IN THE SUPREME COURT OF OHIO
Case No. 08-0315

ROBERT MEYER	)	
	)	
Plaintiff-Appellee	)	On Appeal from the Hamilton County Court of Appeals, First Appellate District
	)	
v.	)	
	)	Court of Appeals Case No. C-06-0772
UNITED PARCEL SERVICE, INC.,	)	
	)	
Defendant-Appellant	)	

BRIEF OF *AMICUS CURIAE* OHIO EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLEE ROBERT MEYER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Ohio Employment Lawyer's Association (OELA) is the statewide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment and civil rights matters. OELA is the only statewide 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. OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of men and women in the workplace. OELA strives for employee rights and workplace fairness, while promoting the highest standards of professionalism and ethics.

As an organization focused on protecting the interests of workers who are subjected to unlawful discrimination, including age discrimination, OELA has an abiding interest in maintaining the integrity of our system of civil adjudication of disputes and ensuring that the doors to the courthouse remain open to those who need and seek its protection. OELA is interested in this case because of the importance of deferring to the Legislature in matters involving the limitations periods for discrimination claims under R.C. 4112.99, and of adhering to the principles of *stare decisis*, which mandate following binding precedent that relates directly to the appropriate limitations periods for the various age-discrimination statutes contained in Chapter 4112.

To engraft onto R.C. 4112.99 a 180-day limitations period would ignore the plain language of R.C. 4112.99, which contains no such statute of limitations, and would force this Court to adopt a position that is wholly inconsistent with its prior decisions in *Morris v. Kaiser Engineers, Inc.* (1984), 14 Ohio St. 3d 45; *Cosgrove v. Williams of Cincinnati Mgmt. Co., Inc.*,

70 Ohio St. 3d 281, 1994-Ohio-295 (Pfeifer, J.); and its most recent pronouncement in *Leininger v. Pioneer National Latex*, 115 Ohio St. 3d 311, 2007-Ohio-4921 (Lanzinger, J.).

OELA is also interested in this case because of the potential danger in broadly applying the provisions of R.C. 4112.14(C), which preclude certain age-discrimination claims where an aggrieved employee has obtained, or could obtain, an arbitral remedy. Courts have routinely recognized the sanctity of the statutory right to be free from workplace discrimination, and have allowed administrative or contractual procedures to trump those rights in very narrow circumstances. To apply R.C. 4112.14(C) in the manner urged by Defendant-Appellant United Parcel Services, Inc., would broaden the scope of what should be a very narrow provision, and would thus compromise the rights of victims of age discrimination in Ohio to obtain the meaningful statutory remedy intended by the Ohio General Assembly.

STATEMENT OF THE CASE AND FACTS

OELA adopts the Statement of the Case and the Statement of Facts contained in the merit brief of Plaintiff-Appellee Robert Meyer.

ARGUMENT

I. THE ISSUE OF THE APPLICABLE STATUTE OF LIMITATIONS FOR AGE-DISCRIMINATION CLAIMS PLED UNDER R.C. 4112.99 IS NOT PROPERLY BEFORE THIS COURT BECAUSE THE RECORD IN THIS CASE DEMONSTRATES THAT, AS A MATTER OF LAW, MEYER FILED THIS CLAIM WITHIN 180 DAYS OF THE DATE HE WAS TERMINATED; TO RENDER AN OPINION ON THIS ISSUE IN THIS CASE WOULD BE TANTAMOUNT TO ISSUING AN ADVISORY OPINION.

While the issue of what limitations period is applicable to age discrimination claims brought pursuant to R.C. 4112.99 is an important issue to both employers and employees, it is not a justiciable issue here because of the procedural posture of this case. Plaintiff-Appellee Robert Meyer was terminated from his job on December 1, 2003.[1] He filed his initial complaint on May 7, 2004, well within 180 days of his termination.[2] Meyer's initial complaint alleged a claim for workers' compensation retaliation.

Subsequently, on July 15, 2005, Meyer amended his complaint to add, *inter alia*, an age-discrimination claim pled under R.C. 4112.99.[3] Although Defendant-Appellant United Parcel Service, Inc. ("UPS") opposed the amendment, the trial court allowed it and thus Meyer's age-discrimination claim "related back" to the original filing of his complaint under Civil Rule 15(C). Thus, as a matter of law, Meyer's age-discrimination claim was effectively filed on May 7, 2004, well within 180 days of his termination. OHIO R. CIV. P. 15(C).

