

ORIGINAL

In the
Supreme Court of Ohio

NURSING CARE MANAGEMENT OF	:	Case No. 2009-0756
AMERICA, INC. d/b/a/ PATASKALA OAKS	:	
CARE CENTER	:	On Appeal from the
	:	Licking County
Appellant,	:	Court of Appeals,
	:	Fifth Appellate District
	:	
v.	:	Court of Appeals Case
	:	No. 08CA0030
OHIO CIVIL RIGHTS COMMISSION	:	
	:	
Appellee.	:	

**MEMORANDUM OPPOSING JURISDICTION
OF APPELLEE OHIO CIVIL RIGHTS COMMISSION**

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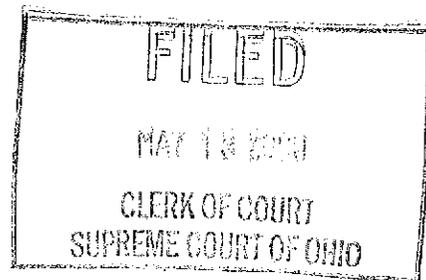


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INTRODUCTION

This case does not warrant review because the statute in question - R.C. 4112.02(A) - is clear. This clarity is underscored by the fact that every Ohio appellate court applying R.C. 4112.02(A) to the issue of maternity leave has unanimously held that such leave must be provided “for a reasonable period of time.” In fact, over twenty years ago the U.S. Supreme Court upheld a similar state law, ruling that maternity leave laws promote the overall purpose of pregnancy discrimination statutes by ensuring that working women will not lose their jobs on account of pregnancy disability. *California Fed. Sav. & Loan Assn. v. Guerra* (1987), 479 U.S. 272, 285-286, 289. Any remaining doubt concerning Ohio’s prohibition against terminating a pregnant employee due to her medical need for maternity leave is eliminated by R.C. 4112.08, which mandates that Ohio’s pregnancy discrimination law must be interpreted liberally so that its purpose - to protect a pregnant woman from losing her job on account of disability - will not be thwarted.

This case involves Tiffany McFee, a pregnant employee who requested medically-necessary maternity leave. Rather than provide maternity leave, however, Ms. McFee’s employer terminated her because it has a policy of denying all leave requests, regardless of type, for the first year of employment. On appeal, the Fifth District held that Ms. McFee’s termination violated Ohio law.

The starting point of the analysis is R.C. 4112.02(A), which prohibits terminations “because of sex.” By definition, this prohibition includes terminations “because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions.” R.C. 4112.01(B). Reading these two provisions together, it becomes evident that a termination resulting from a medical condition “related” to pregnancy - such as the act of childbirth and its recovery - is a termination “on the basis of pregnancy.” Appellant’s position to the contrary requires the nonsensical assumption that the medical condition necessitating maternity leave (i.e., childbirth itself) is not a medical condition “related” to pregnancy.

Ohio Administrative Code 4112-5-05(G) provides sensible guidance regarding the amount of leave required to avoid terminations “on the basis of pregnancy” – maternity leave need only be provided “for a reasonable period of time.” Ohio courts have consistently and uniformly applied this law for decades and, to date, every appellate panel ruling on this question has unanimously held that maternity leave must be provided “for a reasonable period of time.” In its attempt to obtain this Court’s review, Appellant ignores these holdings and instead alleges that there is “confusion and uncertainty” regarding the requirements of Ohio’s maternity leave law. Given the harmony of Ohio courts, however, this alleged “confusion and uncertainty” simply does not exist.

In the instant case, the Fifth District held that a “no leave for one year” policy violates Ohio law when its application results in the termination of a pregnant employee due to her medical need for maternity leave. In contrast, Appellant argues that reasonable maternity leave for pregnant women is actually *unlawful* because it provides so-called “preferential treatment.”

The U.S. Supreme Court rejected the “preferential treatment” argument in *Guerra*. The Court’s majority opinion flatly discarded the notion that maternity leave can in any meaningful way be referred to as “preferential treatment” to the detriment of others, *Guerra*, 479 U.S. at 280-291, and Justice Stevens’ concurrence put the most reasoned point on the question:

[T]he PDA’s posture as part of Title VII compels rejection of [the] argument that the PDA mandates complete neutrality and forbids all beneficial treatment of pregnancy. *** [P]referential treatment of the disadvantaged class is only permissible so long as it is consistent with ‘[accomplishing] the goal that Congress designed Title VII to achieve.’ That goal has been characterized as seeking ‘to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of *** employees over other employees.’ *Guerra*, 479 U.S. at 292, 294-295.

