

IN THE SUPREME COURT OF OHIO

Michael Dworning)

Plaintiff-Appellant)

Case no. 07-0307

vs.)

City of Euclid, et al.)

Defendants-Appellees)

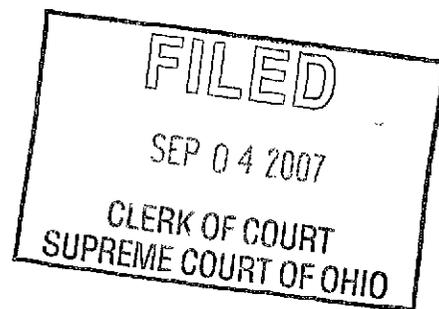
On Appeal from the Cuyahoga County Court of Appeals,
Eight Appellate District
Appellate Case No. CV-04-546231

BRIEF OF *AMICI CURIAE*

THE OHIO EMPLOYMENT LAWYERS' ASSOCIATION,
THE OHIO NOW LEGAL EDUCATION DEFENSE FUND,
COMMITTEE AGAINST SEXUAL HARASSMENT,
OHIO STATE LEGAL SERVICES ASSOCIATION AND
THE COLUMBUS BRANCH OF THE OHIO NAACP
IN SUPPORT OF APPELLANT MICHAEL DWORNING

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I. STATEMENT OF INTEREST OF AMICI CURIAE

The above *amici*, collectively, bring a wealth of experience with the practical realities of the administration of Ohio's civil rights laws. Indeed, several of these *amici* were directly involved in the adoption of §4112.99 and in almost every major case in which the Ohio Supreme Court interpreted or applied this key civil rights statute. *Amici*, and the counsel for *amici*, have participated (and in many instances argued) many of the major employment/discrimination cases heard by the Ohio Supreme Court over the last fifteen years, including the Court's decisions in *Elek v. Huntington National Bank*, 60 Ohio St. 3d 135 (1991); *Smith v. Friendship Vill. of Dublin* (2001), 92 Ohio St.3d 503, 505, 751 N.E.2d 1010, *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 131, 133, 543 N.E.2d 1212 and *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St.3d 281, 281.

More important, these organizations work with thousands of individuals who have been the targets of discrimination. Collectively these organizations provide legal assistance, counseling, referral services, educational clinics and publications all designed to assist and educate both employees and employers regarding the best approaches to preventing and, where appropriate, remedying discrimination in the workplace.

The legal associations seeking leave to participate in this case as *amici* include the majority of Ohio's practicing civil rights lawyers who collectively handle most of the individual employment discrimination cases pending in Ohio's courts. They bring a wealth of experience related to the practicalities and every day impacts of administrative and

judicial interpretations of Ohio's anti-discrimination laws. This every day experience is reflected in the organization descriptions which follow:

Amicus, Ohio Employment Lawyers Association (OELA), is a chapter of the National Employment Lawyers Association (NELA), which is a nonprofit organization consisting of thousands of lawyers throughout the nation who represent individual employees in employment matters.

OELA and NELA regularly sponsor continuing legal education programs and publish newsletters, including "The Employee Advocate," concerning developments in employment, civil rights and labor law. NELA members, including many in the Ohio chapter, participate in free legal clinics providing assistance to unrepresented low and moderate income employees. OELA has submitted *amicus curiae* briefs in most employment and discrimination cases heard by the Ohio Supreme Court. OELA does not endorse political candidates.

Amicus, Ohio Now Education and Legal Defense Fund is a nonprofit corporation originally founded in 1981 by the Trustees of the Ohio Chapter of the National Organization for Women. The NOW Legal Defense and Education Fund provides assistance to bring women into full participation in all activities of American life and conducts research and education concerning discrimination in our society. As part of its activities, the NOW Legal Defense and Education Fund provides legal counsel or other support to victims of employment discrimination and conducts regular programs to prevent discrimination. It and the Ohio NOW Chapter have participated as *amici curiae* in cases before this Court and Ohio's Courts of Appeals.

Amicus, The Committee Against Sexual Harassment (CASH) is an Ohio voluntary association of individuals which focuses on the difficulties faced by female and male victims of sexual harassment. CASH operates as a service offered through the Young Women's Christian Association (YWCA) which provided counseling to victims of sexual harassment and workshops for employees seeking policies and procedures to avoid and remedy sexual harassment. Workshops and other assistance have been provided to a number of employers in the Central Ohio area where CASH is located. CASH has a profound interest in assuring that meaningful remedies for sexual harassment exist.

