

IN THE OHIO SUPREME COURT

KEITH LAWRENCE)	CASE NO. 2011-0621
)	
Plaintiff-Appellant)	
)	
v.)	MERIT BRIEF OF APPELLEE
)	CITY OF YOUNGSTOWN
CITY OF YOUNGSTOWN)	
)	
Defendant-Appellee)	

ON APPEAL FROM THE SEVENTH DISTRICT COURT OF APPEALS

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Proposition of Law No. 1:

The clear and unambiguous language of ORC §4123.90 provides that the time upon which an employee’s retaliation claim begins to run is immediately following the effective date of the employee’s discharge, rather than when the employee receives notice of or is informed of the discharge. When such clear and unambiguous language is present, the directive in ORC §4123.95 for liberal construction of ORC §4123.90 is inapplicable.

- A. The clear and unambiguous language of ORC §4123.90 unequivocally indicates that the time requirements set forth in ORC §4123.90 commence immediately following the effective date of discharge rather than the employee’s receipt of notice of discharge.
 - 1. Ohio Appellate courts in the Seventh and other Appellate Districts prior to and in the 22 years since *Mechling* was decided by the Eleventh Appellate District have appropriately followed the clear and unambiguous language set forth in ORC §4123.90 and have not engrafted a discovery rule within the jurisdictional requisites of ORC §4123.90.
 - 2. Ohio courts, including the Supreme Court, have consistently applied the required standards for statutory interpretation when clear and unambiguous language is present in the context of other statutory provisions similar to the statute of limitations provision set forth in ORC §4123.90.
- B. When clear and unambiguous language is present as is set forth in ORC §4123.90, the liberal construction provision of ORC §4123.95 does not apply so as to read a fairness element into ORC §4123.90 as advocated by *Mechling* and which establishes the receipt of the notice of discharge as the commencement point to serve notice and file a claim under ORC §4123.90.
- C. The requirement that an employer provide “unequivocal notice” of discharge is well beyond the scope of the liberal construction directive in ORC §4123.95 and impractical in practice to Ohio employers.

D. The application of the clear and unambiguous language in ORC §4123.90 will not lead to catastrophic results to employees and potential claimants in either the 90 or 180 day circumstances.

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I. INTRODUCTION/SUMMARY OF ARGUMENT

This appeal arises out of the termination of Plaintiff-Appellant Keith Lawrence (hereinafter "Lawrence"), who was terminated by Defendant-Appellee City of Youngstown ("Youngstown") from his position as a laborer in the Youngstown Street Department ("YSD") on January 9, 2007. Following his termination, Lawrence filed, on July 6, 2007, a four-count Complaint against Youngstown for wrongful termination which included a claim for workers' compensation retaliation pursuant to ORC §4123.90. At issue in this appeal is the time of commencement for statute of limitations purposes of Lawrence's §4123.90 claim. Because of a certified conflict, this Court has requested the parties brief the issue of whether the ORC §4123.90 time limits begin to run when the "discharge" takes effect or whether the liberal construction directive in ORC §4123.95 means the time limits begin to run upon the employee receiving notice of the discharge.

The Seventh District Court of Appeals correctly concluded (R.D. 48), following the approach taken by the Eighth, Ninth and Tenth Appellate Districts, that the written notice provision for employees who claim a violation of ORC §4123.90 must be received by an employer 90 days "immediately following the discharge, demotion, reassignment or punitive action taken" – which means the effective date of discharge or other discriminatory action taken. [The requirement for commencement of the action within 180 days "immediately following the discharge" also commences as of the effective date of discharge.] The language of ORC §4123.90 clearly references the date of discharge and not the notice of discharge. (R.D. 48, Lawrence Opinion, at ¶30.) In rejecting the approach taken by the Sixth and Eleventh Appellate Districts that the time commencement in ORC §4123.90 begins when the employee receives notice of discharge, the Seventh District Court of Appeals properly concluded that if the General

Assembly had intended the time periods to begin to run upon notice of discharge, the statute could have easily been written to indicate as such. R.D. 48, *supra*.

In determining that the time periods in ORC §4123.90 begin to run on the effective date of discharge, the Seventh District Court of Appeals recognized that Ohio courts have consistently refused to apply a “discovery rule” to ORC §4123.90. Consequently, the liberal construction provision identified in ORC §4123.95 does not apply to ORC §4123.90 because words are needed to be added to an unambiguous statute when a court must otherwise apply the statute as written. R.D. 48, *supra* at 29-31. The Seventh District Court of Appeals’ approach to statutory interpretation by exercising adherence to clear and unambiguous language in determining when the time period in ORC §4123.90 commences (effective date of discharge) is more appropriate than the competing approach Lawrence seeks. Adding an interpretative element to the clear language of ORC §4123.90 by lengthening the time periods included therein and by specifically requiring that an employer “unequivocally inform” the employee of his discharge and that the employee has rendered no further services for the employer (see Appellant’s Proposition of Law I, Appellant’s Brief at p. 12), is contrary to the clear meaning of ORC §4123.90 as a matter of law and is impractical to impose upon Ohio employers.

Lawrence and his amicus not only want to create a new interpretation of the clear and unambiguous meaning of “discharge” within ORC §4123.90 (as well as presumably “demotion, reassignment or other punitive action taken”), thereby ignoring this Court’s consistent approach to statutory interpretation in analyzing ORC §4123.90 as well as other statutory provisions in the Ohio Revised Code governing time commencement, but do so in the name of the liberal construction of the workers’ compensation laws which are designed to favor employees who are subject to the provisions of ORC Chapter 4123. Lawrence and his amicus seek to improperly utilize what they deem to be comparable “liberal construction” mechanisms outside of ORC

§4123.90 to establish a commencement date based upon receipt of notice that a particular right of an employee has been violated rather than the date any particular unlawful action or infringement of right effectively occurs.

Youngstown believes, however, that based upon the principles of statutory interpretation employed by the Seventh District Court of Appeals in this case and by other courts in numerous cases discussed below, it is most evident that the time limits in ORC §4123.90 begin to run on the effective date of discharge despite ORC §4123.95's directive for liberal construction as set forth in the conflicting decision of the Eleventh District Court of Appeals. This Court should reject the authorities submitted by Lawrence and his amicus, both from Ohio courts and the Sixth Circuit Court of Appeals, as well as jurisdictions outside these courts, which seek to alter the fundamental analysis to statutory interpretation through the "liberal construction" and expansion of ORC §4123.90. The Seventh District Court of Appeals decision finding that the time provisions in ORC §4123.90 commenced on the effective date of discharge must be affirmed.

Finally, Lawrence and his amicus attempt to present an array of consequences which impact Lawrence and employees like him should the Seventh District Court of Appeals decision be upheld. Youngstown contends that upon this Court's review of the facts in the record, and as found by the Seventh District Court of Appeals, the dire consequences which Lawrence and his amicus maintain will be present do not exist in this particular case nor will other employees be likewise affected. Rather, there are just as many long-term implications to the propositions of law presented by Lawrence and his amicus which do not warrant this Court's reversal of the Seventh District Court of Appeals approach and a radical switch to the interpretation mechanism suggested by Lawrence and his amicus.

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II. STATEMENT OF THE FACTS

Plaintiff-Appellant Keith Lawrence (hereinafter "Lawrence") was first employed at the City of Youngstown ("Youngstown") Street Department ("YSD") as a temporary seasonal laborer in 1999 and 2000. Lawrence was subsequently appointed to a permanent laborer's position in November of 2000.

Under Youngstown's charter "laborer" is an unclassified civil service position and applicants for this position are not required to take a civil service examination to qualify for appointment (see Charter of Youngstown, §52, attached as Exhibit A to Youngstown's Motion for Summary Judgment, R.D. 16). While applicants for the laborer's position are hired by the will of the Youngstown political body, they must possess certain minimum qualifications. These qualifications at YSD include the ability to operate automobiles and possessing a Class 'B' State of Ohio Commercial Drivers License (CDL). (R.D. 16, Ex. B.)

In July of 2002, Youngstown executed a massive layoff of its employees, including Lawrence. Lawrence was sent a layoff notice similar to other employees in Youngstown (R.D. 16, Ex. D, as incorporated into the Affidavit of J. Mastropietro).

In 2006, a Youngstown councilman who had first assisted Lawrence in obtaining the temporary seasonal laborer position requested that Youngstown hire and re-appoint Lawrence to a position now known as "driver/laborer." (See Affidavit of Mayor Jay Williams, R.D. 16, Ex. E, ¶3.) However, upon review of Lawrence's past employment records, Youngstown found that Lawrence had a history of work-related injuries and taking off time from work at YSD (R.D. 16, J. Mastropietro Aff., ¶¶6-7). From 1999 through 2001, nearly five years prior to Lawrence's efforts to become re-appointed to the driver/laborer position in 2006, Lawrence had filed workers' compensation claims for various injuries on three separate occasions (R.D. 16, J. Mastropietro Aff., ¶10). Additionally, from Lawrence's initial hire date of May 1999 until his

layoff in 2002, Lawrence missed significant hours of work while being injured on duty (IOD) status and also utilized extensive sick hours during this period (R.D. 16, J. Mastropietro Aff., ¶7). Lawrence was also written up for violating Youngstown's reporting off policy (R.D. 16, J. Mastropietro Aff., ¶8).

Because of Lawrence's past record, Youngstown's new administration in 2006, led by Mayor Jay Williams, was hesitant to re-appoint Lawrence to a driver/laborer position at YSD, but agreed to do so only if Lawrence would agree to extend his probationary period from 90 days to 12 months. Though Youngstown had never extended a re-appointee's new probationary period before, it did so in this instance via an employment agreement (the "Agreement" – R.D. 16, Ex. F). The Agreement was prepared in part based upon Lawrence's past work record (R.D. 16, Jay Williams Aff., ¶¶4-6), but also to establish that Lawrence could demonstrate good behavior and good work habits to achieve the qualifications of his position. (R.D. 16, Ex. F.)

The Agreement was knowingly and voluntarily executed by Lawrence, Youngstown and Lawrence's union on July 5, 2006, almost five years after Lawrence had last filed a workers' compensation claim in 2001. Lawrence was given full opportunity to consult with his union representatives prior to entering into the Agreement (R.D. 16, Ex. F, p. 2), which consisted of an offer of employment by Youngstown to Lawrence conditioned upon his demonstration of good behavior and work habits. The Agreement not only specified that Lawrence had no present entitlement to being reappointed, reinstated or rehired by Youngstown upon his application for reappointment with YSD (R.D. 16, Ex. F, pp. 1-2), but the Agreement allowed Youngstown to terminate Lawrence **with or without cause** (emphasis added) for up to 365 days after Lawrence's reappointment. Under the Agreement, Lawrence was also required to obtain a valid CDL license during his first 90 days of the probationary period and maintain his license

thereafter. (R.D. 16, Ex. F, p. 2.) Lawrence's appointment to the position of laborer Tier 1 became effective July 18, 2006.

In September 2006, Youngstown hired Sean McKinney as the new Commissioner of Buildings and Grounds. As a cabinet level position, the Commissioner of Buildings and Grounds was in charge of overseeing operations at YSD. In late 2006, McKinney began reviewing all employees under his control, including those employed by YSD, by checking employees' driving records through the Ohio Bureau of Motor Vehicles online data service. Through this review, McKinney found that Lawrence's Ohio drivers license was suspended on December 10, 2006 for his refusal to take part for suspected driving under the influence of alcohol (R.D. 16, S. McKinney Aff., Ex. G, ¶17). Furthermore, McKinney discovered at that time that Lawrence had not advised YSD of his OMVI (Operating a Motor Vehicle Under the Influence) arrest or license suspension, which occurred while Lawrence was still within the one-year probationary period of employment specified in the Agreement. (R.D. 16, S. McKinney Aff., ¶¶5, 7, 9.)

On January 7, 2007, Lawrence was suspended without pay by McKinney (R.D. 16, Ex. H, S. McKinney Aff., ¶11). At that time, McKinney learned that Lawrence claimed he had no notice of his administrative license suspension and that Lawrence claimed he was not operating a motor vehicle under the influence of alcohol (R.D. 16, S. McKinney Aff., ¶10).

On January 9, 2007, McKinney advised Mayor Williams, as well as Youngstown's Law Director, of his findings and he recommended Lawrence be terminated from his position at YSD. (R.D. 16, S. McKinney Aff., ¶12.) In consideration of this recommendation, Mayor Williams subsequently discharged Lawrence from his YSD position effective January 9, 2007 (R.D. 16, Jay Williams Aff., ¶10). A Notice of Termination was mailed to Lawrence on January 9, 2007 (R.D. 16, Ex. I, Appendix "K" to Appellant's Merit Brief), which terminated Lawrence effective

on that date pursuant to the terms of the Agreement. While there is no evidence in the record submitted by Youngstown that the Termination Notice letter mailed on January 9, 2007 was actually received by Lawrence, there is also no evidence that the termination notice was sent to an invalid address, was unclaimed, or otherwise “returned to sender” because of non-delivery.

