ORIGINAL

IN THE SUPREME COURT OF OHIO

NURSING CARE MANAGEMENT OF AMERICA, INC. d/b/a PATASKALA OAKS CARE CENTER,	)	CASE NO.: 2009-0756
Appellant,	)	ON APPEAL FROM THE LICKING COUNTY FIFTH DISTRICT COURT OF APPEALS
vs.	)	
OHIO CIVIL RIGHTS COMMISSION,	)	CASE NO.: 08CA0300
Appellee.	)	

MERIT BRIEF OF *AMICI CURIAE*
THE OHIO EMPLOYMENT LAWYERS ASSOCIATION,
THE OHIO POVERTY LAW CENTER, and
THE OHIO NOW LEGAL DEFENSE AND EDUCATION FUND

PATRICK M. DULL (0064783)
ASSISTANT ATTORNEY GENERAL
Civil Rights Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 466-7900
Facsimile: (614) 466-2437
pdull@ag.state.oh.us

Counsel for Appellee

JAN E. HENSEL (0040785)
DINSMORE & SHOHL LLP
191 W. Nationwide Blvd., Suite 300
Columbus, Ohio 43215
Telephone: (614) 227-4267
Facsimile: (614) 221-8590
jhensel@dinslaw.com

Counsel for Appellant

GREGORY A. GORDILLO (0063445)
GORDILLO & GORDILLO LLC
1370 Ontario Street #2000
Cleveland, Ohio 44113
Telephone: (216) 875-5500
Facsimile: (216) 583-0345
ggordillo@eeoattorney.com

Counsel for Amici Curiae, the Ohio Employment Lawyers Association, the Ohio Poverty Law Center, and the Ohio NOW Legal Defense Fund

PATRICIA GAVIGAN (0081258)
DINSMORE & SHOHL LLP
255 E. 5th St., Suite 1900
Cincinnati, Ohio 45202
Telephone: (513) 977-8200
Facsimile: (513) 977-8141
pgavigan@dinslaw.com

Counsel for Appellant

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STATEMENT OF INTEREST OF *AMICI CURIAE*

I. Ohio Employment Lawyers Association

The Ohio Employment Lawyers Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment, and civil rights matters. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness, while promoting the highest standards of professionalism and ethics.

As an organization focused on protecting the interests of workers who are subjected to unlawful discrimination, OELA has an abiding interest in ensuring the integrity of our system of civil adjudication of disputes. Our system needs to provide remedies that fairly compensate those subjected to discrimination; doing so can effectively deter such unlawful discrimination in the future. The aim of OELA's amicus participation is to cast light not only on the legal issues presented in a given case, but also on the practical effect and impact the decision in that case may have on access to the Courts for people who have been unlawfully treated in the workplace.

OELA has an interest in this case to preserve family values and the rights of pregnant women to actively participate in the workplace free of discrimination against them.

II. Ohio Poverty Law Center

The Ohio Poverty Law Center ("OPLC") is the legal services state support center in Ohio. The OPLC provides assistance to the six legal services (legal aid) regions in Ohio and advocates on

systemic legal and public policy issues that significantly impact Ohio's low-income population, including legal and legislative advocacy and community outreach and education. One of the OPLC's highest priorities is to maintain and strengthen employment protections for low-income workers in Ohio because welfare reform, the erosion of the social safety net, and the need for low-income Ohioans to attain economic self-sufficiency have highlighted the importance of antidiscrimination laws and other employment protection maintaining stable employment and a sustainable income for Ohio's low-income families and households.

Ohio's current laws prohibiting pregnancy and maternity leave discrimination by covered Ohio employers especially impact low-income workers and their families. Low-income workers are more likely to work in jobs lacking contractual employee benefits such as paid or unpaid leave, health insurance coverage or health insurance covering contraceptives and family planning; less likely to be covered by the federal Family and Medical Leave Act because of higher job turnover and a greater reliance on short-term or transient employment; and less likely to have the necessary job skills or education to quickly find alternative employment. Low-income workers also usually lack any significant savings to cushion the loss of employment, and depending on their ability to meet the earnings threshold test for unemployment compensation benefits, are less likely than other employees to receive unemployment compensation benefits in the event they are wrongfully terminated. Therefore, the outcome of this case will have an especially significant impact on Ohio's low-income workers and families.

