ORIGINAL

IN THE SUPREME COURT OF OHIO

ANITA HAUSER, Plaintiff-Appellee, vs. CITY OF DAYTON POLICE DEPARTMENT AND MAJOR E. MITCHELL DAVIS Defendants- Appellants.	:	CASE NOS. 2013-0291 & 2013-0493 On Appeal from the Montgomery County Court of Appeals, Second Appellate District Case No. CA 24965

APPELLEE ANITA HAUSER'S MOTION FOR RECONSIDERATION

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I. Introduction

Pursuant to Supreme Court Practice Rule 18.02(B)(4), Appellee Anita Hauser respectfully requests that the Court reconsider its decision on the merits, as the Court's central holding—that Sections 4112.01(A)(2) and 4112.02(A) do not impose express liability on individual supervisors for purposes of political subdivision immunity—is premised on erroneous historical and textual analysis.

Specifically, the Court placed great weight on dicta from a single case, *Packard Motor Car Co. v. National Labor Relations Board* (1947), 330 U.S. 485, 488, which analyzed a similar definition of "employer" in the National Labor Relations Act (NLRA) prior to the enactment of Chapter 4112 in 1959. The Court assumed that the General Assembly must have relied on the NLRA and *Packard* in drafting its definition of "employer." This analysis disregards the fact that the NLRA's definition of "employer" was amended and narrowed by Congress a few months after *Packard* was decided, and over a decade before the drafting of Chapter 4112, making the NLRA's definition an unlikely source of the definition in Chapter 4112. Meanwhile, under another identically worded statute, the Fair Labor Standards Act (FLSA), which *did* remain in effect in 1959, federal precedent directly supported individual liability.

The Court also relied on language in Divisions (I) and (J) (the retaliation and "aiding and abetting" provisions) of Section 4112.02, correctly pointing out that these provisions provide an independent basis for individual supervisor liability. In fact, this provides an alternative basis for affirming the judgment of the lower courts denying immunity. Any supervisor who participates in discrimination has necessarily violated Division (J) as well as Division (A), and the complaint here even explicitly included the allegation that the Appellant aided and abetted discrimination. But instead of affirming the denial of immunity on this alternative ground, the Court concluded

that if the General Assembly had intended the term "employer" in division (A) to include individuals, there would be no need to use broader language in divisions (I) and (J). This analysis of Divisions (I) and (J) disregards the broader purposes of those divisions, which cover housing and public accommodations as well as employment—a much more straightforward explanation for the use of "any person" instead of "any employer" than the Court's reasoning.

The Appellee respectfully requests that the Court reconsider its holding, or in the alternative, that it revise its opinion in order to affirm the judgment of the court of appeals on other grounds, due to the abrogation of immunity through Section 4112.02(J).

II. Argument

A. The *Packard* Decision Does Not Provide Historical Support for Precluding Individual Liability Under Chapter 4112.

In light of this Court's prior decision in *Genaro*, none of the briefs in this matter addressed the legislative history of Chapter 4112. But the Court did delve into this history, focusing on a single U.S. Supreme Court case prior to the enactment of Chapter 4112, unfortunately attaching undue significance to this decision. In the 1947 case of *Packard Motor Car Co. v. National Labor Relations Board*, the U.S. Supreme Court analyzed a definition of "employer" under the NLRA, which contained language very similar to the definition of "employer" in the 1959 version of Chapter 4112 (both covered persons acting "directly or indirectly" in the interest of an employer). Notably, *Packard* did not decide whether individual supervisors could be held liable under the NLRA. But it did speculate, in dicta, as to the purpose of this language, which it posited was to ensure *respondeat superior* liability under the Act.

