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| **EMANUEL SMITH, III** | * | **NO. 2017-CA-0038** |
| **VERSUS** | * | **COURT OF APPEAL** |
| **HOUSING AUTHORITY OF NEW ORLEANS, SILAS PHIPPS, JR., ROBERT ANDERSON, GREGG FORTNER, AND AB INSURANCE COMPANY** | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
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**BROUSSARD, J., DISSENTS**

I respectfully dissent for the following reasons.

First, I would have followed the law and reasoning contained in *Sommer v. State, Dept. of Transp. and Development*, 758 So.2d 923 (La. App. 4 Cir. 3/29/2000). *See also Encalarade v. New Orleans Center for Creative Arts/Riverfront,* 2010 WL 2854275, at 2 & n. 22 (La. E.D. 7/19/10) cited in *Garcia v. Housing Authority of New Orleans,* 2013 WL 264332, at 4, --F.2d. -- (La. E.D. 1/23/13) wherein it is the clear pronouncement of the law of this circuit that: (1) HANO is not protected under the discretionary acts doctrine; (2) that HANO and its employees are "persons" within meaning of 42 U.S.C § 1983. (3) *Sommer supara established that* a non-privileged communications to third parties regarding an employee are defamatory and give rise to a cause of action for which there is a remedy at law; (4) HANO could be held solidarily liable under the laws of this state and circuit.

Next, I find it imperative to apply the Louisiana Discretionary Acts Doctrine as found in La. R.S. 9:2798.1. A governmental agency is protected from liability at the policy making or ministerial level, not at the operational level. *Fowler v. Robert*s, 556 So.2d 1, 15 (La. 1989). Although I agree with the majority on this point, I submit that the decision of the trial court fails to apply the law in this

circuit. In determining whether La. R.S. 9:2798.1 is applicable herein we are to apply a two-step analysis. The trial court must first decide if the governmental action is a matter of choice, and, if so, whether the government's selection of alternative choices was policy based. *Boguille v. Chambers*, 96–1173 p. 11 (La. App. 4 Cir. 12/11/96), 685 So.2d 582, 589, *citing Rick v. State*, *DOTD*, 93–1776 (La.1/14/94), 630 So.2d 1271. The record in this case is void of any such analysis or determination; therefore I would reverse the district court on its application of the exemptions provided under La. R.S. 9:2798.1.

Even conceding that Mr. Smith's action was a matter of choice, it cannot be held to be policy-based. Mr. Smith asserts facts which, if taken as true for the purpose of an exception of no cause of action, fall within the exemptions from immunity contained in La. R.S. 9:2798.1 C (1) and (2). These provisions impose liability on public entities and their agents for certain acts as public officials. The record reveals that Mr. Smith's allegations convey the notion of intentional and malicious conduct by HANO and its employees which denies them the benefit of the discretionary acts doctrine.

I also believe that the petition should be reviewed in the light most favorable to Mr. Smith. The exception of no cause of action tests the legal sufficiency of a petition by examining whether, based upon the facts alleged within the four corners of the petition, the law affords the plaintiff a remedy. *Meckstroth v. Louisiana Dep't of Transp. & Dev*., 2007-0236, p.2 (La. App. 4 Cir. 6/27/07), 962 So. 2d 490, 492.

Mr. Smith's petition contains approximately eighteen allegations of misconduct on the part of HANO officials which were performed at the operational level. In the State of Louisiana, these allegations, if proven, have a remedy in economic damages.

On February 16, 2016 Mr. Smith filed a petition for damages in Civil District Court for the Parish of Orleans. Mr. Anderson and Mr. Fortner were sued both in their capacity as employees of HANO, and individually.[1]

In keeping with *Meckstroth*, the decision of the trial court does not comport with this axiom of Louisiana Law.

As to 42 U.S.C § 1983 the majority holds that HANO and its employees are collectively instrumentalities of the state except as outlined in La. R.S. 539(C)(8)(b) and are not a persons within the meaning of 42 U.S.C. § 1983. The United States Supreme Court in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), determined that state officials, acting in their official capacities, are outside the class of persons subject to liability under 42 U.S.C. § 1983. However, the Court also rejected the notion that this language means that the statute does not authorize suits against state officers for damages arising from official acts. *Id*. Consequently, HANO and its employees who are sued in their individual capacities are persons in light of 42 U.S.C. § 1983. *Hafer v. Melo, 502 U.S. 21, 22–23, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991)*.

