

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY )	)
COMMISSION )	) CIVIL ACTION 1:03CV2023
Plaintiff )	)
v. )	) JUDGE KATHLEEN McDONALD
S & Z TOOL & DYE CO., INC., )	) O'MALLEY
Defendants. )	)
_____ )	) REPLY MEMORANDUM OF MOLLY
)	) BARON TO S & Z TOOL & DYE,
)	) INC.'S MEMORANDUM IN OPPOSITION
)	) TO MOLLY BARON'S MOTION TO
)	) INTERVENE
)	)
)	)

Defendant S & Z Tool & Dye Co., Inc. (“S & Z”) is wrong as a matter of fact and as a matter of law on each and every point it raises in its opposition memorandum. S & Z misunderstands Fed. R. Civ. P. 24 (a) and its application to Title VII claims and the facts leading up to Ms. Baron’s Motion to Intervene.

**I. Law and Argument**

**A. All Ms. Baron must show is that a federal statute confers upon her an unconditional right to intervene and that she has timely filed her complaint.**

Fed. R. Civ. P. 24 (a)(1) simply states that “[u]pon timely application anyone shall be permitted to intervene in an action when a statute of the Unites States confers an unconditional right to intervene.” Title VII confers to her such an unconditional right to intervene, and her application to this Court is timely.

**1. Title VII confers upon Molly Baron an unconditional right to intervene under Title VII.**

42 U.S.C. 2000(e)-5(f)(1) of Title VII provides, in pertinent part, that “[t]he person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission...” This statute does not limit or otherwise condition such right of intervention. As the Court observed in *EEOC v. Century I, L.C.*, 142 F.R.D. 494, 495 (D. Kan., 1992):

Title VII provides such a statutory right to intervene. "The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission ..." 42 U.S.C. § 2000e-5(f). Therefore, Mr. Woods' motion to intervene must be granted as long as it was timely filed. *EEOC v. Midwestern Distribution, Inc.*, No. 82-2247 (D. Kan. Mar. 22, 1983) (1983 WL 2191) (O'Conner, C.J.) (individual who filed discrimination charge was an "aggrieved person under Title VII . . . who has the right to intervene in an action brought by the EEOC."). Because this case is still in the pretrial stage, the court concludes that Mr. Woods' motion to intervene was timely. *See id.* (Emphasis added.)

Because Ms. Baron filed the EEOC charge of discrimination<sup>1</sup> that originated this matter, she is such an aggrieved person under 42 U.S.C. § 2000e-5(f) . Therefore, Ms. Baron is a person upon whom a federal statute has conferred an unconditional right of intervention.

**2. Molly Baron has timely sought leave to file her complaint with this Court.**

EEOC filed its complaint on 09/30/2003 (Docket #1). S&Z filed its answer on 11/10/2003 (Docket # 5). Ms. Baron filed her Motion to Intervene with attached proposed intervenor's complaint on 12/04/2003 (Docket # 6), a mere 65 days after EEOC filed its complaint, and only 24 days after S&Z filed its answer, and before any CMC had been either scheduled or conducted. There can be no prejudice to any party resulting from Ms. Baron's intervention. Rule 26 initial disclosures have not even yet been exchanged. S & Z's opposing memoranda, however, attempts to equate the administrative processing of Ms. Baron's charge of discrimination with a "suit." A charge of discrimination is not a lawsuit nor is it a federal complaint. S & Z incorrectly fantasizes that "in reality, this suit has been progressing for over 4 years (p.4, S&Z memorandum). (Emphasis added.) As a matter of fact, this "suit" has only been progressing for less than three (3) months. It is elementary that Ms. Baron could not seek to intervene in a suit not yet filed in federal court by the EEOC.