In fact, in its Motion for Summary Judgment filed in May 2006, UPS did not challenge the timeliness of Meyer's age-discrimination claim, or the Court's ruling on the amendment.[4] UPS also failed to assign as error in its appeal to the First District Court of Appeals the trial court's ruling on the "relation back" issue. Thus, the Court of Appeals did not address the

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[1] *See* Defendant's Motion for Summary Judgment, filed on May 1, 2006.

[2] *See id.*

[3] *See id.*

[4] *See id.*

"relation back" issue, and passed only on the issue of the statute of limitations for age-discrimination claims brought under R.C. 4112.99.

As this Court has repeatedly recognized, "it is axiomatic . . . that issues not presented for consideration below will not be considered by this Court on appeal." *E.g., Shover v. Cordis Corp.* (1991), 61 Ohio St. 3d 213, 220, *overruled on other grounds by Collins v. Sotka* (1998), 81 Ohio St. 3d 506. Because it failed to address it in the Court of Appeals, UPS has not properly raised before this Court the issue of whether the trial court erred in finding that Meyer's amended complaint "related back" to his original filing. Accordingly, there is no dispute that Meyer's amended complaint with his age-discrimination claim "relates back" to his original complaint, which was filed within 180 days of his termination.

Because Meyer's age-discrimination claim was filed well within 180 days of his termination, his claim is timely regardless of whether the statute of limitations for age-discrimination claims brought under R.C. 4112.99 is 180 days or six years. Thus, in this case, the question of whether a 180-day, or a six-year, limitations period applies to age-discrimination claims brought under R.C. 4112.99 is merely hypothetical. As this Court has recently recognized, it is improper to "simply answer a hypothetical question for the sake of answering it," because to do so would "make this Court nothing more than an advisory board." *E.g., Ahmad v. AK Steel Corp.*, slip op., 2008-Ohio-4082 at ¶ 3 (O'Connor, J., concurring in the dismissal of the appeal as improvidently granted) (citing *Cascioli v. Cent. Mut. Ins. Co.* (1983), 4 Ohio St. 3d 179, 183, for the proposition that this Court does not render advisory opinions). Issuing an opinion on the statute-of-limitations issue in this case, on this record, would amount to this Court issuing an improper advisory opinion.

II. APPELLANT'S PROPOSITION OF LAW: IN ORDER TO PRESERVE THE DETAILED FRAMEWORK FOR AGE DISCRIMINATION CLAIMS THAT THE GENERAL ASSEMBLY ENACTED, AN AGE DISCRIMINATION CLAIM BROUGHT UNDER THE GENERAL LANGUAGE OF R.C. 4112.99 IS SUBJECT TO THE SUBSTANTIVE PROVISIONS OF R.C. 4112.02 AND 4112.14.

A. This Court's prior precedent – including its most recent pronouncement in *Leininger v. Pioneer National Latex* – and legislative actions dating back to 1995 lead to the inescapable conclusion that the appropriate limitations period for age-discrimination claims pled under R.C. 4112.99 is six years.

The Ohio Revised Code contains three statutory provisions under which a plaintiff can bring an age discrimination claim directly to court:[5]

(1) R.C. 4112.02(N), a specific statutory provision that explicitly prohibits discrimination in employment based upon age, and providing for a cause of action, to be filed within 180 days after the unlawful discriminatory practice occurred. OHIO REV. CODE ANN. § 4112.02(N) (Anderson 2008).

(2) R.C. 4112.14, a word-for-word re-codification of former R.C. 4101.17, and which contains a specific cause of action for age discrimination in the application for, and discharge from, employment. *Id.* § 4112.14.

(3) R.C. 4112.99, which this Court has interpreted to create a private cause of action for any violation of Ohio's anti-discrimination statutes. *Leininger v. Pioneer Nat'l Latex*, 115 Ohio St. 3d 311, 2007-Ohio-4921 (Lanzinger, J.); *Elek v. Huntington Nat'l Bank* (1991), 60 Ohio St. 3d 135.

At issue in this case is whether a claim for age discrimination brought under R.C. 4112.99 is subject to a 180-day statute of limitations, unlike other discrimination claims brought under this provision which are subject to a six-year statute of limitations. The express language of R.C. 4112.99 simply states, "[w]hoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief." OHIO REV. CODE ANN. § 4112.99 (Anderson 2008).

