

IN THE SUPREME COURT OF OHIO

ROBERT MEYER, : Case No. 08-0315
: :
Plaintiff-Appellee, : On Appeal from the
: : Hamilton County Court of Appeals
-vs- : First Appellate District
: :
: Court of Appeals
UNITED PARCEL SERVICE, INC. : Case No. C-06-0772
: :
Defendant-Appellee. : :

MERIT BRIEF OF APPELLEE ROBERT MEYER

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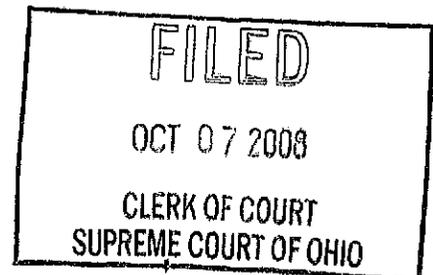


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II. SUMMARY OF THE ARGUMENT

Under the pretense of “preserving” the statutory framework for age discrimination claims under R.C. Chapter 4112, Defendant-Appellant United Parcel Service (“UPS”) asks this Court to ignore the statute as the General Assembly actually enacted it and instead to rewrite a new version. The new version UPS envision would preclude every plaintiff from bringing an independent cause of action for age discrimination under R.C. 4112.99, subordinating it to the substantive provisions of R.C. 4112.02(N) and R.C. 4112.14. Even more alarmingly, UPS’ proposition of law would foreclose every plaintiff who has the opportunity to arbitrate his discharge from obtaining any remedy for age discrimination under Ohio law. Because UPS’ proposition of law squarely contradicts the letter, spirit and legislative intent of R.C. Chapter 4112 as well as this Court’s recent decision in *Leininger v. Pioneer Nat’l Latex*¹, it must be rejected.

Although UPS broadly words its proposition of law to cover all “substantive provisions” of R.C. 4112.02(N) and 4112.14, this case involves only two such provisions. The first is whether an age discrimination claim brought under R.C. 4112.99 is subject to the 180-day statute of limitations set forth in R.C. 4112.02(N). The second is whether R.C. 4112.14(B) bars an employee who has the opportunity to arbitrate his discharge from bringing an age discrimination claim under R.C. 4112.99. The Court should analyze these issues separately, as each involves distinct procedural and substantive considerations.

With regard to the statute of limitations issue, the procedural posture of this case renders that question moot. Whether this Court determines the statute of limitations for

¹ 115 Ohio St.3d 311, 875 N.E.2d 36, 2007-Ohio-4921.

an age discrimination claim brought under R.C. 4112.99 is six years or 180 days, the decision will have no effect on the outcome of this case. Under either period, Mr. Meyer's claim for age discrimination claim was timely. Because UPS seeks a purely advisory opinion on the statute of limitations issue, the Court should decline to address it.

In the event this Court chooses to render an advisory opinion on the statute of limitations issue, it should affirm the appeals court's holding of six years. UPS' argument to the contrary relies primarily upon this Court's interpretation of an outdated version of R.C. Chapter 4112 – a version that existed **before** the General Assembly added R.C. 4112.14. The statutory framework that previously differentiated age discrimination claims brought under R.C. 4112.99 from other forms of discrimination **no longer exists**. Thus, under this Court's unqualified holding in *Cosgrove v. Williamsburg of Cincinnati Mgt. Co.*², an age discrimination claim brought under R.C. 4112.99 is subject to a six-year statute of limitations.

As for the second issue, whether R.C. 4112.14(C) bars an employee that has the opportunity to arbitrate his discharge from bringing an age discrimination claim under R.C. 4112.99, the plain and unambiguous language of R.C. 4112.14(C) establishes that it does not. UPS' feeble suggestion that the Court should ignore the plain, unambiguous and effective version of R.C. 4112.14(C) and instead give effect to a void version of R.C. 4112.14(C) should be flatly rejected. UPS' argument on this issue is little more than an attempt to convince this Court to allow employers to discriminate against every employee who is subject to an arbitration process on the basis of age with impunity.

² 70 Ohio St.3d 281, 638 N.E.2d 991, 1994-Ohio-295.

This argument is squarely inconsistent with not only the plain language of R.C. 4112.14(C), but the overall remedial purpose of R.C. Chapter 4112.