S & Z cites *Johnson v. City of Memphis*, 73 Fed. Appx. 123 (6<sup>th</sup> Cir. 2003) at pages 3 and 4 of their memorandum in opposition. In *Johnson*, at 132, the Court pointed out that the purported intervenor waited until a year after the original complaint was filed (in court), during which time

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<sup>1</sup> See attached charge of discrimination filed by Molly Baron.

a trial date had been set, all witnesses had been identified, expert witnesses had submitted their reports and testified in court, depositions had been taken, and Plaintiffs' motion for partial summary judgment had been granted. The *Johnson* Court, upon which S & Z relies, rightly ruled that such extensive litigation activity rendered the motion to intervene untimely. This case, again, has not even progressed to an initial CMC conference.

**B. S & Z fails to understand that the application of Fed. R. Civ. P. 24 (a)(1) and Fed. R. Civ. P. 24 (a)(2) are to be read in the disjunctive, and, therefore, Ms. Baron need argue no further.**

Molly Baron's right to intervene is unconditional, so long as her petition to do so has been timely filed. Fed. R. Civ. P. 24 (a) is labeled **Intervention of Right**.<sup>2</sup> It reads as follows:

Upon timely application anyone shall be permitted to intervene in an action:

- (1) when a statute of the United States confers an unconditional right to intervene; **or**<sup>3</sup>
- (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. (Emphasis added.)

In *Ruiz v. United States of America*, 161 F.3d 814, 828 (5<sup>th</sup> Cir. 1998) the Circuit Court interpreted the disjunctive application of Fed. R. Civ. P. 24 (a)(1) and 24 (a)(2):

Intervention under Rule 24(a)(1) is "absolute and unconditional." *See Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co. et. al.*, 331 U.S. 519, 67 S. Ct. 1387, 1393, 91 L. Ed. 1646.(1947). Rule 24(a)(1) "**statutory intervenors**" need not show inadequacy of representation or that their interests may be impaired if not allowed to intervene. *Cf.* Fed. R. Civ. P. 24(a)(2)<sup>4</sup> (absent statutory grant, intervention as of right requires showing of timeliness, interest in the subject matter of the transaction, threat that interest may be

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<sup>2</sup> S & Z's arguments attempt to characterize the issue in this case as one of a "Permissive Intervention" under Fed. R. Civ. P. 24(b)(2). Ms. Baron's motion is brought under Fed. R. Civ. P. 24 (a)(1), an intervention "as of right."

<sup>3</sup> Please note this "or" is disjunctive, and as such, Ms. Baron has a right to intervene if she complies either with Fed. R. Civ. P. 24 (a)(1) or 24 (a)(2).

<sup>4</sup> Conversely, where no statutory right of intervention is involved, Rule 24(a)(1) is inapplicable. *See Getty Oil Co. v. Dept. of Energy*, 890 F.2d 425, 426, n.3 (Temporary Emergency Court of Appeals of The United States, 1989).

impaired if not permitted to intervene, and inadequacy of representation by existing parties). Under Rule 24(a)(1), intervenors need not even prove a "sufficient" interest relating to the subject matter of the controversy, since Congress has already declared that interest sufficient by granting the statutory right to intervene. Indeed, "once it is clear that [the statute applies], there is no room for the operation of a court's discretion." See *Brotherhood of Railroad Trainmen*, 67 S. Ct. at 1393. (Emphasis added.)<sup>5</sup>

More recently, in *EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C.*, 273 F. Supp. 2d 260, 263 (E.D.N.Y. 2003), the District Court, in granting the intervention motion of Rabbia Ashraf, performed the following analysis:

*Rule 24* provides, in part, that "upon timely application anyone shall be permitted to intervene in an action ... when a statute of the United States confers an unconditional right to intervene." *Fed. R. Civ. P. 24(a)(1)*. Title VII provides that "the person or persons aggrieved shall have the right to intervene in a civil action brought by the [EEOC] ...." 42 U.S.C. § 2000e-5(f)(1); *EEOC v. Die Fliedermous, L.L.C.*, 77 F. Supp. 2d 460, 469 (S.D.N.Y. 1999) ("where the EEOC has elected to bring suit, [the aggrieved person has] the statutory right to intervene."). Under the provisions of 42 U.S.C. § 2000e-5(f)(1), an aggrieved person is defined as a person who has filed a charge with the EEOC. See *Spirt v. Teachers Insurance and Annuity Assoc.*, 93 F.R.D. 627, 640-41 (S.D.N.Y. 1982), rev'd in part on other grounds, 691 F.2d 1054 (2d Cir. 1982) ("The Court's view that the statutory language strongly indicates that Congress, in drafting the intervention provision contained in 42 U.S.C. §§ 2000e-5(f)(1), must have used the term 'person aggrieved' to refer to a person who filed a charge with the EEOC is fully supported by the legislative history of that section.")....It is undisputed that Ashraf filed a charge with the EECO [sic] and that she is a person aggrieved under 42 U.S.C. § 2000(e)-5(f)(1). Accordingly, Ashraf has an unconditional right to intervene in this action with regard to her Title VII claims and her motion to intervene in this action is therefore granted. In addition, because it is further undisputed that Ashraf's state and local claims derive from the same operative facts that form the basis of this action, the Court grants Ashraf's request to exercise supplemental jurisdiction over her state and local claims.<sup>6</sup>

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<sup>5</sup> See also *Jones v. Caddo Parish School Bd.*, 204 F.R.D. 97, 99 (W.D., La. 2001)[observing that Rule 24(a) is divided into two sections: Rule 24(a)(1) and 24(a)(2), that Rule 24(a)(1) provides that "upon timely application anyone shall be permitted to intervene in an action when a statute of the United States confers an unconditional right to intervene." The *Jones* Court, only after determining that Fed. R. Civ. P. 24(a)(1) was not satisfied due to failure to identify a statute of the United States that confers upon them an unconditional right to intervene, then shifted its focus to examining the requirements of Rule 24(a)(2).] Again, here Molly Baron has satisfied Rule 24(a)(1) because she indeed did identify a statute of the United States confers an unconditional right to intervene, namely 42 U.S.C. 2000(e)-5(f)(1). Therefore, this Court need not shift its focus to examining the requirements of Rule 24(a)(2) before granting Ms. Baron's motion to intervene.

<sup>6</sup> As to this last point made by the *Rappaport* court, Ms. Baron's claims under O.R.C. § 4112.99 will require the same proofs as her claims under Title VII, as Ohio discrimination law. The Ohio Supreme Court in *Little Forest Medical Center of Akron v. Ohio Civil Rights Commission*, 61 Ohio St. 3d 607, 609-610 (1991) explained that "...we have determined that federal case law

Because Ms. Baron has timely filed her Motion to Intervene and because Ms. Baron is a “statutory intervenor,” pursuant to 42 U.S.C. 2000(e)-5(f)(1) and Fed. R. Civ. P. 24 (a)(1), she could end this brief at this point and defeat S & Z’s opposition to her intervention without arguing further.

C. **Even if Ms. Baron was required to show compliance with or fulfillment of the requirements of Fed. R. Civ. P. 24 (a)(2), which she is not, she would still defeat S & Z’s opposition to her intervention.**

Pursuant to Fed. R. Civ. P. 24 (a)(2), if Ms. Baron were not a “statutory intervenor,” which she is, she would have to show that she was so situated that the disposition of the action might, as a practical matter, impair or impede her ability to protect her interests and that her interests were not adequately represented by existing parties, i.e., EEOC and S&Z.

S&Z argues that it would be prejudiced by Ms. Baron’s intervention, but fails to indicate where in Fed. R. Civ. P. 24 (a) prejudice to it is cited as a factor this Court should consider at all. Notwithstanding that, S & Z has advanced no legitimate argument as to how it would be prejudiced by Ms. Baron’s intervention. The only argument it attempts to make is that her “individual claim,” referring to the O.R.C. § 4112.99 pendent/supplemental state claim for sex/gender discrimination, will be more difficult to defend because it occurred four (4) years ago. The simple problem with that argument is that the statute of limitations for claims brought pursuant to O.R.C. § 4112.99 is clearly six (6) years. See *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St.3d 281, 1994 Ohio 295, 638 N.E.2d 991 (holding that *R.C. 4112.99* is a remedial statute and is thus subject to *R.C. 2305.07*’s six-year statute of limitations. See also *Kanieski v. Sears Roebuck*, 2003 Ohio App. LEXIS 418, n. 20 (2003, Cuyahoga County) [attached]. The bottom line here is that Ms. Baron could file her claim under O.R.C. § 4112.99 on August 14, 2005 and still be timely.

