ORIGINAL

IN THE SUPREME COURT OF OHIO

ANITA HAUSER,	:	Supreme Court Case Nos. 2013-0493, 2013-0291
Plaintiff-Appellee,	:	Appeals from Montgomery County Court of Appeals, Second District
v.	:	
CITY OF DAYTON POLICE DEPT., et al.	:	Court of Appeals Case No. CA24965
Defendant.	:	

MERIT BRIEF OF APPELLEE ANITA HAUSER

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I. STATEMENT OF THE FACTS

As a general overview, this case involves intentional discrimination suffered by courageous woman who crossed the gender barrier to become the first female K-9 police officer in the history of the City of Dayton Police Department. As is often the case, there was no shortage of persons who, for whatever reason, participated in the discrimination leading up to and following Detective Anita Hauser's historic (at least at the local level) accomplishment. However, one man stood above the rest, who alone was positioned to initiate/impose meaningful discrimination or, in the alternative forever prevent that discrimination. City of Dayton Police Major E. Mitchell Davis chose the former path. Though as a Defendant, he blamed persons who claimed he was unable to identify; the evidence that came to light showed that he alone initiated charges and specifications and/or imposed other sanctions that gave discrimination its sting, and emboldened the others.

Detective Anita Hauser was run through the Gristmill of charges and specifications that were withdrawn and reserved multiple times over the course of a year for conduct that was not a violation of policy. In fact, during the same period of time, a male K-9 officer engaged in the exact conduct but was not questioned and his actions or omissions that were blessed without adverse comment by Davis and others in the City hierarchy.

Major E. Mitchell Davis also separately served charges and specifications and found Detective Hauser guilty of charges and specifications when the underlying conduct involved a male officer who sent her emails, the content of which she neither knew nor requested. Anita Hauser thus became the first officer sanctioned for another officer sending an email to her that she never received. Later, as Defendant, E. Mitchell Davis admitted that there was no basis to

support his finding or the sanctions that he imposed. There were also other acts of discrimination.

It should be emphasized that though this case involves the breaking of a historic gender barrier, this is not a disparate impact case. Rather this is the disparate treatment case that arose from intentional discrimination supported by evidence in the form of documents and deposition testimony, including admissions.

The evidence shows that the intentional discrimination did not come from hostile coworkers. Discrimination at issue also never arose from the rank-and-file. The vast majority of male police officers, including the all male drug interdiction unit and all-male K-9 officers, encouraged Anita Hauser and supported her efforts to cross the gender barrier and become the first female K-9 officer. Support and honest encouragement also came from her immediate supervisor, a sergeant, and her second-level supervisor, a lieutenant, both of whom were males.

With the foregoing in mind, the facts in this case are as follows:

Anita Hauser graduated from the Dayton Police Department Academy at the end of May 1992 and began serving the community as a patrol officer in June 1992. For the next several years she received various assignments when, at the end of 1996, she was assigned to join the Drug Unit as a detective. TR Hauser 8-10.[1] The Drug Unit is not the same as the Drug

[1] Anita Hauser's deposition transcripts are in two volumes however the pages are numbered sequentially with Volume 1comprising pages 1 through 10 and Volume II comprising pages 105 through 183. Therefore references to her transcript will be by page without reference to Volume.

Interdiction Unit, which is a more specialized unit[2] that came later after Anita paid her legitimate dues.

After her initial assignment as a detective with the Drug Unit, Detective Hauser also worked with other Units and was working with the Forfeitures and Financial Investigations Unit when she became aware of a potential opening with the Drug Interdiction Unit. (See TR Hauser 25, 28 41-42.)

A specialized and prestigious job within the Unit is the dog handler or K-9 Officer. K-9 Officer also provides for additional compensation through overtime or comp time including periods of training with the dog. However, for animal lovers, and especially dog lovers, the true value of the position is the labor of a loved profession. (See TR Hauser 6-7, 30-31, 66.)

In the fall of 2006 it became apparent that Roger "Rocky" Rockwell was preparing to retire. Rocky was a K-9 officer with the Drug Interdiction Unit (See TR Hauser 113, 139, 144, 176.) Anita was well positioned for assignment to fill Rocky's vacancy with seniority, an unblemished career (at least until June 2007) and a reputation for excellence. Policies, procedures and a union contract placed Anita as a top candidate for the position if she applied.

