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Federal and State Employment Law Update

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Cleveland, OH

State and Federal Case Law Update

Notable Cases from 2016

Ohio Association for Justice

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CASES FROM THE U.S. AND OHIO SUPREME COURTS

1. Fair Labor Standards Act

Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. ___, 136 S. Ct. 1036 (2016)

Employees at Tyson Foods' plant alleged they were not paid for time donning and doffing their protective gear. The employer maintained no time records for these hours. The plaintiffs introduced a study by an industrial relations expert, who analyzed how long various donning and doffing activities took.

The Supreme Court affirmed the trial court's finding of liability and $2.9M verdict for the class of workers. "Respondents can show that [the expert's] sample is a permissible means of establishing hours worked in a class action by showing that each class member could have relied on that sample to establish liability had each brought an individual action....Had the employees proceeded with individual lawsuits, each employee likely would have had to introduce Mericle's study to prove the hours he or she worked. The representative evidence was a permissible means of showing individual hours worked."

Encino Motorcars, LLC v. Navarro, et al., 579 U.S. ___, 136 S. Ct. 2117 (2016)

In 2011, the DOL issued a regulation which defined "salesman" as an employee "who sells automobiles, trucks or implements." Five service advisors brought suit against their employer, Encino Motorcars, for the failure to pay overtime compensation under the FLSA. Defendant argued that employees were service advisors and exempt employees under §213(b)(10)(A) of the FLSA.

The district court dismissed the FLSA claims. The Ninth Circuit reversed, finding that service advisors were not exempt under the DOL's 2011 regulation. The Supreme Court reversed and remanded to the Ninth Circuit to interpret the statute without regard to the DOL's 2011 regulation, as the DOL did not sufficiently explain the reasons for the regulation, which thus did not deserve *Chevron* deference

2. First Amendment

Heffernan v. City of Paterson, New Jersey, et al., 578 U.S. ___, 136 S. Ct. 1412 (2016)

The plaintiff was a police detective working under the Chief of Police. At the time, Mayor Jose Torres was running for reelection against Lawrence Spagnola, who was one of plaintiff's friends. During the campaign, plaintiff delivered Spagnola campaign materials to family members, and was seen with them. The next day, his supervisors demoted him from police detective to patrol officer to punish him for what they called "overt involvement" in the Spagnola campaign.

The district court found that plaintiff had not "engaged in First Amendment conduct." The Third Circuit affirmed, holding that a claim of retaliation is actionable only if the adverse action was caused by an "employee's *actual,* rather than *perceived*, exercise of constitutional rights." The Supreme Court reversed, holding that it is the Government's subjective *reason* for the action that counts."

3. Fee Petitions

CRST Van Expedited, Inc. v. EEOC, 578 U.S. ____, 136 S. Ct. 1642 (2016)

In 2005, CRST employee Starke filed a discrimination charge with EEOC, alleging that two male trainers sexually harassed her. EEOC investigated and found "reasonable cause to believe that CRST subjected Starke and 'a class of employees and prospective employees to sexual harassment.'" EEOC filed suit against CRST under Title VII. The district court dismissed the EEOC's claims, finding many were barred on the ground that EEOC had not adequately investigated or attempted to conciliate the claims before filing suit. The district court awarded CRST over $4 million in fees as a prevailing party. The Eighth Circuit upheld the dismissal but reinstated Starke's claims, thereby reversing the award of fees.

The Supreme Court overturned, holding that "a defendant need not obtain a favorable judgment on the merits in order to be a prevailing party," stating that one purpose of the fee-shifting statute is to discourage plaintiffs from bringing lawsuits that are "frivolous, unreasonable, or groundless." (Emphasis added).

4. Workers' Compensation Retaliation

Onderko v. Sierra Lobo, Inc., 141 Ohio St. 3d 1451, 2016-Ohio-5027

SYLLABUS: "The necessary elements of a prima facie case of retaliatory discharge under R.C. 4123.90 do not include proof that the plaintiff suffered a workplace injury."

Employer hired plaintiff as a full-time engineering technician. In 2012, plaintiff left work early because his right knee began to hurt. Plaintiff visited the ER, but did not inform the employer and did not inform the ER his injury was work related. Plaintiff then filed a First Report of Injury with the Ohio Bureau of Workers' Compensation, alleging that his right knee was injured at work. The BWC denied the claim. Employer terminated plaintiff for his "deceptive" attempt to obtain worker's compensation benefits from a non-work-related injury. Plaintiff sued for a violation of R.C. 4123.90.

The trial court granted summary judgment for the employer, but the Sixth District reversed, finding summary judgment inappropriate because R.C. 4123.90 does not require a showing that the plaintiff suffered a workplace injury. The Ohio Supreme Court affirmed. A plaintiff must only prove that the "employer discharged, demoted, reassigned, or took other punitive action against him" in retaliation for filing a workers' compensation claim.

APPELLATE DECISIONS

AGE DISCRIMINATION

Brown v. O'Reilly Automotive Stores, Inc., 2015-Ohio-5146 (8th Dist.)

> Brown (age 53) was terminated by O'Reilly Automotive, and replaced by Carter (age 46) as the store manager. The Eighth District affirmed summary judgment, as Brown failed to establish that "his termination was based on his age, rather than his performance." The court reached this ruling notwithstanding evidence that his direct supervisor called him "gramps," and stated that Brown "would be dead by the time they were taking over the company's headquarters in Missouri."
>
> The Eighth District also affirmed summary judgment on Brown's retaliation claim. The day before being fired, Brown wrote a letter to his supervisor that stated, "There are a number of young guys with worse profit margin, but I am being told to either take a 60% pay cut or be fired." The court of appeals held that "Brown's general complaint of unfair treatment in the letter — which does not specifically address discrimination — is insufficient to constitute protected activity."

Richardson v. Wal-Mart Stores, Inc., 836 F.3d 698 (6th Cir. 2016)

> Plaintiff worked as an hourly associate and handled returns for the store. She received three written disciplines from 2011 to 2012. In 2012, Richardson complained of discriminatory treatment from her manager, including that she claimed plaintiff was too old to continue working and asked when she would to retire. In 2013, Richardson tripped over a cart and broke her wrist while working. The issued a fourth written discipline for a safety violation and fired plaintiff.
>
> The Sixth Circuit affirmed the district court's grant of summary judgment for Wal-Mart. Richardson neither presented direct evidence of discrimination nor demonstrated the pretextual nature of Wal-Mart's proffered reason for her termination. Without evidence that the terminating manager did not honestly believe that Richardson's disciplinary record justified her termination, Richardson failed to show pretext.

Robinson v. Vanex Tube Corp., 2016-Ohio-268 (11th Dist.)

> Plaintiffs worked for many years for VTC as machine operators. In July 2009, VTC laid both off, along with a substantially younger peer. Nine months later, VTC recalled the younger peer. Summary judgment was granted to VTC on their age discrimination claims. The Eleventh District affirmed summary judgment, because, upon recall, the younger peer performed a different job than he and plaintiffs previously held.

Stover v. Myocare Nursing Home, Inc., 2016-Ohio-2729 (8th Dist.)

68 year old Stover was employed by Myocare as a receptionist and a receptionist supervisor. Myocare consolidated some of its nursing facilities, eliminated Stover and another substantially-younger full-time receptionist, and retained five existing part-time receptionists to fill the consolidated receptionist position who were Stover's age peers. Myocare then filled the full-time receptionist position with a 25-year-old from another Myocare facility that was not affected by the RIF.

