IN THE SUPREME COURT OF OHIO
CASE NO. 08-0315

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

REPLY BRIEF OF APPELLANT UNITED PARCEL SERVICE, INC.

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SUMMARY OF REPLY ARGUMENT

The General Assembly enacted R.C. 4112.99 to function as a "gap-filler," providing "civil liability for violations of rights for which no other provision for civil liability has been made." *Cosgrove v. Williamsburg of Cincinnati Mgmt. Co.*, 70 Ohio St.3d 281, 292, 1994-Ohio-295, 638 N.E.2d 991 (Resnick, A.W. Sweeney, Douglas, Wright, J.J., Moyer, C.J., concurring). Unlike any other form of discrimination prohibited by that chapter, R.C. 4112.02(N) and R.C. 4112.14 (formerly R.C. 4101.17) provide a civil remedy specifically for age discrimination. Thus, the "gap filling" function of R.C. 4112.99 need not operate to provide an independent civil remedy for age discrimination. See *Cosgrove*, 70 Ohio St.3d at 292. Instead, a civil action for age discrimination filed under the general language of R.C. 4112.99 must be subject to the age-specific requirements in R.C. 4112.02(N) and R.C. 4112.14. See R.C. 1.51; *Bellian v. Bicron Corp.*, 69 Ohio St.3d 517, 519-520, 1994-Ohio-339, 634 N.E.2d 608; *Cosgrove*, 70 Ohio St.3d at 290-292 (Resnick, J., concurring); *Elek v. Huntington Natl. Bank* (1991), 60 Ohio St.3d 135, 137, 573 N.E.2d 1056.

Applying R.C. 4112.99 in this manner to employment discrimination claims upholds the detailed statutory framework that the General Assembly enacted to remedy age discrimination, but still provides an independent cause of action for non-age plaintiffs, who would have no civil recourse absent R.C. 4112.99. Additionally, subordinating R.C. 4112.99 to the age-specific provisions in R.C. 4112.02(N) and R.C. 4112.14 harmonizes this Court's various opinions regarding this issue.

In contrast to the opinion of the First District Court of Appeals and the arguments of Appellee Robert Meyer and amicus curiae Ohio Employment Lawyers Association ("OELA"), this construction gives effect to all of the applicable sections in R.C. Chapter 4112. Absent

reversal by this Court, the appellate court's decision would nullify the procedural requirements and substantive limitations in R.C. 4112.02(N) and R.C. 4112.14. Moreover, it would undermine the General Assembly's decision to treat age discrimination differently. See *Morris v. Kaiser Eng., Inc.* (1984), 14 Ohio St.3d 45, 47, 471 N.E.2d 471 ("This argument possesses superficial appeal, i.e., that victims of different discrimination ought not to be treated differently. However, how such victims are to be treated is for the legislature to choose and this court concludes that it has so chosen.") Because the Court of Appeals failed to apply the age-specific provisions of R.C. 4112.02(N) and R.C. 4112.14 to Meyer's age discrimination claim under R.C. 4112.99, the opinion below should be reversed, and judgment should be awarded to Appellant United Parcel Service, Inc.

REPLY 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.

A. THIS COURT SHOULD NOT CONSIDER THE "RELATION BACK" ISSUE BECAUSE APPELLEE ROBERT MEYER NEVER RAISED THE ISSUE AT THE TRIAL COURT.

Appellee Meyer's refusal to cite the record in his statement of facts (and largely throughout his merit brief) has given him and amicus OELA substantial liberty to misconstrue the factual and procedural posture of this case. For example, Meyer and his amicus misstate the record in their accusation that Appellant UPS has waived any argument regarding the purported "relation back" of Meyer's amended complaint under Civ. R. 15(C). Amicus OELA goes so far as to say the trial court issued a "ruling on the 'relation back' issue." (Brief of Amicus Curiae OELA at 3.) Of course, OELA does not and cannot cite the record for such a claim because the issue of "relation back" was never raised at the trial court. Meyer and OELA omit the very

important fact that UPS never addressed the relation back issue until now because Meyer argued for "relation back" **for the first time** during oral argument before the First District Court of Appeals. Indeed, UPS has consistently argued that Meyer's age discrimination claim was untimely. It was Meyer's burden to raise an issue regarding relation back in response to the timeliness argument, but he failed to do so.