Up to this point all K-9 police officers with the city of Dayton, regardless of the unit, were male police officers. Conventional wisdom was that it took a man to handle a dog that could weigh 65 pounds or more. Anita Hauser was about to put conventional wisdom to the test. Officers in the Drug Interdiction Unit (all of whom were male) and many other officers in

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[2] The Drug Interdiction in Unit's mission is broad and includes " Narcotic interdiction for drugs come in, and currency as well, illegal proceeds of drug and narcotic dealings" and so forth (TR Houser volume 1 at 6). It could involve obtaining and executing search warrants, anticipatory warrants, surveillance and a host of other procedures (Id. 6-8). At the time there were only five officers in the Drug Interdiction Unit, two of which were trained and certified K-9 handlers and partnered with a certified and trained canine (Id 6-8).

the police department encouraged Anita to put in for the position (See TR Hauser 176.) Additionally, the Interdiction Unit Supervisor Sgt. Warren encouraged Anita to put in for the position as did Lieut. Welsh, Anita's Second-level supervisor. However, the Division Superintendent Maj. E. Mitchell Davis and others in upper management were unusually silent about the opening even when there was contact with Anita.

Anita was also aware that she would be the first female K-9 officer but did not begin to feel the gender barrier until she began to explore commitment both to the City and the dog[3]. Nonetheless, Anita put in for the position as K-9 handler with the understanding that she was free to withdraw her name from consideration. (TR Hauser 110-111.)

While in the decision-making process, in December 2006 Anita had an appointment with Kevin Powell who was Special Projects Administrator for the City of Dayton Police Department (TR Powell 10-11). The appointment was with respect to forfeiture of currency (called DAGs) relating to Det. Hauser's job with the Forfeiture and Financial Investigations Unit (TR Hauser 25-28). Discussion turned to Anita's interest in the Drug Interdiction Unit. Anita wanted to know what to expect financially should she undergo the training (TR Hauser 28-30). During that meeting Mr. Powell told her that if she is not able to successfully complete the K-9 school or if it otherwise "didn't work out" then Anita "would have to pay [refund] the City the entire amount, which is $23,044" (TR Hauser 29-30). Powell suggested that there was concern because Anita was a female she would have difficulty handling a larger types of canine that was always used by the drug interdiction unit.

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[3] The handler and the canine are paired and work very closely together so that a bond between both is established. In fact, when a handler retires the dog usually goes with him because of the emotional bond between the two and, as a practical matter, the dog simply would not be as effective with another handler. Additionally, his never good form to take a position and then not follow through.

Kevin Powell was part of the support staff for the chief of police, deputy chief of police and the majors. His duties include monitoring budgets and preparing "City of Dayton Travel Request, Advance and Expense Report" (hereinafter "Travel Request Report" or "Travel Voucher") for officers with approved travel. He would sit down with the officer who was traveling and explain the corresponding responsibilities associated with the Travel Voucher, which was defined by policy. However, Mr. Powell did not have the power or authority to determine who got to travel or under what conditions rather, his function did not include "any decisions on when policies were implemented or not implemented" (TR Powell 14). He had no veto authority (*Id.* at 20).

On or about January 29, 2013, Anita met again with Kevin Powell this time to sign what is called "City of Dayton Travel Request, Advance and Expense Report" (hereinafter "Travel Voucher"). The funds came from came from Anita's K-9 training. A Travel Voucher is a contract or agreement between the police officer (in this instance Anita Hauser) and the City regarding the disbursement and purpose of funds for the planned travel (TR Powell at 81-82).

Anita's training the funds came from a pool of RICO money forfeited by drug dealers and other nefarious sorts (TR Powell 101; TR Hauser 179). There was no general fund money generated from tax revenues and the like (*Id.*) On the item and column titled "Planned Amount" and the column titled "Expense"; Anita's planned amount for 91 days was $50 per day for meals and tips for a total of $4550.[4] There is also an item number 6 titled "Exceptions". For Anita's travel the exceptions box is checked "No".

[4] As a practical matter because of the length of stay this expense also appears to have included "Sundry" however this is not an issue on appeal.

