

IN THE SUPREME COURT OF OHIO

CASE NO. 08-0315

ROBERT MEYER,

Plaintiff-Appellee,

v.

UNITED PARCEL SERVICE, INC.,

Defendant-Appellant.

On Appeal from the Hamilton County Court  
of Appeals, First Appellate District

Court of Appeals Case No. C-06-0772

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**MERIT BRIEF OF APPELLANT  
UNITED PARCEL SERVICE, INC.**

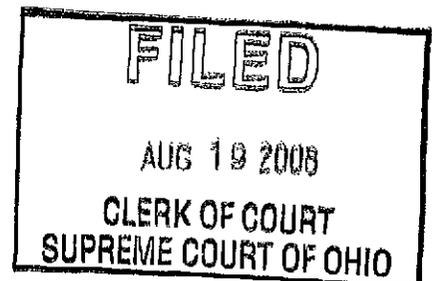
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## STATEMENT OF FACTS

Appellee Robert Meyer was terminated from employment with UPS on December 1, 2003 for falsifying his delivery records. (Def. T. Exhs. 5, 6, 24, 25, 31; T.p. 314, 615-17, 880-82, 1045-46.)<sup>1</sup> Meyer filed a grievance disputing his discharge, and the Ohio State Panel, which arbitrates unresolved grievances, upheld the discharge on January 12, 2004. (T.d. 50, Exhs. V, X.)

Meyer filed a Complaint against UPS on May 7, 2004, alleging he was wrongfully terminated for filing workers' compensation claims in violation of R.C. 4123.90 and Ohio public policy. (T.d. 2 at 1, ¶ 13-17.) That Complaint mentioned nothing about an age discrimination claim and alleged no facts to support a claim for age discrimination. Over a year later, Meyer filed an Amended Complaint on July 15, 2005, alleging age discrimination in violation of R.C. 4112.99 and Ohio public policy. (T.d. 26 at 1, ¶ 1, 18-21.)

Meyer's statutory claims for age discrimination and workers' compensation retaliation were tried to a jury in August 2006. The trial court denied UPS's motions for directed verdict on these claims. (See T.p. at 699-701, 1322, Decisions Overruling Def. Mot. Dir. Verd.) The jury found in favor of Meyer on the age discrimination and workers' compensation retaliation claims. (See T.d. 93-95, Verdicts and Jury Interrogatories.) The jury awarded Meyer \$113,532 in back pay, \$25,000 in punitive damages, and \$175,000 in "other damages." (See *id.*; see T.d., 106, Judgment Entry.) The jury did not specify what amount of the "other damages" was front pay or compensatory damages, if any. (T.d. 93-95.) The trial judge ordered Meyer reinstated, but refused to reduce the damages award, presuming inexplicably that the award of "other damages"

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<sup>1</sup> In this brief, Def. T. Exhs. shall refer to Defendant's Trial Exhibits, T.d. shall refer to Transcript of the Docket, and T.p. shall refer to Transcript of the Proceedings.

was compensatory damages rather than front pay. (T.p. 1532-33, 1550-51; T.d. 106.) The trial judge also awarded Meyer prejudgment interest and attorneys' fees. (T.d. 106.)

UPS timely appealed to the First District Court of Appeals. In *Meyer v. United Parcel Service, Inc.*, the appellate court reversed the jury's verdict because there is no right to a jury trial for a workers' compensation retaliation claim, and because the evidence on that claim tainted the jury's verdict on the age claim. 174 Ohio App.3d 339, 2007-Ohio-7063, at ¶ 46-48. The appellate court rejected several of UPS's arguments that would have entitled it to judgment as a matter of law on Meyer's age claim, or at least limited his remedies in a retrial. 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. *Id.* at ¶ 24-25. The Court of Appeals further concluded that Meyer was entitled to a jury trial and compensatory and punitive damages for his age claim, despite R.C. 4112.14's limitations on remedies available for age discrimination claims. *Id.* at ¶ 26-30, 47-48. Moreover, the appellate court stated that even though Meyer had arbitrated his claim through UPS's grievance process, Meyer's claim was not barred by R.C. 4112.14(C), which bars wrongful discharge claims when the claimant had the opportunity to arbitrate his discharge. *Id.* at ¶ 28-30.

UPS filed its notice of appeal to the Supreme Court of Ohio on February 11, 2008. Meyer filed a notice of cross-appeal on February 20, 2008. On June 4, 2008, the Supreme Court granted jurisdiction to hear UPS's appeal but dismissed Meyer's cross-appeal.

## 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 4112.14.

**I. IN A STATUTORY AGE DISCRIMINATION CLAIM, THE AGE-SPECIFIC PROVISIONS IN R.C. CHAPTER 4112 SHOULD PREVAIL OVER THE ONE-SENTENCE, GENERAL REMEDY PROVISION IN R.C. 4112.99.**

The Court of Appeals' decision in this case renders meaningless the detailed statutory framework created by the Ohio legislature in R.C. Chapter 4112 for filing age discrimination lawsuits. In reaching its decision, the *Meyer* court ignored and misinterpreted prior opinions from this Court requiring that the age-specific provisions in R.C. Chapter 4112 prevail over the general language in R.C. 4112.99. The Court of Appeals' holding eradicates the General Assembly's policy decision to enact different requirements for age discrimination plaintiffs than plaintiffs alleging other forms of discrimination. This Court should overrule *Meyer* in order to uphold the legislative intent regarding age discrimination actions by clarifying that age claims filed under R.C. 4112.99 are subject to the substantive provisions in R.C. 4112.02(N) and 4112.14.

**A. The General Assembly Enacted A Unique, Detailed Statutory Scheme to Prevent and Remedy Age Discrimination.**

The legislative framework for age discrimination claims in Ohio is unique. Indeed, age discrimination is the only form of discrimination for which the legislature expressly and specifically granted a right to file a civil action. Two provisions in R.C. Chapter 4112 specifically authorize a civil action for age discrimination: R.C. 4112.02(N) and 4112.14. This detailed framework distinguishes age discrimination claims from any other form of discrimination proscribed by R.C. Chapter 4112.

R.C. 4112.02 very generally prohibits all varieties of discrimination, including age. But unlike the other forms of discrimination prohibited by R.C. 4112.02, R.C. 4112.02(N) provides an age-specific right to file a civil action:

An aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within one hundred eighty days after the alleged unlawful discriminatory practice occurred, in any court with jurisdiction for any legal or equitable relief that will effectuate the individual's rights.

Therefore, an age plaintiff can file an age discrimination claim under R.C. 4112.02(N) and be awarded broad remedies, but the plaintiff must file the claim within 180 days of the alleged discriminatory practice.

R.C. 4112.14, which previously existed at R.C. 4101.17 and was moved to its current location in 1995, is directed exclusively to age discrimination: "No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older . . . ." R.C. 4112.14(B) specifically authorizes civil actions for age discrimination, but is narrower than R.C. 4112.02(N). R.C. 4112.14(B) provides more limited remedies and applies only to discriminatory hiring or discharge of employees:

Any person aged forty or older who is discriminated against in any job opening or discharged without just cause by an employer in violation of division (A) of this section may institute a civil action against the employer in a court of competent jurisdiction. If the court finds that an employer has discriminated on the basis of age, the court shall order an appropriate remedy 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.

R.C. 4112.14(C) proscribes all wrongful discharge age discrimination claims where the discharge was, or could have been, arbitrated. R.C. 4112.14 does not include a statute of limitations, but when the provision was codified at R.C. 4101.17, this Court held that a six-year

statute of limitations applied. *Morris v. Kaiser Eng'g, Inc.* (1984), 14 Ohio St.3d 45, 48, 471 N.E.2d 471.

Thus, under the current legislative framework, age discrimination plaintiffs must file their claim within 180 days in order to obtain the broad relief offered by R.C. 4112.02(N). If an age discrimination plaintiff files his claim after 180 days, his remedies are limited to those articulated in R.C. 4112.14. If an age discrimination plaintiff files a wrongful discharge claim, that claim is barred, regardless of when it was filed, if the plaintiff had an opportunity to arbitrate his discharge.

In addition to these statutory provisions that specifically authorize age claims, a third provision in R.C. Chapter 4112 – R.C. 4112.99 – generally authorizes claims for any form of 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 for violations of specific protections in other sections of R.C. Chapter 4112. Individuals who claim any form of employment discrimination other than age discrimination must rely upon R.C. 4112.99 because it is the only provision in R.C. Chapter 4112 that authorizes a civil action for those other forms of discrimination. R.C. 4112.99 is a “gap-filling provision” intended to create a civil remedy for victims of discrimination who otherwise would not have a statutory right to bring a civil action under R.C. Chapter 4112. *Cosgrove v. Williamsburg of Cincinnati Mgmt. Co., Inc.*, 70 Ohio St. 3d 281, 292, 1995-Ohio-295.

By enacting a detailed statutory framework that applies exclusively to age discrimination claims, the General Assembly clearly intended to treat age discrimination claims differently than other claims for discrimination. Indeed, this Court has called Ohio’s age-specific scheme

“somewhat unusual.” *Morris*, 14 Ohio St.3d at 46. Although the legislature created only a general right to recovery in R.C. 4112.99 for victims of discrimination other than age discrimination, “it is clear that the legislature intended to create separate and distinct avenues for the redress of alleged age discrimination wrongs.” *Id.* at 48. Indeed, the General Assembly indisputably intended for age discrimination claims to be treated differently than other claims of discrimination.