There is no express language in R.C. 4112.99 providing for a statute of limitations for any type of discrimination claim brought under it. This Court, in previous cases, has held that

[5] Additionally, pursuant to R.C. 4112.05(G), the Ohio Civil Rights Commission may issue a finding of discrimination upon any of the basis enumerated by statute, including age, and order appropriate relief.

anti-discrimination provisions – including relating to age discrimination – that do not contain an express limitations period are subject to a six-year statute of limitations. There is no reason for this Court to deviate from its prior holdings on the subject, or to add to R.C. 4112.99 language relating to the limitations period for age claims, which the General Assembly has not itself seen fit to include.

In its recent decision in *Leininger*, this Court recognized the differing provisions in Chapter 4112 specific to age discrimination, for purposes of analyzing the statutory remedies available for such claims. *See generally* 115 Ohio St. 3d 311, 2007-Ohio-4921 (Lanzinger, J.). In *Leininger*, the language of this Court's opinion evidences that it considers claims under R.C. 4112.02(N), 4112.14, and 4112.99 to be separate causes of actions. *See id.* at 318.

In fact, this Court rejected an argument that R.C. 4112.14 is a "more specific" statute than R.C. 4112.02 and 4112.99:

> Leininger maintains that we should consider only the remedies in R.C. 4114.14 because it is a more specific statute regarding age discrimination that prevails over the more general provisions of R.C. 4112.02 and 4112.99. ***We reject this argument.***

Id. at 318 (emphasis added). In rejecting the argument that the "specific" provisions of R.C. 4112.14 should trump the more "general" provisions of 4112.02 or 4112.99, this Court noted that "R.C. 4112.08 requires a liberal construction of R.C. Chapter 4112." *Id.* at 318.

Also in rejecting Leininger's argument, this Court admonished Leininger for "not tak[ing] into account the scope of R.C. 4112.99's remedies." *Id.* And, in a footnote, this Court noted that R.C. 4112.14 was the only avenue of relief available to Leininger at the time she filed her claim "due to the expiration of the statute of limitations for claims under R.C. 4112.02 and 4112.05." *Id.* at 318, n.4. If R.C. 4112.99 were not a separate basis for a claim of age discrimination, with a statute of limitations separate from that in R.C. 4112.02(N), then this

Court surely would not have characterized it in the manner it did in reaching its ultimate holding in the *Leininger* case.

These pronouncements in the *Leininger* decision are not mere *dicta*, as suggested by UPS and its *amicus*. *Obiter dictum* is "an opinion expressed by a court upon some question of law which is not necessary to the decision of the case before it." *E.g., Bachus v. Loral Corp.* (Oct. 2, 1991), 9th Dist. App. No. 15041, 1991 WL 199906 at *2. Rather, the portions of *Leininger* relating to the different causes of action for age discrimination under Chapter 4112 go to the very heart of the rationale underlying this Court's ultimate holding in the case.

The *Leininger* decision also recognizes this Court's prior holding in *Cosgrove v. Williams of Cincinnati Mgmt. Co., Inc.*, 70 Ohio St. 3d 281, 1994-Ohio-295 (Pfeifer, J.), which held that a six-year limitations period applies to claims brought under R.C. 4112.99. *See* 115 Ohio St. 3d at 319. The *Leininger* Court rejected an argument based on the "short" statute of limitations, and pointed out that the 180-day limitations period applies only to age-discrimination claims filed under R.C. 4112.02 and 4112.05. *See id.* This characterization of Chapter 4112 in a case directly involving age discrimination clearly indicates that the *Leininger* Court's view of the limitations period for ***all*** claims brought under R.C. 4112.99 is consistent with the *Cosgrove* holding.

In *Cosgrove*, this Court rejected the employer's argument that R.C. 4112.99 is a penalty provision that must be strictly construed, instead finding that the Legislature intended it to be a means to redress unlawful discrimination ***of any nature***:

> The simple substance of R.C. 4112.99 is that the General Assembly has statutorily created for those discriminated against the right to seek their own redress in a court of law for discriminatory wrongs done. R.C. 4112.99 provides a remedy rather than instituting a penalty, and its limitations period is thus controlled by R.C. 2305.07.

Id. at 285.

The *Cosgrove* Court also cited this Court's prior decision in *Morris v. Kaiser Engineers, Inc.* (1984), 14 Ohio St. 3d 45, where the issue was whether an age-discrimination claim brought under then-R.C. 4101.17 was subject to the 180-day limitations periods contained in R.C. 4112.02(N) and 4112.05. *See id.* at 283. The *Morris* Court rejected the employer's argument that the lack of an express limitations period in R.C. 4101.17 meant that the appropriate limitations period must be 180 days; instead, this Court held that the limitations period for claims under R.C. 4101.17 was six years. *See* (1984), 14 Ohio St. 3d 45, at paragraph 2 of the syllabus.