Without question, a reasonable period of maternity leave “removes barriers that have operated in the past,” and achieves “equality of employment opportunity” by allowing fathers *and* mothers to work without fear of termination due to pregnancy, childbirth, or the related need for maternity leave.

STATEMENT OF THE CASE AND FACTS

A. Tiffany McFee was terminated because her employer failed to provide her with maternity leave.

After Tiffany McFee provided her employer with a physician's note stating that she was medically unable to work due to a pregnancy-related medical condition (swelling), and requesting six weeks of maternity leave, she was terminated. Her employer, Pataskala Oaks Care Center ("Pataskala Oaks"), refused to provide Ms. McFee with maternity leave because its internal policy provides no maternity leave – or any other type of leave – for any employee during the first year of employment. As a consequence of this policy, all pregnant employees requiring medically-necessary maternity leave during the first year of employment are fired.

B. The Ohio Civil Rights Commission found that Ms. McFee's termination was unlawful pregnancy discrimination.

After her termination, Ms. McFee filed a charge of discrimination with the Ohio Civil Rights Commission ("Commission"). In her charge, Ms. McFee alleged that she had been unlawfully terminated due to her pregnancy. The Commission investigated the allegation, ultimately finding it probable that Pataskala Oaks violated R.C. 4112. After conciliation efforts failed, the Commission issued an administrative complaint alleging that Ms. McFee had been terminated due to her pregnancy, in violation of R.C. 4112.02(A).

All relevant facts were stipulated and submitted to an Administrative Law Judge ("ALJ"). After the ALJ recommended the dismissal of the case, the Ohio Attorney General's Office filed objections to the recommendation, arguing that the ALJ's analysis was legally flawed.

The Commission held oral argument on February 1, 2007. After hearing argument, the Commission rejected the ALJ's recommendation, and issued a Final Order holding that the termination of Ms. McFee's employment was due solely to her need for maternity leave, and was therefore "because of pregnancy" in violation of R.C. 4112.02(A).

C. The Licking County Court of Common Pleas reversed the Commission's Final Order.

Pataskala Oaks filed a Petition for Judicial Review with the Licking County Court of Common Pleas, which upheld Ms. McFee's termination and reversed the Commission's decision.

The court of common pleas relied in part upon Ohio Admin.Code 4112-5-05(G)(2), which states:

Where termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical condition is caused by an employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination.

In analyzing this provision, the court flipped its meaning on its head. The court construed this regulation to mean that Pataskala Oaks could lawfully terminate Ms. McFee as a direct result of providing her with "insufficient or no maternity leave," so long as its policy provided maternity leave to *other* employees. In that regard, the court stated: "While leave was not available to Ms. McFee under the policy, the policy did provide pregnancy leave, and did not discriminate against pregnant employees." (Judgment Entry, at 7). In essence, the court held that pregnant women employed at Pataskala Oaks for one year or more cannot be terminated "on the basis of pregnancy" under Ohio law but, paradoxically, pregnant women employed for less than one year can be terminated "on the basis of pregnancy" without violating Ohio law.

The Commission appealed this decision to the Fifth Appellate District.

D. The Fifth Appellate District held that the denial of maternity leave "for a reasonable period of time" is direct evidence of pregnancy discrimination.

In its unanimous decision reversing the court of common pleas, the Fifth District held that the application of a "no leave for one year" policy to deny medically-necessary maternity leave for a pregnant employee is a violation of R.C. 4112.02(A). Further, the court held that the resultant termination under such a policy is direct evidence of unlawful pregnancy discrimination. The court stated that its holding was:

consistent with goals of the PDA and R.C. 4112.02 by promoting equal employment opportunity by ensuring that women will not lose their jobs on account of pregnancy disability. It ensures a female employee is not put in a position of choosing between her job and the continuation of her pregnancy, a dilemma which would never face a male employee in the first year of employment at Pataskala Oaks. Both sexes are entitled to have a family without losing their jobs, to hold otherwise would be to completely ignore the plain language of Ohio Admin.Code 4112-5-05(G)(2).

