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## I. PRELIMINARY STATEMENT

For the reasons explained in Pataskala Oaks' Merit Brief and for the reasons further discussed in this Reply Brief, the decision by the Fifth District Court of Appeals must be reversed. Ohio Revised Code Chapter 4112 is an anti-discrimination statute, not a mandatory leave statute. Under the plain language of Chapter 4112 and Ohio Administrative Code 4112-5-05, an Ohio employer may establish a leave of absence policy that requires all employees to meet a minimum length of service requirement to qualify for leave. Further, it is well-established that the *McDonnell Douglas* burden-shifting framework applies to Ohio discrimination claims, and this case is no different. Pataskala Oaks respectfully requests the Supreme Court to adopt these Propositions of Law and reverse the decision below.

The OCRC's entire argument is built upon the unsound, unsupported and yet oft-repeated assertion that the prohibition against pregnancy discrimination in R.C. Chapter 4112 mandates maternity leave. (OCRC's Brief at 2, 10-11, 13, 17, 22, 24, 26, 33, 34, 41-42, 44). A reading of the plain language of the relevant provisions of Chapter 4112 demonstrates the fallacy of this assertion. The statute prohibits discrimination; it makes absolutely no mention of required leave for pregnant employees. Ohio Revised Code Sections 4112.01(B) and 4112.02(A) prohibit discharging an employee without just cause because of pregnancy. Furthermore, R.C. 4112.01(B) requires that "[w]omen affected by pregnancy, childbirth, or related medical conditions shall be treated *the same* for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." (Emphasis added). There is simply no basis in the plain language of the statute for a claim that it mandates maternity leave.

Likewise, the regulation, when read as a whole, further supports the conclusion that an employer may incorporate length of service requirements into its leave policy, provided that such

requirements are “equally applied” to both pregnant and non-pregnant employees. O.A.C. 4112-5-05(G)(5). The OCRC's selective reading of the regulation fails to give meaning to the plain language of O.A.C. 4112-5-05(G)(5). Further, despite the plain language of that section, the OCRC vehemently denies that (G)(5) applies to the facts of this case. Instead, the OCRC attempts to shoehorn the facts of this case into (G)(6), which expressly applies only where the employer has *no* leave policy. However, because Pataskala Oaks has a leave policy, one which allows up to twelve weeks of leave for employees with a minimum one-year length of service, (G)(6) does not apply.

Under the OCRC's and the Fifth District Court of Appeals' interpretation of the regulation, it expands the requirements placed on Ohio employers beyond the statutory requirement to refrain from discrimination based on pregnancy. Their interpretation circumvents the plain language of the statute and the regulation which permits an employer to institute policies, including leave policies, that may result in an employee's termination for just cause, so long as pregnant employees are treated the same as other employees similar in their ability or inability to work.

Finally, the *McDonnell Douglas* framework applies to this case. The OCRC claims that “this case involves a policy that discriminates on its face,” and misconstrues the meaning of direct evidence of discrimination. The question of whether there was discriminatory intent is at the crux of employment discrimination cases, and by claiming that the facially neutral policy at issue constitutes a *per se* violation of Ohio law, the OCRC attempts to circumvent its burden of showing that Pataskala Oaks terminated McFee *because of* her pregnancy.

## II. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

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

The OCRC's argument does not withstand legal scrutiny. Read as a whole, it is clear that the plain language of the Ohio law prohibiting discrimination on the basis of pregnancy does not require maternity leave. Ohio Revised Code Section 4112.02 provides that:

It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

Ohio Revised Code Section 4112.01(B) provides that:

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. 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.

Ohio law clearly provides that pregnant women must be treated *the same* for all employment-related purposes as other employees who are temporarily disabled in their ability or inability to work. The plain language of the statutes simply do not require leave, and the OCRC's attempt to read that language into the law is strained at best. Contrary to the proposition advanced by the OCRC and supported by its selective quoting of the statutory language, when read in their entirety, 4112.02 and 4112.01(B) prohibit *discrimination*; they do not institute a blanket prohibition on the termination of pregnant employees. Chapter 4112 prohibits termination of pregnant employees

*without just cause.* Termination pursuant to a neutral, evenly applied policy is termination with just cause.

The regulation recognizes the ability of an employer to apply neutral leave policies to pregnant employees:

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.

