

ORIGINAL

IN THE SUPREME COURT OF OHIO

ANITA HAUSER, : Supreme Court Case Nos. 2013-0493, 2013-
: 0291

Plaintiff-Appellee, : Appeal from Montgomery County Court
: of Appeals, Second District

v. :

CITY OF DAYTON POLICE DEPT., : Court of Appeals
: et. al. Case No. CA 24965

Defendant-Appellant. :

MERIT BRIEF OF APPELLANT E. MITCHELL DAVIS

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STATEMENT OF FACTS

Plaintiff Anita Hauser (“Hauser”) is a female detective employed by the City of Dayton, Ohio, Police Department (“PD”). (Hauser Dep. pg. 4.) Defendant E. Mitchell Davis (“Davis”) was a PD Major who oversaw the division by which Hauser is employed (investigations and administrative support), reporting in turn to the assistant chief of police, the chief of police and the city manager. (Amended Complaint, ¶ 3; Hauser Dep. pg. 4; Davis Dep. pg. 17.) However, Davis did not directly supervise Hauser. (Davis Dep. pg. 18.) That duty belonged to Sergeant Harold Perry. (Hauser Dep. pg. 4.)

Training requests were reviewed by Davis. (Id. at Vol. II, pg. 23.) At some point, Davis denied Hauser’s request for Sky Narc training. (Id. at pg. 24.) That denial was confirmed by Assistant Chief of Police Wanda Smith and Police Chief Richard Biehl. (Id. at pg. 26.) In earlier years, Davis approved Officer Kevin Bollinger’s requests for Sky Narc training. (Id. at pg. 25.) When asked to explain his denial of Hauser’s request, which was affirmed by his superiors, Davis testified as follows:

- Q: All right. And why didn’t you concur with the training request at that time?
- A: There was some movement to limit the amount of training and reduce spending. Even though some of this was out of RICO funds, we were trying to contain spending. And there was a belief we were having people training at the exclusion of performing their duties. So–
- Q: Okay. And that was a belief. What were the facts?

A: There were people away in training a lot. (Id. at pg. 24.)

Hauser testified that Bollinger applied for the two of them to go to Sky Narc training in 2007 and 2008, and both applications were denied. (Hauser Dep. pgs. 16-18; 91-93.) Her 2010 request for Sky Narc training was approved. (Id.) Both times Hauser was denied Sky Narc training, so was Bollinger. (Id.) Bollinger's previous attendance at Sky Narc training occurred before Hauser joined the Interdiction Unit. (Hauser Dep. Vol. II, pg. 113.)

In March through June, 2007, Hauser attended three months of K-9 training with her dog, Zara, in Front Royal, Virginia. (Hauser Dep. pg. 19.) She was advised on February 7, 2007, by email from Carol Rountree (a PD clerical employee), that City Manager Rashad Young had adopted a new travel policy. (Id. at pg. 32.) Hauser was the first person to whom the policy was to be applied as a test. The pertinent change in the policy was that on trips lasting more than seven days, although the City provided a per diem for meals, the employee was required to refund to the City any portion of the per diem which she could not substantiate by receipts as having been spent on food. (Id. at pgs. 31-2, 36, 39.) Hauser was advanced \$4,550 for meals and tips. On her return, Hauser was unable to provide receipts for \$3,058.62 of the advance, resulting in her being required to refund that amount to the City. The City otherwise paid for all of Hauser's K-9 training, food, transportation and hotels, a total of \$19,985.38. (Kevin Powell Dep. pg. 40.)

Davis was unaware of the test travel policy requiring reimbursement of unspent advances. (Davis Dep. pgs. 24-25; 29-31; 39; 44; 65-66.) Davis was also unaware Hauser was required to keep receipts while in Virginia. (Id.) He did not find out about the test policy until afterwards. (Id.) Davis had no role in establishing travel policy or settling travel expenses. (Id.)

Hauser initiated this action on June 29, 2009, against the City of Dayton Police Department and Davis, alleging intentional infliction of emotional distress, age discrimination, discrimination and hostile work environment, and due process violations. (Complaint, ¶ 1.) She subsequently amended her Complaint to include claims for violations of Ohio public records law and spoliation of evidence. (Amended Complaint, ¶1.)

Defendants moved for summary judgment as to all of Hauser's claims. (Motion for Summary Judgment, p. 1.) The trial court granted in part and denied in part Defendants' Motion. (Decision, p. 1.) Davis filed an interlocutory appeal pursuant to R.C. § 2744.02(C) as to his defense of immunity. (Notice of Appeal.)

The Second District Court of Appeals held that Davis was subject to liability under R.C. 4112.01(A)(2) lifting the immunity provided by R.C. 2744.03(A)(6)(c). (Opinion, p. 1.) Davis timely moved to certify a conflict between the Second District's decision and that of the Eighth District Court of Appeals in *Campolieti v. Cleveland*, 184 Ohio App. 3d 419, 2009-

Ohio-5224, at ¶33 (8th Dist.). Davis also timely filed a discretionary appeal with this Court. The Second District certified a question of law to this Court. (Decision and Entry, p. 1.) This Court accepted Davis's jurisdictional appeal, certified a conflict, and consolidated the appeals. The Court directed the parties to brief the issue stated in the Court of Appeals' Judgment Entry, as follows:

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 immunity is lifted by R.C. 2744.03(A)(6)(c).

ARGUMENT

Proposition of Law:

Liability is not expressly imposed on political subdivision employees under R.C. 4112.01(A)(2) so as to lift R.C. 2744.03(A)(6)(c) immunity

R.C. Chapter 4112 does not expressly impose liability on political subdivision employees. R.C. § 4112.02(A) states that “[i]t shall be an unlawful discriminatory practice: (A) For any *employer*...to discriminate against” a protected class in employment. *Hauser v. Dayton Police Dept.*, 2d Dist. No. 24965, 2013-Ohio-11, at ¶31 (J. Hall dissenting)(emphasis added). R.C. § 4112.01(A)(2) defines “employer” as:

...the state, any political subdivision of the state,...and any person acting directly or indirectly in the interest of an employer.

The Political Subdivision Tort Liability Act “generally provides that political subdivisions and their employees are immune from liability.” *Schoenfield v. Navarre*, 164

Ohio App. 3d 571, 2005-Ohio-6407, ¶14 (6th Dist.). Political subdivision employees are immune from civil liability unless one of the following applies:

...

(c) Civil liability is **expressly imposed** upon the employee by a section of the Revised Code.

R.C. § 2744.03(A)(6)(c) (emphasis added). R.C. Chapter 4112 does not expressly impose liability on political subdivision employees so as to withdraw R.C. § 2744.03 immunity.

At first blush, R.C. § 4112.02(A) only imposes liability on employers. But in *Genaro v. Cent. Transport Inc.*, this Court held that a private employer’s supervisor or manager may be held personally liable for violating R.C. Chapter 4112. 84 Ohio St. 3d 293, at syllabus (2002). The Court interpreted “any person acting directly or indirectly in the interest of any employer” to include managers or supervisors. *Id.* *Genaro* was a divided 4-3 decision. *Id.* at 300.

The majority in *Genaro* acknowledged that “federal case law interpreting and applying Title VII is generally applicable to cases involving R.C. Chapter 4112,” and that “the Sixth Circuit has determined that an individual employee/supervisor may not be held personally liable under Title VII.” *Id.* Nevertheless, the Court concluded that R.C. Chapter 4112 was to be “construed liberally for the accomplishment of its purposes.” *Id.* It further concluded that the R.C. Chapter 4112 definition of “employer” was “much broader in scope” than Title VII. *Id.*

In dissent, former Chief Justice Moyer contended that R.C. Chapter 4112 did not impose liability on managers and supervisors. *Id.* His reasoning was twofold. First, R.C. § 4112.02(A) clearly imposes liability on employers for discriminatory acts, not their employees. *Id.* As C.J. Moyer rightly reasoned, if “the General Assembly wished to extend individual liability to managers and supervisors it could have easily included the word ‘employee’ in R.C. § 4112.02(A).” *Id.* at 301.

Secondly, the phrase “any person acting directly or indirectly in the interest of an employer” was included in the definition of “employer” to “impose vicarious liability on employers for discriminatory acts of their employees,” not to add the employees to the list of persons liable. *Genaro*, 84 Ohio St. at 301. This argument was supported by the fact that “federal courts have held that the agency clause of Title VII does not impose liability on individual employees, but instead imposes vicarious liability on employers for the discriminatory acts of their employees.” *Id.* (citing *Wathen v. Gen. Elec. Co.*, 115 F.3d 400 (6th Cir. 1997)). The agency language was added to ensure that employers could not escape vicarious liability. *Genaro*, 84 Ohio St. 3d at 301. As former Justice Cook explained, “The same statutory phrase cannot simultaneously mean to impose both individual liability on employees and vicarious liability on employers.” *Id.* at 303 (J. Cook dissenting).

In *Hauser*, the Second District Court concluded that Davis’s immunity was lifted under R.C. § 2744.03(A)(6)(c) because civil liability was expressly imposed on political

subdivision managers or supervisors under R.C. Chapter 4112. *Hauser*, 2013-Ohio-11, at ¶3. *But see Campolieti*, 2009-Ohio-5224, at ¶33 (holding that because R.C. Chapter 4112 spoke in terms of employers, liability was not expressly imposed on a supervisor, there a fire chief, to invoke the R.C. § 2744.03(A)(6)(c) exception to the immunity statute). The court relied on *Genaro* in reaching its decision, *Id.* at ¶19, but political subdivision employee immunity was not an 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).” *Hauser*, 2013-Ohio-11, at ¶19.

R.C. § 4112.01(A)(2) does not *expressly* impose liability on political subdivision employees to trigger the R.C. § 2744.03(A)(6)(c) immunity exception. The dictionary defines “expressly” as “unambiguously; in a way that shows clear intention or choice.” Merriam Webster 3d ed. 1971. R.C. § 4112.01(A)(2) does not expressly impose liability on political subdivision employees. They are not referenced.

This Court addressed a similar issue in *Cramer v. Auglaize Acres*, 113 Ohio St. 3d 266, 2007-Ohio-1946 (2007). In *Cramer*, the decedent’s estate brought an action against an unlicensed nursing home and several of its employees after the decedent died during surgery. *Id.* at ¶¶ 2-3. The applicable statute subjected “any person” to liability for

violations of R.C. §§ 3721.10 to 3721.17. *Id.* at ¶ 21. The Court held that the term “person” did not expressly impose liability on the county employees so as to lift immunity. *Id.* at ¶32. *See also Marshall v. Montgomery Cty. Children Serv. Bd.*, 92 Ohio St. 3d 348, 352 (2001)(holding that R.C. § 2151.421 does not expressly impose liability on political subdivision employees for failure to investigate reported child abuse); *O’Toole v. Denihan*, 118 Ohio St. 3d 374, 385 (2008)(holding that R.C. § 2919.22 does not expressly impose liability on political subdivision employees for child endangerment).