**B. In Order to Preserve the Legislative Framework for Age Discrimination Claims, the Age-Specific Provisions in R.C. Chapter 4112 Must Prevail Over the General Language in R.C. 4112.99.**

This Court has noted numerous times that it is the legislature's role, not the Court's, to determine the remedies available for discriminatory acts. *Id.* at 47 (“how [discrimination] victims are to be treated is for the legislature to choose . . . .”); *Leininger v. Pioneer Nat'l Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, at ¶ 32 (“the period within which a [discrimination] claim must be brought, however, is a policy decision best left to the General Assembly.”); *Cosgrove*, 70 Ohio St. 3d at 285 (“how victims of different discriminatory practices are treated regarding time limitations on the independent civil remedies afforded them under R.C. Chapter 4112, is a political issue best resolved by the General Assembly.”) As discussed above, the legislature created a detailed framework for age discrimination claims. The decision by the *Meyer* court, however, nullifies that legislative framework. This Court must reverse the *Meyer* court's ruling regarding the proper treatment of Meyer's age discrimination claim in order to preserve the legislature's intended framework for such claims.

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. If the Court of Appeals' decision stands, then R.C. 4112.02(N) and 4112.14

will be meaningless. Indeed, the *Meyer* court ruled that Meyer's age claim was not subject to the statute of limitations included in R.C. 4112.02(N), was not barred by the arbitration provision contained in R.C. 4112.14(C), and was not limited to the remedies available in R.C. 4112.14. The *Meyer* decision allows an age discrimination plaintiff to obtain full legal remedies with a six-year statute of limitations, regardless of whether the claim is based on a discharge that was subject to arbitration. To obtain this broad, unlimited relief, the plaintiff merely needs to file his claim under R.C. 4112.99. The *Meyer* decision effectively eliminates R.C. 4112.02(N) and 4112.14 from R.C. Chapter 4112. Such an interpretation that renders meaningless portions of R.C. Chapter 4112 cannot stand. *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, at ¶ 26 (statutes must be “construed as a whole” to “avoid that construction which renders a provision meaningless or inoperative”); *Elek v. Huntington Nat'l Bank* (1991), 60 Ohio St. 3d 135, 137, 573 N.E.2d 1056 (addressing R.C. Chapter 4112 and noting that the rules of statutory construction require courts to “give effect to an entire statute”).

Moreover, pursuant to the *Meyer* decision, age discrimination claims will be treated identically to claims for other forms of discrimination. Such an outcome is contrary to the legislature's intent to treat age claims differently – an intent that is clearly evidenced by the statutory framework of R.C. Chapter 4112. The *Meyer* decision eliminates the unique structure for age discrimination claims. As a result of *Meyer*, all discrimination plaintiffs can now file their claims within six years and obtain full legal and equitable remedies, even if they file a wrongful discharge claim for a discharge that was subject to arbitration. The *Meyer* decision disregards the legislature's intent to treat age claims differently.

There is no basis to conclude that the legislature intended for R.C. 4112.99 to nullify the substantive provisions in R.C. Chapter 4112 regarding age discrimination. Indeed, this Court has

specifically stated that the legislature did not intend for the general provision in R.C. 4112.99 to nullify the specific provisions regarding age discrimination in other sections of R.C. Chapter 4112:

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.

*Bellian v. Bicron Corp.* (1994), 69 Ohio St.3d 517, 519, 634 N.E.2d 608. The *Meyer* court ignored this Court's conclusion that R.C. 4112.99 was not intended to prevail over the age-specific provisions in R.C. Chapter 4112. In order to preserve the legislative framework for age discrimination claims, the *Meyer* decision must be clarified.

**C. Years of Precedent from this Court Require Correction of the *Meyer* Decision.**

In *Elek*, this Court first noted the gap-filling role that R.C. 4112.99 plays to remedy discrimination prohibited by R.C. Chapter 4112. 60 Ohio St. 3d at 136-37. The plaintiff in *Elek* filed a claim for disability discrimination under R.C. 4112.99. *Id.* The Court first stated that the plain language of R.C. 4112.99 “yields the unmistakable conclusion that a civil action is available to remedy any form of discrimination identified in R.C. Chapter 4112.” *Id.* While recognizing the legislature’s intent to create an independent action with R.C. 4112.99, the Court also recognized that there may be instances where R.C. 4112.99 should not operate independently of the substantive provisions of R.C. Chapter 4112. *Id.* One such instance is when a conflict exists between the broad language in R.C. 4112.99 and the “provisions of a more specific subsection.” *Id.*

The Court noted that in the instance of such a conflict, the rule of construction in R.C. 1.51 would normally result in the specific provision prevailing over the general. *Id.* The *Elek* Court did not need to utilize the conflict resolution language of R.C. 1.51 because “no other

section of R.C. Chapter 4112 confers upon an alleged victim of handicap discrimination the right to pursue a civil action.” *Id.* In other words, R.C. 4112.99 operated to fill the gap that existed in R. C. Chapter 4112 in the area of civil redress for handicap discrimination.

In *Bellian*, this Court applied the same rationale from *Elek* but reached a different result because the General Assembly “clear[ly] manifest[ed]” its intent to treat age discrimination differently than handicap discrimination. 69 Ohio St.3d at 519. Bellian filed his age discrimination claim under R.C. 4112.99, but did so more than 180 days after the alleged adverse employment action. *Id.* The Court rejected Bellian’s argument that the same six-year statute of limitations that applied to Elek’s handicap discrimination claim also applied to Bellian’s age claim. *Id.* at 519-20. Instead, the Court applied the 180-day statute of limitations in R.C. 4112.02(N) because the substantive characteristics of R.C. 4112.02(N) prevailed over the general provision in R.C. 4112.99. *Id.* The Court found that the General Assembly provided no “clear manifestation of legislative intent” for the general provision, R.C. 4112.99, to override the age-specific provision, R.C. 4112.02, and therefore R.C. 1.51 mandated that R.C. 4112.02(N) should prevail. *Id.*

A concurring opinion from Justice Resnick in *Cosgrove* further explains how both age and non-age claims filed under R.C. 4112.99 should be handled. 70 Ohio St.3d at 285-93 (Resnick, J., concurring). Justice Resnick was compelled to write a concurring opinion because of the apparent conflict between the Court’s holding in *Cosgrove* that a claim for gender discrimination under R.C. 4112.99 is subject to a six-year statute of limitations and the Court’s holding in *Bellian* just a few months earlier that an age discrimination claim under R.C. 4112.99 is subject to a 180-day statute of limitations. *Id.* at 290. Notably, a majority of the Court joined in Justice Resnick’s concurrence. *Id.* at 293.

Justice Resnick recognized, as the Court in *Bellian* did, that a claim under R.C. 4112.99 had to be premised on a violation of R.C. Chapter 4112. *Id.* at 290-91. Justice Resnick further explained that “R.C. 4112.99 functions as a gap-filling provision, establishing civil liability for violations of rights for which no other provision for civil liability has been made.” *Id.* at 292. Thus, she explained that when there are other provisions in R.C. Chapter 4112 that grant a right of civil action and contain substantive requirements relating to the civil action (such as a statute of limitations), those substantive provisions control. *Id.* However, when there are no other provisions that grant a right of civil action, the substantive requirements of R.C. 4112.99 control.

Pursuant to *Elek*, *Bellian*, and *Cosgrove*, the substantive requirements in R.C. 4112.02(N) and 4112.14 apply to age claims filed under R.C. 4112.99. Even though these cases were decided under a different statutory scheme than the current one in R.C. Chapter 4112, their rationale should continue to apply to claims for age discrimination filed under R.C. 4112.99. At the time these cases were decided, R.C. 4112.14 was codified at R.C. 4101.17, and the only age-specific provision contained within R.C. Chapter 4112 was R.C. 4112.02(N). The addition of R.C. 4112.14 to R.C. Chapter 4112 does not provide any basis for altering the rule from these cases that an age discrimination claim filed under R.C. 4112.99 is subject to the substantive provisions in other sections of R.C. Chapter 4112 regarding age claims.

Since the re-codification of R.C. 4112.14, there is simply one additional, substantive provision regarding age claims. Thus, age claims filed under R.C. 4112.99 are now subject to the substantive provisions in both R.C. 4112.02(N) and 4112.14. Indeed, numerous courts have applied the same rationale from *Elek*, *Bellian*, and *Cosgrove* even after the General Assembly re-codified R.C. 4101.17 at R.C. 4112.14. See *McNeely v. Ross Correctional Inst.*, 10<sup>th</sup> Dist. No. 06AP-280, 2006-Ohio-5414, at ¶ 19 (“Whether an age discrimination claim is premised on

R.C. 4112.02 or 4112.99, a plaintiff must file the claim within 180 days of the alleged discriminatory act” and comply with the more specific provisions of R.C. 4112.02); *McCray v. City of Springboro* (July 13, 1998), 12<sup>th</sup> Dist. No. CA98-01-006, 1998 Ohio App. LEXIS 3208, at \*14-15 (“any age-based employment discrimination claim, premised on [R.C. 4112.99], must comply with the one-hundred-eighty day statute of limitations set forth in R.C. 4112.02(N).”); *Reminder v. Roadway Express, Inc.* (N.D. Ohio 2008), 2006 U.S. Dist. LEXIS 1899, at \*17 (“a 4112.99 age discrimination claim premised upon 4112.14 [] is subject to 4112.14’s [specific provisions].”); *Talbott v. Anthem Blue Cross & Blue Shield* (S.D. Ohio 2001), 147 F. Supp.2d 860, 863-864 (collecting cases) (“The overwhelming majority of Ohio appellate court cases to have addressed this issue have concluded that age discrimination claims brought under 4112.99 are subject to the election of remedies doctrine.”).

