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Client Bulletin

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New Legislative Protections for Employers, Supervisors and Managers Under Ohio's Anti-Discrimination Laws

History: In 1999, the Supreme Court of Ohio issued a decision in *Genaro v. Cent. Transport, Inc.*, 84 Ohio St.3d 293, that sent a chilling message to supervisors and managers that under Ohio's Civil Rights Statute they, along with the employer, could be sued personally and found personally liable for violating Ohio's anti-discrimination laws. Typically, most supervisors and managers did not have their own insurance to cover the defense costs or indemnification. Even if covered under the employer's policy, the supervisors and/or managers still had to fear being involved as a defendant in a lawsuit, adverse publicity regarding being sued, the emotional distress of having to give a deposition and be involved in the litigation process, and the potential for financial responsibility.

While *Genaro* was hailed as a victory for plaintiffs (employees doing the suing), it was criticized by many. One of the criticisms was that Ohio's anti-discrimination laws are modeled after the federal anti-discrimination law, Title VII, and although the federal courts determined that there was no personal liability for supervisors or managers under the federal anti-discrimination laws, *Genaro* distinguished Ohio law.

Notwithstanding the criticism of *Genaro*, it remained the prevailing law in Ohio for quite some time. Finally, in 2014, the Supreme Court of Ohio distinguished *Genaro* in a case involving a public employer where a supervisor had been sued along with the employer for age and gender discrimination. *Hauser v. Dayton Police Department*. The Supreme Court of Ohio found that *Genaro* involved a private sector employer and supervisor, whereas *Hauser* involved a public employer and public supervisor and reasoned that was a permissible reason to distinguish *Genaro*. Consequently, *Hauser* worked to lessen some of the fears of **public** supervisors and managers, but **private** supervisors and managers were still at risk.

Hauser was criticized as it created the distinction that private employees could sue their supervisors and managers but public employees could not. The General Assembly appears to have finally settled the matter by enacting the Employment Law Uniformity Act (ELUA) via House Bill 352, which became effective in April 2021, and specifically indicates, among other things, that private as well as public supervisors and managers may not be sued under Ohio's anti-discrimination laws unless the private supervisor or manager is also the employer or unless the supervisor or manager retaliates against an individual for opposing a discriminatory practice or aided a discriminatory practice or obstructed a person from complying with Ohio's anti-discrimination laws.

The ELUA also reduces the statute of limitations from six years to two years under Ohio's anti-discrimination laws, requires an individual to first file with the Ohio Civil Rights Commission (OCRC) and codifies certain affirmative defenses for employers previously explained in two United States Supreme Court cases, finding that employers may raise an affirmative defense to sexually hostile work environment cases if the employer proves that it exercised reasonable care to prevent or promptly correct any sexually harassing behavior and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by

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**MANOS, MARTIN &
PERGRAM CO., LPA**

50 North Sandusky Street
Delaware, Ohio 43015

Phone: (740) 363-1313
Fax: (740) 363-1314

Visit us on the web
www.mmpdlaw.com



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the employer or to otherwise avoid harm. It should be recognized, however, that these affirmative defenses do not apply if there has been “quid pro quo” actions. A “quid pro quo” action is one where the employee has, as a result of a supervisor’s or manager’s harassment, been subjected to a tangible employment loss such as a termination, demotion or pay reduction.

Thus, the following are essential for employers:

- 1) A strong anti-discrimination/anti-harassment policy. Even if the policy is in a handbook, it should be provided to the employee in a free-standing document and the employee should sign a document acknowledging receipt of the policy. The United States Supreme Court has reasoned that many employees do not read all of the employee handbook and may not even see the policy. That defense is virtually defeated if the employee is provided the policy as a free-standing document.
- 2) Training and guidance for management evidences that the employer is serious about preventing discrimination and harassment.
- 3) An investigation procedure.
- 4) Appropriate remedial action if it is determined that the discrimination or harassment has occurred.

Prior to the ELUA, Ohio age discrimination claims under Ohio law were somewhat confusing and treated differently than other forms of discrimination. The ELUA has eliminated those differences and now age discrimination claims are treated the same as other discrimination claims.

Dennis L. Pergram

Clay Classic Returns

The Delaware Area Chamber of Commerce will be hosting its annual Clay Classic at Black Wing Shooting Center, 3722 Marysville Road in Delaware. The Classic will take place on Friday, October 14, 2022. Registration and lunch begin at 12 noon, followed by a mandatory safety briefing at 12:30 p.m. Shooting begins at 1:00 p.m.

For more information, sponsorship opportunities, or to register, please visit <https://www.delawareareachamber.com>.

Sarah Moore Service Board Spaghetti Dinner & Silent Auction

The Sarah Moore Service Board spaghetti dinner and silent auction is being held on Monday, October 17, 2022 from 4:30 p.m. to 7:30 p.m. at the Delaware Eagles, 127 E. William Street, Delaware, Ohio. Pricing is as follows: adults, \$10; children (6-12), \$6; children (under 6), free. For carry-outs, call (740) 816-2164 (there are no free meals for carry-outs).