IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 75,181

WILLIAM F. SCOTT,

Petitioner,

vs.

OTIS ELEVATOR COMPANY,

Respondent.
_____/

REPLY BRIEF ON CROSS-APPEAL

MARK E. LEVITT, ESQ.
111 South Parker Street
Suite 200
Tampa, FL 33606
and
EDNA L. CARUSO, P.A.
Suite 4-B/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
Tel: (407) 686-8010
Attorneys for Respondent

INDEX

CITATIONS OF AUTHORITY

STATEMENT OF THE FACTS

Scott incorrectly states that the vehicle in which the bullet casings and clips were found belonged to his son rather than him. The arresting officer denied that that was true (R390).

Scott also incorrectly states that the record is unclear as to whether he was receiving worker's compensation benefits at the time of trial. It was not unclear. During trial the court inquired, and was informed, that the worker's compensation carrier was paying Scott benefits (R9). Accordingly, the record is clear that at the time of trial Scott was receiving worker's compensation benefits.

Scott's contention that he tried to reach Mitchell on the date of his injury to inform him of such is nothing more than his unsupported self-serving testimony. Additionally, Scott states that Mitchell was designated by Otis as the person to whom all injuries were to be reported, but there is no record support for that statement. Scott claims he could not remember whether Mitchell asked him if he wanted to fill out an accident report. In fact, Scott admitted Mitchell "might have" asked him (R275).

Scott states that Mitchell told him to take some time off on September 25, 1980. That is an incorrect date. The Burdines' incident occurred Friday, September 19, 1980. Scott returned to work the following Monday, September 22, 1980, at which time Mitchell told him to take a few weeks off without pay (R498-500,311-12). Mitchell then investigated the incident and terminated Scott three days later on September 25, 1980 (R501). Scott incorrectly states that Mitchell admitted that when he told Scott to take time off that he mentioned Scott's injury. Mitchell merely stated that if the injury was mentioned, it was only mentioned casually (R508-9).

Scott incorrectly argues that his testimony conflicted with Mitchell's testimony regarding the insurance form given Mitchell. Scott initially testified that when he was fired, he asked Mitchell to fill out a mortgage disability

insurance form which his doctor had signed (R351). It is undisputed that Scott did not see a doctor until October 17, 1980, almost a month after he was terminated. Therefore, it was impossible for this form to have been presented to Mitchell on the day he was terminated. At page 4 of his brief, Scott states that he testified on rebuttal that he gave the form to Mitchell prior to his termination, citing to R533. Scott never testified that this occurred prior to his termination. In fact, he testified that there was confusion in his mind as to when this occurred (R351).

Mitchell did not admit that unfounded allegations were the basis for firing Scott. His testimony was that he considered everything in Scott's personnel **file,** but the specific reason Mitchell fired Scott was because of the gun incident. Whether other complaints in Scott's personnel file over the years were unfounded or not is irrelevant. Otis was not sued for firing Scott for these other "unfounded allegations". Rather, Otis was sued for firing Scott for filing a worker's compensation claim.

It is misleading for Scott to state that he was told to take time off by Mitchell because of the Burdines' incident and his injury, citing to R319. When questioned about whether Mitchell actually said anything about his injury, Scott responded "I think he implied that" (R319).

ARGUMENT ON CROSS-APPEAL

POINT V

(RAISED BY THE EMPLOYER)

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

The out-of-state cases cited by Scott are all distinguishable, either factually, or because they are contrary to Florida law as contained in SOUTHLAND DISTRIBUTING CO. v. VERNAL, 497 So.2d 1240 (Fla. 2d DCA 1986). The Second District held in SOUTHLAND that the fact that an employee was

discharged upon his return from jury duty was insufficient circumstantial evidence to support a finding that the employee was terminated because of serving jury duty, where all the other evidence pointed to the fact that the employee was terminated due to a disagreement with his employer that occurred prior to commencement of jury duty. The court reiterated that when circumstantial evidence is relied upon, it must outweigh all contrary inferences, if the plaintiff is to prevail. Likewise, in this case the fact that Scott was terminated after reinjury of an old leg injury was insufficient circumstantial evidence to lead to a conclusion that he was terminated because of the leg injury, where all the other evidence showed he was terminated because he assaulted a co-employee with a gun.

