For whom does the bell toll?

Individual liability under Chapter 4112

Ohio’s Fair Employment Practices Act, codified at Chapter 4112 of the Ohio Revised Code, prohibits discrimination in the terms or conditions of employment on the basis of “race, color, religion, sex, national origin, disability, age, or ancestry.” In 1999, the Supreme Court of Ohio issued its decision in Genaro v. Cent. Transport, Inc., ruling that:

- a supervisor/manager may be held jointly and/or severally liable with her/his employer for discriminatory conduct of the supervisor/manager in violation of R.C. Chapter 4112.

While several appellate and federal district courts in Ohio had ruled previously that Chapter 4112 permitted liability, Genaro nonetheless ushered in a new era of employment discrimination litigation. Aggrieved employees alleging employment discrimination in violation of Chapter 4112 now routinely name their supervisors as co-defendants, along with their organizational employers. Indeed it is not uncommon for aggrieved employees to name as defendants their successive supervisors or anyone believed to have affected a decision being challenged as unlawful.

Although Genaro made it the law of the state that “supervisors” and “managers” could be held individually liable for violations of Chapter 4112, the court did not have occasion to define those terms, nor has it defined those terms in any subsequent decision. The answer to this question is important for employers and employees alike. For employers, the question of who is a supervisor under Genaro has implications for sundry areas of personnel administration and risk management. These include determining the organizational level at which personnel policy is set and decisions are made; who signs termination letters; who sits in meetings affecting the terms or conditions of an employee’s employment; how best to allocate precious human resources (HR) training resources; and what is the employer’s defense and indemnification policy with respect to employees. The specter of personal liability can intrude into the boardroom, as well.

In the age of team leaders, coordinators and other nebulous titles, employees may wonder whether they could be held personally liable for performing required job functions. And aggrieved employees who believe they have been the victims of employment discrimination will of course wish to know who may be held accountable.

Yet despite the frequency with which individuals are named as defendants in employment discrimination litigation under Chapter 4112, the state courts of Ohio have not had the opportunity to flesh out the definition of a “supervisor” for the purposes of Genaro liability. For their part, a handful of federal courts in Ohio have issued decisions relating to the level of authority an individual must possess to be considered a Genaro supervisor. Several of these decisions raise an important analytical and policy question as to whether a supervisor can always be held individually liable for his or her own unlawful conduct or whether the unlawful conduct must flow from a

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Message from the chair

Law firm marketing experts charge large sums to reveal the secrets of growing successful legal practices. However, OSBA members do not need to pay an expert. Here is the secret: Write articles about your law practice and get involved in your profession.

For employment lawyers, the OSBA Labor and Employment Section is the place to be. You can start by writing an article for this newsletter. The newsletter is sent to 1,800 labor and employment lawyers in Ohio. You can also write articles for Ohio Lawyer magazine, Law You Can Use (consumer-oriented) and Fine Print (business-oriented).

The OSBA staff does all the publishing work. The articles reach a wide audience of attorneys, the public and businesses, and are posted on the OSBA Web site. You can also reproduce articles that you write in your firm newsletter and on your firm Web site.

The OSBA also has many opportunities to network with other attorneys. The OSBA Labor and Employment Section, for example, recently expanded its section council and is seeking new members. This is a good opportunity to stay in touch with leading employment lawyers throughout the state, all year long. Finally, plan now for this year’s Midwest Labor Law Conference Oct. 25–26.

The various modes of communication available to us has increased dramatically in the last 15 years. E-mail, cell phones, text messaging, wireless Internet and personal digital assistants keep us in touch (or touch us) even when we are away from the office. Updates, which used to come by mail, now come electronically.

Among the many modes of communication, the discussion group (sometimes referred to as a Listserv) is a convenient and efficient way for OSBA Labor and Employment Law Section members to share information.

What is a discussion group?

It is an automatic e-mail server that transmits e-mail messages to everyone who has subscribed to it. It is similar to a news group or a forum, but the e-mail messages are received only by those members who have subscribed.

What kind of discussion takes place?

Unlike some of the other OSBA discussion groups, it probably is not a place to discuss strategy. Our section membership is diverse and comprised of union attorneys, company attorneys, plaintiffs’ attorneys, arbitrators and attorneys from the National Labor Relations Board, the State Employment Relations Board, the Equal Employment Opportunity Commission (EEOC), the Ohio Civil Rights Commission (OCRC), etc. We are not like the tax folks who face a common enemy (the IRS).

Following are examples of some recent discussion topics.

- An attorney was looking for a case citation. He knew the facts but could not locate the citation;
- There was a query from an estate planning lawyer about which employment posters are required to be posted in a church;
- An attorney was looking for data sources for a preparer of Office of Federal Contract Compliance Programs affirmative action plans; and
- I received valuable feedback when I asked whether mediation was useful in EEOC/OCRC discharge cases.