Ohio Legal Rights Service (OLRS) is an independent state agency designated by the Governor as the federally mandated protection and advocacy system for people with disabilities. *See* Ohio Rev. Code §5123.60; 42 U.S.C. §15041 et seq. As Ohio's protection and advocacy agency, OLRS has litigated many issues involving the rights of people with disabilities including employment discrimination, access to the courts, civil commitment, community integration, and free, appropriate public education. *See, e.g., Popovich v. Cuyahoga County Court of Common Pleas*, 276 F. 3d 808 (6th Cir. 2002)(*amicus curiae* counsel in ADA Title II case involving access to court for hearing impaired individual); *Board of Education of Austintown Local School District v. Mahoning County Board of Mental Retardation and Developmental Disabilities*, 66 Ohio St. 3d 355, 613 N.E. 2d 167 (1993) (IDEA requires county school to serve children residing at developmental center); *State v. Lott*, 97 Ohio St. 3d 303, 779 N.E. 2d 1011 (2002) (*amicus curiae* counsel in case involving standard for assessment of mental retardation in capital cases); *Heller v. Doe by Doe*, 509 U.S. 312 (1993)(*amicus curiae* counsel for organizations of people with

disabilities in case involving civil commitment rights of people with mental retardation); *Martin v. Voinovich*, 840 F. Supp. 1175 (S.D. Ohio 1993)(ADA Title II community integration case); *Cordrey v. Eukert*, 499 U.S. 938 (1991), *denying cert. Cordrey v. Eukert*, 917 F.2d 1460 (6th Cir. 1990) (special education services for children who need an extended school year). Because of its work as Ohio's protection and advocacy agency for people with disabilities, and its litigation in these cases and others, OLRs is familiar with the court decisions regarding exhaustion of administrative remedies under both federal and Ohio's employment discrimination laws.

The NAACP, Columbus Chapter, is the local branch of a New York not-for-profit corporation, an organization devoted to obtaining equal rights for blacks and minority citizens by lawful and peaceful means. The NAACP is a membership corporation with approximately 1,700 local affiliates in all 50 states and the District of Columbia. The basic aims and purposes of the organization are to secure full and equal citizenship rights for blacks and other minorities without restrictions, burdens, limitations or barriers based upon race or color.

The NAACP has a long and distinguished history of championing the rights of all people regardless of race or color. Today the Columbus Branch mission is: to advance the position of minority groups by all appropriate means. This includes combating acts of discrimination against minority groups and working for equal opportunity in the economic, political, social and educational institutions of our nation.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants ask this Court not only to reverse the well-reasoned decision of the Eighth Appellate District Court, but also to overrule several decisions of this Court recognizing the importance of direct access to court under R.C. Section 4112.99 for employees subjected to intentional discrimination. As the Eighth District pointed out, this Court has rejected the notion that an employee must first exhaust administrative procedures with the Ohio Civil Rights Commission, statutorily charged with enforcing anti-discrimination laws, before pursuing a discrimination claim under Section 4112.99. See *Elek v. Huntington Nat'l Bank* (1991), 60 Ohio St.3d 135, 573 N.E.2d 1056; *Smith v. Friendship Vill. of Dublin* (2001), 92 Ohio St.3d 503, 506, 2001-Ohio-1272, 75 N.E.2d 1010; see also *Basic Distrib. Corp. v. Ohio Dep't of Taxation* (2002), 94 Ohio St. 3d 287, 290, 2002-Ohio-794 at ¶ 10, 762 N.E.2d 979.

As the court of appeals also explained, it is self-evident that if exhaustion with the agency created by the General Assembly to investigate claims of discrimination is not a prerequisite under 4112.99, there is no statutory or policy basis for forcing public employees to go through civil service appeals, especially in light of this Court's recognition that civil service commissions possess no jurisdiction or expertise as to the issues raised by discrimination claims under Section 4112.99. See *City of Whitehall ex rel. Wolfe v. Ohio Civil Rights Comm'n*, 74 Ohio St.3d 120, 1995-Ohio-302 (holding that prior civil service appeal does not divest Civil Rights Commission of jurisdiction and noting differences between civil service and Civil Rights Commission proceedings)); see also *Cincinnati v.*

Dixon, Miami App. 2003CA41, 2004-Ohio-4925 (stating that civil service commission is not the appropriate body to resolve discrimination issues).