In their discussions in December 2006 and January 2007, Kevin Powell did not mention any changes about per diem and only noted that Anita was receiving $50 a day without restriction however, if she spent more than $50 a day the City would not pay the additional amount (Powell 82-84). There were no restrictions on the Travel Voucher. Kevin Powell did not tell Anita that she had to keep per Diem receipts when she signed the Travel Voucher or at any time before. There was nothing in the Travel Voucher that required Anita Hauser to keep receipts of per diem use. TR Kevin Powell at 68:16-20 (discussing COD179). Further, the Manual of Procedure ("MOP") did not require officers to keep receipts to verify their use of per diem and there is Executive Order or Administrative Memorandum or other Controlling Document that required police officers to keep receipts to verify their use of per diem went on travel. There was never an amendment to the Travel Voucher until years later after this lawsuit was filed. $50 a day per diem reflected the City policy that have been in existence for many years and continued until shortly after this lawsuit was filed. That policy stated, in pertinent part: "**Meal Allowance**, Meal allowances are increased to $50 per day. A meal allowance is available for each travel day plus the day(s) of the conference/seminar/business meeting. The City does not reimburse for banquets or other social events not included in the conference registration. **Exceptions**, Exceptions to the Policy should be noted on the front of the form, rather than on a separate memo. When the Director or City Manager approves the trip, she/he is approving the exception.

(TR Kevin Powell at 78-79 referring to Bates 01110-City Travel Policy).

The City Manager or Director approved Anita's Travel Voucher as written. The Director of Finance also signed verifying the certificate of funds.

On January 31, 2007, Chief of Police Julian K. Davis (no relation to Maj. K Mitchell Davis) emailed the city manager regarding the "Approval of Travel and Training for Anita Hauser". The email specifically states in pertinent part, "The per diem is $4550.00 (91 days at $50 per day for one employee). The total cost of the travel is $23,044.00[5]. RICO will pay for this travel and training. No General Fund dollars will be used." TR Powell 68-71, 101; Bates COD 0182. The email makes no mention of any conditions on the use of per diem or any reference to Anita Hauser keeping any receipts or other change in policy. Of more detailed email from Lieut. Welsh to Director of Police Julian Davis dated January 29, 2007 also makes no reference to any change in the per diem requirements and gives the amount as $4550.00 reflecting $50 a day for 91 days. Bates COD 0183-0184.After signing the Travel Voucher, Anita's work load jumped dramatically and continued until she left for training:

> And at that time I was training a replacement in Forfeitures and Financial Investigations Unit, and that isn't something you can do in two days, that's a lengthy thing, and I was working both in Interdiction and Financial Investigations, in training a new person and getting ready to be gone for three months, and learning some of the interdiction procedures, and preparing my home life to be gone for three months, and our building had an issue with snow and we were quarantined sometime I think it was February or March,... from our office, and we were scrambling around to find places to work out of.

(TR Hauser 41-43).

On February 7, 2007, while Anita was essentially working two assignments and trying to juggle the substantial increase in the amount of work she was required to produce, she received an unprecedented email from Carol Roundtree. Ms. Roundtree, a

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[5] The $23,044 travel cost, training, lodging as well as the canine.

secretary assigned to upper management in the police department but with no cc to a policy maker like a Major or above only to Kevin Powell who already processed Anita's Travel Voucher. The email read in pertinent part:

> "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 on 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 this doesn't happen often and they want to make a new policy for this type of situation (you will be the example I guess) ...."

(TR Hauser 38-40 Bates COD 018)

Ms. Roundtree's email was not a change in policy. There was a travel policy on the books that did not require receipts. "[P]olicy changes are done differently, policy changes usually start like in administration, and administrative memo or something to that effect. There's a procedure for policy change.[6] So the only thing I got was just an email from a secretary, Carol Rountree, in regards to receipts, but that wasn't a policy change." (TR Hauser 37-38; see also Id. 39-40). Roundtree did not have policy making authority. Roundtree's choice of language indicated a possible policy change but wasn't certain as to if one had been made. Anita did discuss the matter with her lieutenant.

> [I] went to Lieut. Welsh for direction. He knew nothing about it. In his years of experience [he] never heard of a situation where persons traveling had to produce receipts for use of the per diem. Lieut. Welsh speculated that it probably was a test case and that they were "going to see what expenses people could bringing back". He also said "either way, whatever it is, if it's a change to the travel policy and there should be something more forthcoming. [Because] in the travel policy it says any exceptions to the travel policy had to be documented on the travel form, that's what we talked about. ... I had already signed the [Travel Voucher] form prior to receiving the email."

