintiff's Exhibit 2, Notice of injury form)	Oct. 17, 1980
6.	MR. SCOTT sees doctor for first time for injury of Sept. 12, 1980 (Plaintiff's Exhibit 2, Health Insurance Claim form)	Oct. 20, 1980
7.	Mitchell returns from vacation and signs notice of injury form stating that he was "unaware of injury" (Plaintiff's Exhibit 2, Notice of Injury)	Oct. 22, 1980

When Mitchell told SCOTT to take some time off on September 25, 1980, Mitchell admitted that he mentioned MR. SCOTT'S injury (R. 508-509).

The testimony of SCOTT and Mitchell as to the insurance form given Mitchell on the day SCOTT was terminated is directly contradictory. It was MR. SCOTT'S testimony that this form was given Mitchell inside the OTIS' offices before Mitchell took him outside and told him that he was terminated. MR. SCOTT said the form he gave Mitchell was a disability health form to pay MR. SCOTT'S mortgage payments in case he became disabled and had nothing to do with unemployment as Mitchell testified (R. 533).

Mitchell also testified that SCOTT called him and asked him to fill out a mortgage form and that he fired him in the parking lot of the OTIS' offices (R. 503). Mitchell admitted that this form was given to him inside the OTIS' office before he and MR. SCOTT walked

outside to the parking lot thus corroborating Mr. Scott's testimony (R. 318, 529).

MR. SCOTT testified that as to the inconsistency in some of his testimony concerning the date on which certain events occurred, he became confused in giving dates in his deposition as to when the different forms were presented to Mitchell (R. 350-352). However MR. SCOTT clearly testified on rebuttal that the form that he gave Mitchell in his office prior to the time he was terminated was a health form in case he was sick or hurt so that insurance would pay his monthly mortgage payments (R. 533).

Mitchell admitted at trial that even unfounded allegations of wrongdoing on the job by MR. SCOTT were considered by him in firing MR. SCOTT (R. 522). MR. SCOTT'S testimony at trial was that he was told to take some time off by Mitchell because of the Burdines' incident and his injury of September 12, 1980 (R. 319). It should be pointed out that no one from Burdines was produced at trial to verify Mitchell's testimony that he had received a complaint from a vice president of Burdines. MR. SCOTT did not work for an entire month after the accident of September 12, 1980 (Respondent's Brief at 4) but only for a couple of weeks (R. 276-277).

ARGUMENT

POINT I

A CAUSE OF ACTION FOR WRONGFUL DISCHARGE IS SUBJECT TO A FOUR YEAR STATUTE OF LIMITATIONS UNDER FLORIDA LAW.

It is obvious from the brief submitted by OTIS that this Court's decision in Broward Builders Exchange, Inc. v. Goehring, 231 So. 2d 513 (Fla. 1970) has been given broad implications. Indeed, the Fourth District's opinion notes Goehring's "broad language." Otis Elevator Company v. Scott, 503 So. 2d 941, 943 (Fla. 4th DCA 1987). At the outset, Plaintiff urges that if this Court agrees with the construction and interpretation of Goehring by OTIS then this Court should recede from its language in Goehring and clearly limit its application to actions between employers and employees which specifically concern wage disputes under an express or implied contract of employment, which this action under §440.205 certainly is not.

There is no language in Goehring, as Defendant contends, that limits its applicability to employee-employer suits (Respondent's Brief at 14). If this Court were to adopt the reasoning of OTIS, any claim against an employer or others for lost wages would be subject to the statute of limitations contained within §95.11 (4)(c). In fact, if an employer is sued for an intentional tort (presupposing the absence of workers' compensation immunity) and part of the damages claimed are lost wages then clearly under the analysis of Goehring adopted by the Fourth District, §95.11 (4)(c) would be controlling even though there is a separate, specific statute of limitations for intentional torts.

OTIS argues that the specificity of the wording of §95.11 (4)(c) requires that it apply to this case since OTIS characterizes this action as a suit for wages (Respondent's Brief at 18). Nevertheless, We submit that it is the specificity of this statute of limitations which precludes its application here since this action arose pursuant to the payment of workers' compensation benefits and not wages to MR. SCOTT.

The triggering factor giving rise to this cause of action was not the payment of wages by OTIS to MR. SCOTT. Rather, it was the payment of workers' compensation benefits to MR. SCOTT as the result of his on the job injury. It is not the employer's attempt to avoid paying wages which subjects it to liability under §440.205 but rather the employer's attempt to avoid payment of workers' compensation benefits which is unlawful and prohibited.

Contrary to the argument of Defendant that this is a claim for wages or damages concerning the payment of wages (Brief of Respondent at 13, 14), there is no express or implied contract of employment in this case upon which a claim for wages could arise as discussed in Goehring. Goehring at 514. MR. SCOTT has already acknowledged that he had no continued right to employment under any written agreement. Under Florida law he was an employee terminable at will.

The liability of OTIS did not arise from its failure to honor an employment agreement but rather its illegal attempt to circumvent the workers' compensation laws of this State by discharging MR. SCOTT in retaliation for his filing of a workers' compensation claim.

We should mention in passing that apparently OTIS finds laudatory the fact that the workers of OTIS were threatened with loss of a

week's work if they got injured (Respondent's Brief at 9). This type of threat and intimidation by an employer is also illegal under §440.205. That statute prohibits threats, intimidation, or coercion of an employee because of their claim "or attempt to claim" workers' compensation benefits. It is obvious from the brief submitted by OTIS that it still does not understand the meaning of this statute and is probably still violating it!

MR. SCOTT'S position is further supported by a recent decision from the Texas Court of Appeals. In Luna v. Frito-Lay, Inc., 726 S.W. 2d 624 (Tex. Ct. App. 1987) the court was faced with the exact question presented to this Court, i.e., which statute of limitations applies to a wrongful discharge action arising from the plaintiff's workers' compensation claim for benefits. The Texas court held that a wrongful discharge claim for instituting workers' compensation proceedings arises from the employer's statutory obligation (under the Texas statute similar to §440.205) which is a duty separate and independent of any contractual obligation. Luna at 627. The court therefore found the Texas tort statute of limitations applicable to the claim.

The Federal cases cited by OTIS such as McGhee v. Ogburn, 707 F. 2d 1312 (11th Cir. 1983), Burney v. Polk Community College, 728 F. 2d 1374 (11th Cir. 1984), and Lake v. Martin Marietta Corporation, 538 F. Supp. 725 (M.D. Fla. 1982) were overruled by Wilson v. Garcia, ___ U.S. ____, 105 S. Ct. 1938 (1985), also see Goodman v. Lukens Steel Company, ____, U.S. ____, ____ S.Ct. ____, 1 F.L.W. Fed. S866 (June 19, 1987). In these cases the federal appellate courts found a §1983 claim or other employment discrimination claim to be analogous to a

Goehring type claim for wages. However, the U.S. Supreme Court found in Wilson that a §1983 claim was analogous to a state tort claim or a claim arising under a statute. Wilson, 105 S. Ct. at 1945.

