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I. INTRODUCTION

Claims for age discrimination filed under the general damages provision in R.C. 4112.99 should be subject to the 180-day statute of limitations contained in the specific language in R.C. 4112.02(N) pertaining expressly to claims for age discrimination. The Ohio Management Lawyers Association therefore respectfully urges this Court to reverse the First District Court of Appeals' decision in *Meyer*, and reaffirm this Court's decision in *Bellian*.

II. STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts by reference the Statement of the Case and Facts set forth in the Appellants' Merit Brief.

III. ARGUMENT

Proposition of Law: Age discrimination claims brought under the general language of R.C. 4112.99 are controlled by the substantive provisions of statutes specific to age discrimination, including the 180-day statute of limitations provided in R.C. 4112.02(N).

The First District Court of Appeals' decision in *Meyer v. United Parcel Svc.*, 1st Dist. No. C06-0772, 2007-Ohio-7063, highlights the confusion among lower courts on how to address age discrimination claims filed under R.C. 4112.99. *Meyer* failed to apply the substantive provisions of R.C. Chapter 4112 relating specifically to age discrimination to age claims filed under R.C. 4112.99. By inferring a six-year statute of limitations for age discrimination claims filed under the general damages provision R.C. 4112.99, the *Meyer* decision controverts the legislature's express intent to treat age claims differently than claims for other types of discrimination. Rather than applying the substantial body of case law established by this Court to deal with age discrimination, *Meyer* improvidently applied dicta from *Leininger* and rendered

meaningless the detailed statutory framework the Ohio General Assembly created for age discrimination claims. Indeed, *Meyer* (incorrectly) assumed that in *Leininger*, the Court overturned a number of its prior decisions and rejected wholesale the applicability of fundamental principles of statutory construction to age discrimination claims, without ever expressly saying so. Such an assumption is untenable and it cannot stand.

A. THE GENERAL ASSEMBLY EXPRESSED ITS INTENT TO TREAT AGE CLAIMS DIFFERENTLY THAN OTHER DISCRIMINATION CLAIMS BY SUBJECTING THEM TO A 180-DAY LIMITATIONS PERIOD; THEREFORE, THE JUDICIAL IMPOSITION OF A SIX-YEAR STATUTE OF LIMITATIONS ON AGE DISCRIMINATION CLAIMS FILED UNDER R.C. 4112.99 STANDS IN DIRECT OPPOSITION TO THE EXPRESS INTENT OF THE GENERAL ASSEMBLY.

The General Assembly's statutory framework, enacted expressly and exclusively to deal with age discrimination, has been rendered meaningless by the *Meyer* decision, which allows claimants to ignore the substantive provisions relating to age discrimination so long as they file under the general provision for damages in R.C. 4112.99. *Meyer* at ¶25. The General Assembly expressly addressed age discrimination in three separate sections of R.C. Chapter 4112, which provide that age claims are restricted by a 180-day statute of limitations. The appropriate role of the courts is to "defer to the legislative process of weighing conflicting policy considerations." *Provens v. Stark County Bd. of Mental Retardation & Developmental Disabilities*, 64 Ohio St.3d 252, 261, 1992-Ohio-35, 594 N.E.2d 959. The General Assembly made a policy decision to enact a different statute of limitations for age discrimination plaintiffs than other discrimination plaintiffs. *Schamer v. W. & S. Life Ins. Co.*, 1st Dist. No. C-040057, 2004-Ohio-4249, at ¶13. Accordingly, the substantive provisions relating to age discrimination claims should be given full effect. *Bellian v. Bicron Corp.* (1994), 69 Ohio St.3d 517, 519, 634 N.E.2d 608.

Unlike other forms of discrimination, which are dealt with only generally by Chapter 4112, the Revised Code contains four separate provisions under which a plaintiff may pursue remedies for age discrimination: R.C. 4112.02(N), R.C. 4112.05, R.C. 4112.14, and R.C. 4112.99. R.C. 4112.02(N) provides a private cause of action for age discrimination that is subject to a 180-day period of limitations. R.C. 4112.05 allows an individual to enforce the rights created by § 4112.02 administratively by filing a charge with the Ohio Civil Rights Commission. Administrative action is also expressly limited by a 6-month statute of limitations. R.C. 4112.14, formerly § 4101.17, allows an employee who has been subjected to unlawful age discrimination to institute a civil action. Finally, R.C. 4112.99 provides the right to bring a civil action to anyone whose rights under R.C. Chapter 4112 are violated. While the first three statutes address age discrimination exclusively, R.C. 4112.99 provides only generally that civil damages are available for any violation of R.C. Chapter 4112.