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[6] Any unilateral change in that policy may also have violated the duty to bargain with the unions on wages, hours and terms and conditions of employment. See ORC § 4117.11 (A)(5).

(TR. Hauser 35-37.) "So, therefore, I had a whole lot on my plate and really didn't give another thought after I spoke to my lieutenant." Tr. 38.

On or about March 7, 2007, detective Anita Hauser left Dayton Ohio for Front Royal VA to begin her training as a K-9 officer. She had no further instruction regarding keeping receipts for the per diem and thought little of it. Since there was no policy change forthcoming, Anita decided that she would try to keep receipts anyway as a pilot study. She found the process cumbersome and difficult to use when there were vending machines were other in pediments to obtaining a receipt. Additionally, she became ill and though she attended her class work it was difficult to do much more than that. A hotel maid also threw out Made also throughout a number of receipts, but in a final analysis it appears that Anita was just wasting her time sense no one else was asking about or required to maintain receipts.

On April 16, 2007 while Detective Hauser was in class, she received a telephone call on her personal phone from Internal Affairs ("IA"). IA wanted to hold an administrative interview the following day (April 17) at 10:30 AM in Dayton Ohio and pushed for Anita to return from her training. Det. Houser could not comply unless they came to Virginia. The issue continued for the next couple weeks. From discussions with IA Anita was able to discern that in another detective sent her emails on April 3, 4 and 6, 2007 that were intercepted by someone in IT (Information Technologies) as inappropriate. Anita never received the emails and never requested the material that was sent to her. Everyone consented to a phone interview that was held on April 26, 2007. Anita fully cooperated with the investigation. From the comments by the IA investigator and her own experience she didn't expect any issue to arise that would result in specifications and charges against herself. However, the entire incident was a distraction from her training.

Mr. Powell would later testify in his deposition that when Anita left for her training on March 11, 2007, he "was fully informed and aware of the changes in policy by the city manager" (TR 82-83). Kevin Powell testified that starting with Anita's travel "every travel that was like Anita Hauser's after that, they were required to keep receipts." (TR Powell 70:5-15). When he was asked what was considered "like Anita Hauser's?" Mr. Powell testified "a large travel that was, I believe over seven days. A travel that was over seven days." (TR Powell 70:18-21). However, evidence showed otherwise.

On or about May 2, 2007, Kevin Powell met with Detective Kevin Bollinger and processed a travel voucher for 21 days recertification K-9 training signed by Kevin Bollinger (TR Powell 70, 82-84) (TR 82-84; see also COD 241). The travel was for Kevin Bollinger was for a 21 (twenty-one) day K-9 recertification class (*Id.*) Language used in Kevin Bollinger's May 2, 2007 travel voucher was identical in all material respects and with the exact the same material language as the Travel Voucher signed by Anita Hauser on January 29, 2007 (TR 82-84; see also COD 241). Neither Travel Voucher had exceptions to the $50 a day per diem amount. However, Detective Bollinger was not required to produce receipts for Mr. Powell whereas Detective Anita Hauser was required to produce per diem receipts (TR 82-84; see also COD 241). When asked "how come Kevin Bollinger didn't have the same requirements as need a Houser?" Kevin Powell responded, "I don't know." (TR 84). Actually, no other travel voucher was treated like Anita's until after this lawsuit was filed when the city changed its policy after Anita filed this lawsuit in 2009.

Kevin Powell was essentially administrative clerk. He was little more than a minion following the directives of those much higher in the chain of command who were policy and decision-makers. He had no power to alter the course of the intentional discrimination (*Id.*)

Powell's conduct in 2007 stands in sharp contrast to the conduct of a person who was a policy and decision-maker and he was responsible for imposing intentional discrimination on Anita Hauser.

On or about June 12, 2007 Anita Hauser returns from her training with a dog and having passed the course she was a certified K-9 drug interdiction officer. Detective Hauser was justifiably proud of her accomplishment-the first female K-9 officer in the history of the City at the Police Department. She could not wait to put her training to work however, her optimism and exuberance for the future soon faded.

