

ORIGINAL

IN THE SUPREME COURT OF OHIO

ANITA HAUSER : Supreme Court Case No. 13-0291  
Plaintiff-Appellee : Appeals from Montgomery County Court  
of Appeals, Second District  
v. :  
CITY OF DAYTON POLICE DEPT., : Court of Appeals  
Case No. CA 24965  
Et al. :  
Defendant-Appellant. :

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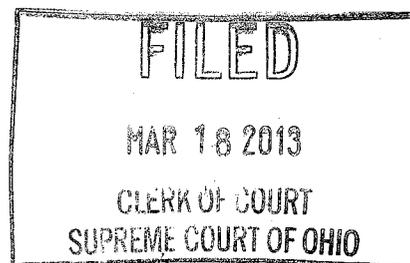
**MEMORANDUM IN OPPOSITION TO JURISDICTION**

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John J. Scaccia, Esq. (#0046860)  
Scaccia & Associates, LLC  
1814 East Third Street  
Dayton, Ohio 45403  
Tel. 937.258.0410  
Fax. 937.258.0416  
COUNSEL FOR APPELLEE ANITA HAUSER

Thomas M. Green, Esq. (#0016361)  
Green & Green, Lawyers  
800 Performance Place  
109 North Main Street  
Dayton, Ohio 45402-1290  
Tel. 937.224.3333  
Fax 937.224.4311

COUNSEL FOR APPELLANT E. MITCHELL DAVIS



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## EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OF GREAT GENERAL INTEREST

This case is not of public or great general interest and certainly does not involve a constitutional question. This case is only of interest to the Appellant and those like him who seek to avoid personal responsibility for their purposeful and personal acts of employment discrimination rather than change their ways or refuse to participate in joint and separable acts of employment discrimination.

The issue is one of statutory interpretation. The definitions of "employer" and "person" are creatures of statute, interpretation and the intent of the legislature. It has been 14 years since the *Genaro* decision and during that time the legislature has not taken any steps to alter the interpretation of this Court though numerous cases have found municipal supervisors and managers liable for their discrimination against employees.

In fact, the history of Chapter 4112 shows that there were amendments on several occasions<sup>1</sup> after this Court's decision in *Genaro v. Central Transport, Inc. et al.*, 84 Ohio St.3d 293 (1999) and its progeny, but the definition of the term "employer" and the definition of the term "person" have remained unchanged. Not so much as a comma has been added or taken away from the language of R.C. § 4112.01 (A)(1) or R.C. § 4112.01 (A)(2) to alter the obvious meaning as held by the Court in *Genaro*.

The statutory language is clear and unambiguous: the public policy of the state of Ohio as reflected in the statute is to hold individuals who act as supervisors and

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<sup>1</sup> See e.g. amendments by the 128 Gen. Assembly File No., HB1, §101.01 effective 10/16/2009; see also 2007 HB372 3/24/2008; 2008 SB 289 8/22/08.

managers responsible for their discriminatory acts even to the point of contributing to any financial award by a jury. This, of course, helps offset and defray some of the cost of discrimination and place it squarely on the shoulders of those who fostered the practice. To allow otherwise would foster government and corporate inefficiency and permitting individuals to hide discrimination behind the corporate shield, whether public or private. It provides incentive for the supervisor or manager to say "no" to those above or co-supervisors and managers who wish a future defendant to join and participate in unlawful discrimination. Thus the Code attacks the source of the discriminatory conduct and provides incentive for individual supervisors and managers simply not participate or, better yet, make known the problem higher up in the government so that the government can take quick and rapid steps to stop a problem before it becomes a liability.

The legislature in Ohio has determined, in its wisdom, that a municipal supervisor will be held accountable for misuse of power that is the core of the discriminatory actions if proven in a court of law. If the municipality wishes to recoup its losses it can do so because the supervisor is jointly and severally liable. This should provide additional incentive for the supervisor not to be discriminatory because he will be held accountable not behind closed doors but in the public eye.

In *Satterfield v. Karnes*, 736 F.Supp.2d 1138 (S.D. Ohio 2010), the United States District examined the *Campolieti* case, the Federal Court in light of a thorough analysis of Ohio law, including cases in three other Ohio Appellate Districts, the *Campolieti* is not a well reasoned analysis of Ohio law and is an anomaly. Id at 1152-53. This analysis is worthy or reciting and states on pertinent part:

R.C. § 4112.01 (A)(1) and R.C. § 4112.01 (A)(2) is sufficient to withstand the "expressly imposed" requirement of R.C. § 2744.03 (A)(6)(c)<sup>3</sup> and cites *Campolieti v. Cleveland*, 184 Ohio App.3d 419, 430 (8<sup>th</sup> Dist. 2009). Appellant's reliance is misplaced. The *Campolieti* case is an anomaly. For reasons unknown, the *Campolieti* case looked at age discrimination pursuant to R.C. § 4112.14 not the types of discrimination forbidden in R.C. § 4112.02 (A).<sup>4</sup> There are functional and practical differences between the two statutes however, the court in the *Campolieti* case did not consult or even refer to the definitional sections RC. § 4112.01 (A)(1) or R.C. § 4112.01 (A)(2) to see how the term employer was defined<sup>5</sup> an attempt to reconcile with R.C. § 4112.14 or R.C. § 2744.03 (A)(6)(c). No

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<sup>3</sup> In addition to any immunity or defense referred to in division (A)(7) of this section ... the employee is immune from liability unless one of the following applies:

....  
(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

<sup>4</sup> See fn. 5, supra, and accompanying text.