No other type of discrimination is subjected to an express 180-day statute of limitations. Claims alleging discrimination on the basis of, for instance, race or sex are subject to the judicially inferred six-year statute of limitations contained in R.C. 2305.07, which is generally applicable to claims filed under any remedial statute unless the statute specifies otherwise. *Cosgrove v. Williamsburg of Cincinnati Mgt. Co.* (1994), 70 Ohio St.3d 281, 285, 638 N.E.2d 991. The legislature precluded such judicial inference for age discrimination by specifically expressing a shorter period in which a case may be brought. The *Meyer* decision provides, however, that age discrimination claimants may avoid the statutory structure by the legislature simply by filing their action under R.C. 4112.99.

R.C. 4112.99 reads: “Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.” It provides no substantive rights or obligations in itself. This Court’s decision in *Elek v. Huntington National Bank* (1990), 60 Ohio St.3d 135, 138, 53 N.E. 2d 1056, established that R.C. 4112.99 provides an independent civil action to seek redress for discrimination on the basis of physical disability. This Court cautioned, however, that in the event of a conflict between R.C. 4112.99 and another statute in R.C. Chapter 4112, the more specific statute would control under R.C. 1.51. *Id.* at 137. In other words, if R.C. Chapter 4112 creates no independent cause of action outside of R.C. 4112.99, the substantive provisions and implied statute of limitations in R.C. 4112.99 control. On the other hand, in instances where R.C. Chapter 4112 provides at least one statute that deals specifically with the plaintiff’s claim, the substantive provisions in the specific section apply. Accordingly, the 180-day statute of limitations contained in R.C. 4112.02(N) applies to all age discrimination claims, including those filed under R.C. 4112.99.

Because R.C. 4112.99 creates liability only for violations of rights for which no other provision for civil liability exists, it functions as a gap-filling provision. *Cosgrove*, 70 Ohio St.3d at 292. In instances where a private cause of action is available to a plaintiff independently of R.C. 4112.99, as in the case of age discrimination, the plaintiff’s cause of action is controlled by the substantive provisions of the specific statute creating the plaintiff’s right to sue for age discrimination, not the general language in R.C. 4112.99. *Id.* at 290-91. The intent of the General Assembly was not to negate with one sweeping sentence the specific statutory provisions that already provided a private cause of action for age discrimination, but instead to provide plaintiffs who formerly had no recourse the right to a civil action. *Vinson v. Diamond*

Triumph Auto Glass, Inc., 149 Ohio App.3d 605, 2002-Ohio-5596, 778 N.E.2d 149, at ¶13; *Pozzobon v. Parts for Plastics, Inc.*, 770 F. Supp. 376, 379 (N.D. Ohio 1991).

It is a basic rule of statutory interpretation that “statutory language 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* (2002), 96 Ohio St.3d 250, 256, 2002-Ohio-4172, 773 N.E.2d 536. If *Meyer* is allowed to stand, no plaintiff would ever again sue for age discrimination under those sections of R.C. Chapter 4112 that were specifically enacted to address age discrimination. Instead they would file under R.C. 4112.99 so as to have available to them a six-year statute of limitations, rather than the legislatively enacted 180-day statute of limitations provided in R.C. 4112.02(N). The General Assembly’s efforts to limit age discrimination claims should not be eviscerated; the six-month statute of limitations provided for age discrimination claims should therefore be applied to all age discrimination claims, including those for damages under R.C. 4112.99.

B. THE LOWER COURT’S DECISION DIVERGES FROM FOURTEEN YEARS OF PRECEDENT ESTABLISHED BY THIS COURT REQUIRING THAT AGE DISCRIMINATION CLAIMS BE SUBJECT TO A 180-DAY STATUTE OF LIMITATIONS.

Over the last fourteen years this Court has carefully constructed an interpretation of R.C. Chapter 4112 as it applies to claims of age discrimination that gives effect to each section and resolves conflicts consistently and predictably. The *Meyer* decision disregards those many decisions, reasoning that because they appear to conflict with *dicta* in *Leininger*, they are impliedly overruled. *Meyer* at ¶24-25. It relies on *Cosgrove*, which decided a case of *sex discrimination*, for which no 180-day limitations period is expressed anywhere in R.C. Chapter 4112, and *Leininger*, which examined the statutory provisions relating to age discrimination for

one purpose only: to determine “whether a *common-law* tort claim for wrongful discharge based on Ohio’s public policy against age discrimination should be recognized.” *Leininger v. Pioneer Nat’l Latex* (2007), 115 Ohio St.3d 311, 875 N.E.2d 36, ¶31, fn. 4. Neither case addresses age discrimination claims and the 180-day statute of limitations, and nowhere has this Court indicated that the cases that do address these issues are no longer good law.

