

ORIGINAL
ORIGINAL

IN THE SUPREME COURT OF OHIO

OHIO CIVIL RIGHTS COMMISSION,	:	
	:	CASE NO. 2009-0756
Respondent,	:	
	:	On Appeal from the Fifth
vs.	:	Appellate District
	:	
NURSING CARE MANAGEMENT OF	:	Court of Appeals Case No. 08CA0030
AMERICA, INC. d/b/a/ PATASKALA	:	
OAKS CARE CENTER,	:	
	:	
Petitioner.	:	

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

Patrick M. Dull (Bar No. 0064783)
Assistant Attorney General
Civil Rights Section
30 East Broad Street, 15th Floor
Columbus, OH 43215
Tel: (614) 466-7900
Fax: (614) 466-2437
Counsel for Ohio Civil Rights Commission

PORTER WRIGHT MORRIS & ARTHUR LLP
Jeffrey J. Weber (Bar No. 0062235)
David C. Tryon (Bar No. 0028954)
925 Euclid Avenue, Suite 1700
Cleveland, OH 44115
Tel: (216) 443-9000
Fax: (216) 443-9011
*Counsel for Amicus Curiae National
Federation of Independent Business Small
Business Legal Center*

Jan E. Hensel (Bar No. 0040785)
Dinsmore & Shohl LLP
191 W. Nationwide Blvd., Suite 300
Columbus, OH 43215
Tel: (614) 221-8448
Fax: (614) 221-8590
*Counsel for Nursing Care Management of
America, Inc.*

Robert Charles Pivonka II (Bar No. 0067311)
Rolf & Goffman Co., LPA
30100 Chagrin Boulevard, Suite 350
Pepper Pike, OH 44124
Tel: (216) 514-1100
Fax: (216) 514-0030
*Counsel for Amicus Curiae Ohio Health Care
Association*

RECEIVED
DEC 22 2009
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
DEC 22 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE NFIB	1
<i>Mandatory Pregnancy Leave Would Unfairly Burden Small Business.</i>	1
SUMMARY OF REPLY	3
A) <u>Proposition of Law I:</u> <i>R.C. 4112.01(B) does not require employers to provide leave to employees who are absent, whether the absence results from childbirth or any other medical reason, as long as the employer applies its policy the same for all medical absences.</i>	4
1. Appellee’s Analysis Of The Legislative History and Case Law Surrounding the PDA is Flawed.	4
2. Appellee’s Textual Analysis of “Because of” Pregnancy is Flawed.	11
B) <u>Proposition of Law II:</u> <i>R.C. 4112.01(B) does not allow the Commission to implement regulations which would require Employers to provide pregnancy leave to employees, as long as the employer applies any leave policy the same for all medical absences. Therefore, OAC 4112-5-05(G) is invalid because the Commission interprets it to require employers to provide leave to pregnant employees.</i>	14
CONCLUSION.....	18

TABLE OF AUTHORITIES

Page

Cases

<i>Allen v. Totes/Isotoner Corp.</i> , 123 Ohio St.3d 216, 2009-Ohio-4231	6, 7, 9, 12
<i>California S. & L. Assn. v. Guerra</i> (1987), 479 U.S. 272, 107 S.Ct. 683, 97 L.Ed.2d 613.....	6, 7
<i>D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health</i> (2002), 96 Ohio St.3d 250, 2002-Ohio-4176, 773 N.E.2d 536.....	16, 17
<i>Derungs v. Wal-Mart Stores, Inc.</i> (C.A.6, 2004), 374 F.3d 428.....	4
<i>Elek v. Huntington Natl. Bank</i> (1991), 60 Ohio St.3d 135, 573 N.E.2d 1056.....	14
<i>Ensley-Gaines v. Runyon</i> (C.A.6, 1996), 100 F.3d 1220.....	14
<i>Gen. Elec. Co. v. Gilbert</i> (1976), 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343	5, 9, 11
<i>Kan. Gas and Elec. Co. v. Kan. Commn. on Civil Rights</i> (1988), 242 Kan. 763, 750 P.2d 1104	10
<i>Kroh v. Continental Gen. Tire, Inc.</i> (2001), 92 Ohio St.3d 30	12
<i>McDonnell Douglas Corp. v. Green</i> (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668	13
<i>Miller-Wohl Co., Inc. v. Commr. of Labor and Industry</i> (1984), 214 Mont. 238, 692 P.2d 1243	9
<i>Newport News Shipbuilding and Dry Dock Co. v. EEOC</i> (1983), 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89.....	7
<i>Plumbers & Steamfitters Joint Apprenticeship Com. v. Ohio Civil Rights Commn.</i> (1981), 66 Ohio St.2d 192.....	9, 16
<i>Reeves v. Swift Transp. Co.</i> (C.A.6, 2006), 446 F.3d 637	14
<i>Sam Teague, Ltd. v. Haw. Civil Rights Commn.</i> (1999), 89 Haw. 269, 971 P.2d 1104	10

Statutes

Section 12112, Title 42, U.S.C. 14

Section 793, Title 29, U.S.C. 14

R.C. 4112.02 passim

R.C. 4112.01 passim

R.C. 3709.21 16

Regulations

Ohio Adm. Code 4112-5-05 passim

INTEREST OF THE AMICUS CURIAE NFIB

Mandatory Pregnancy Leave Would Unfairly Burden Small Business.

