

In the
Supreme Court of Ohio

MICHAEL DWORNING, : Case No. 2007-0307
: :
Plaintiff-Appellee, : :
: :
v. : On Appeal from the
: Cuyahoga County
: Court of Appeals,
THE CITY OF EUCLID, et al., : Eighth Appellate District
: :
Defendants-Appellants. : Court of Appeals Case
: No. 87757

**MERIT BRIEF OF *AMICUS CURIAE* THE STATE OF OHIO
IN SUPPORT OF PLAINTIFF-APPELLEE MICHAEL DWORNING**

RICHARD A. MILLISOR* (0062883)

**Counsel of Record*

WILLIAM E. BLACKIE (0017699)

Millisor & Nobil Co., L.P.A.

9150 South Hills Boulevard, Suite 300

Cleveland, Ohio 44147

440-838-8800

440-838-8805 fax

rmillisor@millisor.com

CHRIS FREY (0038964)

Euclid City Hall

585 East 22nd Street

Euclid, Ohio 44123

216-289-2746

216-289-2766 fax

cfrey@ci.euclid.oh.us

Counsel for Defendant-Appellant

The City of Euclid

MARC DANN (0039425)

Attorney General of Ohio

WILLIAM P. MARSHALL* (0038077)

Solicitor General

**Counsel of Record*

CHRISTOPHER R. GEIDNER (0079233)

ROBERT J. KRUMMEN (0076996)

Deputy Solicitors

DUFFY JAMIESON (0042408)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

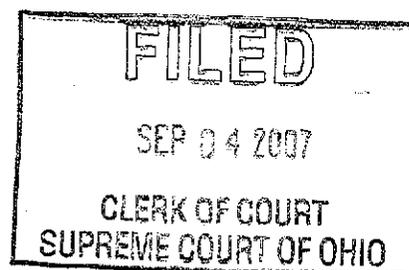
614-466-8980

614-466-5087 fax

wmarshall@ag.state.oh.us

Counsel for *Amicus Curiae*

The State of Ohio



BARBARA KAYE BESSER* (0017624)

**Counsel of Record*

Elfvn & Besser L.P.A.

4070 Mayfield Road

Cleveland, Ohio 44121

216-382-2500

216-381-0250 fax

bkb@elfvinbesser.com

Counsel for Defendants-Appellants

James Slivers and Thomas Cosgriff

CHRISTOPHER P. THORMAN* (0056013)

**Counsel of Record*

PETER HARDIN-LEVINE (0014288)

Thorman & Hardin-Levine Co., L.P.A.

1220 West Sixth Street, Suite 307

Cleveland, Ohio 44113

216-621-9767

216-621-3422 fax

cthorman@thllaw.com

Counsel for Plaintiff-Appellee

Michael Dworning

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INTRODUCTION

This is a case about the scope and purpose of Ohio's laws against discrimination and the types of remedies available to Ohioans when those laws are violated. In the years since Ohio's commitment to eradicating discrimination was codified in Ohio Revised Code Chapter 4112, the scope of that Chapter has been interpreted expressly to further that essential interest.

In 1974, for example, when the owner of a trailer park "denied Miss Beeler the full enjoyment of the facilities of his trailer park because she was white and was entertaining someone who was black," this Court held that a trailer park—despite not being listed within the text of R.C. 4112.02(G)—was a place of public accommodation because the courts "are to construe those statutes liberally in order to effectuate the legislative purpose and fundamental policy implicit in their enactment." *Ohio Civil Rights Commission v. Lysyj* (1974), 38 Ohio St. 2d 217, 220–21. This mandate for a liberal construction has been the touchstone of this Court's analysis of civil rights challenges in the decades since. See, e.g., *Smith v. Friendship Village of Dublin, Ohio, Inc.* (2001), 92 Ohio St. 3d 503, 507; 2001-Ohio-1272; *Elek v. Huntington Nat'l Bank* (1991), 60 Ohio St. 3d 135, 137; see also R.C. 4112.08 ("This chapter shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply.").

One of the central tenets in the requirement that Chapter 4112 be liberally construed is that private anti-discrimination enforcement does not require exhaustion of remedies. When Chapter 4112 was enacted in 1959, the only recourse for the victims of discrimination was to file a charge with the Ohio Civil Rights Commission ("OCRC"), the administrative agency charged with receiving, investigating, adjudicating, and remedying charges of discrimination. In 1987, however, the General Assembly amended R.C. 4112.99 and broadened the enforcement options available to individuals who were the victims of discrimination. Accordingly, in *Elek v.*

Huntington Nat'l Bank (1991), 60 Ohio St. 3d 135, the Court held that a claimant could pursue private civil actions to redress discrimination claims. And ten years later, in *Smith v. Friendship Village of Dublin* (2001), 92 Ohio St. 3d 503, the Court further clarified R.C. 4112.99, finding that employees did not first have to exhaust their remedies available through the OCRC prior to the commencement of a private action. To allow claimants the ability to most fully vindicate discrimination claims, the Court held that, under R.C. 4112.99, citizens alleging discrimination could choose to bypass the OCRC administrative procedures completely and instead proceed directly to court.

