

ORIGINAL

IN THE SUPREME COURT OF OHIO

09-0756

OHIO CIVIL RIGHTS COMMISSION,

Respondent,

vs.

NURSING CARE MANAGEMENT OF AMERICA, INC. d/b/a/ PATASKALA OAKS CARE CENTER,

Petitioner.

:
: CASE NO. 05-0228
:
: On Appeal from the Fifth
: Appellate District
:
: Court of Appeals Case No. 08CA0030
:
:
:
:

BRIEF OF AMICI CURIAE NATIONAL FEDERATION OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER
IN SUPPORT OF PETITIONER NURSING CARE MANAGEMENT OF AMERICA, INC.,
d/b/a/ PATASKALA OAKS CARE CENTER

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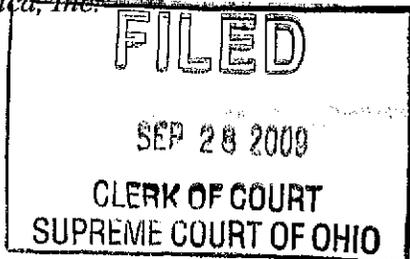


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INTEREST OF THE AMICUS CURIAE

Should the policy choice be to deny employers the exercise of their employment-at-will prerogative and require them to hold open the jobs of injured employees for indefinite periods of time, then employers will be burdened with employees unable to perform the work for which they were hired and an inability to obtain permanent replacements. This resolution would be particularly onerous on small employers with few employees, who lack the ability to shift the duties of an injured employee to other employees.¹

The National Federation of Independent Businesses (“NFIB”) is the nation’s leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate and grow their businesses. The NFIB Small Business Legal Center, a nonprofit public interest law firm established to protect the rights of America’s small business owners, is the legal arm of NFIB. To fulfill this role as the voice for small business, the NFIB Small Business Legal Center frequently files amicus briefs in cases that will impact small businesses. NFIB has about 350,000 members, including over 25,000 located in Ohio. NFIB represents small employers who typically have about ten employees and report gross sales of about \$500,000 per year.

While the concept of mandatory pregnancy leave with guaranteed reinstatement may be laudable in general, it can cause significant hardships for small employers. Consequently, NFIB is very concerned about the impact of the Commission’s decision on Ohio’s small business owners. Because small businesses tend to be very lean and have low profit margins, they have less workforce flexibility. While larger companies have the ability to move workers around, and adjust to additional governmental mandates, small businesses have greater difficulty dealing with additional requirements. Every new mandate, every required employee benefit and every

¹ *Bickers v. W. & S. Life Ins. Co.* (2007), 116 Ohio St.3d 351, 2007-Ohio-6751, at ¶21.

regulation is a new challenge for the limited resources of a small business. They undermine the profitability of the entity and even the viability of the company itself, many of which represent the life savings of their owners.

Most small business owners work 60-70 hours per week, often with no annual vacation. This can leave very little flexibility to fill in for workers who are on extended absences, making the locating and hiring of a qualified replacement essential to the survival of the business. Mandatory pregnancy leave would require small businesses to reserve employees' jobs during undefined "reasonable" periods of absence. This means that the available pool of possible replacement employees would be limited to those willing to accept temporary, rather than long-term, employment. For small businesses that often lead a hand-to-mouth existence, the inability to quickly find a qualified replacement could be devastating.

Perhaps even more harmful than the mandate to provide pregnancy leave is the vagueness of the "reasonable period" requirement. Small employers cannot afford either the time or legal fees necessary to obtain judicial validation as to what might constitute a "reasonable" amount of leave in a given situation. The practical result will be that small businesses will be compelled to provide even unreasonable amounts of leave because of the costs associated with litigating even a proper termination. A small business that "guesses wrong" in determining what constitutes a "reasonable period" of leave when discharging an absent employee may well be putting itself out of business.

Given that the Ohio Civil Rights Act has a jurisdictional minimum of only four employees, NFIB's membership falls squarely in the gunsights of the Commission's interpretation of Ohio's Administrative Code. By way of perspective, the only other law obligating Ohio employers to provide mandatory pregnancy leave is the federal Family and

Medical Leave Act (“FMLA”). But the FMLA does not impose an affirmative obligation on employers to offer medical leaves of absence until the jurisdictional threshold of *fifty* employees is reached. The Commission’s attempt to place a similar burden on employers that employ as few as *four* employees could be devastating to the membership of the NFIB. Before such a rule should be imposed on our small businesses, it should be fully explored, vetted and debated by the General Assembly, not simply implemented by an unelected administrative agency.

THE DISPUTE

This case involves the interpretation of Ohio Revised Code Sections 4112.02 and 4112.01(B), and whether those laws impose a mandatory pregnancy leave requirement upon all Ohio employers. Because neither section contains such a requirement on its face, the core of the dispute are the administrative regulations enacted by the Ohio Civil Rights Commission (OCRC), specifically Ohio Adm. Code 4112-5-05(G)(2), (5-6). Respondent and the Court of Appeals below argue that the Ohio Administrative Code requires that individuals who are temporarily disabled due to pregnancy must be given a “reasonable period” of leave, even if such leave is not available to other employees. Petitioner and Amicus NFIB argue that such a requirement cannot lawfully be read into Revised Code Chapter 4112.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals below improperly expands the reach of Ohio law regarding pregnancy discrimination by creating the right to a “reasonable period” of leave for pregnant employees. It reached this erroneous conclusion by either 1) misinterpreting Ohio Adm. Code 4112-05 et seq., or 2) improperly endorsing administrative regulations promulgated by the Ohio Civil Rights Commission that exceeded the authority of that agency. In any case, the decision of the Court of Appeals should be reversed.

The parties and courts below all agree that the language of the federal Pregnancy Discrimination Act (“PDA”), and Ohio’s subsequently enacted R.C. 4112.01(B), are functionally identical. Controlling opinions of this Court also confirm – and the Court of Appeals below agrees – that federal case law interpreting Title VII – which includes the PDA – is generally applicable to cases involving alleged violations of R.C. Chapter 4112. Yet, despite this syllogism directing that the two statutes be interpreted the same, the Court of Appeals below and Respondent effectively assert that R.C. 4112.01(B) somehow provides *greater* benefits to employees than does the PDA.

They reach this anomalous result by citing to portions of Ohio Administrative Code Section 4112-5-05(G) that purportedly provides pregnant employees with an absolute right to a “reasonable amount” of pregnancy leave. To the extent this interpretation of those regulations is accurate, this cannot be classified as anything other than the creation of a substantive right not to be found anywhere in either the PDA or Chapter 4112.

But it is the province of the General Assembly, not an unelected administrative body, to determine the policy of the state of Ohio. To the extent the Court of Appeals below and Respondent interpret Ohio Adm. Code 4412-5-05(G) to provide such a right to employees, that interpretation cannot be correct because it would mean that the OCRC exceeded its authority in promulgating that provision.

ARGUMENT

A. **The Relevant History of the Pregnancy Discrimination Act and Ohio Revised Code 4112.01(B) and 4112.02(A) Do Not Support The Decision of the Court Below.**

1. The Relationship Between Relevant State and Federal Law

Two federal statutes and their state counterparts lie at the core of this case. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), bars discrimination based on sex, as does its Ohio counterpart, Revised Code 4112.02(A). The subsequently-enacted federal Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) expanded the protection of Title VII to pregnancy, and 4112.01(B) likewise expanded the protections of Chapter 4112 to pregnant employees in Ohio.

