

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-0493

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

NOTICE OF CERTIFIED CONFLICT

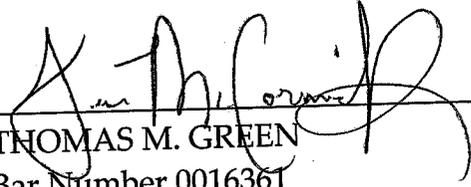
Pursuant to Sup. Ct. R. 4.1, Appellant Major E. Mitchell Davis hereby gives notice that on March 19, 2013 the Montgomery County Court of Appeals, Second Appellate District, issued its Decision and Entry certifying a conflict in the captioned matter. A true and accurate copy of the Court of Appeals' Decision and Entry certifying a conflict is attached as Exhibit A. A copy of the Court of Appeals' opinion in Case No. CA 24965 is attached as Exhibit B. A copy of the Eighth Appellate District's conflicting opinion in *Campolieti v. Cleveland*, 184 Ohio App.3d 419, 2009-Ohio-5224, 921 N.E. 2d 286 (8th Dist.), is attached as Exhibit C.

RECEIVED  
 MAR 26 2013  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

G R E E N  
 G R E E N  
 L A W Y E R S

FILED  
 MAR 26 2013  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

Respectfully submitted,

 (#0088281)  
FOR

THOMAS M. GREEN  
Bar Number 0016361  
Green & Green, Lawyers  
800 Performance Place  
109 North Main Street  
Dayton, Ohio 45402-1290  
Tel. 937.224.3333  
Email: [tmgreen@green-law.com](mailto:tmgreen@green-law.com)  
Fax 937.224.4311  
Counsel for Appellant E. Mitchell Davis

**CERTIFICATE OF SERVICE**

I hereby certify that true copy of the foregoing has been served on Plaintiff/Appellee by forwarding copy of same to her attorney of record, John J. Scaccia, Esquire, SCACCIA & ASSOCIATES, LLC, 1814 East Third Street, Dayton, Ohio 45403 by ordinary U.S. Mail on this 25<sup>th</sup> day of March, 2013.

 (#0088281)  
FOR  
THOMAS M. GREEN

Case: CA 824965  
08/17/13  
DR: CRONE

FILED  
COURT OF APPEALS

2013 MAR 19 AM 10:42

GREGORY A. BRUSH  
CLERK OF COURTS  
MONTGOMERY CO. OHIO  
36

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

ANITA HAUSER	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24965
v.	:	T.C. NO. 09CV5371
CITY OF DAYTON	:	
POLICE DEPARTMENT	:	
Defendant-Appellee	:	
and	:	
MAJOR E. MITCHELL DAVIS	:	
Defendant-Appellant	:	

**DECISION AND ENTRY**

Rendered on the 19th day of March, 2013.

JOHN J. SCACCIA, Atty. Reg. No. 0022217, 1814 East Third Street, Dayton, Ohio 45403  
Attorney for Plaintiff-Appellee

THOMAS M. GREEN, Atty. Reg. No. 0016361, 800 Performance Place, 109 N. Main  
Street, Dayton, Ohio 45402  
Attorney for Defendant-Appellant

EXHIBIT  
A

## PER CURIAM:

Defendant-appellant Major E. Mitchell Davis has filed a timely motion to certify a conflict pursuant to App.R. 25(A). Appellant asserts that our judgment in this case is in conflict with the judgment of the Eighth District Court of Appeals in *Campolieti v. Cleveland*, 184 Ohio App.3d 419, 2009-Ohio-5224, 921 N.E.2d 286 (8th Dist.).

In affirming the trial court's decision and concluding that appellant was not entitled to statutory immunity on plaintiff-appellee Anita Hauser's sex discrimination claim, this court expressly refused to adopt the position of the Eighth District as set forth in *Campolieti. Hauser v. Dayton Police Dept.*, 2013-Ohio-11, – N.E.2d –, ¶ 20, ¶ 25 (2d Dist.). The Eighth District held that a fire chief cannot be held individually liable for an employee's discrimination claim because the discrimination statute speaks in terms of "employers" and thus liability is not expressly imposed upon the fire chief in order to invoke an exception to the immunity statute. *Campolieti* at ¶ 33.

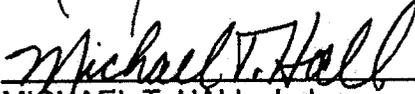
Contrary to appellant's urging, we did not find *Campolieti* persuasive. Instead, we relied on cases out of the Seventh and Third Districts on this issue. *Hauser* at ¶ 21-22, citing *State ex rel. Conroy v. Williams*, 185 Ohio App.3d 69, 2009-Ohio-6040, 923 N.E.2d 191, ¶ 30 (7th Dist.), and *Hall v. Memorial Hosp. of Union City*, 3d Dist. Union No. 14-06-03, 2006-Ohio-4552, ¶ 14-15. See also *Hauser* at ¶ 23-24, citing *Albert v. Trumbull Cty. Bd. of MRDD*, 11th Dist. Trumbull No. 98-T-0095, 1999 WL 957066 (Sep. 30, 1999), and *Satterfield v. Kames*, 736 F.Supp.2d 1138, 1154 (S.D. Ohio 2010).

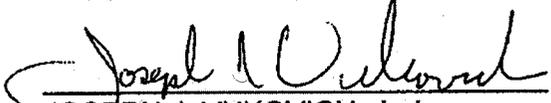
We thus agree that there exists a conflict between this district's recent decision in *Hauser* and the Eighth District's *Campolieti* case. Accordingly, the following question is certified to the Ohio Supreme Court:

"Whether civil liability is expressly imposed upon managers or supervisors under R.C. 4112.01(A)(2) for their individual violations of R.C. 4112.02(A) so that political subdivision employee immunity is lifted by R.C. 2744.03(A)(6)(c)."

IT IS SO ORDERED.

  
MARY E. DONOVAN, Judge

  
MICHAEL T. HALL, Judge

  
JOSEPH J. VUKOVICH, Judge  
(Sitting by assignment of the Chief  
Justice of the Supreme Court of Ohio)

Copies mailed to:

John J. Scaccia  
Thomas M. Green  
Hon. Mary L. Wiseman

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

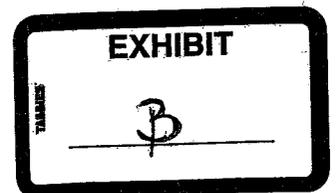
ANITA HAUSER :  
Plaintiff-Appellee : C.A. CASE NO. 24965  
v. : T.C. NO. 09CV5371  
CITY OF DAYTON : (Civil appeal from  
POLICE DEPARTMENT : Common Pleas Court)  
Defendant-Appellee :  
and  
MAJOR E. MITCHELL DAVIS :  
Defendant-Appellant :  
:

.....  
**OPINION**

Rendered on the 4th day of January, 2013.  
.....

