

ORIGINAL

In the
Supreme Court of Ohio

NURSING CARE MANAGEMENT OF	:	Case No. 2009-0756
AMERICA, INC. d/b/a/ PATASKALA OAKS	:	
CARE CENTER	:	
	:	On Appeal from the
Appellant,	:	Licking County
	:	Court of Appeals,
v.	:	Fifth Appellate District
	:	
OHIO CIVIL RIGHTS COMMISSION,	:	
	:	Court of Appeals Case
Appellee.	:	No. 08 CA 0030
	:	

**MERIT BRIEF OF
APPELLEE OHIO CIVIL RIGHTS COMMISSION**

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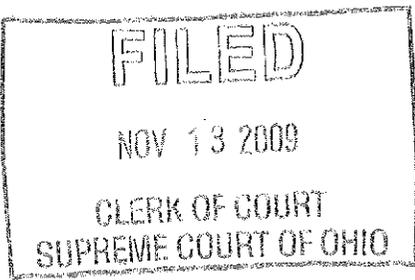


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INTRODUCTION

The employer in this case—Appellant Pataskala Oaks—refused to give any leave time for a pregnant employee, Tiffany McFee, to give birth and recover, and it fired her three days after her child was born. The legal question here is whether Pataskala Oaks violated the Ohio Pregnancy Discrimination Act, R.C. 4112.02(A) and 4112.01(B) (“Ohio PDA”). Appellee Ohio Civil Rights Commission (“Commission”) determined that Pataskala Oaks violated the statute, and the Fifth District Court of Appeals correctly agreed with that determination. The Commission now urges the Court to uphold that result for several reasons.

First, the Ohio PDA’s plain language resolves this case, because it prohibits firing an employee “because of . . . pregnancy, childbirth, or related medical conditions.” R.C. 4112.01(B). Giving birth and recovering from that event are quintessential parts of pregnancy and childbirth, so a new mother’s inability to work the day after giving birth is a “related medical condition.” Thus, firing an employee because of that condition, rather than providing her with any minimal, reasonable leave for childbirth and medical recovery, is a per se violation of the Ohio PDA.

Pataskala Oaks’s opposing “equality” argument—that firing a new mother is not discrimination whenever a company denies any leave to men and women alike—seeks to revive a theory that Congress and the General Assembly rejected long ago. Both the federal and Ohio PDAs were enacted to overrule cases that had held that Title VII’s gender-equality mandate allowed pregnancy discrimination. The reasoning of the cases was that pregnancy as a condition is not the same as being female, and therefore, treatment “because of” pregnancy is not “because of” sex. Both PDAs corrected that flawed reasoning, and post-PDA cases confirm that the remaining equal-treatment language in the statutes cannot be used to trump the PDA’s core

mandate and revive the pre-PDA view. Any doubt on that score is resolved by the statutory mandate to construe the Ohio PDA liberally in favor of broader protection.

Second, the Ohio PDA's corresponding regulations—Ohio Administrative Code (“O.A.C.”) 4112-5-05(G) (“Pregnancy and childbirth”)—simply implement (rather than create) the statutory mandate of “reasonable leave.” After all, granting such leave is the only way to avoid firing someone “because of . . . childbirth”; the regulations merely provide the details. Two sub-parts, O.A.C. 4112-5-05(G)(2) and (G)(6), squarely apply here: sub-part (G)(2) restates the leave mandate, and (G)(6) specifies that the leave mandate trumps a company policy purporting to grant no leave. Here, Pataskala Oaks's minimum length-of-service policy is, for first-year employees, a no-leave policy, so (G)(6) applies and requires reasonable leave.

Pataskala Oaks's contrary view—that one line in O.A.C. 4112-5-05(G)(5) allows an employer to apply its minimum length-of-service policy to give an employee zero leave time for childbirth—cannot be squared with the rest of the regulation. More important, it cannot override the *statutory* mandate against firing someone “because of . . . childbirth or related medical conditions.” All agree that a regulation cannot trump a statute, but that principle here supports the Commission, not Pataskala Oaks, for it is Pataskala Oaks that seeks to rely on regulatory language to escape a statutory mandate. And notably, Pataskala Oaks's regulatory reading offers no limiting principle as to the *duration* of a length-of-service requirement, so a recalcitrant employer could fully avoid the PDA by literally “offering” a generous six-month leave—but only after, say, ten years of employment.

Third, the *McDonnell Douglas* burden-shifting analysis is irrelevant here, because this case involves a policy that discriminates on its face, not a claim that some employer action was a pretext for discrimination. *McDonnell Douglas* is a tool used to ferret out an employer's

discriminatory intent when it denies that any disparate treatment occurred. But Pataskala Oaks does not claim that it fired McFee for poor performance or some other reason. Rather, it freely admits that it fired her for “absenteeism” occasioned by childbirth and recovery, and it merely insists that it was legal to do so. In such a case, intent is irrelevant. The sole question is whether the undisputed facts amount to discrimination as a matter of law, and if so (as here) the case is over.

Finally, the Commission notes that this case raises only the narrow issue of an employer’s duty to provide pregnant employees with *some* reasonable leave for childbirth and *medical recovery*. Because Ohio’s PDA is based on a new mother’s medical inability to work, it does not involve the separate, broader idea of parental leave for sake of the new child, or the family, in general. Thus, unlike the federal Family and Medical Leave Act (“FMLA”), the Ohio PDA does not trigger leave for new fathers, or adoptive parents, and so on. In addition, the case asks only whether a new mother is entitled to any leave at all, and the Court need not, and should not, define the duration or scope of such leave. As long as the Court holds, as it should, that Ohio law requires *some* reasonable leave as an alternative to firing, then the application of that law to the facts here is straightforward. Under any standard, it is unreasonable to expect any new mother to return to work in *three days*.

In sum, Pataskala Oaks fired McFee “because of . . . childbirth,” and when it did so, it discriminated against her on the basis of childbirth, it discriminated against her on the basis of sex, and in short, it broke the law.

STATEMENT OF THE CASE AND FACTS

While this case involves the specific facts of Pataskala Oaks's decision to fire Tiffany McFee three days after she gave birth to her child, the issue is primarily a legal one about the meaning of the Ohio PDA and its accompanying regulations. Thus, this statement includes some of the indisputable legal background about the federal and state laws.

A. Both the federal and Ohio PDAs were enacted in response to the U.S. Supreme Court's decision in *General Electric Company v. Gilbert*, and both define pregnancy discrimination as a form of sex discrimination.

The federal PDA was a direct Congressional response to the U.S. Supreme Court's ruling in *General Electric v. Gilbert* (1976), 429 U.S. 125, which held that Title VII of the Civil Rights Act of 1964 did not prohibit an employer's exclusion of pregnancy-related disabilities from its disability-benefit plan. *Id.* at 136, 139-40. In so holding, the Court relied on the idea, adopted in an earlier equal protection case, that pregnancy discrimination does not constitute sex discrimination because of a "lack of identity" between the line dividing women and men and the line between "pregnant women and nonpregnant persons." *Id.* at 135 (citing *Geduldig v. Aiello* (1974), 417 U.S. 484, 496-97 n.20). The pregnant group "is exclusively female," said the Court, but the nonpregnant group "includes members of both sexes." *Id.* The Court concluded that excluding pregnancy from coverage was neutral because no one received coverage for pregnancy; the insurance coverage was "facially nondiscriminatory in the sense that there is no risk from which men are protected and women are not," and vice versa. *Id.* at 138 (internal citations omitted). In sum, it was "neutral" to deny pregnancy-related benefits when such benefits were denied to men and women alike, and it did not matter that only women could be pregnant, because not all women were pregnant.

Congress responded by enacting the PDA to reverse *Gilbert's* understanding of neutrality or equality under Title VII. The PDA did not create a new cause of action or refine the cause of

action defined under Title VII. Rather, it amended Title VII's definitional section to include both pregnancy and childbirth within the definition of "sex," such that any discrimination—in hiring, firing, and so on—that occurred "because of" or "on the basis of" pregnancy or childbirth constituted discrimination "because of sex." 42 U.S.C. § 2000e(k) ("PDA").

Ohio quickly followed suit. The General Assembly amended the definition section of R.C. Chapter 4112, Ohio's Fair Employment Practices Act ("FEPA"), to incorporate the language of the federal PDA. See R.C. 4112.02(A) & 4112.01(B). As with the federal Title VII, R.C. 4112.02(A) already prohibited employers from discharging, refusing to hire, or otherwise discriminating against anyone "because of" his or her sex. And as with the federal PDA, the Ohio PDA clarified that the definition of discrimination "because of sex" or "on the basis of sex" included any actions occurring "because of" or "on the basis of" pregnancy, childbirth, and related medical conditions:

For the purposes of divisions (A) to (F) of section 4112.02 of the Revised Code, 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.

R.C. 4112.01(B). The Ohio PDA further explained that pregnant women were entitled to equal treatment regarding fringe benefits and for other employment-related purposes:

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.

Id. Finally, the Ohio PDA further refined the "equal benefits" mandate by excluding abortion. No employer is required to provide health insurance benefits for abortion except where the life of the mother would be endangered by a full-term pregnancy, or "where medical complications have arisen from the abortion." *Id.* Thus, under the terms of the Ohio PDA, aside from the

abortion exception, employers may not discriminate against any person because of “childbirth, pregnancy, or related medical conditions.” R.C. 4112.01(B).

