IN THE SUPREME COURT OF OHIO

CASE NO. 08-0315

ROBERT MEYER,	:	
Plaintiff-Appellee,	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
v.	:	Court of Appeals Case No. C-06-0772
UNITED PARCEL SERVICE, INC.,	:	
Defendant-Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT UNITED PARCEL SERVICE, INC.

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EXPLANATION OF WHY THIS CASE INVOLVES A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST

This case involves a question of public or great general interest because the decision from the First District Court of Appeals in *Meyer v. United Parcel Service, Inc.* renders meaningless the detailed statutory framework that the General Assembly created for age discrimination claims in Ohio. 1st Dist. No. A-0403705, 2007-Ohio-7063, ¶25. Additionally, the decision below conflicts with the outcome of other cases in Ohio, resulting in different courts applying different standards to age discrimination claims. The Court should take this opportunity to resolve the conflict among Ohio courts and articulate a standard for the treatment of age discrimination claims that respects the legislative structure for such claims.

The General Assembly clearly demonstrated its intent to treat age discrimination claims differently from other claims of discrimination when it enacted a detailed statutory framework that applies only to age discrimination. Unlike claims for other forms of discrimination, R.C. Chapter 4112 contains three provisions under which a plaintiff can pursue a civil action for age discrimination: R.C. 4112.02(N), R.C. 4112.14, and R.C. 4112.99.[1] R.C. 4112.02(N) allows a victim of age discrimination to file a civil action for legal or equitable relief, but he must do so within 180 days of the alleged discriminatory practice. R.C. 4112.14, previously codified at R.C. 4101.17, is a narrower provision that addresses age discrimination in the hiring or discharge of employees. R.C. 4112.14 provides equitable (but not legal) relief, and includes a prohibition on civil actions where the claimant had the opportunity to arbitrate his discharge. R.C. 4112.14(C). R.C. 4112.14 does not expressly state a statute of limitations. The third avenue, R.C. 4112.99, is

[1] A plaintiff may also file a charge of discrimination administratively with the Ohio Civil Rights Commission under R.C. 4112.05, but such filing bars the plaintiff from filing a civil action in Court.

a general provision that is not specific to age discrimination: "Whoever violates this chapter is subject to a civil action for damages, injunctive relief or any other appropriate relief." R.C. 4112.99 itself contains no prohibitions against discrimination; it simply provides a means by which plaintiffs may pursue relief afforded by more specific protections in Chapter 4112.

As this Court has explained, R.C. 4112.99 only fills gaps in Chapter 4112 where no right of civil action exists. *Cosgrove v. Williamsburg of Cincinnati Management Co.*, (1994), 70 Ohio St.3d 281, 292, 638 N.E.2d 991 (Resnick, J., concurring). No such gap exists for age discrimination. Therefore, in order to give effect to the legislature's statutory framework and to avoid a statutory conflict, a claim under R.C. 4112.99 must be premised on a violation of either R.C. 4112.02 or R.C. 4112.14 and should incorporate the substantive requirements of those provisions. See *Reminder v. Roadway Express, Inc.* (N.D. Ohio Jan. 10, 2008), 2006 U.S. Dist. LEXIS 1899, at *13-14.

The First District Court of Appeals in *Meyer* rendered meaningless the legislature's framework for age discrimination claims and eliminated the legislature's distinction between age and other forms of discrimination. The appellate court allowed Meyer to ignore the substantive requirements for age discrimination claims established by the legislature merely because Meyer filed his age claim under the general provision in R.C. 4112.99. The appellate court held that Meyer timely filed his age discrimination claim under R.C. 4112.99 over a year and a half after his termination, despite the age-specific statute of limitations in 4112.02(N). *Meyer* at ¶¶ 24-25. The court further concluded that Meyer was entitled to a jury trial and compensatory and punitive damages for his age claim, despite the limited remedies permitted under the age-specific R.C. 4112.14. Id. at ¶¶26-30, 47-48. Moreover, the court ignored the prohibition in R.C. 4112.14(C) on wrongful discharge claims when the claimant had the opportunity to arbitrate his

discharge, as Meyer did. Id. at ¶ ¶28-30. Pursuant to the *Meyer* decision, an individual can avoid every substantive limitation that the General Assembly explicitly placed on age discrimination claims by merely pleading a claim under R.C. 4112.99. This Court needs to close the loophole created by *Meyer* in order to effectuate the General Assembly's intended framework for age claims.

In addition to negating the statutory framework for age claims, the *Meyer* decision conflicts with numerous Ohio cases, including this Court's decision in *Bellian v. Bicron Corp.* (1994), 69 Ohio St.3d 517, 520, 1994-Ohio-339, 634 N.E.2d 608. Since *Bellian,* the law in Ohio has been: "**any age-based employment discrimination claim**, premised on a violation described in R.C. Chapter 4112, must comply with the one-hundred-eighty-day statute of limitations period set forth in R.C. 4112.02(N)." Id. at 520 (emphasis added). According to this Court, the specific provisions of Chapter 4112 prevail over the conflicting, general provision of R.C. 4112.99:

> Here, R.C. 4112.99 is the more general statute. Consequently, R.C. 4112.99 prevails over R.C. 4112.02(N) only if there is a clear manifestation of legislative intent. Since the General Assembly has not shown such an intent, the specific provision, R.C. 4112.02(N), must be the only provision applied.

Id. at 519.

Courts in Ohio continue to follow *Bellian* (and thereby conflict with the *Meyer* decision) and hold that **all age discrimination claims** under Chapter 4112 are subject to the specific statute of limitations in R.C. 4112.02(N). *Tablack v. Wellman*, 7th Dist. No. 04-MA-218, 2006-Ohio-4688, ¶97, ¶103, discretionary appeal not allowed (2007), 112 Ohio St.3d 1444, 2007-Ohio-152, 860 N.E.2d 767, reconsideration denied (2007), 113 Ohio St.3d 1417, 2007-Ohio-1036; *Kozma v. AEP Energy Servs.,* 10th Dist. No. 04AP-64, 2005-Ohio-1157, ¶23,

discretionary appeal not allowed (2005), 106 Ohio St.3d 1486, 2005-Ohio-3978, 832 N.E.2d 738; *McCray v. City of Springboro* (July 13, 1998), 12th Dist. No. CA98-01-006, 1998 Ohio App. LEXIS 3208, at *13-15. Indeed, this Court reiterated the holding of *Bellian* and stated that a claim for age discrimination had to be filed within 180 days of the employee's termination in *Oker v. Ameritech Corp.* (2000), 89 Ohio St.3d 223, 224. Additionally, the Court explained in *Cosgrove* that age and gender discrimination claims under R.C. 4112.99 are treated differently because the specific provisions of Chapter 4112 regarding age discrimination prevail over the conflicting, general provision of R.C. 4112.99. Id. at 290-91 (Resnick, J., concurring). In *Meyer*, the First District Court of Appeals ignored *Bellian*, *Oker*, and *Cosgrove*.

Courts in Ohio – including this one – agree that the reasoning of *Bellian*, *Oker*, and *Cosgrove* applies beyond an analysis of the proper statute of limitations for age claims. The Court in *Smith v. Friendship Village of Dublin* stated that the General Assembly clearly intended, by enacting specific provisions in Chapter 4112, to subject claims for age discrimination under R.C. 4112.99 to the doctrine of election of remedies, even though R.C. 4112.99 does not itself contain an election of remedies provision. 92 Ohio St.3d 503, 506, 2001-Ohio-1272, 751 N.E.2d 101. Indeed, "[t]he overwhelming majority of Ohio appellate court cases to have addressed this issue have concluded that age discrimination claims brought under O.R.C. § 4112.99 are subject to the election of remedies doctrine." *Talbott v. Anthem Blue Cross & Blue Shield* (S.D. Ohio 2001), 147 F. Supp.2d 860, 863-864 (collecting cases). Courts in Ohio have also stated that the specific provisions in R.C. 4112.14 regarding arbitration and limited remedies should apply to age discrimination claims filed generally under Chapter 4112 but outside the statute of limitations in R.C. 4112.02(N). *Jones v. Bd. Elect.*, 8th Dist. No. 83470, 2004-Ohio-4750, ¶10, discretionary appeal not allowed (2005), 105 Ohio St.3d. 1406, 2005-Ohio-279, 821 N.E.2d

1027; *Sutterlin v. Mansfield Plumbing Prods.* (Mar. 26, 2001), 5th Dist. No. 00COA01369, 2001 Ohio App. LEXIS 1466, at *3-5.