Similarly, R.C. § 4112.02(A) imposes liability on political subdivisions not their employees. R.C. § 4112.01(A)(2). The phrase “any person acting directly or indirectly in the interest of an employer” is no more express than the phrase “any person” in *Cramer*. *See also Marshall*, 92 Ohio St. 3d at 352; *O’Toole*, 118 Ohio St. 3d at 385. Applying C.J. Moyer’s reasoning in *Genaro*, if the legislature intended to impose liability on political subdivision managerial employees, it should have expressly included them in R.C. § 4112.02(A). *Genaro*, 83 Ohio St. 3d at 301. *See also Hauser*, 2013-Ohio-11, at ¶32 (J. Hall dissenting).

Moreover, the phrase “any person acting directly or indirectly in the interest of an employer” was included in R.C. § 4112.01(A)(2) to impose vicarious liability on political subdivisions for their employees’ discriminatory conduct, not to add to the list of persons liable. This interpretation is consistent with Title VII law, which does not impose liability

on individual employees. *Genaro*, 83 Ohio St. 3d at 301 (citing *Wathen*, 115 F.3d at 404). The definition of employer in R.C. Chapter 4112 and Title VII “are sufficiently similar to warrant the conclusion that both were meant only to impose vicarious liability on employers for the acts of their employees.” *Id.* at 302. Thus, the fine distinction drawn by the *Genaro* majority between the two definitions of “employer,” is really no distinction at all. *Id.* (citing *Lenhardt v. Basic Inst. of Tech. Inc.*, 55 F.3d 377, 379 (8th Cir. 1995)).

R.C. § 2744.03(A)(6)(c) mandates that a political subdivision employee is immune from liability unless liability is expressly imposed by statute. R.C. § 4112.01(A)(2) does not expressly impose liability on political subdivision employees to trigger the R.C. § 2744.03(A)(6)(c) immunity exception. R.C. § 4112.01(A)(2) expressly imposes liability on political subdivisions, not their employees. It took a divided *Genaro* Court to *extend* liability under Chapter 4112 to include private sector managers and supervisors. *Genaro*, at syllabus (emphasis added).

“[T]he primary statutory purpose of R.C. Chapter 2744 is the preservation of the financial stability of political subdivisions.” *Shoenfield*, 2005-Ohio-6407, at ¶14. The *Hauser* decision threatens that stability by subjecting thousands of political subdivision employees to personal liability under R.C. Chapter 4112. If *Hauser* is upheld, the financial ramifications will be felt by political subdivisions throughout the State.

This State has a long-standing policy that political subdivision employees are immune from suit except under a few specific circumstances. *Wilson v. Stark Cty. Dept. of Human Serv.*, 70 Ohio St. 3d 450, 453 (1994). This policy is imperative not only to ensure the financial stability of political subdivisions, but it also encourages and safeguards the ability of political subdivision employees to perform their official duties without fear of possible liability. Private employees enjoy no such protections because they are not tasked with enforcing and administering the laws necessary to the continuance of a stable society. Justifiable reasons exist for treating political subdivision employees different from their private sector counterparts. This case is no exception.

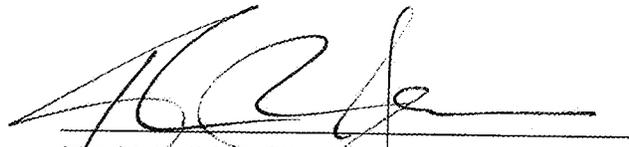
This case does not require the Court to reassess *Genaro*. Immunity is the issue here. The *Genaro* Court did not address whether R.C. Chapter 4112 expressly imposed liability that would defeat political subdivision employee immunity. *Hauser*, 2013-Ohio-11, at ¶ 19. See also *Satterfield v. Karnes*, 736 F. Supp 2d 1138, 1153-54 (S.D. Ohio 2010)(noting that the Supreme Court of Ohio could hold that *Genaro* based liability is not what the legislature had in mind when it required that liability be expressly imposed on a political subdivision employee in order to withdraw immunity). Thus, *Genaro* is distinguishable.

CONCLUSION

The Second District's decision in *Hauser* fails to apply the plain meaning of the statutes in determining that political subdivision managers or supervisors are subject to

liability under R.C. § 4112.02(A). R.C. § 4112.01(A)(2) does not expressly impose liability on political subdivision employees so as to lift immunity under R.C. § 2744.03(A)(6)(c). Accordingly, this Court should answer the certified question in the negative, and the decision below should be reversed. A contrary decision would have a devastating financial effect on political subdivisions and their employees. Public employee immunity should not be diminished by a statute that does not expressly impose liability on these employees.

Respectfully submitted,



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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 28th day of June, 2013.


THOMAS M. GREEN

APPENDIX

IN THE SUPREME COURT OF OHIO

13-0291

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

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Notice of Appeal of Appellant Major E. Mitchell Davis

Appellant Major E. Mitchell Davis hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. CA 24965 on January 4, 2013.

This case is of public or great general interest.

Respectfully submitted,

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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 13th day of February, 2013.

THOMAS M. GREEN

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ORIGINAL

IN THE SUPREME COURT OF OHIO

13-0493

ANITA HAUSER,

: Supreme Court Case No. _____

Plaintiff-Appellee,

: Appeal from Montgomery County Court
of Appeals, Second District

v.

:

CITY OF DAYTON POLICE DEPT.,
et. al.

: Court of Appeals
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.

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Respectfully submitted,

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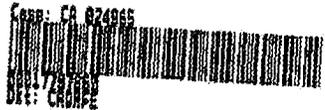
Counsel for Appellant E. Mitchell Davis

CERTIFICATE OF SERVICE

Thereby 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 25th day of March, 2013.

THOMAS M. GREEN

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CLERK OF COURTS
MONTGOMERY CO. OHIO

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

20

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

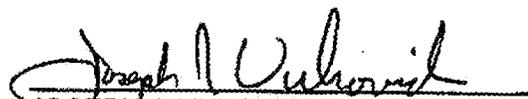
Pursuant to the opinion of this court rendered on the 4th day of January, 2013, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.


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)

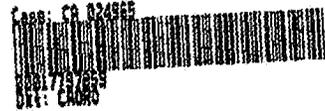
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39

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.

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Attorney for Plaintiff-Appellee

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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.")¹

ASSIGNMENT OF ERROR

¹A 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.² 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).

²Contrary 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. Kames*, 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



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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
.....

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.

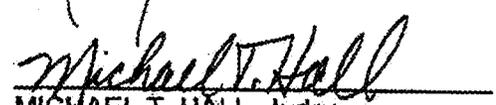
Contrary to appellant's urging, we did not find *Campolieti* persuasive. Instead, we relied on cases out of the Seventh and Third Districts on this issue. *Hauser* at ¶ 21-22, citing *State ex rel. Conroy v. Williams*, 185 Ohio App.3d 69, 2009-Ohio-6040, 923 N.E.2d 191, ¶ 30 (7th Dist.), and *Hall v. 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. Karnes*, 736 F.Supp.2d 1138, 1154 (S.D. Ohio 2010).

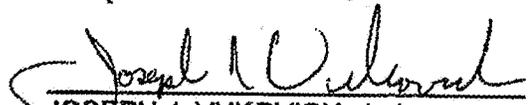
We thus agree that there exists a conflict between this district's recent decision in *Hauser* and the Eighth District's *Campolieti* case. Accordingly, the following question is certified to the Ohio Supreme Court:

"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 COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

ANITA HAUSER,

CASE NO.: 2009 CV 05371

Plaintiff(s),

JUDGE MARY WISEMAN

-vs-

CITY OF DAYTON POLICE DEPT et al,

**DECISION, ORDER AND ENTRY
GRANTING IN PART AND DENYING IN
PART DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Defendant(s).

This matter is before the Court on *Defendants' Motion for Summary Judgment* ("Motion") filed on September 20, 2011 by Defendants E. Mitchell Davis ("Davis") and the City of Dayton Police Department ("City")(collectively, "Defendants"). Based on the following law and analysis, Defendants' Motion is GRANTED in part and DENIED in part.

As an initial matter, Defendants request that *Plaintiffs'*[sic] *Response to Defendant's*[sic] *Motion for Summary Judgment* ("Response") and several of the affidavits attached to the Response filed by Plaintiff Anita Hauser ("Hauser") be stricken. Pursuant to Ohio Civ.R. 12(F), upon the motion of either party or on its own accord, the court may strike from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter.

The Court DENIES Defendants' motion as it relates to the timeliness of Hauser's Response.

Regarding the attached affidavits, pursuant to Civ.R. 56(E):

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.

As to the affidavits attached to Hauser's Response, Defendants allege that Jeffery Roemer's affidavit is inappropriate because he lacks personal knowledge to support his affidavit. The affidavit of Mr. Roemer is appropriate as it relates to Mr. Roemer's knowledge regarding what was provided to Hauser during discovery. Additionally, based on Mr. Roemer's experience in law enforcement, specifically with the City, he can aver to the apparent authenticity of the policies from his own personal knowledge and memory. However, numerous citations to Mr. Roemer's affidavit in Hauser's Response are used to support interpretations of the City's policies. From Mr. Roemer's affidavit it does not appear that he is competent to testify to such matters. Mr. Roemer does not aver that he ever interpreted policy in his capacity as a City police officer. It follows that Mr. Roemer's affidavit does not run afoul of Civ.R. 56(E) such that it should be stricken, but the Court will not rely upon Mr. Roemer's affidavit as support for plaintiff's interpretations of City policy.

Defendants challenge the affidavits of Kevin Bollinger, Keith Coberly, and Thomas Lubonovic because the affidavits purport to authenticate statements to the OCRC, but never swear to the truth or accuracy of the attached statements. All of the affidavits swear that the information contained in the affidavit is based on the affiant's knowledge and is true, correct and complete. At a minimum, the affidavits properly support the averments regarding the affiant's age, position with the City, that the affiant provided a statement to the OCRC and that the attached statement was made by the affiant and is unaltered. The dispute between the parties is whether the affidavits properly aver to the attached statements allegedly made to the OCRC. The affidavits submitted by Bollinger, Coberly and Lubonovic are meant to add the statements of the named individuals to the record to combat summary judgment. Therefore, the Court finds that, while the averment that the "information herein is true, correct and complete" could have been crafted better to avoid confusion, it properly avers to the truth and accuracy of the attached statements to the OCRC.