Even more astonishing, and highlighting the recklessness of Appellants' contentions, is the fact that they ask this Court to create a new doctrine of civil service exhaustion for any Ohio municipal employee subjected to discrimination in a case in which the civil service commission could provide NO remedy to the civil servant. As the Eighth District emphasized, Mr. Dworning, a thirty-year veteran of the Euclid Fire Department, was seeking relief under Section 4112.99, which the civil service commission had no authority to provide. *Dworning v. City of Euclid* (8th Dist.), 2006-Ohio-6772, at ¶ 57 (hereinafter "Opinion"), ("In other words, Dworning's civil service remedy would be no remedy at all."). Worse, as pointed out by the court of appeals, the application of a civil service exhaustion requirement would not only be a waste of time and municipal resources in many instances, but would actually interfere with the ability of the Civil Rights Commission ("OCRC") and the courts to enforce the law. As the court below explained, civil service commission proceedings would prevent some aggrieved civil servants from filing timely charges of discrimination with the OCRC. Opinion at ¶ 50 (noting some civil service proceedings could encompass six months and extend beyond the limitations period for OCRC charges having "the practical effect of elevating by priority the administrative remedy above the remedy expressly provided by statute" and "undermining a person's right to file a charge"). In egregious cases, such as those involving virulent harassment, the harassed employee would be unable to seek judicial intervention through injunctive or other equitable relief.

The court of appeals appropriately stressed that the General Assembly made no distinction between the remedies available under Section 4112.99 to public employees and those available to private employees. Opinion at ¶ 49 (noting that the Act expressly covers political subdivisions and their employees and “makes no distinction between public and private employers or their employees.”) It is also important to note that the General Assembly references exhaustion of non-judicial remedies in only one context, R.C. Section 4112.14(C), which provides that in age discrimination cases, no action under Chapter 4112 is available before exhaustion of arbitration process available to an aggrieved party. The General Assembly, although it obviously could have, has not enacted a similar provision with respect to any other type of discrimination claim. Similarly, only in age discrimination cases has the General Assembly legislated that aggrieved parties must elect between administrative remedies available through the Ohio Civil Rights Commission and those available through the courts. Opinion at ¶¶ 37-44 (quoting *Smith, Elek and Basic Distribution*).

Ironically, Appellants ask the Court to create an exhaustion requirement despite claiming that Mr. Dworning voluntarily retired. If this were true, Mr. Dworning would be barred from appealing to the Euclid civil service commission, as it would lack jurisdiction. Opinion at ¶ 62 (“If, as the city argues, Dworning actually retired, the Commission’s appeal process would be unavailable to him . . .”). According to this reasoning, Appellants are actually requesting, not only that the Court judicially legislate an additional barrier between civil servants and the remedies to which they are entitled under Section 4112.99, but also that the Court eliminate *all* remedies for civil servants who are subjected to discrimination

that does not manifest itself in a straightforward termination, suspension, or demotion. In essence, they ask this Court to bar all claims of constructive discharge and severe and pervasive harassment and other invidious and subtle forms of discrimination.

Ultimately, after carefully examining the history and language of Chapter 4112, as well as decades of consistent precedent from this Court, the Eighth Appellate District Court held that Section 4112.99's clear language, including its prohibition against the application of "any law that is inconsistent" with Chapter 4112's remedial purposes, superseded any civil service rules or judicially created doctrine of convenience that would require exhaustion of municipal administrative appeals by civil servants.¹ Indeed, the court of appeals pointed out that no judicial economy would result from such an exhaustion requirement. Opinion at ¶ 57 (referring to the Euclid Commission's lack of authority to grant the relief Dworning seeks, its lack of expertise and lack of jurisdiction over discrimination issues, the court commented on the inevitable need for judicial involvement, commenting, "This is the antithesis of conservation of judicial resources.").

III. STATEMENT OF THE CASE AND FACTS

Amici adopt the Statement of the Facts and Case presented by the Plaintiff-Appellee.

IV. LAW AND ARGUMENT

PROPOSITION OF LAW: Nothing in the statutory framework of Ohio's anti-discrimination law, or the case law interpreting it, requires a city employee who wishes to bring a civil action for employment discrimination under R.C. 4112.99 to first exhaust civil service appeals.

¹ The Supreme Court has long recognized that "R.C. 4112.99 is to be liberally construed to promote its object (elimination of discrimination) and protect those to whom it is addressed (victims of discrimination)." *Elek*, 60 Ohio St.3d at 137.

A. This Court Has Repeatedly Rejected an Exhaustion of Administrative Remedies Requirement for Claims Brought under Section 4112.99.

Employment discrimination has long been recognized as one of the most persistent and pernicious social problems facing our state and society. The remedies offered by Ohio's anti-discrimination laws are essential in order to achieve the overall objective of eradicating this pervasive social evil. They "reflect Ohio's strong public policy against workplace discrimination." *Genaro v. Central Transport* (1999), 84 Ohio St.3d 293, 297, 703 N.E.2d 782.

The General Assembly established a statutory scheme in Chapter 4112 of the Ohio Revised Code that "provide(s) a variety of remedies for employment discrimination in its various forms." *Smith v. Friendship Vill. of Dublin* (2001), 92 Ohio St.3d 503, 505, 751 N.E.2d 1010 (quoting *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 131, 133, 543 N.E.2d 1212). Those remedies include the filing of discrimination charges with the OCRC, Ohio's expert administrative agency in discrimination matters, as well as a private suit brought in court. *Elek v. Huntington Nat'l Bank* (1991), 60 Ohio St.3d 135, 137, 573 N.E.2d 1056.

