[Cite as *Stachura v. Toledo*, 2013-Ohio-2365.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Captain Carla Stachura, et al.	Court of Appeals No. L-12-1068
Appellees	Trial Court No. CI0200506445
v.	
City of Toledo, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: June 7, 2013

* * * * *

Terry J. Lodge, for appellees.

Adam Loukx, Director of Law, and Merritt W. Green III,
Senior Attorney, for appellants.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a February 24, 2012, judgment of the Lucas County Court of Common Pleas, which denied appellants' motion for partial summary judgment on the issue of immunity. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellants, the city of Toledo, Michael Bell, John Coleman, Robert Metzger, and Michael Wolever, set forth the following two assignments of error:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT/APPELLANTS BY DENYING IMMUNITY AFFORDED TO THEM PURSUANT TO R.C. 2744.03 (A)(6).
>
> THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF/APPELLEES TO ARGUE THE EXCEPTIONS TO GOVERNMENTAL EMPLOYEE IMMUNITY BECAUSE THE AMENDED COMPLAINT FAILED TO ALLEGE ANY OF THE EXCEPTIONS UNDER R.C. 2744.03(A)(6).

{¶ 3} The following undisputed facts are relevant to this appeal. Appellees all formerly served as members of the Toledo Fire Department ("TFD"). Appellees are all female. Appellants include both the political subdivision of the city of Toledo as well as a number of members of the TFD holding various supervisory positions during the relevant time period. All individual appellants are male.

{¶ 4} Over the course of their years of employment with the TFD, appellees each experienced a multitude of workplace interactions and incidents occurring directly with or directly connected to the individual appellants that appellees perceived to be rooted in a pattern of unlawful gender discrimination. Appellees maintain that they were targeted by appellants in the course and scope of the employment by the TFD and subjected to gender based maltreatment.

{¶ 5} On November 21, 2005, appellees filed a complaint alleging gender discrimination directed against them by the enumerated supervisory employees of the TFD. On October 10, 2007, the trial court granted summary judgment in favor of the city of Toledo and the individually named employees of TFD. At that time, the trial court held that the actions and issues complained of constituted non-actionable, "incidents of tension or personality conflicts." Appellees pursued a direct merit appeal. On July 20, 2008, this court reversed the summary judgment ruling in favor of TFD and its named employees. We remanded the matter back to the trial court. To date, this previously remanded eight-year-old case has not yet proceeded to trial.

{¶ 6} On September 12, 2008, appellees filed an amended complaint including an additional individually named employee of the fire department, Michael Wolever, as a defendant. In addition, the amended complaint set forth the additional claim of retaliation.

{¶ 7} On November 7, 2011, some four years after their initial summary judgment filing, appellants again filed for summary judgment. On February 23, 2012, the trial court denied appellants' motion for partial summary judgment as pertaining to the individually named employees of TFD. In support of summary judgment, appellants essentially asserted that they are invariably entitled to R.C. 2744.03 municipal employee immunity as a matter of law. Conversely, appellees asserted that there is no statutory or binding precedent which would operate so as to automatically preclude the potential

applicability of R.C. 2744.03(A)(6) exceptions to immunity from rendering the individually named employees not immune and subject to liability.

{¶ 8} In the course of their summary judgment opposition, appellees referenced extensive citations to depositions taken in this matter in support of their germane position that a genuine issue of material fact remained in dispute necessitating trial court determination. Specifically, appellees contended that it remained in dispute as to whether certain workplace conduct engaged in by the individual appellants directed against appellees could reasonably be construed so as to be reflective of malice, bad faith or recklessness and thereby constitute an R.C. 2744.03(A)(6) exception to immunity.

{¶ 9} On February 23, 2012, the trial court denied appellants' motion for partial summary judgment. The trial court concluded in pertinent part that appellants' proposed interpretation of precedent, statutes, and the record of evidence as directing that appellants be found necessarily immune from the underlying gender discrimination claims was mistaken. The trial court concluded that within the context of the opposing legal arguments and accompanying vast body of contested evidence, a genuine issue of material fact remains in dispute pertaining to whether the evidence supports the application of a statutory liability exception set forth in R.C. 2744.03(A)(6)(b) to the individually named appellants in the instant case. More precisely, the trial court held that a jury must determine whether the individually named appellants acted towards appellees with malice, bad faith, or recklessly so as to have been outside the scope of their

employment, thereby negating their claimed immunity from any liability arising from those actions.

