

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL :  
AMERICAN LEGION POST 25, :  
 : Case No. 2006-2263  
Relator-Appellee, :  
 : On Appeal from the Fayette County  
v. : Court of Appeals, Twelfth Appellate  
 : District  
THE OHIO CIVIL RIGHTS :  
COMMISSION, et al., : Court of Appeals Case No. 2006-01-006

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Respondents-Appellants. :

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**RESPONSE BRIEF OF RELATOR-APPELLEE, AMERICAN LEGION POST 25,  
TO MERIT BRIEF OF THE OHIO CIVIL RIGHTS COMMISSION AND  
OHIO ATTORNEY GENERAL MARC DANN**

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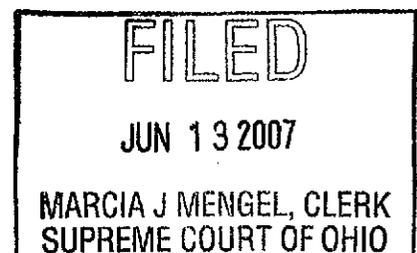


TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS.....	3
ARGUMENT.....	5
<b><u>Appellee Legion's proposition of Law No. I:</u></b>	
Ohio Revised Code §4112.04(B) creates a clear legal duty upon the Commission to issue a subpoena at Respondent's request at any stage of a discrimination charge.....	6
<b><u>Appellee Legion's Proposition of Law No. II:</u></b>	
The Commission loses jurisdiction to issue a complaint when it fails to engage in conciliation due to failure to issue a subpoena on respondent' behalf.....	9
CONCLUSION.....	11
PROOF OF SERVICE.....	13

TABLE OF AUTHORITIES

Page

CASES:

<i>State ex rel. Adams v. Gusweiler</i> (1972), 30 Ohio St.2d 326, 285 N.E.2d 22.....	10
<i>State ex rel. Celebrezzee v. National Lime &amp; Stone Co</i> (1994), 68 Ohio St.3d 377, 382, 627 N.E.2d 538.....	12
<i>State ex rel. Republic Steel Corporation, et al., Appellants v. Ohio Civil Rights Commission, Appellee</i> (1975), 44 Ohio St.2d 178, 339 N.E.2d 658.....	9,10
<i>State ex rel. State Farm v. Ohio Civil Rights Commission</i> (1983), 6 Ohio St.3d 426, 453 N.E.2d 601.....	9

STATUTES:

R.C. 4112.....	1
R.C. 4112.04(B).....	6
R.C. 4112.04(B)(3).....	4
R.C. 4112.04(B)(3)(b).....	1, 6, 7, 11,12
R.C. 4112.04(B)(3)(d).....	7
R.C. 4112.05.....	10
R.C. 4112.05(B)(2).....	8, 12

OTHER AUTHORITIES:

Ohio Adm. Code 4112-3(13)(B).....	12
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## INTRODUCTION

Relator-Appellee, (considered the Respondent during the Commission's process) American Legion Post 25 ("Legion") submits that the decision of the Twelfth Appellate District should be affirmed. The legislature of this state has seen fit to make a provision of the Civil Rights Act requiring Respondent-Appellant, The Ohio Civil Rights Commission ("Commission") to share information with a business or person laboring under a charge of discrimination so the business or person is in a better position to participate and complete the conciliatory process involving discrimination.

There is simply no basis in law to Appellants' position that the Twelfth District's decision threatens the Commission's ability to enforce various provisions of R.C. §4112. The state has gone to great lengths to advise the court of the Commission's administrative process and now claims that by requiring the Commission to follow the statute in question, such will permit Ohio's employers to manipulate the process so as to impede it of enforcing anti-discrimination laws. This is baseless and is an argument designed to subvert the intent of the statute in question.

The state has gone so far as to compare the Commission to a grand jury and urges the Court to adopt a rule of law that permits it to operate in secret, arguing that the Commission may by internal regulation, simply refuse to follow the clear mandate set forth in R.C. 4112.04(B)(3)(b).