B. Ohio adopted administrative regulations addressing maternity leave.

In 1977, the Commission promulgated rules specifically addressing pregnancy discrimination, pursuant to the Commission’s general statutory mandate authorizing rulemaking to effectuate Ohio’s anti-discrimination laws. See O.A.C. 4112-5-05(G) (“Pregnancy and childbirth”); R.C. 4112.04(A)(4) (laying out the Commission’s rulemaking authority).

As first enacted in 1977, the regulations included four subsections, the second of which specifically prohibited firing a pregnant employee when an employment policy provided insufficient or no maternity leave. See O.A.C. 4112-5-05(G)(2) (1977). That part provided that, “[w]here termination of an employee who is temporarily 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.” *Id.*

The regulations were twice amended and supplemented. In 1989, the Commission added subsections (5) and (6), and in 1997 the Commission altered slightly the language of subsection (6) to add the terms “[n]otwithstanding paragraphs (G)(1) to (G)(5) of this rule,” which, according to the historical record of the Ohio Joint Committee on Agency Rule Review (“JCARR”), was the Commission’s attempt “[t]o clarify that an employer must provide a reasonable amount of leave to a pregnant employee and allow the employee to return to her job or a similar job upon completion of her leave.” O.A.C. 4112-5-05(G), Rule Summary and Fiscal Analysis (“RSFA”) 9-26-96 (Oct. 3, 1997). As it reads today (and as it read when the facts of this case occurred), O.A.C. 4112-5-05(G) provides:

- (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.

O.A.C. 4112-5-05(G) (2009).

C. Pataskala Oaks did not give Tiffany McFee maternity leave, and it fired her three days after she gave birth to her child.

The parties stipulated to the facts, so no factual disputes are involved. Pataskala Oaks hired Tiffany McFee as a Licensed Practical Nurse on June 9, 2003. *Nursing Care Mgmt. of Am. v. Ohio Civil Rights Comm'n* (5th Dist.), 181 Ohio App. 3d 632, 2009-Ohio-1107 ("App. Op.," P. Oaks Appx. at A-5) (citing Joint Stipulation ("Stip.") ¶ 4). About eight months later, and a few

days before she was to give birth, McFee provided Pataskala Oaks with a doctor's note stating that complications in her pregnancy made her medically unable to work until six weeks after her delivery. App. Op. ¶ 4 (citing Stip. ¶¶ 8-9). Pataskala Oaks, however, has a company policy to deny leave to all of its employees during their first year of employment. *Id.* ¶ 3 (citing Stip. ¶¶ 5, 6, 7). Pataskala Oaks, following this policy, applied its minimum length-of-service requirement and denied McFee's request for six weeks of maternity leave. *Id.* ¶ 5 (citing Stip. ¶ 10). Instead, it fired McFee three days after she gave birth to her child. *Id.* (citing Stip. at ¶ 11).

D. The Commission found that Pataskala Oaks discriminated against McFee, but the common pleas court reversed.

After Pataskala Oaks fired her, McFee filed a charge of discrimination with the Commission, alleging that she was unlawfully terminated because of her pregnancy. After investigating, the Commission issued an administrative complaint alleging that Pataskala Oaks terminated McFee "because of her pregnancy," in violation of R.C. 4112.02(A). An Administrative Law Judge ("ALJ") recommended dismissing the case, but the Commission disapproved of the ALJ's Report and Recommendation and issued a Final Order holding that McFee had been terminated solely because of her need for maternity leave—"because of pregnancy"—in violation of R.C. 4112.02(A). See Final Order of the Commission in *McFee v. Nusing Care Mgmt.* (Mar. 1, 2007), Compl. No. 9816 ("OCRC Final Order") (P. Oaks Appx. at A-37).

The Licking County Court of Common Pleas reversed the Commission's Order, holding that O.A.C. 4112-5-05(G)(2) authorized Pataskala Oaks to place a length-of-service requirement on leave time provided to pregnant employees as long as that requirement was evenly applied. See Judgment Entry (P. Oaks Appx. at A-27).

E. The appeals court reversed, reinstating the Commission's Order and holding that firing an employee rather than providing maternity leave violated Ohio's PDA.

On further appeal, the Fifth District Court of Appeals held that Pataskala Oaks violated the PDA when it denied McFee maternity leave and fired her instead. The Court held that Ohio law requires maternity leave "for a reasonable period of time" and that refusal to grant leave is discriminatory regardless of an employer's motive. App. Op. ¶¶ 53-54.

The Fifth District found that the plain language of O.A.C. 4112-5-05(G) was unambiguous, relying on (G)(2)'s express statement that "termination of an employee disabled due to pregnancy is prohibited if the employer provides no maternity leave or insufficient maternity leave under its employment policy." *Id.* ¶ 48. Further, it explained that this interpretation is consistent with the goals of both the PDA and Ohio's broader anti-discrimination law, the Ohio FEPA, because it promotes equal employment opportunity "by ensuring that women will not lose their jobs on account of pregnancy disability." *Id.* ¶ 50. The court also found that such a violation is a per se violation, so an employer's motive is not relevant; thus, it concluded that the *McDonnell Douglas* burden-shifting approach used in other types of employment-discrimination cases did not apply. *Id.* ¶ 53 (citing *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792).

This Court accepted Pataskala Oaks's request to review the case.

ARGUMENT

Ohio law does not allow an employer to fire a new mother three days after giving birth, simply because she is not yet able to return to the job. That common sense result is mandated by the statute itself, so the Commission's first Proposition of Law essentially concludes the case. The Commission's other two Propositions of Law rebut Pataskala Oaks's attempt to avoid the statutory mandate and confirm the law's application to these facts.

First, Ohio's PDA, prohibits discrimination against female employees "because of . . . pregnancy, childbirth, or related medical conditions." R.C. 4112.01(B). That text bars firing a female employee for "absenteeism" when childbirth and a related condition—namely, the need to recover medically—require her to miss work to give birth and recover. Thus, the statute itself mandates maternity leave, even if it does not use the words "maternity leave," because such leave is the *sole alternative* to a forbidden firing.

Second, the Commission's corresponding regulations implement that statutory mandate by using the express term "leave" and by confirming that firing an employee instead is prohibited. The other parts of the regulations do not detract from that mandate or authorize a policy such as Pataskala Oaks's, and in any case, no regulation could negate the statutory mandate.

Third and finally, the *McDonnell Douglas* burden-shifting analysis does not apply here, because if the law does prohibit what happened here—and it does—such facial discrimination is a *per se* violation, and motive is irrelevant.

Taken together, these Propositions confirm that Pataskala Oaks violated the Ohio PDA and committed sex discrimination when it fired McFee. Thus, the Court should affirm the Fifth District's decision and uphold the Commission's finding.

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

The Ohio PDA, R.C. 4112.02(A) and 4112.01(B), bars firing an employee "because of . . . pregnancy, childbirth, or related medical conditions," so an employer violates that prohibition when it fires an employee immediately after she gives birth instead of allowing her reasonable leave to give birth and recover.

- A. The plain language of the Ohio PDA, R.C. 4112.02(A) and 4112.01(B), requires an employer to allow an employee a reasonable period of leave to give birth and recover, as such leave is the only alternative to a prohibited firing.**

The plain language of the Ohio PDA controls this case, because Pataskala Oaks did precisely what the statute tells it not to do: it fired Tiffany McFee *because she gave birth and needed more than three days to recover* and return to work. The statute is straightforward: the Ohio FEPA forbids firing an employee because of sex, 4112.02(A), and the Ohio PDA, R.C. 4112.01(B), clarifies that an employer cannot fire someone because of pregnancy, childbirth, or any related medical conditions. This textual clarity triggers the rule that when a statute's language conveys a clear and definite meaning, the statute must be applied accordingly. See *State v. Elam* (1994), 68 Ohio St. 3d 585, 1994-Ohio-317, 5. Here, the statute's application is equally simple, as the facts are as clear as the law: Pataskala Oaks fired McFee because she had not yet recovered from childbirth enough to return to work.

- 1. The statute's maternity-leave mandate arises logically from the bar against firing, as those binary options leave no other alternative.**

Although the Ohio PDA does not explicitly mention "maternity leave," such leave flows logically from the prohibition on firing an employee "because of . . . pregnancy, childbirth, or related medical conditions." R.C. 4112.01(B). That is so because an employer has only two options when an employee is unable to return to work due to recent childbirth: (1) allow leave until she recovers, or (2) fire her for absenteeism because of the birth. Thus, when the General Assembly outlawed the firing option, it necessarily mandated the leave option even if it did not use the word "leave." After all, the definition of unpaid leave—and that it is all that is at issue

here, not paid leave—is the ability to take time off without pay and without being fired for missing work.

Further, the need to miss work on the day of giving birth, and the need to miss work to recover for some time after, both fall under the headings of “childbirth[] or related medical conditions.” The “medical conditions” point is critical here, because it shows that this particular law is solely about the new mother’s medical condition and physical inability to work. It is not—in sharp contrast to the federal FMLA or similar laws—about mandating a social-welfare benefit for the good of children, families, and so on. It is not based upon the time needed to take care of a baby, so, for example, it does not mandate leave for fathers or for adoptive parents. Conversely, it does mandate leave for a mother who gives birth and immediately gives the baby up for adoption, as her medical condition still requires some recovery time.

