

# Damage Caps For Employment Claims Under the Revised Ohio Civil Rights Law

**Shafiyal Ahmed, Esq.**  
Freeman, Mathis & Gary, LLP



Ohio's own Civil Rights law underwent a few significant reforms last year.

On January 12, 2021, Governor Mike DeWine signed into law [House Bill 352](#), passed by the 133rd General Assembly, which took effect on April 15, 2021.

Titled the "Employment Law Uniformity Act (ELUA)", the revised statute now addresses some of the more convoluted sections within the prior Code provisions. Specifically, the revisions contained within ELUA tighten and more clearly state the statutory scheme in respect of the applicable statute of limitations, available affirmative defenses, filing requirements for claimants, those circumstances which might expose individual actors to the possibility of personal liability exposure, and the parameters of an age discrimination claim.

The ELUA also now provides for enumerated caps for damages.

## **A. The Revised Law / Seven Key Points**

The revised version of the Ohio Revised Code 4112.08 (eff. April 15, 2021) is now amended to include those substantive changes contained within House Bill 352. The revisions include several clarifications and substantive changes.

- 1. Removes Personal Liability for Managers and Supervisors.** Previously, managers and supervisors could potentially be held personally liable for workplace discrimination claims. This was inconsistent with Federal anti-discrimination laws. The ELUA removed the potential for

personal liability for supervisors and managers unless they are the employer.

- 2. Exhaustion of Administrative Remedies.** The ELUA now *requires* that claimants first exhaust their available administrative remedies before proceeding to suit. This is in line with applicable Federal law. Under the new ELUA, claimants must now first file their discrimination claims with the OCRC, whereas before claimants could proceed directly to a civil suit. After the passage of sixty (60) days following the initial administrative filing, a claimant may file a request with the OCRC and ask for a "Notice of Right to Sue" letter. If such a Notice is then issued, the claimant may proceed to file a civil action in court following the passage of an additional forty-five (45) days after the employer receives a copy of the same Notice.
- 3. Revised Statute of Limitations.** The revised ELUA also implements a revised a statute of limitations relative to claims made pursuant to R.C. Chapter 4112. Previously, the period of time for any claimant to bring suit was six (6) years. The timeframe for filing an administrative claim with the OVRC was six (6) months. House Bill 352 changed these time periods as follows: (a) for the filing of a lawsuit – two (2) years, and (b) for the filing of an administrative charge of discrimination – two (2) years.
- 4. Simplification of Age Discrimination Lawsuits.** The ELUA also now simplifies the process for age discrimination lawsuits.

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Now, the law provides that age discrimination claimants must file suit pursuant to Ohio Revised Code 4112.08, thereby creating a single cause of action and streamline procedures. The process and remedies for age discrimination claims will be the same as for other protected classes.

- 5. Affirmative Defenses Added.** Importantly, the ELUA also identifies specific affirmative defenses to a hostile workplace harassment claim as determined by the U.S. Supreme Court.

Known as the “*Faragher-Ellerth* defense,” an employer can likely avoid vicarious liability for any employee found to have sexually harassed another provided the employer can establish, by a preponderance of the evidence: (a) the employer exercised reasonable care to prevent or promptly correct any sexually harassing behavior; or (b) the employee alleging the hostile work environment unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. See O.R.C. 4112.054.

- 6. Exclusive Remedy.** The ELUA now also provides for an exclusive remedy for unlawful discrimination claims. Common law claims, such as wrongful discharge in violation of public policy, are no longer available for claimants if their charges fall under O.R.C 4112.

- 7. Limits for non-Economic and Punitive Damages.** Lastly, the ELUA enacts limits for the recovery of both *non-economic* and punitive damages for employment discrimination claims under the statute.

The new damages caps enable employers to better understand what their potential economic liability might be and also likely enhances an employer’s negotiation position.

**B. New Limits on Non-Economic and Punitive Damages**  
Clarifying the caps on damages under Ohio’s Tort Reform Act (R.C. 2315.18), the ELUA has

implemented new limits for the recovery of *non-economic* and punitive damages for those litigants filing employment discrimination claims.

The ELUA now distinguishes limits for compensatory damages (economic and non-economic losses) and punitive damages. In particular, House Bill 352 amended the statutory definition of “tort action.” Under the Bill, “[t]ort action’ means a civil action for damages for injury or loss to person or property.” A civil action is “based on an unlawful discriminatory practice relating to employment brought under section 4112.052 of the Revised Code, and a civil action brought under section 4112.14 of the Revised Code.” Therefore, civil actions regarding employment discrimination claims that fall under Chapter 4112 are now defined as a “tort action.”

Although the law does not limit compensatory damages for *economic* loss, ELUA places caps on non-economic compensatory damages, with limited exceptions for certain situations.

*Non-economic* losses cannot exceed the greater of \$250,000 or three times the amount of the plaintiff’s economic loss ... to a maximum of \$350,000 for each plaintiff in the legal action, or \$500,000 for each occurrence.

Also, the ELUA mandates that *punitive* damages cannot exceed two times the number of compensatory damages awarded to the plaintiff, or ten percent (10%) of a small employer’s or individual’s net worth when the alleged act was committed, with a maximum penalty of \$350,000.

If a claimant requests punitive damages, they then have the burden of proving, *by clear and convincing evidence*, that they are entitled to recover punitive or exemplary damages.

