TESTIMONY OF OHIO ALLIANCE FOR CIVIL JUSTICE
IN SUPPORT OF S.B. 268

On behalf of the Ohio Alliance for Civil Justice, I am Joëlle Khouzam and I'd like to briefly explain why the Alliance supports S.B. 268. The Ohio Alliance for Civil Justice was founded in the mid-1980s and has been dedicated to stopping lawsuit abuse and promoting a common-sense civil justice system in Ohio. The Alliance is comprised of representatives of several Ohio trade and professional associations, small and large businesses, medical groups, farmers, non-profit organizations and local government associations. The membership includes but is not limited to the National Federation of Independent Businesses of Ohio, the Ohio Chamber of Commerce, the Ohio Manufacturers' Association, the Ohio Council of Retail Merchants, the Ohio State Medical Association, the Ohio Society of CPAs, and the Ohio Hospital Association, to name a few.

S.B. 268 is much-needed in Ohio, for at least four reasons:

- First, it will promote more consistent results and predictability in employment discrimination cases.
- Second, it limits the forum shopping that currently occurs.
- Third, it limits the use of the individual-claim anomaly to harass and humiliate individuals and to force settlements.
- And fourth, it will allow the state to better use taxpayer dollars to support investigative and mediation resources for the Ohio Civil Rights Commission investigators, hearing examiners, and Assistant Attorneys General.

AVOID OUTLIERS, PROMOTE MORE CONSISTENT LITIGATION OUTCOMES

As you may have already heard, there are some marked differences between state and federal employment laws, even though the legal analysis for determining whether discrimination has occurred often refers to state and federal cases interchangeably.

One notable difference is that under Ohio law, there are several laws that trigger age discrimination claims. And although Ohio's current statute of limitations is six years, age is specifically carved out of that and is limited to six months. This makes no sense.

Another significant difference between state and federal law, which makes one question the reasons, is in the way our federal Southern District of Ohio and Sixth Circuit Court of Appeals view the meaning of "employer" as compared to how our state courts do.

In the 1997 case of *Wathen v. General Electric Co*., 115 F.3d 400 (6th Cir. 1997), "The Sixth Circuit [ ] determined that an individual employee / supervisor may not be held personally liable under Title VII." [Title VII is the federal workplace non-discrimination law.]

Then in 1999, the Ohio Supreme Court in *Genaro v. Cent. Transport, Inc*. (1999), 84 Ohio St.3d 293, held that the definition of "employer" under Ohio Revised Code 4112.02, the corollary to Title VII, should include any "person acting directly **or indirectly** in the interest of an employer" to have the broadest possible meaning. If one thought about it, a custodian or line worker acts directly or indirectly in the interest of an

employer. Even if the Court really only intended to hold decision-makers liable, an entry-level HR generalist who has sat in on a disciplinary or termination meeting but was not directly involved in a decision could be personally liable.

What is the harm of holding individuals, even those indirectly involved in decision-making, personally liable? Their homes, personal property, and sense of confidence about the way they perform their daily jobs are exposed. Good people have been promoted in recognition of their talents and contributions to corporate advancement. They did not accept a promotion thinking they could become targets of lawsuits and risk the fruits of their labors. Should employees stop aspiring to management because they could one day be sued and have to deplete their 401(k) accounts to defend themselves? The reality is that the company is the deep pocket, not the individual.

Interestingly, there is another inconsistency in Ohio on this very subject: In 2014, the Ohio Supreme Court expressly stated that **public-sector managers** are not subject to individual claims, thus raising the question of why some managers are given most-favored nation status.

Let me share a quick anecdote about a plaintiff's boutique firm in Northeast Ohio that seems to have made a cottage industry of naming individual managers or supervisors along with the company, and then scaring these individuals to enter separate settlements by "informing" them that they potentially faced punitive damages and that a judgment for such damages cannot be discharged in bankruptcy. Of course, if anyone

took them up on such proposals, it multiplied the opportunities for recovery and potentially pitted managers against their employers. This is not how our justice system was intended to work.