The Court should accept jurisdiction in this case to eliminate the conflict among Ohio courts created by the *Meyer* decision regarding the proper treatment of age discrimination claims filed under R.C. 4112.99. As a result of the current conflict among Ohio courts, the substantive requirements applicable to an age discrimination claim will differ based on the venue of the claim. Because of *Meyer*, claimants in the First District will be able to file age discrimination claims under R.C. 4112.99 without any concern for the substantive requirements for age claims found in other provisions of Chapter 4112. But in other judicial districts, claimants' age claims will be subject to those substantive requirements. See, e.g., *Jackson v. Int'l Fiber*, 169 Ohio App.3d 395, 2006-Ohio-5799, 863 N.E.2d 189, ¶20; *McNeely v. Ross Corr. Inst.*, 10th Dist. No. 06AP-280, 2006-Ohio-5414, ¶¶19-20, discretionary appeal not allowed (2007), 112 Ohio St.3d 1494, 2007-Ohio-724, 862 N.E.2d 119.

The *Meyer* decision will likely lead to forum-shopping, as all claimants will want to file suit in Hamilton County, where they can ignore the substantive requirements enacted by the General Assembly for age claims. The First District erred when it ignored the holdings and rationale of cases like *Bellian*, *Oker*, *Cosgrove*, and *Smith*. The Court should align Hamilton County with this Court's precedent and eliminate the conflicting standards being applied by Ohio courts to age discrimination claims.

By granting jurisdiction in this case, the Court can also explain how its recent decision in *Leininger v. Pioneer National Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36, affects the application of the substantive requirements of Chapter 4112 to age discrimination claims under R.C. 4112.99. The First District Court of Appeals interpreted *Leininger* as

rejecting the proposition that the specific provisions of Chapter 4112 prevail over the general provision in R.C. 4112.99. *Meyer* at ¶24 (citing *Leininger* at syllabus, ¶31). This interpretation of *Leininger* must be erroneous. If interpreted in this manner, *Leininger* would contradict prior decisions from this Court in *Bellian*, *Cosgrove*, and *Smith*. In each of these cases, the Court stated that specific provisions regarding age discrimination apply to age claims brought under R.C. 4112.99. Moreover, the First District's interpretation of *Leininger* results in the legislature's framework for age claims being ignored. This case provides the Court with the opportunity to clarify its opinion in *Leininger*.

In order to effectuate the intended statutory scheme for age discrimination claims in Ohio, the Court should clarify that the rationale of *Bellian* continues to apply to all age discrimination claims, including those under R.C. 4112.99. This Court and others have been reluctant to interfere with the General Assembly's policy decision to enact more hurdles for age discrimination plaintiffs than other discrimination plaintiffs. *Leininger* at ¶32; *Schamer v. W. & S. Life Ins. Co.*, 1st Dist. No. C-040057, 2004-Ohio-4249, ¶13. The decision by the First District Courts of Appeals, however, has removed all of those hurdles and now treats age discrimination claims under R.C. 4112.99 like all other claims of discrimination in Ohio.

The Court of Appeals has effectively concluded that the single, broadly-worded sentence contained in R.C. 4112.99 eradicated the detailed legislative framework for age discrimination claims in Chapter 4112. As Ohio courts have stated, there is no basis to conclude that the General Assembly intended R.C. 4112.99 to have such a drastic consequence. *Vinson v. Diamond Triumph Auto Glass, Inc.*, 149 Ohio App.3d 605; 2002-Ohio-5596; 778 N.E.2d 149, ¶13 (quoting *Pozzobon v. Parts for Plastics, Inc.* (N.D. Ohio 1991), 770 F. Supp. 376, 379). The

Court should grant jurisdiction to settle the conflict created by *Meyer* and to restore the detailed, age-specific framework created by the General Assembly.

STATEMENT OF THE CASE AND FACTS

Meyer was discharged from employment with Appellant United Parcel Service, Inc. ("UPS") on December 1, 2003. Meyer filed a grievance disputing his discharge, but his discharge was upheld through the grievance process, which is equivalent to arbitration.[2] Meyer filed a claim of workers' compensation retaliation against UPS in the Hamilton County Court of Common Pleas and amended his complaint over a year and a half later to add a claim of age discrimination under R.C. 4112.99.

The trial court denied UPS's motions for summary judgment and directed verdict. Meyer's claims for age discrimination and workers' compensation retaliation were tried to a jury in August 2006. The jury found in Meyer's favor and awarded him $113,532 in back pay, $25,000 in punitive damages, and $175,000 in "other damages," which the trial court presumed was compensatory damages. The trial court also awarded prejudgment interest and attorneys' fees to Meyer.

UPS timely appealed the verdict to the First District Court of Appeals. The Court of Appeals reversed the jury's verdict because there is no right to a jury trial for a workers' compensation retaliation claim, and the evidence on that claim tainted the jury's verdict on the age claim. *Meyer* at ¶¶46-48. In its decision, the appellate court made several incorrect determinations regarding Meyer's age claim, each premised on the erroneous conclusion that the substantive provisions regarding age discrimination in Chapter 4112 do not apply to age claims

[2] As the appellate court noted, the grievance process "was the functional equivalent of arbitration." *Meyer* at ¶27, n.21 (citing *Hopkins v. UPS, Inc.*, (Feb. 11, 2000), 1st Dist. No. C-990392, fn. 7, discretionary appeal denied (2000), 89 Ohio St.3d 1426, 729 N.E.2d 1196; *UPS, Inc. v. Mitchell* (1981), 451 U.S. 56, 101 S.Ct. 1559).

under R.C. 4112.99. First, the court concluded that Meyer's age discrimination claim under R.C. 4112.99 was subject to a six-year statute of limitations. Id. at ¶ 25. Next, the appellate court determined that R.C. 4112.14(C), which bars age discrimination plaintiffs from suing if their discharge was arbitrated and found to be for just cause, did not apply to Meyer's age discrimination claim. Id. at ¶¶28-30. Finally, the Court refused to apply the appropriate limitations on Meyer's damages and failed to recognize that Meyer is not entitled to a jury trial on his age claim. Id. at ¶¶47-48.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: In order to preserve the detailed framework for age discrimination claims that the General Assembly enacted, an age discrimination claim brought under the general language of R.C. 4112.99 is subject to the substantive provisions of R.C. 4112.02 and R.C. 4112.14.

1. The Court must respect the legislature's intended framework for age discrimination claims.

The legislature made a policy decision to treat age discrimination differently than other forms of discrimination and chose to place certain substantive limitations on those claims. See *Leininger* at ¶32; *Schamer* at ¶13. For instance, the legislature articulated a statute of limitations specifically for age claims – 180 days. R.C. 4112.02(N). The legislature also chose to prohibit wrongful discharge claims for age discrimination if the employee had the opportunity to arbitrate the termination. R.C. 4112.14(C). Additionally, the legislature chose to provide limited remedies for certain age discrimination claims (e.g., claims for age discrimination "in any job opening or discharge[] without just cause"). R.C. 4112.14(B). Lastly, the legislature implemented an election of remedies requirement for age claims in Ohio. *Smith* at 506-507. The *Meyer* decision rejects this legislative framework and enables age discrimination claimants to bypass all of the substantive requirements implemented by the legislature by merely filing age claims under R.C. 4112.99.

