MEMORANDUM

TO: Ohio House of Representatives, Economic Development, Commerce and Labor Committee, Chairman Ron Young and Members

FROM: Neil Klingshirn, on behalf of Protecting Ohio's Employees and the Ohio Employment Lawyers Association

SUBJECT: Testimony Regarding Sub. HB 2, Relating to Amendments to Ohio's Civil Rights Act, Chapter 4112 of the Revised Code

DATE: MARCH 14, 2017

Dear Mr. Chairman and Committee Members,

My name is Neil Klingshirn. I am a board member of Protecting Ohio's Employees (POE), which advocates for employee rights in Ohio, and the Ohio Employment Lawyers Association (OELA), a professional organization comprised of attorneys who, like me, represent Ohio workers in employment matters.

However, I am also testifying:

- As a business owner—I am a partner at the Cleveland law firm of Elfvin, Klingshirn, Royer & Torch, and prior to joining that firm, I was a partner of the Akron law firm Fortney & Klingshirn;
- As a member of a family comprised entirely of business owners - My father and each sibling owns their own business; and
- As an attorney who represents businesses. Nearly a third of my practice currently consists of representing employers (including employers defending against employment discrimination claims).

I began my legal career in 1986 representing employers at the firms Squire, Sanders & Dempsey and Millisor & Nobil, before starting my own firm in 1993. For the first seven years of my legal career I represented only employers, and have continued to represent employers ever since. I therefore analyzed Substitute House Bill 2 from the perspective of both Ohio's employees and the interests of the businesses that employ them. This perspective allows me to share the following information with the Committee:

- It has been the law in Ohio for nearly two decades that individual managers and supervisors can be held accountable for intentional acts of employment discrimination based on religion, military status, age, sex, race, and disability. For many decades prior, including the entirety of my legal career, it has been the law of Ohio that managers and supervisors can be held responsible for retaliating against employees who complain of discrimination in the workplace.
- Ohio is far from alone in ensuring accountability for supervisors who intentionally harm their subordinates for discriminatory or retaliatory reasons. In fact, at least 27 states provide some form of individual liability for intentional discrimination, retaliation against employees who have made discrimination complaints, or aiding and abetting discrimination by others. This majority of states includes our neighbors West Virginia, Pennsylvania, and Michigan.
- The existence of individual liability under Ohio law is not a major concern for my business or the businesses I represent. One client recently described as "terrible"

the idea of letting the perpetrator off the hook while leaving only the employer liable for the perpetrator's unlawful conduct. And it is not just about making managers pay for the harm they cause. It is about preventing it in the first place. When I teach equal employment opportunity law to supervisors, nothing focuses their attention on obeying the law better than the knowledge that their intentional discrimination could result in lawsuits not just against the company, but against them personally.

- I pursue employment discrimination cases for employees, and defend such cases against businesses, based on both federal and Ohio law. I can therefore speak to the claim that Substitute House Bill 2 would merely make Ohio law match federal law. This claim is just not accurate.
- In fact, there are a number of federal laws protecting employees against discrimination, and many of them—in fact, most of them—provide some form of individual supervisor liability, like Chapter 4112 does. This includes 42 U.S. Code Sections 1981, 1983, and 1985, which have protected against race-based employment discrimination, as well as violations of the U.S. Constitution by public employers, since just after the Civil War. It also includes the Family Medical Leave Act, the Fair Labor Standards Act, and the Equal Pay Act. Some courts (though not all) have also interpreted USERRA, the law protecting military personnel and reservists from discrimination based on their status. However, this federal protection of employees from intentional discrimination by supervisors is

incomplete. Federal law does not protect private-sector employees from discrimination or retaliation based on religion, sex, age, or disability. Eliminating these protections under Ohio law will simply shift some litigation from state court to federal court (which is not always an advantage for local businesses), while depriving many Ohio employees of any protection from unscrupulous supervisors.

- I am also aware that some proponents of the bill have claimed that individual liability under Chapter 4112 is not necessary because there are Ohio common-law remedies for supervisor harassment and discrimination. This is also inaccurate. Without the statute, except for cases involving *physical assaults* of employees by supervisors, there will be almost no protection for employees who are intentionally harassed by a supervisor based on sex, religion, disability, or other illegal factors. This is because there are cases making it clear that there is no Ohio common-law claim for workplace harassment. For instance, in *Bell v. Cuyahoga Community College* (Cuyahoga Ct. App. 1998), 129 Ohio App.3d 461, 466 n.2, the court rejected a harassment claim against an individual supervisor. It was only the *Genaro* case, a year later, that allowed such claims. Substitute House Bill 2 would overrule that decision.
- The only type of common-law claim that can be brought against a non-physical workplace harasser is one called Intentional Infliction of Emotional Distress ("IIED"). I bring IIED claims very rarely, and in my experience representing employers, courts routinely dismiss such claims before trial. The federal Sixth

Circuit Court of Appeal has held that even intentional discrimination is not severe enough to justify an IIED claim "without something more," *Godfredson v. Hess & Clark, Inc.* (6th Cir. 1999), 173 F.3d 365, 376, and the Cuyahoga County Court of Appeals has rejected such claims even as to discriminatory conduct the court labeled as "reprehensible." *Bryans v. English Nanny and Governess School, Inc.* (Cuyahoga Ct. App. 1996), 117 Ohio App.3d 303, 318.

- It is crucially important for the businesses, employees, and people of the state of Ohio to prevent intentional discrimination, harassment, and retaliation by managers and supervisors by preserving individual accountability for such acts.