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interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) *et seq.*, Title 42, U.S.Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112. [citations omitted]...Thus, ‘reliable, probative, and substantial evidence’ in an employment discrimination case brought pursuant to R.C. Chapter 4112 means evidence sufficient to support a finding of discrimination under Title VII.” The difference between the Ohio and federal claims, again, are that Ms. Baron’s claims under Ohio’s anti-discrimination statute are not constrained by caps on damages, as is Title VII.

S & Z's stated problem that they have not retained records from four years ago is also ludicrous, for a number of reasons. First, by their own admission in their opposing memoranda, they have been working with EEOC since the charge was filed – by Ms. Baron. In fact, because Ms. Baron filed her charge on October 7, 1999, S&Z only had 64 days<sup>7</sup>, not 4 years, where they arguably may not have known that Ms. Baron would complain. Second, once put on notice, S & Z was responsible to preserve, and not engage in the spoliation of, evidence. Finally, EEOC alleged in its complaint and found in a probable cause determination “that S&Z has failed to maintain applications and other employment records in violation of Title VII and 29 CFR § 1601.14 as well as 29 CFR §§ 1607.4 and 1607.15.” (The maintenance of these records is required even without the filing of a charge of discrimination.) If records from four years ago are missing, this is S & Z's fault and S & Z's problem, not Ms. Baron's.

S & Z further misstates facts in its opposing memorandum. It claims with repetitive, yet inaccurate, cadence that Ms. Baron “did nothing,” to advance her individual rights. Though Ms. Baron need not even address this, because she has complied fully with Fed. R. Civ. P. 24 (a)(1), she will.

First, Ms. Baron, after receiving the March 21, 2001 and the June 18, 2001 letters from the EEOC indicating that their investigation revealed that S & Z's actions with regard to hiring were discriminatory and that there was reasonable cause to believe that she had been discriminated against because of her sex, did call EEOC and did ask for a right to sue letter, which was not provided to her. (Molly Baron Aff. ¶ 2, attached.) Between June, 2001 and January, 2003, although Ms. Baron called EEOC and told them she wanted to be kept informed of the progress of the case,

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<sup>7</sup> S & Z was on notice when EEOC, shortly after October 7, 1999, served it with Ms. Baron's attached charge of discrimination. As such, they have absolutely no room to complain about their inability to retain records for less than 60 days. (Ms. Baron filed her employment application with S&Z on or about August 15, 1999. She filed her charge with the EEOC on October 7 1999.) 42 U.S.C. § 2000e-5 (e)(1) provides in pertinent part that “notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter...” Therefore, S & Z only had 64 days between August 15, 1999 and Monday, October 18, 1999 to be put on notice of Ms. Baron's complaint, not the four (4) years to which they allude.

and although she had been told by EEOC that conciliation efforts were ongoing, never was included in any conciliation discussions that may have taken place. Further, up to this date and time, neither S & Z nor the EEOC has communicated to her any settlement offers. She has also not been informed that there was any final or signed conciliation to which S & Z has agreed. (Molly Baron Aff. ¶ 3) Further, Ms. Baron has indicated that while she appreciates the fact that the scope of EEOC's claims in this matter extend beyond herself to others similarly situated, including minorities, such as other females as well as Black applicants denied employment by S & Z, that she wishes her undersigned counsel to represent her as an individual in this matter and that she wishes to intervene in order to protect all of her interests under both federal and Ohio statutory law. (Molly Baron Aff. ¶ 4)

**D. Ms. Baron's has a substantial legal interest in the filing, which interest will be impaired absent intervention, and EEOC cannot represent those interests as a matter of law.**

Points 2 through 4 of the Fed. R. Civ. P. 24 (a) 4-prong test cited by S & Z at page 3 of its brief are all easily addressed. Aside from the fact that it was Ms. Baron's filing of her charge that began this matter and caused EEOC to investigate S&Z's historic, ongoing pattern of reprehensible systemic discrimination in the first place, Ms. Baron has asserted claims in her proposed intervention complaint pursuant to O.R.C. § 4112.99.