Consistent with the overall framework for age discrimination, claims under R.C. 4112.99 should be treated differently than other claims of discrimination. This Court has repeatedly recognized that the courts should not interfere with the General Assembly's decision to enact stricter procedural requirements for age discrimination claims. See, e.g., *Smith* at 506-07; *Oker* at 224. Enacting those requirements was a "policy decision" by the legislature that the courts should not second guess. See *Leininger* at ¶32. The decision below by the Court of Appeals has rendered the age-specific provisions of R.C. 4112.02(N) and R.C. 4112.14 completely meaningless. No plaintiff will ever sue under either R.C. 4112.02 or R.C. 4112.14 because *Meyer* allows a plaintiff to obtain full legal remedies with a six-year statute of limitations and no substantive requirements simply by suing for age discrimination under R.C. 4112.99. In other words, the *Meyer* decision treats age discrimination claims like all other claims of discrimination – contrary to the legislature's intent.

As this Court has stated, statutes must be "construed as a whole" to "avoid that construction which renders a provision meaningless or inoperative." *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 256, 2002-Ohio-4172, 773 N.E.2d 536. Interpreting the age-discrimination statutes in a manner that gives effect to the substantive requirements best accomplishes the General Assembly's intent regarding age discrimination claims.

2. The Court's decision in *Bellian* requires that claims under R.C. 4112.99 be subject to the substantive provisions regarding age claims in other sections of Chapter 4112.

The rationale of this Court's decision in *Bellian* must be applied to the entire age discrimination structure in order to effectuate the legislature's decision to subject age discrimination claims to more specific requirements than other claims of discrimination.

Otherwise, the provisions regarding age discrimination in R.C. 4112.02 and 4112.14 become superfluous.

The Court in *Bellian* noted that the more specific provisions of Chapter 4112 prevail over the general provision in R.C. 4112.99 and therefore held that the statute of limitations for "any age-based employment discrimination claim" under R.C. Chapter 4112 is 180 days. *Id.* at 520 In *Cosgrove*, the Court reconciled *Bellian* with its conclusion in *Cosgrove* that a six-year statute of limitations applied to a claim for gender discrimination under R.C. 4112.99. *Id.* at syllabus. In a concurring opinion that garnered majority support (five Justices), the Court explained why age claims under R.C. 4112.99 have a different statute of limitations than claims for other types of discrimination under R.C. 4112.99:

> [T]here may be other provisions in R.C. Chapter 4112 that authorize aggrieved individuals to enforce specific rights under Chapter 4112 by instituting a civil action. To the extent that other specific provisions set forth a statute of limitations, a conflict would exist between such specific provision and R.C. 4112.99, relative to the applicability of the statute of limitations. In such an event, pursuant to R.C. 1.51, the specific provision's statute of limitations must prevail.

Id. According to this explanation, the age-specific statute of limitations in R.C. 4112.02(N) should apply to all claims for age discrimination in Chapter 4112.

The recodification that moved R.C. 4112.14 into Chapter 4112 led some courts to question the applicability of *Bellian*. But *Bellian* has never been overruled. Indeed, many courts in Ohio continue to apply the rationale of *Bellian* to all age discrimination claims in Ohio. See *Oker* at 224; *McCray* at *13-15; *Tablack* at ¶97. The rationale of *Bellian* still applies to age discrimination claims. At the time *Bellian* was decided, Chapter 4112 contained only one specific provision regarding age discrimination – 4112.02. Now, it contains two specific provisions regarding age discrimination – R.C. 4112.02 and 4112.14. Thus, the rationale of

Bellian now requires that the specific provisions of both R.C. 4112.02 and 4112.14 prevail over the general provision of R.C. 4112.99.

R.C. 4112.02(N) is the only age-specific statute of limitations contained in R.C. Chapter 4112. The explicit statement in R.C. 4112.02(N) that age claims must be filed within 180 days remains the only indication of the legislature's intent regarding the appropriate statute of limitations for age discrimination claims. Before R.C. 4101.17 was recodified as R.C. 4112.14, the Court had determined that a six-year statute of limitations applied to the provision in *Morris v. Kaiser Engineering, Inc.*, (1984), 14 Ohio St.3d 45, 48, 471 N.E.2d 471. After the Court's decision in *Morris*, the legislature chose to make R.C. 4101.17 part of Chapter 4112, where the legislature had expressly stated that age claims are subject to a 180-day statute of limitations. There is no indication that the legislature intended for the six-year statute of limitations to apply to claims under R.C. 4112.14. Under *Bellian*, the specific provision in 4112.02(N) regarding the appropriate statute of limitations for age claims should prevail.

Nevertheless, even if the Court continues to apply a six-year statute of limitations to R.C. 4112.14, the Court should still apply the reasoning of *Bellian* to claims under R.C. 4112.99. In that case, *Bellian* requires that the specific provisions applicable to R.C. 4112.02 apply to age claims filed under R.C. 4112.99 within 180 days, and that the specific provisions applicable to R.C. 4112.14 apply to age claims filed under R.C. 4112.99 more than 180 days after the allegedly discriminatory act occurred. For instance, an age claim filed under R.C. 4112.99 within 180 days would be entitled to the full legal and equitable remedies permitted by R.C. 4112.02(N). Conversely, age claims filed under R.C. 4112.99 after 180 days would be subject to the limited remedies permitted by R.C. 4112.14. Regardless of when the claim was filed, age claims under R.C. 4112.99 would be subject to the arbitration limitation in R.C. 4112.14(C)

because that provision specifically states that it applies to claims under both R.C. 4112.02 and R.C. 4112.14. Similarly, because the election of remedies requirement applies to both R.C. 4112.02 and R.C. 4112.14, that requirement would also apply to all age discrimination claims under R.C. 4112.99, regardless of when they are filed. This synthesis of Ohio's detailed statutory framework best accomplishes the legislature's intent regarding age claims, if the Court decides not to apply the 180-day statute of limitations to all age claims.

The General Assembly could not have intended with the general, one-sentence provision in R.C. 4112.99 to abolish the detailed framework for age discrimination contained elsewhere in Chapter 4112. See *Vinson* at 608-09. To the contrary, R.C. 4112.99 was intended to fill the gaps where Chapter 4112 did not previously provide for civil actions, such as for gender discrimination. Chapter 4112 contains no gap for age discrimination; R.C. 4112.02 and R.C. 4112.14 already "authorize[] independent civil actions" and set forth their own substantive requirements. *Cosgrove* at 290-92 (Resnick, J., concurring). Therefore, claims under R.C. 4112.99 must be subject to those requirements under *Bellian.*

3. The appellate court incorrectly interpreted *Leininger* as supporting its decision in *Meyer.*

The Court's decision in *Leininger* does not support the decision below. The appellate court relied on this Court's decision in *Leininger* to conclude that the substantive provisions regarding age discrimination claims in Chapter 4112 do not apply to age discrimination claims under R.C. 4112.99. This interpretation of *Leininger* is improper. The Court in *Leininger* held that Ohio does not recognize a common-law tort claim for wrongful discharge based on the public policy against age discrimination. In reaching that holding, the Court appeared to state in dicta that the specific provisions of Chapter 4112 do not control over a conflicting general provision in R.C. 4112.99, and stated that the doctrine of election of remedies does not apply to

age discrimination claims in R.C. 4112.99. *Id.* at ¶31, n.4. The appellate court improperly relied upon this dicta from *Leininger*.

The appellate court's interpretation of *Leininger's* dicta conflicts with several previous cases from this Court. Absent direction from this Court to the contrary, the appellate court should have applied *Bellian*, *Smith*, and *Cosgrove* to Meyer's age discrimination claim under R.C. 4112.99. In *Bellian*, the Court expressly held that the procedural requirements of the more specific age discrimination sections in Chapter 4112 apply to the general section of R.C. 4112.99. *Id.* at 519. In *Smith*, the Court applied the election of remedies doctrine to claims under R.C. 4112.99 and stated that "in clear language, the General Assembly expressed its intent that an election must be made." *Id.* at 506. Similarly, the dicta in *Leininger* (according to *Meyer*'s interpretation) contradicts the concurring opinion in *Cosgrove*, which garnered the support of five Justices and explained why the specific requirements for age claims apply to claims under R.C. 4112.99. See *Cosgrove* at 290-91.

