ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. THE OHIO CIVIL RIGHTS COMMISSION, et al.

Relators,

v.

THE HON. RICHARD J. McMONAGLE,

Respondent.

v.

GMS MANAGEMENT CO., INC.

Intervenor.

Case No. 2014-0295

Original Action in Prohibition Arising from Cuyahoga County Common Pleas Court

Case No. 14 CV 820282

FILED
MAR 17 2014
CLERK OF COURT
SUPREME COURT OF OHIO

AMICI CURIAE BRIEF OF THE OHIO EMPLOYMENT LAWYERS ASSOCIATION (OELA) AND THE OHIO DISABILITY RIGHTS LAW AND POLICY CENTER (DISABILITY RIGHTS OHIO) IN SUPPORT OF MEMORANDUM IN OPPOSITION TO DISMISS

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I. STATEMENTS OF INTEREST OF AMICI CURIAE

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

As an organization focused on protecting the interests of those who are subjected to workplace discrimination, OELA has an interest in the integrity and efficiency of the investigations of the Ohio Civil Rights Commission, which are immensely important to those who are victims of discrimination. This is especially true for individuals who cannot find or afford an attorney, those who need more information in order to determine whether they have experienced discrimination, and those whose claims are capable of mediation through the Commission without the need for litigation or judicial intervention. OELA files this amicus brief to call attention to the impact the decision in this case may have on the ability of individuals to discover and remedy unlawful discrimination, and on the state's ability to uncover discrimination on behalf of those who cannot do so on their own.

The Ohio Disability Rights Law and Policy Center, Inc. (d.b.a. Disability Rights Ohio) is the system to protect and advocate for the rights of people with disabilities in Ohio. *See, e.g.*, R.C. 5123.60; 29 U.S.C. § 794e; 42 U.S.C. § 10801 *et seq.* Disability Rights Ohio is a 501(c)(3) not-for-profit corporation chartered under the laws of Ohio. The mission of Disability Rights

Ohio is to advocate for the human, civil, and legal rights of people with disabilities in Ohio. In accordance with that mission, Disability Rights Ohio receives many requests for assistance in a wide variety of legal areas affecting individuals with disabilities, including housing, employment and public accommodations, issues that fall within the jurisdiction of the Ohio Civil Rights Commission to investigate charges of discrimination. Disability Rights Ohio is participating in this case as *amicus curiae* to provide insight on the importance of the Ohio Civil Rights Commission and its ability to advocate for individuals who need assistance. The outcome of this decision will impact on the work of Disability Rights Ohio because the Ohio Civil Rights Commission receives a large amount of disability cases, and Disability Rights Ohio, because of its limited resources, refers individuals to the Commission on a wide range of issues within their jurisdiction.

II. STATEMENT OF FACTS

Amici adopt the Statement of Facts set forth in Relator's Complaint for Writ of Prohibition and Affidavit in Support filed with the Court on February 24, 2014.

III. ARGUMENT

A. Ohio Civil Rights Commission Has Jurisdiction Under Ohio Revised Code 4112 and Ohio Administrative Code 4112.

The General Assembly, in R.C. Chapter 4112, created the Ohio Civil Rights Commission and gave the Commission the power to receive charges, investigate, and conduct hearings to resolve charges of unlawful discriminatory practices. The Ohio General Assembly enacted R.C. 4112 to be a remedial statute in order to deter and prevent discrimination in the state of Ohio. R.C. 4112 must "be construed liberally for the accomplishment of its purposes." R.C. 4112.08. The Supreme Court of Ohio stated, "...the courts, upon review, are to construe those statutes liberally in order to effectuate the legislative purpose and fundamental policy implicit in their

enactment, and to assure that the rights granted by the statute are not defeated by overly restrictive interpretation." *Ohio Civ. Rights Comm. v. Lysyj*, 38 Ohio St.2d 217, 220, 313 N.E.2d 3 (1974).

The Ohio Civil Rights Commission is a neutral agency that enforces laws against discrimination in Ohio. The Commission is empowered through the special statutory proceeding to receive and investigate charges of discrimination in employment, public accommodations, housing, credit and higher education on the bases of race, color, religion, sex, military status, national origin, disability, age or ancestry. R.C. 4112.02. While both the Commission and individual targets of discrimination can pursue actions in court, only the Commission is empowered by statute to *investigate* potential discrimination, including gathering documents and interviewing witnesses, without the need for judicial proceedings, and without drawing an initial conclusion that discrimination has occurred.

