IN THE COURT OF APPEALS OF OHIO
FIFTH APPELLATE DISTRICT

NURSING CARE MANAGEMENT OF AMERICA, INC. d/b/a PATASKALA OAKS CARE CENTER, Appellee, vs. OHIO CIVIL RIGHTS COMMISSION, Appellant.	)	C.A. CASE NO.: 08CA0030 ON APPEAL FROM THE LICKING COUNTY COURT OF COMMON PLEAS CASE NO.: 07CV0488

BRIEF OF *AMICUS CURIAE*
THE OHIO EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT OHIO CIVIL RIGHTS COMMISSION

ATTORNEY GENERAL OF OHIO
NANCY HARDIN RODGERS

PATRICK M. DULL (0064783)
ASSISTANT ATTORNEY GENERAL
Civil Rights Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 466-7900
Facsimile: (614) 466-2437
pdull@ag.state.oh.us

Counsel for Appellant

JON R. SECREST (0075445)
Dickerson Law Group
5003 Horizons Drive, Suite 200
Columbus, Ohio 43220
Telephone: (614) 339-5370
Facsimile: (614) 442-5942
jsecrest@dickerson-law.com

Counsel for Appellee

GREGORY A. GORDILLO (0063445)
GORDILLO & GORDILLO LLC
1370 Ontario Street #2000
Cleveland, Ohio 44113
Telephone: (216) 875-5500
Facsimile: (216) 583-0345
ggordillow@eeoattorney.com

Counsel for Amicus Curiae, the Ohio Employment Lawyers Association

LAW and ARGUMENT

I. Introduction.

The judgment below should be reversed. When an employer discharges an employee because of pregnancy, the employer violates the law against sex discrimination. Before Tiffany McFee qualified for her employer's medical leave benefit, she became pregnant and needed time off from work. So her employer, Defendant-Appellee Nursing Care Management of America d/b/a Pataskala Oaks Care Center ("Pataskala Oaks"), fired Ms. McFee. The Plaintiff-Appellant Ohio Civil Rights Commission ("OCRC") recognized that this was sex discrimination. But the court below reversed the OCRC's determination and dismissed the OCRC's complaint. The court below was wrong. This Court should reverse the error.

II. When An Employer Admits To Firing An Employee For Being Unable To Work While Pregnant, The Employer Admits To Sex Discrimination.

Under Ohio Revised Code Section 4112.02(A), an employer may not take adverse action against an employee "because of . . . sex." An adverse action taken because of pregnancy is taken because of sex. As clarified by R.C. 4112.01(B):

> the terms "because of sex" and "on the basis of sex" include but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of pregnancy, childbirth, or related medical conditions.

Nevertheless, Pataskala Oaks discharged Ms. McFee rather than permit her to take a medical leave required by her pregnancy.

A. The OCRC proved through direct evidence that Pataskala Oaks discharged Ms. McFee "because of sex."

Pataskala Oaks stipulated that it discharged Ms. McFee based on her pregnancy-caused incapacity to work. The stipulation proves sex discrimination through direct evidence. Direct evidence "refers to a method of proof, not a type of evidence. It means that a plaintiff may

establish a *prima facie* case of sex discrimination directly by presenting evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent."[1] "The crux of the direct method is not the type of evidence used, but that the evidence actually proves discriminatory intent."[2] Plainly, Pataskala Oaks's admission that it discharged Ms. McFee because she needed time off for her pregnancy in her first year of employment satisfies the direct evidence standard. The decision below should be reversed.

B. Adding a "comparator element" to a sex discrimination cause of action established by R.C. 4112.02(A) that contains no such element was wrong.

The court mistakenly concluded that "[t]he Commission incorrectly applied the statute, and failed to apply the proper analysis for a discrimination claim under R.C. 4112.02(A) the third element of which – that an employee similar in ability or inability to work was treated differently – could not be satisfied in this case." The court's threshold finding that R.C. 4112.02(A) contains a required 'comparator element' was wrong. First, the court relied on an inapposite standard of proof to require the OCRC to show that Ms. McFee was treated differently than another incapacitated employee that also was not yet qualified for the employer's leave benefit, but was not pregnant. Second, the court incorrectly interpreted the second portion of R.C. 4112.01(B) to engraft onto R.C. 4112.02(A) a limitation not intended by the General Assembly.

1. *Applying an indirect evidence standard to direct evidence of discrimination was contrary to law.*

The court below trespassed into an indirect evidence analysis. Citing a decision from the First District Court of Appeals,[3] the court below erroneously opined that the OCRC had to satisfy

[1] *Mauzy v. Kelly Services, Inc.*, 75 Ohio St. 3d 578, at paragraph 1 of the syllabus, 1996-Ohio-265.