{¶ 10} Both assignments of error set forth by appellants are rooted in the shared underlying legal premise that the trial court erred in its above-described denial of partial summary judgment in favor of the individually named appellants. It is well-established that summary judgment is only proper when no genuine issue of material fact remains so that after construing the evidence most favorably to the nonmoving party, reasonable minds can only conclude the moving party is entitled to judgment as a matter of law. Civ.R. 56(C); *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 628 N.E.2d 1377 (1994).

{¶ 11} We have carefully reviewed the considerable record of evidence accumulated over the course of this case. It entails extensive claims and vast evidence all ultimately connected to the disputed workplace-based conduct between the parties occurring over a multi-year timeframe during their employment by TFD.

{¶ 12} Appellants' assertion of absolute immunity rests on their questionable interpretation of the recent Supreme Court of Ohio ruling in *Zumwalde v. Madiera*, 128 Ohio St.3d 492, 2011-Ohio-1603, 946 N.E.2d 748. Appellants sought to have *Zumwalde* interpreted as rendering individual employees of a political subdivision automatically immune from discrimination and retaliation claims. We do not concur in this interpretation.

{¶ 13} On the contrary, we find that *Zumwalde* simply establishes that political subdivisions may not invoke the R.C. 2744 general presumption of immunity, subject to specified exceptions, in cases arising in the course of the employment relationship. While *Zumwalde* preserved the ability of individual employees to invoke the general presumption of immunity, it did not negate the potential countervailing applicability of the statutory exceptions to the claimed immunity of individual employees, as suggested by appellants. Accordingly, potential liability can still be found against individual employees should the evidence establish a statutory exception.

{¶ 14} We concur with the trial court's ultimate conclusion that neither precedent nor statute in the context of the evidence presented automatically entitles the individually named appellants to the protection of government immunity against these gender discrimination claims as a matter of law. More precisely, we find that a genuine issue of material fact remains in dispute for jury determination regarding whether the conduct at issue by appellants directed towards appellees during their employment at TFD constitutes conduct of malice, bad faith or recklessness by appellants such that the R.C. 2744.03(A)(6)(b) exception to immunity applies to any or all of the individual appellants in this matter. Lastly, we are not persuaded that appellees' specificity of pleading in their amended complaint was too imprecise with respect to the immunity exceptions of R.C. 2744.03(A)(6) such that immunity automatically attaches to the individual appellants.

{¶ 15} Wherefore, we find appellants' assignments of error not well-taken. The judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J.
CONCUR. _____
JUDGE

Stephen A. Yarbrough, J.,
DISSENTS.

YARBROUGH, J., dissenting.

{¶ 16} This case involves an employment relations lawsuit filed by three female employees against their supervisors in the city of Toledo's fire department. Appellees have alleged a series of acts by appellants which they claim, over time, have formed a pattern of unlawful gender discrimination and, more recently through an amended complaint, a retaliation claim was added.

{¶ 17} The specific issue before us pertains to the immunity of the individual employees named in the complaint. Appellants' first assigned error challenges the trial court's blanket denial of their immunity claim under R.C. 2744.03(A)(6).

{¶ 18} When determining whether a political subdivision employee is entitled to immunity, R.C. 2744.03(A)(6) is the starting point because it establishes the framework of analysis by means of tripartite categories or exceptions, which differ from that applicable to political subdivisions. *See, e.g., Dolan v. Glouster*, 173 Ohio App.3d 617, 2007-Ohio-6275, 879 N.E.2d 838, ¶ 25 (4th Dist.).

{¶ 19} R.C. 2744.03(A)(6) states:

> 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.

{¶ 20} Generally, whether a political subdivision employee is entitled to immunity is a question of law. *See, e.g., Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992) ("Whether immunity may be invoked is a purely legal issue, properly determined by the court prior to trial, [and] preferably on a motion for summary judgment." (Citations omitted.)); *Mathews v. Waverly*, 4th Dist. No. 08CA787, 2010-Ohio-347, ¶ 14.