In *Morris*, the employer argued that R.C. 4101.17 must be read *in pari materia* with R.C. 4112.02(N) and 4112.05 to reach the conclusion that the Legislature intended a 180-day statute of limitations for age claims under R.C. 4101.17. *Id.* at 47. This Court handily rejected that argument as facile and misplaced. *Id.* ("This argument possesses superficial appeal . . . ."). Instead, as the *Morris* Court found, if the Legislature intended to limit the recovery period of R.C. 4101.17, as it had in other age-discrimination provisions, it would have done so:

> Had the legislature intended to further limit the recovery period of R.C. 4101.17, ***it would specifically have done so as it did with the two remaining avenues of age discrimination relief.*** Since the General Assembly expressed no such contrary intention this court holds that the statute of limitations applicable to an action for age discrimination in employment pursuant to R.C. 4101.17 is the six-year period contained in R.C. 2305.07.

Id. at 48 (emphasis added).

In fact, it was not until 10 years after the *Morris* decision, and one year after *Cosgrove*,[6] that the General Assembly turned its attention to R.C. 4101.17. Effective October 29, 1995, the Legislature moved R.C. 4101.17 into Chapter 4112 and re-numbered it as 4112.14. *See* OHIO REV. CODE ANN. § 4112.14, Historical & Statutory Notes (Anderson 2008) (referencing S.B.

[6] *Cosgrove* was decided on September 21, 1994.

162, 121st Gen. Assem. (1995)).[7] When it re-codified R.C. 4101.17 in 1995, the General Assembly could have changed the statutory text to add a specific limitations period in response to the *Morris* decision, but it chose not to do so. *Cf.* S.B. 162, 121st Gen. Assem. (1995); *South v. Toledo Edison Co.* (1986), 32 Ohio App. 3d 24, 27 (citing *State* ex rel. *County Bd. of Educ. v. Howard* (1957), 167 Ohio St. 93, 96 for the proposition that "[t]he legislature, in enacting amendments to existing statutory law, is presumed to be cognizant of prior judicial construction of that law."). At that point, the Legislature could also have included a limitations period in R.C. 4112.99, in response to the *Cosgrove* decision, but it chose not to. *Cf.* S.B. 162, 121st Gen. Assem. (1995).

It was not until 1997, in House Bill 350, that the Legislature attempted to specify a two-year statute of limitations for discrimination claims brought under R.C. 4112.02(N), 4112.14, and 4112.99. *See* H.B. 350, 121st Gen. Assem. (1996). However, House Bill 350 was held unconstitutional by this Court in *State* ex rel. *Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451. After that, to repeal House Bill 350, the Legislature amended R.C. 4112.14 to restore the original language of the statute, including deleting the reference to the two-year statute of limitations. *See* S.B. 108, 124th Gen. Assem. (2001). The 2001 legislation did not change anything about R.C. 4112.02(N) or 4112.99. *Cf. id.*

The decisions in *Morris* and *Cosgrove*, as well as legislative activity involving Chapter 4112 since those decisions, require this Court to find that the statute of limitations for an age-discrimination claim pled under R.C. 4112.99 is six years. As this Court noted in *Cosgrove*,

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[7] Subsequent to the Legislature's decision to move R.C. 4101.17 into Chapter 4112, Ohio courts, with virtual unanimity, have followed *Morris* and continued to apply a six-year limitations period to claims brought pursuant to R.C. 4112.14. *See, e.g., Ferraro v. BF Goodrich Co.*, 149 Ohio App.3d 301, 2002-Ohio-4398; *Leonardi v. Lawrence Indus., Inc.* (Sept. 4, 1997), 8th Dist. App. No. 72312, 1997 WL 547825; *Ziegler v. IBP Hog Market, Inc.* (6th Cir. 2001), 249 F.3d 509.

R.C. 4101.17 (now R.C. 4112.14) and R.C. 4112.99 are "directly analogous," and ultimately rejected the employer's argument that these provisions could not share the same statute of limitations. 70 Ohio St. 3d at 283 ("With respect to the issue in question, R.C. 4101.17 and 4112.99 are directly analogous. Both create civil recourse for employees injured by alleged discriminatory acts.").