O.A.C. 4112-5-05(G)(5) (emphasis added). The only logical conclusion that can be drawn from this regulatory provision is that termination of a pregnant employee who does not "qualify for leave", for example because she does not meet "the equally applied length of service requirements", is termination for just cause and does not constitute pregnancy discrimination. When read as a whole, the statutes and regulation do not mandate pregnancy leave under all circumstances with no regard to the employer's neutral policies.

The OCRC asserts that only by ignoring the first sentence of R.C. 4112.01(B) can Pataskala Oaks argue that the statute does not require maternity leave, and claims that because Pataskala Oaks did not quote that language it is ignoring its import. The first sentence of R.C. 4112.01(B) is merely definitional: it adds "because of pregnancy, childbirth, or related medical conditions" to the class who cannot be terminated without just cause or otherwise discriminated against. This straightforward language was not quoted by Pataskala Oaks because it needs no interpretation. Pataskala Oaks readily acknowledged in its Brief that Chapter 4112 prohibits discrimination on the basis of sex and specifically on the basis of pregnancy. (Pataskala Oaks' Brief at 11).

The OCRC further argues, incorrectly, that the first sentence of R.C. 4112.01(B) contains “the maternity-leave mandate.” (OCRC’s Brief at 13). It is this interpretation that is a stretch. This “first sentence” does not state anything about maternity leave. Instead, it clarifies that the prohibition against sex discrimination contained in R.C. 4112.02 includes pregnancy and pregnancy-related medical conditions; it certainly does not contain a “maternity-leave mandate.” Indeed, the OCRC only reaches the unsupported conclusion that Ohio law requires maternity leave by repeatedly editing out key language of the statute, and then grafting additional requirements into the statute’s plain language. Throughout its brief, the OCRC states that Ohio law prohibits firing an employee “because of ... pregnancy, childbirth, or related medical conditions.” (OCRC’s Brief at pp. 1, 2, 11, 33). However, the relevant language of the statute defines as an unlawful discriminatory practice for any employer to “discharge without just cause, to refuse to hire or otherwise to discriminate against” employees who fall within the statute’s protected classes. Ohio law does not contain a blanket prohibition on terminations; indeed, it recognizes that employees, including those who are protected by the statutory prohibition against discrimination, may be terminated for just cause.

Furthermore, the OCRC urges an interpretation of the statute as prohibiting terminations due to absences caused by pregnancy, childbirth, or related medical conditions, arguing that because the process of childbirth necessarily will involve some absences from work a mandatory maternity leave policy is the only way to prohibit “termination ... because of ... pregnancy.” However, because the plain language of the statute mandates that pregnant employees be treated “the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work ....” and permits terminations for just cause, it is clear that some terminations of pregnant employees -- for example the termination of an employee who does not qualify for leave because she does not meet the employer’s minimum length of service requirements -- do not violate

the statute's prohibitions against pregnancy discrimination. Further, the federal Pregnancy Discrimination Act ("PDA"), which is worded nearly identically to R.C. 4112.01(B) (as recognized by the OCRC in its Brief, at 14) has been uniformly interpreted as *not* requiring maternity leave. *Rhett v. Carnegie Ctr. Assoc.* (C.A.3 1997), 129 F.3d 290, 297, *certiorari denied* (1998), 524 U.S. 938, 118 S. Ct. 2342, 141 L.Ed.2d 714; *Troupe v. May Dep't. Stores Co.* (C.A.11 1994), 20 F.3d 734, 738. The OCRC's attempt to read a "maternity-leave mandate" into Chapter 4112 fails.

The *Newport News* case, which the OCRC cites in support of its interpretation of the "first sentence" of R.C. 4112.01(B), has no bearing on this case. When the federal PDA was enacted, the employer in *Newport News* modified its health insurance plan to provide hospitalization benefits for pregnancy-related conditions, to the same extent as other non-pregnancy-related conditions, for its female employees. *Newport News Shipbuilding & Dry Dock Co. v. EEOC* (1983), 462 U.S. 669, 670, 103 S. Ct. 2622, 77 L.Ed.2d 89. The health insurance plan provided less favorable pregnancy benefits to spouses of male employees. *Id.* The EEOC filed a lawsuit, alleging that the employer discriminated against male employees in its provision of health benefits. *Id.* The employer argued that the "prohibitions of Title VII do not extend to discrimination against pregnant spouses because the statute applies only to discrimination in employment." *Id.* at 684. However, because the plan at issue gave married male employees a benefit package for their dependents that was less inclusive than the dependency coverage for married female employees, the court held that it violated Title VII's prohibition against discrimination on the basis of sex. *Id.* at 683-684. *Newport News*, unlike the present case, involved an evaluation of the first -- definitional -- clause of the PDA. Because "[t]he 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", it is unlawful discrimination

against male employees in the provision of benefits to exclude from coverage the pregnancy-related expenses of their spouses. *Id.* at 678. Therefore, *Newport News* is inapposite to this case.

