

ORIGINAL

IN THE SUPREME COURT OF OHIO

Nursing Care Management of America, Inc. :
d/b/a Pataskala Oaks Care Center, :
 : Case No. 2009-0756
Appellant, :
 :
v. :
 :
Ohio Civil Rights Commission, : On Appeal from the Licking County Court
 : of Appeals, Fifth Appellate District
 : Court of Appeals
Appellee. : Case No. 08CA0030

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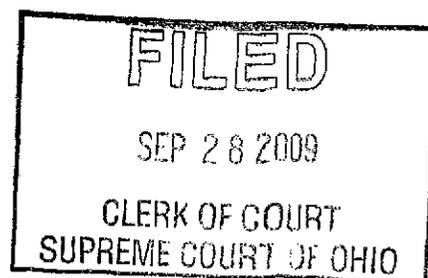


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STATEMENT OF INTEREST

Amicus curiae Ohio Management Lawyers Association is an Ohio nonprofit corporation. Its stated purpose is “[t]o provide an organization and forum for the exchange of information, discussion of common issues and problems, and promotion of the administration of justice with respect to employment, labor, and other areas of law affecting employers.” It submits this brief because it believes the issue regarding mandatory maternity leave before the Court in this case is of critical importance to Ohio employers. The issue also raises important questions about the constitutional limits of an administrative agency’s rule-making authority.

STATEMENT OF FACTS

Amicus curiae adopts the Statement of the Case and Facts in Appellant’s merit brief to this Court.

ARGUMENT

Proposition of Law No. 1: Ohio Revised Code Chapter 4112 is an anti-discrimination statute and cannot be interpreted by a court or agency as a mandatory leave statute.

I. Introduction.

The Ohio Civil Rights Commission (OCRC) has adopted an administrative rule that requires employers to provide their female employees with “reasonable leave on account of childbearing.” See O.A.C. 4112-5-05(G)(5) and (6) . Yet nothing in R.C. Chapter 4112 mentions maternity leave or otherwise authorizes the OCRC to require employers to provide maternity leave. Chapter 4112 prohibits discrimination on the basis of sex and pregnancy but cannot be interpreted as requiring a minimum amount of maternity leave.

This case is not about whether requiring employers to provide maternity leave is good public policy or bad public policy. This case is about who has the constitutional authority to determine that public policy in the first place. Under the Ohio Constitution, the General Assembly makes that determination, not an unelected administrative agency like the OCRC. In adopting the mandatory maternity leave requirements in 4112-5-05(G), the OCRC exceeded the authority delegated to it by the General Assembly and created public policy without a statutory grant of authority to do so. The OCRC rule requiring maternity leave is a usurpation of legislative authority and is therefore invalid.

II. The only rule-making authority the Ohio Civil Rights Commission has is that which has been properly delegated to it by the General Assembly.

The Ohio Constitution vests all legislative authority in the General Assembly and local legislative bodies with home rule powers. Section 1, Article II and Section 7, Article XVIII, Ohio Constitution. The Constitution forbids delegation by a legislative body “to any other power the right to declare principles and standards or general public policy.” Desenco, Inc. v. Akron, 84 Ohio St.3d 535, 538, 706 N.E.2d 323, 328, 1999-Ohio-368; see also Belden v. Union Cent. Life Ins. Co. (1944), 143 Ohio St. 329, paragraph one of the syllabus, 55 N.E.2d 629, 630 (“the General Assembly...may not abdicate or transfer to others the essential legislative functions with which it is vested.”). This is because “[m]embers of the General Assembly are accountable to their constituents because they are elected to office.” Chambers v. St. Mary’s School, 82 Ohio St.3d 563, 566, 697 N.E.2d 198, 201, 1998-Ohio-184, citing Section 2, Article II, Ohio Constitution. “The legislative process and accountability are the cornerstones of the democratic process which justify the General Assembly’s role as lawmaker.” Id. at 567, 697 N.E.2d at 202.