The out-of-state cases Scott relies upon also do not recognize the fact that under Florida law once the employer shows a valid reason for discharge, the burden shifts to the employee to show the employer's explanation is pretextual. ANDERSON v. LYKES PASCO PACKING CO., 503 So.2d 1269 (Fla. 2d DCA 1986). See also TILMAN v. HOLY CROSS HOSP., 706 F. Supp. 831 (SD Fla. 1987); CARTER v. CITY OF MIAMI, 870 F.2d 578 (11th Cir. 1989); YOUNG v. GENERAL FOODS CORP., 840 F.2d 825 (5th Cir. 1988), cert den. 109 S.Ct. 782; NASH v. CONSOLIDATED CITY OF JACKSONVILLE, DUVAL CTY, FLA., 837 F.2d 1534 (5th Cir. 1988); ARCHAMBAULT v. UNITED COMPUTING SYSTEMS, INC., 786 F.2d 1507 (11th Cir. 1986); NIX v. WLCY RADIO/RAHALL COMMUNICATIONS, 738 F.2d 1181 (5th Cir. 1984); PUGH v. HEINRICH, 695 F.Supp. 533 (MD Fla. 1988). An employee can prove a pretext by demonstrating either that the reason given by the employee for his discharge more likely than not was the true motivation, or that the employer's reason is unworthy of belief. MOLLOY v. LEE COUNTY, 694 F. Supp. 851 (MD Fla., 1988). Here, Scott could prove neither.

FRAMPTON v. CENTRAL INDIANA GAS CO., 297 N.E. 2d 425 (Ind. 1973) did nothing more than create a cause of action in Indiana when an

employee is terminated for filing a worker's Compensation claim. This case does not concern whether a cause of action exists in Florida, but rather whether Scott's evidence was sufficient to prove a prima facie case.

Scott argues that there was "substantial evidence" that he was discharged because of filing a worker's compensation claim, and that he was intimidated and threatened by Otis for pursuing the claim. Scott gives no record citations because there was no evidence, much less substantial evidence, that Scott was discharged for filing the worker's compensation claim a month after he was discharged. All we have is speculation on Scott's part that was supported by nothing.

Scott cites AXEL v. DUFFY-MOTT CO., INC., 47 N.Y. 2d 1, 389 N.E. 2d 1075 (1979) for the proposition that normally employers who fire an employee for retaliatory reasons do not broadcast their intentions to the world. AXEL is distinguishable on its facts. Two days after Axel testified at her worker's compensation hearing she was terminated. The employer claimed this was because of a deterioration in her job performance. However, it was only after receipt of a letter from the employee's lawyer that adverse statements began to appear in the employee's personnel file. The court found that the employer was attempting to build a case so that it would have an excuse to discharge the employee.

Unlike AXEL, Scott presented no evidence from which a reasonable conclusion could be drawn that Otis terminated him for filing a worker's compensation claim. The claim was not even filed until a month after he was terminated, and Scott failed to prove any connection between the claim and his termination. Unlike AXEL, here Scott never introduced evidence of "retaliation" and therefore the burden never shifted to Otis to show a legitimate reason for the discharge, although it did so. And Scott never thereafter met his burden of proving that the gun incident was a "pretext" for his discharge, as required in ANDERSON v. LYKES PASCO PACKING

CO., supra. Additionally, although evidence relied upon to prove wrongful discharge may of necessity be circumstantial in nature, that evidence must nonetheless have sufficient probative value to constitute the basis for a legal inference, rather than mere speculation, and the circumstances proven must lead to that conclusion with reasonable certainty and probability, outweighing all contrary inferences. THOMPSON v. MEDLEY MATERIAL HANDLING, INC., 732 S.W.2d 461 (Okl. 1987); SOUTHLAND DISTRIBUTING CO. v. VERNAL, supra.

Scott cites HANSOME v. NORTH WESTERN COOPERAGE CO., 679 S.W.2d (Mo. 1984) for the proposition that the testimony of an employee alone is sufficient to submit the case to a jury. But it depends on the testimony. In HANSOME, the employee exercised his worker's compensation right to receive medical treatment for an on-the-job injury and was terminated. His undisputed testimony was that he was told he was being discharged because "you got hurt on the job; you drew your workman's compensation, and went back and forth to the doctor's office". Here, Scott presented no evidence that Otis had any reason to believe he was going to file a worker's compensation claim. There was simply no proof of any causal connection whatsoever. Scott was terminated because of the gun incident, a month later he filed a worker's compensation claim, and his only testimony was that he "thought" there "probably" was some relationship with his injury, and that he "thought" his injury had a bearing on his discharge. That was total and absolute speculation on Scott's part, and constituted no proof of a causal relationship whatsoever. It was insufficient to meet Scott's burden under either SOUTHLAND DISTRIBUTING (circumstantial evidence must outweigh all contrary influences) or ANDERSON v. LYKES PASCO PACKING CO., supra, (proof that employer's reason is pretextual).