{¶ 21} Under the employee immunity exceptions of R.C. 2744.03(A)(6)(a) and (b), in determining whether an individual acted manifestly outside the scope of his employment or whether he acted with malicious purpose, in bad faith, or in a wanton or reckless manner, specific issues can sometimes raise questions of fact. *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, 857 N.E.2d 573, ¶ 14; *Fabrey v. McDonald Police Dept.*, 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994). However, that a factual analysis is often necessary to determine whether an employee acted beyond the scope of his employment or acted maliciously, in bad faith or wantonly, does not transform a question of law into a matter that cannot be resolved on summary judgment. *Compare Ruta v. Breckenbridge-Remy Co.*, 69 Ohio St.2d 66, 68, 430 N.E.2d 935 (1982) ("[S]imply because resolution of a question of law involves a consideration of the

evidence does not mean that the question of law is converted into a question of fact or that a factual issue is raised.").

{¶ 22} Thus, under R.C.2744.03(A)(6)(a) and (b), summary judgment should be granted when it cannot reasonably be disputed that the employee's conduct was not "manifestly outside the scope of" his job responsibilities and duties, and when the level of conduct shown cannot reasonably be construable as "malicious," "in bad faith," or "wanton or reckless." *Hackathorn v. Preisse*, 104 Ohio App.3d 768, 772, 663 N.E.2d 384 (9th Dist.1995) (Summary judgment proper under R.C. 2744.03(A)(6)(b) if the evidence "show[s] that [the employee] did not intend to cause harm, * * * did not breach a known duty through an ulterior motive or ill will, [and] did not have a dishonest purpose.")

{¶ 23} And whether the exception to immunity under R.C. 2744.03(A)(6)(c) applies is purely a question of law, for it always involves the interpretation or application of a statutory provision that is purported to remove the employee's immunity.

{¶ 24} Under their first assigned error, appellants contend that appellees have failed to establish that any of the three exceptions in R.C. 2744.03(A)(6) apply to them.

{¶ 25} Plainly neither R.C. 2744.03(A)(6)(a) nor (c) apply.

{¶ 26} First, appellees have not pointed to anything in the record, beyond conclusory claims or the repetition, essentially, of the allegations in their amended complaint, that would create a genuine question as to whether appellants were acting

manifestly beyond the realm of their employment duties.[1] The summary-judgment evidence indicates only that they were on duty and engaged in their official responsibilities in the fire department—i.e., generally doing what they were employed to do as firefighters—when various acts occurred that allegedly constituted the discriminatory treatment. Therefore, the employee immunity-exception under R.C. 2744.03(A)(6)(a) does not apply, and the trial court erred in concluding otherwise.

{¶ 27} Second, for the specific conduct alleged, appellees have cited no statute that "expressly imposes" civil liability on appellants as employees of a political subdivision. The exception under R.C. 2744.03(A)(6)(c) must be read carefully. It is not just an "exception" to immunity in the normal sense, but adds the burden that the party urging the exception identify language in a particular statutory provision that explicitly removes that immunity and imposes liability on the *employees* in their individual capacity.

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[1] "An employee's wrongful act, even if it is unnecessary, unjustified, excessive or improper, does not automatically take the act manifestly outside the scope of employment." *Elliot v. Ohio Dept. of Rehab. & Corr.*, 92 Ohio App.3d 772, 775, 637 N.E.2d 106 (10th Dist.1994). Instead, "[t]he act must be so divergent that it severs the employer-employee relationship." *Id.*at 775. "Employees can act unreasonably and still be in the scope of their [employment] duty[.] * * * It is only where the acts of state employees are motivated by actual malice or other such [motives] giving rise to punitive damages that their conduct may be outside the scope of their state employment." *James H. v. Dept. of Mental Health & Mental Retardation*, 1 Ohio App.3d 60, 61, 439 N.E.2d 437 (10th Dist.1980). However, "[c]onduct is within the scope of employment if it is initiated, in part, to further or promote the master's business." *Jackson v. McDonald*, 144 Ohio App.3d 301, 307, 760 N.E.2d 24 (5th Dist.2001), quoting *Martin v. Cent. Ohio Trans. Auth.*, 70 Ohio App.3d 83, 92, 590 N.E.2d 411 (10th Dist.1990).