The Commission claims that its interpretation of its regulations imposing mandatory pregnancy leave constitutes sound policy that will not burden small businesses such as those represented by NFIB. Setting aside the argument that it is for the General Assembly, not the Commission, to establish sound policy, the Commission's claim that small businesses will not be unduly burdened is simply wrong.

The Commission first implies that the burden on employers (particularly small employers) is insignificant because "only 4.8% of employed women give birth in a given year, and only 3.1% of employees (men and women) take leave to care for a new child."¹ Of course, if these low percentages indicate an insignificant issue, why is such a regulation needed in the first place to address such a 'minor' problem? Clearly, it is because while the overall numbers may not be great, the burden on the particular entities who *are* affected is significant.

In fact, these low percentages demonstrate exactly why it is small employers who suffer the most. A large employer will only have a small percentage of its workforce taking pregnancy leave at any given time, and has a larger pool of workers that can assume some of the duties of the absent employee. But for a small employer with five employees, one absent employee constitutes 20% of its workforce. A small employer who is unfortunate enough to have two employees entitled to mandatory pregnancy leave with compelled job reinstatement may well be forced out of business.

Appellee next argues that that a mandatory leave requirement would not harm employers because it is generally cheaper to give a current employee leave than to terminate employment

¹ Appellee's Brief at 38.

and find a replacement.² This “we know what’s best for you and you don’t” position is not a legal argument at all. Amicus NFIB Small Business Legal Center does not dispute there may be times where this is true, and in those instances, employers large and small will act in their own best interests and provide such leave even without a regulatory mandate from the Commission. But that is no excuse for the Commission to usurp its authority and create a one-size-fits-all rule based on how *it* thinks small businesses should run.

Moreover, this argument is circular because if it truly is to the benefit of employers to offer such leave, why is a regulation required at all? The reality, of which the Commission is well-aware, is that there are times when it will *not* benefit the employer, which is why the Commission seeks to make this requirement mandatory in *all* cases, not just those that are to the benefit of both parties.

Finally, Appellee argues that the “reasonableness” requirement in the regulation would not be a burden at all, but a “virtue rather than a vice.”³ In essence, Appellee is implying in this section of its brief that “reasonable” in this context permits consideration of the relative hardships placed on the employer. This contradicts the Commission’s position elsewhere in its brief that OAC 4112-5-05(G) requires leave in all cases and that the only allowable analysis of what is “reasonable” is how long is reasonable for that specific woman.⁴ Appellee claims at page 3 that it is unreasonable under any standard for a new mother to return to work in three days. Likewise, Appellee notes on page 39 that “[r]easonableness’ will differ depending on each woman’s situation . . .,” and that the difference between “what is reasonable for one new mother versus another should be determined by medical necessity . . .” No mention is made on

² Appellee’s Brief at 39.

³ Appellee’s Brief at 38-39.

⁴ Appellee’s Brief at 37-39.

the burden on the employer. In sum, Appellee clearly takes the position that there is an absolute entitlement to “leave for a reasonable period of time,” regardless of the burden on the employer.

But when arguing about the burden placed on small employers, Appellee points to a “reasonable” requirement in other areas of the law that simply is not applicable to the absolute requirement contained in the regulation in question. With respect to the “reasonable person” standard of negligence law, the issue is one of the judgment to be used in daily activities, not the creation of a mandatory entitlement. As noted *infra*, the Americans with Disabilities Act and some of Ohio’s laws contain express legislative provisions and/or legislative history requiring “affirmative action” in the form of reasonable accommodations.⁵ But that is not the case here.

In any event, Appellee’s contradictory arguments regarding reasonableness give no guidance to either the Court or employers. Thus, the Commission’s Administrative Regulations are not only improper as explained herein, but harmful and destructive to all Ohio employers. Accordingly, the NFIB and its members ask this Court to reject the Commission’s interpretation of R.C. 4112.01(B) and strike down O.A.C. Section 4112-05-5(G).