Accordingly, *Defendants Motion to Strike Plaintiff's Response and Affidavits* is DENIED.

I. Statement of Facts

Plaintiff Anita Hauser ("Hauser") is a detective employed by the City. *Motion* at 1. In late 2006, Hauser became the first female K-9 handler in City history and was assigned to the City's Drug Interdiction Unit. *Response* at 2. As part of the training for her new position, Hauser and her dog Zara attended a three

month K-9 training program in Front Royal, Virginia. *Motion* at 2. On February 7, 2007, before Hauser left for training, Hauser was notified in an email from Carol Roundtree (a City clerical employee) that the City Manager was adopting a new travel policy. *Id.* The email stated:

Anita – just wanted to let you know this in advance.

We got a call from the City Manager's office today regarding the per diem amount for your trip. There will be a new policy coming from the City Manager's Office regarding extended travel and per diem. You will receive the advance total of \$4,500 for your per diem, but you will be required to keep all food receipts for the final travel closeout. This is no reflection on you (they trust you) this is a travel that doesn't happen often and they want to make a new policy for this type of situation (you will be the example I guess).

Any questions – call me or Kevin.

Thanks

Carol

Response at 3; *Motion* Ex. 2.

On January 29, 2007 Hauser signed a Travel Request, Advance and Expense Report that stated "If the advance exceeds the actual amount of travel, you must return the excess within 5 days of return. I Authorize advance deductions from my paycheck." *Motion* Ex. 1; *see also Defendants' Reply in Support of Motion for Summary Judgment*, at pg. 2. The expense report also specified that Hauser would be advanced \$4,550 for "meals and tips." *Id.* When Hauser returned from training, she could not produce receipts to account for \$3,058.62 of the amount advanced for food and tips. *Id.* As a result, \$3,058.62 was deducted from Hauser's pay. *Response* at 10. Hauser filed a grievance, but the FOP declined to take the matter to arbitration after the grievance was initially denied by the City Police Chief following a hearing. *Motion* at 7.

While Hauser attended K-9 training out of state, Hauser requested that Detective Douglas Roderick send her pornographic images to show officers from other jurisdictions the types of cases handled by Dayton officers. *Motion* at 4; *Response* at 7. The City intercepted the emails being sent to Hauser's City email address. *Id.* Hauser was issued Charges and Specifications related to the incident and was suspended for three days without pay. *Id.* Hauser appealed the suspension and the issue was submitted to contractual arbitration, the result of which was a reduction of the suspension to one day without pay for unprofessional conduct. *See Arbitration Decision* (attached to *Response*) at pg. 18.

Hauser subsequently filed suit alleging that Defendants treated her differently, without a rational basis. *Amended Complaint* at ¶12. Additionally, Hauser alleged the following: intentional infliction of emotional distress ("IIED"); age discrimination; discrimination and hostile work environment; violations of substantive and procedural due process; violation of the Ohio public records law; and spoliation of evidence. *See generally id.*

On September 20, 2011 Defendants moved for summary judgment on Hauser's IIED, age discrimination, discrimination and hostile work environment, and due process claims. *See generally Motion*. Defendants claim that Hauser has failed to establish a claim for IIED. *Id.* at 3-7. According to Defendants, Hauser's IIED claim "is based on three contentions: 1. that Plaintiff was told she would have to refund the K-9 school fee if she did not complete the course; 2. that she was investigated for improper use of the City's email system; and 3. that she was required to produce receipts or refund the meals advance not used for food." *Id.* (citing *Hauser Depo.* Pg. 138). In regard to the K-9 school fees, Defendants assert that Hauser was not required or expected to refund the fees if she did not successfully complete the course. *Id.* Additionally, Defendants point out that both individuals Hauser alleges told her that she would be responsible for reimbursing the City if she failed deny making any such statement. *Id.* In Hauser's amended complaint, she asserts that Davis told her that she would be responsible for the school fees if she failed. *Id.*; *see also Amended Complaint* at ¶15. However, Davis stated at his deposition that he had never heard of any City employee being required to reimburse the City for failing to successfully complete a training course. *Davis Depo.* at pg. 43. At her deposition, Hauser identified Kevin Powell as the individual who informed her that she would be responsible for reimbursing the City if she did not pass the training course, but like Davis, Powell denies ever saying that. *Motion* at 3-4. Defendants conclude that Hauser cannot establish that "any defendant did anything to deliberately cause her emotional distress" and that Hauser "cannot establish that she sustained serious emotional distress as a result of being told that she would be expected to refund money advanced by the City for her education if she failed to complete the course." *Id.*

Next, Defendants contend that Hauser cannot use her discipline for improper use of City email as grounds for an IIED claim. *Id.* According to Defendants, because Hauser had an opportunity to appeal her suspension, and in fact had it reduced, that she cannot now "complain that she was somehow damaged by the process." *Id.* at 4-5. Defendants assert that any claim raised by Hauser related to her suspension for

improper use of City email is *res judicata* because Hauser failed to appeal the matter when she could have. *Id.*

Defendants also argue that Hauser cannot assert a claim of IIED based on her being required to refund the unsubstantiated portion of her advance for meals and tips. *Id.* Defendants contend that Hauser “has no claim to the money; it is the City’s money which she was entitled to keep only if she can show written proof it was spent on food....” *Id.* Defendants also point to the fact that Hauser only knows of one other officer, Detective Kevin Bollinger, a male officer over the age of forty, who was not required to produce food receipts to substantiate his per diem during a three week training trip. *Id.* Defendants admit that Bollinger was not required to provide receipts, but assert that Hauser’s trip was a test application of the new travel policy. *Id.* Defendants further argue that Hauser knew the trial travel policy came from the City Manager’s office and that the City Manager has the authority to set travel policy. *Id.* at 5-6. Defendants again argue that because Hauser previously challenged the deductions from her pay to refund the City for the unsubstantiated per diem, the issue is *res judicata*. *Id.* at 6-7.

Defendants assert that Hauser has failed to establish a claim for either age discrimination or sex/gender discrimination and hostile work environment. *Id.* According to the Defendants, Hauser’s claims for discrimination are based on the fact that she was subject to the test travel policy and Bollinger was not. *Id.* at 8. Defendants argue that because Hauser was never “denied any promotion nor given any demotion...nor suffered any loss in compensation or benefits” she cannot link the conduct complained of to her gender or age. *Id.*

Defendants next argue that summary judgment is proper on Hauser’s due process claims because all she was entitled to was notice and an opportunity to be heard, both of which she received. *Id.* at 9. Defendants assert that because Hauser’s Ohio Civil Rights Commission Claims, Equal Employment Opportunity Claims and grievances were promptly processed to disposition, her fundamental constitutional rights were not violated. *Id.*

Defendants also argue that Hauser’s claims were filed outside the applicable limitations period. *Id.* According to Defendants, Hauser had 180 days following the complained of conduct to file suit and the 180 days expired long before Hauser filed suit on June 29, 2009. *Id.* at 9-10. Defendants argue that the conduct

Hauser complains of occurred between February and July 2007, which is more than 180 days prior to the current suit being filed. *Id.*

Finally, Defendants argue that Defendant Davis is not liable on any of Hauser's claims. *Id.* at 10. Defendants argue that municipal supervisors cannot be individually liable for discrimination under O.R.C. § 2744.03(A)(6) and § 4112.14.¹ *Id.* Accordingly, the Defendants contend that Davis cannot be liable to Hauser regardless of the merits of her claims. *Id.*

Hauser responds that the Defendants cannot assert *res judicata* as an affirmative defense based on her FOP grievance proceedings because the hearings did not constitute a prior suit. *Response* at 12. Additionally, Hauser asserts that Davis is not immune from suit because employees of political subdivisions are not immune from suit under O.R.C. § 4112 *et seq* pursuant to precedent that is binding on this Court. *Id.* at 12-16 (quoting from numerous cases).

Hauser also argues that her claims are timely. *Id.* Hauser points out that Defendants did not challenge the timeliness of her federal law claims; Hauser then contends that her state law claims are timely. *Id.* Hauser contends that her sex discrimination claims have a six year statute of limitations, which makes her claims timely since the incidents occurred in 2007 and her suit was filed in 2009. *Id.* at 16-17. Moreover, Hauser argues that her age discrimination claims are timely because they are based on chapter 4112 in its entirety (a six year statute of limitations), not O.R.C. § 4112.02(N) (180 day statute of limitations). *Id.* Accordingly, Hauser asserts that her claims are timely and summary judgment is not proper. *Id.*

Next, Hauser contends that her discrimination claims are for the jury. *Id.* Hauser claims that Defendants' arguments are based on a rigid interpretation of the *McDonnell Douglas* test and ignore the expansion of sex discrimination and harassment claims under the law. *Id.* at 18. Specifically, Hauser points out that sex discrimination claims now include actions based on discrimination against individuals in the terms and conditions of employment. *Id.* Hauser contends that the "simple test" for sex discrimination is "whether the evidence shows 'treatment of a person in a manner which but for the person's sex would be

¹ Defendants rely on *Campolieti v. Cleveland*, Cuyahoga App. No. 92238, 184 Ohio App.3d 419, 2009-Ohio-5224, 921 N.E.2d 286 in support of this proposition of law.

different.”² *Id.* at 18-19. Hauser also argues that the ultimate fact of discrimination can be inferred from the falsity of the employer’s explanation. *Id.* Hauser asserts that she is treated differently than all the other dog handlers based on gender, and therefore, her sex/gender discrimination and hostile work environment claims should survive summary judgment. *Id.* 22-26.

Hauser also contends that her due process rights were violated because the City took her property (deductions from her pay) without a court order or consent. *Id.* at 26. Interestingly, Hauser does not respond to any of Defendants’ arguments related to her IIED claim.