Nursing Care Mgmt. of Am. v. Ohio Civ. Rights Comm'n, 2009 Ohio 1107, ¶50.

The court further held that, as Ohio law requires maternity leave “for a reasonable period of time” without reference to the motive of the employer, Pataskala Oaks’ motive for denying maternity leave to Ms. McFee was irrelevant. Because of this, the framework designed by the U.S. Supreme Court to uncover motive (i.e., the *McDonnell Douglas* analysis) was not applicable. *Nursing Care Mgmt.*, at ¶53. Pataskala Oaks filed this appeal on April 24, 2009.

THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

A. Ohio’s pregnancy discrimination statute is clear.

Ohio Revised Code 4112.02(A) is clear – it prohibits terminations “because of sex.” With R.C. 4112.01(B), Ohio law defines a termination “because of sex” to include terminations “on the basis of pregnancy.” More specifically, R.C. 4112.01(B) defines the phrase “because of sex” to include “because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions.”

This definition illuminates the flaw in Pataskala Oaks’ overall argument: at its core, Pataskala Oaks asserts that childbirth is not a medical condition “related” to pregnancy. To the contrary, a plain reading of these statutes demonstrates that a termination based upon a pregnant employee’s medical need for maternity leave due to childbirth is a termination “on the basis of pregnancy” and, hence, is a termination “because of sex.”

Although R.C. 4112.02(A) prohibits terminations based upon medical conditions “related” to pregnancy, it does not provide guidance on how to avoid such childbirth-related

terminations. On this point, Ohio's Administrative Code provides guidance – maternity leave need only be provided “for a reasonable period of time.” Admin.Code 4112-5-05(G)(1)-(6).

B. All Ohio appellate courts addressing the issue of maternity leave have held that maternity leave need only be provided “for a reasonable period of time.”

Pataskala Oaks claims that there is “confusion and uncertainty” regarding the issue of maternity leave in Ohio. (Memorandum of Appellant, at 3). In fact, exactly the opposite is true. Every court of appeals decision applying R.C. 4112.02(A) to the issue of maternity leave has concluded that maternity leave must be provided “for a reasonable period of time.” There are no contrary appellate decisions, and thus no “confusion and uncertainty” on this point.

Of course, the most recent of these rulings is the instant case, issued by the Fifth District in March 2009. This decision correctly analyzed how maternity leave is to be applied in Ohio: because pregnant women cannot be terminated based upon pregnancy-related conditions, maternity leave must be provided “for a reasonable period of time.” *Nursing Care Mgmt.*, at ¶53. But *Nursing Care Mgmt.* does not exist in a vacuum. There are three additional Ohio appellate decisions, and one federal case analyzing Ohio law, that have applied the same analysis to the same law, and each has reached the same conclusion.

In 2000, the Southern District of Ohio addressed maternity leave under Ohio law. After citing R.C. 4112.02(A), R.C. 4112.01(B), and Admin.Code 4112-5-05(G), the court held that “A female employee must be granted a reasonable leave on account of childbearing.” *Woodworth v. Concord Management Limited* (S.D. Ohio W.D. 2000), 164 F. Supp. 2d 978, 982. The court also discussed the situation where – as in the instant case – the application of a leave policy to a pregnant employee actually results in the pregnant employee receiving *no* maternity leave.

The court held that in such situations the employer does not really have a maternity leave policy at all (i.e., the policy is “illusory”), and so Admin.Code 4112-5-05(G)(6) applies, which

requires maternity leave “for a reasonable period of time.” *Woodworth*, 164 F. Supp. 2d at 986, footnote 6. In other words, a so-called “leave policy” that in fact provides no leave is the equivalent of no policy at all. The court also noted that “The Ohio Administrative Code plainly indicates that new mothers ‘must be granted a reasonable leave on account of childbearing.’” *Woodworth*, 164 F. Supp. 2d at 985. The *Woodworth* decision counters Pataskala Oaks’ claim of “confusion and uncertainty” – Ohio law prohibits the application of a leave policy that operates to deny maternity leave for pregnant employees.