SUMMARY OF REPLY

The Merit Brief of Appellee Ohio Civil Rights Commission (“Appellee’s Brief”) is analytically dependent upon a single flawed conclusion -- that the “because of pregnancy” language contained in the federal Pregnancy Discrimination Act (“PDA”) and Ohio Revised Code 4112.02 mandates that pregnancy leave be provided to all pregnant employees. Absent this conclusion, the reasonable period of leave requirement created by the Ohio Civil Rights Commission in OAC 4112-05-5(G) would be invalid.

⁵ As noted above, Ohio’s prohibition against disability discrimination was based upon the Rehabilitation Act of 1973, which contained an extensive scheme requiring affirmative accommodation of disabled individuals in the public realm.

Appellee's "because of" argument is flawed because it ignores the actual statutory language; ignores the relevant legislative history of the PDA, from which Revised Code 4112.02(A) was derived; and distorts the relevant case law virtually beyond recognition. With respect to the legislative history, Appellee relies upon sweeping generalizations rather than examining the actual holding of the seminal case that gave rise to the PDA. This same pattern is repeated with Appellee's recitation of the relevant case law. Again and again, Appellee's Brief resorts to selective use of vague, aspirational dicta from those cases, while ignoring the actual *holdings* of those cases. The result is a complete distortion of the Pregnancy Discrimination Act, and, by extension, Revised Code 4112.02(A), which cannot withstand examination.

A) Proposition of Law I: *R.C. 4112.01(B) does not require employers to provide leave to employees who are absent, whether the absence results from childbirth or any other medical reason, as long as the employer applies its policy the same for all medical absences.*

In 1979, Ohio enacted Ohio Revised Code 4112.01(B), which mirrored the language of the newly enacted PDA. Both the language of the Ohio statute and the legislative history of the PDA show that the statute does not require employers to provide pregnancy leave to employees, as long as the employer applies its leave policy the same for all "similarly situated employees." See *Derungs v. Wal-Mart Stores, Inc.* (C.A.6, 2004), 374 F.3d 428, 436 (Ohio was following the rationale for the federal PDA when it enacted R.C. 4112.01(B)).

1. Appellee's Analysis Of The Legislative History and Case Law Surrounding the PDA is Flawed.

Appellee's Brief repeatedly asserts that the Pregnancy Discrimination Act was enacted by Congress to prohibit gender-neutral restrictions on leave that resulted in the denial of leave to pregnant females.⁶ This is simply false. It is also the critical analytical aspect of this case

⁶ Appellee's Brief at 1-2, 4, 15-16.

because Appellee acknowledges that Revised Code 4112.02(B) provides the same rights as the PDA, and that OAC 4112-05-5(G) would be invalid *if* it exceeded the mandate of 4112.02(B). Thus, if Appellee’s interpretation of the PDA fails, so does its requirement that employers must provide leave for a “reasonable period of time” for pregnant employees.

Appellee acknowledges, as it must, that Congress enacted the PDA in response to the decision of the U.S. Supreme Court in *General Electric Co. v. Gilbert*.⁷ Yet, Appellee’s Brief never bothers to discuss the actual holding of that case, or the issue presented. The reason is obvious – a look at the actual issue at stake in *Gilbert* leads a more narrow interpretation of the resultant PDA than that which Appellee is asserting here. *Gilbert* was not, as Appellee argues, an endorsement of neutrality that was subsequently rejected by the PDA. Rather, *Gilbert* endorsed *affirmative discrimination* against pregnancy, and the PDA was later enacted to set a “floor” of neutrality towards pregnancy so that it was treated the same as other medical conditions.

As noted in Amicus’ Opening Brief,⁸ the specific issue in *Gilbert* was whether it was lawful for an employer to *carve-out* pregnancy from other medical conditions in terms of eligibility for employer provided disability benefits. The Court in *Gilbert* held that discrimination “because of pregnancy” did not constitute discrimination “because of sex,” which was prohibited under Title VII. In other words, because Title VII contained no explicit prohibition against pregnancy discrimination, employers were free to treat pregnancy in a non-neutral manner, and lawfully discriminate against pregnant employees.⁹ Accordingly, the

⁷ (1976), 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343.

⁸ Brief of Amicus Curiae National Federation of Independent Businesses Small Business Legal Center, pp. 7-8.

⁹ While this conclusion may appear nonsensical today, the rationale of some at that time was that pregnancy was a “voluntary” medical condition that did not deserve the same protection as

Court in *Gilbert* held that the pregnancy carve-outs at issue were not discrimination because of sex, and therefore were lawful. Congress enacted the PDA to reverse that decision by equating discrimination because of pregnancy with discrimination because of sex.

