IN THE SUPREME COURT OF OHIO

MARLENE LEININGER,	*	Case No. 06-1304
	*	
	*	
Plaintiff-Appellee,	*	On Appeal from the
	*	Fifth Appellate District
	*	
v.	*	
		5th District No. 05-COA-048
	*	
PIONEER NATIONAL LATEX, et al.,	*	
	*	
	*	
Defendant-Appellant.	*	

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REPLY BRIEF OF AMICUS CURIAE OHIO MANAGEMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS PIONEER NATIONAL LATEX, MELISSA McCORMIC, AND JERRY MEYER

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I. INTRODUCTION

The Ohio Management Lawyers Association respectfully urges this Court to curb the judicial legislating that has occurred in the area of public-policy employment law.

II. ARGUMENT

PROPOSITION OF LAW: A plaintiff cannot state a separate cause of action for wrongful discharge in violation of public policy based upon the policy against discrimination in employment embodied in Ohio Revised Code Chapter 4112.

At the very least, this Court's decision in *Wiles* mandates reversal because there is no question that the remedies provided in R.C. Chapter 4112 adequately protect the public policies in question. But this Court should go further and hold that common-law public policy claims are improper where the statute or statutes creating the right also provide a remedy.

A. Public Policy Claims for Wrongful Discharge are Inappropriate Where the General Assembly has Both Identified a Right and Specified the Remedy for Violations of that Right.

The jeopardy element of the public policy wrongful-termination analysis requires that to justify a public policy claim the circumstances involved in the plaintiff's dismissal would have to jeopardize the public policy. See *Collins v. Rizkana*, 73 Ohio St.3d 65, 69-70, 1995-Ohio-135.

1. Public policy includes the procedures and remedies in R.C. Chapter 4112 and the ADEA; judicial creation of additional remedies amounts to judicial legislation.

Ohio public policy is embodied in R.C. Chapter 4112 and the federal Age Discrimination in Employment Act ("ADEA"), which prohibit discrimination in

employment among employees and applicants 40 and over, and also include myriad remedies. Judicial additions to those remedies amount to inappropriate judicial legislation.

Appellee argues that a "common law public policy against age discrimination exists independently and in advance of the enactment of Ohio R.C. 4112.02...." Appellee's Merit Brief at p. 16. However, appellee cites no authority for this proposition.[1] In fact, no such common law public policy existed before R.C. Chapter 4112 was enacted. See generally *Greeley*, 551 N.E.2d at 986 (decided after R.C. Chapter 4112 was enacted; "We believe that the time has come for Ohio to ... recognize a public policy exception to the employment-at-will doctrine.")

Thus, the General Assembly's failure to include "exclusive" language in R.C. Chapter 4112 that specifically rejects common law claims is meaningless because there were no common law public policy exceptions to the employment-at-will doctrine at the time of enactment. There was no reason for the legislature specifically to preempt a claim that did not exist.

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[1] This vague assertion is contrary to the "clarity" requirement for public policy claims, which requires a "sufficiently clear" basis for any public policy claims based on the common law (i.e., not based on written statutes or other law). See generally *Painter v. Graley*, 70 Ohio St.3d 377, 384, 1994-Ohio-334 (explaining clarity requirement); *Collins*, 73 Ohio St.3d 65 (same). There is simply no historical common law on age discrimination which would suffice for the clarity requirement.

Moreover, the General Assembly's inaction since the time of *Greeley* is meaningless; legislative silence is insignificant. *Greeley*, 49 Ohio St.3d at 231. The judiciary should not wait for the legislature to correct judicial missteps.

Likewise, Amicus Curiae OELA's assertion that this Court must deter misconduct and prevent employment discrimination in its role as the arbiter of the common law is misguided. Employment discrimination was not unlawful under Ohio law until the General Assembly enacted R.C. Chapter 4112. It is the General Assembly's role to determine the ways to deter the same misconduct and prevent employment discrimination under the statutes that it created.