If a jury awards a claimant more than the available statutory punitive damages amount, the trial court

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*must* amend the award pursuant to Ohio Revised Code § 2315.18. Further, the trial court can make specific findings of fact to change the punitive damages award. For example, the trial court may find, by a finding of clear and convincing evidence, that the total amount of prior punitive or exemplary damages awards against the same employer was insufficient to punish the employer's behavior and to deter them and others from similar behavior in the future.

The trial court may also reduce the amount of the punitive damages award by the sum of any punitive or exemplary damages awards previously rendered against the same employer in any state or federal court.

### **C. Looking Forward**

Several Ohio courts have held that the punitive damages cap is based upon the uncapped compensatory damage award. Although the Ohio Supreme Court has yet to offer clear guidance as to the constitutionality of the damage caps now applicable to discrimination claims, there appears minimal doubt that (for the time being, at least) judicially modified punitive damages awards in discrimination claims will likely be held constitutional.

In 2007, the Ohio Supreme Court determined in the landmark case of *Arbino v. Johnson & Johnson*<sup>1</sup> that damage caps were not unconstitutional and did not violate a plaintiff's rights to a trial by jury or due process, equal protection rights and Ohio constitutional provisions. The General Assembly would decide damage caps, not the courts. See also *Simpkins v. Grace Brethren Church of Delaware*<sup>2</sup> (holding that the statutory cap was constitutional as applied to the facts in the case—a child rape victim—and that this case involves a single “occurrence” for purposes of applying the caps).

The Ohio Supreme Court also has determined a case dealing with the uncapped jury-awarded compensatory damages issue. In the *Brandt* case<sup>3</sup>,

the Court addressed the issue of the reduction of a child rape victim's damages award from \$100 million in punitive damages to \$250,000 pursuant to the statutory damages cap. In *Brandt*, the appellant had challenged the constitutionality of Ohio's statutory cap on noneconomic tort damages (R.C. 2315.18), arguing that the precedent established in *Arbino* should be overturned. The appellant further argued that Ohio's statutory cap is unconstitutional because it: (1) violated her right to a jury trial because the trial court altered the jury's finding that she had suffered a catastrophic injury; (2) deprived her of a meaningful remedy; and (3) deprived her of due process and the equal protection of the laws because the award reduction impinged on fundamental rights and was not narrowly tailored to serve a compelling state interest when reviewed under the strict scrutiny standard. The Ohio Supreme Court in *Brandt* upheld the trial judge's decision to modify the punitive damages award to comport with Ohio Revised Code § 2315.21. Similarly, the Supreme Court had previously ruled in *Wayt v. DHSC, L.L.C.*<sup>4</sup> that a trial court erred by awarding damages in excess of the applicable caps on damages set forth in R.C. 2315.18(B)(2) because the statute unambiguously capped the noneconomic damages that could be recovered as a result of a “tort action.”

Prior to the passage of House Bill 352, *Luri v. Republic Services, Inc.*<sup>5</sup>, an Eighth District Court of Appeals decision, addressed whether tort damage caps apply to discrimination cases under Chapter 4112. The court in *Luri* determined that punitive damage caps set out in Ohio Revised Code § 2315.21(D)(2)(a) also apply to Chapter 4112 statutory discrimination claims, thus limiting the plaintiff's punitive damage award to twice the amount of compensatory damages. However, the court provided little rationale for its decision.

The Southern District of Ohio in *Kramer Consulting, Inc. v. McCarthy*<sup>6</sup> considered the applicability of limits to the amount of punitive damages available under a particular statutory claim. Although *Kramer* construed a different statutory claim, it specifically

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referenced Chapter 4112 claims for discrimination and determined that “if the statute does not explicitly specify such a limit, one should not be applied”.

By applying the damage caps from § 2315.21, the *Luri* court implicitly ruled that a Chapter 4112 discrimination claim is a “tort action” under the Ohio Tort Reform Act. This implicit ruling is now explicitly codified. Under the District Court’s rationale in *Kramer*, and Ohio Supreme Court decisions regarding the constitutionality of punitive damages, the damage caps now applicable to employment claims per Chapter 4112.08 will force employees to justify excessively high demands. Ultimately, the damage caps place employers in a better position to assess their exposure in discrimination claims and limit litigation costs.

**Shafiyal Ahmed, Esq.**, is an Associate in Freeman Mathis & Gary, LLP’s Columbus office. His practice focuses on the defense of insurers, employers, businesses and commercial entities, licensed professionals, and government entities.

Mr. Ahmed handles all aspects of litigation, from pre-suit investigations to trial and through appeal. His broad litigation background ranges from successfully representing businesses in contract disputes and employment litigation, to defending local governments in litigation under § 1983 for alleged violations of constitutional rights. His experiences uniquely prepare him to serve as an advocate and counselor.

## Endnotes

- 1 (116 Ohio St.3d 468, 2007-Ohio-6948)
- 2 149 Ohio St. 3d 307, 2016-Ohio-8118, 75 N.E.3d 122
- 3 *Brandt v. Pompa*, No. 2021-0497
- 4 155 Ohio St.3d 401, 2018-Ohio-4822, 122 N.E.3d 92
- 5 1 953 N.E.2d 859, 864 (Ohio Ct. App. 2011)
- 6 No. C2-02-116, 2006 WL 581244 (S.D. Ohio Mar. 8, 2006)