HB 2 GUTS OHIO'S LAWS PROHIBITING DISCRIMINATION AGAINST WOMEN, OLDER WORKERS, EMPLOYEES WITH DISABILITIES, MILITARY VETERANS, MINORITIES, AND RELIGIOUS EMPLOYEES.

AN ANALYSIS OF HOUSE BILL 2
BY THE OHIO EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY OF SOME KEY PROVISIONS

The bill to amend Ohio's anti-discrimination laws is a transparent and cynical attempt to prevent employers and managers from being held accountable for even blatant harassment or discrimination directed at women, older workers, employees with disabilities, military veterans, minorities, or religious employees. In fact, the bill bans any lawsuits against individual managers, company officers, and even some entire companies for overt sexual harassment or intentional discrimination under the state's anti-discrimination laws, prevents all lawsuits against individual managers and officers who retaliate against employees for reporting discrimination, and, because of the way it strips key protective language out of the current law, even the largest corporate wrongdoers could use it to avoid *any* legal responsibility for illegal acts committed by their managers and other authorized agents.

The bill also imposes extremely short deadlines on employees to file suit in court, and in some cases only sixty days—shorter than the shortest deadlines imposed in federal civil rights cases. Worse, the bill applies its extremely short time limits only to employees—not employers. In other words, while employees will face one of the shortest time limits in Ohio law for filing a legal claim, this draconian provision would not apply to lawsuits filed by employers—even when they sue their own employees. And the bill applies obsolete, artificially low caps to the damages employees can recover in discrimination cases, especially cases of workplace harassment, even in cases where a jury determines that the employee has suffered severe emotional harm.

HB 2 creates new limitations that do not exist under numerous federal civil rights laws or existing Ohio law. It eliminates remedies and protections that have been the law of Ohio for many years and are consistent with federal laws. The bill does not harmonize state anti-discrimination laws with federal civil rights laws, as has been claimed. Doing so would actually be quite simple, but would not serve the real purpose of this bill: to limit the power of Ohio's employees to remedy unlawful workplace discrimination.

THE SPECIFIC PROVISIONS OF THE BILL

Protects company managers and officers from any legal responsibility for intentionally discriminating against or harassing employees based on sex, disability, age, race, religion, military status, or national origin (Lines 172, 1667 of bill)

The bill changes the definition of the word "Employer" in order to reverse the 1999 decision of the Ohio Supreme Court in the *Genaro* case, which held that individual company managers and officers who engage in intentional discrimination or sexual harassment could be sued personally, along with their employers. The current law's definition of "Employer" includes not just companies employing four or more employees, but also "any person acting directly or indirectly in the interest of an employer." The bill deletes these words entirely, and also states that "no person has a cause of action or claim based on unlawful discriminatory practices relating to employment against a supervisor, manager, or other employee of an employer unless that supervisor, manager, or other employee is the employer."

If intentional discrimination and harassment in the workplace are to be prevented, as well as remedied, individual managers who harass and discriminate must be held accountable. In fact, the existence of such personal accountability can often help employers keep their own managers from violating the law. But the bill eliminates any personal legal responsibility of individual managers and officers for their proven acts of sexual harassment and other intentional discrimination. Under the bill, these individuals could not be sued personally for violating Ohio's anti-discrimination laws by using their positions as managers and officers to discriminate against or harass employees based on age, sex, race, disability, military status or religion.

Even worse, the specific language the bill uses to let workplace predators off the hook could have tremendously harmful effects on the operation of the law. In a 2014 case, *Hauser v. Dayton Police Dept.*, a majority of the Ohio Supreme Court stated that the words "any person acting directly or indirectly in the interest of an employer," which the bill eliminates, were originally intended to make it possible for employees to hold a company liable for the harm caused by supervisors or others acting in the company's interest. Because of that recent opinion, the bill's deletion of that key language would make it possible for major corporations to claim they cannot be held responsible for the actions of the managers they empowered to commit illegal acts of discrimination. Under this interpretation, employers could be sued only if they formally adopted official pro-discrimination policies (which almost never occurs). In other words, in their zeal to eliminate needed protections against the predatory acts of individual harassers, the bill's sponsors are running the risk of making Ohio's anti-discrimination law completely unenforceable.

<u>Weakens important protections against retaliation</u> (Lines 301, 1667)

Even before the *Genaro* case, there was never a question that an individual manager, officer, or other wrongdoer could be held liable for retaliating against an employee because he or she complained of discrimination or harassment, or for taking any action "to aid, abet, incite, compel, or coerce" others who discriminate against an employee. See divisions (I) and (J) of R.C. 4112.02. But the bill completely erases this accountability by preventing any lawsuit against anyone other than "the employer" (as the bill redefines that term), meaning that under the bill's definition, no individual could ever be held responsible in court even if they commit blatant retaliation or force their subordinates to commit discriminatory acts.