That the structure of the statute provides employees with multiple remedies without imposing any requirement to choose or exhaust specific remedies is demonstrated by at least three definitive statements by this Court. First, in *Elek v. Huntington Nat'l Bank, supra*, this Court held that an individual "may, pursuant to R.C. 4112.99, institute an independent civil action to seek redress for discrimination," rejecting the employer's argument that a discrimination victim must first exhaust administrative procedures before the Ohio Civil

Rights Commission before filing suit. 60 Ohio St.3d at 138. The *Elek* Court firmly pronounced that “R.C. 4112.99 is to be liberally construed to promote its object (elimination of discrimination) and protect those to whom it is addressed (victims of discrimination) As such, R.C. 4112.99 must be interpreted to afford victims of handicap discrimination the right to pursue a civil action.” *Id.* at 137.

In *Smith v. Friendship Village, supra*, this Court reaffirmed *Elek*’s holding that “an individual may institute an independent action for discrimination on the basis of physical handicap even though that individual has not invoked and exhausted his or her administrative remedies,” and extended it, stating that “[t]he filing of an unlawful discriminatory practice charge with the Ohio Civil Rights Commission under R.C. 4112.05(B)(1) does not preclude a person alleging handicap discrimination from instituting an independent civil action under R.C. 4112.99.” 92 Ohio St.3d 503, at syllabus; *see also Ward v. Hengle* (1997), 124 Ohio App.3d 396, 403, 706 N.E.2d 392 (“R.C. 4112.99 has permitted a discrimination claimant to pursue an independent civil cause of action, without any requirement that he first exhaust his administrative remedies.”).

More recently, as the court of appeals noted, this Court has further clarified the holdings of *Elek* and *Smith* and “refused to apply the exhaustion of administrative remedies doctrine when there is a ‘judicial remedy that is intended to be separate from the administrative remedy * * * .’ ” Opinion at ¶ 44 (quoting *Basic Distrib. Corp. v. Ohio Dep’t of Taxation*, 94 Ohio St. 3d 287, 290, 2002-Ohio-794, ¶ 10 (citing *Larkins v. G.D. Searle*, 68 Ohio App.3d 746, 750, 589 N.E. 2d 488)).

As the Eighth District recognized after examining Section 4112.99 and this Court's precedents, "[t]he statutes imply—and the supreme court's most recent cases compel" the conclusion that there is "no doubt that an individual's private right of action under R.C. Section 4112.99 is a judicial remedy separate from an administrative remedy offered by a civil service commission," and thus, civil servants need not exhaust administrative remedies prior to pursuing judicial relief. Opinion at ¶ 45.

B. The General Assembly did not intend administrative appeals to interfere with an employee's private right of action under Section 4112.99

The court of appeals relied not only on past Supreme Court holdings, but also on this Court's consistent and reasonable interpretation of the statutory framework established by the General Assembly in Chapter 4112. The appellate court reached at least two inarguable conclusions as to that framework: (1) by creating an election and exhaustion requirements only for claims of age discrimination claims, the General Assembly demonstrated its intent that no such requirement be imposed on other types of discrimination claims; and (2) by emphasizing the remedial nature of the private right of action under the statute and specifically enacting a liberal construction rule invalidating inconsistent laws, the General Assembly foreclosed any judicially created exhaustion requirement. Opinion at ¶¶ 45-47.

1. The election requirement of R.C. 4112.08 applies only to age discrimination claims, and demonstrates that no such requirement applies to other claims of discrimination under R.C. 4112.

As this Court reasoned in *Smith, supra*, the General Assembly is perfectly capable of creating an election requirement where it wishes to do so. Indeed, it has done so with

respect to age discrimination claims, providing that “any person filing a charge under division (B)(1) of section 4112.05 of the Revised Code [providing for charges of age discrimination with the OCRC] . . . is barred from instituting a civil action * * * .” R.C. 4112.08. It has *not* done so with respect to any other forms of discrimination. As the *Smith* court stated, “had the General Assembly intended that individuals alleging [other types of] discrimination be forced to choose between an administrative or civil proceeding, it would have specifically stated so, as it did with respect to age discrimination.” 92 Ohio St.3d at 506.