In 1998, the First Appellate District of Ohio addressed the issue of maternity leave, and looked to the situations where: 1) the employer has a leave policy, and 2) the employer does not have a leave policy. The court held that, either way, pregnant employees in Ohio are entitled to maternity leave “for a reasonable period of time.” *McConaughy v. Boswell Oil* (1st Dist. 1998), 126 Ohio App. 3d 820, 829, 711 N.E.2d 719.

Mirroring the discussion above, the court noted that R.C. 4112.02(A) prohibits terminations “because of sex,” and that this phrase includes “on the basis of pregnancy” pursuant to R.C. 4112.01(B). The First District then consulted the regulations in Ohio’s Administrative Code, and held that “[a]ccording to Ohio Admin.Code 4112-5-05(G)(5), if an employer has a leave policy, a female employé ‘must be granted a reasonable leave on account of childbearing.’ If there is no leave policy, the employee must be provided a leave of absence ‘for a reasonable period of time.’ Ohio Admin.Code 4112-5-05(G)(6).” *McConaughy*, 126 Ohio App. 3d at 829-830. As in *Woodworth*, the *McConaughy* decision refutes Pataskala Oaks’ claim of confusion; it is clear that regardless of an employer’s leave policy (or lack of one), maternity leave must be provided “for a reasonable period of time.”

In 1994, the Eighth District ruled that “[d]enial of maternity leave mandated by Ohio Admin.Code 4112-5-05(G)(6) is, in effect, terminating the employee because of her pregnancy.” *Marvel Consultants, Inc. v. Ohio Civ. Rights Comm’n* (8th Dist. 1994), 93 Ohio App. 3d 838, 841, 639 N.E.2d 1265. As noted above, Ohio Admin.Code 4112-5-05(G)(6) states that maternity leave must be provided “for a reasonable period of time.” Again, the “confusion and uncertainty” alleged by Pataskala Oaks is not supported by the *Marvel Consultants* decision.

Finally, the Sixth District ruled in 1992 that the “The purpose of Ohio Admin.Code 4112-5-05(G)(2) and (6) is clearly to provide substantial equality of employment opportunity by prohibiting an employer from terminating a female worker because of pregnancy without offering her a leave of absence, *even if no disability leave is available generally to employees.*” *Frank v. Toledo Hosp.* (6th Dist. 1992), 84 Ohio App. 3d 610, 617, 617 N.E.2d 774 (emphasis added). As in the *McConaughy* decision, the *Frank* court unanimously held that an employer must provide a pregnant employee with maternity leave “even if no disability leave is available generally to employees.” Pataskala Oaks’ allegation of “confusion” is again without support.

These cases represent the only Ohio appellate decisions to address whether maternity leave must be provided “for a reasonable period of time.”¹ Not only do these cases show significant unity between them but, more remarkably, each panel was unanimous in reaching its holding. Thus, Pataskala Oaks’ alleged “confusion” concerning maternity leave has no basis.

C. The Supreme Court of the United States has rejected Pataskala Oaks’ “absolute neutrality” and “preferential treatment” arguments.

Two main themes run throughout Pataskala Oaks’ Memorandum: 1) the “neutral”

¹ There are two other Ohio appellate decisions touching upon the issue of maternity leave. These cases quite sensibly hold that Ohio law does not require employers to provide *unlimited* maternity leave for pregnant employees. *Frantz v. Beechmont Pet Hosp.* (1996), 117 Ohio App. 3d 351, 357; *Frazier v. The Practice Management Resource Group, Inc.* (June 27, 1995), 1995 Ohio App. LEXIS 2750, *10, Franklin App. No. 95APE01-46, unreported.

application of its “no leave for one year” policy, and 2) the claim that reasonable maternity leave results in the unlawful “preferential treatment” of pregnant employees over non-pregnant employees. (Memorandum of Appellant, at 1, 7, 10). These themes ignore the fact that R.C. 4112.02(A) prohibits the termination of an employee due to conditions related to pregnancy – this law does not prohibit the termination of an employee due to non-pregnancy related conditions.