<u>Provides sexual harassers with more protection than federal law</u> (Line 1525)

Under federal case law, employers can defend against harassment and hostile work environment claims by showing they had an effective anti-harassment policy in place and the harassed employee unreasonably failed to take advantage of the policy. In other words, when companies provide a fair opportunity for their employees to complain about harassment, open an internal investigation, and take appropriate remedial action, if necessary, they can often avoid liability in situations when a lower-level supervisor harasses another employee without the knowledge of the upper management.

The bill writes this defense into Ohio law for sexual harassment cases, but it applies the defense much more broadly than the federal courts have. Under federal law, the defense does not apply when the harassment results in a "tangible employment action," such as a termination, demotion, or change in duties—since it would be unfair to let employers off the hook when supervisors use the authority their employers gave them to discriminatorily change the tangible terms and conditions of their employees' jobs.

The bill uses the same term "tangible employment action," but its definition is very different from federal law. Federal law broadly defines "tangible employment action" as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." But the bill's definition only covers "an action resulting in material economic detriment such as failure to hire or promote, firing, or demotion." It does not protect against punitive reassignments or reductions in benefits.

This means under the bill, a manager could get away with punishing a female secretary or cashier who refused his sexual advances by taking away all her vacation time, or by assigning her to a different position where she does nothing but clean toilets. As long as the manager does not fire the employee or dock her pay, the employee will have no claim against her employer unless she goes through the often risky, difficult, and futile process of making an internal complaint to a designated company official. Given that the bill also prevents such an employee from making a claim directly against the actual sexual predator, her manager, she would have no recourse whatsoever—unlike under federal law, which would make the company automatically liable for the manager's acts.

<u>Makes discrimination cheap by applying outdated, arbitrary caps on what victims of discrimination can recover</u> (Line 49)

The bill adopts limits on what employees can recover for proven discrimination and harassment based on sex, disability, race, religion, age, military status, or national origin, by applying outdated damages caps the legislature adopted years ago for personal injury claims. The law that established the caps was not designed with employment discrimination cases in mind, and the caps themselves are actually a form of discrimination when it comes to these cases.

Employees who are wrongfully terminated often recover most of their damages from lost wages. White-collar employees suffer more economic harm than others because of their high salaries. The damages caps applied by the bill make the maximum noneconomic damages depend on the economic damages the employee has suffered—the maximum noneconomic damages an employee can recover is the greater of $250,000 or three times the economic harm, up to a maximum of $350,000. This means that an employee who loses $200,000 in wages can receive a hundred thousand dollars *more* than what a lower-wage employee who loses only $20,000 could recover—even though the low-wage worker will often suffer far more noneconomic harm, since a lack of savings and other resources often means that worker will lose not just his job, but his car, his home, and the ability to provide for his family.

And the caps do not account for the fact that workers who do not lose their jobs at all can still experience extreme harm in the workplace. Under the bill, a woman who is subjected to continuous, extreme, and blatant sexual harassment (or even a sexual assault in the workplace), but does not lose any wages as a result, will recover less compensation for emotional harm than a high-level executive who loses his job in a discriminatory layoff. This injustice calls to mind the recent Ohio Supreme Court case, *Simpkins v. Grace Brethren Church of Delaware*, 2016-Ohio-8118, in which even a teenager who was forcibly raped by her pastor was subjected to these same arbitrary damages caps after a jury awarded her ten times the amount allowed by the caps. The *Simpkins* case emphasizes the gross injustice that can result from "one-size-fits-all" damages caps, which take power that should be in the hands of Ohio juries and give it to politicians. The same injustice would result in severe workplace harassment cases.

Making matters worse, these arbitrary caps, which were adopted in 2005, have never been updated and adjusted for inflation, even after 12 years. Even though inflation has been unusually low during those 12 years, adjusting for inflation would have raised the law's $250,000 cap to more than $307,000, and its $350,000 cap would be now be more than $430,000. The law's $500,000 cap for multiple-plaintiff cases would now be over $614,000. But nothing in the law automatically makes the caps keep up with inflation, and the legislature has not bothered to update it. As a result, those who cause harm to Ohio citizens have been able to do so more and more cheaply with every passing year. The bill seeks to apply this unjust arithmetic to workplace discrimination.

Fails to provide for attorneys' fees for meritorious claims and weakens existing attorneys' fees provision for age discrimination claims (Lines 689, 1700)

The bill eliminates two separate statutory provisions that allowed older workers to sue their employers for age discrimination. While the bill still allows age discrimination actions under a different provision, employers who intentionally discriminate against or harass older workers (frequently to force them to retire early or quit) will no longer be required to pay automatic attorneys' fees and expenses of older workers who are forced to sue and prove discrimination—instead, attorneys' fees and expenses will be discretionary, meaning that unlike under existing Ohio and federal law, older workers who are thinking of filing suit and trying to find an attorney will have no way to predict whether their attorneys' fees will be paid for until after they have won in court.