JOHN J. SCACCIA, Atty. Reg. No. 0022217, 1814 East Third Street, Dayton, Ohio 45403  
Attorney for Plaintiff-Appellee

THOMAS M. GREEN, Atty. Reg. No. 0016361, 800 Performance Place, 109 N. Main  
Street, Dayton, Ohio 45402  
Attorney for Defendant-Appellant



VUKOVICH, J. (by assignment)

{¶ 1} Defendant-appellant Major E. Mitchell Davis appeals the decision of the Montgomery County Common Pleas Court which found that he was not entitled to statutory immunity on plaintiff-appellee Anita Hauser's sex discrimination claim. The main issue on appeal is whether liability is expressly imposed by the unlawful discrimination statutes in Chapter 4112 so that the exception to political subdivision employee immunity under R.C. 2744.03(A)(6)(c) applies.

{¶ 2} Appellant argues that the unlawful discrimination statutes do not expressly impose liability upon managerial employees of a political subdivision. He alternatively contends that even if liability is expressly imposed upon managers and supervisors, he was not appellee's manager or supervisor because, although he was the head of her department, others directly supervised her.

{¶ 3} For the following reasons, we conclude that the trial court correctly determined that Major Davis's immunity was lifted by R.C. 2744.03(A)(6)(c) because civil liability is expressly imposed upon managers or supervisors under R.C. 4112.01(A)(2) for their individual violations of R.C. 4112.02(A). As for his alternative argument, merely because a plaintiff has a more direct supervisor does not mean that individuals further up the chain of command are not considered managers or supervisors. The trial court's judgment is hereby affirmed.

#### STATEMENT OF THE CASE

{¶ 4} In 2009, appellee Anita Hauser filed a complaint against the City of Dayton Police Department and appellant, a major who was the head of Ms. Hauser's detective division in the police department. One of the claims she raised was sex discrimination in

violation of Chapter 4112, which defines various unlawful discriminatory practices. The defendants filed a motion for summary judgment on multiple grounds, raising immunity only for Major Davis.

{¶ 5} Major Davis urged that he had statutory immunity as an employee of a political subdivision. He relied upon the Eighth District's *Campolieti* case, which held that a fire chief cannot be held individually liable for an employee's discrimination claim because the discrimination statute speaks in terms of "employers" and thus liability was not expressly imposed upon the fire chief in order to invoke the R.C. 2744.03(A)(6)(c) exception to the immunity statute. See *Campolieti v. Cleveland*, 184 Ohio App.3d 419, 2009-Ohio-5224, 921 N.E.2d 286, ¶ 33 (8th Dist.).

{¶ 6} Ms. Hauser responded that the exception to political subdivision employee immunity in R.C. 2744.03(A)(6)(c) applies here because liability is expressly imposed under Chapter 4112, the employment discrimination statutes. Ms. Hauser pointed out that the Supreme Court has held that a supervisor or manager is individually liable for their own acts of employment discrimination under the definitions within Chapter 4112. See *Genaro v. Central Transport, Inc.*, 84 Ohio St.3d 293, 296-297, 300, 703 N.E.2d 782 (1999). She concluded that the *Campolieti* holding was incorrect because it failed to cite the Supreme Court's *Genaro* case and failed to recognize that the statutory definition of an employer contained in Chapter 4112 includes any person acting directly or indirectly in the interest of the employer. Ms. Hauser cited cases from other courts which held that R.C. 2744.03(A)(6)(c) withdrew immunity from employees of a political subdivision facing claims for Chapter 4112 violations.

{¶ 7} Ms. Hauser alternatively argued that conduct arising from employment with

a political subdivision is excluded from immunity by R.C. 2744.09. In his reply, Major Davis alternatively claimed that, even if the *Campolieti* case was incorrect, he was immune because he was not Ms. Hauser's manager or supervisor.

{¶ 8} On December 7, 2011, the trial court granted summary judgment in part and denied summary judgment in part. In pertinent part, the court found that Ms. Hauser's sex discrimination claims remained for trial. In doing so, the trial court denied the immunity defense set forth by Major Davis and found that there existed a genuine issue of material fact as to whether he was her manager or supervisor.

{¶ 9} On December 27, 2011, Ms. Hauser and the defendants entered a stipulated entry of voluntary dismissal without prejudice under Civ.R. 41(A)(1)(b). That same day, Major Davis filed a timely notice of appeal from the court's denial of immunity, which remained a final order. See R.C. 2744.02(C) ("An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.")<sup>1</sup>

#### ASSIGNMENT OF ERROR

---

<sup>1</sup>A voluntary dismissal of all defendants renders an interlocutory summary judgment decision a nullity with no res judicata effect. *Fairchilds v. Miami Valley Hosp., Inc.*, 160 Ohio App.3d 363, 2005-Ohio-1712, 827 N.E.2d 381, ¶¶ 37-39 (2d Dist.) (where summary judgment for some defendants had no Civ.R. 54(B) language, it remained interlocutory and thus was dissolved by voluntary dismissal). However, if that decision was a final order, such as one containing Civ.R. 54(B) language, then the order was not an interlocutory one subject to nullification by a voluntary dismissal. See *id.* at ¶ 39, distinguishing *Denlinger v. Columbus*, 10th Dist. Franklin No. 00AP-315, 2000 WL 1803923 (Dec. 7, 2000) (voluntary dismissal has no effect on claims already subject to final adjudication). Here, as the order denying Major Davis immunity was final when made, it is not nullified by the voluntary dismissal and it will have res judicata effect in the refiled action; thus, it is subject to appeal at this time. See *id.*

{¶ 10} Appellant's sole assignment of error provides:

The trial court erred in denying Major Davis the benefit of immunity under R.C. 2744.03(A)(6).

{¶ 11} We begin by disposing of a brief alternative argument set forth in Ms. Hauser's response brief.<sup>2</sup> Ms. Hauser seems to suggest that Major Davis lacks immunity due to R.C. 2744.09(B). This statute provides that the immunity provisions in Chapter 2744 do not apply to civil actions by an employee (or the collective bargaining representative of an employee) against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision. R.C. 2744.09(B). *See also* R.C. 2744.09(C) (Chapter 2744 does not apply to civil actions by an employee of a political subdivision against the political subdivision relative to conditions or terms of employment).

{¶ 12} This argument is unfounded. Even the case she mentions under this argument holds that R.C. 2744.09(B) does not apply to the portion of the suit naming employees as defendants. *See Sampson v. Cuyahoga Metro. Hous. Auth.*, 8th Dist. Cuyahoga No. 93441, 2010-Ohio-1214, ¶ 34 (R.C. 2744.09(B) does not apply to bar the individual defendants from asserting immunity as its express language applies only to political subdivisions). *See also Sampson v. Cuyahoga Metro. Hous. Auth.*, 188 Ohio App.3d 250, 2010-Ohio-3415, 935 N.E.2d 98, ¶ 40 (8th Dist.) (a majority of judges reiterated this point on rehearing en banc).

---

<sup>2</sup>Contrary to the contention in Major Davis's reply brief, Ms. Hauser did raise this argument in her response to summary judgment as well.

{¶ 13} Notably, division (A) of R.C. 2744.09 includes employees in the removal of immunity. See R.C. 2744.09(A) (providing that Chapter 2744 does not apply to civil actions that seek to recover damages from a political subdivision *or any of its employees* for contractual liability). However, the plain language of R.C. 2744.09(B) deals only with an action filed by the employee against the political subdivision. It does not remove immunity in an action filed by the employee against someone other than the political subdivision, such as Major Davis. See R.C. 2744.01(B), (F) (political subdivision and employee are not interchangeable in this chapter). Hence, Ms. Hauser's alternative argument is without merit. We now turn to the main issue on appeal.