Essentially, the Commission told the Twelfth District that it was not required to follow the statute and "was above the law" and was not required to follow the clear mandate of the statute when requested by the employer or person who had been the object of a discrimination charge. The concepts promulgated by Chapter 4112 of the Code are primarily to permit many of the charges of discrimination to be resolved in the conciliatory stage. In order to permit the parties to freely participate in this process, the General Assembly permitted the employer or person subjected to the charge to request the Commission to issue a subpoena on their behalf for records and items to

help them more fully participate in the conciliatory process in an effort to resolve the issues at this juncture of these cases. The Commission told the Twelfth District that its rules take precedent over the mandate of the statute and that the Legion could obtain discovery and subpoenas after a complaint was filed, which position is contrary to the statute.

The Commission has fostered a host of unsound reasons as to why this Court should overturn the Twelfth District's decision, none of which have a reasonable basis. The limited subpoena request gives to the employer and an individual the right to better defend themselves and to enumerate their position based on information which would otherwise be denied them. The employer and the individual facing the allegations of an individual who is, as in this case, facing a charge of sexual harassment made by an employee, has an absolute right at any stage of the investigation to have made available to him or her any information which is under anyone's control, so as to better assist them in the joint resolution of the charge.

We are no longer living in the dark secret world of a one-sided investigation conducted in secret by the Commission who refuses to follow the statute permitting the respondent access to information which respondent claimed would be of value to them in disposition of the issues involved in this case.

The Commission is not above the law. It is not an inquisitorial grand jury as argued by the state, and this Court has never and should never give the Commission unbridled authority to run rough shod over any employer or in fact any individual facing a charge of discrimination, by flaunting the specific mandates enumerated by the drafters of this section of the Code, designed specifically for individuals, businesses, and companies in Ohio, such as the Legion.

The decision of the Twelfth District sends a clear message to the Commission and that is:

Follow Ohio law as mandated and unless you do, you have failed to complete the conciliatory process, barring you from formally charging one with discriminatory practices.

The Twelfth District's decision should stand and be affirmed.

### STATEMENT OF THE CASE AND FACTS

Carol Van Slyke was employed by the Legion, as a waitress-bartender which necessitated the handling of monies, the sale of alcoholic beverages, and the sale of Ohio lottery tickets.

When she made her employment application, she failed to advise the Legion that she was a convicted felon on probation, having stolen approximately \$6,000 in funds from the State of Arizona; that she had been on probation in Arizona; and upon her moving back to Ohio, her "probation package" was transferred to the Fayette County, Ohio Probation Officer, one David Porter. Ms. Van Slyke failed to reveal any of these facts to the Legion.

In June of 2005, the Legion received an anonymous letter advising the Post Commander that Ms. Van Slyke was a convicted felon on probation. The Post Commander and Mr. Dale Butler, Operating Manager of the Legion questioned Ms. Van Slyke concerning her previous background. Specifically, he questioned whether her probationary terms prohibited the sale of alcoholic beverages and the sale of lottery tickets. Finding her responses unsatisfactory and not knowing her probationary terms and conditions, the Legion discharged Ms. Van Slyke.

Ms. Van Slyke immediately filed a charge of discrimination, i.e., sexual harassment against the Legion. She alleged that Mr. Butler had sexually harassed her while working and that her termination was in retaliation for complaining of the

alleged harassment. Mr. Butler and the Legion denied that charge of sexual harassment and denied that it had retaliated in any manner.

As a result of its preliminary investigation, the Commission found that Mr. Butler's alleged conduct toward Ms. Van Slyke did not constitute sexual harassment, but that Ms. Van Slyke had been discharged in retaliation for her alleged charge. The Legion believed that Ms. Van Slyke's probationary terms prohibited her from the sale of alcoholic beverages and lottery tickets and such was in violation of her probationary terms. Prior to her discharge the Legion had contacted Ms. Van Slyke's probation officer who divulged some information to the Legion regarding Ms. Van Slyke. The Legion's attorney then contacted Mr. Porter to obtain the same information to present as evidence to the Commission. This time, however, Mr. Porter refused to release any information. Therefore, through frustration, the Legion requested the subpoena from the Commission. In the interim, the Legion complied with the Commission's request to furnish it the Legion's employment written policies and practices. After several conferences, the Legion realized that any charge of retaliatory discrimination turned on information contained in the parole file held by the adult parole officer, Mr. Porter, who had refused the Legion's request for information.

On September 23, 2005, the Legion sent the Commission a written request to issue a subpoena to Mr. Porter, seeking the terms of Ms. Van Slyke's probation pursuant to O.R.C. 4112.04(B)(3). The Commission denied the request. The Commission then immediately contacted Mr. Porter and obtained the contents of Ms. Van Slyke's probationary file, however, refusing to release the information to the Legion.