The Commission cannot respond to Pataskala Oaks’s view of the Ohio PDA’s first sentence, with its “because of . . . childbirth” language, because Pataskala Oaks never once cites or acknowledges that sentence—which is the heart of the case—let alone offers some explanation of why it does not apply here. The appeals court cited it, App. Op. ¶ 23, and the Commission relied on it, see OCRC Final Order (P. Oaks Appx. at A-31-38), but Pataskala Oaks ignores it.

Instead, Pataskala Oaks relies solely on the *second* sentence in R.C. 4112.01(B), which supplements the first “because of” sentence and requires that pregnant women “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.” Pataskala Oaks Br. (“P. Oaks Br.”) at 5. Pataskala Oaks quotes this language three times, *id.* at 5, 8, and 9, but never the sentence that precedes it. Thus, Pataskala Oaks implicitly suggests that the first sentence does not matter here, and that the

second sentence is the sole statutory benchmark. Only by adopting that approach can Pataskala Oaks argue that the statute does not mandate leave, and only on that basis can it accuse the Commission of improperly relying on the regulations rather than the statute to effectively “transform” the Ohio PDA “into a mandatory leave law.” *Id.* at 8.

The better view is to consider both statutory sentences and to harmonize them. And, as explained below, the second sentence does not eliminate or dilute the mandate of the first—as shown by both the text used and decisions of the United States Supreme Court.

2. The PDA’s “equal treatment” language in the second sentence does not erase or dilute the maternity-leave mandate in the first sentence.

The first and second sentences of the PDA—the “because of” sentence and the “equal treatment” sentence—should be read in a way that gives life to both provisions. *State ex. rel. Shisler v. Ohio Pub. Employees Ret. Sys.*, 122 Ohio St. 3d 148, 2009-Ohio-2522, ¶ 20 (“Under the in pari materia canon of construction, we read all statutes relating to the same general subject matter together and interpret them in a reasonable manner that give[s] proper force and effect to each and all of the statutes.”) (internal citations and quotations omitted). Pataskala Oaks’s view fails that test, as its view of the second sentence would allow an employer to violate the plain text of the first sentence. The Commission’s view, by contrast, does not commit the converse error, as its view preserves meaning for both sentences, adopting the meaning that the U.S. Supreme Court explained in addressing the parallel language in the federal PDA. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC* (1983), 462 U.S. 669, 676; see *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm’n* (1981), 66 Ohio St. 2d 192, 196 (holding that this Court follows federal case law regarding antidiscrimination statutes when addressing Ohio’s parallel laws).

In *Newport News*, the U.S Supreme Court explained that the second “treated the same” clause did not limit, let alone override, the first clause’s prohibition against firing or otherwise discriminating against an employee “because of” pregnancy or childbirth. *Newport News*, 462 U.S. at 676. The text of Ohio’s PDA closely mimics the language of the federal provision; it simply uses two sentences instead of one. (The Ohio PDA also adds another clause not relevant here.) The federal PDA provides, in relevant part:

(k) 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 to work, and nothing in section 703(h) of this title [42 USCS § 2000e-2(h)] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e(k). The Court explained the federal PDA’s two “clauses” as follows: “The meaning of the first clause [i.e., defining “sex” to include “pregnancy and childbirth”] is not limited by the specific language of the second clause [i.e., “shall be treated the same”], which explains the application of the general principle to women employees.” *Newport News*, 462 U.S. at 678 n.14.

Not only does this language confirm that the second clause does not limit the first, but it explains how the second is narrower in scope: the first is a “general principle” against acting adversely to an employee “because of” pregnancy or related conditions, and the second is merely one “application” of that principle. That makes sense, as, of course, denying benefits to pregnant employees is discriminatory; nevertheless, firing someone because of pregnancy is forbidden by the broader general principle, even if no fringe benefits or similar items are involved.

Notably, the Court unanimously agreed on this common sense reading, as the dissent expressly noted its agreement before dissenting on other grounds. The sole dissenter in *Newport News*, then-Justice Rehnquist, stressed that “I do not disagree” with the majority’s approach to the two clauses, and he quoted the majority’s full sentence to leave no doubt. *Id.* at 688 (Rehnquist, J., dissenting). He dissented because, in his view, the PDA protected only pregnant employees (and applicants), thus allowing the exclusion of benefits to pregnant wives or daughters of male employees. *Id.* at 695. In explaining that view regarding the exclusion of pregnant dependents, Justice Rehnquist stressed the PDA’s “singular focus of discussion on the problems of the *pregnant worker*.” *Id.* at 689 (emphasis in original). In that regard, he quoted one sponsor’s statement that, “In addition to providing protection to working women with regard to fringe benefit programs, such as health and disability insurance programs, this legislation will prohibit other employment policies which adversely affect pregnant workers.” *Id.* (quoting 124 Cong. Rec. 36817 (1978) (statement of Sen. Williams)). That reference to “other employment policies” that could harm pregnant workers, “in addition to” unequal benefit programs, shows that the first clause has a broader focus on all employment practices, and the second focuses on benefits, such as the eligibility-for-benefits policy at issue in *Gilbert*.

After *Newport News* took this view, Congress did not then, and never has since, amended the law to reject the Court’s reading of the PDA. That is significant here because given that Congress enacted the PDA precisely to overrule *Gilbert* it would have been much more likely, compared to in other cases, to react if the Court had gotten it wrong again. Further, the Court reiterated its view when it next considered the PDA. *Cal. Fed. Sav. & Loan Ass’n v. Guerra* (1987), 479 U.S. 272, 285. In *Guerra*, the Court explained that the second clause did not “impos[e] a limitation on the remedial purpose of the PDA,” but that it instead “was intended to

overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied.” *Id.* Again, the second clause “illustrate[s]” the first but does not limit it, and it corrects the specific *Gilbert* issue of fringe benefit programs and the like that specifically exclude pregnancy from coverage.

The U.S. Supreme Court’s description of the second clause as a narrower “illustration” of the first—focusing on benefits or other conditions as opposed to the broader prohibition against discriminatory hiring and firing—is equally true of Ohio’s PDA, as a careful examination of the text shows. The first sentence says that “because of sex,” for purposes of R.C. 4112.02’s bar on hiring, firing, and so on, includes any such actions “because of” or “on the basis of” an employee’s “pregnancy, childbirth, or related medical conditions.” The second sentence, however, does not refer to R.C. 4112.02’s broad prohibitions, but places its mandate for pregnant women to be “treated the same” in the narrower context of “employment-related purposes, including receipt of benefits under fringe benefit programs.”

The maternity leave at issue here, because it is merely a barrier against being fired, does not fit the context of “fringe benefits” or other “employment-related purposes.” First, such leave is not a “fringe benefit,” because protection for keeping one’s job is not a “fringe” attached to the job; it is *the job itself*. To be sure, leave policies are sometimes thought of as a form of “fringe benefit,” but that is so because many other forms of leave, such as vacation and personal days, are *paid*, and further, an employee can choose to invoke them. So a new employee with no vacation can simply go without for a year, but an employee unable to work after childbirth has no choice. Keeping the job is not an affirmative “benefit,” but is merely the necessary absence of the negative event of being fired. Second, the term “employment-related purposes” is also best understood as referring to contexts *within* employment, such as promotions, and not the

basic hiring and firing decisions, because getting or losing a job is not merely employment “related” but is employment itself. In addition, viewing the second sentence as more narrowly about benefits, flows naturally into the third sentence, which even more narrowly negates any obligation to cover abortion costs in a benefit program (unless medically necessary).

This reading of the second sentence is the better one because it gives meaning to both sentences. By contrast, Pataskala Oaks’s position allows an employer to rely on the second sentence to justify an act that violates the plain text of the first sentence. Alternatively, even if Pataskala Oaks were somehow right (and it is not) that the statute does not mandate leave, its view would at a minimum render the first sentence irrelevant. That is, if the “employment-related purposes” in the second sentence were so broad as to mandate Pataskala Oaks’s view of “equal treatment” in all cases, then it is hard to see how the first sentence adds anything at all. The PDA could have been enacted without it, without changing a thing. But of course, statutes should not be read to have no effect. *Celebrezze v. Hughes* (1985), 18 Ohio St. 3d 71, 75 (“[T]he General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute, it is inserted to accomplish some definite purpose.”).

Consequently, the Court should conclude that Ohio’s PDA is a statutory mandate for maternity leave, as the sole alternative is a prohibited firing in violation of the law. That alone ends the case, and everything else is merely confirmation.

B. Any doubt about the statute’s plain meaning must be resolved in the employee’s favor under the liberal construction mandate, as only the Commission’s reading serves the purposes of protecting pregnant workers and eradicating discrimination.

