OHIO ALLIANCE FOR CIVIL JUSTICE

## OHIO ALLIANCE FOR CIVIL JUSTICE LETTER IN SUPPORT OF H.B. 2

The Ohio Alliance for Civil Justice was founded in the mid-1980s and has been dedicated to stopping lawsuit abuse and promoting a common-sense civil justice system in Ohio. The Alliance is comprised of representatives of several Ohio trade and professional associations, small and large businesses, medical groups, farmers, non-profit organizations and local government associations. The membership includes but is not limited to the National Federation of Independent Businesses of Ohio, the Ohio Chamber of Commerce, the Ohio Manufacturers' Association, the Ohio Council of Retail Merchants, the Ohio State Medical Association, the Ohio Society of CPAs, and the Ohio Hospital Association, to name a few.

H.B. 2 is much-needed in Ohio:

- First, it will promote a standardized way of handling discrimination clams, thus promoting consistency and predictability.
- Second, it limits forum shopping.
- Third, it limits the use of Ohio's individual-claim anomaly, often used merely to harass and humiliate individuals and force settlements.
- Fourth, it will allow the state to effectively use taxpayer dollars to limit duplicative administrative charges and lawsuits.

## H.B. 2 HELPS AVOID OUTLIERS AND PROMOTES MORE CONSISTENT LITIGATION OUTCOMES

There are notable differences between state and federal employment laws. One such difference is that under Ohio law, several different laws trigger age discrimination claims. And although Ohio's current statute of limitations for most claims is six years, one of the longest in the country, age is specifically carved out of that and is limited to six months. This makes no sense. The proposal for a one-year statute of limitations would eliminate confusion and level the playing field.

Another difference between state and federal law is the way the term "employer" is defined to determine who can be liable. The federal Southern District of Ohio and Sixth Circuit Court of Appeals have ruled that an "employer" is a company, not an individual: "The Sixth Circuit [ ] determined that an individual employee / supervisor may not be held personally liable under Title VII" [the federal workplace non-discrimination law.] *Wathen v. General Electric Co.*, 115 F.3d 400 (6th Cir. 1997)

However, in 1999, the Ohio Supreme Court in *Genaro v. Cent. Transport, Inc*., 84 Ohio St.3d 293 (1999), held that an "employer" under Ohio Revised Code 4112.02, the corollary to Title VII, should include any "person acting directly **or indirectly** in the interest of an employer", a much broader meaning. Even if the Court really only intended to hold decision-makers liable, an entry-level HR generalist who has sat in on a disciplinary or termination meeting but was not directly involved in a decision could be personally liable.

Why is this result a problem? A supervisor could theoretically have a judgment brought against her and risk losing her home or other personal property. Good people might be dis-incented from accepting promotions if they thought about the legal risk. The reality is that if there is liability, a company is the deep pocket, not an individual. Interestingly, in 2014, the Ohio Supreme Court expressly carved out **public-sector managers** from the individual-liability provision.

The *Genaro* case includes a dissent from Justice Lundberg Stratton, specifically calling for the General Assembly to remedy R.C. 4112.02(A) if its intent was to burden individual employees with potential liability.

Other states have specifically defined "employer" to not include individuals, or, to the contrary, to expressly include agents of the employer within this definition. The Ohio Revised Code demands more statutory clarity.

Anecdotally, opponents have claimed that carving out individuals means giving a free pass to "bad actors", but opponents conveniently disregard that an individual can still be liable for **intentional acts**, including **civil assault**, **battery**, and **indecent exposure**, not to mention **criminal prosecution**, depending on the complained-of acts. Limiting individual liability will also not preclude plaintiffs from stating claims for **negligent retention** or **negligent supervision** against an employer that knowingly retains someone who has taken unlawful actions against a plaintiff.

## H.B. 2 LIMITS FORUM SHOPPING

This legislation is designed to curb forum shopping. Often, we see plaintiffs' counsel choosing a forum, just based on the length of a statute of limitations, whether an individual can be named, or damage caps. This type of effort, in turn, increases the cost of defense, particularly for the company that indemnifies or pays for the individual or individuals to secure separate counsel.

## H.B. 2 LEVELS THE PLAYING FIELD

Ohio's six-year statute of limitations is the longest in the country. Ohio's statute of limitations results specifically as the legislature had not expressly enacted a statute of limitations for employment claims. In *Cosgrove v. Williamsburg of Cincinnati Management Co., Inc.*, the Court essentially backed into six years and then "…beseech[ed] the General Assembly to … resolve.." this issue of defining the right statute of limitations legislatively. *Cosgrove v. Williamsburg of Cincinnati Management Co.*, 70 Ohio St. 3d 281 (1994).

Ohio is out of step with most of the country and also with the federal court system. The statutes of limitations of neighboring states typically range from 90 days to 1 year. Adopting H.B.

2 would also standardize the claims of potential age discrimination plaintiffs who currently only have six months to file.

Shortening the statute of limitations has other benefits. Claims brought much later tend to be less factually accurate, which can make it harder to defend against them. Sometimes witnesses have moved away. Even if witnesses are available, it is difficult to recall the details of what may have happened six years hence, or to have all the relevant personnel records. Requiring claims to be addressed more timely will ensure more fair results.

In addition, many other states also require that a plaintiff first exhaust his or her administrative remedies before filing a lawsuit. There is no such requirement in Ohio. H.B. 2 does not deprive a plaintiff of any substantive rights. It would toll the filing time of any individual who first pursues an administrative charge, and would also provide additional time to contemplate filing if an administrative decision is made close to the statutory filing deadline.

## **H**.B. 2 PRESERVES/PROPERLY USES TAXPAYER DOLLARS IN AGENCY INVESTIGATIONS

H.B. 2 tries to make sure plaintiffs only get one bite at the apple: if an individual can obtain redress through a grievance mechanism or internal complaint procedure, it should do so before pursuing court action. This pre-suit requirement would help limit the backlog of OCRC cases and court dockets.

H.B. 2 also creates an affirmative defense for employers who can demonstrate that they had an internal mechanism to redress complaints but that the complainant failed, without good reason, to avail himself or herself of it. This affirmative defense is consistent with a long line of U.S. Supreme Court and Sixth Circuit cases designed to hold employers accountable for timely and fairly investigating and remedying known workplace problems.

## H.B. 2'S DAMAGE CAPS ARE CONSISTENT WITH OTHER TORT ACTIONS IN OHIO

Ohio's absence of guidance to jurors about how to consider a plaintiff's case allows for inconsistent outcomes, unpredictability, and, potentially, runaway juries. By adopting the schedule of damages in Ohio's tort law, plaintiffs can be fairly compensated for economic and non-economic losses.

## CONCLUSION

In conclusion, Ohio needs to be competitive and to get in step with other states and the federal court system. This bill does not inequitably disadvantage plaintiffs – it serves only to level the playing field. For these reasons, the Ohio Alliance for Civil Justice requests that you support H.B. 2.