But Appellee’s cursory analysis of *Gilbert* ignores this and falsely claims that “Congress enacted the PDA to reverse *Gilbert*’s understanding of neutrality or equality under Title VII.”¹⁰ As noted previously, the issue in *Gilbert* was *not* one of “neutrality” towards pregnancy, but of affirmative discrimination against pregnancy. Since the PDA was enacted to reverse *Gilbert*, the PDA changed the law to make pregnancy a protected status regarding discrimination to the same degree as race, color, religion, sex and other classifications. Thus, the PDA made unlawful employment policies that differentiate employment actions based solely on pregnancy.

Had the issue in *Gilbert* been a denial of disability benefits to a pregnant employee because of a facially-neutral employment policy, the “reversal” of *Gilbert* by the PDA would have the meaning argued here by Appellee. But that is not the case, and the NFIB Amicus’ interpretations of *Gilbert* and the PDA urged herein are the only one that can withstand legal scrutiny. As noted by Justice O’Connor in *Allen v. Totes/Isotoner Corp.*, “[t]he essential command of the PDA is that an employer must maintain the same neutrality towards an employee’s pregnancy as it would an employee’s race, gender, or other protected classes.”¹¹

Appellee also cites to two other decisions of the U.S. Supreme Court, neither of which contains a shred of language requiring employers to provide anything to pregnant employees beyond what they provide to other employees. In *California S. & L. Assn. v. Guerra*,¹² the sole

“involuntary” medical conditions. The PDA rejected this, and so included “pregnancy” as one of the specific “because of” protection in Title VII.

¹⁰ Appellee’s Brief at 4.

¹¹ 123 Ohio St.3d 216, 2009-Ohio-4231, ¶26 (O’Connor, J., concurring).

¹² (1987), 479 U.S. 272, 107 S.Ct. 683, 97 L.Ed.2d 613

issue at stake was the legality of a California statute that went beyond the requirements of the PDA by *mandating* pregnancy leave, regardless of what leave the employer provided to other employees. The claim was brought by males who claimed that such a “pregnancy preference” constituted “reverse discrimination” against males in violation of Title VII’s prohibition against discrimination based upon sex and pregnancy.

As noted in Amicus’ Opening Brief, *Guerra* held the “pregnancy preferences” enacted by California did not violate Title VII because the PDA (which imposed neutrality relative to pregnancy) was intended to be a “floor beneath which pregnancy disability benefits may not drop, not a ceiling above which they may not rise.”¹³ But rather than recognizing that the PDA is a “floor” that requires neutrality but *permits* preferential treatment, Appellee argues that the PDA, and by extension Ohio Revised Code 4112.02(B), *mandates* pregnancy leave. This is simply an attempt to bypass the Ohio General Assembly and impose the California statute’s pregnancy affirmative preferences at issue in *Guerra* into the PDA and the Ohio Revised Code 4112.02(B). This is wrong both as a matter of legislative history and common sense. Cf. *Allen*, supra, 2009 Ohio-4231, ¶44 (O’Connor, J., concurring) (“The FEPA and the PDA mandate that an employer treat pregnancy with neutrality, but not preferentially.”)

Appellee’s citation to *Newport News Shipbuilding and Dry Dock Co. v. EEOC*¹⁴ is another example of twisting vague dicta while ignoring the central issue of the case. The sole issue in *Newport News* was whether pregnant spouses of male employees were entitled to the same benefits as pregnant employees. The Court held that, under the PDA, spouses were entitled to pregnancy benefits on the same basis as spouses were entitled to coverage for other medical conditions. *Newport News* did not reject the principle of neutrality – it *endorsed* it. Not

¹³ Opening Brief at 10-11.

¹⁴ (1983), 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89

surprisingly, Appellee was unable to provide a single quote or statement from that opinion stating that an employer is required to provide a certain level of benefits to pregnant employees. Instead, it simply twists the Court's acknowledgment that the purpose of the PDA was to guarantee the "floor" of neutrality to pregnancy into a requirement for mandatory preferences.

With no direct citations to any U.S. Supreme Court cases endorsing its view of the PDA, Appellee falls back on the false assertion that federal case law is "replete" with cases that support its position.¹⁵ But to support this assertion, Appellee manages to cite the sum total of only *two* cases. The first is a 1981 decision from the D.C. Circuit, and the second is a 1988 decision from a Kansas state court.¹⁶

The truth is that the overwhelming weight of the case law holds exactly the opposite, and in fact endorses Amicus' and Appellant's interpretation of the PDA. Amicus' Opening Brief truly was "replete" with citations to federal circuit courts, including the Sixth Circuit, that have rejected Appellee's argument and found that the PDA requires only that employers treat pregnant employees the same as other employees similarly-situated in their ability or inability to work, and does not require any certain level of benefits.¹⁷

Finally, Appellee argues that this Court should follow the alleged lead of three other state courts in relation to those states' pregnancy discrimination laws. Appellee argues that these states have held that "because of" language found in the PDA and in 4112.02(B) mandates leave for pregnant employees. However, there are two problems with this argument. First, Ohio does not follow the lead of other states on this issue.¹⁸ Indeed, as Appellee admits elsewhere, the

¹⁵ Appellee's Brief at 19.