This Court’s interpretation of R.C. 4112.99 is extensive and well-reasoned. As discussed *supra*, *Elek* first established that R.C. 4112.99 provides an independent civil action for discrimination, but also established that in the event of a conflict between R.C. 4112.99 and another statute in R.C. Chapter 4112, the more specific statute controls. *Elek*, 60 Ohio St.3d at 137. Since *Elek*, this Court held that all claims for age discrimination under R.C. Chapter 4112 are subject to the 180-day statute of limitations provided in R.C. 4112.02(N). *Bellian v. Bicron Corp.*, 69 Ohio St.3d 517, at 519-520. It reasoned that because R.C. 4112.99 was only a general damages provision, and its six-year statute of limitations conflicted with the 180-day statute of limitations applicable to age discrimination under the specific provision R.C. 4112.02(N), the specific provision controlled, making age claims filed under R.C. 4112.99 subject to the shorter limitations period. *Id.* at 519-20.

Therefore, even when this Court later determined that R.C. 4112.99 is a remedial statute, and therefore has a six-year statute of limitations under R.C. 2305.07 in *Cosgrove v. Williamsburg of Cincinnati Mgt. Co.* (1994), 70 Ohio St.3d 281, 285, 638 N.E.2d 991, it explained in a concurrence (in which a majority of five justices joined) that the holding was not applicable to claims of age discrimination, which were still to be analyzed under *Bellian*. *Id.* at 290-91. The continued application of the 180-day statute of limitations was reaffirmed in *Oker*

v. Ameritech Corp., 89 Ohio St.3d 223, 2000-Ohio-139, 729 N.E.2d 1177, which recognized the shorter limitations period for age claims filed under R.C. 4112.99, before deciding the issue of when the statute of limitations period began to run. *Id.* at 224.

In *Meyer*, this entire line of careful reasoning was disregarded by the lower court. When faced with the issue of whether a statutory age discrimination claimant was barred from bringing suit under R.C. 4112.99 by the statute of limitations contained in R.C. 4112.02(N), it ignored all of the relevant precedent. The lower court instead turned for guidance to *Leininger*, a case that stands only for the proposition that there is no common law public policy claim for age discrimination under Ohio law. In particular, the lower court focused on ¶31 of *Leininger*, which consists primarily of a list of the remedies available to an age discrimination plaintiff at the time the plaintiff's cause of action accrues. It reads, in pertinent part: "Leininger maintains that we should consider only the remedies in R.C. 4112.14 because it is a more specific statute regarding age discrimination that prevails over the more general provisions of R.C. 4112.02 and 4112.99. We reject this argument." *Leininger*, 115 Ohio St.3d at ¶31.

The lower court read this language to indicate that the holdings of all cases in which the substantive provisions of specific statutes relating to age discrimination were found to control over the general provisions of R.C. 4112.99 were overruled. In so doing it misinterpreted entirely this Court's position. Rather than making a blanket statement regarding the applicability of the principle stated in R.C. 1.51 to claims of age discrimination, the *Leininger* decision simply rejected the plaintiff's erroneous employment of that principle to an inapposite scenario. This is clear from the footnote to ¶31, which specifically states,

Although R.C. 4112.14 was the only statutory claim available to Leininger at the time she filed her complaint due to the expiration of the statute of limitations for claims under R.C. 4112.02 and 4112.05, this fact does not justify limiting our examination of the available remedies under the chapter as a whole.

Id. at ¶31, fn. 4. Further, the holding in *Leininger* addresses whether a claim for wrongful discharge based on Ohio's public policy against age discrimination is allowed and relates in no way to whether age discrimination claims are subject to a 180-day statute of limitations. *Id.* at ¶31, fn. 4. It is therefore clearly distinguishable from the case *sub judice*, which addresses the statutorily created limitations period for age discrimination claims filed under R.C. Chapter 4112.

The lower court further erred when it cited *Cosgrove* for the blanket proposition that R.C. 4112.99 is a remedial statute and is therefore subject to the 6-year statute of limitations in R.C. 2305.07. *Meyer*, 2007-Ohio-7063 at ¶23. This sweeping finding ignored the majority's concurrence in *Cosgrove*, which reaffirmed *Bellian*, that the judicially inferred six-year statute of limitations on claims under R.C. 4112.99 does not apply to age discrimination claims, which are governed by the express statutory language limiting age claims to 180 days. *Cosgrove*, 70 Ohio St.3d at 290-91. The *Cosgrove* holding dealt only with claims of sex discrimination, and its concurrence explicitly states that this holding should *not* be extended to age discrimination claims. Accordingly, *Meyer's* conclusion that, age claims under R.C. 4112.99 are subject to a six-year statute of limitations is simply incorrect.

