

**IN THE SUPREME COURT OF OHIO**

<b>BARBARA ZUMWALDE,</b>	:	
	:	
<b>Plaintiff-Appellee,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>MADEIRA AND INDIAN HILL JOINT FIRE DISTRICT,</b>	:	<b>Case No.: 2010-0218</b>
	:	
<b>Defendant,</b>	:	
	:	
<b>and</b>	:	<b>On Appeal from the Hamilton County Court of Appeals First Appellate District Case No. C0900015</b>
	:	
<b>STEPHEN ASHBROCK,</b>	:	
	:	
<b>Defendant-Appellant.</b>	:	

**Brief of Amicus Curiae**

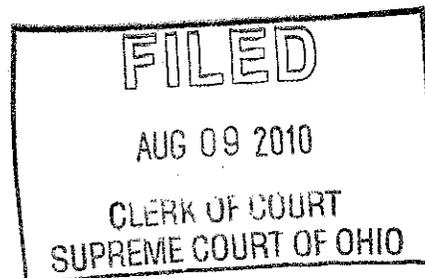
**THE OHIO EMPLOYMENT LAWYERS' ASSOCIATION**

**In Support of**

**APPELLEE BARBARA ZUMWALDE**

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Brief of Amicus Curiae

THE OHIO EMPLOYMENT LAWYERS' ASSOCIATION

In Support of

APPELLEE BARBARA ZUMWALDE

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I. Statement of Interest of Amicus Curiae

The Ohio Employment Lawyers' Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA and OELA strive to protect the rights of

their members' clients, and regularly support precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

As an organization focused on protecting the interests of workers who are subjected to workplace discrimination, OELA has an abiding interest in ensuring that Ohio's civil justice system hold those most able to prevent workplace discrimination to account. Granting political subdivision supervisors immunity from civil liability for their unlawful discrimination removes a powerful deterrent against discrimination. Workers and those whom they support would suffer. OELA asks to participate as amicus in this case to cast light on these issues and to call attention to the impact the decision in this case may have on victims of workplace discrimination throughout the state.

## **II. Statement of the facts**

The amici adopt the statement of the facts contained in the merit brief of Plaintiff-Appellee Barbara Zumwalde, with one special notation. Appellant was sued for unlawful retaliation under R.C. Section 4112.02(I) in his capacity a “person,” defined to include any “individual,” an “employee,” including that of a political subdivision and an “employer,” defined to include supervisors acting in the interest of their employer.

### **III. Argument**

#### ***A. Preliminary Statement***

Immunity did not attach to Appellant for his discriminatory acts, since R.C. Section 4112.02(I) “expressly imposes civil liability” on him in his capacity a “person.” R.C. Section 2744.03(A)(6)(c). A person means any “individual,” an “employee,” including that of a political subdivision, and an “employer.” R.C. Sections 4112.01(A)(1)-(3). Appellant is an individual, an employee of a political subdivision and as a supervisor, a statutory employer. The Revised Code thus expressly imposes civil liability on him for retaliation, without immunity.

Even if immunity did attach to Appellant’s retaliatory suspension, Appellant lost it because the claims against him arose out of Ms. Zumwalde’s employment relationship with a political subdivision. R.C. Section 2744.09(B). As her statutory “employer,” Appellant stands in the shoes of the political subdivision-employer.

Allowing Appellant to escape liability for his discriminatory acts would defy logic and violate the public policies advanced by Chapters 4112 and 2744. The General Assembly would not logically leave the cloak of immunity, obtained by a political subdivision employee as a result of being a political subdivision employee, when it removed the immunity from the political subdivision. To do so would violate the strong anti-discriminatory policy of R.C. Chapter 4112 and the fiscal integrity policy promoted by Chapter 2744. This Court must therefore hold Appellant accountable for his unlawful discriminatory acts, and deny him Chapter 2744’s cloak of immunity.

