The Supreme Court of Ohio

CASE ANNOUNCEMENTS

April 16, 2021

[Cite as *04/16/2021 Case Announcements #3*, 2021-Ohio-1277.]

APPEALS NOT ACCEPTED FOR REVIEW

2021-0065. Fayak v. Univ. Hosps.
Cuyahoga App. No. 109279, 2020-Ohio-5512.
Donnelly, J., dissents, with an opinion.
Brunner, J., dissents.

DONNELLY, J., dissenting.

{¶ 1} This case presents an issue of great public interest: whether a private company can insulate itself from damages for sex discrimination and sexual harassment (among other things) by contractually shortening the time period within which an injured employee can bring suit.

{¶ 2} When appellant, Amanda Fayak, applied for a job with appellee University Hospitals Health System, Inc., she signed an employment application that included the following clause: "I agree that any claim or lawsuits relating to my service with University Hospitals * * * must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary."

{¶ 3} Fayak was hired to be a police officer with University Hospitals; two and a half years later, her employment was terminated. She filed a complaint in Cuyahoga County Common Pleas Court, alleging sex discrimination under R.C. Chapter 4112 and other claims, within the six-month period stated in the employment application. She voluntarily dismissed that complaint without prejudice and filed a new complaint that was outside the six-month period stated in the employment application but was within the otherwise applicable statute of limitations. The new

complaint alleged sex discrimination and sexual harassment under R.C. Chapter 4112, retaliation under R.C. Chapter 4112, invasion of privacy, and intentional infliction of emotional distress.

{¶ 4} The trial court granted the motion for summary judgment filed by University Hospitals and all other defendants based on the limitation language contained in the application contract. The court of appeals affirmed, relying in part on *Kraly v. Vannewkirk*, 69 Ohio St.3d 627, 635 N.E.2d 323 (1994). In *Kraly*, this court stated:

> "Generally, in the absence of a controlling statute to the contrary, *a provision in a contract may validly limit, as between the parties, the time for bringing an action on such contract to a period less than that prescribed in a general statute of limitations provided that the shorter period shall be a reasonable one.*"

(Emphasis added in *Kraly*.) *Id*. at 632, quoting *Colvin v. Globe Am. Cas. Co.*, 69 Ohio St.2d 293, 295, 432 N.E.2d 167 (1982) (plurality opinion), *overruled on other grounds, Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St.3d 619, 635 N.E.2d 317 (1994); *see also Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 608, 67 S.Ct. 1355, 91 L.Ed. 1687 (1947).

{¶ 5} Fayak has presented the following proposition of law:

> A Contractual provision which purports to impose a shortened six month limitation period in which a person may file a lawsuit alleging a violation of Chapter 4112 of the Ohio Revised Code is contrary to the public policy of the State of Ohio and is null and void as a matter of law.

{¶ 6} I offer no opinion on the merits of this proposition of law, but it is clear that it patently and obviously presents an issue that should be addressed by this court. Barring that, the existence of this issue should be made known to the public and the bar. This case has implications for persons in Ohio who apply for a job. It has implications for any company seeking to protect itself from lawsuits. It has implications for every lawyer who might be consulted by an aggrieved employee. It has implications, in short, for many, many Ohioans.

{¶ 7} Many striking facets of this case are apparent, even without the benefit of full briefing and access to the record. The most obvious is its presentation of the issue whether a shortened limitation period within which to bring a suit alleging sex discrimination and sexual harassment is against the public policy of this state. This concern applies generally and it also applies specifically based on the facts in this case. Another obvious concern is whether a shortened period within which to bring a suit alleging sex discrimination and sexual harassment is "reasonable," based on the standard set forth in *Kraly*, *Colvin*, and *Order of United Commercial Travelers*. What was reasonable in 1947 when the United States Supreme Court decided *Order of United Commercial Travelers* and given the insurance-policy context of that case (and of *Kraly* and *Colvin*) might not be reasonable in 2021, given the allegations of sex discrimination and sexual harassment that are present in this case. Another concern is the employment application itself—does that seem like a fair and proper way for a company to limit the future options, perhaps years in the future, of an employee who may have suffered grievous injuries? Might it be considered a contract of adhesion, unduly coercive, or in another way contrary to public policy?

{¶ 8} It is, at the least, ironic that in an era when victims of sexual harassment have assembled in a nationwide movement to say, "Time's Up," an employer could contractually escape civil liability for alleged sexual harassment and other alleged tortious conduct by saying, "time's up" to its employee, notwithstanding that the employee met a statute of limitations that is specifically prescribed by state law. But because a majority of this court declines to hear Fayak's case, consideration of these issues will have to wait for another day. I would accept her discretionary appeal to consider issues that have major legal implications for many Ohioans. I dissent.