¹⁶ Appellee's Brief at 20.

¹⁷ NFIB Opening Brief at 12 n.25.

¹⁸ Appellee cites three Ohio cases at 22-23 of its brief for this claim. The cases discuss the interpretation of real estate tax statutes, which have nothing to do with Ohio's pregnancy

Federal PDA law “guides Ohio” on this issue. See *Plumbers & Steamfitters Joint Apprenticeship Com. v. Ohio Civil Rights Commn.* (1981), 66 Ohio St.2d 192. Federal law rejects Appellee’s assertion and endorses Amicus NFIB’s position on this issue.¹⁹

Furthermore, the three cases which Appellee cites from three other states actually disprove Appellee’s point. In 1975, prior to the enactment of the Pregnancy Disability Act, Montana passed a statute specifically mandating maternity leave by employers. Subsequently, in 1976, the federal government enacted the PDA in response to the *Gilbert* case. In 1980, the Miller-Wohl Company challenged the Montana mandatory maternity leave statute, claiming that it was pre-empted by the Federal PDA. The Montana Supreme Court concluded that the PDA did not invalidate the mandatory language of the Montana Statute; but neither did the Montana statute broaden the PDA to require mandatory leave. See *Miller-Wohl Co., Inc. v. Commr. of Labor and Industry* (1984), 214 Mont. 238, 257-62, 692 P.2d 1243, vacated, 479 U.S. 1050, 107 S.Ct. 919 (1987). This is the same conclusion that the United States Supreme Court later reached in *Guerra* when it concluded that, although the PDA did not require pregnancy leave, a state statute could do so. Of course, Ohio Rev. Code 4112 mirrors the PDA, not the California statute in *Guerra* or the Montana statute in *Miller-Wohl*. Therefore, *Miller-Wohl* is irrelevant.

Appellee also cites *Kan. Gas and Elec. Co. v. Kan. Commn. on Civil Rights* (1988), 242 Kan. 763, 750 P.2d 1055. In that case, a male employee of KCEC had injured his shoulder and had run out of sick time. When he was unable to return to work, he was terminated. He then claimed that his employer’s pregnancy leave policy should entitle him to time off for his shoulder injury or be declared invalid as sex discrimination. This was the *Guerra* argument once again, except that rather than challenging a preference provided by statute, the plaintiff was

discrimination statutes.

¹⁹ NFIB Opening Brief at 5-12.

challenging whether a preference provided by an employer's voluntarily-adopted pregnancy leave policy violated Title VII. Not surprising, the Kansas Supreme Court rejected this argument. Using the same "similarly-situated" analysis derided by Appellee throughout its Brief, the Court concluded that if a female employee or a pregnant employee had "a shoulder injury like Williams," it was "uncontroverted her request for leave of absence would have been denied just as Williams' request was." *Id.* at 768. Thus, this case also had nothing to do with reading a mandatory leave requirement into the text of the PDA.

Appellee then cites *Sam Teague, Ltd. v. Haw. Civil Rights Commn.* (1999), 89 Hawaii 269, 971 P.2d 1104. Unlike Ohio's statute on this issue, Hawaii's law covered all employers, whereas Ohio covers only employers with at least four employees. In *Teague*, the employer only raised the issue of what constituted a "reasonable" amount of leave time due to the pregnancy or childbirth. The Hawaii Supreme Court specifically noted that "*Employer does not challenge the validity of these administrative rules . . .*" *Id.* at 278 n.7 (emphasis added). In this case, the validity and interpretation of the Ohio administrative regulations is exactly what is being challenged. Further, in this case, Appellant and the NFIB Amicus urge this Court to follow the Sixth Circuit's interpretation of the PDA, not a Hawaii court's interpretation of a Hawaii statute. If the Court does so, as it should, it must conclude that the Commission may not impose a mandatory leave policy upon Ohio employers without a specific statutory mandate from the Ohio legislature.

The legislative history and relevant case law rejects Appellee's interpretation and espouses Appellant's and NFIB Amicus' interpretation. Ohio Rev. Code 4112.01(B) does not mandate pregnancy leave or allow the Commission to impose such a leave policy on employers.