The elimination of automatic attorneys' fees (and the other changes in the bill) highlight the untruthfulness of the claims made by those behind the bill that the bill is only intended to make Ohio anti-discrimination law mirror federal anti-discrimination law. Under federal anti-discrimination laws, an employer who is proven to have discriminated must pay the fees and costs necessary for the employee to prove his or her case. By eliminating such automatic attorneys' fees even in age cases, the only Ohio anti-discrimination law that has such a provision, the bill will let employers who have been proven to have discriminated escape from having to pay fees in all discrimination cases, including all of those involving sex, race, disability, military status, and religion, and now, many age cases as well. This means that unlike in federal cases, employees will not be fully compensated even after proving discrimination in court, since they will not recover the amounts they are required to pay to their attorneys.

Shortens the time limit for an employee who has suffered discrimination to file a lawsuit from six years to 365 days (Lines 1472, 1486, 1692)

Under existing law, an employee who has been discriminated against on the basis of race, sex, disability, national origin, or religion has up to six years to file a state court lawsuit. The bill reduces this time limit to 365 days, an unreasonably short and arbitrary time limit that will prevent many employees from even finding a lawyer to advise them about their claims—especially employees who are too busy dealing with the many effects on themselves and their families from being fired (such as relocation, seeking unemployment compensation, and of course, looking for a new job). This provision will even hurt employers, by forcing employees and their lawyers to rush into court and file lawsuits that might have been avoided if there were sufficient time to investigate a potential claim before this deadline. Keep in mind that the deadlines for most common court cases which do not involve intentional discrimination, are longer than 365 days. These include breach of contract cases (8 years), invasion of privacy cases (4 years), intentional infliction of emotional distress (4 years), anti-trust cases (4 years), and auto accident cases (2 years), to name just a few.

Unlike under federal law, where numerous causes of action give employees two years or more to file a lawsuit, there would be no alternative ways for an employee who misses this short deadline to pursue any discrimination claim under Ohio law. In contrast, employers with claims against employees would continue to have much longer time limits for filing their claims—only employees, not employers, would have their time for filing reduced to one-sixth of the existing time limit.

As just one example, an employee who has been wrongfully fired because she complained about sexual harassment by her supervisor might reasonably decide not to pursue her claim because she quickly found a better job with a different company and wanted to put her terrible experience behind her. But if the employer decides to come after her a year later because that new job allegedly violates a non-compete agreement that the fired employee signed when she was hired, files a lawsuit against her for damages, and even bullies her new employers into firing her so that the former employer won't sue them, too (which is not at all unusual in Ohio, where non-compete agreements are routinely enforced even after a wrongful termination), the employee could not change her mind and file her discrimination claim, because the bill cuts her time limit short without doing the same for her employer.

Perhaps worst of all, the bill provides a combined 365-day limit for filing a charge with the Ohio Civil Rights Commission and filing a lawsuit in a way that will make it extremely difficult for many employees to file suit. Through a process the bill calls "tolling," an employee has 365 days to file a charge with the Commission, and doing so "stops the clock" on the employee's deadline for filing a lawsuit. But then, once the Commission makes its finding, the clock starts running again. So if an employee files a charge shortly before the 365-day deadline, he or she will be almost out of time to file a lawsuit if the charge is dismissed. The bill provides only a 60-day window for filing a lawsuit in such cases. This, once again, is far worse for employees than federal law, which provides that after an agency determination, the employee receives a formal letter providing 90 days in which to file suit. It can take weeks and even months for these letters to issue from the federal government. Since employees generally file their state and federal charges together, this will put many employees in the impossible position of having their state-law filing deadlines expire while they wait for formal "right to sue" letters from the federal agency. This would never be part of the bill if it were truly aimed at making state and federal law consistent.

Oppose this unjust and unneeded legislation

Please oppose employment discrimination legislation that weakens or eliminates Ohio's laws guaranteeing equal employment opportunity and prohibiting discrimination based on sex, disability, race, age, military status, national origin or religion. HB 2 should be rejected, as similar proposals have been in the past, because it defeats the very purpose of Ohio's anti-discrimination laws by eliminating protections that are important to all Ohio workers. Equal opportunity is good legislative policy, good for the public, and good for the economy. Individuals and employers who discriminate against or harass Ohio workers should be fully responsible for their illegal conduct, and those who suffer discrimination should have access to full and equal remedies under state law.

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