For the reasons set forth below, Mr. Meyer respectfully requests this Court reject UPS' proposition of law and affirm the appeals court's decision.

III. STATEMENT OF THE FACTS AND CASE

A. STATEMENT OF THE FACTS

Plaintiff-Appellee Robert Meyer was employed by Defendant-Appellant United Parcel Service, Inc. ("UPS") for nearly 25 years. He worked the majority of his career as a package car driver delivering packages to local residences and businesses from UPS' Colerain facility. For the first 24 years of Mr. Meyer's career, he performed his job satisfactorily and was not involved in any serious disciplinary matters.

During the course of his career, however, Mr. Meyer suffered several on-the-job injuries for which he received workers compensation benefits, particularly during the later years of his career. UPS is a self-insured employer for the purpose of workers compensation, meaning the company pays 100 percent of an employee's claim for benefits. If a facility exceeds its budget for employee workers compensation claims, its profitability decreases – and so does the compensation that UPS provides to its managers.

In 2002, UPS assigned a new manager, Jim Murray, to the Colerain facility where Mr. Meyer worked. Mr. Murray had a proud track record of remaining under budget for workers compensation claims. Upon assuming command, Mr. Murray reviewed Mr. Meyer's injury history. Shortly thereafter, Mr. Murray convened a meeting with Mr. Meyer during which he warned Mr. Meyer that he had better not get hurt on the job again. Later, Mr. Murray threatened Mr. Meyer more explicitly, saying that if Mr. Meyer

wanted to retire from UPS, he had better not get hurt on the job anymore. Mr. Murray also told Mr. Meyer that he took great pleasure in firing "veteran" employees like Mr. Meyer. Two other UPS employees under Mr. Murray's command testified that Mr. Murray made similar threats to their employment after they were hurt on the job.

Despite his best efforts, Mr. Meyer sustained another job-related injury in November 2002 that required major surgery and a nearly six-week leave of absence. Mr. Meyer filed a workers compensation claim for medical benefits and wages relating to this injury.

When Mr. Meyer returned to work in January 2003, Mr. Murray – true to his promise – initiated efforts to terminate Mr. Meyer's employment. The first attempt came just weeks after Mr. Meyer's return, when Mr. Murray fired Mr. Meyer for driving the same route he had driven for seven years. Mr. Murray determined this route was not expeditious and, without warning, fired Mr. Meyer for "inflating his route." On the second occasion, Mr. Murray fired Mr. Meyer in September 2003 when a single customer registered a complaint about him. On those two occasions, the Teamsters Union initiated grievances on Mr. Meyer's behalf and Mr. Meyer was reinstated.

In November 2003, UPS pulled Mr. Meyer off his seniority "bid" route and unilaterally assigned him to a management-controlled delivery route that Mr. Meyer had never driven before. On his second day on that route, Mr. Meyer sustained a minor injury. On December 1, 2003 – the very day Mr. Meyer returned to work from that injury – Mr. Murray fired him, claiming Mr. Meyer had made several errors in inputting information into his computer.

On all three occasions, Mr. Murray characterized Mr. Meyer's conduct as "dishonesty." This was significant because, absent an allegation of dishonesty or a

serious offense, UPS management was contractually required to progressively discipline Mr. Meyer. Mr. Murray, however, made no attempt to progressively discipline Mr. Meyer; rather, his reaction to every perceived wrongdoing by Mr. Meyer was to fire him.

After terminating the then 45-year-old Mr. Meyer on December 3, 2003, UPS replaced him with a man in his early twenties.

B. STATEMENT OF THE CASE

On May 7, 2004, Mr. Meyer filed suit against UPS alleging his discharge was retaliation for filing a workers compensation claim. In July 2005, Mr. Meyer moved to amend his complaint pursuant to Civ. R. 15 to add a claim of age discrimination under R.C. 4112.99. The trial court permitted Mr. Meyer to so amend his complaint.

A six-day jury trial was held in August 2006. The jury found in favor of Mr. Meyer on both his retaliatory discharge and age discrimination claims and awarded Mr. Meyer \$113,352 in back pay, \$175,000 in compensatory damages and \$25,000 in punitive damages. In a post-trial hearing, the trial court entered judgment on the verdict and ordered UPS to reinstate Mr. Meyer to his employment and pay his reasonable attorneys fees and costs plus prejudgment interest.