The employee's testimony in A.J. FOYT CHEVROLET, INC. v. JACOBS, 578 S.W. 2d 445 (Tex. Civ. App. 1979) is distinguishable. He testified that

after being injured on the job and having surgery, his manager told him "I would put you back to work, but I would be a damned fool to hire you when you have a lawyer". That testimony was confirmed by the employer's general manager. In comparison, Scott's testimony was totally insufficient to get this case to a jury.

Scott cites REED v. SALE MEMORIAL HOSPITAL AND CLINIC, 698 S.W.2d 931 (Mo. App. 1985) for the proposition that proof in retaliatory discharge cases is necessarily indirect. In the present case, there was no evidence of a causal connection, whether direct or indirect. Scott also argues that in REED the court rejected the employer's argument that an employee has to establish that he filed a worker's compensation claim prior to being discharged in order to have a cause of action. As stated by the court in REED, the employer knew "the claim was imminent". That is not true here. There was no evidence that when Scott was terminated Otis had any reason to anticipate that a worker's compensation claim was going to be filed by Scott.

Scott states that in REED the court found that proximity in time between the plaintiff's termination to his decision to make a claim "was some indication of retaliatory motive". In fact, the court referred to the proximity in time between the filing of the worker's compensation claim, or evidence of the intent to do *so,* and the employee's subsequent termination. In this case, the firing came first at a point where there was no evidence that Scott intended to file a worker's compensation claim, much less that this intent was communicated to Otis.

Scott's reliance upon KELSAY v. MOTOROLA, INC., 384 N.E. 2d 353 (111.1978) is misplaced. In that case the employee's attorney sent notice of an impending worker's compensation claim to her employer. The employer told the employee that she would be more than adequately compensated for her injury by the company, that there was no reason for her to file a claim, and

that it was the company's policy to terminate employees who pursued such claims. The plaintiff decided to proceed with her claim and was discharged.

The facts in KELSAY cannot be compared to the facts here. Scott filed no worker's compensation claim before being terminated. He was not warned that if he filed a claim he would be terminated. Mitchell's statement that there were too many accidents and that the next person who had an accident and filed a claim would lose a week of work was not a threat to discharge any employee if a claim was filed. There was no evidence that any employee had ever been fired for filing a claim. In fact, Otis presented other employees who had been injured on the job, and who testified they had filed worker's compensation claims, and no one had ever been fired or threatened in regard to losing their job (R225-26).

Scott cites HENDERSON v. TRADITIONAL LOG HOMES, INC., 319 S.E.2d 290 (N.C. Ct. App. 1984) for the proposition that even if there is evidence supporting a valid termination by the employer, where reasonable men can differ as to its import, a directed verdict should be granted. In HENDERSON, the employee informed his employer that his compensation claim was pending. He was subsequently "laid off" while employees with less seniority were retained. Certainly that evidence was sufficient to allow reasonable men to conclude a retaliatory discharge. The evidence in the present case was insufficient to draw that conclusion. Scott's evidence was circumstantial only, and did not outweigh the contrary reasonable inference that Scott was fired for assaulting his co-employee. See SOUTHLAND DISTRIBUTING CO. v. VERNAL, supra. Nor did it prove that this reason for Scott's firing was pretextual. ANDERSON v. LYKES PASCO PACKING CO., supra.

Scott cites SCHRADER v. ARTCO BELL CORP., 579 S.W.2d 534 (Tex.Civ.App. 1979) for the proposition that as long as there is a scintilla of evidence a directed verdict should not be granted. In SCHRADER there was

unrebutted testimony that the foreman told an employee that he could not work for the company as long as he had an attorney representing him in a compensation case, and the personnel officer admitted that the claim was a factor in the employee's termination. In the present case, it can be said without any hesitation that there was not a scintilla of evidence that Scott was terminated because of a worker's Compensation claim. The circumstantial evidence upon which Scott relies did not outweigh the contrary inference that Scott was fired for good cause, as it is required to do under SOUTHLAND DISTRIBUTING CO. v. VERNAL, supra. Nor did Scott prove that Otis' claim that he was fired for assaulting a co-employee was a pretext, as required under ANDERSON v. LYKES PASCO PACKING CO., supra.