The Supreme Court stated that characterizing §1983 civil rights claims as personal injury actions for the purposes of determining the appropriate limitations period was the best alternative. Id. at 1947. All of the Federal court decisions cited by OTIS and decided prior to Wilson construed employment discrimination claims as "labor" disputes. The U. S. Supreme Court in Wilson rejected such reasoning.

Since OTIS finds the federal court's construction of employment discrimination cases persuasive, We submit that the Wilson decision overruling those cases should be equally persuasive here. This Court should find that a §440.205 claim is an intentional tort or at the very least a statutory cause of action. However, an action under §444.205 is certainly not an "employment discrimination action" as discussed in the federal cases cited by OTIS.

Simply stated, OTIS did not breach an employment contract with MR. SCOTT in this case (Respondent's Brief at 19). This is also not a tort arising out of a contract of employment but rather a tort arising out of a claim for workers' compensation benefits. This claim is most analogous to an intentional tort cause of action and should be subject to the same limitations period and measure of damages as an intentional tort claim.

OTIS makes much of the fact that MR. SCOTT did not actually sign a notice of injury until after he was purportedly terminated by Mitchell on September 25, 1980. However, the record reflects that it was Mitchell who had the sole responsibility for filing the notice of

injury forms and therefore his absence on vacation delayed the filing of the form. This is in addition to the fact that MR. SCOTT did not know how to file a workers' compensation claim and there was no question that SCOTT told Mitchell about his fall and resulting injury.

In brief response to the answer brief filed by OTIS in response to the amicus brief supporting the position of MR. SCOTT, We would simply point out that the arguments made by OTIS and the case law cited therein have no applicability to a §440.205 claim. We agree with OTIS that Florida courts have not adopted a common law cause of action for retaliatory discharge arising from a claim for workers' compensation benefits. That is irrelevant however since our Legislature indeed saw fit to prescribe a statutory remedy.

We submit that an action pursuant to §440.205 is subject to a four year statute of limitations under either §95.11 (3)(f) or §95.11 (3)(o). Therefore the decision of the Fourth District should be quashed and this action should be remanded with directions that the judgment entered on the verdict herein be reinstated.

POINT II

THE PLAINTIFF IN A WRONGFUL DISCHARGE ACTION IS ENTITLED TO RECOVER DAMAGES FOR MENTAL PAIN AND SUFFERING AND HUMILIATION.

This issue has been properly preserved for appeal. The complaint specifically stated that MR. SCOTT sought damages for "loss of morale, confidence, self-esteem, humiliation and loss of reputation among his friends and fellow co-workers" (R. 674). In addition, the Plaintiff proferred testimony on this issue (R. 221).

OTIS' citation of Catania v. Eastern Airlines, Inc., 381 So. 2d 265 (Fla. 3d DCA 1980) is puzzling since this case concerned an action for wrongful discharge based upon false charges which the employer knew to be false. Catania is not a wrongful discharge case arising under §440.205 and has no application here. There is no issue in this case of an employee's right to bring a common law wrongful discharge claim based upon public policy.

OTIS does not attempt to discuss or distinguish Plaintiff's citation of Cagle v. Burns and Roe, Inc., 106 Wash. 2d 911, 726 P. 2d 434 (Wash. en banc 1986) where that court held that the plaintiff in a wrongful termination suit could recover damages for emotional distress. OTIS also does not respond to the fact that the majority of jurisdictions that recognize a cause of action for wrongful discharge also allow recovery for damages for emotional distress.

We need not repeat the arguments raised in our initial brief but rather urge that this Court align itself with the majority of jurisdictions which have considered this issue and determined that damages for emotional distress are available as part of the plaintiff's compensatory damages. We believe that such a decision would implement the Legislature's obvious remedial intent in enacting §440.205.

For these reasons, the Plaintiff respectfully requests that this Court hold that damages for mental distress are available to the Plaintiff in this case and reverse and remand this action with directions that Plaintiff's claim for mental distress arising from his wrongful discharge be presented to the jury.

POINT III

THE PLAINTIFF IN A WRONGFUL DISCHARGE CASE IS ENTITLED TO PREJUDGMENT INTEREST ON HIS PAST LOST WAGES AWARD.

Contrary to the argument presented by OTIS, MR. SCOTT'S attorney did not advise the trial court that he was not seeking prejudgment interest (R. 150). Rather, the transcript reflects that the court and counsel were discussing testimony to be presented by Plaintiff's economist as to his past and future lost wages and the calculations used by the economist in bringing the past lost wages of MR. SCOTT to present value (R. 149-150).

Of course, at the time this action was tried in April of 1985 this Court's decision in Argonaut Insurance Co. v. May Plumbing Company, 474 So. 2d 212 (Fla. 1985) had not been rendered. However, this Court stated in Argonaut that once the verdict has liquidated the damages as of a date certain the computation of prejudgment interest is merely a mathematical computation and therefore no finding of fact by the jury is necessary. It is also not necessary that the plaintiff demand prejudgment interest in their pleadings. See, Getelman v. Levey, 481 So. 2d 1236 (Fla. 3d DCA 1985). Since this Court must apply the prevailing law at the time of appeal, Plaintiff would be entitled to prejudgment interest.

Defendant's argument that MR. SCOTT'S past lost wages are not "out of pocket" losses is wholly without merit since his wages were determined according to union scale and were easily verifiable. No speculation by the jury was necessary as to the amount of these damages. Although OTIS claims that prejudgment interest is not available under Florida law on past lost wages, it fails to cite any

authority for this claim.

Plaintiff submits that where lost wages are an element of tort damages which are verifiable in amount and duration and are liquidated by a jury verdict, prejudgment interest should be assessed. See, Hadra v. Herman Blum Consulting Engineers, 632 F. 2d 1242 (5th Cir. 1980) which affirmed an award to the plaintiff in a wrongful discharge case of prejudgment interest on his past lost wages claim under Texas law.

For these reasons, Plaintiff respectfully requests that this Court reverse and remand this action with directions that the Plaintiff be awarded interest on the amount of the verdict for past lost wages at the statutory rate from the date of the loss.

(Issues raised by Defendant/Respondent)

POINT IV

THE TRIAL COURT WAS CORRECT IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT SINCE SUBSTANTIAL EVIDENCE EXISTED PRESENTING A JURY QUESTION ON THE ISSUE OF PLAINTIFF'S WRONGFUL DISCHARGE.