Interestingly, in the *Genaro* dissent, Justice Lundberg Stratton noted that the parts of R.C. 4112 that cover housing discrimination expressly say when they intend individuals to be held liable. She wrote: "Had the General Assembly intended R.C. 4112.02(A) to burden individual employees, it could have expressed that intention. See, *e.g.*, R.C. 4112.02(G)." The section she sited states that it shall be an unlawful discriminatory practice "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 race, color, religion, sex, military status, national origin, disability, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation."

Other states have faced the same challenge of how to interpret "employer". For example, *Kentucky's* civil rights law has limited the term "employer" to not include individuals. (Ky.Rev.Stat.Ann 344.030(2)). *Missouri's* definition of "employer" is similar to Ohio's (Mo.Rev.Stat. 213.010(6)), but excludes individual liability. *Massachusetts* specifically states "… for an employer, by himself or his agent…" The lack of clarity in Ohio's statute needs to be corrected and not susceptible to common-law interpretation.

A lot has been made in the media about “bad actors” getting a free pass if individual liability is removed from R.C. 4112. That is simply untrue. When an individual acts outside the scope of his or her authority as an employee, he or she can still be individually liable for **intentional acts**, including **civil assault**, **battery**, and **indecent exposure**, not to mention **criminal prosecution**, depending on the complained-of acts. Limiting individual liability will also not preclude plaintiffs from stating claims for **negligent retention** or **negligent supervision** against an employer that knowingly retains someone who has taken unlawful actions against a plaintiff.

DAMAGES CAPS HELP ENSURE CONSISTENCY, RELIANCE ON PRECEDENT

Another challenge with different state and federal court processes is that this devalues precedent, and doesn’t afford the legal community the ability to gauge when courts will upheld claims or how they will value them. It is fundamental to the practice of law to be able to look to and rely on precedent when advising clients. And in a marketplace where businesses often work across state lines or in cyberspace, companies should be able to know what they face if they choose to bring their business to Ohio.

The proposal to include damages caps that mirror the federal court’s damage caps limits the threat that runaway juries can cause, especially to smaller businesses. Juries don’t have a framework for measuring damages or knowing what is equitable. If they feel a need to punish a defendant, they have other tools available to do so, but at least when the judge or the statute can provide a framework for valuing the claims, parties may be more motivated to settle cases before going through the expense of a trial.

Ohio's discrimination law covers companies with 4 or more employees, whereas the federal law covers employers with 15 or more employees. Ironically, under our current law, that means smaller companies have a higher likelihood of being sued in state court, and facing unlimited damages, whereas larger companies sued under Title VII in federal court know what their maximum exposure may be.

S.B. 268 LIMITS FORUM SHOPPING

The next point is how this bill can curb forum shopping. Often, we see plaintiffs' counsel choosing a forum, sometimes even across state lines, just based on the length of a statute of limitations, whether an individual can be named, and whether there are damage caps. This, in turn, increases the cost of defense, particularly for the company that indemnifies or pays for the individual or individuals to secure separate counsel. This plaintiff's technique is a form of harassment, another irony.

LEVEL THE PLAYING FIELD

Ohio's six-year statute of limitations is the longest one in the country. A long statute, even one that is two or three years long, essentially promotes forum shopping when someone has sat on their rights. In another Supreme Court decision, *Cosgrove v. Williamsburg of Cincinnati Management Co., Inc.,* Justice Alice Robie Resnick "…beseech[ed] the General Assembly to … resolve.." this issue of defining the right statute of limitations legislatively. Several nearby states' statutes of limitations limit the

filing of a court action to somewhere between 90 and 180 days of the agency's disposition of the charge.

IN – within 90 days of state agency's disposition
IL - within 90 days of administrative disposition
IA - within 90 days of state agency's disposition
VA – within 180 days of alleged discrimination

In addition, these and many other states also require that the party first exhaust their administrative remedies.