<sup>5</sup> Specifically the *Campolieti* stated "The immunity granted to individual employees of a political subdivision by R.C. 2744.03(A)(6) applies because none of the exceptions put forth in that section match this situation. The actions of Chief Stubbs were not " manifestly outside the scope of [his] employment or official responsibilities," they were not " with malicious purpose, in bad faith, or in a wanton or reckless manner," and civil liability is not " expressly imposed upon the employee by a section of the Revised Code." R.C. 2744.03(A)(6)(a) through (c). The statutory basis of appellant's action, R.C. 4112.14, speaks in terms of " employers." Accordingly, the trial court properly granted summary judgment to Chief

argument was raised regarding the language of R.C. § 4112.01 (A)(1) or R.C. § 4112.01 (A)(2) and its impact on R.C. § 4112.14 or R.C. § 2744.03 (A)(6)(c) nor was *Genaro v. Central Transport*, supra, raised.

Further, the term "expressly imposed" is not a term of art and does not impose a particularly heavy burden on the legislature. This Court has previously held in *Campbell v. Burton*, 92 Ohio St.3d 336, (Ohio 2001):

It is evident from a plain reading of R.C. 2744.02(B)(5) that the legislature is using the term "liability" as set forth in other chapters of the Revised Code, and not within the context of R.C. 2744.02(A)(1). In addition, it is instructive to compare and contrast the actual language of each section of the code. Specifically, R.C. 2744.02(A)(1) provides for immunity from civil liability. In contrast, R.C. 2744.02(B)(5) is not as narrowly drawn. All it requires is express imposition of "liability" by another section of the Revised Code. When that exists the exception to immunity is satisfied.

Id. at 342 (emphasis added). R.C. § 4112.01 (A)(1) and R.C. § 4112.01 (A)(2) satisfied that criterion. "'Person" includes one or more individuals, ... employee, ... and the state and all political subdivisions, authorities, agencies, boards, and commissions of the state." R.C. § 4112.01 (A)(1). "Employer" includes the state, any political subdivision of the state, any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer." R.C. § 4112.01 (A)(2) (emphasis added). With these definitions in control the Revised Code goes on to provide: "It shall be an unlawful discriminatory practice: For any employer, because of the ... sex ... of any person ... to Stubbs." Id. at 430.

discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.” R.C. §4112.02 (A)<sup>6</sup> (emphasis added).

Principles of statutory construction suggest that the legislature is presumed to know the effect of this Court’s decisions on the statutes it enacts. Therefore when the legislature amends the statute and takes no action the silence speaks approval. In the 14 years since *Genaro* was decided neither legislature nor any other court has embraced the argument raised by Appellant. During the intervening years there have been several amendments to the portions of chapter 4112 that defines the scope of liability and not a single instance has a legislature sought to change any portion of the definition of employee. Not a single one of those amendments impacted or suggested any desire to abrogate the impact of the *Genaro* decision on municipal employees who engage in discrimination. During the intervening years there has not been a public outcry the government and officials who engage in discriminatory conduct should be allowed to hide behind the municipality or political subdivision so as to escape liability and cover responsibility for the discriminatory conduct.

Yet the Appellant suggests to this court the something new is at hand. The Appellant is in error.

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<sup>6</sup> In its complete version states:

For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

## CONCLUSION

For the reasons set forth above it is respectfully submitted that the Appellant's request for jurisdiction be overruled.

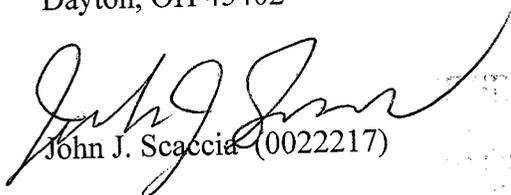
  
Respectfully Submitted,

John J. Scaccia (0022217)  
*Scaccia & Associates, LLC*  
1814 East Third Street  
Dayton, OH 45403  
(937) 258-0410  
(937) 258-0416

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by regular first class U.S. mail on the date of filing.

Thomas M. Green  
PERFORMANCE PLACE  
109 North Main Street  
Suite 800  
Dayton, OH 45402

  
John J. Scaccia (0022217)