Even if the Court finds the statutory text of R.C. 4112.02(A) and 4112.01(B) ambiguous—though it is not—the Court should adopt the Commission’s view in favor of prohibiting the firing of a new mother. The General Assembly, in R.C. 4112.08, mandates that all of the Ohio FEPA, including the PDA, be “construed liberally for the accomplishment of its purposes.” The Court

follows this path. See, e.g., *Dworning v. City of Euclid*, 119 Ohio St. 3d 83, 2008-Ohio-3318, ¶ 35 (“We will not permit a rule of judicial convenience to frustrate R.C. Chapter 4112’s goals of eliminating discrimination and providing redress to its victims. R.C. 4112.08 forbids such a result.”) Because the Ohio PDA was enacted to promote equal employment opportunities for women, a reading of the statute that endorses firing a new mother because she experiences the continuing medical consequences of giving birth—consequences unique to women and the core reason for enacting the PDA—would not only violate the liberal construction mandate, but it would also undercut the purpose for which the PDA was enacted.

Pataskala Oaks’s view, by insisting that it is “preferential treatment” to account for the biological reality that only women face pregnancy, seeks to revive the precise theory of neutrality that *Gilbert* adopted, and the PDA rejected. Indeed, not only is it not “preferential” or discriminatory to account for the sexes’ asymmetry regarding pregnancy, but to the contrary, it is discriminatory to refuse to acknowledge that difference, and to fire women for giving birth. As one Ohio appeals court put it, “when the two sexes are *dissimilar* in that one sex exclusively possesses a trait which the other, without exception, does not possess, it is a differentiation based on sex to treat two sexes *similarly* in that regard.” *Frank v. Toledo Hosp.* (6th Dist. 1992), 84 Ohio App. 3d 610, 616.

Pataskala Oaks cites several cases that, it says, endorse its view of an “equal treatment” mandate, as opposed to what it calls “preferential treatment,” but those cases are distinct. Those all involve on-the-job conditions that fit under the Ohio PDA’s second sentence regarding equal treatment, not an employer’s policy of hiring or firing someone “because of pregnancy.” See *Tysinger v. Police Dep’t of City of Zanesville* (6th Cir. 2006), 463 F.3d 569, 571 (denial of a pregnant employee’s request for light duty at work was not pregnancy discrimination); *Mullet v.*

Wayne-Dalton Corp. (N.D. Ohio 2004), 338 F. Supp. 2d 806, 809 (same); *Priest v. TFH-EB, Inc.* (10th Dist. 1998), 127 Ohio App. 3d 159, 167-68 (finding that employer's denial of pregnant employee's request to avoid being exposed to cigarette smoke in the workplace was not pregnancy discrimination); *Frank*, 84 Ohio App. 3d at 616-17 (finding that employee's termination for refusing to get a mandatory rubella vaccine at work was not pregnancy discrimination); *Armstrong v. Flowers Hosp.* (M.D. Ala. 1993), 812 F. Supp. 1183, 1191-92 (denial of pregnant employee's request to avoid contact with AIDS patient at work was not pregnancy discrimination). In the alternative, to the extent that these or any other cases are not distinct, but instead, arguably continue to apply the now-obsolete *Gilbert* view of equality, they are simply wrong.

Pataskala Oaks cites only one case that involves maternity leave, see *Frazier v. Practice Resources Management Group, Inc.* (10th Dist.), 1995 Ohio App. Lexis 2750, but its reliance on *Frazier* is also misplaced. *Frazier* merely held that an employer need not have a policy providing its pregnant employees with *unlimited* maternity leave, a proposition the Commission does not dispute. The Commission's regulation requires only "reasonable" leave, O.A.C. 4112-5-05(G)(2), and that is, again, because the alternative is a firing prohibited by the statute.

Moreover, federal law—which guides Ohio law in this context, *Plumbers*, 66 Ohio St. 2d at 196—is replete with explanations of how the analogous federal PDA is meant to preserve women's ability to participate in the workplace, and how allowing for "different" treatment to recognize the unique reality of pregnancy, does not itself amount to discrimination. That vision starts with Title VII itself: "[I]n enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment

opportunity due to discrimination on the basis of race, religion, sex, or national origin.” *Franks v. Bowman Transp. Co., Inc.*, (1976), 424 U.S. 747, 763.

And in enacting the PDA, Congress confirmed what Title VII meant all along: that accounting for pregnancy, even if it means “different” treatment, implements Title VII’s vision of equality; it does not amount to “preferential treatment” in violation of Title VII’s equality requirements. Thus, the U.S. Supreme Court rejected a claim that California’s mandate to provide certain pregnancy benefits violated Title VII by requiring a “preference.” *Guerra*, 479 U.S. at 289. It explained that by “taking pregnancy into account, California’s pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs.” *Id.* (internal citation omitted). And it cited the PDA’s legislative history, noting that “[t]he entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.” *Id.* at 289 (quoting 123 Cong. Rec. 29658 (1977) (statement of Sen. Williams)).

Thus, maternity leave, unlike insurance benefits or other ancillary issues, is fundamental to protecting women’s ability to obtain and keep jobs. See *Abraham v. Graphic Arts Int’l Union* (D.C. Cir. 1981), 660 F.2d 811, 817 (“[P]regnancy and childbirth are, of course, phenomena shared only by women, and only female employees are susceptible to employment losses which may be tied to either.”); accord *Kansas Gas & Elec. Co. v. Kansas Comm’n on Civil Rights* (Kan. 1988), 750 P.2d 1055, 1057.

Moreover, equal employment opportunity is further implicated here because, as the Commission noted in its Final Order, allowing an employer to fire a new mother not only violates the statutory ban on *firing* because of pregnancy and childbirth, but it effectively allows

an employer an end-run around the ban on pregnancy discrimination in *hiring* as well. OCRC Final Order (P. Oaks Appx. at A-37). No one can deny that it is illegal sex discrimination for an employer to refuse to hire a pregnant woman because she is pregnant. Yet, if the employer may announce in advance to such an applicant, “I will hire you today, but be forewarned that you will be fired in a few months,” that renders hollow the protection against discrimination in hiring. By firing Tiffany McFee, Pataskala Oaks has essentially hung up a “pregnant women need not apply” sign.

Further, Pataskala Oaks’s policy threatens employment opportunity for all job applicants who might be pregnant soon. As the Sixth Circuit has explained, the PDA protects the potentially pregnant, in that it prohibits an employer from refusing to hire a woman based on the belief that the *particular* woman is likely to be pregnant soon after hiring. *Kocak v. Comm. Health Partners of Ohio, Inc.* (6th Cir. 2005), 400 F.3d 466, 469-70. But that protection carries little weight if a woman is discouraged from even applying, based on the fear that becoming pregnant “too soon” will result in her being fired.

In sum, the PDA’s purpose and text are aimed at preventing women from being fired or kept out of the workplace because of the biological reality of pregnancy, and allowing a new mother to be fired for giving birth cannot be squared with that basic goal. Nor is it plausible to say that someone in McFee’s situation is being fired “because of” absenteeism rather than the birth itself, because the inability to work is a “related medical condition.” Nor is it plausible to say that the causation here is linked to the policy, not the birth, so that McFee was fired “because” she did not have a year of service yet. If that were true, an employer that chose to give no leave, ever, not just for the first year, could also point to its policy as “the cause.” The

only way to ensure that the PDA's literal terms, as well as its purpose of allowing women to participate fully in the workplace, are met is to require leave and to forbid firing.

C. Other states have interpreted similar anti-discrimination statutes as mandating the provision of reasonable maternity leave.

The Ohio PDA and the cases that interpret it, along with those involving the federal law, are reason enough to affirm the Fifth District's decision and the Commission's Order. Notably, though, Ohio is not the only State that requires employers to provide female employees with reasonable maternity leave, and it is not the only State to do so by the mechanism of barring firing because of pregnancy and childbirth. The Court has noted its willingness to look to other States' case law when those similar statutes are involved, and this is such a case. *Lakeside Ave. Ltd. P'Ship v. Cuyahoga County Bd. of Revision*, 75 Ohio St. 3d 540, 1996-Ohio-175, 9-10; *Ratner v. Stark County Bd. of Revision* (1986), 23 Ohio St. 3d 59, 61; *Cincinnati v. Kelley* (1976), 47 Ohio St. 2d 94, 95.

A Hawaii decision, *Teague v. Hawaii Civil Rights Commission* (Haw. 1999), 971 P.2d 1104, is particularly instructive, because there, the Hawaii Supreme Court construed its State's anti-discrimination mandate to reject *Gilbert*-style "neutrality" and hold that pregnancy and childbirth automatically require the provision of reasonable leave. *Id.* at 1114-15. The *Teague* Court applied its statute and corresponding administrative rules—which are virtually identical to Ohio's—and concluded that the application of an employer's one-year minimum length-of-service requirement to deny leave to a pregnant employee, resulting in her termination, constitutes unlawful sex discrimination. *Id.* at 1115. The court reasoned that "an employer's policy prohibiting any extended leave for one year contravenes the plain language of [the statute]," and noted that the employer's policy to disallow its employees any leave greater than a few days "[f]ell] considerably short of the period generally recognized in the human experience as

the time needed for pregnancy leave.” *Id.* at 1114. The court also explained that “[o]ther jurisdictions that have enacted [similar administrative rules] have held that ‘no leave’ policies similar to Employer’s in this case result in impermissible sex discrimination.” *Id.* at 1113. As in *Teague*, therefore, to find otherwise would undermine the purpose of the Ohio PDA—to further the provision of equal employment opportunities to *both* sexes, while simultaneously recognizing the biological differences between them.