In contrast, administrative agencies like the OCRC “have no accountability as do members of the General Assembly.” Id. For this reason, “[a]dministrative rules do not dictate

public policy, but rather expound upon public policy already established by the General Assembly in the Revised Code. The purpose of administrative rule-making is to facilitate an administrative agency's placing into effect a policy declared by the General Assembly in the statutes to be administered by the agency." Id. The General Assembly may delegate rule-making to an administrative agency. Amoco Oil Co. v. Petroleum Underground Storage Tank Release Comp. Bd., 89 Ohio St.3d 477, 483, 733 N.E.2d 592, 598, 2000-Ohio-224. "In delegating this authority, ordinarily the General Assembly must provide standards to guide the agency in its rulemaking. The administrative agency must adopt rules within the standards provided by the General Assembly in order for the rules to be valid." Id. at 480, 733 N.E.2d at 596. "The basic limitation on this authority is that an administrative agency may not legislate by enacting rules which are in excess of legislative policy, or which conflict with the enabling statute." P.H. English v. Koster (1980), 61 Ohio St.2d 17, 19, 399 N.E.2d 72, 74. Moreover, an agency cannot extend its own authority beyond that which has been provided by the General Assembly. Burger Brewing Co. v. Thomas (1975), 42 Ohio St.2d 377, 379, 329 N.E.2d 693, 695.

It is well settled that an agency only has the express or implied rule-making authority conferred on it by the General Assembly. Id. If the authority claimed by the agency is implied:

the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective. In short, the implied power is only incidental or ancillary to an express power, and, *if there be no express grant*, it follows, as a matter of course, that *there can be no implied grant*. In construing such grant of power, particularly administrative power through and by a legislative body, the rules are well settled that *the intention of the grant of power, as well as the extent of the grant, must be clear; that in cases of doubt that doubt is to be resolved not in favor of the grant but against it.*

D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health, 96 Ohio St.3d 250, 259, 773 N.E.2d 536, 545, 2002-Ohio-4172 ¶¶39-40, quoting State, ex rel. A. Bentley & Sons Co. v. Pierce (1917), 96 Ohio St. 44, 47 (emphasis added).

The General Assembly delegated to the OCRC the authority to promulgate rules of procedure in order to operate efficiently. As discussed below, while R.C. 4112.04 provides the OCRC with the authority to implement rules to carry out the purposes of Chapter 4112, the legislature did not confer upon the OCRC the substantive authority to implement public policy in the form of mandatory maternity leave.

III. The General Assembly has delegated authority to the OCRC to adopt rules only to administer Chapter 4112, not to require that employers provide maternity leave.

To determine whether the OCRC exceeded its legislative grant of authority by adopting its mandatory maternity leave, the Court must first determine whether Chapter 4112 discusses maternity leave or delegates to the OCRC the authority to adopt rules regarding maternity leave. “In determining intent, it is the duty of this Court to give effect to the words used, not to delete words used or insert words not used.” Cline v. Ohio Bur. of Motor Vehicles (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77, 80-81.

The General Assembly enacted the Civil Rights Law, among other things, to prohibit sex discrimination in employment:

It shall be an unlawful discriminatory practice: (A) For any employer, because of the...sex...of any person, to discharge without cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

R.C. 4112.02(A). The General Assembly expanded upon this prohibition to include pregnancy discrimination by requiring that “[w]omen affected by pregnancy, childbirth, or related medical

conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work..." R.C. 4112.01(B). Chapter 4112 thus reflects a legislative intent to prohibit discrimination on the basis of pregnancy and to require that pregnant employees be treated the same as non-pregnant employees for purposes of pay and fringe benefits. Nowhere in Chapter 4112, however, does the General Assembly mention maternity leave, mandate maternity leave, or expressly or impliedly delegate to the OCRC the authority to adopt rules regarding mandatory maternity leave. Consequently, Chapter 4112 does not reflect a legislative intent to require Ohio employers to provide maternity leave to their employees.

IV. The OCRC usurped the General Assembly's legislative authority by adopting a mandatory maternity leave requirement for Ohio employers.

To carry out its intent in prohibiting discrimination, the General Assembly has authorized the OCRC to "[a]dopt, promulgate, amend, and rescind rules to effectuate the provisions of this chapter and the policies and practice of the commission in connection with this chapter."