It is well-established in Ohio that federal caselaw interpreting Title VII generally is applicable to cases involving violations of R.C. 4112. As the court below correctly noted in its opinion:

R.C. 4112.02 is similar to the federal Pregnancy Discrimination Act (“PDA”) provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C 2000 et seq., and the Ohio Supreme Court has held that federal case law interpreting Title VII is generally applicable to cases involving alleged violations of R.C. Chapter 4112.²

Though there are occasions when the interpretation of Chapter 4112 will vary from its federal counterpart, this Court has limited such occasions to situations where there is a specific textual variation between Chapter 4112 and Title VII justifying that different interpretation. For example, in *Genaro v. Central Transport*,³ this Court addressed the question of whether R.C. 4112.02 permitted individual claims to be brought against managers and supervisors, despite clear precedent that such claims could not be brought under Title VII.

² *Nursing Care Mgt. of Am., Inc. v. Ohio Civ. Rights Comm.* (2009), 181 Ohio App.3d 632, 2009-Ohio-1107, at ¶37.

³ *See Genaro v. Central Transp., Inc.* (1993), 84 Ohio St.3d 293, 297-299, 703 N.E.2d 782.

In holding that such claims could be brought, this Court first recognized the general rule that caselaw interpreting Title VII is generally applicable to claims raised under R.C. 4112.⁴ It then noted, however, that there was an important textual distinction between Title VII and R.C. 4112. Specifically, R.C. 4112.02 included a provision that its prohibitions applied to “anyone acting directly or indirectly in the interests of an employer,” language that does not appear in Title VII.⁵ Relying on this textual distinction, this Court found that individual liability on the part of individual supervisors and managers is available under Chapter 4112 even though it is not available under Title VII.

There is no such textual distinction between the federal Pregnancy Discrimination Act and R.C. 4112.01(B) that would justify different interpretations of the two statutes, as shown by the comparison below:

Federal Law	State Law
<p style="text-align: center;"><u>42 U.S.C §2000e(k) (“PDA”)</u></p> <p>The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women 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 work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion....</p>	<p style="text-align: center;"><u>Revised Code 4112.01(B)</u></p> <p>.... the terms “because of sex” and “on the basis of sex” include, but are not limited to, 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. Women 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, and nothing in division (B) of section 4111.17 of the Revised Code shall be interpreted to permit otherwise. This division shall not be construed to require an employer to pay for health insurance benefits for abortion....</p>

⁴ Id. at 297-98.

⁵ Id. at 298-99.

Because the language of 4112.01(B) tracks the language of the federal PDA without any relevant textual distinctions, a correct understanding of the federal PDA and related caselaw is essential to reaching a correct understanding of the scope of Ohio's own laws relating to pregnancy.

Though it purported to apply this reasoning in its opinion, the court of appeals below misinterpreted the federal case law interpreting the PDA. The Court of Appeal's conclusion is self-contradictory: 1) the protections of R.C. 4112.01(B) and the PDA are coextensive, but 2) R.C. 4112.01(A) provides an affirmative right to a "reasonable period" of mandatory pregnancy leave, which the PDA does not. This contradiction cannot stand.

2. The PDA and 4112.01(B) Forbid Only Pregnancy "Carve-Outs"

As noted above, the analysis of the protections provided pregnant employees under Revised Code 4112.02(B) must start with an analysis of the PDA. As noted by the U.S. Supreme Court in *Newport News Shipbuilding and Dry Dock Co. v. EEOC*,⁶ and again in 1987's *California S. and L. Assn. v. Guerra*,⁷ the PDA was passed in 1978 in reaction to the U.S. Supreme Court's decision in *General Electric Co. v. Gilbert*.⁸ A correct understanding of the issue in *Gilbert* that led to the passage of the PDA is essential to a correct understanding of the PDA, and by extension, R.C. 4112.01(B).

At issue in *Gilbert* was the legality of a disability plan that provided the company's employees with weekly compensation during periods of disability resulting from non-occupational causes, but specifically excluding pregnancy.⁹ The Supreme Court had held the plan in *Gilbert* to be lawful, finding that "an exclusion of pregnancy from a disability-benefits

⁶ (1983), 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89.

⁷ (1987), 479 U.S. 272, 107 S.Ct. 683, 97 L.Ed.2d 613.

⁸ (1976), 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343.

⁹ *Newport News*, 462 U.S. at 676-78.

plan providing general coverage is not a gender-based discrimination.”¹⁰ The dissenters argued that singling out pregnancy for exclusion violated Title VII because a pregnancy carve-out gave “men protection for all categories of risk but [gave] women only partial protections.”¹¹ They also rejected the argument that pregnancy was a “voluntary” condition justifying different treatment. The dissenters additionally cited to the then-current EEOC guideline relating to pregnancy, which stated that: “(Benefits) shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.”¹²

In response to the decision in *Gilbert*, Congress passed the PDA in 1978, which stated as follows:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women 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 similarly-situated in their ability or inability to work.¹³

In passing the PDA, Congress “unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision.”¹⁴ Legislative history relating to the passage of the PDA confirms that the dissenting opinions in *Gilbert* had expressed both the “principle and meaning of Title VII.”¹⁵ Simply put, carving out pregnancy from a list of covered conditions is unlawful.

Contrary to the interpretation of Revised Code 4112.01(B) urged by Respondent below, *Gilbert* had nothing to do with an affirmative requirement that pregnant employees be granted a

¹⁰ *Id.* (citing *Gilbert*, 429 U.S. at 136).

¹¹ *Id.* at 678

¹² *Gilbert*, 429 U.S. at 140-41, 157-58 (citing 29 C.F.R. § 1604.10(6) (1975)).

¹³ 42 U.S.C. §2000e(k).

¹⁴ *Newport News*, 462 U.S. at 678.

¹⁵ *Id.*

reasonable amount of leave.¹⁶ The issue in *Gilbert* was the legality of a specific carve-out of pregnancy that treated it differently from every other non-occupational condition. The EEOC, the dissenters in *Gilbert* whose opinions later were validated by the passage of the PDA, and the PDA's legislative history confirm that the intent of the PDA was that benefits shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. Nothing in the legislative history or text of the PDA requires that any particular benefits be offered at all. The *only* restriction is that pregnancy must be treated on the same basis as other conditions.

Following the 1978 passage of the federal PDA, the Ohio General Assembly followed the lead of Congress and passed 4112.01(B) in 1979, essentially mirroring the language of the PDA. The Sixth Circuit commented on the clear link between the history of the PDA and the history of 4112.01(B):

Having incorporated the PDA's language almost verbatim into the definitional provisions of §4112, it is clear to us that the Ohio Legislature was aware of the meaning and rationale of *Gilbert*, as well as being aware of the PDA. The Legislature made a conscious choice to extend the definition of discrimination to include pregnancy even though there cannot be a class of similarly situated males.¹⁷

Accordingly, when determining the scope of Revised Code 4112.01(B), the proper frame of reference is the federal PDA, including the rationale of *Gilbert* that led to the passage of that Act.

In the subject case, Petitioner below fully complied with the requirements of both the PDA and 4112.01(B). There is no *Gilbert* "carve-out" provision at issue in this case – Petitioner

¹⁶ Indeed, even the Petitioner in *Gilbert* acknowledged that defendant GE had "no obligation to establish any fringe benefit program" at all. The issue was that if such a plan was established, pregnancy could not be specifically excluded. See *Gilbert*, 429 U.S. at 170 n.18.

¹⁷ *Derungs v. Wal-Mart Stores, Inc.* (C.A.6, 2004), 374 F.3d 428, 436.

applied its “one-year” requirement to pregnant employees on the exact same basis as employees who were not pregnant. Nor did Petitioner otherwise have any affirmative obligation to provide maternity leave. Given the well-established case law of this Court applying federal Title VII law in interpreting Chapter 4112, and the complete lack of any textual justification for interpreting the PDA and 4112.01(B) differently, the “reasonable period of leave” requirement argued by Respondent cannot stand.