2. Appellee’s Textual Analysis of “Because of” Pregnancy is Flawed.

Swimming upstream against the overwhelming current of legislative history and federal case law interpreting the PDA, Appellee retreats to creating a false syllogism around the phrase “because of” pregnancy. According to Appellee’s argument, “an employer has only two options when an employee is unable to return to work due to recent childbirth: 1) allow leave until the employee recovers, or 2) fire her for absenteeism because of the birth.” Appellee then triumphantly asserts that only the first option is consistent with the PDA and Revised Code 4112.02(B).²⁰

But in fact, there is a third option – *treat the pregnant employee the same as other employees similarly situated “in their ability or inability to work.”* Cf. R.C. 4112.01(B). It is only this third option that is completely consistent with the legislative history and case law of the PDA, beginning with the issue of legislative carve-outs in *Gilbert*, the “floor, not a ceiling” mandate of *Guerra*, and moving on to the language of Revised Code 4112.02(B).

Likewise, it is this common-sense option of treating pregnant employees the same as other employees that provides the answer to Appellee’s hypothetical employer hanging out a sign saying “Pregnant women need not apply.” Contrary to Appellee’s assertion, such a sign would violate both the PDA and Revised Code 4112.02(B) under Amicus’ and Appellant’s interpretation of Revised Code 4112.02(B) because it singles out pregnant employees. The actual “sign” that such an employer could legally hang out might read “applicants needing significant amounts of leave in their first six months of employment need not apply.” That sign, while perhaps appearing harsh to some applicants, would be perfectly legal because it is *pregnancy-neutral*.

²⁰ Appellee’s Brief at 11.

Of course, the Ohio Legislature *could* pass a law to mandate specific and immediate leave requirements for all employers, either limited just to pregnant employees (as California did in the *Guerra* case) or covering all employees. However, the Legislature has not done so. Therefore, the Commission may not do so.

Appellee next tries to evade the actual language of the second sentence of R.C. 4112.01(B) by misstating it as the “equal treatment sentence.” Interestingly, those words never appear in the statute and Appellee never even quotes the actual sentence which reads:

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). Appellee argues that the “similarly-situated” phrase must grant additional substantive rights in addition to the “because of” language in the first sentence or else it would be “redundant”. But in fact, Appellee’s own strained efforts to twist Revised Code 4112.02(B) to its purposes provide a perfectly logical alternate explanation for that language. The “similarly-situated” language of 4112.02(B) is simply explanatory language intended to clarify the “because of” language in the first clause of 4112.02(B), and was used quite reasonably in that regard in *Kansas Gas*. It is intended to prevent the exact type of misinterpretation in which Appellee is engaging here.

As this Court is well-aware, claims of discrimination “because of” a protected status routinely involve the question of whether the alleged victim was “similarly-situated” to persons not in that protected class who allegedly received more favorable treatment.²¹ The two phrases

²¹ See, e.g., *Kroh v. Continental Gen. Tire, Inc.* (2001), 92 Ohio St. 3d 30, 31, 748 N.E.2d 36 (plaintiff must show that she “was similarly situated to the non-protected employee in all

are not in opposition, but rather, the latter simply provides an additional, more specific framework as guidance for analyzing such claims.

Moreover, both phrases commonly appear in the burden-shifting approach of proving discrimination as described in *McDonnell Douglas Corp. v. Green*.²² This is just as applicable to this claim of pregnancy discrimination as it is to claims of other types of discrimination. Appellee is correct in arguing that this burden-shifting approach is inapplicable to claims involving direct, *per se* discrimination. A perfect example of such a *per se* discrimination claim would be Appellee's own hypothetical of the employer hanging out a sign saying "pregnant women need not apply." Such a sign singles out pregnancy and is discriminatory on its face. But where an employer fails to provide leave for *any* employees based on neutrally-applied criteria, pregnant employees are not singled-out, and there is no *per se* discrimination.

By contrast, a sign saying "employees requiring significant leave in the first six months of employment need not apply" presents a different question entirely because it would not constitute facial discrimination against pregnant employees. A pregnant applicant could still prevail on such a claim if she could demonstrate that the facial neutrality was, in fact, a pretext for discrimination, and that in practice, other individuals "similarly-situated" in their ability or inability to work were receiving leave. Perhaps the applicant could demonstrate that (1) a male employee was permitted time off in the first six months of employment to recover from a sports injury and (2) a pregnant woman was denied equivalent leave during the first six months of employment to recover from childbirth. Likewise, the employee in this case was free to use this same burden-shifting approach to try to demonstrate that Patalaska Oaks' leave policy was a

relevant respects" to prevail on her claim that she was discriminated against "because of" her gender.).

²² (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668.

sham, and that non-pregnant employees really were permitted to take leave even though they had no entitlement to FMLA leave. However, Appellee did not make this claim.

Previously, in the lower courts, the Commission based its interpretation of the “similarly-situated” phrase on the 1996 Sixth Circuit decision of *Ensley-Gaines v. Runyon* (C.A.6, 1996), 100 F.3d 1220. That argument was expressly rejected by the Sixth Circuit in *Reeves v. Swift Transportation Co.* (C.A. 6, 2006), 446 F.3d 637. Appellee never mentions the *Reeves* case in its brief and never responds to this Amicus’ discussions of the “similarly-situated” clause set forth in Amicus’ opening brief at pages 13 through 16.