If the Court denies jurisdiction over this appeal, the Court will have effectively allowed the First District Court of Appeals to reject three of this Court's prior opinions. According to the First District's interpretation, *Leininger* intended to overrule in dicta the Court's express holding in *Bellian*, and to reject the dicta in *Smith* and the rationale of *Cosgrove*. Nowhere in *Leininger* did this Court mention these decisions, let alone overrule them. Thus, the First District should not have acted as though those decisions are overruled. The Court should accept jurisdiction to clarify its decision in *Leininger*. Otherwise, Ohio courts may follow the holding of the First District Court of Appeals and its reliance upon *Leininger*, further compounding the confusion surrounding age discrimination claims in Ohio.

Moreover, the Court of Appeals in *Meyer* ignored language in *Leininger* that undermines its logic. The First District Court of Appeals quoted *Leininger* for the proposition that R.C. 4112.99 provides a remedy for discrimination in general that is independent of the age-specific requirements in Chapter 4112. *Meyer* at ¶24. In *Leininger*, however, this Court noted that because the plaintiff's age claim was filed outside of the 180-day statute of limitations in 4112.02(N), Leininger's only avenue of relief was R.C. 4112.14; the Court did not list R.C. 4112.99 among her options. *Leininger* at ¶ 31, n.4. This statement in *Leininger* nullifies the *Meyer* court's logic that R.C. 4112.99 is independent of the statute of limitations in R.C. 4112.02. This Court recognized that claims under R.C. 4112.99 are subject to the 180-day statute of limitations in 4112.02(N). Accordingly, the Court should grant jurisdiction to correct the error by the First District and clarify that age-discrimination claims under R.C. 4112.99 are subject to the age-specific provisions in Chapter 4112.

CONCLUSION

The First District Court of Appeals has contradicted binding precedent from this Court and has undermined the General Assembly's decision to create a detailed framework for age discrimination claims in Ohio. This Court's guidance is necessary to settle the conflict created by the Court of Appeals and to restore the framework and procedural requirements that the General Assembly enacted for age discrimination claims. Appellant respectfully requests that this Court grant jurisdiction and decide this case on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the Memorandum in Support of Jurisdiction of Appellant United Parcel Service, Inc. was served upon Marc D. Mezibov and Stacy A. Hinners at Law Office of Marc Mezibov, 401 E. Court Street, Suite 600, Cincinnati, OH, 45202, by first-class mail on this 11th day of February, 2008.

Kasey Bond (CK, per authority 0077417)

Kasey Bond
Counsel of Record for Appellant

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

ROBERT MEYER,	:	APPEAL NO. C-060772 TRIAL NO. A-0403705
Plaintiff-Appellee,	:	*OPINION.*
vs.	:	
UNITED PARCEL SERVICE, INC.,	:	
Defendant-Appellant.	:	

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DEC 28 2007

COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: December 28, 2007

Law Office of Marc Mezibov, Marc D. Mezibov, and *Stacy A. Hinners,* for Plaintiff-Appellee,

Frost, Brown, Todd, LLC., Kasey Bond, Eugene J. Droeder, III, and *Tony C. Coleman, pro hac vice,* for Defendant-Appellant.

Note: We have removed this case from the accelerated calendar.

CUNNINGHAM, Judge.

{¶1} Defendant-appellant United Parcel Service, Inc. ("UPS") appeals the judgment of the trial court entered on a jury's verdict in favor of plaintiff-appellee Robert Meyer on his claims for age discrimination under R.C. 4112.99 and for retaliatory discharge under R.C. 4123.90 for filing workers' compensation claims. Meyer brought these claims after UPS had discharged him after 24 years of employment as a delivery driver. Meyer was then 45 years old. In his final year of employment, Meyer had sustained several serious job-related injuries for which he had filed claims for workers' compensation benefits. UPS asserted that Meyer was properly discharged for dishonesty and other serious offenses.

{¶2} In its nine assignments of error, UPS argues that (1) Meyer's age-discrimination claim was barred by the statute of limitations and because it had been previously arbitrated; (2) the trial court improperly permitted a jury trial on Meyer's retaliatory-discharge claim; (3) the court erred in denying its motions for summary judgment and for a directed verdict on these claims; (4) the court erred in instructing the jury and in admitting various testimony at trial; and (5) the court erred in awarding prejudgment interest to Meyer. Because Meyer was not entitled to a jury trial on his retaliatory-discharge claim, and because this error tainted the jury's verdicts, we reverse that portion of the trial court's judgment entered on those verdicts.

Facts

{¶3} Meyer began his employment at UPS in 1978. In 1984 he became a full-time package delivery driver. While Meyer had had previous disciplinary issues at UPS,

until January 2003 he had never been discharged and had never received serious punishments while on the job.

{¶4} In 2002, James Murray became business manager of the Colerain facility where Meyer worked. UPS was self-insured for purposes of paying workers' compensation benefits to its employees. UPS set aside its own funds to pay the medical costs and lost wages of its employees injured on the job. Meyer's division manager received reports detailing the costs of employee workers' compensation claims. The manager discussed those costs with individuals in UPS's finance department, which provided a workers'-compensation budget for each division. Thus a division's profitability was adversely affected when claims exceeded the budgeted amount.

{¶5} In August 2002, Meyer sustained a workplace-related injury that required him to miss work. When he returned to work, Meyer met with Murray. During that meeting, Meyer alleged, Murray told him, "If [Meyer] wanted to make [his] last five years at UPS, that [he had] better not get hurt." UPS acknowledged only that it had simply admonished Meyer to be careful and to follow its methods and procedures at all times.

{¶6} In November 2002, Meyer suffered another workplace-related injury, an inguinal hernia. The injury required two surgeries to repair. Meyer filed a claim for workers' compensation benefits and missed nearly two months of work.

{¶7} In late January 2003, Meyer returned to work. Three weeks later, UPS discharged Meyer without warning. While UPS's various agreements with Meyer's collective-bargaining unit generally provided for progressive discipline, UPS could discharge an employee, without warning, for dishonesty and "other serious offenses."

Other drivers had alleged that Meyer had intentionally inflated the miles he had driven on his route. Meyer filed a grievance, and after a hearing, UPS's discipline was reduced to a suspension.

{¶8} When Meyer returned to work, he met with Murray. Murray reviewed a document that listed Meyer's workplace-injury history and again emphasized that his continued employment was related to not sustaining any further workplace injuries.

{¶9} In September 2003, UPS again discharged Meyer without warning based upon a customer's complaint that Meyer had driven too fast in the customer's parking lot, had thrown boxes off the back of the truck, and had made inappropriate sexually explicit statements. After recourse to the grievance procedure, Meyer was again reinstated after serving a suspension.

{¶10} Two months later, Meyer returned to work. He was assigned to a different route that included frequent deliveries of heavy packages. Meyer's immediate supervisor rode with him on the first day and provided training on UPS's new wireless computer system used to record pickups and deliveries of packages—DIAD. Even with the supervisor's assistance, Meyer completed the route over one and one-half hours late.

{¶11} The following day, Murray warned Meyer that he was too slow and that he should be concerned for his job. Meyer's request for additional DIAD training was denied. Meyer had difficulty completing the route and difficulty employing DIAD. He also sustained a serious groin injury during the day. Meyer filed for workers' compensation benefits and missed four weeks of work. UPS's security investigators uncovered serious discrepancies in the DIAD record, including one record showing that Meyer had made eight customer stops in a three-minute period.

{¶12} On December 3, 2003, the day that Meyer returned to work, UPS discharged him for dishonesty based on what UPS perceived as fraudulent entries on the DIAD system. Meyer again filed a grievance. But this time the discharge was upheld.

{¶13} Meyer brought this action for workers' compensation retaliation and age discrimination. Meyer contended that his termination was motivated by retaliation for his filing claims for workers' compensation benefits and by his age. Meyer sought reinstatement to his previous position or, in the alternative, an award of front pay as well as back pay, other compensatory damages, punitive damages, and his reasonable attorney fees and costs.