If R.C. 4112.99 is more like R.C. 4112.14, then the six-year statute of limitations that applies to age-discrimination claims under R.C. 4112.14 must likewise apply to age-discrimination claims under R.C. 4112.99. This Court's precedent – starting with *Morris*, continuing with *Cosgrove*, and culminating in *Leininger* – establishes that a claim under R.C. 4112.99 is a separate and distinct cause of action, and that the limitations period for such a claim is the six-year period found in R.C. 2305.07. To hold otherwise would require this Court to seriously undermine, and possibly even overrule, its decisions in *Morris*, *Cosgrove*, and *Leininger*.

UPS and its *amicus* urge a result that contradicts not only this Court's well-settled precedent, but also the Legislature's intent. As the *Morris* Court recognized in the context of R.C. 4101.17 (which is now 4112.14), if the Legislature wanted to specify a statute of limitations for claims under R.C. 4112.99, or even if it wanted to carve out age-discrimination claims, then it certainly could do so. But, as the legislative history of Chapter 4112 – beginning in 1995 and continuing through 2001 – demonstrates, the General Assembly has done nothing to alter the limitations period for .99 claims – or for .14 claims for that matter.

In *Leininger*, this Court aptly recognized the impropriety of legislating from the bench on the matter of limitations periods:

> The period within which a claim must be brought . . . is a policy decision best left to the General Assembly.

115 Ohio St. 3d at 319. These words echo the concurring opinion in *Cosgrove*, which recognized the impropriety of this Court's choosing a limitations period for R.C. 4112.99, where the General Assembly expressly omitted one:

> The court, however, is not a political branch of government. We cannot choose a limitations period based on any political motivation. Nor can we speculate as to the limitations period that would be chosen by the General Assembly. Any such speculation, even under the guise of ascertaining legislative intent, would amount to an assumption of the legislative role of the General Assembly.

70 Ohio St. 3d at 292 (Resnick, J., concurring). Thus, Justice Resnick beseeched the Ohio Legislature to "reclaim this issue and resolve it on a legislative level." *Id.*

To adopt UPS's argument – and carve out of R.C. 4112.99 a 180-day limitations period for age claims only – would flout this Court's recent and historical pronouncements; would contradict the plain language of the statutory text; and would result in this Court inappropriately substituting its judgment for that of the General Assembly, as this Court itself has repeatedly recognized.

In arguing that Meyer's age-discrimination claim is untimely, UPS and their *amicus* rely principally upon this Court's decision in *Bellian v. Bicron Corp.*, 69 Ohio St. 3d 517, 1994-Ohio-339. In *Bellian*, this Court upheld the dismissal of a R.C. 4112.99 age-discrimination claim because the plaintiff did not comply with the 180-day statute of limitations set forth in R.C. 4112.02(N). The *Bellian* Court applied the 180-day limitations period from R.C. 4112.02(N) to a claim under R.C. 4112.99 because the "specific" limitations provision in R.C. 4112.02(N) governed the more "general" provisions of R.C. 4112.99, which do not contain a specific limitations period. *See generally* 69 Ohio St. 3d at 519-20.

However, *Bellian* was decided on June 29, 1994, before October 29, 1995, when the General Assembly moved R.C. 4101.17 into Chapter 4112 and numbered it as R.C. 4112.14. *See*

OHIO REV. CODE ANN. § 4112.14, Historical & Statutory Notes (Anderson 2008) (referencing S. 162, 121st Gen. Assem. (1995)). As this Court recently noted in *Leininger*, the statutory scheme for age-discrimination claims has changed since the mid-1990s. 115 Ohio St. 3d at 314, 2007-Ohio-4712 at ¶ 14.

Under the current statutory structure of Chapter 4112, there is no single, specific limitations provision relating to age discrimination. Unlike when *Bellian* was decided, there are now two specific age-discrimination provisions with conflicting limitations periods: R.C. 4112.02(N), with a 180-day limitations period, and R.C. 4112.14(B), with a six-year limitations period. Because there are now two specific age-discrimination statutes with different limitations periods, the reasoning underlying the *Bellian* decision is no longer applicable.

Other courts in Ohio have recognized that *Bellian* is no longer controlling. For example, in *Knepper v. The Ohio State University*, the Ohio Court of Claims, citing *Leininger*, rejected OSU's argument that an age claim under R.C. 4112.99 must be governed by a 180-day statute of limitations. *See* Case No. 2007-01851, 2008-Ohio-4796. According to the *Knepper* Court, "*Bellian* has . . . been superseded by statute." *Id.* at ¶ 17 (describing the re-codification of R.C. 4101.17 as 4112.14). The Court also noted that *Cosgrove* was decided "only months after *Bellian*" and thus is the controlling precedent. *See id.* (concluding that a six-year limitations period applies to age claims brought under R.C. 4112.99).[8]

Similarly, in *Compton v. Swan Super Cleaners*, the United States District Court for the Southern District of Ohio rejected an employer's reliance on *Bellian* for the proposition that age claims brought under R.C. 4112.99 must be filed within 180 days. *See generally* (S.D. Ohio

[8] Although the Court of Claims resolved the debate over the statute of limitations for private litigants, it ultimately concluded that Knepper's claim against the public university was subject to the two-year limitations period in R.C. 2743.16. *Knepper*, 2008-Ohio-4796 at ¶ 18.