In Meyer's motion to amend the complaint, Meyer did not argue that his addition of new facts and allegations in support of age discrimination related back to his original complaint, which was filed over a year and half earlier. Rather, Meyer posited that "the proposed age discrimination claim is timely and brought well within the applicable statute of limitation [sic]. See R.C. §§ 4112.14 and 4112.99." (See T.d. 21, Pl's. Mot. Amend Compl. at 2.) Even after UPS opposed Meyer's motion as untimely, Meyer still did not argue for "relation back," nor did he cite Civ. R. 15(C). (See T.d. 23, Def's. Mem. Opp. Mot. Amend at 1, 4; T.d., 24, Pl. Reply Mem. Supp. Mot. Amend.) Instead, Meyer persisted that his claim for age discrimination was "timely made" within the six-year statute of limitations that applied to his claim under R.C. 4112.99. (See T.d. 24 at 2.)

During trial, UPS again argued that Meyer's claim was not timely and that the specific provisions of R.C. Chapter 4112 applied to Meyer's age claim under R.C. 4112.99. (See T.p., Trns. 692-93, 1317-18.) Meyer's counsel responded: "the statute of limitation [sic] for age discrimination under 4112 is six years, or at best, that there is a split." (T.p., Trns. 695.) That Meyer consistently pushed for a six-year statute of limitations can easily be construed as implied acceptance that his amendment was untimely if the 180-day statute of limitations under R.C. 4112.02(N) applied to his claim under R.C. 4112.99.

Meyer did not even raise relation back or cite Civ. R. 15(C) in his appellate brief to the First District Court of Appeals. Indeed, Meyer's counsel admitted she had missed the issue before she raised it for the first time at oral argument before the Court of Appeals. The Court of Appeals did not address Meyer's argument.

Meyer cannot be permitted to rely upon an argument that he raised for the first time before an appellate court. *Kuenzer v. Teamsters Union Local 507* (1981), 66 Ohio St.2d 201, 204, 420 N.E.2d 1009 ("At the trial level appellant did not litigate the question of whether the mandatory arbitration provision of Local Rule 29 violates constitutional guarantees of due process. He is, therefore, foreclosed from raising the issue on appeal."); *Kalish v. Trans World Airlines, Inc.* (1977), 50 Ohio St.2d 73, 79, 362 N.E.2d 994 ("[T]his court will not consider a question not presented, considered or decided by a lower court.") Because Meyer failed to raise "relation back" or Civ. R. 15(C) before the trial court, he should be foreclosed from bringing that issue to this Court.

B. IN ORDER TO HARMONIZE THIS COURT'S DECISIONS APPLYING R.C. 4112.99 AND TO EFFECTUATE THE DETAILED LEGISLATIVE FRAMEWORK ESTABLISHED FOR AGE DISCRIMINATION CLAIMS, AN AGE DISCRIMINATION CLAIM FILED UNDER R.C. 4112.99 MUST BE SUBJECT TO THE SUBSTANTIVE PROVISIONS OF R.C. 4112.02(N) AND R.C. 4112.14.

Subjecting a plaintiff's R.C. 4112.99 age claim to the substantive conditions that the legislature enacted for age claims harmonizes this Court's decisions in *Elek*, *Cosgrove*, and *Bellian* with its recent decision in *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36. Notably, Meyer and amicus OELA rely almost exclusively on discrete language in *Cosgrove* and *Leininger*, but they ignore key aspects of those decisions that support UPS's position. Viewing this Court's cases on age discrimination and R.C. 4112.99 as a unified body of work, rather than as disjointed parts, yields the unmistakable conclusion that

R.C. 4112.99 should be subject to the age-specific requirements in R.C. 4112.02(N) and R.C. 4112.14, which authorize civil actions exclusively for age discrimination.