Unlike Title VII, O.R.C. § 4112.99 has no cap on damages<sup>8</sup>, as does Title VII. [See 42 U.S.C. 1981a (b)(3) and *Pollard v. E. I. Du Pont De Nemours & Co.*, 532 U.S. 843, 845 (2001).] No provision of Title VII allows EEOC to pursue claims under state law.

Therefore, because EEOC cannot pursue state claims where there are no caps on damages, it cannot adequately represent Ms. Baron's state law rights under O.R.C. § 4112.99. Ms. Baron's claims under O.R.C. § 4112.99 are substantial, and the economic recovery available to EEOC under Title VII is severely limited by comparison to O.R.C. § 4112.99. EEOC cannot pursue cap

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<sup>8</sup> See *Rice v. Certainteed*, 84 Ohio St. 3d 417; 1999 Ohio 361; 704 N.E.2d 1217 (1999).

less punitive damages under Ohio law against S & Z. Ms. Baron, however, can pursue these substantial claims against S & Z under her pendent state O.R.C. § 4112.99 claim if intervention is granted.<sup>9</sup> S & Z closes its brief with heading C. on page 6 captioned “Ms. Baron’s Motion Should Be Denied In the Interests of Judicial Economy.” Inexplicably, the two sentences following that heading do not speak to the issue of “judicial economy.” Instead, S & Z argues that it will be prejudiced if Ms. Baron is allowed to join this lawsuit as an individual defendant [sic], and that it cannot defend itself over a hiring decision made over four years ago. The lack of merit to those arguments has already been addressed. Even though S&Z never supported its argument as to judicial economy, it is obvious that the realities of time and money make the litigation of Ms. Baron’s individual claims anywhere but as an intervenor in this action ridiculous and a true waste of not only judicial economy, but a waste of time and money for all parties concerned. While Ms. Baron could file a claim today under O.R.C. § 4112.99 well within the six (6) year statute of limitations in Cuyahoga County Common Pleas Court, this would cause S&Z more, rather than less, inconvenience and problems, as S&Z would then have to defend the same basic case in two forums, attend depositions of the same witnesses twice, and the like.

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<sup>9</sup> See 42 U.S.C. § 2000e-7. Effect on State laws [Nothing in this title [42 USCS §§ 2000e et seq.] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title [42 USCS §§ 2000e et seq.].

**II. Conclusion**

Because Ms. Baron has fully complied with Fed. R. Civ. P. 24 (a) (1) and (a)(2), though she only needs to have complied with Fed. R. Civ. P. 24 (a) (1), her motion to intervene should be granted and she should be allowed to file the proposed complaint attached to her motion to intervene.

Respectfully submitted,

s/ Dennis J. Niermann  
Dennis J. Niermann, Esq. [007988]  
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**CERTIFICATE OF SERVICE**

A true copy of the foregoing Reply Memorandum of Molly Baron to S & Z Tool & Dye, Inc.'s Memorandum in Opposition to Molly Baron's Motion to Intervene has been filed this 2<sup>nd</sup> day of January, 2004 through the Court's electronic filing system. All parties may access the foregoing, and will be served via the Court's electronic filing system.

s/ Dennis J. Niermann  
Dennis J. Niermann

# CHARGE OF DISCRIMINATION

Case 1:03-cv-02023-KMO Document 9-2

Filed 01/02/2004

Page 1 of 1

CHARGE NUMBER

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY

FEPA

EEOC

220A00045

and EEOC

State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.)