{¶14} The case proceeded to a jury trial, and after six days of testimony and deliberations, the jury answered special interrogatories and found in favor of Meyer on both claims. The jury awarded damages of $113,352 to Meyer for back pay under the retaliatory-discharge claim, and damages of $113,352 for back pay, $175,000 for "other damages," and $25,000 in punitive damages on his age-discrimination claim. The trial court entered judgment on the verdicts, awarding only one recovery for back pay, but otherwise adding $47,616.03 in prejudgment interest and $135,194.45 in attorney fees and costs. The trial court also ordered Meyer reinstated to his position at UPS and imposed postjudgment interest.

{¶15} This appeal ensued. In September 2006, UPS executed a supersedeas bond in the amount of $744,590, and this court granted a stay of execution of the judgment.

Pretrial Challenges to Meyer's Age-Discrimination Claim

{¶16} In its first assignment of error, UPS argues that the trial court erred by refusing to grant judgment to UPS as a matter of law on Meyer's claim for age discrimination because (1) Meyer had filed his claim outside the statute-of-limitations period contained in R.C. 4112.02(N), and (2) Meyer had arbitrated his claim, and his discharge had been upheld, thus precluding his claim under R.C. 4112.14(C).

{¶17} UPS first argues that since Meyer had brought his R.C. 4112.99 age-discrimination claim over 18 months after he had been terminated, his claim was barred by the statute of limitations in R.C. 4112.02(N). In his amended complaint, Meyer alleged age discrimination by UPS under R.C. 4112.99. UPS argues that since R.C. 4112.99 contains "no substantive provisions," any claim brought under that statute "must be premised upon [the provisions of] either" R.C. 4112.02(N) or R.C. 4112.14.[1] Thus, the appropriate limitations period for bringing an R.C. 4112.99 age-discrimination claim must also be premised upon the period provided by R.C. 4112.02(N) or 4112.14.

{¶18} UPS contends that Meyer's claim was premised upon R.C. 4112.02 because he sought remedies similar to those permitted under that statute. That is, an age-discrimination claim like Meyer's that was brought under R.C. 4112.99 must have been premised upon the rights and remedies created by R.C. 4112.02(N), which also provides a 180-day limitations period for bringing claims. UPS also notes that the more specific limitations provisions of R.C. 4112.02 should have prevailed over the general provisions of R.C. 4112.99.[2]

{¶19} UPS's argument that Meyer's age-discrimination claim was barred by the statute of limitations was first raised as an affirmative defense in its answer to the

[1] Appellant's Brief at 10.
[2] Id. at 11, fn. 67.

amended complaint.[3] While ordinarily a statute-of-limitations issue would be resolved by a Civ.R. 12 motion or by a motion for summary judgment, UPS advanced this argument principally in its motion for a directed verdict. A directed verdict is properly granted when "the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party * * *."[4] Thus, a motion for a directed verdict assesses the sufficiency of the evidence, not the weight of the evidence or the credibility of the witnesses.[5] An appellate court reviews a trial court's ruling on a motion for a directed verdict de novo, as it presents a question of law.[6]

{¶20} UPS filed its directed-verdict motion on August 3, 2006, after the jury trial had already begun. But because the resolution of this portion of the assignment of error raises primarily a legal question not dependent on any evidence adduced at trial, we answer the assignment of error as presented.

{¶21} An action for age discrimination in employment can be maintained under four different statutes within R.C. Chapter 4112.[7] Only three are at issue in this case.[8] First, R.C. 4112.02(N) prohibits discrimination in employment on the basis of age and provides for "any legal or equitable relief that will effectuate the individual's rights." An

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[3] See Civ.R. 8(C).
[4] Civ.R. 50(A)(4).
[5] See *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68, 430 N.E.2d 935, citing *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 91, 262 N.E.2d 685.
[6] *Ruta v. Breckenridge-Remy Co.*, paragraph one of the syllabus.
[7] See *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36, at ¶29.
[8] See R.C. 4112.05(G) (the Ohio Civil Rights Commission may issue orders requiring an employer to cease and desist from unlawful discriminatory practices).

age-discrimination claim under this statute must be brought within 180 days of the alleged unlawful discriminatory practice.[9]

{¶22} Second, R.C. 4112.14(B), formerly codified in R.C. 4101.17,[10] provides a remedy for age-based discrimination in the hiring and termination of employees "which shall include reimbursement to the applicant or employee for the costs, including reasonable attorney's fees, of the action, or to reinstate the employee in the employee's former position with compensation for lost wages and any lost fringe benefits from the date of the illegal discharge and to reimburse the employee for the costs, including reasonable attorney's fees, of the action." Although R.C. 4112.14 does not include a limitations period, the Ohio Supreme Court has held that the six-year limitations period of R.C. 2305.07 applies to claims under R.C. 4101.17.[11]

{¶23} Third, R.C. 4112.99 provides an independent civil action to seek redress for any form of discrimination identified in R.C. Chapter 4112.[12] The statute "makes violators of R.C. Chapter 4112 'subject to a civil action for damages, injunctive relief, or any other appropriate relief.' "[13] Like R.C. 4112.14, the text of R.C. 4122.99 does not provide a limitations period for bringing claims. But in *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.*, the Ohio Supreme Court held that R.C. 4112.99 is a remedial statute and is subject to R.C. 2305.07's six-year statute of limitations.[14]

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[9] See R.C. 4112.02(N).
[10] See *Leininger v. Pioneer Natl. Latex* at ¶14.
[11] See *Morris v. Kaiser Engineers, Inc.* (1984), 14 Ohio St.3d 45, 471 N.E.2d 471, paragraph two of the syllabus; see, also, *Jackson v. Internatl. Fiber*, 169 Ohio App.3d 395, 2006-Ohio-5799, 863 N.E.2d 189.
[12] See *Elek v. Huntington Natl. Bank* (1991), 60 Ohio St.3d 135, 136, 573 N.E.2d 1056; see, also, *Leininger v. Pioneer Natl. Latex* at ¶31.
[13] *Leininger v. Pioneer Natl. Latex* at ¶29 (quoting R.C. 4112.99).
[14] 70 Ohio St.3d 281, 1994-Ohio-295, 638 N.E.2d 991, syllabus; see, also, *Jackson v. Internatl. Fiber*, 169 Ohio App.3d 395, 2006-Ohio-5799, 863 N.E.2d 189, at ¶20; *Ferraro v. B.F. Goodrich Co.*, 149 Ohio App.3d 301, 2002-Ohio-4398, 777 N.E.2d 282, at ¶32; *Jones v. Bd. of Elections*, 8th Dist. No. 83470, 2004-Ohio-4750, at ¶9.

{¶24} Recently, in *Leininger v. Pioneer National Latex*, the Ohio Supreme Court held that Ohio does not recognize a common-law tort claim for wrongful discharge based on the public policy against age discrimination, "because the remedies in R.C. Chapter 4112 provide complete relief for a statutory claim for age discrimination."[15] In reaching its holding, the court reiterated its prior holding that had rejected the argument that the specific-remedies provisions of subsections within the chapter prevail over the more general provisions of R.C. 4112.99.[16] The court noted that "R.C. 4112.08 requires a liberal construction of R.C. Chapter 4112. Although R.C. 4112.02(N), 4112.08, and 4112.14(B) all require a plaintiff to elect under which statute (R.C. 4112.02, 4112.05, or 4112.14) a claim for age discrimination will be pursued, when an age discrimination claim accrues, a plaintiff may choose from the full spectrum of remedies available. Leininger's argument also does not take into account the scope of R.C. 4112.99's remedies. In *Elek v. Huntington Natl. Bank* (1991), 60 Ohio St.3d 135, 573 N.E.2d 1056, we stated that R.C. 4112.99 provides an independent civil action to seek redress for any form of discrimination identified in the chapter. Id. at 136. A violation of R.C. 4112.14 (formerly R.C. 4101.17), therefore, can also support a claim for damages, injunctive relief, or any other appropriate relief under R.C. 4112.99. This fourth avenue of relief is not subject to the election of remedies."[17]

{¶25} Because the undisputed evidence produced before trial indicated that Meyer had brought his R.C. 4112.99 age-discrimination claim within the six-year limitations period, reasonable minds could only conclude that Meyer was not barred from pursuing his age-discrimination claim.