This reasoning extends not only to types of discrimination claims, but also to types of discrimination plaintiffs. The General Assembly created a distinction between age discrimination and other types of discrimination, and had it wished to do so, it could have created a similar distinction between civil servants and private employees, contemplating that civil servants should face greater administrative burdens prior to seeking judicial remedies than employees in the private sector. It did not. As the court of appeals stated, “there is nothing in the text of R.C. 4112.02 to suggest that the General Assembly meant to treat employees subject to civil service commission rules (or any other disciplinary procedure) differently than non-civil service employees. R.C. 4112.01(A)(2) includes within the definition of ‘employer’ ‘any political subdivision of the state.’ An ‘employee’ is defined as ‘an individual employed by any employer * * * .’” Opinion at ¶ 49. Indeed, there is no reason to believe that the General Assembly would have desired such a distinction, as there is no logical basis for one—public employers have no greater right to

discriminate than private employers, and public employees certainly have no less right to be free of discrimination than private employees.

2. An Exhaustion Doctrine Violates Section 4112.08 Because It Is Inconsistent with the Remedial Purpose of an Independent Section 4112.99 claim.

The court of appeals next recognized that an exhaustion requirement forcing a discrimination victim to wade through a public employer's civil service procedures before filing a Section 4112.99 claim would violate the plain language R.C. Section 4112.08, which states that Chapter 4112:

[S]hall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply.

(Emphasis added). Appellant's civil service rules have the force of law, as does a judicially imposed exhaustion doctrine. These laws, as applied to discrimination victims, are inconsistent with the purpose of an independent R.C. Section 4112.99 claim and thereby violate R.C. Section 4112.08. Opinion at ¶ 47.

An exhaustion doctrine is inconsistent with Section 4112.99 because, as the court stated, it would have "the undeniable effect of limiting, and in some circumstances superseding, the private right of action under R.C. 4112.99." *Id.* The Appellate Court explained its conclusion:

The civil service appeal process, on the other hand, is silent on Dworning's remedies. Rule 8.4(B) of the commission states that the commission, "upon hearing testimony may affirm or disaffirm or modify the decision or judgment of the Appointing Authority." The rules make no provision for money damages. Additionally, the commission is not quasi-judicial, and therefore lacks the ability to enter an injunction or any other equitable relief that is available under R.C. 4112.99.

The city's position in essence argues that we should prefer an exhaustion of the very limited remedies available in a civil service appeal over the significantly more expansive rights provided under R.C. 4112.99. This position is inconsistent with the spirit of *Elek*, where the supreme court held that a party did not have to exhaust the more expansive civil rights commission review before initiating a private action. If the right to private action is so remedial as to trump the very well-established statutory process created through the civil rights commission, that private remedy will certainly trump a civil service appeal with significantly more limited remedies.

Opinion at ¶¶ 51-52.

The civil service commission's lack of any duty or authority to consider whether unlawful discrimination played a part in Mr. Dworning's removal and its lack of power to award damages or enjoin ongoing discrimination, order corrective actions or institute any other equitable relief also demonstrates that any exhaustion requirement will not eliminate the need for judicial involvement. As the court below noted:

We likewise fail to see how the purposes of judicial economy are served by requiring a party to exhaust administrative remedies with a civil service commission before filing a private discrimination action. The civil service commission's own rules severely limit its review of employment decisions. As we previously noted, the city civil service commission may simply affirm, disaffirm or modify the "appointing authority's" decision. This mandate does not encompass the relief sought by Dworning in his discrimination action. In *City of Whitehall ex rel. Wolfe v. Ohio Civil Rights Comm.*, 74 Ohio St.3d 120, 122, 1995-Ohio-302, the supreme court stated, * * * the issues involved in a civil service appeal before either the State Personnel Board of Review or a municipal civil service commission and an unlawful discriminatory practice charge before OCRC are different." As we read its rules, the city civil service commission could only order reinstatement of employment-something Dworning has not requested. And even if it did have authority to determine whether the city had discriminated against Dworning, the civil service commission does not appear to have the authority to order money damages as a remedy. This is opposed to the private right of action which specifically permits money damages and other injunctive relief. In other words, Dworning's civil service remedy would be

no remedy at all. This is the antithesis of conservation of judicial resources.

Opinion at ¶57.

Forcing an employee to litigate her discrimination (or retaliation and harassment) claims two times or more before two or more tribunals not only increases the cost and time required to vindicate her right to be free from discrimination (and retaliation and harassment), but also creates thorny issues of claim and issue preclusion as well. Although not yet developed in this case, Appellants hint at the procedural nightmare that their exhaustion requirement will create. Specifically, Appellants argue that a civil service commission might reach an issue of discrimination as a basis for finding a removal unjust. If the civil service commission finds no discrimination, however, is the civil servant precluded from litigating this finding in a Section 4112.99 action?