Pursuant to this Court’s precedent, the specific provisions of both R.C. 4112.02(N) and 4112.14 should prevail over the general provision of R.C. 4112.99 in order to maintain the statutory framework for age discrimination claims. For instance, an age claim filed under R.C. 4112.99 within 180 days of the alleged discriminatory act should 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 should be subject to the limited remedies permitted by R.C. 4112.14. Additionally, regardless of when the claim is filed, age claims under R.C. 4112.99 should 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 4112.14. Similarly, because the election of remedies requirement applies to both R.C. 4112.02 and 4112.14, that requirement should 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. It gives effect to the substantive provisions regarding age claims that were implemented by the legislature. Allowing the age-specific provisions in R.C. Chapter 4112 to control over the general, one-sentence provision of R.C. 4112.99 in an age discrimination case treats age discrimination differently than claims for other forms of discrimination, as the legislature intended. In contrast, allowing R.C. 4112.99 to override the substantive provision of R.C. 4112.02(N) and 4112.14 -- as the Court of Appeals held -- ignores the legislative intent.

R.C. 1.51 allows a general provision to prevail over a specific provision only if the General Assembly clearly manifests its intent for such an outcome. As this Court has noted, the General Assembly did not clearly intend for R.C. 4112.99 to prevail over the specific provisions in R.C. Chapter 4112 regarding age discrimination. *Bellian*, supra; *Balent v. Nat'l Revenue Corp.* (1994), 93 Ohio App.3d 419, 424, 638 N.E.2d 1064 (“[T]he specific and detailed articulation of available remedies and interaction between applicable statutes addressing age discrimination claims must be taken to prevail over the broad terms of R.C. 4112.99.”); *Vinson v. Diamond Triumph Auto Glass, Inc.*, 149 Ohio App.3d 605, 2002-Ohio-5596, at ¶13 (noting that it is not “reasonable to conclude that the single, broadly worded sentence contained in 4112.99 could possibly have been intended to eradicate the detailed legislative scheme” of R.C. Chapter 4112.) (quoting *Pozzobon v. Parts for Plastics, Inc.* (N.D. Ohio 1991), 770 F. Supp. 376, at \*379). Thus, the Court should hold that age claims filed under R.C. 4112.99 are subject to the substantive requirements in R.C. 4112.02(N) and 4112.14.

**D. The Court of Appeals Misinterpreted and Misapplied *Leininger* When It Stated That Age Claims Under R.C. 4112.99 Are Not Subject To The Age-Specific Provisions of R.C. Chapter 4112.**

As discussed above, for over two decades, this Court has consistently accepted that the General Assembly intended for the specific provisions on age discrimination in R.C. Chapter 4112 to prevail over the general provision in R.C. 4112.99. The Court of Appeals in *Meyer* ignored this Court's decisions in *Elek*, *Bellian*, and *Cosgrove* when it rejected the notion that the substantive provisions on age discrimination in R.C. Chapter 4112 apply to an age claim brought pursuant to R.C. 4112.99. The Court of Appeals in *Meyer* erroneously relied upon this Court's decision in *Leininger* to support its decision.

The Court in *Leininger* held that a claim for wrongful discharge in violation of public policy does not exist for age discrimination because R.C. Chapter 4112 provides victims of age discrimination with complete relief. *Leininger*, syllabus. The Court analyzed the jeopardy element of *Leininger*'s public policy claim by examining the statutory remedies available for age discrimination. *Id.* at ¶ 28. *Leininger* argued that the jeopardy prong should be analyzed only in light of the remedies available under R.C. 4112.14 because that statute is more specific to age and prevails over the general language in the rest of R.C. Chapter 4112. *Id.* at ¶31. Although the Court "rejected this argument," that rejection was limited to the context of analyzing the available remedies for purposes of the jeopardy element of a public policy claim. *Id.*

In *Leininger*, the Court did not state that the general remedy provision of R.C. 4112.99 prevails over the specific statutes regarding age discrimination in R.C. Chapter 4112. Rather, the Court rejected *Leininger*'s argument that only R.C. 4112.14 and its limited remedies could be analyzed for purposes of the jeopardy prong. *Id.* This Court expressly stated that all remedies available when *Leininger*'s action accrued had to be examined for purposes of analyzing the

propriety of a public policy claim. *Id.* ¶ 31, fn. 4. At the moment her claim accrued, Leininger had available to her all of the statutory remedies for age discrimination under R.C. Chapter 4112; therefore, a common-law public policy claim was unnecessary. *Id.* at ¶ 31-33. The Court did not need to separately categorize and evaluate the more limited remedies for age discrimination under R.C. 4112.14 versus the more expansive remedies under R.C. 4112.02(N) and 4112.99 because the plaintiff had full remedies available to her at the moment her claim accrued. In that context only, the Court rejected the plaintiff's attempt to elevate the specific provisions of R.C. 4112.14 over the general provision of R.C. 4112.99. *Id.* at ¶ 31. The *Meyer* court erroneously relied on *Leininger* for the proposition that R.C. 4112.99 prevails over the age-specific provisions in R.C. Chapter 4112.

Moreover, the *Meyer* court ignored aspects of *Leininger* that demonstrate that the age-specific provisions of R.C. Chapter 4112 apply to age claims filed under R.C. 4112.99. As the Court noted in *Leininger*, "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 [R.C.] 4112.05. . . ." *Id.* ¶ 31, fn. 4. Notably, the Court did not list a claim under R.C. 4112.99 as being available to Leininger. Such a claim was not available to Leininger because she did not file her claim within 180 days. The statute of limitations for age discrimination in R.C. 4112.02(N) must have applied to Leininger's age discrimination claim under R.C. 4112.99. In other words, the age-specific provisions in R.C. 4112.02(N) prevailed over the general language in R.C. 4112.99. Thus, *Leininger* does not support the *Meyer* court's ruling.

**II. THE FIRST DISTRICT COURT OF APPEALS ERRED BY FAILING TO RULE THAT MEYER'S AGE DISCRIMINATION CLAIM UNDER R.C. 4112.99 WAS SUBJECT TO THE AGE-SPECIFIC PROVISIONS IN R.C. 4112.02(N) AND 4112.14.**

When the substantive requirements of the more specific provisions of R.C. 4112.02(N) and 4112.14 are applied to Meyer's age claim under the general provision of R.C. 4112.99, Meyer's claim is barred. Judgment should have been entered in favor of UPS on Meyer's age discrimination claim pursuant to R.C. 4112.14(C) because he arbitrated his discharge. Alternatively, Meyer's remedies on remand should be limited to those provided under R.C. 4112.14(B).

**A. Meyer's Claim is Barred Because He Arbitrated His Discharge.**

Meyer's discharge was upheld through the UPS grievance process, which is equivalent to arbitration. See *Meyer* at ¶ 28. Accordingly, Meyer's claim under R.C. 4112.99 should be barred under R.C. 4112.14(C), which prohibits wrongful discharge claims when the discharge has been upheld in arbitration:

The 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 been found to be for just cause.

The Court of Appeals held that Meyer's claim "was outside the ambit of R.C. 4112.14(C)[]" because "[t]he plain language of R.C. 4112.14(C) does not now bar previously arbitrated cases from proceeding to trial under R.C. 4112.99." *Meyer* at ¶ 29-30. The court distinguished its previous decision in *Hopkins v. United Parcel Services, Inc.* (Feb. 11, 2000), 1st Dist. No. C-990392, 2000 WL 279228, discretionary appeal denied (2000), 89 Ohio St.3d 1426, 729 N.E.2d 1196, which applied a different version of R.C. 4112.14(C) to R.C. 4112.99. *Id.* at

28-30. At the time of *Hopkins*, R.C. 4112.14(C) applied to all “remedies available under” R.C. Chapter 4112. 2000 WL 279228, at \* 2.

Importantly, the legislature did not choose to limit the application of R.C. 4112.14(C) to only the remedies available under R.C. 4112.01 to R.C. 4112.11. Instead, the legislature specifically amended R.C. 4112.14(C) in 1997 to make it applicable to all remedies available under R.C. Chapter 4112. Am.Sub.H.B. No. 350. Unfortunately, that amendment was part of a larger tort reform bill that was struck down by this Court as unconstitutional in 1999. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 199-Ohio-123, syllabus. Therefore, the more limited pre-amendment language in R.C. 4112.14(C) became operative again. The legislature has indicated its intent that R.C. 4112.14(C) apply to all age claims under R.C. Chapter 4112.

Additionally, if the Court rules that R.C. 4112.14(C) does not apply to age discrimination claims under R.C. 4112.99, R.C. 4112.14(C) will be rendered meaningless. Plaintiffs alleging age discrimination will be able to avoid the arbitration language in R.C. 4112.14(C) simply by filing under R.C. 4112.99. It is unreasonable to conclude that the legislature intended for R.C. 4112.99 to effectively eliminate the arbitration provision from the statute. The Court must subject age claims under R.C. 4112.99 to the requirements of R.C. 4112.14(C) in order to preserve the statutory framework for age discrimination.

**B. If Meyer’s Claim is Not Barred, His Remedies Must be Limited to the Remedies Available under R.C. 4112.14.**

The legislature clearly intended that victims of age discrimination must file their claim within 180 days to obtain full legal and equitable remedies. Although R.C. 4112.02(N) allows a victim of age discrimination to recover full remedies, the legislature explicitly placed a 180-day statute of limitations on age claims in R.C. 4112.02(N). Notably, the legislature provided an

alternative avenue for victims of age discrimination to file a civil action – R.C. 4112.14. The legislature did not specifically place a 180-day statute of limitations on claims under R.C. 4112.14, but provided for recovery of more limited remedies. The legislative framework compels the conclusion that the legislature intended that victims of age discrimination who file their claim beyond the 180-day statute of limitations in R.C. 4112.02(N) be allowed to recover only the limited remedies identified in R.C. 4112.14.