On or about June 28, 2007 charges and specifications were prepared against the Detective Anita Hauser alleging that in three instances (March 30, April 3, and April 4, 2007) she requested adult oriented and or pornographic material be sent to her in violation of the city of Dayton personnel policies and procedures and for misuse of government owned equipment. (See COD 682-696). The charges and specifications were served on Anita on July 30, 2007. Detective Anita Hauser pled not guilty and in the same document ordered to appear before major in Mitchell Davis Superintendent, Department of Police ... On July 12, 2007 at 10:30 AM" to face a hearing on these charges. Anita Hauser appeared as ordered on July 12, 2007. In a document dated July 24, 2007 titled "Findings" Maj. E Mitchell Davis stated:

> Anita Hauser appeared in person for the hearing scheduled for July 12, 2007, before superintendent, Eve Mitchell Davis, Department of Police and entered a plea of not guilty to the charges and specifications. The superintendent having considered same and finds the said Anita Houser as follows:
>
> | | | |
> |---|---|---|
> | Charge I, Specification I | Guilty | Suspension Eight (8) hours |
> | Charge I, Specification II | Guilty | Suspension Eight (8) hours |
> | Charge I, Specification III | Guilty | Suspension Eight (8) hours |

Total Discipline Suspension Twenty-Four (24) hours

(TR Davis (7/27/2011) at 13, 15-16) The signature of E. Mitchell Davis appears below the findings (*Id*).

Approximately 4 years later on July 27, 2011, defendant E Mitchell Davis testified in his deposition, "I didn't decide that verdict" (TR Davis (7/27/2011) at Vol. II 13:3-4). He could not identify who was the decision-maker but did it knowledge that the document carried his signature. Though the language of the findings asserts that he is the decision-maker he insisted "it comes to me pre-determined" (*Id.* Vol. II 16:12). He claimed the decision to discipline came from others who "did not sit and listen to the same evidence as [I] did" (Id. at Vol. II 14:15). In the course of his deposition testimony defendant Davis admitted that from the evidence presented, Anita Hauser did not know what was going to be sent to her and the officer who sent the material was the only person that knew what it contained. Furthermore, there was no indication that Anita made a specific request or otherwise asked for the material of the nature that was sent (*Id.* Vol II at 12: 15, 18). Davis also in his deposition admitted he had the authority to dismiss the charges and that if he had done so no further action could have been perpetrated against the Detective Anita Hauser.

(TR Davis 64.)

When Detective Hauser met with Kevin Powell to close out her travel voucher, Mr. Powell demanded that she produce all the receipts for every cent of per diem. This was not required of Kevin Bollinger or any other police officer with the City of Dayton. Anita produced what she could in terms of receipts and asked for the policy or procedure that applied but none could be produced.

In his deposition on June 22, 2011, defendant E Mitchell Davis testified that the Manual of Procedures (MOP) controls travel policy and applies to everyone. That if an order is different from the MOP and was applied to only one officer, that order would change policy but to be a change of policy it must apply to everyone (TR Davis (6/22/11) at 15-16). Defendant Davis admitted that went Anita left for training in March 2007 he had no knowledge of any policy change on travel and when Anita returned the standard policy that was in existence did not require and needed to produce receipts for use of per diem (TR Davis (*Id* at 24).

Defendant Davis admitted that he never saw the policy upon which charges and specifications were based (*Id* 30-31). Defendant Davis also admitted that the only documentation he had that Anita Hauser was alleged to have violated was the Roundtree email, which is his knowledge was not a policy. He testified that the email was "about a policy change proposed by the city manager" did not come about on till after the lawsuit was filed (TR Davis Vol. I at 31: 3-6, 8-12.) He admitted that though the city manager wanted to start a policy and wanted and needed and return with receipts, "travel policies or other types of policies are for the entire group to which they were addressed" and of eventually admitted "you don't have special rules for Anita Hauser versus anybody else who is out there on a long-term travel." (TR Davis Vol. I at 32: 14-16). Defendant Davis also admitted to videos never seen and (TR Davis Vol. I at 75) policies communicated in the way the Rountree email was and admits that the Roundtree email was not provided to anyone with authority over Anita Hauser, does not identify any person charged with changing any policy and that Ms. Roundtree and Mr. Powell (the only persons identified in the email aside from Anita Hauser) do not have policymaking authority (Id at Vol. I 74-75). Further the Travel Voucher signed by

Anita Hauser "doesn't say anything about keeping receipts" nor does any other document that was generated to authorize and support Anita Hauser's training (Id. Vol. I 76, 77--78, 80; COD 180-COD 184). Defendant Davis also had a good knowledge for the first time that the provision in the travel voucher for exceptions can provide for deviations but when it states "no exceptions" that means there are no restrictions on the use of per diem (Id Vol. 1 80-82).