Lawrence contends he did not receive the Notice of Termination until, at the latest, February 19, 2007, when he had his administrative license suspension terminated by the Girard Municipal Court. Lawrence claims on that date he went to YSD to show that his license was not suspended when he was given a copy of the termination letter by someone there with a date stamp of January 18, 2007 on the letter. (See Appellant’s Merit Brief, p. 9.)

Subsequent to Lawrence’s termination, Youngstown did receive a letter from Lawrence’s counsel (R.D. 16, Ex. J) requesting Youngstown reconsider Lawrence’s suspension. However, this letter and its contents did not alter Youngstown’s decision to terminate Lawrence, as it was within Youngstown’s rights to do so under the provisions of the Agreement (R.D. 16, Jay Williams Aff., ¶11; S. McKinney Aff., ¶13).

On February 20, 2007, Lawrence filed charges against Youngstown with the Ohio Civil Rights Commission (“OCRC”), claiming he was forced to sign the Agreement extending his probation for one year and that he was discriminated against on the basis of race (R.D. 19, Ex. L). Youngstown submitted a response to the OCRC charges filed by Lawrence through a Position Statement, documentation and exhibits, denying all of the charges in Lawrence’s OCRC Complaint. (R.D. 20, Ex. B – Position Statement only.)

Lawrence’s OCRC Complaint did not include a charge of workers’ compensation retaliation when brought before the OCRC. Lawrence met with an OCRC representative on April 4, 2007 in Akron where the particulars of Lawrence’s Complaint were discussed. The OCRC representative’s notes (R.D. 19, Ex. M) did not document that anyone (i.e., OCRC

representative, Lawrence) discussed the possibility of a workers' compensation retaliation claim which could be brought on Lawrence's behalf under ORC §4123.90.

On April 17, 2007, Attorney Martin S. Hume, on behalf of Lawrence, submitted a letter to Youngstown (R.D. 16, Ex. K) notifying Youngstown that Lawrence intended to pursue a claim against Youngstown for unlawful retaliation under ORC §4123.90 as well as racial discrimination. (R.D. 20, Exs. D & E, Appellant's Appdx. "L"). This occurred less than two weeks after Lawrence's meeting with the OCRC representative which Lawrence claimed was when he was first informed that one of the reasons for his probation extension was "because of my workers' compensation claims" and he would seek counsel to assist him (R.D. 19, Ex. M), (R.D. 20, Lawrence Aff. ¶22). Attorney Hume's letter, which was received by Youngstown on April 18, 2007, was received more than 90 days immediately following Lawrence's January 9, 2007 discharge. The notice was also sent approximately 57 days after Lawrence claimed he first received notice of his discharge on February 19, 2007, and well in advance of the 90 day limit suggested by Lawrence.

Lawrence subsequently filed a Complaint against Youngstown with the Mahoning County Common Pleas Court (Case No. 2007 CV 2447) on July 6, 2007, with said filing occurring 179 days after Lawrence's discharge of January 9, 2007. Additionally, Lawrence also separately pursued an appeal before the State of Ohio Unemployment Compensation Review Commission concerning the rejection of Lawrence's claim for unemployment benefits. (R.D. 17, Ex. N.) One of the Findings of Fact by the Hearing Officer in his September 11, 2007 Decision was that Lawrence ". . . was discharged by the City of Youngstown on January 9, 2007 because he did not have the proper licenses, which were a requirement of his position." In this decision, there are no other dates of discharge discussed. (R.D. 17, Ex. N, p. 2.)

On April 16, 2009, Youngstown filed a Motion for Summary Judgment, contending, in part, that Lawrence had failed to notify Youngstown of his ORC §4123.90 workers' compensation claim within 90 days immediately after his discharge. (R.D. 16.) On October 21, 2009, the Trial Court issued its decision granting summary judgment in favor of Youngstown (R.D. 28), with the summary judgment decision being affirmed by the Seventh District Court of Appeals on February 25, 2011. (R.D. 48). The Seventh District Court of Appeals specifically determined that Lawrence's retaliation claim brought under ORC §4123.90 was barred because the 90-day notice sent on Lawrence's behalf by Attorney Hume to Youngstown was received by Youngstown more than 90 days after the effective date of discharge, thereby rejecting Lawrence's argument that the time commencement for his 90-day notice began when he claimed he received notice of the discharge which otherwise was in the 90-day period. (R.D. 48, ¶30.)

On April 8, 2011, the Seventh District Court of Appeals determined that a conflict existed between its decision, and similar decisions of the Eighth, Ninth and Tenth Appellate Districts, with decisions of the Eleventh and Sixth District Courts of Appeals and thereafter certified the conflict to the Ohio Supreme Court. (R.D. 52.) This Court then determined that a conflict exists and on June 8, 2011, requested the parties brief the issue for determination of the certified question as to whether ORC §4123.90 time limits begin to run when the "discharge" takes effect or whether the liberal construction directive in ORC §4123.95 means the time limits begin to run upon the employee's receipt of the notice of discharge.

III. ARGUMENT

- A. The clear and unambiguous language of ORC §4123.90 unequivocally indicates that the time requirements set forth in ORC §4123.90 commence immediately following the effective date of discharge rather than the employee's receipt of notice of discharge.
 - 1. Ohio Appellate courts in the Seventh and other Appellate Districts prior to and in the 22 years since *Mechling* was decided by the Eleventh Appellate District have appropriately followed the clear and unambiguous language set forth in ORC

§4123.90 and have not engrafted a discovery rule within the jurisdictional requisites of ORC §4123.90.

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Despite the contention in Lawrence's Merit Brief that the Eleventh District Court of Appeals' approach stated in *Mechling v. Kmart Corporation* (1989), 62 Ohio App.3d 46, stands for the proposition that the period of time in which an action under ORC §4123.90 begins to run is when the individual receives notice of the discharge, rather than the effective date of discharge and thus is a matter of "fundamental fairness" (see Appellant's Brief, pp. 12, 17), in the 22 years since *Mechling*, and even pre-dating that decision, no other Ohio Appellate Courts have ruled similarly with perhaps the exception of the Sixth District Court of Appeals' decision of *O'Rourke v. Collingwood Health Care, Inc.* (Apr. 15, 1988, Ohio App. LEXIS, 1334). However, Youngstown maintains that *O'Rourke* simply involved the circumstance where the effective date of termination post-dated the notice of termination given to the employee by three days, thereby rendering the official date of termination as the appropriate commencement date for pursuing an ORC §4123.90 claim. While the Seventh District Court of Appeals determined herein that a conflict exists between the *Lawrence* decision and *O'Rourke* on a different basis (R.D. 52, p. 3), the Eighth Appellate District indicated in *Butler v. Cleveland Christian Home*, 2005-Ohio-4425 at ¶7, that there is no conflict with that decision holding the effective date of termination governs and *O'Rourke* because the statute of limitations commenced on the actual or effective date of termination and thus the *O'Rourke* claim was filed within the time limits as such.

All of the other Appellate Courts which have specifically analyzed the clear and unambiguous language of ORC §4123.90 have followed this clear and unambiguous language and determined for the reasons set forth therein that ORC §4123.90 is a jurisdictional provision and that the term "discharge" is interpreted to mean the "effective date" of discharge rather than

when the employee learns or receives notice of his or her discharge. As stated by the Eighth Appellate District in *Gribbons v. Acor Orthopedic, Inc.*, 2004-Ohio-5872:

The statute of limitations provision contained in R.C. §4123.90 is not ambiguous; therefore, the liberal construction provision of R.C. §4123.95 had no application. *Gleich v. J.C. Penney Co., Inc.*, Franklin App. No. 85 AP-276, 1985 Ohio App. LEXIS 8441 “The 180 day time limit period set forth in R.C. §4123.90 is an integral element of the action itself.” *Powell v. Timken Co.*, Stark App. No. 1996 CA 00062, 1997 Ohio App. LEXIS 1911.

Gribbons at ¶¶17-18.

Furthermore, the Eighth District noted in *Gribbons* that the appellant’s reliance on *Mechling* was misplaced because Ohio courts have “repeatedly refused to apply the discovery rule suggested by appellant.” *Gribbons* at ¶17.

The Eighth Appellate District in *Butler, supra*, as well as *Gribbons, supra*, relied on the unambiguous language and the clear expression of law that the [180 day] statute of limitations set forth in ORC §4123.90 commences on the effective date of the employee’s termination rather than the date the employee learns of the termination. *Butler, supra* at ¶6. Likewise, in *Potelicki v. Textron, Inc.*, 2000 Ohio App. LEXIS 4771, the 90 day intent to sue letter which was sent after the 90 day period was deemed untimely because “the failure to give the employer written notice of a claim violation of R.C. §4123.90 within 90 days is a jurisdictional defect, and the action must be dismissed.” *Potelicki*, at *12, citing *Miller v. Premier Industrial Corp.*, 136 Ohio App.3d 662 (2000). In *Potelicki*, the jurisdictional defect is deemed controlling even though the appellant had argued that his complaint was timely because his filing was within 180 days after he learned in a deposition that he was discharged for filing workers’ compensation claims. In rejecting the argument for a discovery rule, the court in *Potelicki* determined it would not “judicially rewrite an element of a cause of action created and limited by statute.” *Potelicki, supra*.

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The Ninth District Court of Appeals in *Parham v. Jo-Ann Stores, Inc.*, 2009-Ohio-5944, in analyzing the statute of limitations provisions in ORC §4123.90, also followed the clear and unambiguous language set forth in ORC §4123.90 and also discussed this Court's analysis of statutory provisions which are created through special statutes such as Ohio Revised Code Chapter 4123. As the Ninth District stated:

The Ohio Supreme Court has held that “[s]tatutory provisions . . . that set forth timely requirements go to the core of procedural efficiency. We have read such provisions as mandatory and jurisdictional, and the failure to fully comply with such requirements properly leads to dismissal.” *Hafiz v. Levin*, 120 Ohio St.3d 447, 2008-Ohio-6788 at ¶8. Specifically, within the context of ORC §4123.90, this Court had held:

“Where by statute a right of action is given which did not exist at common law, and the statute giving the right fixes the time within the right may be enforced, the time so fixed becomes a limitation or condition on such right and will control. In such a case time is made of the essence of the right created, and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of the limitation and a lapse of the statutory period operates to extinguish the right altogether. If a cause of action arising out of a special statute containing limitations qualifying the right is not brought within the time limited in the statute, the court has no jurisdiction of the case.” *Griffith v. Allen Trailer Sales* (Oct. 18, 1984, 9th Dist. No. 3630, 1984 Ohio App. LEXIS 12184, quoting 34 Ohio Jurisprudence 2nd 1958), 505-506 Limitation of Actions, §19.

Furthermore, the Ninth District stated in *Parham*:

“Compliance with the time of filing, the place of filing, and the content of the notice as specified in the statute are all conditions precedent to jurisdiction. . . . A failure to file the written notice of a claimed violation of 4123.90 within 90 days of (the violative act) is a jurisdictional defect. *Cross v. Gerstenslager* (1989), 63 Ohio App.3d 827.

Parham, at ¶¶16-17.

Recently, the Twelfth District Court of Appeals in *Gohman v. Atlas Roofing Corporation*, 2010-Ohio-5956, interpreted ORC §4123.90 within the realm of the common and generally accepted meaning given to the wording of the statute. While the issue in *Gohman* was an interpretation of the term “reinstatement”¹ as delineated in ORC §4123.90, the Twelfth District panel nevertheless utilized this Court’s time-honored approach in statutory interpretation which was the basis upon which the Seventh District Court of Appeals reached its decision in this case:

The Supreme Court of Ohio has stated in interpreting R.C. §4123.90 . . . “[a] court must apply the common and generally accepted meaning to the wording of the statute.” *Bryant v. Dayton Casket Co.* (1982), 69 Ohio St.2d 367, 369. Further, while we acknowledge R.C. §4123.95 requires liberal construction of, among other provisions, R.C. §4123.90 in favor of an employee, it is also true that provision does not allow a court to read into a statute something which cannot be reasonably implied from the language of the statute. *State ex rel. Williams v. Colasurd*, 71 Ohio St.3d 462, 1995-Ohio-236; *Szekely v. Young* (1963), 174 Ohio St.3d 213, ¶2 of the syllabus. See, also, R.C. 1.42. . . .

Gohman at ¶34.

