

PHILIP HABEEB, et al.

Case No. 2006-05543

Plaintiffs

Judge Clark B. Weaver Sr.

v.

DECISION

THE OHIO HOUSE OF
REPRESENTATIVES

Defendant

{¶1} An evidentiary hearing was conducted in this matter to determine whether Shirley Smith is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶2} R.C. 2743.02(F) states, in part:

{¶3} “A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer’s or employee’s conduct was manifestly outside the scope of the officer’s or employee’s employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.”

{¶4} R.C. 9.86 states, in part:

{¶5} “[N]o officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer’s or employee’s actions were manifestly outside the scope of his employment or official responsibilities or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.”

{¶6} Plaintiffs, Philip Habeeb and John Kraynik, are detectives employed by the Cleveland Police Department. On September 1, 2005, they executed a search warrant at

the home of 15 year-old Brandon McCloud. McCloud had been considered a suspect in several robberies, during which the offender displayed a knife. The detectives began to search the residence after they were informed by McCloud's relatives that he was not at home. During the search, the detectives encountered McCloud in a bedroom, allegedly brandishing a knife. The detectives fatally shot McCloud.

{¶7} At the time of the incident, Shirley Smith was serving as a member of the Ohio House of Representatives and it is undisputed that she was a state official as defined in R.C. 109.36. Although the incident did not take place in the district that Smith represented, she met with several members of McCloud's family at their request. On September 6, 2005, five days after the shooting, Smith issued a letter on Ohio House of Representatives letterhead stationary to Sanford Watson, Director of the Department of Public Safety for the city of Cleveland. Copies of Smith's letter were also sent to the mayor, chief of police, and both the county and city prosecutor for the city of Cleveland.

{¶8} At the immunity hearing, Smith testified that she sent the letter to convey the "outrage" that was experienced both by McCloud's family and "members of the black community." Although Smith did not recall signing the letter, she testified that she read it before sending it.

{¶9} In her letter, Smith stated that plaintiffs had acted as "judge, jury and prosecutor" by serving an "execution warrant" and that the detectives had "turned the youngster's bedroom into an execution chamber." Smith referred to plaintiffs as "death merchants" and "malicious accurate sharpshooters" who fired their weapons "until their execution assignment had been filled."

{¶10} Smith concluded her letter with the following: "These two hit men should be prosecuted to the full extend [sic] of the law. I will then take on a personal crusade to spare their lives as I unequivocally oppose the death penalty. Life without the possibility for parole would be the appropriate sentence in the case of Mr. John Kraynik and Mr. Philip Habeeb. But to do nothing or to allow them to distance themselves from the tragic events of September 1, 2005, and ultimately, their role in the death of Brandon McCloud without exacting some punishment for their actions means that they will have gotten away with cold-blooded murder, pure and simple." Portions of Smith's letter were published by the local media.

{¶11} Plaintiffs assert that Smith acted outside the course and scope of her official responsibilities and that she acted with malice, in bad faith, and in a reckless or wanton manner when she sent the letter.

{¶12} The Supreme Court of Ohio has addressed the analysis used in determining personal immunity for state employees: “If the Court of Claims determines that the employee's acts did not *further the interests of the state*, i.e., the employee was acting outside the scope of his employment, maliciously, in bad faith, or in a wanton or reckless manner, the state has not agreed to accept responsibility for the employee’s acts and the employee is personally answerable for his acts in a court of common pleas. (Emphasis added.) *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 287, 1992-Ohio-133. “The Revised Code does not define ‘scope of employment.’ The concept generally denotes an agency relationship in which the agent or employee is engaged in an activity that is logically related to the business of the principal or employer.” *Theobald v Univ. of Cincinnati*, 111 Ohio St.3d 541, 544, 2006-Ohio-6208 at ¶15. “[A] state employee does not have personal immunity if his ‘actions were manifestly outside the scope of his employment or official responsibilities,’ even if he does not act ‘with malicious purpose, in bad faith, or in a wanton or reckless manner.’” *Oye v. The Ohio State Univ.*, Franklin App. No. 02AP-1362, 2003-Ohio-5944 at ¶10. The question whether a state official or employee is entitled to immunity is a matter of law; however, the determination whether that person was acting within the scope of official responsibilities is one of fact. *Chitwood v. University Med. Center* (May 5, 1998), Franklin App. No. 97API09-1235.