Appellee’s final “because of” argument cites to disability law, and how employers may be required to grant reasonable periods of leave for disabled employees. But the Americans with Disabilities Act contains an *affirmative requirement* to make a “reasonable accommodation” that is utterly lacking in revised Code 4112.02(B).²³ Likewise, Ohio’s own prohibition against disability discrimination (R.C. 4112.02), which also requires “reasonable accommodations,” was based on the pre-existing federal Rehabilitation Act²⁴ which itself contained an express requirement for affirmative action in favor of disabled individuals.²⁵ The affirmative textual requirement for affirmative action in favor of disabled employees found both in the 1991 Americans with Disabilities Act and in the Rehabilitation Act of 1973 is simply not present in

²³ 42 U.S.C. §12112(b)(5)(A) (declaring unlawful “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified applicant.”).

²⁴ See *Elek v. Huntington National Bank* (1991), 60 Ohio St.3d 135, 138-39, 573 N.E.2d 1056 (recognizing that Ohio courts are competent to adjudicate claims under the federal Rehabilitation Act in part because of their familiarity with analogous state claims); *S.S. v. E. Ky. Univ.* (C.A.6, 2008), 532 F.3d 445, 452-453 (noting that the relevant protections of the Rehabilitation Act and the Americans with Disability Act are identical.).

²⁵ 29 U.S.C. §793(a) (“Any contract in excess of \$10,000 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that the party contracting with the United States *shall take affirmative action to employ and advance in employment qualified individuals with disabilities.*”) (emphasis added).

4112.02(B) with respect to pregnancy discrimination.

Appellee's conclusion that the "because of pregnancy" language contained in the PDA and in Revised Code 4112.02(B) mandates pregnancy leave ignores the statutory language itself, the legislative history and all relevant federal case law. The only reasonable conclusion from those sources is that the statute neither dictates mandatory pregnancy leave nor permits the Commission to mandate it.

B) Proposition of Law II: R.C. 4112.01(B) does not allow the Commission to implement regulations which would require Employers to provide pregnancy leave to employees, as long as the employer applies any leave policy the same for all medical absences. Therefore, OAC 4112-5-05(G) is invalid because the Commission interprets it to require employers to provide leave to pregnant employees.

Appellee's proposition of law number two claims that the Commission's own administrative regulations merely implement "the statute's mandate" to provide reasonable leave. Of course, the statute does *not* mandate reasonable leave, and the Commission's administrative regulations far exceed its authority.

In its Opening Brief, Amicus offered a possible reconciliation of the apparently conflicting provisions within OAC 4112-5-05(G) which 1) permit employers to deny leave to pregnant employees who had not met a length of service requirement, yet contradictorily 2) require employers to offer a reasonable period of leave to all pregnant employees even if they are ineligible for leave under the employers policy.²⁶ Amicus' suggested interpretation would also reconcile the administrative code with the statute. Appellee's Brief, however, rejects any such resolution, arguing that the "leave for a reasonable period of time" mandate found in subsection (G)(2) trumps other language appearing in that subsection, other subsections, and in the statute.

²⁶ Amicus NFIB Opening Br. at 21-26.

As noted *supra*, there is no statutory basis for this mandatory leave requirement in either the PDA or Revised Code 4112.02(B), or in the legislative history or case law of either statute. Nor can the “construed liberally” language of R.C. 4112.08 justify expanding substantive rights under Ohio law beyond the federal statutes upon which those Ohio statutes were admittedly based.²⁷ The statute simply requires the same treatment for persons “similar in their ability or inability to work” It does not mandate preferential treatment as do the statutes in other states such as California and Montana. The Commission cannot impose regulations to implement the statutes of other states it believes are good policy for Ohio.

As noted in Amicus’ Opening Brief, an administrative agency such as the Ohio Civil Rights Commission does not have the power to *dictate* policy, only to *develop and administer* policy enacted by the legislature.²⁸ By mandating an affirmative obligation that does not exist in the statute, the Commission has dictated policy rather than merely developing and administering the Legislature’s and Governor’s policy. The Commission apparently cannot accept that the compromises of the legislative process could have resulted in a statute that does not actually mandate pregnancy leave in all situations. Yet, Revised Code 4112.02(B) contains no such mandate. The Legislature, if it so chose, could mandate such a requirement, and then the Governor could sign it. But neither the Legislature nor the Governor has taken such action, and neither the Commission nor this Court can do so without that statutory mandate.