Similarly, the Sixth Appellate District, eight years after *O’Rourke*, determined that compliance with the time of service of the written notice requirement for a claimed violation of ORC §4123.90 is one of the conditions precedent to acquisition of subject matter jurisdiction by a trial court. In *Barringer v. The Kroger Company* 1996 Ohio App. LEXIS 597, the Sixth District Court, in citing *Cross, supra*, and referring to *Colasurd, supra* and *Szekely, supra*, as did the Twelfth District Court in *Gohman*, see ¶34, definitively determined that the language of ORC §4123.90 is clear and unambiguous. At issue in *Barringer* was what interpretation was given to the term “receive” for the 90 day notice of ORC §4123.90 to apply which was allegedly untimely because the employer had not received it. The Sixth District utilized Webster’s dictionary to analyze the term “receive” and indicated that the employer had not come into possession of the

¹ At issue in *Gohman* was whether the term “reinstatement” connotes uninterrupted seniority and benefits or a more limited construction meaning “reinstatement” to the position the employee held on the date of termination (*Gohman* at ¶31).

required notice until the 91st day after appellant was discharged. *Barringer* at *5. The Court in *Barringer* also stated that it is not permitted to read into a statute something which cannot be reasonably be implied from the language of the statute. *Barringer, supra*.

The Tenth District Court of Appeals, in interpreting ORC §4123.90, held in *Browning v. Navistar Int'l Corp.*, 1990 Ohio App. LEXIS 3111, that a suit under ORC §4123.90 must be commenced within 180 days of the employer's action regardless of the date the employee is actually aware of such action. *Browning*, at *10. The Court in *Browning* relied upon its previous decision of *Gleich v. J.C. Penney, Inc.*, 1985 Ohio App. LEXIS 8441, Franklin App. No. 85AP-276, wherein it had defined the term "discharge" as the permanent termination of the employment relationship occasioned by unambiguous employer action. *Gleich*, at *4-*5. The Court in *Browning* also determined that the effective date of discharge commenced the ORC §4123.90 period's run time even though the employer in *Browning* did not have evidence in the record that the plaintiff had actually received written notice of the discharge on the date at issue. *Browning, supra*.

Finally, although before *Mechling*, the *Gleich* decision discussed above also followed the clear and unambiguous language of ORC §4123.90 in determining whether or not the 180 day time period commenced with the effective date of discharge or the plaintiff's receipt of notice of the discharge. In a factual situation very similar to Lawrence's case, the plaintiff in *Gleich* was not actually working at his employment due to injury on May 3, 1984, the effective date of discharge, and the date a termination letter was sent to him. However, *Gleich* did not actually receive the letter or become aware of his discharge until May 7, 1984. Consequently, the difference between the plaintiff in *Gleich* learning about his discharge after its effective date was

four days, as opposed to when Lawrence learned of his discharge, which, according to Lawrence, occurred 41 days after its effective date.

The Court in *Gleich*, in addition to adhering to the clear language of ORC §4123.90, recognized that while ORC §4123.90 does not define “discharge”:

... Discharge in the context of firing an employee contemplates unambiguously a unilateral act by the employer without the consent of the employee. It is clear that the employer made that unilateral decision on May 3, 1984 effective that date, and promptly and clearly notified plaintiff of that fact by reasonable means of communication which was first class mail and which was received by him within a reasonable period of time, far in advance of either the 90 day period for giving written notice to the employer and far in advance of the 180 days established as a bar to the statutory remedy provided by ORC §4123.90.

Gleich at pp. *4-5.

Not only do all of the authorities cited above follow the clear and unambiguous language of ORC §4123.90 in determining, on a jurisdictional basis, that the construction of ORC §4123.90 requires this Court determine that its time limits begin to run with the effective date of discharge, but a related and underlying basis for that determination is that it is improper in this particular context of a limiting statutory provision to engraft a discovery rule upon the statutory rights set forth in ORC §4123.90. As stated in several of the authorities identified above, and ignored by the *Mechling* majority (although noted in the dissent in *Mechling* at pp. 559-560), Ohio courts have clearly declined to engraft a discovery rule on the time limitations enunciated in ORC §4123.90 which would permit any alleged retaliatory motives which may have been discovered beyond the (90 or 180 day) period to extend the limitations period. *Parham, supra* at ¶20, citing *Potelicki, supra* at *13; *Gribbons* at ¶17; *Butler* at ¶6; and *Gleich, supra* at *5. Specifically, the Tenth Appellate District in *Gleich, supra*, stated:

A discovery rule should not be engrafted upon the statutory rights set forth in R.C. §4123.90 which contains its own statutory limitation provision within the right

created. This is particularly true where the statute relates one period to notice and the other period to the act.

Even the Sixth Circuit Court of Appeals has recognized that “Ohio courts have refused to apply the discovery rule in ORC §4123.90 cases.” See *Jakischav Cent. Parcel Express* (C.A. 6, 2004), 106 Fed. Appx. 436, 441, as cited in *Parham* at ¶21.

Lawrence’s attempt to utilize *Mechling* with a concept of “fundamental fairness,” as well as his amicus’s attempt to demonstrate any particular hardship to Lawrence or any other similarly-situated employees, however noble, must nevertheless be rejected based upon the overwhelming authorities cited above which correctly apply the clear and unambiguous language of ORC §4123.90, as well as the well-established principle of not engrafting a discovery rule into ORC §4123.90 where it does not belong in the statutory scheme. Not only would this Court be altering the clear and unambiguous language of ORC §4123.90 by “rewriting” the intent of the statute so as to create a new meaning of the time limit commencement by declaring it to be “receipt of notice” of discharge, but this Court would be altering the statutory rights set forth in ORC §4123.90 which contain its own statutory limitation provision within the rights created therein. This Court would also be reading the “receipt of notice” language into the statute when it cannot otherwise be implied as such.

As the Seventh District Court of Appeals correctly pointed out in its Opinion (see R.D.

¶30):

. . . as to the 90-day notice requirement, the statute quoted above (ORC §4123.90) specifically states “90 days immediately following a discharge, demotion, reassignment or punitive action taken.” This language clearly references the date of discharge, not notice of discharge. **If the General Assembly had intended the time periods to begin to run upon notice of discharge, the statute could have easily been written to indicate as such. Accordingly, we find that the time limits begin to run on the effective date of discharge.** (Emphasis added)

This Court should reach the same result and, despite *Mechling*, affirm the Seventh District's decision.

Moreover, Lawrence's advocacy for the commencement date to be the "receipt of notice of discharge" as of February 19, 2007, is even less persuasive given the fact that on the next day when Lawrence filed his claim with the OCRC on February 20, 2007, he did not include an ORC §4123.90 workers' compensation retaliation claim in his filing. This occurred because, as he indicated in his affidavit, Lawrence did not learn that he might have a workers' compensation retaliation claim until the beginning of April 2007 – less than seven days before the 90 day period would have run based upon the clear and unambiguous language of effective date of discharge.

Lawrence's "fairness" argument based upon *Mechling* actually ignores the possibility that the discovery of a potential workers' compensation claim could occur well after the 90-day period following the employee's receipt of notice of discharge. As such, this particular "fairness" argument was rejected by the appellate courts in *Potelicki, supra* and *Parham, supra*, where the clear and unambiguous language of ORC §4123.90 was adhered to even though the employees in those cases discovered potential ORC §4123.90 claims through depositions which occurred well after the 90-day period immediately following discharge.

In fact, Lawrence's own conduct suggests even he was following the clear and unambiguous language of ORC §4123.90 – meaning the effective date of discharge commences the time periods rather than "receipt of notice of discharge" – given that Lawrence did not wait for the full 90 days after February 19, 2007 to submit his written notice to Youngstown but did so through Attorney Hume's letter less than two weeks after discovering a potential claim existed. Additionally, Lawrence's filing of his Complaint in this case before the trial court (R.D.

1) occurred on the 179th day after the effective date of discharge (January 9, 2007), as presented by Youngstown, which demonstrates that he attempted to comply with the plain language of ORC §4123.90 rather than file the Complaint 180 days after February 19, 2007.

This Court must apply the rules of statutory construction and follow the jurisdictional requisites for applying clear and unambiguous language in all parts of ORC §4123.90, whether they consist of other sections of the statute (i.e., determining meaning of “reinstatement” - *Gohman, supra*; or “receive” - *Barringer, supra*) or the statute of limitations time pronouncements themselves. It is wholly improper for this Court to add words to an unambiguous statute rather than apply the statute as written. (See *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049, ¶15.) Therefore, the Seventh District Court of Appeals’ decision should be affirmed.

2. Ohio courts, including the Supreme Court, have consistently applied the required language standards for statutory interpretation when clear and unambiguous language is present in the context of other statutory provisions similar to the statute of limitations provisions set forth in ORC §4123.90.

This Court has also applied the principles of jurisdictional requirements and the interpretation of “clear and unambiguous” language in discussing other statutes in the Ohio Revised Code beyond ORC §4123.90. Some of these statutes which deal with time limitation provisions also adhere to the concept that statutes should be applied as written without the insertion of additional words to an unambiguous statute. *Davis, supra* at ¶15.

For example, this Court in the recent decision of *Smith v. McBride*, slip opinion 2011-Ohio-4674, in interpreting the term “emergency call” as defined in ORC §2744.01(A) and used in ORC §2744.02(B)(1)(a), stated: “. . . We accordingly apply those statutes as written and will not read into the statute language does not exist.” *Smith, supra* at ¶40. In *Smith*, this Court also referenced its recent decision of *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, 128 Ohio

St.3d 492, 2011-Ohio-1603, which stated in the Court's analysis of ORC §2744.09(B), that a statute that is clear and unambiguous on its face requires no interpretation. *Zumwalde* at ¶24, *Smith, Id.* Specifically, this Court set forth in *Zumwalde*:

. . . The intent of the lawmakers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the General Assembly intend to enact, but what is the meaning of which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction. (*Zumwalde* at ¶22), citing *Slingluff v. Weaver* (1902), 66 Ohio St. 621.

In *Zumwalde*, this Court further expounded upon this rule as set forth in *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105-106:

It is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal, and definite, at that point, the interpretive effort is at an end and the statute must be applied accordingly. (*Zumwalde, supra* at ¶23.)

Finally, in interpreting the clear and unambiguous language of ORC §2744.09(B) in *Zumwalde*, this Court stated:

. . . Had the General Assembly intended also to remove immunity from the employees of political subdivisions, it could have easily done so by including the word "employee" in R.C. 2744.09(B) as it did in R.C. 2744.09(A). To find otherwise would require this Court to insert "employee" into subsection (B). But "[a] court should give effect to the words actually employed in a statute, and should not delete words used, or insert words not used, in the guise of interpreting the statute." *State v. Taniguchi* (1995), 74 Ohio St.3d 154; *Zumwalde* at ¶24.

Next, in *In Re: Estate of Centorbi*, 2011-Ohio-2267, in discussing the 90 day statute of limitations period governing the recovery of assets from the estates of deceased Medicaid recipients as set forth in ORC §2117.061(E), this Court again stated:

We have consistently recognized that it is the General Assembly's role to consider an established limitations period, see, e.g., *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, ¶32, and that we may not

substitute our judgment for that of the legislature. *Eppley v. TriValley Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, ¶17. Instead, our role is to apply the legislature's designated limitations on causes of action.

In Re: Estate of Centorbi, at ¶11, this Court then stated further:

A statute's wording " 'may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act.' " *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, ¶13, quoting *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, ¶5 of the syllabus. "No part should be treated as superfluous unless it is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *State, ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.* (1917), 95 Ohio St. 367.

In Re: Estate of Centorbi, ¶13. Accordingly, this Court applied the unambiguous language of ORC §2117.061(E) in the interpretation of the 90 day provision which clearly designated receipt of the particular form as one of the time periods when the requirements therein commenced.²

Finally, in *Sutton v. Tomko Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, which was cited by Lawrence for this Court's recognition of Ohio laws' prohibition of the discharge of employees in retaliation for having pursued workers' compensation claims (see Appellant's Brief at p. 20), this Court discussed the legislative intent of the General Assembly, *Sutton* at ¶22, yet still recognized that the workers' compensation act plainly provides limited exclusive remedies. *Sutton* at ¶33.

Other Ohio appellate courts have similarly looked at other limitations periods in other statutory provisions and, like this Court's decisions referred to above, as well as the numerous decisions discussed regarding the interpretation of ORC §4123.90, followed the clear and unambiguous language of the particular statutory provision in holding that the effective date of

² ORC §2117.061(E) is an example of the General Assembly clearly intending that receipt of the particular forms (i.e., notice) is a commencement point -- which is what could have been done by the legislature when it drafted ORC §4123.90.

the particular statutory provision, rather than notice of the particular action taken, is the triggering point for statute of limitations purposes.

For instance, Ohio Revised Code §4113.52(D) discusses the time limits by which a “whistleblower claim” can be brought under this particular statute. According to ORC §4113.52(D), a claim must be brought within 180 days “after the date the disciplinary or retaliatory action was taken.” See *Lesko v. Riverside Methodist Hospital*, 2005-Ohio-3152 at ¶8.