Meyer filed his age discrimination claim beyond the 180-day statute of limitations and therefore is limited to the remedies available in R.C. 4112.14. Meyer’s claim accrued upon his discharge on December 1, 2003. *Oker v. Ameritech Corp.*, 89 Ohio St.3d 223, 226, 2000-Ohio-139 (the statute of limitations for an age-discrimination claim under R.C. Chapter 4112 begins to run on the date of the plaintiff’s termination). He did not file his age discrimination under R.C. 4112.99 until July 15, 2005 – more than 19 months after his discharge. Because Meyer did not file his claim within the 180-day statute of limitations for R.C. 4112.02(N), he cannot obtain the full remedies available under R.C. 4112.02(N); rather, he is limited to the remedies available under R.C. 4112.14.

During the oral argument before the appeals court, Meyer first argued that his age discrimination claim related back to his original complaint. This argument must be rejected. Meyer’s late-filed age discrimination claim does not relate back to his original complaint, which he filed on May 7, 2004. Meyer’s initial complaint contained no claim for or allegations to support age discrimination. (See T.d. 2). In contrast, Meyer’s amended complaint alleged he was impliedly warned he would not reach retirement, that he was discriminated against “based on concerns that by virtue of his age (48 years old) . . . he could not perform as well or for as long as a younger employee,” and that younger employees “are treated more favorably.” (T.d.

26 at ¶ 5, 14, 15.) Because the amended complaint introduced a new cause of action and the original complaint contained no facts to notify UPS of Meyer's age discrimination claim, Meyer's age claim does not relate back under Civ. R. 15(C). *Widok v. Ford Motor Co.* (Apr. 21, 1988), 8th Dist. App. No. 53635, 1988 Ohio App. LEXIS 1720, at \*12-13 (untimely age claim did not relate back because, even though both claims shared common fact of dismissal, "the original complaint would not give [the employer] notice of a possible amended claim as required by Civ. R. 15(C)."); *Barnes v. Callaghan & Co.* (C.A.7, 1977), 559 F.2d 1102, 1106 (untimely amended claim did not relate back because original complaint contained "no timely specific allegations" of essential elements of amended claim); *Benton v. Bd. of County Comm'rs* (D. Colo. 2007), 2007 U.S. Dist. LEXIS 84157, at \*10-12 (no relation back of untimely due process claim "because the facts alleged in the original complaint [for retaliation] could not have reasonably put defendants on notice of such a claim[]").

The appeals court undermined the legislative intent of R.C. Chapter 4112 when it gave Meyer the benefit of the six-year statute of limitations that applies to R.C. 4112.14 but did not limit his remedies to those available under that provision. Because Meyer filed his age discrimination claim after the statute of limitations in R.C. 4112.02(N) had expired, he must not be allowed to recover the remedies available under that provision, but must be limited to the remedies available under R.C. 4112.14. Therefore, the Court of Appeals erred in stating that Meyer could pursue a jury trial with compensatory and punitive damages.

### CONCLUSION

The Court of Appeals erred by holding that the general language in R.C. 4112.99 overrides the specific provisions in R.C. Chapter 4112 regarding age discrimination. In order to maintain the General Assembly's detailed statutory scheme for filing age discrimination claims

under R.C. Chapter 4112, the specific provisions of R.C. 4112.02(N) and 4112.14 should apply to Meyer's R.C. 4112.99 claim. Such a construction of the statutory framework for age claims in R.C. Chapter 4112 is supported by this Court's decisions in *Elek*, *Bellian*, *Cosgrove*, and *Leininger*. Applying the rationale of those opinions to the existing statutory scheme, Meyer's age discrimination claim should be barred by the arbitration language in R.C. 4112.14(C). Alternatively, Meyer's remedies on retrial should be limited to those provided in R.C. 4112.14(B).

Respectfully submitted,



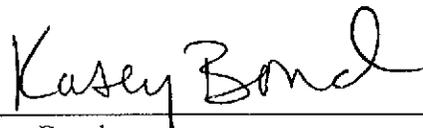
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**CERTIFICATE OF SERVICE**

A true and correct copy of the Merit Brief of Appellant United Parcel Service, Inc. was served upon Marc D. Mezibov and Stacy A. Hanners at the Law Office of Marc Mezibov, 401 E. Court Street, Suite 600, Cincinnati, OH, 45202, by first-class mail on this 19th day of August, 2008.



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Kasey Bond  
Counsel of Record for Appellant

IN THE SUPREME COURT OF OHIO

CASE NO. 08-0315

ROBERT MEYER,

Plaintiff-Appellee,

v.

UNITED PARCEL SERVICE, INC.,

Defendant-Appellant.

On Appeal from the Hamilton County Court  
of Appeals, First Appellate District

Court of Appeals Case No. C-06-0772

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**NOTICE OF APPEAL OF APPELLANT UNITED PARCEL SERVICE, INC.**

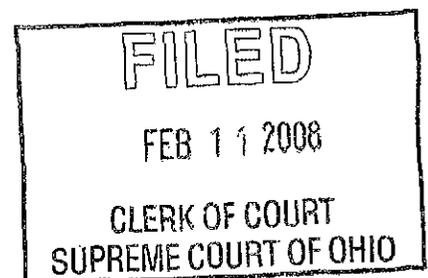
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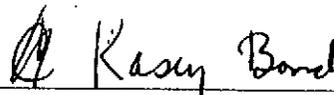


**NOTICE OF APPEAL OF APPELLANT UNITED PARCEL SERVICE, INC.**

Appellant United Parcel Service, Inc. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Ohio Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C-06-0772 on December 28, 2007.

This case raises a question of public or great general interest.

Respectfully submitted,

 *Kasey Bond* (ck - per authority)  
0077 & 12

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CERTIFICATE OF SERVICE

A true and correct copy of this Notice of Appeal of Appellant United Parcel Service, Inc. was served upon Marc D. Mezibov and Stacy A. Hanners 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 (cc prauthuis)  
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Counsel of Record for Appellant

FILED

The Supreme Court of Ohio

JUN 04 2008

CLERK OF COURT  
SUPREME COURT OF OHIO

Robert Meyer

Case No. 2008-0315

v.

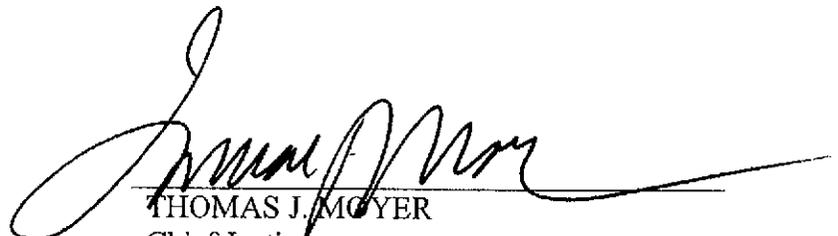
ENTRY

United Parcel Service, Inc.

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Hamilton County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

It is further ordered that the Court declines jurisdiction to hear the cross-appeal and dismisses the cross-appeal as not involving any substantial constitutional question.

(Hamilton County Court of Appeals; No. C060772)



THOMAS J. MEYER  
Chief Justice

**CAPTION:** MEYER V. UNITED PARCEL SERVICE, INC.

**12-28-07**

**APPEAL NO.:** C-060772

**TRIAL NO.:** A-0403705

**CATEGORY:** JURIES - WORKERS' COMPENSATION - CIVIL MISCELLANEOUS

**SUMMARY:**

R.C. 4112.99 provides an independent civil action to seek redress for any form of discrimination identified in R.C. Chapter 4112; the statute makes violators of R.C. Chapter 4112 "subject to a civil action for damages, injunctive relief, or any other appropriate relief," and as a remedial statute, it is subject to R.C. 2305.07's six-year statute of limitations.

R.C. 4112.14(C) provides 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.

Unlike a retaliatory-discharge claim based on a violation of public policy, a claim of retaliatory discharge brought under R.C. 4123.90 affords equitable relief without the right to a jury trial.

When the trial court erroneously submitted to a jury an R.C. 4123.90 retaliatory-discharge claim, along with a properly submitted age-discrimination claim, and both claims depended on a seamless web of facts, the jury's verdict for the plaintiff on the wrongfully submitted claim tainted its verdict on the age-discrimination claim, thus requiring that both verdicts be overturned.

**JUDGMENT:** REVERSED AND CAUSE REMANDED

**JUDGES:** OPINION by CUNNINGHAM, J.; SUNDERMANN, P.J., and HENDON, J., CONCUR.

**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,	:	
vs.	:	<i>OPINION.</i>
UNITED PARCEL SERVICE, INC.,	:	
Defendant-Appellant.	:	

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."

OHIO FIRST DISTRICT COURT OF APPEALS

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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.

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{¶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.<sup>1</sup> 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.<sup>2</sup>

{¶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

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<sup>1</sup> Appellant's Brief at 10.

<sup>2</sup> Id. at 11, fn. 67.

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amended complaint.<sup>3</sup> 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 \* \* \*.”<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

{¶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.<sup>7</sup> Only three are at issue in this case.<sup>8</sup> 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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<sup>3</sup> See Civ.R. 8(C).

<sup>4</sup> Civ.R. 50(A)(4).

<sup>5</sup> 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.

<sup>6</sup> *Ruta v. Breckenridge-Remy Co.*, paragraph one of the syllabus.

<sup>7</sup> See *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36, at ¶29.

<sup>8</sup> 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).