The issue in *Packard* was whether employees who might, under some circumstances, fall within the definition of "employer," could still utilize the protections of the NLRA as employees. The NLRA did not specifically exclude employees from the protections of the Act if they could

also arguably be considered "employers" or agents of an employer. The Court held that because foremen were "employees," they could permissibly organize and collectively bargain as a union under the Act, and rejected the contention that because foremen arguably fell within the Act's broad definition of "employer," they could not also claim the Act's protection. 330 U.S. at 488.

Critically, the *Packard* Court, far from stating a rule that individual supervisors working on behalf of a corporation could not be considered "employers," explicitly warned that the outcome would be different "[i]f a union of vice presidents, presidents or others of like relationship to a corporation comes here claiming rights under this Act," due to their more direct connection to the interests of employers. *Id.* at 490, n.2. But the Court never actually faced this question, because in 1947—a few months after *Packard* was issued, and twelve years prior to the enactment of Chapter 4112—Congress changed the definition of "employer" in the NLRA from "any person acting in the interest of an employer" to "any person acting as an agent of an employer," for the express purpose of narrowing the Act's scope. *Friend v. Union Dime Sav. Bank* (S.D.N.Y. 1980), 24 Fair Empl. Prac. Cas. (BNA) 1307, 1310.

This Court did not express an opinion on the purpose of the former NLRA definition, but noted that "we cannot ignore *Packard*'s historical relevance when examining the General Assembly's use 12 years later of the same language" in the definition of "employer." *Hauser v. Dayton Police Dept.*, 2014-Ohio-3636, at ¶ 11. This historical relevance is not at all clear given that the NLRA no longer contained the same language in 1959, making it unlikely that the General Assembly relied on the NLRA in drafting its definition of "employer" in Chapter 4112.

As important, *Packard* and the NLRA were far from the only authorities available to the General Assembly when it decided to use the language it did. Unlike the revised NLRA, the Fair Labor Standards Act (FLSA) did still include the key language at the time the General Assembly

acted; it defined "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).[1] And by 1959, there were a number of federal cases that, unlike *Packard*, directly addressed the question of whether this language imposed liability on individual supervisors and officers, uniformly answering in the affirmative. See, e.g., *Hertz Drivurself Stations, Inc. v. United States* (8th Cir. 1945), 150 F.2d 923, 929, 929 n.3 (holding individual branch manager liable under FLSA); *Chambers Constr. Co. v. Mitchell* (8th Cir. 1956), 233 F.2d 717, 724 (upholding injunction against individual supervisor under FLSA based on same definition, post-*Packard*); *Mitchell v. L.W. Foster Sportswear Co.* (E.D.Pa. 1957), 149 F.Supp. 380, 381 ("It is not disputed that the defendant corporation was an employer under the act. Certainly the individual defendants in regulating the employment of the employees were acting in the interest of the corporation in relation to an employee.").

Given that the NLRA no longer contained the pertinent definition, while the FLSA did, it seems that the General Assembly, in enacting Chapter 4112, was far more likely to have considered wage and hour law than less applicable case law interpreting a superseded labor relations statute. Given the state of the law in 1959, there is no question the legislature would have considered its definition of "employer" to impose individual liability.

B. The FLSA Case Law Since 1959 Is More Persuasive than Title VII Precedent on this Issue, Given that Title VII Uses Different, Narrower Language to Define "Employer."

Although irrelevant to Chapter 4112's original legislative history, post-1959 case law under the FLSA is also helpful here, as it confirms that—even while rejecting individual liability

[1] To the extent there was ever any significance to the precise placement of the phrase "directly or indirectly" in the FLSA ("directly or indirectly in the interest of an employer") and the original text of Chapter 4112 ("in the interest of an employer, directly or indirectly"), the General Assembly has since erased this distinction and shifted Chapter 4112's definition even closer to that of the FLSA. See 1991 H.B. No. 321 (changing definition to current form).