Defendants reply that, based on the undisputed facts, summary judgment is appropriate. *See generally, Reply.* Specifically, Defendants assert that Hauser cannot establish any factor necessary for an IIED claim because none of the City’s actions were undertaken with the intent to cause her severe emotional distress. *Id.* at 5. Additionally, Defendants claim that Hauser misstates the medical evidence provided by Dr. Lesley Meeker. *Id.* Namely, Defendants contend that Dr. Meeker never affirmatively stated that Hauser’s stress and need for medication were directly tied to increased stress at work. *Id.* Rather, Dr. Meeker testified that Hauser’s stress seemed to correlate with work experiences and noted that Hauser “had made mention to me about the job stress, being involved in a lawsuit.” *Id.* Defendants contend that Dr. Meeker’s testimony falls “woefully short of showing that the City’s conduct proximately caused Hauser’s stress or depression. Moreover, work-related stress is not so serious and of such a nature that ‘no reasonable man could be expected to endure it.’” *Id.*

Defendants argue that Hauser’s sex discrimination and hostile work environment claims fail because she never suffered an adverse employment action. *Id.* at 7-8. In regards to Hauser’s age discrimination claims, Defendants argue that Hauser has produced no evidence that the City discriminated against her based on age. *Id.* at 9. Accordingly, Defendants assert that summary judgment should be granted on Hauser’s age discrimination claims.

Defendants also argue that Hauser’s claims related to her suspension and the deduction from her pay are *res judicata* because Hauser had a full and fair opportunity to litigate both issues at prior proceedings. *Id.* at 10.

² Hauser cites *City of Los Angeles, Dept. of Water and Power v. Manhart* (1978), 98 S.Ct. 1370 in support of this proposition.

Defendants also re-assert that Davis is immune from suit because he is neither Hauser's employer nor her supervisor. *Id.* at 11. Additionally, Defendants argue that Hauser has failed to produce "one scintilla" of evidence showing Davis ever discriminated against Hauser and her claims against him should be dismissed.

According to Defendants, Hauser's claims are untimely because she failed to file her suit within the applicable time frame after denial letters from the OCRC (thirty days under O.R.C. § 4112.06(H)) and the EEOC (ninety days under 42 U.S.C.S. § 2000e(f)(1)). *Id.*

Finally, Defendants reply that Hauser's due process rights were not violated because she had no property right to the money and because she authorized in advance the deductions from her pay in to recoup excess in advances that were not refunded. *Id.* at 12.

II. Law and Analysis

A. Summary Judgment

Summary judgment is a procedural device that terminates litigation, avoiding a trial in cases where there is nothing to try. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138. Summary judgment is awarded with caution, construing evidence and resolving doubts in favor of the non-moving party. *Id.* Summary judgment is proper when: (1) no genuine issues of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence in the light most favorable to the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Inc.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. A material fact is any fact that would affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505 (interpreting analogous Federal Rule 56).

The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists as to an essential element of the claim(s) involved in the case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264. The moving party cannot satisfy this burden by simply making assertions that the non-moving party has no supporting evidence. *Id.* Rather, the moving party is required to specifically delineate the basis upon which summary judgment is sought, so the non-moving party has a

meaningful opportunity to respond. *State ex rel. Coulverson v. Parole Authority* (1991), 62 Ohio St.3d 12, 14, 577 N.E.2d 352, 353 (quoting *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 114, 526 N.E.2d 798, 800-801, fn 5). Additionally, the evidence used by the moving party must be of the type listed in *Civ.R. 56(C)*: pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact. *Dresher*, 75 Ohio St.3d at 293, see also *Civ.R. 56(C)*(listing acceptable types of evidence). If the moving party seeks summary judgment on the basis of an affirmative defense, the movant must demonstrate no genuine issue of material fact exists with respect to every element of the defense. *McCoy v. Maxwell*, Portage App. No. 2001-P-0132, 2002-Ohio-7157, ¶33.

If the moving party does not satisfy its initial burden, summary judgment is not proper. *Dresher*, 75 Ohio St.3d at 293. However, if the moving party satisfies its initial burden, the non-moving party cannot rest on allegations or denials in its pleadings, but has a reciprocal burden outlined in *Civ. R. 56(E)* to set forth specific evidence showing that a genuine issue of material fact exists. *Id.* It is the non-moving party's task to negate the movant's showing by establishing a triable issue. *State ex rel. Coulverson*, 62 Ohio St.3d at 14 (citing *Harless*, 54 Ohio St.2d at 66). The non-moving party bears the responsibility for producing evidence related to any issue for which it bears the burden of production at trial. *Wing v. Anchor Media, Ltd. Of Texas (1991)*, 59 Ohio St.3d 108, 570 N.E.2d 1095. The non-moving party may not rest upon unsworn or unsupported allegations in the pleadings. *Harless*, 54 Ohio St.2d at 66. If the non-moving party does not satisfy its burden or fails to respond, summary judgment, if appropriate, shall be entered against the non-moving party. *Id.*

Furthermore, the trial court has an absolute duty under *Civ.R. 56(C)* to review, read and consider all appropriate materials filed by the parties before ruling on a motion for summary judgment. *Murphy*, 65 Ohio St.3d at 359. When considering evidentiary material presented in favor of, or in opposition to, a summary judgment motion, the court does not weigh credibility. *Whiteside v. Conroy*, 2005-Ohio-5098, ¶75, Franklin App. No. 05AP-123. Summary judgment is not appropriate if it appears that a genuine issue of material fact is disputed or if, viewing the evidence in the light most favorable to the non-moving party, reasonable minds can reach different conclusions from the undisputed facts. *Hounshell v. American States Ins. Co.* (1981), 67 Ohio St.2d 427, 434, 424 N.E.2d 311.

B. Intentional Infliction of Emotional Distress

The party asserting a claim of Intentional Infliction of Emotional Distress must establish the following elements: "(1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; (2) that the actor's conduct was so extreme and outrageous as to go 'beyond all possible bounds of decency' and was such that it can be considered as 'utterly intolerable in a civilized community'; (3) that the actor's actions were the proximate cause of the plaintiff's psychic injury, and (4) that the mental anguish suffered by the plaintiff is serious and of a nature that 'no reasonable person could be expected to endure it.'" *Buckman-Peirson v. Brannon*, Montgomery App. No. 20320, 159 Ohio App.3d 12, 2004-Ohio-6074, 822 N.E.2d 830, ¶29 (citing *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 374-375, 453 N.E.2d 666). Serious emotional distress is more than hurt feelings or a trifle mental disturbance, it describes an emotional injury that is both severe and debilitating. *Id.* at ¶33 (citations omitted).

The Ohio Supreme Court, in *Yeager*, 6 Ohio St.3d at 374-375, described what constitutes extreme and outrageous conduct:

"It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort * * * Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' * * * The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."

The party claiming a severe and debilitating emotional injury is required to present some "guarantee of genuineness' in support of his or her claim." *Buckman-Peirson*, 2004-Ohio-6074 at ¶40. Plaintiff is required to provide some evidence beyond his or her own testimony that the plaintiff experienced an emotional injury due to the defendant's conduct. *Id.* at 56. The additional evidence can be expert testimony or "testimony of lay witnesses acquainted with the plaintiff to show significant changes that they have observed in the emotional or habitual makeup of the plaintiff." *Id.* at ¶¶40-41 (citations omitted).

To begin, Defendants' assertion that the grievance proceedings bar Hauser's claims under the doctrine of *res judicata* are unpersuasive. *Res judicata* bars "the relitigation of the same cause of action." *State ex rel. Davis v. Public Emples. Ret. Bd.* (2008), 120 Ohio St.3d 386, 2008-Ohio-6254, 899 N.E.2d 975, ¶27. Hauser did not litigate any of the claims asserted in this suit before the arbiter or the Chief of Police for the City. It is not clear that she could or should have addressed IIED, discrimination and due process at

either hearing, therefore, the final judgment in those proceedings does not bar her claims at this summary judgment stage.

Hauser's IIED claims fail under the second prong; that the defendant's conduct was so extreme and outrageous as to go beyond public decency and be intolerable in a civilized community. Here, the conduct complained of by Hauser is (1) Defendants told her that if she failed the K-9 training program she would have to pay for it; (2) Defendants disciplined Hauser for improper use of the City's email system and a city laptop; and (3) Defendants, after prior notice to Hauser, required Hauser to refund any amount of her per diem that she could not prove was used on food by receipts.

None of this conduct is so extreme and outrageous that the recitation of the facts would cause an average member of the community to resent the actors and exclaim "Outrageous!" As to the issue of per diem and receipts, Defendants informed Hauser ahead of time that she would have to provide receipts for her per diem and would have to refund any amount that she could not prove was spent on food. Hauser signed a waiver indicating that she understood she would have to refund any money that she could not prove was spent on food and consented to the money being deducted from her paycheck. In light of those facts, reasonable minds can come to but one conclusion, that the Defendants conduct was not extreme and outrageous such that it cannot be tolerated by civilized society. Essentially, Hauser argues that the Defendants conduct was outrageous because they disciplined her for failing to provide receipts for her per diem after informing her that she would be required to provide receipts. Hauser claims that no other officer was required to provide receipts for per diem until the new travel policy recently took effect. This argument misses the mark because prior to the new policy being implemented there was no requirement that officers provide receipts for per diem. The fact that Hauser was the "guinea pig" for the new travel policy is not outrageous because she was given ample notice of the policy before she left for K-9 training.

In regard to Hauser's suspension for improper use of the City's email system and laptop, Hauser argues that she asked Detective Roderick to send her the pornographic materials so she could show other officers attending training in an attempt to "one-up" the other officers. Hauser points to language in the arbitrator's decision reducing her suspension from three days to one in support of her argument. Specifically, the arbiter's conclusion that "the employer has failed to establish that the grievant (Hauser) violated the City's...[policies relating to] electronic mail exchange." *Response* at 10. However, this ignores

the arbitrator's ultimate finding that Hauser engaged in conduct of an unprofessional manner by even asking Roderick to send her such items. *See Arbitration Decision* (attached to Response) at pg. 18. Accordingly, it cannot be said that Defendants acted in an outrageous or extreme fashion by deciding to discipline Hauser when a neutral arbiter found her conduct inappropriate.

As it relates to Defendants alleged assertion that Hauser would be required to reimburse the City if she failed her K-9 training, Hauser has failed to establish a cognizable IIED claim. First, it is unclear if Hauser was in fact told she would be required to reimburse the City if she failed. Defendants repeatedly deny that such a condition was ever placed on Hauser. Moreover, the two individuals Hauser identifies as the source of the information both deny ever making such a statement. While this is a factual dispute, it is not a genuine issue of material fact because even if the City in fact told Hauser that she would have to pay for the course if she failed, such conduct is not outrageous. Employers often place conditions on employees before paying for training.

Additionally, assuming *arguendo* that Defendants' conduct was extreme and outrageous enough to support an IIED claim, Hauser's IIED claim would still fail. Even viewing the facts in the light most favorable to Hauser, she has failed to show that she suffered a mental injury that is both severe and debilitating. The only evidence produced by Hauser was the testimony of Dr. Meeker that Hauser's increased stress and need for medication "seemed to correlate with the timeline of the stressors she was experiencing at work." *Response* at 10. There is no evidence that the increase in Hauser's stress was significant enough to be a severe and debilitating mental injury.