Only where no view of the evidence could sustain a verdict for the party against whom judgment is sought is a directed verdict appropriate. In reviewing the evidence in the record before this Court, all facts and inferences are to be viewed in the light most favorable to the Plaintiff as the non-moving party. It is clear that OTIS' brief is wholly violative of these principles and that in fact it urges this Court to adopt certain "undisputed" facts which in reality were the subject of conflicting evidence.

Defendant claims that it is entitled to a directed verdict in this case because "the undisputed facts were sufficient as a matter of law to warrant the employer in terminating the employee" (Respondent's brief at 22). Defendant then goes on to discuss numerous cases where an employee was discharged and such a discharge was later upheld on the basis of misconduct within the scope of employment (Respondent's brief at 22-26).

MR. SCOTT submits that OTIS again ignores the legal elements necessary to sustain a wrongful discharge action, the burden of proof of such claims, and the nature of the action. Plaintiff has set forth below decisions from other jurisdictions, since there is no Florida law directly on point, concerning an action for wrongful discharge, the burden of proof and inferences available to the employer and employee, and the quantum of proof necessary to present a jury question.

Numerous states have now recognized an employee's right to maintain a cause of action for retaliatory discharge arising from the employee's filing of a workers' compensation claim. See, Annot., 32 A.L.R. 4th 1221, 1227-1235 (1984).

The seminal case discussing retaliatory discharge actions is clearly Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E. 2d 425 (1973). In that case, the Supreme Court of Indiana recognized a common law cause of action in Indiana for retaliatory discharge arising from the filing of a workers' compensation claim. That court found:

> If employers are permitted to penalize employees for filing workmans' compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right.

> Employees will not file claims for justly deserved compensation-opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation. Frampton at 427.

The court in Frampton found that retaliatory discharge because of the filing of a workers' compensation claim was an intentional wrongful act for which the employee is entitled to be fully compensated.

OTIS argues that because it came forward with a "reason" for MR. SCOTT'S termination, i.e., the alleged gun incident at Burdines, that therefore there is no cause of action available to Plaintiff as a matter of law (Respondent's brief at 21-22).

Defendant claims that the "undisputed evidence" establishes that this alleged gun incident justified Plaintiff's termination and therefore Defendant was entitled to a directed verdict. In addition to the fact that there was substantial evidence in the record supporting Plaintiff's position that he was discharged because of his filing of a workers' compensation claim and was intimidated and threatened by Defendant in pursuing this claim, the Defendant ignores that line of cases discussing the elements necessary to establish a prima facie case and the type and quality of evidence found sufficient to present a jury question in other jurisdictions.

The New York Court of Appeals in Axel v. Duffy-Mott Company, Inc., 47 N.Y. 2d 1, 389 N.E. 2d 1075 (1979) discussed judicial review of the evidence presented in a retaliatory discharge case. The court wisely noted that employers who engage in such conduct "rarely broadcast their intentions to the world." Axel at 1077. The court in Axel pointed out that employers who do retaliate are expected to try

to avoid detection and therefore will use subtle rather than obvious methods. Id. The court specifically acknowledged that:

> visible manifestations of even a most improperly motivated discharge may be difficult to sort out from a nonretaliatory exercise of this discretion. Id.

In fact, the testimony of the plaintiff alone has been held sufficient to submit the case to the jury, see, Hansome v. Northwestern Cooperage Company, 679 S.W. 2d 273 (Mo. en banc 1984) and cases cited therein, and support judgment in the plaintiff's favor. A.J. Foyt Chevrolet, Inc. v. Jacobs, 578 S.W. 2d 445 (Tex. Civ. App. 1979); Curling v. Newport News Shipbuilding and Dry Dock Company, 8 B.R.B.S. 770 (BRB No. 77-421 August 31, 1978).

As one court observed, the proof necessary to establish that an employee has been terminated because of the filing of a workers' compensation claim is necessarily indirect because the employer is not likely to "announce retaliation as his motive." Reed v. Sale Memorial Hospital and Clinic, 698 S.W. 2d 931 (Mo. Ct. App. 1985). The court in Reed noted that the existence of animus between the employer and employee is a question for the jury. Reed at 936.

Like the Defendant here, the defendants in Reed argued that in order for the plaintiff to present a submissible case for jury determination, plaintiff would have to establish that the notice of formal claim was received by the employer prior to plaintiff's discharge and that defendant acted based upon this knowledge. Reed at 936. However, the Reed court rejected this argument and found that imposing such a burden on the plaintiff would effectively nullify the statute allowing such a claim. Id.

The court found that the proximity in time of the employer's

action to the plaintiff's decision to make a claim was some indication of a retaliatory motive on the part of the employer. Id. The court further found that the evidence in Reed which consisted of the plaintiff's testimony and the contrary testimony of her employer was sufficient to present a jury question. Also see Kelsay v. Motorola, Inc., supra, where that court affirmed judgment in favor of the plaintiff/employee and noted that the essential testimony in the record consisted of plaintiff's statements of being warned by her employer not to follow through with her compensation claim and where plaintiff was advised by her employer that it was company policy to terminate employees who pursued workers' compensation claims. Kelsay, 384 N.E. 2d at 356.

Even if the record contains evidence tending to explain the actions of the defendant or perhaps support termination, where there is evidence of such a character that reasonable men could differ as to its truthfulness or importance, a directed verdict should not be granted. Henderson v. Traditional Log Homes, Inc., 70 N.C. App. 303, 319 S.E. 2d 290 (N.C. Ct. App. 1984). That is the exact situation here since the determinative factual issues were based upon the jury's assessment of the credibility of the witnesses and the weight of the evidence presented by MR. SCOTT and OTIS.

In reversing the trial court's entry of judgment notwithstanding the verdict in favor of the defendant/employer in Schrader v. Artco Bell Corporation, 579 S.W. 2d 534 (Tex. Civ. App. 1979) the court noted that where there is some evidence, "more than a scintilla," having probative force upon which the jury could make the findings relied upon, a directed verdict is not available because of the

factual insufficiency of the evidence. Schrader at 539.

Additionally, in the case of Henderson v. St. Louis Housing Authority, 605 S.W. 2d 800 (Mo. Ct. App. 1979) that court affirmed the trial court's denial of defendant's motion for directed verdict based upon the testimony of the plaintiff in that case that defendant's employee told him he was being discharged because he had filed a workers' compensation claim. The court found this testimony constituted substantial evidence sufficient to present a submissible jury question. Henderson at 803.

In Schubbe v. Diesel Service Unit Co., 71 Or. App. 232, 692 P. 2d 132 (1984) the defendant/employer argued that the plaintiff was fired because he had worked unauthorized overtime and exhibited a bad attitude. However, the appellate court concluded on de novo review that plaintiff would not have been discharged but for the defendant/employer's discriminatory motive of retaliation for the plaintiff's filing of a workers's compensation claim.