In HENDERSON v. ST. LOUIS HOUSING AUTHORITY, 605 S.W.2d 800 (Mo. Ct.App. 1979), a directed verdict was denied since the employee testified that his employer told him that he was being discharged because he filed a worker's compensation claim. That type evidence was totally lacking here.

SCHUBBE v. DIESEL SERVICE UNIT CO., 692 P.2d 132 (Ore. 1984) cannot be likened to this case. The supervisor had complained on several occasions to the employee about his filing a compensation claim. The employee was fired the day he returned to work after an absence due to his injury. The employer claimed he was being discharged because of a poor attitude, and because months earlier he had allegedly worked unauthorized overtime. The court held that the employee would not have been discharged but for the employer's retaliatory motive for filing the worker's compensation claim. The same is not true here. Scott would not have been terminated but for the fact that he was arrested on the job for assaulting a co-employee with a gun.

Scott cites TEXAS STEEL CO. v. DOUGLAS, 533 S.W.2d 111 (Tex.Ct.App. 1976) for the proposition that an employee is not required to show that he filed a claim for compensation first, and then was fired.

However, in that case although the employee had not instituted a formal claim when he was discharged, he had sustained an on-the-job injury, had been furnished medical treatment and had been paid worker's compensation benefits for several weeks. The court held that by receiving benefits the plaintiff had in effect instituted a claim prior to being fired pursuant to the Texas statute. That is not true here. Scott had received no medical attention and received no compensation benefits, when he was terminated.

Scott argues that proof of "coercion, threats or intimidation by the employer" can be by inference. However, Scott's claim was not for coercion, thefts or intimidation. The only instruction given the jury was that it should determine whether Scott proved that he was discharged by reason of his claim or attempted claim for worker's compensation (R582). Scott's attempt to convert this case into a "coerce, threaten and intimidation" case at the appellate level is simply not supported by the record.

Scott states that the real question is why he was terminated after 19 1/2 years. There is an easy answer. He was terminated because he assaulted a co-employee with a gun.

Scott makes the incredible statement that the undisputed evidence supports his position that his termination was retaliatory in light of the fact that (Petitioner's Brief p. 20):

> 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.

There was absolutely no evidence that Mitchell was aware that Scott would be filing a worker's compensation claim (R520). As a matter of fact, there was no evidence prior to his discharge that Scott had an inclination to file such a claim, or had indicated he would be doing so, or was even thinking about it. In addition, how Scott can say the Burdines' incident was not a substantial reason for his discharge is incredible.

Scott states that although Otis claimed he was fired because of customer complaints, there was no documentation in his 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). Even in 1980, Otis did not have a personnel office or a person in charge of keeping personnel files or paperwork in South Florida (R528-29). The responsibility was his, the district manager's and their secretary's (R529). How well Scott's personnel file was documented is irrelevant. It is not disputed that Scott was arrested for assaulting a co-employee with a gun on Otis' job site, 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 job site. While Scott testified that in years past Burdines had requested that he work on all their jobs, that was before the gun incident (R244).

Scott argues that incidents of tardiness and customer complaints, which Mitchell had knowledge of, were insufficient to allow Otis to terminate him. Whether they were or not is irrelevant because Otis did not fire him for those incidents. And, Scott did not sue Otis for firing him for these other incidents claiming they were insufficient reasons to terminate him. If that had been the case, Scott could have filed a grievance contesting his discharge. Rather, Scott sued Otis claiming that he had been fired for filing a worker's compensation claim.

Scott refers to his testimony that the men were instructed to hold down "lost time accidents". In simple language, he testified "we were always told to hold the accidents down" (R265), and admitted that it was fairly normal for an employer to want to minimize accidents (R264). Scott admitted Otis always emphasized that they should be careful, work safely and maintain a safe working area (R264). Scott said that at some point Otis 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 (R264).