Decisions by the Supreme Courts of Kansas and Montana are in direct accord. See *Kansas Gas & Elec. Co.*, 750 P.2d at 1057-58 (explaining that Kansas’s anti-discrimination statute requires the provision of maternity leave); *Miller-Wohl Co., Inc. v. Comm’r of Labor & Indus.* (Mont. 1984), 692 P.2d 1243, 1251, *vacated and remanded on other grounds*, 479 U.S. 1050 (determining that employer’s “no leave policy,” though facially neutral, was gender-based discrimination where its application subjected pregnant women to the risk of job termination “on a basis not faced by men”). Thus, the Court should join these sister States in affirming that a pregnancy-discrimination law, by barring pregnancy-caused firings as a specific prohibition in an equal employment opportunity statute, logically mandates maternity leave as the sole alternative to allowing such firings. Equal employment opportunity is not advanced by endorsing the firing of a new mother under the guise of “equal treatment.”

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

The relevant Ohio regulations merely implement the statute's mandate to provide "reasonable leave," and nothing in the regulations or in an employer's length-of-service requirements can negate that mandate.

Although this Court can (and should) affirm the Fifth District's decision based solely on the statutory language at issue, the administrative regulations that interpret that language bolster the Commission's position. Moreover, even if the Court somehow concludes that the statute does not mandate maternity leave—though the statute does—the regulations provide such a mandate in a manner consistent with the statute.

A. O.A.C. 4112-5-05(G) requires employers to provide female employees with reasonable maternity leave, and reading all of the sub-parts of the regulation together confirms that understanding.

Statutes and administrative regulations are an interrelated body of law, and courts must construe the provisions in harmony. *State ex rel. Cuyahoga County Hosp. v. Ohio Bureau of Workers' Comp.* (1986), 27 Ohio St. 3d 25, 27 (citing *State ex rel. McGraw v. Gorman* (1985), 17 Ohio St. 3d 147, 149). Moreover, an administrative rule implemented under a statutory scheme cannot be overturned unless it conflicts with a statute on the same subject matter. *State ex rel. Celebreeze v. Nat'l Lime & Stone Co.*, 68 Ohio St. 3d 377, 382, 1994-Ohio-486.

Ohio's rules of statutory interpretation "apply equally to administrative regulations." *State ex rel. Brilliant Elec. Sign Co. v. Indus. Comm'n of Ohio* (1979), 57 Ohio St. 2d 51, 54. Therefore, if unambiguous, the plain language of the regulations in question govern. See *State ex rel. Nimberger v. Bushnell* (1917), 95 Ohio St. 203, syl. ¶ 4. If, however, a court determines that an administrative regulation is ambiguous, it must defer to the agency's interpretation of that regulation. *Cincinnati City Sch. Dist. v. State Bd. of Educ.* (10th Dist. 1996), 113 Ohio App. 3d 305, 312. Moreover, where—as in the case of O.A.C. 4112-5-05(G)—the regulations in question all relate specifically to a single issue, a court should construe them together to give

“full force and effect to the legislative intent.” *State v. Parks* (10th Dist. 1983), 13 Ohio App. 3d 85, 86 (noting that sections of a statute relating to the same subject are to be “construed together so as to give full force and effect to the legislative intent”).

Applying this approach, O.A.C. 4112-5-05(G) requires employers to provide their employees with reasonable maternity leave regardless of any internal policies, and Pataskala Oaks’s arguments to the contrary are insupportable.

1. **O.A.C. 4112-5-05(G)(2) expressly prohibits firing an employee on the basis of “pregnancy or a related medical condition,” and that prohibition covers a termination caused by a policy granting insufficient or no maternity leave.**

O.A.C. 4112-5-05(G)(2) provides that, “[w]here 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.” The meaning of (G)(2) is unambiguous and needs no interpretation. See *State ex rel. Jones v. Conrad*, 92 Ohio St. 3d 389, 392, 2001-Ohio-207. Since Pataskala Oaks does not dispute that it fired McFee because she had worked there for less than one year when she requested maternity leave—and hence, made no maternity leave available to her—terminating her employment was unlawful.

Pataskala Oaks argues that “available,” as used in (G)(2), means any leave that is “theoretically available,” should the pregnant employee happen to need the leave after she has satisfied the “employer’s internal ‘no leave’ policy.” P. Oaks Br. at 11. Such a reading, however, would permit an employer to dispense with its maternity-leave policy altogether, in contravention of the statutory mandate to provide such leave. This interpretation would effectively gut the regulation—which, notably, is the *only* regulation in the scheme to address specifically the issue of termination. See *Hoffman v. State Med. Bd. of Ohio*, 113 Ohio St. 3d 376, 2007-Ohio-2201, ¶ 17 (“[A]n administrative rule may not add to or subtract from a

legislative enactment. If it does, it creates a clear conflict with the statute, and the rule is invalid.”) (internal citation omitted).

2. O.A.C. 4112-5-05(G)(5) does not authorize firing an employee based on the employer’s minimum length-of-service requirement.

Pataskala Oaks extends its flawed interpretation of (G)(2) to argue that O.A.C. 4112-5-05(G)(5) specifically governs a situation like McFee’s—where an employer’s minimum-length-of-service requirement applies to *all* types of leave. The regulation states:

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 her 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.

O.A.C. 4112-5-05(G)(5) (emphasis added). Pataskala Oaks’s argument that (G)(5) authorizes the termination of *any* employee who has not met an employer’s minimum length-of-service requirement is flawed for several reasons.

First, a regulation cannot derogate from a statute. Yet that is precisely what Pataskala Oaks’s reading does, by setting up (G)(5) to conflict with the statutory mandate of reasonable leave for pregnant employees. *State ex rel. Celebreeze*, 68 Ohio St. 3d at 382. Instead, the regulation should be read in harmony with both the underlying statutory mandate and with the other regulations, all of which favor the provision of maternity leave.

Second, Pataskala Oaks fixates improperly on the second and third sentences of (G)(5), disregarding both the surrounding language of (G)(5) itself and that of the other subsections of the regulation. In taking the other sentences in the provision out of context, Pataskala Oaks contravenes the well-established rule that “words in statutes should not be construed to be

redundant, nor should any words be ignored.” *E. Ohio Gas Co. v. Pub. Util. Comm’n of Ohio*. (1988), 39 Ohio St. 3d 295, 299. The first sentence of (G)(5) speaks in clear terms: “Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing.” O.A.C. 4112-5-05(G)(5). Though they would have this Court gloss over it, that sentence alone negates Pataskala Oaks’s argument.

Third, Pataskala Oaks’s interpretation does not square with the fact that several Ohio courts have interpreted (G)(5) as requiring employers to provide pregnant employees with reasonable maternity leave. For instance, in *Woodworth v. Concord Management Limited* (S.D. Ohio 2000), 164 F. Supp. 2d 978, an Ohio federal district court referenced O.A.C. 4112-5-05(G)(5) and noted that “[t]he Ohio Administrative Code plainly indicates that new mothers must be granted a reasonable leave on account of childbearing.” *Id.* at 984 (internal citation omitted). Decisions by several Ohio state courts are in accord. See, e.g., *McConaughy v. Boswell Oil Co.* (1st Dist. 1998), 126 Ohio App. 3d 820, 829 (“According to [O.A.C.] 4112-5-05(G)(5), if an employer has a leave policy, a female employee ‘must be granted a reasonable leave on account of childbearing.’ If there is no leave policy, the employee must be provided a leave of absence ‘for a reasonable period of time.’ [O.A.C.] 4112-5-05(G)(6).”); *Frazier*, 1995 Ohio App. Lexis 2750, at *10 (“[A]n employer need not have a policy allowing unlimited maternity leave: an employer is required only to have a reasonably adequate policy of maternity leave”); *Marvel Consultants, Inc. v. Ohio Civ. Rights Comm’n* (8th Dist. 1994), 93 Ohio App. 3d 838, 841 (“Denial of [the reasonable period of] maternity leave mandated by Ohio Adm. Code 4112-5-05(G)(6) is, in effect, terminating the employee because of her pregnancy.”); *Frank*, 84 Ohio App. 3d at 617 (explaining that denial of maternity leave mandated by the regulations is, in effect, terminating the employee “because of” her pregnancy).

Thus, the Ohio courts that have considered O.A.C. 4112-5-05(G) agree that regardless of its internal policies, an employer must provide its pregnant employees with some period of reasonable leave to give birth and recover.

Finally, Pataskala Oaks's focus on the example in the third sentence of O.A.C. 4112-5-05(G)(5)—“*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 her childbearing”—employs a logical fallacy. Pataskala Oaks asserts that as applied to a situation like McFee's, where a woman does not meet her employer's minimum length-of-service requirement before she requests maternity leave, the foregoing example allows the employer to *deny* her leave. And in its brief, the Ohio Health Care Association (“OHCA”) draws the same conclusion, noting, “[I]f the OCRC is saying that, ‘if a female meets the equally applied minimum length of service requirement; she must be granted leave,’ then it follows that ‘if a female does *not* meet the equally applied minimum length of service requirement’ she need not be granted leave.” OHCA Amicus Br. at 12. This conclusion, however, is unsupportable.