In *Lesko*, the Tenth District Court of Appeals determined that the 180 days “after the date the disciplinary retaliatory action was taken” was the effective date of termination, rather than the date the employee claims she received written confirmation of the denial of her appeal of her termination which was almost eight months after her termination. *Lesko, supra*. In fact, the Court of Appeals specifically rejected the employee’s assignment of error where, like Lawrence argues in his Proposition of Law No. 1, she contended that the 180 day statute of limitations commenced when she received “final and unequivocal notice” of her termination. *Lesko* at ¶4.

In *Underwood v. Myers*, 1998 Ohio App. LEXIS 4298, the Third District Court of Appeals similarly stated that the clear language of ORC §4113.52(D) states that the employee must bring his or her action within 180 days after the alleged retaliation occurred or the claim is waived. *Underwood* at *16-*17. Much like ORC §4123.90, the Third Appellate District noted that the employee must satisfy strict requirements to invoke the statutory provision. *Underwood, Id.*

Another statutory provision which is relied upon by Lawrence and his amicus is the 180 day time limit established in ORC §4112.02(N) by which an employee can file an ADEA claim against an employer. Appellant’s Brief, pp. 15-16. Lawrence argues that in ORC §4112.02(N), the commencement period for filing an ADEA claim is that time when an employee receives

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notice of his or her termination, rather than the effective date of termination. Therefore, Lawrence states the same concept should apply to this Court's analysis of ORC §4123.90 and as reasoned in *Mechling, supra*.

ORC §4112.02(N) specifically states that an individual has 180 days to institute a civil action after the unlawful discriminatory practice occurs. *Macklin v. Turner*, 2005 U.S. Dist. LEXIS 196 (N.D. Ohio) at *10. Additionally, the 180 day limitation period under ORC §4112.02(N) commences when the discriminatory act or practice occurs, not when adverse consequences or other facts resulting therefrom manifest themselves. *McCray v. City of Springboro*, 1998 Ohio App. LEXIS 3208, citing *Beraducci v. Oscar Mayer Foods Corp.* 1984 Ohio App. LEXIS 1062, at *17. In *McCray*, the Twelfth Appellate District indicated that ORC §4112.02(N) "makes it clear that any age-based employment discrimination claim, premised on a violation described in R.C. Chapter 4112, must comply with the 180 day statute of limitations set forth in R.C. 4112.02(N). *McCray* at *15. As was the situation with ORC §4123.90, there is no mention in ORC §4112.02(N) of the time commencement being within 180 days *after the employee receives notice* of any alleged unlawful discriminatory practice.

Lawrence and his amicus each refer to this Court's decision in *Oker v Ameritech Corp.* (2000), 89 Ohio St.3d 223, as authority which demonstrates that in Ohio, a cause of action for discriminatory discharge does not accrue until an employee has received "unequivocal notice of discharge and his employment has actually terminated." (See Appellant's Brief at p. 6.) Lawrence states that only after both events have occurred does the time limit to bring an action begin. Lawrence's amicus states that in *Oker*, this Court held that when the date an employee is informed of his or her termination differs from the effective date of the termination,

the employee's claim accrues on the later of the two dates. See Brief of Amicus Curae, OMLA at p. 4.

A closer examination of *Oker*, however, indeed reveals that this Court determined that the statute of limitations period applicable to an age discrimination claim brought under R.C. Chapter 4112 begins to run on the date of the employee-plaintiff's termination from the defendant employer. *Oker* at 224. In fact, this Court specifically states:

The plain language of R.C. Chapter 4112 and the reasoning applied by this court . . . support our conclusion that the statute of limitations period for an age discrimination claim brought pursuant to R.C. Chapter 4112 begins to run on the date of the employee-plaintiff's termination from the defendant-employer. *Oker* commenced the suit on June 29, 1995 within 180 days of his termination from Ameritech. Therefore, his claims against Ameritech were timely filed.

Oker at 226.

At issue in *Oker* was whether or not Ameritech could invoke an earlier commencement point for the statute of limitations under ORC §4112.02(N). Ameritech contended that its earlier decision not to rehire Oker was the trigger point for the "possible infringement of Oker's rights" - which is when Oker was informed he would not be offered a position in the reorganized Ameritech law department -- rather than the effective date of termination which occurred nearly two months later. While this Court did discuss the liberal construction provision of ORC §4112.08, *Oker* at 225, this Court's specific application of the plain language of Chapter 4112 and, specifically, ORC §4112.02(N), does not, contrary to the position of Lawrence, demonstrate that a cause of action for discriminatory discharge accrues when an employee has received "unequivocal notice of discharge." Rather, as is the situation in ORC §4123.90, the actual termination date, or effective date of termination, was determinative in *Oker*. Moreover, at no point in *Oker* does this Court hold, as contended by Lawrence's amicus, that when the date an

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employee is informed of his or her termination is different from the effective date of termination, the employee's claim accrues on the later of the two dates.

Lawrence also relies upon the Tenth Appellate District case of *Kozma v. AEP Energy Services, Inc.* 2005 Ohio 1157, to support his proposition of law that a cause of action for wrongful discharge accrues when the employee "was unequivocally informed" of his discharge. In *Kozma*, the Tenth Appellate District, in relying upon *Oker*, determined that it is the "date upon which the defendant's employment practice became presently injurious" (i.e., infringed upon the plaintiff's right to be free from unlawful discrimination), which was the commencement date for the 180 day period set forth within ORC §4112.02(N). *Kozma* at ¶41. However, the appellant in *Kozma's* contentions that the statute of limitation accrued at a later point in time, which was his last day of employment, was rejected by the Appellate Court and thus his claim of discrimination for a violation of ORC §4112.02 was rejected because it was untimely. *Kozma* at ¶¶24, 43.

The decision in *Kozma*, despite the contentions of Lawrence, is not only consistent with this Court's application of the clear language of ORC §4112.02(N), but the Court of Appeals in *Kozma* also found that the commencement point for the 180 day period would be when the plaintiff's right to be free from unlawful discrimination was infringed upon – which happened to be incidental to when the appellant was informed of his discharge as opposed to the appellant's argument that his final day of employment would commence the 180 day period. Similarly, the infringement of Lawrence's rights – wherein he has a right to be free from unlawful discrimination under ORC §4123.90 – occurred on the date he was terminated: January 9, 2007.

Kozma does not stand for either the proposition that it is the unequivocal notification of termination that triggers the 180 day period (*Kozma* at ¶38), nor does the Court in *Kozma* at any point rely upon the liberal construction provision of ORC §4112.08 to expand the analysis of the

Tenth Appellate District beyond the plain language of ORC §4112.02(N). Consequently, the *Kozma* decision, which is from the same Appellate District (Tenth) which decided *Browning* and *Gleich*, does not create circumstances where the “notice” interpretation put forth by Lawrence should be similarly applied by this Court within the context of ORC §4123.90.

B. When clear and unambiguous language is present as is set forth in ORC §4123.90, the liberal construction provision of ORC §4123.95 does not apply so as to read a fairness element into ORC §4123.90 as advocated by *Mechling* and which establishes the receipt of the notice of discharge as the commencement point to serve notice and file a claim under ORC §4123.90.

As discussed extensively by Youngstown concerning the several Ohio Appellate decisions interpreting the clear and unambiguous language of ORC §4123.90, the same authorities arrived at their conclusions that the time limitations in ORC §4123.90 commenced with the “effective date of discharge” -- rather than the employee’s receipt of notice of discharge -- despite the recognition that ORC §4123.95 states that the provisions of ORC Chapter 4123 shall be liberally construed in favor of employees. (See Appellant’s Brief, Appx. G.) These same authorities overwhelmingly, with the exception of *Mechling* which was decided by the Eleventh District 22 years ago, would thus answer the Court’s directive to the parties and counsel that the liberal construction provision of ORC §4123.95 does not mean that the time limits in ORC §4123.90 begin to run upon the employee’s receiving notice of the discharge.

As set forth in *Gribbons, supra*, which directly rejected the premise of *Mechling*, see *Gribbons* at ¶17, because the statute of limitations provision contained in ORC §4123.90 is not ambiguous, the liberal construction provision of ORC §4123.95 has no application. *Gribbons* at ¶18. This is because the 180 day time period (as well as the 90 day time period) set forth in ORC §4123.90 is an integral element of the action itself. *Gribbons, Id.*, citing *Powell v. Timken Company*, 1997 Ohio App. LEXIS 1911.

Concerning the application of the liberal construction provision of ORC §4123.95, the Twelfth District Court of Appeals in *Gohman* clearly stated, even though it was interpreting the term “reinstatement” within the statutory language of ORC §4123.90, that:

. . . While we acknowledge R.C. §4123.95 requires liberal construction of, among other provisions, R.C. §4123.90 in favor of an employee, it is also true that provision does not allow a court to read into a statute something which cannot be reasonably implied from the language of the statute. *Gohman*, at ¶34.

The same analysis was reached by the Sixth Appellate District in *Barringer, supra*, at *4-*5 in holding that in interpreting the term “receive” within ORC §4123.90, ORC §4123.95 does not allow a court to read into a statute something which cannot be reasonably implied from the language of the statute. *Barringer, supra*, at *4-*5.

The *Gleich* decision, *supra*, from the Tenth Appellate District offers perhaps the best rationale for the determination that because ORC §4123.90 is not ambiguous, the liberal construction provision of ORC §4123.95 has no application. *Gleich*, at *5. Because “discharge” in the context of firing of an employee contemplates unambiguously a unilateral act by the employer without the consent of the employee, *Gleich, Id.*, that is the determinative act which equates to the “infringement of the right” of an employee and which follows the clear language set forth in ORC §4123.90. *Gleich*. Furthermore, the *Gleich* Court also decided the fact that the plaintiff therein received the termination notice by reasonable means of communication (a few days after effective date) and which left plaintiff plenty of time to submit the 90 day notice as well as the 180 day notice – which would be completely unacceptable to Lawrence and his amicus – did not mean the Tenth District should go astray and completely interpret the statute beyond the clear and unambiguous language through application of the “liberal construction” provision to effectuate a greater degree of “fairness.”

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This is the same basis upon which the Seventh District in this case acknowledged that because Lawrence still had 49 days to get the notice of ORC §4123.90 claim letter to Youngstown, especially when the Seventh District determined there was no evidence that Youngstown intentionally or otherwise withheld the notice of discharge from Lawrence in an attempt to protect itself from liability (see R.D. 48, ¶32), the liberal construction concept of ORC §4123.95 should not defeat the clear and unambiguous language of the statute. Accordingly, the above authorities clearly indicate that the liberal construction provision of ORC §4123.95 is not enough to rescue Lawrence's failure in this case to follow the clear and unambiguous language of ORC §4123.90 through the improper revisions and alterations to clear statutory language. See also *Matheson v. USF Holland, Inc.*, 2007 U.S. Dist. LEXIS 7040, at *27-*28.

Lawrence and his amicus, to maneuver around the clear and unambiguous language of ORC §4123.90, have, as set forth previously, looked to other provisions within the Ohio Revised Code to demonstrate that similar treatment for ORC §4123.90 is warranted and that somehow the clear and unambiguous language in those statutes should likewise be ignored under the guise of "fundamental fairness" where there is the liberal construction afforded in these particular statutes. As was discussed concerning this Court's inquiry herein as to whether the liberal construction provision in ORC §4123.95 warrants this Court's statutory interpretation beyond the clear and unambiguous language of ORC §4123.90, these statutes do not provide any authorities, especially those non-persuasive authorities outside Ohio and the Sixth Circuit,³ to expand the

³ Lawrence also refers to authorities from the Third Circuit Court of Appeals and the District Court in Texas, for the proposition that retaliatory discharge for wrongful termination in similar causes of action commences when an employee receives notice of termination rather than effective date of discharge. See Appellant's Brief at pp. 6, 13. Lawrence also compares his wrongful or retaliatory discharge situation to an ERISA case as well as a contract cause of action. See Appellant's Brief at pp. 13-14. All of the above should be dismissed by this Court as non-persuasive authorities from jurisdictions outside Ohio or the Sixth Circuit and involving causes of actions based upon statutes lacking the clear and unambiguous language of ORC §4123.90 as interpreted by this Court and other Ohio appellate courts.

interpretation of ORC §4123.90 to mean time commencement begins with receipt of notice of discharge.