Molly A. Baron-Hrisco

HOME TELEPHONE (Include Area Code)

216-651-4061

STREET ADDRESS

CITY, STATE AND ZIP CODE

8700 Denison Avenue Cleveland, Ohio 44102

DATE OF BIRTH

09281976

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME

S & Z Tool & Die

NUMBER OF EMPLOYEES, MEMBERS

+ 15

TELEPHONE (Include Area Code)

216-252-4250

STREET ADDRESS

CITY, STATE AND ZIP CODE

3180 Berea Road Cleveland, Ohio 44111

COUNTY

Cuyahoga

NAME

TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS

CITY, STATE AND ZIP CODE

COUNTY

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))

RACE  COLOR  SEX  RELIGION  AGE  
 RETALIATION  NATIONAL ORIGIN  DISABILITY  OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE EARLIEST (ADEA/EPA) LATEST (ALL)

081599 081599

CONTINUING ACTION

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

On or about August 15, 1999, I went to apply for a position with this company. I went back several times to check on my application. I never heard anything regarding my application.

I do not believe that this company employees any females in the factory.

I believe that I was denied hire and discriminated against because of my sex female in violation of Title VII of the Civil Rights Act of 1964 as amended.

EEOC NOTED

OCT 07 1999

RECEIVED

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

SIGNATURE OF COMPLAINANT

Molly A. Baron-Hrisco  
SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE  
(Day, month, and year)

Date

Charging Party (Signature)

Terrell Hargrove 10/7/99

EEOC FORM 5 (10/94)

EXHIBIT A

COUNTY OF CUYAHOGA )  
 )  
STATE OF OHIO ) SS: AFFIDAVIT OF MOLLY ANNE  
 ) BARON

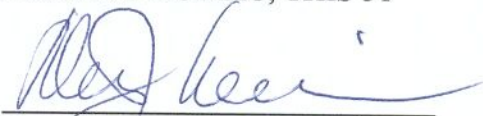
Now comes Molly Anne Baron, first having been placed under oath, and deposes and states that the following information is true to the best of her information and belief:

- (1) I have read Defendant S & Z's Memorandum in Opposition to my Motion to Intervene, which incorrectly states that in a number of repeated ways I "did nothing."
- (2) After receiving the March 21, 2001 and the June 18, 2001 letters from the EEOC indicating that their investigation revealed that S & Z's actions with regard to hiring were discriminatory and that there was reasonable cause to believe that I had been discriminated against because of my sex, I did call EEOC and did ask for a right to sue letter, which was not provided to me.
- (3) Between June, 2001 and January, 2003, although I called EEOC and told them I wanted to be kept informed of the progress of the case, and although I had been told by EEOC that conciliation efforts were ongoing, I never was included in any conciliation discussions that may have taken place. Further, up to this date and time, neither S & Z nor the EEOC has communicated to me any settlement offers. I have not been informed that there was any final or signed conciliation to which S & Z has agreed.
- (4) I appreciate the fact that the scope of EEOC's claims in this matter extend beyond myself to others similarly situated employees, including other minorities, such as other females as well as Black applicants denied employment by S & Z. I wish to have my attorney, Dennis J. Niermann, represent me as an individual in this matter and wish to intervene in order to protect my interests under both federal and Ohio statutory law.

FURTHER, AFFIANT SAYETH NAUGHT.

  
MOLLY ANNE BARON

SWORN TO AND SUBSCRIBED BEFORE ME, A NOTARY PUBLIC, THIS 31<sup>ST</sup> DAY OF DECEMBER, 2003.

  
NOTARY PUBLIC  
Dennis Niermann, Bar No. 0007988,  
Ohio Attorney, My Commission  
Never Expires



**DENNIS J. NIERMANN**  
Attorney At Law  
NOTARY PUBLIC  
STATE OF OHIO  
My Commission  
Has No Exp. Date  
Section 147.03 O.R.C.