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**OHIO FIRST DISTRICT COURT OF APPEALS**

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age-discrimination claim under this statute must be brought within 180 days of the alleged unlawful discriminatory practice.<sup>9</sup>

{¶22} Second, R.C. 4112.14(B), formerly codified in R.C. 4101.17,<sup>10</sup> 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.<sup>11</sup>

{¶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.<sup>12</sup> The statute “makes violators of R.C. Chapter 4112 ‘subject to a civil action for damages, injunctive relief, or any other appropriate relief.’”<sup>13</sup> Like R.C. 4112.14, the text of R.C. 4112.99 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.<sup>14</sup>

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<sup>9</sup> See R.C. 4112.02(N).

<sup>10</sup> See *Leininger v. Pioneer Natl. Latex* at ¶14.

<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> *Leininger v. Pioneer Natl. Latex* at ¶29 (quoting R.C. 4112.99).

<sup>14</sup> 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.

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{¶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.”<sup>15</sup> 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.<sup>16</sup> 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.”<sup>17</sup>

{¶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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<sup>15</sup> *Leininger v. Pioneer Natl. Latex*, syllabus.

<sup>16</sup> See *id.* ¶31.

<sup>17</sup> *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.<sup>18</sup>

{¶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.<sup>19</sup> 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.<sup>20</sup>

{¶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.<sup>21</sup> 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

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<sup>18</sup> (Feb. 11, 2000), 1st Dist. No. C-990392, discretionary appeal denied (2000), 89 Ohio St.3d 1426, 729 N.E.2d 1196.

<sup>19</sup> See *Polen v. Baker*, 92 Ohio St.3d 563, 564-565, 2001-Ohio-1286, 752 N.E.2d 258.

<sup>20</sup> See, also, *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

<sup>21</sup> 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.”<sup>22</sup> 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.”<sup>23</sup>

{¶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.<sup>24</sup>

{¶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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<sup>22</sup> *Hopkins v. United Parcel Service, Inc.* (emphasis added).

<sup>23</sup> *Id.*

<sup>24</sup> 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.

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{¶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.<sup>25</sup> 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."<sup>26</sup> 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.<sup>27</sup> 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."<sup>28</sup> 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

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<sup>25</sup> 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).

<sup>26</sup> *Schramm v. Appleton Papers, Inc.*, 162 Ohio App.3d 270, 2005-Ohio-3663, 833 N.E.2d 336.

<sup>27</sup> 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.

<sup>28</sup> (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.”<sup>29</sup>

{¶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,<sup>30</sup> 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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<sup>29</sup> *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.

<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

{¶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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<sup>31</sup> See, e.g., *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 2004-Ohio-4653, at ¶14.

<sup>32</sup> See *Pelletier v. Rumpke Container Serv.* (2001), 142 Ohio App.3d 54, 61, 753 N.E.2d 958.

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{¶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.<sup>33</sup> 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.”<sup>34</sup> 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

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<sup>33</sup> See *Taylor v. Natl. Group of Companies, Inc.*, 65 Ohio St.3d 482, 1992-Ohio-68, 605 N.E.2d 45.

<sup>34</sup> *Leininger v. Pioneer Natl. Latex* at ¶29 (quoting R.C. 4112.99).

of legally recognized pecuniary relief.”<sup>35</sup> 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.<sup>36</sup> But UPS’s assertion that the trial court improperly denied its motion for summary judgment survives.

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<sup>35</sup> 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).

<sup>36</sup> See App.R. 12(A)(1)(c); see, also, Civ.R. 50(A)(4).

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{¶51} In prosecuting its assignment of error, UPS has an obligation under the appellate rules to support its argument with citations to the record.<sup>37</sup> 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.”<sup>38</sup> 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.<sup>39</sup> 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*.<sup>40</sup>

{¶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.<sup>41</sup> 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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<sup>37</sup> 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 ¶123.

<sup>38</sup> 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”).

<sup>39</sup> 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.

<sup>40</sup> 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”).

<sup>41</sup> 1st Dist. No. C070259, 2007-Ohio-6510, at ¶22-23.

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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.<sup>42</sup>

{¶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.<sup>43</sup> 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.<sup>44</sup>

{¶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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<sup>42</sup> 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.

<sup>43</sup> See *id.* at ¶21, citing *Kilbarger v. Anchor Hocking Glass Co.* (1997), 120 Ohio App.3d 332, 338, 697 N.E.2d 1080.

<sup>44</sup> 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<sup>45</sup> 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.<sup>46</sup> 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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<sup>45</sup> See *Boyd v. Winton Hills Med. & Health Ctr., Inc.*, 133 Ohio App.3d at 155-156, 727 N.E.2d 137.

<sup>46</sup> See *Kent v. Chester Labs, Inc.* (2001), 144 Ohio App.3d 587, 592, 761 N.E.2d 60.

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{¶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.<sup>47</sup>

{¶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."<sup>48</sup> 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.<sup>49</sup>

{¶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."<sup>50</sup>

{¶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.<sup>51</sup> 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.<sup>52</sup>

{¶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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<sup>47</sup> See *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, 505, 575 N.E.2d 439.

<sup>48</sup> *Id.* at 504, 575 N.E.2d 439.

<sup>49</sup> *Id.*

<sup>50</sup> *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.

<sup>51</sup> 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.

<sup>52</sup> 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.<sup>53</sup>

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<sup>53</sup> See App.R. 12(A)(1)(c).

**OHIO FIRST DISTRICT COURT OF APPEALS**

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{¶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.<sup>54</sup>

***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.

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<sup>54</sup> R.C. 1343.03(C).

**ENTERED**  
SEP 12 2006



**COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO**

*JUDGE ROBERT P. RUEHLMAN*  
Court of Common Pleas  
Hamilton County, Ohio

**ROBERT MEYER,**  
  
**Plaintiff,**

**Case No. A0403705**  
  
**Judge Ruehlman**

**V.**  
  
**UNITED PARCEL SERVICE,**  
  
**Defendant.**



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**JUDGMENT ENTRY**

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This action came on for trial before the Court , and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that Plaintiff Robert Meyer recover from Defendant United Parcel Service the following:

1. Back pay in the amount of \$113,582.00;
2. Other compensatory damages in the amount of \$175,000.00;
3. Prejudgment interest in the amount of \$47,616.03;
4. Punitive damages in the amount of \$25,000.00; and
5. Attorneys fees and costs in the amount of \$135,194.45;

with post-judgment interest thereon at a rate of 6 percent per annum as provided by law, and his costs of action.

Defendant United Parcel Service is also ordered to reinstate Plaintiff to his position of employment, effective immediately as of the date of this Order.

SO ORDERED:

\_\_\_\_\_  
JUDGE ROBERT RUEHLMAN

Date: 09/12/2006

SEEN AND ACKNOWLEDGED:

Stacy A. Hinners  
Stacy A. Hinners, Attorney for Plaintiff Robert Meyer

Kasey Bond Esq. per phone auth.  
Kasey Bond, Attorney for Defendant United Parcel Service

## **1.51 Special or local provision prevails as exception to general provision.**

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Effective Date: 01-03-1972

## **4112.02 Unlawful discriminatory practices.**

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(B) For an employment agency or personnel placement service, because of race, color, religion, sex, military status, national origin, disability, age, or ancestry, to do any of the following:

(1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate against any person;

(2) Comply with a request from an employer for referral of applicants for employment if the request directly or indirectly indicates that the employer fails to comply with the provisions of sections 4112.01 to 4112.07 of the Revised Code.

(C) For any labor organization to do any of the following:

(1) Limit or classify its membership on the basis of race, color, religion, sex, military status, national origin, disability, age, or ancestry;

(2) Discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions of any person as an employee because of race, color, religion, sex, military status, national origin, disability, age, or ancestry.

(D) For any employer, labor organization, or joint labor-management committee controlling apprentice training programs to discriminate against any person because of race, color, religion, sex, military status, national origin, disability, or ancestry in admission to, or employment in, any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, personnel placement service, or labor organization, prior to employment or admission to membership, to do any of the following:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, military status, national origin, disability, age, or ancestry of an applicant for employment or membership;

(2) Make or keep a record of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any applicant for employment or membership;

(3) Use any form of application for employment, or personnel or membership blank, seeking to elicit information regarding race, color, religion, sex, military status, national origin, disability, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any department or agency of that government, may require an

employee or applicant for employment to furnish documentary proof of United States citizenship and may retain that proof in the employer's personnel records and may use photographic or fingerprint identification for security purposes;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, sex, military status, national origin, disability, age, or ancestry;

(5) Announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of that group;

(6) Utilize in the recruitment or hiring of persons any employment agency, personnel placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, military status, national origin, disability, age, or ancestry.

(F) For any person seeking employment to publish or cause to be published any advertisement that specifies or in any manner indicates that person's race, color, religion, sex, military status, national origin, disability, age, or ancestry, or expresses a limitation or preference as to the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any prospective employer.

(G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, military status, national origin, disability, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

(H) For any person to do any of the following:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin;

(2) Represent to any person that housing accommodations are not available for inspection, sale, or rental, when in fact they are available, because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin;

(3) Discriminate against any person in the making or purchasing of loans or the provision of other financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, or any person in the making or purchasing of loans or the provision of other financial assistance that is secured by residential real estate, because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located, provided that the person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to the person's principal business and not only as a part of the purchase price of an owner-occupied residence the person is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing accommodations or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations, including the sale of fire, extended coverage, or homeowners insurance, because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member of a married couple;

(7) Print, publish, or circulate any statement or advertisement, or make or cause to be made any statement or advertisement, relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing accommodations, or relating to the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, that indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, military status, familial status, ancestry, disability, or national origin, or an intention to make any such preference, limitation, specification, or discrimination;

(8) Except as otherwise provided in division (H)(8) or (17) of this section, make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, military status, familial status, ancestry, disability, or national origin in connection with the sale or lease of any housing accommodations or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations. Any person may make inquiries, and make and keep records, concerning race, color, religion, sex, military status, familial status, ancestry, disability, or national origin for the purpose of monitoring compliance with this chapter.