How do I subscribe?

Subscribing to the discussion list is not difficult. First and foremost, you must be a current OSBA member. You do not, however, need to be a member of the labor and employment section. Here are step-by-step instructions for subscribing:

1. Go to the OSBA Web site at www.ohiobar.org and log on. If you have not logged on before, you can use the “Forget your login information? Have your login information e-mailed to you” option on the login page. The system will e-mail your login information to the e-mail address on file for you.

2. Place your cursor on “Members,” which is found on the left side of the gray bar beneath the OSBA logo. A drop down menu will appear.

3. Move the cursor to “Committees and Sections.” A pop-up menu will open to the right. Click on “Discussion Groups.”

By Neil Klingshirn, chair of the OSBA Labor and Employment Section.
This is the first collaborative column written for Ohio labor practitioners by National Labor Relations Board (NLRB) Region 8 in Cleveland and region 9 in Cincinnati. Our aim is to better acquaint Ohio attorneys with not only what is happening procedurally and substantively in the two Ohio regions, but also what is happening with the NLRB on the national front.

Each of the regional offices will report on recent Ohio cases that are particularly high profile or involve unusual legal issues, or both. Additionally, we will bring to your attention NLRB rulings or decisions, either procedural or substantive, that arise in either the unfair labor practice or representational that may be of particular importance.

For those practitioners not currently involved in NLRB practice, region 8 in Cleveland and region 9 in Cincinnati are among the larger of the 32 NLRB regional offices throughout the United States. Each region has a professional staff of approximately 30 comprised of field attorneys and field examiners. Region 8 has jurisdiction over approximately three-fifths of the state and region 9 covers the remainder of Ohio and extends to northern Kentucky. In most fiscal years, each of these regions processes 80 to 90 unfair labor practice charges each month (charges may be filed by a labor organization, an employer or an individual).

Approximately 35 percent of all unfair labor practice charges result in a merit determination warranting issuance of complaint and a hearing before an administrative law judge. Again, a petition can be filed by a labor organization, an employer or an individual. Approximately 75 percent of petitions result in an election that is held under NLRB auspices. Labor organizations prevail in slightly more than 50 percent of all elections in which they are involved.

One area of law that both the NLRB and the general counsel have emphasized recently relates to the question of Section 10(j) relief. As you may know, under Section 10(j) of the National Labor Relations Act (NLRA), Congress provided the NLRB with the right to petition a federal district court to enjoin alleged unfair labor practices pending NLRB adjudication of the substantive evidence of those practices. The rationale for this relief relates to the delay often inherent when charges are resolved through the administrative procedures provided by the NLRA and where it can be shown that a delay of this type may undermine the efficacy of any NLRB-ordered remedies.

The 6th Circuit view is that a district court faced with a petition for 10(j) relief must make two findings. First, the district court must find reasonable cause to believe that the alleged unfair labor practices have occurred. If that finding is made, the district court moves on to a second determination: whether injunctive relief is just and proper. If either question is answered in the negative, the district court must deny the petition.

It is worth noting that the first of these two matters, reasonable cause, requires that the regional director need only shoulder a relatively insubstantial burden. That is, the director does not need to convince the court of the validity of the NLRB’s theory of liability as long as the theory is substantial and not frivolous. Thus, the district court does not adjudicate the underlying merits of the case. The more difficult aspect of the 6th Circuit test for injunctive relief relates to whether relief is just and proper. The key here is whether the court finds that injunctive relief is necessary to return the parties to [the] status quo pending the Board’s remedial powers under the NLRA, and whether achieving status quo is possible…

A recent Region 8 case involving a central Ohio manufacturer illustrates the important and useful impact Section 10(j) can have in resolving serious
labor-management disputes even before injunctive relief is actually authorized. This case came about as a result of four charges filed from Dec. 8, 2006, to April 16, 2007. The charges included the following allegations:

- Discharge of four employees;
- Interrogation of employees, including coercive statements, promises of benefits and threats made to employees when the human resources representative urged employees to circulate a decertification petition;
- Coercive statements and threats made to employees wearing union t-shirts and hats;
- The discriminatory enforcement of the uniform policy;
- Unilateral changes to the drug-alcohol policy and the health care policy without notice to or bargaining with the union;
- Bad faith bargaining and surface bargaining evidenced by the company’s failure to schedule sessions, cancellation of bargaining sessions and failure to meet at reasonable times or locations;
- Failure to provide the union with requested information after the employer announced that it was closing the facility; and
- Withdrawal of recognition from the union.