The Eighth District reversed summary judgment with respect to Stover's age discrimination claim. In RIF cases a plaintiff often cannot establish a prima facie case when work is redistributed among other existing employees. Here, however, the part-time receptionists initially to take over Stover's duties all resigned or were terminated within a month of the RIF, leaving only the younger hire to handle Stover's duties.

Treadway v. California Products Corp., ___ Fed. Appx. ___ (6th Cir. Aug. 1, 2016)

In early 2009, Treadway (age 66), notified his supervisor that he decided to "slow down" and sought to reduce his sales territory because it required "a lot of travel." Treadway continued to work in a reduced service area and finally, in October of 2011, a new sales agent (age 57) was hired. A few months later, the employer terminated Treadway. He filed an ADEA claim claiming that the repeated use of the words "retire" and "retirement" constitutes direct evidence of age discrimination because the terms "carry the explicit connotation of advancing age."

The Sixth Circuit affirmed the District Court's grant of summary judgment, holding that Treadway did not establish a *prima facie* case of age discrimination. The terms "retire" and "retirement" alone, without any evidence that they are being used as a proxy for age to express discriminatory bias, are not direct evidence of age discrimination.

DISABILITY DISCRIMINATION

Boileau v. Capital Bank Fin. Corp., 646 Fed. Appx. 436 (6th Cir. 2016)

As a head teller for defendant, plaintiff's duties required regular attendance. Boileau was diagnosed with lupus, a condition that required her to miss work for indefinite periods of time. Boileau was on FMLA leave for a surgery that attempted to mitigate her condition in May 2011. Boileau took her second period of FMLA leave in January 2012. Boileau's physician, however, certified that Boileau was incapacitated on January 18 and that she would be incapacitated every 1-2 months with episodes lasting between 8-12 weeks at a time for the rest of her life. In early March 2012, Boileau was still physically unable to return to work. The employer terminated Boileau on March 14, 2012.

Boileau sued Capital for disability discrimination and discriminatory discharge under the FMLA and the ADA. The district court granted summary judgment for Capital because there was insufficient evidence to satisfy Boileau's claims. The Sixth Circuit affirmed. She could not establish that the proffered nondiscriminatory reason for the termination—that she could not return to work before her FMLA leave exhausted—was pretext.

As to Boileau's ADA claim, the Court found that Boileau was not "qualified." Regular attendance was an essential function of the teller position. Because of Boileau's condition, she could not perform that function: she missed three months of work leading up to termination. Boileau alleged that she was qualified if Capital would allow her two weeks of absence. But even with that accommodation, Boileau's medical diagnosis would require her to indefinitely miss prolonged stretches of work in the future.

Camp v. Bi-Lo, LLC, ___ Fed. Appx. ___ (6th Cir., Oct. 21, 2016)

61-year old plaintiff worked as a grocery stock clerk for 38 years. He was one of three clerks who worked as a team to stock the grocery store each night. During March 2012, the store's director found that Camp's team did not finish shelving the product. When the director asked why, Camp's supervisor stated that Camp had a "bad back" and that the team had to help him with the "heavy stuff."

After that conversation, the director told Camp that Bi-Lo was thinking of putting him on light duty. Camp met with HR and told them that he could still do his job. Bi-Lo required Camp to have his physical capabilities tested by a physician. The physician found that Camp could meet some lifting requirements of the job but not all.

Bi-Lo made Camp take a leave of absence and instructed him to use the remainder of sick leave and vacation days, then use short-term disability, to reach his sixty-second birthday when he could begin Social Security and start getting his retirement check. In September, Bi-Lo informed Camp he would be terminated on October 12 for "job abandonment" unless he provided a "fitness for duty" form signed by his doctor. Camp requested an accommodation, but Bi-Lo terminated Camp on because he could not fulfill the physical demands of the position. Camp sued under the ADA and the ADEA.

The trial court granted summary judgment to Bi-Lo because its job description required Camp to lift more than 35 pounds, and was therefore an essential function of the job. Because Camp could not perform that function, he was not qualified for the position.

The Sixth Circuit reversed. Camp produced testimony from supervisor that heavy lifting was not essential. The employees who worked closely with Camp agreed that heavy lifting was not an important part of the job. Camp's disability did not cause undue hardship, or endanger a colleague. Even if the ability to lift 35 pounds *was* an essential function of the job, there was evidence that Camp was qualified

with an accommodation, and that such not requiring Camp to do heavy lifting, would not cause an undue hardship or disrupt business operations.

Deister v. Auto Club Ins. Ass'n, 647 F. App'x 652 (6th Cir. 2016)

Plaintiff began working for defendant as a claims adjuster in September 2011. At work, plaintiff began to experience shakiness, poor concentration, and suffered panic attacks. Plaintiff informed his supervisor that he was "leaving home due to panic/stress attacks and to meet [his] doctor tomorrow." He took an indefinite medical leave the next day. On March 12, Deister sent HR a letter from his doctor indicating that he suffered from "acute stress reaction" and that he could return to work on April 9. The company informed plaintiff it might replace him after "90 days of absence in a rolling 12-month period ..." and that "the failure to return ... as instructed may result in termination."

In June, the supervisor sent plaintiff a letter to advise him that he had been gone for more than 90 calendar days and "business conditions require[d] that [Auto Club] fill the vacancy." Auto Club terminated plaintiff on August 6th because he chose "not to return to [his] former position." Deister sued for wrongful discharge, failure to accommodate, and retaliation under the ADA.

The district court granted summary judgment. It found that Deister failed to show that Auto Club's proffered reason for the termination was pretext. Deister argued that HR conspired in a ploy to terminate him by intentionally delaying his return to work until the 90 days had lapsed. The Sixth Circuit found this failed to show pretext. In addition, he failed to let HR know that he requested a new position *because of* his disability.

Ferrari v. Ford Motor Co., 826 F.3d 885 (6th Cir. 2016)

Ford hired Ferrari in 1996. In 2000, Ferrari suffered a neck injury at work which placed him on medical leave from June 2001—April 2003. After his return to work, Ford accommodated his medical restrictions for the next nine years by assigning him to light-work positions. Ferrari requested that Ford's company doctor, Dr. Brewer, lift all restrictions so that he could apply for and receive a skilled-trade apprenticeship. Dr. Brewer conducted the pre-apprenticeship physical on January 16, 2013 and decided to maintain Ferrari's restrictions because his medical records indicated that he still used opioids. He was bypassed for the position because of medical findings based on two medical examinations and medical history. The district court granted Ford's motion for Summary Judgment on Ferrari's claims of "regarded as" disability discrimination.

The Sixth Circuit affirmed. Under the direct evidence standard, Ferrari failed to present sufficient evidence that Ford regarded Ferrari's opioid use as a substantial impairment on the major life activity of working. Ferrari also failed to demonstrate a factual dispute about whether the decision-makers honestly believed his medical restrictions reflected a reasonable medical judgment.

Hartman v. Ohio Dep't of Transp., 2016-Ohio-5208 (10th Dist.)

Hartman worked as a truck driver for ODOT. In 2012, he was involved in multiple preventable accidents. Hartman submitted a doctor's note to ODOT which stated that Hartman's accidents were a result of hearing loss in his right ear. ODOT's physician reviewed Hartman, however, and concluded that a hearing deficiency did not cause Hartman's accidents. ODOT assigned Hartman to fix a pothole, which he did not complete because he went home sick.

