

IN THE SUPREME COURT OF OHIO

NURSING CARE MANAGEMENT  
OF AMERICA, INC. D/B/A  
PATASKALA OAKS CARE  
CENTER

09-0756

Appellant

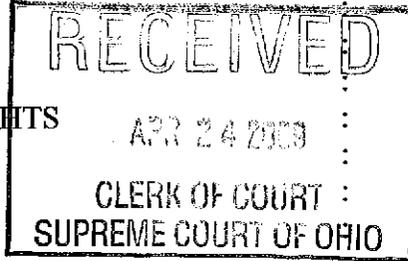
On Appeal from the  
Court of Appeals of  
Licking County, Ohio  
Fifth Appellate District

vs.

OHIO CIVIL RIGHTS  
COMMISSION

Appellee

Court of Appeals  
Case No. 08CA0030



MEMORANDUM IN SUPPORT OF JURISDICTION  
OF AMICUS CURIAE, OHIO HEALTH CARE ASSOCIATION

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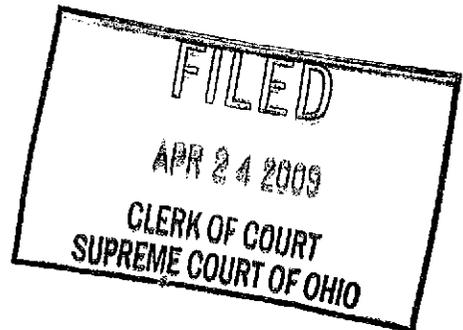


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**EXPLANATION OF WHY THIS CASE IS A CASE  
OF GREAT GENERAL AND PUBLIC INTEREST**

This case examines the important question of whether Ohio anti-discrimination law places an affirmative duty on employers to provide leave for pregnant employees, regardless of the employers' existing internal leave policy. Specifically, the case questions whether an employer's uniformly applied length of service requirement is enforceable with respect to maternity leave, as expressly permitted under the plain language of Ohio Adm. Code 4112-5-05(G)(5).

This case is of great general interest as it affects virtually every employer and employee in Ohio. The decision of the Court of Appeals signifies that an employer may no longer create a neutrally applied leave policy requiring employees to reach a specific tenure to be eligible for leave. In effect, the Court of Appeals turned an anti-discrimination regulation into a leave of absence statute for a particular category of individuals (i.e., pregnant employees), creating an affirmative duty for employers to provide leave to all pregnant employees under any circumstance.

The determination of these issues particularly impacts the more than 750 members of the Ohio Health Care Association ("OHCA"): nursing facilities, assisted living communities, and intermediate care facilities for the mentally retarded ("ICF/MR"). These facilities provide care to residents 24 hours a day, seven days a week, and the work of their professionals is crucial to supporting the health and safety of Ohio's elderly and disabled. In 2007, Ohio long-term care professionals provided to nursing home residents alone 113,907,685 hours of direct care services, 20,080,408 hours of dietary services, 8,789,492 hours of social and pastoral services, and 10,712,588 hours of housekeeping services, all of which are essential to maintain the health and safety of

the residents served. Additionally, professionals at ICF/MRs provided 15,650,120 hours of direct care services, 778,055 hours of dietary services, 116,348 hours of social and pastoral services, and 569,899 hours of housekeeping services.

OHCA's members cannot provide these important services without a qualified, dependable workforce. Long-term care facilities are staffed primarily by female employees and thus are more susceptible to having workers on leave and being short-staffed on account of pregnancy. There is a compelling business justification for a length of service requirement for employees working in long-term care, as they must be replaced and re-staffed immediately in order to maintain the quality of care to residents. In addition, nursing homes, residential care facilities and ICF/MRs must all meet certain staffing expectations to maintain state licensure requirements. *See* Ohio Adm. Code 3701-17-08, 3701-17-54, and 5123:2-3-07. These facilities therefore *must* replace employees while they are on leave, not only to maintain their service levels, but also to comply with the law. By eliminating the one-year eligibility period for leave, the Court would effectively increase the number of employees on leave in long-term care facilities. These facilities are then obligated to find replacement employees for each individual on maternity leave and, upon their return, either restructure work assignments or fire the replacement. This burden is much more reasonable when an employee requesting leave has been staffed for a full year, trained, and proven to be dependable.