Importantly here, while the Commission is required by R.C. 4112.04(A)(6) to investigate sworn charges of discrimination in employment, housing, and public accommodations, it also has independent authority under R.C. 4112.04(B)(2) to "[i]nitiate and undertake on its own motion investigations of problems of employment or housing accommodations discrimination." This defeats the substantive claims of the Respondent and the intervening landlord here, both of whom have overlooked Division (B)(2) and incorrectly asserted that the Commission is without jurisdiction to investigate without a sworn charge.

B. Subjecting the Jurisdiction of the Ohio Civil Rights Commission to Interlocutory Judicial Review Will Severely Undermine the Commission's Role in Investigating and Remedying Unlawful Discrimination.

Failing to grant the Commission's requested writ could defeat the General Assembly's purpose in creating an agency to receive charges of discrimination, investigate, mediate, and conduct formal hearings. The Commission's role as an investigative body depends on its ability

to act quickly and flexibly to uncover potential discrimination and bring disputes to a successful conclusion where possible. The process of gathering information, facilitating mutually acceptable resolutions, and, where necessary, conducting administrative hearings, creates the potential—unique to the Commission process, and utterly unavailable in litigation—for facilitating swift, effective, and often voluntary compliance with Chapter 4112. Unfortunately, such a process is vulnerable to tactics such as the one used here by GMS Management. If those being investigated can initiate interlocutory proceedings in court to slow the process, the Commission cannot achieve speedy resolutions (or any resolutions, given the unique, strict time limits set by statute for completing Commission investigations). If every landlord or employer responds to a purported defect in the Commission's investigation by seeking judicial intervention, individuals who try to avail themselves of the General Assembly's carefully constructed, efficient, and free administrative process will be involuntarily drawn into the more expensive, slower litigation process. Since many of the Commission's investigations conclude that no discrimination has occurred, and an impressive proportion are resolved through the Commission's mediation program, the result would be a disturbing number of entirely unnecessary court proceedings.

1. Denying the Commission's Requested Writ Would Interfere with a Process that Leads to Efficient Resolutions.

The process of the Ohio Civil Rights Commission is clear and fair to both parties. An investigation is initiated by either a sworn charge or an investigation opened by the Commission "on its own motion" pursuant to R.C. 4112.04(B)(2). This secondary authority gives the Commission not only the ability to investigate unsworn allegations of discrimination if it chooses, but also to investigate potential patterns of discrimination beyond the circumstances alleged by an individual charging party.

Prior to any investigation, the Commission attempts to resolve the issues between the charging party and the party alleged to have unlawfully discriminated against the charging party, Respondent, through mediation or conciliation. After a charge is filed, the case is assigned to an investigator and an initial interview is scheduled. A notification letter is sent to the charging party and the Respondent with information inquiring whether the parties would like to participate in mediation or investigation. Both the charging party and the Respondent must voluntarily choose mediation to proceed with the mediation stage; if one party decides not to mediate then the charge is investigated. The investigator will review any necessary information to resolve the case from both parties. After all of the investigatory matters are complete, the Commission makes a determination of probable cause or no probable cause. *See* Appendix A.

The Commission makes every effort to conciliate the case if there is a determination of probable cause, which gives the parties another chance to use alternative dispute resolution to resolve the matter. It is only after conciliation efforts fail that a formal complaint is issued and the case is scheduled for a public hearing before an Administrative Law Judge. Either party has a chance to appeal a finding of probable cause or any final commission determination through the Commission's reconsideration process. Ohio Adm.Code 4112-3-04.

The success of the Commission's alternative dispute resolution options is astounding. According to the Commission's annual report from 2010, the staff mediated 689 claims and 81% were successful. *See* Appendix B. Between July 1, 2009 and June 30, 2010, 79% of the cases mediated were successful and on average 85% of all cases electing mediation are successful. This speaks volumes to the effectiveness of the available process and *amici* urge the Court not to allow landlords or others respondents to interfere with this successful program.

