[Cite as *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, 2009-Ohio-6801.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BARBARA ZUMWALDE,	:	APPEAL NO. C-090015 TRIAL NO. A-0611022
Plaintiff-Appellee,	:	*D E C I S I O N.*
vs.	:	
MADEIRA AND INDIAN HILL JOINT FIRE DISTRICT,	:	
Defendant,	:	
and	:	
STEPHEN ASHBROCK,	:	
Defendant-Appellant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 24, 2009

Law Offices of Marc Mezibov, *Marc Mezibov*, and *Susan M. Lawrence*, for Plaintiff-Appellee,

Rendigs, Fry, Kiely & Dennis, L.L.P., and *Wilson G. Weisenfelder, Jr.*, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

SUNDERMANN, Judge.

{¶1} Stephen Ashbrock appeals the trial court's denial of his motion for summary judgment. We conclude that Ashbrock was not immune from the claims brought by plaintiff-appellee Barbara Zumwalde, so we affirm the judgment of the trial court.

{¶2} Zumwalde is a firefighter with the Madeira and Indian Hill Joint Fire District ("the JFD"), and Ashbrock is the fire chief of the JFD. In 2006, Zumwalde was suspended for 20 days for allegedly lying on medical questionnaires that she had submitted to the JFD prior to becoming a full-time firefighter. Zumwalde filed a lawsuit against the JFD and Ashbrock in which she asserted that the suspension had been ordered in retaliation for an age- and gender-discrimination lawsuit that she had previously filed against the JFD and Ashbrock, as well as in retaliation for the workers' compensation claim that she had filed for a recent injury.

{¶3} The JFD and Ashbrock filed a motion for summary judgment against Zumwalde, asserting that Ashbrock was immune from the claims, that Zumwalde had failed to establish a prima facie case of retaliation, and that the JFD was immune from Zumwalde's claim for punitive damages. The trial court denied the motion with respect to whether Ashbrock was immune from the claims and whether Zumwalde had established a prima facie case of retaliation. The trial court granted summary judgment to the JFD on the issue of punitive damages. This appeal followed.

{¶4} Ashbrock challenges the trial court's judgment that the existence of immunity could not be decided as a matter of law. A trial court's determination that

a political subdivision or its employee is not entitled to immunity under R.C. Chapter 2744 is a final, appealable order.[1]

{¶5} In his sole assignment of error, Ashbrock specifically asserts that the trial court erred when it refused to conclude as a matter of law that he was immune from Zumwalde's claims under R.C. 2744.03(A)(6). We review the trial court's decision not to grant summary judgment de novo.[2]

{¶6} Under R.C. 2744.03(A)(6), an employee of a political subdivision is immune from liability, unless one of three exceptions applies: (1) the employee acted outside the scope of his employment; (2) the employee acted "with malicious purpose, in bad faith, or in a wanton or reckless manner"; or (3) civil liability is expressly imposed by statute. The trial court concluded that there existed a genuine issue of material fact about whether Ashbrock had acted maliciously, in bad faith, or in a wanton or reckless manner.

{¶7} Although the trial court began its analysis with R.C. 2744.03 and its exceptions, we conclude that the analysis should have begun with R.C. 2744.09, which removes certain types of actions from the purview of R.C. Chapter 2744. R.C. 2744.09(B) provides that R.C. Chapter 2744 "does not apply to * * * [c]ivil actions by an employee * * * against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision."

{¶8} To determine whether R.C. 2744.09(B) makes R.C. Chapter 2744 inapplicable to Zumwalde's action, we must first determine whether R.C. 2744.09(B)

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[1] See R.C. 2744.02(C); *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, 909 N.E.2d 88, syllabus.
[2] *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243.

applies to the claims against Ashbrock individually, and then we must decide whether the claims made by Zumwalde "arise[] out of the employment relationship."

{¶9} Ashbrock argues that R.C. 2744.09(B) removes from the purview of R.C. Chapter 2744 only employee actions against the political subdivision itself. While the JFD may not be entitled to immunity from the action under R.C. 2744.09(B), Ashbrock contends, he was still entitled to immunity under R.C. 2744.03(A). The Eighth Appellate District agrees with Ashbrock's view. In *Campolieti v. Cleveland*, that court concluded that R.C. 2744.09(B) did not work to remove immunity from a political subdivision's employee, because the section referred only to actions against the political subdivision.[3] On the other hand, the Fourth and Eleventh Appellate Districts have concluded that R.C. 2744.09(B) does exclude from R.C. Chapter 2744 claims against individual employees if the claims arise out of the employment relationship with the political subdivision.[4] We conclude that this latter view reflects a more logical reading of the statute. A political subdivision's employee is cloaked with immunity under R.C. 2744.03 by virtue of his employment with the subdivision. To follow the Eight Appellate District's conclusion would mean that the political subdivision's immunity could be removed for actions arising out of the employment relationship but that the individual employee's immunity would remain. We, therefore, conclude that R.C. 2744.09(B) does apply to the claims against Ashbrock that arise from Zumwalde's employment relationship with the JFD.