R.C. 4112.04(A)(4).¹ The purpose of the OCRC's rules "is to assure compliance with the provisions of Chapter 4112 of the Revised Code" and "[s]uch rules...are not intended to either expand or contract the coverage of Chapter 4112 of the Revised Code." O.A.C. 4112-5-01. The rules are meant to assist in implementing legislative policy. At the same time, the rules cannot expand upon or create such policy, "no matter how laudable or sensible the ends sought to be

¹ The OCRC is also required to recommend to the General Assembly "legislative or other remedial action" the OCRC deems necessary. *Id.* 4112.04(A)(8). From a review of the OCRC's available annual reports, the OCRC has not recommended that the General Assembly enact mandatory maternity leave legislation. See <http://crc.Ohio.gov/annualreports.htm> (last visited 9/15/09).

accomplished.” Carroll v. Dept. Admin. Serv. (10 Dist. 1983), 10 Ohio App.3d 108, 110, 460 N.E.2d 704, 707.

Chapter 4112 requires that pregnant employees be treated the same as non-pregnant employees. There is no express grant of authority to the OCRC in Chapter 4112 to adopt rules requiring maternity leave. Despite this, the OCRC has adopted a mandatory maternity leave rule doing just that. As graphically illustrated below, the OCRC’s maternity leave rule bears no resemblance to the express direction of equality chiseled in plain English into the statute’s language. As importantly, the statute is silent on any concept of preferential maternity leave.

Revised Code 4112.01(B)	OCRC Rule 4112-5-05(G)(5) and (6)
<p>“Women affected by pregnancy, childbirth, or related medical conditions <i>shall be treated the same</i> for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work...” (Emphasis added.)</p>	<p>“Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. <i>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.</i> 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 her return to employment shall be in accordance with the employer’s leave policy.”</p> <p>“Notwithstanding paragraphs (G)(1) to (G)(5) of this rule, <i>if the employer has no leave policy, childbearing must be considered by the employer to be a justification for leave of absence for a female employee for a reasonable period of time.</i> Following childbirth, and upon signifying her intent to return within a reasonable time, such female employee shall be reinstated to her original position or to a position of like status and pay, without loss of service credits.” (Emphasis added.)</p>

The Fifth District accepted the validity of 4112-5-05(G) and concluded that Ohio law mandates maternity leave for all pregnant employees. The OCRC, however, has not been delegated authority to mandate maternity leave. In construing such a grant of authority, “the rules are well settled that the intention of the grant of power, as well as the extent of the grant must be clear; that in cases of doubt that doubt is to be resolved not in favor of the grant but against it.” Burger Brewing Co., 42 Ohio St.2d at 383. The Fifth District failed to recognize that the OCRC’s rule impermissibly expands the scope of Chapter 4112 and so is invalid. A rule adopted by an administrative agency is “valid and enforceable unless unreasonable or in conflict with the statutory enactment covering the same subject matter.” Amoco Oil Co. 89 Ohio St.3d at 484, 733 N.E.2d at 599, 2000-Ohio-224. “A rule that is contrary to statute is invalid.” Hoover Universal, Inc. v. Limbach (1991), 61 Ohio St.3d 563, 569, 575 N.E.2d 811, 816. To find otherwise, this Court would need to read into R.C. 4112.04 an incredibly broad grant of authority unintended by the General Assembly and not supported by the words of the statute. “It is well settled that an administrative agency has only such regulatory power as is delegated to it by the General Assembly. Authority that is conferred by the General Assembly cannot be extended by the administrative agency.” D.A.B.E., 96 Ohio St.3d at 259, 773 N.E.2d at 545, 2002-Ohio-4172 ¶38.