UPS appealed the judgment to the Ohio Court of Appeals for the First District. Among the nine assignments of error cited by UPS, it argued that: (1) Mr. Meyer's claim for age discrimination under R.C. 4112.99 was barred by the 180-day statute of limitations set forth in R.C. 4112.02(N); and that (2) Mr. Meyer's claim for age discrimination under R.C. 4112.99 was barred by the arbitration provision set forth in R.C. 4112.14(C). UPS did **not** contend that the trial court erred in allowing Mr. Meyer to amend his complaint to add an age discrimination claim.

The appeals court overruled UPS' assignments of error on both the statute of limitations and arbitration issues. The appeals court held that the applicable statute of limitations for an age discrimination claim brought under R.C. 4112.99 is six years. *Meyer v. United Parcel Svc.* (1st Dist. 2007), 174 Ohio App.3d 339, 882 N.E.2d 31, 2007-Ohio-7063 at ¶25. It further found that R.C. 4112.14(C) does not preclude an employee who could have arbitrated his discharge from bringing a claim for age discrimination under R.C. 4112.99. *Id.* at ¶40.

III. ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW

APPELLANT'S 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.

A. THE STATUTE OF LIMITATIONS ISSUE SHOULD NOT BE CONSIDERED BECAUSE IT IS MOOT.

"It is, of course, well settled that this court will not indulge in advisory opinions." *North Canton v. Hutchinson*, 75 Ohio St.3d 112, 114, 661 N.E.2d 1000, 1996-Ohio-170 (internal citations omitted). To the extent a party seeks the resolution of a moot issue, it seeks an advisory opinion. *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 257 N.E.2d 371.

UPS asks this Court to render a purely advisory opinion on whether an age discrimination claim brought under R.C. 4112.99 is subject to a six-year or 180-day statute of limitations. For the purposes of this case, that issue is moot because under either period, Mr. Meyer's age discrimination claim was timely by virtue of Civ. R. 15(C).

Civ. R. 15(C) provides that “[w]henver 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.” As the Staff Notes to Civ. R. 15(C) explain, “[i]f plaintiff files his complaint, and if the applicable statute of limitations runs, and if plaintiff amends his complaint * * * Because of relation back, the intervening statute of limitation does not interference with the opportunity to amend.” See also *Kraly v. Vannewick* (1994), 69 Ohio St.3d 627, 631, 635 N.E.2d 323.

Mr. Meyer filed his original complaint alleging retaliatory discharge under R.C. 4123.90 on May 7, 2004 – well within 180 days of his discharge. He later moved to amend his complaint pursuant to Civ. R. 15 to add a claim of age discrimination under R.C. 4112.99. His age discrimination claim arose from the same facts and same occurrence as those underlying his original claim – his December 2003 termination. The trial court permitted Mr. Meyer to amend his complaint. Under the plain and unambiguous language of Civ. R. 15(C), Mr. Meyer’s age discrimination claim related back to the May 7, 2004, date of his original complaint.

UPS’ argument that Mr. Meyer’s amended complaint should not relate back to the date of Mr. Meyer’s original pleading – an argument it raises for the **very first time** in its Merit Brief – attempts to backdoor an argument that UPS failed to properly present to the appeals court. (See Merit Brief of Appellant United Parcel Service, Inc., at 17-18). Indeed, UPS failed to assign **any** error relating to the trial court’s decision granting Mr. Meyer’s motion to amend his complaint. As such, UPS waived its right to appellate review of the trial court’s decision regarding the amended complaint – including relation back under Civ. R. 15(C).

Even if this Court could properly consider this issue, Mr. Meyer's age discrimination claim undoubtedly arose out of the "same conduct, transaction or occurrence" as Mr. Meyer's original claim under R.C. 4123.90 – both involved his December 2003 termination. UPS' proffer of *Widok v. Ford Motor Co.* (Apr. 21, 1988), 8th Dist. No. 53635, unreported, 1988 WL 38113 is easily distinguished. The *Widok* court found that "[t]he facts giving rise to the amended claim are based on age discrimination which presumably occurred well before appellant's discharge." *Widok* at * 5 (emphasis added). Unlike Mr. Meyer's age claim which occurred in the same transaction as his original retaliatory discharge claim, the conduct at issue in *Widok* did not arise out of the same transaction or occurrence as his original claims.