C. Unlawful Discrimination – O.R.C. § 4112 *et seq.*, ADEA and Title VII

Pursuant to O.R.C. § 4112 *et seq.* it is unlawful for an employer to discriminate against any person based on a statutorily protected classification³ with regards to hiring, tenure, terms, conditions or privileges of employment. *Hapner v. Tuesday Morning Inc.*, Montgomery App. No. 19395, 2003-Ohio-781, ¶12. The Ohio Supreme Court has held that, when interpreting O.R.C. § 4112 *et seq.*, case law interpreting analogous federal statutes is generally applicable. *Plumbers & Steamfitters Joint Apprenticeship Comm. V. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 196, 421 N.E.2d 128. State discrimination claims brought under

³ The statutorily protected classifications are "race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person."

O.R.C. § 4112 *et seq* and federal claims brought under Title VII, 42 U.S.C.S. § 2000e *et seq* or the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C.S. § 621 *et seq* are analyzed under the framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed.2d 688. See *Coryell v. Bank One Trust Co.* (2004), 101 Ohio St.3d 175, 2004-Ohio-723, 803 N.E.2d 781, ¶9-10

Under the *McDonnell Douglas* test the plaintiff bears the burden of establishing a prima facie case of discrimination by either direct or circumstantial evidence. *Shepard v. Griffin Services, Inc.*, Montgomery App. No. 19032, 2002-Ohio-2283, ¶17 (citation omitted); Direct evidence of discrimination is any evidence capable of proving discrimination “‘occurred without requiring further inferences.’” *McFee v. Nursing Care Mgmt. of Am., Inc.* (2010), 126 Ohio St.3d 183, 2010-Ohio-2744, 931 N.E.2d 1069, ¶34 (quoting *Reeves v. Swift Transp. Co., Inc.*, 446 F.3d 637, 640). Moreover, the plaintiff must show a direct link between the adverse employment action in question and the evidence of discrimination. *Shepard*, 2002-Ohio-2283, ¶18 (citations omitted). Due to the high standard of proof, it is a rare situation in which a plaintiff can produce direct evidence of discrimination. *Id.* (citations omitted). On the other hand, circumstantial evidence creates a presumption that a statutorily protected classification was a factor in the defendant’s decision making process. *Id.* at ¶20 (citations omitted).

To establish a prima facie case of discrimination using circumstantial evidence, the plaintiff must show: “(1) that she is a member of the protected class; (2) that she was subject to an adverse employment action; (3) that she was qualified for the position; and (4) that someone outside the class either replaced her or was treated more favorably.” *Id.* (citations omitted). If the plaintiff can establish a prima facie case of discrimination, the burden shifts to the defendant to articulate a justification for the adverse employment action that is legitimate and non-discriminatory. *Id.* (citation omitted). Because the plaintiff bears the burden of persuasion in discrimination cases, the defendant does not have to prove that the articulated justification was the only motivating factor; defendant just has to show its decision was not motivated by a statutorily protected classification. *Id.* (citations omitted). Once the defendant states a non-discriminatory reason for the adverse employment action, the burden shifts back to the plaintiff to show by a preponderance of the evidence that the articulated reason was mere pretext. *Id.* (citation omitted).

There are three ways to establish pretext: "(1) by proof that the reason proffered by the employer has no basis in fact; (2) that the reason did not actually motivate the [disparate treatment]; or (3) that the reason was insufficient to motivate the [disparate treatment]." *Id.* at ¶29 (citation omitted).

1. Discrimination Claims under Title VII, ADEA and 42 U.S.C.S. § 12111 et seq

As an initial matter, there is a dispute between the parties regarding the timeliness of Hauser's federal discrimination claims based on age, sex/gender and disability. To begin, a plaintiff cannot file suit under Title VII without a "right-to-sue" letter from the EEOC. *Temple v. City of Dayton*, Montgomery App. No. 20211, 2005-Ohio-57, ¶55. Moreover, pursuant to 42 U.S.C.S. § 2000e(f)(1), the plaintiff must file suit within 90 days of receiving a "right-to-sue" letter from the EEOC. Hauser attached a "right-to-sue" letter to her amended complaint filed December 17, 2010. The "right-to-sue" letter is dated March 24, 2009 and specifically states "Your lawsuit must be filed WITHIN (90) DAYS of your receipt of this notice; or your right to sue based on this charge will be lost." (Emphasis in original). Additionally, the letter instructed Hauser to keep a record of the date that she received the letter because the 90 day time period begins to run once the complainant receives the letter. Moreover, the EEOC "right-to-sue" letter instructed Hauser that "in order to avoid any question that you did not act in a timely manner, it is prudent that your suit be filed within 90 days of the date of this Notice was *mailed* to you (as indicated where the Notice is signed) or the date of the postmark, if later." However, Hauser does not recall the date she received the letter from the EEOC and did not record it. *See* Hauser Depo. 12-13. Hauser's original complaint was filed on June 29, 2009, 97 days after the "right-to-sue" letter was mailed. The EEOC letter provides several ways for a complainant to ensure that his or her claim is not subject to timing issues: recording the receipt date, saving the envelope/postmark date, or filing a complaint with 90 days of the date the letter was mailed. Hauser did none of these things. While it is difficult to imagine Hauser's EEOC "right-to-sue" letter taking seven days to reach her when it was mailed from Indianapolis, Indiana (roughly 120 miles away from Dayton, Ohio), this Court is instructed to construe evidence and resolve doubts in favor of the non-moving party. Accordingly, absent direct evidence that Hauser received her "right-to-sue" letter from the EEOC more than 90 days before filing her complaint on June 29, 2009, summary judgment on the issue is improper. Rather, the issue should be resolved by the factfinder, in this case a jury.

Additionally, Defendants argument that Hauser's state claims are barred by O.R.C. § 4112 is contrary to the very case Defendants cite in support of their argument. Specifically, Defendants state that the under *Toliver v. Montgomery Cty Dept. of Job and Fam. Serv.*, Montgomery App. No. 22979, 2009-Ohio-3521, "[u]nder R.C. § 4112.06(H) failure to obtain judicial review of such a denial [from the OCRC] within thirty days precludes a trial court from hearing the case." *Reply* at 11. While the Defendants' assertion is correct in regards to appeals from OCRC decision, the *Toliver* Court held that "R.C. 4112.99 provides an independent remedy, and actions under the statute are not barred by the filing of an unlawful discriminatory practice charge with OCRC." *Id* at ¶38. The *Toliver* Court also noted that the plaintiff was "correct in contending that she may have been able to file a civil action...." *Id.* at ¶37. Accordingly, Hauser's suit is not barred by O.R.C. § 4112.06(H) because she is not challenging the OCRC's denial of her unlawful discrimination claim, but is bringing a civil action for a violation of chapter 4112 *et seq.*

2. Age Discrimination – O.R.C. § 4112.02(N), § 4112.14 *et seq.*, § 4112.99 and ADEA

Age based discrimination claims can be asserted under three provisions of O.R.C. § 4112 *et seq.*: § 4112.02(N), § 4112.14 and § 4112.99. *Meyers v. UPS, Inc.* (2009), 122 Ohio St.3d 104, 2009-Ohio-2463, 9090 N.E.2d 106, ¶30. Pursuant to O.R.C. § 4112.02(N) an individual can enforce his or her rights relative to age discrimination "by instituting a civil action, within one hundred eighty days after the alleged unlawful discriminatory practice occurred." O.R.C. § 4112.14 allows "[a]ny person aged forty or older who is discriminated against in any job opening or discharged without just cause by an employer...[to] institute a civil action against the employer." However, the two statutes are mutually exclusive because each provision bars an individual from utilizing any other enforcement provision contained in O.R.C. § 4112 *et seq.* See *O.R.C. § 4112.08*. On the other hand, O.R.C. § 4112.99 does not deal exclusively with age discrimination, but functions as a general gap-filling provision that allows a plaintiff to initiate a civil action based on any violation of O.R.C. § 4112 *et seq.* *Id.* at ¶28. Recently, the Ohio Supreme Court addressed the interplay between the three provisions, holding:

"[There are] two provisions in R.C. Chapter 4112 that specifically recognize court-filed actions for discrimination on the basis of age: R.C. 4112.02(N) and 4112.14... 'R.C. 4112.99 is the more general statute. Consequently, R.C. 4112.99 prevails over R.C. 4112.02(N) [and 4112.14] only if there is a clear manifestation of legislative intent. Since the General Assembly has not shown such an intent, the specific provision[s], R.C. 4112.02(N) [and

4112.14], must be the only provision[s] applied...The only provision[s] in R.C. Chapter 4112 that recognize [] discrimination on the basis of age-[are] R.C. 4112.02 [and 4112.14].’ Thus, even if a plaintiff states reliance on R.C. 4112.99, he or she is ‘referring to the form[s] of age-based employment discrimination identified by R.C. 4112.02 [and 4112.14].’”

Id. at ¶30 (citing *Bellian v. Bicron Corp.* (1994), 69 Ohio St.3d 517, 519, 1994-Ohio-339, 634 N.E.2d 608. The *Meyers* Court went on to hold that any age discrimination claim filed under O.R.C. § 4112 *et seq* is subject to the provisions contained in § 4112.02 and § 4112.14. *Id.* at ¶32.

Defendants argue that Hauser’s age discrimination claims under O.R.C. § 4112 *et seq* are time barred because Hauser failed to file suit within 180 days of the alleged discriminatory conduct. Hauser argues that her claims are not subject to the 180 statute of limitation contained in O.R.C. § 4112.02(N) because she filed her claim under the entire chapter, not a specific provision. Hauser argues that her age discrimination claims are subject to a six year statute of limitations under O.R.C. § 4112.99. This argument is directly contrary to the *Meyers* Court’s holding. Under *Meyers* and *Bellian*, any civil action based on age discrimination brought under O.R.C. § 4112.99, the gap-filling provision, is still subject to the 180 day statute of limitations contained in § 4112.02(N). Accordingly, Hauser’s age discrimination claim is untimely. Hauser alleges that Defendants discriminated against her based on age by subjecting her to the travel policy requiring receipts for the officer’s use of per diem, and not subjecting other officers to the same policy. It is undisputed that Hauser attended K-9 training from March 2007 to June 2007 and was informed that she would be required to refund the City \$3,058.62 on June 18, 2007. Hauser’s suit was filed on June 29, 2009, more than two years later. Even under Hauser’s theory of the case her claims are untimely. Hauser argues that the discrimination occurred on March 27, 2008, when she was officially ordered to reimburse the city. On March 31, 2008 Hauser filed her complaint with the EEOC for age discrimination, and that tolls the statutory time limits. However, the OCRC sent Hauser a denial letter, meaning they had completed investigating her claim and were not going to pursue it further, on January 9, 2009. That is still more than 180 days before Hauser filed her suit. It follows that Hauser’s age discrimination claim brought under O.R.C. § 4112.99 is barred by the applicable statute of limitations and summary judgment in favor of the Defendants is proper.