2003 Ohio 421, \*; 2003 Ohio App. LEXIS 418, \*\*

**ALLAN KANIESKI, ET AL., Plaintiffs-Appellants -vs- SEARS, ROEBUCK & COMPANY, ET AL., Defendants-Appellees**

**NO. 80833**

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY**

*2003 Ohio 421; 2003 Ohio App. LEXIS 418*

**January 30, 2003, Date of Announcement of Decision**

**SUBSEQUENT HISTORY:** Appeal denied by *Kanieski v. Sears, Roebuck & Co., 99 Ohio St. 3d 1437, 789 N.E.2d 1118, 2003 Ohio LEXIS 1608* (Ohio, June 11, 2003)

**PRIOR HISTORY:** **[\*\*1]** CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court. Case No. CV-410111.

**DISPOSITION:** Trial court's judgment was affirmed.

**LexisNexis (TM) HEADNOTES - Core Concepts:**

**COUNSEL:** For Plaintiffs-Appellants: WALTER P. BUBNA, Cleveland, Ohio.

For Defendants-Appellees: KEITH A. SAVIDGE, ANDREW D. BEMER, Seeley, Savidge & Ebert, East Cleveland, Ohio.

**JUDGES:** JAMES D. SWEENEY, P.J., and COLLEEN CONWAY COONEY, J., CONCUR. PATRICIA ANN BLACKMON JUDGE.

**OPINIONBY:** PATRICIA ANN BLACKMON

**OPINION:** JOURNAL ENTRY and OPINION

PATRICIA ANN BLACKMON, J.:

**[\*P1]** Allan and Sharon Kanieski appeal from the trial court's summary judgment in favor of appellee Sears, Roebuck, & Co. (Sears). Appellants assign the following as errors for our review:

**[\*P2]** *"The trial court erred in granting Defendants-Appellees' Motion For Summary Judgment on January 3, 2002, as there was a Genuine Issue of*

*Material Fact as to whether Plaintiff-Appellant Allan Kanieski's termination of employment was the result of age discrimination and wrongful discharge in violation of public policy by the Defendants-Appellees.*

**[\*P3]** *"The trial court erred in granting Defendant-Appellees' Motion For Summary Judgment on January 3, 2002, as there was a Genuine Issue of Material Fact as to whether Plaintiff-Appellant **[\*\*2]** Sharon Kanieski's discharge from employment was the result of sexual discrimination and wrongful discharge in violation of public policy, and that Plaintiff-Appellant Sharon Kanieski was the victim of sexual harassment."*

**[\*P4]** Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

**[\*P5]** Appellants are former Sears employees. Following 29 years of service, Sears terminated Allan's employment ostensibly in response to violations of store policies relating to the retention of loaned merchandise and the resale of returned merchandise. At the time of termination Allan was 52 years of age.

**[\*P6]** Prior to her January 20, 1996 wedding to Allan, Sharon engaged in a sexual relationship with Thomas Stewart who held various managerial positions at Sears, but never held direct authority over Sharon. Sharon claimed Stewart harassed her while she worked at the Mentor store and that she failed to secure a managerial position because she spurned his advances. Soon after her wedding to Allan, Sharon transferred from Sears's Mentor store to its Richmond Heights store due to the Mentor store manager's policy against married couples **[\*\*3]** working together.

**[\*P7]** Appellants complained that Sears, Stewart, and Robert Green, the Mentor store's general manager, are liable to Allan for age discrimination and wrongful

2003 Ohio 421, \*; 2003 Ohio App. LEXIS 418, \*\*

discharge, and liable to Sharon for sexual harassment and wrongful discharge.

**[\*P8]** On January 3, 2002, the trial court granted Sears's motion for summary judgment. This appeal followed.

**[\*P9]** We consider an appeal from summary judgment under a de novo standard of review. n1 Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. n2 Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion which is adverse to the nonmoving party. n3

n1 *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 746 N.E.2d 618, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 30 Ohio B. 78, 506 N.E.2d 212; *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 699 N.E.2d 534. **[\*\*4]**

n2 *Id.*, citing *Brown v. Scioto Bd. Of Commrs.* (1993), 87 Ohio App. 3d 704, 622 N.E.2d 1153.

n3 *Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

**[\*P10]** The moving party carries an initial burden of setting forth specific facts which demonstrate his or her entitlement to summary judgment. n4 If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. n5

n4 *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996 Ohio 107, 662 N.E.2d 264.

n5 *Id.* at 293.