The union successfully organized the employees at one of the company’s two Ohio facilities and was certified on June 20, 2006.

At the union plant, the company started disparately enforcing policy that could result in employee discipline or termination, including its policy on attendance and uniforms. The same infractions at the non-union facility would go unnoticed. Union employees (who had worn all kinds of non-uniform t-shirts) were informed that they would be sent home if found wearing union t-shirts or hats. The previously unenforced uniform policy was reiterated verbally and in writing and strictly enforced with regard to all union items.

From the time of the union’s certification to the present, the company attended only two negotiation sessions where substantive contract proposals were discussed. The company canceled 10 bargaining sessions from August 2006 to April 30, 2007.

The union persistently sought bargaining dates from June 23, 2006, through June 2007. The employer was uncooperative and noncommittal in the bargaining process; it also sought to get rid of regular full-time employees at the union plant. Shortly after the union’s request for information and bargaining, the company fired a 17-year employee after he informed his team leader that he had a headache and, with no objection from the team leader, left early. The company had not fired even temporary employees who had walked off the job.

July 2006 passed with no bargaining. The first bargaining session was Aug. 29, 2006, during which the company made no proposals. The months of September 2006 and October 2006 also passed with no bargaining.

In addition to skirting bargaining sessions, the company’s human resources manager interrogated employees about their union activities, solicited employees to begin a decertification effort in exchange for benefits and threatened employees’ jobs because of their union activities.

In mid-November 2006, the company unilaterally changed its historical practice of giving employees with a positive drug test result a second chance if they attended rehabilitation classes and agreed to 12 months of random drug screenings. In early November 2006, the company also departed from its practice of giving employees 24-hours notice to submit to a drug/alcohol screen and instead called employees to a mandatory meeting where it selected employees to give a urine sample.

Three employees tested positive. All three asked for the opportunity to enter the company’s well-established second chance program. The company announced that the second chance program had been eliminated the previous week and then terminated the three employees. The union was given no notice or opportunity to bargain over the change.

The second and last substantive bargaining session was on Nov. 15, 2006. The employer made its first and only bargaining proposal. Five days later, the company announced to employees that their health insurance benefits were changing and there would be an increased expense to employees. Again, the union was given no notice or opportunity to bargain over the change.

In December 2006, the company sent a single representative to a bargaining session. She admitted that she had no authority to bargain with the union.

Although the company retained an attorney for the purposes of bargaining as early as December 2006, it would not go to the bargaining table until the very end of March 2007. No substantive bargaining took place during the March session because the attorney announced that the company was closing the union facility so negotiations for a contract would be limited to effects bargaining.

Thereafter, the company refused to provide any of the requested information about the stated closing and refused to engage in any bargaining with the union.

On April 30, 2007, a consolidated complaint and notice of hearing was issued. In May 2007, the regional office requested authorization to pursue Section 10(j) relief due to the severity of the unfair labor practices, the an-
nounced closure of the organized facility and the bad faith and surface bargaining allegations related to the effort to secure an initial collective bargaining agreement. The region informed the parties that it was seeking authorization for injunctive relief.

The administrative hearing began June 19, 2007, before an administrative law judge. On the second day of hearing, the company and the union entered into an informal settlement agreement providing for offers of reinstatement and back pay for four employees. A fifth employee was also offered reinstatement and back pay since he had been impacted by the company’s unilateral change in the drug/alcohol policy. The informal settlement agreement also provided for a one-year extension of the certification year; payment of $300 to every employee on the payroll as of the date of the settlement agreement to mitigate the effects of the employer’s change to the health care policy; rescission of the changes to the drug/alcohol policy, the uniform policy and the health care policy; the agreement to provide the bulk of the requested information contained in the union’s March 2007 request for information and all other necessary and relevant requested information; and an agreement to meet and confer with the union at reasonable times and provide bargaining reports to the regional office.

There can be little doubt that the specter of 10(j) litigation and the likelihood of injunctive relief spurred the company toward reaching a full settlement of the underlying unfair labor practice issues. One of the often repeated—and sometimes justified—criticisms of the NLRB’s administrative processes is that undue delay is inherent in taking a case before an administrative law judge and securing a remedy two or three years after the conduct was committed. This case demonstrates that when there are serious unfair labor practices involved and the circumstances support a conclusion that the NLRB’s traditional remedies may fail, a regional office may pursue alternative means of re-establishing the status quo ante and often resolve the case without delay.

My next article will feature region 9 and recent southern Ohio cases of particular interest. ♦

Section establishes law student achievement award

One of the missions of the OSBA Labor and Employment Law Section is to encourage law students to learn more about labor and employment law issues and to pursue that area of law after graduation. To foster interest, the section established the Ohio State Bar Association Labor and Employment Law Section Student Achievement Award, effective at the beginning of the 2003–2004 academic year. All 10 Ohio law schools are eligible to select one of their students to receive the award and most, but not all, of the law schools have regularly selected a deserving student.