III. Ohio NOW Legal Defense and Education Fund

The Ohio NOW Legal Defense and Education Fund (Ohio NOW LDEF) is a non-profit corporation originally founded in 1981 by the trustees of the Ohio Chapter of the National Organization of Women. The Ohio NOW LDEF provides assistance to bring women into full

participation in all activities of American life and conducts research and education concerning discrimination in our society. As part of its activities, the Ohio NOW LDEF provides legal counsel or other support to victims of employment discrimination and conducts regular programs to prevent discrimination. It and the Ohio NOW Chapter have been granted leave to file an amicus brief in numerous cases before the Ohio Supreme Court, including *Ohio Civil Rights Commission v. Ingram*, 69 Ohio St.3d 89, 630 N.E.2d 669 (1994); *Ricciardi v. Babcock & Wilcox Co.*, 66 Ohio St.3d 1490, 612 N.E.2d 1243 (1993) (motion granted); *Elek v. Huntington National Bank*, 60 Ohio St.3d 135, 573 N.E.2d 1056 (1991); *Kerans v. Porter Paint Co.*, 58 Ohio St.3d 709, 569 N.E.2d 509 (1991); and *Little Forest Medical Center of Akron v. Ohio Civil Rights Commission*, 57 Ohio St.3d 704, 566 N.E.2d 168 (1991) (motion granted).

The Ohio NOW LDEF is particularly concerned that pregnancy rights and family values not be stripped from employees in Ohio. Ohio NOW LDEF recognizes the practical and policy reasons which make the availability of reasonable leave for pregnancy an important factor in combating discrimination and maintaining equal opportunity for employees to raise families and participate in the workplace. For these reasons, the Ohio NOW LDEF seeks to participate in this case as *amicus curiae*.

STATEMENT OF THE CASE AND FACTS

The *Amici Curiae* adopt the Statement of the Case and the Statement of Facts contained in the brief of Plaintiff-Appellee Ohio Civil Rights Commission.

ARGUMENT

The judgment below should be affirmed. When an employer discharges an employee because of pregnancy, the employer violates the law against sex discrimination. Before Tiffany McFee qualified for her employer's medical leave benefit, she became pregnant and needed time off from work. So her employer, Defendant-Appellant Nursing Care Management of America d/b/a Pataskala Oaks Care Center ("Pataskala Oaks"), fired Ms. McFee. The Plaintiff-Appellee Ohio Civil Rights Commission ("OCRC") recognized that this was sex discrimination. A unanimous panel of the Fifth District Court of Appeals agreed. The court below was right. This Court should affirm.

Proposition of Law No. 1:

An Admission Of Firing An Employee For Being Unable To Work While Pregnant Is Direct Evidence Of Sex Discrimination.

Under Ohio Revised Code Section 4112.02(A), an employer may not take adverse action against an employee "because of . . . sex." An adverse action taken because of pregnancy is taken because of sex. As clarified by R.C. 4112.01(B):

> 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 pregnancy, childbirth, or related medical conditions.

Nevertheless, Pataskala Oaks discharged Ms. McFee rather than permit her to take a medical leave required by her pregnancy.

The Fifth District correctly held that the OCRC proved its case with direct evidence. Pataskala Oaks stipulated that it discharged Ms. McFee based on her pregnancy-caused incapacity to work. The stipulation proves sex discrimination through direct evidence. Direct evidence "refers to a method of proof, not a type of evidence. It means that a plaintiff may establish a *prima facie* case of sex discrimination directly by presenting evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent."[1] "The crux of the direct method is not the type of evidence used, but that the evidence actually proves discriminatory intent."[2] Plainly, Pataskala Oaks's admission that it discharged Ms. McFee because she needed time off for her pregnancy in her first year of employment satisfies the direct evidence standard. The decision below should be affirmed.

Applying the *McDonnell-Douglas* shifting burdens test[3] as urged by the Appellant Pataskala Oaks and the *Amicus Curiae* Ohio Health Care Association would trespass into an indirect evidence analysis. It does not apply when direct evidence exists. As the Ohio Supreme Court has explained, "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination."[4] The OCRC had to prove only that Pataskala Oaks discharged Ms. McFee "because of sex." Requiring more than the Legislature and the Ohio

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[1] *Mauzy v. Kelly Services, Inc.*, 75 Ohio St. 3d 578, at paragraph 1 of the syllabus, 1996-Ohio-265.