{¶ 14} In a civil action against an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the employee is immune from liability unless one of the following applies: (a) the employee's acts or omissions were manifestly outside the scope of employment or official responsibilities; (b) the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or (c) civil liability is expressly imposed upon the employee by a section of the Revised Code. R.C. 2744.03(A)(6)(a)-(c).

{¶ 15} From these three sections, it is only subdivision (c) that Ms. Hauser claims is applicable as an exception to Major Davis's statutory immunity. After setting forth an exception to immunity when civil liability is expressly imposed by statute, subdivision (c) explains:

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.

R.C. 2744.02(A)(6)(c).

{¶ 16} Ms. Davis argues that civil liability is expressly imposed by Chapter 4112, the collection of statutes dealing with unlawful employment discrimination. Specifically, it shall be an unlawful discriminatory practice *for any employer*, because of the sex of any person, 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. R.C. 4112.02(A). As used in Chapter 4112, an "employer" is defined as including the state, *a political subdivision*, 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). See also R.C. 4112.01(A)(1) (definition of "person" includes political subdivisions, agents, or employee).

{¶ 17} "Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief." R.C. 4112.99. This clearly and unambiguously creates an independent civil action to remedy all forms of discrimination prohibited by Chapter 4112. *Elek v. Huntington Natl. Bank*, 60 Ohio St.3d 135, 136-137, 573 N.E.2d 1056 (1991). See also *Campbell v. Burton*, 92 Ohio St.3d 336, 341, 750 N.E.2d 539 (2001) (list of those who must report abuse, which includes employees of a political subdivision, combined with statement in R.C. 2151.99 that "Whoever violates" the failure to report statute is guilty of a crime, is sufficient to break employee immunity as it

expressly imposes liability).

{¶ 18} In *Genaro*, a federal district court asked the Ohio Supreme Court to answer the certified question of whether a supervisor/manager may be held jointly and/or severally liable with his employer for his conduct in violation of Chapter 4112. *Genaro*, 84 Ohio St.3d at 295, 703 N.E.2d 782. The Supreme Court noted that it would not follow federal cases interpreting the federal discrimination statutes because the definition of “employer” in federal discrimination statutes was not as broad as the definition in the Ohio discrimination statutes. *Id.* at 298-299. That is, the federal definition includes “a person engaged in an industry affecting commerce who has fifteen or more employees \* \* \* and any agent of such a person,” *id.* at 299, whereas Ohio’s language broadly stated, “any person acting directly or indirectly in the interest of an employer,” *id.* at 298-299. The Supreme Court concluded by answering the certified question affirmatively, holding that individual managers and supervisors are liable for their own discriminatory conduct in the workplace. *Id.* at 300.

{¶ 19} Major Davis notes that immunity was not at issue in *Genaro* as the discussion involved the liability of managers and supervisors of a private company under the discrimination statute and thus the court did not specifically answer the question of whether civil liability is “expressly imposed” upon a political subdivision employee by Chapter 4112 as required by R.C. 2744.03(A)(6)(c). However, the Court did say that the language defining an employer in R.C. 4112.01(A)(2) was clear and unambiguous. *Id.* at 300. And, aforementioned, an employer who is liable for discrimination includes a political subdivision *and* any person acting directly or indirectly in the interest of an employer. R.C. 4112.01(A)(2).

{¶ 20} Major Davis relies on the Eighth District's *Campolieti* case, which held that a fire chief cannot be held individually liable for an employee's discrimination claim because the discrimination statute speaks in terms of "employers" and thus liability is not expressly imposed upon the fire chief in order to invoke an exception to the immunity statute. See *Campolieti*, 184 Ohio App.3d 419, 2009-Ohio-5224, 921 N.E.2d 286, at ¶ 33. However, *Campolieti* failed to cite or analyze the effect of the Supreme Court's 1999 holding in *Genaro* that managers and supervisors are liable individually for their acts of workplace discrimination. *Campolieti* also failed to recognize that the statutory definition of an employer contained in Chapter 4112 included any person acting directly or indirectly in the interest of the employer or explain why that did not encompass the fire chief. See *id.* Rather, that court seemed to merely use the everyday definition of employer as the entity itself without realizing that there existed a special statutory definition of employer applicable to Chapter 4112.

{¶ 21} To the contrary, the Seventh District has held that a person in a supervisory position at a political subdivision was not immune from liability in a discrimination action, finding that liability was expressly imposed under Chapter 4112 by focusing on the definition of employer in R.C. 4112.01(A)(2) and the Supreme Court's cited *Genaro* holding. *State ex rel. Conroy v. William*, 185 Ohio App.3d 69, 2009-Ohio-6040, 923 N.E.2d 191, ¶ 30 (7th Dist.). The *Conroy* court thus concluded that the mayor's statutory immunity was lifted under R.C. 2744.03(A)(6)(c) as civil liability was expressly imposed for discrimination in hiring under R.C. 4122.02(A)(2), the same section utilized herein. *Id.*

{¶ 22} Similarly, the Third District has held that three defendants who occupied managerial or supervisory positions in a hospital, which was a political subdivision, were

not entitled to statutory immunity as liability was expressly imposed for disability discrimination under Chapter 4112. *Hall v. Memorial Hosp. of Union City*, 3d Dist. Union No. 14-06-03, 2006-Ohio-4552, ¶ 15. That court relied on *Genaro* and the statutory definition of employer in R.C. 4112.01(A)(2) and concluded that supervisors and managers at a political subdivision can be held liable for violating Chapter 4112. *Id.* at ¶ 14-15.

{¶ 23} The Eleventh District has utilized similar reasoning in holding that an employee of a political subdivision can be liable if she engages in an unlawful discriminatory practice while performing the function of an employment agency. *Albert v. Trumbull Cty. Bd. of MRDD*, 11th Dist. Trumbull No. 98-T-0095, 1999 WL 957066 (Sep. 30, 1999) (but then finding that the functions of the entity did not fit the definition of an employment agency).

{¶ 24} Ms. Hauser cites a case from this court, apparently to show the factual background as no issue was raised concerning immunity or liability of supervisors of a political subdivision under Chapter 4112 and thus the court did not issue a ruling on said topics. *See Mitchell v. Lemmie*, 2d Dist. Montgomery No. 21511, 2007-Ohio-5757, ¶ 52, 102 (race and gender discrimination claim under R.C. 4112.02 filed by employee of political subdivision against city and city manager who refused to promote plaintiff). Ms. Hauser also points out that the Southern District of Ohio reviewed these decisions and concluded that cases such as the Seventh District's *Conroy* case "are the best evidence of how the Ohio Supreme Court would rule regarding the immunity of employees of political subdivisions under § 2744.03(A)(6)(c) for claims brought under § 4112.02." *Satterfield v. Karnes*, 736 F.Supp.2d 1138, 1154 (S.D. Ohio 2010) (concluding that sheriff was not entitled to immunity in his individual capacity on employee's R.C. 4112.02(A) claim).

