BEFORE THE HOUSE ECONOMIC DEVELOPMENT, COMMERCE, & LABOR
PROPONENT TESTIMONY ON HB 2
Tuesday, February 21, 2017

Chairman Young, Vice Chairman DeVitis, Ranking Member Lepore-Hagan, and members of the House Economic Development, Commerce, and Labor committee, thank you for the opportunity to provide proponent testimony on House Bill 2 (HB 2), the Employment Law Uniformity Act. My name is Don Boyd and I am the Director of Labor and Legal Affairs for the Ohio Chamber of Commerce.

The Ohio Chamber is the state's leading business advocate, and we represent nearly 8,000 companies that do business in Ohio. Our mission is to aggressively champion free enterprise, economic competitiveness and growth for the benefit of all Ohioans. The Ohio Chamber of Commerce is a champion for Ohio business so our state enjoys economic growth and prosperity.

I am joined by Jan Hensel who is chair of the Ohio Chamber's Labor and Employment Committee. Jan is a partner at Columbus office of Dinsmore & Shohl, LLP and has over twenty years of employment litigation experience. The mission statement of the Ohio Chamber's Employment Law Committee is to support employment law reforms that are fair to both employers and employees that simplify Ohio's employment law statute and eliminates frivolous lawsuits filed against employers for such claims.

Overview

Drastically differing state and federal employment laws create an administrative burden and uncertainty for employers and human resources professionals and put Ohio's businesses at a competitive disadvantage. HB 2 remedies these issues by more closely aligning state employment discrimination laws with those at the federal level. This improves Ohio's legal climate and economic competitiveness. It will allow for the timely, fair, and efficient resolution of claims for both employers and employees. Further, it would create better predictability in these types of cases which allows for reasonable settlement discussions and a more economical use of resources.

Reasonable Statute of Limitations & Efficient Filing Procedure

Right now, Ohio has the nation's longest statute of limitation on civil actions for employment discrimination – six years. With respect to Ohio Civil Rights Commission (OCRC) claims, current law provides 180 days to file a claim. HB 2 would create a universal one-year statute of limitations for both civil actions and OCRC claims.

Ohio's statute of limitations for employment discrimination claims was set at six years not by the legislature but by the Supreme Court of Ohio in the *Cosgrove v. Williamsburg of Cincinnati Management Company, Inc.*, 70 Ohio St. 3d 281 (1994), case. The Supreme Court of Ohio created a number of new causes of action in the early 1990's and thus needed to also create a statute of limitation for these actions since none was in statute. The court settled on six years. In her concurrence opinion, Justice Alice Robie Resnick stated:

> "Yet, in light of the general contour of R.C. Chapter 4112, it appears to me that the General Assembly would probably not opt for a six-year statute of limitations. It also appears, however, that it would not opt for a one-hundred-eighty-day statute of limitations as it did in the more specific provisions. In providing in R.C. 4112.99 for what is in essence a remedy, yet retaining the .99 designation, it may be that the General Assembly intended for the one-year statute of limitations set forth in R.C. 2305.11(A) to apply. Or it may be that the legislature did not consider the issue and, if it had, would have opted for something in between.
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> ***In any event, the decision is, in the first instance, a political one that should not be left to the judiciary. Accordingly, I beseech the General Assembly to reclaim this issue and resolve it on a legislative level.***" (Emphasis Added). *Cosgrove v. Williamsburg of Cincinnati Management Company, Inc.*

Twenty-two years later, the General Assembly has still not reclaimed this issue nor resolved it on a legislative level.

Federal law under Title VII requires exhaustion of administrative remedies prior to filing a lawsuit. Thus, an individual is required to file a charge the Equal Employment Opportunity Commission (EEOC) prior to filing a federal lawsuit. The statute of limitation to file a charge with the EEOC is 300 days. This is ***less than*** what is proposed under HB 2. Many states have a one to two year statute of limitation for employment discrimination type claims and some states requires exhaustion of state administrative remedies prior to a civil lawsuit, which Ohio does not require.

HB 2 would ***extend*** the timeframe for employees to file a claim with the OCRC from 180 days to one year. This one-year statute of limitation would be uniform for all types of employment discrimination and would apply to both civil actions and OCRC claims. However, HB 2 goes even further in trying to accommodate employees in alleged cases of discrimination. If an employee first files a claim with the OCRC, the statute of limitation for a civil action is tolled until the OCRC process is completed. Thus, if an employee files a claim with the OCRC on day 200, once the process is complete, the employee would have 165 days to file a civil action. The OCRC claims process must be completed within one year. Essentially, a person could have up to a maximum of two years to file a civil lawsuit.

Preventing simultaneous claims in both the OCRC and civil court saves money and resources for employers and the state. If the OCRC is expending resources investigating and pursuing a claim filed by an individual, that individual should go through the process to completion. Additionally, it prevents employers from having to defend in both venues at the same time. This allows time for mediation through the OCRC and for the OCRC to fully investigate the claim rather than wasting resources, and providing free discovery for plaintiffs' attorneys, when an individual is filing a civil case at the same time.