Because Mr. Meyer's age discrimination claim related back to the date of his original filing well within 180 days of his termination, this Court should decline UPS' request to render an advisory opinion on the statute of limitations issue applicable to an age discrimination claim brought under R.C. 4112.99.

B. AN AGE DISCRIMINATION CLAIM BROUGHT UNDER R.C. 4112.99 IS SUBJECT TO A SIX-YEAR STATUTE OF LIMITATIONS.

In the event this Court chooses to render an advisory opinion regarding the statute of limitations issue, it properly concludes that an age discrimination claim brought under R.C. 4112.99 is subject to a six-year statute of limitations. As the appeals court found, this conclusion is consistent with this Court's unqualified holding in *Cosgrove* that "R.C. 4112.99 is a remedial statute, and is thus subject to R.C. 2305.07's six-year statute of limitations." *Cosgrove* at syllabus.

UPS' argument to the contrary presents a new and indeed, bizarre framework that would make the statute of limitations for a claim brought under R.C. 4112.99

dependent on the remedies sought.³ According to UPS, a plaintiff who seeks both legal and equitable remedies under R.C. 4112.99 is subject to an 180-day statute of limitations under R.C. 4112.02(N), while a plaintiff who seeks only equitable remedies, however, may avail himself of the six-year statute of limitations applicable to R.C. 4112.14. (UPS' Merit Brief at 5). UPS hinges its argument upon holdings from this Court that pre-date the General Assembly's October 25, 1995, amendment of R.C. Chapter 4112 to add 4112.14.⁴ Indeed, this Court has never directly considered the statute of limitations issue applicable to age discrimination claims brought under R.C. 4112.99 since R.C. 4112.14 was added to R.C. Chapter 4112.

UPS' reliance upon this Court's holding *Bellian v. Bicron Corp.* (1994), 69 Ohio St.3d 517, 634 N.E.2d 608, 1994-Ohio-339 as controlling is misplaced. The version of R.C. Chapter 4112 at issue in *Bellian* contained only one provision recognizing an employee's right to be free from age discrimination: R.C. 4112.02. Because R.C. 4112.02(N) specifically set forth a 180-day statute of limitations for age discrimination claims for "individual's rights relative to discrimination on the basis of age as provided in this section," this Court found that a plaintiff bringing a claim for age discrimination under R.C. 4112.99 "had to be referring to the form of age-based employment discrimination identified by R.C. 4112.02." *Id.* at 519. Accordingly, R.C. 4112.02(N)'s 180-day statute of limitations applied. *Id.*⁵

³ Notably, UPS' position differs from even that of its amicus Ohio Management Lawyers Association ("OMLA"), which suggests that all age discrimination claims brought under R.C. Chapter 4112 are subject to an 180-day statute of limitations.

⁴ *Elek v. Huntington Nat'l Bank* (1991), 60 Ohio St.3d 135, 575 N.E.2d 1056 (claim filed May 2, 1988); *Bellian* at 517 (claim filed February 4, 1991); *Cosgrove* at 281 (claim filed March 28, 1990); and *Oker v. Ameritech Corp.*, 89 Ohio St.3d 223, 729 N.E.2d 1177, 2000-Ohio-139 (claim filed June 29, 1995).

⁵ *Bellian* also pre-dated the General Assembly's 1992 amendment to R.C. 4112.08, which stated that "[t]his chapter shall be construed liberally for the accomplishment of its purposes * * *."

The premise upon which *Bellian* hinged – that R.C. 4112.02 is the only source of rights for age discrimination under R.C. Chapter 4112 – **no longer applies**. As previously mentioned, in 1995, the General Assembly amended Chapter 4112 to add 4112.14(B)(former R.C. 4101.07). The introduction of R.C. 4112.14 means that R.C. 4112.02 was no longer the only provision of R.C. Chapter 4112 to confer a right to the right to free from age discrimination – it is now guaranteed in **both** R.C. 4112.02 and R.C. 4112.14. The addition of R.C. 4112.14 to Chapter 4112 also means that the *Bellian* Court’s holding that an age discrimination claim brought under R.C. 4112.99 “had to be referring” to R.C. 4112.02 no longer accurately states Ohio law.

