

Memo

To: City Council
From: David W. Kuhn
Date: May 25, 2007
Copies: file
Subject: Steven E. Nagel vs. Charles H. Horner, et al

Attached is a copy of Judge Harcha's order dismissing the civil action filed by Officer Steven Nagel against the City and Chief Horner.

SCIOTO COUNTY
OHIO
FILED

IN THE COURT OF COMMON PLEAS,
GENERAL DIVISION - SCIOTO COUNTY
PORTSMOUTH, OHIO

2007 MAY 24 PM 2:05

James S. Thompson
CLERK OF COURTS

STEVEN E. NAGEL

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Plaintiff

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Case No. 03-CIC-081

vs.

*

JUDGE HOWARD H. HARCHA, III

CHARLES H. HORNER, et al

*

Defendants

*

DECISION AND JUDGMENT ENTRY

This matter comes before the Court on the defendants' motion for summary judgment and the plaintiff's memorandum in opposition. The Court finds the defendant has filed a reply memorandum as well as additional authority.

The main purpose of summary judgment is to enable a party to go behind the allegations in the pleadings and assess the proof in order to see whether there is a genuine need for trial. (See O Jur 3, Summary Judgment, Etc., Section 2). The Ohio Rule of Civil Procedure 56(C) governs summary judgment motions and provides in pertinent part, that:

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admission, affidavits, transcripts of evidence, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence of stipulation may be considered except as stated in this rule..."

In construing Civ. R. 56(C), the Supreme Court of Ohio has stated that summary judgment may be granted if it is determine that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. Temple v. Wean United, Inc., 50 Ohio St.2d 317, 324, (1977); State ex rel Howard v. Ferreri, 70 Ohio St.3d 587, 589 (1994).

"The burden of demonstrating that no genuine issue exists as to any material fact falls upon the moving party requesting a summary judgment". (Harless v. Willis Day Warehousing Co., 54 Ohio St.2d 64, 66 (1978)). The non-moving party is forced "to produce evidence on any issue for which that party bears the burden at trial." (Wing v. Anchor Media, Ltd. of Texas, 59 Ohio St.3d 108, 111 (1991)).

In ruling on a motion for summary judgment, the inferences to be drawn for the underlying facts contained in the depositions and affidavits must be viewed in the light most favorable to the party opposing the motion. Thus, summary judgment must be denied if reasonable minds could find for the party opposition the motion. (Kunkler v. Goodyear Tire and

Rubber Co., 36 Ohio St.3d 135, 136 (1988), citing Houshell v. American States Ins. Co., 67 Ohio St.2d 427, 433 (1981)).

This Court has previously ruled on a motion for summary judgment filed by the defendants. This Court ruling was reviewed by the Fourth District Court of Appeals. These parties were also involved in an arbitration which was reviewed by this Court and subsequently reviewed by the Court of Appeals.

This matter is now before the Court on the defendants' motion for summary judgment on the remainder of the claims that were not dismissed by the Court in the previously motions for summary judgment. The defendant now asserts the plaintiff's hostile work environment claim and the retaliation claim should be dismissed and the plaintiff argues to the contrary. The Court finds, for the purpose of the motion for summary judgment, there is no genuine issue of material fact remaining in the case. The Court has reviewed the affidavits, depositions and pleadings of the parties as well as the decisions of the Court of Appeals.

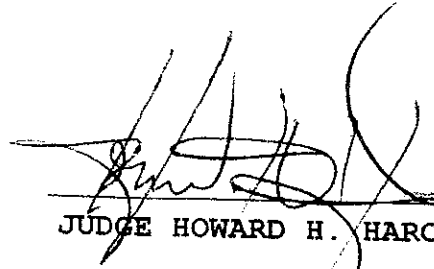
This Court, in its earlier decision, asked for assistance with some issues. On the hostile work environment claim, this Court finds that a necessary element of a claim is the employee be a member of a protected class. Downs v. Postmaster General, 31 F.App.848 (6th Cir.(202) Eakin v. Lakeland Glass Co., 2005 WL 161170 (Ohio App. 9th District. The Plaintiff argues that this

claim is a constitutional claim and that the plaintiff need not be a member of a protected class. This Court finds the plaintiff is not a member of such a protected class and his claim for a hostile work environment shall fail.

This Court also finds the plaintiff's claim for retaliation should also fail. This Court finds that it is necessary, to make a retaliation claim, that a plaintiff show that he was engaged in a protected activity. The plaintiff must also show the employer knew about the protected activity and that an adverse action was taken against the employee. The plaintiff asserts that he was retaliated against and punished for his constitutional and first amendment activities as well as his association with Matt Powell. The plaintiff states that his comments and actions were clearly matters of public concern. The plaintiff alleges these actions are clearly protected activities and would survive the defendant's motion for summary judgment. This Court has reviewed the case of Garcetti, et al v. Ceballos, 547 US , 126 S.Ct.1951, (2006) which holds that when public employees make statements pursuant to their official duties, they are not speaking as citizens for first amendment purposes and the constitution does not insulate their communication from employer discipline. Based upon this case and the arguments of counsel, this Court finds the plaintiff's retaliation claim shall also fail.

The Court finds the defendants' motion for summary judgment is well taken and is sustained. This Court finds that the resolution of these matters creates a final appealable order. This Court finds the plaintiff's complaint is hereby dismissed at the plaintiff's costs.

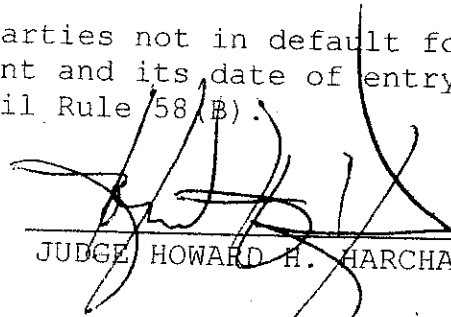
IT IS SO ORDERED.



JUDGE HOWARD H. HARCHA, III

TO THE CLERK:

Please serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal pursuant to Ohio Civil Rule 58(B).



JUDGE HOWARD H. HARCHA, III