

**IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO**

<b>TERRI A. POPPY</b>	)	<b>CASE NO. 02CV001922</b>
	)	
Plaintiff	)	<b>JUDGE EUGENE A. LUCCI</b>
	)	
vs.	)	
	)	<b><u>OPINION AND</u></b>
<b>CITY OF WILLOUGHBY HILLS</b>	)	<b><u>ORDER GRANTING SUMMARY</u></b>
	)	<b><u>JUDGMENT FOR DEFENDANT</u></b>
Defendant	)	

**INTRODUCTION**

{¶1} The court has considered the motion for summary judgment, filed by Defendant City of Willoughby Hills on July 7, 2003, the response to the defendant’s motion for summary judgment, filed by Plaintiff Terri A. Poppy on September 18, 2003, and the defendant’s reply brief in support of its motion for summary judgment, filed on October 6, 2003. For the reasons stated in this order, the motion for summary judgment is granted, and the within civil action is dismissed in favor of Defendant City of Willoughby Hills.

**PROCEDURAL POSTURE**

{¶2} Plaintiff Terri A. Poppy filed her complaint, at the voluntary end of her career, against her former employer, Defendant City of Willoughby Hills, on October 24, 2002, and amended it on May 21, 2003.<sup>1</sup> Poppy alleges one claim: that city council discriminated against her on the basis of her gender, in violation of R.C. Chapter 4112, by failing to classify her as a full-time employee (rather than part-time), and failing to compensate her the same as similarly situated males.

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<sup>1</sup> This civil action is the second she filed against the City of Willoughby Hills. Her first action was filed in U.S. District Court against Willoughby Hills Mayor Mort O’Ryan and the City of Willoughby Hills on September 14, 2001. In that action, Poppy alleged that the mayor retaliated against her – because she supported opposition mayoral candidate Ted Dellas – by denying her full-time employee status and higher compensation. U.S. District Judge Paul Matia ruled that Poppy’s part-time status and compensation were not the result of unlawful retaliation, and dismissed the lawsuit. Judge Matia determined that the mayor was not her employer (her employer was city council), and that the lawsuit was nothing more than political infighting perpetuated by Poppy.

## ISSUES

{¶3} The issues presented in this case are: (1) whether there is a genuine issue of material fact over the allegation that the defendant failed to classify her as a full-time employee or failed to compensate her the same as any similarly situated males, on the basis of gender; and (2) whether as a matter of law, plaintiff cannot establish her claim.

## LAW

{¶4} Rule 56(C) of the Ohio Rules of Civil Procedure states, in pertinent part, as follows:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, 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 or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Thus, before summary judgment may be granted, it must be determined 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 nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.<sup>2</sup>

{¶5} Although Rule 56(C) states that “No evidence or stipulation may be considered except as stated in this rule,” Ohio courts have recognized that when the opposing party “fails to object to the admissibility of evidence under Civ. R. 56, the court may, but need not, consider such evidence in determining whether summary judgment is appropriate.”<sup>3</sup>

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<sup>2</sup> *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 364 N.E.2d 267; *Mootispaw v. Eckstein* (1996), 76 Ohio St. 3d 383, 667 N.E.2d 1197.

<sup>3</sup> *Carver v. Deerfield Township* (Portage 2000), 139 Ohio App. 3d 64, 742 N.E.2d 1182, citing *Felker v. Schwenke* (Cuyahoga 1998), 129 Ohio App. 3d 427, 431, 717 N.E.2d 1165, 1168, *State ex rel. Spencer v. E. Liverpool Planning Comm.* (1997), 80 Ohio St. 3d 297, 301, 685

{¶6} The main purpose of the summary judgment procedure 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. The remedy should be applied sparingly and only in those cases where the justice of its application is unusually clear. Resolving issues of credibility, or reconciling ambiguities and conflicts in witness testimony is outside the province of a summary judgment.<sup>4</sup> In reviewing a motion for summary judgment, the court must construe the evidence and all reasonable inferences drawn therefrom in a light most favorable to the party opposing the motion.<sup>5</sup>