Against this background, the Eighth District Court of Appeals decision, which permits an individual to bypass city administrative procedures in favor of a private action under R.C. 4112.99, is surely correct. If exhaustion of OCRC remedies—the state’s preferred method of resolving discrimination allegation complaints—is not required, the conclusion that individuals do not have to exhaust other in-house remedies in other fora as a prerequisite to instituting an independent civil action is inescapable.

Accordingly, Appellant City of Euclid’s argument that exhaustion of administrative remedies may be required in **non-discrimination** cases misses the point. The State of Ohio’s commitment to protecting its citizens from discrimination trumps any run-of-the-mill exhaustion of remedies concerns. Accordingly, this Court should affirm the decision of the Eighth District Court of Appeals.

STATEMENT OF AMICUS INTEREST

The Ohio Attorney General serves as the lawyer for the State of Ohio and its agencies and entities, including the Ohio Civil Rights Commission. As an independently elected statewide executive officer, the Attorney General is answerable to the citizens of Ohio and, accordingly, responsible for advancing their interests in his role as the state’s chief lawyer. As such, a case

addressing the rights of victims of discrimination is of paramount concern to the Attorney General and the State of Ohio.

The OCRC was created by the General Assembly to combat the destructive societal effects caused by discrimination upon its citizens. Through Ohio's anti-discrimination laws, found in Chapter 4112, the OCRC is authorized to formulate policies, conduct investigations, and adjudicate cases of unlawful discriminatory conduct. In fact, the OCRC investigates nearly 5,000 charges of discrimination annually. As a result, the OCRC is uniquely qualified to address employment discrimination issues. Judicial decisions that infringe upon how those issues are handled are of the utmost importance to the OCRC and the State.

Accordingly, the State of Ohio has a strong interest in ensuring that private or local administrative remedies—not subject to the controls or protections of the state—do not serve as barriers to individuals' abilities to bring a private action for discrimination claims.

STATEMENT OF THE CASE AND FACTS

The State of Ohio adopts the statement of the case and facts used by Appellee Michael Dworning.

ARGUMENT

Amicus Curiae State of Ohio's Proposition of Law:

Ohio does not require public employees to exhaust administrative remedies before seeking redress in the courts for discrimination claims.

The Court has clearly and consistently interpreted the General Assembly's intent behind Chapter 4112 as requiring an expansive interpretation of the range of remedies available to individuals claiming discrimination. Time and again, this Court has expounded on the specific

harms that Ohio's laws against discrimination attempt to combat.¹ The General Assembly's dictates led the Court to clarify that individuals need not even exhaust the administrative remedies provided for by the OCRC before filing a private action. Accordingly, the history and the Court's interpretation of Chapter 4112 lead to the inescapable conclusion reached by the court below and urged by Appellee Dworning and Amicus the State of Ohio: Individuals need not exhaust administrative remedies—and certainly not non-state remedies—before seeking redress from the courts under R.C. 4112.99.

The General Assembly created the OCRC and gave it the “statutory duty of eliminating unlawful discriminatory practices.” *State ex rel. Ohio Civil Rights Comm'n v. Gunn* (1976), 45 Ohio St. 2d 262, 266. It succinctly declared the OCRC's mission in a solitary provision:

The [Ohio Civil Rights Commission], as provided in this section, shall prevent any person from engaging in unlawful discriminatory practices, provided that, before instituting [a] formal hearing . . . , it shall attempt by informal methods of conference, conciliation, and persuasion, to induce compliance with this chapter.

