

IN THE OHIO SUPREME COURT

STATE, EX REL. OHIO AFL-CIO :
395 E. Broad St., Suite 300 :
Columbus, Ohio 43215 :

and :

WILLIAM A. BURGA :
395 E. Broad St., Suite 300 :
Columbus, Ohio 43215 :

and :

UNITED AUTO AEROSPACE & :
AGRICULTURAL IMPLEMENT WORKERS :
OF AMERICA, REGION 2 :
5000 Rockside Road :
Cleveland, Ohio 44131 :

and :

UNITED AUTO AEROSPACE & :
AGRICULTURAL IMPLEMENT WORKERS :
OF AMERICA, REGION 2-B :
1691 Woodlands Drive :
Maumee, Ohio 43537 :

Relators :

v. :

OHIO BUREAU OF WORKERS' :
COMPENSATION :
30 W. Spring St. :
Columbus, Ohio 43215 :

and :

JAMES CONRAD, ADMINISTRATOR :
Ohio Bureau of Workers' :
Compensation :
30 W. Spring St. :
Columbus, Ohio 43215 :

Case No.

**ORIGINAL COMPLAINT IN
MANDAMUS**

ORAL ARGUMENT REQUESTED

and
INDUSTRIAL COMMISSION
30 W. Spring St.
Columbus, Ohio 43215
Respondents.

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[Counsel of Record]

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Auto Aerospace & Agricultural
Implement Workers of America,
Region 2 and Region 2-B

COMPLAINT

Introduction

1. Relator, Ohio AFL-CIO, is an unincorporated association composed of around 1,500 affiliated local labor unions and 43 central bodies. Labor unions which are affiliated with the Ohio AFL-CIO include around 850,000 employees throughout the state of Ohio.

2. Relator, William A. Burga is a citizen and taxpayer in the State of Ohio.

3. Relator, United Auto Aerospace & Agricultural Implement Workers of America, Region 2 and Region 2-B, comprise the United Auto Aerospace & Agricultural Implement Workers of America in the State of Ohio (hereinafter "U.A.W."). The U.A.W. is an unincorporated voluntary association representing over 100,000 workers throughout the State of Ohio.

4. Individuals who belong to unions affiliated with the Ohio AFL-CIO and individuals who belong to the U.A.W. work in the State of Ohio and are directly affected by the provisions of the Ohio Workers' Compensation Act; they are also citizens and taxpayers of the State of Ohio.

5. Respondent Ohio Bureau of Workers' Compensation (hereinafter "BWC") is an administrative agency of the State of

Ohio charged with administering the workers' compensation system. Included in the authority of the Ohio Bureau of Workers' Compensation is the authority to make initial decisions on the allowance of workers' compensation claims involving State Fund employees.

6. Respondent James Conrad is the Administrator of the Ohio Bureau of Workers' Compensation.

7. Respondent Industrial Commission (hereinafter "IC") is an administrative agency of the State of Ohio charged with adjudicatory functions in the workers' compensation system. Included in the adjudicatory responsibility of the Industrial Commission is the authority to make determinations on the allowance of workers' compensation claims.

8. The 123rd General Assembly passed Amended Substitute House Bill 122, which amended the provisions of R.C. 4123.54.

9. Amended Substitute House Bill 122, a true and accurate copy of which is attached hereto as Exhibit A, was signed by the Governor and will be effective on April 10, 2001.

10. R.C. 4123.54, as amended by Amended Substitute House Bill 122, permits a requirement that workers who are injured in their employment submit to drug/alcohol testing.

11. R.C. 4123.54, as amended by Amended Substitute House

Bill 122, includes certain "rebuttable presumptions" that an employee was intoxicated or under the influence of a controlled substance if certain test results are shown, or if an employee refuses to take a test. An employee who was injured while intoxicated or under the influence of a controlled substance is ineligible for workers' compensation.