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[15] *Leininger v. Pioneer Natl. Latex*, syllabus.
[16] See id. ¶31.
[17] Id. (internal footnotes omitted).

{¶26} UPS next argues that the trial court erred in permitting Meyer to advance his age-discrimination claim despite having had his discharge previously upheld in arbitration. UPS relies on this court's decision in *Hopkins v. United Parcel Service,* where we interpreted R.C. 4112.14(C) and held that any claim for wrongful discharge under R.C. Chapter 4112 is barred if the plaintiff has argued the issue before a labor-grievance panel and the discharge has been upheld for just cause.[18]

{¶27} UPS raised this issue both in its motion for summary judgment and in its directed-verdict motion. Because summary judgment presents only questions of law, an appellate court reviews the entry of summary judgment de novo, without deference to the trial court's determinations.[19] Summary judgment is proper pursuant to Civ.R. 56(C) when (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence viewed most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.[20]

{¶28} It is undisputed that Meyer contested his discharge in the grievance procedure established for employees at UPS. This grievance procedure was the functional equivalent of arbitration.[21] But UPS's reliance on the holding of *Hopkins* is misplaced. In that case, we interpreted a version of R.C. 4112.14(C) that provided, "[T]he cause of action described in division (B) of this section *and other remedies available under this chapter* shall not be available in the case of discharges where the employee has available to the

[18] (Feb. 11, 2000), 1st Dist. No. C-990392, discretionary appeal denied (2000), 89 Ohio St.3d 1426, 729 N.E.2d 1196.
[19] See *Polen v. Baker*, 92 Ohio St.3d 563, 564-565, 2001-Ohio-1286, 752 N.E.2d 258.
[20] See, also, *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.
[21] See *Hopkins v. United Parcel Service, Inc.*, fn. 7, citing *United Parcel Service, Inc. v. Mitchell* (1981), 451 U.S. 56, 101 S.Ct. 1559; *Vanderveer v. United Parcel Service, Inc.* (C.A.6, 1994), 25 F.3d 403.

employee the opportunity to arbitrate the discharge or where a discharge has been arbitrated and has found to be for just cause."[22] We noted that "[t]he plain language of the statute indicates the General Assembly's intent to bar civil actions for age discrimination as well as 'other remedies available under this chapter' when the employee has the ability to arbitrate his claims."[23]

{¶29} At all times pertinent to this case, however, R.C. 4112(C) provided that "[t]he cause of action described in division (B) of this section *and any remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code* shall not be available in the case of discharges where the employee has available to the employee the opportunity to arbitrate the discharge or where a discharge has been arbitrated and has found to be for just cause." The plain language of R.C. 4112.14(C) does not now bar previously arbitrated cases from proceeding to trial under R.C. 4112.99.

{¶30} Thus *Hopkins* is not applicable, and Meyer's R.C. 4112.99 claim of age discrimination was outside the ambit of R.C. 4112.14(C). Since UPS was not entitled to judgment as a matter of law on this issue, the trial court did not err in denying summary judgment on this basis. The trial court also correctly denied UPS's directed-verdict motion and permitted Meyer's age-discrimination claim to be submitted to the jury.[24]

{¶31} The first assignment of error is overruled.

No Right to Jury Trial on Meyer's Retaliation Claim

{¶32} In its second assignment of error, UPS argues that the trial court erred (1) by denying its motion to strike Meyer's jury demand on his workers' compensation

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[22] *Hopkins v. United Parcel Service, Inc.* (emphasis added).
[23] Id.
[24] See Civ.R. 50(A).

retaliation claim and (2) by allowing the jury to award compensatory and punitive damages.

{¶33} We find merit in UPS's first contention. When Meyer first brought suit against UPS, he asserted two claims for relief. He alleged that he had been wrongfully terminated by UPS for filing workers' compensation claims, in violation of his rights under R.C. 4123.90, and in violation of the public policy of Ohio identified in R.C. 4123.90.

{¶34} In July 2004, UPS moved to dismiss both claims. Meyer contested the motion with respect to the statutory claim, but admitted that UPS was "on firmer ground" in moving to dismiss the public-policy claim, because Meyer had been part of an employee bargaining unit. On September 10, 2004, the trial court dismissed Meyer's public-policy claim.

{¶35} In October 2004, UPS moved to strike Meyer's jury demand for his statutory retaliation claim and his requests for compensatory and punitive damages and for attorney fees. Because "R.C. 4123.90 does not provide Plaintiff with a jury trial * * *," UPS requested that "the case be assigned to a bench trial." Meyer's bare-bones response to this portion of the motion noted only that "the matter has not been dispositively ruled on by the [Ohio] Supreme Court." In December 2004, the trial court denied UPS's motion without explanation.

{¶36} Six months later, Meyer sought and obtained leave to amend his complaint to add a claim of age discrimination under R.C. 4112.99. Both the age-discrimination claim and Meyer's remaining statutory claim for workers' compensation retaliation were tried to a jury. The jury answered special interrogatories and found in favor of Meyer on both claims. The trial court entered judgment on the verdicts and awarded prejudgment interest, attorney fees, and costs.

{¶37} R.C. 4123.90 prohibits retaliation by an employer for an employee's pursuit of a workers' compensation claim. The statute states that "[n]o employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer." It further provides that "[a]ny such employee may file an action in the common pleas court of the county of such employment in which the relief which may be granted shall be limited to reinstatement with back pay, if the action is based upon discharge, * * * plus reasonable attorney fees."

{¶38} An aggrieved employee may also pursue a retaliatory-discharge claim based on a violation of the public policy identified in R.C. 4123.90.[25] But a "statutory claim under R.C. 4123.90 and [a] wrongful discharge claim based on the public policy set forth in R.C. 4123.90 are distinct claims which must be addressed separately."[26] One of the primary differences between the two claims is that a statutory retaliation claim under R.C. 4123.90 affords equitable relief without the right to a jury trial.[27] In 1986, we held in *Gallaher v. Western Southern Life Ins. Co.* that "the remedies envisioned by R.C. 4123.90 are essentially equitable in nature, generally reinstatement, and therefore no right to a jury exists under the statute."[28] A retaliatory-discharge claim based on a violation of public policy, however, is a common-law claim that provides the right to a trial by jury, and that

[25] See *Boyd v. Winton Hills Med. & Health Ctr., Inc.* (1999), 133 Ohio App.3d 150, 162, 727 N.E.2d 137 (1st Dist.); but, see, *Coon v. Technical Construction Specialties, Inc.*, 9th Dist. No. 22317, 2005-Ohio-4080 (refusing to permit a separate public-policy claim under R.C. 4123.90); see, generally, *Bickers v. Western Southern Life Ins. Co.*, 1st Dist. No. C-040342, 2006-Ohio-572, at ¶14 (detailing the split among Ohio's appellate districts).
[26] *Schramm v. Appleton Papers, Inc.*, 162 Ohio App.3d 270, 2005-Ohio-3663, 833 N.E.2d 336.
[27] See *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 158 Ohio App.3d 356, 2004-Ohio-4653, 815 N.E.2d 736, at ¶11; see, also, *Boyd v. Winton Hills Med. & Health Ctr., Inc.*, 133 Ohio App.3d at 162, 727 N.E.2d 137; *Coon v. Technical Construction Specialties, Inc.*, 2005-Ohio-4080, at ¶29.
[28] (Dec. 10, 1986), 1st Dist. No. C-860062.

"allows a full range of remedies, including full monetary recovery, that are not available under the limited remedy provided in a statutory claim brought under R.C. 4123.90."[29]

{¶39} But Meyer's claim for relief under R.C. 4123.90 was purely a statutory one; his public-policy claim was dismissed in September 2004. Meyer was not entitled to a jury trial on his R.C. 4123.90 claim for retaliatory discharge for filing a workers' compensation claim.