{¶ 25} We agree that civil liability is expressly imposed upon managers and supervisors of a political subdivision under Chapter 4112. This conclusion is supported by the above case law and the following litany of law. It is unlawful discrimination for an employer to discriminate against an employee due to their sex, and whoever commits unlawful discrimination is clearly subject to a civil suit for damages. R.C. 4112.02(A); R.C. 4112.99; *Elek*, 60 Ohio St.3d at 136-137, 573 N.E.2d 1056. Chapter 4112 specifically includes a political subdivision in the statutory definition of an employer. R.C. 4112.01(A)(2). Certain employees of such an employer are also included in the statutory definition of an employer, and the Supreme Court has stated that this statutory definition clearly allows managers and supervisors of an employer to be held individually liable. R.C. 4112.01(A)(2); *Genaro*, 84 Ohio St.3d at 295, 703 N.E.2d 782. Accordingly, a manager or supervisor of a political subdivision is expressly subject to civil liability for his individual act of discrimination against an employee and thus is not immune from suit for such acts.

{¶ 26} Major Davis suggests that even if we adopt this position, he is not liable as he should not be considered a manager or supervisor of Ms. Hauser because he was merely the head of her department and another person working under him was her direct supervisor. However, merely because a person has a more direct supervisor does not mean that another individual further up the chain of command cannot also be considered a manager or supervisor of a certain employee. See *Hall*, 3d Dist. Union No. 14-06-03, 2006-Ohio-4552 (suing hospital's chief operating officer and the vice president of nursing along with the political subdivision hospital). That is, each manager/supervisor is liable for his own individual acts of discrimination. See *Genaro* at 293 (allowing plaintiff to sue corporate employer and various supervisory employees). It is not as if Major Davis is Ms.

Hauser's non-supervisory co-employee. *Compare Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003-Ohio-5340, 798 N.E.2d 1141, ¶ 31 (10th Dist.); *Hoon v. Superior Tool Co.*, 8th Dist. Cuyahoga No. 79821, 2002 WL 93422 (Jan. 24, 2002).

{¶ 27} Rather, he is the top individual in Ms. Hauser's department and her third level of report. (Hauser Depo. at 4). Her position is under his command. (Davis Depo. I at 8). He signed her request to attend a dog training program and handed in the request on her behalf. (Davis Depo. I at 40-41). Major Davis is the individual who denied her request to participate in a certain training program, which decision she claims was a result of discrimination. (Davis Depo. II at 24). Ms. Hauser received an order from Major Davis demanding she pay back money received for her travel expenses incurred in three months of out-of-town training because she did not maintain receipts (even though no other officer had ever been asked to keep receipts). (Hauser Depo. at 53-54; Davis Depo. I at 65, 104). She met with him multiple times to discuss the issue, and he sent word through her direct supervisor for her to produce receipts. (Davis Depo. I at 46, 56-58). His signature is on documents involved in initiating disciplinary charges against her alleging that she violated his order; although he states his name was placed on some documents even though he did not initiate them, such is not an immunity issue. (Davis Depo I at 93, 104-111; Davis Depo. II at 40-41, 47). He also ordered her to produce a report of all of her activity in 2009. (Hauser Depo. at 155). There is sufficient evidence that he could be considered a supervisor of Ms. Hauser, and thus, he could be held liable *if* he is factually found to have committed acts of discrimination.

{¶ 28} For the foregoing reasons, we conclude that the trial court correctly determined that Major Davis's immunity was lifted by R.C. 2744.03(A)(6)(c) because civil

liability is expressly imposed upon managers or supervisors, such as Major Davis, under R.C. 4112.01(A)(2) for their individual violations of R.C. 4112.02(A). In accordance, the trial court's judgment is hereby affirmed.

.....

DONOVAN, J., concurs.

HALL, J., dissenting:

{¶ 29} Because I believe there is no statute that "expressly imposes" individual liability on a manager or supervisor of a political subdivision for a claim of discrimination, the individual employee is statutorily immune from suit and the claimant's action may be pursued only against the employer.

{¶ 30} This state has long had a codified policy that individual employees of a political subdivision are immune from suit except in a few specific instances. Statutory immunity was instituted in response to the Ohio Supreme Court's abrogation of judicially created municipal sovereign immunity in *Haverlack v. Portage Homes, Inc.*, 2 Ohio St.3d 26, 442 N.E.2d 749 (1982), holding in paragraph two of the syllabus: "The defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation \* \* \*." The legislature soon enacted the immunity statute in 1985, generally defining when political subdivisions are immune from suit. From the beginning, public employees, as individuals, were granted greater immunity protection. Although a political subdivision, as an entity, could be liable where immunity did not extend, the individual employee was shielded by the terms of R.C. 2744.03(A)(6). The individual could be individually liable only if (1) he acted outside the scope of employment, (2) he acted maliciously, in bad faith or recklessly, or (3) liability was "expressly imposed" by the

Revised Code. The last phrase is the crux of this matter.

{¶ 31} The long-standing policy of shielding individual public employees from liability, as opposed to liability of the political subdivision which remains liable for acts of its employees, should not be diminished by a statute that does not “expressly impose” civil liability on the individual. R.C. 4112.02(A) does not expressly impose liability on the individual. That statute states: “It shall be an unlawful discriminatory practice: (A) For any *employer* \* \* \*” to discriminate against a protected class in employment. It is only through the 4-3 Ohio Supreme Court’s decision in *Genaro v. Cent. Transp., Inc.*, 84 Ohio St.3d 293, 298, 703 N.E.2d 782 (1999) that the term “employer” in R.C. 4112.01(A)(2) was interpreted to include supervisors or managers. That subdivision of the statute states: “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.” If it took a divided Supreme Court to interpret “any person acting directly or indirectly in the interest of an employer” to include managers and supervisors as persons subject to liability for discrimination in the private sector, I fail to see how that interpretation means the statute “expressly imposed” liability on individual employees of a municipal corporation, especially when the “political subdivision,” as an entity, is specifically subject to liability.

{¶ 32} If the legislature intended that one statute, R.C. 4112.02, “expressly imposed” liability that would circumvent another statute, R.C. 2744.03(A)(6), it could have said so expressly. It did not. It is not our province to amend the General Assembly’s legislation. I dissent.

.....

(Hon. Joseph J. Vukovich, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

John J. Scaccia  
Thomas M. Green  
Hon. Mary L. Wiseman

184 Ohio App.3d 419  
Court of Appeals of Ohio,  
Eighth District, Cuyahoga County.

Affirmed in part, reversed in part, and remanded.

CAMPOLIETI, Appellant and Cross-Appellee,

West Headnotes (21)

v.

CITY OF CLEVELAND et al.,  
Appellees and Cross-Appellants.

No. 92238. | Decided Oct. 1, 2009.

**Synopsis**

**Background:** Firefighter filed action against city aid fire chief, alleging age discrimination and promissory estoppel in connection with denial of his application for transfer to fire investigation unit (FIU). The Court of Common Pleas, Cuyahoga County, No. CV-621615, granted summary judgment to defendants. Firefighter appealed.