In that case, plaintiff presented evidence that his supervisors had expressed their displeasure with his decision to file a workers' compensation claim and that after a work related injury and lay off, when he was released to return to work he was informed that he did not have a job. The court found that even though plaintiff may have worked some unauthorized overtime prior to his discharge, that the primary reason for his discharge was still his filing of a workers' compensation claim and therefore upheld judgment in his favor.

Plaintiff should also point out that in the case of Texas Steel Co. v. Douglas, 533 S. W. 2d 111 (Tex. Civ. App. 1976) it was emphasized that statutes prohibiting retaliatory discharge would be

"completely useless" if the plaintiff/employee was required to show that he or she was fired only after they filed a claim for compensation. The court stated that if such a rule were allowed, then all the employer would have to do in order to defeat a claim for retaliatory discharge would be to fire the injured workman before he filed the claim. Texas Steel at 115. This is the exact position taken by OTIS in this case since it argues that SCOTT couldn't have been discharged in retaliation for his filing of a workers' compensation claim since he was discharged by Mitchell before the notice of injury form was signed by MR. SCOTT and prepared by OTIS.

In Axel, supra, the New York Court of Appeals noted that the change in attitude by the employer between the time of the injury and the termination of employment supported an inference that plaintiff was terminated because of her workers' compensation claim. The court noted in Axel that plaintiff had a "first rate employment history" (like MR. SCOTT) and the employer's sudden change of attitude with respect to plaintiff's performance indicated an underlying animus as the result of the claim.

In addition, the appellate court noted that the employer offered no evidence at trial of its treatment of other employees who were supposedly tardy, or who made personal phone calls, or whose performance was questioned on the same grounds as the plaintiff in Axel. Moreover, there was no documentation of company policies or rules submitted into evidence showing that the plaintiff's conduct was below the standard required of employees (like OTIS here). The court found that an adequate foundation had been laid by the plaintiff in Axel to establish that her discharge was in retaliation for her

pursuit of a compensation claim.

The Defendant has cited in support of its defense of nonretaliatory discharge only those facts in the record which concern the incident at the Burdines' job site where Plaintiff allegedly threatened the employee of another company with a gun (Respondent's Brief at 21-22, 28-29). However, even that description by Defendant is slanted and clearly not within the appellate rule requiring that all facts and inferences be construed in favor of the prevailing party in order to determine whether a jury question was established in this record.

The trial court correctly determined that it was up to the jury to determine whether MR. SCOTT had proven his case of retaliatory discharge and that such proof would have to be done by inference concerning OTIS' coercion, threats, or intimidation of MR. SCOTT (R. 430). The trial court found that based upon §440.205 and the evidence presented, OTIS' motion for directed verdict should be denied.

The issue raised by Defendant's motion for directed verdict at trial and now on appeal is not whether the facts and the record would support the Defendant's discharge of Plaintiff as stated by OTIS (Respondent's brief at 21-22). The question is rather whether MR. SCOTT sustained the burden of proof of establishing the pursuit of a workers' compensation claim, and retaliatory discharge arising therefrom. Regardless of whether Defendant "believes" it had an excuse for terminating Plaintiff, if the substantial reason for MR. SCOTT'S discharge was his filing of a workers' compensation claim, he is entitled to prevail.

There is no question in this case nor was there any at trial that Plaintiff was an at will employee. The only question in this case is why MR. SCOTT was terminated from his employment with OTIS after nineteen and one half years.

Defendant ignores the evidence in this record that supports MR. SCOTT'S position as found by the jury, that his termination was retaliatory, that OTIS through its agent Mitchell was aware that MR. SCOTT had been injured on the job and would be filing a workers' compensation claim, and that the Burdines' incident was not the substantial reason for MR. SCOTT'S discharge. Plaintiff urges that based on the evidence submitted at trial which will be reviewed below, the jury was properly the final arbiter of the question of whether OTIS was guilty of wrongfully discharging MR. SCOTT. Contrary to the facts contained at pages 21-22 and 28 of the Respondent's brief, there is sufficient evidence in the record, albeit circumstantial, to support Plaintiff's claim and the verdict rendered herein.

The trial court correctly determined that it was the Plaintiff's burden to establish a workers' compensation claim, that the discharge was the result of that claim, and that Plaintiff suffered damages arising therefrom (R. 60). The court also reasoned that it was the Defendant's burden to establish that the reason for MR. SCOTT'S discharge was not pretextural and for Plaintiff in rebuttal to establish why that was not the real reason for his discharge (R. 60).

The trial court noted that Plaintiff was not required to establish that an OTIS representative specifically stated to MR. SCOTT "I'm discharging you because you filed a claim," because the court found that was not a reasonable burden of proof (R. 60). Defense

counsel for OTIS conceded that such a burden was not present and recognized that in most cases there would not always be direct statements to the employee (R. 61).

Nevertheless, in response to OTIS' claim of entitlement to a directed verdict We submit for the Court's review the facts in this case viewed most favorably to the Plaintiff:

J. D. Mitchell, an OTIS employee and MR. SCOTT'S direct supervisor, admitted at trial that BILL SCOTT told him he had injured himself on the Galleria job site and at the time that BILL informed him of the injury, BILL was walking with a cane (R. 124). Mitchell was also aware that SCOTT had sustained a prior injury to his leg (R. 124). Mitchell testified that MR. SCOTT told him that he had tripped and fallen over some debris when he got out of an elevator and injured his leg (R. 125). Mitchell stated that it was mid or early September when MR. SCOTT told him about his leg injury (R. 125). However, on MR. SCOTT'S notice of injury form which was finally completed by OTIS, Mitchell made a notation that he was "unaware of injury" (Plaintiff's Exhibit #1).

Mitchell claimed that MR. SCOTT was fired because of customer complaints, absenteeism, and tardiness (R. 127). However the "customer complaints" were contained only on the termination notice (R. 127, 130). As to absenteeism and tardiness, Mitchell testified that there was only one letter written by Mitchell in MR. SCOTT'S personnel file concerning that complaint (R. 130). There was no mention in MR. SCOTT'S personnel file of the incident at Burdines.

MR. SCOTT testified at trial that in all the years that he was a foreman on OTIS job sites, there was never any complaints about the

quality of his work (R. 244). MR. SCOTT testified that OTIS representatitves told him that he had been requested by Burdines to do all of their jobs (R. 244).

The only time that MR. SCOTT recalled being late to the job site after becoming a foreman and while Mitchell was his supervisor was an incident that occurred the day after New Year's Day when he stayed in a restaurant to have coffee resulting in him and his men being about fifteen minutes late for work (R. 246). Mitchell was already on the job site when SCOTT and his men arrived and reprimanded SCOTT for the incident. MR. SCOTT testified that he deducted one hour's pay from his own paycheck for the week because there were four people who were approximately 15 minutes late. However, he did not deduct anything from the other men's paychecks (R. 246-247). MR. SCOTT testified that he did not remember an incident in August of 1980 reflected in a memorandum from Mitchell in MR. SCOTT'S personnel file where a discussion took place between the men concerning MR. SCOTT'S "tardiness" (R. 248). As foreman, MR. SCOTT was the highest official on the OTIS job site on a day to day basis.