{¶7} For purposes of ruling on a motion for summary judgment, a dispute of fact is “material” if it affects the outcome of the litigation. The dispute is “genuine” if it is manifested by substantial evidence going beyond the mere allegations of the complaint.<sup>6</sup>

## DISCUSSION

### *No Genuine Issue of Material Fact*

{¶8} In her complaint, plaintiff alleges her former employer, the City of Willoughby Hills City Council, discriminated against her based on her gender, in violation of Revised Code Chapter 4112, by failing to classify her as a full-time, rather than as a part-time, employee, and by failing to compensate her the same as allegedly similarly-situated males.

{¶9} Based upon the pleadings, depositions, affidavits, and other evidence permitted by Civil Rule 56, the following material facts are established without any genuine issue.

{¶10} When Poppy was hired as the clerk of city council, the position was part-time and plaintiff understood that her employment was part-time, as opposed to full-time. The clerk of council’s pay and its status as part-time are controlled by ordinance. The legislation governing the pay and status of the clerk is introduced and voted on before Willoughby Hills City Council. Since being hired in

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N.E.2d 1251, 1255, and *Bowmer v. Dettelbach* (1996), 109 Ohio App. 3d 680, 684, 672 N.E.2d 1081, 1084 (holding that “[w]hile the court of appeals may consider evidence other than that listed in Civ R. 56[C] when there is no objection, it need not do so.”)

<sup>4</sup> *Napier v. Brown* (Montgomery 1985), 24 Ohio App. 3d 12, 492 N.E.2d 847.

<sup>5</sup> *Morris v. Ohio Cas. Ins. Co.* (1988), 35 Ohio St. 2d 45, 517 N.E.2d 904; *Harless v. Willis Day Warehousing* (1978), 54 Ohio St. 2d 64, 375 N.E.2d 46.

<sup>6</sup> *Mount v. Columbus & Southern Elec. Co.* (Coshocton 1987), 39 Ohio App. 3d 1, 528 N.E.2d 1262.

1996, several ordinances have been passed by city council which have increased plaintiff's rate of compensation, and Poppy received consistent and substantial compensation increases during her tenure as clerk of council. The court also notes that the plaintiff's income as clerk of city council was significantly higher than that of other council clerks in comparable neighboring and contiguous communities.

{¶11} To prove her claim of gender discrimination, Poppy alleges she was treated differently than "similarly-situated males." Plaintiff claims that the mayor's administrative assistant, Mr. Randy Slusarz, was full-time, and, being similarly situated, plaintiff also should have been full-time. Plaintiff also claims that, if she was to remain part-time, she should have been paid as much as the part-time "similarly-situated" male building inspector, Mr. Don Burth.

{¶12} Plaintiff is not similarly situated to Mr. Slusarz, the mayor's administrative assistant. The administrative assistant's position not only is materially different than the clerk of council's position, but also the employment and compensation in these two positions are controlled by different employers. The clerk of council's compensation and position are controlled by city council; the administrative assistant's compensation and position are controlled by the mayor. Prior to Poppy taking the position as clerk of council, the clerk of council and mayor's administrative assistant were one and the same position, and the city council and the mayor determined that the positions should be split, with the mayor's administrative assistant position being full-time and the clerk of council position being part-time.

{¶13} Plaintiff is not similarly situated to Mr. Burth, the building inspector. The clerk of council's position is clerical and requires secretarial skills, no formal certifications, and is a part-time position as defined by the clerk's employer, the City of Willoughby Hills City Council. The building inspector's duties are quite different from those of the clerk of council. The qualifications of Poppy are quite different from Mr. Burth's. Mr. Burth was a building inspector for the City of Macedonia, a licensed electrical contractor for 25 years, a licensed general contractor for 12 years, a licensed state fire marshal, a registered building appraiser, an experienced plumbing inspector, and had two years of college education at Western Reserve University. Poppy has none of these qualifications.