In *Elek*, this Court laid the foundation for R.C. 4112.99's role as a gap-filler, recognizing for the first time the potential for conflict between R.C. 4112.99 and more specific provisions of Chapter 4112. Because no other section of Chapter 4112 authorized a civil action for disability discrimination, no conflict existed and the employee could bring an independent action under R.C. 4112.99. *Elek*, 60 Ohio St.3d at 137. Later in *Bellian*, the Court applied the conflict resolution language of R.C. 1.51 to an age discrimination claim under R.C. 4112.99. The Court held that the 180-day statute of limitations in R.C. 4112.02(N) applied because that specific provision conflicted with the general provision of R.C. 4112.99, and the General Assembly had not shown a "clear manifestation of legislative intent" for the general provision to prevail. *Bellian*, 69 Ohio St.3d at 519-520.

In *Cosgrove*, R.C. 4112.99 was expressly limited to the role of "gap filler" for discrimination claims filed under R.C. Chapter 4112. The Court held that a six-year limitations period governed a gender discrimination claim under R.C. 4112.99. 70 Ohio St.3d at 282. The Court looked outside of Chapter 4112 to the general, six-year statute of limitations for remedial actions contained in R.C. 2305.07, "for the appropriate limitations period" to apply to Cosgrove's gender claim. *Id.* This was because, unlike a claim for age discrimination, no provision of Chapter 4112 provided a right of civil action specifically to redress gender discrimination. *Id.* at 291 (Resnick, J., concurring). Thus, the "gap-filling" function of R.C. 4112.99 operated to provide civil liability for violations of the right to be free from gender discrimination "for which no other provision for civil liability has been made." *Id.* at 292.

Meyer contends that the rationale in *Elek*, *Bellian*, and *Cosgrove* is obsolete because R.C. Chapter 4112 now contains two provisions that authorize civil actions only for age discrimination. (Merit Brief of Appellee Meyer at 10.) Meyer's argument is wrong. The addition of R.C. 4112.14 to Chapter 4112 did not undermine the rationale of these cases. The rationale of these cases now applies to both R.C. 4112.02(N) and 4112.14 because both of these sections conflict with the general provision of R.C. 4112.99. Thus, the rationale of *Elek*, *Bellian*, and *Cosgrove* applies to require that both of these age-specific provisions trump the general provision in R.C. 4112.99. Notably, even after the Court's decision in *Bellian* and the recodification of R.C. 4101.17 at R.C. 4112.14, the legislature has not declared that the general, one-sentence provision of R.C. 4112.99 should prevail over the more specific provisions in Chapter 4112.

The only thing that has changed in R.C. Chapter 4112 since *Bellian* or *Cosgrove* is the addition of another section specifically designed to remedy age discrimination. Thus, R.C. 1.51's interpretive guideline now applies to two age-specific statutes, not just one. The force of the Court's opinions in *Elek* and *Bellian* and the concurrence of Justice Resnick in *Cosgrove* (which garnered support from a majority of the Court) remains: general provisions must give way to conflicting, more specific provisions, absent clear legislative intent to the contrary. The General Assembly announced no contrary intent before or since *Bellian* and *Cosgrove*, irrespective of the movement of R.C. 4101.17 to R.C. 4112.14. Consequently, a claim for age discrimination must be subject to the substantive requirements specifically enacted to remedy age discrimination in R.C. 4112.02 and R.C. 4112.14.

Importantly, the Court's opinions since the addition of R.C. 4112.14 to Chapter 4112 support the conclusion that the age-specific provisions of Chapter 4112 prevail over the general

language in R.C. 4112.99. In *Smith v. Friendship Village of Dublin, Ohio, Inc.*, the Court unanimously held that a plaintiff who files a claim for handicap discrimination under R.C. 4112.99 need not elect between a judicial and administrative remedy. 92 Ohio St.3d 503, 504-506, 2001-Ohio-1272, 751 N.E.2d 1010. Contrasting handicap and age discrimination claims, the Court reasoned that an age claim under R.C. 4112.99 would be subject to an election requirement, while a handicap claim would not. The age-specific provisions in Chapter 4112 require an election between judicial and administrative remedies, while the handicap statutes are silent as to an election requirement. *Id.* at 506-507.