**Holdings:** The Court of Appeals, Frank D. Celebrezze Jr., J., held that:

[1] issue of material fact existed as to whether firefighter was subjected to adverse employment action;

[2] firefighter was not required to exhaust all administrative remedies contained in collective bargaining agreement before bringing age discrimination action;

[3] issue of material fact existed as to whether firefighter would have been barred under statutory age limit from attending police academy, as necessary qualification for FIU position;

[4] issue of material fact issued as to whether city's explanation for denial of firefighter's application for transfer was a legitimate nondiscriminatory reason;

[5] fire chief was immune from individual liability on age discrimination claim;

[6] city had sovereign immunity on promissory estoppel claim; and

[7] city's discovery request for production of firefighter's medical records for past ten years was overbroad.

[1] **Courts**

↪ Construction of federal Constitution, statutes, and treaties

Because Ohio's statutory employment discrimination scheme is similar to federal discrimination law, federal case law interpreting Title VII of Civil Rights Act of 1964 is generally applicable to cases involving alleged violations of Ohio's discrimination statutes. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; R.C. § 4112.01 et seq.

[2] **Judgment**

↪ Public officers and employees, cases involving

Genuine issue of material fact existed as to whether firefighter was subjected to an adverse employment action when his application for transfer to fire investigation unit was denied, precluding summary judgment for city on age discrimination claim. R.C. § 4112.02(A).

[3] **Civil Rights**

↪ Adverse actions in general

In order to establish a prima facie case of age discrimination, a plaintiff must show that he was subjected to an adverse-employment action. R.C. § 4112.02(A).

[4] **Civil Rights**

↪ Adverse actions in general

A materially "adverse employment action," as necessary to establish prima facie case of discrimination, must be more disruptive than a mere inconvenience or an alteration of job responsibilities, and might be indicated by a termination of employment, a demotion

evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. R.C. § 4112.02(A).

academy, which was a necessary qualification for the position, precluding summary judgment in age discrimination action against city. R.C. §§ 124.41, 4112.02(A), 4112.14.

[5] **Labor and Employment**

☞ Particular disputes in general

City firefighter was not required to exhaust all administrative remedies contained in collective bargaining agreement (CBA) before bringing age discrimination action under state statute in connection with the denial of his application for transfer to fire investigation unit, where CBA did not refer to discrimination claims but only to grievances generally, and there was no provision to appeal a discrimination claim to the civil service commission or other administrative agency. R.C. §§ 4112.02(A), 4112.14.

[9] **Civil Rights**

☞ Employment practices

In order for a statement to be evidence of an unlawful employment decision, plaintiff must show a nexus between the improper motive and the decision-making process or personnel, and, accordingly, courts consider (1) whether the comments were made by a decision maker; (2) whether the comments were related to the decision-making process; (3) whether they were more than vague, isolated, or ambiguous; and (4) whether they were proximate in time to the act of alleged discrimination. R.C. § 4112.02(A).

[6] **Labor and Employment**

☞ Matters Subject to Arbitration Under Agreement

Any agreement in a collective bargaining agreement to arbitrate a statutory claim must be clear and unmistakable.

[10] **Judgment**

☞ Public officers and employees, cases involving

Genuine issue of material fact existed as to whether city's explanation for denial of 64-year-old firefighter's application for transfer to fire investigation unit, i.e., that firefighter would not meet requirement under collective-bargaining agreement (CBA) of having at least five years to use the specialized training needed for the FIU position, was a legitimate nondiscriminatory reason for adverse employment action, precluding summary judgment on age discrimination claim. R.C. § 4112.02(A).

[7] **Civil Rights**

☞ Waiver, effect of labor contracts

Strong policy of remedying employment discrimination in its many forms, evidenced by the state legislature's bestowing a private right of action, should not be abrogated by contract without clear evidence of intent by the parties. R.C. § 4112.01 et seq.

[11] **Civil Rights**

☞ Employment practices

If a plaintiff makes a prima facie case for age discrimination, then the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse employment action. R.C. § 4112.02(A).

[8] **Judgment**

☞ Public officers and employees, cases involving

Genuine issue of material fact existed as to whether firefighter who was 64 years old when city denied his application for transfer to fire investigation unit (FIU) would have been barred under statutory age limit from attending police

[12] **Civil Rights**

↔ Practices prohibited or required in general; elements

The inquiry into the employer's rationale for the adverse employment action at issue in employment discrimination action is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. R.C. § 4112.02(A).

1 Cases that cite this headnote

[13] **Civil Rights**

↔ Employment practices

City's fire chief was immune from individual liability on firefighter's age discrimination claim against city and chief arising from the denial of firefighter's application for transfer to fire investigation unit; chief's actions were not manifestly outside the scope of his employment or official responsibilities, those actions were not done with malicious purpose, in bad faith, or in a wanton or reckless manner, and civil liability was not expressly imposed upon chief by a section of Ohio Revised Code. R.C. §§ 2744.03(A)(6), 4112.14.

2 Cases that cite this headnote

[14] **Municipal Corporations**

↔ Nature and grounds of liability

**States**

↔ Liability and Consent of State to Be Sued in General

Governmental immunity generally prohibits suit against the state and its political subdivisions except in limited circumstances.

3 Cases that cite this headnote

[15] **Estoppel**

↔ Municipal corporations in general

**Municipal Corporations**

↔ Appointment and promotion of firemen

City had sovereign immunity on promissory estoppel claim asserted by firefighter in connection with the notice of an available position in fire investigation unit for which

firefighter unsuccessfully applied, as city was exercising a government function in making employment decisions. R.C. §§ 2744.01(C)(1), (C)(2)(a), 2744.09.

[16] **Estoppel**

↔ State government, officers, and agencies in general

**Estoppel**

↔ Municipal corporations in general

Principles of equitable estoppel generally may not be applied against the state or its agencies when the act or omission relied on involves the exercise of a governmental function.

[17] **Estoppel**

↔ State government, officers, and agencies in general

**Estoppel**

↔ Municipal corporations in general

"Governmental functions," for which equitable estoppel claims generally may not be applied against state or its agencies, are those which are duties imposed upon the state as obligations of sovereignty, such as protection from crime, fires, or contagion, or preserving the peace and health of citizens and protecting their property.

[18] **Estoppel**

↔ Particular state officers, agencies or proceedings

**Estoppel**

↔ Municipal corporations in general

Employment decisions made in the exercise of a government function fall within the protection of state and its agencies from claims of equitable estoppel.

[19] **States**

↔ Particular Actions

Resort to an equitable theory of recovery that is barred by sovereign immunity should not stand.

[20] **Privileged Communications and Confidentiality**

☛ Medical or hospital records or information

Under statute governing physician-patient privilege, city's discovery request for production of firefighter's medical records for the past ten years was overbroad in its scope in firefighter's age discrimination action arising from the denial of his application for transfer to fire investigation unit (FIU); records were irrelevant to determining whether firefighter could do a job in FIU that was less strenuous than the one he was currently engaged in, and records were not necessary to show that firefighter would suffer no damages in the form of increased overtime pay in FIU position. R.C. §§ 2317.02(B)(1)(a)(iii), (B)(3)(a), 4112.02(A), 4112.14.