MR. SCOTT testified that he was told by Mitchell to hold down accidents on the job site (R. 249). MR. SCOTT further testified that at one time OTIS had a substandard safety record and the employees were instructed to hold down "lost time accidents" (R. 249).

MR. SCOTT related an incident where an employee was injured on the job site, and MR. SCOTT took him to the hospital. While at the hospital MR. SCOTT called Mitchell and told him about the accident. MR. SCOTT testified that Mitchell asked that the hospital bill claim be handled through the employee's health insurance (instead of

workers' compensation) and that the employee would be reimbursed with cash from OTIS (R. 250-251). Furthermore, SCOTT testified that at one Friday safety meeting Mitchell stated that the next employee who got hurt and filed a compensation claim was going to lose a week's time (i.e., lose one week's pay) (R. 252). MR. SCOTT testified that the reason for this was to hold down OTIS' insurance rates and improve the company's safety record (R. 253).

MR. SCOTT was injured on September 12, 1980. He tried to call Mitchell that day but Mitchell was out of the office (R. 272). MR. SCOTT testified that he told Mitchell about his injury the following week when Mitchell came to the job site (R. 272). MR. SCOTT stated that when he told Mitchell about his injury he showed him his swollen knee and also told him his elbow was swollen (R. 273). MR. SCOTT explained that he did not go to a doctor on the day he told Mitchell about his injury because he did not feel he could take the time off from work (R. 275).

MR. SCOTT stated that he did not request that Mitchell file a workers' compensation claim for him for the September 12, 1980 injury since he did not understand the process and did not know what was necessary to file such a claim (R. 275-276). MR. SCOTT stated that a couple of weeks after the injury Mitchell told him to take off from work and gave as his reason the incident at Burdines and MR. SCOTT'S injury (R. 278, 319).

As to the alleged gun incident at the Burdines job site on September 19, 1980, MR. SCOTT denied that he had a weapon on the job site and that he had pointed it at another construction worker (R. 305). MR. SCOTT testified that the man who accused him of pointing a

gun at him also had his wife present at the time of the arrest. His wife was a police dispatcher for the City of Ft. Lauderdale Police Department who arrested MR. SCOTT (R. 307-308). MR. SCOTT further testified that this couple were friends of his ex-wife (R. 308). MR. SCOTT had had a prior confrontation with this man concerning MR. SCOTT'S ex-wife.

MR. SCOTT signed the first notice of injury on October 17, 1980 (R. 326). MR. SCOTT testified that since he had reported his injury to Mitchell he assumed that Mitchell had taken care of preparing an accident report (R. 326).

MR. SCOTT stated that he felt intimidated by OTIS because he had requested his vacation pay when he left OTIS and the delay in receiving it made him feel intimidated (R. 329). MR. SCOTT further testified that he felt that his accident had a "great deal" to do with his termination (R. 329). Moreover, MR. SCOTT believed that the OTIS employee who completed his accident report was fired (R. 330).

MR. SCOTT gave an example of Mitchell's intimidation of him by explaining that normal company policy was that a worker was paid expenses if they had to work away from their residence. MR. SCOTT testified that Mitchell had him work on several jobs in the Palm Beach area even though MR. SCOTT lived in Ft. Lauderdale. However, Mitchell told SCOTT to either work in Palm Beach with no expenses or go to Miami (R. 347). MR. SCOTT testified that since traffic wasn't as bad going to Palm Beach he elected to have his expense money cut off and stayed on the job in Palm Beach (R. 347). MR. SCOTT testified that he later discussed the matter with Mitchell and told him that he didn't think it was fair that he was not receiving expense money (R. 348).

MR. SCOTT explained that a day or two after they had that discussion, midway through the Palm Beach job, Mitchell replaced SCOTT (R. 349).

Tom Bermingham, district manager for OTIS and Mitchell's supervisor at the time MR. SCOTT was terminated, testified that the decision to terminate MR. SCOTT was a joint decision between himself and Mitchell (R. 365-366). Bermingham stated that he relied upon the investigation by Mitchell and Mitchell's findings in his decision to terminate MR. SCOTT (R. 374-376). Bermingham was surprised when he learned at trial that no weapon was ever found on the job site (R. 374). Bermingham confirmed that it was Mitchell's responsibility to file a notice of injury with the State of Florida (R. 381). Bermingham testified that MR. SCOTT did a good job and was a hard worker (R. 383).

Detective Howard Kaye of the Ft. Lauderdale Police Dept. testified that he responded to a complaint at the Burdines' job site. He stated that he approached MR. SCOTT at the job site and that MR. SCOTT denied any involvement with a gun incident (R. 386-387). Detective Kaye testified that MR. SCOTT voluntarily took him down to the truck in which he had come to work (which belonged to MR. SCOTT'S son) and allowed Detective Kaye to search the truck (R. 388). Detective Kaye testified that no gun or weapon was ever found in the vehicle or on the job site (R. 389). Detective Kaye also testified that he did not find any bullets to an alleged rifle (R. 391).

Mitchell admitted that on the day he fired MR. SCOTT, MR. SCOTT had called him and asked him to fill out a disability insurance mortgage form for him (R. 503). It was when MR. SCOTT came to the office to have Mitchell fill out the form that he informed him that he

had been terminated (R. 503). In fact, Mitchell stated that he fired SCOTT after SCOTT gave him the form to complete (R. 529). Mitchell testified that at the time he fired MR. SCOTT, SCOTT was walking with a cane (R. 508-509). Mitchell admitted that he saw SCOTT twice between the time he was injured and the time he was terminated and SCOTT was limping and using a cane both times (R. 132).

This case is unlike the facts of DeFord Lumber Co., Inc. v. Roys, 615 S.W. 2d 235 (Tex. Civ. App. 1981) where there was no testimony of any witness including the plaintiff that his discharge was the result of the filing of a workers' compensation claim. Similarly, in Swanson v. American Manufacturing Co., 511 S.W. 2d 561 (Tex. Civ. App. 1974) it was clear that the employee in that case was fired because he lied about filing a prior workers' compensation claim. Swanson at 564. Also the facts here are unlike Mitchell v. St. Louis County, 575 S.W. 2d 813 (Mo. Ct. App. 1978) where that plaintiff was discharged several months after filing a claim for compensation benefits and the record amply supported the employer's asserted reason for her discharge, i.e., excessive absenteeism. Mitchell at 815.