The award, which is made annually, consists of a certificate acknowledging the recipient, a cash award of $500 and a copy of the Thompson-West publication Labor and Employment Law Compliance and Litigation. Usually, the awards are made in person by a member of section council.

The criteria varies from law school to law school and each law school makes its own selection. Some use academic achievement in labor, employment, and/or employment discrimination law courses and others base it on demonstrated interest in one or more of these areas through a student’s work in an internship position, writing a law review note or a journal paper that deals with labor or employment issues, etc. Most require a recommendation by a member of the school’s faculty, as well.

Some recent recipients of the award are Richard Fry and Kara Robinson, University of Akron School of Law; Ryan Martin, University of Cincinnati College of Law; Heather Banchek, Cleveland State University College of Law; Sarah Shive and Gary Provencher, The Ohio State University Moritz College of Law; Jennifer Free and Christopher Timmermans, University of Toledo College of Law; and Joshua Pomeranz, Case Western Reserve University School of Law.

For more information about the OSBA Labor and Employment Law Section Student Achievement Award, contact Don Jaffe at djaffelaw@aol.com. ♦

By Donald N. Jaffe, an attorney with Persky, Shapiro and Arnoff in Beachwood.

By Frederick J. Calatrello, regional director, Region 8, National Labor Relations Board.

Endnotes

1 See generally, Automatic Sprinkler, 55 F.3d 208 (6th Cir. 1995).

2 Specialty Envelope, 10 F.3d 1221 (6th Cir. 1993).
Pregnancy discrimination: review of the proposed revised rule

For many years now, the Ohio Civil Rights Commission (OCRC), pursuant to its rule-making authority, has required more of Ohio employers than simply not discriminating against pregnant workers. This requirement was not found in the Ohio Revised Code but, rather, in the Ohio Administrative Code (4122-5-05(G). In June 2007, the OCRC approved a revision to this administrative rule. Public hearing was held regarding this rule on Aug. 1, 2007, and action is expected soon on the proposed revised rule. The OCRC recommended amendment of the rule “in order to clarify the rights of pregnant employees and the obligations of employers” and to “provide clear and unambiguous guidance on the issue of leave” related to pregnancy, childbirth and related medication conditions.

The text of the proposed revised rule is as follows:

4112-5-05 Sex Discrimination (G) Pregnancy, childbirth, and related medical conditions

A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is a prima facie violation of the prohibitions against sex discrimination contained in Chapter 4112 of the Revised Code.

An employee affected by pregnancy, childbirth or a related medical condition shall be treated the same for all employment-related purposes, including eligibility for light duty positions and participation in modified work programs, accrual of seniority, receipt of benefits under fringe benefits programs, and all other benefits and privileges of employment, as other employees not so affected but similar in their ability or inability to work, and regardless of whether she is otherwise similarly situated in all respects.

Distinctions based upon length of service, the nature of the medical condition, or whether the medical condition is related to an on-the-job injury, shall not constitute a legitimate, nondiscriminatory reason for treating an employee affected by pregnancy, childbirth or a related medical condition less favorably than other persons not so affected but similar in their ability or inability to work.

Where an adverse employment action taken against an employee who is temporarily limited, in part or in whole, in her ability to work due to pregnancy, childbirth or a related medical condition is based upon an employment policy or practice under which less than 12 weeks of pregnancy, childbirth or maternity leave is available, such policy shall be presumed to have a disparate impact on women and constitutes unlawful sex discrimination unless justified by business necessity.

Written and unwritten employment policies and practices involving commencement and duration of pregnancy, childbirth or maternity leave shall be so construed as to provide for individual capacities and the medical status of the woman involved.

No employer shall be permitted to place an employee affected by pregnancy, childbirth or a related medical condition on mandatory leave, or otherwise limit or alter her job duties, in the absence of an objective, verifiable safety justification and only when the pregnancy or related medical condition interferes with her ability to safely perform her position.

Upon signifying her intent to return to employment, an employee who was temporarily limited, in part or in whole, in her ability to work due to pregnancy, childbirth or a related medical condition shall be reinstated to her original position or to a position of like status and pay, without loss of service credits or other benefits.

* * *

If approved, the rule will require that employers give 12 weeks of leave to women affected by pregnancy, childbirth or related medical conditions, regardless of the length of the woman’s employment; her eligibility for a leave of absence; or whether the employer is required to comply with the Family and Medical Leave Act (FMLA). Adverse action taken against an employee because of her inability to work due to pregnancy, childbirth or related medical conditions, which is based on a policy or practice under which less than 12 weeks of leave is available will be presumed to have a disparate impact on women (and, therefore, to constitute unlawful sex discrimination) unless the employer can demonstrate that practice or policy is justified by business necessity.