[2] *Dobozy v. Gentek Bldg. Prods., Inc.*, (Nov. 22, 2000), 8th Dist. App. No. 77047, 2000 WL 1739230 at *3.

[3] *Hollingsworth v. Time Warner Cable* (2004), 157 Ohio App. 3d 539, 549.

the indirect evidence standard by showing that Ms. Mc Fee was: (1) pregnant; (2) discharged; and (3) treated differently than a nonpregnant employee similar in ability or inability to work.[4] This standard is also known as the *McDonnell Douglas* test.[5] It does not apply when direct evidence exists. As the Ohio Supreme Court has explained, "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination."[6] The OCRC had to prove only that Pataskala Oaks discharged Ms. McFee "because of sex." Requiring more than the Legislature and the Ohio Supreme Court require was an error this Court should reverse.

2. *Interpreting Chapter 4112's amended definitional statute to create a new element modifying and limiting the already existing sex discrimination cause of action established by R.C. 4112.02(A) was wrong.*

Holding that R.C. 4112.01(B) added to R.C. 4112.02(A) an element of proof more than merely showing that Ms. McFee was fired "because of sex" takes the law in a direction opposite to that required by the Legislature's intent and mandate. The lower court incorrectly opined that adding the comparator element to the OCRC's burden of proof was required by the second clause of R.C. 4112.01(B). The second clause provides:

> Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in the ability or inability to work. . . .

Contrary to the opinion below, this clause does not establish any liability element for pregnancy discrimination claims.

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[4] Opinion below at 3.

[5] The test is also known as the *Burdine* test. *See Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248.

[6] *Mauzy*, 75 Ohio St. 3d at 585 (citing *Trans World Airlines, Inc. v. Thurston* (1985), 469 U.S. 111, 121).

Copied "almost verbatim" into R.C. 4112.01(B),[7] the federal Pregnancy Discrimination Act[8] was enacted to correct a United States Supreme Court decision.[9] That decision failed to recognize that excluding benefits for pregnancy disability from an employer's health benefit plan is sex discrimination.[10] The second clause of the Act therefore merely illustrates how such sex discrimination may be remedied. Indeed, the United States Supreme Court declared:

> Rather than imposing a limitation on the remedial purpose of the PDA, we believe that the second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied. *Cf.* [*Newport News Shipbuilding Co.*,] 462 U.S. at 678, n. 14 ("The meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees"); *see also id*. at 462 U. S. 688 (REHNQUIST, J., dissenting).[11]

Reliance on either the *McDonnell-Douglas* test or R.C. 4112.01(B) to establish a "comparator" element of proof was wrong. The court below had no basis in the law for requiring the OCRC to prove not only that Pataskala Oaks discharged Ms. McFee because of her pregnancy, but also that the employer treated a comparative employee differently. Creating an unnecessary hurdle for the OCRC was a reversible error.

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[7] *Derungs v. Wal-Mart Stores, Inc*. (6th Cir. 2004), 374 F.3d 428, 436.

[8] 42 U.S.C. §2000e(k) (2007). In relevant part, the statute provides: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise."

[9] *General Electric Co. v. Gilbert* (1976), 429 U.S. 125.

[10] *Newport News Shipbuilding Co. v. EEOC* (1983), 462 U.S. 669, 676.

[11] *California Fed. Svgs & Loan Assn. v. Guerra* (1987), 479 U.S. 272, 285-86.

III. A Leave Policy That Permits Firing a Pregnant Employee for Being Pregnant Cannot Be a Legitimate Business Reason for Firing the Employee; the Policy Is an Affront to Statutorily Protected Family Values and the Right of Women to Enjoy Equal Opportunity in the Workforce.

A. An employer's leave policy that does not always accommodate pregnancy cannot provide a legitimate business reason to fire an employee because of sex.

The argument that discharging Ms. McFee was legitimate because she was not qualified for leave is without merit. When she became pregnant, her qualification for leave was established by the Ohio General Assembly. Pataskala Oaks had no power to create a policy that trumped the law.

Pataskala Oaks attempted to distinguish between discrimination based on pregnancy and discrimination based on incapacity to work. In effect, Pataskala Oaks claims it fired Ms. McFee because she was incapacitated, but not because she was pregnant.[12] In sex discrimination cases, however, pregnancy and pregnancy-related incapacity to work are indistinguishable.