The Court's recent opinion in *Leininger* also demonstrates that the age-specific requirements in R.C. Chapter 4112 apply to an age claim brought under R.C. 4112.99. The Court noted that the only remedy available to *Leininger* when she filed her complaint was R.C. 4112.14 because the statute of limitations in R.C. 4112.02(N) had expired. 2007-Ohio-4921 at ¶31, fn. 4. The Court did not list R.C. 4112.99 among Leininger's remedies because her age claim under R.C. 4112.99 was subject to the age-specific 180-day statute of limitations in R.C. 4112.02(N). See *id.*

The Court of Appeals relied upon *Leininger* to wrongly conclude that a six-year statute of limitations applied to Meyer's age discrimination claim under R.C. 4112.99. *Meyer v. United Parcel Serv., Inc.*, 174 Ohio App.3d 339, 2007-Ohio-7063, 882 N.E. 2d 31, ¶¶ 24-25. The Court of Appeals interpreted *Leininger* as rejecting the argument that the age-specific provisions in R.C. Chapter 4112 should prevail over the general remedy provision of R.C. 4112.99. The Court misinterpreted the following language from *Leininger*:

> Leininger maintains that we should consider only the remedies in R.C. 4112.14 because it is a more specific statute regarding age discrimination that prevails over the more general provisions of R.C. 4112.02 and 4112.99. We reject this argument.

2007-Ohio-7063 at ¶ 31. The Court rejected Leininger's argument that it could consider only the remedies in R.C. 4112.14 when analyzing the jeopardy prong of Leininger's public policy claim. The Court did not reject the principle that specific statutory provisions prevail over general provisions. Because all of the remedies in R.C. Chapter 4112 were available to Leininger when she was terminated, all of the remedies could be considered; the differences between them were irrelevant. *Id.* at ¶¶ 31-33. Thus, the Court rejected **only** the argument that the more limited remedies in R.C. 4112.14 had to be analyzed.

The Court's various decisions regarding discrimination claims under R.C. Chapter 4112 demonstrate that R.C. 4112.99 is a gap-filler, operating only to fill a gap where the legislature did not provide a civil remedy. The Court's cases establish that although R.C. 4112.99 normally operates to provide a civil remedy for most forms of discrimination, the General Assembly chose to treat age discrimination differently by providing distinct avenues of relief with procedural requirements not applicable to other claims of discrimination. This Court's rulings illustrate that maintaining the distinction between age and non-age claims requires that a claim for age discrimination under R.C. 4112.99 be subject to the specific provisions in R.C. 4112.02(N) and R.C. 4112.14.

In contrast, applying R.C. 4112.99 as the Court of Appeals did renders meaningless the substantive provisions in R.C. 4112.02(N) and R.C. 4112.14. Pursuant to the holding below, age plaintiffs will never be subject to either section because they will file under R.C. 4112.99, be subject to a six-year statute of limitations, and receive the full legal and equitable remedies, as the Court of Appeals decided. *Meyer*, 2007-Ohio-7063 at ¶¶ 25, 47-48. The decision of the Court of Appeals effectively abolishes the two provisions that the General Assembly enacted to distinguish age discrimination from other types of discrimination. See *D.A.B.E., Inc. v. Toledo-*

Lucas County Bd. of Health, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 26 (statutes must be "construed as a whole" to "avoid that construction which renders a provision meaningless or inoperative"); *Ford Motor Co. v. Ohio Bureau of Employ. Servs.* (1991), 59 Ohio St.3d 188, 190-91, 571 N.E.2d 727 (statutes should be interpreted to give affect to every part of the statute, and not to render a section meaningless). This Court should reverse the decision below and adopt an interpretation of R.C. Chapter 4112 that gives effect to the entire framework that the General Assembly enacted to remedy age discrimination.