[2] *Dobozy v. Gentek Bldg. Prods., Inc.*, (Nov. 22, 2000), 8th Dist. App. No. 77047, 2000 WL 1739230 at *3.

[3] The test is also known as the *Burdine* test. *See Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248.

[4] *Mauzy v. Kelly Services, Inc.*, 75 Ohio St. 3d 578, 585 (citing *Trans World Airlines, Inc. v. Thurston* (1985), 469 U.S. 111, 121).

Supreme Court require was an error the trial court committed, the court of appeals avoided, and should not be repeated by this Court.[5]

Proposition of Law No. 2:

An Employer's Leave Policy That Does Not Always Reasonably Accommodate Pregnancy Cannot Provide A Legitimate Business Reason To Fire An Employee Because Of Sex.

A leave policy that permits firing a pregnant employee for being pregnant cannot be a legitimate business reason for firing the employee; the policy is an affront to statutorily protected family values and the right of women to enjoy equal opportunity in the workforce. The argument that discharging Ms. McFee was legitimate because she was not qualified for leave[6] is without merit. When she became pregnant, her qualification for leave was established by the Ohio General Assembly. Pataskala Oaks had no power to create a policy that trumped the law.

Pataskala Oaks attempted to distinguish between discrimination based on pregnancy and discrimination based on incapacity to work. In effect, Pataskala Oaks claims it fired Ms. McFee because she was incapacitated, but not because she was pregnant.[7] In sex discrimination cases, however, pregnancy and pregnancy-related incapacity to work are indistinguishable.[8]

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[5] As the Fifth District correctly held, "motive is irrelevant in light of Ohio's requirement for maternity leave for a reasonable period of time." *Slip Op. at 16.* In failure to accommodate cases, circumstantial proof of discrimination is not necessary because liability arises from nonfeasance rather than malfeasance. In other words, plaintiff has no burden of proving intent. Yet that is the only purpose for applying an indirect evidence method of proof. It has no application here. *See Shaver v. Wolske & Blue,* 138 Ohio App. 3d 653, 742 N.E.2d 164, 171 (10th Dist. 2000), *citing, Bultemeyer v. Fort Wayne Community Schools,* 100 F.3d 1281, 1283-84 (7th Cir. 1996).

[6] *See* Brief of Appellant at 15 ("McFee was not terminated because of her pregnancy but because she did not qualify for leave. . . ."); Brief of Amicus Ohio Health Care Association at 14-15 ("Thus, it was her tenure not her pregnancy that led to McFee's discharge.")

[7] The irony of the argument made by Pataskala Oaks in asserting that a policy that permits discharging all incapacitated employees permits discharging pregnancy caused incapacitated

That is because pregnancy and pregnancy-related incapacity have been uniquely defined by the Legislature as part of being female.[9] The principle that discrimination against pregnancy is discrimination against women has been succinctly summarized by the United States Court of Appeals for the Seventh Circuit:

> Discrimination on the basis of pregnancy is part of discrimination against women, and one of the stereotypes involved is that women are less desirable employees because they are liable to become pregnant. This was one of Congress' concerns in passing the Pregnancy Discrimination Act. *See Amending Title VII, Civil Rights Act of 1964*, S.Rep. No. 95-331, 95th Cong., 1st Sess. at 3 (1977); *Prohibition of Sex Discrimination Based on Pregnancy*, H.R.Rep. No. 95-948, 95th Cong ., 2d Sess. at 3 (1978) ("As the testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace.").[10]

Furthermore, the United States Supreme Court has recognized that the Pregnancy Discrimination Act was intended specifically to protect family values and the right of women to simultaneously participate fully in family life and in the workplace:

> Rather than limiting existing Title VII principles and objectives, the PDA extends them to cover pregnancy. As Senator Williams, a sponsor of the Act, 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

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employees is that this argument attempts to avoid pregnancy discrimination by throwing the baby out with the bath water.