The reliance by the court of appeals upon the U.S. Supreme Court’s 1987 decision in *Guerra* as somehow expanding the rights of Ohioans under Revised Code 4112.01(B) is completely misplaced.¹⁸ At issue in *Guerra* was legality of a California statute that expressly mandated certain benefits for pregnant employees. Thus, whereas the Ohio General Assembly chose to mirror the language of the PDA in enacting Revised Code 4112.01(B), California chose to go one step further by enacting a specific statute, Cal. Gov’t Code § 12945, requiring employers to provide leave and reinstatement to pregnant employees – regardless of what benefits were offered to employees in general.¹⁹ The plaintiff in *Guerra* challenged the California law as amounting to discrimination against men by providing unlawful “preferential treatment” to pregnant employees.²⁰

The U.S. Supreme Court rejected the argument that a state law providing “preferential” treatment to pregnant employees was barred by Title VII. It noted that the PDA set a “floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise,” and that state legislatures could enact laws that granted benefits for pregnancy that

¹⁸ See *Guerra*, 479 U.S. at 275-76.

¹⁹ *Id.* at 275-76 n.2.

²⁰ *Id.* at 279.

were not available for other conditions.²¹ The Court reviewed the legislative history of the PDA, noting specifically the portion of the legislative history stating that “the PDA does not *require* employers to extend any benefits to pregnant women that they do not already provide to other disabled employees.”²² The Court continued by noting “[w]e do not interpret these references to support petitioner’s construction of the statute. On the contrary, if Congress had intended to *prohibit* preferential treatment, it would have been the height of understatement to say only that the legislation would not *require* such conduct.”²³

Notably absent from the Supreme Court’s opinion in *Guerra* is any *federal* requirement mandating leave for pregnancy or pregnancy-related conditions. Indeed, the Supreme Court went out of its way to acknowledge that the PDA itself set a “floor” of equal treatment, and that its legislative history acknowledged the lack of such a requirement. Fairly read, *Guerra* cannot possibly support the argument that the PDA – and by extension, the “me-too” of Revised Code 4112.02(B), mandates that an employer provide any pregnancy-related leave at all.

Guerra therefore is directly relevant to the instant case, but not in the sense argued by Petitioners. Under *Guerra*, a *state legislature* may chose to enact legislation that expressly goes beyond the limited “non carve-out” protection of the PDA – the PDA does not mandate “strict neutrality.” Accordingly, a state legislature may enact laws guaranteeing pregnant employees a reasonable period of leave, or other employee benefits not available to similarly-situated individuals who may need leave but are not pregnant, without violating Title VII.

But unlike the California General Assembly, the Ohio General Assembly has not enacted such legislation. It did not do so in the eight years between the passage of 4112.01(B) in 1979

²¹ Id. at 285-286 (citation omitted).

²² Id. at 286.

²³ Id. at 287 (emphasis in original).

and *Guerra* (1987), and it has not done so in the twenty-two years since *Guerra*. Section 4112.01(B) remains substantively identical to the federal PDA, and an argument to the contrary has not even been attempted. As noted by the Sixth Circuit in *Derungs*,²⁴ it is reasonable to assume that the General Assembly was well aware of the debate surrounding the PDA when it enacted the identically-worded 4112.05(B) in 1979, and likely also was aware that other states have enacted laws providing a greater level of benefits. Federal courts interpreting the PDA have concluded overwhelmingly that it does not mandate any particular benefits for pregnant employees, but instead only requires equal treatment.²⁵ Given this clear history, any interpretation of Chapter 4112 that creates a right to a “reasonable period of leave” is inconsistent with both the text and history of R.C. 4112.01(B).

B. The Text of R.C. 4112.01 et seq. Does Not Support the Expansion of 4112.02(B) by the OCRC or the Court of Appeals Below.

Respondent attempts to justify the creation of a right to a “reasonable period of leave” by making two textual arguments based upon the language of 4112.01(B). Of course, given that the identical language also appears in the PDA, these arguments cannot justify their position that R.C. 4112.01(B) somehow provides greater benefits than the PDA. Moreover, both interpretations are wrong.

²⁴ *Derungs* at 436.

²⁵ See, e.g., *Carney v. Martin Luther King Home, Inc.* (C.A.8, 1987), 824 F.2d 643, 646; *Mullet v. Wayne-Dalton Corp.* (N.D. Ohio 2004), 338 F.Supp.2d 806, 813; *Stout v. Baxter Healthcare Corp.* (C.A.5, 2002), 282 F.3d 856, 859-60; *Dormeyer v. Comerica Bank-Illinois* (C.A.7, 2000), 223 F.3d 579, 583; *In re Carnegie Ctr. Assoc.* (C.A. 3, 1997), 129 F.3d 290, 296-97; *Fisher v. Vassar College* (C.A.2, 1997), 70 F.3d 1420, 1448, reheard en banc on other grounds, (C.A.2, 1997) 114 F.3d 1332; *Armando v. Padlocker, Inc.* (C.A.11, 2000), 209 F.3d 1391 (per curiam) *EEOC v. Ackerman, Hood, & McQueen, Inc.* (C.A.10, 1992), 956 F.2d 944, 948 (PDA requires employees to prove they were treated differently than similarly situated non-pregnant employees); *EEOC v. Detroit-Macomb Hospital Corp.* (C.A.6, 1992), Nos. 91-1088, 91-1278 (unreported) (copy attached at Tab A) (employee must prove she was treated differently than similarly situated employees.).

1. The “similarly-situated in the ability or inability to work” argument

The first argument cited in support of the decision below is based on the second clause of 4112.01(B) – also found in the PDA – which states as follows:

Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, included receipt of benefits under fringe benefit programs, as other persons not so affected but similar in ability or inability to work.

Respondent’s first argument is that the statute requires that “women affected by pregnancy [and] childbirth” be treated exactly the same as other employees based *solely* on the employees’ “ability or inability to work.” Any other distinguishing factor, such as tenure with the employer, experience, hours worked, whether or not the underlying condition is work-related, are impermissible. Again, because the identical language appears in the PDA, Respondent’s textual argument necessarily must apply to the PDA as well. Yet, there is no authority for such a strained interpretation of the PDA.

In support of the argument that the only permissible point of comparison is “ability or inability to work,” the decision of the Commission²⁶ below cited to the 1996 decision of the Sixth Circuit in *Ensley-Gaines v. Runyon*.²⁷ That case involved a claim of alleged intentional pregnancy discrimination under the PDA by a pregnant postal worker who purportedly was denied limited-duty work available to other employees. The district court granted summary judgment in favor of the employer on the grounds that the employee failed to establish a prima facie case of discrimination because, pursuant to the employer’s policy, the only employees who

²⁶ Ohio Civil Rights Commission Final Order, Complaint No. 9816, pp. 4-5.

²⁷ (C.A.6, 1996), 100 F.3d 1220.

received more favorable treatment had work-related injuries.²⁸ The Sixth Circuit reversed, noting that there appeared to be a legitimate issue of fact as to whether the employer's policy distinguished between work-related and non-work related injuries.²⁹ The court held that *at the prima facie* stage of the inquiry, the only relevant comparison was ability or inability to work, not whether the injury was work-related.³⁰ However, the Sixth Circuit expressly left open the possibility that on remand, the employer could articulate a "legitimate, nondiscriminatory" reason for why the pregnant employee had been treated differently.³¹

Tellingly, the Sixth Circuit has since expressly rejected the argument that *Ensley-Gaines* be interpreted as the Commission did below. In *Reeves v. Swift Transportation Co.*,³² the plaintiff had been terminated due to a "pregnancy-blind" policy denying light-duty work to employees who could not meet the lifting requirements of the job, and who also had not been injured on the job.³³ Relying on *Ensley-Gaines*, the plaintiff argued that this policy violated the PDA's mandate that "pregnant employees 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."³⁴ Respondent in this case made the exact same argument below in terms of "ability or inability to work" being the only permissible point of comparison.