Over twenty years ago, the Supreme Court rejected Pataskala Oaks’ claim that maternity leave laws can in any meaningful way be characterized as compelling “preferential treatment” for pregnant women to the detriment of non-pregnant employees. *California Fed. Sav. & Loan Assn. et al. v. Guerra* (1987), 479 U.S. 272, 285-287, 291, 107 S. Ct. 683. In fact, the Court held that maternity leave laws simply ensure that pregnant women “will not lose their jobs on account of pregnancy disability.” *Guerra*, 479 U.S. at 289. In that regard, the Court noted that an employer is completely free to provide maternity-like leave to non-pregnant employees, and thereby not treat anyone “better” than anyone else. *Guerra*, 479 U.S. at 291. As such, maternity leave laws cannot be characterized as compelling employers to treat pregnant employees “better” than anyone else.

Likewise, Ohio’s requirement of reasonable maternity leave does not compel employers to treat pregnant employees “better” than non-pregnant employees. Instead, as held in *Guerra*, reasonable maternity leave simply ensures that pregnant employees are not terminated “on the basis of pregnancy.” In other words, the leave employers provide (or deny) to non-pregnant employees is unrelated to the prohibition against terminating pregnant employees “on the basis of pregnancy.”

As with the claim of “preferential treatment,” Pataskala Oaks’ argument of “absolute neutrality” has also been rejected. In *Coolidge v. Riverdale Local Sch. Dist.* (2003), 100 Ohio St. 3d 141, 2003 Ohio 5357, this Court addressed the anomaly of permitting the termination of a workers’ compensation claimant solely due to absences that resulted from the claimed injury:

In the final analysis, [allowing such a termination] reflects a rather anomalous proposition – that an employee cannot be fired for having pursued TTD compensation but can be fired for the very absenteeism and inability to work that defines the employee as eligible to receive such compensation.

Coolidge, 2003 Ohio 5357, at ¶42. Likewise, allowing the termination of a pregnant employee due to her medical need for maternity leave reflects the same “anomalous proposition” – an employee cannot be fired “on the basis of pregnancy” but can be fired for the physical necessities of childbirth that define the employee as pregnant. Although applying a leave policy with absolute neutrality “may well suffice as a galvanizing slogan,” *Coolidge*, 2003 Ohio 5357, at ¶45, it has no value in the analysis of a termination “on the basis of pregnancy.” In short, absolute neutrality notwithstanding, pregnant employees are entitled to medically necessary leave precisely because they are pregnant.

Similarly, in a federal case addressing a neutrally-applied, but inadequate, leave policy, the court held that “[a]n employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy it does have. Title VII outlaws employment discrimination traceable to an employee’s gender, and it takes little imagination to see that an omission may in particular circumstances be as invidious as positive action.” *Abraham v. Graphic Arts Internatl. Union* (D.C. Cir. 1981), 660 F.2d 811, 819. The omission here, of course, is the denial of maternity leave “for a reasonable period of time” for the sake of “absolute neutrality.”

The Supreme Court in *Guerra* also addressed the issue of a neutral policy resulting in the termination of a pregnant employee. As Justice Stevens wrote in his concurrence: “[T]he PDA’s posture as part of Title VII compels rejection of [the] argument that the PDA mandates complete neutrality ***.” *Guerra*, 479 U.S. at 292. This is because a neutral policy that results in the blanket denial of maternity leave actually results in *unequal* treatment: it forces pregnant employees to choose between having a job and having a family, something that the neutral policy never forces upon non-pregnant employees.

As these issues have already been adequately addressed, and as all Ohio appellate courts addressing maternity leave have unanimously adopted the view that it is required “for a reasonable period of time,” no further clarification requiring this Court’s review is needed.

ARGUMENT

Appellee Ohio Civil Rights Commission’s Proposition of Law No. 1:

Terminating a pregnant employee solely on the basis of her need for maternity leave is unlawful sex discrimination.

It is unlawful for Ohio employers to terminate an employee “on the basis of pregnancy.” R.C. 4112.02(A), 4112.01(B). As childbirth is a medical condition related to pregnancy, it is likewise protected. R.C.4112.01(B). And yet, Pataskala Oaks persists in arguing that Ohio law allows employers to terminate a pregnant employee due to her medical need for leave to give birth to her child.