April 29, 2008), Case No. 08-CV-0002, 2008 WL 1924251. The *Compton* Court also noted that the statutory change to Chapter 4112 incorporating R.C. 4112.14 "negated the primacy of § 4112.02(N)" in the *Bellian* decision. *See id.* at *3. As the *Compton* Court aptly recognized, because there are now two specific age-discrimination provisions within Chapter 4112, and which have different statutes of limitations, neither "trumps" the general provisions of R.C. 4112.99. *See id.*

Accordingly, the Ohio Employment Lawyers Association as *amicus curiae* urges this Court to hold that the applicable statute of limitations for all discrimination claims brought under R.C. 4112.99 – including age-discrimination claims – is six years.

B. The arbitration provision in R.C. 4112.14(C) cannot, by judicial fiat, be engrafted onto a separate claim pled under R.C. 4112.99; even if it could, R.C. 4112.14(C) should be construed narrowly to preclude discrimination claims only where there is truly an arbitral remedy procured or available.

UPS asks this Court to engraft onto the broad, general language of R.C. 4112.99's remedial provision the very specific arbitration language from R.C. 4112.14(C), and then use that language to preclude Meyer's age-discrimination claim because he grieved and arbitrated his termination from UPS. This is so despite the fact that the issue in the grievance and arbitration proceedings was whether Meyer engaged in dishonesty – not whether UPS engaged in age discrimination – and the fact that the arbitrator issued no substantive opinion in upholding Meyer's termination.

Adopting UPS's position would require this Court to ignore the plain language of R.C. 4112.14(C) and to ignore wide-ranging precedent – including its own – mandating a narrow view

of any attempt to allow non-statutory proceedings to trump the statutory rights contained in Chapter 4112.[9]

The plain language of R.C. 4112.14(C) states that arbitration precludes a claim under R.C. 4112.14(B) and the availability of remedies contained in R.C. 4112.02 through 4112.11:

> The cause of action described in division (B) of this section and any remedies available pursuant to sections 4112.02 to 4112.11 of the Revised Code shall not be available in the case of discharges where the employee has available to the employee the opportunity to arbitrate the discharge or where a discharge has been arbitrated and has been found to be for just cause.

OHIO REV. CODE ANN. § 4112.14(C) (Anderson 2008). Thus, by its own terms, R.C. 4114.14(C) applies to two types of claims: (1.) age-discrimination claims brought under R.C. 4112.14(B); and (2.) age-discrimination claims brought under the "remedial provisions" contained in R.C. 4112.01 to 4112.11. *Id.*

There are only two remedial provisions contained in R.C. 4112.01 to 4112.11: R.C. 4112.02(N), which provides for a civil suit; and R.C. 4112.05, which allows a complainant to file a charge of discrimination with the Ohio Civil Rights Commission, and allows an award of damages upon a finding that unlawful discrimination occurred. *See* OHIO REV. CODE ANN. §§ 4112.02(N); 4112.05 (Anderson 2008); *see also Luginbihl v. Milcor Ltd. Partnership*, 3d Dist. App. No. 1-01-162, 2002-Ohio-2188 at ¶¶ 36, 37.

In contrast, R.C. 4112.02(A) does not contain any remedial provisions; rather, it simply proscribes discrimination on the basis of, *inter alia*, age. *See* OHIO REV. CODE ANN. § 4112.02(A) (Anderson 2008). Rather, claims made under R.C. 4112.02(A) are enforced by the remedial provision contained in R.C. 4112.99. *See id.* § 4112.99; *see also Luginbihl*, 2002-Ohio-

[9] Even the Ohio Management Lawyers Associations, as *amicus curiae* in support of UPS, declined to advocate this position in its brief.

2188 at ¶ 36 ("Luginbihl is enforcing the 'thou shalt not discriminate' language of R.C. 4112.02 *through* an action brought pursuant to R.C. 4112.99.") (emphasis sic).