The Sixth Circuit in *Reeves* rejected this interpretation of *Ensley-Gaines*, pointing out that the "similarly-situated in the ability or inability to work" holding of that case applies only at

²⁸ See *id.* at 1224-25

²⁹ See *id.* at 1226.

³⁰ *Id.*

³¹ *Id.* at 1227.

³² (C.A.6, 2006), 446 F.3d 637.

³³ *Id.* at 638.

³⁴ *Id.* at 641 (quoting 42 U.S.C. §20003(k)).

the *prima facie* case stage of a claim of intentional discrimination.³⁵ On the ultimate issue of discrimination, an employer lawfully may point to *additional* non-discriminatory factors to explain any differences in treatment between a pregnant and non-pregnant employee.³⁶ Thus, according to the Sixth Circuit in *Reeves*, “[a]s long as pregnant employees are treated the same as other employees injured off duty, the PDA does not entitle pregnant employees with non-work related infirmities to be treated the same under [an employer’s] light-duty policy as employees with occupational injuries.”³⁷

More importantly, the “similarly-situated in ability or inability to work” phrase contained in 4112.01(B) cannot possibly justify the “reasonable period of time” of leave requirement found in Ohio Adm. Code 4112-5-05(G)(2), (6). For example, a small employer that has no guaranteed leave policy for *any* employee is treating pregnant and non-pregnant employees exactly the same, in full compliance with the “similarly situated” language of 4112.01(B) and the PDA. Grafting an absolute right to a “reasonable period of time” for leave, regardless of what is provided to other employees, clearly exceeds the plain meaning of the statute. To require that such leave be granted to pregnant employees regardless of the leave available to other employees “would have the effect of granting a right of special treatment for pregnant employees,” which not contemplated by the PDA.³⁸

An additional problem with the Commission’s restrictive reading of the “similarly-situated” clause of 4112.01(B) is that it necessarily would lead to absurd results. By its own terms, 4112.01(B) applies to “*all employment-related purposes, including receipt of benefits under fringe benefit plans . . .*” (emphasis added). Naturally, this forbids discriminating against

³⁵ See *id.* at 641 n.1.

³⁶ *Id.* at 643.

³⁷ *Id.* at 642 (quoting *Urbano v. Continental Airlines, Inc.* (C.A.5, 1998), 138 F.3d 204, 208).

³⁸ *Id.*

pregnant employees in terms of wages, hours of work, contributions to retirement plans, office assignments, etc., as well.

But according to the Commission’s interpretation of 4112.01(B), employers may not look at *any* factor other than “similarly situated in the ability or inability to work” for all “employment-related purposes.” Accordingly, differences like job duties, experience, training, college degree, admission to practice law, admission to practice medicine, etc., would be excluded from consideration “for all employment related purposes.” Such an interpretation would lead to clearly anomalous results. For example, any pregnant employee could demand wages equal to that of the CEO as long as the two were “similar in their ability or inability to work,” because considering any other factor – such as job duties, experience, or qualifications – is impermissible. A pregnant office administrator could claim that because she had the same “ability or inability to work” as the Chief Operating Officer of the company, the employer must “treat her the same” as the COO and give her the same salary, benefits, etc.

Obviously, to avoid such bizarre results, the statute necessarily must permit employers to point to other non-discriminatory factors to distinguish the treatment of a particular pregnant employee from that of an employee otherwise similarly situated. If two employees are both going to miss six weeks of work, and the only difference is that one had back surgery and the other was pregnant, the pregnant employee is entitled to the same benefits as the other employee.³⁹ Other differences, such as tenure or length of service (as happened in this case), that are *unrelated* to pregnancy should justify dissimilar treatment under a facially neutral policy.

2. The “because of *absences*” argument

R.C. 4112.02(A) prohibits discrimination “because of the race, color, religion [or] sex . . .

³⁹ See, e.g., *Guerra* at 286.

of any person” R.C. 4112.01(B) modified this provision so that the word “sex” now also means “on the basis of pregnancy.” Respondent’s second argument essentially changes the statute to insert the word “absences” into this operative language. Thus, Respondent argues that terminating an employee “because of *absences* due to pregnancy” is the same as terminating an employee “because of” pregnancy. Respondent further argues that this is a “direct” or “*per se*” violation of 4112.02, and that an intent to single out pregnant employees need not be proven. Therefore, Petitioner contends that the indirect method of proof using the *McDonnell Douglas* burden-shifting approach⁴⁰ is inapplicable, and a violation of the statute is established by the mere existence of the policy.

The most basic flaw in this argument is that the statute does *not* bar termination of an employee “because of absences due to pregnancy.” The Respondent’s claim that “because of . . . pregnancy” – which is how the statute actually reads – is the same as “because of *absences* due to pregnancy” is simply ipse dixit, without foundation in either the legislative history or language of either the PDA or 4112.01(B). Terminating an employee because he or she cannot perform her job duties due to absence – for whatever reason, is not *discrimination* on the basis of pregnancy or a pregnancy-related condition. It is treating pregnancy and pregnancy-related conditions the *same* as other conditions.

The Sixth Circuit in *Reeves* recently rejected the claim that a pregnancy-blind policy could constitute “direct evidence” of discrimination as a “*per se*” violation of the PDA. The plaintiff in *Reeves* argued that a policy depriving her of the right to “limited duty” because her pregnancy was not work-related constituted “direct evidence” of discrimination, and a *per se*

⁴⁰ *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802-803, 93 S.Ct. 1817, 36 L.Ed.2d 668.

violation of the PDA.⁴¹ The court rejected this argument, again confirming that the PDA did not mandate any substantive benefits:

But Swift's policy cannot be viewed as direct evidence of discrimination because the Act merely requires employers to "ignore" employee pregnancies.⁴² Swift's light-duty policy is indisputably pregnancy-blind. It simply does not grant or deny light work on the basis of pregnancy, childbirth, or related medical conditions. It makes this determination on the nonpregnancy-related basis of whether there has been a work-related injury or condition.⁴³

Had the General Assembly wished to go beyond the PDA, and provide an affirmative right to leave for pregnant employees, it would have followed California's lead by enacting a statute that did just that. Or it could simply have added the "absences due to pregnancy" language to 4112.01(B). But the General Assembly did neither.

In further support of this interpretation of the "because of" phrase, Respondent cites in its Memorandum Opposing Jurisdiction ("Memorandum") to *Coolidge v. Riverdale Local School District*.⁴⁴ In that case, the plaintiff teacher had been injured at work, missed extensive time as a result, and eventually was terminated for missing work while on temporary total disability. The plaintiff argued that terminating her for being absent "because of" a temporary total disability was the equivalent of terminating her because she applied for temporary total disability benefits, which is unlawful. Respondent argues that, by extension, terminating her for absences due to pregnancy is equivalent to terminating her "because of" her pregnancy.

In 2007, this Court decided *Bickers v. Western & Southern Life Ins. Co.*, which completely eviscerated Respondent's argument. In *Bickers*, this Court expressly revisited *Coolidge*, and held *Coolidge* was limited to its very specific facts, which included a teacher's

⁴¹ See *Reeves* at 640-41.

⁴² See *Spivey v. Beverly Enters.* (C.A.11, 1999), 196 F.3d 1309, 1313; *Urbano* at 206; *Troupe v. May Dept. Stores Co.* (C.A.7, 1994), 20 F.3d 734, 738.

⁴³ *Reeves* at 641-42.

⁴⁴ (2003), 100 Ohio St.3d 141, 2003-Ohio-5357, 797 N.E.2d 61.

contract and a requirement that she only be discharged for “good and just cause.”⁴⁵ No such “good and just cause” standard applies in this case, and *Coolidge* is completely inapplicable.

