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Bill Analysis
Legislative Service Commission

H.B. 489

124th General Assembly
(As Re-referred by H. Rules & Reference)

Reps. Reidelbach, Webster, Seitz, Roman, Britton

BILL SUMMARY

- Provides that a person does not have a cause of action or claim based on unlawful discriminatory practices in employment under the Civil Rights Law against a supervisor, manager, or other employee of an employer unless that supervisor, manager, or other employee is the employer and modifies the definition of "employer" to remove from specific inclusion in the definition any person acting directly or indirectly in the interest of an employer.
- Declares the intent of the General Assembly to supersede the effect of the Ohio Supreme Court holding in *Genaro v. Central Transport, Inc.* (1999), 84 Ohio St.3d 293, that a supervisor or manager may be held jointly and/or severally liable with the employer for unlawful discriminatory conduct of the supervisor or manager.
- States that it does not abrogate statutory or common law imposing vicarious liability on an employer for the actions or omissions of its agents.
- Expands the period of limitations for bringing a civil action for certain unlawful discriminatory practices based on age from 180 days to two years and provides a two-year period of limitations for a civil action by a person who is 40 years of age or older, who meets the established job requirements and employer-employee relationship laws, and who is discriminated against in any job opening or discharged without just cause by an employer.
- Specifies a two-year period of limitations for a civil action for damages, injunctive relief, or any other appropriate relief generally for a violation of the Civil Rights Law.

- Declares the intent of the General Assembly to establish a uniform two-year statute of limitations for civil actions under the Civil Rights Law with respect to unlawful discriminatory practices related to employment and to supersede the Ohio Supreme Court decision in *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St.3d 281, that R.C. 4112.99 is a remedial statute and is subject to the six-year statute of limitations for actions upon a liability created by statute other than a forfeiture or penalty.

TABLE OF CONTENTS

Civil Rights Law.....	2
Unlawful discriminatory practices by an employer	3
Existing law.....	3
Operation of the bill.....	4
Intent	4
Statute of limitations	5
Existing law.....	5
Operation of the bill.....	5
Intent	6
Preexisting causes of action.....	6

CONTENT AND OPERATION

Civil Rights Law

The Civil Rights Law (R.C. Chapter 4112.) prohibits various acts or practices by certain persons or entities that are designated as *unlawful discriminatory practices*. The Ohio Civil Rights Commission enforces the Civil Rights Law, conducts investigations of alleged unlawful discriminatory practices, and makes appropriate determinations under that Law. Furthermore, any person who violates the Civil Rights Law is subject to a civil action for damages, injunctive relief, or any other appropriate relief (R.C. 4112.99--not in the bill).

The Civil Rights Law is construed liberally for the accomplishment of its purposes, and any law inconsistent with any of its provisions do not apply. Generally, nothing in that Law is considered to repeal any provision of any law of Ohio relating to discrimination because of race, color, religion, sex, familial status, handicap, national origin, age, or ancestry. (R.C. 4112.08.)

Unlawful discriminatory practices by an employer

Existing law

General discriminatory practices. Under the Civil Rights Law, it is an unlawful discriminatory practice for any *employer* (see "**Definition,**" below), because of the "race, color, religion, sex, national origin, disability, age, or ancestry" of any person (hereafter, "specified personal characteristics"), to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment (R.C. 4112.02(A)).

It is also an unlawful discriminatory practice for *any employer*, among others, to do any of the following (R.C. 4112.02(D) and (E)):

(1) Discriminate against any person because of specified personal characteristics, other than age, in admission to, or employment in, any program established to provide apprentice training;

(2) Except if based on a bona fide occupational qualification certified in advance by the Civil Rights Commission, prior to employment:

(a) Elicit or attempt to elicit any information concerning the specified personal characteristics of an applicant for employment;

(b) Make or keep a record of the specified personal characteristics of any applicant for employment;