**B. Proposition of Law I:**

**R. C. Section 2744.03(A)(6)(c) Exempts from Immunity R.C. 4112.02(I) Claims asserted against Employees of Political Subdivisions.**

Where immunity is asserted by an employee of a political subdivision, courts undertake a two-step analysis. *See Knox v. Hetrick*, 8th Dist. No. 91102, 2009 Ohio 1359, P 15; *Stoll v. Gardner*, 9th Dist. No 24336, 182 Ohio App. 3d 214, 2009 Ohio 1865, P 14, 912 N.E.2d 165. After a court establishes that an employee engaged in a governmental or proprietary function, it examines whether one of the three exceptions listed in R.C. 2744.03(A)(6) apply. If any of the three exceptions apply, immunity does not shield the employee of the political subdivision from civil liability.

The third exception applies in this case. Immunity is not available to individual employees where “civil liability is expressly imposed upon (them) by a section of the Revised Code.” R.C. 2744.03(A)(6)(c).<sup>1</sup> Two Ohio appellate courts have held that Chapter 4112 expressly imposes civil liability on supervisors for unlawful discrimination, thereby depriving them of immunity under R.C. 2744.03(A)(6)(c). *State ex rel. Conroy v. Williams*, 185 Ohio App. 3d 69, 75-76 (Ohio Ct. App., Mahoning County 2009); (“because R.C. Chapter 4112 has been interpreted to include supervisory and managerial employees in the statutory definition of ‘employer,’ we find that the general immunity provided in R.C. 2744.02(A) does not apply to McKelvey because civil liability is imposed by R.C. 4112.02(A) for discriminatory hiring practices”); *Albert v. Trumbull County Bd. of Mental Retardation/Developmental Disabilities*, 1999 Ohio App. LEXIS 4136, 11-15 (Ohio Ct. App., Trumbull County Sept. 3, 1999) (under R.C. 2744.05(B) and 2744.03(A)(6)(c), “a political subdivision *and its employees* may be liable

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<sup>1</sup> Immunity similarly does not attach to a political subdivision for “civil liability . . . expressly imposed upon the political subdivision.” R.C. Section 2744.02(B)(5)

for discriminatory practices pursuant to various provisions within R.C. Chapter 4112.” (emphasis added)).

In this case, Ms. Zumwalde asserted retaliation claims against Appellant under R.C. Section 4112.02(I), whose reach is broader than 4112.02(A)’s prohibition against discrimination. Specifically, the General Assembly imposed Section 4112.02(I) retaliation liability on any “person” who discriminates against any other person because that person opposed unlawful discriminatory practices. R.C. Section 4112.02(I).<sup>2</sup> “Person” includes not only employers, but “individuals” and “employees.” R.C. Section 4112.01(A)(1).

Appellant is an “individual.” Section 4112.02(I) thus expressly imposes liability against him for retaliating against any person because that person opposed unlawful discriminatory practices. By operation of R.C. Section 2744.03(A)(6)(c), Appellant is not immune from civil liability under R.C. Section 4112.02(I).

Appellant is also an “employee.” Section 4112.01(A)(3) defines “employee” to mean “an individual employed by any employer.” “Employer” includes “the state (and) any political subdivision of the state.” R.C. Section 4112.01(A)(2). Since Appellant is employed by a political subdivision, he is an “employee” against whom R.C. Section 4112.02(I) expressly imposes civil liability. As a result, immunity does not attach to Appellant for violations of R.C. Section 4112.02(I) retaliation claims, again by operation of R.C. Section 2744.03(A)(6)(c).

Finally, R.C. Section 4112.02(I) includes as a “person” a “political subdivision.” A political subdivision is an “employer” under R.C. Section 4112.01(2) (“Employer” includes . . .

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<sup>2</sup> Section 4112.02(I) states “[i]t shall be an unlawful discriminatory practice \* \* \* For any *person* to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.” (Emphasis added).

any political subdivision of the state”). Employer also includes “any person acting directly or indirectly in the interest of an employer.” Supervisors so act, and are therefore “employers” under Chapter 4112. *Genaro v. Cent. Transp.*, 84 Ohio St. 3d 293 (Ohio 1999). Since Appellant was acting as a Chapter 4112 employer, R.C. Section 4112.02(I) once again expressly imposes civil liability on him, for which immunity is denied under 2744.03(A)(6)(c).