(9) Include in any transfer, rental, or lease of housing accommodations any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant;

(10) Induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, sexual, military status, familial status, or ethnic composition of the block, neighborhood, or other area in which the housing accommodations are located, or induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that the presence or anticipated presence of persons of any race, color, religion, sex, military status, familial status, ancestry, disability, or national origin, in the block, neighborhood, or other area will or may have results including, but not limited to, the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, military status, familial status, or ethnic composition of the block, neighborhood, or other area;

(c) An increase in criminal or antisocial behavior in the block, neighborhood, or other area;

(d) A decline in the quality of the schools serving the block, neighborhood, or other area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or discriminate against any person in the terms or conditions of that access, membership, or participation, on account of race, color, religion, sex, military status, familial status, national origin, disability, or ancestry;

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by division (H) of this section;

(13) Discourage or attempt to discourage the purchase by a prospective purchaser of housing accommodations, by representing that any block, neighborhood, or other area has undergone or might undergo a change with respect to its religious, racial, sexual, military status, familial status, or ethnic composition;

(14) Refuse to sell, transfer, assign, rent, lease, sublease, or finance, or otherwise deny or withhold, a burial lot from any person because of the race, color, sex, military status, familial status, age, ancestry, disability, or national origin of any prospective owner or user of the lot;

(15) Discriminate in the sale or rental of, or otherwise make unavailable or deny, housing accommodations to any buyer or renter because of a disability of any of the following:

(a) The buyer or renter;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(15)(b) of this section.

(16) Discriminate in the terms, conditions, or privileges of the sale or rental of housing accommodations to any person or in the provision of services or facilities to any person in connection with the housing accommodations because of a disability of any of the following:

(a) That person;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(16)(b) of this section.

(17) Except as otherwise provided in division (H)(17) of this section, make an inquiry to determine whether an applicant for the sale or rental of housing accommodations, a person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available, or any individual associated with that person has a disability, or make an inquiry to determine the nature or severity of a disability of the applicant or such a person or individual. The following inquiries may be made of all applicants for the sale or rental of housing accommodations, regardless of whether they have disabilities:

- (a) An inquiry into an applicant's ability to meet the requirements of ownership or tenancy;
- (b) An inquiry to determine whether an applicant is qualified for housing accommodations available only to persons with disabilities or persons with a particular type of disability;
- (c) An inquiry to determine whether an applicant is qualified for a priority available to persons with disabilities or persons with a particular type of disability;
- (d) An inquiry to determine whether an applicant currently uses a controlled substance in violation of section 2925.11 of the Revised Code or a substantively comparable municipal ordinance;
- (e) An inquiry to determine whether an applicant at any time has been convicted of or pleaded guilty to any offense, an element of which is the illegal sale, offer to sell, cultivation, manufacture, other production, shipment, transportation, delivery, or other distribution of a controlled substance.

(18)(a) Refuse to permit, at the expense of a person with a disability, reasonable modifications of existing housing accommodations that are occupied or to be occupied by the person with a disability, if the modifications may be necessary to afford the person with a disability full enjoyment of the housing accommodations. This division does not preclude a landlord of housing accommodations that are rented or to be rented to a disabled tenant from conditioning permission for a proposed modification upon the disabled tenant's doing one or more of the following:

- (i) Providing a reasonable description of the proposed modification and reasonable assurances that the proposed modification will be made in a workerlike manner and that any required building permits will be obtained prior to the commencement of the proposed modification;
- (ii) Agreeing to restore at the end of the tenancy the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if it is reasonable for the landlord to condition permission for the proposed modification upon the agreement;
- (iii) Paying into an interest-bearing escrow account that is in the landlord's name, over a reasonable period of time, a reasonable amount of money not to exceed the projected costs at the end of the tenancy of the restoration of the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if the landlord finds the account reasonably necessary to ensure the availability of funds for the restoration work. The interest earned in connection with an escrow account described in this division shall accrue to the benefit of the disabled tenant who makes payments into the account.

(b) A landlord shall not condition permission for a proposed modification upon a disabled tenant's payment of a security deposit that exceeds the customarily required security deposit of all tenants of the particular housing accommodations.

(19) Refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit, including associated public and common use areas;

(20) Fail to comply with the standards and rules adopted under division (A) of section 3781.111 of the Revised Code;

(21) Discriminate against any person in the selling, brokering, or appraising of real property because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin;

(22) Fail to design and construct covered multifamily dwellings for first occupancy on or after June 30, 1992, in accordance with the following conditions:

(a) The dwellings shall have at least one building entrance on an accessible route, unless it is impractical to do so because of the terrain or unusual characteristics of the site.

(b) With respect to dwellings that have a building entrance on an accessible route, all of the following apply:

(i) The public use areas and common use areas of the dwellings shall be readily accessible to and usable by persons with a disability.

(ii) All the doors designed to allow passage into and within all premises shall be sufficiently wide to allow passage by persons with a disability who are in wheelchairs.

(iii) All premises within covered multifamily dwelling units shall contain an accessible route into and through the dwelling; all light switches, electrical outlets, thermostats, and other environmental controls within such units shall be in accessible locations; the bathroom walls within such units shall contain reinforcements to allow later installation of grab bars; and the kitchens and bathrooms within such units shall be designed and constructed in a manner that enables an individual in a wheelchair to maneuver about such rooms.

For purposes of division (H)(22) of this section, "covered multifamily dwellings" means buildings consisting of four or more units if such buildings have one or more elevators and ground floor units in other buildings consisting of four or more units.

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

(J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this

chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(K)(1) Nothing in division (H) of this section shall bar any religious or denominational institution or organization, or any nonprofit charitable or educational organization that is operated, supervised, or controlled by or in connection with a religious organization, from limiting the sale, rental, or occupancy of housing accommodations that it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference in the sale, rental, or occupancy of such housing accommodations to persons of the same religion, unless membership in the religion is restricted on account of race, color, or national origin.

(2) Nothing in division (H) of this section shall bar any bona fide private or fraternal organization that, incidental to its primary purpose, owns or operates lodgings for other than a commercial purpose, from limiting the rental or occupancy of the lodgings to its members or from giving preference to its members.

(3) Nothing in division (H) of this section limits the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations. Nothing in that division prohibits the owners or managers of housing accommodations from implementing reasonable occupancy standards based on the number and size of sleeping areas or bedrooms and the overall size of a dwelling unit, provided that the standards are not implemented to circumvent the purposes of this chapter and are formulated, implemented, and interpreted in a manner consistent with this chapter and any applicable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations.

(4) Nothing in division (H) of this section requires that housing accommodations be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

(5) Nothing in division (H) of this section pertaining to discrimination on the basis of familial status shall be construed to apply to any of the following:

(a) Housing accommodations provided under any state or federal program that have been determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended, to be specifically designed and operated to assist elderly persons;

(b) Housing accommodations intended for and solely occupied by persons who are sixty-two years of age or older;

(c) Housing accommodations intended and operated for occupancy by at least one person who is fifty-five years of age or older per unit, as determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended.

(L) Nothing in divisions (A) to (E) of this section shall be construed to require a person with a disability to be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the person with a disability, other employees, the general public, or the

facilities in which the work is to be performed, or to require the employment or training of a person with a disability in a job that requires the person with a disability routinely to undertake any task, the performance of which is substantially and inherently impaired by the person's disability.

(M) Nothing in divisions (H)(1) to (18) of this section shall be construed to require any person selling or renting property to modify the property in any way or to exercise a higher degree of care for a person with a disability, to relieve any person with a disability of any obligation generally imposed on all persons regardless of disability in a written lease, rental agreement, or contract of purchase or sale, or to forbid distinctions based on the inability to fulfill the terms and conditions, including financial obligations, of the lease, agreement, or contract.

(N) An aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within one hundred eighty days after the alleged unlawful discriminatory practice occurred, in any court with jurisdiction for any legal or equitable relief that will effectuate the individual's rights.

A person who files a civil action under this division is barred, with respect to the practices complained of, from instituting a civil action under section 4112.14 of the Revised Code and from filing a charge with the commission under section 4112.05 of the Revised Code.

(O) With regard to age, it shall not be an unlawful discriminatory practice and it shall not constitute a violation of division (A) of section 4112.14 of the Revised Code for any employer, employment agency, joint labor-management committee controlling apprenticeship training programs, or labor organization to do any of the following:

(1) Establish bona fide employment qualifications reasonably related to the particular business or occupation that may include standards for skill, aptitude, physical capability, intelligence, education, maturation, and experience;

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, including, but not limited to, a retirement, pension, or insurance plan, that is not a subterfuge to evade the purposes of this section. However, no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual, because of the individual's age except as provided for in the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 623, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 623, as amended.

(3) Retire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, of the employer of the employee, which equals, in the aggregate, at least forty-four thousand dollars, in accordance with the conditions of the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 631, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 631, as amended;

(4) Observe the terms of any bona fide apprenticeship program if the program is registered with the Ohio apprenticeship council pursuant to sections 4139.01 to 4139.06 of the Revised Code and is approved by the federal committee on apprenticeship of the United States department of labor.