Moreover, the plaintiff in Solomon v. Cohn, Glickstein, Lurie, Ostrin & Lubell, 468 N.Y. Supp. 2d 86 (1983) did not point to any specific acts or statements of her employer which indicated that she had been terminated because of the filing of a workers' compensation claim. That case is therefore also distinguishable.

The case of Vollenweider v. New Orleans Publis Services, Inc., 466 So. 2d 804 (La. App. 1985) is also not dispositive since in that case it was clear that the plaintiff did not follow company regulations concerning treatment for a work related injury, and that

the employee in that case was absent from work without permission.

Finally in Hughes Tool Co. v. Richards, 624 S.W. 2d 598 (Tex. Civ. App. 1981) the employee in that case testified that he instituted suit against the employer for retaliatory discharge because he felt his employer had never accepted the fact that he was hurt and they denied him the right to go and see a doctor. Richards at 599. The court found these allegations, even if true, insufficient to support a finding that plaintiff was fired because he instituted proceedings to collect workers' compensation benefits.

Under the Florida Evidence Code specifically §90.803 (7), the absence of an entry as to a regularly conducted business activity can be utilized to prove the non-existence or non-occurrence of any matter. In this case, the Defendant failed to establish that the reasons given for termination, i.e., customer complaints, absenteeism, tardinees, etc. were substantiated in MR. SCOTT'S personnel file or ever actually existed. In addition, it is clear from the testimony of the arresting officer on the Burdines' job site that no gun was ever found, and the arrest of the Plaintiff was made based upon the unsupported statements of the complainant, a personal foe of MR. SCOTT.

There is simply no way in a wrongful discharge case to present or elicit "direct" evidence of the employer's intent. The evidence will of necessity always be circumstantial and subject to appropriate inferences by the jury.

In this case, the jury was presented with the conflicting testimony of MR. SCOTT and Mitchell as to the reason for MR. SCOTT'S termination. MR. SCOTT specifically stated that OTIS employees had

been warned about filing workers' compensation claims, had been discouraged from it, and that he felt intimidated by Mitchell in pursuing a workers' compensation claim. This evidence together with the lack of documentation and the purported reason given by OTIS for SCOTT'S termination establishes the causal link under §440.205 necessary to create a submissible jury case.

Under the circumstances, there was a conflict in the evidence as to the reason Mitchell fired MR. SCOTT. On that basis the trial court properly ruled that this issue should be resolved by the jury. An employer cannot use the filing or attempt to file a compensation claim "as a reason to discharge or otherwise discriminate against an employee even if there are other reasons." Santex, Inc. v. Cunningham, 618 S.W. 2d 557, 559 (Tex. Civ. App. 1981).

For these reasons, the trial court was correct in denying Defendant's motion for directed verdict and this Court should affirm that decision.

POINT V

THE TRIAL COURT WAS CORRECT IN REFUSING TO MODIFY PLAINTIFF'S AWARD FOR PAST LOST WAGES AND BENEFITS.

Defendant claims that Plaintiff is not entitled to past lost wages in this case. As the basis for this argument, Defendant urges that because MR. SCOTT received an on the job injury which necessitated restriction of his duties as an employee, any difference in income is the result of the injury and therefore noncompensable.

MR. SCOTT testified that prior to the on the job injury he received in September of 1980 he was able to perform the work of a

foreman or superintendent even though he had a twenty percent disability from his previous injury (R. 346). MR. SCOTT also stated that when he recovered from his injury and was told he could go back to work, he attempted to return to work for OTIS but he was told that there was no work available for escalator men (R. 350). In addition to the higher union scale which MR. SCOTT received at OTIS than at his subsequent employer, he was entitled to three weeks of vacation at foreman's pay, one hundred percent medical coverage for himself and his family, a vested pension plan through the union that OTIS made contribution to, and of course, the higher pay (R. 260).

Plaintiff introduced into evidence the sworn affidavit of J. D. Mitchell which stated that Mitchell was familiar with MR. SCOTT'S prior knee injury and took this into consideration in continuing his employment (Plaintiff's Exhibit #1). This affidavit also states that Mitchell determined that MR. SCOTT was capable of working as a mechanic in spite of this accident. Interestingly, the affidavit also states that BILL SCOTT continued to work for OTIS "until" September 12, 1980-the day he was injured (See Plaintiff's Exhibit #1).

More importantly, OTIS took the position at trial that "the only appropriate remedy" in this case, if Plaintiff prevailed, would be back pay (including lost wages and benefits) and reinstatement (R. 790, 152, 800, 444, 834). In fact, no mention was made of the award of past lost wages and benefits in Defendant's pre- and post-trial motions! As a result any alleged error has been waived for appellate purposes. Stallworth v. Superior Dairies, Inc., 354 So. 2d 950 (Fla. 1st DCA 1978; Allstate Insurance Company v. Gillespie, 455 So. 2d 617 (Fla. 2d DCA 1984).

Nevertheless, Plaintiff would point out that it is clearly the burden of the employer to establish lack of entitlement to salary increases and benefits within the employment position of the plaintiff. Schubbe v. Diesel Service Unit Co., 71 Or. App. 232, 692 P. 2d 132 (1984). The burden of proof is also on the employer as to the issue of mitigation of damages. The employer must establish that there was comparable employment available to the employee in a similar convenient location, that the employee made no attempt to apply for such a job and that it was reasonably likely that the former employee could obtain such a comparable job. Ryan v. Superintendent of Schools of Quincy, 374 Mass. 670, 373 N.E. 2d 1178 (Mass. 1978); Falls Stamping & Welding Company v. International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, 485 F. Supp. 1097 (N.D. Ohio 1979).

The proper measure of damages in a wrongful discharge case is:

> The amount the salary for the period would have been less the amount plaintiff earned, or which with reasonable diligency could have earned, had he applied the same ability and devotion in a comparable job.

Lines v. City of Topeka, 223 Kan. 772, 577 P. 2d 42, 50 (Kan. 1978). The Defendant ignores the fact that the damages awarded Plaintiff for loss of past wages also included loss of his pension and other benefits. The $100,000.00 award to Plaintiff is actually less than the total of lost wages and benefits sustained.

It is somewhat incongruous for Defendant to now argue on appeal that Plaintiff was not entitled to any past wage loss benefits. Accepting Defendant's argument would further benefit an employer for its own wrong. The employer can discharge its employee who has filed

a compensation claim as the result of an on the job injury and then argue that the employee is not entitled to past lost wages because of his disability. Such a result was clearly not the intent of the Legislature in enacting §440.205.

For these reasons, this issue has not been preserved for appellate review but, in fact, was conceded by Defendant and the award of past lost wages and benefits should be affirmed.

POINT VI

THE AWARD OF DAMAGES FOR FUTURE LOST WAGES AND BENEFITS AS A RESULT OF PLAINTIFF'S WRONGFUL DISCHARGE WAS CORRECT.