2 Cases that cite this headnote

[21] **Appeal and Error**

☛ Cases Triable in Appellate Court

**Pretrial Procedure**

☛ Failure to Disclose; Sanctions

A motion to compel discovery is the province of the trial court, but the application of a privilege set forth in evidence provision is reviewed as a matter involving an issue of law, meaning that appellate court reviews the decision de novo. R.C. § 2317.02.

**Attorneys and Law Firms**

\*\*289 Caryn Groedel & Associates Co., L.P.A., Chastity L. Christy, Caryn M. Groedel, and Jennifer L. Speck, Cleveland, for appellant and cross-appellee.

Robert J. Triozzi, Cleveland Director of Law, L. Stewart Hastings and Theodora M. Monegan, Chief Assistant Directors of Law, and William M. Menzalora, Assistant Director of Law, for appellees and cross-appellants.

**Opinion**

FRANK D. CELEBREZZE Jr., Judge.

\*423 ¶ 1 Appellant, John Campolieti, a firefighter for the Cleveland Fire Department ("CFD"), appeals the lower court's grant of summary judgment in favor of appellees, the city of Cleveland and Chief of Fire Paul A. Stubbs, disposing of appellant's age-discrimination and promissory-estoppel claims. After a thorough review of the record and for the following reasons, we affirm in part and reverse in part.

¶ 2 Appellant, age 67, has been a firefighter with CFD for more than 40 years. He was currently serving as a lieutenant in Engine Company Four. On May 19, 2006, when appellant was 64 years old, CFD posted a notice of openings for several positions within CFD, including a lieutenant position in the Fire Investigation Unit ("FIU"). The notice stated that "where all such qualifications are relatively equal, employees shall be selected on the basis of seniority." FIU is staffed with firefighters who must become sworn police officers in order to investigate possible fire-related crimes. Appellant submitted a transfer request from Engine Company Four into FIU along with the other requisite paperwork to be considered for the position.

¶ 3 The selection process and other terms of employment were governed by the collective-bargaining agreement ("CBA") in force at the time. The criteria for the selection of applicants to fill this position, or any other position that requires specialized training, were based on any specialized skills possessed by the applicant specified in their resume. Where all qualifications were relatively equal, selection was based on seniority. As set forth in Article VI of the CBA, the applicant must also be able to use the specialized training received for the new position for at least five years. For appellant, this position would have been \*424 a lateral transfer under the CBA, and appellant would not have been entitled to any increase in benefits or pay. There may have been an opportunity for more overtime pay and increased prestige in the eyes of some firefighters.

¶ 4 Appellant had the highest seniority and was at least as equally qualified as the applicant selected. On June 9, 2006, Lieutenant Christopher Posante, then age 42, was granted transfer into FIU rather than appellant. When questioned by appellant as to why his transfer was not granted, Chief Stubbs cited as his reason that he did not feel appellant could satisfy the requirement in Article VI of the CBA of being able to use the specialized training for five years. This was based on a mandatory retirement requirement for police and firefighters who reached age 65, as specified in Cleveland City Codified Ordinance \*\*290 135.07. Officers and firefighters 65 and

older could request an extension of employment. Since Chief Stubbs took office in 2004, no firefighter seeking such an extension has been denied. However, in spring 2006, Councilman Zachary Reed, the chair of Cleveland City Council's Safety Committee, informed Chief Stubbs that no more employment extensions would be granted because "there were younger people out there who needed jobs." An employment extension could be granted only if the chief of fire, the city council, and the public safety director approved.

{¶ 5} On April 16, 2007, foregoing the grievance procedures set forth in the CBA and administrative remedies available by statute, appellant filed a complaint in the common pleas court, alleging that he was denied transfer based on age discrimination, a violation of R.C. 4112.14 and 4112.99; a claim of promissory estoppel relying on the language of the posted notice of available positions; and a wrongful-employment action in violation of public policy. The complaint was later amended to reflect only the first two claims.

{¶ 6} After several procedural motions and issues, the parties filed for summary judgment on July 22, 2008. Appellant's motion for summary judgment was denied on September 15, 2008, and appellees' motion for summary judgment was granted on September 19, 2008, with the trial court finding that the city and Chief Stubbs had demonstrated a legitimate, nondiscriminatory reason for their actions and that appellant had failed to show that appellees' reason was mere pretext.

{¶ 7} Appellant appeals this decision and requests that the case be remanded for trial on the following grounds:

{¶ 8} "1. The trial court erred in granting summary judgment in favor of defendants-appellees as to plaintiff-appellant's age discrimination claim."

{¶ 9} "2. The trial court erred in granting summary judgment in favor of defendants-appellees as to plaintiff-appellant's promissory estoppel claim."

#### \*425 Law and Analysis

##### Age Discrimination

{¶ 10} "Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains

to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 364 N.E.2d 267.

{¶ 11} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 604 N.E.2d 138.

{¶ 12} In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary-judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material \*\*291 element of the nonmoving party's claim." (Emphasis sic.) Id. at 296, 662 N.E.2d 264. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293, 662 N.E.2d 264. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing that a genuine issue for trial exists. Id.

{¶ 13} This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Cty. Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record \* \* \* in a light most favorable to the nonmoving party \* \* \*. [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741, 607 N.E.2d 1140.

[1] {¶ 14} Appellant's claim of age discrimination is rooted in R.C. 4112 et seq., which is the embodiment of Ohio's staunch resolve to remedy instances of discrimination based

on “race, color, religion, sex, national origin, handicap, age, or ancestry of any person.” R.C. 4112.02(A). Because this statutory scheme is \*426 similar to federal discrimination law, “[f]ederal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S.Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112.” *Little Forest Med. Ctr. of Akron v. Ohio Civ. Rights Comm.* (1991), 61 Ohio St.3d 607, 609, 575 N.E.2d 1164.

{¶ 15} Under R.C. 4112.02(A), which sets forth unlawful employer discriminatory practices, it is “an unlawful, discriminatory practice for any employer, because of \* \* \* age \* \* \* 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.”

{¶ 16} In *Byrnes v. LCI Communication Holdings Co.* (1996), 77 Ohio St.3d 125, 128–129, 672 N.E.2d 145, the Ohio Supreme Court stated that a plaintiff-employee may prove a claim of employer discrimination pursuant to R.C. 4112.02 via two separate methods. “Discriminatory intent may be established indirectly by the four[-]part analysis set forth in *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, 6 OBR 202, 451 N.E.2d 807, adopted from the standards established in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. The *Barker* analysis requires that the plaintiff-employee demonstrate ‘(1) that he was a member of the statutorily-protected class, (2) that he was discharged, (3) that he was qualified for the position, and (4) that he was replaced by or that his discharge permitted the retention of a person not belonging to the protected class.’ ” *Id.*, paragraph one of the syllabus. The fourth prong of this analysis has been broadened, allowing a plaintiff to show a substantially younger individual rather than an individual not belonging to the protected class. *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, 803 N.E.2d 781, paragraph one of the syllabus.

{¶ 17} The court stated further that discriminatory intent may be established by direct evidence of discrimination, “which is evidence other than the four-part demonstration of *Barker*. *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, 575 N.E.2d 439. A plaintiff may establish a prima facie case by presenting evidence, of any nature, to show that an employer more \*\*292 likely than not was motivated by discriminatory intent.” *Byrnes* at 128–129, 672 N.E.2d 145.