Hartman filed an EEOC charge, alleging age and disability discrimination. ODOT threatened disciplinary actions against him for failure to complete the pothole. The parties entered into a "Last Chance Agreement," lasting two years, and covering all workplace rules. He later crossed a highway on a mower was struck by a motorist. ODOT terminated him.

The trial court granted summary judgment for ODOT, and the Tenth District affirmed. ODOT terminated Hartman because he was involved in a traffic accident in violation of the Last Chance Agreement. While Hartman presented a prima facie case of disability discrimination and retaliation, he did not present evidence of pretext.

Lopreato v. Select Specialty Hospital-Northern Ky., 640 Fed. Appx. 438 (6th Cir. 2016)

Plaintiffs, both former nurses, became addicted to narcotics and began to steal it from their former workplaces. Their employers terminated them when they learned. Both entered the Kentucky Alternative Recovery Effort for Nurses ("KARE") to help manage substance-use disorder. Upon completing KARE, each signed an agreement placing restrictions on their professional licenses: they could not work long hours or administer narcotics without supervision.

Years later, both plaintiffs applied for promotions with Select. The promotion application required applicants to answer whether professional licenses had ever been restricted or investigated. Both responded affirmatively, but stated they had no current restrictions even though each was currently restricted. Neither disclosed the true reason for their involvement in the KARE program. Select demonstrated that it based its decision not to promote plaintiffs on a company policy of not hiring nurses with "current or previous restrictions or disciplinary action on their license."

Plaintiffs sued Select under the ADA alleging that Select refused to promote them based on their disabilities (chemical dependency). The district court granted summary judgment for Select; it found that a neutral company-policy motivated Select's decision not to promote the two employees. The Sixth Circuit affirmed because Select set forth a legitimate, nondiscriminatory reason for the decision: Select did not promote or hire nurses with restrictions on their licenses. Because Select's policy applied equally to nurses with restricted licenses, and because plaintiffs did not show the decision was motivated by their disabilities instead of policy, they failed to establish proof of pretext.

Mathis v. City of Red Bank, ___ Fed. Appx. ___ (6th Cir., Oct. 25, 2016)

Mathis worked for Red Bank's Public Works Department for over 10 years. When he was diagnosed with lupus, the City began the interactive process to accommodate his disability. Mathis' doctor said that he must work indoors. No such jobs existed for which he was qualified. The City accommodated Mathis by allowing him to wear protective clothing, but the doctor objected. Mathis was not qualified for the two vacant jobs that had only indoor work and was therefore laid off.

The Trial Court granted summary judgment for the City, and the Sixth Circuit agreed and affirmed.

Michael v. City of Troy Police Dep't, 808 F. 3d. 304 (6th Cir. 2015)

After brain surgery, plaintiff sought to return to work, and was referred to neuropsychologists based on "aberrant behavior" the employer observed. After differing medical opinions were submitted, the City kept plaintiff on unpaid leave "mostly because of the conclusions of [the doctors], but also because Michael's own behavior tended to confirm those conclusions."

The Sixth Circuit analyzed whether plaintiff was a qualified individual with a disability, or whether he posed a "direct threat that cannot be eliminated by a reasonable accommodation." The Court noted that an employer can rely on a "reasonably objective" medical opinion. The Court affirmed summary judgment on the basis of the medical reports the City obtained and because of the plaintiff's own observed behavior in the workplace.

Neely v. Benchmark Family Servs., 640 Fed. Appx. 429 (6th Cir. 2016)

Plaintiff suffered from sleeping problems. No doctor diagnosed him with sleep apnea or another sleep-related disorder.

The Sixth Circuit affirmed summary judgment because plaintiff did not present evidence that he was disabled, as no doctor diagnosed him. Under the ADA, self-described symptoms without medical evidence, are not enough to establish a substantial limitation on a major life activity. The Court refused, on a retaliation claim, to find that a plaintiff who did not meet the ADA's definition of "disabled," who did not request an accommodation, and who never filed a formal charge while employed, engaged in protected activity.

RACE DISCRIMINATION

Artis v. Finishing Brands Holdings, Inc., 639 Fed. Appx. 313 (6th Cir. 2016)

Plaintiff worked as a machine operator. The Sixth Circuit reversed summary judgment on pretext in this race discrimination claim based on evidence of a

"discriminatory atmosphere." Specifically, the Court noted that the supervisor referred to one of a black co-worker as a "half-breed," made a comment that "only blacks like going to jazz concerts," led employees to believe that he did not want blacks or females in management positions, and said that "blacks had to be trained longer." The supervisor was previously ordered to attend diversity training, but plaintiff disputed that the supervisor did attend this training.

Davis v. Landscape Forms, Inc. 640 Fed. Appx. 445 (6th Cir. 2016)

Davis, who is African-American, worked as a welder for Landscape Forms, Inc. ("LFI"). In 2012, Davis claimed he suffered three racially-motivated incidents: 1) a coworker placed a banana in his work boot; 2) a coworker placed yellow tape on Davis' work helmet with the words "Chiquita" and "Ghetto fab"; and, 3) a coworker drew a monkey on a white board with the caption "I love bananas." Davis also alleged that his coworkers made racial slurs about him, including "nigger," that he "had a tail," and used the term "porch monkey." Earlier in 2012, Davis had persistent attendance problems. Eventually, LFI discovered that Davis had submitted timecards for days that he had called off sick.

Davis complained about the racially-motivated incidents and in August and September. It was undisputed that Davis did not mention racial slurs until this later meeting, and did not provide detail. He informed LFI that he heard the slurs "in the background." LFI terminated Davis' employment for falsification of a timesheet, intimidation of team members, and interference with the company investigation into Davis' attendance issues.

Davis sued for racial harassment and race-based discrimination and retaliation. The district court found that Davis did not establish a prima facie case because he did not provide evidence that similarly-situated white employees were treated more favorably; his retaliation claim failed because he failed to show pretext, and the racial harassment claim failed because LFI did not act negligently in response to his complaints.

The Sixth Circuit affirmed. On Davis' harassment claim, the Court found that LFI took prompt and appropriate remedial action. Davis failed to provide detailed information about the racial slurs, such as what was said, who made the slurs, or when the slurs occurred. Therefore, Davis did not provide enough information for LFI to take proper action. LFI's reason for terminating Davis, that he engaged in conduct justifying termination, triggered the "honest belief rule" and prevented Davis from proving pretext. Similarly, on the retaliation claim, the Court found that temporal proximity alone was not enough to prove pretext.

English v. AK Steel Corp., 2016-Ohio-5287 (12th Dist.)

The plaintiff, who is African-American, began employment for AK Steel in 2007. In 2009, he applied for and received a position at its cold strip mill. He arrived late on his first day, and continued to be tardy over the next weeks. English's

supervisor issued him disciplinary actions for his attendance issues. AK Steel terminated English after determining he was sleeping at work. English sued, alleging that it was motivated by race and that he was subjected to a racially-hostile work environment.

At summary judgment, English his own affidavit and that of a coworker. English's own affidavit was unsigned when submitted and the affidavit from his coworker was not submitted to the court until the day of the hearing on summary judgment. The trial court found them both inadmissible because they were untimely filed, and that neither affidavit raised a genuine issue of material fact. The Twelfth District affirmed the trial court's exclusion of English's affidavits and grant of summary judgment, as the plaintiff could not point to a specific piece of evidence in the record to show that similarly-situated non-African-American employees were treated more favorably than black employees or that he was exposed to a hostile work environment.