Although Chapter 4112 applies to employers of four or more, because this administrative rule likely makes a clear statement of public policy, torts of wrongful discharge in violation of public policy may well be available to employees whose employers have fewer than four employees. This type of leave is not mandated for any other temporary disability for employ-
ers who are not large enough to be required to comply with the FMLA.

Under this new rule, if an employer offers light-duty or modified work programs to employees affected by other conditions, it will also have to offer them to women affected by pregnancy, childbirth or related medical conditions. In addition, employers may not place an employee affected by pregnancy, childbirth or related conditions on mandatory leave or otherwise limit her job duties unless the employer can show an objective, verifiable safety justification and then only when the pregnancy or related medical condition interferes with her ability to safely perform her position.

From the face of this new proposed rule, then, it appears that if a woman is eligible for FMLA but has used it and later in the same 12-month period requires time off for pregnancy, childbirth or a related medical condition, the employer will be required to give her another 12-week leave in the same 12-month period. Presumably, the employee can be required to provide medical documentation to demonstrate her inability to work due to pregnancy, childbirth or related medical conditions if medical documentation is required of employees for other periods of inability to work. Under the proposed rule, when an employee signifies her intent to return to work, she must be reinstituted to her original position or to a position of like status and pay, without loss of service credits or other benefits.

By Pam Krivda of the Krivda Law Offices in Columbus.

misuse of supervisory authority. The answer to this question has particularly important implications for the law of discriminatory harassment, which need not be incidental to an exercise of supervisory authority to be unlawful. Also implicated is the murky concept of causation in employment litigation. Workplaces have become more collaborative over the years. To what extent can an employee, such as an HR coordinator, who serves in a consultative, rather than a supervisory role, nonetheless be held liable under Genaro by virtue of his or her influence on a particular employment action? To better understand these questions and some potential answers, a brief review of Genaro and its rationale is in order.

The Genaro decision

The Genaro decision has a unique genesis in a dispute over federal diversity jurisdiction. Citing complete diversity of citizenship, the corporate and individual defendants in three separate employment actions initiated in state courts removed those actions to U.S. District Court for the Northern District of Ohio. It appears that there was no dispute that complete diversity existed between the plaintiffs and the corporate defendants. But the status of the individual defendants, who were residents of Ohio, like the plaintiffs, was hotly contested. At issue was whether the individual defendants were properly named as party defendants for claims brought pursuant to R.C. Chapter 4112. An affirmative answer to the question would destroy complete diversity, which in turn would require the federal court to remand the cases to the state courts in which they were originally brought. A negative answer would mean that the individuals were not proper parties and consequently their Ohio citizenship was irrelevant to the diversity equation. Ultimately, the district court certified the questions to the Supreme Court of Ohio, which answered the question in the affirmative, ruling that supervisors could be held individually liable under Chapter 4112.

The majority rooted its rationale in the definition of employer found in R.C. 4112.01(A)(2). That section defines “employer” as:

any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer.

Relying on that last clause, the majority concluded that Chapter 4112’s definition of employer “by its very terms, encompasses individual supervisors and managers whose conduct violates the provisions of R.C. Chapter 4112.” This reading of division (A)(2), the majority explained, was consistent with the mandate in R.C. 4112.08 that Chapter 4112 be construed liberally to effectuate its purposes and the court’s previous statements concerning the strong public policy against discrimination, including discrimination in the workplace.

In arriving at its ruling, the majority rejected the defendants’ contention that Chapter 4112 should be interpreted in line with Title VII of the Civil Rights Act of 1964, which precludes individual liability. The majority reasoned that Title VII’s definition of employer was far more restrictive than Chapter 4112’s. Under Title VII of the Civil Rights Act of 1964, “employer” is defined as “a person engaged in an industry affecting commerce who has fifteen or more employees *** and...
any agent of such a person.” The court reasoned that Title VII’s “differing numerosity requirements and uses of agency terminology indicated that the definition of employer in R.C. 4112.01(A)(2) was far broader than its federal counterpart. Therefore, case law interpreting Title VII’s definition of “employer” did not control the court’s interpretation of “employer” in Chapter 4112. To the contrary, the majority contended, these textual differences required a different result. But to whom does Genaro apply?