(c) Use any form of application for employment seeking to elicit information regarding specified personal characteristics; but an employer holding a contract containing a nondiscrimination clause with the United States government or any United States governmental department or agency may require an employee or applicant for employment to furnish documentary proof of United States citizenship, may retain that proof in the employer's personnel records, and may use photographic or fingerprint identification for security purposes;

(d) Print, publish, or cause to be printed or published any notice or advertisement relating to employment indicating any preference, limitation, specification, or discrimination, based upon specified personal characteristics;

(e) Announce or follow a policy of denying or limiting, through a quota system or otherwise, employment opportunities of any group because of the specified personal characteristics of that group;

(f) Utilize in the recruitment or hiring of persons any employment agency, personnel placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their specified personal characteristics.

Age discrimination. The Civil Rights Law further prohibits any *employer* from discriminating in any job opening against any applicant, or discharging without just cause any employee, who is 40 years of age or older and who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee (R.C. 4112.14(A)). (See **COMMENT 1.**)

Definition. As used in the Civil Rights Law, "employer" includes the state, any political subdivision of the state, any person employing four or more persons within the state, and *any person acting directly or indirectly in the interest of an employer* (R.C. 4112.01(A)(2)). (See **COMMENT 2.**)

Operation of the bill

The bill removes from specific inclusion in the definition of "employer," as used in the Civil Rights Law *any person acting directly or indirectly in the interest of an employer*. Under the bill, "employer" includes the state, any political subdivision of the state, and any person employing four or more persons within the state. (R.C. 4112.01(A)(2).)

The bill specifically provides that a person does not have a cause of action or claim based on unlawful discriminatory practices in employment under the Civil Rights Law against a *supervisor, manager, or other employee* of an employer unless that supervisor, manager, or other employee is the employer. The bill states that nothing in this provision abrogates statutory law or the common law imposing vicarious liability on an employer for the actions or omissions of its agents. (R.C. 4112.08(B).)

Intent

The bill declares the General Assembly's intent in amending R.C. 4112.01 and 4112.08, as described above: (1) to supersede the effect of the holding of the Ohio Supreme Court in *Genaro v. Central Transport, Inc.* (1999), 84 Ohio St.3d 293, and (2) that individual supervisors, managers, and employees *not* be held liable under the Civil Rights Law for unlawful discriminatory practices related to employment. (See **COMMENT 3.**) The bill states that the General Assembly does not intend the bill to abrogate the imposition at common law of vicarious liability on employers for the unlawful discriminatory practices of their agents. (Section 3.)

Statute of limitations

Existing law

Under existing law, an aggrieved individual may enforce the individual's rights relative to discrimination *on the basis of "age"* (defined as, generally, at least 40 years old) as provided for in R.C. 4112.02 (see **COMMENT** 4 and 5) by instituting a civil action, within *180 days* after the alleged unlawful discriminatory practice occurred, in any court with jurisdiction for any legal or equitable relief that will effectuate the individual's rights. A person who files such a civil action is barred, with respect to the practices complained of, from instituting a civil action as described in the following paragraph or from filing a charge with the Ohio Civil Rights Commission. (R.C. 4112.02(N) and 4112.01(A)(14).)

Any person aged 40 or older who is discriminated against in any job opening or discharged without just cause by an employer in violation of the prohibition described above in "Age discrimination" may institute a civil action against the employer in a court of competent jurisdiction. A person instituting such a civil action is barred, with respect to the practices complained of, from instituting a civil action as described in the preceding paragraph or from filing a charge with the Ohio Civil Rights Commission. (R.C. 4112.14(B).)

Any person who violates the Civil Rights Law is subject to a civil action for damages, injunctive relief, or any other appropriate relief (R.C. 4112.99--not in the bill).

Operation of the bill

The bill modifies existing law by providing a two-year period of limitations for commencing the above described civil actions as follows:

(1) It extends the period of limitations for instituting a civil action based on unlawful discrimination *on the basis of age* as described above in the first paragraph in "Existing law" to *two years* after the alleged unlawful discriminatory practice occurred (R.C. 4112.02(N)).

