

TESTIMONY OF COSE, THE COUNCIL OF SMALLER ENTERPRISES,  
TO THE JOINT COMMITTEE ON AGENCY RULE REVIEW,  
DECEMBER 3, 2007

Mr. Chairman, Mr. Vice Chairman, Members of JCARR:

My name is Keith Ashmus. I am a partner at Frantz Ward a law firm in Cleveland, Ohio and a past chair of the Council of Smaller Enterprises (COSE). While there are many reasons why the proposed rule of the Ohio Civil Rights Commission is both unwise and improper, COSE's presentation this afternoon will focus upon only one issue: the rule's interference with the workers' compensation system's return to work process. COSE, as an association of almost 17,000 small business owners, is concerned that the Commission has ignored the adverse impact its rule will have on the workers' compensation system and has grossly exceeded its proper role as an administrative agency.

As you know, the workers' compensation system in Ohio was established in the Constitution of our state. It provides no-fault compensation for injured workers in exchange for yielding common law rights to court damages. Yet, the System does not end there. Over the years, it has developed comprehensive injury and illness management systems, designed to get workers back on the job as quickly as possible, providing incentives to workers, employers and, more recently, managed care organizations, to do so. One of the key elements of those programs is the light duty rehabilitation assignment. For years now, under the same language of the Ohio Civil Rights Act, employers large and small have elected to help their injured workers get back on the job by providing light duty opportunities to them,

and, in most cases for very good reasons, have limited these opportunities to their male and female employees who have been injured on the job.

The Commission's rule will destroy that system by exacting an additional price from an employer who wants to help one of its workers transition back to full-time unrestricted work. That price is the mandatory extension of the employer's light duty program to women affected by conditions related to pregnancy. This is unprecedented. There is no final decision in any Ohio court, or even by the Commission, establishing this perverse principle. Indeed, the federal law, the Pregnancy Discrimination Act of 1978, reads similarly to Ohio's law, and has been repeatedly construed to permit employers to grant light duty opportunities to injured workers, male and female, while denying it to employees, male and female, who have not been injured at work, without violating the PDA. For example, the case of *Reeves v. Swift Transport Co.*, 446 F.3d 637 (6<sup>th</sup> Cir. 2006), rejected a claim of pregnancy discrimination brought by a woman turned down for a light duty job even though the employer provided light duty opportunities for its employees injured on the job. Other federal circuits have adopted the same position. Accordingly, the Commission's rule is not consistent with the law itself, creates a totally new burden and lacks in the record any analysis whatsoever of its fiscal impact.

Employers, especially small employers, have a difficult time creating light duty opportunities, and are vulnerable to injury claims. If they create a light duty job for an injured worker, they may not have the ability to create yet another one for a pregnant employee. If a workers' compensation claimant comes back to work on light duty and reinjures herself, the employer is

protected under the workers compensation second injury program. If a pregnant employee is injured while on light duty, the employer is completely unprotected.

Additionally, employers do other things for injured workers under our workers compensation system—providing paid leave or wage continuation, for example—that they would never provide for individuals, including pregnant employees, who are not injured at work. If the Commission’s rule on this point is allowed to stand, there is nothing in the way of mandating paid leave to pregnant employees whenever the employer has provided wage continuation to an injured worker. The Commission’s proposed rule will therefore clearly interfere with the workers’ compensation system, and COSE believes that this is not the proper business of the Commission.

In conclusion, COSE submits that the issue of the Commission’s rule impacting the workers’ compensation system is reason enough to invalidate the rule. The rule is contrary to the law, the Commission is not empowered to create new law different from what the legislature enacted, the Commission is interfering with a constitutionally mandated system committed to governance by a different agency, and the Commission failed to make any fiscal analysis of this aspect of its proposed rule. Besides the fact that this rule is stunningly bad policy, these technical deficiencies permit—indeed, they mandate—rejection of the rule by this Committee. COSE thanks you for your attention, and we welcome any questions.