{¶14} The court determines that former councilman Peter Pike's comments that plaintiff was entitled to more pay and/or she was being discriminated against: (1) cannot be construed as

referencing gender discrimination in any legal sense; (2) can be construed as misusing the legal term “discrimination” in a political context; (3) are one councilman’s opinions rather than an expression of vote by the legislative body; and (4) are belied by the material facts (of which there is no genuine issue) and the law, and do not constitute an admission upon which plaintiff can rely upon to support her allegations.<sup>7</sup>

{¶15} Poppy was qualified for the position of clerk of council.

### ***Sovereign Immunity***

{¶16} The defendant is entitled to judgment as a matter of law on the plaintiff’s Revised Code Chapter 4112 claim, pursuant to R.C. §§2744.02(A)(1) and 2744.03(A)(1), (3), and (5).<sup>8</sup> Defendants’ decision to make the clerk of council’s position part-time, rather than full time, was made before the plaintiff applied for or accepted the position. That is a governmental legislative decision with which this court will not interfere.<sup>9</sup> Plaintiff knew, when she applied for the position, that it was part-time, and if she did not want a part-time position, she could and should have looked elsewhere. The fact that there are other employees in the city which are full-time is inapposite. Decisions, in the exercise of judgment or discretion, designating certain positions as part-time or setting hourly pay rates and determining job benefits involve legislative discretion in the allocation of personnel and resources, and absent malicious purpose, bad faith, or wantonness or recklessness, are not actionable.<sup>10</sup> Poppy produced no evidence that the clerk of council position was designated

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<sup>7</sup> In fact, this court is cognizant of the very public political turmoil between Mr. Pike and the defendant (as well as the mayor) and this court agrees with the United States District Court Judge Paul Matia, who protested, in his order dismissing the previous lawsuit that plaintiff filed against Willoughby Hills Mayor Mort O’Ryan, “the use of the court system for the airing of what are clearly petty political feuds between mayors, councils and their employees. To attempt to elevate what has been occurring in Willoughby Hills to the level of a civil rights violation is ludicrous and makes a mockery of the civil rights laws. The taxpayers of Willoughby Hills might be interested to learn what this episode has cost them in legal fees. Accordingly, for the foregoing reasons, defendants’ motion for summary judgment is granted.”

<sup>8</sup> See, *Howard v. City of Beavercreek* (2002), 276 F.3d 802, 808.

<sup>9</sup> See, *Drew v. Laferty*, 1999 WL 366532 (Ohio App. 4 Dist.)

<sup>10</sup> The situation might be different if the city council had voted down a measure to make the clerk’s position full-time, or if the city council had reduced the pay and benefits and full-time

part-time by city council, maliciously, in bad faith, or in a wanton or reckless manner. Poppy produced no evidence that a person of the female gender was required to fill the position of clerk of council – the terms and conditions of employment were gender-neutral, and were enacted by legislation voted on in public, before Poppy took the position.

{¶17} Poppy’s complaint is premised on the establishment of the part-time status and pay of the defendant’s clerk of council. City council, and each of its members who voted in favor of the measure: (1) engaged in the purely legislative function; (2) by enacting an ordinance in the exercise of its judgment and within its discretion with respect to its policy-making and planning powers by virtue of its duties and responsibilities; and (3) specifically acted within its sole power in determining whether to acquire and how to use personnel and resources. Defendant is immune from suit on this issue. Accordingly, the defendant is entitled to sovereign immunity under these circumstances as a matter of law.

#### ***Absolute Immunity***

{¶18} In addition, the defendant is entitled to absolute immunity because the creation of the job, including its part-time status, rate of pay, and benefits, were enacted by the defendant in the sphere of legitimate legislative authority.<sup>11</sup> The defendant took no actions detrimental to the emoluments of plaintiff’s position at any time during her employment with the City of Willoughby Hills. Despite the fact that not all of the councilmen agreed with the position ultimately taken by the majority of council – an expected consequence of the political process – council validly enacted the legislation prescribing the terms and conditions of plaintiff’s employment before plaintiff took the job.