What if the civil servant does not allege unlawful discrimination during the civil service proceeding? Will he be barred from relitigating the factual basis for his removal because he could have alleged discrimination during the civil service commission proceeding? Suppose the civil servant discovers evidence supporting a discrimination claim after the civil service commission holds its hearing? A municipality could, for example, wait to replace a female employee with a male until after the hearing, thereby preventing the employee from establishing a prima facie case of gender discrimination. These are just the most obvious examples of claim and issue preclusion that will arise out of stacking a set of sequential administrative proceedings ahead of a discrimination claim. The possibilities, and the need for appellate review, will be endless.

Such a regime would be unacceptable even if it only served as a temporary barrier between unjustly terminated employees and the courts, but in many cases, including Mr. Dworning's, it would serve as an absolute bar to judicial relief. As the court below stressed:

[T]he differentiation of employees based on nothing more than civil service status could create scenarios which end up frustrating the right to exercise a statutory remedy. Suppose that a civil service appeal is considered a predicate to filing a discrimination claim. It is conceivable that a civil service appeal (and subsequent court review of a civil service appeal) might take more than six months to be resolved. This time period would extend beyond the limitations period set forth for filing a claim of discrimination with the Ohio Civil Rights Commission. R.C. 4112.05(B)(1). If this scenario plays out, it would have the practical effect of elevating by priority the administrative remedy above the remedy expressly provided by statute. That would be a clear violation of R.C. In fact, the city's position could have the ultimate effect of undermining a person's right to file a charge of discrimination with the civil rights commission.²

Opinion at ¶50.

For civil servants who, like Mr. Dworning, are subjected to discrimination, but whose harm does not occur through a simple "you're fired," Appellants' proposed exhaustion requirement is a totally cynical effort to exhaust individual employees and eliminate, in many cases, their remedies. Their contention lacks common sense and directly conflicts with the language of the statute and the decisions of this court. Any judicial economy from an exhaustion requirement will only result from the nullification of Chapter

² In light of the Eighth Appellate District Court's concern that an exhaustion of internal administrative remedies requirement would also interfere with a discrimination victim's access to the Ohio Civil Rights Commission, Appellant now insists that the OCRC would not be subject to the requirement, since it is a judge made rule. This argument is unconvincing. First, the OCRC hears discrimination cases in a quasi judicial capacity. Appellant offers no rational reason why the OCRC would not need to follow the same rule of judicial economy when operating in its judicial capacity as any other tribunal. Further, the OCRC's decisions are subject to judicial review, at which point the exhaustion requirement would apply.

4112 remedies for many city employees—not from any economy associated with civil service commission reviews.

To illustrate the deceptive nature of Appellants' proposed civil service exhaustion requirement, consider that Mr. Dworning's separation was allegedly entirely voluntary—thus rendering him unable to have his termination reviewed by the civil service commission. Even if Mr. Dworning were able to convince the civil service commission otherwise, many other similarly situated civil servants will not. Considering the case of *Kerans v. Porter Paint Co.*, involving a female employee sexually molested by her store manager on five different occasions in a single day of employment, sheds light on the consequences of Appellants' proposed rewrite of the statutes. See generally (1991), 61 Ohio St. 3d 486, 575 N.E.2d 428.³ Ms. Kerans worked alone with the male manager, who grabbed her breasts, put his hand up her dress against her will, exposed himself to her in a back room, forced her to touch his genitalia, and, finally, appeared naked before her and forced her to watch him masturbate. Despite other complaints about this manager, the employer dismissed his conduct as “boys will be boys.”

As a result of this vicious harassment, Ms. Kerans was forced to resign her position. If she had been a civil servant under Appellants' proposed regime, she would not have had access to the civil service commission's review process—and if she had, the commission

³ The issue in *Kerans* was whether the workers' compensation system provided the only remedy for injuries sustained as a result of sexual harassment in the workplace, and there was no civil service review involved. See generally *id.* OELA utilizes the facts of that case, however, as a hypothetical to demonstrate the importance of allowing employees to file discrimination and harassment claims without the interposition of civil service commission review.

could hardly “affirm or disaffirm or modify” any decision by her supervisor, as it was ultimately Ms. Kerans’ own decision to resign. Even if the commission were able to adapt its procedures to incorporate the concept of constructive discharge, the most favorable outcome it could provide a civil servant in Ms. Kerans’s position would be to return her to the very work environment that had been so intolerable as to force her to resign in the first place. The fact of the matter is that claims of discrimination under Section 4112.99 cannot often be resolved by a civil service commission’s yes-or-no answer to the question of whether a termination is justified, and very few, if any, targets of discrimination can be made whole simply by being allowed to return to work. It is the OCRC and the judicial system, not the civil service commission, that possess the authority, expertise, and flexibility to resolve the critically important and often complex issues raised by claims under Section 4112.99.

Requiring a discrimination victim to exhaust a civil service appeal, when doing so will result in, at best, delay of Section 4112’s remedies, and, often, an absolute bar to such remedies, is therefore inconsistent with Chapter 4112 and violates R.C. Section 4112.08.