(2) It provides that any person aged 40 or older who is discriminated against in any job opening or discharged without just cause by an employer as described above in the second paragraph in "Existing law" may institute a civil action against the employer *within two years after the discrimination or discharge occurred* (added by the bill) in a court of competent jurisdiction (R.C. 4112.14(B)).

(3) It provides that a civil action for damages, injunctive relief, or any other appropriate relief for a violation of the Civil Rights Law as described above

in the third paragraph in "Existing law" must be brought within *two years after the alleged unlawful discriminatory practice occurred*. This period of limitation for purposes of such a civil action authorized by R.C. 4112.99 does not affect any other period of limitation that is specified in another section of the Civil Rights Law for purposes of a distinct civil action authorized by that other section, including, but not limited to, a civil action authorized as described in the first and second paragraphs above in "Existing law" and certain other provisions of the Civil Rights Law (see **COMMENT 6**). (R.C. 4112.16.)

Intent

The bill declares the General Assembly's intent in amending R.C. 4112.01, 4112.02, and 4112.14 and in enacting R.C. 4112.16, as described above: (1) to supersede the decision of the Ohio Supreme Court in *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St.3d 281 (see **COMMENT 7**) and (2) to establish a uniform two-year statute of limitations for civil actions provided for in the Civil Rights Law with respect to unlawful discriminatory practices related to employment. (Section 5.)

Preexisting causes of action

The bill provides that it does not impair or affect a cause of action arising before the effective date of the bill (Section 4).

COMMENT

1. With regard to *age*, it is not an unlawful discriminatory practice and it does not constitute a violation of R.C. 4112.14(A) for any *employer*, among others, to do any of the following (R.C. 4112.02(O):

(a) Establish bona fide employment qualifications reasonably related to the particular business or occupation that may include standards for skill, aptitude, physical capability, intelligence, education, maturation, and experience;

(b) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, including a retirement, pension, or insurance plan, that is not a subterfuge to evade the purposes of the prohibitions against unlawful discriminatory practices; but no such employee benefit plan can excuse the failure to hire any individual, and no such seniority system or employee benefit plan can require or permit the involuntary retirement of any individual, because of the individual's age, except as provided for in specified federal law on age discrimination in employment;

(c) Retire an employee who has attained 65 years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, of the employer of the employee, which equals, in the aggregate, at least \$44,000, in accordance with the conditions in specified federal law on age discrimination in employment;

(d) Observe the terms of any bona fide apprenticeship program if the program is registered with the Ohio Apprenticeship Council and is approved by the Federal Committee on Apprenticeship of the United States Department of Labor.

2. The Civil Rights Law contains definitions of terms in the following provisions relevant to the bill:

Sec. 4112.01. (A) As used in this chapter:

(1) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. "Person" also includes, but is not limited to, any owner, lessor, assignor, builder, manager, broker, salesperson, appraiser, agent, employee, lending institution, and the state and all political subdivisions, authorities, agencies, boards, and commissions of the state.

....

(3) "Employee" means an individual employed by any employer but does not include any individual employed in the domestic service of any person.

....

(7) "Discriminate" includes segregate or separate.

....

(13) "Disability" means a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for

one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

(14) Except as otherwise provided in section 4112.021 of the Revised Code, "age" means at least forty years old.

....

(B) For the purposes of divisions (A) to (F) of section 4112.02 of the Revised Code, the terms "because of sex" and "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions. Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in division (B) of section 4111.17 of the Revised Code shall be interpreted to permit otherwise. This division shall not be construed to require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or except where medical complications have arisen from the abortion, provided that nothing in this division precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

3. The specific issue before the Supreme Court in *Genaro v. Central Transport, Inc., supra*, was whether supervisors and managers may be held personally liable for unlawful discriminatory acts committed by them in violation of Chapter 4112. of the Revised Code. The Supreme Court, by a majority of four Justices, held that a supervisor or manager may be held jointly and/or severally liable with the supervisor's or manager's employer for discriminatory conduct of the supervisor or manager in violation of Chapter 4112. of the Revised Code. The Court, in an opinion written by Justice Douglas, stated the rationale for its decision as follows:

R.C. 4112.02 provides that "[i]t shall be an unlawful discriminatory practice: (A) [f]or any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, * * * to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." R.C. 4112.01(A)(2) defines "employer" as "any person employing four or more persons within the state, and *any person acting directly or indirectly in the interest of an employer.*" (Emphasis added.) Further, the term "person" is defined very broadly by R.C. 4112.01(A)(1) as including "one or more individuals, * * * any owner, lessor, assignor, * * * agent, [and] employee." It is clear that the R.C. 4112.01(A)(2) definition of "employer," by its very terms, encompasses individual supervisors and managers whose conduct violates the provisions of R.C. Chapter 4112. (At p. 296.)

To explain its holding, the Court contrasts the definition of "employer" in R.C. 4112.01(A)(2) from the definition of "employer" in the federal anti-discrimination laws. The difference according to the Court is that, under Title VII, "employer" is defined as "a person engaged in an industry affecting commerce who has *fifteen or more employees . . . and any agent of such a person.*" (42 U.S.C.A. 2000e(b); emphasis added by the Court.) The Court reasoned that the Ohio statute's specific reference to fewer employees (four instead of 15) and inclusion of "any person acting directly or indirectly in the interest of an employer" (instead of the agency terminology in Title VII) creates a much broader scope than the federal statute and a clear intent to hold individual supervisors and managers personally liable for their own discriminatory conduct in the workplace environment.

The dissenting opinion written by Chief Justice Moyer declared that R.C. 4112.02 clearly imposes liability upon employers for discriminatory practices in the workplace but conspicuously fails to include a provision imposing liability upon employees who participate in discriminatory practices. The dissent states as follows:

The majority asserts that the public policy against discrimination supports its argument that R.C. Chapter 4112 should be construed to impose liability on supervisors and managers. However, when the

language of a statute is clear and unambiguous, it is the duty of the court to apply the statute as written, making neither additions to the statute nor deletions therefrom. . . . Applying this principle of statutory interpretation to R.C. Chapter 4112. causes me to conclude that this court should not expand the liability imposed under R.C. 4112.02 to individual employees. Had the General Assembly wished to extend individual liability to managerial personnel it could have easily included the word "employee" in R.C. 4112.02(A). (Citations omitted.)

Petitioners argue that supervisors and managers should be considered employers under the definition of "employer" contained in R.C. 4112.01(A)(2). That section reads as follows:

"(2) 'Employer' includes the state, any political subdivision of the state, any person employing four or more persons within the state, *and any person acting directly or indirectly in the interest of an employer.*" (Emphasis added.)

Petitioner's argument that managerial personnel should be considered "employers" under this section fails for several reasons. First, petitioners contend that the phrase "and any person acting directly or indirectly in the interest of an employer" should be read to include managerial personnel in the definition of "employer." However, this phrase was more likely included in R.C. 4112.01 in order to impose vicarious liability on employers for discriminatory acts of their employees. This court has previously stated that federal case law interpreting Title VII is generally applicable to interpretations of R.C. Chapter 4112. *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192. . . . Title VII is the federal antidiscrimination statute. Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees * * * *and any agent of such a person.*" (Emphasis added.) Section 2000e(b), Title 42, U.S. Code.

Numerous federal courts have held that the agency clause of Title VII does not impose liability on individual employees, but instead imposes vicarious liability on employers for the discriminatory acts of their employees. See *Miller v. Maxwell's Internatl., Inc.* (C.A.9, 1993), 991 F.2d 583; *Gary v. Long* (C.A.D.C.1995), 59 F.3d 1391; *Wathen v. Gen. Elec. Co.* (C.A.6, 1997), 115 F.3d 400. While R.C. Chapter 4112 and Title VII contain slightly different language, the language of both statutes indicates an intent to hold employers vicariously liable for the discriminatory acts of their employees. (At pp. 300-301.)