Pataskala Oaks’ argument results in an absurd position: although a pregnant woman cannot be terminated “on the basis of pregnancy,” she can nevertheless be terminated due to the resultant need to give birth to her child. By adopting this position, Pataskala Oaks ignores reality to insulate itself from liability.

Ohio law has a specific statute instructing courts to reject such an irrational analysis. Revised Code 4112.08 requires R.C. 4112 – including its laws protecting pregnant employees – to be interpreted liberally so that it will accomplish its purposes. This Court has a lengthy history of refusing to allow parties to interpret Ohio’s anti-discrimination laws in a manner that would thwart its purposes. *Ohio Civil Rights Comm’n v. Lysyj* (1974), 38 Ohio St. 2d 217, 220 (“courts, upon review, are to construe [R.C. 4112] liberally in order to effectuate the legislative purpose and fundamental policy implicit in their enactment, and to assure that the rights granted by the statutes are not defeated by overly restrictive interpretation.”); see also *Ohio Civil Rights*

Comm'n v. David Richard Ingram, D.C. (1994), 69 Ohio St. 3d 89, 94, 1994 Ohio 515, 630 N.E.2d 669; *Rice v. CertainTeed Corp.* (1999), 84 Ohio St. 3d 417, 420-421, 1999 Ohio 361, 704 N.E.2d 1217; *Leininger v. Pioneer Nat'l Latex* (2007), 115 Ohio St. 3d 311, 2007 Ohio 4921, ¶31, 875 N.E.2d 36; *Dworning v. City of Euclid*, 2008 Ohio 3318, ¶34, 892 N.E.2d 420.

Permitting the termination of a pregnant employee due to her medical need for maternity leave would thwart the core purpose of Ohio's pregnancy discrimination statute. Pataskala Oaks cannot escape liability for violating this law by simply claiming that it blindly terminates all of its other employees who need leave for different, non-pregnancy related reasons. This view – which simply pretends that pregnancy does not exist in the workplace – would directly contravene Ohio's law prohibiting terminations based upon pregnancy. In short, it is *pregnancy* that is protected from termination under Ohio's sex discrimination statute; terminations resulting from medical conditions unrelated to pregnancy are not.

Appellee Ohio Civil Rights Commission's Proposition of Law No 2:

A “no leave for one year” policy that denies reasonable maternity leave to a pregnant employee, resulting in her termination, is unlawful sex discrimination.

Without question, Pataskala Oaks' policy provided no maternity leave for Ms. McFee. As every Ohio Appellate decision addressing the issue has held, maternity leave must be provided “for a reasonable period of time.” *McConaughy*, 126 Ohio App. 3d at 829-830; *Marvel Consultants, Inc.*, 93 Ohio App. 3d, at 841; *Frank*, 84 Ohio App. 3d, at 617; see also *Woodworth*, 164 F. Supp. 2d at 985. By definition, an employer that provides “no leave” for a period of time fails to provide maternity leave “for a reasonable period of time” during that time period.

Because of this, several appellate cases rightfully hold that the specifics of an employer's internal leave policy are immaterial to the right of a pregnant employee to reasonable maternity leave. For example, both the *McConaughy* and *Frank* decisions note that, whether the employer

has a leave policy or not, it is unlawful to deny reasonable maternity leave. *McConaughy*, 126 Ohio App. 3d, at 829-830; *Frank*, 84 Ohio App. 3d, at 617. Thus, employers are prevented from crafting leave policies that would thwart the purpose of Ohio's pregnancy discrimination laws.

In light of these unanimous decisions, it is immaterial whether a "no leave for one year" policy is applied neutrally to all of its employees when, as in the instant case, the employer admits that it denied a pregnant employee maternity leave "for a reasonable period of time." Accordingly, the Fifth District was correct when it held that "Pataskala Oaks does not deny that McFee requested maternity leave, and that it terminated McFee without providing her maternity leave for a reasonable period of time. Pursuant to Ohio Admin.Code 4112-05-05(G)(2) such termination 'shall constitute unlawful sex discrimination'." *Nursing Care Mgmt.*, at ¶53. Consequently, the application of a "no leave for one year" policy to deny reasonable maternity leave and terminate a pregnant employee is a termination "on the basis of pregnancy," and is therefore unlawful sex discrimination.