{¶10} We next consider whether Zumwalde's claims arise from the disciplinary action taken against her as an employee of the JFD. In *Engleman v.*

[3] 8th Dist. No. 92238, 2009-Ohio-5224.
[4] See *Nagel v. Horner*, 162 Ohio App.3d 221, 2005-Ohio-3574, 833 N.E.2d 300; *Ross v. Trumbull Cty. Child Support Enforcement Agency* (Feb. 9, 2001), 11th Dist. No. 2000-T-0025.

Cincinnati Bd. of Edn., this court considered whether a teacher's claim against a school board for failing to provide adequate protection was excluded from the purview of R.C. Chapter 2744 under R.C. 2744.09(B).[5] We concluded that R.C. 2744.09(B) did not remove the claim from the purview of R.C. Chapter 2744, because intentional torts occur outside the employment relationship.[6]

{¶11} *Engleman* followed the lead of the Ohio Supreme Court in *Brady v. Safety-Kleen Corp.*, in which the court held that employer intentional torts occur outside the employment relationship.[7] Because such torts occur outside the employment relationship, the court reasoned, a cause of action by an employee for an employer intentional tort was not preempted by Section 35, Article II of the Ohio Constitution or by R.C. 4123.74 and 4123.741, which govern the workers' compensation system in Ohio.[8] But the Ohio Supreme Court's pronouncement on intentional torts with respect to the workers' compensation system is inapposite to the determination of whether a claim for retaliation "arises out of the employment relationship between the employee and the political subdivision" for purposes of R.C. 2744.09(B).

{¶12} We find the reasoning of the Eleventh Appellate District persuasive: "In many instances, the *Brady* holding is readily applicable to an immunity case under R.C. 2744.09(B). For example, if a political subdivision employee initiates a lawsuit for battery against his or her employer alleging that a supervisor inappropriately touched him or her, such conduct would clearly be outside of the employment relationship. This is because once the supervisor made the decision to

[5] (June 22, 2001), 1st Dist. No. C-000597.
[6] Id.
[7] (1991), 61 Ohio St.3d 624, 576 N.E.2d 722, paragraph one of the syllabus.
[8] Id.

engage in the inappropriate behavior, he was acting independently from the interests of the employer and was no longer acting in the course and scope of his employment. However, we do not believe that the *Brady* holding acts as a per se bar to any intentional tort claim by a political subdivision employee against his or her employer. If the conduct forming the basis of the intentional tort arose out of the employment relationship, the employer does not have the benefit of immunity pursuant to the plain language of R.C. 2744.09(B)."[9]

{¶13} This court even acknowledged in *Engleman* that R.C. 2744.09 removed claims for the intentional torts of invasion of privacy and racial discrimination from the purview of R.C. Chapter 2744.[10] Here, the claims for retaliation that were asserted by Zumwalde clearly arose out of her employment relationship with the JFD. That she alleged an intentional tort did not make R.C. 2744.09(B) inapplicable. We limit the holding of *Engleman* to its specific determination that intentional-tort claims for failure to provide adequate protection do not arise out of the employment relationship for purposes of R.C. 2744.09(B).

{¶14} Our conclusion is in accord with the Ohio Supreme Court's acknowledgement that R.C. 2744.09(B) would apply to an employee's discrimination lawsuit.[11] And other appellate districts have similarly concluded that R.C. 2744.09(B) does apply to employer intentional torts that arise from the employment relationship.[12]

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[9] *Fleming v. Ashtabula Area City School Bd. of Edn.*, 11th Dist. No. 2006-A-0030, 2008-Ohio-1892.
[10] *Engleman*, supra.
[11] *Whitehall ex rel. Wolfe v. Ohio Civil Rights Comm.*, 74 Ohio St.3d 120, 123, 1995-Ohio-302, 656 N.E.2d 684.
[12] *Nagel v. Horner*, 162 Ohio App.3d 221, 2005-Ohio-3574, 833 N.E.2d 300 (retaliation and hostile work environment); *Ross v. Trumbull Cty. Child Support Enforcement Agency* (Feb. 9, 2001), 11th Dist. No. 2000-T-0025 (invasion of privacy).

{¶15} We therefore conclude that R.C. 2744.09(B) applies to Zumwalde's claims. The trial court properly concluded that Ashbrock was not entitled to immunity as a matter of law under R.C. 2744.03. The judgment of the trial court is affirmed.

Judgment affirmed.

HENDON, P.J., and **MALLORY, J.,** concur.

Please Note:

The court has recorded its own entry this date.