

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF AMICUS CURIAE
OHIO MANAGEMENT LAWYERS ASSOCIATION

Thomas M. Tarpay (0021723)
Michael C. Griffaton (0062027)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-6209

Carol Rolf (0038356)
Robert C. Pivonka (0067311)
(Counsel of Record)
Rolf and Goffman Co., L.P.A.
30100 Chagrin Blvd., Suite 350
Cleveland, OH 44124-5705
Tel: (216) 514-1100

Counsel for Amicus Curiae
Ohio Management Lawyers Association

Counsel for Amicus Curiae
Ohio Health Care Association

Jan E. Hensel (0040785)
(Counsel of Record)
Dinsmore & Shohl, LLP
191 W. Nationwide Blvd., Suite 300
Columbus, OH 43215
Tel.: (614) 227-4267

Benjamin C. Mizer (0083089)
Solicitor General
(Counsel of Record)
30 East Broad Street, 17th Floor
Columbus, OH 43215-3248
Tel: (614) 466-8980

Patricia Gavigan (0081258)
Dinsmore & Shohl, LLP
255 E. 5th Street, Suite 1900
Cincinnati, OH 45202

Counsel for Appellee
Ohio Civil Rights Commission

Counsel for Appellant
Nursing Care Management of America, Inc.
d/b/a Pataskala Oaks Care Center

Jeffrey J. Weber (0062235)
(Counsel of Record)
Porter, Wright, Morris & Arthur LLP
925 Euclid Avenue, Suite 1700
Cleveland, OH 44115
Tel: (216) 443-2533
Counsel for Amicus Curiae National
Federation of Independent Business Small
Legal Center

FILED
DEC 27 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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ARGUMENT

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

I. Introduction

Nothing in RC Chapter 4112 gives the Ohio Civil Rights Commission express or implied authority to adopt rules relating to mandatory maternity leave. The Attorney General admits “the statutory scheme does not mention ‘maternity leave’ in name.” Appellee Brief at 33. Yet inexplicably, the Attorney General concludes that, “[b]ecause 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.” Appellee Brf. at 34 (emphasis added). What mandate? The Attorney General does not cite to the Revised Code section allegedly creating this “mandate.” He can’t; as he concedes, there isn’t one. *See id.* at 33. This reasoning is as muddled as the administrative rule in question. But the Court need not delve into parsing the rule and the tortured attempts to harmonize its language. The OCRC did not have the authority to promulgate the maternity leave provisions of OAC § 4112-5-05(G) in the first place and its doing so usurped the General Assembly’s legislative authority. For these reasons, the rule should be declared invalid.

II. There is no legislative “gap” in RC Chapter 4112 for the OCRC to fill in regarding maternity leave.

The OCRC does not have unfettered authority to adopt rules. Its rule-making authority, like the rule-making authority of any administrative agency, is delineated by statute. “It is axiomatic that if a statute provides the authority for an administrative agency to **perform a specified act**, but does not provide the details by which the act should be performed, the agency is to perform the act in a reasonable manner based upon a reasonable construction of the

statutory scheme.” Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad (2001), 92 Ohio St.3d 282, 287, 750 N.E.2d 130, 135 (emphasis added). Thus, courts may defer to an administrative agency that adopts gap-filling rules that “implement[] the legislative command.” Id. at 289, 750 N.E.2d at 137 (quotation and citation omitted).

The facts of Northwestern Ohio Bldg. & Constr. Trades Council are distinguishable from the OCRC’s adoption of its mandatory maternity leave rule. There, the Court determined whether, absent express legislative direction, the Bureau of Workers’ Compensation may permissibly use state insurance fund (“SIF”) proceeds to draw the funds necessary to make required administrative and performance-incentive payments to managed-care organizations (“MCO”) as part of the Health Partnership Program mandated by RC §§ 4121.44 and 4121.441. The Court found that the use of SIF monies to pay MCO’s was consistent with the permissible uses of the fund set forth in RC § 4123.30. The Court held that, when the legislature mandates that an agency administer a program but leaves inevitable gaps in the statutes as to all of the details of the program’s administration, the agency may adopt rules to fill in these gaps. See Northwestern Ohio Bldg. & Constr. Trades Council, 92 Ohio St.3d at 288-292, 750 N.E.2d at 136-139.

Gap-filling is only permitted, however, to implement existing public policy. “Administrative rules do not dictate public policy, but rather expound upon public policy already established by the General Assembly in the Revised Code. The purpose of administrative rule-making is to facilitate an administrative agency’s placing into effect a policy declared by the General Assembly in the statutes to be administered by the agency.” Chambers v. St. Mary’s School, 82 Ohio St.3d 563, 567, 697 N.E.2d 198, 202, 1998-Ohio-184.

“[O]rdinarily the General Assembly must provide standards to guide the agency in its

rulemaking.” Amoco Oil Co. v. Petroleum Underground Storage Tank Release Comp. Bd., 89 Ohio St.3d 477, 480, 733 N.E.2d 592, 596, 2000-Ohio-224.

Unlike the express statutory program in Northwestern Ohio Bldg. & Constr. Trades Council, there is no “legislative command” to the OCRC in RC § 4112.04 (or anywhere else in Chapter 4112) to implement mandatory maternity leave, nor is the OCRC expressly or impliedly directed “to perform a specified act” relating to maternity leave in any form. Moreover, there are no “standards to guide the agency” in Chapter 4112 in adopting a mandatory maternity leave rule. On the contrary, the only standard expressed in Chapter 4112 is that “[w]omen affected by pregnancy, childbirth, or related medical conditions *shall be treated the same* for all employment-related purposes.” RC § 4112.01(B) (emphasis added). The OCRC’s mandatory maternity leave rule squarely contradicts this unambiguous legislative command. The OCRC’s “interpretation” of RC 4112 permitting it to adopt a mandatory maternity leave rule does not involve agency administration of a statutorily mandated program. Rather, the OCRC’s arguments amount to nothing more than policy-making, which is a legislative function, not an administrative one.