Once again, a six-year statute of limitation, set by the Court and not the legislature, is unfair, a burden on businesses, and out of line with federal law. Business must maintain six years' worth of employee

records after a termination that adds both business and logistical costs. Further, in the event a claim is filed six years after the alleged discriminatory event, memories fade, employees move on, and managers leave. Having employees file a claim within a year, or up to two years if they file with the OCRC first, is reasonable. Simply stated, setting the statute of limitations at one year helps create a more competitive and fair legal environment in Ohio. HB 2 takes back legislative control of the employment discrimination statutes by setting a reasonable one-year statute of limitations, improving Ohio's legal environment.

Individual Supervisor Liability

The intent of state and federal employment discrimination laws is to hold employers vicariously liable for the acts and omissions of employees. Individual supervisor liability did not exist in Ohio prior to the 1999 Ohio Supreme Court case titled *Genaro v. Cent. Transport, Inc.,* 84 Ohio St.3d 293 (1999). In this case, the Ohio Supreme Court, which had a significantly different judicial composition that its current makeup, extended Ohio's employment discrimination laws beyond the original intent by allowing plaintiffs to sue individual supervisors, in addition to the employer, for discrimination.

Today, many plaintiffs name multiple coworkers and supervisors, along with the employer, to pressure settlement and create conflict between the employer and its supervisors. Further, many plaintiffs' attorneys also play games with the justice system by naming individual supervisors as a legal tactic to prevent an employer from removing the case to federal court. As you will hear in later testimony, there are examples of plaintiffs' attorneys sending letters to multiple managers and supervisors bullying them into settlements and attempting to create conflict between the supervisors and the employer. Complicating matters further, the Ohio Supreme Court eliminated individual supervisor liability for public employers in the 2014 case *Hauser v. Dayton Police Dept.,* 140 Ohio St.3d 266 (2014). This has left a discrepancy between Ohio law and federal law and also between how private and public employers are treated within Ohio.

Under HB 2, as in federal law, *see Wathen v. GE*, 115 F.3d 400 (6th Cir. 1997), individual supervisors or managers could not be held personally liable under the employment law statutes when that individual is acting in the interest of an employer (unless that individual is the employer). This will allow supervisors and managers to exercise sound judgment without fear of being sued when making management decisions on matters such as employee discipline or termination.

Opponents often charge that, with the elimination of supervisor liability, sexual harassers will be "off the hook" for illegal behavior or that they are being granted immunity. This is wholly inaccurate. The purpose of anti-discrimination law is to protect employees from the effects of discrimination on their jobs. Nothing in this bill prevents an employee from taking civil action or filing an OCRC claim under discrimination laws. In the event that a supervisor would commit an egregious act of harassment, remedies exist under other laws and are not impacted by HB 2 such as tort claims like assault, battery, and emotional distress. This is not to mention the criminal charges that could be pursued. HB 2 aligns Ohio law with its original intent and federal law by eliminating individual supervisor liability while maintaining employees' ability to hold employers vicariously liable for the actions of supervisors.

Fix Age Discrimination Claims

Age discrimination in Ohio is a mess, which creates unnecessary complications and confusion for employers and employees. Unlike all other discrimination claims under Ohio law, age discrimination claims currently have multiple avenues of redress with different remedies and limitation periods. The Employment Law Uniformity Act changes the law governing age discrimination claims so they are

consistent with all other types of discrimination claims, and subject to the same remedies and statutes of limitation. HB 2 unifies age discrimination claims with all other types of employment discrimination bringing much-needed clarity to age discrimination claims.

Affirmative Defense

In an effort to incentivize employers to have robust protections and policies for handling claims of hostile work environment harassment discrimination, HB 2 creates an affirmative defense under certain conditions where an employer can show that it had policies and procedures in place and the employee failed to take advantage of these policies. Specifically, HB 2 grants an employer the ability to raise an affirmative defense if it can prove ***all of the following:***

- that it had an effective discrimination policy,
- properly educated employees about the policy and complaint procedures,
- exercised reasonable care to prevent or promptly correct an unlawful discriminatory practice, and
- that the complainant failed to take advantage of any preventative or corrective opportunities.

The Employment Law Uniformity Act provides exceptions in the event a complainant can prove that taking preventative or corrective action would have failed or would have been futile. Also, the affirmative defense cannot be used when the alleged unlawful discriminatory action resulted in adverse, tangible employment action against the complainant, such as failure to hire or promote, firing, or demotion. HB 2 provides an affirmative defense that will incentivize employers to have extensive policies in place to handle these claims early and encourage employees to take advantage of those policies.

Conclusion

Ohio remains at competitive disadvantage under employment discrimination laws that are woefully out of line with their counterparts at the federal level and in other states. Businesses in Ohio are hampered by a cumbersome statute of limitations that creates costly recordkeeping expenses for businesses and prevents timely, fair, and efficient resolution of claims for both employers and employees. In addition, supervisors are forced to second-guess otherwise-sound management decisions for fear of being held personally liable in a lawsuit.

Shaping Ohio law to mirror federal law as much as possible will create greater predictability for both employers and employees in matters of alleged workplace discrimination. HB 2, the Employment Law Uniformity Act, seeks to maintain robust protection for Ohio employees from discrimination in the workplace while also increasing uniformity between state and federal discrimination laws and improving predictability, stability, and efficiency for Ohio employers.

We urge you to support HB 2. Thank you for the opportunity to provide this testimony and we would be happy to answer any questions you may have at this time.