O'Donnell v. City of Cleveland, 838 F.3d 718 (6th Cir. 2016)

In November 2012, thirteen Cleveland Police officers (twelve white and one Hispanic) fired 139 bullets into a vehicle, killing two black suspects in the vehicle. On December 3, 2012, the department assigned the officers to restricted duty pursuant to Cleveland's "Post Traumatic Incident Protocol." Restricted duty under the protocol imposed limited public contact, no overtime pay or compensation for court appearances, and according to the officers, caused them stress and demeaned them. On June 13, 2014, the police department reassigned the officers to their full duties.

The white officers argued that the police department subjected them to restricted duty for a longer amount of time than the policy required because they were white officers who were involved in an incident with black suspects. The officers cited to two cases, *Franko v. City of Cleveland*, 654 F. Supp. 2d 711 (N.D. Ohio 2009) and *Lentz v. City of Cleveland*, 335 F. App'x 42 (6th Cir. 2009), which found that Cleveland is the "unusual employer that discriminates against the majority." Finally, the officers presented an Excel spreadsheet that they compiled with information about the number of deadly force incidents and the length of time officers received restricted duty. The officers argued that the spreadsheet demonstrated that seven similarly situated African-American officers were placed on restricted duty for less time than they were. The District Court granted summary judgment for the City of Cleveland.

The Sixth Circuit affirmed, finding that the officers' arguments based on *Franko* and *Lentz* involved different events, different officers, different supervisors, and different decision-makers and therefore did not constitute direct evidence of discriminatory animus based on the November 2012 incident. The officers' attempts to meet the circumstantial evidence standard with the spreadsheet likewise failed because it did not address all "relevant" aspects the officers' employment situation, such as whether the assignment was pending an investigation.

Stallworth v. Wal-Mart Stores East, L.P., 2016-Ohio-2620 (1st Dist.)

Stallworth was employed as the only African-American overnight stocker at a Wal-Mart store in Cincinnati. His Caucasian supervisor criticized him for being "lazy," which he did not call Caucasian stockers. Plaintiff reported the harassing behavior. The supervisor became retaliated and made comments like "the way you people think is dumb" and told plaintiff not to come to work on several occasions. He then terminated the plaintiff for opposing more harassing conduct. Nineteen co-workers signed a statement explaining that the plaintiff was being harassed by the supervisor. After receiving the petition, the employer asked the plaintiff to return to work, and required him to receive coaching. The company then informed the plaintiff that he did not comply with the coaching and did not allow him to come back to work.

Stallworth filed a charge of racial discrimination with the OCRC. The OCRC issued a "probable cause" finding, and the matter proceeded to hearing. The OCRC found Wal-Mart had been motivated by an illegal discriminatory animus. The OCRC ordered Wal-Mart to "stop all discriminatory practices in violation of R.C. Chapter 4112, make a timely offer of employment to Stallworth for the position of third-shift stocker, and issue a check for back pay to Stallworth in the amount of $99,199.48." Wal-Mart filed a petition for judicial review, and the common pleas court affirmed.

The First District affirmed. Applying the "cat's paw" theory of liability, the Court agreed with the OCRC's findings that the supervisor's discriminatory animus had influenced the ultimate decision-maker in the case.

Woods v. FacilitySource, LLC, 640 Fed. Appx. 479 (6th Cir. 2016)

Employer hired the plaintiff, an African-American, as a customer-service representative at $10 per hour. Throughout his employment, plaintiff was promoted several times, reaching an annual salary was $42,200.69. The defendant's President and CEO, was responsible for approving promotions, and allegedly froze plaintiff's salary while others in similar positions were paid more, and subjected him to offensive, racially-motivated comments.

Plaintiff informed HR that he planned to file a formal complaint of discrimination. Twenty-four of the account managers hired during plaintiff's employment were Caucasian, and of those, eleven received a higher salary. The higher salaries, however, were given to persons with more experience, expertise, and education than Woods. During discovery, the employer learned that plaintiff lied on his initial job application to the company about graduating from high school. The employer fired plaintiff during the case.

The district court granted summary judgment to defendant on each claim because the company offered a legitimate, nondiscriminatory reason for the wage differential, and plaintiff failed to show pretext. The Sixth Circuit affirmed, as the

plaintiff did not provide any evidence that he had similar qualifications to the employees who he alleged were treated more favorably. Additionally, the plaintiff did not meet the minimum qualifications for the positions at issue.

SEX / PREGNANCY DISCRIMINATION

Graves v. Dayton Gastroenterology, Inc., ___ Fed. Appx. ___ (6th Cir. Sept. 13, 2016)

After obtaining a new supervisor, the female plaintiff began to receive inappropriate sexual text messages from her new supervisor (Schum). In January 2013, Graves texted Schum about how she was enjoying her vacation and how it was nice to not have to do anything. Schum responded, "I [sic] happy for you, you just have fun and wild sex." A week later, Schum texted Graves again, apparently out of the blue, saying, "You and your husband lay out a wonderful dinner an [sic] have wild sex on the table!!!!! I do think about sex all the time. I [sic] just not getting it."

Graves reported both text messages to the CEO who then spoke with the supervisor. He apologized to Graves and sought to discuss the matter with her, but she refused. Thereafter, the supervisor addressed her curtly, refused to respond to her questions about work assignments, would not relieve her from her duties despite regularly relieving other employees, gave her the most difficult assignments, denied her lunch breaks on several occasions, threw a chart at her, failed to provide her with updated work schedules, and denied her requests for days off. Schum told Graves that these behaviors were due to her reporting the text messages and threatened that he would become more aggressive. Graves resigned and sued Schum and the employer for discrimination based on her gender by creating a hostile work environment. She did not include a retaliation claim.

The Sixth Circuit affirmed the district court's grant of summary judgment to the employer, finding that the behavior might have formed the basis of a successful retaliation claim, but declined to stretch the hostile-work environment analysis to fit what was essentially a retaliation claim.

Jackson v. VHS Detroit Receiving Hosp., Inc., 814 F. 3d. 769 (6th Cir. 2016)

The female plaintiff began working for employer's Mental Health Crisis Center in 1998 as a mental health technician. In 2013 she was terminated after she assisted a RN in incorrectly discharging a suicidal patient. The patient was unharmed. Both the plaintiff and the RN failed to check the patient's ID band prior to discharge. Prior to her termination, the plaintiff had received very good performance evaluations, and had no disciplinary record. The plaintiff filed a sex discrimination lawsuit, alleging that the hospital did not fire two male mental health technicians who made mistakes of comparable seriousness. Unlike with the female plaintiff, the hospital utilized the progressive disciplinary process with the male comparators.

The Sixth Circuit reversed the trial court's grant of summary judgment, finding that a reasonable jury could conclude that the hospital's reasons for termination were a pretext for sex discrimination.

Locigno v. 425 Bagley, Inc., 2016-Ohio-5924 (8th Dist.)

The female plaintiff worked as a bartender and server for Zach's Steakhouse. Throughout Locigno's employment, she alleged that the owners sexually harassed her daily. They often asked and made Locigno feel obligated to give a "hello kiss," made comments about her appearance, offered to buy her lingerie, touched, grabbed, or swatted her buttocks and breasts, and made sexual comments to her. Locigno recorded one encounter with Paul Sr., where she told Paul Sr. that she was not comfortable with him touching her. When she complained, no action was taken. Other staff members had stories nearly identical to those of Locigno.

Locigno sued the owning family for sexual harassment, discrimination, retaliation, negligent retention, and intentional infliction of emotional distress. The jury returned a verdict for Locigno, awarding her $3,400 in lost wages, $25,000 for pain and suffering on the sexual harassment claim against each of the Zachariases, and $50,000 in punitive damages, plus attorney fees ($99,370).