Defendant claims that the only damages recoverable by Plaintiff would be those sustained between the time Plaintiff was discharged by OTIS and subsequently employed by Mowry Elevator. Defendant also urges that if the Plaintiff was unemployed at the time of trial he would be entitled to reinstatement to his old position if he was able to perform those duties (Respondent's brief at 40). If not, Defendant claims that Plaintiff would be entitled to reinstatement to a position comparable to the one he presently holds with Mowry, if the employee so elected (Respondent's brief at 40).

Again, however, Defendant confuses the nature of this claim. Since this is a tort action Plaintiff is entitled to all proximately caused damages resulting from Defendant's wrongful conduct. See, generally, Smith v. Atlas Offshore Boat Service, Inc., 552 F. Supp. 128 (S.D. Miss. 1982). Although Defendant relies upon federal anti-discrimination statutes and provisions to support such an argument,

this is not the nature of this claim.

As cited previously, numerous courts have held that an action for wrongful discharge, even when brought pursuant to a statute similar to Florida's, is nonetheless a tort action. As a result, since there is no provision under the statute in question for the court to order reinstatement, the trial court in this case appropriately found that Plaintiff's remedy was limited to an award of damages (R. 156).

According to the testimony of Dr. Redman, Plaintiff's economist, based upon union wage rates between 1980 and 1984 and assuming MR. SCOTT would continue as a mechanic (the position he held at Mowry) working full time until the age of 65, this would result in a present value of net future lost earnings of $424,230.00 (R. 176). This figure did not include possible promotions (R. 184). The jury awarded less than half this figure (R. 830).

An award of future lost wages has been found appropriate where the employee can establish with reasonable certainty that the loss of future wages, retirement and other benefits are the result of a wrongful discharge. Carnation v. Borner, 610 S.W. 2d 450 (Tex. 1980); Santex, Inc. v. Cunningham, 618 S.W. 2d 557 (Tex. Civ. App. 1981); Kelsay, supra.

In the case of Goins v. Ford Motor Company, 131 Mich. App. 185, 347 N.W. 2d 184 (Mich. Ct. App. 1983) that court held that the trial court properly instructed the jury on loss of future wages since it found that plaintiff's action for wrongful discharge was one in tort not in contract and therefore loss of future wages was recoverable. Goins, 347 N.W. 2d at 191.

It is clear that under federal law, an award of front pay is

permissible where reinstatement is not a suitable remedy for the defendant's discriminatory discharge. Whittlesey v. Union Carbide Corp., 742 F. 2d 724, 726 (2nd Cir. 1984). In a Title VII case for employment discrimination an award of future lost wages is an alternative to the traditional equitable remedy of reinstatement. Goss v. Exxon Office Systems Company, 747 F. 2d 885 (3rd Cir. 1984).

Since the claim presented by Plaintiff was a tort action and §440.205 does not provide for reinstatement as an equitable remedy, it is clear that the trial court appropriately instructed the jury and allowed an award of future lost wages. Otherwise, there is no way for the Plaintiff to be made whole.

As a practical matter, Plaintiff should point out that it would be a hollow victory indeed to be awarded reinstatement herein since Defendant claims that Plaintiff can't work anyway (Respondent's brief at 39-40) and Plaintiff testified when he tried to return to work he was told that there was no work available (R. 350).

As with any other tort action concerning recovery for future lost wages, it is up to the jury to decide, based upon the evidence presented, whether such an award is speculative or unsupported by the evidence. Defendant chose not to present any contrary testimony on this issue and therefore the jury was free to accept Dr. Redman's analysis.

Plaintiff should further point out that even where reinstatement has been found to be an appropriate remedy, it will not be utilized where animosity between the employer and employee make such a remedy inappropriate. See, O'Donnell v. Georgia Osteopathic Hospital, 748 F. 2d 153 (11th Cir. 1984); Goss, supra. In such a case disharmony on

the job would preclude reinstatement as an alternative remedy. Under the facts of this case, Plaintiff submits that the relationship of the parties at this time is obviously such that reinstatement would not be possible.

Moreover, any argument by the Defendant that these damages were speculative is to no avail, since Defendant did not come forward with any proof as to Plaintiff's projected future lost wages nor did it discredit the testimony of Plaintiff's expert as to the amount of damages sustained. For these reasons, the trial court was correct in submitting Plaintiff's claim for future lost wages and benefits to the jury and refusing to alter this award.

POINT VII

THE JURY WAS CORRECTLY CHARGED ON ALL ELEMENTS NECESSARY TO PROVE WRONGFUL DISCHARGE.

The trial court rejected Defendant's argument that the jury should be instructed that the Plaintiff's filing of a workers' compensation claim must be shown to be the "sole" cause of his termination (R. 469-470). The trial court reasoned that an employer could always find something to "nit-pick about" and use it as a cover up (R. 470). The court determined that the jury had to find that the positive reason for the discharge was the Plaintiff's pursuit of a workers' compensation claim and therefore determined that the jury should be instructed that they must find that the "substantial reason" for MR. SCOTT'S discharge was his pursuit of a workers' compensation claim (R. 469-471).

In refusing to give a special mitigation of damages instruction

the court found that Defendant was entitled to argue to the jury that Plaintiff did not mitigate his damages but the court determined that a special instruction was not necessary due to the fact that this testimony and the actual result sought to be achieved by Defendant was implied by the way the evidence had been submitted (R. 486-487). More importantly, Defendant failed to raise mitigation of damages as an affirmative defense!

Defendant complains because the jury instructions as given did not give the jury the "elements" of a cause of action for wrongful discharge (Respondent's brief at 44). Moreover, Defendant urges that the court should have instructed the jury that in order for the Plaintiff to recover he must prove that "but for his claim" he would not have been discharged (Respondent's brief at 44).

It was stated in ITT-Nesbitt, Inc. v. Valle's Steak House of Ft. Lauderdale, Inc., 395 So. 2d 217 (Fla. 4th DCA 1981) that the test as to whether the jury instructions as given were correct is whether "the instructions misled the jury or prejudiced a party's right to a fair trial." Id. at 220. In this case it is clear that the jury was properly instructed according to substantial case law concerning the burden of proof in a wrongful discharge case.

Plaintiff requested that the statute simply be read to the jury. However, the trial court rejected this suggestion and instead drafted its own jury instruction providing that if the jurors found that MR. SCOTT'S attempt to file a compensation claim was the substantial reason for his discharge, Plaintiff would prevail.

The Missouri Court of Appeals found the special jury instruction given in Henderson v. St. Louis Housing Authority, supra, to be

overbroad where the jury was instructed that it must find for the plaintiff if: (1) plaintiff was employed by defendant; (2) plaintiff exercised his rights under the workers' compensation act; (3) as a direct result of plaintiff exercising his right under the workers' compensation act defendant discharged plaintiff; and (4) as a direct result of the discharge plaintiff sustained damage. Henderson at 803. This is essentially the type of instruction requested by this Defendant.