Mr. Smith has sued the HANO employees in both their official and personal capacities for their individual acts and for violations of constitutional rights by state officials acting under the color of state law. A personal capacity suit is only another way to sue the entity of which an officer is an agent. *See Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Consequently, an official, sued in his official capacity, has only those defenses which are afforded to the state agency.

In this case the majority agrees that HANO is not to be considered as an instrumentality of the state for purposes of Article X, Section 1(A) of the Constitution of Louisiana. Therefore with a few exceptions, most of HANO

[1] See the petition and amended petition of the Appellant.

employees are not included in the state civil service system. La. R.S. 40:539(C)(8)(a) and 40:539(C)(8)(b). HANO and its employees also assert that they are immune from liability pursuant to La. R.S 40:515 which declares that no representative of a local housing agency shall personally be civilly or criminally liable for: acts not committed or authorized by such persons; action authorized or taken in good faith; under prescribed circumstances, denial of individuals to access to public housing; disclosure of confidential information. I will address each of these defenses sequentially.

Regarding the presumed immunity from the obligation to provide Mr. Smith with the right to due process in an adverse personnel action proceeding as is required, the reliance on the "at-will" character of employment is misplaced. The Civil Code provides that an employment contract for an indefinite duration may be terminated by either the employee or the employer at any time without cause. Reasons for termination of or by an at-will employee need not be accurate, fair, or reasonable. *Mix v. University of New Orleans,* 609 So. 2d 958 (La. App. 4 Cir. 1992). However, the doctrine of employment-at-will is limited by federal and state statutes that prohibit discrimination and retaliation against employees. One such limitation of the application of the at-will doctrine is retaliation for whistle blowing. *See R.S. 23:967(a); Matthews v. Military Dept. ex rel. State, 970 So. 2d 1089 (La. Ct. App. 1st Cir. 2007); Hale v. Touro Infirmary, 886 So. 2d 1210 (La. Ct. App. 4th Cir. 2004)* § 12:3.Statutory limitations, La. Prac. Employment Law § 12:3. Herein Mr. Smith has made such an allegation. If these allegations are taken as true, HANO should have to defend their good faith termination of Mr. Smith. In the absence of a valid nondiscriminatory reason for termination that is related to the whistleblower allegation. For this reason I would deny the exception of no cause of action.

Now I will address the defenses of immunities provided by La. R.S. 9:2798. The defenses and immunities provided to HANO and its employees are found within the provisions of La. R.S. 9:2798.1 wherein the State of Louisiana has consented to be sued. However, the exemptions provided in paragraphs A and B of that statute are withdrawn from conduct by public officials acting in their official capacity as illustrated in La. R.S. 9:2798.1 C (1) and (2). Hence HANO and its employees are not afforded immunity when "(1) [a]cts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or (2) [t]o acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct." *Id*.

As stated previously, Mr. Smith's allegations are sufficient to state a cause of action under the exemption provided La. R.S. 9:2798.1 because the allegations can be characterized as willful, intentional, and violations of constitutional rights. Mr. Smith's allegations, if taken as true for the purpose of the exception of no cause of action, are acts and omissions that can be characterized as not reasonably related to the legitimate governmental objective for which policy making or discretionary policies exist. Consequently such actions are not exempt from liability under 42 U.S.C. § 1983. I would reverse the decision of the district court on this basis as well.

As to the personal capacity aspect of the suit, Mr. Smith sought to impose individual liability upon a government officer for actions taken under the color of state law. Such an action it is sufficient to establish personal liability in light of 42 U.S.C. § 1983 in order to plead conduct that shows that the official acted under the color of state law and caused a deprivation of the federal right of to due process under the Police Bill of Rights.

While Mr. Smith, in a personal-capacity suit, need not establish a connection to governmental policy or custom, officials sued in their personal capacities (unlike those sued in their official capacities), may assert personal immunity defenses such as objectively reasonable reliance on existing law. Thus the United States Supreme Court made it clear that acts outside the official's authority and not essential to the operation of state government as well as those within the official's authority and necessary to the performance of governmental functions can subject an official to 42 U.S.C. § 1983 liability. *Hafer, supra*, 502 U.S. at 27, 112 S.Ct. 358.

From this reasoning, I conclude that Mr. Smith alleged sufficient facts in his petition to state a cause of action concerning policy decisions on which relief could be granted.