C. MEYER'S AGE DISCRIMINATION CLAIM SHOULD BE BARRED BY THE ARBITRATION PROVISION IN R.C. 4112.14(C).

The holding of the Court of Appeals undermines the General Assembly's policy decision to distinguish age discrimination claims and enact more procedural requirements for plaintiffs alleging age discrimination. Meyer contends that the current version of R.C. Chapter 4112 does not merit distinguishing age discrimination from claims for other forms of discrimination. (Merit Brief of Appellee Meyer at 2, 11.) This argument ignores the statutory framework and is contrary to this Court's prior decisions. See *Leininger*, 2007-Ohio-4921 at ¶ 32 (noting that the short statute of limitations that applied only to age discrimination claims was the legislature's decision); *Dworning v. City of Euclid*, 2008-Ohio-3318, 892 N.E.2d 420, ¶ 41 (noting that the legislature chose to treat age discrimination differently with respect to the effect of arbitration). The General Assembly made a policy choice to treat age discrimination differently, and this Court should apply R.C. 4112.99 in a way that preserves the legislature's choice. See *Cosgrove*, 70 Ohio St.3d at 285 (Resnick, J., concurring).

In order to preserve the detailed framework the legislature enacted for age discrimination claims, the Court should clarify that R.C. 4112.99 applies to an age discrimination claim in the following manner – any age discrimination plaintiff who files a claim, whether under R.C.

4112.99 or 4112.02(N), within 180 days can pursue full legal and equitable remedies, as authorized by R.C. 4112.02(N); however, a plaintiff who files after 180 days, but within the six-year statute of limitations applicable to claims under R.C. 4112.14(B), can pursue only a claim for equitable remedies as provided in R.C. 4112.14(B). Additionally, all age discrimination claims involving wrongful discharge, even those filed under R.C. 4112.99, must be subject to the arbitration language in R.C. 4112.14(C) because the General Assembly clearly demonstrated its preference for arbitration remedies. *Dworning*, 2008-Ohio-3318 at ¶ 41.

Meyer's claim for age discrimination under R.C. 4112.99 should have been limited to the remedies provided under R.C. 4112.14 because Meyer did not file his age discrimination claim within 180 days (and his claim does not relate back to his original filing). Furthermore, irrespective of the timeliness of Meyer's filing, his claim for age discrimination should have been barred by the arbitration language in R.C. 4112.14(C) because Meyer's "discharge has been arbitrated and has been found to be for just cause." R.C. 4112.14(C). The General Assembly manifested its intent with R.C. 4112.14(C) to "prefer arbitration" over civil actions for age discrimination and distinguish claims for age discrimination from "other forms of discrimination":

> Thus, for certain age discrimination claims, the General Assembly **has expressed its intent to prefer arbitration** over other remedies when arbitration is available. The General Assembly, however, has not manifested a similar intent for claims of other forms of discrimination.

Dworning, 2008-Ohio-3318 at ¶ 41 (emphasis added).

Amicus OELA misinterprets the Court's use of "certain" in *Dworning*. "Certain" does not mean the General Assembly intended to exclude age discrimination claims under R.C. 4112.99 from the ambit of R.C. 4112.14(C). (See Brief of Amicus Curiae OELA at 15.) Rather, the term "certain" refers to the fact that R.C. 4112.14(C) covers – by its very terms – only

discriminatory "discharges" and does not cover claims such as failure to promote. See R.C. 4112.14(C). Therefore, "certain" in *Dworning* refers to the General Assembly's intent for R.C. 4112.14(C) to bar only the lawsuits of those discharged age plaintiffs who claim wrongful discharge and either squander the opportunity to arbitrate or unsuccessfully arbitrate their discharges (like Meyer).