On appeal, the family asked for a new trial based on misconduct of the prevailing party, challenged the award of punitive damages, and claimed that *ex parte* communication between the trial judge and the jury constituted reversible error. The 8th District found that the jury's verdict was supported by the weight of the evidence and that there was no behavior by the prevailing party that rose to the level of misconduct. On the issue of punitive damages, the court found no plain error because the trial court properly instructed the jury on the standard for punitive damages.

Smith v. Rock-Tenn Servs., 813 F. 3d. 298 (6th Cir. 2016)

Smith resigned from his employment in a factory job after one of his male co-workers repeatedly grabbed Smith's buttocks, and once ground his genitals into Smith's backside. Despite Smith's complaints to management, the coworker continued to work in the same workspace as Smith. This caused Smith to suffer from anxiety, panic attacks, and a later diagnosis of PTSD. Smith prevailed on his Title VII claim at trial, and was awarded $307,000 by the jury. Rock-Tenn Services appealed.

The Sixth Circuit affirmed the verdict, finding that the conduct described by Smith was more than mere "horseplay," in particular because the coworker acknowledged that despite being in a mixed-sex work environment, he only directed his antics at Smith and other males.

Weber v. Ferrellgas, Inc., 2016-Ohio-4738 (11th Dist.)

The plaintiff worked as a Customer Service Specialist (CSS) with excellent performance reviews. When a scheduler position became available, the general manager allegedly discouraged Weber from applying for the position because "she is a single mother with kids and if [she] had to take time off work, it would jam [them] up for getting someone to cover the scheduling."

Weber did not apply. A woman with children who was qualified for the position was hired for the position. Weber discussed the alleged instruction not to apply with the supervisor, but never took formal action with the HR department. Instead, Weber complained to Regional Vice President 6 months later. A month later, the supervisor issued the plaintiff a "verbal warning" regarding unauthorized overtime. A month later, the company terminated her employment based on a violation of the company's ethical code. Weber filed claims for gender discrimination based on sexual stereotyping, retaliation, and defamation.

The trial court granted summary judgment in favor of the employer and the Eleventh District affirmed. Discrimination based upon "familial status" is unlawful in the context of housing and lending, but not employment [R.C. 4112.02(H)]. The Court explained that even if viewed under a "sex-plus" discrimination lens, Weber's claims would still fail on the merits because Weber was not discharged as a result of the alleged discriminatory statements.

RETALIATION / WHISTLEBLOWING

Bennett v. Columbiana Cnty. Coroner, 2016-Ohio-7182 (7th Dist.)

Susan Bennett, an executive secretary at the County Coroner's Office, was deposed in an employment law action against the County and coroner brought by one of her co-workers. Bennett resigned during the action.

Bennett then filed this suit against the County for retaliation and retaliatory constructive discharge. Bennett's complaints stem from two alleged incidents of faulty/altered death certificates, and an allegation that the coroner attempted to steal a gun that was brought in with a suicide victim. Bennett did not comply with the written notice requirement of R.C. 4113.52. The County investigated and found no wrongdoing. Bennett claimed she then began to experience retaliation in the workplace in the form of reduced hours and benefits. Bennett ultimately resigned.

The trial court granted summary judgment in favor of the County finding that Bennett failed to satisfy the requirements of R.C. 4113.52 and failed to prove that the violation was likely to increase "imminent risk of physical harm to persons or is a hazard to public health of safety or were felonies." The Seventh District

affirmed, finding that even if the violation fit the imminent risk standard, appellant had a duty to comply with the procedures of R.C. 4113.52.

Braun v. Ultimate JetCharters, LLC, 828 F.3d 501 (6th Cir. 2016)

The female plaintiff was hired by Ultimate JetCharters as a co-pilot. Two male pilots worked alongside Braun. The two men repeatedly harassed Braun about her marital status, her uniform, and her off-duty behavior, Braun made multiple calls to management. During these calls, Braun complained that the male pilots and harassed her because of her sex.

Braun then sent an email to the Director of Operations complaining about her coworkers' harassment. Approximately three weeks later, the President and CEO terminated Braun. The proffered reasons for the termination were that Braun had sent "inappropriate emails" and that her off-duty behavior was not "in line with the UJC image."

At trial, the CEO admitted that he knew of Braun's harassment complaints. Moreover, the DoO stated that he "[a]bsolutely provided input on the decision to terminate [the plaintiff]." In addition, there was testimony that male pilots engaged in conduct identical to Braun's. The jury found in favor of Braun, but when she attempted to collect the judgment, UJC counsel sent a letter stating that Braun sued UJC, Inc., a company that is out of business and without assets, instead of UJC, LLC.

The Sixth Circuit affirmed the verdict against UJC in full. Evidence presented at trial was sufficient to establish that UJC should have reasonably understood that Braun was making a complaint of sex discrimination under O.R.C. § 4112.02. Braun's complaints therefore could constitute opposition to an unlawful discriminatory practice. The Court also found that Rule 60(a) "may be used to correct mistakes or oversights that cause a judgment to fail to reflect what was intended at the time of trial," and affirmed the district court's decision to amend Braun's judgment to reflect that UJC, LLC was the proper moniker for the entity found responsible for the retaliatory conduct.

Bryan v. Valley Care Health Sys. of Ohio, 2016-Ohio-7156 (11th Dist.)

Plaintiff Bryan was hired in 2007 at Northside Medical Center. She was provided with an employee handbook and grievance procedure. Bryan was issued a formal written corrective action due to patient care. Bryan followed the grievance procedure and was denied at stages 1, 2, and 3. Bryan asserted in her grievances that she should not have been disciplined because she was following hospital policy and honoring union rules and regulations. Prior to the conclusion of the grievance process, Bryan was notified that she was being laid off as part of a RIF. Bryan subsequently filed a claim of retaliation.

The trial court granted summary judgment, and the Eleventh District affirmed. The hospital provided undisputed evidence of the criteria used in its decision to

lay off Bryan, which were valid and nondiscriminatory reasons. Also, Bryan's filing of a grievance unrelated to the employer's discriminatory activity cannot form the basis for a retaliation claim.

Crawford v. Notar, 2016-Ohio-3010 (11th Dist.)

The African-American plaintiff alleged that he was terminated by Warren City Schools from his position as Supervisor of Student Services after complaining in January 2013, that he was being paid less than similarly-situated Caucasian supervisors.

The Eleventh District affirmed the grant of summary judgment in favor of the school system, because there was undisputed evidence that the superintendent had recommended that the School Board eliminate Crawford's position at the end of the current school year, and it agreed to do so based upon economic reasons.

Glenn v. Hose Master, L.L.C., 2016-Ohio-1124 (8th Dist.)

Hose Master terminated Glenn after learning that he made a racially offensive video on company property and posted it to social media. Glenn claimed that he was actually discharged in retaliation for filing a workers' compensation claim. The trial court granted summary judgment because Glenn was unable to establish a causal connection between his workers' compensation claim and his termination. The Eighth District affirmed summary judgment for Hose Master.

Henry v. Abbott Laboratories, 651 Fed. Appx. 494 (6th Cir. 2016)

After complaining of race discrimination in the denial of a promotion, the African American plaintiff received a worse performance evaluation than she had previously received. She filed an OCRC charge, and the agency found probable cause that Abbott had discriminated against her. The OCRC pointed to the fact that Henry had similar performance reviews to similarly-situated Caucasian co-workers who had been promoted, some of whom had less experience than Henry. On June 3, 2011, Abbott placed Henry on a 60-day performance improvement plan (PIP). Henry, believing the PIP was disciplinary and retaliatory, began to suffer anxiety, and took a medical leave of absence on June 8, 2011.