Now, the Legion had no way of obtaining vital information to aid it, as the matter had proceeded to the conciliatory phase of the investigation. The Legion and its counsel were repeatedly contacted by the Commission, advising essentially that if the Legion would agree to pay Ms. Van Slyke a sum of money, this case would go away.

The Legion's counsel advised the Commission of the unethical nature of advising its client to settle the case when the Commission had the "upper hand" because of its knowledge of the contents of Mr. Porter's file, and that conciliation was meaningless because of the unequal playing field. The Commission replied by continuing to run the statutory period of conciliation.

The Legion, believing that it had no adequate remedy at law, then brought a mandamus action in the Fayette County Common Pleas Court. The Legion asked the Court to compel the Commission to comply with the statute and issue the requested subpoena. The trial court dismissed the Legion's complaint holding that the Legion's remedy laid in the ongoing formal complaint stage of the case.

While the Mandamus action was pending, the Commission notified the Legion that it had filed a formal complaint against the Legion and that it was proceeding with its statutory process despite the Legion's request to halt the proceedings until the trial court had made its ruling on the Legion's request for a writ of mandamus. The Legion then timely filed a Notice of Appeal to the Twelfth District who unanimously reversed the trial court, finding that the Legion was entitled to a writ of mandamus; that the Legion had no adequate remedy at law to secure the issuance of a subpoena by the Commission; that the Commission by its refusal to issue the required subpoena had failed to complete the conciliatory process of its investigation; and that it lacked jurisdiction to file a formal complaint against the Legion.

### ARGUMENT

The Legion submits the following Propositions of Law dispose of the Commission's position and this appeal:

**Appellee Legion's Proposition of Law No. I:**

**Ohio Revised Code §4112.04(B) creates a clear legal duty upon the Commission to issue a subpoena at Respondent's request at any stage of a discrimination charge.**

A state governmental agency must follow their clear statutory duty as mandated, and is not excused from such requirement unless clearly exempted from such duty by the act or statute itself. A governmental agency, i.e., the Commission, cannot create a set of rules and regulations which in effect weakens or nullifies a mandatory requirement of the statute,. Otherwise, why have a legislative body in the first instance who wrote the laws -the statute in question.

The Commission has argued in its brief:

- (a) That the Commission by its regulation can nullify the statutory requirement;
- (b) That typically it does not share information and likens the Commission to a grand jury and a law enforcement agency;
- (c) That the issuing of a subpoena would be disruptive to the agency's process and undermine the investigative process by delay; and
- (d) That it violates confidential relationships.

The Legion submits that the Commission sees the weakness of its position and now floods the Court and actually asks the Court to adopt one of these excuses to avoid compliance e with R.C. 4112.04(B)(3)(b), which was specifically written to aid and assist the party charged in developing its position in the investigative and conciliatory phase of the investigation.

The Legion submits that R.C. 4112.04(B) provides:

"Upon written request of respondent, the Commission shall issue subpoenas in its name to the same extent and subject to the same limitation as subpoenas issued by the Commission."

This section of the Code could not be anymore clear. All the Commission had to do was to issue one subpoena for the Legion who believed that the employee's

probationary file contained information and/or prohibitions relative to her employment and subsequent discharge.

The Legion submits that it was not the issuing of the subpoena that is the root of this problem. The Commission was afraid of what the subpoena would reveal and that it would no longer be able to conduct its investigation in a cloud of darkness, placing the charged party at a distinct disadvantage even at the investigative and conciliatory stage of the charge. No time limit, no restraint, during any case before the Commission, is placed on the relator or respondent when it comes to the issuing of a subpoena. If this Court adopts the position of the Commission, most employers are back in the dark ages, forced to enter into the conciliatory stage of a Civil Rights violation charge with their legal hands tied behind their back.

The Commission's argument that requiring the issuing of a subpoena pursuant to statute when requested by the Legion would be disruptive, impede the Commission's investigatory process, and take away their "grand jury-esque powers" is also fallacious.