R.C. 4112.14(C) applies to wrongful discharge age discrimination claims under R.C. 4112.99 even though, as the Court of Appeals noted, R.C. 4112.14(C) does not explicitly encompass R.C. 4112.99. See *Meyer*, 2007-Ohio-7063 at ¶ 29. In *Bellian*, this Court held that similar, non-inclusive language in R.C. 4112.02(N) applied to a claim for age discrimination under R.C. 4112.99. R.C. 4112.02(N) stated[1] that an individual could file a civil action for "discrimination on the basis of age **as provided for in this section**," so long as the individual filed within 180-days of the discrimination. The Court did not hold that a claim for age discrimination under R.C. 4112.99 was not encompassed by the plain language of R.C. 4112.02(N) because R.C. 4112.99 was not "in this section." Rather, R.C. 1.51 mandated that the age-specific language in R.C. 4112.02(N) prevailed over the general language in R.C. 4112.99. *Bellian*, 69 Ohio St.3d at 519-520.

Like in *Bellian*, the Court should analyze R.C. 4112.14(C) in light of the entire age discrimination framework that the General Assembly enacted. R.C. 4112.14(C) expressly applies to claims under R.C. 4112.02(N) and R.C. 4112.14(B). It is illogical to conclude that the General Assembly would express a preference for arbitration over the remedies under R.C. 4112.02(N) and R.C. 4112.14(B) – the only sections of R.C. 4112 that authorize civil actions exclusively for age discrimination – but then suppress that arbitral preference by giving primacy

[1] A former version of R.C. 4112.02(N) applied to Bellian's claim. The section was amended on June 30, 1992 to add the word "discriminatory" after "unlawful." See *Bellian*, 69 Ohio St.3d at 520.

to an age discrimination lawsuit filed under the general remedy provision of R.C. 4112.99. See *Dworning*, 2008-Ohio-3318 at ¶ 41.

Because of the contradiction between the specific language in R.C. 4112.14(C) and the general language in R.C. 4112.99, the specific language must apply to an age discrimination claim filed under the general language. Applying R.C. 4112.14(C) to R.C. 4112.99 in this manner comports with the General Assembly's intent to treat age discrimination differently and for R.C. 4112.99 to operate as a gap-filler. R.C. 4112.14(C) should bar an employee from filing a civil action under R.C. 4112.99 for wrongful discharge age discrimination.

Although amicus OELA expresses strong disdain for the legislature's choice to elevate arbitration over statutory remedies for age claims for wrongful discharge, it is indisputable that the legislature has made that policy choice. This Court is not the proper forum for the OELA to challenge that choice. Moreover, the OELA's attack on R.C. 4112.14(C) is factually flawed. For example, the OELA claims that this statutory provision deprives individuals, such as Meyer, from obtaining a "meaningful remedy." (Brief of Amicus Curiae OELA at 19.) To the contrary, even if an individual is barred by R.C. 4112.14(C) from bringing a state law claim for age discrimination, the individual can still pursue a federal remedy for age discrimination under the Age Discrimination in Employment Act, which is not affected by R.C. 4112.14(C). Thus, the individual will certainly have access to a meaningful remedy. Therefore, the OELA's attack on R.C. 4112.14(C) must be dismissed.

The Court of Appeals should have applied R.C. 4112.14(C) to Meyer's age discrimination claim and held that his claim was barred because his discharge was upheld at arbitration. Accordingly, the Court should reverse the Court of Appeals' decision and award judgment to UPS as a matter of law.

CONCLUSION

R.C. 4112.99 fills the gap in civil remedies that the General Assembly left in R.C. Chapter 4112 for non-age discrimination claims. However, because no similar gap exists for age discrimination, a claim for age discrimination under R.C. 4112.99 should be subject to the age-specific provisions in R.C. 4112.02(N) and R.C. 4112.14. Applying the age discrimination statutes in this way effectuates the legislative intent to differentiate age discrimination claims and to provide distinct avenues of relief for age discrimination. Moreover, it harmonizes this Court's opinions that have addressed discrimination claims under R.C. 4112.99. Applying the rationale of this Court's opinions in *Elek*, *Bellian*, *Cosgrove*, *Leininger*, and *Dworning* to the existing statutory scheme in Chapter 4112, 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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I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant United Parcel Service, Inc. was served by first class mail on this 14th day of November, 2008 to the following:

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