This Court not only must adhere to its jurisdictional analysis and requirements for statutory interpretation, but also must not be persuaded by the utilization of the liberal construction provisions in other contexts in deciding whether the *Mechling* approach is the appropriate one to follow for Lawrence. Not only are the *Oker, supra* and *Kozma, supra*, decisions distinguishable, and in fact do not suggest when examined closely the usage of the liberal construction mechanism set forth in ORC §4112.08, but all of the outside authorities cited by Lawrence which attempt to establish receipt of notice as the accrual date for a cause of action for wrongful discharge cannot be applied in the ORC §4123.90 context. For instance, Lawrence's citation to *Eoff v. New Mexico Corrections Dept.*, 2010 WL 5477679(D.N.M.), see Appellant's Brief at p. 13, in addition to being nonpersuasive authority, engrafts a discovery rule which even Lawrence would admit is not engrafted into ORC §4123.90 because it is very possible that an employee, such as Lawrence, would not be aware of the ability to file an ORC §4123.90 claim until well after (i.e., more than 90 or 180 days) the employee receives notice of discharge.⁴

Even Lawrence's reliance upon *Cain v. Quarto Mining Company*, 1984 WL 3773 for the proposition that the accrual date for a claim of wrongful discharge is when the employee receives notice of the discharge decision (Appellant's Brief, p. 12) also is misplaced because as a Seventh Appellate District decision, it appears to be in direct conflict with the analysis established by the Seventh District Court of Appeals 26 years later in this case – which chose not to apply the ORC §4123.95 “liberal construction” within ORC §4123.90. While *Cain* does not have appeared to

⁴ Lawrence's attempt to utilize ORC §1.11 for the “liberal construction” of remedial laws, see Appellant's Brief at p. 16, is also inapplicable given the authorities Appellee has presented, and despite Lawrence's position that fairness and justice are best served when a court disposes of a case on the merits. See Appellant's Brief at p. 18.

have been expressly overruled by the Seventh District in this case, or is discussed specifically in its decision herein, Youngstown contends that the opinion in this case represents the correct approach delineated by the appellate court in applying the clear and unambiguous statutory language and rejecting attempts to rewrite into a statute additional language based upon the directives of a “liberal construction” in favor of employees.

Finally, Lawrence’s reliance upon *Williams v. Bureau of Workers’ Compensation*, 2010-Ohio-3210, also cited for the proposition that the cause of action for wrongful discharge accrues when the employee “was unequivocally informed” of his discharge, Appellant’s Brief, p. 12, is not only distinguishable because nowhere does the Tenth Appellate District in *Williams* discuss “liberal construction provisions,” but the Tenth District in fact decided that the claim for wrongful termination, which is the equivalent of Lawrence’s claim for “wrongful discharge,” accrues on the actual date of termination from employment. *Williams, supra*, at ¶31, citing *Gleason v. Ohio Army Natl Guard* (2001), 142 Ohio App.3d 697, 703. Again, the “liberal construction” application sought by Lawrence is not appropriate under ORC §4123.90.

C. The requirement that an employer provide “unequivocal notice” of discharge is well beyond the scope of the liberal construction directive in ORC §4123.95 and impractical in practice to Ohio employers.

Lawrence’s proposition of law that ORC §4123.90’s time provisions begin to run when the employee has been “unequivocally informed of his discharge” actually creates more questions than answers in the suggested interpretation of how said language would be applied under ORC §4123.90. How much notice is “unequivocal” notice and when exactly does the employee cease to render services to the employer are all questions of fact would undoubtedly create a myriad of interpretations for courts which would go far beyond the plain language of ORC §4123.90 in discussing time periods commencing “immediately after discharge . . . or other

punitive action taken.” Furthermore, while Lawrence criticizes the rule advocated by Youngstown as “defying logic and common sense” (Appellant’s Brief at p. 13), it also defies “logic and common sense” to burden the employer with achieving the “unequivocal” notice of discharge to the employee – especially when the employee may be just as unscrupulous as alleged against Youngstown and avoid service or receipt of the termination notice.

In this case, Youngstown had every reason to believe the termination letter sent by Mayor Williams to Lawrence reached him, as there is no evidence in the record suggesting that there was a failure of service of any kind upon Lawrence. With the proposition of law suggest by Lawrence and his amicus, how far Youngstown, or any Ohio employer, would have to go to achieve “unequivocal notice” is impossible to apply in a practical sense nor can it be done consistently and/or fairly with employees who may be suspended, demoted or terminated. This is a change which is best left to the General Assembly to decide since Youngstown believes it would be impossible for the judiciary to establish a standard level of requirement for an Ohio employer to achieve “unequivocal notice” and so as to satisfy the multitude of situations when an employee may not be able to be unequivocally informed or receive the notice prior to the end of the 90 day period in ORC §4123.90.

Also requiring the unequivocal notice of discharge and the determination that in fact the employee has rendered no further services to the employer – which can be more than 90 or 180 days prior to when the employee even discerns that he has an ORC §4123.90 claim -- needlessly burdens Ohio’s employers and creates uncertainty as to when employers can be subject to ORC §4123.90 actions. This requirement would go well beyond the clear intention of the General Assembly to place a fixed limitation on the time periods when the notice to the employer and the filing of a claim can occur under ORC §4123.90. Lawrence’s proposition of law, as well as his

amicus's proposition (Amicus Brief at p. 8) that the time limits of ORC §4123.90 commence with the "unequivocal termination of the employer-employee relationship" is fraught with ambiguity and unnecessarily impractical to incorporate in the relationship between Ohio employers and their employees. Consequently, the "liberal construction" approach as argued by Lawrence and his amicus, must be rejected by this Court on statutory interpretation grounds as well as the impracticalities of applying such an approach in the unlimited scenarios in which they could arise.

D. The application of the clear and unambiguous language in ORC §4123.90 will not lead to catastrophic results to employees and potential claimants in either the 90 or 180 day circumstances.

Aside from the impracticalities of having employers such as Youngstown "unequivocally inform" employees of their discharge by knowing specifically what degree of notification is required for any actions taken in addition to "discharge" under ORC §4123.90, this Court's application of the clear and unambiguous language of ORC §4123.90 will not lead to the catastrophic results suggested by Lawrence and his amicus if an unequivocal informed discharge is not the commencement point for the limitations provisions in ORC §4123.90. This is especially so in a situation such as this where an employer like Youngstown, as the Seventh District Court of Appeals determined (R.D. 48, at ¶32), has no proven intent to withhold the notice of termination for more than 90 days for the purpose of protecting the employer from liability.

Despite this lack of evidence, Lawrence states that if taken to its outer limits, adherence to the clear and unambiguous language of ORC §4123.90 allows an employer to "extinguish an employee's right to bring an action simply by waiting more than 90 days to inform an employee

that he has been discharged. It would then be impossible for the employee to comply with the statutory requirement.” Appellant’s Brief at p. 14.

As stated above, not only did the Seventh District find that there was no evidence in the record that Youngstown actually tried to avoid sending Lawrence his termination letter for the specific purpose that Lawrence would not be able to meet the 90 day statutory requirement, it would have been impossible for Youngstown as of the time it terminated Lawrence to even contemplate that Lawrence would be filing a workers’ compensation retaliation claim under ORC §4123.90 because when Youngstown discharged him under the terms of the Agreement, it had been five years since Lawrence had actually filed the last of his workers’ compensation claims. Youngstown still would have been unaware that Lawrence might be filing an ORC §4123.90 claim even as of February 19, 2007 because, as the evidence demonstrates in the record, Lawrence himself was unaware on that date and when he filed his OCRC complaint the next day that he potentially possessed a potential workers’ compensation retaliation claim. Since it is entirely possible, and this in fact occurred concerning depositions noted in the *Parham* and *Potelicki* cases, *supra*, where an employee may not realize he or she has a potential ORC §4123.90 claim until well after either the 90 or 180 day periods occur subsequent to discharge, whether the commencement point is the effective date of discharge, actual date of discharge, or even when the employee receives the discharge notice may not permit the employee to meet the time requirements of ORC §4123.90. In these situations, it is indeed “impossible” for the employee to comply with the requirement of ORC §4123.90, but said failure would be independent of whatever actions may have been taken by the employer which would generate a potential for a ORC §4123.90 claim.

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Youngstown contends that the reason courts have interpreted the ORC §4123.90 commencement dates to follow the clear and unambiguous language of “effective date” rather than the “receipt of notice” of discharge, even given the liberal construction directive within ORC §4123.95, is that most employees will be aware that they may have a potential claim upon which they can notify the employer within 90 days of discharge under ORC §4123.90 because in fact there is a close time component between the worker’s discharge (or even suspension or other punitive action taken) and the filing of workers’ compensation claims. The scenario in this case, where Lawrence admittedly did not even learn he may have a potential claim under ORC §4123.90 until nearly an additional six weeks had passed after receiving notice of discharge, was that over five years had passed between Lawrence’s filing a workers’ compensation claim in 2001 and his discharge in January of 2007. Youngstown believes a statutory scheme of ORC §4123.90 is designed with the strict time requirements for such a reason and should not be altered by this Court with “liberal construction” when in this particular circumstance it might be unfair to employers like Youngstown to do so.

Furthermore, it is also just as likely that an employee, who has been suspended and may not physically be present to have received the notice of discharge, and who is contemplating filing a workers’ compensation retaliation claim, may attempt to avoid receipt of the “unequivocal” notice of termination to avoid the commencement of the 90 and 180 day periods as long as possible. An employee like Lawrence could avoid receiving his notice of termination and claim that, through his own purposeful conduct, that he never received notice so as to create for himself additional time to file ORC §4123.90 claims. It is not merely the employer who allegedly could extinguish an employee’s right to bring an action but also an

employee who could forestall the employer's ability under the statute to otherwise avoid facing untimely ORC §4123.90 claims based upon the unambiguous language of ORC §4123.90.

As for Lawrence's contention that this Court's adherence to the clear and unambiguous language of ORC §4123.90 would enable an employer to "unilaterally shorten the time the legislature has decided an employee should be given to provide notice of his claim to his employer," Appellant's Brief at p. 14, not only did the Seventh District find that Youngstown in no way attempted to unilaterally shorten the time period by which Lawrence would have to submit his 90 day notice, but the fact that the 90 day limit to provide notice to employer is "an extremely short period of time to begin with," Appellant's Brief, p. 14, was a decision made by the General Assembly. As a result, this cannot be a valid rationale as to why this Court should reverse the reasoning of the Seventh Appellate District and adopt the *Mechling* approach.

Moreover, that the 90 day notice requirement is not generally known by laymen and only attorneys who are actively engaged in the practice of employment or workers' compensation law are likely to be familiar with the statutory requirements, each of which is argued by Lawrence (see Appellant's Brief at p. 14) is absolutely no reason for this Court to make an exception under some sort of "fairness" analysis by favoring laymen who may need to engage counsel to file employment discrimination claims – under ORC §4123.90 or any other statute. That there are only two attorneys who are certified as specialists in labor and employment law in Mahoning County and that there may be "practical realities" involved in the logistics of an employee such as Lawrence pursuing an ORC §4123.90 claim within the 90 day period, Appellant's Brief at pp. 14-15, should have absolutely no bearing at all when it comes to this Court's consideration of altering the commencement provision in ORC §4123.90 to "receipt" of notice because it would

give “laymen” as opposed to non-laymen, additional time to file a claim and provide written notice under ORC §4123.90.

Lawrence not only had 49 days after discharge to provide the required ORC §4123.90 notice (R.D. 48, at ¶32), but he in fact was able to have Attorney Hume generate the one-page letter of notice of filing an ORC §4123.90 claim less than two weeks after Lawrence even discovered that he might have a ORC §4123.90 claim and indicated to the OCRC staff representative that he may need to seek counsel. R.D. 19, Ex. M. All of the investigation which Lawrence claims is necessary to go through the process of seeking a qualified employment law attorney to evaluate his case, Appellant’s Brief at p. 15, was not in fact needed by him when he was able to have Attorney Hume generate the one-page letter merely alerting Youngstown that he may be pursuing a ORC §4123.90 claim and where he did not need the full 90 days starting from February 19, 2007 to do so. However, Lawrence did manage, despite being a layman, to engage Attorney Hume to file his Complaint (R.D. 1) submitting, in part, a cause of action pursuant to ORC §4123.90 on the 179th day after he was effectively discharged on January 9, 2007.

Lawrence further contends that an employee should not be “discharged” until the decision has been communicated to him and an employee who continues to work for an employer does not believe he has been “discharged” until his employment has actually ended. (Appellant’s Brief at p. 19.) However, these propositions of law will not provide guidance to courts, employers and employees to know when an ORC §4123.90 claim has accrued but rather will create more situations of ambiguity under a “liberal construction” interpretation than exist in the Seventh District’s approach and adherence to this Court’s rules for interpreting clear and unambiguous language in statutes. If this Court were to follow the *Mechling* approach it would

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do far more damage to Ohio employers on an interpretive scale than correctly applying the clear language (“technical standards”) to defeat ORC §4123.90 claims when appropriate.