{¶40} Meyer's contention that UPS waived this error because it had not requested that the trial court enter findings of fact and conclusions of law on the R.C. 4123.90 claim in lieu of entering judgment on the jury's verdict is disingenuous. The record demonstrates that UPS moved to strike the jury demand under Civ.R. 39. Its timely motion raised specific grounds for relief with citation to competent legal authority, including this court's decision in *Gallaher v. Western Southern Life Ins. Co.* The issue was properly preserved for appellate review. Since UPS did not consent to have the claim tried by a jury or by an advisory jury,[30] the trial court erred in denying UPS's motion to strike Meyer's jury demand and improperly held a jury trial on Meyer's R.C. 4123.90 claim.

{¶41} UPS now argues the trial court's error in permitting a jury trial on the R.C. 4123.90 claim requires that the judgment against UPS be reversed and a new trial ordered.

{¶42} Determining the precise effect of the error on the trial court's judgment and the jury's other verdict is problematic. While the trial court denied UPS's motion for a directed verdict on Meyer's R.C. 4123.90 claim, the denial of the directed verdict demonstrates merely that the trial court had found sufficient evidence to submit the claim

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[29] *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 2004-Ohio-4653, at ¶12; see, also, *Boyd v. Winton Hills Med. & Health Ctr., Inc.*, 133 Ohio App.3d at 162, 727 N.E.2d 137.
[30] See Civ.R. 39(C).

to the jury. The denial did not affirmatively demonstrate that the trial court would necessarily have reached the same result as the jury had the issue been tried to the bench. Therefore, the jury's verdict on the R.C. 4123.90 claim must be overturned.

{¶43} More troublesome is the impact that presentation of the workers' compensation retaliation claim had on the jury's verdict for the age-discrimination claim under R.C. 4112.99. During the trial, the jury heard substantial evidence to support the R.C. 4123.90 claim that UPS had retaliated against Meyer for filing workers' compensation claims. And it was instructed to reach a conclusion concerning whether UPS had violated Meyer's rights under that statute, thus permitting Meyer to recover damages against UPS.

{¶44} Frequently, in cases where a statutory claim has been joined with a public-policy retaliation claim, the jury is entitled to hear evidence common to both retaliation claims.[31] But here, where only a statutory claim remained to be tried with the age-discrimination claim, the amount of evidence of workers' compensation retaliation admitted and the proper purposes for its admission would have been more narrowly circumscribed. For example, the jury might have been permitted to hear evidence of retaliation against Meyer offered to demonstrate that UPS's proffered reason for terminating Meyer—his dishonesty—was a pretext, and that he was actually terminated because of his age.[32]

{¶45} But in the case as presented to the jury, the evidence adduced at trial on the retaliatory-discharge claim and the age-discrimination claim presented a seamless web of facts. While Meyer moved for a bifurcation of the trial into liability and damages phases, he never sought to bifurcate the trial for his two claims of wrongful discharge.

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[31] See, e.g., *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 2004-Ohio-4653, at ¶14.
[32] See *Pelletier v. Rumpke Container Serv.* (2001), 142 Ohio App.3d 54, 61, 753 N.E.2d 958.

{¶46} Meyer summarized his case in closing argument. He argued to the jury that UPS "wanted to fire [Meyer]. And they wanted to fire him because he was costing the company too much money. He was old. He was breaking down and as far as they were concerned, he was a liability." Meyer's remarks to the jury at the beginning of his closing argument, while not evidence themselves, were illustrative of the evidence presented at trial and reflected Meyer's theory of the case—that Meyer's filing workers' compensation claims and his age were inextricably linked, and that both claims stemmed from unlawful acts by UPS. In its charge to the jury, and in the special interrogatories, the trial court identified retaliatory discharge as an unlawful practice. And a question from the jury during its deliberations seeking clarification of whether the special interrogatories titled "Age Discrimination" "[we]re * * * all related only to age discrimination" further reflected the intermixing of the two claims. The impact on the jury of the evidence of workers' compensation retaliation, along with the arguments and the instructions given on that evidence, was so prejudicial that the jury's verdicts on both claims must be overturned.

{¶47} We note that UPS's second argument, that Meyer had no right to recover compensatory and punitive damages, is not well taken. The Ohio Supreme Court has held that a plaintiff like Meyer who asserts a claim of age discrimination under R.C. 4112.99 has a right to a trial by jury.[33] R.C. 4112.99 provides that employers that discriminate against employees on the basis of age are "subject to a civil action for damages, injunctive relief, or any other appropriate relief."[34] Where a statute includes "broad language regarding the relief available" and does not limit the word "damages" with "a restrictive modifier like 'compensatory,' 'actual,' 'consequential' or 'punitive,' " the statute "embrac[es] the panoply

[33] See *Taylor v. Natl. Group of Companies, Inc.*, 65 Ohio St.3d 482, 1992-Ohio-68, 605 N.E.2d 45.
[34] *Leininger v. Pioneer Natl. Latex* at ¶29 (quoting R.C. 4112.99).

of legally recognized pecuniary relief."[35] Therefore, R.C. 4112.99 permits the recovery of compensatory and punitive damages by an injured plaintiff if the evidence adduced at trial supports the damage awards.

{¶48} Therefore, that portion of the second assignment of error asserting that the trial court erred in permitting a jury trial on Meyer's claim for workers' compensation retaliation under R.C. 4123.90 is sustained, and the jury verdicts on both the workers' compensation retaliation claim and the age-discrimination claim are set aside. In all other aspects, the assignment of error is without merit.

Summary Judgment Properly Denied on Meyer's Retaliatory-Discharge Claim

{¶49} In its fifth assignment, UPS contends that the trial court erred in refusing to grant UPS's motion for summary judgment and motion for a directed verdict on Meyer's retaliatory-discharge claim because no reasonable juror could have concluded that Meyer had made a prima facie case of retaliation for filing workers' compensation claims, or that Meyer had demonstrated that UPS's reason for Meyer's termination was a pretext for retaliation.

{¶50} Our resolution of UPS's second assignment of error renders moot that portion of the assignment of error that asks this court to assess the sufficiency of the evidence adduced at trial and to overturn the denial of UPS's motion for a directed verdict.[36] But UPS's assertion that the trial court improperly denied its motion for summary judgment survives.

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[35] Id. at ¶30, quoting *Rice v. Certainteed Corp.* (1999), 84 Ohio St.3d 417, 419, 1999-Ohio-361, 704 N.E.2d 1217 (internal quotations omitted).
[36] See App.R. 12(A)(1)(c); see, also, Civ.R. 50(A)(4).

{¶51} In prosecuting its assignment of error, UPS has an obligation under the appellate rules to support its argument with citations to the record.[37] But on appeal, UPS and Meyer have both supported their summary-judgment arguments, in virtually every instance, with references to the transcript of the subsequent trial proceedings.

{¶52} In supporting a motion for summary judgment, a party must conform to the restriction contained in Civ.R. 56(C) that "[n]o evidence or stipulation may be considered except as stated in this rule."[38] In ruling on an assignment of error dealing with the granting or the denial of a motion for summary judgment, this court must review the same evidentiary material provided to the trial court.[39] Subsequent testimony from the trial is not to be considered in reviewing the trial court's ruling on a summary-judgment motion. We are cognizant that the same issues were tried to the jury, albeit improperly. Our resolution of the second assignment of error, however, precludes us from considering the testimony adduced at trial and precludes the application of the mootness doctrine enunciated in *Continental Ins. Co. v. Whittington*.[40]

{¶53} Considering only the material properly before the trial court at the time that it ruled on UPS's summary-judgment motion, we now resolve the assignment of error. Recently, in *Young v. Stelter & Brinck, Ltd.*, we described the burden-shifting approach used to analyze retaliatory-discharge claims.[41] In this case, the initial burden of proof lay with Meyer to establish a prima facie case of retaliation. In a retaliatory-