{¶19} Because the legislation was within the pure legislative power of city council, and was enacted before the plaintiff took the position, this court will not inquire into the motives of the legislators in enacting the legislation establishing the clerk’s position and pay.

#### ***Prima Facie Case***

{¶20} Plaintiff has not produced any direct evidence of gender discrimination, nor has she set forth a prima face case of gender discrimination because she did not establish that any similarly-situated

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status to part-time status *after* plaintiff accepted the employment – that is not the case here.

<sup>11</sup> *Tenney v. Brandhove* (1951), 341 U.S. 367, 376, 71 S.Ct. 783, 95 L.Ed. 1019; *Hogan v. Village of South Lebanon* (1991), 73 Ohio App.3d 230, 233-34, 596 N.E.2d 1092.

males were treated differently than her, or that she was subject to an adverse employment action.<sup>12</sup> Poppy has brought forth no evidence that Mr. Burth or Mr. Slusarz were similarly situated in all relevant respects. All relevant aspects, including Poppy’s employer, supervisor, job description and status, daily job duties, work hours and standards, and experience and qualifications, were quite different from those of the two males, and the conduct of the employers and supervisors is affirmatively distinguishable, so that any comparison is like “apples to oranges.” Common sense dictates this conclusion. Furthermore, as stated previously, the City of Willoughby Hills City Council took no action adverse to plaintiff. Poppy voluntarily accepted the position, knowing it was part-time, and she received regular compensation increases. Accordingly, since the plaintiff cannot establish any different treatment from similarly-situated members outside the protected class, and cannot show any adverse employment action, as a matter of law, her gender discrimination claims, under R.C. Chapter 4112, cannot be substantiated.<sup>13</sup>

#### ***Mayor’s Control Over City Council***

{¶21} The court determines that any claim that the mayor controlled city council so as to cause council to discriminate against Poppy is pure fancy on the part of Poppy, and has already been determined to be not so by the federal court in the prior lawsuit. The federal court ruled – and this ruling is *res judicata* in the lawsuit pending in this court – that city council had control over Poppy’s employment, and that any allegation that Mayor O’Ryan influenced council was without merit.

#### **CONCLUSION**

{¶22} Accordingly, it appears from the evidence that reasonable minds can come to but one conclusion and that conclusion is adverse to the plaintiff, the court having construed the evidence

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<sup>12</sup> *McDonnell Douglas Corp. v. Green* (1972), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668; *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6<sup>th</sup> Cir. Ohio, 1992); *Burns v. Jacor Broadcasting Corp.*, 128 F.Supp.2d 497 (S.D. Ohio 2001).

<sup>13</sup> Plaintiff contends that the clerk of council position was sufficiently similar to that of the mayor’s administrative assistant because both positions: (1) handled correspondence; (2) kept records and handled files; (3) kept track of appointments and meetings; (4) handled inquiries from the public and other officials and routed inquiries to the proper place; and (5) handled public records requests. If one were to throw common sense to the wind, and use the plaintiff’s recipe as our sole criteria, the position of clerk of council is also sufficiently similar to that of any law director or judge.

most strongly in plaintiff's favor. The defendant is entitled to sovereign immunity and absolute immunity on the plaintiff's gender discrimination claims, and the plaintiff has produced no evidence indicating gender discrimination or that she can establish a prima facie case of gender discrimination by showing that she was the subject of adverse employment action or was treated differently than similarly-situated male employees.

**ORDER**

{¶23} The within civil action is hereby dismissed with prejudice at plaintiff's cost.

{¶24} **IT IS SO ORDERED.**

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**EUGENE A. LUCI, JUDGE**

c: Kenneth D. Myers, Esq., Attorney for Plaintiff  
John T. McLandrich, Esq. & Paul J. Cristallo, Esq., Attorneys for Defendant