4. In addition to the unlawful discriminatory practices described above in "Existing law" under "Unlawful discriminatory practices by an employer," R.C. 4112.02 also provides other types of unlawful discriminatory practices based on specified personal characteristics, *including age*, as follows (R.C. 4112.02(B), (C), (F), (G), and (H)(14)):

(a) For an *employment agency or personnel placement service*, because of specified personal characteristics, to do any of the following: (i) refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate against any person, (ii) comply with a request from an employer for referral of applicants for employment if the request directly or indirectly indicates that the employer fails to comply with R.C. 4112.01 to 4112.07;

(b) For any *labor organization* to do any of the following: (i) limit or classify its membership on the basis of specified personal characteristics, (ii) discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions of any person as an employee because of specified personal characteristics;

(c) For *any person seeking employment* to publish or cause to be published any advertisement that specifies or in any manner indicates that person's specified personal characteristics or expresses a limitation or preference as to the specified personal characteristics of any prospective employer;

(d) For any *proprietor or any employee, keeper, or manager of a place of public accommodation* to deny to any person, except for reasons applicable alike to all persons regardless of specified personal characteristics, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation;

(e) For *any person* to refuse to sell, transfer, assign, rent, lease, sublease, or finance, or otherwise deny or withhold, a burial lot from any person because of the race, color, sex, familial status, *age*, ancestry, disability, or national origin of any prospective owner or user of the lot.

5. Nothing in the Civil Rights Law prohibiting age discrimination and nothing in R.C. 4112.14(A) (see "*Age discrimination*," above) can be construed to prohibit the following: (i) the designation of uniform age the attainment of which is necessary for public employees to receive pension or other retirement benefits pursuant to specified statutes, (ii) the mandatory retirement of uniformed patrol officers of the State Highway Patrol, (iii) the maximum age requirements for appointment as a patrol officer in the State Highway Patrol, (iv) the maximum age requirements established for original appointment to a police department or fire department, (v) any maximum age not in conflict with federal law that may be established by a municipal charter, municipal ordinance, or resolution of a board of township trustees for original appointment as a police officer or firefighter, or (vi) any mandatory retirement provision not in conflict with federal law of a municipal charter, municipal ordinance, or resolution of a board of township trustees pertaining to police officers and firefighters. (R.C. 4112.02(P).)

6. These provisions are the following:

(a) Aggrieved individuals may file a civil action in a court of common pleas within 180 days after an alleged unlawful discriminatory practice by creditors or credit reporting agencies occurred (R.C. 4112.021(D)).

(b) Aggrieved persons may file a civil action in the court of common pleas of the county in which an alleged unlawful discriminatory practice involving housing accommodations occurred within *one year* after it allegedly occurred (R.C. 4112.051(A)).

7. The syllabus by the Supreme Court in *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St.3d 281, reads as follows:

R.C. 4112.99 is a remedial statute, and is thus subject to R.C. 2305.07's six-year statute of limitations.

The Court in *Cosgrove* noted that R.C. 4112.99 is not a penalty statute regardless of how it is labeled and numbered in the Revised Code. R.C. 4112.99 creates civil liability for persons committing discriminatory acts and provides a remedy rather than instituting a penalty. According to the Court, in the absence of a limitations period in R.C. 4112.99, R.C. 2305.07, which provides a six-year period of limitations for an action upon a liability created by statute other than a forfeiture or penalty, applies.

Justice Resnick, in her concurring opinion, stated as follows:

. . . I wish to stress that how victims of different discriminatory practices are treated regarding time limitations on the independent civil remedies afforded them under R.C. Chapter 4112. is a political issue best resolved by the General Assembly. (At p. 285.)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-29-02	p. 1337
Re-referred by H. Health & Family Services	02-14-02	p. 1404
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