

*In the
Supreme Court of Ohio*

STATE OF OHIO EX REL,
AMERICAN LEGION POST 25,

Relator-Appellee,

v.

OHIO CIVIL RIGHTS
COMMISSION AND OHIO ATTORNEY
GENERAL JIM PETRO

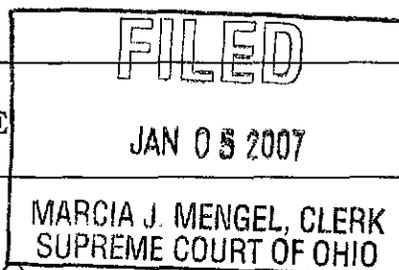
Respondents-Appellants.

Case No.: 06-2263

On Appeal from the
Fayette County
Court of Appeals,
Twelfth Appellate District

Court of Appeals Case
No.: 2006-01-005

MEMORANDUM IN RESPONSE



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INTRODUCTION

This case arose from a mandamus action filed in the Common Pleas Court of Fayette County, Ohio. The American Legion Post 25 sought to compel the Ohio Civil Rights Commission and Attorney General Jim Petro to issue a subpoena on behalf of the American Legion pursuant to R.C. 4112.05(B). Clearly, the American Legion was entitled to have the subpoena issued, however, the Ohio Civil Rights Commission blatantly and willfully refused to issue said subpoena on its own behalf. Thereafter, the Common Pleas Court dismissed the case.

On appeal, the 12th District, in a unanimous opinion, determined that the American Legion was entitled to the subpoena and that failure to do so was prejudicial to the American Legion's position. The Court decided that non-issuance of the subpoena hindered the American Legion's ability to fairly and equally participate in the investigatory and conciliatory processes in efforts to settle the case, before a formal Complaint was filed by the Commission. The Court of Appeals further held that failing to comply with the express mandate of the Ohio Revised Code statute divested the Commission's jurisdiction to file a formal complaint until it complied with the statute.

The Ohio Civil Rights Commission incorrectly stands before this Court and contends that the 12th District's opinion will hinder the Commission's ability to administratively adjudicate cases. The Commission proffers that the practices of the Commission have the force of law and take precedence over the plain meaning and express mandate as set forth in R.C. 4112.02(B). Also, the Commission argues that compliance with the 12th District's opinion will adversely affect its ability to investigate, conciliate and adjudicate discriminatory charges. The concise summation of the Commission's position is that they did not have to follow the Revised Code's

statutory requirements, thereby permitting it to conduct a one-sided investigation resulting in a disadvantage to the charged party during the conciliation process.

Relator-Appellee submits that the allegations proposed in Respondent's introduction are frivolous and basically without merit. All the Commission had to do was issue a simple subpoena, which the statute mandated be done when requested by Relator-Appellee. Therefore, the 12th District Court correctly overruled the Fayette County Court of Common Pleas.

The 12th District's opinion is a good, solid decision. The issuance of a subpoena pursuant to R.C. 4112.05(B), for information to be used in the conciliatory and settlement processes, places the parties on a level playing field and provides settlement of this type of case before a charge of discrimination is filed. The Courts of this state have overwhelmingly adopted the position of favoring conciliation and settlement at every available opportunity. For the Commission to now say that the Appellate Court's decision will invite manipulation of the administrative process is contrary to Ohio's favor of alternative dispute resolution. Therefore, this Court should refuse to review this case.

STATEMENT OF FACTS

Appellee-Relator is a federally chartered organization under 36 U.S.C. 217, and appellant derives its authority from R.C. 4112 et al. On August 18, 2005, Appellant began an investigation of Appellee's employment practices. Carol VanSlyke, a former employee of Appellee, initiated a charge of discrimination with the Ohio Civil Rights Commission. She claimed that she was sexually harassed by the Appellee's director and was wrongfully discharged in retaliation for her complaints about the harassment. Appellee fully complied with Appellant's request for numerous documents and information by returning to Appellant a complete informational packet in full compliance with their request.

Appellee insisted that Ms. VanSlyke was discharged because of an anonymous letter to the Executive Director of Appellee, alleging that Ms. VanSlyke had been convicted of a felony, that she was on probation, and had failed to inform Appellee of these facts. The letter also stated that Ms. VanSlyke was possibly in violation of her probation because she was selling alcohol as a part of her barmaid duties for Appellee. After several telephone calls with the agents of Appellant, the parties realized that any charge of discrimination and retaliation pivoted on information contained in Ms. VanSlyke's parole file held by Adult Parole Authority Officer David Porter. Unlike most parole files, Ms. VanSlyke's file was held confidential by her parole officer because it was under the jurisdiction of an interstate compact. Therefore, Appellee could not see the file or obtain any information from her parole officer.

