IN THE SUPREME COURT
OF THE STATE OF OHIO

Case No. 06-1304

PIONEER NATIONAL LATEX, Et Al.,

Appellants-Defendants

-vs-

MARLENE LEININGER,

Appellee-Plaintiff.

AMICUS CURIAE OF AARP IN SUPPORT OF APPELLEE-PLAINTIFF

On appeal from the May 26, 2006 Decision of the Ohio Fifth District Court of Appeals for Ashland County in Case No. 05-COA-048

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP is dedicated to enhancing quality of life for all as we age. We lead positive social change and deliver value to members through information, advocacy and service.

AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Almost half of AARP's more than 37 million members are in the work force. More than 1.5 million of AARP members reside in Ohio and rely on its laws to protect them. Vigorous enforcement of the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 and state age discrimination statutes, is of paramount importance to AARP, its working members, and the millions of other older workers who rely on these statutes to deter and remedy invidious age bias in the work place. As part of its advocacy efforts, AARP has filed numerous *amicus curiae* briefs in the United States Supreme Court, federal courts of appeals, and state courts regarding the proper interpretation and application of the ADEA and related federal and state employment statutes.

AARP's concern in this case is that the Appellants are asking this Court to widen the existing disparity between the protections provided to age discrimination victims in Ohio and those afforded to other employment discrimination victims. Age discrimination victims must try to navigate a bewildering labyrinth of legal provisions and must do so in a very short amount of time or risk losing their rights altogether. Although the Ohio General Assembly prohibited age discrimination in employment, the resulting complex and confusing statutory scheme does not adequately protect the state's older workers. A cause of action for wrongful discharge in violation of public policy based upon the policy against age discrimination in employment embodied in Ohio Revised Code 4112 is crucial to ensure that Ohio's interest in eliminating age bias from the work place is not jeopardized.

II. STATEMENT OF THE CASE AND FACTS

Amicus Curiae AARP adopts the Appellee's statement of the case and facts.

III. ARGUMENT

Proposition of Law:

THE AVAILABILITY OF A CLAIM FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY IS CRITICAL TO ENSURING THAT OHIO'S INTEREST IN ELIMINATING AGE BIAS FROM THE WORK PLACE IS ADEQUATELY PROTECTED.

The Appellants claim that the remedies for age discrimination set forth in Ohio Revised Code § 4112 are adequate, thereby precluding the need for a separate claim for wrongful discharge in violation of public poliy. *See* Merit Brief of Appellants at 20 ("Ohio Revised Code Chapter 4112 Provides Expansive and Complete Relief for Alleged Victims of Age Discrimination."). The "jeopardy" element of Ohio's tort for wrongful discharge in violation of public policy requires more than a simple analysis of the remedies available under the source of the public policy. The promise of an adequate remedy is illusory if a potential plaintiff can not comprehend how to pursue that remedy. That promise is also illusory if a plaintiff inadvertently chooses the wrong remedy and as a consequence of that misstep is barred from pursuing the right one; or if, having spent precious time to discern the correct steps necessary to bring an action, the claimant learns that the extremely short statute of limitations has already expired.

Ohio's statutory scheme for challenging age discrimination is so confusing that most individuals can not begin to comprehend which of the four independent provisions would be the most advantageous for their claim. Confounding this already bewildering situation is an elections of remedies requirement and an extremely short statute of limitations for most of the available remedies. As a result, countless claims undoubtedly are never brought. Chapter 4112 does not

adequately protect Ohio's interest in protecting its citizens from age discrimination in employment.

A. The Complexity of Ohio's Statutory Scheme Intended to Prohibit Age Discrimination in Employment Impedes Its Effectiveness and Jeopardizes the State's Interest in Eliminating Age Bias from the Workplace.