Finally, the case presents an issue of great public interest, namely, the interest in preventing the Ohio Civil Rights Commission ("OCRC") from circumventing the legislative process. To date, the Ohio General Assembly has not chosen to enact any legislation mandating leave for pregnant employees. In this case, however, the OCRC

purports to have found a way to do just that. In 2007, the OCRC attempted to remove language permitting minimum length of service requirements from Ohio Adm. Code 4112-5-05, but the Joint Committee on Agency Rule Review (“JCARR”), comprised of legislators, voted down the proposed rule.<sup>1</sup> Now, the OCRC has determined to ignore its own regulation, which specifically allows employers to include length of service requirements in their leave policies, and require employers to provide leave to pregnant employees regardless of a neutrally applied policy. The decision of the Court of Appeals cannot stand, as it allows OCRC to improperly legislate through the courts.

Because this case presents a matter of public and great general interest as stated above, Amicus Curiae respectfully requests this Court to accept jurisdiction and review the case on the merits.

#### **STATEMENT OF THE INTEREST OF AMICUS CURIAE**

OHCA represents nearly 750 nursing facilities, assisted living communities, and ICF/MRs. These facilities, and the more than 100,000 men and women who work as long-term care professionals, provide the elderly and disabled with critical health care services, including skilled nursing, personal care, and habilitation. OHCA strives to identify best practices to ensure quality improvement in long-term care and to keep members informed of laws and regulations governing the profession.

Providing long-term health care is a vital service, and to ensure quality care, OHCA’s members need qualified and trained professionals. The majority of these long-term care professionals are women, and therefore OHCA’s members are particularly affected by the outcome of this case. OHCA’s members are statutorily obligated to

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<sup>1</sup> JCARR examined and voted down the proposed rule because it wanted the OCRC to provide more economic data on how the rule would financially impact employers.

maintain certain staffing levels to uphold their high standard of care and comply with licensure requirements. The enforceability of a one-year minimum length of service requirement will greatly impact how OHCA members administer their leave policies and will affect the quality of care provided to their residents.

### **STATEMENT OF THE CASE AND FACTS**

Ms. Tiffany R. McFee (“McFee”) began employment with Nursing Care Management of America, Inc. d/b/a Pataskala Oaks Care Center (“POCC”) on June 9, 2003. *Opinion of Court of Appeals* at ¶3. At the time of McFee’s hire, POCC had a leave policy maintained in accordance with the Family Medical Leave Act, providing no leave until after one year of service and allowing 12 weeks of leave thereafter. *Id.* Under the policy, employees who required leave and did not meet the one year service requirement were denied leave. If the employee required leave which was not available, he or she was terminated and eligible to re-apply for employment once able to resume work.

On January 26, 2004, McFee provided POCC with a physician’s note stating she was medically unable to work due to pregnancy-related swelling. *Id.* at ¶4. On February 4, 2004, because McFee had been employed less than one year and did not qualify for leave under POCC’s neutral leave policy, POCC terminated McFee. *Id.* at ¶5. On February 25, 2004, POCC’s Director of Nursing contacted McFee to inform her that a full-time day shift position was now available, but McFee never returned the call. *Id.* at ¶6.

McFee filed a charge with the Ohio Civil Rights Commission (“OCRC”) on March 2, 2004. *Id.* at ¶8. After reviewing the relevant facts, an Administrative Law

Judge recommended the complaint be dismissed, because the OCRC's regulations authorized an equally applied length of service requirement for leave time. *Id.* at ¶9. However, the OCRC rejected this recommendation and held that McFee's employment had been terminated in violation of Ohio's laws against pregnancy discrimination. *Id.* at ¶10. POCC filed a Petition for Judicial Review with the Licking County Court of Common Pleas, and on February 11, 2008, the court issued a judgment reversing the OCRC and finding the minimum length of service requirement lawful. *Id.* at ¶11. The OCRC then appealed to the Court of Appeals of Ohio, Fifth Appellate District, which reversed the Court of Common Pleas and affirmed the OCRC's final order on March 11, 2009. *Id.* at ¶1.

#### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. I: R.C. 4112.01(B) authorized the Ohio Civil Rights Commission to adopt rules preventing discrimination on account of pregnancy, but it did not authorize the OCRC to mandate special, additional benefits for pregnant employees.**

R.C. 4112.01(B) and 4112.02(A) make it an unlawful discriminatory practice to discharge, refuse to hire, or otherwise discriminate against an individual on account of pregnancy. R.C. 4112.01(B) specifically states that "women affected by pregnancy, childbirth, or related medical conditions shall be *treated the same* for all employment-related purposes... as other persons not so affected but similar in their ability or inability to work..." (Emphasis added.) R.C. 4112.01(B). The Ohio General Assembly does not go so far as to require preferential treatment for pregnant employees, as the clear

language of this statute demands only that they be treated the same as other non-pregnant employees.

The legislature charged the OCRC with adopting rules to effectuate R.C. Chapter 4112, and the OCRC promulgated Ohio Adm. Code 4112-5-05 to assure compliance with the chapter. *See* R.C. 4112.04 and Ohio Adm. Code 4112-5-01. Significantly, the OCRC recognized that its regulations “are not intended to either expand or contract the coverage of Chapter 4112 of the Revised Code.” Ohio Adm. Code 4112-5-01.

Nevertheless, the OCRC and the Court of Appeals would have this Court do just that – expand the statute’s coverage. The Court of Appeals’ decision fundamentally alters the statute, mandating preferential treatment of pregnant employees by requiring employers to grant them leave in excess of and regardless of an equally applied internal leave policy. However, Ohio courts have rejected the preferential treatment approach. *See Priest v. TFH-EB, Inc.* (1998), 127 Ohio App.3d 159, 165, 711 N.E.2d 1070, discretionary appeal not allowed (1998), 82 Ohio St.3d 1480, 696 N.E.2d 1087 (noting that Ohio courts have “implicitly... and expressly... recognize[d] that an employer need not accommodate pregnant women to the extent that such accommodation amounts to preferential treatment” (citing *Frank v. Toledo Hosp.* (1992), 84 Ohio App.3d 610, 617 N.E.2d 774, *Frazier v. The Practice Mgt. Resource Group, Inc.* (June 27, 1995), Franklin App. No. 95APE01-46)).

In this case, the Court of Appeals improperly cited *California Federal Savings & Loan Ass’n v. Guerra* (1987), 479 U.S. 272, 107 S.Ct. 683, 93 L.Ed.2d 613, to support its argument that Ohio law requires preferential treatment. *Guerra* determines only whether preferential treatment is *permitted* under Title VII, not whether it is *required*. *Id.* at 283-

284. Moreover, *Guerra* interprets California Government Code Section 12945, which specifically required employers to provide female employees an unpaid pregnancy disability leave up to four months. *Id.* at 275-276. This leave statute was enacted by the California legislature *in addition to* California's anti-discrimination statute, Government Code Section 12940. *See* Cal. Govt. Code 12945. Presumably, the California legislature realized that the anti-discrimination statute did not place an affirmative duty on employers to provide leave, and therefore it created the duty statutorily.