{¶ 28} Although political subdivisions and their employees may not discriminate under R.C. Chapter 4112, that chapter does not *expressly impose* liability in the manner that R.C. 2744.03(A)(6)(c) requires (i.e., it is not enough that it creates a *duty* not to discriminate). *Horen v. Bd. of Edn. of Toledo Pub. Schools,* 6th Dist. No. L-09-1143, 2010-Ohio-3631, ¶ 41.[2] Instead, Chapter 4112 declares only that "[i]t shall be an unlawful discriminatory practice * * * [f]or any *employer* * * *" to discriminate against a protected class in employment. R.C. 4112.02(A). The individual appellants here are not appellees' employer; the city of Toledo, a political subdivision, is the employer, and it is already made subject to liability by R.C.4112.02(A). If the legislature had intended for one statute, i.e., R.C. 4112.02, to "expressly impose" a liability that would circumvent the

[2] The parties dispute the applicability of *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.,* 128 Ohio St.3d 492, 2011-Ohio-1603, 946 N.E.2d 748, but that is largely wasted effort. A careful reading reveals that its holding was quite narrow. Similar to this case, *Zumwalde* involved a discrimination lawsuit by a firefighter against the fire chief, to which a retaliation claim was later added. The Supreme Court addressed the import of R.C. 2744.09(B), which excepts from R.C. Chapter 2744 civil actions "relative to any matter that arises out of the employment relationship." The issue was whether R.C. 2744.09(B) removes the immunity of a political subdivision employee or only the immunity of the political subdivision. If R.C. 2744.09(B) were construed to apply to the employee, then the immunity analysis entailed by R.C. 2744.03(A)(6) would be irrelevant. *Zumwalde* ultimately held that "R.C. 2744.09(B) removes immunity *only as to the political subdivision* and does not affect the statutory immunity of the fellow employee." (Emphasis added) *Id.* at syllabus. This language is broad enough that the management status of the employee being sued is also irrelevant, and his presumptive immunity is unaffected by that status. That does not mean, however, that employee-immunity under R.C. 2744.03(A)(6) is automatic and absolute; rather, in the summary-judgment process, the claim for immunity must still be analyzed under R.C. 2744.03(A)(6)(a)-(c), in light of the complaint's allegations and the evidentiary record submitted within the strictures of Civ.R. 56(C).

effect of another statute, i.e., R.C. 2744.03(A)(6), it would have said so in direct and unambiguous language in the former statute. It did not.[3] In my view, the trial court erred in concluding—apparently as a matter of law—that the exception in R.C. 2744.03(A)(6)(c) applied to the appellants.

{¶ 29} What remains is the narrow window of immunity-removing conduct embraced by R.C. 2744.03(A)(6)(b), which characterizes such conduct by the primary terms "malicious purpose," "in bad faith," and "wanton or reckless." Under Ohio law these terms entail stringent standards, and not everything that occurs between employees in the workplace of a political subdivision that is unpleasant, unfair, upsetting, stressful, or lacking in civility, falls within their reach.

{¶ 30} "Malicious" means the willful and intentional desire to harm another, usually seriously, through conduct which is unlawful or unjustified and which, in some cases, may be criminal. *Hicks v. Leffler*, 119 Ohio App.3d 424, 428-429, 695 N.E.2d 777

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[3] R.C. 4112.02(A) prohibits *employers* from discriminating against current or prospective employees. Its language does not similarly address the liability of *employees.* The statutory definition of "employer" in R.C. 4112.01(A)(2) "*includes* * * * any person acting directly or indirectly in the interest of an employer." The trial court read this language to include managerial or supervisory personnel in the definition of "employer," citing *Genaro v. Cent. Transport, Inc*., 84 Ohio St.3d 293, 703 N.E.2d 782 (1999). However, R.C. 4112.01(A)(2) frames the *employer's* accountability for workplace discrimination in terms of both direct and vicarious liability. The same statutory phrase cannot mean to impose both individual liability on employees *and* vicarious liability on employers. For that reason, the Ohio Supreme Court should revisit the muddling of this issue that occurred in *Genaro*.

