

In the  
**Supreme Court of Ohio**

STATE OF OHIO EX REL.	:	Case No. 2006-2263
AMERICAN LEGION POST 25,	:	
	:	
Relator-Appellee,	:	On Appeal from the
	:	Fayette County
v.	:	Court of Appeals,
	:	Twelfth Appellate District
OHIO CIVIL RIGHTS	:	
COMMISSION and OHIO ATTORNEY	:	Court of Appeals Case
GENERAL MARC DANN,	:	No. 2006-01-006
	:	
Respondents-Appellants.	:	

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**REPLY OF RESPONDENTS-APPELLANTS, THE OHIO CIVIL RIGHTS  
COMMISSION AND OHIO ATTORNEY GENERAL MARC DANN**

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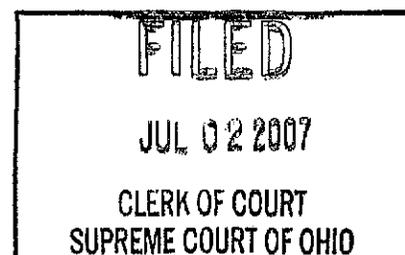
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## INTRODUCTION

Before filing a claim and adjudicating a charge of discrimination, Respondent the Ohio Civil Rights Commission (“Commission”) proceeds in two ways. First, it investigates the charge of discrimination, and second, it attempts conciliation. Relator American Legion Post 25 (“Legion”) and the court below mischaracterize both procedures. First, contrary to the Legion’s assertions, no due process rights attach during the investigative stage. Second, also contrary to the Legion’s contentions, the conciliation stage is not designed to settle cases; it is designed to obtain voluntary compliance. Therefore, during neither pre-adjudication stage is the Commission under an obligation to issue subpoenas on behalf of the respondent.

The first process the Legion and the court below mischaracterize is the Commission’s investigation. The Commission initially operates as an independent investigative body, similar to a grand jury. In its investigative role, the Commission favors neither those who file the charges, nor those who are accused of the discriminatory conduct. Neither the complainant—the party charging discrimination—nor the respondent—the one accused of discriminatory conduct—can dictate the direction of a Commission investigation by having subpoenas issued on its behalf. See *Salazar v. Ohio Civ. Rights Comm.* (1987), 39 Ohio App.3d 26. Thus, the Legion is not entitled to an active role in the Commission’s investigation.

In addition, statute requires the Commission to keep the results of an investigation confidential until it decides whether to file a complaint against the respondent. R.C. 4112.05(B)(2). This confidentiality is as much to protect respondents from unwelcome and undeserved publicity as it is to protect complaining parties; the Commission rejects almost 60% of all charges after investigation. Investigations are therefore not conducted in a “cloud of darkness” as alleged by the Legion. (Legion Br. at 7) Rather, they are kept confidential to protect all parties’ privacy, because so often there is no need for public adjudication.

The second process the Legion and the court below mischaracterize is conciliation. The conciliation process is designed to eradicate discrimination, and a completed attempt to conciliate is a prerequisite to the Commission's initiating an adjudication. R.C. 4112.05(B)(5). Conciliation is not a settlement negotiation, and failure to settle is not a failure to attempt conciliation on the part of the Commission. Most importantly, failure to conciliate is not a justification for dismissal of the underlying discrimination case, as dismissal would violate the due process rights of the complainant and undercut the policy underlying laws against discrimination.

#### **RESPONSE TO LEGION'S STATEMENT OF FACTS**

The Legion's Statement of Facts should be disregarded in its entirety by the Court. The Legion's Statement fails to cite a single page of the record before the Court. Rather, it is replete with contested information, developed as a result of discovery in the underlying case before the Commission—*not* this mandamus case before the Court. Almost none of the Legion's "facts" are part of the record here. For example, the Legion (incorrectly) states that the information received from a subpoena "revealed that charging party could not sell alcoholic beverages." (Brief, p. 8 ¶4). Not only are these "facts" not before the Court at this time, but the Commission contests the accuracy of these statements.

In addition, the Legion's allegations of fact coming out of the Commission's attempt at conciliation are improperly before any court. Ohio law clearly states that "[n]othing said or done during informal methods of conference, conciliation and persuasion under this section shall be ... used as evidence in any subsequent hearing or other proceeding." R.C. 4112.05(B)(5).

In short, the only facts properly before the Court at this time are those which were presented to the courts below in this mandamus case. These facts are set forth in the Commission's Statement of Facts, and are the only ones the Court may properly consider.

## LAW AND ARGUMENT

### **A. No due process rights attach to either a complainant or a respondent during the Commission's preliminary investigation.**

The General Assembly gave the Commission several powers to accomplish its task as the primary enforcer of Ohio's anti-discrimination laws, including the authority to conduct preliminary investigations. *State ex rel. Ohio Civ. Rights Comm. v. Gunn* (1976), 45 Ohio St.2d 262, 266; R.C. 4112.05(A). Preliminary investigations are conducted before adjudication to determine "whether it is probable" that discrimination has taken place. R.C. 4112.05(B)(2) and R.C. 4112.04(A)(6).