By misapplying the *dicta* in *Leininger* and the holding in *Cosgrove*, the lower court incorrectly concluded that *Bellian* is no longer good law. To the contrary, *Bellian* remains the leading case on the 180-day statute of limitations for age discrimination claims and numerous

appellate courts continue to follow *Bellian* today. See, e.g., *Kozma v. AEP Energy Servs.*, 10th Dist. No. 04AP-64, 2005-Ohio-1157; *McCray v. City of Springboro* (July 13, 1998), 12th Dist. No. CA98-01-006, 1998 Ohio App. LEXIS 3208; *Tablack v. Wellman*, 7th Dist. No. 04-MA-218, 2006-Ohio-4688; *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. Thus, this Court should now clarify that its *dicta* in *Leininger* in no way affects the holding of *Bellian*, that all age discrimination claims filed under R.C. Chapter 4112 are subject to the 180-day statute of limitations in R.C. 4112.02(N), is still good law.

C. **NOW, MORE THAN EVER, WITH AN AGING WORKFORCE AND A STRUGGLING ECONOMY, IT IS CRITICAL THAT THE LEGISLATURE'S INTENT BE CARRIED OUT, AND EMPLOYERS BE ABLE TO RELY ON A CLEAR, CONCISE RULE REGARDING AGE DISCRIMINATION.**

The protected-age work force will grow dramatically in the next ten years. A federal task force recently reported that nationally, “the number of people in the labor force ages 55 to 64 is projected to increase by 42.3 percent, and the number of labor force participants age 65 and older is expected to grow by nearly 74 percent.” Task Force on the Aging of the American Workforce, *Report of the Task Force on the Aging of the American Workforce* 9 (2008), <http://www.aging.senate.gov/letters/agingworkforcetaskforcereport.pdf>. Ohio has recently projected similar increases. See, Bureau of Labor Market Information, Ohio Department of Job and Family Services, *Ohio's Graying Labor Force: Aging through 2016* 10 (2008), available at, <http://lmi.state.oh.us/PROJ/Projections.htm>. (“From 2006 to 2016, the older Ohio labor force will grow much faster than the younger labor force as the baby boom generation continues to age.”).

Meanwhile, the average age of retirement has steadily increased and will continue to do so. Many older Americans either want to continue working or need to do so for financial reasons. Task Force on the Aging of the American Workforce at 6. Recent developments, such as changes to Social Security law reducing penalties for delayed retirement, increases in defined contribution retirement plans within the workforce like the 401(k), and the added productive years provided by continuing improvements in healthcare all contribute to older workers remaining in the workforce beyond the traditional age of retirement. Bureau of Labor Market Information, Ohio Department of Job and Family Services at 17.

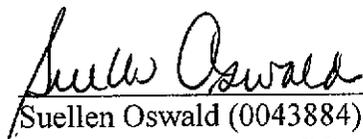
At the same time, with an economy that is slowing, the likelihood of age discrimination litigation may be further exacerbated. The weakened stock market has cost many workers at least some of their savings and retirement accounts. The slumping real estate market means that equity that otherwise could be used for retirement is not available. The combination of these factors and the escalation in the number of workers over age 40 serves to increase the potential number of age discrimination claims that employers may face in the coming decade. Henry Perlowsky, *With an Aging Workforce, a Rising Risk of Discrimination Claims*, Workforce Week Online, July, 2008, <http://www.workforce.com/section/03/feature/25/62/90/index.html>. In fact, the effects are already being seen. Discrimination charges filed with the Equal Employment Opportunity Commission increased by 9% in 2007, the largest annual increase since the early 1990s. Equal Employment Opportunity Commission, *Job Bias Charges Rise 9% in 2007, EEOC Reports* (2008), available at <http://www.eeoc.gov/press/3-5-08.html>. Amid such uneasiness in the employment sector, a clear rule explaining to all parties their rights and duties under Ohio's

statutory scheme is called for. Now more than ever the intent of the legislature should be given full effect, limiting age discrimination claims to a 180-day statute of limitations.

IV. CONCLUSION

This Court should take this opportunity to clarify its holding in *Leininger* and correct the misinterpretation by lower courts that the substantive provisions of sections of R.C. Chapter 4112 do not apply to age discrimination claims filed under R.C. 4112.99. It should reaffirm its holding in *Bellian* and explicitly extend the statute of limitations contained in R.C. 4112.02(N) to all age discrimination claims.

Respectfully submitted,



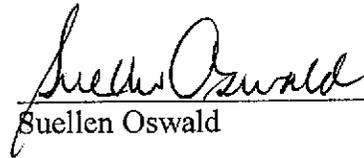
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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing on Stacy A Hanners, Marc D Mezibov, and Susan M. Lawrence, Law Office of Marc Mezibov, 401 E. Court St. Suite 600, Cincinnati, Ohio 45202 and Kasey Bond and Eugene Droder II, Frost Brown Todd LLC, 2200 PNC Center, 201 E. Fifth St., Cincinnati, Ohio 45202-4182 via regular U.S. mail, postage prepaid on this 18th day of August, 2008.



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