[2] [3] [4] {¶ 18} No matter the type of evidence presented, in order to establish a prima facie case of age discrimination, a plaintiff must show that he was subjected to an adverse-employment action. *Mauzy v. Kelly Servs., Inc.* (1996), 75 Ohio St.3d 578, 664 N.E.2d 1272. “A materially adverse employment action ‘must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a \*427 less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.’ ” *Watson v. Cleveland* (C.A.6, 2006), 202 Fed.Appx. 844, 854, 2006 WL 2571948, quoting *Kocsis v. Multi-Care Mgt. Inc.* (C.A.6, 1996), 97 F.3d 876, 886, citing *Crady v. Liberty Natl. Bank & Trust Co. of Indiana* (C.A.7, 1993), 993 F.2d 132, 136.

{¶ 19} Appellant wishes to characterize a transfer request as a promotion, even though this change in employment would not have entitled him to greater pay, benefits, or rank. Appellant cites the possibility of an increased opportunity for overtime pay and the position in FIU as being more prestigious. Appellant has introduced no admissible evidence that supports the contention that increased overtime was available to him. This speculative proposition put forth by appellant does not transform a lateral transfer into a promotion. Although appellant cites Chief Stubbs's deposition testimony as evidence that placement in FIU was more prestigious, Chief Stubbs actually answered appellant's question as to whether or not it was more prestigious by responding “for some.” The members of FIU keep their respective ranks, meaning that appellant would have remained a lieutenant.

{¶ 20} Examining the record in favor of appellant, a jury could find that the denial of transfer into a position with increased prestige, at least for some, could constitute an adverse employment action that creates a genuine issue of material fact.

[5] [6] {¶ 21} Appellees argue that appellant must exhaust all administrative remedies contained in the CBA before a civil suit can be filed. This is not required in this case because “statutory rights are different from any contractual rights he may have under his collective-bargaining agreement. Therefore, while [appellant's] contractual rights are subject solely to the collective-bargaining agreement, his statutory rights are not. Further, ‘[a]ny agreement in a collective bargaining agreement to arbitrate a statutory claim \* \* \* must

be "clear and unmistakable." ' ' *Haynes v. Ohio Turnpike Comm.*, 177 Ohio App.3d 1, 2008-Ohio-133, 893 N.E.2d 850, ¶ 18, quoting *Wright v. Universal Maritime Serv. Corp.* (1998), 525 U.S. 70, 82, 119 S.Ct. 391, 142 L.Ed.2d 361.

[7] {¶ 22} Appellees cite *Dworning v. Euclid*, 119 Ohio St.3d 83, 2008-Ohio-3318, 892 N.E.2d 420, in support of their position. The Ohio Supreme Court stated, "[A]n employee or employee's agent who bargains with an employer relinquishes certain rights to obtain other benefits. Therefore, an employee who has entered into an employment contract may give up the right to immediately file a civil action for discrimination in a court and instead agree to appeal to a civil service commission or other administrative agency." *Id.* at ¶ 42. The CBA in \*428 this case did not encompass the relinquishment of this right. There is no reference in the CBA to discrimination claims, but only to grievances \*\*293 generally. There is no provision to appeal a discrimination claim to "the civil service commission or other administrative agency." *Id.* The strong policy of remedying discrimination in its many forms, evidenced by the Ohio legislature's bestowing a private right of action, should not be abrogated by contract without clear evidence of intent by the parties.

[8] {¶ 23} Appellees also argue that appellant is not qualified for the position because he is unable to participate in the necessary police academy training to become a sworn police officer. R.C. 124.41 prohibits those over the age of 35 from receiving an original appointment as a police officer, which would act to bar appellant from becoming a member of FIU. Appellees state that this precludes appellant from being qualified for the position and thus unable to make a prima facie case of age discrimination. However, Lieutenant Posante was allowed to attend police academy training even though he was over age 35. No explanation was given by appellees for the incongruity, so there remains some issue of material fact as to appellant's ability to set forth a prima facie case of age discrimination.

[9] {¶ 24} Appellant argues that the statement made by Councilman Zachary Reed is direct evidence of age discrimination. In order for a statement to be evidence of an unlawful employment decision, appellant must show a "nexus between the improper motive and the decision-making process or personnel. Accordingly, courts consider (1) whether the comments were made by a decision maker; (2) whether the comments were related to the decision-making process; (3) whether they were more than vague, isolated, or ambiguous; and (4) whether they were proximate in time to

the act of alleged discrimination." *Birch v. Cuyahoga Cty. Probate Court*, 173 Ohio App.3d 696, 2007-Ohio-6189, 880 N.E.2d 132, ¶ 23.

{¶ 25} The statement that no extensions in employment would be granted because there were "younger people out there who needed jobs" was not made by Chief Stubbs and did not lead to the decision not to grant appellant's transfer. This was an isolated statement made by a single member of the safety committee and not by the committee as a whole or the city council. Chief Stubbs testified that the statement factored into his decision merely by enforcing the fact that the grant of an extension of employment was not automatic and that appellant could not meet the five-year ability-to-use requirement in the CBA.

[10] [11] [12] {¶ 26} If an appellant makes a prima facie case for age discrimination, then "the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse employment action." *Wexler v. White's \*429 Fine Furniture, Inc.* (C.A.6, 2003), 317 F.3d 564, 574. See also *Kline v. Tennessee Valley Auth.* (C.A.6, 1997), 128 F.3d 337. The inquiry into the employer's rationale is "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Wards Cove Packing Co., Inc. v. Atonio* (1989), 490 U.S. 642, 659, 109 S.Ct. 2115, 104 L.Ed.2d 733.

{¶ 27} Appellees have put forth a reason as the basis for their decision to grant Lieutenant Posante's transfer request over appellant's, but that reason is discriminatory in its application.

{¶ 28} When appellant asked why he was not granted the transfer, Chief Stubbs cited the requirement contained in Article VI of the CBA that any transferee entering a position requiring specialized training have at least five years in which to use such training. Appellant, age 64 at the time of the request, did not have the requisite five years to use the specialized training, \*\*294 which the city would invest considerable resources in providing.

{¶ 29} Appellant argues that the only time this provision can ever be applied results in age discrimination. The city, in its motion for summary judgment, cited several situations, including planned early retirement, planned resignation to take other employment, or plans to move as situations where this provision of the CBA would bar a transfer that would not be based on age. The only practical situations where these

confluent provisions act to bar a transfer or promotion are based on age.

{¶ 30} Cleveland City Codified Ordinance 135.07 requires that all firefighters and police officers retire at age 65. This ordinance leaves available to employees the option to seek a year-by-year extension in employment. One wishing to extend employment must submit an application to his department head. In the fire department's case, the chief of fire then must recommend the applicant for extension. An extension is granted only when the public safety director and city council grant the applicant's request.

{¶ 31} To show that appellees' reliance on this five-year ability-to-use requirement contained in the CBA in conjunction with the mandatory retirement provision was mere pretext, appellant argues that appellees were aware that employment extensions were always granted. Appellant relies on the fact that no firefighter who has requested an employment extension since Chief Stubbs took office in 2004 has been denied. This establishes a genuine issue of material fact that makes summary judgment inappropriate. There remains a question of whether appellees' stated business reason is only applicable based on age. Therefore, summary judgment was inappropriate to dispose of appellant's age-discrimination claim.