(P) Nothing in this chapter prohibiting age discrimination and nothing in division (A) of section 4112.14 of the Revised Code shall be construed to prohibit the following:

(1) The designation of uniform age the attainment of which is necessary for public employees to receive pension or other retirement benefits pursuant to Chapter 145., 742., 3307., 3309., or 5505. of the Revised Code;

(2) The mandatory retirement of uniformed patrol officers of the state highway patrol as provided in section 5505.16 of the Revised Code;

(3) The maximum age requirements for appointment as a patrol officer in the state highway patrol established by section 5503.01 of the Revised Code;

(4) The maximum age requirements established for original appointment to a police department or fire department in sections 124.41 and 124.42 of the Revised Code;

(5) Any maximum age not in conflict with federal law that may be established by a municipal charter, municipal ordinance, or resolution of a board of township trustees for original appointment as a police officer or firefighter;

(6) Any mandatory retirement provision not in conflict with federal law of a municipal charter, municipal ordinance, or resolution of a board of township trustees pertaining to police officers and firefighters;

(7) Until January 1, 1994, the mandatory retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure, or similar arrangement providing for unlimited tenure, at an institution of higher education as defined in the "Education Amendments of 1980," 94 Stat. 1503, 20 U.S.C.A. 1141(a).

(Q)(1)(a) Except as provided in division (Q)(1)(b) of this section, for purposes of divisions (A) to (E) of this section, a disability does not include any physiological disorder or condition, mental or psychological disorder, or disease or condition caused by an illegal use of any controlled substance by an employee, applicant, or other person, if an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee acts on the basis of that illegal use.

(b) Division (Q)(1)(a) of this section does not apply to an employee, applicant, or other person who satisfies any of the following:

(i) The employee, applicant, or other person has successfully completed a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance, or the employee, applicant, or other person otherwise successfully has been rehabilitated and no longer is engaging in that illegal use.

- (ii) The employee, applicant, or other person is participating in a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance.
- (iii) The employee, applicant, or other person is erroneously regarded as engaging in the illegal use of any controlled substance, but the employee, applicant, or other person is not engaging in that illegal use.
- (2) Divisions (A) to (E) of this section do not prohibit an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee from doing any of the following:
- (a) Adopting or administering reasonable policies or procedures, including, but not limited to, testing for the illegal use of any controlled substance, that are designed to ensure that an individual described in division (Q)(1)(b)(i) or (ii) of this section no longer is engaging in the illegal use of any controlled substance;
- (b) Prohibiting the illegal use of controlled substances and the use of alcohol at the workplace by all employees;
- (c) Requiring that employees not be under the influence of alcohol or not be engaged in the illegal use of any controlled substance at the workplace;
- (d) Requiring that employees behave in conformance with the requirements established under "The Drug-Free Workplace Act of 1988," 102 Stat. 4304, 41 U.S.C.A. 701, as amended;
- (e) Holding an employee who engages in the illegal use of any controlled substance or who is an alcoholic to the same qualification standards for employment or job performance, and the same behavior, to which the employer, employment agency, personnel placement service, labor organization, or joint labor-management committee holds other employees, even if any unsatisfactory performance or behavior is related to an employee's illegal use of a controlled substance or alcoholism;
- (f) Exercising other authority recognized in the "Americans with Disabilities Act of 1990," 104 Stat. 327, 42 U.S.C.A. 12101, as amended, including, but not limited to, requiring employees to comply with any applicable federal standards.
- (3) For purposes of this chapter, a test to determine the illegal use of any controlled substance does not include a medical examination.
- (4) Division (Q) of this section does not encourage, prohibit, or authorize, and shall not be construed as encouraging, prohibiting, or authorizing, the conduct of testing for the illegal use of any controlled substance by employees, applicants, or other persons, or the making of employment decisions based on the results of that type of testing.

Effective Date: 07-06-2001; 2007 HB372 03-24-2008

## **4112.05 Filing a charge of unlawful discriminatory practice.**

(A) The commission, as provided in this section, shall prevent any person from engaging in unlawful discriminatory practices, provided that, before instituting the formal hearing authorized by division (B) of this section, it shall attempt, by informal methods of conference, conciliation, and persuasion, to induce compliance with this chapter.

(B)(1) Any person may file a charge with the commission alleging that another person has engaged or is engaging in an unlawful discriminatory practice. In the case of a charge alleging an unlawful discriminatory practice described in division (A), (B), (C), (D), (E), (F), (G), (I), or (J) of section 4112.02 or in section 4112.021 or 4112.022 of the Revised Code, the charge shall be in writing and under oath and shall be filed with the commission within six months after the alleged unlawful discriminatory practice was committed. In the case of a charge alleging an unlawful discriminatory practice described in division (H) of section 4112.02 of the Revised Code, the charge shall be in writing and under oath and shall be filed with the commission within one year after the alleged unlawful discriminatory practice was committed.

(2) Upon receiving a charge, the commission may initiate a preliminary investigation to determine whether it is probable that an unlawful discriminatory practice has been or is being engaged in. The commission also may conduct, upon its own initiative and independent of the filing of any charges, a preliminary investigation relating to any of the unlawful discriminatory practices described in division (A), (B), (C), (D), (E), (F), (I), or (J) of section 4112.02 or in section 4112.021 or 4112.022 of the Revised Code. Prior to a notification of a complainant under division (B)(4) of this section or prior to the commencement of informal methods of conference, conciliation, and persuasion under that division, the members of the commission and the officers and employees of the commission shall not make public in any manner and shall retain as confidential all information that was obtained as a result of or that otherwise pertains to a preliminary investigation other than one described in division (B)(3) of this section.

(3)(a) Unless it is impracticable to do so and subject to its authority under division (B)(3)(d) of this section, the commission shall complete a preliminary investigation of a charge filed pursuant to division (B)(1) of this section that alleges an unlawful discriminatory practice described in division (H) of section 4112.02 of the Revised Code, and shall take one of the following actions, within one hundred days after the filing of the charge:

(i) Notify the complainant and the respondent that it is not probable that an unlawful discriminatory practice described in division (H) of section 4112.02 of the Revised Code has been or is being engaged in and that the commission will not issue a complaint in the matter;

(ii) Initiate a complaint and schedule it for informal methods of conference, conciliation, and persuasion;

(iii) Initiate a complaint and refer it to the attorney general with a recommendation to seek a temporary or permanent injunction or a temporary restraining order. If this action is taken, the attorney general shall apply, as expeditiously as possible after receipt of the complaint, to the court of

common pleas of the county in which the unlawful discriminatory practice allegedly occurred for the appropriate injunction or order, and the court shall hear and determine the application as expeditiously as possible.

(b) If it is not practicable to comply with the requirements of division (B)(3)(a) of this section within the one-hundred-day period described in that division, the commission shall notify the complainant and the respondent in writing of the reasons for the noncompliance.

(c) Prior to the issuance of a complaint under division (B)(3)(a)(ii) or (iii) of this section or prior to a notification of the complainant and the respondent under division (B)(3)(a)(i) of this section, the members of the commission and the officers and employees of the commission shall not make public in any manner and shall retain as confidential all information that was obtained as a result of or that otherwise pertains to a preliminary investigation of a charge filed pursuant to division (B)(1) of this section that alleges an unlawful discriminatory practice described in division (H) of section 4112.05 of the Revised Code.

(d) Notwithstanding the types of action described in divisions (B)(3)(a)(ii) and (iii) of this section, prior to the issuance of a complaint or the referral of a complaint to the attorney general and prior to endeavoring to eliminate an unlawful discriminatory practice described in division (H) of section 4112.02 of the Revised Code by informal methods of conference, conciliation, and persuasion, the commission may seek a temporary or permanent injunction or a temporary restraining order in the court of common pleas of the county in which the unlawful discriminatory practice allegedly occurred.

(4) If the commission determines after a preliminary investigation other than one described in division (B)(3) of this section that it is not probable that an unlawful discriminatory practice has been or is being engaged in, it shall notify any complainant under division (B)(1) of this section that it has so determined and that it will not issue a complaint in the matter. If the commission determines after a preliminary investigation other than the one described in division (B)(3) of this section that it is probable that an unlawful discriminatory practice has been or is being engaged in, it shall endeavor to eliminate the practice by informal methods of conference, conciliation, and persuasion.

(5) Nothing said or done during informal methods of conference, conciliation, and persuasion under this section shall be disclosed by any member of the commission or its staff or be used as evidence in any subsequent hearing or other proceeding. If, after a preliminary investigation and the use of informal methods of conference, conciliation, and persuasion under this section, the commission is satisfied that any unlawful discriminatory practice will be eliminated, it may treat the charge involved as being conciliated and enter that disposition on the records of the commission. If the commission fails to effect the elimination of an unlawful discriminatory practice by informal methods of conference, conciliation, and persuasion under this section and to obtain voluntary compliance with this chapter, the commission shall issue and cause to be served upon any person, including the respondent against whom a complainant has filed a charge pursuant to division (B)(1) of this section, a complaint stating the charges involved and containing a notice of an opportunity for a hearing before the commission, a member of the commission, or a hearing examiner at a place that is stated in the notice and that is located within the county in which the alleged unlawful discriminatory practice has occurred or is occurring or in which the respondent resides or transacts business. The hearing shall be held not less than thirty days after the service of the complaint upon the complainant, the aggrieved persons other than the complainant on whose behalf the complaint is issued, and the respondent, unless the

complainant, an aggrieved person, or the respondent elects to proceed under division (A)(2) of section 4112.051 of the Revised Code when that division is applicable. If a complaint pertains to an alleged unlawful discriminatory practice described in division (H) of section 4112.02 of the Revised Code, the complaint shall notify the complainant, an aggrieved person, and the respondent of the right of the complainant, an aggrieved person, or the respondent to elect to proceed with the administrative hearing process under this section or to proceed under division (A)(2) of section 4112.051 of the Revised Code.

(6) The attorney general shall represent the commission at any hearing held pursuant to division (B) (5) of this section and shall present the evidence in support of the complaint.

(7) Any complaint issued pursuant to division (B)(5) of this section after the filing of a charge under division (B)(1) of this section shall be so issued within one year after the complainant filed the charge with respect to an alleged unlawful discriminatory practice.