Defendant Davis also admitted that no one was required or told they would be reimbursing the city if they failed a school or course (TR Davis Vol. 1 at 43: 1-22).

However, in previous years Maj. E Mitchell Davis acted differently.

Examination of all the documents relating to Charges and Specifications associated with the per diem issue disclose the following events that occurred under the signature of Maj. E. Mitchell Davis:

On August 13, 2007, Maj. E. Mitchell Davis Superintendent of the Special Investigations Division issued a written order to Detective Anita Hauser that she paid the city of Dayton $3058.62 by noon on Friday, August 17 or produce receipts in that amount. Major Davis explicitly stated "*Failure to comply with this directive will result in disciplinary action being taken against you.*" (TR Davis Vol. II 52-54; COD708) (emphasis original). Four years later now the defendant Davis admitted that requiring Anita Hauser to produce over $3000 in four days was unrealistic and that he had absolutely no evidence to suggest that the per diem was spent on anything other than the purpose for which it was issued (TR Davis Vol. II at 55-56).

When the August 13, 2007 order could not complied with on August 23, 2007, in a memorandum to the Acting Interim Chief of Police Maj. Davis represented, Detective Anita Hauser was required to provide receipts or reimburse the City of Dayton for expenditures of

$3058.62 by noon on Friday, August 17, 2007. As of August 23, 2007 Detective Houser has failed to comply." (COD-707; TR Davis Vol. II 46, 48-54).

On August 24, 2007 in a memorandum to the Acting Interim Chief of Police Major Davis represented that Anita Hauser owed the City of Dayton (there was no reference to the RICO fund) $3058.62 and after being ordered to reimburse the city but August 17 failed to comply. Major David stated, "Detective Hauser was issued an S-93[7] on August 22, 2007. Hauser requested a hearing that was held on August 23, 2007 at 1530 hrs. at 335 W. 3rd Street, The Special Investigations Complex". This memorandum concluded:

> My investigation has determined Detective Hauser failed to comply with the directive dated August 13, 2007. This is in violation of ROC 5.3. I therefore recommend that Detective Hauser received charges and specifications for violating ROC 5.3 which states, "*No officer will be insubordinate. Officers will not conduct themselves in a manner that undermines the authority of any ranking member of the department and will at all times respond to though the lawful orders, verbal or written, of ranking members. Lawful orders will not be in derogation of a job description. Department employees will obey any lawful order relayed from a Superior by an employee of the same or lesser rank.*"

(COD-706; TR 51-54) (italics original). Four years later defendant Davis denied he conducted an investigation and determined Hauser was guilty of failing to follow's directive on August 13, 2007 (TR Davis Vol. 52-54). Defendant Davis blamed the Chiefs complex but couldn't identify who gave him the order to write this memo or issue charges and specifications (TR Vol. II 55).

While Davis was issuing charges and specifications for almost one year regarding conduct that was neither insubordinate nor in violation of any rule or policy of the city of Dayton or making guilty findings on charges and specifications that were discriminatory and

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[7] An S-93 is a form advising a police officer of the likelihood of pending charges and specifications.

fictitious, he was also responsible for denying Anita Hauser additional training (Sky Narc training), All other interdiction officers had and would have given her credentials comparable with other interdiction officers both within and outside of the city of Dayton. Defendant Davis denied it was the result of intentional discrimination, at least not by him.

Defendant Davis also indicated that the signature that appeared was not his signature but the client could not identify whose signature it was. Regardless, the document generated the charges and specifications that he later signed and subsequently held a hearing on (TR Davis Vol. II at 61 - 62). However, this was not the usual set of carefully crafted charges and specifications.

Between August 24, 2007 and April 28, 2008, under the signature of Major E Mitchell, many versions of charges and specifications regarding the disputed $3058.62 was issued, withdrawn, then amended and reissued. At least one version involved over 200 charges and specifications and comprised of approximately 69 pages. In each instance, the charges and specifications would be withdrawn at the last minute and a few weeks or later they would be withdrawn at the last minute.

