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Apportionment and the Empty Chair: What are they? And why should you care?

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I. Introduction

In August 2011, Ohio plaintiff employment attorneys watched in horror as the unthinkable became reality: the 8th District ruled that statutory employment claims are "torts" subject to the 2005 tort reform caps. *Luri v. Republic Services*[1] sent shock waves through Ohio's legal community causing plaintiff and defense attorneys alike to revalue their cases in light of this new, poorly written, and seemingly unconstitutional tort reform statute. In ways big and small, the *Luri* decision has changed how employment attorneys practice, from the cases they take, to litigation strategies they employ. And the repercussions of *Luri* continue to surface. Indeed, with statutory employment claims now classified as "torts," defense attorneys have begun to advance other tort-based defenses designed to transfer the cost of supervisor discrimination away from their clients and ultimately back to the plaintiffs themselves. One of the most aggressive and baseless arguments to surface is apportionment of damages to an "empty chair."

What is apportionment and the "empty chair"?

The right to apportionment arises in tort cases when two or more tortfeasors cause the same harm. Under R.C. 2307.22 (the apportionment statute), multiple tortfeasors share joint and several liability for economic damages, but each is liable only for his or her "proportionate share" of noneconomic damages. The empty chair defense derives from the right to apportionment and allows a defendant to instruct a jury to assess and

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1 *Luri v. Republic Servs.,* 2011-Ohio-2389.

apportion a percentage of any noneconomic damages to one not named as a defendant in the underlying action. In most cases, the nonparty purposely has not been named as a defendant, either because of a pre-existing settlement or because the nonparty is uncollectable.

Why should you care?

In the employment setting, empty chair apportionment arguments can arise in Ohio-based actions in which the plaintiff's supervisor is the bad actor. This is because, unlike federal law, under Ohio law supervisors can be held personally liable for their discriminatory conduct. Although the empty chair defense could be advanced in any supervisor-based employment case, it poses the greatest danger to plaintiff recovery in low economic damage employment cases with egregious facts, a substantial psychological damage element, and an uncollectable supervisor.

I first encountered the empty chair defense in a case involving a teenage minimum wage employee who was sexually assaulted by her supervisor, a registered sex offender. For the defendant, the facts were about as bad as they could be. There was ample evidence that the employer promoted the supervisor *knowing* he was a registered sex offender. And because the supervisor pled guilty to the sexual assault and was incarcerated, there was no doubt that the plaintiff was sexually harassed. Enter the empty chair apportionment defense.

Defendant's argument was a simple syllogism.

- *Luri* holds employment cases are tort actions.
- Tort actions are subject to apportionment and the empty chair defense.
- Therefore, defendant is entitled to apportion damages to the uncollectable

incarcerated supervisor.

The danger of this argument lies in its simplicity. However, the empty chair defense is completely inimical to the purpose and goals of Ohio's discrimination. Notably, not a single Ohio case has applied the empty chair defense in the employment context. Plainly, the argument is baseless. But defense attorneys advance it nonetheless.

Defeating the empty chair

So what can you do when confronted with this baseless defense? The answer lies in R.C. 1.51. That statute provides that when a general provision and special provision conflict, the special provision controls. R.C. 4112 (Ohio's discrimination statute) is a special provision of the Ohio Revised Code, and the apportionment statute, a more general one. The apportionment statute directly conflicts with Ohio's discrimination statute because it diminishes both employer incentive to prevent discrimination as well as the scope of recovery available to plaintiffs.[2] Accordingly, courts should reject the empty chair defense under R.C. 1.51

1. Apportionment diminishes employer incentive to prevent discrimination.

Ohio's discrimination statute was modeled after Title VII, and federal case law is generally applicable to discrimination cases brought under Ohio law.[3] Both federal and Ohio discrimination statutes were designed to incentivize employers to better screen, train, and monitor their supervisors. As the United States Supreme Court poignantly explained:

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[2] A similar argument was considered and accepted in *Romig v. Baker Hi-Way Express, Inc*. (10th Dist. 2012), 2012-Ohio-321 (rejecting the empty chair defense because it is "completely inconsistent with the workers' compensation system as structured by the constitution and the legislature and as construed by the courts.")

[3] *Hampel v. Food Ingredients Specialties, Inc.* (2000), 89 Ohio St.3d 169, 176

> Recognition of employer liability *** is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.[4]

If the empty chair apportionment defense is erroneously injected into employment claims, it will lessen employer liability risk for supervisor discrimination, thereby lessening incentive to screen, train, and monitor supervisors. Consequently, empty chair apportionment undermines the strong anti-discriminatory purpose for which these statutes were created.

2. Ohio's supervisor liability provision was designed to broaden the scope of recovery for plaintiffs, never lessen it.

Although Ohio law extends personal liability to supervisors, such liability does not extinguish or diminish employer liability for the harassment. As the Second District recently explained, Ohio's supervisor liability provision was created to broaden the scope of recovery available to plaintiffs, not to lessen it.

> "[T]he purpose of including supervisors *** as employers was to expand the parties who could be held responsible *** and to further the antidiscrimination goals of the statute—not to provide an escape clause for the employing company which, due to greater assets and resources, may be more willing to enter into and continue protracted litigation."[5]

The empty chair defense is nothing more than an employer attempt to reduce the recovery available to plaintiffs and carve out a liability "escape clause." As such, the defense is in direct conflict with R.C. 4112's statutory purpose.

Conclusion

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[4] *Faragher v. City of Boca Raton*, 524 U.S. 775, 803, (1998).

[5] *Edwards v. Ohio Inst. of Cardiac Care,* 170 Ohio App.3d 619, 2007-Ohio-1333, ¶74.

The empty chair defense runs directly counter to the antidiscriminatory purpose of Ohio's discrimination statute. Thus, any attempt to invoke the defense by employers *should* be rejected in accordance with R.C. 1.51. But what the courts will ultimately do in the wake of *Luri* is anybody's guess.