C. Exhaustion Would Provide No Benefit to Justify the Violence It Does to Chapter 4112 and the Employees It Was Drafted to Protect

1. Requiring Exhaustion of an Employer’s Internal Review Process Supports No Legitimate Policy Underlying Exhaustion Doctrines.

Appellant asks this Court to discard Chapter 4112’s express language and history of providing an immediate and unfettered cause of action in favor of promoting the policies “underlying the exhaustion doctrine.” Appellants rely heavily on this court’s decision in

Nemazee v. Mr. Sinai Medical Center (1990), 56 Ohio St. 3d 109, 564 N.E. 2d 477, which the court of appeals noted was decided before *Elek* and *Smith*. More important, *Nemazee* was primarily a contract case involving hospital privileging issues, for which this court has long required exhaustion of hospital internal appeals. Indeed, the *Nemazee* court specifically relied upon *Khan v. Suburban Community Hospital* (1976), 45 Ohio State 2d 39 and its progeny, dealing with hospital privileging cases. As the court below stressed:

Our view is consistent with *Nemazee*. To be sure, *Nemazee* ordered a litigant to exhaust “internal” administrative remedies provided by his employer. But *Nemazee* did not file a disability discrimination claim subject to private action under R.C. 4112.99. He filed a breach of contract and intentional infliction of emotional distress claim. *Nemazee*, 56 Ohio St.3d at 110. Making a special note of its reluctance to involve itself in the staffing decisions of a hospital, the supreme court reached the unremarkable conclusion that *Nemazee's* contract complaint was best resolved with resort to the hospital's grievance procedure, which itself was listed in *Nemazee's* employment contract. *Id.*

Opinion at ¶ 50.

None of the policies discussed in *Nemazee*, are advanced by requiring city employees to exhaust civil service remedies. In *Nemazee* this Court stated that its requirement that a physician employed by a hospital exhaust internal hospital review procedures incorporated into his employment agreement before he sued the hospital for an alleged breach of that agreement would:

1. Give the hospital an opportunity to correct its own errors;
2. Afford the parties and courts the benefit of its expertise; and
3. Compile a record which is adequate for review.

Nemazee, supra at 111. None of these policies are promoted by requiring a discrimination victim to exhaust a civil service appeal before filing a Chapter 4112 claim.

First, applying an exhaustion doctrine does not provide Appellant any opportunity to correct its own errors that it does not already have. This includes the opportunity to correct its own unlawful discrimination. Like any other employer, Appellant is always free to reverse an unlawful discharge decision and reinstate the discrimination victim. It can also remedy the effects of its own discrimination by making the discrimination victim whole. Importantly, the City of Euclid does not need a civil service commission to order it to remedy unlawful discrimination before it can do so. It can do so on its own. Appellant cannot dispute this, having helpfully cited case law demonstrating that, as an employer, it can reduce and even eliminate liability for discrimination by making an unconditional offer of reinstatement to a wrongly discharged employee. *Brief of Appellant City of Euclid* at 24.

More important, there is no basis for any belief that the Euclid Civil Service Commission had the authority or duty to even address Mr. Dworning's discrimination charges given its extremely limited remedial authority and lack of expertise. Nor in Mr. Dworning's case—and many others like his, in which the City contends that the employee quit or retired voluntarily and the employee is not seeking any remedy available from the Commission—does the Commission even have jurisdiction. If it is Appellants' contention that they need the aid of an external fact-finding process to “self-correct” their discriminatory conduct, both judicial discovery and the OCRC process offer the same assistance without any meaningless mandatory appeals to civil service commissions.

Appellants ignore the critical fact about any civil service commission process.

Whether an employee wins or loses in the civil service commission does not “correct” or “end” the employee’s discrimination claim. Even if a civil service commission finds just cause for a termination, assuming there is no jurisdiction issue as to constructive discharge claims, the employee may still prove discrimination. For example, a lone female employee in a city’s street department fired for absenteeism may still prevail upon a showing that her male peers’ similar or worse attendance problems were routinely ignored by supervisors who told her that women do not belong on street crews. Similarly, even if the civil service commission were to find that the termination of such an employee was unjust, the issues of discrimination and the panoply of statutory remedies would remain.

Nor would an exhaustion requirement promote the policy of providing the parties and the courts with the benefit of Appellants’ expertise. As the court of appeals pointed out, neither Appellants nor the Euclid Civil Service Commission has any particular expertise in preventing and remedying discrimination. See Opinion at ¶ 57 (citing *City of Whitehall ex rel. Wolfe v. Ohio Civil Rights Comm’n*, 74 Ohio St.3d 120, 1995-Ohio-302 (holding that prior civil service appeal does not divest Civil Rights Commission of jurisdiction and noting differences between civil service and Civil Rights Commission proceedings)); see also *Cincinnati v. Dixon*, Miami App. 2003CA41, 2004-Ohio-4925 (stating that civil service commission is not the appropriate body to resolve discrimination issues).