under Title VII—federal courts have been nearly unanimous in applying the FLSA's definition of "employer" to include individual supervisors. See, e.g., *Donovan v. Agnew* (1st Cir. 1983), 712 F.2d 1509, 1511 (holding that "[t]he overwhelming weight of authority" supported individual FLSA liability for corporate officers, irrespective of their ownership interest in the corporation); *Donovan v. Sabine Irrigation Co.* (5th Cir. 1983), 695 F.2d 190, 194-95 ("[W]e perceive the parameters of § 203(d) as sufficiently broad to encompass an individual who, though lacking a possessory interest in the 'employer' corporation, effectively dominates its administration or otherwise acts, or has the power to act, on behalf of the corporation vis-a-vis its employees."); accord *United States DOL v. Cole Enters.* (6th Cir. 1995), 62 F.3d 775, 778.

This Court, in departing, at least in the context of immunity, from the reasoning of *Genaro v. Central Transport, Inc.* (1999), 84 Ohio St. 3d 293, 703 N.E.2d 782, cited a long string of federal cases reaching a different determination under Title VII (though, notably, the U.S. Supreme Court has never answered this question). See *Hauser*, 2014-Ohio-3636, ¶¶ 13-14 (stating that "[f]ederal case law interpreting Title VII has persuasive value in cases like this one, which involves comparable provisions in R.C. Chapter 4112."). But, as noted in *Genaro*, Title VII contains much narrower language than Chapter 4112 in this regard. *Genaro*, 84 Ohio St. 3d at 298-99. In fact, Title VII defines "employer" using the word "agent," just like the NLRA has since 1947, when Congress narrowed the definition of "employer."

Upon reconsideration, this Court should recognize that in this particular context, because the FLSA uses the same language as Chapter 4112, while Title VII and the NLRA use different, narrower language, cases analyzing the FLSA are more useful than cases analyzing Title VII or the NLRA. Thus, contrary to the Court's analysis, federal case law actually supports individual liability under Section 4112.02(A).

C. Division (J) of Section 4112.02 Supports Affirmance, Not Reversal, of the Lower Court's Judgment.

1. The Use of "Any Person" in Divisions (I) and (J) of Section 4112.02 Cannot Be Interpreted to Imply that Individuals are Excluded from Liability under Division (A).

The Court correctly concluded that despite its determination as to Division (A), "[a]n individual political-subdivision employee still faces liability under other provisions of R.C. 4112.02 that expressly impose liability, including the aiding-and-abetting provision in R.C. 4112.02(J)." 2014-Ohio-3636, at ¶ 15. As noted below, this should have ended the inquiry in the Appellee's favor, as her claim inherently implicates Division (J) as well as Division (A), making immunity inapplicable. But instead of applying Division (J) to the case at hand, the Court concluded that by imposing individual liability in Division (J), the General Assembly implicitly excluded individuals from Division (A). The Court stated that "the General Assembly knows how to expressly impose liability on individuals, and it has done so elsewhere in R.C. 4112.02," cited the language in R.C. 4112.02(I) and (J) making it unlawful for "*any person*" to retaliate, to " 'aid, abet, incite, compel[,] or coerce the doing of * * * an unlawful discriminatory practice," or to 'attempt directly or indirectly to commit any act" constituting 'an unlawful discriminatory practice,' " and stated, "If we were to conclude that the employer-discrimination provision in R.C. 4112.02(A) expressly imposes liability on employees, we would render the aiding-and-abetting provision in R.C. 4112.02(J) largely superfluous." *Id.* at ¶ 16 (emphasis added)

This distinction between Division (A), which applies to "any employer," and Divisions (I) and (J), which apply to "any person," is easily explained. Divisions (I) and (J) cover retaliation and aiding-and-abetting not just in the realm of employment, but also in the realms of housing and public accommodations. The potential defendants in these combined fields include not just corporate employers and supervisors, but landlords, property managers, store managers,

and any number of other individuals and entities. As important, even in the employment context, Divisions (I) and (J) cover individuals that Division (A) does not, such as third parties who aid an employer in the commission of discrimination or hiring managers who retaliate against those who have opposed discrimination at previous employers. It is simply not the case that because the General Assembly used "any person" in Divisions (I) and (J), it must have intended the term "any employer" in Division (A) to exclude individual supervisors.