III. The Attorney General’s reliance on public policy arguments proves the determination of mandatory maternity leave is a matter to be decided by the General Assembly.

The Attorney General relies on the public policy underlying the federal Pregnancy Discrimination Act to support the OCRC’s mandatory maternity leave rule. See Appellee Brf. at 35-36. This misses the point.

This case is not about whether “[a]dhering 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.” Appellee Brf. at 36. This case is about what body – the

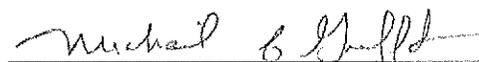
democratically elected General Assembly or an unelected administrative agency – is authorized to determine Ohio’s policy on mandatory maternity leave. The OCRC is not the proper forum for debating what the state’s maternity leave policy should be (nor is this Court). That debate is reserved to the General Assembly. “Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.” State v. Smorgala (1990), 50 Ohio St.3d 222, 223, 553 N.E.2d 672, 674, superseded by statute on other grounds; see also Section 1, Article II, Ohio Constitution (vesting the power to resolve policy issues in the General Assembly). “Administrative regulations cannot dictate public policy....” D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health, 96 Ohio St.3d 250, 260, 773 N.E.2d 536, 546, 2002-Ohio-4172 ¶41.

The Attorney General also argues that “health and safety concerns of the mother warrant the provision of a reasonable maternity leave.” Appellee Brf. at 37. While that may be true, it too is beside the point. What the OCRC has done in adopting OAC § 4112-5-05(G) is no different than what the Toledo-Lucas County Board of Health did in adopting anti-smoking regulations because of health concerns related to second-hand smoke. The Court recognized the “well intentioned and beneficial regulation,” but concluded that such determinations are the sole and exclusive province of the General Assembly. D.A.B.E., 96 Ohio St.3d at 263, 773 N.E.2d at 549, 2002-Ohio-4172 ¶54. How much maternity leave should be required in balancing employer rights, economic issues, and the “maternal mental health and lower peri-natal, neonatal, and post-natal mortality rates”? See Appellee Brf. at 37. As in D.A.B.E., weighing such matters is reserved to the General Assembly.

IV. Conclusion

As the Attorney General observes, there are important public policy matters underlying a mandatory maternity leave policy. See Appellee Brf. at 35-37. What is missing from the Attorney General's analysis, however, is the recognition that the General Assembly is the final arbiter of the state's public policy, not an unelected administrative agency. See Chambers, 82 Ohio St.3d at 567, 697 N.E.2d at 202, 1998-Ohio-184. This Court has noted, "We recognize that an agency can, at times, overstep the bounds of its statutorily delegated authority when interpreting and enforcing its administrative rules." Northwestern Ohio Bldg. & Constr. Trades Council, 92 Ohio St.3d at 288, 750 N.E.2d at 136. Here, the OCRC has overstepped its authority by adopting a mandatory maternity leave rule without the delegated authority to do so. For these reasons, Amicus Curiae Ohio Management Lawyers Association respectfully requests that the Court reverse the decision of the Fifth District Court of Appeals and declare the provisions in OAC § 4112-5-05(G) relating to mandatory maternity leave invalid.

Respectfully submitted,



Thomas M. Tarpay (0021723)
Michael C. Griffaton (0062027)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-6209
Fax: (614) 464-719-4995

Counsel for Amicus Curiae
Ohio Management Lawyers Association

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Amicus Curiae was served by regular U.S. Mail, postage prepaid, upon the following counsel, this 21st day of December, 2009:

Jan E. Hensel, Esq. (Counsel of Record)
Dinsmore & Shohl, LLP
191 W. Nationwide Blvd., Suite 300
Columbus, OH 43215

Patricia Gavigan, Esq.
Dinsmore & Shohl, LLP
255 E. 5th Street, Suite 1900
Cincinnati, OH 45202
*Counsel for Appellant Nursing Care Management of America, Inc.
d/b/a Pataskala Oaks Care Center*

Carol Rolf, Esq.
Robert C. Pivonka, Esq. (Counsel of Record)
Rolf and Goffman Co., L.P.A.
30100 Chagrin Blvd., Suite 350
Cleveland, OH 44124-5705
Counsel for Amicus Curiae Ohio Health Care Association

Benjamin C. Mizer, Esq. (Counsel of Record)
Solicitor General
30 East Broad Street, 17th Floor
Columbus, OH 43215-3248
Counsel for Appellee Ohio Civil Rights Commission

Gregory A. Gordillo, Esq. (Counsel of Record)
Gordillo & Gordillo, LLC
1370 Ontario Street
2000 Standard Building
Cleveland, OH 44113
*Counsel for Amicus Curiae Ohio Employment Lawyers Association,
Ohio Poverty Law Center, and Ohio NOW Legal Defense Fund*

Jeffrey J. Weber (Counsel of Record)
Porter, Wright, Morris & Arthur LLP
925 Euclid Avenue, Suite 1700
Cleveland, OH 44115
Counsel for Amicus Curiae National Federation of Independent Business Small Legal Center


Michael C. Griffaton (0062027)