By exceeding its lawful authority, the OCRC engaged in unlawful public policy-making beyond the proper role of an administrative agency. This Court has already recognized that requiring employers to provide family leave is a matter of legislative concern involving a balancing of competing interests. In Wiles v. Medina Auto Parts, 96 Ohio St.3d 240, 773 N.E.2d 526, 2002-Ohio-3994, this Court reviewed the history of the federal Family and Medical Leave Act and explained that “Congress expressly stated an intent ‘to balance the demands of the

workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity’ and ‘to entitle employees to take reasonable leave...for the care of a child, spouse, or parent who has a serious health condition.’” Id. at 243, 773 N.E.2d at 530, 2002-Ohio-3994 ¶13, quoting 29 U.S.C. 2601(b) and citing Stekloff v. St. John’s Mercy Health Sys. (8th Cir. 2000), 218 F.3d 858, 861 (observing that “a desire to promote job security and stability in workplace relationships was central to Congress’s decision to pass the FMLA”). Similarly, in Hundley v. Dayton Power & Light Co., 148 Ohio App.3d 556, 774 N.E.2d 330, 2002-Ohio-3566, the Second District evaluated whether the one-year term-of-service requirement in the FMLA was mandatory. The court found that the one-year requirement “is part of the effort to balance the needs of employers against the needs of families...[T]he public policy of the FMLA reflects more of a balance between the interests of employers and employees. The FMLA seeks to accomplish the above-stated purpose ‘in a manner that accommodates the legitimate interests of employers.’” Id. at 561, 774 N.E.2d at 335, 2002-Ohio-3566 ¶20, quoting 29 U.S.C. 2601(b)(3).

Recently, this Court faced a situation similar to the one here in which an agency overstepped its authority by creating public policy. In D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health, 96 Ohio St.3d 250, 773 N.E.2d 536, 2002-Ohio-4172, the Court considered whether local boards of health had the statutory authority to adopt a Clean Indoor Air Regulation prohibiting smoking in public places. The Court recognized that the regulation was “well intentioned and beneficial.” Id. at 263, 773 N.E.2d at 549, 2002-Ohio-4172 ¶54. But the Court found that no express or implied authority existed in the rules-enabling statute or anywhere else in the Revised Code authorizing the local board to adopt that regulation. Consequently, the regulation was invalid:

Since there is no express delegation, it follows that there is no implied authority for petitioners to adopt the smoking ban at issue...In promulgating the Clean Indoor Air Regulation, petitioners engaged in policy-making requiring a balancing of social, political, economic, and privacy concerns. Such concerns are legislative in nature, and by engaging in such actions, petitioners have gone beyond administrative rule-making and usurped power delegated to the General Assembly.

Id. at 260, 773 N.E.2d at 546, 2002-Ohio-4172 ¶41. The Court “refuse[d] to extend by mere implication the authority of local boards of health beyond clearly stated and well-defined limits. To do so would require that we embrace policies and objectives that were not specifically designated by the General Assembly. Within its constitutional grant of powers, the General Assembly possesses both the authority to enact smoking legislation such as the regulation at issue and the prerogative to delegate that authority to local boards of health. However, unless the General Assembly or a local municipality with home-rule power decides otherwise, local boards of health are powerless to act as petitioners have acted herein.” Id. at 263, 773 N.E.2d at 549, 2002-Ohio-4172 ¶54.

Likewise, there is no express grant of authority to the OCRC in R.C. 4112.04 (the rules-enabling statute in the Civil Rights Law) or elsewhere in Chapter 4112 to adopt rules requiring that employers provide maternity leave to their pregnant employees. Whether to provide maternity leave, the extent of leave, and the limits and requirements for that leave all involve weighing competing interests. As with providing family leave or prohibiting smoking in public places, striking the proper balance among maternal and fetal health concerns, costs to business and to society, and employers’ right to operate their businesses is a uniquely legislative function. Unlike Athena from the head of Zeus, the FMLA did not spring fully formed from the heads of bureaucrats in the U.S. Department of Labor. In enacting the FMLA, these same matters were discussed and debated by Congress, which – after it enacted the FMLA – authorized the

Department of Labor to adopt rules implementing the FMLA. And here, it is for the elected members of the General Assembly to balance those same competing interests in determining whether Ohio's employers must provide maternity leave to their employees. However sensible or laudable the OCRC's maternity leave rule may be – just as the “well intentioned” attempt to prohibit smoking was in D.A.B.E. – that balancing and the resulting public policy is a legislative function reserved solely to the General Assembly. “Administrative regulations cannot dictate public policy...” D.A.B.E., 96 Ohio St.3d at 260, 773 N.E.2d at 546, 2002-Ohio-4172 ¶41. “[D]etermination of public policy remains with the General Assembly.” Chambers, 82 Ohio St.3d at 567, 697 N.E.2d at 202.