Scott also admitted that Mitchell's alleged statement about losing a week's work was not made within a short time of his accident, and could have been made years before (R265). Scott had no criticism of Mitchell's wanting to hold down accidents. Scott never claimed Mitchell said that if workmen filed a worker's compensation claim they would be fired. He simply claimed Mitchell said they would lose a week's work if they got injured, obviously in an attempt to try to get the workmen to be more careful. Scott produced no other workmen to testify that Otis had ever made them lose a week's work because of an injury claim, much less terminated them 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 a couple of weeks after his accident, Mitchell told him to take several weeks off, and that Scott "felt" he was probably being asked to take time off because of his injury. Scott fails to point out that this conversation occurred the day he returned to work after being arrested (R311-12), and that the gun incident was discussed (R314). On deposition Scott clearly testified that Mitchell had told him to take some time off because Burdines had requested that he not work on this job site anymore, and he admitted that this conversation took place the day he returned to work after his arrest (R316).

While Scott continues to argue that he did not assault the co-employee with a weapon, in fact he pled nolo contendere.

Scott states that he felt intimidated because of the delay in receiving his vacation pay while out of work (R329). Scott is talking about vacation pay

he was to receive after he was terminated, so this so-called intimidation had nothing to do with his firing (R328-29). Second, there was no delay in paying Scott his vacation pay. Scott admitted receiving it only two weeks after his termination (R257). Third, whether Scott "felt" intimidated or not is irrelevant. Otis did nothing to intimidate him.

Scott states that he "felt" that his accident had a bearing on his termination. But Scott was unable to substantiate this "feeling" with any evidence. Scott also states that he believed the Otis employee who completed his accident report was fired. 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). At page 24 Scott attempts to give other examples of "intimidation" which not only do not constitute "intimidation" but also had nothing to do with his firing. In addition, the jury was not instructed upon "coercion, threats or intimidation" (R582), and therefore this evidence has no bearing on the issues in this lawsuit.

Scott states that Detective Kaye did not find a weapon or bullets in his vehicle. In fact, Detective Kaye testified that on the floor board of Scott's vehicle he found 22 caliber bullet casings and in the glove compartment he found a clip belonging to a 30 caliber military type carbine, the type weapon which was allegedly used to accost the co-employee (R388).

Scott argues that Mitchell admitted that on the day he fired Scott, Scott had asked him to fill out a mortgage disability insurance form (R528). In fact, Mitchell testified that the form was an unemployment form to provide Scott with house payments while he was unemployed (R525). Scott's own testimony made it clear that it was only after he was under a doctor's care that he obtained a disability insurance form for his mortgage, which he asked Mitchell to fill out (R351). It is undisputed that Scott only started seeing a doctor for his knee injury after he was terminated. Accordingly, pursuant to Scott's own testimony, the disability form only came about after his

termination, and therefore could not have been the cause of his termination, as he now implies. Although Scott has changed his position before this Court, before the Fourth District he admitted that the disability form was presented to Mitchell after he was discharged (A1):

> Mr. Scott, while he was under the doctor's care and off from work, asked Mitchell to complete a mortgage disability insurance form which Scott had taken out on his home to guarantee payment of his mortgage should he be out of work.

Scott unsuccessfully attempts to distinguish the cases cited by Otis. As in those cases, Scott totally failed to present sufficient evidence that he was unjustly discharged because of a worker's compensation claim.

Scott argues that Otis failed to establish that the reasons given for his termination were substantiated in his personnel file "or ever actually existed". First of all, what was contained in his personnel file was totally irrelevant in light of the undisputed evidence that Scott was arrested on the job for assaulting a co-employee with a gun and pled nolo contendere to that charge. Nobody disputes that the arrest occurred, not even Scott.

Much of what is discussed in Scott's brief has no bearing on the issues. Importantly, Scott does not demonstrate that he presented any evidence to support his claim that he was fired because of his knee injury. 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 compensation claim. There was no evidence that Otis knew that a claim was imminent. 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 had a bearing on it (R329). Scott has cited to no facts to create an issue in this regard except circumstantial evidence based on sheer speculation and guess work which did not rise to the level of creating an inference that outweighed all contrary inferences. Nor did Scott's evidence prove that the assault on the co-employee was a pretextual reason given by Otis for firing him.

Contrary to Scott's assertion, there was no conflicting evidence that could lead the jury to believe that he was terminated because of filing a compensation claim or attempting to do so. Even Scott acknowledged that he never led Mitchell to believe he was going to file a claim. It was only after he was arrested that Scott was terminated. A month later he filed a compensation claim. Scott simply could prove no connection whatsoever between his discharge and the compensation claim. Certainly an inference to that effect, from whatever circumstantial evidence that there was, was insufficient to rebut the contrary inference that Scott was fired for assaulting a co-employee, and insufficient to prove the assault was a pretext for his termination.