Even more indicative of *Bellian*’s inapplicability to the new version of R.C. Chapter 4112 is that since 1995, Ohio courts – including this Court – have consistently recognized that age discrimination claims brought under R.C. 4112.14 are **not** subject to an 180-day statute of limitation, but rather a six-year statute of limitations. See *Leininger* at ¶31 (recognizing that the statute of limitations for a claim brought under R.C. 4112.14 is longer than the 180-day period set forth in R.C. 4112.02(N)); *Camardo v. QualChoice, Inc.*, 8th Dist. No. 84954, 2005-Ohio-1860, 2005 WL 926998; *Jones v. Board of Elections*, 8th Dist. No. 83470, 2004-Ohio-4750, 2004 WL 2002470, appeal not allowed 105 Ohio St.3d 1406, 821 N.E.2d 1027, 2005-Ohio-279; *Ferraro v. B.F. Goodrich Co.* (9th Dist. 2002), 149 Ohio App.3d 301, 777 N.E.2d 282, 2002-Ohio-4398, appeal not allowed 98 Ohio St.3d 1411, 781 N.E.2d 1019, 2003-Ohio-60; *Morris v. Kaiser Engineering, Inc.* (1984), 14 Ohio St.3d 45, 48, 471 N.E.2d 471. These holdings underscore the obsolescence of *Bellian*’s holding since R.C. 4112.14 was added to R.C.

Chapter 4112.⁶ Even UPS concedes that age discrimination claims brought under R.C. 4112.14 are subject to a six-year – rather than 180-day – statute of limitations. (UPS’ Merit Brief at 4-5).

Unlike the version of R.C. Chapter 4112 that existed when *Bellian* was issued, there is no longer one “specific” statute of limitations applicable to all age discrimination claims under R.C. Chapter 4112. The addition of R.C. 4112.14 and its six-year statute of limitations means that the direct conflict between R.C. 4112.02(N) and R.C. 4112.99 that this Court identified in *Bellian* no longer exists, negating the need for any consideration of the “specific” over the “general.” In other words, the basis for distinguishing age discrimination claims brought under R.C. 4112.99 from other forms of discrimination that this Court identified in *Bellian* is inapplicable to the current version of R.C. Chapter 4112.⁷

UPS alternatively suggests that if this Court cannot find a statutory conflict between R.C. 4112.02(N) and R.C. 4112.99 in light of R.C. 4112.14, it should nonetheless attempt to discern the intent of the General Assembly, which it suggests has always been to subject individuals seeking legal and equitable remedies to a 180-day statute of limitations. (UPS’ Merit Brief at 5). This argument, however, is based upon a disingenuously incomplete version legislative history underlying R.C. Chapter 4112. In 1997, the General Assembly enacted a uniform two-year statute of limitations for age

⁶ Compare above with *Bellian*, 69 Ohio St.3d at syllabus, which states that “[a]ny age discrimination claim, premised on a violation described in R.C. Chapter 4112, must comply with the one-hundred-eighty day statute of limitations period set forth in former R.C. 4112.02(N).”

⁷ Similarly, the dicta set forth in the concurring opinion in *Cosgrove* – dicta to which both UPS and the OMLA give great weight in their respective arguments – was issued prior to the addition of R.C. 4112.14 to R.C. Chapter 4112. See *Cosgrove* at 285 (J. Resnick, concurring). For all of the same reasons that *Bellian* is obsolete in light of the current version of R.C. Chapter 4112, so too is *Cosgrove*’s dicta echoing *Bellian*.

discrimination claims brought under either R.C. 4112.02 or R.C. 4112.14, 1996 H 350 (Eff. 1-27-97) (“H.B. 350”). That amendment was ultimately struck down as unconstitutional for other reasons in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062, 1999-Ohio-123. Notwithstanding, the General Assembly’s most recent indication of its intent was to create a two-year statute of limitations for age discrimination claims under R.C. Chapter 4112 – not a 180-day period.

No reasonable interpretation of the current version of R.C. Chapter 4112 merits distinguishing age discrimination claims from any other type of discrimination brought under R.C. 4112.99. Indeed, the plain language of R.C. 4112.99 states without qualification that it applies to “[w]hoever violates this chapter.” Consistent with this Court’s holding in *Cosgrove*, the Court should find that an age discrimination claim brought under R.C. 4112.99 is subject to a six-year statute of limitations.