There is absolutely no evidence that the instruction as given could have misled or prejudiced Defendant's right to a fair trial. Therefore the instruction should be upheld. American National Bank of Jacksonville v. Norris, 368 So. 2d 897 (Fla. 1st DCA 1979).

The Michigan Court of Appeals in Goins, supra determined that it was the burden of the employee to establish that the filing of a workers' compensation claim was a "significant factor" in the employer's decision to discharge the plaintiff. Goins at 191. Similarly, the Texas Court of Civil Appeals in Santex, Inc. v. Cunningham, supra held that plaintiff was not required to establish that he was discharged "solely" because he attempted to claim workers' compensation benefits. In reviewing its statute, which is almost on all fours with Florida, the court found that the clear intent was that the employer could not use the filing of a workers' compensation claim as a reason for discharge of the employee even if other reasons may exist. Id.

As to Defendant's proffered jury instructions (Respondent's brief at 45), these instructions were contrary to the Florida Standard Jury Instructions concerning proximate cause and the collateral source

rule. See, Fla. Std. Jury Instr. (Civ.) 6.13 and 5.1. Defendant's blatantly self-serving instructions were clearly violative of Florida law and therefore correctly refused. Florida law specifically provides that wages paid from other sources are not to be considered.

The trial court correctly instructed the jury on the issue of proximate cause and refused to give the jury a special instruction on mitigation of damages. For these reasons, the decision of the trial court was correct and must be affirmed.

POINT VIII

THE TRIAL COURT WAS CORRECT UNDER BINGER V. KING PEST CONTROL, 401 So. 2d 1310 (Fla. 1981) IN EXCLUDING THE TESTIMONY OF WILLIE FERGUSON.

The trial court in considering whether to allow Ferguson to testify undertook the Binger anlaysis. In Binger, this Court stated that whether to allow the testimony of undisclosed witnesses is generally within the broad discretion of the trial court. Binger at 1313. The trial court's discretion to exclude a witness is based upon prejudice to the objecting party. Binger at 1314. Prejudice refers to surprise in fact of the objecting party and is not dependent on the adverse nature of the testimony.

In Binger this Court ruled that the district court had properly ordered a new trial since it found that the intentional nondisclosure of the plaintiff coupled with the surprise and disruption occasioned by the use of an unlisted witness necessitated a finding that prejudice resulted which could not be cured other than by the exclusion of this testimony.

Binger sets forth several factors which the trial court may consider in determining whether to permit a witness to testify. Those factors are: (1) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (2) the calling party's possible intentional or bad faith noncompliance with the pre-trial order; and (3) the possible disruption of the trial. Binger at 1314.

The essence of Ferguson's testimony (still an employee of OTIS at the time of trial) was that he saw MR. SCOTT with a gun and that his helper, Hal Noon, took the gun and put it in his car (R. 401). Defense counsel told the trial court that he had told Plaintiff's counsel about the witness ten or twelve days prior to trial (R. 406). Plaintiff's counsel explained that he was in trial at the time he was told of this new witness (R. 406). Defense counsel conceded that he was late in notifying the Plaintiff about Ferguson (R. 409).

Moreover, the information which defense counsel had that indicated that Ferguson was present on the job site the day of the incident was obtained from another case, SCOTT v. Federated Department Stores pursuant to a subpoena duces tecum issued by Ronald Solomon, Esq. who was Federated Department Stores' counsel (R. 405-407). The SCOTT v. Federated case involved MR. SCOTT'S injury of September 12, 1980 (R. 411). MR. SCOTT testified that he did not know that Ferguson was deposed in the criminal proceedings against him arising from the Burdines' incident nor that he had been listed as a witness (R. 415).

The trial court determined from listening to this testimony and the proffered testimony of Ferguson that Plaintiff should have been given the opportunity to subpoena Mr. Noon at the very least in order

to determine the credibility of the statements by Ferguson (R. 417). Defense counsel indicated to the court that he had attempted to find Mr. Noon but was unable to do so (R. 417).

The trial court reasoned that Plaintiff should have been given the opportunity to determine whether Mr. Noon would corroborate Ferguson's testimony and since Plaintiff was not timely given an opportunity to do so, the testimony should be excluded (R. 418).

The simple fact of the matter was that there was no way, at the time Plaintiff's counsel learned of Ferguson's existence and Defendant's intent to call him at trial, to cure the prejudice since Plaintiff only learned ten days before trial that Defendant intended to call Ferguson. Plaintiff's counsel stated that he was in trial in another case when informed of Defendant's plans and until hearing Ferguson's testimony at trial was not aware of its content.

Since Defendant's counsel indicated that he could not find Mr. Noon prior to trial, it would have been impossible for Plaintiff to determine or test the truthfulness of Ferguson's statements. Under these circumstances, the trial court correctly applied Binger in refusing to allow Ferguson's testimony. Any other result would have allowed trial by ambush. For these reasons, the decision of the trial court excluding Ferguson should be affirmed as a proper exercise of the trial court's discretion.

CONCLUSION

For the reasons set forth above and in the initial brief, the Plaintiff WILLIAM SCOTT respectfully submits that the Fourth District Court of Appeal erred in finding that his claim for wrongful discharge was time barred under this Court's decision in Broward Builders Exchange, Inc. v. Goehring, 231 So. 2d 513 (Fla. 1970). In addition, Plaintiff urges that this Court reach the other issues raised by him and hold that Plaintiff is entitled to damages for mental pain and suffering arising from his wrongful discharge and prejudgment interest on his past lost wages award. Plaintiff also respectfully submits that the additional issues raised by Defendant OTIS are wholly without merit, contrary to the majority view, and therefore the decision of the trial court on these issues should be affirmed.

Respectfully submitted,

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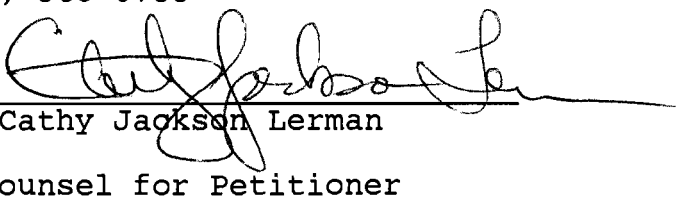
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been mailed this 9 th day of July, 1987 to: Edna L. Caruso, Esq., Suite 4B Barristers Bldg., 1615 Forum Place, West Palm Beach, Fla. 33401; Mark Levitt, 609 W. Horatio St., Tampa, Fl. 33606; Edward J. Dempsey, Esq., United Technologies Bldg., Hartford, Conn. 06101; and Earle Lee Butler, 1995 E. Oakland Park Blvd., Suite 100, Ft. Lauderdale, Fl. 33306.

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