POINT VI

(RAISED BY EMPLOYER)

OTIS WAS ENTITLED TO A JUDGMENT IN ITS FAVOR ON THE $100,000 AWARD FOR PAST LOST WAGES.

Scott argues that prior to this injury he was able to perform the work of a foreman or superintendent even though he had a 20% disability. That helps Otis, not Scott. Despite his 20% disability, Scott had been able to work for Otis as an elevator mechanic/foreman. The evidence is undisputed that he could not do so after this injury.

Scott states that he testified that he could do the work of a foreman or superintendent or perhaps even a service person, citing to R346. However, his testimony was in regard to his ability to work with a 20% disability without difficulty as a foreman or superintendent prior to this accident. Scott never testified that he was presently able to do that work. In fact, all of the evidence was to the contrary, as admitted by Scott (R344), and by his new employer (R86-89,91).

Scott argues that in addition to the higher union scale he received at Otis, he had been entitled to three weeks vacation, medical coverage and a pension plan, which he was not entitled to at his new employment. There was absolutely no monetary value given to any of these benefits. In fact, Scott's economist based his testimony upon a loss of net earnings and did not factor in any loss of benefits (R173-90). Without proof as to the value of these benefits, the jury could not award money for their loss. During closing argument counsel for Scott told the jury repeatedly that the monies they were seeking to recover were "without benefits" (R545-47). The jury was not entitled to add any amount for loss of benefits because Scott chose not to place before the jury any value for those benefits.

Moreover, this point-on-appeal concerns Scott's entitlement to past lost wages, not the amount of his recovery. Benefits or no benefits, the lost wages Scott sustained from his discharge until he was rehired by Mowry were the result of his knee injury, and not the result of being unable to find a comparable job. And the diminution in wages Scott sustained after he went to work for Mowry was the result of his inability to perform a comparable job because of his knee injury, and not because of an inability to find a comparable job. Accordingly, Scott's discharge did not cause him any past lost wages for which he was entitled to recover under a wrongful discharge action.

Scott argues that Otis has waived this argument by taking the position at trial that the only appropriate remedy he might have would be back pay. In fact, Otis' position was that Scott had failed to prove **a** prima facie case, both as to liability and damages. In addition, Otis argued that the proper measure of damages did not allow Scott to recover for future lost wages and that the only recoverable damages were past lost wages. However, Otis never admitted that Scott had proven his entitlement to past damages. Scott states that Otis never argued in its pretrial motion that he was not entitled to past lost wages, but that was all a matter of proof.

Scott contends that the burden was upon Otis to establish that there was comparable employment available. Otis did not have to prove this because Scott admitted he could not perform comparable employment. Scott also argues that the burden was on Otis to prove that he was not entitled to recover for the benefits he lost when he left Otis, and that Otis must demonstrate that the damages awarded him did not include loss of pension and other benefits. The damage award clearly did not because Scott failed to prove the value of any lost benefits. He chose to put on proof at trial solely as to his loss of income.

POINT VII

(RAISED BY EMPLOYER)

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

Scott argues that the jury instructions did not mislead the jury or prejudice Otis' right to a fair trial. Otis does not know how it could be otherwise when the jury was never charged on the elements of wrongful discharge, and was not charged on who had the burden of proof, or upon the shifting of the burden of proof, or the necessity of proving a causal **link**

between the discharge and the damages and so forth. The instruction as set forth at page 44 of Otis' main brief was wholly inadequate.

CONCLUSION

This Court should direct that judgment be entered in favor of Otis Elevator because Scott failed to prove a cause of action for wrongful discharge.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 30th day of APRIL, 1990, to: CATHY JACKSON LERMAN, ESQ., 3328 N.E. 34th St., Ft. Lauderdale, FL 33308; and EARLE LEE BUTLER, ESQ., 1995 E. Oakland Park Blvd., Ste. 100, Ft. Lauderdale, FL 33306.

MARK E. LEVITT, ESQ.
111 South Parker Street
Suite 200
Tampa, FL 33606
and
EDNA L. CARUSO, P.A.
Suite 4-B/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
Tel: (407) 686-8010
Attorneys for Respondent

BY: 
EDNA L. CARUSO
Florida Bar No: 126509

PS/OTIS.RB/pss