Importantly, this Court in *Bickers* also noted that it was the province of the General Assembly to set policy for the state on such issues, and that “it would be inappropriate for the judiciary to presume the superiority of its policy preference and supplant the policy choice of the legislature”⁴⁶ by barring an employer from terminating an employee because he or she missed work due to a temporary total disability. In particular, this Court recognized the burden a policy barring the termination of absent workers would have on small employers such as the membership of NFIB:

Should the policy choice be to deny employers the exercise of their employment-at-will prerogative and require them to hold open the jobs of injured employees for indefinite periods of time, then employers will be burdened with employees unable to perform the work for which they were hired and an inability to obtain permanent replacements. **This resolution would be particularly onerous on small employers with few employees, who lack the ability to shift the duties of an injured employee to other employees.**⁴⁷

The far more reasonable interpretation of the “because of” language follows the legislative and case history of the PDA. If an employer singles out pregnancy from a list of conditions entitled to leave, resulting in termination, that would be discriminating against an employee “because of pregnancy.” If, however, a pregnant employee is subject to the same one-year requirement as any other employee denied leave, then the employee is not terminated “because of” pregnancy, but rather “because” she did not meet the employer’s facially-neutral leave policy.⁴⁸

⁴⁵ *Bickers* at ¶11.

⁴⁶ *Id.* at ¶¶23-24.

⁴⁷ *Id.* at ¶21 (emphasis added).

⁴⁸ See *Dormeyer* at 583. (Plaintiff was “fired because of her absenteeism, not because of her pregnancy”).

Finally, the court of appeals' expansive interpretation of "because of" fails because it simply proves too much. R.C. 4112.02 bars discrimination on the basis of pregnancy with respect to all "terms [and] conditions" of employment. Accordingly, just as an employer may not *terminate* an employee "because of" her pregnancy, an employer may not *reduce the pay* of an employee "because of" her pregnancy. This makes perfect sense in the context of intentional discrimination directed at pregnant employees – an employer could not lawfully reduce an employee's wages simply because she is pregnant.

But this reasonable application of the statute falls apart if "because of" pregnancy equates to "because of absences due to pregnancy" as the court of appeals held below. Not only would an employer be required to provide leave, but it would have to be *paid* leave. Otherwise, the employer would be reducing the employee's wages – a term or condition of employment – "because of absences due to her pregnancy." For obvious reasons, the OCRC does not argue for such an absurd result, yet that result would be compelled by the court of appeals' and the OCRC's interpretation of the statute.

In fact, the court of appeals' "because of" interpretation virtually eliminates the "similar in their ability or inability to work" requirement found both in the PDA and R.C. 4112.01(B). Under the court of appeals' reasoning, what benefits are provided to employees "similar in their ability or inability to work" is irrelevant. The requirement becomes absolute, and employers must treat pregnant employees who are absent or unable to perform critical job duties exactly the same as if they were sitting at their desks performing their normal, full job functions. This is not consistent with the text or history of either R.C. 4112.01(B) or the PDA.

C. The Court of Appeals' Interpretation of the Ohio Administrative Code is Unreasonable.

Ohio Adm. Code 4112-5-01 states that the regulations implementing R.C. Chapter 4112 “are not intended to either expand or contract the coverage of Chapter 4112 of the Revised Code.” Yet that is what Respondent attempts to do in this case. The key provision is Ohio Adm. Code 4112-5-05(G), which reads as follows:

(G) Pregnancy and childbirth.

(1) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is a prima facie violation of the prohibitions against sex discrimination contained in Chapter 4112. of the Revised Code.

(2) 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.

(3) Written and unwritten employment policies involving commencement and duration of maternity leave shall be so construed as to provide for individual capacities and the medical status of the woman involved.

(4) Employment policies involving accrual of seniority and all other benefits and privileges of employment, including company-sponsored sickness and accident insurance plans, shall be applied to disability due to pregnancy and childbirth on the same terms and conditions as they are applied to other temporary leaves of absence of the same classification under such employment policies.

(5) Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. 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.

(6) Notwithstanding paragraphs (G)(1) to (G)(5) of this rule, 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. 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.

Both Respondent and the Court of Appeals relied upon the foregoing Ohio Administrative Code provision for the proposition that employers are required to provide pregnant employees with leave for a “reasonable period of time.” While this phrase does appear in Ohio Adm. Code 4112-5-05(G)(5) and (6), Respondent’s interpretation patently ignores the other subsections of 4112-5-05 that compel a far different conclusion. However, rather than reiterate the clear, competent arguments regarding the various subsections of Ohio Adm. Code 4112-5-05 presented by Petitioner, Amicus will focus on subsection (G)(2), the particular subsection relied upon by Respondent and the Court of Appeals.

At the outset, when interpreting an ambiguous regulation, a construction of the regulation that exceeds the authority of the agency that promulgated the rule should be rejected. It is a non-controversial point of law that courts should avoid interpretations of statutes that would raise serious constitutional questions unless such a construction is “plainly contrary” to the intent of the legislature.⁴⁹ The same rules for statutory construction apply to interpretation of ambiguous administrative regulations.⁵⁰ Accordingly, statutes and regulations should be construed to avoid “unreasonable or absurd results.”⁵¹ To the extent there is any ambiguity in Ohio Adm. Code 4112-5-05, it would be “unreasonable” to assume that the Ohio Civil Rights Commission intended a result that exceeded its authority.

⁴⁹ *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs* (2001), 531 U.S. 159, 173.

⁵⁰ *State ex rel. R. Bauer & Sons Roofing & Siding, Inc. v. Indus. Comm.* (1998), 84 Ohio St.3d 62, 66, 701 N.E.2d 995; *Vaughn Inds., Inc. v. Dimech Servs.* (2006), 167 Ohio App.3d 634, 2006-Ohio-3381, at ¶23 (citing *Columbus & Franklin Cty. Metro. Park Dist. v. Shank* (1992), 65 Ohio St.3d 86, 103 n.17, 602 N.E.2d 1042); *Page v. Bd. of Liquor Control*, (Ohio Ct. Com. Pls. 1954), 121 N.E.2d 125, 128 .

⁵¹ *State ex rel. Asti v. Ohio Dept. of Youth Servs.* (2005), 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, at ¶28.

In that regard, the authority of an administrative agency to issue regulations is not unlimited. This Court has held repeatedly that an administrative agency only has the authority delegated to it by the General Assembly.⁵² Moreover, in construing such grants of authority, it is well-settled “that the extent of that granting of authority must be clear, and any doubt is to be resolved not in favor of the grant but against it.”⁵³ As this Court has stated previously, it is the General Assembly, not administrative agencies such as the Ohio Civil Rights Commission, that dictate policy. Administrative agencies can only “develop and implement policy already established by the General Assembly.”⁵⁴

If one were to accept Respondent’s interpretation of Ohio Adm. Code 4112-5-05, then one would likewise have to conclude that the “reasonable period of time” for leave policy at the heart of this case was one *already established* by the General Assembly.⁵⁵ Otherwise, the OCRC clearly exceeded its authority by going beyond “developing and implementing policy already established by the General Assembly,” and actually *dictating* public policy itself.

There is no credible argument that the “reasonable period of time” policy urged upon this Court by Respondent is one that was established by the General Assembly. As noted in Sections A and B above, the PDA does not contain any such requirement, the U.S. Supreme Court’s opinions relating to the PDA do not support such an interpretation, and the General Assembly enacted a statute that *mirrored* the PDA in all relevant respects.⁵⁶ The most reasonable interpretation of 4112-5-05 must therefore be the one urged by Petitioner below – that employers

⁵² *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health* (2002), 96 Ohio St.3d 250, 2002-Ohio-4176, 773 N.E.2d. 536, at ¶38.

⁵³ *Id.* at ¶40.

⁵⁴ *Id.* at ¶41.

⁵⁵ *Id.*

⁵⁶ See *Birchard v. Glassman, Inc.*, Cuyahoga App. No. 82429, 2003-Ohio-4073, at ¶12 (“The requirements of R.C. 4112.02 and R.C. 4112.01(B) coincide with the federal Pregnancy Discrimination Act . . .”).

are permitted to apply facially-neutral leave policies to pregnant employees on the same basis as they are applied to other employees who are not pregnant, but otherwise similarly-situated.