{¶13} According to Smith, her duties as a state representative included work on legislative committees, attending speaking engagements, and advocating causes of her constituents. Smith also testified that her duties involved issues and events that occurred outside of her district. However, even if the shooting or subsequent investigations had implicated some state legislative function, it is clear that she had no official involvement with the incident when she sent the letter inasmuch as the incident did not involve any of her constituents and it occurred outside the district that she represented. Furthermore, Smith testified that portions of the letter were originally drafted by Mark Olds, an acquaintance who had no association with Smith’s legislative duties. The court finds that Smith was neither engaged in an activity that was logically related to her duties as a state representative nor furthering the interests of the state when she authored and sent the letter.

{¶14} Furthermore, the statements in Smith’s letter do not support her assertion that she wrote the letter in response to the McClouds’ request that the shooting be properly and fully investigated. Although Smith testified that her opinions were based upon her conversation with McCloud’s relatives, she also testified that the relatives she spoke with were not present at the time of the incident. Nevertheless, she determined that “[w]ithout question, excessive force” had been used. Within five days after the shooting, before any investigation had been completed, Smith had concluded that plaintiffs were “hit men” who deserved a sentence of “life without parole” for engaging in an “execution assignment.” Rather than seek a full and fair investigation, Smith chose to publicly announce her own determination that plaintiffs should be punished for criminal conduct. The court finds that plaintiff’s testimony regarding her reason for writing the letter was not credible.

{¶15} Considering Smith’s testimony, and in light of the fact that the incident did not occur in Smith’s legislative district, and that neither McCloud nor his relatives were Smith’s constituents, the court finds that the statements made by Smith in her letter did not further the interests of the state. Therefore, the court finds that Smith was acting manifestly outside the scope of her employment as a state representative.

{¶16} Even if the court were to find that Smith acted within the scope of her official responsibilities, she would not be entitled to immunity if she acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶17} The Tenth District Court of Appeals has held that for purposes of determining statutory immunity, malice is the “willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified.” *Lowry v. State Highway Patrol* (Feb. 27, 1997), Franklin App. No. 96API07-835, quoting *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 453-454. Bad faith is defined as “a design to mislead or deceive another * * * not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.” *Id.* quoting *Black’s Law Dictionary* (5 Ed. 1979), 127. The Supreme Court of Ohio has held that the term reckless involves a risk of harm that “is substantially greater than that which is necessary to make [the actor’s] conduct negligent” and a “reckless disregard of the safety of others * * * knowing or having reason to know of facts which would lead a reasonable man to realize” that his conduct creates an unreasonable risk of harm to another. *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105. The term reckless is often used interchangeably with the term wanton. *Id.*

{¶18} In addition to the fact that Smith’s comments were addressed to city officials who were involved in investigating the incident, the court is convinced by Smith’s testimony that she intended for her statements to be considered factual accusations rather than political hyperbole. Smith testified that the incident had become a matter of great concern to the community and that she carefully drafted her letter. However, the court finds that Smith’s statements characterizing plaintiffs as “hit men” and “death merchants” who committed “cold blooded murder” were made with “a reckless disregard” with respect to both the truth or falsity of the statements and harm to the detectives’ reputations and careers. There is no evidence to suggest that Smith was furnished with information that would allow any reasonable person to conclude that such statements were true. The court further finds that Smith’s statements were “not prompted by an honest mistake.” Accordingly, the court finds that Smith acted with malicious purpose, in bad faith, or in a wanton or reckless manner in characterizing plaintiffs’ conduct as criminal.

{¶19} For the foregoing reasons, the court finds that Shirley Smith is not entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, the courts of common pleas have jurisdiction over any civil actions that may be filed against her based upon the allegations in this case.

Court of Claims of Ohio

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JUDGMENT ENTRY

THE OHIO HOUSE OF
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Defendant

The court held an evidentiary hearing to determine civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon hearing all the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that Shirley Smith is not entitled to immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do have jurisdiction over any civil actions that may be filed against her based upon the allegations in this case.

CLARK B. WEAVER SR.
Judge

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AMR/cmd
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