So why does one year make sense for Ohio, and why the recommendation to have parties choose either the administrative process or the courts, not both? Under the OCRC mechanism, a person can bring a charge within 180 days of the alleged discriminatory conduct. Under the EEOC's mechanism, a person has 300 days in which to initiate such a claim. Both agencies, having limited budgets and staffs, generally take between 5-9 months to complete their investigations, and even after a decision, the charging party can still pursue numerous avenues of relief or appeals in the courts. This legislation does not take away the substantive rights that the current law provides complainants. It helps investigators potentially expedite the process of resolution by focusing on recent cases where witnesses are likely to still be accessible, and it allows them to focus on cases that won't be yanked out of them just shy of a determination, when the charging party decides she'll just take the free investigation and run to court. Essentially, this charging party has obtained all the free information that the employer has paid legal counsel to prepare and the legwork that the investigator has done at taxpayer expense.

When an individual is not required to exhaust his or her remedies in an administrative agency before going to state court, the person could theoretically sit on his or her rights for 5 years and 364 days and still go to state court. Where is the taxpayer economy or judicial efficiency in that?

A one-year statute of limitations would more than double the amount of time in which an individual could bring an administrative charge before the OCRC and limit confusion about how long a person has to initiate a charge.

The proposed statute of limitations also has a safeguard built in: if the individual chooses to first file a charge with the Ohio Civil Rights Commission, the one-year period for filing in court is tolled. In other words, the clock stops during the pendency of an administrative investigation. Thus, the charging party is not adversely impacted if the reason for any delay is due to the speed of the administrative investigation.

The proposed change in the statute of limitations has other benefits. Claims brought much later tend to be less factually accurate, which can make it harder to defend against them. Sometimes witnesses have moved away. Even if witnesses are available, it is difficult to recall the details of what may have happened six years hence. Second, it is sometimes logistically challenging and costly to preserve documents for six or more years. And even when a company has retained personnel records for six years, it might not have had any reason to retain every departing employee's notes about certain transactions or communications that, six years later, the former employee

claims would prove she was treated differently than male counterparts. Who of us could be counted upon to remember everything that kids thought was important in the six years between birth and grade one without a photo album or scrapbook to remind us?

S.B. 268 also expressly states that this statute of limitations does not prohibit the bringing of discrimination claims with longer statutes of limitations, such as federal claims under Sections 1981 or 1982 of the federal anti-discrimination claims.

PRESERVE/PROPERLY USE TAXPAYER DOLLARS IN AGENCY INVESTIGATIONS

Another consideration in support of this bill is that it will limit the squandering of state resources. As noted earlier, parties filing charges with the OCRC or EEOC often wait until the employer has been forced to spend money to respond to the allegations, and then take that information that they get at no cost from the agency and dismiss the charge to proceed to court. They now have in their hand the employer's strategy without having spent one cent, and then to proceed to state court to get their second bite at the apple and pursue considerably higher damage awards than they might have gotten from an administrative agency proceeding. The state, in the meantime, has been delayed from investigating claims where unrepresented parties really need to have their claims heard with the assistance of an unbiased investigator.

One other aspect that this bill brings up is that the current system does not have limitations for persons who might have other remedies available to them, such as grievance arbitration through a collective bargaining agreement. The bill's effort to

avoid clogging the OCRC or even our courts' dockets with matters that can be or have been heard in other forums is designed to ensure that parties do not get more than one bite at the apple.

Let me touch briefly on the affirmative defenses provision of the bill, found in R.C. 4112.054. This provision levels the playing field and makes employers responsible for creating and actively enforcing policies to safeguard employees. This should result in more complaints being dealt with internally at the HR or corporate level. This is consistent with a long line of U.S. Supreme Court cases that expressly directed employers to have and enforce policies or else face liability if they knew of a problem but failed to remedy it. This requirement to first avail oneself of available complaint mechanisms creates fairness, by requiring employees to notify employers when there is a problem, rather than just filing a costly lawsuit without warning.

CONCLUSION

To sum up, Ohio has been an outlier for the past 17 years. It's time to provide certainty to litigants and to enable them to fairly pursue and defend claims, without the gamesmanship associated with harassing individuals or forum shopping. Correcting these procedural challenges will not substantively impact plaintiffs or their counsels' abilities to bring claims or obtain recoveries. This corrective measure is long overdue. For these reasons, the Ohio Alliance for Civil Justice requests that you support S.B. 268.