As this Court has observed, "[t]he Ohio statutory scheme concerning [age] discrimination is somewhat unusual." *Morris v. Kaiser Engineers, Inc.* (1984), 14 Ohio St. 3d 45, 46, 471 N.E. 2d 471. Ohio is unique in the respect that it has four separate statutes intended to provide a remedy for age discrimination: R.C. § 4112.02(N); R.C. § 4112.14; R.C. § 4112.99 and R.C. § 4112.05. These provisions interact and overlap in subtle and often befuddling ways. Indeed, courts applying these statutes have reached differing conclusions even on relatively simple matters such as the length of the statute of limitations or the election of remedies requirement. Two of the statutes, R.C. § 4112.02(N) and R.C. § 4112.99, provide a panoply of remedies, but an anomalously short limitations period of only 180 days. Section 4112.14 provides limited remedies including reinstatement, costs of litigation, and lost wages, but does not allow recovery for compensatory damages, punitive damages, or the right to a jury trial. Because the statutory scheme for challenging age discrimination in employment is

a quagmire of several different provisions, many meritorious claims are probably never brought and as a result Ohio's interest in ensuring a workplace free from age bias is not adequately protected. Accordingly, a common law wrongful discharge claim for violation of public policy based on R.C. Chapter 4112 is necessary.

The Ohio General Assembly's decision to enact four independent provisions that each provide remedies for age discrimination inadvertently creates problems for age discrimination victims. More does not always mean better.

In their present form, each of these provisions resides in Chapter 4112, though, as discussed below, that was not always the case. Section 4112.02(N) exists as part of a more general anti-discrimination statute and provides a civil cause of action against employers who discriminate on the basis of age. Section 4112.05, by contrast, enables individuals to seek remedies at the administrative level by filing charges with the Ohio Civil Rights Commission (OCRC). Section 4112.14 (previously § 4101.17) specifically addresses age discrimination and creates another avenue of a civil action, although with a more limited set of remedies. Finally, § 4112.99 provides generally for a private cause of action to remedy all types of discrimination listed in Chapter 4112, including age discrimination.

Age discrimination victims in Ohio must not only decide which of these provisions to bring a claim under, but must also decipher the complex statutes of limitations applicable to each section to determine whether or not it is too late to bring a claim at all. Even lawyers familiar with these laws may find them difficult to untangle. This labyrinth of laws and statutes of limitations is undoubtedly bewildering to a layperson, especially someone who was recently terminated from their job.

Of the four provisions, only two – § 4112.02(N) and § 4112.05 – contain explicit statutes of limitations. Section 4112.02(N) explicitly bars claims brought more than 180 days after the alleged discrimination, while § 4112.05 requires complaints to be filed with the Ohio Civil Rights Commission within six months.

This Court has never directly ruled on the limitations periods for the other two: §§ 4112.14 and 4112.99. Confusion surrounds the time limitation for bringing a claim under § 4112.14. This uncertainty stems in part from the Ohio General Assembly's 1995 "State Government -Enforcement and Regulation Reorganization" that recodified § 4101.17 as § 4112.14. *See* S.B. No. 162, 121st Gen. Ass. Fil 37 (Ohio 1995). Two decisions by this Court issued prior to the Reorganization make § 4112.14's transfer into Chapter 4112 very significant.

In the first decision, *Morris v. Kaiser Engineers, Inc.* (1984), 14 Ohio St. 3d 45, 471 N.E. 2d 471, this Court was asked to decide whether the express 180-day statute of limitations in § 4112.02(N) applied to claims brought pursuant to § 4101.17 (which would subsequently become § 4112.14 after the recodification). Rejecting the shorter statute of limitations of § 4112.02(N), this Court concluded that the Ohio General Assembly intended to create independent avenues for an employee to pursue a claim of age discrimination, *id.* at 47-8, and thus held that the six-year statute of limitations governing "an action upon a contract not in writing" applied to § 4101.17. *Id.* at 48.

The *Morris* holding, however, was subsequently called into question by a second decision by this Court. The issue in *Bellian v. Bicron Corp.* (1994), 69 Ohio St. 3d 517, 634 N.E. 2d 608, ostensibly was the statute of limitations for § 4112.99, which at that time, was the only other statute besides § 4112.02(N) in Chapter 4112 providing a civil cause of action for age discrimination. In resolving that case, this Court held that "any discrimination claim premised on a violation described in R.C. Chapter 4112, must comply with the one-hundred -eighty day statute of limitations set forth in former O.R.C. § 4112.02(N)." *Id.* at 520. Under the holding of *Bellian*, § 4112.14 would become subject to the extremely short

180-day statute of limitations in § 4112.02(N) when § 4107.07 was recodified as § 4112.14 in 1995 and moved into R.C. Chapter 4112.