To be sure, the example in (G)(5) directs an employer to give a female employee reasonable leave when she meets her employer's minimum service requirements, but it says nothing about whether such leave is required when a woman *does not* meet those requirements. Further, although the Commission recognizes that one-year service requirements are common, if taken to its logical conclusion, Pataskala Oaks's interpretation would allow employers to circumvent (G)(5)'s requirements. For instance, an employer could legally apply seemingly endless minimum length-of-service requirements—such as no leave for any employee who had worked fewer than forty years—thereby limiting substantially the number of employees who could *ever* be eligible for leave. Surely this scenario is not what the General Assembly intended

in its attempt to further equal employment opportunities for pregnant women in the Ohio workforce.

For all of these reasons, (G)(5) should not be read to limit the protection provided by the statute or the other portions of O.A.C. 4112-5-05(G).

3. Where an employer's leave policy would result in "illusory leave" for the affected pregnant woman, subsection (G)(6) applies as a catch-all "no-leave" rule requiring maternity leave for a reasonable period of time.

The Fifth District applied a combination of O.A.C. 4112-5-05(G)(2) and (G)(6) to hold that McFee was entitled to reasonable maternity leave regardless of Pataskala Oaks's internal policies. Despite Pataskala Oaks's arguments to the contrary, the Fifth District's application of (G)(2) and (G)(6) was proper.

O.A.C. 4112-5-05(G)(6) states:

(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.

O.A.C. 4112-5-05(G)(6) (emphasis added). Pataskala Oaks asserts that (G)(6) does not apply to an evaluation of McFee's situation because Pataskala Oaks has a leave policy, which includes minimum length-of-service requirements, and, as such, cannot be considered as having "no leave policy." Once again, Pataskala Oaks selectively focuses its interpretation of the entirety of O.A.C. 4112-5-05(G) on a single subsection, violating the well-settled rule of statutory interpretation that statutory provisions be construed together. *State v. Moaning*, 76 Ohio St. 3d 126, 128, 1996-Ohio-415. Because the other subsections of the regulation require the provision of reasonable maternity leave, where an employer only has a policy that *as applied* to certain

groups of employees amounts to no leave at all—in effect, “illusory leave”— the “catch-all” provision in subsection (G)(6) applies.

Case law supports the Commission’s reading. In *Abraham v. Graphic Arts International Union*, an employer hired the plaintiff, a female employee, as an administrative assistant for a project “as long as the project received funding.” 660 F.2d at 813. After working for less than one year, the woman sought and received a period of maternity leave. *Id.* at 814. But while she was on leave, her employer fired her. *Id.* When the plaintiff sued for sex discrimination, the employer argued that its provision of a maximum of ten days of sick leave and ten days of vacation leave for all employees working on the project was sufficient. *Id.* The D.C. Circuit disagreed, explaining that “[a]n employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy it does have.” *Id.* at 819. The court reasoned that because the employer’s ten-day leave policy fell “considerably short of the period generally recognized in human experience as the respite needed to bear a child, . . . [o]ncoming motherhood was virtually tantamount to dismissal, though other indispositions might well and usually would pose no threat to continued employment,” and the employer’s policy was discriminatory. *Id.* (emphasis added). By the same token, Pataskala Oaks has a policy under which “oncoming motherhood is virtually tantamount to dismissal”; unless a pregnant employee has worked there for more than a year, its policy is a “no-leave policy” as applied to her.

Ohio case law is to the same effect. In *Morse v. Sudan, Inc.* (8th Dist. 1994), 1994 Ohio App. Lexis 3480, the Eighth District Court of Appeals determined that an employer did not satisfy Ohio law by providing a leave policy that, though perhaps legally sound in theory, denied female employees maternity leave in practice. *Id.* at *10. In *Morse*, plaintiff argued that her employer discriminated against her by failing to return her to her former (or a comparable)

position following her pregnancy leave. *Id.* at *2. Further investigation of employer’s past practices revealed that its “so-called leave of absence policy was illusory. In fact, it provided no leave[s] of absence for females who were pregnant. It was [the employer’s] practice to permanently replace all the females who took maternity leave.” *Id.* at *10. Thus, the Eighth District found that the employer had a “no leave” policy and applied O.A.C. 4112-5-05(G)(6). *Id.*

Where Pataskala Oaks’s policy provides its pregnant employees who have worked for less than one year with *no* leave—be it for birth and recovery, or for some other reason—it has not (and cannot) satisfy the strictures of the Ohio PDA’s statutory and regulatory directives.

4. The application of the rule of statutory interpretation that the specific governs the general would not allow the interpretation offered by Pataskala Oaks.

Further, Pataskala Oaks and its amici mistakenly argue that because (G)(5) is “specific” and (G)(2) is “general,” (G)(5) governs. See P. Oaks Br. at 13; see also OHCA Amicus Br. at 12-13. To be sure, it is a “well-settled principle of statutory construction that ‘when two statutes, one general and the other special, cover the same subject matter, the special provision is to be construed as an exception to the general statute which might otherwise apply.’” *State ex rel. Slagle v. Rogers*, 103 Ohio St. 3d 89, 2004-Ohio-4354, ¶ 14 (citing R.C. 1.51). But this canon is irrelevant here.

As a threshold matter, it is not clear that (G)(2) is “general” while (G)(5) is “specific.” Subsection (G)(2) specifically mentions “terminations,” while (G)(5) does not. Because this dispute centers on the issue of “terminations,” (G)(2) is actually the more specific regulation of the two. Although Pataskala Oaks asserts that the unreviewed administrative decision in *Johnson v. Watkins Motor Lines, Inc.* (Oct. 3, 2001), 2001 Ohio Civil Rights Comm’n Lexis 10, at *3-4, supports its position, that nonbinding decision is distinguishable. In *Johnson*, the

Commission argued that O.A.C. 4112-5-05(G)(2) governed. Here, however, the Commission asserts that this Court should look to *both* O.A.C. 4112-5-05(G)(2) and (G)(6) to find that Pataskala Oaks's minimum length-of-service requirement effectively means that the employer has no leave policy for pregnant employees who have not served the minimum amount of time.

Regardless, despite Pataskala Oaks's attempt to read it out of the regulation completely, the *first* sentence of (G)(5), under which women "shall not be penalized" for pregnancy, expressly addresses how employers should proceed where a pregnant employee has not satisfied its minimum length-of-service requirement. Therefore, although Pataskala Oaks focuses its arguments on the second and third sentences of (G)(5), which provide no information on these types of employees, those sentences are neither "general" nor "specific" as to the situation at issue. As such, the first sentence governs.

Finally, to interpret the regulations as Pataskala Oaks and its amici suggest would lead to the invalidation of (G)(5), and such invalidation should not occur unless the regulations in question "are irreconcilable and in hopeless conflict." *Johnson's Mkts., Inc. v. New Carlisle Dep't of Health* (1991), 58 Ohio St. 3d 28, 35. The Commission's reading, by contrast, harmonizes (G)(5) with the rest of the regulation, including (G)(2). See *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St. 3d 369, 372, 1994-Ohio-209 (explaining that when two statutory provisions conflict, R.C. 1.51 requires a court to construe them "where possible, to give effect to both").

5. The Commission did not overstep its rule-making authority in enacting O.A.C. 4112-5-05(G), as the statute already mandates maternity leave.

Finally, the Court should reject Pataskala Oaks's assertions that the Commission overstepped its rule-making authority in enacting O.A.C. 4112-5-05(G). Pataskala Oaks and its amici argue that the Commission's adoption of O.A.C. 4112-5-05(G) is an impermissible

extension of the statute and the Commission's attempt to make an "end-run" around the legislative process in order to pursue its own policy initiatives. P. Oaks Br. at 11; Ohio Mgmt. Lawyers Ass'n ("OMLA") Amicus Br. at 8, 11; OHCA Amicus Br. at 14; Nat'l Fed. Of Indep. Bus. Small Bus. Legal Ctr. ("NFIB") Amicus Br. at 26-28. This argument fails for multiple reasons.

To begin with, although the statutory scheme does not mention "maternity leave" in name, its prohibition on terminations "because of" pregnancy amounts to a prohibition on a termination for taking time for childbirth and recovery. Further, the existence of a "legislative gap" does not mean that the agency is not authorized to act. See *Nwern. Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St. 3d 282, 288-89, 2001-Ohio-190. In *Conrad*, this Court recognized the long-observed "power of an administrative agency to administer a . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by the legislature" and explained that in such situations "courts . . . must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of implementing the legislative command." *Id.* at 289 (internal citations omitted). The logic of *Conrad*—which addresses an administrative interpretation—applies with even greater force to a rule promulgated under a legislative mandate to "[e]ffectuate the provision" of a statute. The former is entitled only to "due deference," but the latter has "the force and effect of law." *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St. 3d 234, 2009-Ohio-2610, ¶ 23.