On September 23, 2005, Appellee requested in writing, pursuant to R.C. 4112.04(B)(3)(b), that Appellant issue a subpoena for Appellee to Ms. VanSlyke's parole officer, David Porter. Appellee further advised that the information contained in the file would assist

them during the conciliatory and investigatory processes and would perhaps cause the case to be settled. Appellant flat out refused to issue the subpoena. A subsequent phone call initiated by Appellee to Appellant revealed that Appellant had issued its own subpoena to Parole Officer David Porter, thereby allowing Appellant access to the file while refusing to provide the same to Appellee. Once again, Appellee could not obtain this information on its own behalf because it was restricted to the administrative process because there was no action pending in any court of this state. A subpoena was essential to allow Appellee to view the file because of the confidentiality requirements of the interstate compact.

Subsequently, Appellant advised Appellee that it had moved into a conciliation phase of the case, yet refusing to issue the requested subpoena. Appellee's counsel informed Appellant that it would be unethical to advise his client to settle the case in conciliation when Appellant had the upper hand because of its knowledge of the contents of the parole authority's file and that the "playing field was unlevel." Appellant refused to toll the statutory time for conciliation. Appellee then brought an action for a writ of mandamus in the Court of Common Pleas of Fayette County, Ohio. Appellee demanded that the Court issue a writ of mandamus ordering Appellant to comply with R.C. 4112.04(B)(3)(b) by issuing a subpoena as required by law and that Appellee had no other remedy at law to retrieve the information originally requested.

On December 21, 2005, while the mandamus action was pending, Appellant filed a formal complaint charging Appellee with retaliation. The Court contacted all parties to the mandamus action informing them of a phone conference to be held concerning procedural matters. In a brief argument to the Court by telephone during the conference, Appellant argued

that it did not have to comply with R.C. 4112.04(B)(3)(b). That same day, the Court issued a brief entry dismissing the Complaint in mandamus.

The 12th Appellate District reversed the Trial Court's dismissal and ordered the Trial Court to issue a Writ of Mandamus, thereby ordering Appellant to issue the requested subpoena to the Adult Parole Authority to compel the production of Ms. VanSlyke's file and the terms of her parole, i.e. whether or not she was permitted to sell and serve alcoholic beverages and sell and collect funds for lottery tickets. Further, the Court held that Appellant had a clear legal duty to issue the subpoena for Appellee during the investigatory phase of the proceedings in order to facilitate settlement of the case, and Appellant's willful failure to issue the requested subpoena for Appellee constituted a failure to engage in a completed attempt to eliminate unlawful discriminatory practices by conference, conciliation and persuasion before issuing the administrative Complaint. The Court thereby divested Appellant of jurisdiction to proceed to the administrative Complaint.

THIS CASE IS NOT OF PUBLIC AND GREAT GENERAL INTEREST.

This case rests on a point of law already decided by this court in *State ex rel. Republic Steel Corp. v. Ohio Civil Rights Comm'n* (1975), 44 Ohio St. 2d 178. Therefore, this Court should not review this case.

(A) This court should deny review of the Appellate Court's decision because the decision does nothing to impede Appellant's investigation and prosecution of a civil rights case.

A civil rights case is generally based upon a founded or unfounded Complaint made by a party, who believes that his or her civil rights have been violated by another, i.e. person or corporation. The case generally consists of three phases, the investigatory, conciliatory, and

administrative hearing processes. Appellant derives its authority solely from Chapter 4112, et seq. of the Ohio Revised Code.

The legislature, in its creation of Chapter 41 et seq., mandates that the Ohio Civil Rights Commission be given subpoena power, for its use during the investigatory phase of each case. In addition, the legislature mandates that when requested, the Ohio Civil Rights Commission shall issue subpoenas on behalf of the Relator so that Relator may be fully provided with information, documents, etc., so as to engage in meaningful conciliation. R.C. 4112.04(B)(3)(b). Meaningful conciliation allows for many of these cases to be settled early in the administrative process so as to avoid unnecessary expense and waste of time both for the Ohio Civil Rights Commission as well as Relator. There is nothing earth shattering about this section of the Code, however, its purpose is crystal clear.