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[37] See App.R. 16(A)(7); see, also, *State v. Perez*, 1st Dist. Nos. C-040363, C-040364, and C-040365, 2005-Ohio-1326, at ¶23.
[38] See *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264 ("movant must be able to point to evidentiary materials of the type listed in Civ.R. 56[C] that a court is to consider in rendering summary judgment").
[39] See *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 360, 1992-Ohio-95, 604 N.E.2d 138; see, also, *McConaughy v. Boswell Oil Co.* (1998), 126 Ohio App.3d 820, 711 N.E.2d 719.
[40] See 71 Ohio St. 3d 150, 1994 Ohio 362, 642 N.E.2d 615, syllabus ("any error by a trial court in denying a motion for summary judgment is rendered moot or harmless, when a subsequent trial on the same issue reveals that there were genuine issues of material fact supporting a judgment in favor of the party opposing the motion).
[41] 1st Dist. No. C070259, 2007-Ohio-6510, at ¶22-23.

discharge case, this burden is not onerous. Meyer had to show that (1) he was injured on the job, (2) he filed a workers' compensation claim, and (3) there was a causal connection between his filing the workers' compensation claim and his termination.[42]

{¶54} If Meyer established a prima facie case, the burden would have then shifted to UPS to set forth a legitimate nonretaliatory reason for his discharge.[43] If UPS could have articulated a nonretaliatory reason for Meyer's discharge, the burden would then have shifted back to Meyer to prove that the reason proffered by UPS was a pretext and that he was fired because he had pursued workers' compensation claims.[44]

{¶55} It is undisputed that Meyer was injured on the job and that he had filed workers' compensation claims. But UPS asserts that it was entitled to summary judgment because no genuine issue of fact remained concerning whether there was a causal connection between the protected activity and Meyer's discharge.

{¶56} Construing the evidence most strongly in favor of Meyer, the nonmoving party, we are convinced that genuine issues of material fact remained to be determined concerning whether Meyer had been repeatedly threatened with termination for sustaining workplace injuries and filing workers' compensation claims. After more than 20 years of service without formal discipline, Meyer was terminated three times, all following his November 2002 filing of a workers' compensation claim. Meyer's deposition testimony recounted that immediately after returning to work from leave for compensable injuries, he was warned by Murray, the newly appointed business manager of UPS's

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[42] See id. at ¶20, citing *Cunningham v. Kroger Co.*, 1st Dist. No. C-050990, 2006-Ohio-5900, at ¶16, *Greer-Burger v. Temesi*, 8th Dist. No. 87104, 2006-Ohio-3690, at ¶15, and *Wilson v. Riverside Hospital* (1985), 18 Ohio St.3d 8, 479 N.E.2d 275, paragraph one of syllabus.
[43] See id. at ¶21; citing *Kilbarger v. Anchor Hocking Glass Co.* (1997), 120 Ohio App.3d 332, 338, 697 N.E.2d 1080.
[44] See id.; see, also, See *Boyd v. Winton Hills Med. & Health Ctr., Inc.*, 133 Ohio App.3d at 154, 727 N.E.2d 137.

Colerain facility, that if Meyer wanted to reach retirement, he should stop getting injured; that he was terminated within one month after returning from a compensable-injury leave in February 2003; and that in December 2003, UPS terminated his employment less than one month after he had filed a workers' compensation claim and on the same day that he returned to work.

{¶57} By demonstrating UPS's threats of termination[45] and a temporal proximity between his filing the workers' compensation claims and his discharges, Meyer created an inference of a causal connection between his workers' compensation claims and his termination. Meyer established a prima facie case of retaliatory discharge.[46] And genuine issues of material fact remained concerning whether UPS's proffered justification for Meyer's discharge was a pretext for retaliation. The trial court properly denied summary judgment.

{¶58} The fifth the assignment of error is overruled.

Summary Judgment Properly Denied on Meyer's Age-Discrimination Claim

{¶59} UPS also challenges, in its fourth assignment of error, the trial court's denial of its motion for summary judgment and its directed-verdict motion on Meyer's age-discrimination claim. As in our resolution of the fifth assignment of error, we do not address UPS's directed-verdict argument, we ignore the parties' citations to the transcript of the trial proceedings, and we consider only the evidentiary material properly before the trial court at the time that it ruled on UPS's summary-judgment motion.

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[45] See *Boyd v. Winton Hills Med. & Health Ctr., Inc.*, 133 Ohio App.3d at 155-156, 727 N.E.2d 137.
[46] See *Kent v. Chester Labs, Inc.* (2001), 144 Ohio App.3d 587, 592, 761 N.E.2d 60.

{¶60} R.C. Chapter 4112 prohibits an employer from discharging an employee without just cause, on the basis of the employee's age. The ultimate inquiry in an age-discrimination case is whether an employee was discharged on account of age.[47]

{¶61} Again, the employee's burden is not an onerous one. The "ultimate inquiry [in an age-discrimination case is] whether evidence of age discrimination is present."[48] The Ohio Supreme Court has underscored that the law does not require a "rigid, mechanized, or ritualistic" exercise to make out a prima facie case for discrimination.[49]

{¶62} Absent direct evidence of age discrimination, to establish a prima facie case of age discrimination in employment discharge, a plaintiff "must demonstrate that he or she (1) was a member of the statutorily protected class, (2) was discharged, (3) was qualified for the position, and (4) was replaced by, or the discharge permitted the retention of, a person of substantially younger age."[50]

{¶63} If a plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's discharge.[51] Should the employer carry this burden, the plaintiff must then demonstrate that the reason the employer has offered is not its true reason, but is merely a pretext for discrimination.[52]

{¶64} UPS concedes that Meyer established the first two elements of his discrimination claim and challenges only the latter two elements: whether Meyer was

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[47] See *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, 505, 575 N.E.2d 439.
[48] Id. at 504, 575 N.E.2d 439.
[49] Id.
[50] *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, 803 N.E.2d 781, paragraph one of the syllabus; see, also, *Abrams v. Am. Computer Technology*, 168 Ohio App.3d 362, 2006-Ohio-4032, 860 N.E.2d 123, at ¶19.
[51] See *Kohmescher v. Kroger Co.*, 61 Ohio St.3d at 505, 575 N.E.2d 439; see, also, *Bullock v. Totes, Inc.* (Dec. 22, 2000), 1st Dist. No. C-000269.
[52] See id.

qualified for his position, and whether he was replaced by, or his discharge permitted the retention of, a substantially younger person.

{¶65} Construing the evidence most strongly in favor of Meyer, we hold that genuine issues of material fact remained to preclude the entry of summary judgment. Meyer had over 24 years of experience performing his assigned tasks for UPS without serious disciplinary problems. After Meyer had returned from a two-month injury leave, UPS disciplined Meyer on his second day at work. Genuine issues remained concerning whether Meyer was provided with sufficient training on his new route and whether he had been given training on a new computer tracking system. Meyer had been replaced by a 23- or 24-year-old employee. In light of comments made by Meyer's managers to others regarding Meyer's veteran status at UPS and the advantages of terminating older employees, Meyer established a prima facie case of age discrimination, and genuine issues of material fact remained concerning whether UPS's proffered justification for Meyer's discharge was a pretext.

{¶66} The trial court properly denied summary judgment. The fourth assignment of error is overruled.

Trial and Post-Trial Assignments of Error

{¶67} Our resolution of the second assignment of error renders moot UPS's third, sixth, seventh, and eighth assignments of error, in which it challenges the jury instructions and various evidentiary rulings that were made during trial, and we, therefore, do not address them.[53]

[53] See App.R. 12(A)(1)(c).

{¶68} UPS's ninth assignment of error, that the trial court erred in awarding prejudgment interest, is sustained but only on the basis that without a valid judgment in his favor on the merits "for the payment of money rendered in a civil action," Meyer was not entitled to prejudgment interest.[54]

Conclusion

{¶69} Having overruled UPS's first, fourth, and fifth assignments of error, we do not disturb the trial court's entries ruling that Meyer's age-discrimination claim was not barred by the statute of limitations or by a prior arbitration, and that UPS was not entitled to summary judgment on that claim or on the retaliation claim. Having sustained UPS's second assignment in part, we reverse the trial court's judgment entered on the jury verdicts for Meyer and its award of prejudgment interest, and we remand this case for further proceedings consistent with law and this opinion.

Judgment reversed and cause remanded.

SUNDERMANN, P.J., and **HENDON, J.**, concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.

[54] R.C. 1343.03(C).