The OCRC recognizes the similarity between Ohio law and the federal PDA in the circumstances of their enactment and in their language. (OCRC brief pp. 5, 13, 14, 15, 16, 18, 19). Although the OCRC acknowledges that federal law guides Ohio law in this context, it simply ignores the wealth of authority interpreting the federal PDA and holding that statute does not require preferential treatment of pregnant employees. *See, e.g., Reeves v. Swift Trans. Co., Inc.* (C.A.6 May 16, 2006), 446 F.3d 637, 643; *Harness v. Hartz Mountain Corp.* (C.A.6 1989), 877 F.2d 1307, 1310, *certiorari denied* (1990), 493 U.S. 1024, 110 S.Ct. 728, 107 L.Ed.2d 747; *Tysinger v. Police Dep't of the City of Zanesville* (C.A.6 Sept. 25, 2006), 463 F.3d 569, 575; *Mullet v. Wayne-Dalton Corp.* (N.D. Ohio 2004), 338 F.Supp.2d 806, 811; *Davidson v. Franciscan Health Sys. of the Ohio Valley, Inc.* (S.D. Ohio 2000), 82 F.Supp.2d 768, 774. In spite of the overwhelming weight of authority interpreting the federal PDA, the decision by the Fifth District and the position urged by the OCRC require preferential treatment of pregnant employees if the pregnant employee does not qualify for leave under the employer's equally applied length of service requirement. Simply put, Chapter 4112 does not require employers to treat pregnant employees more favorably than other employees who are temporarily disabled in their ability to work. Therefore, the interpretation of O.A.C. 4112-5-05 adopted by the Fifth District -- mandating leave for pregnant employees regardless of their eligibility for leave under the employer's policy -- conflicts with Chapter 4112 and is invalid.

In an additional attempt to circumvent the plain language of the statute, the OCRC argues, without citation to legal authority, that maternity leave "does not fit within the context of 'fringe benefits' or other 'employment-related purposes.'" (OCRC's Brief at 16). The OCRC's argument that somehow the language "all employment-related purposes" is narrower than the prohibition

against discrimination contained in Section 4112.02(1), which prohibits discharge without just cause, is unsupported, and frankly, illogical. The OCRC’s semantic argument distracts from the common-sense and plain meaning of the statute: “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 . . .” R.C. 4112.01(B) (emphasis added). “All employment-related purposes” means precisely that: all matters related to one’s employment, including those enumerated in R.C. 4112.02(A), such as discharge, hiring, tenure, terms, conditions, and privileges of employment. Pataskala Oaks’ interpretation of “all employment-related purposes” does not nullify the first sentence of R.C. 4112.01(B), as the first sentence merely clarifies that “because of sex” includes “pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions.”

Although the OCRC argues that the language of the statute requires maternity leave, its plain language does not support that proposition. Indeed, when the Ohio legislature intends to enact a leave statute, the Ohio legislature knows how to draft a statute that expressly requires leave. *See, e.g.* R.C. 5923.05 (permanent public employees in military service entitled to leave of absence; payments); R.C. 124.1311 (paid leave for funeral honors detail at veteran’s funeral); R.C. 124.1310 (paid leave for volunteer firefighting or providing emergency medical service); R.C. 124.139 (paid leave for organ donation); R.C. 124.135 (miscellaneous paid and discretionary leave for employees); R.C. 124.387 (bereavement leave); R.C. 3319.08 (teacher employment and reemployment contracts); R.C. 3319.142 (personal leave for nonteaching employees); R.C. 3319.084 (vacation of nonteaching employees; compensation on separation; payment to dependents); R.C. 124.38 (sick leave; other than state employees); and R.C. 124.386 (personal leave for state

employees exempt from collective bargaining law). Here, the Ohio legislature did not enact a statute that requires maternity leave. Instead, the legislature enacted a statute that prohibits *discrimination* because of pregnancy and requires that pregnant employees be treated *the same as* other employees similar in their ability or inability to work.