Further, Pataskala Oaks and its amici unsuccessfully attempt to compare this case to *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172. OMLA Amicus Br. at 2; NFIB Amicus Br. at 26. There, this Court invalidated a regional board

of health's regulation banning smoking in all enclosed places open to the public. *D.A.B.E., Inc.*, 2002-Ohio-4172, ¶ 55. The board of health argued that R.C. 3709.21 granted it the power to enact the regulation, which allowed local boards of health to "make such orders and regulations as are necessary for [their] own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances." R.C. 3709.21. This Court struck the regulation, however, holding that despite the board's interest in the health and well-being of the public, the statute in question did not "allow[] local boards of health unfettered authority to promulgate any health regulation deemed necessary." *D.A.B.E., Inc.*, 2002-Ohio-4172, ¶ 41.

Here, the Commission is statutorily authorized to issue regulations under R.C. 4112.04(A)(4) and (5), which allow it 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" and to "[f]ormulate 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." R.C. 4112.04(A)(4)-(5). Thus, unlike the board of health's limited authority in *D.A.B.E., Inc.*, O.A.C. 4112-5-05(G) falls squarely within the grant of statutory authority to the Commission. Because the statute itself mandates the provision of a reasonable period of leave for pregnant employees, the Commission's enactment of regulations that correspond to that mandate is well within the bounds of its authority. Accordingly, any argument that O.A.C. 4112-5-05(G) should be invalidated is simply unsupported by the statute itself or any case law interpreting it.

Amicus curiae OHCA incorrectly argues that, because the Commission in 2007 unsuccessfully tried to amend O.A.C. 4112-5-05(G) to eliminate (G)(5)'s allowance of minimum

length-of-service requirements for maternity leave, the Commission's interpretation is an impermissible attempt to carry out its own policy-making initiatives. OHCA Amicus Br. at 14. OHCA correctly notes that JCARR rejected the Commission's proposed 2007 amendment because it sought more information about the impact the entire revised rule would have on Ohio employers. But the existence of a defect in the Commission's attempt to amend does not mean that the rule was not already established. The Commission's request that this Court adopt the Fifth District's holding under which (G)(2) and (G)(6)—not (G)(5)—govern is, therefore, not administrative over-stepping, but rather, a proper clarification and interpretation of the regulation.

B. Liberally construing the applicable regulations furthers the purpose and public policy behind the requirement for the provision of reasonable leave.

Although the statutory and regulatory scheme alone are sufficient to support an affirmance, public policy concerns further bolster the Commission's position.

1. Both the history and purpose of the PDA support the Commission's position.

The and purpose of the PDA support an interpretation of the Ohio PDA under which employers must provide their employees with a reasonable period of maternity leave for medical purposes. As explained above, Congress enacted the federal PDA as a direct response to *Gilbert's* failure to recognize the biological differences between men and women. Importantly, the remedial purpose of the PDA is not to require "identical treatment" for men and women. Rather, the PDA sets forth a common sense test for whether a policy furthers Title VII's purpose of achieving "equal employment opportunities" for pregnant employees. In fact, rather than limiting the purpose of Title VII, the PDA extends it to cover pregnancy. "As Senator Williams, a sponsor of the PDA, stated: 'The entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the

fundamental right to full participation in family life.” *Guerra*, 479 U.S. at 288-89 (quoting 123 Cong. Rec. 29658 (1977) (statement of Sen. Williams)). Thus, “equality” under the PDA is measured in terms of employment opportunity, not in terms of blindly “identical treatment.” A requirement that female employees receive reasonable maternity leave simply acknowledges that women are biologically distinct from men in their ability to bear children—a difference that requires flexibility on the part of their employers.

Further, given the growing number of mothers in the workforce, the underlying purpose of the PDA is even more applicable today. “Women’s labor force participation is significantly higher today than it was in the 1970s, particularly among women with children. . . . From March 1975 to March 2000, the labor force participation rate of mothers with children under age 18 rose from 47 percent to a peak of 73 percent.” Sec’y of the U.S. Dep’t of Labor Hilda L. Solis & Comm’r of the U.S. Dep’t of Labor Statistics Keith Hall, *Women in the Labor Force: A Databook*, Report 1018, 1 (Sept. 2009). According to recent studies, 44 percent of women who noted having left their careers temporarily cited “family responsibilities” as their reason for doing so; this was true for only 12 percent of men. Thomas H. Barnard & Adrienne L. Rapp, *The Impact of the Pregnancy Discrimination Act on the Workplace—From a Legal and Social Perspective*, 36 U. Mem. L. Rev. 93, 134 & n.171 (Fall 2005) (citing Laura D’Andrea Tyson, *What Larry Summers Got Right*, *BusinessWeek* (Mar. 29, 2005)). Although women are now an integral part of America’s workforce, they still face the biological realities of motherhood. Adhering to Pataskala Oaks’s interpretation of the Ohio PDA would discount women’s unique position and retreat from the advances made following the express rejection of *Gilbert* neutrality.

2. Health and safety concerns of the mother warrant the provision of a reasonable maternity leave.

Providing unpaid maternity leave to pregnant employees for childbirth and recovery also serves the employees' physical health. Statistical studies suggest that offering maternity leave to women is associated with improvements in maternal mental health and lower peri-natal, neonatal, and post-neonatal mortality rates. Katharina Stachelin, et al., *Length of Maternity Leave and Health of Mother and Child – a Review*, Int'l J. of Pub. Health 52, at 202, 203 (2007); see also Pat McGovern, et al., *Mothers' Health & Work-Related Factors at 11 Weeks Postpartum*, Annals of Family Medicine, Vol. 5, No. 6, at 520 (Nov./Dec. 2007) (finding that the longer childbirth-related leaves had a positive association with maternal health). Further, although the Commission does not ask this Court to interpret the Ohio PDA as providing for a particular period of leave, where "[t]estimony before the House Committee on Education and Labor considering the adoption of the PDA, indicated that normal period of pregnancy leave is about six weeks," it is clear that "[a]n employer's no-leave policy . . . poses a drastic effect on women employees of childbearing age, an impact no male would ever encounter." *Miller-Wohl*, 692 P.2d at 1251-52. For instance, as noted above, Pataskala Oaks fired McFee when she did not return to work only three days after giving birth. Regardless of a woman's physical health, three days will never be enough to allow her body the recovery it requires following the trauma caused by childbirth.

3. Providing employees with reasonable maternity leave will not unduly burden employers, regardless of their size, because the reasonableness test allows for considering all circumstances.

Amici OHCA and the NFIB spend a significant portion of their briefs arguing that affirming the Fifth District's decision would unfairly subject small employers to regulations that would deny them the ability to provide leave only to those employees who have "proven

themselves reliable and trustworthy” after serving the minimum length-of-service requirement, and would endorse a rule that would place “devastating” burdens on employees without first “vetting” it through the General Assembly. OHCA Amicus Br. at 2; NFIB Amicus Br. at 3. NFIB also claims that the vagueness of the “reasonable period” requirement would further burden them as they “will be compelled to provide even unreasonable amounts of leave because of the costs associated with litigating even a proper termination.” NFIB Amicus Br. at 2.

The Commission does not dispute that the concerns of small employers differ from those of employers with fifty-plus employees, who fall under the coverage of the federal FMLA. However, the fact that such small employers need not provide their employees with the *social* benefits available to new parents (biological and adoptive) under the FMLA—twelve weeks of parental leave to allow for a period of bonding, and adjustment to the changes in lifestyle that accompany parenthood—does not negate the fact that a new mother will always need a period of *medical* recovery before she can resume work. Accordingly, Pataskala Oaks’s bald assertion that the provision of mandatory maternity leave for pregnant employees will be detrimental to its economic viability should not invalidate the statutory mandate.

First, as noted above, the Commission does not want to eviscerate the minimum length-of-service requirements, which Pataskala Oaks cites as a tool to differentiate the more “reliable” and “trustworthy” employees from their peers. Rather, an affirmance of the Fifth District’s holding would merely support a rule under which such minimum length-of-service requirements do not serve to bar an employee’s request for maternity leave. The amici’s argument that this rule would unduly burden small employers has no basis. In fact, a recent study of Ohio employers revealed that only 4.8 percent of employed women give birth in a given year, and only 3.1 percent of employees (men and women) take leave to care for a new child. Amanda

Woodrum, *Adopting Maternity Leave: A Report from Policy Matters Ohio*, 1 (Oct. 2007), available at <http://www.policymattersohio.org/pdf/AdoptingMaternityLeave2007.pdf> (last visited Nov. 13, 2009). Notably, these same studies show that the costs employers face to provide unpaid maternity leave are modest, and, according to other studies done on the impact of the FMLA, an employer's turnover costs would actually be *higher* than the cost of providing such leave. *Id.* at 8 & n.19 (citing C.L. Baum II, *The Effect of State Maternity Leave Legislation and the 1993 Family Medical Leave Act on Employment and Wages*, *Labor Economics* 10, 573-96 (2003)).

The General Assembly need not define the appropriate period of leave to apply to every covered employee's request. "Reasonableness" will differ depending on each woman's situation, and allowing for an employer and an employee to consider these independent factors will best serve the intent of the law. The difference between what is "reasonable" to one new mother versus another should be determined by medical necessity, which can be evidenced by a note from a physician, or some other medical documentation—similar to the requirements for an employer's provision of disability leave. See R.C. 124.385 ("Disability leave benefits and program"); O.A.C. 123:1-33-01(D) (requiring an employee to consult a medical practitioner for medical care prior to receiving disability benefits); see *Huberty v. Esber Beverage Co.* (5th Dist.), 2001 Ohio Ct. App. Lexis 6034, 2001-Ohio-7048, at *17 (noting that "what constitutes reasonable accommodation [of a disability] may vary widely from cases to case, and also, the extent of the interactive process will vary from case to case").