Preliminary investigations are not adjudicatory in nature, are informal and ex-parte, and do not confer due process rights on the complainant or the respondent. R.C. 4112.05(B)(2). See also *McCrea v. Ohio Civil Rights Comm.* (1984), 20 Ohio App. 3d 314, 316 (the Commission "does not seek formal evidence," and the investigation "does not provide for the swearing of witnesses, the taking of testimony, or the keeping of a record . . ."); *Housing Advocates, Inc. v. American Fire & Casualty, et al.* 8<sup>th</sup> Dist. No. 86444, 2006 Ohio 4880, R.C. 4112.05.

Furthermore, investigative bodies traditionally do not inform the targets of their investigation about the case or allow them an opportunity to confront and cross-examine witnesses. See *Hannah v. Larche* (1960), 363 U.S. 420. This is because investigative bodies, such as grand juries and the Commission in its investigative role, are exploratory, not adversarial in nature. The point is to determine if it is probable that there is any truth to the charge *before*

the expense and clamor of an adversarial trial or hearing. R.C. 4112.05(B)(2); see also *Salazar v. Ohio Civ. Rights Comm.* (1987), 39 Ohio App.3d 26, 30.

Indeed, preliminary investigations are informal, confidential and *ex parte* *precisely because* they protect all parties—the respondent as well as the charging party—from both the expense and invasion of privacy of an adversarial action. The Commission rejects the majority of discrimination charges at the investigative stage. For example, in 2004, out of 4,965 case closures, 2,922—or 59%—were closed on a finding of no probable cause. Ohio Civil Rights Commission, Annual Report 2004. The confidentiality dictated by R.C. 4112.05(B)(2) protects the respondent from the negative publicity of a charge of discrimination during investigation partly because the charge might well be rejected, and no need for an adversarial action will ever arise. If the investigation were turned into an adversarial proceeding and respondents were allowed to subpoena witnesses, the protection of investigative confidentiality would be lost—for all parties.

The Legion wants to transform the informal, confidential, and preliminary nature of the thousands of Commission investigations into formal, adversarial, evidentiary hearings by arming itself and all other respondents with subpoena power. Doing so would defeat the purpose of the preliminary investigation—to allow the Commission to make a preliminary determination of the charge without the public clamor of an adversarial hearing.

Furthermore, the Legion was not given an “unfair disadvantage” nor had its due process rights violated by not having subpoena power, because the complainant is also without such power. In holding that respondents have investigatory rights identical to the Commission, the court below would afford respondents due process rights far greater than any victim of unlawful discrimination. This imbalance threatens the Commission’s role as the agency charged with

eradicating discrimination, and it would also place *victims* of discrimination at an unfair disadvantage—exactly the opposite of the General Assembly’s intent in passing the anti-discrimination laws.

As the evidentiary privilege of R.C. 4112.05(B)(5) and the confidentiality requirements of R.C. 4112.05(B)(2) and (3)(c) make clear, until investigation and conciliation are complete, the Commission’s investigatory role is strictly separated from its adjudication of charges. So while due process and fairness may require that a respondent have access to subpoenas during *adjudication*,<sup>1</sup> such matters are foreign to the investigation process.

**B. The purpose of conciliation is to eliminate the discriminatory practice, not to settle a lawsuit.**

In addition to seriously mischaracterizing the investigation stage of Commission procedure, the Legion (and the Court of Appeals) mischaracterize the purpose of conciliation. Conciliation is not designed to settle cases. It is designed to eliminate discrimination and obtain voluntary compliance. Therefore, the parties do not need subpoena power, nor do they need to be on “equal footing” with the Commission during conciliation.

The General Assembly recognized that prevention of discrimination does not always mean litigation. Indeed, the statute mentions conciliation three separate times. After investigation but before filing a complaint, the Commission must “attempt, by informal methods of conference, conciliation, and persuasion, to induce compliance with this chapter.” R.C. 4112.05(A). Therefore, the General Assembly made clear that the Commission is to eradicate discrimination by first attempting to obtain voluntary compliance.

The importance of voluntary compliance emerges again after the Commission’s investigation is complete. R.C. 4112.05(B)(4) once again provides that if the Commission

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<sup>1</sup> The adversarial hearing process is authorized by R.C. 4112.05(C)-(H).

determines that unlawful discrimination is probable, “it shall endeavor to eliminate the practice by informal methods of conference, conciliation, and persuasion.” Once an attempt at conciliation has been made and failed, only then may the Commission file a complaint: “If the commission fails to effect the elimination of an unlawful discriminatory practice by informal methods of conference, conciliation, and persuasion under this section and to obtain voluntary compliance with this chapter, the commission shall issue . . . a complaint . . .” R.C. 4112.05(B)(5). Read together, these sections—R.C. 4112.05(A), R.C. 4112.05(B)(4), and R.C. 4112.05(B)(5)—demonstrate that the purpose of conciliation is to get the respondent to voluntarily and fully comply with the law—not to attempt to settle a lawsuit.