The Sixth Circuit reversed the district court's entry of summary judgment on the race discrimination and retaliation claims. Henry sufficiently alleged adverse employment actions by pointing to more than just the low performance evaluation; Henry also alleged she was subjected to increased scrutiny, a PIP, and being kept in training. The low performance evaluation rendered Henry ineligible for promotion, therefore affecting her advancement potential.

O'Donnell v. Genzyme Corp., 640 Fed. Appx. 468 (6th Cir. 2016)

O'Donnell worked as a manager for Genzyme, a biotechnology company that develops and sells medical products. To raise sales numbers, some of Genzyme's

representatives began to promote an off-label use of Genzyme products. O'Donnell openly opposed this practice and alleged that he was retaliated against for doing so. O'Donnell resigned when Genzyme substantially increased its sales goals and he believed the goal was unattainable without promoting an off-label use of Seprafilm. O'Donnell sued Genzyme for retaliation and constructive discharge.

When the parties first discussed the scope of electronically-stored information ("ESI"), they discussed six document custodians, a date range of 4.5 years, and planned to wait for O'Donnell to propose search terms. On December 1, O'Donnell submitted a much broader ESI request than the parties discussed. The district court adopted Genzyme's ESI proposal because it better balanced the need to identify relevant documents while avoiding a disproportionate burden. The court, however, did not establish a deadline for Genzyme's ESI production until after the plaintiff's summary judgment opposition was due. Despite the timing, O'Donnell did not move to compel Genzyme's ESI more quickly or otherwise complain. The district court granted summary judgment to Genzyme on each claim.

On appeal, O'Donnell argued that the district court abused its discretion in discovery matters when it ordered Genzyme to produce ESI with no deadline and granted summary judgment to Genzyme. The Sixth Circuit found no abuse of discretion because O'Donnell had adequate discovery time. First, O'Donnell did not make any complaints that he would not have sufficient time for discovery. Second, O'Donnell failed to show how additional discovery would have affected the outcome. Third, the length of discovery was not unfairly brief because neither party objected when the court set the discovery schedule. Fourth, O'Donnell acted dilatorily in light of the discovery schedule. He failed to move to compel, he did not take meaningful steps to schedule additional depositions, and he did not complete his proposal until one month before the deadline.

Vogt v. Total Renal Care, Inc., 2016-Ohio-4955 (8th Dist.)

In 2004, Vogt became the regional operations director for Total Renal Care, Inc., reporting to the divisional vice president. As TRC began to acquire more dialysis companies, the DVP instructed Vogt that she could not speak to doctors or enter their facilities during the integration process. The DVP testified that he did not know the reason for this prohibition. Vogt complained that she was being discriminated against on the basis of gender. Vogt then transferred involuntarily within the company. Vogt then complained to HR that "decisions were made based on my gender" and that she "felt it was unfair." After this complaint, Vogt received lower yearly bonuses and zero stock options. Vogt then resigned from TRC and sued for gender discrimination and retaliation.

The trial court granted summary judgment to TRC. On appeal, the Eighth District reversed. A genuine issue of fact existed whether Vogt suffered an adverse employment action in the removal from participation in the integration process dialysis centers and her forced transfer. Vogt made complaints that she "was

being discriminated against," and that she believed her transfer was in retaliation for complaining about gender discrimination. Because her transfer occurred after she complained about discrimination, the court found a genuine issue of material fact regarding her claim of retaliation.

FAMILY AND MEDICAL LEAVE ACT

Hartman v. Dow Chemical, ___ Fed. Appx. ___ (6th Cir., Aug. 16, 2016)

Hartman, an administrative assistant for an attorney and paralegal, was required to be online and connected to Dow's network either at the office or using VPN. After two weeks of approved FMLA leave, Hartman requested an extension, which Dow approved. She returned to work part time after two months and then resumed her full-time schedule three weeks later.

Prior to her FMLA leave, Hartman's supervisors suspected she was leaving work earlier than normal and began taking notes on her arrivals and departures. Dow investigated her work performance and online behaviors. Once Hartman returned to work, Dow continued to monitor Hartman's non-work activity and time at work. Hartman was terminated after an investigation confirmed irreconcilable time records. Hartman filed a charge against Dow for both interference and retaliation in violation of the FMLA.

The trial court granted summary judgment on the interference claim, but denied it on the retaliation claim given the close proximity between the leave, monitoring of work activity and Hartman's termination. A jury found Dow liable and awarded Hartman over $150,000 in damages.

The Sixth Circuit reversed the jury verdict, finding that Dow's nondiscriminatory reason for termination of timecard fraud was supported by specific evidence which gave Dow an "honest belief." Hartman's disagreement with the accuracy of the timecard investigation results was not enough to prove pretext and that she must show that the Dow's decision-making process was not "reasonably informed and considered" and thus not worthy of belief. Importantly, the Court noted that "where a plaintiff's evidence of retaliatory animus ultimately rests **solely** on temporal proximity, a jury's verdict in favor of the plaintiff cannot stand.")

Partin v. Weltman Weinberg & Reis Co., ___ Fed. Appx. ___ (6th Cir., Nov. 28, 2016)

Partin began working for Weltman Weinberg & Reis Co. LPA ("WWR") in 2003 as a clerk. In 2012, WWR began a multi-phase RIF. In June 2013, WWR selected Renner—an employee who never used FMLA leave—for layoff. In round two of layoffs, WWR selected another non-FMLA user for layoff. On the third round of layoffs, WWR selected Partin, who used FMLA. WWR postponed telling Partin she was chosen for layoff because she was on FMLA leave at the time.

Partin sued, alleging retaliation for using FMLA leave. The district court granted summary judgment for WWR, as Partin failed to show that selecting her for elimination constituted pretext. Partin argued that WWR selected two FMLA users for layoff and that the ones who stayed did not use FMLA. On appeal, the court found that in context, Partin's evidence failed to cast doubt on WWR's stated reason for the layoff: that it selected Partin because she scored poorly on its employee evaluation system.

Tilley v. Kalamazoo Cty. Rd. Comm'n, et al., 777 F.3d 303 (6th Cir. June 27, 2016)

Tilley, an employee of the KCRC, was assigned by a supervisor to three projects. KCRC suspended Tilley for five days when he missed the first set of deadlines for these projects. On August 1, Tilley was admitted to the hospital. His wife delivered a doctor's note to KCRC on August 8 that excused him from work through October. Tilley submitted his FMLA paperwork on August 17, the same day that he received a termination notice from KCRC in the mail. The termination letter stated that KCRC made numerous attempts to contact the plaintiff with no response. These calls were made during Tilley's FMLA leave. The district court granted KCRC's motion for summary judgment on Tilley's FMLA claims of interference and retaliation.

The Sixth Circuit reversed, finding that the termination letter "create[d] a disputed issue of fact as to whether KCRC would have terminated the plaintiff notwithstanding" his failure to complete the assigned tasks. In addition, the letter's description of the disciplinary sanctions for not communicating while on leave were sufficient to create an inference that KCRC terminated him, at least in part, for using FMLA leave.