Applying that line of reasoning to the particular provisions here, one can rationally and reasonably interpret the subsections as follows:

Ohio Adm. Code 4112-5-05(G)(2) should be understood to prohibit employment termination for temporary disablement due to leave taken based on pregnancy where the employment termination is “caused” by the employment policy *and* that employment policy allows leave for non-pregnancy disabilities. If the last clause is not inferred, then Ohio Adm. Code 4112-5-05 (G)(2) creates new rights not otherwise clearly established by the statute. Instead, this inferred requirement is wholly consistent with the statutes.

Ohio Adm. Code 4112-5-05(G)(5) should be interpreted to mandate that if an employer has a leave policy allowing leave for non-childbearing reasons, then the employer must also allow a like amount of leave to a female employee for childbearing reasons. However, length of service prior to allowing leave is permissible, as the regulation states: “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.”⁵⁷ The italicized provision is key because that is exactly the case for the Petitioner here. Petitioner declined to allow leave because Ms. McFee did not meet the “minimum length of stay requirements” set forth in the Petitioner’s leave policy. For some reason, the Respondent and the Court of Appeals ignore this provision.

The Court of Appeals claims that this clear provision does not affect its interpretation of the first sentence. It believes that each sentence of this subsection should be read separately, not as part of the entire subsection. This is a flawed analysis. Clearly the sentences subsequent to

⁵⁷ Ohio Adm. Code 4112-5-05(G)(5) (emphasis added).

the first explain, modify and expound upon the first. Proper construction requires evaluating a statute or regulation⁵⁸ based on all the sentences and not isolating any one sentence. “In reviewing a statute, a court cannot pick out one sentence and dissociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body.”⁵⁹ “In looking to the face of the statute or Act to determine legislative intent, significance and effect should be accorded to every word, phrase, sentence and part thereof, if possible.”⁶⁰ Well-settled rules of construction require that the rule at issue “be construed as a whole and given such interpretation as will give effect to every word and clause in it.”⁶¹ The rule should not be construed to render some words redundant or to ignore words in the rule.⁶² Thus, the rule should be construed together, given effect to every part and sentence.⁶³

Ohio Adm. Code 4112-5-05(G)(6) is the catch-all provision for employers who have no leave policy. This applies to many of the small businesses which this Amicus represents. In light of the rather clear provisions in the foregoing discussed provisions, this should not be interpreted more broadly. Instead, it should be expected that such a leave for childbearing would only be required when another employee would be entitled to leave based on some other applicable law for an illness or disability. Otherwise this would improperly “expand . . . the coverage of Chapter 4112 of the Revised Code.”⁶⁴ To do so would be generate an “unreasonable

⁵⁸ The same rules for statutory construction apply to interpretation of ambiguous administrative regulations. See footnote 50, supra.

⁵⁹ *State v. Wilson* (1997), 77 Ohio St.3d 334, 336, 673 N.E.2d 1347.

⁶⁰ *Id.* at 336-37 (citations omitted).

⁶¹ *State ex rel. Myers v. Bd. of Educ. of Rural Sch. Dist. of Spencer Twp.* (1917), 95 Ohio St. 367, 372-73, 116 N.E. 516.

⁶² See *E. Ohio Gas Co. v. Pub. Util. Comm.* (1988), 39 Ohio St.3d 295, 299, 530 N.E.2d 875.

⁶³ *Froelich v. City of Cleveland* (1919), 99 Ohio St. 376, 124 N.E. 212, paragraph one of the syllabus.

⁶⁴ See Ohio Adm. Code 4112-5-01.

or absurd” result.⁶⁵

If instead this Court finds the regulation is not ambiguous and accepts Respondent’s interpretation of subsection (G), then one can logically conclude that the OCRC did not like the fact that the General Assembly did not enact a *Guerra*-type state statute and enacted that policy on its own. If that is the case, then the OCRC has exceeded its rule making authority and has dictated policy rather than simply implementing the policy already established by the General Assembly. As discussed in Section D below, *D.A.B.E., Inc.* would require that such rules should be stricken. Thus, this Court should reject any interpretation of Ohio Adm. Code 4112-5-05(G) that requires a “reasonable period of leave” for pregnant employees.

D. The OCRC Should Not Dictate Policy For Ohio and the Ohio Administrative Code Regulation Should Be Stricken.

If this Court were to conclude that Ohio Adm. Code 4112-5-05(G) is unambiguous, and requires all employers to provide a “reasonable period of time” for maternity leave without regard to what is provided to non-pregnant employees, that portion of the regulation should be stricken as exceeding the authority of the OCRC.

In *D.A.B.E., Inc.*, this Court invalidated a regulation promulgated by the Board of Health of the Lucas County Regional Health District (“District”) because the regulation exceeded the authority of the District, and improperly invaded the province of the legislature.⁶⁶ The facts and analysis in *D.A.B.E., Inc.* apply to this case.

The regulation at issue in *D.A.B.E., Inc.* prohibited smoking in all enclosed places open to the public, including paces of employment and public transportation. The Lucas County Board

⁶⁵ Cf. *Asti* at ¶28.

⁶⁶ *D.A.B.E.* at ¶38.

of Health had acted pursuant to the authority granted to it by Revised Code 3709.21 which provided, in pertinent part, as follows:

The board of health of a general health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances.⁶⁷

Given the obvious risks to public health relating to smoking and second-hand smoke, the promulgated non-smoking regulation appeared to be within the Board of Health's authority to make "such orders and regulations as are necessary . . . for the public health."

This Court nevertheless found that the promulgation of this regulation exceeded the authority of the District. It noted that an administrative body has only such regulatory power as is delegated to it by the General Assembly, and that this authority "cannot be extended by the administrative agency."⁶⁸ This Court continued:

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 the case of doubt that doubt is to be resolved not in favor of the grant but against it.*⁶⁹

This Court noted that there was no grant of power in R.C. 3709.21 or anywhere else "allowing local boards of health unfettered authority to promulgate any health regulation deemed necessary."⁷⁰ Because of this lack of authority, the regulation was invalidated.⁷¹

One of the key elements of this Court's decision in *D.A.B.E., Inc.* was to draw the distinction between the legislative and administrative functions. In language directly applicable to the instant case, this Court noted that that:

⁶⁷ R.C. 3709.21.

⁶⁸ *D.A.B.E.* at ¶38.

⁶⁹ *Id.* at ¶40 (emphasis added; internal citations and quotation marks omitted).

⁷⁰ *Id.* at ¶41.

⁷¹ It is noteworthy that *D.A.B.E., Inc.* preceded the voter referendum that enacted R.C. 3794, which implemented a statewide ban on smoking in enclosed public places.

Administrative regulations cannot dictate public policy but rather can only develop and administer policy already established by the General Assembly. In promulgating [that] regulation, the [District] 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.⁷²

The holding and reasoning of *D.A.B.E, Inc.* apply to this case. The statutory authority for the issuance of regulations by the OCRC is found at R.C. 4412.04(4) and (5), which authorizes the Commission to:

- (4) Adopt, 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;
- (5) Formulate policies to effectuate the purposes of this chapter and make recommendations to agencies and officers of the state or political subdivisions to effectuate the policies;

Neither provision vests the OCRC with the authority to either *expand* or *contract* state policy with respect to pregnancy discrimination. This Court has declared that “regulatory authority must still rest upon a discernible public policy declaration by the General Assembly of the need of such regulations in the statutes it has enacted and the delegation of authority to the agency for implementation.”⁷³ There is simply no “discernible public policy declaration by the General Assembly” of the need of regulations regulating pregnancy leave outside the scope of discrimination among similarly situated people.