This ambiguity was resolved, if only temporarily, when Ohio lawmakers passed a tort reform bill in 1997 that amended § 4112.14 to expressly include a two-year statute of limitations.[1] In 1999, however, this Court declared the entire legislative package unconstitutional[2], sending Ohio courts back into uncertainty as to whether the statute of limitations applicable to § 4112.14 was six years under *Morris* or 180 days under *Bellian*. *See Ziegler v. IBP HOG Market, Inc.* (2001), 249 F.3d 509, 515 (6th Cir.). Since then, several Ohio appellate courts have gone back to the holding in *Morris* and established a six-year limitations period for § 4112.14, *see, e.g., Camardo v. QualChoice, Inc.*, 2005 WL 926998, at *2 (Ohio App. 8th Dist. Apr. 1, 2005); *Ferraro v. B.F. Goodrich Co.* (2002), 149 Ohio App. 3d 301, 310; *Lehman v. AAA Cincinnati*, 1999 WL 162151, at *1 (Ohio App. 1st Dist. Mar. 26, 1999); *Leonardi v. Lawrence Indus., Inc.*, 1997 WL 547825, at *3 (Ohio App. 8th Dist. Sept. 4, 1997). However the statute of limitations of a claim premised upon a violation of § 4112.14 "remains unsettled," *Reminder v. Roadway*

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[1] Am. Sub. H.B. No. 350, 146 Laws of Ohio, Part II, 3867, 4004.

[2] *See State ex re. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 715 N.E.2d 1062.

Express, Inc., 2006 WL 51129, at *4 (N.D. Ohio Jan. 10, 2006) to the detriment of age discrimination victims in Ohio.[3]

The statute of limitations for claims brought under § 4112.99 further complicates Ohio's already inscrutable age discrimination regime. Unlike the other age discrimination provisions, § 4112.99 is a general statute. This Court has held that § 4112.99 creates an independent civil action distinct from the more specific remedies located elsewhere in Chapter 4112 and that this independence inevitably result in conflicts with the provisions of those specific remedies. *See Elek v. Huntington Natl. Bank* (1991), 60 Ohio St. 3d 135, 576 N.E.2d 1056, 1058. When such conflicts arise, this Court applies rules of statutory construction to require that the more specific provisions prevail. Ohio Rev. Code § 1.51; *Bellian*, 69 Ohio St. 3d at 519.

As a result, the limitations period for a claim brought under § 4112.99 "differs depending on the underlying provision for which a § 4112.99 action is premised." *Reminder*, 2006 WL 51129 at *4. In *Bellian*, this Court dealt explicitly with a § 4112.99 age discrimination claim that was based on § 4112.02(N) and

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[3] The Appellants wrongly characterize the "unambiguous" statute of limitations for § 4112.14 as two years. *See* Merit Brief of Appellants at 30, n 7. This error alone exemplifies the difficulty these statutes create for otherwise qualified attorneys.

concluded that the 180-day statute of limitations from § 4112.02(N) applied because of that provision's specificity. *Bellian*, 69 Ohio St. 3d at 520.

The statute of limitations period for a § 4112.99 claim premised on § 4112.14 has not been addressed by this Court and is therefore much less clear. Following the reasoning in *Bellian*, however, several courts have found that this type of claim can be brought within the six year statute of limitations. *Kaltenmark v. K-Mart, Inc.*, 2005 WL 2406147, at *2 (N.D. Ohio Sept. 29, 2005) (holding that "in the event plaintiff's 4112.99 claim is premised on Section 4112.14, a six year statute of limitations applies"); *Reminder*, 2006 WL 51129 at *5 ("where an employee premises a § 4112.99 age discrimination claim on § 4112.14, the claim is subject to the six-year statute of limitations generally attaching to claims under § 4112.14.")