In this case, Meyer's cause of action arises under R.C. 4112.99, pursuant to which he sought a remedy for age discrimination in violation of R.C. 4112.02(A). Meyer's claim is not barred by the language of R.C. 4112.14(C) because it does not arise under 4112.14(B), 4112.02(N), or 4112.05, the remedial provisions referenced in the plain language of R.C. 4112.14(C).

In fact, in July 2008, this Court had occasion to consider R.C. 4112.14(C) and its potential application to ***certain*** age discrimination claims:

> Thus, for certain age discrimination claims, the General Assembly has expressed its intent to prefer arbitration over other remedies when arbitration is available.

Dworning v. Euclid, 119 Ohio St. 3d 83, 91, 2008-Ohio-3318. If, in reading and interpreting this provision, this Court believed that R.C. 4112.14(C) applied to ***all*** age claims under Chapter 4112, it would not have qualified its reach using the word "certain." Despite the plain language of the statute and this Court's interpretation of it, however, UPS urges this Court to step into the role of the General Assembly and add language to R.C. 4112.99 that simply is not there.

In addition, as this Court noted in *Dworning*, R.C. 4112.14(C) contemplates that the arbitration process actually provide a remedy to an employee seeking to vindicate his right to be free from age discrimination. Because arbitration itself – or even the availability of arbitration – may not always provide a remedy for age discrimination, R.C. 4112.14(C) must not be applied broadly to bar age-discrimination claims – including those brought under R.C. 4112.99 – in every instance where arbitration occurs, or is otherwise "available" to the employee.

In fact, courts have consistently acted cautiously in determining whether limited grievance or administrative mechanisms should trump statutory remedies that serve the dual

purposes of eradicating workplace discrimination as a whole, and providing relief to individual victims of discrimination. For example, in *Alexander v. Gardner-Denver Co.*, the United States Supreme Court refused to allow a grievance and arbitration procedure in a collective-bargaining agreement take precedence over the statutory rights conferred by Title VII. *See* (1974), 415 U.S. 36. After *Gardner-Denver*, the Supreme Court held that the parties to a collective-bargaining agreement may negotiate away the right to pursue discrimination claims in court and require that they be submitted to arbitration only by incorporating a "clear and unmistakable" waiver into the CBA. *See Wright v. Universal Maritime Serv. Corp.* (1998), 525 U.S. 70, 82 (Scalia, J.).

This Court has even refused to allow a "just cause" finding under a collective-bargaining agreement arbitration procedure to trump an employee's rights to receive statutory benefits under the Unemployment Compensation Act. *See Youghiogeny & Ohio Coal Co. v. Oszust* (1986), 23 Ohio St. 3d 39 (finding that the right to unemployment compensation is a "statutory right independent of the arbitration process"). And, in *Dworning*, this Court paid close attention to the pitfalls of forcing public employees to bring discrimination claims to a civil service commission as a prerequisite to filing suit directly in court: (1.) the short 10-day period in which to determine whether discrimination occurred; (2.) discrimination claims are not "encompassed within the broader determination of whether the discharge was for 'just cause' "; and (3.) a civil service commission's lack of expertise in handling discrimination matters. *See* 119 Ohio St. 3d. at 89-90.

Like the civil service setting, the collective-bargaining setting is fraught with challenges to an employee's ability to truly obtain a "remedy" for age discrimination via the grievance and arbitration process, as contemplated in R.C. 4112.14(C). As in the civil service milieu, a finding of "just cause" for discipline or discharge under a CBA does not determine whether the employer

was also motivated by an unlawful discriminatory purpose. *See, e.g., Hawaiian Airlines, Inc. v. Norris* (1994), 512 U.S. 246, 258-59; *Minnick v. Euclid*, 8th Dist. App. No. 81728, 2003-Ohio-5068 at ¶ 22. Likewise, a labor arbitrator's role and expertise is limited to enforcing and interpreting the terms of CBAs; he or she does not serve as a "public tribunal" to administer the "law of the land," but rather is charged only with administering the "law of the shop." *See, e.g., Alexander v. Gardner-Denver Co.* (1974), 415 U.S. 36, 58, n. 19.