West v. Wayne County, ____ Fed. Appx. ____ (6th Cir., Nov. 30, 2016)

In 2013, West's supervisor demanded that West fire another County employee after the employee returned from FMLA leave. West refused because he believed that this would violate the employee's rights under the FMLA. Two weeks later, the supervisor made the same demand and West refused again. When the supervisor learned that the employee was in the process of settlement negotiations with the County, he ordered West to attend the meeting and vote against the settlement. West refused again, and the settlement was approved. West was then fired.

West alleged that he was terminated because he defended another employee's FMLA rights, thus violating the FMLA's retaliation provision. The County and Garrett both argued, and the court agreed, that since West was a personal staff member of Garrett, an elected official, he could not be considered an "employee" under the FMLA. Therefore, West was not eligible to sue under the FMLA. The court found that the plain meaning of the FMLA reserves a private right of action only for "eligible employees."

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WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY AND OTHER EMPLOYMENT TORTS

Shields v. Tyack, 2015-Ohio-5369 (10th Dist.)

Shields, an employee of the Franklin County Municipal Clerk of Court, was terminated after being accused of giving preferential treatment and social security numbers to one bail bonds company. The trial court granted summary judgment on Shields's claims of wrongful termination in violation of public policy. Shields argued that most of the information he was providing was a matter of public record, and a policy argument that a bail bond company might need to obtain an individual's social security number.

The Tenth District affirmed summary judgment, finding that the court could not perceive "jeopardy" to a "clear public policy."

McQuillen v. FeeCorp Indust. Servs., 2016-Ohio-1590 (5th Dist.)

In March 2009, McQuillen began working for FeeCorp, which provides industrial vacuuming services. On May 21, 2009, McQuillen was injured while vacuuming on the job. McQuillen lost control of the hose and "it sucked up his arm." The manufacturer of the vacuum truck unit made a piece of safety equipment, that was a vacuum brake device to be attached to the vacuum hose.

McQuillen alleged an employer intentional tort claim under R.C. 2745.01 (C), which provides, in relevant part, that a "deliberate removal by an employer of an equipment safety guard ... creates a rebuttable presumption that the removal ... was committed with intent to injure another if an injury occurs as a direct result." The trial court granted summary judgment in favor of employer FeeCorp because McQuillen failed to meet the rebuttable presumption of "intent to injure" as required by the statute.

The Fifth District affirmed, finding that the definition of "equipment safety guard" means a device that is designed to shield the operator from exposure to, or injury by, a dangerous aspect of equipment. The guard in this case did not shield an employee from injury, rather, the employee must take proactive steps in order to receive protection. Thus, the safety device did not constitute an "equipment safety guard" within the scope of R.C. 2745.01(C) and accordingly, McQuillen failed to meet his burden under the statute.

Ball v. MPW Indus. Servs., Inc., 2016-Ohio-5744 (5th Dist.)

Defendant provided cleaning services to industrial plants. In September 2009, MPW hired Ball as a technician and promoted him to crew leader in 2010. MPW assigned Ball to remove a byproduct of burning coal with an industrial vacuum. This work required employees to wear steel-toed boots and other gear. Ball did not wear steel-toed boots during this job. The fly ash pile collapsed, engulfed Ball, and melted his boots to his feet.

Ball sued MPW for an employer intentional tort under R.C. 2745.01. The trial court granted summary judgment for MPW. The Fifth District affirmed because under R.C. 2745.01, an employee must prove that the employer had a deliberate intent to injure the employee, not just that an injury was substantially certain to occur or that the employer's actions were negligent or reckless. There was no evidence to suggest that MPW deliberately intended to injure its employees.

ATTORNEY'S FEES

Northeast Ohio Coalition for the Homeless v. Husted, 831 F.3d 686 (6th Cir. 2016)

Defendants, the State of Ohio and Secretary of State John Husted, sought to undo a federal consent decree that required Ohio to count provisional ballots that voters casted in the correct voting locations, but who lacked proper voting identification. Plaintiffs were successful in defending the Decree, and obtaining a statewide preliminary and permanent injunction requiring Ohio to count these votes. Plaintiffs sought attorney's fees and costs stemming from their successes.

The district court awarded fees to Plaintiffs, but limited the recovery of fees incurred in litigation to recover fees in the underlying matter to 3% under the "*Coulter* cap," arising out of *Coulter v. Tennessee*, 805 F.2d 146, 151 (6th Cir. 1986). Plaintiffs cross-appealed the district court's application of the *Coulter* cap, arguing that "unusual circumstances" justified a higher award.

The Sixth Circuit did not address Plaintiffs' "unusual circumstances" argument; instead, it abrogated *Coulter*'s presumptive cap on "fees for fees" awards in light of intervening Supreme Court authority—particularly *Commissioner, I.N.S. v. Jean*, 496 U.S. 154 (1990). *Jean* emphasized that the presumptive cap on fees lacked textual support in 42 U.S.C. § 1988(b) and is not necessary to prevent exorbitant fees and protracted litigation. Further, a presumptive cap ultimately subtracts from the discretion that the fees statute grants to district courts. Congress has set caps on fee applications in other contexts—but it did not explicitly do so in 42 U.S.C. § 1988(b).

The Court highlighted several policy reasons to support its decision to abrogate the *Coulter* rule. First, supporting a fee application requires much more of civil rights attorneys. They must use affidavits, distinguish between successful and unsuccessful claims, defend their rates, and compare themselves to similar attorneys. Second, all of this extra work is completely separate from the work a civil rights attorney must expend to win on the merits of his or her case. Third, the *Coulter* cap incentivizes plaintiffs to accept low settlement terms and incentivizes defendants to push the fee litigation beyond the cap. Finally, the Court reasoned that the *Coulter* rule defied the purpose of 42 U.S.C. § 1988(b) which seeks to provide civil rights plaintiffs with "effective access to the judicial process."

OHIO ASSOCIATION for JUSTICE
TRIAL LAWYERS HELPING PEOPLE

2017 Annual Convention

Employment Law

Strengthening Your Case with Public Records: Useful Tactics for Making the Most of Ohio's Sunshine Laws

Ashlie Case Sletvold, Esq.

Cleveland, OH

Strengthening Your Case with Public Records:
Useful Tactics for Making the Most of Ohio's Sunshine Laws
Ohio Association for Justice Convention
May 4, 2017 (11:00–12:00)

1. Public Records Act, R.C. 149.43, *et seq*.
    a. "Public record"
        i. "kept"
        ii. "public office"
            1. governmental function
            2. functional equivalency
            3. quasi-agency
            4. Public Records Act v. Rules of Superintendence
        iii. "document, device, or item"
            1. includes personal devices
        iv. "document the organization, function, policies, decisions, procedures, or other activities of the office"
    b. Exemptions
        i. No exemptions by agreement
        ii. Certain law-enforcement records
        iii. Security records
        iv. Records relating to children
        v. Some business records
        vi. Attorney-client privilege/attorney work product
        vii. Other exemptions
    c. Guidelines for requesting
        i. How to request
        ii. Declaring the medium

iii. Inspection v. copies

iv. Examples

v. "actual cost"

d. Public office's obligations

i. "promptly" respond

ii. copies "within a reasonable time"

iii. maintain in a reasonably accessible manner

iv. explain denial/redaction with supporting authority in writing

e. Enforcement

i. Mandamus action

1. Option to file in common pleas court or appellate district where public office is located or in the Ohio Supreme Court

2. Don't have to prove lack of adequate remedy

3. Ohio Supreme Court

a. Model mandamus filings attached (complaint, supporting affidavit, memorandum, praecipe)

b. $200 filing fee; statutory damages of $100 per day up to $1,000 from time of filing; court costs; discretionary attorneys' fees

c. Mediation program (always referred)

ii. Court of Claims (new as of September 28, 2016)

1. Complete form (attached); $25 filing fee

2. Staff attorney shuttle diplomacy; special master mediation; special master recommendations; Court of Claims can adopt; appellate review in district court where public office located

iii. Generally

1. statute strictly construed in favor of broad access with any doubt resolved in favor of disclosure

2. government must prove exemption

3. clear and convincing standard from mandamus has been applied in new proceeding (hasn't been challenged)

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[DATE], 2017

Via U.S. Mail (certified)

[NAME]
[PUBLIC OFFICE]
[ADDRESS]
[ADDRESS]

Re: Public-records request

Dear [NAME]:

This is a public-records request under R.C. 149.43 to inspect the following records:

1.