Assuming *arguendo* that Hauser’s age discrimination claim was in fact filed under O.R.C. § 4112.14, summary judgment is still proper. The Ohio Supreme Court set forth a modified *McDonnell Douglas* test for age discrimination claims brought under O.R.C. § 4112.14(A) in *Coryell, supra*, 101-Ohio-723 at ¶20. To

establish a prima facie claim under § 4112.14, the plaintiff must show that “he or she (1) was a member of the statutorily protected class, (2) was discharged, (3) was qualified for the position, and (4) was replaced by, or the discharge permitted the retention of, a person of substantially younger age.” *Id.*; see also *Davis v. Goodwill Industries of the Miami Valley*, Montgomery App. No. 23238, 2009-Ohio-6133, ¶41 (adopting the *Coryell* standard in a recent age discrimination case). In regards to Hauser’s ADEA claim, the standard set forth in *Coryell* was adopted from the United States Supreme Court opinion in *O’Conner v. Consol. Coin Caterers Corp.* (1996), 517 U.S. 308, 312, 116 S. Ct. 1307. It follows that Hauser’s ADEA claim and § 4112.14(A) claim should be resolved similarly.

Here, Hauser has not been discharged, or demoted, or denied a job opening (the other possible grounds for liability under § 4112.14(A)). Accordingly, Hauser cannot assert a claim under O.R.C. § 4112.14(A) and summary judgment in favor of Defendants is proper. Moreover, the only comparable employee Hauser points to is Officer Kevin Bollinger, a male officer who is over fifty three (eight years older than Hauser) who was not asked to provide receipts for his per diem. Eight years is a substantial age difference, but the other employee has to be substantially *younger*, not older: Hauser is 45, Bollinger is 53. See *Affidavit of Anita Hauser and Affidavit of Kevin Bollinger* (attached to Response). It follows that Hauser cannot establish a prima facie case of age discrimination and summary judgment is proper.

Hauser’s ADEA claim fails for the same reason as her O.R.C. § 4112.14(A) claim. Hauser was not discharged or demoted, and the actions taken against her did not permit the retention of a person substantially younger. Accordingly, summary judgment on Hauser’s ADEA claim is also appropriate.

3. Sex Discrimination – O.R.C. § 4112 et seq and Title VII

Hauser’s state and federal sex discrimination claims are analyzed under the standard *McDonnell Douglas* test. *Shepard*, 2002-Ohio-2283 at ¶20. One actionable form of sex discrimination under O.R.C. § 4112 et seq is disparate treatment of an employee in the terms and conditions of employment based on a statutorily protected classification. *Id.* at ¶24. To establish a prima facie case of discrimination based on the terms and conditions of employment the plaintiff must demonstrate that other employees outside the protected classification “were treated more favorably [and] were similarly situated [to the plaintiff] in all relevant respects.” *Id.* To be similarly situated, the other employees and the plaintiff ““must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without

such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Hapner*, 2003-Ohio-781, ¶

Additionally, sex discrimination claims can be based on the creation of a hostile work environment. *Edwards v. Dubruiel*, Greene App. No. 2002 CA 50, 2002-Ohio-7093, ¶16. "According to Ohio law, there are five elements of a claim of sexual harassment/hostile work environment: '(1) the employee was a member of the protected class; (2) the employee was subjected to unwelcome harassment; (3) the harassment complained of was based upon sex; (4) the harassment had the purpose or effect of unreasonably interfering with the employee's work performance or creating an intimidating hostile, or offensive work environment; and (5) the existence of respondeat superior liability.'" *Id.* (quoting *Anania v. Daubenspeck Chiropractic* (1998), 129 Ohio App.3d 516, 521, 718 N.E.2d 480). A hostile work environment is determined by weighing "(1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance." *Id.* at ¶28 (citing *Harris v. Forklift Systems, Inc.* (1993), 510 U.S. 17, 23-24, 126 L. Ed. 2d 295, 114 S. Ct. 367).

Here, Hauser contends that she was the victim of sex discrimination because she was treated differently than similarly situated male employees. Specifically, Hauser points out that she was subjected to discipline under employment policies that were not applied to male co-workers. Hauser has shown that she is a member of a statutorily protected class (sex/gender under O.R.C. § 4112.02(A)). However, based on the evidence produced by the parties, reasonable minds could disagree whether Hauser suffered an adverse employment action in regards to the terms and conditions of her employment (the second prong of the *McDonnell Douglas* test), whether Hauser was qualified for the position (the third prong of the *McDonnell Douglas* test), and whether employees outside the protected classification were treated more favorably (the fourth prong of the *McDonnell Douglas* test). Accordingly, a genuine issue of material fact exists regarding Hauser's sex discrimination claim under O.R.C. § 4112.02(A) and summary judgment is not appropriate.

Additionally, Hauser's hostile work environment claim is better addressed by a jury because it requires the weighing of evidence, witness testimony and determining the severity of the conduct complained of. Accordingly, summary judgment on Hauser's sex discrimination claim based on a hostile work environment is not appropriate.

Because Hauser's Title VII and § 4112.02(A) sex discrimination claims are analyzed under the same standard, it follows that since Hauser's state claim survives summary judgment under the second, third and fourth prong of the *McDonnell Douglas* test then her Title VII claims survives as well.

D. Substantive and Procedural Due Process

At a minimum, due process requires notice and an opportunity to be heard before an individual is deprived of life, liberty or property by adjudication. *State ex rel. Ballard v. O'Donnell* (1990), 50 Ohio St.3d 182, 183, 553 N.E.2d 650. Moreover, due process requires that notice be reasonably calculated to appraise any interest parties of the pending action under all circumstances and provide interested parties the opportunity to present objections. *In re Foreclosure of Liens* (1980), 62 Ohio St.2d 333, 405 N.E.2d 1030, paragraph one of the syllabus.

Here, Hauser had a hearing regarding the deduction from her pay as it relates to her unsubstantiated per diem. There is no dispute that Hauser had a hearing regarding the paycheck deductions and that she had notice of the hearing. *Hauser Depo.* pg 59-63. That is all that was required to comply with due process. Hauser argues that Defendants violated her due process rights by taking money from her paycheck without a court order or consent. However, Hauser signed the expense report that specifically stated "I authorize in advance deductions from my paycheck." Accordingly, the only conclusion that reasonable minds can reach is that Hauser consented to the paycheck deductions. Moreover, Hauser has presented no evidence of legal authority that due process requires a court order before an employer can deduct money from an employee's paycheck when the employee has consented. Defendants have established that there is no genuine issue of material fact regarding Hauser's due process claims because she received notice and an opportunity to be heard before deductions were made from her paycheck. Hauser has failed to meet her reciprocal burden to negate the moving party's showing and establish a genuine issue for trial. Accordingly, summary judgment is proper on Hauser's due process claim.

E. Immunity for Major Davis

Defendants assert that Davis is immune from suit under O.R.C. § 2744.03(A)(6), 42 U.S.C.S. § 2000e(b) and *Campolieti*. *Reply* at 10. Hauser contends that Davis is not immune from suit under the Ohio Supreme Court precedent established in *Genaro v. Cent. Transp. Inc.* (1999), 84 Ohio St.3d 293, which held

that a supervisor or manager may be held jointly and severally liable for discriminatory conduct of the supervisor or manager. *Id.* at 300. Defendants argue that Davis is neither Hauser's supervisor nor manager and is immune from suit. Additionally, Defendants argue that, even if Davis is not immune, Hauser has failed to provide any evidence against Davis on any of her claims. Hauser contends that Davis is the supervisor overseeing her division.

Here, the Court finds that there is a genuine issue of material fact regarding Davis's status as a manager or supervisor and whether Davis discriminated against Hauser based on sex. According to Hauser, Davis denied Hauser "SkyNarc" training and approved such training for Bollinger multiple times. Hauser contends that sex was used as a discriminatory factor in Davis's decision-making. Accordingly, a genuine issue of material fact exists regarding Davis's liability as it relates to Hauser's sex discrimination and hostile work environment and summary judgment on the issue is not appropriate.

III. Conclusion

Based on the foregoing law and analysis, Defendants' Motion is GRANTED as it relates to Hauser's HIRED, age discrimination and due process claims. Defendants' Motion is DENIED as it relates to Hauser's sex discrimination claims. Defendants did not seek summary judgment on Hauser's violation of the Ohio public records law and spoliation of evidence claims.

SO ORDERED:

JUDGE MARY WISEMAN

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General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Case Title: ANITA HAUSER vs CITY OF DAYTON POLICE DEPT
Case Number: 2009 CV 05371
Type: Decision

So Ordered

A handwritten signature in cursive script that reads "Mary Wiseman".

Mary Wiseman

Electronically signed by mwiseman on 2011-12-07 page 22 of 22

Baldwin's Ohio Revised Code Annotated
Title XXVII. Courts--General Provisions--Special Remedies
Chapter 2744. Political Subdivision Tort Liability (Refs & Annos)

R.C. § 2744.03

2744.03 Defenses and immunities

Currentness

(A) In a civil action brought against a political subdivision or 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 following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, 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 the employee's 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;

(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.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

CREDIT(S)

(2002 S 106, eff. 4-9-03; 2001 S 108, § 2.03, eff. 1-1-02; 2001 S 108, § 2.01, eff. 7-6-01; 2000 S 179, § 3, eff. 1-1-02; 1997 H 215, eff. 6-30-97; 1996 H 350, eff. 1-27-97 (*State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999)); 1994 S 221, eff. 9-28-94; 1986 S 297, eff. 4-30-86; 1985 H 176)

CONSTITUTIONALITY

"Ohio Revised Code § 2744" was held on 12-16-2003 to violate the right to trial by jury, under Ohio Constitution Article 1, § 5, and the right to a remedy, under Ohio Constitution Article 1, § 16. The ruling was by the U.S. District Court for the Southern District of Ohio, deciding as it believes the Supreme Court of Ohio would have, in the case of *Kammeyer v City of Sharonville*, 311 F.Supp.2d 653 (SD Ohio 2003). The Court also observed that the state is sovereign but political subdivisions are not.