That is because pregnancy and pregnancy-related incapacity have been uniquely defined by the Legislature as part of being female.[13] The principle that discrimination against pregnancy is discrimination against women has been succinctly summarized by the United States Court of Appeals for the Seventh Circuit:

> Discrimination on the basis of pregnancy is part of discrimination against women, and one of the stereotypes involved is that women are less desirable employees because they are liable to become pregnant. This was one of Congress' concerns in passing the Pregnancy Discrimination Act. *See Amending Title VII, Civil Rights Act of 1964,* S.Rep. No. 95-331, 95th Cong., 1st Sess. at 3 (1977); *Prohibition of Sex Discrimination Based on Pregnancy,* H.R.Rep. No. 95-948, 95th Cong ., 2d Sess. at 3 (1978) ("As the

[12] The irony of the argument made by Pataskala Oaks in asserting that a policy that permits discharging all incapacitated employees permits discharging pregnancy caused incapacitated employees is that this argument attempts to avoid pregnancy discrimination by throwing the baby out with the bath water.

[13] *See* OHIO REV. CODE ANN. § 4112.01(B) (Anderson 2008).

> testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace.").[14]

Furthermore, the United States Supreme Court has recognized that the Pregnancy Discrimination Act was intended specifically to protect family values and the right of women to simultaneously participate fully in family life and in the workplace:

> Rather than limiting existing Title VII principles and objectives, the PDA extends them to cover pregnancy. As Senator Williams, a sponsor of the Act, stated: "The entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life." 123 Cong. Rec. 29658 (1977).[15]

Undoubtedly, the Ohio General Assembly understood this intent and adopted it by enacting virtually the same pregnancy discrimination act statute. Indeed, the United States Court of Appeals for the Sixth Circuit has declared:

> Having incorporated the PDA's language almost verbatim into the definitional provisions of § 4112, it is clear to us that the Ohio Legislature was aware of the meaning and rationale of *Gilbert*, as well as being aware of the PDA. The Legislature made a conscious choice to extend the definition of discrimination to include pregnancy even though there cannot be a class of similarly situated males.[16]

The opinion below offends both family values and the Ohio General Assembly's mandate of equal opportunity in the workforce for women. The lower court failed to recognize that the statute requires embracing the fact that being pregnant or needing time off for pregnancy is

[14] *Sheehan v. Donlen Corp*. (7th Cir. 1999), 173 F.3d 1039, 1045

[15] *California Fed. Svgs & Loan Assn. v. Guerra* (1987), 479 U.S. 272, 288-89

[16] *Derungs v. Wal-Mart Stores, Inc.* (6th Cir. 2004), 374 F.3d. 428, 436.

indistinguishable from being female in the workplace. Failing to accommodate pregnancy is discrimination against women.

That is exactly what the First District Court of Appeals held:

> According to Ohio Adm.Code 4112-5-05(G)(5), if an employer has a leave policy, a female employee must be granted a reasonable leave on account of childbearing. If there is no leave policy, the employee must be provided a leave of absence for a reasonable period of time. Ohio Adm.Code 4112-5-05(G)(6).[17]

To the same effect, the Sixth District Court of Appeals held:

> The purpose of Ohio Adm.Code 4112-5-05(G)(2) and (6) is clearly to provide substantial equality of employment opportunity by prohibiting an employer from terminating a female worker because of pregnancy without offering her a leave of absence, even if no disability leave is available generally to employees.[18]

These authorities make clear that an employer's leave policy that does not expressly recognize and follow the Legislature's mandate by providing *all* female workers with reasonable pregnancy leave is no reason to absolve an employer from sex discrimination liability.[19] In fact, implementing the policy is sex discrimination.

B. The OCRC correctly ordered Pataskala Oaks to revise its one-year leave policy to accommodate all pregnant workers' need for leave.

The OCRC ordered Pataskala Oaks to revise its leave policy in accordance with the OCRC's Final Order. The essence of that part of the Order is:

> Pataskala Oaks is free to retain its one-year policy – except to the point that it conflicts with Ohio law. Pataskala Oaks' policy, when it provides 12 weeks of leave for employees who are unable to

[17] *McConaughy v. Boswell Oil* (1st Dist. 1998), 126 Ohio App. 3d 820, 829.

[18] *Frank v. Toledo Hosp.* (6th Dist. 1992), 84 Ohio App. 3d 610, 617.