Had the General Assembly mandated pregnancy leave *for a reasonable time* by including such language in R.C. 4112.01(B), there would be a “discernible public policy declaration” which the OCRC could interpret by defining such period. The fact that such language is not in any part of Chapter 4112 shows that the General Assembly chose not to impose leave under this

⁷² *D.A.B.E* at ¶41 (citations omitted).

⁷³ *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 385, 329 N.E.2d 693.

Chapter.

The court below and Petitioner essentially argue that because the “purpose” of R.C. 4112.01(B) is to protect pregnant employees, an action that *favours* pregnant employees necessarily fits within the “purpose” of the statute. But just because the General Assembly chose to provide “half a loaf” to pregnant employees by mandating treatment equal to employees similar in their ability or inability to work does not justify the OCRC expanding this to a “full loaf” of guaranteed benefits. Statutes are the product of compromise, and require “a *balancing* of social, political, economic, and privacy concerns.”⁷⁴ Thus, how far R.C. 4112.01(B) does *not* go is just as important as how far it actually *does* go.

As noted in Sections A-B above, R.C. 4112.01(B) provides limited pregnancy protections that, in mirroring those provided by the federal PDA, constitute only a “floor. . . not a ceiling.”⁷⁵ The choice to follow states such as California and enact legislation that rises above that floor is the province of the General Assembly. By administratively creating the right to a “reasonable period” of leave for pregnancy, the Commission usurped a policy decision that is properly the role of the Ohio General Assembly.

This “reasonable period of time” requirement is invalid regardless of whether an employer has a one year seniority requirement, a work-related requirement, or no leave policy at all. As noted previously, the members of Amicus NFIB tend to be very small employers, averaging about ten employees. Unlike Petitioner in this case, many small employers do not provide formal leave of absence policies because such policies are impractical. If the particular small business has the necessary flexibility and can find temporary help, the business may be able to provide an employee leave and enable her to retain a job. Many small employers,

⁷⁴ *D.A.B.E.* at ¶41 (emphasis added).

⁷⁵ *Guerra* at 285.

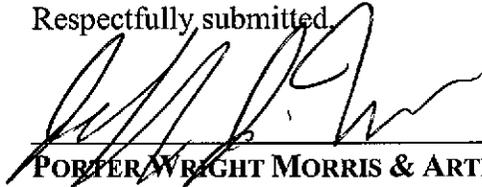
however, do not have the flexibility to hold a job open and must seek a long-term replacement. The “reasonable period of time” requirement found by the court of appeals below destroys that flexibility.

The *General Assembly* certainly has the right to tell such small employers “tough luck.” It may balance the competing social, political, and economic interests, and require even very small employers to offer leave with guaranteed reinstatement to pregnant employees. Or it might balance those interests differently, and decide to mandate such leave, but set the minimum employee threshold at 15, 25, or 50 employees, rather than at the four employee minimal jurisdictional threshold. But that policy decision is one that should be made by the elected representatives of the people, and go through the legislative process described in the Ohio Constitution, not simply instituted by the fiat of an unelected administrative body. Accordingly, if this Court determines that Ohio Adm. Code 4112-5-05(G) unambiguously requires employers to offer a “reasonable period” of leave for pregnancy, this Court should strike the elements of that regulation created such a right.

CONCLUSION

For all the above reasons, Amicus NFIB Small Business Legal Center urges the Court to reject any interpretation of Ohio Admin. Code 4112-5-05(G) that purports to require employers to provide guaranteed leave to pregnant employees, unless the employer offers such leave to other employees who are similarly-situated in all relevant respects.

Respectfully submitted,



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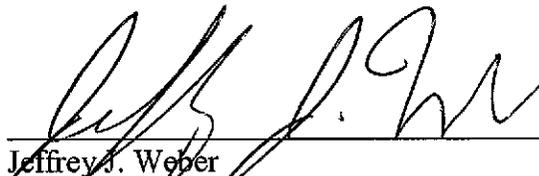
CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was sent via first class United States mail,
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952 F.2d 403

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,
v.
DETROIT-MACOMB HOSPITAL CORP. a/k/a Macomb Hospital Center,
Defendant-Appellee.

Nos. 91-1088, 91-1278.

United States Court of Appeals, Sixth Circuit.

Jan. 14, 1992.

As Amended Jan. 27, 1992.

NOTICE: Sixth Circuit Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Sixth Circuit.

Before KENNEDY and NATHANIEL R. JONES, Circuit Judges, and RUBIN, District Judge.*

KENNEDY, Circuit Judge, delivered the opinion of the Court as to Parts I and II and a dissenting opinion in Part III. RUBIN, District Judge, delivered a separate opinion announcing the decision of the Court in Part III in which JONES, Circuit Judge joined.

KENNEDY, Circuit Judge.

The Equal Employment Opportunity Commission (EEOC) appeals the District Court's grant of Detroit-Macomb Hospital's (Hospital) summary judgment motion and order awarding attorney's fees to the Hospital. The EEOC alleged that the Hospital discriminated against two employees on the basis of sex and pregnancy by refusing to accommodate their pregnancy related disabilities. We AFFIRM the District Court's order of summary judgment. The majority of the Court AFFIRMS the order awarding attorney's fees to the defendant.

I.

Detroit-Macomb Hospital Corporation owns two hospitals, one of which is Macomb Hospital Center. Macomb Hospital Center is an acute care hospital. In March of 1987, a part-time nurses aide, Theresa Janowicz, declined to deliver a tray into a isolation room. Janowicz was pregnant and was concerned about the health of the fetus. The nursing supervisor told her to get a medical restriction from entering isolation rooms so that she would not endanger her job for refusing a work assignment. Janowicz obtained a restriction. She was then contacted by the Director of Nursing, Leona Weertz, who told her that the Hospital did not allow its staff to work with restrictions that interfered with her job. Janowicz was given the option to rescind the restriction and, when she declined, was placed on an involuntary leave of absence until six weeks after the birth of her child.

Charlotte Pierog-Manuel worked as a full-time licensed practical nurse at Macomb Hospital. In

July 1987, she too obtained a doctor's note which stated that, due to her pregnancy, she should not enter isolation rooms. Leona Weertz placed Pierog-Manuel on an involuntary leave of absence when Weertz learned of the medical restriction and Pierog-Manuel declined to rescind the restriction. Pierog-Manuel did not return to work until April 1988, eight weeks following the birth of her child.

The Hospital has a policy which places employees on medical leave if they are placed under a temporary medical restriction which interferes with their job duties. Persons under a temporary medical disability are not allowed to change job categories for the duration of the disability. In the case of permanent disability, a job transfer is allowed under certain circumstances. The parties agree that absent a written medical restriction, the involuntary leave would not have been necessary because the staff would have worked the problem out among themselves. Other pregnant workers who do not put their restrictions in writing have continued to work throughout their pregnancies. On the other hand, non-pregnant workers with temporary disabilities and medical restrictions have been placed on disability leave similar to Janowicz's and Pierog-Manuel's leave.

On April 26, 1990, the EEOC filed a complaint alleging that the Hospital violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. by treating employees with medical restrictions related to pregnancy differently than employees with other medical restrictions. The District Court orally granted the Hospital's motion for summary judgment. Subsequent to the District Court decision, the Hospital filed a motion for attorney's fees. The District Court issued a written order awarding fees in the amount of \$20,814.50 to the Hospital. The EEOC filed timely appeals of both orders.

II.

We review a grant of summary judgment de novo. *McKee v. Cutter Laboratories, Inc.*, 866 F.2d 219, 220 (6th Cir.1989); *Storer Communications, Inc. v. National Ass'n of Broadcast Employees & Technicians*, 854 F.2d 144, 146 (6th Cir.1988). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Fed.R.Civ.P.* 56(c). Summary judgment is appropriate in sex discrimination cases where the plaintiff has failed to prove a prima facie case or where the evidence is insufficient to support an inference that the employer's articulated reason for the different treatment was in fact a pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Canitia v. Yellow Freight System, Inc.*, 903 F.2d 1064 (6th Cir.), cert. denied, 111 S.Ct. 516 (1990).