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Current through 2013 File 11 of the 130th GA (2013-2014).

End of Document

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Baldwin's Ohio Revised Code Annotated
Title XII. Labor and Industry
Chapter 4112. Civil Rights Commission (Refs & Annos)
General Provisions

R.C. § 4112.01

4112.01 Definitions

Effective: October 16, 2009
Currentness

(A) As used in this chapter:

- (1) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. "Person" also includes, but is not limited to, any owner, lessor, assignor, builder, manager, broker, salesperson, appraiser, agent, employee, lending institution, and the state and all political subdivisions, authorities, agencies, boards, and commissions of the state.
- (2) "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.
- (3) "Employee" means an individual employed by any employer but does not include any individual employed in the domestic service of any person.
- (4) "Labor organization" includes any organization that exists, in whole or in part, for the purpose of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or other mutual aid or protection in relation to employment.
- (5) "Employment agency" includes any person regularly undertaking, with or without compensation, to procure opportunities to work or to procure, recruit, refer, or place employees.
- (6) "Commission" means the Ohio civil rights commission created by section 4112.03 of the Revised Code.
- (7) "Discriminate" includes segregate or separate.
- (8) "Unlawful discriminatory practice" means any act prohibited by section 4112.02, 4112.021, or 4112.022 of the Revised Code.
- (9) "Place of public accommodation" means any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available to the public.

(10) "Housing accommodations" includes any building or structure, or portion of a building or structure, that is used or occupied or is intended, arranged, or designed to be used or occupied as the home residence, dwelling, dwelling unit, or sleeping place of one or more individuals, groups, or families whether or not living independently of each other; and any vacant land offered for sale or lease. "Housing accommodations" also includes any housing accommodations held or offered for sale or rent by a real estate broker, salesperson, or agent, by any other person pursuant to authorization of the owner, by the owner, or by the owner's legal representative.

(11) "Restrictive covenant" means any specification limiting the transfer, rental, lease, or other use of any housing accommodations because of race, color, religion, sex, military status, familial status, national origin, disability, or ancestry, or any limitation based upon affiliation with or approval by any person, directly or indirectly, employing race, color, religion, sex, military status, familial status, national origin, disability, or ancestry as a condition of affiliation or approval.

(12) "Burial lot" means any lot for the burial of deceased persons within any public burial ground or cemetery, including, but not limited to, cemeteries owned and operated by municipal corporations, townships, or companies or associations incorporated for cemetery purposes.

(13) "Disability" means a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

(14) Except as otherwise provided in section 4112.021 of the Revised Code, "age" means at least forty years old.

(15) "Familial status" means either of the following:

(a) One or more individuals who are under eighteen years of age and who are domiciled with a parent or guardian having legal custody of the individual or domiciled, with the written permission of the parent or guardian having legal custody, with a designee of the parent or guardian;

(b) Any person who is pregnant or in the process of securing legal custody of any individual who is under eighteen years of age.

(16)(a) Except as provided in division (A)(16)(b) of this section, "physical or mental impairment" includes any of the following:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine;

(ii) Any mental or psychological disorder, including, but not limited to, mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(iii) Diseases and conditions, including, but not limited to, orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, human immunodeficiency virus infection, mental retardation, emotional illness, drug addiction, and alcoholism.

(b) "Physical or mental impairment" does not include any of the following:

(i) Homosexuality and bisexuality;

(ii) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(iii) Compulsive gambling, kleptomania, or pyromania;

(iv) Psychoactive substance use disorders resulting from the current illegal use of a controlled substance or the current use of alcoholic beverages.

(17) "Dwelling unit" means a single unit of residence for a family of one or more persons.

(18) "Common use areas" means rooms, spaces, or elements inside or outside a building that are made available for the use of residents of the building or their guests, and includes, but is not limited to, hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas, and passageways among and between buildings.

(19) "Public use areas" means interior or exterior rooms or spaces of a privately or publicly owned building that are made available to the general public.

(20) "Controlled substance" has the same meaning as in section 3719.01 of the Revised Code.

(21) "Disabled tenant" means a tenant or prospective tenant who is a person with a disability.

(22) "Military status" means a person's status in "service in the uniformed services" as defined in section 5923.05 of the Revised Code.

(23) "Aggrieved person" includes both of the following:

(a) Any person who claims to have been injured by any unlawful discriminatory practice described in division (H) of section 4112.02 of the Revised Code;

(b) Any person who believes that the person will be injured by, any unlawful discriminatory practice described in division (H) of section 4112.02 of the Revised Code that is about to occur.

(B) For the purposes of divisions (A) to (F) of section 4112.02 of the Revised Code, the terms "because of sex" and "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions. Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in division (B) of section 4111.17 of the Revised Code shall be interpreted to permit otherwise. This division shall not be construed to require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or except where medical complications have arisen from the abortion, provided that nothing in this division precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

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Baldwin's Ohio Revised Code Annotated
Title XLI. Labor and Industry
Chapter 4112. Civil Rights Commission (Refs & Annos)
General Provisions

R.C. § 4112.02

4112.02 Unlawful discriminatory practices

Effective: March 24, 2008
Currentness

It shall be an unlawful discriminatory practice:

(A) 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.

(B) For an employment agency or personnel placement service, because of race, color, religion, sex, military status, national origin, disability, age, or ancestry, to do any of the following:

- (1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate against any person;
- (2) Comply with a request from an employer for referral of applicants for employment if the request directly or indirectly indicates that the employer fails to comply with the provisions of sections 4112.01 to 4112.07 of the Revised Code.

(C) For any labor organization to do any of the following:

- (1) Limit or classify its membership on the basis of race, color, religion, sex, military status, national origin, disability, age, or ancestry;
- (2) Discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions of any person as an employee because of race, color, religion, sex, military status, national origin, disability, age, or ancestry.

(D) For any employer, labor organization, or joint labor-management committee controlling apprentice training programs to discriminate against any person because of race, color, religion, sex, military status, national origin, disability, or ancestry in admission to, or employment in, any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, personnel placement service, or labor organization, prior to employment or admission to membership, to do any of the following:

- (1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, military status, national origin, disability, age, or ancestry of an applicant for employment or membership;
 - (2) Make or keep a record of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any applicant for employment or membership;
 - (3) Use any form of application for employment, or personnel or membership blank, seeking to elicit information regarding race, color, religion, sex, military status, national origin, disability, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any department or agency of that government, may require an employee or applicant for employment to furnish documentary proof of United States citizenship and may retain that proof in the employer's personnel records and may use photographic or fingerprint identification for security purposes;
 - (4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, sex, military status, national origin, disability, age, or ancestry;
 - (5) Announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of that group;
 - (6) Utilize in the recruitment or hiring of persons any employment agency, personnel placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, military status, national origin, disability, age, or ancestry.
- (F) For any person seeking employment to publish or cause to be published any advertisement that specifies or in any manner indicates that person's race, color, religion, sex, military status, national origin, disability, age, or ancestry, or expresses a limitation or preference as to the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any prospective employer.
- (G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, military status, national origin, disability, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.
- (H) For any person to do any of the following:
- (1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin;

(2) Represent to any person that housing accommodations are not available for inspection, sale, or rental, when in fact they are available, because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin;

(3) Discriminate against any person in the making or purchasing of loans or the provision of other financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, or any person in the making or purchasing of loans or the provision of other financial assistance that is secured by residential real estate, because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located, provided that the person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to the person's principal business and not only as a part of the purchase price of an owner-occupied residence the person is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing accommodations or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations, including the sale of fire, extended coverage, or homeowners insurance, because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member of a married couple;

(7) Print, publish, or circulate any statement or advertisement, or make or cause to be made any statement or advertisement, relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing accommodations, or relating to the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, that indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, military status, familial status, ancestry, disability, or national origin, or an intention to make any such preference, limitation, specification, or discrimination;

(8) Except as otherwise provided in division (H)(8) or (17) of this section, make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, military status, familial status, ancestry, disability, or national origin in connection with the sale or lease of any housing accommodations or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations. Any person may make inquiries, and make and keep records, concerning race, color, religion, sex, military status, familial status, ancestry, disability, or national origin for the purpose of monitoring compliance with this chapter.

(9) Include in any transfer, rental, or lease of housing accommodations any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant;

(10) Induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, sexual, military status, familial status, or ethnic composition of the block, neighborhood, or other area in which the housing accommodations are located, or induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that the presence or anticipated presence of persons of any race, color, religion, sex, military status, familial status, ancestry, disability, or national origin, in the block, neighborhood, or other area will or may have results including, but not limited to, the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, military status, familial status, or ethnic composition of the block, neighborhood, or other area;

(c) An increase in criminal or antisocial behavior in the block, neighborhood, or other area;

(d) A decline in the quality of the schools serving the block, neighborhood, or other area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or discriminate against any person in the terms or conditions of that access, membership, or participation, on account of race, color, religion, sex, military status, familial status, national origin, disability, or ancestry;

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by division (H) of this section;

(13) Discourage or attempt to discourage the purchase by a prospective purchaser of housing accommodations, by representing that any block, neighborhood, or other area has undergone or might undergo a change with respect to its religious, racial, sexual, military status, familial status, or ethnic composition;

(14) Refuse to sell, transfer, assign, rent, lease, sublease, or finance, or otherwise deny or withhold, a burial lot from any person because of the race, color, sex, military status, familial status, age, ancestry, disability, or national origin of any prospective owner or user of the lot;

(15) Discriminate in the sale or rental of, or otherwise make unavailable or deny, housing accommodations to any buyer or renter because of a disability of any of the following:

(a) The buyer or renter;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(15)(b) of this section.

(16) Discriminate in the terms, conditions, or privileges of the sale or rental of housing accommodations to any person or in the provision of services or facilities to any person in connection with the housing accommodations because of a disability of any of the following:

(a) That person;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(16)(b) of this section.