Mediation has been recognized by many legal scholars and court systems as an effective tool to resolve disputes between parties. People perform more effectively and with greater motivation when they choose to voluntarily participate in a resolution process.[1] The Commission works with the mediation program on a strictly voluntary basis; if one party does not want to participate then the mediation will not happen. Participants in mediation support it because they are in control of the outcome of the case, in contrast to the risk of litigation.[2] Mediation is effective at increasing access to justice because litigation is expensive and people rarely have the means to litigate.[3]

Offering mediation at the court level is helpful but also requires an allocation of court resources. The Ohio Civil Rights Commission's use of mediation helps obviate the need for parties to seek court intervention, whether through litigation or a court mediation program. It is therefore important to have the Ohio Civil Rights Commission which allows participants to have access to mediation and makes it more possible for individuals to participate in the justice system.

The Ohio Civil Rights Commission hears about 4,000 charges annually, and files a formal complaint only rarely. According to the Ohio Civil Rights Commission's 2010 Annual Report, most charges result in settlement, withdrawal with benefits, successful conciliation, withdrawal without benefits, dismissal for failure to cooperate, dismissal because of lack of jurisdiction, or dismissal because there is no probable cause found. From July 1, 2009 through June 30, 2010 the Commission successfully mediated, settled, or dismissed for lack of probable

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[1] Henry Chen, *The Mediation Approach: Representing Clients with Mental Illness in Civil Commitment Proceedings,* 19 Geo. J. Legal Ethics 599, 599-612 (2006).
[2] Jo Daugherty Bailey & Susan P. Robbins, *Couple empowerment in divorce: A comparison of mediated and nonmediated outcomes*, Conflict Resolution Quarterly. V22(4). 453-472 (2005).
[3] Douglas Van Epps, *The Impact of Mediation of State Courts,* The Ohio State Journal of Dispute Resolution. V17(3) 627-638 (2001-2002).

cause all but less than 1%, the remainder of which actually went to an administrative hearing or litigation. *See* Appendix C. The bottom line result of this process is that thousands of disputes each year are settled or otherwise brought to a conclusion without ever involving a court.

2. Denying the Commission's Requested Writ Would Strip the Commission of Its Important Role in Assisting Unrepresented Parties.

The Commission's independent investigative power is vitally important for individuals who feel they may have been victims of unlawful discrimination. Most individuals cannot find or afford an attorney; the Commission allows individuals to file charges without hiring an attorney, and reduces the burden that would otherwise fall on nonprofit and state-operated entities who share the mission of ending discrimination. For instance, *amicus curiae* Disability Rights Ohio receives on average 3,200 requests each year for services in a variety of issue areas, and can provide representation with respect to only a limited number of these requests. The Commission is one of the only alternatives available to clients who are claiming disability discrimination in housing, employment, or public accommodations and cannot obtain an attorney from the private bar or from Disability Rights Ohio. According to the Ohio Civil Rights Commission's 2010 Annual Report, the Commission handled 1,070 disability charges. *See* Appendix D. If the Commission's authority through the special statute is questioned or limited by the denial of the requested writ, the Commission would lose its effectiveness as a referral option for individuals seeking assistance from organizations like Disability Rights Ohio. The number of individuals without representation and with no way to address claims of discrimination would be unnecessarily high, and the state's ability to uncover unlawful discrimination would be at an all-time low.

As important, many, if not most, individuals who suspect they have been discriminated against are uncertain at the outset of the investigation whether they have been discriminated

against. Only the Commission can help make that determination without first initiating litigation. Denying a writ of prohibition here would force those who reasonably believe there has been discrimination to either acquiesce in the discrimination or take legal action that may ultimately prove to have been totally unnecessary. Neither of these choices would serve the remedial purpose of Chapter 4112, and the General Assembly certainly never intended for individuals to have to make such a choice.

Perhaps most harmful, if this Court permits the interlocutory review sought by the landlord in this case, the very individuals the General Assembly has sought to protect will be deterred from filing charges. If meritorious charges are defeated through the delay and interference of collateral judicial proceedings, charging parties will lose confidence in the ability of the Commission to provide effective remedies. And in nearly every such case, given the lack of representation noted above, charging parties will end up caught, without their own legal counsel, in the middle of confusing, technical court actions that have little or nothing to do with the core question of whether they experienced unlawful discrimination. Such charging parties will be effectively denied a forum to voice their discrimination concerns and seek effective remedies.