As for Lawrence’s amicus’s contention that Seventh District Court’s interpretation carries the potential for a disrupted impact throughout the entire system of at-will employment in Ohio, Amicus Brief at p. 10, there is no evidence in the record that Lawrence’s termination notice was wrongfully withheld or that even if somehow it was Youngstown’s fault that Lawrence did not receive notice, the entire at-will employment system will ultimately collapse. Lawrence’s amicus entirely ignores Mayor Williams’ issuance of the termination letter on January 9, 2007 (R.D. 16, Ex. 1, Appx. K) and instead wrongfully characterized the notice as “an internal communication about his termination.” Amicus brief at p. 10. Lawrence’s amicus also incorrectly implies that Youngstown never made a written record of the termination decision (see Amicus Brief at p. 10), when Lawrence is the one who not only allegedly was unaware that he had been terminated, but also was unaware of his drivers license suspension until McKinney made him aware of such (R.D. McKinney Aff., ¶10).

Lawrence’s amicus even misstates the record when it declares that Lawrence was aware of no reason at all to pursue his claim until he learned of Youngstown’s decision to terminate him. Amicus Brief at p. 7. As stated previously, however, even when he learned of Youngstown’s termination decision on February 19, 2007, Lawrence at that time had no reason at all to pursue an ORC §4123.90 claim until April of 2007. In fact, Lawrence would not even have been able to pursue a claim based upon an alleged wrongful suspension on January 7, 2007 until that time.

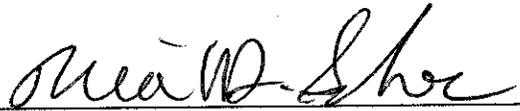
Comparing the “absurd and unjust results” of Lawrence’s discharge to credit card holders having their contract terminated by a credit card company without notice (Amicus Brief at p. 11)

is wholly inapplicable and has no bearing on this Court's interpretation of ORC §4123.90. Youngstown in fact would follow Lawrence's amicus's suggestion that this case may involve a situation of "constructive notice," see Amicus Brief, p. 13, note 1, because Youngstown certainly can demonstrate it made reasonable efforts to communicate its discharge decision to Lawrence by way of the written notice and there is a lack of evidence that said notice failed to reach its destination despite the contentions of Lawrence to the contrary. Moreover, the 90 day period within ORC §4123.90 which is deemed by Lawrence's amicus as too short a time period, Amicus Brief at 13, does not deprive Ohio's employees who can easily, as Lawrence demonstrated, locate an attorney and generate a letter of notice to satisfy the 90 day limitations provision in ORC §4123.90. This Court's affirmance of the Seventh District Court of Appeals decision will not give employers an illegitimate benefit, but will instead protect employers from the additional burdens which would be impractical in their application nor which can be applied consistently as a rule of law across a myriad of situations and circumstances. Consequently, this Court must affirm the Seventh District Court of Appeals decision and reject the fairness and liberal construction approach as suggested in the lone supportive decision of *Mechling* which in turn would remove the clarity and non-ambiguity as otherwise set forth in ORC §4123.90 and relied upon by this Court and other courts throughout Ohio.

IV. CONCLUSION

For all of the above reasons, Defendant-Appellee City of Youngstown respectfully requests that the judgment of the Seventh District Court of Appeals be affirmed and that this Court determine as a matter of law that the limitations periods set forth in ORC §4123.90 commence on the effective date of discharge, and consequently, nullify any application of the liberal construction provision of ORC §4123.95.

Respectfully submitted,



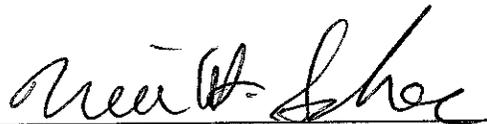
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Merit Brief of Appellee City of Youngstown* was served this 14th day of October, 2011 by regular U.S. Mail upon the following:

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1.42 Common, technical or particular terms.

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Effective Date: 01-03-1972

Lawyer - ORC - 2117.061 Notice of receipt of medicaid benefits to administrator of estate... Page 1 of 2

2117.061 Notice of receipt of medicaid benefits to administrator of estate recovery program.

(A) As used in this section:

- (1) "Medicaid estate recovery program" means the program instituted under section 5111.11 of the Revised Code.
- (2) "Permanently institutionalized individual" has the same meaning as in section 5111.11 of the Revised Code.
- (3) "Person responsible for the estate" means the executor, administrator, commissioner, or person who filed pursuant to section 2113.03 of the Revised Code for release from administration of an estate.

(B) The person responsible for the estate of a decedent subject to the medicaid estate recovery program or the estate of a decedent who was the spouse of a decedent subject to the medicaid estate recovery program shall submit a properly completed medicaid estate recovery reporting form prescribed under division (D) of this section to the administrator of the medicaid estate recovery program not later than thirty days after the occurrence of any of the following:

- (1) The granting of letters testamentary;
- (2) The administration of the estate;
- (3) The filing of an application for release from administration or summary release from administration.

(C) The person responsible for the estate shall mark the appropriate box on the appropriate probate form to indicate compliance with the requirements of division (B) of this section.

The probate court shall send a copy of the completed probate form to the administrator of the medicaid estate recovery program.

(D) The administrator of the medicaid estate recovery program shall prescribe a medicaid estate recovery reporting form for the purpose of division (B) of this section. In the case of a decedent subject to the medicaid estate recovery program, the form shall require, at a minimum, that the person responsible for the estate list all of the decedent's real and personal property and other assets that are part of the decedent's estate as defined in section 5111.11 of the Revised Code. In the case of a decedent who was the spouse of a decedent subject to the medicaid estate recovery program, the form shall require, at a minimum, that the person responsible for the estate list all of the decedent's real and personal property and other assets that are part of the decedent's estate as defined in section 5111.11 of the Revised Code and were also part of the estate, as so defined, of the decedent subject to the medicaid estate recovery program. The administrator shall include on the form a statement printed in bold letters informing the person responsible for the estate that knowingly making a false statement on the form is falsification under section 2921.13 of the Revised Code, a misdemeanor of the first degree.

(E) The administrator of the medicaid estate recovery program shall present a claim for estate recovery to the person responsible for the estate of the decedent or the person's legal representative not later than ninety days after the date on which the medicaid estate recovery reporting form is received under division (B) of this section or one year after the decedent's death, whichever is later.

Effective Date: 09-26-2003; 06-30-2005; 2007 HB119 09-29-2007

2744.01 Political subdivision tort liability definitions.

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets,

avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

(k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

(m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

(q) Urban renewal projects and the elimination of slum conditions;

(r) Flood control measures;

(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(t) The issuance of revenue obligations under section 140.06 of the Revised Code;

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:

(i) A park, playground, or playfield;

(ii) An indoor recreational facility;

(iii) A zoo or zoological park;

(iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;

(v) A golf course;

(vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;

(vii) A rope course or climbing walls;

(viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.

(v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;

(w)(i) At any time before regulations prescribed pursuant to 49 U.S.C.A 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;

(ii) On and after the effective date of regulations prescribed pursuant to 49 U.S.C.A. 20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 49 U.S.C.A 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.

(x) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.

(E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, board of hospital commissioners appointed for a municipal hospital under section 749.04 of the Revised Code, board of hospital trustees appointed for a municipal hospital under section 749.22 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 of the Revised Code, fire and ambulance district created pursuant to section 505.375 of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code, community school established under Chapter 3314. of the Revised Code, the county or counties served by a community-based correctional facility and program or district community-based correctional facility and program established and operated under sections 2301.51 to 2301.58 of the Revised Code, a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated, and the facility governing board of a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated.

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G) (2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons:

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

Effective Date: 04-09-2003; 04-27-2005; 10-12-2006

2744.02 Governmental functions and proprietary functions of political subdivisions.

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political

subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

Effective Date: 04-09-2003; 2007 HB119 09-29-2007

2744.09 Exceptions.

This chapter does not apply to, and shall not be construed to apply to, the following:

- (A) Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;
- (B) Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;
- (C) Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment;
- (D) Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds;
- (E) Civil claims based upon alleged violations of the constitution or statutes of the United States, except that the provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions.

Effective Date: 11-20-1985

4112.02 Unlawful discriminatory practices.

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.

(B) For an employment agency or personnel placement service, because of race, color, religion, sex, military status, national origin, disability, age, or ancestry, to do any of the following:

(1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate against any person;

(2) Comply with a request from an employer for referral of applicants for employment if the request directly or indirectly indicates that the employer fails to comply with the provisions of sections 4112.01 to 4112.07 of the Revised Code.

(C) For any labor organization to do any of the following:

(1) Limit or classify its membership on the basis of race, color, religion, sex, military status, national origin, disability, age, or ancestry;

(2) Discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions of any person as an employee because of race, color, religion, sex, military status, national origin, disability, age, or ancestry.

(D) For any employer, labor organization, or joint labor-management committee controlling apprentice training programs to discriminate against any person because of race, color, religion, sex, military status, national origin, disability, or ancestry in admission to, or employment in, any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, personnel placement service, or labor organization, prior to employment or admission to membership, to do any of the following:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, military status, national origin, disability, age, or ancestry of an applicant for employment or membership;

(2) Make or keep a record of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any applicant for employment or membership;

(3) Use any form of application for employment, or personnel or membership blank, seeking to elicit information regarding race, color, religion, sex, military status, national origin, disability, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any department or agency of that government, may require an

employee or applicant for employment to furnish documentary proof of United States citizenship and may retain that proof in the employer's personnel records and may use photographic or fingerprint identification for security purposes;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, sex, military status, national origin, disability, age, or ancestry;

(5) Announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of that group;

(6) Utilize in the recruitment or hiring of persons any employment agency, personnel placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, military status, national origin, disability, age, or ancestry.

(F) For any person seeking employment to publish or cause to be published any advertisement that specifies or in any manner indicates that person's race, color, religion, sex, military status, national origin, disability, age, or ancestry, or expresses a limitation or preference as to the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any prospective employer.

(G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, military status, national origin, disability, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

(H) For any person to do any of the following:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin;

(2) Represent to any person that housing accommodations are not available for inspection, sale, or rental, when in fact they are available, because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin;

(3) Discriminate against any person in the making or purchasing of loans or the provision of other financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, or any person in the making or purchasing of loans or the provision of other financial assistance that is secured by residential real estate, because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located, provided that the person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to the person's principal business and not only as a part of the purchase price of an owner-occupied residence the person is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing accommodations or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations, including the sale of fire, extended coverage, or homeowners insurance, because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member of a married couple;

(7) Print, publish, or circulate any statement or advertisement, or make or cause to be made any statement or advertisement, relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing accommodations, or relating to the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, that indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, military status, familial status, ancestry, disability, or national origin, or an intention to make any such preference, limitation, specification, or discrimination;

(8) Except as otherwise provided in division (H)(8) or (17) of this section, make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, military status, familial status, ancestry, disability, or national origin in connection with the sale or lease of any housing accommodations or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations. Any person may make inquiries, and make and keep records, concerning race, color, religion, sex, military status, familial status, ancestry, disability, or national origin for the purpose of monitoring compliance with this chapter.

(9) Include in any transfer, rental, or lease of housing accommodations any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant;

(10) Induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, sexual, military status, familial status, or ethnic composition of the block, neighborhood, or other area in which the housing accommodations are located, or induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that the presence or anticipated presence of persons of any race, color, religion, sex, military status, familial status, ancestry, disability, or national origin, in the block, neighborhood, or other area will or may have results including, but not limited to, the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, military status, familial status, or ethnic composition of the

block, neighborhood, or other area;

(c) An increase in criminal or antisocial behavior in the block, neighborhood, or other area;

(d) A decline in the quality of the schools serving the block, neighborhood, or other area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or discriminate against any person in the terms or conditions of that access, membership, or participation, on account of race, color, religion, sex, military status, familial status, national origin, disability, or ancestry;

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by division (H) of this section;

(13) Discourage or attempt to discourage the purchase by a prospective purchaser of housing accommodations, by representing that any block, neighborhood, or other area has undergone or might undergo a change with respect to its religious, racial, sexual, military status, familial status, or ethnic composition;

(14) Refuse to sell, transfer, assign, rent, lease, sublease, or finance, or otherwise deny or withhold, a burial lot from any person because of the race, color, sex, military status, familial status, age, ancestry, disability, or national origin of any prospective owner or user of the lot;

(15) Discriminate in the sale or rental of, or otherwise make unavailable or deny, housing accommodations to any buyer or renter because of a disability of any of the following:

(a) The buyer or renter;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(15)(b) of this section.

(16) Discriminate in the terms, conditions, or privileges of the sale or rental of housing accommodations to any person or in the provision of services or facilities to any person in connection with the housing accommodations because of a disability of any of the following:

(a) That person;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(16)(b) of this section.