#### \*430 Individual Liability

[13] [14] {¶ 32} Governmental immunity generally prohibits suit against the state and its political subdivisions except in limited circumstances. *Hodge v. Cleveland* (1998), Cuyahoga App. No. 72283, 1998 WL 742171. R.C. 2744 et seq. sets forth the protections the city enjoys as a political subdivision of the state. Appellant cites R.C. 2744.09 as removing these protections from the city and Chief Stubbs. This section specifically removes sovereign immunity from "political subdivisions" in actions by its employees involving matters arising out of the employment relationship. While appellant's claim against the city fits neatly into this statutory exception, the claim against Chief Stubbs does not. Appellant argues that Chief Stubbs remains liable on agency principles, but can cite no statutory provision in Ohio's governmental immunity statutes that would grant appellant the ability to maintain suit against Chief Stubbs individually for actions taken within the scope of his employment.

{¶ 33} 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 Stubbs.

#### Promissory Estoppel and Sovereign Immunity

[15] [16] {¶ 34} Appellant asserts that the notice of available positions contained a \*\*295 promise that forms the basis of a claim against appellees. "Principles of equitable estoppel generally may not be applied against the state or its agencies when the act or omission relied on involves the exercise of a governmental function." *Sun Refining & Marketing Co. v. Brennan* (1987), 31 Ohio St.3d 306, 307, 31 OBR 584, 511 N.E.2d 112. See also *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716, ¶ 25; *Cleveland v. W.E. Davis Co.* (July 18, 1996), Cuyahoga App. No. 69915, 1996 WL 403337.

[17] {¶ 35} "Governmental functions are those duties that are imposed upon the state as obligations of sovereignty, such as protection from crime, fires, or contagion, or preserving the peace and health of citizens and protecting their property." *State ex rel. Scadden v. Willhite* (Mar. 26, 2002), Franklin App. No. 01AP-800, 2002 WL 452472, \*7. See also *Neelon v. Conte* (Nov. 13, 1997), Cuyahoga App. No. 72646, 1997 WL 711232. The Ohio Revised Code defines a governmental function as "a function \* \* \* that promotes or preserves the public \*431 peace, health, safety, or welfare." R.C. 2744.01(C)(1). This section further states, "a 'governmental function' includes, \* \* \* the provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection." R.C. 2744.01(C)(2)(a). Marshaling and maintaining an agency to protect the public from fire is an activity that is specifically defined as a governmental function.

[18] {¶ 36} Appellant argues that employment decisions fall outside this statutory immunity. Employment decisions made in the exercise of a government function fall within this

protection. *Western-Southern Life Ins. Co. v. Fridley* (1990), 69 Ohio App.3d 190, 590 N.E.2d 325.

[19] ¶ 37 The exceptions to sovereign immunity contained in R.C. 2744.09 allow an employee to bring suit against a state or municipal employer. Resort to an equitable theory of recovery that is barred by sovereign immunity should not stand. Summary judgment was appropriate to dispose of this claim in the city's favor. Appellant's second assignment of error is overruled.

### Medical Records

[20] ¶ 38 The city and Chief Stubbs cross-appeal the trial court's denial of their motion for production of appellant's<sup>1</sup> medical records for the past ten years. As a requirement for admission into FIU, appellant must be able to complete police academy training. One of the city's defenses is that appellant is unqualified for the position because he would be unable to complete the requisite training. The city also alleges that because appellant's damages are solely based on an increase in availability of overtime pay, appellant's medical records are necessary in order to show that appellant would suffer no actual damages. To show this, the city requested the names of every doctor appellant has seen in the last ten years, as well as signed releases allowing the city access to all medical records and prescriptions held by these physicians.

[21] ¶ 39 A motion to compel discovery is the province of the trial court; however, application of privilege, R.C. 2317.02, is reviewed as a matter involving an issue of law, meaning this court reviews the decision de novo. *Ward v. Johnson's Indus. Caterers, Inc.* (June 25, 1998), Franklin App. No. 97APE11-1531, 1998 WL 336786. R.C. 2317.02(B)(1)(a) governs the physician-patient privilege; however, "R.C. 2317.02(B)(1)(a)(iii) is limited in \*\*296 scope by R.C. 2317.02(B)(3)(a), which provides: '(3)(a) If the testimonial privilege described in division (B)(1) of this section does not apply as provided in division (B)(1)(a)(iii) of this section, a physician or dentist may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to \*432 the physician or dentist by the patient in question in that relation, or the physician's or dentist's advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the \* \* \* other civil action, or claim.' "

¶ 40 "Pursuant to R.C. 2317.02(B)(3)(a), '[o]nly those communications (which includes medical records) that relate causally or historically to the injuries relevant to the civil action may be discovered.' " *Porter v. Litigation Mgt., Inc.* (2000), Cuyahoga App. No. 76159, 2000 WL 573197, \*2, quoting *Ward*, 1998 WL 336786, \*5. See also *Groening v. Pitney Bowes*, Cuyahoga App. No. 91394, 2009-Ohio-357, 2009 WL 205628.

¶ 41 Appellees argue that appellant's damages stem only from the denial of increased overtime compensation. Appellant is still employed by the city as a firefighter and is presumably still earning overtime in this position. Unlimited access to appellant's medical records for the limited purpose of determining the amount of appellant's damages is inappropriate. These records are irrelevant for the purpose of determining whether appellant could do a less strenuous job than he is currently engaged in. The city's discovery request was clearly overbroad in its scope; therefore, the judgment of the trial court is affirmed.

### Conclusion

¶ 42 Appellant has offered evidence that would allow this court to conclude that a reasonable jury could find in his favor in rebutting the city's reason for refusing his lateral transfer. Therefore, summary judgment was not appropriate to dispose of appellant's age-discrimination claim against the city. However, appellant cannot maintain the suit against Chief Stubbs in his individual capacity or a promissory-estoppel claim against the city or Chief Stubbs. Accordingly, the trial court's grant of summary judgment against Chief Stubbs as to both claims should be affirmed. The trial court's grant of summary judgment in favor of the city on appellant's promissory-estoppel claim was also appropriate. However, there remain genuine issues of material fact in appellant's age-discrimination claim against the city. The city should not be permitted to delve into appellant's sensitive medical records when there is no evidence that appellant was unfit for the position and Chief Stubbs testified that appellant was qualified for the position.

¶ 43 The judgment is affirmed in part and reversed in part, and the cause is remanded to the lower court for further proceedings consistent with this opinion.

Judgment affirmed in part and reversed in part, and cause remanded.

**Parallel Citations**

McMONAGLE, P.J., and BOYLE, J., concur.

921 N.E.2d 286, 107 Fair Empl.Prac.Cas. (BNA) 951, 2009  
-Ohio- 5224

**Footnotes**

1 For continuity, John Campolieti will continue to be addressed as appellant.

---

**End of Document**

© 2013 Thomson Reuters. No claim to original U.S. Government Works.