C. Permitting Respondents to Pursue Emergency, Interlocutory Review of Commission Proceedings Serves No Legitimate Purpose.

The question in this matter is not whether the Commission was within its broad statutory authority to investigate the intervening landlord (though it clearly was, as discussed above). The question is whether the General Assembly's purposes and the public interest would be served by entitling the landlord to emergency, interlocutory review of any flaws it perceived in a Commission investigation. See *State ex rel. Pressley v. Industrial Comm'n of Ohio*, 11 Ohio St. 2d 141, 162, 228 N.E.2d 631, (1967) (noting that the Court, in considering a writ, must consider

not only the rights of the individual parties, but the interests of third parties, the importance of the matter, and "public policy and the public's interest").

The intervening landlord here sought interlocutory review based on the speculative, intangible harm that might occur from merely being investigated. There had been no finding that it discriminated, or even that there was probable cause to believe it discriminated. In the event of such a finding, there is no question that the landlord can seek judicial review, including review of not only the merits of the charge, but also any underlying procedural flaws in the Commission's investigation—just as a charging party who is denied relief through the Commission process can seek judicial review of both the merits of the case and the Commission's investigative process.[4] If the landlord is truly harmed—that is, if the landlord is subjected to substantive sanctions pursuant to a finding of discrimination—its rights can be vindicated with or without emergency interlocutory review.

The Commission and the public interest, in contrast, will be utterly defeated if this Court permits emergency interlocutory review of an investigation. The Commission must finish its investigation and file any administrative complaint within a mandatory one-year deadline, regardless of any interruptions or delays. This deadline is difficult to meet in complex cases, even if everything proceeds smoothly. The deadline will be impossible to meet if the Commission must defend its very right to investigate in court, and potentially prevail in a judicial appeal process, before completing its investigation. In addition, the Commission is a state agency that, like many similar agencies, does not have extra resources available to devote to unnecessary judicial proceedings. Its investigators must be permitted to spend their available

[4] Notably, denying the Commission's requested writ here would likely make the same interlocutory review available to charging parties, who might reasonably claim in many cases that the Commission has failed to investigate properly pursuant to its statutory mandate. If being subjected to an unfair investigation is a cognizable harm that merits emergency relief, the same is true of being denied a fair investigation.

time investigating discrimination, not serving as witnesses in collateral proceedings. This Court should recognize the landlord's tactic here as what it is: an attack on the General Assembly's civil rights enforcement scheme, and an intrusion on the investigative prerogatives of the agency specially delegated by the General Assembly to root out discrimination wherever it occurs.

The U.S. Supreme Court has recognized the importance of allowing the federal analog to the Commission, the Equal Employment Opportunity Commission, to perform its investigative role without interference. In *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291-92, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002), the Court considered whether the EEOC was authorized to proceed in a case where an employee and employer had agreed to private arbitration of any claims between them. The Supreme Court concluded that the federal authorizing statute "clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake. Absent textual support for a contrary view, it is the public agency's province—not that of the court—to determine whether public resources should be committed to the recovery of victim-specific relief." The Court went on to state that "whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief. To hold otherwise would undermine the detailed enforcement scheme created by Congress ***." *Id.* at 296.

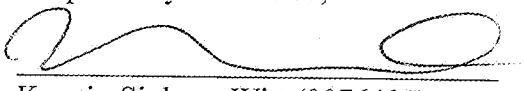
The same concerns are at issue here, and this Court should reach the same conclusion. The Ohio Civil Rights Commission can only function as an effective enforcement body if it is permitted to conduct its investigations without interruption. If they are flawed, those flaws can be corrected through the ordinary judicial process. There is no urgent need for an examination of

the Commission's jurisdiction in any given case. The only urgency is in the Commission's own fundamental goals of identifying discrimination, resolving cases, and otherwise carrying out the mission delegated to it by the General Assembly.

IV. CONCLUSION

For these reasons, *amici* respectfully request that this Court grant the Relator's Peremptory or Alternative Writ of Prohibition and allow the matter to be resolved through means of the special statutory proceeding conducted by the Ohio Civil Rights Commission.