Compounding the confusion created by the complex array of independent statutory provisions with inconsistent and unclear time limits is an equally confusing election of remedies requirement. Chapter 4112 makes the remedies of §§ 4112.02(N), 4112.05 and 4112.14 expressly exclusive.[4] And while § 4112.99

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[4] Ohio Rev. Code § 4112.08 states, "any person filing a charge under division (B)(1) of section 4112.05 of the Revised Code . . . is barred from instituting a civil action under section 4112.14 or division (N) of section 4112.02 of the Revised Code." Similarly, Ohio Rev. Code § 4112.02(N) states, "A person who files a civil action under this division is barred . . . from instituting a civil

is not subject to an express election of remedies clause, "the general consensus among Ohio courts is that the election of remedies scheme applies to age discrimination claims brought under § 4112.99." *Reminder*, 2006 WL 51129, at *2 (citations omitted). So should an age discrimination victim be fortunate enough to have figured out Ohio's confusing statutory scheme in time to bring a claim, she must also be sure to choose carefully before bringing that claim: once an action is commenced, the individual is barred from bringing an action under any other provision. *Morris*, 14 Ohio St. 3d at 46.

Ohio's election of remedies requirement for age discrimination claims presents a serious obstacle to individuals who seek to protect their rights under the federal ADEA. Filing an administrative charge with the Equal Employment Opportunity Commission (EEOC) and the appropriate state agency is a mandatory prerequisite to the commencement of a federal lawsuit under the ADEA. *See* 29 U.S.C. § 633; *Oscar Mayer & Co. v. Evans* (1979), 441 U.S. 750. In addition, because Ohio is a deferral state under the ADEA, all claims filed with the EEOC

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action under section 4112.14 of the Revised Code and from filing a charge with the commission under section 4112.05 of the Revised Code." Finally, Ohio Rev. Code § 4112.14(B) states, "any person instituting a civil action under this section is . . . thereby barred from instituting a civil action under division (N) of section 4112.02 or the Revised Code or from filing a charge with the Ohio civil rights commission under section 4112.05 of the Revised Code."

are automatically forwarded to the Ohio Civil Rights Commission. "This leaves plaintiffs who wish to file both federal and state claims for age discrimination in a catch-22. . . . If the mere filing of an administrative claim for the purposes of preserving one's rights to file an (sic) federal ADEA claim is as an election of the administrative remedy set forth in Ohio Rev. Code § 4112.05, then a plaintiff will simultaneously be precluded from seeking any judicial remedy under state law." *Reminder*, 2006 WL 51129 at * 6.

While this Court has not spoken directly on whether the ADEA's mandatory state agency filing requirement constitutes an election of an administrative remedy under § 4112.05, it did rule that "a claimant who has previously filed an age discrimination action under R.C. 4101.17 [later recodified as 4112.14] is not barred from filing a claim with the OCRC pursuant to R.C. 4112.05 in order to satisfy the mandatory prerequisite to an action under the ADEA." *Morris*, 14 Ohio St. 3d at 47.

Although some courts have followed the principle established by *Morris*,[5] others have held that merely filing a charge with the EEOC qualifies as an election of remedy pursuant to § 4112.05 and precludes the plaintiff from seeking a judicial remedy under state law.[6] When an age discrimination victim risks forfeiting the right to bring a claim under Chapter 4112 by simply taking the required steps to protect their federal claim, it can hardly be maintained that Ohio's public policy interest in prohibiting age discrimination in employment is adequately protected.