¹ The Court has invoked the liberal construction mandate in no fewer than 10 cases, with each encompassing a different aspect of Chapter 4112. See, e.g., *Oker v. Ameritech Corp.* (2000), 89 Ohio St. 3d 223, 225 (the statute of limitations period begins to run on the date of discharge, not the date on which an employee is informed he will not be offered a position in a reorganized department); *Rice v. Certainteed Corp.* (1999), 84 Ohio St. 3d 417, 420-21 (punitive damages are available in a civil action instituted under R.C. 4112.99); *Genaro v. Central Transport, Inc.* (1999), 84 Ohio St. 3d 293, 296 (a supervisor/manager is jointly and severally liable with an employer for his/her discriminatory conduct); *City of Whitehall ex rel. Wolfe v. Ohio Civ. Rights Comm.* (1995), 74 Ohio St. 3d 120, 122 (a civil service appeal of a discharge does not bar a proceeding before the Commission); *Cosgrove v. Williamsburg of Cincinnati Management Co., Inc.* (1994), 70 Ohio St. 3d 281, 288-89 (a person has six years to bring a civil action pursuant to R.C. 4112.99); *Ohio Civ. Rights Comm. v. Ingram* (1994), 69 Ohio St. 3d 89, 94 (any ambiguities regarding the amount of back pay must be resolved against the discriminating employer); *Elek v. Huntington Nat'l Bank* (1991), 60 Ohio St. 3d 135, 137 (a person may institute a civil action pursuant to R.C. 4112.99 to remedy disability discrimination); *Bd. of Educ. of the Lordstown Local Sch. Dist. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St. 2d 252, 256-57 (a teacher's employment is terminated upon expiration of the teaching contract, not upon notice of intent not to renew that contract); *State ex rel. Ohio Civ. Rights Comm. v. Gunn* (1976), 45 Ohio St. 2d 262, 268 (the Commission may seek summary enforcement of its subpoenas); *Lysyj*, 38 Ohio St. 2d at 220 (a trailer park is a place of public accommodation, and discrimination based on the race of one's associates is unlawful).

R.C. 4112.05(A).

For thirty years, the OCRC's administrative process was the sole means to handle all charges of discrimination. In 1987, the General Assembly chose to expand the private remedies available to Ohio's citizens. Ohio's commitment to nondiscrimination led to this expansion and prevented delay for the victims of discrimination seeking to right that wrong. In *Elek v. Huntington Nat'l Bank*, the Court corrected those who urged a strained, narrow reading of the amended R.C. 4112.99 by holding that it is "beyond question that R.C. Chapter 4112 is remedial," and that, accordingly, "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)." 60 Ohio St. 3d at 137.

In *Smith v. Friendship Village of Dublin*, the Court re-affirmed the mandate that Chapter 4112 is remedial in nature and must be construed liberally to accomplish its purposes of eliminating discrimination. *Id.* at 505 (citing *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St. 3d 131, 133-134). More specifically, the Court held that "an individual may institute an independent civil action for discrimination . . . even though that individual has not invoked and exhausted his or her administrative remedies." *Friendship Village of Dublin*, 92 Ohio St. 3d at 506 (emphasis added). The reason for multiple enforcement mechanisms is straightforward. As this Court earlier held, Chapter 4112 "is comprehensive legislation designed to provide a variety of remedies for employment discrimination in its various forms." *Helmick*, 45 Ohio St. 3d at 133. The best way to accomplish this public policy is by assuring that victims of discrimination have available to them a "variety of remedies." *Friendship Village of Dublin*, 92 Ohio St. 3d at 507.

Following in the shadow of this history, the question of whether an individual must exhaust any other alternative mechanism, *i.e.*, any non-OCRC administrative remedy, before filing an independent civil action, effectively answers itself. The General Assembly did not create a statutory scheme under which exhaustion with the OCRC is **optional**, but exhaustion of a non-state “administrative” mechanism is **mandatory**. Conceptually, such a scheme makes little sense and, at least, would render the OCRC’s processes meaningless.

Several other appellate courts to have considered the issue have already answered the question in favor of allowing civil remedies without requiring exhaustion. In *Luginbihl v. Milcor Limited Partnership*, Allen App. No. 1-01-162, 2002-Ohio-2018, the court found that a grievance procedure “cannot prevent an employee from bringing statutory claims, absent language in the relevant statute to the contrary.” *Id.* at ¶ 28. The court rejected the exhaustion of remedies argument and concluded that the plaintiff’s “state law discrimination claim is her own and may not be forfeited by her membership in a labor organization.” *Id.* at ¶¶ 21, 29. In *Filips v. Case Western Reserve Univ.*, Cuyahoga App. No. 79741, 2002-Ohio-4428, the Court refused to dismiss a statutory retaliation case for not following an internal administrative appeal procedure. In *Thomas v. General Electric* (1st Dist. 1999), 131 Ohio App. 3d 825, the court held that even where a collective bargaining agreement specifically provided for arbitration in discrimination claim disputes that the claimant need not pursue arbitration at all. *Id.* at 830.