Several versions were drafted in April 2008 alone all under the orders of authority of Maj. E Mitchell Davis. Finally on April 28, 2008 Maj. E. Mitchell Davis served upon Anita Hauser nine charges and specifications each for various refusals over the course of the preceding year to pay $3058.62 to the City. In each instance Major Davis alleged that Anita Hauser had engaged in conduct that "constitutes a theft and/or Misuse of City funds." (See e.g. COD 644). Once again Anita Hauser pled not guilty and demanded a hearing which was scheduled for May 6, 2008. However, before May 6, 2008 the charges and specifications were

again withdrawn but this time the money was just deducted from Anita Hauser's pay until it was satisfied. This was done without judicial order or consent from Anita Hauser.

In the end Defendant Davis was asked, "And in terms of … of request for specs and charges, did that come from you or from somebody else? The response was, "From me with their input." (TR Davis (6/22/11) Vol. I at 113:3-8). Davis was then asked, "were you the person responsible--were you the person who decided to charge Anita Hauser or did it come from above?" His answer was, "From above me." (Id. Vol. I at 113:13-16), but when effort was made to try to identified the culprit, Defendant Davis testified, "to be honest, I don't know where it originated." (Id. Vol. I at 114:7-8).

Despite the fact that the Defendant Davis previously testified that he had authority to stop the charges and specifications going any further, and despite the fact Defendant Davis acknowledged that his signature appeared on the charges and specifications indicating both that he had conducted an investigation and had approved the charges and specifications in the first instance, and had failed to identify any person other than himself with decision-making authority. Defendant Davis ended his depositions by stating that he had "input" but denied he had decision-making authority. (TR Davis (6/22/11) Vol. at 114). In other words a major who was in charge of police investigations in a unit comprising of dozens of trained officers was unable to mount an internal inquiry to determine who was behind the intentional discrimination… besides himself.

When Anita Hauser returned from her training. Kevin Powell was responsible for meeting with her and coming up with an accounting. However, whatever he was told to do and by whom no sanction could be imposed on Anita Hauser in less it went through Maj. E. Mitchell Davis who admitted in his deposition as the initial Hearing Officer "when [he sits in

that capacity] listening to the evidence being presented, [he does have] the ability to say I don't think that this person is guilty of this" and he could make a finding of not guilty and such a finding would preclude a proceeding to the next level. Maj. Davis could have also refused to sign the charges and specifications, but that was not his purpose or intent.

On June 29, 2009, Appellee Anita Hauser filed a complaint in Montgomery County's Common Pleas Court alleging that her Municipal Employer and Major D. Mitchell Davis intentionally discriminated against her regarding the aforementioned events. Shortly thereafter, the City amended its per diem policy.

Appellant filed a motion for summary judgment alleging immunity and claiming the Davis was not Appellee's supervisor. On January 7, 2011, the trial court issued a decision overruling this motion.

On appeal the Second District Court of Appeals overruled the Appellant's assignment of error holding there was no immunity.

ARGUMENT

PROPOSITION OF LAW: Revised Code Chapter 4112 expressly imposes liability on political subdivision management employees who discriminate against employees of the political subdivision:

As an initial matter, Appellee Anita Hauser supports the efforts and analysis of law submitted in support of her by Amicus Curiae.

The issues in this case and its history involve allegations supported by evidence showing that Appellant E. Mitchell Davis intentionally discriminated against Anita Hauser or, at least acted purposefully, willfully or recklessly. He was charged on the basis of documents with his name and signature that represented a course of action, later confirmed in depositions, that supports a jury question on the issue of intentional discrimination. The question now is, therefore, whether the legislature intended to give the jury the right to make this determination. Examination of the plain language of R.C. § 4112.01(A) indicates that the legislature was confident that a jury could, and ought to, make this determination.

Ohio prohibits a vast array of discrimination including employment discrimination. R.C. § 4112.02 (A) provides:

> It shall be an unlawful discriminatory practice: (A) For <u>any employer</u>, 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 <u>otherwise to discriminate</u> <u>against that person</u> with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter <u>directly or indirectly related to employment</u>.

R.C. § 4112.02 (A) (emphasis added). Employer is defined broadly but specifically applies to political subdivisions and persons acting on its behalf:

> "Employer includes the state, <u>any political subdivision of the state</u>, any person employing four or more persons within the state, <u>and</u> any <u>person acting directly or indirectly in the interest of an employer</u>."

R.C. § 4112.01(A) (2) (emphasis added). So there is no mistake the legislature also defines person in that definition states in pertinent part:

> ""Person" includes one or more individuals , ... "Person" also includes, but is not limited to, any ... manager, ... agent, employee, ... and the state and all political subdivisions, authorities, agencies, boards, and commissions of the state.