12. The provisions of R.C. 4123.54, as amended by Amended Substitute House Bill 122, will be applied by the BWC and the IC, as well as the Courts of this state, to deny workers' compensation claims.

13. The provisions of Am. Sub. H.B. 122 will be used by Employers in this state to compel workers who suffer injuries on their job to undergo testing for controlled substances.

14. The types of testing for controlled substances which Am. Sub. H.B. 122 permits Employers to require workers who suffer an injury in their employment to undergo include urine testing, blood testing and/or breath testing.

15. The provisions of R.C. 4123.54, as amended by Amended Substitute House Bill 122, potentially apply to every worker in this State who suffers an injury in their employment. As a result, every injured worker in this State is potentially subject to the unconstitutional provisions contained in R.C. 4123.54, as

amended.

16. R.C. 4123.54, as amended, is unconstitutional for the various reasons set forth in this Complaint. The provisions of the United States Constitution which are violated are applicable as a result of the Fourteenth Amendment to the United States Constitution.

17. The injured workers of this state have a right to have their claims determined based upon whether or not their injury occurred in the course of, and arising out of, their employment and further have a right to be free from the unconstitutional drug tests provided for by the amendments to R.C. 4123.54.

18. The presumptions created by R.C. 4123.54, as amended, place a burden on injured workers who test positive, or refuse a drug/alcohol test, to prove a negative, *i.e.*, that their injury was not due to their having been under the influence of a controlled substance.

19. Respondents will apply the presumptions of R.C. 4123.54, as amended, to deny injured workers who have otherwise valid claims the right to receive workers' compensation.

20. Respondents are required to comply with the requirements of the United States and Ohio constitutions.

21. Respondents are not permitted to violate injured

workers' constitutional rights when determining whether to allow or deny a workers' compensation claim.

22. Because R.C. 4123.54, as amended, is unconstitutional, Respondents have a clear legal duty to refuse to apply it and to instead apply the previous version of R.C. 4123.54.

23. The right of workers to be free from the unconstitutional requirements of Am. Sub. H.B. 122, as alleged herein, involves the enforcement and protection of a public right.

24. Members of unions affiliated with the Ohio AFL-CIO and members of the U.A.W. work in the state of Ohio and may potentially be injured in the course of their employment. Such members may be subjected to the unconstitutional testing requirements created by Am. Sub. H.B. 122.

25. Relators are without an adequate remedy at law.

Count I
(Violation of Oh. Const. Art. II, Sec. 35)

26. Relators reallege and incorporate by reference the allegations of paragraphs 1 through 25 of this Complaint.

27. Ohio Constitution Article II, Sec. 35 provides for the creation of the Ohio Workers' Compensation system.

28. Ohio Constitution Article II, Sec. 35 permits the

legislature to pass laws "[f]or the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment."

29. Ohio Constitution Article II, Sec. 35 provides for a no-fault system of workers' compensation.

30. The provisions of R.C. 4123.54, as amended, are not for this purpose because the drug/alcohol testing results, or the failure to take a drug/alcohol test, bear no relationship to whether or not the injury occurred in the course of, and arising out of, employment.

31. The provisions of R.C. 4123.54, as amended, violate Ohio Constitution Article II, Sec. 35 because they provide for a determination of fault.

32. The provisions of R.C. 4123.54, as amended, violate Ohio Constitution Article II, Sec. 35 because they are not for the purpose of providing workers' compensation to injured workers and improperly require an injured worker to prove a negative.

Count II
(Violation of Right to Privacy, Unreasonable Search or Seizure)

33. Relators reallege and incorporate by reference the allegations of paragraphs 1 through 32 of this Complaint.

34. Pursuant to the Fourth Amendment of the United States Constitution, and Oh. Const. Art. I, Sec. 14, individuals have a right to privacy, as well as a right to be free from unreasonable searches or seizures.

35. R.C. 4123.54, as amended, authorizes drug/alcohol testing of injured workers solely because there has been an injury.

