BEFORE THE HOUSE CIVIL JUSTICE COMMITTEE
PROPONENT TESTIMONY ON HOUSE BILL 352
Wednesday, December 9, 2020

Chairman Eklund, Vice Chair Manning, Ranking Member Thomas, and members of the Senate Judiciary Committee, thank you for the opportunity to provide testimony in support of House Bill 352 (HB 352). My name is Joe D'Andrea and I am an employment attorney with the law firm Squire Patton Boogs (US) LLP.

Squire Patton Boggs is a full-service global law firm with more than 1,500 lawyers in 44 offices in 19 countries, with 16 of those offices in the United States. Our clients include public and private businesses, individuals, and local, state, and national governments.

I am here today in support of HB 352, specifically to highlight two components of the bill: (1) codifying the *Faragher-Ellerth* affirmative defense; and (2) making the statute of limitations for Ohio's age discrimination claims congruent with that of the other causes of action in RC 4112.

The *Faragher-Ellerth* Affirmative Defense

First established by two decisions the US Supreme Court simultaneously issued in 1998—*Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)—this affirmative defense has existed in federal law for over twenty years.

The *Faragher-Ellerth* defense has two elements that must be satisfied for an employer to properly assert it in defense to a claim of sexual harassment. First, the employer must show that it exercised reasonable care to prevent sexual harassment, that it promptly investigated the employee's complaints thereof, and that it swiftly corrected any violations of law and/or policy related to the harassing behavior. Second, the employer must show the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or otherwise avoid the harm.

This affirmative defense is widely accepted across the country because it strikes the right balance between incentivizing employers to have and enforce robust anti-harassment policies while enhancing and fully protecting the employee's right to a harassment-free workplace. To meet the "reasonable care" standard in the first element, employers are required to take *proactive* steps not only to have anti-harassment policies, but to educate supervisors and employees of their rights and obligations under those policies and the law. Further, the second element incentivizes employers to make their reporting procedures as accessible and straightforward as possible. As a labor and employment attorney who has written many of these policies and has conducted trainings for clients across the country, it is surprising to see how much employees and supervisors learn when they have the benefit of interactive training and are able to ask questions from an experienced professional in the field. These education measures by employers are the best prevention to sexual harassment.

Further, this affirmative defense does not diminish the rights of an aggrieved employee. HB 352 places the burden on the employer to raise and prove the defense, which limits its impact to only those circumstances where the employee *unreasonably* failed to avoid the harm or take advantage of preventive or corrective opportunities provided by the employer. This is only fair as the employee needs to put the employer on notice so it can take steps to stop and prevent future harassment. Also, the affirmative defense, by its own terms, does not apply if any workplace harassment resulted in a tangible employment action against the employee. This not only protects the employee in litigation if he or she

suffered a demotion or other adverse job action as a result of the harassment, it also serves as a preventative measure to discourage retaliation against individuals who report sexual harassment in the workplace.

Harmonizing the Enforcement Scheme and Statute of Limitations for
Age Discrimination with that of other RC 4112 Claims

In addition to the affirmative defense, HB 352 modifies the enforcement mechanism and the statute of limitations for Ohio's age discrimination statute into line with all other discrimination claims under 4112. As it currently stands, all claims under the Ohio Civil Rights Act alleging discrimination based upon any protected classes – except for age – have the same statutory enforcement scheme and have the same 6-year statute of limitations.

As it currently stands, an employee claiming discrimination on any basis (other than age) can file a charge of discrimination with the Ohio Civil Rights Commission under R.C. 4112.05, may proceed straight to Court under R.C. 4112.99, or may do both. Age discrimination, however, is different. Under R.C. 4112.02(L), an individual alleging age discrimination has only 180 days to file suit in court. And if the individual chooses to file suit, he or she foregoes the right to file a charge with the Ohio Civil Rights Commission or filing a claim under RC 4112.14. Further, depending on which statute a plaintiff chooses, he or she may have inadvertently waived the right to a jury trial or limited his/her access to certain remedies.

To be clear, we are not advocating that these confusing and conflicting enforcement avenues be maintained or applied to other claims of discrimination. We are simply highlighting the fact that, as to age discrimination, the current statutory scheme is a mess. It does not serve an older worker to have a statutory scheme that no one—not even lawyers who practice in this area—understand.

HB 352 improves Ohio's business climate by correcting this confusion caused by Ohio's current process. First, under HB 352, filing a workplace age discrimination claim that seeks more than injunctive relief will happen exclusively under RC 4112.14 or 4112.02(A), and the choice will remain with the plaintiff as to which statute he or she wants to use to pursue the claim. If the plaintiff only pursues injunctive relief, he/she will file the claim under RC 4112.052.

Second, under HB 352, age discrimination claims will be subject to the same 2-year statute of limitation and administrative exhaustion requirements at the Ohio Civil Rights Commission like all other workplace discrimination claims.

This new process will lead to fairer outcomes for all parties involved, and employees will not risk inadvertently waiving their right to administrative remedies.

I urge your favorable consideration of HB 352 because the legislation before the Committee today makes important changes to the law that will help employers and employees have greater certainty of the laws that govern and protect them.

Thank you for the opportunity to testify, and I can answer any questions from the Committee.