Respectfully Submitted,



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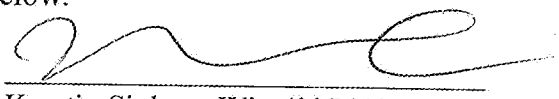
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 17, 2014, the foregoing Amici Curiae Brief of the Ohio Employment Lawyers Association (OELA) and the Ohio Disability Rights Law And Policy Center (Disability Rights Ohio) in Support of Memorandum in Opposition to Dismiss with the Clerk of the Court for the Supreme Court of Ohio. I certify that all participants were served via regular U.S. Mail as listed below.



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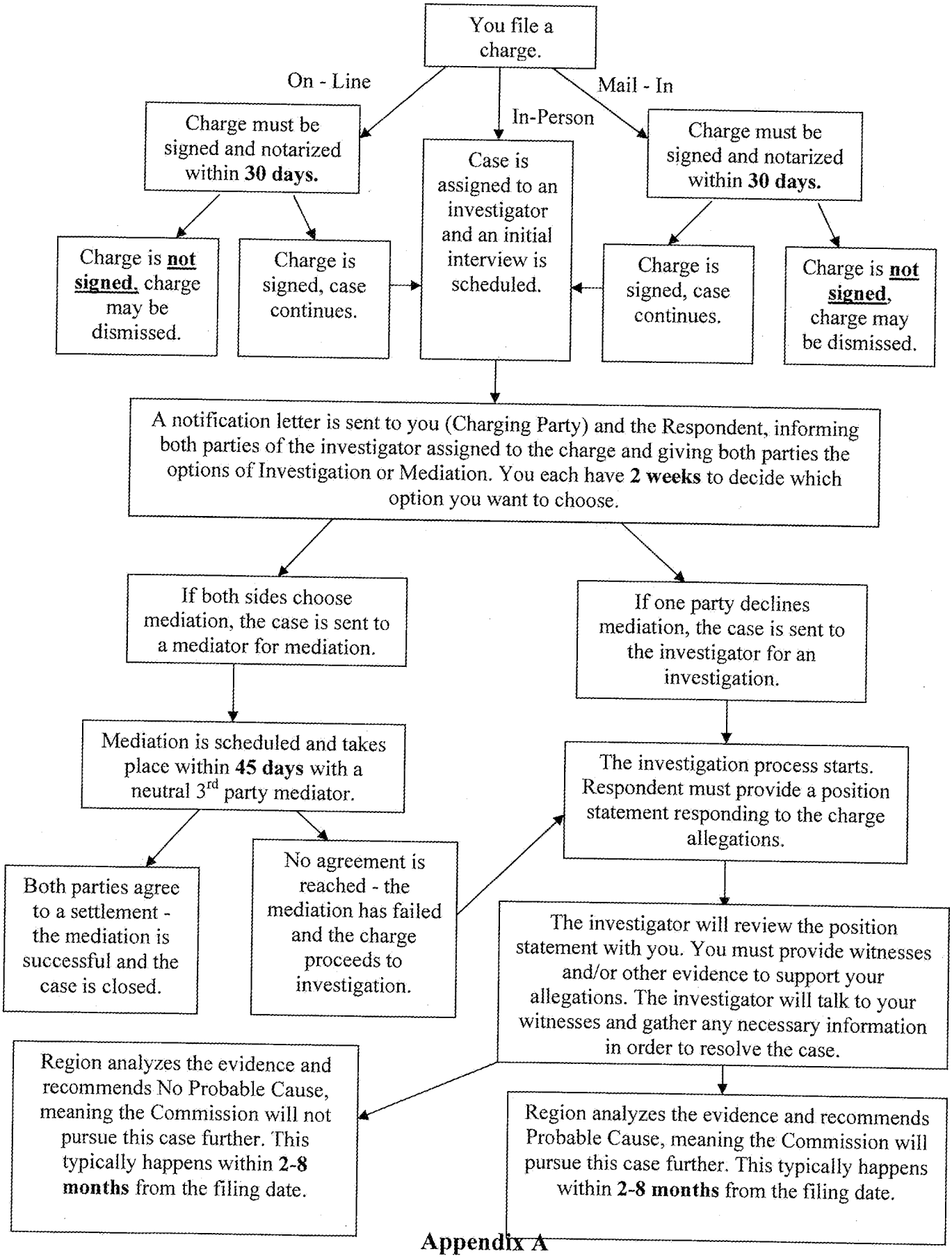