The United States Supreme Court, among others, has repeatedly noted that the judiciary is limited in its remedy-creating abilities when the legislature has issued a specific remedy for a right. "[Congress] selected the precise machinery and fashioned the tool which it deemed suited to that end. . . . All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. In such a case the specification of one remedy normally excludes another." *Switchmen's Union of North America v. Nat'l Mediation Bd.* (1943), 320 U.S. 297, 301, 64 S.Ct. 95 (citations omitted); see also *Grzyb v. Evans* (Ky. 1985), 700 S.W. 2d 399, 401 (no common-law claim exists where the statute both creates the right and assigns a remedy); *Carver v. Elec. Data Sys. Corp.* (S.D. Ind.), 2005 U.S. Dist. LEXIS 3692 at *23 (same); *Endahl v. Vinnell Corp.* (D. Colo.), 2006 U.S. Dist. LEXIS 1617 at *28 (same); *Calderon v. Dinan & Dinan PC* (D.

Conn.), 2006 U.S. Dist. LEXIS 39024 at *24 (same); *Smith v. F.W. Morse & Co.* (1st Cir. 1996), 76 F.3d 413, 429 (same).

The jeopardy analysis is therefore limited to one question: Did the General Assembly or Congress provide any enforcement or remedy? If the answer is "yes," no public policy claim arises.

R.C. Chapter 4112 and ADEA provide numerous remedies associated with employment discrimination.[2] The inquiry ends there. Because the General Assembly and Congress have provided remedies for employment discrimination, this Court should not judicially legislate an additional public policy claim.

2. The distinction between single-source and multiple-source public policy claims is illusory and, therefore, incorrect; where the General Assembly has provided both the remedy and the right, *Greeley* claims are inappropriate.

Amicus Curiae OELA argues that courts distinguish between single-source and multiple-source public policies in deciding whether a separate action arises out of the common law. But that is a distinction without a difference.

"[T]he specification of one remedy normally excludes another." *Switchmen's Union of North America v. Nat'l Mediation Bd.* (1943), 320 U.S. 297, 301. This is true regardless of whether the right being protected arose out of one or many sources.

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[2] In fact, as articulated by Amicus Curiae AARP, there are no fewer than four Ohio statutes, one federal statute, and other federal regulations which provide remedies to victims of age discrimination.

There are four Ohio statutory provisions prohibiting age discrimination, each with its own remedies attached. See R.C. 4112.02(N); R.C. 4112.05; R.C. 4112.14; R.C. 4112.99. Any one of those statutes is sufficient to defeat a public policy claim by a plaintiff who can invoke the statute.

In this light, *Collins v. Rizkana*, 73 Ohio St.3d 65, 1995-Ohio-135, was wrongly decided. There, the court held that the plaintiff could bring a public policy claim because the employer had violated a criminal sexual-harassment statute and the remedies of R.C. Chapter 4112 were unavailable to the plaintiff. But the existence of a criminal statute does not alter the statutory language of the various provisions of R.C. Chapter 4112, which provided the only remedies that are properly available to victims of employment discrimination.

3. Overruling *Greeley*, *Kulch*, and their progeny would not adversely affect any individuals or society as a whole.

There has been no individual or societal reliance on *Greeley* and its progeny. *Greeley v. Miami Valley Maint. Contrs., Inc.* (1990), 49 Ohio St.3d 228. No reasonable employees could possibly have relied on the fact that a *Greeley* public policy claim might be available to them if they were wrongfully discharged on the basis of their race, color, religion, sex, national origin, disability, age, or ancestry.[3] See *Galatis v. Westfield Ins. Co.*, 100 Ohio St.3d 216 (2003) (potential that individuals changed their behavior

[3] The issue of whether this would leave employees in offices with fewer than four employees unprotected is a separate question; Appellee Pioneer National Latex has more than four employees.

based on *Scott-Ponzer* was practically nonexistent; stare decisis was inapplicable). The conduct prohibited by such a claim is identical to the conduct prohibited by statute.