The reach of Genaro
In the wake of Genaro, state and federal courts have made clear that Chapter 4112 neither imposes individual liability on nonsupervisory employees nor imposes vicarious liability on supervisors for the discriminatory conduct of other employees. Important questions remain open, however. For one, what kind and how much authority must an individual possess to be deemed a “supervisor” under Genaro? For another, can a supervisor, simply by virtue of having supervisory status, be held liable for any of his or her conduct prohibited by Chapter 4112? Or is Genaro liability triggered only when the prohibited conduct also involves the exercise of supervisory authority? These are topics to which we now turn.

Who is a supervisor?
Shortly after Genaro was issued, the Court of Appeals for the 6th Circuit suggested per curiam in the unreported case of Summerville v. Ross/Abbott Laboratories that an individual who exercised “significant control” over the terms or conditions of the plaintiff’s employment could qualify as a supervisor for the purpose of imposing individual liability under Genaro. Among other claims, Summerville sought to hold her “crew leader” liable for sexual harassment. Ultimately, she was unable to rebut the defendants’ description of the crew leader as the leader of a peer group who did not exercise significant control over the plaintiff’s hiring, firing or conditions of employment. Consequently, the court of appeals affirmed the district court’s grant of summary judgment on this claim. Although Summerville adds little to our understanding of who may qualify as a supervisor under Genaro, it does reinforce the notion that the inquiry should focus on authority, not title.

In the age of team leaders, coordinators and other nebulous titles, employees may wonder whether they could be held personally liable for performing required job functions. Without mentioning Summerville, a district court in the Northern District of Ohio, in McCormick v. Kmart Distribution Center, ruled that, in determining whether an individual was the plaintiff’s supervisor for the purpose of Genaro liability, a court should look at both the economic and noneconomic power an individual could exercise over the plaintiff in the workplace. The plaintiff in that case, McCormick, alleged unlawful sexual harassment at the hands of her alleged supervisor, Spiva, whom she sued individually under Chapter 4112 pursuant to Genaro. McCormick also asserted various claims against her organizational employer, Kmart.

Contending that he was not McCormick’s supervisor, Spiva moved for summary judgment of the Genaro claim asserted against him. Spiva pointed to the fact that he could not exercise any economic authority over McCormick—for example, he did not have the authority to hire, fire or transfer her; nor could he affect her compensation. The court had previously found this argument persuasive in ruling that Spiva was not the plaintiff’s supervisor as that term is used under Title VII and therefore Spiva’s employer, Kmart, was not precluded from asserting the Ellerth/Faragher affirmative defense. However, in light of the Genaro court’s broader view of Chapter 4112, the court reasoned that the chapter’s definition of supervisor had to be broader than the one for Title VII. Therefore, Spiva’s noneconomic authority over McCormick must also be considered in determining whether he was her supervisor for the purpose of a Genaro claim. And when this authority was considered, factual issues remained as to whether Spiva was McCormick’s supervisor for the purposes of her Genaro claim.

The court based its decision on Spiva’s alleged ability to discipline
the plaintiff and other employees, although the record was not clear on this issue, as well as on his authority to make “secondary work assignments.” These assignments were mostly clean-up activities that employees performed at the end of their shifts, if there was time. According to the court, these assignments were rarely made, as employees seldom finished their primary work assignments, which were not assigned by Spiva. Though not determinative, the court noted that there was evidence in the record that Kmart itself considered Spiva a supervisor because it evaluated him, at least in part, in light of certain supervisory traits, including giving him a supervisor performance assessment, in which he was referred to as a supervisor. Kmart also included him in its sexual harassment training for management employees. Ultimately, while the court acknowledged that Spiva’s supervisory authority over McCormick was limited, the dispute over Spiva’s supervisory status was sufficient to survive summary judgment.

The McCormick court’s consideration of both economic and non-economic authority to determine supervisory status certainly gave full sweep to Genaro. But the court did not end its analysis there. Finding supervisory status alone insufficient to establish individual liability under Chapter 4112, the court turned its attention to whether Spiva had misused the limited authority vested in him by his employer to create an unlawful hostile environment for McCormick. Perhaps adding an additional substantive element to the Genaro analysis, the court characterized the second prong of its analysis thus:

In order to determine whether Spiva is individually liable under [Chapter 4112], this Court must look to the employer’s authority misused by the employee-supervisor in order to harass Plaintiff. Therefore, the relevant question becomes, “Did the employee-supervisor misuse the power of the employer in any way to influence or harass the plaintiff?”

The court found this additional analysis necessary to determine whether Spiva was “acting directly or indirectly in the interests of an employer” as set forth in the definition of “employer” in R.C. 4112.01(A)(2). Turning to McCormick’s claim against Spiva, the court found genuine issues of material fact as to whether Spiva misused his limited supervisory authority. Ultimately, McCormick was permitted to move forward with her hostile environment claim against Spiva.