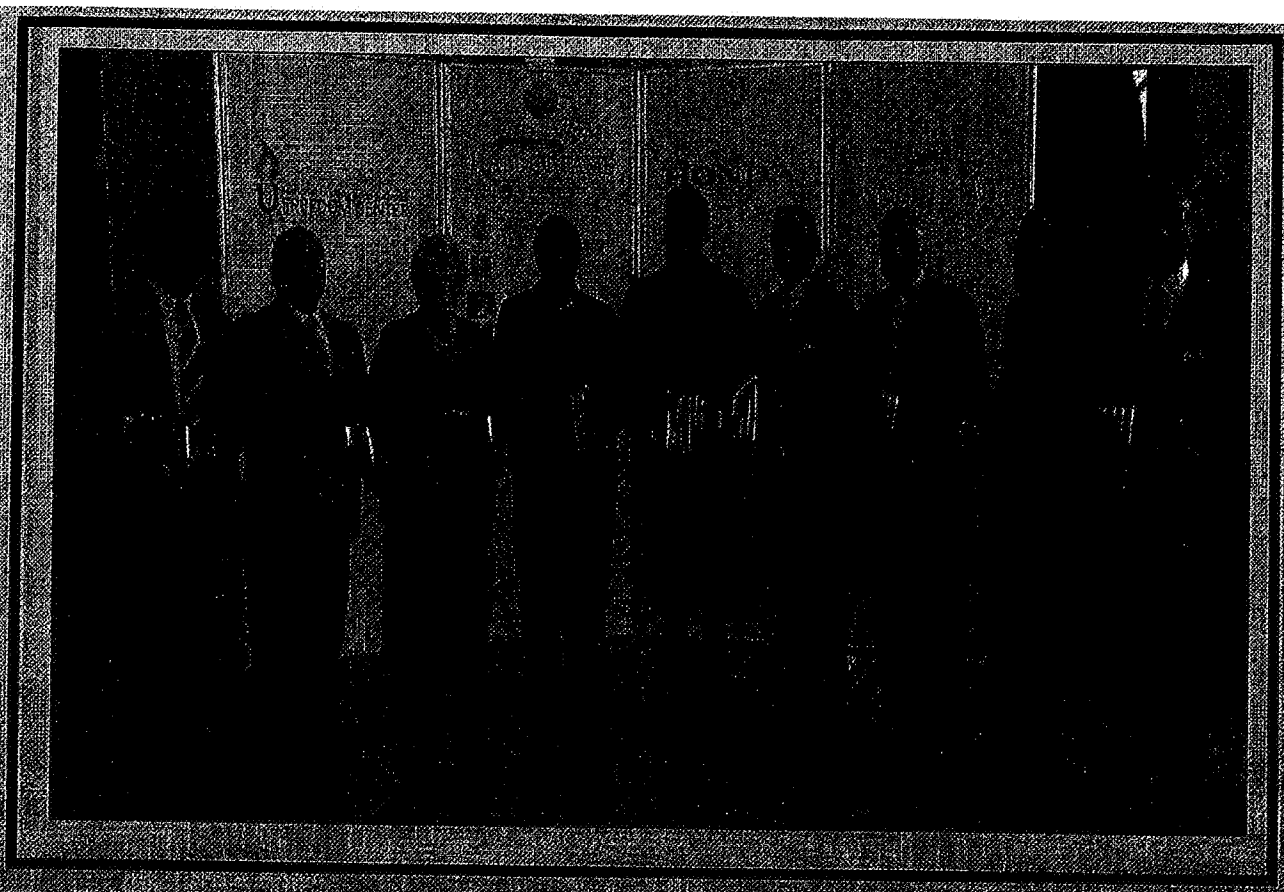
A GENERAL OVERVIEW OF THE CHARGE FILING PROCESS FOR THE CHARGING PARTY



Appendix A



Inaugural Ohio Civil Rights Hall of Fame inductees: [illegible] representing [illegible]; [illegible] representing Rabbi Dr. Alexander Gilbert; Mary H. Commander; [illegible]; [illegible]; Mrs. Fred Shuttlesworth (posthumously); Reverend Fred Shuttlesworth; Martin Kaydell representing Carl B. Stokes; [illegible]; Thomas Shumbrevich; Dr. Dwight William Dixon; Hon. Carl Lancione; Office of Congressman Dennis J. Kucinich; [illegible]; Reverend Dave Roads.