[8] *See Allen v. totes/Isotoner* (Ohio 2009) ---N.E.2d ---, 2009 WL 2634592 (identifying pregnancy as first element of a *prima facie* case and explaining that "plaintiff may satisfy the first element of this *prima facie* test by showing that she was affected by pregnancy or an illness or medical condition related to pregnancy.")(O'Connor, J. and Moyer, J. concurring)).

[9] *See* OHIO REV. CODE ANN. § 4112.01(B) (Anderson 2008).

[10] *Sheehan v. Donlen Corp.* (7th Cir. 1999), 173 F.3d 1039, 1045

> fundamental right to full participation in family life." 123 Cong. Rec. 29658 (1977).[11]

Undoubtedly, the Ohio General Assembly understood this intent and adopted it by enacting virtually the same pregnancy discrimination act statute. Indeed, the United States Court of Appeals for the Sixth Circuit has declared:

> 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.[12]

If this Court were to reverse the decision below as suggested by Pataskala Oaks and the Ohio Health Care Association suggest, the Court would reach a conclusion offensive to both family values and the Ohio General Assembly's mandate of equal opportunity in the workforce for women. Both Pataskala Oaks and the Ohio Health Care Association fail to recognize that the statute requires embracing the fact that being pregnant or needing time off for pregnancy is indistinguishable from being female in the workplace. Failing to accommodate pregnancy is discrimination against women.

That is exactly what the First District Court of Appeals held:

> According to Ohio Adm.Code 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. Ohio Adm.Code 4112-5-05(G)(6).[13]

To the same effect, the Sixth District Court of Appeals held:

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[11] *California Fed. Svgs & Loan Assn. v. Guerra* (1987), 479 U.S. 272, 288-89

[12] *Derungs v. Wal-Mart Stores, Inc.* (6th Cir. 2004), 374 F.3d. 428, 436.

[13] *McConaughy v. Boswell Oil* (1st Dist. 1998), 126 Ohio App. 3d 820, 829.

> The purpose of Ohio Adm.Code 4112-5-05(G)(2) and (6) is clearly to provide substantial equality of employment opportunity by prohibiting an employer from terminating a female worker because of pregnancy without offering her a leave of absence, even if no disability leave is available generally to employees.[14]

These authorities make clear that an employer's leave policy that does not expressly recognize and follow the Legislature's mandate by providing *all* female workers with reasonable pregnancy leave is no reason to absolve an employer from sex discrimination liability.[15] In fact, implementing the policy is sex discrimination.

Proposition of Law No. 3:

Ohio Administrative Code Section 4112.05-05(G)(2) and Ohio Revised Code Section 4112.01(B) Properly Prohibit An Employer From Terminating A Pregnant Employee's Employment Because Of Her Need For Reasonable Pregnancy Leave.

The OCRC ordered Pataskala Oaks to revise its leave policy in accordance with the OCRC's Final Order. The essence of that part of the Order is:

> Pataskala Oaks is free to retain its one-year policy – except to the point that it conflicts with Ohio law. Pataskala Oaks' policy, when it provides 12 weeks of leave for employees who are unable to work but denies the same leave to pregnant women who are also unable to work, is, to that extent, inconsistent with R.C. 4112.01(B).[16]

Both Pataskala Oaks and the Ohio Health Care Association mistakenly argue that this interpretation of R.C. 4112.01(B) would mandate preferential treatment to pregnant employees.[17] Their conclusion is directly contrary to the law established by the United States Supreme Court.

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[14] *Frank v. Toledo Hosp.* (6th Dist. 1992), 84 Ohio App. 3d 610, 617.

[15] *See* OHIO ADMIN. CODE § 4112.05-05(G)(2) (2008) (terminating an employee because insufficient leave for pregnancy is available is unlawful sex discrimination).

[16] OCRC Order at 6.

[17] *See* Brief of Appellant at 6 ("the Appellate Court's decision establishes the proposition that R.C. Chapter 4112 requires preferential treatment of pregnant employees. . . ."); Brief of Amicus Ohio Health Care Association at 5, Proposition of Law No. 1.