(17) Except as otherwise provided in division (H)(17) of this section, make an inquiry to determine whether an applicant for the sale or rental of housing accommodations, a person residing in or

intending to reside in the housing accommodations after they are sold, rented, or made available, or any individual associated with that person has a disability, or make an inquiry to determine the nature or severity of a disability of the applicant or such a person or individual. The following inquiries may be made of all applicants for the sale or rental of housing accommodations, regardless of whether they have disabilities:

- (a) An inquiry into an applicant's ability to meet the requirements of ownership or tenancy;
 - (b) An inquiry to determine whether an applicant is qualified for housing accommodations available only to persons with disabilities or persons with a particular type of disability;
 - (c) An inquiry to determine whether an applicant is qualified for a priority available to persons with disabilities or persons with a particular type of disability;
 - (d) An inquiry to determine whether an applicant currently uses a controlled substance in violation of section 2925.11 of the Revised Code or a substantively comparable municipal ordinance;
 - (e) An inquiry to determine whether an applicant at any time has been convicted of or pleaded guilty to any offense, an element of which is the illegal sale, offer to sell, cultivation, manufacture, other production, shipment, transportation, delivery, or other distribution of a controlled substance.
- (18)(a) Refuse to permit, at the expense of a person with a disability, reasonable modifications of existing housing accommodations that are occupied or to be occupied by the person with a disability, if the modifications may be necessary to afford the person with a disability full enjoyment of the housing accommodations. This division does not preclude a landlord of housing accommodations that are rented or to be rented to a disabled tenant from conditioning permission for a proposed modification upon the disabled tenant's doing one or more of the following:
- (i) Providing a reasonable description of the proposed modification and reasonable assurances that the proposed modification will be made in a workerlike manner and that any required building permits will be obtained prior to the commencement of the proposed modification;
 - (ii) Agreeing to restore at the end of the tenancy the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if it is reasonable for the landlord to condition permission for the proposed modification upon the agreement;
 - (iii) Paying into an interest-bearing escrow account that is in the landlord's name, over a reasonable period of time, a reasonable amount of money not to exceed the projected costs at the end of the tenancy of the restoration of the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if the landlord finds the account reasonably necessary to ensure the availability of funds for the restoration work. The interest earned in connection with an escrow account described in this division shall accrue to the benefit of the disabled tenant who makes payments into the account.
- (b) A landlord shall not condition permission for a proposed modification upon a disabled tenant's payment of a security deposit that exceeds the customarily required security deposit of all tenants of the particular housing accommodations.

- (19) Refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit, including associated public and common use areas;
- (20) Fail to comply with the standards and rules adopted under division (A) of section 3781.111 of the Revised Code;
- (21) Discriminate against any person in the selling, brokering, or appraising of real property because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin;
- (22) Fail to design and construct covered multifamily dwellings for first occupancy on or after June 30, 1992, in accordance with the following conditions:
 - (a) The dwellings shall have at least one building entrance on an accessible route, unless it is impractical to do so because of the terrain or unusual characteristics of the site.
 - (b) With respect to dwellings that have a building entrance on an accessible route, all of the following apply:
 - (i) The public use areas and common use areas of the dwellings shall be readily accessible to and usable by persons with a disability.
 - (ii) All the doors designed to allow passage into and within all premises shall be sufficiently wide to allow passage by persons with a disability who are in wheelchairs.
 - (iii) All premises within covered multifamily dwelling units shall contain an accessible route into and through the dwelling; all light switches, electrical outlets, thermostats, and other environmental controls within such units shall be in accessible locations; the bathroom walls within such units shall contain reinforcements to allow later installation of grab bars; and the kitchens and bathrooms within such units shall be designed and constructed in a manner that enables an individual in a wheelchair to maneuver about such rooms.

For purposes of division (H)(22) of this section, "covered multifamily dwellings" means buildings consisting of four or more units if such buildings have one or more elevators and ground floor units in other buildings consisting of four or more units.

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

(J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(K)(1) Nothing in division (H) of this section shall bar any religious or denominational institution or organization, or any nonprofit charitable or educational organization that is operated, supervised, or

controlled by or in connection with a religious organization, from limiting the sale, rental, or occupancy of housing accommodations that it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference in the sale, rental, or occupancy of such housing accommodations to persons of the same religion, unless membership in the religion is restricted on account of race, color, or national origin.

(2) Nothing in division (H) of this section shall bar any bona fide private or fraternal organization that, incidental to its primary purpose, owns or operates lodgings for other than a commercial purpose, from limiting the rental or occupancy of the lodgings to its members or from giving preference to its members.

(3) Nothing in division (H) of this section limits the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations. Nothing in that division prohibits the owners or managers of housing accommodations from implementing reasonable occupancy standards based on the number and size of sleeping areas or bedrooms and the overall size of a dwelling unit, provided that the standards are not implemented to circumvent the purposes of this chapter and are formulated, implemented, and interpreted in a manner consistent with this chapter and any applicable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations.

(4) Nothing in division (H) of this section requires that housing accommodations be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

(5) Nothing in division (H) of this section pertaining to discrimination on the basis of familial status shall be construed to apply to any of the following:

(a) Housing accommodations provided under any state or federal program that have been determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended, to be specifically designed and operated to assist elderly persons;

(b) Housing accommodations intended for and solely occupied by persons who are sixty-two years of age or older;

(c) Housing accommodations intended and operated for occupancy by at least one person who is fifty-five years of age or older per unit, as determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended.

(L) Nothing in divisions (A) to (E) of this section shall be construed to require a person with a disability to be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the person with a disability, other employees, the general public, or the facilities in which the work is to be performed, or to require the employment or training of a person with a disability in a job that requires the person with a disability routinely to undertake any task, the performance of which is substantially and inherently impaired by the person's disability.

(M) Nothing in divisions (H)(1) to (18) of this section shall be construed to require any person selling or renting property to modify the property in any way or to exercise a higher degree of care for a

person with a disability, to relieve any person with a disability of any obligation generally imposed on all persons regardless of disability in a written lease, rental agreement, or contract of purchase or sale, or to forbid distinctions based on the inability to fulfill the terms and conditions, including financial obligations, of the lease, agreement, or contract.

(N) An aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within one hundred eighty days after the alleged unlawful discriminatory practice occurred, in any court with jurisdiction for any legal or equitable relief that will effectuate the individual's rights.

A person who files a civil action under this division is barred, with respect to the practices complained of, from instituting a civil action under section 4112.14 of the Revised Code and from filing a charge with the commission under section 4112.05 of the Revised Code.

(O) With regard to age, it shall not be an unlawful discriminatory practice and it shall not constitute a violation of division (A) of section 4112.14 of the Revised Code for any employer, employment agency, joint labor-management committee controlling apprenticeship training programs, or labor organization to do any of the following:

(1) Establish bona fide employment qualifications reasonably related to the particular business or occupation that may include standards for skill, aptitude, physical capability, intelligence, education, maturation, and experience;

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, including, but not limited to, a retirement, pension, or insurance plan, that is not a subterfuge to evade the purposes of this section. However, no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual, because of the individual's age except as provided for in the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 623, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 623, as amended.

(3) Retire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, of the employer of the employee, which equals, in the aggregate, at least forty-four thousand dollars, in accordance with the conditions of the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 631, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 631, as amended;

(4) Observe the terms of any bona fide apprenticeship program if the program is registered with the Ohio apprenticeship council pursuant to sections 4139.01 to 4139.06 of the Revised Code and is approved by the federal committee on apprenticeship of the United States department of labor.

(P) Nothing in this chapter prohibiting age discrimination and nothing in division (A) of section 4112.14 of the Revised Code shall be construed to prohibit the following:

- (1) The designation of uniform age the attainment of which is necessary for public employees to receive pension or other retirement benefits pursuant to Chapter 145., 742., 3307., 3309., or 5505. of the Revised Code;
 - (2) The mandatory retirement of uniformed patrol officers of the state highway patrol as provided in section 5505.16 of the Revised Code;
 - (3) The maximum age requirements for appointment as a patrol officer in the state highway patrol established by section 5503.01 of the Revised Code;
 - (4) The maximum age requirements established for original appointment to a police department or fire department in sections 124.41 and 124.42 of the Revised Code;
 - (5) Any maximum age not in conflict with federal law that may be established by a municipal charter, municipal ordinance, or resolution of a board of township trustees for original appointment as a police officer or firefighter;
 - (6) Any mandatory retirement provision not in conflict with federal law of a municipal charter, municipal ordinance, or resolution of a board of township trustees pertaining to police officers and firefighters;
 - (7) Until January 1, 1994, the mandatory retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure, or similar arrangement providing for unlimited tenure, at an institution of higher education as defined in the "Education Amendments of 1980," 94 Stat. 1503, 20 U.S.C.A. 1141(a).
- (Q)(1)(a) Except as provided in division (Q)(1)(b) of this section, for purposes of divisions (A) to (E) of this section, a disability does not include any physiological disorder or condition, mental or psychological disorder, or disease or condition caused by an illegal use of any controlled substance by an employee, applicant, or other person, if an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee acts on the basis of that illegal use.
- (b) Division (Q)(1)(a) of this section does not apply to an employee, applicant, or other person who satisfies any of the following:
- (i) The employee, applicant, or other person has successfully completed a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance, or the employee, applicant, or other person otherwise successfully has been rehabilitated and no longer is engaging in that illegal use.
 - (ii) The employee, applicant, or other person is participating in a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance.
 - (iii) The employee, applicant, or other person is erroneously regarded as engaging in the illegal use of any controlled substance, but the employee, applicant, or other person is not engaging in that illegal use.
- (2) Divisions (A) to (E) of this section do not prohibit an employer, employment agency, personnel

placement service, labor organization, or joint labor-management committee from doing any of the following:

(a) Adopting or administering reasonable policies or procedures, including, but not limited to, testing for the illegal use of any controlled substance, that are designed to ensure that an individual described in division (Q)(1)(b)(i) or (ii) of this section no longer is engaging in the illegal use of any controlled substance;

(b) Prohibiting the illegal use of controlled substances and the use of alcohol at the workplace by all employees;

(c) Requiring that employees not be under the influence of alcohol or not be engaged in the illegal use of any controlled substance at the workplace;

(d) Requiring that employees behave in conformance with the requirements established under "The Drug-Free Workplace Act of 1988," 102 Stat. 4304, 41 U.S.C.A. 701, as amended;

(e) Holding an employee who engages in the illegal use of any controlled substance or who is an alcoholic to the same qualification standards for employment or job performance, and the same behavior, to which the employer, employment agency, personnel placement service, labor organization, or joint labor-management committee holds other employees, even if any unsatisfactory performance or behavior is related to an employee's illegal use of a controlled substance or alcoholism;

(f) Exercising other authority recognized in the "Americans with Disabilities Act of 1990," 104 Stat. 327, 42 U.S.C.A. 12101, as amended, including, but not limited to, requiring employees to comply with any applicable federal standards.

(3) For purposes of this chapter, a test to determine the illegal use of any controlled substance does not include a medical examination.

(4) Division (Q) of this section does not encourage, prohibit, or authorize, and shall not be construed as encouraging, prohibiting, or authorizing, the conduct of testing for the illegal use of any controlled substance by employees, applicants, or other persons, or the making of employment decisions based on the results of that type of testing.

Effective Date: 07-06-2001; 2007 HB372 03-24-2008

4113.52 Reporting violation of law by employer or fellow employee.

(A)(1)(a) If an employee becomes aware in the course of the employee's employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that the employee's employer has authority to correct, and the employee reasonably believes that the violation is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety , a felony, or an improper solicitation for a contribution, the employee orally shall notify the employee's supervisor or other responsible officer of the employee's employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification or the receipt of the report, whichever is earlier, the employee may file a written report that provides sufficient detail to identify and describe the violation with the prosecuting authority of the county or municipal corporation where the violation occurred, with a peace officer, with the inspector general if the violation is within the inspector general's jurisdiction, or with any other appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which the employer is engaged.

(b) If an employee makes a report under division (A)(1)(a) of this section, the employer, within twenty-four hours after the oral notification was made or the report was received or by the close of business on the next regular business day following the day on which the oral notification was made or the report was received, whichever is later, shall notify the employee, in writing, of any effort of the employer to correct the alleged violation or hazard or of the absence of the alleged violation or hazard.

(2) If an employee becomes aware in the course of the employee's employment of a violation of chapter 3704., 3734., 6109., or 6111. of the Revised Code that is a criminal offense, the employee directly may notify, either orally or in writing, any appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which the employer is engaged.

(3) If an employee becomes aware in the course of the employee's employment of a violation by a fellow employee of any state or federal statute, any ordinance or regulation of a political subdivision, or any work rule or company policy of the employee's employer and the employee reasonably believes that the violation is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety , a felony, or an improper solicitation for a contribution, the employee orally shall notify the employee's supervisor or other responsible officer of the employee's employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation.