Title VII prohibits an employer from discriminating among employees on the basis of "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e.¹ Thus, women affected by childbirth or pregnancy must be treated the same as other employees for all "employment related purposes." In order for summary judgment to be granted in this case, there must be a genuine issue of fact as to whether the Hospital treated pregnant employees worse than employees with medical restrictions who were not pregnant. Because we find that no such issue of fact exists, we AFFIRM the grant of defendant's motion for summary judgment.

The EEOC has failed to show that pregnancy was a determining factor in the Hospital's decision to place the two pregnant employees on involuntary leave. It is hospital policy that as long as a medical restriction exists which interferes with an employee's ability to do a job, that employee may not work. Only when the disability is a permanent one will job reclassification be considered. The EEOC provides no evidence which suggests that this policy is enforced only or disproportionately or discriminatorily against pregnant employees.

The EEOC argues that the Hospital's handling of other employees' disabilities exhibits the discrimination between pregnant and non-pregnant employees. First, the EEOC argues that Theresa McClellan, an EKG technician on the night shift, was not placed on involuntary leave when she reported a non-pregnancy related medical condition. McClellan submitted a note from her doctor which indicated that it would be better if McClellan worked days instead of midnights because of problems associated with her diabetes. The Hospital eventually transferred McClellan to the day shift. McClellan was not placed on temporary disability until the transfer could be arranged. This situation differs from the one at issue because diabetes is clearly a permanent disability. Thus, under the Hospital's policy, job reclassification or other adjustments are permissible. She was not required to take a temporary leave until the transfer because McClellan was able to perform fully the necessary functions of her job during the interim period. Nurses who are not allowed to enter isolation units are not performing the full scope of their duties.

Second, the EEOC argues that the Hospital has treated other pregnant employees better than Janowicz and Pierog-Manual. Specifically, these employees, who chose not to submit written doctors' notes outlining medical restrictions, were allowed to continue working throughout their pregnancies. Hospital employees may choose to work out some difficulties informally that would not be possible if they are handled directly by the Hospital administration. When the Hospital receives written notice of a disability, it faces a greater level of legal responsibility which may require it to actions which are unnecessary when the problem is handled on an informal basis between the employer and supervisor. Clearly, the fact that other employees choose to cover for nurses who cannot perform certain tasks does not show sex discrimination on the part of the Hospital. In addition, the EEOC's argument only shows that some pregnant workers may be treated better than other pregnant workers. Showing that different pregnant workers are treated differently does not supply the prima facie case that the EEOC must develop in order to prevent summary judgment from being granted. Neither does the evidence suggest that the reasons articulated by the Hospital for its policy are a pretext for sexual discrimination.

Because we agree that the EEOC is unable to make out a prima facie case of sex discrimination, we AFFIRM the decision of the District Court to grant the defendant's motion for summary judgment.

III. **

The Supreme Court has held that attorney's fees may be awarded to the prevailing defendant in a Title VII suit "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). An appellate court may overturn a trial court's award of attorney's fees only if it finds that the lower court clearly

abused its discretion in awarding the fees. *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir.1986).

Awards of attorney's fees against the losing plaintiff in a civil rights action "is an extreme sanction, and must be limited to truly egregious cases of misconduct." *Jones*, 789 F.2d at 1232. The court must look at whether the allegation of discrimination was completely unjustified and whether the position presented by the plaintiff is plausible. *Id.* at 1233. The EEOC's position cannot be viewed as implausible or unjustified. The EEOC could have reasonably believed that McClellan's situation prior to her transfer to daytime work was analogous to the plaintiff nurses situation. It was not unreasonable to seek to have this issue decided by the court.

Accordingly, the judgment of the District Court is AFFIRMED. The majority of the panel finds no error in awarding attorney fees. The order awarding attorney fees is therefore also AFFIRMED.

The only issue upon which any members of the panel disagree is the award of partial attorney fees to the defendant. It is the position of two members hereof that the award should be affirmed.***

Section 703(k) of Title VII provides:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k) (1988) (emphasis added). The statute expressly commits the decision whether to award attorney's fees in Title VII actions to the discretion of the trial judge. See *Wrenn v. Gould*, 808 F.2d 493, 504 (6th Cir.1987).

The Supreme Court instructs trial courts to award attorney's fees to a prevailing defendant in a Title VII action only "upon a finding that the plaintiffs action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). Our task in reviewing the trial court's decision to award attorney's fees in this case is to determine whether it has erred in so doing. If we are not firmly convinced that the trial court has made a mistake, then it has not abused its discretion. See *In re Bendectin (Hoffman v. Merrell Dow Pharmaceuticals, Inc.)*, 857 F.2d 290, 307 (6th Cir.1988), cert. denied, 488 U.S. 1006 (1989).

In awarding attorney's fees to Macomb Hospital, the trial court stated:

There was no discrimination in this case, clearly, from start to finish, and the E.E.O.C.'s position is totally unjustified.

....

... [T]he July 23rd, 1990 letter warning the E.E.O.C. of the consequences of this course of action.... clearly laid out that the Commission was opening itself up to a claim of attorney fees. Its position was altogether unreasonable, frivolous, and without foundation, therefore the fees as

1990.

J.A. at 57-58. The EEOC's claim was not so unreasonable from its inception as to warrant an attorney's fees award. Prior to July 23, 1990, the agency did not have full knowledge of the Hospital's past record in dealing with cases of employees' temporary disabilities. By the time the Hospital sent the above-referenced letter, however, the EEOC's discovery was complete and it still had not uncovered any disparate treatment of similarly situated employees. The situation of Theresa McClellan was clearly different from those of Janowicz and Pierog-Manuel in that her disability was permanent. See *supra* p. 4.

A reviewing court has only a "cold" record before it. It is sometimes difficult to determine the propriety of an attorney's conduct from reading briefs and watching that attorney argue for fifteen minutes. It is the trial judge who not only has that opportunity, but likewise a day to day contact with the parties involved. In this instance, there is evidence of persistence beyond that which was appropriate.

It should be noted that the trial judge assessed only those attorney fees incurred after July 23, 1990 when the defendant placed plaintiff on notice that its claims were frivolous (R82: TR. pp. 11-12).

This determination was not an abuse of discretion. By not awarding the fees from the litigation's inception through July 23, 1990, the court refrained from discouraging possible victims of discrimination from bringing actions and investigating their claims. The award of the post-July 23 attorney's fees simply serves as a reminder that claims which are found, upon investigation, to be without foundation or merit should not be pursued further.

The United States and its agencies with superior time, money and manpower should not be able to subject defendants, even corporate defendants, to unnecessary and wasteful depletion of resources in order to pursue an untenable position.

The United States also, it should be pointed out, has an obligation to its citizens not to subject them to unnecessary litigation. The trial judge in this case is an experienced and capable one and if that judge, after a first-hand view of the case and the conduct of the attorneys, determines that the imposition of sanctions by way of attorney fees is appropriate, that decision should be given great deference.

The award of attorney fees by the district court is affirmed.

*

The Honorable Carl B. Rubin, United States District Court for the Southern District of Ohio, sitting by designation

1

The Pregnancy Discrimination Act of 1978, Pub.L. No. 95-555, § 1, 92 Stat. 2076 provides:

The terms [in Title VII] "because of sex" or "on the basis of sex" include ... because of or on the basis of pregnancy, childbirth, or related medical conditions; and 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.

Part III is the opinion only of Circuit Judge Cornelia G. Kennedy. The other members of the panel filed a separate opinion

This opinion was labeled "Dissent." However, it is the opinion of two members of the panel. District Judge Carl B. Rubin is the author. Circuit Judge Nathaniel R. Jones joined in the opinion