The Commission seeks to distinguish the striking of an administrative regulation by this Court in the *D.A.B.E.* case by claiming that while the administrative agency in that case had a narrow scope of legislative authority, the Commission’s scope of authority under Revised Code

²⁷ See, e.g., *Plumbers & Steamfitters Joint Apprenticeship Com. v. Ohio Civil Rights Commn.*

²⁸ *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health* (2002), 96 Ohio St.3d 250, 2002-Ohio-4176, 773 N.E.2d 536

4112 is broader. But in fact, it would be difficult to imagine a scope of authority greater than the one given to the Lucas County Board of Health by Revised Code 3709.21, which authorized local boards to “make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances.”²⁹ Yet, this Court took a common-sense approach in *D.A.B.E.* and determined that banning smoking was a question of public importance demanding a weighing of costs and benefits that is the proper province of the General Assembly, not an unelected administrative body.³⁰

Appellee’s own argument demonstrates the wisdom and propriety of the General Assembly, not the Commission, making this important policy decision. The Appellee’s Brief contains a recitation of the dire consequences of invalidating this regulation, analyzes and weighs the burdens on business, analyzes the burden on individuals and tries to measure the costs and benefits to society. The Commission then concludes that the benefits of its proposed policy outweigh the burdens . Yet it is this exact type of analysis that is the province of the elected General Assembly, not the unelected Ohio Civil Rights Commission. The General Assembly can take public input, study the proposed legislative language, debate it publicly, allow both chambers to propose language, and then submit it to the Governor for his signature or veto. The Commission had no role in creating the underlying policy or the language enacting it.

While the Commission tries to discount *D.A.B.E.*, that decision is the only Supreme Court case on this legal issue, and the Commission does not provide any alternative case authority to suggest a different analysis. It simply claims that it, unlike the Board of Health in *D.A.B.E.*, can pretty much do whatever it wants. Appellee then concludes that “[b]ecause the statute itself

²⁹ *Id.* at ¶18.

³⁰ A smoking ban was later passed into Ohio law by initiative petition.

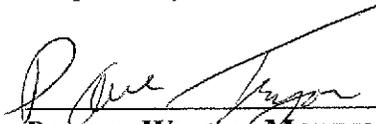
mandates the provision of a reasonable period of leave for pregnant employees, Commission's enactment of regulations that correspond to that mandate is well within the balance of its authority." See Appellee Br. at 34. But the statute nowhere includes a "mandate" for a "reasonable period of leave for pregnant employees"

Because the statute does not mandate pregnancy leave and does not evidence a clear policy to that effect, this Court should strike any and all provisions of OAC 4112-5-05(G) that purport to require employers to provide leave to pregnant employees.

CONCLUSION

For all the above reasons, Amicus NFIB Small Business Legal Center urges the Court to (1) reject any interpretation of R.C. 4112.01(B) that purports to require employers to provide guaranteed leave to pregnant employees, unless the employer offers such leave to other employees who are similarly-situated in all relevant respects and (2) declare OAC 4112-5-05(G) to be invalid as in conflict with R.C. 4112.01(B).

Respectfully submitted,



PORTER WRIGHT MORRIS & ARTHUR LLP

David C. Tryon (Bar No. 0028954)

Jeffrey J. Weber (Bar No. 0062235)

Brodie M. Butland (Bar No. 0084441)

925 Euclid Avenue, Suite 1700

Cleveland, Ohio 44115

Tel: (216) 443-9000

Fax: (216) 443-9011

*Counsel for Amicus Curiae National Federation of
Independent Business Small Business Legal Center*

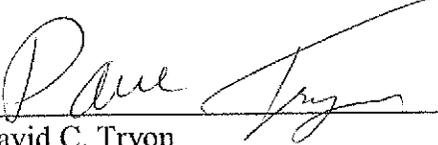
CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was sent via first class United States mail, postage prepaid, this 21st day of December, 2009 to the following:

Patrick M. Dull
Assistant Attorney General
Civil Rights Section
30 East Broad Street, 15th Floor
Columbus, OH 43215
Tel: (614) 466-7900
Fax: (614) 466-2437
Counsel for Ohio Civil Rights Commission

Robert Charles Pivonka II
Rolf & Goffman Co., LPA
30100 Chagrin Boulevard, Suite 350
Pepper Pike, OH 44124
Tel: (216) 514-1100
Fax: (216) 514-0030
Counsel for Amicus Curiae Ohio Health Care Association

Jan E. Hensel
Dinsmore & Shohl LLP
191 W. Nationwide Blvd., Suite 300
Columbus, OH 43215
Tel: (614) 221-8448
Fax: (614) 221-8590
Counsel for Nursing Care Management of America, Inc.



David C. Tryon
One of the Attorneys for *Amicus Curiae National Federation of Independent Business Small Business Legal Center*