McCormick’s “misuse” element was deployed in High v. Genting/ Castle, Inc., an unreported case from the Southern District of Ohio. Among other claims, the plaintiff, High, asserted age discrimination claims under Chapter 4112 against his former supervisors, Hite and Beebe, pursuant to Genaro. It was undisputed that Hite and Beebe were High’s supervisors at different times during High’s career at Genting. Nonetheless, Hite and Beebe moved for summary judgment alleging that they did not meet the standard of individual liability under Chapter 4112, which the court, citing McCormick, acknowledged required a showing that the supervisors misused their authority in a manner that violated Chapter 4112. Denying Hite’s and Beebe’s motion, the court concluded that genuine issues of fact existed as to whether certain conduct in the form of negative performance evaluations, negative comments, and placing High on several probationary periods constituted actionable misuse of supervisory authority.

If adopted, the “misuse of authority” standard could circumscribe the breadth of Genaro liability, especially in the area of hostile environment harassment claims. But is this standard consistent with Chapter 4112?

**Whither the “misuse” standard?**

To be sure, McCormick and High are not binding in their own districts, let alone the state courts of Ohio. Yet these decisions raise an interesting question as to the proper scope of Genaro liability. On one hand, it could be argued that these district court decisions infuse an additional substantive element into the Genaro analysis that is unwarranted in light of the liberal construction to be given to Chapter 4112 and the broad language of Genaro’s holding. The operative part of the syllabus for our purposes provides that an individual supervisor can be held liable for the “discriminatory conduct of the supervisor/manager in violation of R.C. Chapter 4112.” The misuse of authority standard is not derived from this language in any obvious way.

On the other hand, the “misuse of authority” standard is arguably not foreclosed by the holding in Genaro. One must remember that the Court was asked only whether a particular class of employees could be proper party defendants under Chapter 4112. There is no indication that the majority in Genaro set out to delineate the circumstances under which a supervisor’s conduct is “in violation of R.C. Chapter 4112.” In fact, when one turns to the text of the majority’s opinion, one can find support for adopting the misuse of authority standard. The majority in Genaro reasoned that individual supervisors fell within Chapter 4112’s definition of “employer” because that definition included individuals “acting directly or indirectly in the interests of an employer.” But it is not always the case that supervisors are acting.

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directly or indirectly in the interests of their employers when discriminating against subordinates. As the U.S. Supreme Court has noted in the context of what have traditionally been called hostile environment sexual harassment claims,

[the] general rule is that sexual harassment by a supervisor is not conduct within the scope of employment. The harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer.

Thus one could argue that the “misuse of authority” standard keeps the concept of individual liability under Chapter 4112 moored to the statutory language the Genaro majority found dispositive.

In addition, as pointed out by Justice Deborah L. Cook in her dissenting opinion, Genaro’s rationale does not provide a principled basis by which individual liability can be limited to supervisory employees alone. All employees are capable of acting directly or indirectly in the interests of their employers and do so on a daily basis. Therefore, one implication of Genaro’s reasoning is that co-workers could be held personally liable under Chapter 4112. However, this interpretation has never been suggested by any court in Ohio and would be out of step with the prevailing view of most analogous employment discrimination statutes. A misuse of authority standard provides such a limiting principle by imposing liability on individuals deemed to be employers under Chapter 4112 only when they are acting as employers by exercising company power.

Finally, requiring a nexus between conduct prohibited by Chapter 4112 and a misuse of supervisory authority to impose individual liability would help clarify when an employee who is not a plaintiff’s supervisor but who nonetheless acts as a “decision maker” in connection with a challenged decision can be sued under Chapter 4112. For example, in Bukta v. J.C. Penney Company, Inc., the plaintiff sued the following J.C. Penney employees: the store manager for the store in which she worked; the store’s district manager; a district human resources manager and a human resources director located in another state. The plaintiff alleged that these employees collectively reached a decision that resulted in a failure to accommodate her disability in violation of Chapter 4112. Applying the misuse of authority standard, the court ruled that all four employees could be sued under Chapter 4112.

The court concluded that insofar as each employee had authority to deny the plaintiff’s accommodation and then had exercised that authority in a discriminatory fashion, they could be held liable for any violation of Chapter 4112. Thus, the misuse of authority standard may in some cases extend the reach of Chapter 4112 by regulating the conduct of non-supervisory employees who nonetheless exercise the power of the employer in particular situations.

Considerations

Whether personal liability under Chapter 4112 will flow simply from supervisory status or from an unlawful use of supervisory authority is a question yet to be answered. Any answer should take into account both the salutary antidiscrimination purposes of Chapter 4112 and the intent of the General Assembly, which is presumed to reside in the language of Chapter 4112.