Section 2744.03(A)(6) of the Ohio Revised Code applies to Appellant, three different ways. The Ohio Revised Code expressly imposes civil liability on him as an “individual,” as an “employee” of a political subdivision and as an “employer.” As a result, R.C. Section 2744.03(A)(6) applies, denying immunity to Appellant.

**C. Proposition of Law II:**

**R.C. Section 2744.09(B) Removes the Cloak of Immunity from a Political Subdivision Supervisor for Claims Arising out of the Employment Relationship.**

Even if Section 2744.03(A)(6)(c) did not prevent immunity from attaching to Appellant in the first place, the General Assembly made clear that Chapter 2744's grant of immunity “does not apply to, and shall not be construed to apply to . . . [c]ivil actions by an employee . . . against (her) political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision.” Section 2744.09(B). Ms. Zumwalde’s claims against Appellant arose out of her employment relationship with the District, a political subdivision. Importantly, her claim against Appellant includes that against him as an “employer,” since he was a “person acting in the interest of (her) employer” when he suspended her for 20 days. *Genaro v. Cent. Transp.*, 84 Ohio St. 3d 293 (Ohio 1999). Since the claims against Appellant involve his actions as the political subdivision-employer, R.C. 2744.09(B) removes the cloak of immunity from Appellant for the civil liability caused by his acts.

Appellant's attempt to escape liability for his discriminatory acts defies logic. As the First District elegantly reasoned, a "political subdivision's employee is cloaked with immunity under R.C. 2744.03 by virtue of his employment with the subdivision." *Zumwalde v. Dadiera and Indian Hill Joint Fire District*, 2009 Ohio 6801; 2009 Ohio App. LEXIS 5749. The General Assembly could not logically remove the political subdivision's immunity for actions arising out of the employment relationship, the First District reasoned, without also removing the immunity protecting the employee who engaged in the discriminatory acts. *Id.* This compelled the First District to embrace the "logical reading of the statute" adopted by the Fourth and Eleventh Appellate Districts. *See Nagel v. Horner*, 162 Ohio App. 3d 221, 226-227 (Ohio Ct. App., Scioto County 2005) (immunity provided by R.C. Chapter 2744 is not available to an individual supervisor for retaliation and hostile-work-environment claims arising out of an employment relationship); *Ross v. Trumbull County*, 2001 Ohio App. LEXIS 495 (Ohio Ct. App., Trumbull County Feb. 9, 2001) (immunity for a supervisor from "civil actions by an employee . . . against his political subdivision relative to any matter that arises out of the employment relationship" is excluded by R.C. 2744.09(B)).

If logic left anything to question, the strong public policies against workplace discrimination and in favor of political subdivision fiscal integrity promoted by R.C. Chapters 4112 and 2744 compel the conclusion that the General Assembly intended Chapter 2744 to remove political subdivision supervisor immunity from claims arising out of the employment relationship. This court has noted in numerous cases:

the existence of a strong public policy against discrimination. A majority of this court have, time and time again, found that there is no place in this state for any sort of discrimination no matter its size, shape, or form or in what clothes it might masquerade. This, of course, includes discrimination in the workplace. For instance in *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St. 3d 131, 133, 543 N.E.2d 1212, 1215, we stated that "there appears to be little

question that R.C. Chapter 4112 is comprehensive legislation designed to provide a wide variety of remedies for employment discrimination in its various forms." *See, also, Kerans v. Porter Paint Co.* (1991), 61 Ohio St. 3d 486, 575 N.E.2d 428, and *Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 652 N.E.2d 653, indicating that Ohio's statutory framework and case law reflect Ohio's strong public policy against workplace discrimination. **By holding supervisors and managers individually liable for their discriminatory actions, the antidiscrimination purposes of R.C. Chapter 4112 are facilitated**, thereby furthering the public policy goals of this state regarding workplace discrimination.

*Genaro v. Cent. Transp.*, 84 Ohio St. 3d 293, 296-297 (Ohio 1999)(emphasis added).

To combat workplace discrimination, the General Assembly wisely shifted its costs to those who engage in it, including supervisors. By imposing civil liability on those whose conduct caused it, the General Assembly gave those best able to stop discrimination an incentive to do so, while making their victims whole. The General Assembly would do violence to Ohio's strong public policy against workplace discrimination if it left supervisors of political subdivisions immune from liability for their discriminatory acts. Chapter 4112 gives no hint that the General Assembly intended to do such a thing. To the contrary, the General Assembly held political subdivisions and private employers to the same workplace standards, without distinguishing between the liability of their supervisors.