(B) Except as otherwise provided in division (C) of this section, no employer shall take any disciplinary or retaliatory action against an employee for making any report authorized by division (A)(1) or (2) of this section, or as a result of the employee's having made any inquiry or taken any other action to ensure the accuracy of any information reported under either such division. No employer shall take any disciplinary or retaliatory action against an employee for making any report authorized by division (A) (3) of this section if the employee made a reasonable and good faith effort to determine the accuracy

of any information so reported, or as a result of the employee's having made any inquiry or taken any other action to ensure the accuracy of any information reported under that division. For purposes of this division, disciplinary or retaliatory action by the employer includes, without limitation, doing any of the following:

- (1) Removing or suspending the employee from employment;
- (2) Withholding from the employee salary increases or employee benefits to which the employee is otherwise entitled;
- (3) Transferring or reassigning the employee;
- (4) Denying the employee a promotion that otherwise would have been received;
- (5) Reducing the employee in pay or position.

(C) An employee shall make a reasonable and good faith effort to determine the accuracy of any information reported under division (A)(1) or (2) of this section. If the employee who makes a report under either division fails to make such an effort, the employee may be subject to disciplinary action by the employee's employer, including suspension or removal, for reporting information without a reasonable basis to do so under division (A)(1) or (2) of this section.

(D) If an employer takes any disciplinary or retaliatory action against an employee as a result of the employee's having filed a report under division (A) of this section, the employee may bring a civil action for appropriate injunctive relief or for the remedies set forth in division (E) of this section, or both, within one hundred eighty days after the date the disciplinary or retaliatory action was taken, in a court of common pleas in accordance with the Rules of Civil Procedure. A civil action under this division is not available to an employee as a remedy for any disciplinary or retaliatory action taken by an appointing authority against the employee as a result of the employee's having filed a report under division (A) of section 124.341 of the Revised Code.

(E) The court, in rendering a judgment for the employee in an action brought pursuant to division (D) of this section, may order, as it determines appropriate, reinstatement of the employee to the same position that the employee held at the time of the disciplinary or retaliatory action and at the same site of employment or to a comparable position at that site, the payment of back wages, full reinstatement of fringe benefits and seniority rights, or any combination of these remedies. The court also may award the prevailing party all or a portion of the costs of litigation and, if the employee who brought the action prevails in the action, may award the prevailing employee reasonable attorney's fees, witness fees, and fees for experts who testify at trial, in an amount the court determines appropriate. If the court determines that an employer deliberately has violated division (B) of this section, the court, in making an award of back pay, may include interest at the rate specified in section 1343.03 of the Revised Code.

(F) Any report filed with the inspector general under this section shall be filed as a complaint in accordance with section 121.46 of the Revised Code.

(G) As used in this section:

- (1) "Contribution" has the same meaning as in section 3517.01 of the Revised Code.
- (2) "Improper solicitation for a contribution" means a solicitation for a contribution that satisfies all of the following:
 - (a) The solicitation violates division (B), (C), or (D) of section 3517.092 of the Revised Code;
 - (b) The solicitation is made in person by a public official or by an employee who has a supervisory role within the public office;
 - (c) The public official or employee knowingly made the solicitation, and the solicitation violates division (B), (C), or (D) of section 3517.092 of the Revised Code;
 - (d) The employee reporting the solicitation is an employee of the same public office as the public official or the employee with the supervisory role who is making the solicitation.

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Ohio JURISPRUDENCE

SECOND EDITION

A COMPLETE TEXT STATEMENT OF THE MODERN LAW AND
PRACTICE OF OHIO, COVERING BOTH THE STATUTE
LAW AND THE CASE LAW

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be open to a construction that would let in the other. The clause
thus restricted is of rare application, and further restriction by
construction is inadmissible. The phrase, "a liability created by
statute," is, therefore, interpreted to mean a liability which would
not exist but for the statute.¹²

An action upon a statute for a penalty or forfeiture must be
brought within one year after the cause thereof accrues.¹³

Limitations of actions in state courts upon federally created
rights to sue are governed by the law of the state where the
crucial combination of events occurred.¹⁴

§ 19. — Where Statute Creating Right Also Prescribes Limi-
tation Period.—Where by statute a right of action is given which
did not exist at common law, and the statute giving the right
fixes the time within which the right may be enforced, the time
so fixed becomes a limitation or condition on such right and will
control.¹⁵ In such a case time is made of the essence of the right
created, and the limitation is an inherent part of the statute or
agreement out of which the right in question arises, so that there
is no right of action whatever independent of the limitation¹⁶
and a lapse of the statutory period operates to extinguish the
right altogether.¹⁷ If a cause of action arising out of a special

12. *Hawkins v Iron Valley Furnace*
Co. 40 OS 507.

13. RC § 2305.11 (GC § 11225).
See 24 O Jur2d, FORFEITURES AND
PENALTIES p 528 § 8, p 537 § 19.

14. *Cope v Anderson*, 331 US 461,
91 L ed 1602, 67 S Ct 1340, 36 O Ops
398.

As to conflict of laws respecting
limitations generally, see 9 O Jur2d
834, CONFLICT OF LAWS §§ 117 et seq.

15. *Castrovinci v Castrovinci*, 93 O
App 133, 50 O Ops 344, 112 NE2d 53;
Kohrman v Rausch (App) 75 OL Abs
193, 138 NE2d 22 (action by one
holding title by virtue of tax sale
of forfeited Torrenized lands to com-
pel county auditor to issue registered
certificate of title under the author-
ity of RC § 5309.60 (GC § 8572-58));
Purtee v General Motors Corp.
(App) 78 OL Abs 92 (action to re-
cover benefits under Workmen's
Compensation Act).

16. *Scullin v Mutual Drug Co.* 138
OS 132, 20 O Ops 126, 33 NE2d 992.

The 2-year limitation provided by
the Federal Employer's Liability
Act, within which actions thereunder
must be brought, qualifies the right
of action, and is not merely a limita-
tion on the remedy. *Wade v Frank-*
lin, 51 O App 318, 5 O Ops 190, 20
OL Abs 575, 200 NE 644.

17. *Errett v Howert*, 78 OS 109, 84
NE 753; *Crandall v Irwin*, 139 OS
253, 39 NE2d 608, 139 ALR 895,
former judgment adhered to on reh
139 OS 463, 22 O Ops 509, 40 NE2d
933, 139 ALR 900; *Shinn v New*
York, C. & St. L. R. Co. 24 O App
113, 156 NE 250; *George L. Rackle*
& Sons Co. v Western & Southern
Indem. Co. 54 O App 274, 7 O Ops
118, 22 OL Abs 502, 6 NE2d 1007,
m c o Nov. 25, 1936; *McCampbell v*
Southard, 62 O App 339, 16 O Ops
45, 27 OL Abs 146, 23 NE2d 95;

statute containing limitations qualifying the right is not brought within the time limited in the statute, the court has no jurisdiction of the case.¹⁸

§ 20. — When Common-Law Right Is Incorporated in Statute.—When a common-law right of action is incorporated into a statute, such enactment does not bring the right of action within the purview of the statute of limitations limiting the time to 6 years for the bringing of “an action upon . . . a liability created by statute.”¹⁹

§ 21. Equitable Actions, Generally.—It may be said as a broad general rule that the statute of limitations applies to actions of an equitable nature,²⁰ and this was true to a certain extent even before the adoption of the Code of Civil Procedure. It has been said that generally equitable actions fall within the statute²¹ providing that an action for relief not otherwise provided for

Christensen v Maxen (App) 29 OL Abs 219, m c o June 8, 1938; Purtee v General Motors Corp. (App) 78 OL Abs 92.

Huff v Spruance (CP) 52 O Ops 97, 67 OL Abs 10, 116 NE2d 470 (action for recovery of overpayment of rent).

Where by statute a right of action is given which did not exist at common law, and the statute giving the right fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition on such right and will control no matter in what forum the action is brought, and such rule does not make the general provisions of the statute of limitations existing in the jurisdiction where the liability was created operate extraterritorially. *Castrovinci v Castrovinci*, 93 O App 133, 50 O Ops 344, 112 NE2d 53.

If a statute creating a liability also sets the time within which an action may be brought to enforce it, the bringing of a suit within that time is an indispensable requirement to the maintenance of the action. *Huff v Spruance* (CP) 52 O Ops 97, 67 OL Abs 10, 116 NE2d 470.

Where there is a special statutory

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limitation qualifying a given right, the petition and proof must affirmatively avoid the limitation or qualification. *Scullin v Mutual Drug Co.* 138 OS 132, 20 O Ops 126, 33 NE2d 992.

18. *Christensen v Maxen* (App) 29 OL Abs 219, m c o June 8, 1938, citing *McCord v McCord*, 104 OS 274, 135 NE 548.

19. *Hartford Acci. & Indem. Co. v Proctor & Gamble Co.* 91 O App 573, 49 O Ops 159, 109 NE2d 287, involving a workman's personal injury action assigned to an insurance carrier and sued on by the latter, wherein the court held that the 2-year limitation applicable to personal injury actions applied, and not the 6-year limitation on liabilities created by statute, the court saying that the cause of action to the injured workman existed independent of the statute as a common-law right to recover for personal injuries; that by statute the ownership was assigned, but that the assignment did not change the character of the cause of action into one “created” by statute.

20. See § 16, supra.

21. RC § 2305.14 (GC § 11227).

and the amounts prescribed by the specified tariff required by law to be filed was governed by RC § 2305.07. *City Messenger Service, Inc. v Capitol Records Distributing Corp.* (CA6 Ohio) 446 F2d 6, 32 O Misc 231, 59 O Ops 2d 176, cert den 404 US 1059, 30 L Ed 2d 746, 92 S Ct 738.

Annotation: Extraterritorial operation of limitation applicable to statutory cause of action, other than by reason of "borrowing statute". 95 ALR2d 1162.

Additional case authorities for section:

The statute of limitations established by RC § 2305.07 did not operate to limit a municipality's obligation to make payments to a public employees retirement system under the mandatory terms of RC §§ 145.47 and 145.48 and did not bar pension claims extending beyond six years from the date of a complaint seeking contribution from the municipality. *State ex rel. Teamsters v Youngstown*, 50 OS2d 200, 4 O Ops 3d 387.

Since RC § 3109.09, providing recovery against parents for compensatory damages for injury to property caused by minors, is primarily intended to be compensatory in nature and bears a real and substantial relation to the object sought to be attained, the two-year statute of limitations set forth in RC § 2305.10 applies to actions brought under RC § 3109.09. *Rudnay v Corbett* (1977) 53 O App 2d 311, 7 O Ops 3d 416.

In actions brought in federal district courts in Ohio based on 42 USCS § 1981, proscribing racial discrimination in employment, the applicable statute of limitations is RC § 2305.07, providing that an action upon a liability created by statute must be brought within 6 years from the time the cause of action accrued, rather than RC § 4112.05(B), providing that the Ohio Civil Rights Commission must file complaints based on allegedly discriminatory practices within one year from the date such practices occurred. *Mason v Owens-Illinois, Inc.* (CA6 Ohio) 517 F2d 520, 29 ALR Fed 705.

In a civil rights action against city officials and employees under 42 USCA § 1983, plaintiff's complaint comprised a broader action than a common law tort and therefore, was not time barred

by the applicable four-year statute of limitations. *Schorle v Greenhills* (1981, SD Ohio) 524 F Supp 821.

§ 19. —Where Statute Creating Right Also Prescribes Limitation Period.

p. 505, n. 15.

While as a general rule a period of limitations may be extended by an amendment of the statute of limitations, prior to the expiration of the previously controlling period, where the statute creating the right also prescribes the limitation period, the limitation called for in the original statute bars the action, notwithstanding any amendment of the statute thereafter. *Snyder v Yoder*, 176 F Supp 617, 11 O Ops 2d 183, 88 OL Abs 294.

p. 505, n. 17.

General or pure statutes of limitation relate to the remedy rather than the right; whereas, in special statutory provisions creating and qualifying a given right if exercised within a given time, the time limitation is an inherent part of the statute, so that after the time runs the right is extinguished. *Cincinnati v Bossert Machine Co.* 14 O App 2d 35, 43 O Ops 2d 76, 236 NE2d 216, revd on other grounds 16 OS2d 76, 45 O Ops 2d 420, 243 NE2d 105, cert den 394 US 998, 22 L Ed 2d 776, 89 S Ct 1592.

§ 23. Contribution.

Annotations: What statute of limitations applies to action for contribution against joint tortfeasor. 57 ALR3d 927.

—When statute of limitations commences to run against claim for contribution or indemnity based on tort. 57 ALR3d 867.

§ 24. Applicability to Defenses, Setoffs, or Counterclaims.

p. 511, n. 7.

A defense of the statute of limitations does not apply to the beneficiaries of a valid and subsisting trust. *Cleveland Trust Co. v Pomeroy* (CP) 16 O Ops 2d 131, 87 OL Abs 502, 177 NE2d 410.

Additional case authorities for section:

A claim of a defendant which would be barred by the statute of limitations