C. R.C. 4112.14(C) DOES NOT BAR AN EMPLOYEE WHO HAS THE OPPORTUNITY TO ARBITRATE HIS DISCHARGE FROM BRINGING AN AGE DISCRIMINATION CLAIM UNDER R.C. 4112.99.

This Court has long held that when the language of a statute is plain and unambiguous, there is no need to apply the rules of statutory interpretation. *State ex rel. Jones v. Conrad*, 92 Ohio St.3d 389, 392, 750 N.E.2d 583, 2001-Ohio-207. “In such a case, we do not resort to rules of interpretation in an attempt to discern what the General Assembly could have conclusively meant or intended in * * * a particular statute – we rely only on what the General Assembly has actually said.” *Id.*; citing *Muenchenbach v. Preble Cty.* (2001), 91 Ohio St.3d 141, 149, 742 N.E.2d 1128, 2001-Ohio-244 (C.J. Moyer, dissenting).

What the General Assembly has **actually** said in R.C. 4112.14(C) is 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 been found to be for just cause. (emphasis added).

This plain and unambiguous provision requires no interpretation as it clearly “does not bar previously arbitrated cases from proceeding to trial under R.C. 4112.99.” *Meyer* at 129.

Notwithstanding, UPS asks this Court to ignore what the current version of R.C. 4112.14(C) plainly states and instead, resurrect a previous version of R.C. 4112.14(C) which barred every plaintiff who has the opportunity to arbitrate from bringing a claim of age discrimination under **any** provision of R.C. Chapter 4112 – including R.C. 4112.99. (UPS’ Merit Brief at 16). This previous version of R.C. 4112.14(C) has absolutely **no** bearing on this case as it was voided in 1999 as part of this Court’s decision in *Sheward* declaring H.B. 350 unconstitutional. *Sheward*, 86 Ohio St.3d 451, syllabus. UPS’ attempt to convince this Court that this version of R.C. 4112.14(C) – and not the version of R.C. 4112.14(C) actually in effect – represents the General Assembly true intent. (UPS Merit Brief at 16). This position is not only inconsistent with the rules of statutory interpretation, it fails to consider that the General Assembly has made **no** attempt in the past ten years to revive the prior version of R.C. 4112.14(C) contained in H.B. 350. Indeed, the General Assembly **deleted** that amendment from Am.Sub.S.B. 2005 S 80 (“S.B. 80”) – a law nearly identical to H.B. 350.

For all of these reasons, the appeals court’s decision that R.C. 4112.14(C) does **not** bar an age discrimination claim brought under R.C. 4112.99 should be affirmed.

D. THIS COURT'S RECENT DECISION IN *LEININGER* CONFIRMS THAT AN AGE DISCRIMINATION CLAIM BROUGHT UNDER R.C. 4112.99 IS NOT SUBJECT TO THE SUBSTANTIVE REQUIREMENTS OF EITHER R.C. 4112.02(N) OR R.C. 4112.14.

In its recent decision in *Leininger*, this Court expressly found that an age discrimination claim brought under R.C. 4112.99 is separate from and **not** subject to the substantive requirements of other age discrimination statutes set forth in R.C. Chapter 4112. *Leininger* at ¶ 31.

In *Leininger*, this Court held that Ohio does not recognize a public policy discharge claim for age discrimination because “the remedies in R.C. Chapter 4112 provide complete relief for a statutory claim for age discrimination.” *Id.* at syllabus. The *Leininger* Court, analyzing the elements of a public policy claim set forth in *Painter v. Graley* (1994), 70 Ohio St.3d 377, 384, 639 N.E.2d 51, found that the General Assembly enacted “four **separate** statutes that provide remedies for age discrimination in R.C. Chapter 4112”: R.C. 4112.02(N), 4112.08(G), 4112.14(B) and 4112.99. *Id.* at 317.

The *Leininger* Court focused on R.C. 4112.99. The Court found that like R.C. 4112.02(N) – but notably **unlike** R.C. 4112.08(G) and 4112.14(B) – R.C. 4112.99 provides an employee with the “full panoply of pecuniary relief” and other remedies available at law and equity. *Leininger* at ¶ 30. Unlike R.C. 4112.02(N), however, the Court found that a claim brought under R.C. 4112.99 was **not** subject to the substantive requirements of other provisions of R.C. Chapter 4112, specifically the election of remedies requirement: “[i]n *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, 573 N.E.2d 1056. 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.** *Id.* at ¶ 31. (emphasis added).” UPS’ argument that claims brought under R.C. 4112.99 should be subject to the election of remedies squarely contradicts this Court’s clear holding to the contrary. (UPS’ Merit Brief at 11).