As for Chapter 2744, this Court noted that "[t]he manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions." *Wilson v. Stark County Dep't of Human Servs.*, 70 Ohio St. 3d 450 (Ohio 1994) (responding to the judicial abrogation of sovereign immunity). Shifting discrimination and retaliation costs to political subdivisions while shielding the culprits who create them imperils fiscal integrity. Indeed, such a reading of 2744.09(B) places political subdivisions at greater peril of civil liability than private employers, since liability for their own conduct deters privately employed supervisors from discriminating. An interpretation of 2744.09(B) that removes liability from supervisors defies

logic in any context, but doubly so when the General Assembly's driving purpose is to protect political subdivision fiscal integrity.

Appellant has no logical answer or countervailing policy to justify immunizing him from responsibility for his retaliatory acts. Instead, Appellant argues that omission of the phrase "any of (the political subdivision's) employees" from 2744.09(B)'s removal of immunity for claims arising out of the employment relationship creates a "fellow-employee" immunity doctrine in employment cases, which protects him from his discriminatory acts as a supervisor. This argument fails because the General Assembly did not create any such doctrine and, even if it did, Appellant's conduct giving rise to the claims against him were not as a fellow employee, but in his role as the political subdivision-employer.

Appellant would not lose immunity under 2744.09(B), if it ever attached, because he is just "any" employee. Rather, the claim against him arising out of Ms. Zumwalde's employment relationship with the District is the result of his conduct *as her supervisor*. Appellant obtained the status of employer under Chapter 4112 because the District vested in him the power to act in its interest. No mere "fellow-employee" suspended Ms. Zumwalde for 20 days. To allow Ms. Zumwalde to reach Appellant with her claim against Appellant as her employer, the General Assembly did not have to remove immunity from "any of the political subdivision's employees." Its removal of immunity from the political subdivision as the employer was sufficient to achieve the dual purposes of Chapters 2744 and 4112.

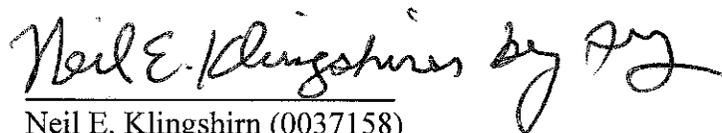
### **Conclusion**

Immunity did not attach to Appellant for his discriminatory acts, since he is subject to civil liability under R.C. Section 4112.02(I) in his capacity a "person." A person means any "individual," an "employee," including that of a political subdivision, and an "employer."

Appellant is an individual and an employee of a political subdivision. A “person” also includes an employer. When Appellant suspended Ms. Zumwalde, he did so as her supervisor and employer. The Revised Code thus expressly imposes civil liability on him for his retaliatory acts in three different ways. Even if immunity did attach to Appellant’s retaliatory suspension, Appellant lost it because the claims asserted against him arose out of Ms. Zumwalde’s employment relationship with Appellant and the District, a political subdivision.

Appellant’s attempt to escape liability for his discriminatory supervisory acts defies logic and offends the public policies advanced by both Chapter 4112 and 2744. The General Assembly would not logically leave the cloak of immunity, obtained by a political subdivision employee as a result of being a political subdivision employee, when it removed the immunity from the political subdivision. To do so would offend the strong anti-discriminatory policies of R.C. Chapter 4112 and the policy of fiscal integrity promoted by Chapter 2744. This Court must therefore hold Appellant accountable for his unlawful discriminatory acts.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was sent via regular U.S. mail to Wilson E. Weisenfelder, Jr. and Laura I. Hillerich, RENDIGS, FRY, KIELY & DENNIS LLP, One West Fourth Street, Suite 900, Cincinnati, OH 45202, on this 9th day of August, 2010.

A handwritten signature in cursive script that reads "Neil E. Klingshirn by Fry". The signature is written in black ink and is positioned above a horizontal line.

Neil E. Klingshirn (0037158)