The United States Congress examined and allowed for a minimum length of service requirement when it enacted the Family and Medical Leave Act ("FMLA") in 1993, limiting FMLA leave to employees with one year of service. Section 2611, *et seq.*, Title 29, U.S. Code. At the time, the Pregnancy Discrimination Act ("PDA") had already specified that sex discrimination included discrimination on the basis of pregnancy. *See* Section 2000e(k), Title 42, U.S. Code. Therefore, not only did Congress presumably agree that there was a legitimate nondiscriminatory business justification for a minimum length of service requirement, but like California, it found that the anti-discrimination statute did not mandate leave.<sup>2</sup>

Ohio's anti-discrimination statute requires only equal treatment, and the Ohio legislature has not chosen to create additional obligations. The OCRC cannot expand the statute now simply by instituting a leave requirement through regulations. *See* Ohio Adm. Code 4112-5-01. As Congress did when it enacted the FMLA, the OCRC is attempting to mandate maternity leave, but the OCRC is not the legislature. POCC

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<sup>2</sup> R.C. 4112.02 is nearly identical to the PDA, and the Ohio Supreme Court has held that federal case law interpreting Title VII is applicable to cases involving alleged violations of Chapter 4112. *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n* (1981), 66 Ohio St.2d 192, 196, 421 N.E.2d 128.

treated McFee the same as all other employees who did not meet the minimum length of service requirement under its leave policy, and this is all that was required under the state's anti-discrimination statute.

**Proposition of Law No. II: The OCRC's own regulations specifically envision and permit minimum length of service requirements for leave policies.**

Even if the OCRC did have the authority to expand the Ohio anti-discrimination statute and mandate maternity leave – which it does not – it has not actually done so. Ohio Adm. Code 4112-5-05(G)(2) states simply that termination caused by an employment policy under which “insufficient or no maternity leave is available” shall constitute discrimination. However, Ohio Adm. Code 4112-5-05(G)(5) specifically allows for minimum length of service requirements, as follows:

When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. *For example, if the female meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing. Conditions applicable to her leave (other than its length) and to her return to employment shall be in accordance with the employer's leave policy.*

(Emphasis added.) Ohio Adm. Code 4112-5-05(G)(5). The Court of Appeals failed to address the clear language of Ohio Adm. Code 4112-5-05(G)(5) and instead relied solely on 4112-5-05(G)(2).

At first glance, 4112-5-05(G)(2) and 4112-5-05(G)(5) may seem contradictory. However, following the rule of construction that the specific prevails over the general, the two regulations can be reconciled. *See* R.C. 1.51; *McCoy v. McCoy* (1995), 105 Ohio App.3d 651, 656, 664 N.E.2d 1012 (stating that “courts are not free to construe general

language of [a] statute in a manner that renders specific enumerations meaningless”). Ohio Adm. Code 4112-5-05(G)(5) serves as a defining provision of 4112-5-05(G)(2). Expressly, Ohio Adm. Code 4112-5-05(G)(2) does not define “insufficient or no maternity leave,” and 4112-5-05(G)(5) goes on to specify and describe a policy that does not qualify as such. In other words, a leave policy with a minimum length of service requirement is not considered by the OCRC to be a policy under which “insufficient or no maternity leave is available.”

The OCRC’s own actions also indicate that this reading of the regulations is consistent with their original intent. The OCRC has previously issued a decision allowing minimum length of service requirements. *See Johnson v. Watkins Motor Lines, Inc.* (Oct. 3, 2001), 2001 Ohio Civil Rights Comm. LEXIS 10, \*3. Also, in 2007, the OCRC attempted to change its regulations to remove the permissive language of 4112-5-05(G)(5). The OCRC sought to add language making distinctions based upon length of service discriminatory and requiring twelve weeks of leave for pregnant employees, unless justified by business necessity. If the law does not allow minimum length of service requirements as the OCRC currently suggests, then why did it try to redraft its regulations in this manner? Regardless, JCARR voted to strike down the proposed rule change. OCRC cannot now enforce the regulations as if it had succeeded in changing them.

The Court of Appeals further argues that the only provision expressly applying to termination is 4112-5-05(G)(2), and claims that the OCRC was correct in relying on this provision because no maternity leave was available to McFee. This argument is flawed, as leave indisputably would have been available to McFee after a year of service.