Quite simply, *Leininger* confirms that while a claim brought under R.C. 4112.99 must be premised upon a **right** set forth in another provision(s) in Chapter 4112 (i.e., to be free from discrimination on the basis of age), it is not limited to the **remedies** set forth by that other provision. *Id.* This is illustrated by the *Leininger* Court’s explanation of the relationship between R.C. 4112.14(B) and 4112.99:

The Court found that an individual who experiences a violation of R.C. 4112.14 may **also** make a claim under R.C. 4112.99, which would entitle him to the full range of remedies and a jury trial. *Id.* at ¶ 31. However, if UPS’ proposition of law were accepted, this would not be true. Under UPS’ argument, an individual who brought age discrimination claims under R.C. 4112.14(B) and 4112.99 would be not be entitled to the “full panoply” of damages this Court held, bur rather would be limited to recovering the same equitable relief available under R.C. 4112.14. In other words, a plaintiff would be limited to the lowest common denominator of rights and remedies provided by R.C. Chapter 4112. This argument is not only contrary to *Leininger*, it is contradicted by the plain language of R.C. 4112.99, which states in qualified terms that “[w]hoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.”

UPS’ attempt to dismiss this Court’s detailed findings in *Leininger* as “dicta” is misplaced. (Appellant’s Memorandum at 12). “Dicta” is an “expression in [a] court’s

opinions which go beyond the facts before [the] court and therefore are * * * not binding in subsequent bases as legal precedent.” *Westfield v. Galatis*, 100 Ohio St.3d 216, 797 N.E.2d 1256, 2003-Ohio-5849 at ¶ 85 (Sweeney, J., dissenting), quoting Black’s Law Dictionary (6th Ed. 1990); *see also Easter v. Complete General Construction Co.*, 10th Dist. Case No. 06-AP-763, 2007-Ohio-1297 at ¶ 34. The *Leininger* Court’s discussion of the remedies available under R.C. Chapter 4112, however, was necessary for its analysis of whether a public policy in Ohio against discrimination on the basis of age was in jeopardy under R.C. Chapter 4112’s statutory framework. *See Leininger* at syllabus.

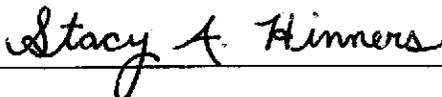
Accordingly, the *Leininger* Court’s binding opinion that a claim under R.C. 4112.99 is not subject to the substantive provisions of R.C. 4112.02 and R.C. 4112.14 such as election of remedies requires this Court to reject UPS’ position of law to the contrary. *Id.* at ¶ 31.

IV. CONCLUSION

For all of these reasons, this Court should decline UPS’ request to rewrite Ohio law regarding age discrimination claims in a manner that would thwart, rather than promote, the express remedial purpose of R.C. Chapter 4112. The purpose and plain language of R.C. Chapter 4112 as well as this Court’s recent decision in *Leininger* require this Court to reject UPS’ proposition of law. Accordingly, Mr. Meyer respectfully requests this Court affirm the appeals court’s decision.

Respectfully submitted,

LAW OFFICE OF MARC MEZIBOV

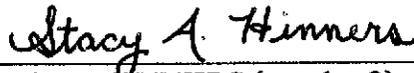


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CERTIFICATE OF SERVICE

A copy of this Notice of Cross-Appeal of Appellee/Cross-Appellant Robert Meyer was served upon: Kasey Bond and Eugene Droder, Frost Brown Todd, 2200 PNC Center, 201 E. Fifth Street, Cincinnati, OH 45202; Suellen Oswald, Littler Mendelson, 1100 Superior Avenue, 20th Floor, Cleveland, OH 44114; Mark Herron, 55 Public Square, Suite 650, Cleveland, OH 44113; and Christina M. Royer, 8803 Brecksville Road, Suite 11, Brecksville, OH 44141 by first-class mail on this 7th day of October 2008.



STACY A. HINNERS (0076458)