2.

Ohio's public-records law requires that a public office, upon receiving a public-records request, *promptly* make its records available for inspection.[1] We expect to receive your complete response by **[DATE]**.

Further, the statute gives the requester the right to choose the medium in which the records are received for inspection.[2] Please provide .pdf files of the records by email. In the alternative, you may provide a link to a file-sharing site (such a Dropbox, Box, Accellion, etc.) to that same email address.

If the responsive records are too large to email and you do not have access to a file-sharing site, please contact our office for a link to our file-sharing site where you can upload the records at no cost.

Please note that records documenting the business of a public entity or the basis for the decisions of its officials that are in officials' personal email accounts, cell phones, personal computers, etc. are still public records.[3] Therefore, an exhaustive search should be made for responsive records of this nature.

Please contact me at the number above if you have any questions regarding this request.

Sincerely,

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[1] R.C. 149.43(B)(1). *See State ex rel. Wadd v. City of Cleveland*, 81 Ohio St.3d 50, 54, 689 N.E.2d 25 (1998) (requiring public office to produce records within eight days of request).

[2] R.C. 149.43(B)(6).

[3] See, e.g., *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 23.

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel. **[RELATOR]** [ADDRESS] [ADDRESS] Relator, vs. **[RESPONDENT]** [ADDRESS] [ADDRESS] Respondent.	**Original Action in Mandamus**
Complaint for Writ of Mandamus with Affidavit in Support	

[LEAD ATTORNEY NAME & (BAR NO)]
Counsel of Record
[OTHER COUNSEL NAME & (BAR NO)]
[FIRM]
[ADDRESS]
[ADDRESS]
[PHONE]
[FAX]
[EMAILS]

Attorney(s) for Relator [NAME]

Relator, [NAME], respectfully states its Complaint for Writ of Mandamus and alleges as follows:

I. Preliminary Statement

1. This is a mandamus action in which Relator, asks this Court to order Respondent to comply with a public-records request outstanding since [DATE]. Relator brings this original action under Ohio S.Ct.R. 10.1, R.C. 2731.01 *et seq.*, and R.C. 149.43.

2. Respondent is the public office responsible for producing records responsive to Relator's public-records request. In violation of its obligations, Respondent has failed to promptly prepare and make all requested records available.

II. Parties

3. Relator, [NAME], resides at [ADDRESS].

4. Respondent, [NAME], is a [DESCRIBE PUBLIC OFFICE] located in [] County. Respondent is a "public office" within the meaning of the Act and as that term is defined by R.C. 149.011(A).

5. Respondent is required to maintain and preserve public records in its possession, custody, or control, R.C. 149.351, and is therefore the "person responsible for" the records it holds within the meaning of the Act. As the public office and as the person responsible for the public records that it

holds, Respondent is obligated under the Act to promptly prepare such records and make them available for inspection and copying upon request. R.C. 149.43(B).

III. Jurisdiction & Venue

6. This Court has jurisdiction based on Section 2 of Article IV, Ohio Constitution, which establishes original jurisdiction for mandamus; Ohio S. Ct. R. 10, which is the rule governing original actions in the Ohio Supreme Court; R.C. 2731.02, *et seq.* which are the code sections controlling mandamus; and R.C. 149.43, which is the statute establishing public rights to public documents.

7. Venue is appropriate in this Court under R.C. 2731.02 and R.C. 149.43(C)(1)(b).

IV. Statement of the Case

8. Relator may properly bring this mandamus action.

   a. The Ohio Public Records Act provides that, when a public office refuses to promptly comply with a public-records request, the requesting party "may commence a mandamus action" to obtain the records. R.C. 149.43(C).

   b. This Court has held that mandamus is "the appropriate remedy to compel compliance with Ohio's Public Records Act." *State ex rel.*

Consumer News Services, Inc. v. Worthington City Bd. of Educ., 97 Ohio St.3d 58, 63, 2002-Ohio-5311, 7778 N.E.2d 82, 88. Relator need not establish the absence of an alternative remedy to seek a writ of mandamus under the Public Records Act. *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 41.

c. In this case, Respondent and its officials and/or employees failed to comply with Relator's [DATE] public-records request.

d. Therefore, Relator may properly bring this mandamus action.

9. Respondent's failure to provide all of the requested documents is not justified by any exception to disclosure under Ohio's Public Records Act and/or any other state or federal law.

10. Respondent, therefore, must produce the documents under R.C. 149.43(B)(1).

V. Violations of the Public Records Act, R.C. 149.43

11. On [DATE], Relator submitted a written request to Respondent by [METHOD OF TRANSMISSION] for specific categories of records requesting compliance by [DATE]. Attached Affidavit of Attorney [NAME] at ¶ _ and public-records request to Respondent ([DATE]) (attached as Ex. 1 to [NAME] Aff.).

12. The public-records request sought the following categories of records:

    a. [QUOTE REQUEST]

13. Relator sent the public-records request by [METHODS OF TRANSMISSION] and requested that the documents be produced as .pdf files by email. *Id*. at ¶¶ __ and certified-mail receipt for delivery of [DATE] public-records request (attached as Ex. 2 to [NAME] Aff.).

14. [DESCRIBE IN DETAIL ANY RESPONSE OR PARTIAL COMPLIANCE AND ATTACH ANY CORRESPONDENCE WITH RESPONDENT OR ITS COUNSEL]. *Id*. at. ¶ _ and ___ (attached as Ex. 3 to [NAME] Aff.).

15. As of the filing of this petition, this public-records request has been outstanding for [NUMBER] days. *Id*. at ¶ _.

VI. Attorneys' fees and court costs

16. In this action, Relator seeks an award of attorneys' fees and court costs under R.C. 149.43(C).

17. A full and complete complement of responsive records will inform the public about their government, and will allow appropriate legal and other action to be taken, which will serve the very purpose of the sunshine laws.

VII. Oral argument

18. If this Court finds that its decision process would be aided by oral argument, or finds itself hesitant to grant the relief requested, Relator

respectfully requests such argument to address any of the Court's concerns.

THUS, Relator prays for the following:

- That this Court issue a peremptory writ of mandamus directing Respondent to make responsive public records available promptly;
- That this Court award attorneys' fees and costs to Relator;
- That this Court order any other relief available to Relator under R.C. 149.43 and/or R.C. 2731.01 *et seq.* and any other relief as is appropriate.

Dated: [DATE]

Respectfully submitted:

/s/ _____

[LEAD ATTORNEY NAME & (BAR NO)]
Counsel of Record
[OTHER COUNSEL NAME & (BAR NO)]
[FIRM]
[ADDRESS]
[ADDRESS]
[PHONE]
[FAX]
[EMAILS]

Attorney(s) for Relator [NAME]