R.C. § 4112.01(A) (1) (emphasis added). In other words the political subdivisions and any individual or entity who chooses to engage in discrimination does so at the risk of personal liability joint and severally with the employer. The Lack of tolerance for discrimination is further emphasized by the numerous prohibitions against discrimination in many virtually all aspects of public social discourse. See R.C. § 4112.01(A) (4)-(22).

As referenced in appellee's jurisdictional memoranda, in the 14 years since this court's decision in *Genaro v. Central Transport, Inc. et al.*, 84 Ohio St.3d 293 (1999) its progeny both in Federal District Courts and in the Courts of Appeals in Ohio (save perhaps one) have uniformly held that the plain language of R.C. § 4112.01 is sufficiently clear to expressly impose liability for intentional acts of discrimination by supervisors working with the political subdivisions of the state. Even more significant is the fact that the legislature has resisted any change to the statutes that could be interpreted as limiting the scope of the *Genaro* case to shield municipal employees who discriminate. During the same time it has responded to other decisions by this Honorable Court in areas that limit liability. See R.C. § 4112.01(B). But the definition of the term "employer" and the definition of the term "person" have remained unchanged.

Appellant argues that the immunity statute trumps the plain language of the Revised Code because the foregoing statutes do not "expressly impose" liability. However, the Appellant's argument is beyond even hyper-technical. The court has previously held that the

term "expressly impose" is not a term of art requiring magic words and is not difficult burden for the legislature to achieve. In *Campbell v. Burton*, 92 Ohio St.3d 336, (Ohio 2001) the Court held:

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

Id. at 342 (emphasis added). R.C. § 4112.01 (A)(1) and R.C. § 4112.01 (A)(2) satisfied that criterion. Further, during the intervening years since the Genero decision the legislature has on approximately seven occasions amended the government immunity provisions associated and not a single amendments sought to impacted, limit or abrogate the impact of the Genero decision.

Appellant's reliance on *Campolieti v. Cleveland*, 184 Ohio App.3d 419, 430 (8th Dist. 2009) is misplaced. The *Campolieti* case is an anomaly. For reasons unknown, the court in the *Campolieti* case did not reference the Court's decision in *Genaro v. Central Transport, Inc.*, supra, and not analyze the definitional sections RC. § 4112.01 (A). Further, the analysis in *Satterfield v. Karnes*, 736, F.Supp.2d 1138, 1152-53 (S.D.Ohio 2010) rejected application of the *Campolieti* case in a well-reasoned decision. Though not controlling for this Court analysis is nonetheless worthy and should be applied in overruling the Appellant's proposition of law. However, even assuming, arguendo, that the *Campolieti* case was well decided it still should not impact the instant case. The court in *Campolieti* indicated the personal liability would follow a municipal employee, like Appellant herein,

However, even assuming, arguendo, that the *Campolieti* case was well decided it still should not impact the instant case. The court in *Campolieti* indicated the personal liability would follow a municipal employee, like Appellant herein, who intentionally discriminated, acted in a wanton or reckless manner or did other acts which removed him from the scope of employment[8] as is alleged in the instant case.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the appellant's proposition of law should be overruled.

Respectfully submitted,

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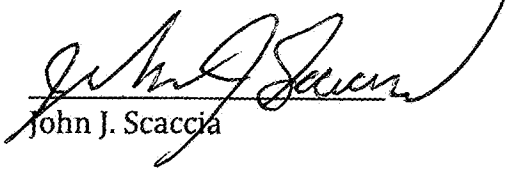
[8] "The actions of Chief Stubbs were not " manifestly outside the scope of [his] employment or official responsibilities," they were not " with malicious purpose, in bad faith, or in a wanton or reckless manner," and civil liability is not " expressly imposed upon the employee by a section of the Revised Code." R.C. 2744.03(A)(6)(a) through (c)." *Campolieti v. Cleveland*, 184 Ohio App.3d 419, 430 (8th Dist. 2009)

CERTIFICATE OF SERVICE

I hereby certify the true copy of the foregoing was served on defendant/appellant by forwarding a copy of same to his attorney of record, Thomas M. Green, Esq., Green & Green, Lawyers, 800 Performance Pl., 109 North Main St., Dayton, OH 45402 – 1290, by ordinary U. S. Mail first class on this 20th day of August 2013.



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