Finally, the third purpose of an exhaustion requirement, to provide a court with a record for review, has no application to a *de novo* discrimination claim filed under R.C. Section 4112.99. A doctrine of exhausting internal employer remedies thus promotes none of the policies identified by this Court in *Nemazee* as supporting an exhaustion requirement.

2. Protecting an Employer from Suit for Unlawful Bias is not a Policy Supported by a Judicial Exhaustion Doctrine.

Appellant champions a fourth “policy” that it claims justifies a bar of discrimination suits unless and until an employee completes an employer review of its unlawful decision, which is “avoiding premature, and potentially unnecessary, employment lawsuits.” *See, e.g., Brief of Appellant City of Euclid* at 11. Regrettably for Appellant, but fortunately for the citizens of Ohio, no Ohio court, including its high court, has ever supported an exhaustion of remedies doctrine to insulate a defendant from ripe and valid claims. This Court must not do so here. If it did, employers across Ohio could erect elaborate review procedures lasting for years and containing procedural traps in the name of “avoiding . . . employment lawsuits” against the employer. Lost through it all will be the public purpose of eradicating unlawful discrimination as rapidly as possible.

IV. Conclusion

This Court should reject Appellants’ request to judicially amend the Legislature’s statutory directive to interpret Chapter 4112 liberally in favor of maximizing the remedies available to stop, deter, and alleviate acts of discrimination. This Court should condemn Appellants’ contention that municipal employees are entitled to less effective and timely remedies, even for the most vicious acts of discrimination and harassment, than other citizens, despite the General Assembly’s decision to include city employees within the coverage of the Act with no distinction as to their remedies.

Appellants are asking this Court to rewrite the explicit provisions enacted by the Legislature limiting any exhaustion and election requirements to age discrimination claims

not presented by this case. Appellants' proposal to legislate through the courts is at odds with this Court's repeated pronouncements that it will enforce the General Assembly's legislative choices unless doing so would violate applicable constitutional requirements or limits.

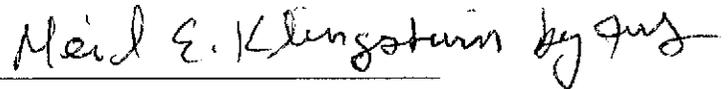
The Legislature's (and this Court's) wisdom about the need for direct actions in court, as reflected in *Elek* and *Smith*, are highlighted by this case. Appealing to the Euclid Civil Service Commission would be a futile act for Mr. Dworning. As the Court of Appeals pointed out, the commission has no authority to provide the remedies to which he is entitled, and forcing him to pursue a civil service appeal is also at odds with the Appellees' own contention that he resigned voluntarily (depriving him of any right to a civil service commission appeal in the first place). Nor, as this court and the court below have explained, does the civil service commission have any jurisdiction over or expertise in discrimination cases. Even worse, forcing Mr. Dworning and other municipal employees to forego resort to the OCRC and the courts may result in them losing any meaningful relief and immunizing discriminating employers.

The purpose of Chapter 4112 and Section 4112.99 is to remedy and deter discrimination. Creating artificial and pointless exhaustion requirements that delay or eliminate meaningful remedies for employees who have evidence that their employers are engaging in intentional discrimination undermines that purpose. Indeed, it would interfere with the ability of the OCRC to investigate and carry out its legislative mandates.

The Legislature, as confirmed repeatedly by this Court, rejected the notion that aggrieved parties must exhaust the administrative processes of the Ohio Civil Rights

Commission or must elect between the Commission and court in non-age cases. It is just as clear that the Legislature did not intend to permit election or exhaustion requirements associated with municipal civil service commissions to be erected by city governments charged with intentional discrimination. To allow civil service commissions with no expertise and no authority to provide complete or adequate relief to supersede, delay, and, in some cases, eliminate the authority of the OCRC and the courts would effectively repeal the legislative policies embodied in Chapter 4112 by the General Assembly.

Respectfully submitted,



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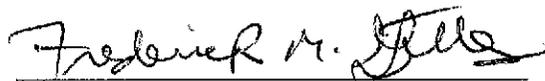
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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2007, a copy of Brief of Amici Curiae of the Ohio Employment Lawyers Association, the Ohio Now Legal Education Defense Fund, Committee Against Sexual Harassment, Ohio State Legal Services Association and the Columbus Branch of the Ohio NAACP in Support of Appellant, Michael Dworning was served by postage-paid U.S. Mail upon the following:

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