The amici's concerns about the high litigation costs surrounding the imprecision of "reasonable" leave are similarly meritless. The flexibility afforded by a "reasonableness" standard is a virtue, not a vice. Moreover, the standard of "reasonableness" is used in many

other employment-law contexts. See, e.g., *Alexander v. Choate* (1985), 469 U.S. 287, 302 (citing 45 C.F.R. § 84.12 (1984), which requires an employer to make “reasonable accommodation to the known physical or mental limitations” of a handicapped individual) (emphasis added); accord *Trans World Airlines v. Hardison* (1977), 432 U.S. 63, 66 (noting that 42 U.S.C. §2000e(j) requires an employer to make “reasonable accommodations” for the religious needs of its employees); *DeBolt v. Eastman Kodak Co.* (10th Dist.), 146 Ohio App. 3d 474, 2001-Ohio-3966, ¶¶ 78-79 (noting that O.A.C. 4112-5-02(A) requires employers to make “reasonable accommodations” for a handicapped employee). A standard of “reasonableness” is deeply rooted in common law as well. For instance, the “reasonable man” standard has been long employed in analyzing negligence claims. E.g., *Stoffel v. New York, N.H. & H.R. Co.* (2d Cir. 1953), 205 F.2d 411, 412 (Hand, J.) (where a “reasonable man with due regard for his own safety” would not have acted as plaintiff, plaintiff was guilty of contributory negligence as a matter of law). In fact, it is likely that the rule that the amici want—a rule that covers *all* pregnant employees—would be *worse* for employers because, to err on the side of caution, such a rule would necessarily require the provision of a *longer* leave period.

Finally, therefore, given that the amici acknowledge and accept their responsibilities reasonably to accommodate individuals with disabilities and certain religious beliefs—a reality that occurs with the same irregularity that these small employers will likely face an employee’s request for reasonable maternity leave—their concerns are called into question.

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

The McDonnell Douglas burden-shifting analysis does not apply to a case involving an express policy that on its face violates anti-discrimination laws.

In its Third Proposition of Law, Pataskala Oaks seeks to inject an additional element—the *McDonnell Douglas* framework—where it has no role. See P. Oaks Br. at 15-18; see *McDonnell Douglas Corp.*, 411 U.S. at 792. The *McDonnell Douglas* burden-shifting analysis does not apply because that test is used only to resolve a *factual* dispute about whether an employer discriminated—and even then, it is used only when a plaintiff offers indirect rather than direct evidence. Here, by contrast, the sole question is a *legal* one regarding whether Pataskala Oaks's policy, which on its face conflicts with Ohio's leave requirement, constitutes sex discrimination. If the Court finds, as it should, that Ohio law requires reasonable maternity leave, and forbids an employer from firing an employee in these circumstances, the case is over: Ohio's leave requirement does not turn on intent, and the case raises no factual dispute regarding Pataskala Oaks's policy or its application to McFee.

McDonnell Douglas's limited scope—namely, that it is used only to resolve factual disputes about intent based upon indirect evidence—is well-established. See *Mauzy v. Kelly Servs.*, 75 Ohio St. 3d 578, 1996-Ohio-265. As this Court explained in *Mauzy*, the U.S. Supreme Court developed the *McDonnell Douglas* burden-shifting analysis to ferret out whether a discriminatory intent was the real motive behind an allegedly unlawful action. *Id.* at 584. The Court noted that “the function of the *McDonnell Douglas* prima facie test is to allow the plaintiff to raise an inference of discriminatory intent indirectly,” and it further noted that the inference approach applies only when an action's motivation is “otherwise unexplained.” *Id.* at 583. Consequently, the Court concluded that the test is “inapplicable where the plaintiff presents direct evidence of discrimination.” *Id.*

This case is an easier one than *Mauzy* for rejecting *McDonnell Douglas*, because it involves no factual dispute at all. Here, unlike in *Mauzy*, the parties stipulated to all of the facts, and the employer does not contest what happened, but rather, just whether its policy is legal. The *McDonnell Douglas* test would apply, by contrast, if Pataskala Oaks argued, apart from its legal challenge, that it fired McFee for some other reason. See *Allen v. Totes/Isotoner Corp.*, 2009 Ohio Lexis 2284, 2009-Ohio-4231, ¶¶ 3-6; *id.* ¶¶ 40-45 (O'Connor, J., concurring).

As the U.S. Supreme Court has explained, motive or intent is not an issue that needs to be proven—by any form of evidence—to resolve a legal dispute over the permissibility of an express company policy. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.* (1991), 499 U.S. 187, 199. In *Johnson Controls*, the Court said that “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.” *Id.* The Court further explained that, for such a policy to be legal, the employer must defend it under the express provision of the “bona fide occupational qualification,” or BFOQ defense, built into Title VII. *Id.*

This Court, citing *Johnson Controls*, has also held that the BFOQ provision is the “only defense to facially discriminatory employment policies.” See *Little Forest Med. Ctr. of Akron v. Ohio Civil Rights Comm'n* (1991), 61 Ohio St. 3d 607, 611. Pataskala Oaks insists that its policy is “nondiscriminatory,” but that would be true only if Pataskala Oaks *first* persuades the Court that Ohio law does not require any leave. If the Court instead finds, as it should, that Ohio’s anti-discrimination law requires reasonable leave, then a policy that denies leave is facially

discriminatory. That is, the policy's terms constitute the legal definition of discrimination without further factual showing.

Other courts, too, have repeatedly rejected the use of the *McDonnell Douglas* test when the sole question is whether an express policy amounts to illegal discrimination. See, e.g., *Larkin v. Mich. Dep't of Soc. Servs.*, 89 F.3d 295, 289-90 (6th Cir. 1996) (in the context of the Fair Housing Act, "a defendant's benign motive does not prevent [a] statute from being discriminatory on its face"); *Bangerter v. Orem City Corp.* (10th Cir. 1995), 46 F.3d 1491, 1501 n.16 (same); *Reidt v. County of Trempealeau* (7th Cir. 1992), 975 F.2d 1336, 1341 (in the employment context, noting that "[t]he *McDonnell Douglas* procedure is inapt in a situation involving a facially discriminatory policy, as is the case here"). Similarly, in other contexts in which an employer has a duty to accommodate rather than fire an employee, such as in disability law, courts routinely hold that the *McDonnell Douglas* framework does not apply for that reason as well. See *Tripp v. Beverly Enters.-Ohio, Inc.* (9th Dist.), 2003 Ohio App. Lexis 6158, 2003-Ohio-6824, ¶ 30 ("[A] court considers reasonable accommodation, or lack thereof, in relation to whether the employee could safely and substantially perform her essential job functions, not in relation to the completely separate element of intent"); see also *Shaver v. Wolske & Blue* (10th Dist. 2000), 138 Ohio App. 3d 653, 663 ("The *McDonnell Douglas* prima facie case and burden shifting analysis does not apply in a failure to accommodate case.").

Finally, the *McDonnell Douglas* framework is also irrelevant here because this case is an administrative appeal from the Commission's Order, which challenges the Commission's legal standard, not its factfinding. This Court imported the federal evidentiary scheme as a way to resolve challenges based on agency factfinding, explaining that "the requisite burdens of proof regarding particular evidentiary issues established by the federal courts are relevant in

determining whether there exists reliable, probative and substantial evidence of discrimination in violation of R.C. Chapter 4112.” *Little Forest*, 61 Ohio St. 3d at 607; see R.C. 4112.06(E) (“findings of the commission *as to the facts* shall be conclusive if supported by reliable, probative, and substantial evidence”) (emphasis added). But the Commission did not find any facts; it accepted the parties’ stipulations. Pataskala Oaks challenges the Commission’s view of the law, not the facts: its main assignment of error before the common pleas court was that the “order is not supported by reliable, probative, or substantial evidence since the Ohio Civil Rights Commission did not apply the correct legal analysis.” Com. Pl. Op. at 2, P. Oaks. Appx. at A-21. That challenge to the law gives Pataskala Oaks the benefit of de novo review, see App. Op. ¶ 15, but it also means that Pataskala Oaks, having stipulated to the facts, may not smuggle in a fact-based or evidentiary-burden-based challenge as a backup plan if its legal argument fails.

In sum, if refusing to grant leave to a new mother violates the law, then Pataskala Oaks broke the law, and there is nothing more to prove.

CONCLUSION

For all of these reasons, this Court should affirm the decision of the Fifth District Court of Appeals that Pataskala Oaks's termination of McFee was discriminatory under the Ohio PDA and order that judgment be entered in favor of the Commission.

Respectfully submitted,

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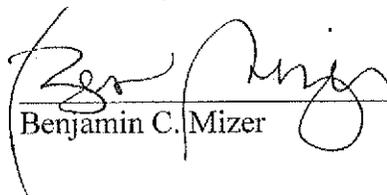
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