In the case at hand, the Legion did not request a subpoena to stall the Commission's process. The subpoena was requested for the sole reason that the information sought was pivotal to the case and could not be obtained by the Legion because of an interstate compact. Specifically, R.C. 4112.04(B)(3)(d) protects individuals and the Commission from harassment by subpoena. It also limits subpoenas to matters before the Commission. This built in protective provision of the Ohio Revised Code negates the Commission's contention that enforcement of R.C. 4112.04(B)(3)(b) would leave the Commission open for burdensome attack by all respondents. Likewise, if the Court imparts the Commission's belief that the power of subpoena, if given to respondents, would corrupt the expeditious flow of the investigation, then the Court must also find that subpoenas during the administrative hearing phase are

unduly burdensome on the Commission. Thereby, the Commission could eliminate all of respondent's due process rights.

The Commission argues that its investigatory and conciliatory processes are confidential and akin to a grand jury. This proposition is simply false. R.C. 4112.05(B)(2) imposes confidentiality upon members, officers, and employees of the Commission. However, this confidentiality refers to making information public.

The Commission's contention that it cannot divulge information to respondent is false. Throughout the investigatory process, the Commission is in contact with the respondent, gathering information directly from the respondent. The Commission divulges its information in order to induce the respondent to gather and send the correct information back to the Commission. Therefore, the argument that there is a strict code of confidentiality is false. Similarly, the Commission misconstrues the legislature's intent by consistently using confidentiality as a false predicate to the issuance of subpoenas. Confidentiality refers to the public. Confidentiality cannot be maintained with respondent because of Commission's need for information from respondent. Simply put, the respondent is not the "public".

An impanelled grand jury is special in our legal system. The grand jury allows peers to discern whether a charge should be brought. The Commission's investigation is not like a grand jury because it does not offer the safeguard of peers looking over the evidence. Likewise, a grand jury does not include a conciliatory process. If there existed a settlement process during the grand jury investigation, then the Legion submits that due process rights of a defendant would require full discovery rights during the grand jury process. This proves that the Commission's argument that it has the powers of a grand jury is incorrect.

We now address the argument concerning, if the Commission had issued the subpoena which revealed that the charging party could not sell alcoholic beverages pursuant to the terms of her probation. Would this revelation help and assist in the

conciliatory phase of this case? The answer is YES. The Commission admits it sought and secured this information from Ms. Van Slyke's probation officer by subpoena for itself and yet refused to honor the Legion's request.

**Appellee Legion's Proposition of Law No. II:**

**The Commission loses jurisdiction to issue a complaint when it fails to engage in conciliation due to failure to issue a subpoena on respondent's behalf.**

The Commission incorrectly characterizes the conciliatory process in its brief. The contention that conciliation is merely a time to try to end discriminatory practices is completely untrue. In real life, the Commission uses conciliation to play a monetary numbers game with respondents. The true colors of conciliation, once revealed, show an exact match to settlement negotiations. Therefore, the Legion and all respondents must be allowed equal footing when entering these negotiations.

There is a jurisdictional issue in this case. Unlike *State ex rel. State Farm v. Ohio Civil Rights Commission* (1983), 6 Ohio St.3d 426, 453 N.E.2d 601, we do not contest someone else's investigation. Instead, the Legion contests jurisdiction because conciliation never occurred. The Commission states that conciliation did occur, however, this assumption is based upon one telephone conversation between the Legion's attorney and the Commission in which the Legion's attorney stated that conciliation could not occur because of the Commission's refusal to issue the subpoena. The Twelfth District correctly found that a completed attempt at conciliation did not occur.

The Commission's next contention that an appeal divests the Legion of the right for mandamus is also incorrect. In *State, ex rel. Republic Steel Corporation, et al., Appellants v. Ohio Civil Rights Commission, Appellee* (1975), 44 Ohio St.2d 178, N.E.2d 658, the court holds the conciliatory phase of a discrimination charge has a direct

relationship to a judicial prerequisite to the issuance of a complaint by the Commission, except where circumstances warrant the issuance of a complaint directly upon receipt by the Commission of knowledge of the unlawful discriminatory practices alleged therein (R.C. 4112.05 construed). According to *Republic Steel, supra*, an adequate remedy at law is immaterial in light of the commission's unambiguous lack of jurisdiction and the principal announced in *State ex rel. Adams v. Gusweiler* (1972), 30 Ohio St.2d 326, 285 N.E.2d 22. The Commission is pushing its beliefs upon the Court to get this Court to create a new interpretation of the Ohio Revised Code. The Code currently states a clear intent for respondents to have access to subpoenas. Therefore, this Court must uphold the current law, not the law as incorrectly interpreted by the Commission. The reliance of the Twelfth District upon *Republic Steel, supra* is correct.