In this case HANO was bound to discipline Mr. Smith, the peace officer, pursuant to La. R.S. 40:456.1 and La. R.S. 40:2531, the "Police Bill of Rights". HANO has no choice or discretion in how it would discipline its peace officers. The plain meaning of the statutes require that Mr. Smith be given his right to due process that is afforded to all certified police officers in the State of Louisiana.

Taking as true the allegation of abuse of administrative authority that caused the injury claimed by Mr. Smith, he should be able to recover damages, especially if the conduct that caused the injury is not protected by policy or procedures of the HANO. As stated above, there are sufficient allegations of bad faith in the employment termination process to state a cause of action. An example of such allegations is the claim that Mr. Smith was entitled to be disciplined as a peace officer and afforded the Police Bill of Rights.

Mr. Smith alleges that he is a peace officer within the meaning of La. R.S. 40:456.1 and La. R.S. 40:2531. HANO police officers are peace officers in light of La. R.S. 40:456.1 and La. R.S. 40:2531 and are required to provide due process protections afforded to police employees as defined by R.S. 40:1372(5). The issue

was addressed by the Attorney General as follows: "as used in La. R.S. 40:2531, applies to all police employees, including the elected or appointed head of a law enforcement department, who are authorized to make arrests, perform searches and seizures, or execute criminal warrants, and who are responsible for the prevention or detection of crime or for the enforcement of the penal, traffic, or highway laws of this state." Op. Atty. Gen. No. 13-0207 (03/19/2014), 2014 WL 1404481. These functions are identical to the duties imposed on HANO peace officers pursuant to La. R.S. 40:456.1 (A). This statute is inscribed under Title 40 of the Louisiana Revised Statutes. It is the same title that addresses the qualifications and discipline for Peace Officers in the State of Louisiana. This title concerns Public Health and Safety including Housing Authorities and Slum Clearance, Housing Authority Law in Chapter 3. Under La. R.S. 40:456.1, HANO peace officers are required to be certified under the police officer standard training. This is the same training required for all peace officers in the state of Louisiana including the Louisiana State Police. A review of the statute makes the legislative intent clear. It reads as follows:

> A. The Housing Authority of New Orleans, referred to hereafter as HANO, may appoint and commission peace officers who shall enforce laws, rules, and regulations to secure the protection of persons, properties, or interests relating to HANO.
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> B. HANO's peace officers may carry weapons, concealed or exposed while in the performance of their duties, and shall take such action as is authorized by law, rule, or regulation to protect persons, properties, or interests relating to HANO. Such peace officers shall exercise regular police powers of the state granted to law enforcement officers, including but not limited to, enforcement of municipal laws, issuance of municipal summons and citations and with respect to criminal and other offenses affecting the protection of persons, properties, or interests relating to HANO or affecting the performance of their duties.
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> C. HANO's peace officers shall be P.O.S.T. certified in accordance to the Peace Officers Standard and Training Law.[1]
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> D. HANO's peace officers shall prevent and detect crime, apprehend criminals, enforce the criminal and traffic laws of the state, keep the peace and good order in the state by the enforcement of the state's police powers, and perform any other related duties imposed upon them by the legislature.

This statute must be given its plain meaning. HANO's peace officers are empowered to enforce the "State's police powers". As recently stated in *McLane S., Inc. v. Bridges*, 2011-1141, p.5-6 (La. 1/24/12), 84 So. 3d 479, 483 it is a fundamental principle of statutory interpretation that when a 'law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written, and no further interpretation may be made in search of the intent of the legislature." Id. citing *Harrah's Bossier City Inv. Co., LLC v. Bridges*, 09–1916 (La.5/11/10), 41 So.3d 438, 446–447 (citing La. C.C. art. 9) and *Tarver v. E.I. Du Pont De Nemours and Co.*, 93–1005 (La.3/24/94), 634 So.2d 356, 358)

The majority opinion herein stated that the assertion of entitlement to La. R.S. 40:2531 was unfounded because Mr. Smith does not belong to the class of persons protected by that statute. The plain language of that statute quantifies the functions of police officers as the same as those of HANO peace officers. Therefore, I respectfully disagree because HANO Peace Officers are peace officers and police employees within the meaning of La. R.S. 40:2531, and should be disciplined according to the rights guaranteed by La. R.S. 40:2531.

For the forgoing reasons, I would respectfully reverse the decision of the trial court on all issues and reinstate, HANO, Robert Anderson, Greg Fortner, and AIG as defendants.