Civil Rights

50th Anniversary

OHIO CIVIL RIGHTS COMMISSION

ANNUAL REPORT 2010

(JULY 1, 2009 – JUNE 30, 2010)

Appendix B

The Charge Filing Process

Who can file a charge?

Any person who lives or works in Ohio and believes they have been subjected to unlawful discrimination can file a charge with one of OCRC's regional offices. Such complaints must be filed within 180 days (or one year for housing complaints) of the alleged act of discrimination. The OCRC may also self-initiate an investigation based on preliminary information indicating that the Civil Rights Act may have been violated. OCRC must issue a finding within one (1) year after a charge is filed.

Mediation Services

At the time a charge of discrimination is filed, all parties to the charge are provided with the option to participate in the OCRC's mediation program. OCRC employs one Mediator in each of five (5) regional offices throughout the state. The case is assigned to a Mediator who works with both parties and attempts to reach a mutually satisfactory agreement. In the event an agreement is reached, the terms of the agreement are binding upon the parties and the case is closed. If a settlement is not reached, the case is referred to an Investigator for a full investigation. In 2009, the mediation staff conducted a total of 689 mediations and successfully mediated 81% of those cases.

Investigative Process

Each case filed with the OCRC is assigned to a lead Investigator who works with an investigative team consisting of Investigators, the Regional Director, and Team Supervisor in order to collect position papers, obtain witness statements, review relevant records and conduct interviews. The team reviews all evidence collected in the case and submits a written recommendation to the Commissioners who are responsible for issuing the final ruling.

If the facts obtained during the investigation are insufficient to substantiate the charge of discrimination, the Commission will issue a finding of **NO PROBABLE CAUSE** to believe a violation of law has occurred. However, if the facts are sufficient to substantiate discrimination has occurred, the Commission will issue a finding of **PROBABLE CAUSE** to believe a violation of the law has occurred. Upon issuance of a probable cause finding, OCRC staff makes every effort to conciliate the case. **Successful Conciliations** are settlements reached after a preliminary finding of probable cause.

If conciliation efforts fail, a formal complaint is issued and the case is scheduled for a public hearing before an Administrative Law Judge. The Civil Rights Section of the Ohio Attorney General's Office represents the Commission in all matters of litigation.

Appendix B

Inaugural Ohio Civil Rights Hall of Fame inductees [illegible] Ruth Gonzales de Garcia, [illegible] Reverend Fred Shuttlesworth, Marvin Rudolph representing [illegible] William Brown, Honorable Senator Ray Miller representing George Washington Williams, [illegible] Reverend Bruce Klunder.