The City of Euclid responds that if the judicial exhaustion doctrine is extended to administrative processes, the employee could still file a complaint with the OCRC or pursue a private remedy within the mandatory time frames prescribed by statute. See Euclid Br. at 12, 23. That argument, however, is simply beside the point. The question is not whether the anti-discrimination claimant could be ultimately deprived of her discrimination claim if forced to

exhaust her administrative remedies. The question is whether any obstacle can be placed in the way of a public employee before she is allowed to pursue her discrimination claim. And the answer to that question is an emphatic no. The protection of an individual's right to pursue her private anti-discrimination remedies is too central an aspect of Ohio's commitment to non-discrimination for it to be delayed by an administrative process. Stated differently, an employee must have access to the entire arsenal of remedies available to redress discrimination "no matter its size, shape, or form or in what clothes it might masquerade." *Genaro v. Central Transport, Inc.* (1999), 84 Ohio St. 3d 293, 296.

Despite the Court's longstanding commitment to protecting public employees from discrimination, one appellate court, the Ninth District, has apparently confused anti-discrimination law with a decision of this Court requiring exhaustion in a case in which no discrimination was claimed. See *Portis v. Metro Parks Serving Summit Cty.*, Ninth Dist. App. No. 22310, 2005-Ohio-1820. Relying primarily on this Court's 1990 case of *Nemazee v. Mt. Sinai Medical Center* (1990), 56 Ohio St. 3d 109, the Ninth District held that exhaustion of remedies is required in anti-discrimination cases. See *Portis*, 2005-Ohio-1820, ¶¶ 14-20. The appeals court found that if an employee did not first comply with the provisions in the employer's handbook, then his/her discrimination claim could properly be extinguished. *Id.* at ¶ 19; see also *Sanders v. Summit County Veterans' Service Comm.* (May 29, 2002), Summit App. No. 20800, 2002-Ohio-2653 (conditioning an employee's discrimination lawsuit on whether a claimant first complied with the requirements set forth in a city charter).

The fault with the Ninth District's reasoning, however, is that *Nemazee* and the other authorities relied on by the court did not involve discrimination claims. Earlier this year, the U.S. District for the Northern District of Ohio considered this very conflict, and it found that not only

did the cases relied upon by the Ninth District for this unprecedented expansion “predate” *Friendship Village of Dublin*, but also that none of the cases “involved the issue of exhaustion of remedies with regard to a discrimination claim brought pursuant to O.R.C. § 4112.” *Braud v. Cuyahoga Career Center*, N.D. Ohio, 2007 U.S. Dist. Lexis 22526, at *17; see also *Filips*, 2002-Ohio-4428, ¶ 16 (holding in a Chapter 4112 case that “neither *Nemazee* nor *Frick* apply as they relate only to breach of employment contract claims”) (O’Donnell, J.). Instead, the Northern District in *Braud* found the *Friendship Village of Dublin-Elek* line of cases “to be persuasive,” *id.*, and found that the public employee “did not need to exhaust any administrative remedies prior to filing his claim for discrimination under O.R.C. § 4112.” *Id.*

Here, the court of common pleas committed the same error made by the Ninth District and found that failure to first file with a municipal civil service commission extinguished Dworning’s disability discrimination complaint. The Eighth District below, in reversing, corrected that error by applying the *Friendship Village of Dublin-Elek* line of cases to Dworning’s situation and holding that “the city cannot rationally argue that a party must first file a civil service appeal before filing a private discrimination action.” *Dworning v. City of Euclid*, 2006-Ohio-6772, ¶ 56.

The Ohio General Assembly created a remedy that permits an aggrieved individual to institute an independent cause of action to redress claims of discrimination. In creating this remedy, the General Assembly did not require, as a prerequisite, exhaustion through the OCRC—the administrative agency it created for the sole purpose of investigating and remedying discrimination claims. The City of Euclid’s contention that exhaustion of a public employee’s administrative remedies is required—while exhaustion of OCRC remedies are not—contradicts the legislative intent that anti-discrimination remedies be expansive, the Court’s longstanding jurisprudence that anti-discrimination rights be broadly interpreted, and common sense.

The decision of the Eighth District should be affirmed.

CONCLUSION

For the above reasons, the State of Ohio respectfully requests that the Court affirm the decision of the court of appeals and hold that Dworning, or any public employee, is not required to exhaust any administrative remedies before filing a civil action.

Respectfully submitted,

MARC DANN (0039425)

Attorney General of Ohio



WILLIAM P. MARSHALL * (0038077)

Solicitor General

**Counsel of Record*

CHRISTOPHER R. GEIDNER (0079233)

ROBERT J. KRUMMEN (0076996)

Deputy Solicitors

DUFFY JAMIESON (0042408)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

wmarshall@ag.state.oh.us

Counsel for *Amicus Curiae*

The State of Ohio