**C. Conciliation in this case is complete.**

The Commission’s obligation to conciliate before issuing a complaint is not onerous or regimented. It requires only that the Commission make the most rudimentary attempts at getting the respondent to comply with the law. For example, in *State ex rel. State Farm Mutual Auto. Ins. v. Ohio Civ. Rights Comm.* (1983), 6 Ohio St.3d 426, this Court found that conciliation efforts were completed and unsuccessful, even though they consisted essentially of one letter and one phone call to the respondent, during which the respondent refused to make a counter-offer. Similarly, in *State ex rel. East Mfg. Corp. v. Ohio Civ. Rights Comm.* (1992), 63 Ohio St.3d 179, this Court held that conciliation was completed even though it consisted solely of scheduling a meeting that the respondent was unable to attend.

Only when the Commission has acknowledged that it did not attempt conciliation efforts has the Court found that conciliation was inadequate. *State ex rel. Republic Steel Corp. v. Ohio*

*Civ. Rights Comm.* (1975), 44 Ohio St.2d 178; *State ex rel. General Motors Corp. v. Ohio Civ. Rights Comm.* (1977), 50 Ohio St.2d 111.<sup>2</sup>

Similarly, federal appellate courts have accorded great deference to the EEOC's conciliation efforts under the analogous federal discrimination law. See, e.g., *EEOC v. KECO Industries* (6th Cir. 1984), 748 F.2d 1097, 1102 (the EEOC "is under no duty to attempt further conciliation after an employer rejects its offer."); *EEOC v. Radiator Specialty Co.* (4th Cir. 1979), 610 F.2d 178 (same).

In short, conciliation is a process controlled by the Commission, not a respondent, and the Commission's obligation to attempt conciliation is not onerous. Conciliation does not require that the parties be on "equal footing," nor does it require that the Commission issue a subpoena on behalf of the respondent before adjudication.

In this case, the Commission invited the Legion to conciliate, and although the Legion accepted the invitation, the Commission's efforts were unsuccessful. Conciliation is therefore complete, and the Commission should be able to prosecute its complaint against the Legion.

**D. Dismissing a case for failure to conciliate violates the due process rights of the charging party and undercuts the purpose of the laws against discrimination.**

Assuming arguendo that the Commission's conciliation efforts were insufficient, or that the Commission was obligated to issue a subpoena on behalf of the Legion during investigation and conciliation, the remedy is not dismissal of the underlying discrimination case. As explained in the Commission's opening brief, under *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, the complainant, Carol Van Slyke, has a property right to use the Commission's process.

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<sup>2</sup> The wording of R.C. 4112.05(B) was slightly different while these cases were being litigated. It contained an exception to the requirement that conciliation take place prior to the complaint being issued. The Court found that the exception, which no longer exists, did not apply there.

Dismissing her discrimination case because of a procedural failure by the Commission—exactly what the Twelfth District did here—will violate her rights to due process of law.

Moreover, other courts have held that dismissal of a discrimination case for failure of conciliation is contrary to the purposes of the laws against discrimination. For example, in *EEOC v. Prudential Fed. Sav. & Loan Assn.* (10th Cir. 1985), 763 F.2d 1166, 1169, the court held that a stay, not dismissal, was the appropriate remedy if further conciliation efforts are required because dismissal would be incompatible with the “humanitarian nature” of the ADEA. In *Marshall v. Sun Oil* (10th Cir. 1979), 592 F.2d 563, 566, the court held “The drastic step of dismissal in this action is incompatible with the humanitarian nature of [ADEA].”

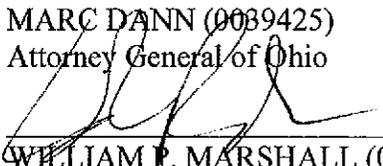
Ohio has a strong public policy against discrimination. *Genaro v. Central Transport* (1999), 84 Ohio St. 3d 293. The Twelfth District’s dismissal of Ms. Van Slyke’s case based on an alleged procedural defect by the Commission is inconsistent with that strong public policy, and with the purposes of Chapter 4112. Therefore, if the Court should find that the Commission did not adequately attempt to conciliate, or should have issued a subpoena, it should remand to the court below with an order requiring the Commission to engage in conciliation or issue the subpoena, but not dismiss Ms. Van Slyke’s case.

## CONCLUSION

Based on the foregoing, the Commission and the Attorney General respectfully request that the Court reverse the decision of the Twelfth District Court of Appeals.

Respectfully submitted,

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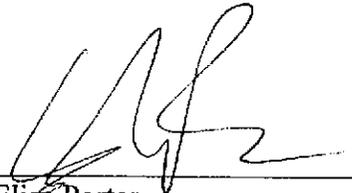
Ohio Attorney General Marc Dann

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Reply Brief of Respondents-Appellants, The Ohio Civil Rights Commission and Ohio Attorney General Marc Dann, was served by U.S. mail this 21<sup>st</sup> day of July, 2007, upon the following counsel:

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