In upholding the purpose of R.C. 4112.04(B)(3)(b), the Appellate Court's decision does nothing to impede the expeditious review or investigation of the claim of discrimination. In fact, the purpose of this section of the Code is to provide Appellee with an opportunity to evaluate its case, based upon the information sought after by the subpoenas. The position of Appellant that such issuing of subpoenas would result in harassing or intimidating the charging party is without merit. Accordingly, from the contents of Appellant's brief, Appellant appears to argue that it may disregard the statute, with impropriety, and urges this Court to review and reverse the decision of the Appellate Court, for lack of legal reasoning, which has no legal basis at all.

It is ironic that Appellant argues for use of unmeaningful conciliation at this time in our judicial system when the courts at every level are encouraging parties to settle and resolve their disputes through several judicially encouraged processes of alternative dispute resolution. The

courts have actively encouraged the public to utilize these methods of alternative dispute resolution, rather than encouraging the state to enact new legislation to resolve many legal issues. To participate in a meaningful way in these procedures, the parties must be able to use every available source in order to determine the strengths and weaknesses of their respective cases. R.C. 4112.04(B)(3)(b) provides a mandatory framework for Appellant as well as Appellee to help them in investigating their case.

Appellant also argues that their administrative rules and regulations regarding this issue of subpoenas have the force of law. The Appellate Court took issue with this argument by succinctly clarifying for Appellant the basic rules of authority. The Court reminded Appellant that legislature enacted law takes precedence over administrative laws when there is a direct conflict between the two. In this case, there is a direct conflict. The administrative rules state that the Ohio Civil Rights Commission may issue subpoenas requested by Respondent at its discretion, while the Revised Code states that a subpoena must be issued when properly requested by a Respondent to a discrimination charge. Of course, we must follow precedential value of authority because the Revised Code is created by direct representatives of the people, whereas administrative rules do not carry a system of check and balances.

(B) This case does not warrant review by this Court because the Appellate Court found that Appellant's failure to comply with the Revised Code statute is a jurisdictional issue.

Appellant argues that it must have full control when it comes to issuing subpoenas. Appellant took an antagonistic position at the Trial Court and Appellate Court levels, telling both courts that Appellant does not have to follow the specific mandate of the Ohio Revised Code

statute. To be most candid, Appellant, in its brief to the Appellate Court, argues that they have the power to disregard the express mandate of the Ohio Revised Code when it comes to issuing subpoenas. The Appellate Court correctly holds that unless there was and is compliance with the mandated requirements of R.C. 4112.04(B)(3)(b), the conciliatory phase of the case is not completed, and Appellant is without jurisdiction to file a Complaint in the administrative process.

Appellant also argues that it cannot issue subpoenas because R.C. 4112.05(B)(2) requires Appellant to keep confidential its investigation. However, this Code section actually states that the Commission, its investigators and employees may not make the information “public”. Issuing a subpoena for a respondent certainly does not make any information “public”. Therefore, Appellant’s argument is clearly without merit.

The ultimate conclusion in this case is that Appellant refuses to follow the mandate of the Ohio Revised Code. Appellant does not want to level the informational playing field through the subpoena process, thereby forcing the parties into a litigious position.

ARGUMENT

Appellees Proposition of Law No. 1:

R.C. 4112.04(B)(3)(b) creates a clear legal duty upon Appellant to issue a subpoena upon Appellee’s request during the preliminary investigation and/or conciliatory phases of the case and Appellant’s failure to do so clearly violates the purpose and intent of the statute.

R.C. 4112.04(B)(3)(b) provides, “upon written application by a Respondent the Commission shall issue subpoenas in its name to the same extent and subject to the same limitations as subpoenas issued by the Commission.” Appellee submits that this section of the

code is mandatory and Appellant is required to issue the subpoena. Their willful failure to honor this request is unlawful and violates the spirit of conciliation. It also places Appellee or the requesting party at a disadvantage in attempting to evaluate its position for settlement purposes. Under these circumstances, the rules of the Ohio Civil Rights Commission must give way to those of the Ohio Revised Code. The conflict between the statute and the rules of the Ohio Civil Rights Commission is clear, and the failure of Appellant to follow the requirements of the statute is an unreasonable and arbitrary position. This is why the Appellate Court decision holds that Appellant is divested of jurisdiction to continue its case, until it complies with the statute.