By Christopher Hogan of Moots, Carter & Hogan in Columbus.

Endnotes

1R.C. 4112.02(A).
284 Ohio St.3d 293, 1999-Ohio-353; Id. at the syllabus. When parties are jointly and severally liable, each defendant may be held liable for the entire amount of the judgment. Shoemaker v. Crawford, 78 Ohio App.3d 53, 66-67, 603 N.E.2d 1114 (1991). The tortfeasors may apportion their liability and seek contribution among themselves. Notably, at least one court of appeals ruled, in the context of a sexual harassment case brought under Chapter 4112, that a settlement between the plaintiff and her former supervisor did not extinguish the plaintiff’s claim against her corporate employer. See Edwards v. Ohio Institute of Cardiac Care, et. al. (March 23, 2007), Green Cty. App. No. 2006 CA 74, 2007-Ohio-1333 at ¶76, 2007 WL 866942.
4Courts do not appear to view “supervisors” as legally distinct from “managers” for the purposes of applying Genaro. As later explained, whether an individual can be held individually liable under Chapter 4112 is a question answered not by reference to title but by job function or by being a decision maker. Therefore, for ease of reference, I will use the term “supervisor” to refer collectively to supervisors and managers. Decision-makers will be discussed separately.
5See, e.g., Shevin v. Rathi (Aug. 30, 2002), Seneca Cty App. 13-02-20, 2002 WL 1998535 (unreported). The court ruled that a professor had a stated claim of age discrimination against 24 individual board members of his college employer sufficient to survive a motion to dismiss by alleging the board was responsible for making the
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For more information about Labor and Employment News, contact the editor Amy Glesius at the Law Office of Amy S. Glesius, Lorenzo Carter Building, 1360 West 9th Street, Suite 310, Cleveland, Ohio 44113, at (216) 241-6882 or by e-mail at aglesius@glesiuslaw.com or section secretary Joseph B. Swartz at Weston Hurd, Tower at Erieview, 1301 East 9th Street, Suite 1900, Cleveland, Ohio 44114, at (216) 687-3302 or by e-mail at JSwartz@westonhurd.com.

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challenged employment decision, thereby becoming “supervisors” under Genaro.
84 Ohio St.3d at 293-294.
7Id.
8Id. at 296.
9Id. at the syllabus.
10R.C. 4112.01(A)(2) (emphasis added).
1184 Ohio St.3d at 296.
12Id.
1484 Ohio St.3d at 298-299.
1542 U.S.C. §2000e(b) (emphasis added).
1684 Ohio St.3d at 299.
17Incredulous dissenters argued that R.C. 4112.01(A)(2)’s language that “employer” included “any person acting directly or indirectly in the interest of an employer” was similar to Title VII’s agency clause, which was designed not to impose liability on individual employees but instead to impose vicarious liability on employers for the discriminatory acts of their employees. Id. at 300-304.
19187 F.3d 638, 1999 WL 623786 (6th Cir. 1999) (unpublished) (per curiam); Id. at *4.
20Id. at *8.
21Id. at *4.
22163 F.Supp.2d 807 (N.D. Ohio 2001); Id. at 822.
23Id.
24Id.
25Id.
26Id. at 812, 822.
27Id. at 812.
28Id. at 822.
29Id. at 822-823.
30McCormick had also asserted a quid pro quo harassment claim under Chapter 4112 against Spiva, but that claim was dismissed for reasons not relevant here.
31Id. at 823.
32The record indicated that Spiva allegedly offered McCormick preferable secondary work assignments if she “got to know him better.” Id. at 823. Further, the court found he misused his authority in an unspecified manner to discourage McCormick from reporting his alleged misconduct, although this reason does not appear to have specific support in the record. Rather, it appears Spiva allegedly threatened plaintiff’s safety, a form of misconduct that does not require supervisory authority. Id.
34Id. at *1-2.
35Id. at *16.
36“Supreme Court Rules for the Reporting of Opinions Rule 1(B)(1) provides, “[t]he law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes.” Division (B)(2) of rule provides, “[i]f there is disharmony between the syllabus of an opinion and its text or footnotes, the syllabus controls.”
3884 Ohio St.3d at 303-304.
40Id. at 670-671.
41Id. at 671 & n.13.

19
20Id. at *4.
21Id. at *4.
22163 F.Supp.2d 807 (N.D. Ohio 2001); Id. at 822.
23Id.
24Id.
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3884 Ohio St.3d at 303-304.
39359 F.Supp.2d 649 (N.D. Ohio 2004). See also note 6, supra.
40Id. at 670-671.
41Id. at 671 & n.13.
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*By Joseph B. Swartz, an attorney with Weston Hurd in Cleveland.*

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