The OCRC cites to decisions by other states that the OCRC claims have interpreted similar anti-discrimination statutes as mandating the provision of reasonable maternity leave. However, these cases and the statutes in these respective states are clearly distinguishable. In *Sam Teague v. Haw. Civ. Rights Comm.* (Haw. 1999), the employee was terminated at the start of her maternity leave pursuant to the employer's policy prohibiting any extended leave for one year. 89 Haw. 269, 274, 971 P.2d 1104, 1109. During the employee's pregnancy, her employer made several facially discriminatory statements, including a statement that pregnancy was a "self-induced illness" and that the employee should have used "precautions" so she would not become pregnant. *Id.* at 1110. The Supreme Court of Hawaii found that the employer's policy violated the administrative regulations relating to maternity leave and that the employer failed to provide a legitimate nondiscriminatory explanation for her termination or lack of reinstatement. *Id.* at 1114. The *Teague* case is clearly distinguishable from the facts at hand here, as there are no allegations of any discriminatory remarks or animus by Pataskala Oaks. Further, the regulations adopted by the Hawaii Civil Rights Commission do not contain language similar to the language contained in O.A.C. 4112-5-05(G)(5): the Hawaiian regulations do not include language relating to a female employee qualifying for leave or meeting an equally applied minimum length of service requirements for leave time. Thus, the *Teague* case and Hawaii administrative regulations are inapposite.<sup>1</sup>

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<sup>1</sup> It is also important to note that the Supreme Court of Hawaii applied the *McDonnell Douglas* framework in analyzing this claim. *Id.* at 1114, n.10.

Likewise, the other non-Ohio cases cited by the OCRC are distinguishable from the statute and regulation at issue here. The Kansas regulations at issue in *Kansas Gas & Elec. Co. v. Kansas Commission on Civil Rights* (Kan. 1988) do not contain any language relating to qualifications for leave or equally applied minimum length of service requirements for leave time. 242 Kan. 763, 764, 750 P.2d 1055, 1056. The Montana statute at issue in *Miller-Wohl Co. Inc. v. Commission of Labor and Industry* (Mont. 1984) expressly required employers to grant a reasonable leave of absence for pregnancy, which is a wholly different type of statute than R.C. 4112.02 or R.C. 4112.01(B), which does not address leave. 214 Mont. 238, 243, 692 P.2d 1243, 1246. Accordingly none of the non-Ohio cases cited by the OCRC are instructive here.

**Proposition of Law No. 2. An Ohio employer may legally establish a neutral leave of absence policy that requires all employees to meet a minimum length of service requirement in order to qualify for leave, including maternity leave.**

Under a plain reading of O.A.C. 4112-5-05, in its entirety, an employer may establish a neutral leave of absence policy that contains a length of service requirement. To find otherwise would render O.A.C. 4112-5-05(G)(5) meaningless, in violation of the rules of statutory construction. As the OCRC concedes, “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 women *does not* meet those requirements.” (OCRC’s Brief at 28). The OCRC’s interpretation of (G)(5) effectively disregards the plain language of (G)(5): if an employer cannot enforce the minimum service “requirements” placed on all employees, then, in effect, an employer is prohibited from having any minimum service requirements with any real meaning behind them. Further, if the regulation was intended to prohibit the termination of pregnant employees under any circumstance, why does the regulation not say so? Why would the regulation provide an express example discussing a pregnant employee qualifying under an employer’s leave policy or meeting “the equally applied minimum length of service

requirements for leave time”, if it was intended to provide a blanket prohibition against the termination of pregnant employees, as the OCRC argues? Clearly, the regulation permits an employer to establish a leave of absence policy that requires all employees, including pregnant employees, to meet a minimum length of service requirement.

Terminating an employee because she is ineligible for leave is not equivalent to terminating an employee because of pregnancy or childbirth, as the OCRC contends. *See, e.g., Frank v. Toledo Hosp.* (6th Dist. 1992), 84 Ohio App.3d 610, 617, 617 N.E.2d 774 (where pregnant employee was terminated for refusing a mandatory rubella vaccine, the Court found that “[t]he failure to make leave available to a pregnant employee in lieu of terminating her is not discriminatory, however, unless it is shown that such employee was terminated because of, or on the basis of, sex, including pregnancy”); *Mullet v. Wayne-Dalton Corp.* (N.D. Ohio 2004), 338 F.Supp.2d 806, 817 (“Plaintiff is unable to show that her employment was terminated ‘because of’ her pregnancy or that she was treated differently from other similarly-situated employees. Rather, defendant has articulated a legitimate, non-discriminatory reason for the termination, namely, its uniform application of the policy to terminate employees who fail to return to full-duty work after the expiration of a 30-day personal leave of absence”). In *Stout v. Baxter Healthcare Corp.* (C.A.5 2002), 282 F.3d 856, 859-860, the United States Court of Appeals for the Fifth Circuit found no disparate treatment on the basis of pregnancy, where an employee was terminated pursuant to an attendance policy that prohibited probationary employees from missing more than three days of work. *Id.* The employee suffered a miscarriage during her probationary period and was unable to work for over two weeks. *Id.* at 859. The Fifth Circuit’s decision is instructive here:

Stout’s claim of disparate treatment has no merit. She argues that she was fired “because of” her pregnancy. But, to the contrary, *all* of the evidence in the record indicates that she was fired because of her absenteeism, not because of her pregnancy. **There is no evidence**

**she would have been treated differently if her absences had been due to some reason unrelated to pregnancy or if she had been absent the same amount but not pregnant. Baxter's policy does not in any way mention or focus on pregnancy, childbirth, or any related medical condition.** So far as here relevant, it merely limits the permissible absenteeism, on any basis, of all probationary employees. Although Baxter's policy results in the dismissal of any pregnant or post-partum employee who misses more than three days of work during the probationary period, it equally requires the termination of any non-pregnant employee who misses more than three days. There is no evidence in the record that Stout was treated any differently than any other employee who failed to comply with Baxter's probationary attendance policy. Such a policy does not violate the PDA . . .

*Id.* at 859-860 (internal quotations and citations omitted); *see also Armindo v. Padlocker, Inc.* (C.A.11 2000), 209 F.3d 1319, 1322 (“The [federal] PDA is not violated by an employer who fires a pregnant employee for excessive absences, unless the employer overlooks the comparable absences of non-pregnant employees”); *Rhett v. Carnegie Center Assoc.* (C.A.3 1997), 129 F.3d 290, 296, *certiorari denied* (1998), 524 U.S. 938, 118 S. Ct. 2342, 141 L.Ed.2d 714 (“the PDA requires the employer to ignore an employee's pregnancy, but . . . not her absence from work, unless the employer overlooks the comparable absences of non-pregnant employees. . . This view eliminates Rhett's theory of transitivity, that if A (termination) is caused by B (absence) which is caused by C (pregnant), then C causes A”) (internal quotations and citations omitted); *Dormeyer v. Comerica Bank-Illinois* (C.A.7 2000), 223 F.3d 579, 583 (“But the Pregnancy Discrimination Act does not protect a pregnant employee from being discharged for being absent from work even if her absence is due to pregnancy or to complications of pregnancy, unless the absences of nonpregnant employees are overlooked”).

Indeed the “the same as” language in R.C. 4112.01(B), combined with the “just cause” language of R.C. 4112.02(A) supports that a termination pursuant to a neutral policy is “for just cause” and does not violate the statute's prohibitions against discrimination on the basis of

pregnancy. To the extent that O.A.C. § 4112-5-05(G) is read to create an absolute right to maternity leave, it creates a substantive right that exceeds the requirements of the statutes and is invalid.

Assuming the requirement for maternity leave in the regulations withstands scrutiny, Pataskala Oaks has a maternity leave policy, and the fact that McFee's need for leave fell within that narrow 3-month period between the minimum length of service requirement in the policy and the period of human gestation does not make it otherwise. This unusual fact pattern does not make Pataskala Oaks' leave policy illusory. A finding that Pataskala Oaks has "no" leave policy would invalidate many leave policies in place by employers across Ohio. Under the OCRC's view, any eligibility criteria that could potentially disqualify a pregnant employee from leave would automatically render that employer in violation of Chapter 4112. Merely because one employee does not qualify for leave does not mean that there is *no* leave policy. This should not be a case where the unfortunate circumstances and timing of McFee's commencement of employment and need for maternity leave ("bad facts") should result in bad law.

The OCRC discusses extensively the policy considerations behind mandating maternity leave. However, "[t]he General Assembly is responsible for weighing . . . concerns and making policy decisions," and the Court's role is to evaluate the constitutionality and apply and interpret the law. *Arbino v. Johnson & Johnson* (Dec. 27, 2007), 116 Ohio St.3d 468, 492, 880 N.E.2d 420; *Silver Lake v. Metro Reg'l Transit Auth.* (Nov. 22, 2006), 111 Ohio St.3d 324, 326, 856 N.E.2d 236; *see also Allen v. totes/Isotoner Corp.* (Aug. 27, 2009), 123 Ohio St.3d 216, 224, n.1, 915 N.E.2d 622 ("I am aware of the debates that surround breastfeeding in forums as divergent as law reviews, public health journals, and the popular press. But our role as judges is not to substitute our own views of those issues for those of the legislature as they are embodied in the Revised Code. Rather, we must follow the laws as written by the legislature and interpret them accordingly") (O'Connor, J.,

concurring in judgment only). Accordingly, this Court must focus on the statutory and regulatory language itself in reaching a decision in this case.