V. The passage of time does not validate the OCRC's maternity leave rule.

The OCRC first promulgated its mandatory maternity leave rule in 4112-5-05(G) in 1977; at the time, the rule provided that “[w]here termination of an employee who is temporally disabled due to pregnancy is caused by an employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination.” 4115-5-05(G)(2). The OCRC subsequently amended that rule in 1989 and 1997 to add the requirement that employers must provide pregnant employees with maternity leave “for a reasonable period of time.” 4115-5-05(G)(6); see also id. at (G)(5) (pregnant employees “must be granted a reasonable leave”). To date, this Court has not determined whether the OCRC exceeded its authority in adopting that maternity leave requirement. Lower courts, including the Fifth District in this case, have applied the rule, but none has specifically examined the underlying validity of the rule itself. The happenstance that the rule is long-standing and the fact that its validity apparently has not been challenged previously does not prevent this Court from invalidating it now.

Rules issued pursuant to statutory authority have the force and effect of law. Lyden Co. v. Tracy, 76 Ohio St.3d 66, 69, 666 N.E.2d 556, 559, 1996-Ohio-112. “A rule that is in conflict with law is invalid and unconstitutional because it usurps the General Assembly’s legislative function.” Williams v. Spitzer Autoworld Canton LLC, 2009-Ohio-3554 ¶18. A law that is unconstitutional is void from its enactment and incapable of any valid application. In City of Middletown v. Ferguson (1986), 25 Ohio St.3d 71, 495 N.E.2d 380, this Court explained that “an unconstitutional law must be treated as having no effect whatsoever from the date of its enactment. This fundamental proposition has been expressed as follows: ‘An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.’” Id. at 80, 495 N.E.2d at 388 (quoting Norton v. Shelby County (1886), 118 U.S. 425, 442). The maternity leave requirements in 4112-5-05(G) were adopted by the OCRC without having the statutory authority to do so. The rule is thus invalid, and “[t]he passage of time...cannot ‘cure’ this constitutional defect.” Id.

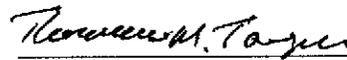
CONCLUSION

The balancing of work and family, maternal and fetal health, the rights of employers, and the provision of maternity leave are important matters of public policy. But the General Assembly has never delegated to the OCRC the authority to weigh and balance competing policy matters concerning mandatory maternity leave. There is not a hint, not a whiff, in either 4112.01(B) or 4112.04 that supports or even suggests the creation of mandatory maternity leave. To the contrary, the directive from the legislature is that all persons “shall be treated the same.” As well intentioned as its motive may have been, in creating an unlawful preference for pregnant

employees, the OCRC has exceeded its authority and acted exactly like a legislature rather than the appointed administrative agency it is.

As this Court concluded in D.A.B.E., “Power must always feel the check of power.” D.A.B.E., 96 Ohio St.3d at 263, 773 N.E.2d at 549, 2002-Ohio-4172 ¶55. In this case, the Court must check the OCRC’s exercise of unlawful power because it directly conflicts with the principles of “legislative process and accountability [that] are the cornerstones of the democratic process....” Chambers, 82 Ohio St.3d at 567, 697 N.E.2d at 202, 1998-Ohio-184. Amicus curiae Ohio Management Lawyers Association therefore respectfully requests that the Court reverse the decision of the Fifth District Court of Appeals and declare the provisions in 4112-5-05(G) relating to mandatory maternity leave invalid.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus Curiae was served by regular U.S. Mail, postage prepaid, upon the following counsel, this 28th day of September, 2009:

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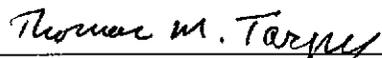
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