B. In the Alternative, *Wiles* also Mandates Reversal.

A more limited approach under *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, also mandates reversal. This approach requires examination of the adequacy of available remedies.

1. The remedies contained in R.C. Chapter 4112 and the ADEA are adequate.

Focusing on the jeopardy element, the *Wiles* court held that the remedies under the FMLA adequately protected the rights it created. The absence of punitive or emotional-distress damages for FMLA claims did "not render the statutory remedies inadequate." *Wiles*, supra at ¶ 15. Further, the presence of adequate remedies obviated recognition of a public policy claim based on the same statute. Id. at ¶ 22.

The remedial scheme of R.C. Chapter 4112 is substantially similar to that of the FMLA, but is even broader. *Wiles* thus bars public policy claims based on age discrimination under R.C. Chapter 4112.[4] See *Reynolds v. Georgia-Pacific Corp.* (S.D. Ohio), 2006 U.S. Dist. LEXIS 5356 at *25-26; *Kaltenmark v. K-Mart, Inc.* (N.D. Ohio), 2005 U.S. Dist. LEXIS 21699 at *19.

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[4] Contrary to Amicus Curiae OELA's contention, the statutory reference to not repealing any "provisions" clearly refers to other statutory provisions, not the common law. See R.C. 4112.08.

2. The remedial and procedural choices made by the General Assembly do not jeopardize the public policy against age discrimination enacted by the General Assembly.

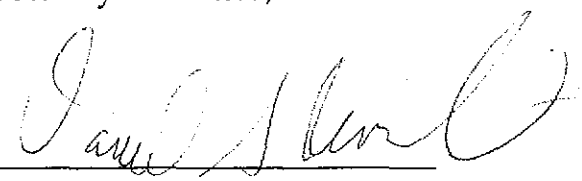
Amicus Curiae AARP suggests that the existence of multiple statutory remedies is a detriment to employees because the statutory scheme is "bewildering." Though imaginative, this argument fails to explain why the remedies selected by the General Assembly are insufficient or why addition of another remedy would not cause more confusion.

The existence of four separate statutory provisions provides victims of age discrimination with *more* opportunities to obtain a remedy than a single statute would. For this same reason, Amicus Curiae's single- versus multiple-source argument fails from an adequacy perspective. And, contrary to AARP's suggestion, a 180-day statute of limitations is not insufficient to protect the rights created in a statute. See generally R.C. 4123.90 (180-day statute of limitations for workers' compensation retaliation suits).

III. CONCLUSION

This Court should take this opportunity to overturn *Greeley* and *Kulch* and restore to the legislature its Constitutional function to determine the remedies and enforcement procedures for the employment rights it has created. Alternatively, the Court should apply its reasoning in *Wiles* to this case. The Fifth District's judgment should therefore be reversed and the trial court's judgment reinstated.

Respectfully submitted,



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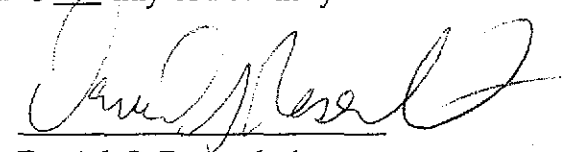
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing on Corey V. Crognale and Kelly K. Curtis, Schottenstein, Zox & Dunn Co., L.P.A. 250 West Street, Columbus, OH 43215-2538; Michael T. Conway, 180 Aster Place, Brunswick, OH 44212; Frederick M. Gittes and Kathaleen B. Schulte, Gittes & Schulte, 723 Oak Street, Columbus, OH 43205; Gregory A. Gordillo, Gordillo & Gordillo, LLC, 2000 Standard Building, 1370 Ontario Street, Cleveland, OH 44113; Christina M. Royer, 237 East Main Street, Kent, OH 44240; and Richard R. Renner, Tate & Renner, 505 North Wooster Avenue, P.O. Box 8, Dover, OH 44622 via regular U.S. mail, postage prepaid, on this 12th day of February 2007.



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