Civil Rights

Ohio Civil Rights Commission

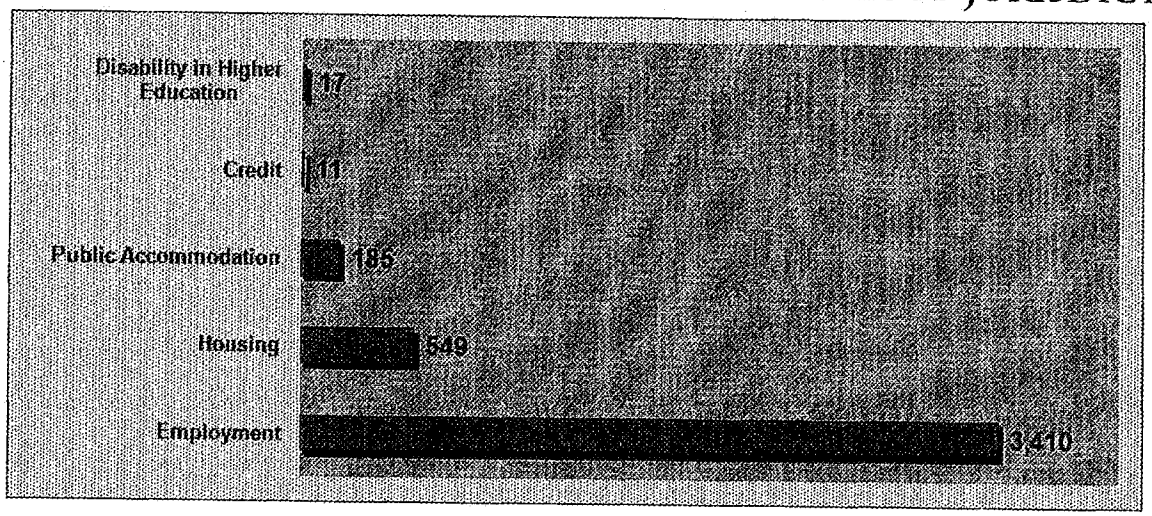
ANNUAL REPORT 2010

(July 1, 2009 – June 30, 2010)

Appendix C

STATISTICAL DATA & INFORMATION

TOTAL NUMBER OF CHARGES CLOSED BY AREA OF JURISDICTION



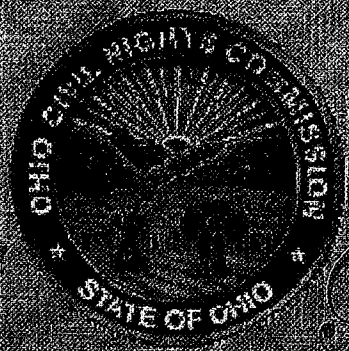
CASE RESULTS JULY 1, 2009 THROUGH JUNE 30, 2010	
Settlements	383
Withdrawal With Benefits	500
Successful Conciliation	67
Probable Cause	177
Withdrawal Without Benefits	252
No Probable Cause	2,598
Failure to Cooperate	42
No Jurisdiction	83
Administrative Closures	59
Failure to Accept Full Remedy	1
Hearing Closure	3
Closed by Litigation	6
Total Closures	**4,171**

4,171 CASES WERE COMPLETED AND PROCESSED BETWEEN JULY 1, 2009 AND JUNE 30, 2010.

DURING THIS SAME PERIOD OF TIME, 79% OF ALL CASES THAT WENT THROUGH THE MEDIATION PROCESS WERE SUCCESSFULLY MEDIATED.

Appendix C

Inaugural Ohio Civil Rights Hall of Fame Inductees (l-r): C. J. McGhee, Jr., Representative C. J. McGhee; Lee Leonard on behalf of Representative Rita Gonzalez de Quesada; Joan B. Campbell; Dr. Lillie Howard; Representative Tom Morrison; Ms. Fred Smallwood; Representative Reverend Fred Shuttlesworth; Marvin Rodgers, Representative Charles Stokes; Honorable Robert M. Duncan; Shad Donovan; Representative William Bowen; Honorable Senator Ray Miller; Representative George Verich; Washington Mitchell; Not pictured: Reverend Bruce Klunder



Civil Rights

OCRC 50th Anniversary

OHIO CIVIL RIGHTS COMMISSION

ANNUAL REPORT 2010

(JULY 1, 2009 – JUNE 30, 2010)

Appendix D

STATISTICAL DATA & INFORMATION

Alleged Bases for Filing a Charge *Charges may contain more than one alleged basis.	
Familial Status	**121**
Disability	**1,070**
Gender/ Pregnancy	**992**
Retaliation	**1,005**
Age	**653**
National Origin	**259**
Religion	**106**
Race/Color	**1,780**

Alleged Issues for Filing a Charge *Charges may contain more than one alleged issue.	
Advertising	45
Benefits	15
Constructive Discharge	156
Demotion	124
Discharge	1,699
Discipline	629
Exclusion	72
Harassment	756
Hiring	168
Housing Specific Issues	133
Intimidation	55
Lay Off	134
Maternity	31
Other	405
Promotion	154
Reasonable Accommodation	307
Recall	8
Reinstatement	5
Retire Involuntarily	3
Sexual Harassment	176
Suspension	99
Terms & Conditions	842
Training	12
Union Representation	20
Wages	58
Total	6,106

Appendix D