(10th Dist.1997). "Bad faith" implies a sinister motive that has "no reasonable justification." *Id.* "Bad faith" embraces more than merely bad judgment or negligence. It means a "dishonest purpose, moral obliquity, conscious wrongdoing," or the "breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces the actual intent to mislead or deceive another." *Id.; Jackson v. Butler Cty. Bd. of Cty. Commrs.*, 76 Ohio App.3d 448, 454, 602 N.E.2d 363 (12 Dist.1991). "Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result." *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-571, 983 N.E.2d 266, ¶ 33, citing *Hawkins v. Ivy*, 50 Ohio St.2d 114, 117-118, 363 N.E.2d 367 (1977). Merely negligent conduct is not wanton misconduct. *Fabrey*, 70 Ohio St.3d at 356, 639 N.E.2d 31. It requires that the actor be aware that his conduct will, in all likelihood, result in injury. Moreover, the standard of proof for wanton misconduct is high. *Id.* Finally, reckless conduct "is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Anderson* at ¶ 34, citing *Thompson v. McNeill*, 53 Ohio St.3d 102, 104-105, 559 N.E.2d 705 (1990) (adopting 2 Restatement of the Law 2d, Torts, Section 500, at 587 (1965).

{¶ 31} In my view, the record fails to demonstrate the sort of reprobative acts by appellants toward appellees that could reasonably be construed as "malicious," "in bad faith," or "wanton or reckless." In the first place, the nature of the evidence offered by

appellees is largely conclusory or opinion-based. When measured against the statutory standards for relinquishing immunity in light of Civ.R. 56(C), that evidence does not create a material factual question sufficient to survive summary judgment. Moreover, many of appellees' discrete complaints arise from personality disputes. That may make for an unenjoyable or even stressful work environment, but none of these complaints meet the standards in R.C. 2744.03(A)(6)(b).

{¶ 32} Even apart from the immunity issue, personality conflicts in the workplace and idiomatic comments strung together from separate incidents are not in themselves actionable under R.C. Chapter 4112. *Perez v. Theller*, 6th Dist. No. S-10-053, 2011-Ohio-2176, ¶ 14. ("Not everything in the workplace that makes an employee upset or resentful is necessarily 'adverse' or grounds for an actionable claim.") And some incidents which appellees cite as evidence of discrimination, such as counselings and reprimands, are not "adverse employment actions" as a matter of law. *Id.* at ¶ 13.

{¶ 33} Accordingly, I would find the first assigned error well-taken, for none of the immunity exceptions in R.C. 2744.03(A)(6)(a)-(c) have been shown to apply.

{¶ 34} I would also find appellants' second assigned error well-taken. Under this assignment, appellants urge that the amended complaint never alleged as a basis for liability any of the exceptions under R.C. 2744.03(A)(6), even though it was clear to appellees from the initiation of their lawsuit that the individual defendants were political subdivision employees to whom that section would presumptively apply.

{¶ 35} Given R.C. Chapter 2744's broad grant of immunity to political subdivisions and their employees respectively, and the fact that the immunity provisions applicable to each differ markedly in operation, it is axiomatic that a plaintiff must specifically plead and prove which exception (or exceptions) applies in the context of his claim. Although Ohio is generally a notice pleading state, *see* Civ.R. 8(F), that approach does not excuse a plaintiff's failure, by the summary-judgment stage of the litigation, to plead the applicability of one or more of the exceptions to employee immunity under R.C. 2744.03(A)(6), in relation to the conduct alleged. *See Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 31 ("[B]ecause the amended complaint failed to allege malice, bad faith, or wanton or reckless conduct, the appellate court strayed well beyond the pleadings and erred in reversing the [summary] judgment of the trial court[.]"); *Horen*, 6th Dist. No. L-09-1143, 2010-Ohio-3631, ¶ 50 (failure to allege in the complaint that the named individual public school employees acted with malicious purpose, in bad faith, wantonly, or recklessly entitled them to summary judgment).

{¶ 36} For the foregoing reasons, I dissent.