Appellee Ohio Civil Rights Commission's Proposition of Law No 3:

The *McDonnell Douglas* framework is a tool used to reveal unlawful discriminatory intent. In cases that do not involve intent, but rather an employer's failure to perform an affirmative duty, the *McDonnell Douglas* framework does not apply.

In *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, the U.S. Supreme Court developed a tool to assist courts in ferreting out whether a discriminatory intent underlies an allegedly unlawful action. As this Court has stated, "The function of the *McDonnell Douglas* prima facie test is to allow the plaintiff to raise an inference of discriminatory intent indirectly." *Mauzy v. Kelly Servs.* (1996), 75 Ohio St. 3d 578, 583 (internal citations and quotes omitted). Further, "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Id.*

No inferences are necessary when interpreting Ohio's Administrative Code – it requires maternity leave “for a reasonable period of time.” Admin.Code 4112-5-05(G)(1)–(6). Likewise, no inferences are needed when determining whether an employer has satisfied this requirement. In this case, Pataskala Oaks stipulated that it did not provide any maternity leave to Ms. McFee.

Pataskala Oaks' motive for denying the reasonable maternity leave required by law is simply irrelevant. Consequently, the *McDonnell Douglas* framework – which operates by inference to uncover motive – is not applicable. Because no inferences are necessary, Pataskala Oaks' blanket denial of leave, when it results in the denial of reasonable maternity leave, is direct evidence of pregnancy discrimination.

This position simply makes sense. In contrast, the Proposition suggested by Pataskala Oaks (that the *McDonnell Douglas* framework applies to *all* claims of pregnancy discrimination) assumes that all pregnancy discrimination claims allege a discriminatory motive. Such sweeping reliance on the *McDonnell Douglas* framework is an oversimplification, and improperly requires pregnant employees to establish proof that the employer had a *motive* behind its failure to satisfy the affirmative duty to provide maternity leave “for a reasonable period of time.”

Several Ohio courts have already determined that, in the context of discrimination law under R.C. 4112, the application of the *McDonnell Douglas* test is inappropriate in situations where the employer failed to satisfy an affirmative duty. *Shaver v. Wolske & Blue* (2000), 138 Ohio App. 3d 653, 663, 742 N.E.2d 164 (“The *McDonnell Douglas* prima facie case and burden shifting analysis does not apply in a failure to accommodate case.”); see also *DeCesare v. Niles City Sch. Dist. Bd. of Educ.* (2003), 154 Ohio App. 3d 644, 2003 Ohio 5349, 798 N.E.2d 655, at ¶23. In short, as noted by the Administrative Code, the failure to perform an affirmative duty establishes a direct violation, and there is no need for the indirect proof and burden-shifting

framework of *McDonnell Douglas*. Admin.Code 4112.05-5(G)(2). This reasoning is consistent with this Court's precedent, holding that the *McDonnell Douglas* test is inapplicable to cases involving direct evidence of discrimination. *Mauzy*, 75 Ohio St. 3d at 583.

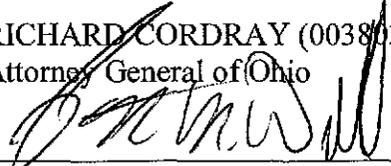
In the final analysis, Pataskala Oaks does not deny that it terminated Ms. McFee rather than provide her with maternity leave "for a reasonable period of time." Instead, Pataskala Oaks' only explanation is that it automatically denies every type of leave to every type of employee who needs it during the first year of employment. There is no need to infer the motive behind Pataskala Oaks' failure – good, bad, or simply indifferent to the statutorily-protected rights of pregnant employees, an employer's motive for denying reasonable maternity leave is irrelevant in light of Ohio's requirement that employers provide maternity leave for a "reasonable period of time." As a result, the *McDonnell Douglas* framework does not apply.

CONCLUSION

For the above reasons, this Court should decline jurisdiction.

Respectfully submitted,

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I certify that a copy of the foregoing was served by U.S. mail this 13th day of May,

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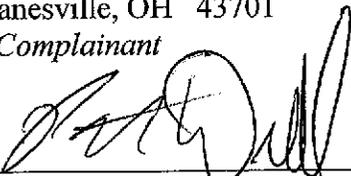
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