36. The drug/alcohol testing of R.C. 4123.54, as amended, is not based upon any requirement that there be probable cause or a reasonable basis for believing that the injury was due to the injured worker having been under the influence of a controlled substance.

37. The generalized drug/alcohol testing provided for by R.C. 4123.54, as amended, which exists without any individual basis for suspicion, violates the right to privacy guaranteed by the Fourth Amendment of the United States Constitution and Oh. Const. Art. I, Sec. 14.

38. The generalized drug/alcohol testing provided for by R.C. 4123.54, as amended, which exists without any individual basis for suspicion, results in an unreasonable search or seizure which violates the right to be free from unreasonable searches or seizures guaranteed by the Fourth Amendment of the United States

Constitution and Oh. Const. Art. I, Sec. 14.

Count III
(Violation of Due Process)

39. Relators reallege and incorporate by reference the allegations of paragraphs 1 through 38 of this Complaint.

40. The drug/alcohol testing provided for in R.C. 4123.54, as amended, violates due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution and Ohio Constitution Art. I, Sec. 16.

41. R.C. 4123.54, as amended, does not provide any standards for when drug/alcohol testing may be imposed and leaves it solely to the discretion of Employers whether or not to require drug/alcohol testing after a work injury.

42. R.C. 4123.54, as amended, violates Due Process because R.C. 412.54(B)(4) permits laboratories to make a determination of levels which will establish a violation of the statute.

43. Due process is violated by the lack of standards for imposing drug/alcohol testing and the fact that the imposition of such testing is left to the uncontrolled discretion of Employers.

44. Due process is violated because there is no relationship between a positive test result and whether or not the injured worker's injury was caused by the injured worker

having been under the influence of a controlled substance.

45. Due process is violated because test results are not certain and false positives (incorrectly determining the presence of a controlled substance which is not there) and false negatives (incorrectly determining the absence of a controlled substance which is there) are possible.

46. Due process is violated by the requirement that an injured worker prove a negative, *i.e.*, by the requirement that an injured worker who tests positive or refuses a test must prove that the injury was not due to their being under the influence of a controlled substance.

Count IV
(Violation of Equal Protection)

47. Relators reallege and incorporate by reference the allegations of paragraphs 1 through 46 of this Complaint.

48. The drug/alcohol testing provided for in R.C. 4123.54, as amended, violates equal protection of law, as guaranteed by the Fourteenth Amendment to the United States Constitution and Ohio Constitution Art. I, Sec. 2.

49. Equal protection is violated because R.C. 4123.54, as amended, does not require the same treatment for all workers.

50. R.C. 4123.54, as amended, violates equal protection

because R.C. 4123.54(B)(4) permits laboratories to make a determination of levels which will establish a violation of the statute. As a result, whether employees fall under the statutory presumption will depend on what laboratory did the test, and employees with the same level may be treated differently based on what laboratory did the test.

51. Under R.C. 4123.54, as amended, some Employers will test employees, other Employers will not. Not all employees will be treated equally and some employees may be barred compensation under R.C. 4123.54, as amended, while similarly situated workers may be entitled to compensation because the Employer did not have them tested.

WHEREFORE, Relators request the following relief:

1. Relators request the Court to issue a peremptory writ of mandamus,
 - a. instructing Respondents not to apply R.C. 4123.54, as amended by Am. Sub. H.B. 122, because the provisions of Am. Sub. H.B. 122 are unconstitutional;
 - b. instructing Respondents to apply the previous version of R.C. 4123.54, as it existed prior to the addition of the unconstitutional requirements of Am. Sub. H.B. 122;
2. in the event this Court does not issue a peremptory writ of mandamus, Relators request that this Court issue an alternative writ, setting forth a schedule for the presentation of evidence

and briefs;

3. Relators request any further relief to which Relators may be entitled, including their costs herein.

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2-B

REQUEST FOR ORAL ARGUMENT

Pursuant to Supreme Court Rule IX, Section 2, Relators request oral argument before the Court on the issues raised in this Complaint.

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