Moreover, unless the CBA in question contains a "clear and unmistakable" waiver requiring bargaining unit members to submit discrimination claims to the grievance/arbitration process, there is no arbitral remedy "available" to the employee, as required under R.C. 4112.14(C). Even if a CBA does contain an appropriate waiver of the statutory right to pursue a discrimination claim directly, it is the union, not the employee, that has actual standing to initiate a grievance or arbitration proceeding. *See, e.g., Leon v. Boardman Twp.*, 100 Ohio St. 3d 355, at the syllabus, 2003-Ohio-6466[10]; *Hines v. Anchor Motor Freight, Inc.* (1976), 424 U.S. 554, 564; *Vaca v. Sipes* (1967), 386 U.S. 171, 182 ("The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.").[11]

In addition to lacking standing, bargaining unit members lack meaningful decision-making input or authority vis-à-vis whether to pursue their claims in grievance or arbitration proceedings. All discretion to pursue such remedies lies solely in the hands of the union. *See, e.g., Barrentine v. Arkansas Best Freight Sys.* (1981), 450 U.S. 728, 742; *Vaca*, 386 U.S. at 191-

[10] UPS itself has cited this case to argue, successfully, that a union employee lacks standing to challenge arbitration decisions where the union has pursued the arbitration on the employee's behalf. *See Rush v. United Parcel Servs.*, 9th Dist. App. No. 07-CA-0069, 2008-Ohio-1646, at ¶10.

[11] There is a fundamental difference between a collective-bargaining agreement negotiated by a union, and an arbitration agreement negotiated between an individual non-union employee and an employer, as was at issue in *Ignazio v. Clear Channel Broadcasting, Inc.*, 113 Ohio St. 3d 276, 2007-Ohio-1947.

92. Because the union holds all of the power to decide whether to arbitrate an employee's claim, the arbitral remedy may not actually be "available" to the employee, as contemplated under R.C. 4112.14(C). Thus, employees whose unions decide – unilaterally, in keeping with established principles of labor law – not to arbitrate their claims will effectively be precluded from seeking any statutory remedy for age discrimination under Chapter 4112. Under such circumstances, an employee has no remedy whatsoever, either arbitral or statutory. This result is inconsistent with the Legislature's mandate in construing Chapter 4112 liberally to effectuate its purposes of eradicating and remedying discrimination in all forms.

The result in Meyer's particular case illustrates precisely why the arbitration provision in R.C. 4112.14(C) should not be extended beyond its plain language to apply to claims under R.C. 4112.99. Meyer's case also demonstrates why R.C. 4112.14(C) should be construed narrowly in each case to determine whether an arbitral remedy was actually "available" or dispensed. The CBA between UPS and Meyer's union does not provide a mechanism for grieving or arbitrating discrimination claims; rather, the only proper subject of these proceedings is "any controversy, complaint, misunderstanding, or dispute arising as to interpretation, application or observance of any of the provisions of this Agreement . . . ."[12]

In addition, Meyer himself had no standing to initiate a grievance: "Grievance procedures may be invoked only by authorized Union or employer representatives."[13] Even if the Union were to invoke a grievance relating to age discrimination, the timeline in which to do so is only five days, even shorter than the timeline in *Dworning*. In fact, in this case, Meyer's Union did not arbitrate the issue of age discrimination; the only issue before the labor arbitrator

[12] Article V of the CBA. The CBA is attached as an exhibit to UPS's Motion for Summary Judgment.

[13] *Id.*

was whether Meyer was terminated for "just cause" for engaging in "dishonesty."

Thus, even if the Union had prevailed at the arbitration, it would not have procured a "remedy" for age discrimination that Meyer suffered. Rather, the arbitration would have established only that Meyer did not engage in dishonesty, as defined in the collective-bargaining agreement. Thus, even if R.C. 4112.14(C) were to apply to Meyer's .99 claim, he did not truly obtain, or have access to, an arbitral remedy for age discrimination.

If this Court were to hold that the arbitration bar in R.C. 4112.14(C) applies to age-discrimination claims pled under R.C. 4112.99, it would ignore not only the plain language of R.C. 4112.14(C) itself, but also the Legislature's mandate in R.C. 4112.08 to construe Chapter 4112 liberally to effectuate its purposes. And, in cases where CBAs contain language similar to the agreement between UPS and Meyer's Union, members of the collective-bargaining unit who are victims of age discrimination would have no meaningful remedy – in any forum.

Accordingly, the Ohio Employment Lawyers Association as *amicus curiae* urges this Court to reject the position advocated by UPS and decline to engraft onto claims brought under R.C. 4112.99 the arbitration clause that is specific to claims brought under R.C. 4112.14.

CONCLUSION

For all of the foregoing reasons, the Ohio Employment Lawyers Association as *amicus curiae* in support of Appellee Robert Meyer urges this Court to affirm the judgment of the First District Court of Appeals.

Respectfully submitted,

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