2. Division (J) Provides a Separate Basis for Affirming the Judgment Below.

As a final matter, even in the event the Court does not reconsider its central holding as to R.C. 4112.02(A), it should reconsider the outcome of the appeal. The Court instructed that the certified conflict question be answered in the negative, and that the judgment below be reversed. The Appellee respectfully suggests that while it was consistent with the Court's reasoning to answer "no" to the certified question (which specifically asked whether Sections 4112.01(A)(2) and 4112.02(A) impose liability on political subdivision supervisors), it was not consistent to reverse the judgment of the court of appeals denying immunity. This is because, as the Court itself stated, "[a]n individual political-subdivision employee still faces liability under other provisions of R.C. 4112.02 that expressly impose liability, including the aiding-and-abetting provision in R.C. 4112.02(J)." 2014-Ohio-3636, at ¶ 15.

Division (J) makes it unlawful for "any person [including individual political subdivision employees] 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." R.C. 4112.02(J). Any supervisor who personally commits an act of discrimination on behalf of an employer, as the

Appellant is alleged to have done, has also inherently committed a number of the unlawful acts prohibited by Division (J), including, at minimum, "aiding" and "abetting" the practice and "preventing" the employer from complying with the act. In any case containing an allegation of discrimination by a supervisor, immunity should be denied, and the lower courts were correct to do so here, whether on the basis of Division (J) or Division (A). Notably, although no such specific reference was necessary, see *Illinois Controls v. Langham* (1994), 70 Ohio St. 3d 512, 526, 639 N.E.2d 771 (plaintiffs need not plead legal theories, but must merely state the facts underlying their claims), the Appellee's Complaint specifically alleged that the Appellant "aided and abetted" the discrimination at issue. (Amended Complaint, ¶¶ 47, 68).

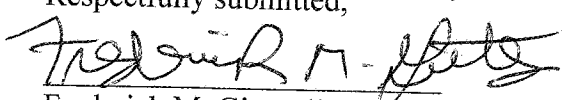
Affirming the denial of immunity here is the correct result not only as a legal matter, but also as an equitable and practical matter. If the Court reverses and remands, and the trial court correctly denies immunity based on Division (J), the case may be delayed significantly because the Appellant will be entitled to take a second interlocutory appeal under Section 2744.02(C).

A second consideration is worth noting: there are undoubtedly other cases pending in the lower courts that include claims against individual supervisors (including some against political subdivision employees). Although this Court's opinion questions the viability of *Genaro*, none of those other cases *should* be dismissed, or subject to appeal or motions practice on that basis, as R.C. 4112.02(J) is broad enough to impose individual liability whenever a supervisor actively participates in employment discrimination. But unless this Court gives practical effect here to its reasoning as to Division (J), the present opinion will inevitably result in confusion, and some number of erroneous dismissals, unnecessary appeals, and needless motions. An affirmance here that recognizes the imposition of individual liability pursuant to Division (J) would prevent such uncertainty and inefficiency in not just this case, but potentially many other cases.

III. Conclusion

For the reasons stated above, Appellee Anita Hauser respectfully requests that the Court reconsider its decision on the merits and affirm the judgment of the court of appeals denying immunity to the Appellant on the basis of R.C. 4112.02(A), R.C. 4112.02(J), or both provisions.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September 2014, a copy of Appellee Anita Hauser's Motion for Reconsideration was served by postage-paid U.S. Mail upon the following:

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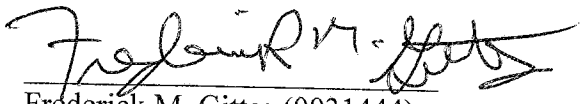

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