Furthermore, where the employee's pregnancy simply creates the situation in which a facially neutral policy requires termination, her pregnancy is *not* considered a factor in the termination. *Frank v. Toledo*, 84 Ohio App.3d at 617-618 (stating that failure to make leave available to a pregnant employee in lieu of terminating her was not discriminatory *unless* it was shown that such employee was terminated because of, or on the basis of, pregnancy).

The Court of Appeals also inexplicably asserts that Ohio Adm. Code 4112-5-05(G)(5) should not apply to termination cases because termination is not a "condition" of employment. To the contrary, termination is the *ultimate* condition of employment. The United States Court of Appeals, Sixth Circuit has stated that a materially adverse change in "terms and conditions" of employment might be indicated by a *termination of employment*, a demotion evidenced by a decrease in salary, a less distinguished title, and more. *Coleman v. ARC Automotive, Inc.* (C.A.6, 2007), 255 Fed. Appx. 948, 951, 2007 WL 3390945.

POCC's leave policy placed a one-year minimum length of service requirement on leave, as specifically permitted by Ohio Adm. Code 4112-5-05(G)(5). The Ohio legislature was given the opportunity to change this regulation and require leave for pregnant employees, and it did not take the opportunity to do so. McFee was not eligible for leave (and therefore was terminated) because she did not meet this minimum length of service requirement, not because of her pregnancy. Consequently, POCC did not violate Ohio's anti-discrimination laws.

**Proposition of Law No. III: The *McDonnell Douglas* burden-shifting test applies because there is no direct evidence of discrimination.**

The Court of Appeals dismissed the burden-shifting test established in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, summarily concluding there was direct evidence of discrimination because McFee was not provided leave. The Court of Appeals failed to cite any authority for this reasoning, most likely because authority is to the contrary.

First, in finding the failure to provide leave was direct evidence of discrimination, the court improperly relied upon its own mistaken holding that there is an affirmative duty to provide leave. Direct evidence is present when, accepting the employee's version of the facts, no inference is necessary to conclude that the employee has proven discrimination. *Kleiber v. Honda of America Mfg., Inc.* (C.A.6, 2007) 485 F.3d 862, 868. Here, McFee stipulated that she was terminated because of her failure to meet POCC's minimum length of service requirements. Clearly, the Court is being asked to infer that this termination was discriminatory rather than based on a neutral policy.

Additionally, courts have found that the *McDonnell Douglas* framework and burden shifting-approach generally applicable to Title VII cases should be used in determining discrimination claims under the Pregnancy Discrimination Act and R.C. Chapter 4112. *See, e.g., Priest v. TFH-EB, Inc.* (1998), 127 Ohio App.3d at 166-167; *McConaughy v. Boswell Oil Co.* (1998), 126 Ohio App.3d 820, 826-827, 830, 711 N.E.2d 719. The court has specifically applied burden-shifting even where no leave was available. *See Frank v. Toledo Hosp.*, 84 Ohio App.3d at 615-616.

To establish a prima facie case of discrimination under the *McDonnell Douglas* framework, a plaintiff must show (1) she was pregnant, (2) she was subject to an adverse employment decision, (3) she was qualified for the job she lost, and (4) another employee similar in his or her ability or inability to work received more favorable treatment. *McConaughy*, 126 Ohio App.3d at 827. Once the employee has established a prima facie case, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the discharge. *Id.* at 826. The burden then shifts back to the employee to demonstrate that the reasons offered by the employer are pretextual. *Id.* McFee cannot establish a prima facie case of discrimination because she has offered no evidence that other employees similar in their ability or inability to work were treated differently. POCC applied its length of service requirement and leave policy equally. Therefore, no discrimination is present.

### CONCLUSION

For the reasons stated herein, further review of the judgment of the Licking County Court of Appeals, Fifth Appellate District is warranted. The Court should accept jurisdiction so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction of Amicus Curiae, Ohio Health Care Association, has been served upon the following persons, by Federal Express overnight delivery on this 23rd day of April, 2009:

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