(C) Any complaint issued pursuant to division (B) of this section may be amended by the commission, a member of the commission, or the hearing examiner conducting a hearing under division (B) of this section, at any time prior to or during the hearing. The respondent has the right to file an answer or an amended answer to the original and amended complaints and to appear at the hearing in person, by attorney, or otherwise to examine and cross-examine witnesses.

(D) The complainant shall be a party to a hearing under division (B) of this section, and any person who is an indispensable party to a complete determination or settlement of a question involved in the hearing shall be joined. Any person who has or claims an interest in the subject of the hearing and in obtaining or preventing relief against the unlawful discriminatory practices complained of may be permitted, in the discretion of the person or persons conducting the hearing, to appear for the presentation of oral or written arguments.

(E) In any hearing under division (B) of this section, the commission, a member of the commission, or the hearing examiner shall not be bound by the Rules of Evidence but, in ascertaining the practices followed by the respondent, shall take into account all reliable, probative, and substantial statistical or other evidence produced at the hearing that may tend to prove the existence of a predetermined pattern of employment or membership, provided that nothing contained in this section shall be construed to authorize or require any person to observe the proportion that persons of any race, color, religion, sex, military status, familial status, national origin, disability, age, or ancestry bear to the total population or in accordance with any criterion other than the individual qualifications of the applicant.

(F) The testimony taken at a hearing under division (B) of this section shall be under oath and shall be reduced to writing and filed with the commission. Thereafter, in its discretion, the commission, upon the service of a notice upon the complainant and the respondent that indicates an opportunity to be present, may take further testimony or hear argument.

(G)(1) If, upon all reliable, probative, and substantial evidence presented at a hearing under division (B) of this section, the commission determines that the respondent has engaged in, or is engaging in, any unlawful discriminatory practice, whether against the complainant or others, the commission shall state its findings of fact and conclusions of law and shall issue and, subject to the provisions of Chapter

119. of the Revised Code, cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful discriminatory practice, requiring the respondent to take any further affirmative or other action that will effectuate the purposes of this chapter, including, but not limited to, hiring, reinstatement, or upgrading of employees with or without back pay, or admission or restoration to union membership, and requiring the respondent to report to the commission the manner of compliance. If the commission directs payment of back pay, it shall make allowance for interim earnings. If it finds a violation of division (H) of section 4112.02 of the Revised Code, the commission additionally shall require the respondent to pay actual damages and reasonable attorney's fees, and may award to the complainant punitive damages as follows:

(a) If division (G)(1)(b) or (c) of this section does not apply, punitive damages in an amount not to exceed ten thousand dollars;

(b) If division (G)(1)(c) of this section does not apply and if the respondent has been determined by a final order of the commission or by a final judgment of a court to have committed one violation of division (H) of section 4112.02 of the Revised Code during the five-year period immediately preceding the date on which a complaint was issued pursuant to division (B) of this section, punitive damages in an amount not to exceed twenty-five thousand dollars;

(c) If the respondent has been determined by a final order of the commission or by a final judgment of a court to have committed two or more violations of division (H) of section 4112.02 of the Revised Code during the seven-year period immediately preceding the date on which a complaint was issued pursuant to division (B) of this section, punitive damages in an amount not to exceed fifty thousand dollars.

(2) Upon the submission of reports of compliance, the commission may issue a declaratory order stating that the respondent has ceased to engage in particular unlawful discriminatory practices.

(H) If the commission finds that no probable cause exists for crediting charges of unlawful discriminatory practices or if, upon all the evidence presented at a hearing under division (B) of this section on a charge, the commission finds that a respondent has not engaged in any unlawful discriminatory practice against the complainant or others, it shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the complaint as to the respondent. A copy of the order shall be delivered in all cases to the attorney general and any other public officers whom the commission considers proper.

(I) Until the time period for appeal set forth in division (H) of section 4112.06 of the Revised Code expires, the commission, subject to the provisions of Chapter 119. of the Revised Code, at any time, upon reasonable notice, and in the manner it considers proper, may modify or set aside, in whole or in part, any finding or order made by it under this section.

Effective Date: 03-17-2000; 2007 HB372 03-24-2008

## **4112.14 Age discrimination.**

(A) No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee.

(B) Any person aged forty or older who is discriminated against in any job opening or discharged without just cause by an employer in violation of division (A) of this section may institute a civil action against the employer in a court of competent jurisdiction. If the court finds that an employer has discriminated on the basis of age, the court shall order an appropriate remedy 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. The remedies available under this section are coexistent with remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code; except that any person instituting a civil action under this section is, with respect to the practices complained of, thereby barred from instituting a civil action under division (N) of section 4112.02 of the Revised Code or from filing a charge with the Ohio civil rights commission under section 4112.05 of the Revised Code.

(C) The 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 been found to be for just cause.

Effective Date: 07-06-2001

## **4123.90 Discrimination against alien dependents unlawful.**

The bureau of workers' compensation, industrial commission, or any other body constituted by the statutes of this state, or any court of this state, in awarding compensation to the dependents of employees, or others killed in Ohio, shall not make any discrimination against the widows, children, or other dependents who reside in a foreign country. The bureau, commission, or any other board or court, in determining the amount of compensation to be paid to the dependents of killed employees, shall pay to the alien dependents residing in foreign countries the same benefits as to those dependents residing in this state.

No 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. Any 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, or an award for wages lost if based upon demotion, reassignment, or punitive action taken, offset by earnings subsequent to discharge, demotion, reassignment, or punitive action taken, and payments received pursuant to section 4123.56 and Chapter 4141. of the Revised Code plus reasonable attorney fees. The action shall be forever barred unless filed within one hundred eighty days immediately following the discharge, demotion, reassignment, or punitive action taken, and no action may be instituted or maintained unless the employer has received written notice of a claimed violation of this paragraph within the ninety days immediately following the discharge, demotion, reassignment, or punitive action taken.

Effective Date: 11-03-1989

## **4112.99 Civil penalty.**

Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.

Effective Date: 07-06-2001

any controlled substance by employees, applicants, or other persons, or the making of employment decisions based on the results of that type of testing.

**4112.14 Discrimination because of age by employers; civil action [Eff. 1-27-97]**

(A) No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee.

(B) Any person aged forty or older who is discriminated against in any job opening or discharged without just cause by an employer in violation of division (A) of this section may institute a civil action, WITHIN TWO YEARS AFTER THE DISCRIMINATION OR DISCHARGE OCCURRED, against the employer in a court of competent jurisdiction. If the court finds that an employer has discriminated on the basis of age, the court shall order an appropriate remedy which shall include reimbursement to him THE APPLICANT OR EMPLOYEE for the costs, including reasonable attorney ATTORNEY'S fees, of the action, or to reinstate the employee in his 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 him THE EMPLOYEE for the costs, including reasonable attorney ATTORNEY'S fees, of the action. The remedies available under this section are coexistent with OTHER remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code UNDER THIS CHAPTER; except that any person instituting a civil action under this section is BARRED, with respect to the practices complained of, thereby barred from instituting a civil action under division (N) of section 4112.02 of the Revised Code or from filing a charge with the Ohio civil rights commission under section 4112.05 of the Revised Code.

(C) The cause of action described in division (B) of this section and any OTHER remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code UNDER THIS CHAPTER shall not be available in the case of discharges where the employee has available to him THE EMPLOYEE the opportunity to arbitrate the discharge or where a discharge has been arbitrated and has been found to be for just cause.

**4112.99 Civil action for violations [Eff. 1-27-97]**

Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief. A CIVIL ACTION COMMENCED PURSUANT TO THIS SECTION SHALL BE BROUGHT WITHIN TWO YEARS AFTER THE ALLEGED UNLAWFUL DISCRIMINATORY PRACTICE OCCURRED. THE PERIOD OF LIMITATION SPECIFIED IN THIS SECTION FOR PURPOSES OF A CIVIL ACTION AUTHORIZED BY THIS SECTION DOES NOT AFFECT ANY OTHER PERIOD OF LIMITATION THAT IS SPECIFIED IN ANOTHER SECTION OF THIS CHAPTER FOR PURPOSES OF A DISTINCT CIVIL ACTION AUTHORIZED BY THAT OTHER SECTION, INCLUDING, BUT NOT LIMITED TO, A CIVIL ACTION AUTHORIZED BY DIVISION (N) OF SECTION 4112.02, DIVISION (D) OF SECTION 4112.021, DIVISION (A) OF SECTION 4112.051, OR DIVISION (B) OF SECTION 4112.14 OF THE REVISED CODE.

**4113.52 Employees to report violations of state or federal law; retaliatory conduct prohibited [Eff. 1-27-97]**

(A)(1)(a) If an employee becomes aware in the course of his THE EMPLOYEE'S employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that his THE EMPLOYEE'S employer has authority to correct, and IF the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony, the employee orally shall notify his THE EMPLOYEE'S supervisor or other responsible officer of his THE EMPLOYEE'S employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification or the receipt of the report, whichever is earlier, the employee may file a written report that provides sufficient detail

## **RULE 15. Amended and Supplemental Pleadings**

**(A) Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

**(B) Amendments to conform to the evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

**(C) Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to this state, a municipal corporation or other governmental agency, or the responsible officer of any of the foregoing, subject to service of process under Rule 4 through Rule 4.6, satisfies the requirements of clauses (1) and (2) of the preceding paragraph if the above entities or officers thereof would have been proper defendants upon the original pleading. Such entities or officers thereof or both may be brought into the action as defendants.

**(D) Amendments where name of party unknown.** When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words "name unknown," and a copy thereof must be served personally upon the defendant.

**(E) Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

[Effective: July 1, 1970.]