B. The 180 -Day Statute of Limitations Jeopardizes Ohio's Public Policy Against Age Discrimination.

The provision of R.C. § 4112 that provides the full complement of remedies for age discrimination, § 4112.02(N) has an anomalous and uniquely short limitations period of only 180 days.[7] All other discrimination claims brought

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[5] *See Reminder*, 2006 WL 51129, at *8; *Laffterty v. Coopers & Lybrand* (1988), 841 F.2d 1126 (6th Cir.); *McLaughlin v. Excel Wire and Cable, Inc.* (1986), 787 F.2d 591 (6th Cir.); *Baker v. Siemens Energy & Automation, Inc.* (1993), 838 F. Supp. 1227, 1233-34 (S.D. Ohio); *Carr v. French Oil Mill Machinery Co.* (1989), 746 F. Supp. 700, 703-05 (S.D. Ohio); *Pitts v. Dayton Power Light & Co.* (1989), 748 F. Supp. 527, 530 (S.D Ohio).

[6] *See Williams v. Allstate Ins. Co.*, 2005 WL 1126761, at *4 (N.D. Ohio Apr. 19, 2005); *Gray v. Allstate Ins. Co.*, 2005 WL 2372845, at *6 (S.D. Ohio Sept. 26, 2005)

[7] R.C. § 4112.02(N) states, in relevant part, as follows:

under R.C. § 4112.99 (including race, sex, religion, disability, and national origin) have limitations periods of six years.[8] This disparity does not reflect a purposeful statutory scheme created by the General Assembly, instead, as explained above, it is the result of various enactments and recodifications, as well as actions taken by this Court.

Because the 180-day limitations period provided by R.C. § 4112.02(N) is overly harsh, it places Ohio's public policy against age discrimination in jeopardy. By its very nature, a short statute of limitations has the potential to preclude an otherwise meritorious claim from being heard. As one legal scholar has observed:

> The statute of limitations, for any type of claim, acts as a barrier to entry. The shorter the limitations period, the more likely it is that claims, both valid and invalid, will not be investigated.[9]

An aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, **within one hundred eighty days** after the alleged unlawful discriminatory practice occurred . . . . (emphasis added).

[8] *See Cosgrove v. Williamsburg of Cincinnati Management Co., Inc.* (1994), 70 Ohio St. 3d 281, 281, 638 N.E. 2d 991 (holding that discrimination claims brought under R.C. § 4112.99 are "subject to R.C. § 2305.07's six-year statute of limitations.").

[9] Lawton, A., "TIPPING THE SCALES OF JUSTICE IN SEXUAL HARASSMENT LAW," 27 Ohio. N.U.L. Rev. 517, 529 (2001) (discussing the inadequacy of the 180-day limitations period for Title VII sexual harassment claims) (internal citations omitted).

In anti-discrimination statutes, a short limitations period may unnecessarily punish the very individuals the statute was meant to protect. As another legal scholar commented:

> One source of confusion [in discrimination cases] arises from the fact that the 180-day statute of limitations [for discrimination cases] is too short - absurdly short given the relatively unsophisticated class the statute is intended to protect.[10]

Although these remarks were made in the Title VII context, their reasoning is fully applicable here. A 180-day statute of limitations is yet one more factor placing Ohio's public policy against age discrimination in jeopardy.

IV. CONCLUSION

Older workers in Ohio are already significantly disadvantaged by an extremely short statute of limitations combined with a bewildering morass of four different statutory provisions related to age discrimination. Depriving individuals terminated from their jobs because of their age of the right to bring a claim for wrongful discharge in violation of public policy will further jeopardize Ohio's interest in eliminating age discrimination from the work place.

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[10] Laycock, D., "CONTINUING VIOLATIONS, DISPARATE IMPACT IN COMPENSATION, AND OTHER TITLE VII ISSUES," 49 Law & Contemp. Probs. 53, 56 (1986) (discussing Title VII's 180-day statute of limitations).

For all the foregoing reasons, this Court should affirm the holding of the Fifth District that, in keeping with this Court's prior decision in *Livingston v. Hillside Rehab. Hosp.* (1997), 79 Ohio St. 3d 249, 680 N.E. 2d 1220, age discrimination victims may bring wrongful termination claims in violation of public policy based upon the policy against age discrimination in employment embodied in Ohio Revised Code Chapter 4112.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief of *Amicus Curiae* AARP in support of the Appellee-Plaintiff Marlene Leininger was served upon the following, via regular, U.S. Mail, postage prepaid this 29th day of January, 2007:

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