Simply put, the conciliatory phase of these proceedings is a critical phase of the case. It is the time when the parties set down, evaluate their case and based upon the strengths and weaknesses therein, attempt to settle the same before a complaint is filed. The Legion, now however, will address the Twelfth District's finding that the Commission failed to issue a much needed subpoena when timely requested, amounts to failure to complete the conciliatory process and constitutes bad faith, thus depriving it of jurisdiction to issue the complaint.

There is no question but that the issuance of a subpoena when requested by the Legion-Appellee was crucial to the completion of the conciliatory phase of the case. The willful failure to complete this phase of the case rendered Respondent's-Appellant's case moot until compliance with the statute. The Code clearly states an intent for the Legion to have access to subpoenas and this position must be upheld.

Lastly, the Commission argues that the harm done to the complainant outweighs a respondent's rights. The Legion, however, proffers that harm is done to it, in loss of due process rights and in costs for defending against the Commission.

Therefore, waiting for judicial review of an administrative hearing prejudices the Legion . The Legion's rights were trampled by the Commission when it did not issue the requested subpoena. The possibility of doing harm to a complainant's due process rights does not mean that the Legion's rights may also be crushed. One wrong simply does not make up for another wrong. The Commission had a duty to realize the ramifications of the Twelfth District's opinion. The Commission should have protected the complainant's rights. Instead, the Commission chose to battle over the subpoena, while divesting the complainant of her rights. The Commission made this choice, not the Legion. Therefore, it is not the Legion violating Ms. Van Slyke's rights due to loss of jurisdiction, instead, it is the Commission which violated her due process rights by not obeying already codified law.

#### CONCLUSION

The Ohio Civil Rights Commission contends that the Legion and the Twelfth District Court of Appeals' decision threatens the Commission's right to enforce anti-discrimination laws. This theory, however, errs because the legion is not attacking the Commission's right to enforce laws. Instead, the legion simply asks for the investigative and conciliatory processes to remain impartial to both sides, while protecting the due process rights of both relator and respondent.

The decision of the Twelfth District should be upheld. As recognized by the Twelfth Appellate district, the potential unfairness of this situation stems from the fact that the Commission's position denies due process right, given by the State of Ohio, to a person or business which is under investigation. The Commission's position has been that we do not have to issue any subpoena, provide the Legion with any information concerning the allegation until a complaint has been filed. This position is arbitrary, unlawful and runs counter to the plain language of the statute 4112.04(B)(3)(b).

As the lower court carefully pointed out, the Commission's administrative rule does not have the "force of law," as the Commission's rule conflicts with R.C. 4112.04(B)(3)(b) which grants the Legion the right to have the subpoena to the same extent and subject to the same limitations as subpoenas issued by the Commission. See *State ex rel. Celebrezze v. National Lime & Stone Co.* (1994), 68 Ohio St.3d 377 and at 382, 627 N.E.2d 538.

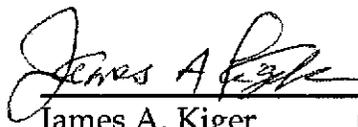
In this case, isn't the Legion entitled to an adequate remedy at law? It certainly is and to quote the Court:

"The statute in question is designed to place the Legion on equal footing with the Commission, once a charge has been filed."

Fairness and the ability to defend one's self goes to the basic heart of our system. The Ohio Civil Rights Commission is no exception and its position is unreasonable.

Respectfully submitted,

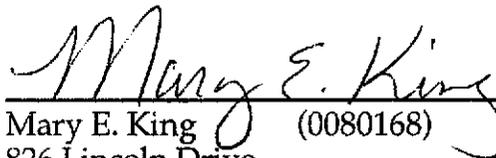
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CERTIFICATE OF SERVICE

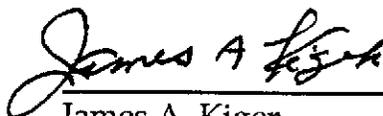
I certify that I served a copy of the foregoing Relator-Appellee, American Legion Post 25's, Response to Merit Brief of Respondents-Appellants, The Ohio Civil Rights Commission, et al., was served upon the following counsel by ordinary U. S. Mail this 13<sup>th</sup> day of June 2007:

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