[19] *See* OHIO ADMIN. CODE § 4112.05-05(G)(2) (2008) (terminating an employee because insufficient leave for pregnancy is available is unlawful sex discrimination); *but see Birchard v. Marc Glassman, Inc.*, 8th Dist. App. No. 82428, 2003-Ohio-4073 (holding – without acknowledging O.A.C. § 4112.05-05(G)(2) – that Ohio law does not require employers to accommodate pregnant employees unless similarly situated non-pregnant employees are accommodated); *Priest v. TFH-EB, Inc. d/b/a Electra Bore, Inc.* (10th Dist. 1998), 127 Ohio App. 3d 159 (same).

> work but denies the same leave to pregnant women who are also unable to work, is, to that extent, inconsistent with R.C. 4112.01(B).[20]

The court below erred in finding that "The Commission's interpretation of R.C. 4112.01(B) would mandate preferential treatment to pregnant employees over similarly disabled employees within the first year of employment under appellant's leave policy."[21] The conclusion is directly contrary to the law established by the United States Supreme Court.

The Court examined whether a California statute requiring employers to give pregnant workers unpaid leave and the right to return to their jobs constituted preferential treatment for women over men. Rejecting the argument for preferential treatment, the Court declared:

> Section 12945(b)(2) does not compel California employers to treat pregnant workers better than other disabled employees; it merely establishes benefits that employers must, at a minimum, provide to pregnant workers. Employers are free to give comparable benefits to other disabled employees, thereby treating "women affected by pregnancy" no better than "other persons not so affected but similar in their ability or inability to work."[22]

For the same reasons, the OCRC's interpretation of R.C. 4112.01(B) does not compel preferential treatment for women.

Moreover, the lower court was wrong in finding that Pataskala Oaks's "leave policy is not prohibited by R.C. 4112.01 *et seq.* or O.A.C. §4112-5-05(G)." Pataskala Oaks admits that it fired Ms. McFee because of her need for a pregnancy absence, and Pataskala Oaks's policy that Pataskala Oaks claimed *required* firing her. The policy therefore resulted in: (a) unlawfully firing Ms. McFee because of sex; and (b) directly violating R.C. 4112.02(A).

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[20] OCRC Order at 6.

[21] Opinion below at 5.

[22] *California Fed. Svgs & Loan Assn. v. Guerra* (1987), 479 U.S. 272, 291.

Pataskala Oaks also clearly violated a regulation promulgated by the OCRC to interpret 4112.02(A). As the Ohio Supreme Court has recognized, "[a]dministrative regulations issued pursuant to statutory authority have the force and effect of law."[23] O.A.C. 4112-5-05(G)(2) requires employers to provide employees with sufficient leave to accommodate pregnancy, and if insufficient leave is available, terminating the employee under the policy is unlawful:

> Where termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical condition is caused by an employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination.

That is precisely what happened to Ms. McFee.

Pataskala Oaks had a leave policy that did not provide Ms. McFee with sufficient leave for her pregnancy. The insufficient policy caused her termination. It was a plain violation of O.A.C. 4115-5-05(G)(2). It was unlawful sex discrimination, and the mistaken decision to the contrary by the court below should be reversed.

CONCLUSION

As *amicus curiae*, the Ohio Employment Lawyers Association does not suggest that the foregoing reasons are the only reasons to reverse the decision below. Instead, the foregoing reasons are merely highlights of the reasons why the lower court decision should be reversed. In any event, the Ohio Employment Lawyers Association urges this Court to reverse the decision of the court below and enter judgment in accordance with the Final Order of the Ohio Civil Rights Commission issued in connection with Ohio Civil Rights Commission Complaint 9816.

[23] *Lyden Co. v. Tracy*, 76 Ohio St. 3d 66, 69, 1996-Ohio-112.

Respectfully Submitted,

GREGORY A. GORDILLO (0063445)
Gordillo & Gordillo, LLC
1370 Ontario Street
2000 Standard Building
Cleveland, Ohio 44113
(216) 875-5500 (Telephone)
(216) 583-0345 (Facsimile)

Counsel for Amicus Curiae
Ohio Employment Lawyers Association

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of June 2008, a copy of the foregoing was sent, via regular U.S. mail, postage pre-paid, to:

ATTORNEY GENERAL OF OHIO
NANCY HARDIN RODGERS

PATRICK M. DULL (0064783)
ASSISTANT ATTORNEY GENERAL
Civil Rights Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215-3428

Counsel for Plaintiff-Appellant

JON R. SECREST (0075445)
DICKERSON LAW GROUP
5003 Horizons Drive, Suite 200
Columbus, Ohio 43220

Counsel for Defendant-Appellee

_____
GREGORY A. GORDILLO