# MEMORANDUM

## *BEFORE THE HOUSE CIVIL JUSTICE COMMITTEE*
## *PROPONENT TESTIMONY ON HOUSE BILL 352*

Chairman Hambley, Vice Chair Patton, Ranking Member Brown, and members of the House Civil Justice Committee, thank you for the opportunity to provide testimony in support of House Bill 352 (HB 352). My name is Steve Loewengart and I am the Regional Managing Partner for the Columbus office of the law firm Fisher Phillips.

At Fisher Phillips we are on the front lines of workplace law and have 35 offices across the country, which gives us a unique perspective on the federal and state employment and labor laws throughout the United States. We are devoted to counseling employers in all areas of the law that touch businesses from wage and hour complaints and employee benefits to employment discrimination and pay equity. I have focused my 32 years in the practice of law on these labor and employment issues and currently serve on the American Bar Association's and Columbus Bar Association's Labor and Employment Law Sections.

We also engage with lawmakers for the betterment of Ohio's business community through our government affairs attorneys and as active members of the Ohio Chamber of Commerce whose lobbyists seek our counsel on a range of employment issues.

My testimony today is in support of HB 352 and I will be sharing with the committee why returning legislative control to the definition of an employer is needed. As the witnesses before me have stated, HB 352 makes reasonable and prudent cost-effective reforms to Ohio's anti-discrimination laws in order to bring Ohio in line with federal law and the workplace anti-discrimination laws of other states. In HB 352, the definition of employer is amended to clarify that supervisors, managers, or other employees are not considered an employer for purposes of Ohio's workplace anti-discrimination laws.

Unlike in federal law and the laws of most states, Ohio's supervisors and managers are in an undesirable position of being personally liable for acts of discrimination in the workplace even when they did not engage or aid in any discrimination. This result is not due to legislative action, but instead it is the consequence of an Ohio Supreme Court decision in 1999 – *Genaro v. Central Transport* – where a majority of the Justices concluded the statutory definition of an employer under RC 4112 included managerial employees despite no reference to these employees in the statute.

In a step in the right direction, the Ohio Supreme Court lifted personal liability for public supervisors in a recent 2014 decision – *Hauser v. Dayton Police Dept*. – but now an uneven playing field exists since public and private supervisors are subjected to varying liability for acts of discrimination. In addition to the testimony of the witnesses before me, there are several other reasons why this Committee should support leveling that playing field.

First, plaintiffs sometimes use the maneuver of alleging personal liability against a supervisor simply as an attempt to defeat diversity jurisdiction and removal of an action from state court to federal court. This maneuver deprives employers, and even plaintiffs for that matter, from having actions decided by federal judges who are well-versed in interpreting the large body of case law on Title VII, which contains the federal workplace anti-discrimination laws. Given that the federal case law on Title VII is often used to interpret Ohio's workplace anti-discrimination laws and that most employment cases are heard in federal court, lifting personal liability for private supervisors is critical to removing a merely strategic jurisdictional impediment that can prevent actions from being decided on their merits and in a manner that is consistent with federal and state anti-discrimination case law. This would benefit all parties to an action.

Second, to the extent that anyone on the Committee has any reservations about this component of HB 352 premised upon a desire to ensure that perpetrators are held accountable, HB 352 certainly does nothing to thwart that worthy desire. To be sure, individuals who are victims of intentional discrimination or harassment already have a host of claims available against individual perpetrators, including, to name just a few, assault, battery, intentional infliction of emotional distress, invasion of privacy, and defamation. These civil causes of action are, of course, in addition to potential criminal penalties that individuals can seek for the most appalling forms of misconduct. Such civil and criminal remedies available against all individuals, whether a supervisor or not, are sufficient tools to help stamp out discrimination and harassment.

Finally, eliminating supervisor liability from RC 4112 will allow supervisors to effectively perform their jobs. The day-to-day personnel management in most workplaces is often assigned to frontline supervisory staff. When it comes time to make decisions about the terms and conditions of employment, the ultimate decision-makers thus will necessarily rely on feedback from these frontline supervisors – they are, after all, oftentimes more knowledgeable about employee performance, attendance, disciplinary issues and the like. When these supervisors know that they could face personal liability for the ultimate decisions of their employer, they may limit their interactions with some of their direct reports or they may be less likely to give candid and frank feedback regarding employees. Such exclusionary reactions are not only unfortunate, but they also undermine forward progress to rooting out discrimination and harassment in the workplace.

HB 352 takes a balanced approach to amending the definition of an employer and removing personal liability for managerial employees by only removing a supervisor's liability when that individual does not engage or aid in any discriminatory act. That exception accounts for the interests of employees and keeps supervisors and managers legally responsible when they engage in discriminatory behavior.

In closing, HB 352 strikes the appropriate balance of reform to Ohio's workplace discrimination laws that will create a better business climate and protect important interests of employees. Also, clarifying the definition of an employer for purposes of workplace discrimination will restore the legislature's control over the definition and will align Ohio's definition with the majority of other states and federal law. I urge you favorably report HB 352 out of this committee.