**Proposition of Law No. 3. The *McDonnell Douglas* framework applies to Ohio pregnancy discrimination claims, thereby requiring evidence of discriminatory intent in order for an employer to be found liable.**

The OCRC's entire position is founded on the faulty conclusion that Chapter 4112 requires leave. If Chapter 4112 requires leave *per se*, then the OCRC's argument that *McDonnell Douglas* framework being inapplicable is correct. However, because Chapter 4112 prohibits discrimination, rather than requiring leave, *McDonnell Douglas* applies and a determination of the employer's intent lies at the crux of a determination of whether discrimination occurred. Decisions by the Supreme Court of Ohio, other Ohio Courts of Appeals, federal courts and decisions by the OCRC itself have applied *McDonnell Douglas* in similar factual scenarios under Ohio law. (See Pataskala Oaks' Brief at 16-17).

The OCRC's brief essentially argues for a *per se* pregnancy discrimination standard. In other words, the OCRC argues that Pataskala Oaks' policy "on its face conflicts with Ohio's leave requirement", and therefore, intent is irrelevant. First, the Sixth Circuit has not recognized a "*per se* violation" of the federal Pregnancy Discrimination Act. *Reeves v. Swift Trans. Co., Inc.* (C.A.6 May 16, 2006), 446 F.3d 637, 640. In *Swift*, the plaintiff was pregnant and sought a light-duty assignment. *Id.* at 638-39. The plaintiff's employment was terminated pursuant to the employer's policy that provided light-duty work only to employees on workers' compensation leave. *Id.* at 639. The plaintiff argued that the employer's policy constituted a "*per se* violation" of the PDA and that the terms of the employer's light-duty policy constituted direct evidence of discrimination. *Id.* at 640. The Sixth Circuit rejected this argument and found that the light-duty policy was in fact "pregnancy-blind." *Id.* Specifically, the Sixth Circuit found that

Swift's light-duty policy is indisputably pregnancy-blind. It simply does not grant or deny light work on the basis of pregnancy, childbirth, or related medical conditions. It makes this determination on the non-pregnancy-related basis of whether there has been a work-related injury or condition. Pregnancy-blind policies of course can be tools of discrimination. But challenging them as tools of discrimination requires evidence and inference beyond such policies' express terms.

Swift's pregnancy-blind policy, therefore, cannot serve as direct evidence of Swift's alleged discrimination against Reeves.

*Id.* at 641. The Sixth Circuit then utilized *McDonnell Douglas* burden-shifting framework and affirmed summary judgment in favor of the employer, as the plaintiff failed to present evidence of discriminatory intent. *Id.* at 642.

Likewise, here, Pataskala Oaks' leave policy is pregnancy-blind. It does not grant or deny leave on the basis of pregnancy, childbirth, or related medical conditions. Rather, the leave policy turns on whether the employee has satisfied the one-year length of service requirement. The policy is not "facially discriminatory," as the OCRC claims in its Brief. (OCRC's Brief at 42-43). *See, e.g., Piriano v. Int'l Orientation Resources, Inc.* (C.A.7 1998), 137 F.3d 987, 991 ("The policy is facially neutral; it draws no distinctions between pregnant and nonpregnant persons for leave eligibility purposes. If the policy discriminates at all, it discriminates between those employees with more than or less than a year of service with the company. An employee's length of service, however, does not place her in a protected class"). Therefore, the OCRC has not shown direct evidence of discrimination, thus making analysis under *McDonnell Douglas* appropriate in this case.

### **III. CONCLUSION**

For the reasons stated in Pataskala Oaks' Briefs, Pataskala Oaks respectfully requests the Supreme Court to adopt these Propositions of Law and reverse the decision by the Fifth District Court of Appeals.

Respectfully submitted,



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**IV. CERTIFICATE OF SERVICE**

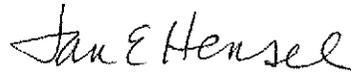
The undersigned hereby certifies that a copy of the foregoing Reply Brief of Appellant was served by regular U.S. mail, postage prepaid, upon the following this 21<sup>st</sup> day of December, 2009.

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