The Court examined whether a California statute requiring employers to give pregnant workers unpaid leave and the right to return to their jobs constituted preferential treatment for women over men. Rejecting the argument for preferential treatment, the Court declared:

> Section 12945(b)(2) does not compel California employers to treat pregnant workers better than other disabled employees; it merely establishes benefits that employers must, at a minimum, provide to pregnant workers. Employers are free to give comparable benefits to other disabled employees, thereby treating "women affected by pregnancy" no better than "other persons not so affected but similar in their ability or inability to work."[18]

For the same reasons, the OCRC's interpretation of R.C. 4112.01(B) does not compel preferential treatment for women. Ohio employers remain free to give comparable benefits to other disabled employees, thereby treating women affected by pregnancy no better than other persons not so affected but similar in their ability or inability to work.

Pataskala Oaks clearly violated a regulation promulgated by the OCRC to interpret 4112.02(A). As the Ohio Supreme Court has recognized, "[a]dministrative regulations issued pursuant to statutory authority have the force and effect of law."[19] O.A.C. 4112-5-05(G)(2) requires employers to provide employees with sufficient leave to accommodate pregnancy, and if insufficient leave is available, terminating the employee under the policy is unlawful:

> 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.

That is precisely what happened to Ms. McFee.

Pataskala Oaks had a leave policy that did not provide Ms. McFee with sufficient leave for her pregnancy. The insufficient policy caused her termination. It was a plain violation of

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[18] *California Fed. Svgs & Loan Assn. v. Guerra* (1987), 479 U.S. 272, 291.

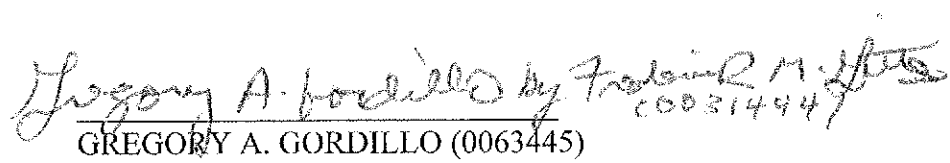
[19] *Lyden Co. v. Tracy*, 76 Ohio St. 3d 66, 69, 1996-Ohio-112.

O.A.C. 4115-5-05(G)(2). It was unlawful sex discrimination, and the correct decision by the Fifth District Court of Appeals should be affirmed.

CONCLUSION

As *amici curiae*, the Ohio Employment Lawyers Association, the Ohio Poverty Law Center, and the Ohio NOW Legal Defense Fund do not suggest that the foregoing reasons are the only reasons to reverse the decision below. Instead, the foregoing reasons are merely highlights of the reasons why the appellate court decision below should be affirmed. In any event, the Ohio Employment Lawyers Association, the Ohio Poverty Law Center, and the Ohio NOW Legal Defense Fund urge this Court to affirm the decision of the court below and enter judgment in accordance with the Final Order of the Ohio Civil Rights Commission issued in connection with Ohio Civil Rights Commission Complaint 9816.

Respectfully Submitted,



GREGORY A. GORDILLO (0063445)
Gordillo & Gordillo, LLC
1370 Ontario Street
2000 Standard Building
Cleveland, Ohio 44113
(216) 875-5500 (Telephone)
(216) 583-0345 (Facsimile)

Counsel for Amici Curiae
Ohio Employment Lawyers Association
Ohio Poverty Law Center, and
Ohio NOW Legal Defense Fund

CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of November 2009, a copy of the foregoing was sent, via regular U.S. mail, postage pre-paid, to:

ATTORNEY GENERAL OF OHIO
RICHARD CORDRAY

PATRICK M. DULL
ASSISTANT ATTORNEY GENERAL
Civil Rights Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215-3428

Counsel for Plaintiff-Appellee

JAN E. HENSEL
DINSMORE & SHOHL LLP
191 W. Nationwide Blvd., Suite 300
Columbus, Ohio 43215

Counsel for Defendant-Appellant

PATRICIA GAVIGAN
DINSMORE & SHOHL LLP
255 E. 5th St., Suite 1900
Cincinnati, Ohio 45202

Counsel for Defendant-Appellant

CAROL ROLF
ROBERT C. PIVONKA
ROLF & GOFFMAN CO., L.P.A.
30100 Chagrin Blvd., Suite 350
Cleveland, Ohio 44124-5705

Counsel for Amicus Curiae,
Ohio Health Care Association

Gregory A. Gordillo by [illegible]

GREGORY A. GORDILLO (0031444)