In State ex rel. Republic Steel Corp. et al v. Ohio Civil Rights Commission, 44 Ohio St. 2d. 1975, the Court requires a good faith effort to complete conciliation before the Ohio Civil Rights Commission may issue a complaint to proceed with the administrative process. Appellee asks, where in this case is the good faith of the Commission? No preference should ever be given to an agency over an individuals rights when interpreting a statute contra to an administrative rule when there is a complete lack of good faith on the agency's behalf. Hence, there would be a violation of due process for the individual. R.C. 4112.04(B)(3)(b) is not ambiguous and is not subject tot conflicting interpretation to fit the whim of Appellant.

Finally, Appellants first proposition of law is flimsy and does not present any good reason for the willful violation of the Ohio Revised Code. The 12th Appellate District was absolutely correct in holding that the subpoena statute is clear and its requirements are mandatory. Therefore, Appellants first proposition of law fails at its core.

Appellee's Proposition of Law No. 2:

The Commissions failure to issue the subpoena, amounts to failure to engage in the complete conciliatory process pursuant to R.C. 4112.05(B) and is jurisdictional.

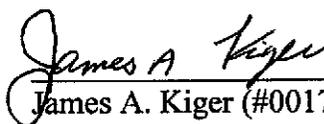
Appellant admits that it refused to issue a subpoena during the investigatory phase of its case when Appellee properly made a request pursuant to R.C. 4112.04(B)(3)(b). Such a willful violation of the statute constitutes failed, or uncompleted conciliation, thereby divesting the Appellant of jurisdiction to bring a discrimination charge against Appellee until it complies with the statute. Failure to issue the requested subpoena is failure to engage in conciliation in an effort to resolve the issues and eliminate discrimination.

No attack on the conciliating process was ever made by Appellee. At the most, any attempt to enter into the conciliatory phase of the case failed because Appellant demolished the process by telling Appellee that it was unfounded in its case. At no time did Appellee challenge the determination of probable cause, because the mandamus issue first needed to be decided by the proper court. The Court of Appeals correctly concluded that the refusal by Appellant to issue the requested subpoena gave Appellant an unfair advantage during the conciliation phase of the case. In fact, Appellant issued a subpoena on its own behalf, secured what it wanted from the Adult Parole Authority, and advised Appellee that it needed to settle, while dangling the precious lack of information in front of Appellee's face. Appellee's counsel refused to bite, stating that settlement was unethical due to the unobtainable information. Therefore, it is evident that Ohio Civil Rights Commission's role is more than investigatory in this case.

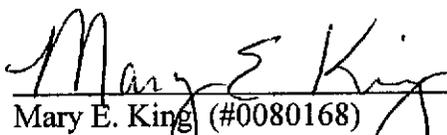
In Conclusion, it is legally absurd to urge this Court to assume jurisdiction when doing so would have this Court admit that an individual's rights of due process can be violated during

the Ohio Civil Rights Commission's investigatory and conciliatory processes. The ultimate point, to have a subpoena issued during this process to the same extent as that of the Commission, goes right to the heart of the Civil Rights Process. Without the subpoena, an individual's due process rights are violated. This basic premise was recognized by the Court of Appeals. For the reasons set forth herein, the Court should refuse to review the decision of the 12th Appellate District.

Respectfully Submitted,



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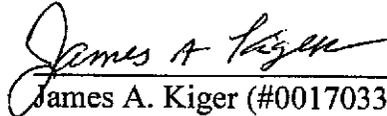


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Certificate of Service

I hereby certify that a copy of the foregoing was served by ordinary U.S. Mail, postage prepaid, this 5th day of January, 2007, upon the following: Jim Petro, Attorney General of Ohio, 30 East Broad St., 17th Floor, Columbus, Ohio 43215, Stephen Carney, State Solicitor, 30 East Broad St., 17th Floor, Columbus, Ohio 43215, Diane Richards Brey, Senior Deputy Solicitor, 30 East Broad St., 17th Floor, Columbus, Ohio 43215, Michael Stokes, Assistant Solicitor, 30 East Broad St., 17th Floor, Columbus, Ohio 43215, Stephanie Bostos Demers, 30 East Broad St., 17th Floor, Columbus, Ohio 43215, and Lori Anthony, Assistant Attorney General, 30 East Broad St., 17th Floor, Columbus, Ohio 43215.

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