(17) Except as otherwise provided in division (H)(17) of this section, make an inquiry to determine whether an applicant for the sale or rental of housing accommodations, a person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available, or any individual associated with that person has a disability, or make an inquiry to determine the nature or severity of a disability of the applicant or such a person or individual. The following inquiries may be made of all applicants for the sale or rental of housing accommodations, regardless of whether they have disabilities:

(a) An inquiry into an applicant's ability to meet the requirements of ownership or tenancy;

(b) An inquiry to determine whether an applicant is qualified for housing accommodations available only to persons with disabilities or persons with a particular type of disability;

(c) An inquiry to determine whether an applicant is qualified for a priority available to persons with disabilities or persons with a particular type of disability;

(d) An inquiry to determine whether an applicant currently uses a controlled substance in violation of section 2925.11 of the Revised Code or a substantively comparable municipal ordinance;

(e) An inquiry to determine whether an applicant at any time has been convicted of or pleaded guilty to any offense, an element of which is the illegal sale, offer to sell, cultivation, manufacture, other production, shipment, transportation, delivery, or other distribution of a controlled substance.

(18)(a) Refuse to permit, at the expense of a person with a disability, reasonable modifications of existing housing accommodations that are occupied or to be occupied by the person with a disability, if the modifications may be necessary to afford the person with a disability full enjoyment of the housing accommodations. This division does not preclude a landlord of housing accommodations that are rented or to be rented to a disabled tenant from conditioning permission for a proposed modification upon the disabled tenant's doing one or more of the following:

(i) Providing a reasonable description of the proposed modification and reasonable assurances that the proposed modification will be made in a workerlike manner and that any required building permits will be obtained prior to the commencement of the proposed modification;

(ii) Agreeing to restore at the end of the tenancy the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if it is reasonable for the landlord to condition permission for the proposed modification upon the agreement;

(iii) Paying into an interest-bearing escrow account that is in the landlord's name, over a reasonable period of time, a reasonable amount of money not to exceed the projected costs at the end of the tenancy of the restoration of the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if the landlord finds the account reasonably necessary to ensure the availability of funds for the restoration work. The interest earned in connection with an escrow account described in this division shall accrue to the benefit of the disabled tenant who makes payments into the account.

(b) A landlord shall not condition permission for a proposed modification upon a disabled tenant's payment of a security deposit that exceeds the customarily required security deposit of all tenants of the particular housing accommodations.

(19) Refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit, including associated public and common use areas;

(20) Fail to comply with the standards and rules adopted under division (A) of section 3781.111 of the Revised Code;

(21) Discriminate against any person in the selling, brokering, or appraising of real property because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin;

(22) Fail to design and construct covered multifamily dwellings for first occupancy on or after June 30, 1992, in accordance with the following conditions:

(a) The dwellings shall have at least one building entrance on an accessible route, unless it is impractical to do so because of the terrain or unusual characteristics of the site.

(b) With respect to dwellings that have a building entrance on an accessible route, all of the following apply:

(i) The public use areas and common use areas of the dwellings shall be readily accessible to and usable by persons with a disability.

(ii) All the doors designed to allow passage into and within all premises shall be sufficiently wide to allow passage by persons with a disability who are in wheelchairs.

(iii) All premises within covered multifamily dwelling units shall contain an accessible route into and through the dwelling; all light switches, electrical outlets, thermostats, and other environmental controls within such units shall be in accessible locations; the bathroom walls within such units shall contain reinforcements to allow later installation of grab bars; and the kitchens and bathrooms within such units shall be designed and constructed in a manner that enables an individual in a wheelchair to maneuver about such rooms.

For purposes of division (H)(22) of this section, "covered multifamily dwellings" means buildings consisting of four or more units if such buildings have one or more elevators and ground floor units in other buildings consisting of four or more units.

(I) 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.

(J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(K)(1) Nothing in division (H) of this section shall bar any religious or denominational institution or organization, or any nonprofit charitable or educational organization that is operated, supervised, or controlled by or in connection with a religious organization, from limiting the sale, rental, or occupancy of housing accommodations that it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference in the sale, rental, or occupancy of such housing accommodations to persons of the same religion, unless membership in the religion is restricted on account of race, color, or national origin.

(2) Nothing in division (H) of this section shall bar any bona fide private or fraternal organization that, incidental to its primary purpose, owns or operates lodgings for other than a commercial purpose, from limiting the rental or occupancy of the lodgings to its members or from giving preference to its members.

(3) Nothing in division (H) of this section limits the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations. Nothing in that division prohibits the owners or managers of housing accommodations from implementing reasonable occupancy standards based on the number and size of sleeping areas or bedrooms and the overall size of a dwelling unit, provided that the standards are not implemented to circumvent the purposes of this chapter and are formulated, implemented, and interpreted in a manner consistent with this chapter and any applicable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations.

(4) Nothing in division (H) of this section requires that housing accommodations be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

(5) Nothing in division (H) of this section pertaining to discrimination on the basis of familial status shall be construed to apply to any of the following:

(a) Housing accommodations provided under any state or federal program that have been determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended, to be specifically designed and operated to assist elderly persons;

(b) Housing accommodations intended for and solely occupied by persons who are sixty-two years of age or older;

(c) Housing accommodations intended and operated for occupancy by at least one person who is fifty-five years of age or older per unit, as determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended.

(L) Nothing in divisions (A) to (E) of this section shall be construed to require a person with a disability to be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the person with a disability, other employees, the general public, or the facilities in which the work is to be performed, or to require the employment or training of a person with a disability in a job that requires the person with a disability routinely to undertake any task, the performance of which is substantially and inherently impaired by the person's disability.

(M) Nothing in divisions (H)(1) to (18) of this section shall be construed to require any person selling or renting property to modify the property in any way or to exercise a higher degree of care for a person with a disability, to relieve any person with a disability of any obligation generally imposed on all persons regardless of disability in a written lease, rental agreement, or contract of purchase or sale, or to forbid distinctions based on the inability to fulfill the terms and conditions, including financial obligations, of the lease, agreement, or contract.

(N) An aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within one hundred eighty days after the alleged unlawful discriminatory practice occurred, in any court with jurisdiction for any legal or equitable relief that will effectuate the individual's rights.

A person who files a civil action under this division is barred, with respect to the practices complained of, from instituting a civil action under section 4112.14 of the Revised Code and from filing a charge with the commission under section 4112.05 of the Revised Code.

(O) With regard to age, it shall not be an unlawful discriminatory practice and it shall not constitute a violation of division (A) of section 4112.14 of the Revised Code for any employer, employment agency, joint labor-management committee controlling apprenticeship training programs, or labor organization to do any of the following:

(1) Establish bona fide employment qualifications reasonably related to the particular business or occupation that may include standards for skill, aptitude, physical capability, intelligence, education, maturation, and experience;

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, including, but not limited to, a retirement, pension, or insurance plan, that is not a subterfuge to evade the purposes of this section. However, no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual, because of the individual's age except as provided for in the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 623, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 623, as amended.

(3) Retire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, of the employer of the employee, which equals, in the aggregate, at least forty-four thousand dollars, in accordance with the conditions of the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 631, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 631, as amended;

(4) Observe the terms of any bona fide apprenticeship program if the program is registered with the Ohio apprenticeship council pursuant to sections 4139.01 to 4139.06 of the Revised Code and is approved by the federal committee on apprenticeship of the United States department of labor.

(P) Nothing in this chapter prohibiting age discrimination and nothing in division (A) of section 4112.14 of the Revised Code shall be construed to prohibit the following:

(1) The designation of uniform age the attainment of which is necessary for public employees to receive pension or other retirement benefits pursuant to Chapter 145., 742., 3307., 3309., or 5505. of the Revised Code;

(2) The mandatory retirement of uniformed patrol officers of the state highway patrol as provided in section 5505.16 of the Revised Code;

(3) The maximum age requirements for appointment as a patrol officer in the state highway patrol established by section 5503.01 of the Revised Code;

(4) The maximum age requirements established for original appointment to a police department or fire department in sections 124.41 and 124.42 of the Revised Code;

(5) Any maximum age not in conflict with federal law that may be established by a municipal charter, municipal ordinance, or resolution of a board of township trustees for original appointment as a police officer or firefighter;

(6) Any mandatory retirement provision not in conflict with federal law of a municipal charter, municipal ordinance, or resolution of a board of township trustees pertaining to police officers and firefighters;

(7) Until January 1, 1994, the mandatory retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure, or similar arrangement providing for unlimited tenure, at an institution of higher education as defined in the "Education Amendments of 1980," 94 Stat. 1503, 20 U.S.C.A. 1141(a).

(Q)(1)(a) Except as provided in division (Q)(1)(b) of this section, for purposes of divisions (A) to (E) of this section, a disability does not include any physiological disorder or condition, mental or psychological disorder, or disease or condition caused by an illegal use of any controlled substance by an employee, applicant, or other person, if an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee acts on the basis of that illegal use.

(b) Division (Q)(1)(a) of this section does not apply to an employee, applicant, or other person who satisfies any of the following:

(i) The employee, applicant, or other person has successfully completed a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance, or the employee, applicant, or other person otherwise successfully has been rehabilitated and no longer is engaging in that illegal use.

(ii) The employee, applicant, or other person is participating in a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance.

(iii) The employee, applicant, or other person is erroneously regarded as engaging in the illegal use of any controlled substance, but the employee, applicant, or other person is not engaging in that illegal use.

(2) Divisions (A) to (E) of this section do not prohibit an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee from doing any of the following:

(a) Adopting or administering reasonable policies or procedures, including, but not limited to, testing for the illegal use of any controlled substance, that are designed to ensure that an individual described in division (Q)(1)(b)(i) or (ii) of this section no longer is engaging in the illegal use of any controlled substance;

(b) Prohibiting the illegal use of controlled substances and the use of alcohol at the workplace by all employees;

(c) Requiring that employees not be under the influence of alcohol or not be engaged in the illegal use of any controlled substance at the workplace;

(d) Requiring that employees behave in conformance with the requirements established under "The Drug-Free Workplace Act of 1988," 102 Stat. 4304, 41 U.S.C.A. 701, as amended;

(e) Holding an employee who engages in the illegal use of any controlled substance or who is an alcoholic to the same qualification standards for employment or job performance, and the same behavior, to which the employer, employment agency, personnel placement service, labor organization, or joint labor-management committee holds other employees, even if any unsatisfactory performance or behavior is related to an employee's illegal use of a controlled substance or alcoholism;

(f) Exercising other authority recognized in the "Americans with Disabilities Act of 1990," 104 Stat. 327, 42 U.S.C.A. 12101, as amended, including, but not limited to, requiring employees to comply with any applicable federal standards.

(3) For purposes of this chapter, a test to determine the illegal use of any controlled substance does not include a medical examination.

(4) Division (Q) of this section does not encourage, prohibit, or authorize, and shall not be construed as encouraging, prohibiting, or authorizing, the conduct of testing for the illegal use of any controlled substance by employees, applicants, or other persons, or the making of employment decisions based on the results of that type of testing.

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