**[\*P11]** In their first assigned error, appellants argue the trial court erred by granting summary judgment on Allan's claims for age discrimination and wrongful termination. We disagree.

**[\*P12]** **[\*\*5]** It is an unlawful discriminatory

practice for "any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." n6

n6 R.C. 4112.02(A).

**[\*P13]** Further, "No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee." n7

n7 R.C. 4112.14(A).

**[\*P14]** **[\*\*6]** We generally apply federal case law interpreting Title VII of the Civil Rights Act of 1964 to cases involving alleged violations of R.C. 4112. n8 In *McDonnell Douglas Corp. v. Green*, n9 the United States Supreme Court "established a flexible formula to ferret out impermissible discrimination in the hiring, firing, promoting, and demoting of employees." n10 We adopt this formula to fit the specific circumstances of each case. n11

n8 *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 421 N.E.2d 128.

n9 (1973) 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817.

n10 *Plumbers & Steamfitters Joint Apprenticeship Comm.*, 66 Ohio St. 2d at 197.

n11 See *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802, n.13, 36 L. Ed. 2d 668, 93 S. Ct. 1817 ("The facts necessarily will vary in [employment discrimination] cases, and the specification above the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.")

**[\*\*7]**

**[\*P15]** Initially, we look to whether the plaintiff set forth a prima facie case of discrimination. As set forth in *Barker v. Scovill, Inc.*, n12 the plaintiff must demonstrate

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he or she: (1) belonged to a protected class, (2) was discharged, (3) possessed the necessary qualifications for the job, and (4) he or she was replaced by, or the discharge permitted the retention of, a person from outside the protected class. n13

n12 (1983), 6 Ohio St. 3d 146, 6 Ohio B. 202, 451 N.E.2d 807.

n13 Id. at paragraph one of the syllabus.

**[\*P16]** If the plaintiff establishes a prima facie case of discrimination, a presumption of unlawful discrimination arises. n14 The burden then shifts to the employer to set forth a legitimate, nondiscriminatory reason for discharging the plaintiff. n15

n14 *Sheridan v. Drs. Alperin & Ruch, D.D.S., Inc. (Feb. 20, 1997), Cuyahoga App. No. 70813, 1997 Ohio App. LEXIS 574, citing St. Mary's Honor Ctr. v. Hicks (1993), 509 U.S. 502, 506, 125 L. Ed. 2d 407, 113 S. Ct. 2742. [\*\*8]*

n15 *Sheridan, 1997 Ohio App. LEXIS 574 at \*7; McDonnell-Douglas Corp., 411 U.S. at 802.*

**[\*P17]** Finally, the plaintiff must counter with proof that the employer's reasons were pretextual or, in other words, simply not worthy of credence. n16 Despite these shifting burdens, the burden of proving unlawful discrimination ultimately rests with the plaintiff.

n16 *Sheridan, 1997 Ohio Spp. LEXIS 574 at \*7, citing Barker v. Scovill, Inc. (1983), 6 Ohio St.3d 146, 148, 6 Ohio B. 202, 451 N.E.2d 807 and Wagner v. Allied Steel & Tractor Co. (1995), 105 Ohio App.3d 611, 664 N.E.2d 987; Texas Dept. of Community Affairs v. Burdine (1981), 450 U.S. 248, 67 L. Ed. 2d 207, 101 S. Ct. 1089.*

**[\*P18]** In its motion for summary judgment, Sears did not challenge whether appellants established a prima facie case of age discrimination. Nevertheless, the record reveals Allan satisfied the requisite elements. Sears terminated Allan's employment when he **[\*\*9]** was fifty-two years of age, and thus a member of the protected class. Allan set forth facts which demonstrate he performed his job adequately for several years, and received satisfactory reviews from his supervisors, thus establishing his qualification to maintain his position.

Finally, Allan averred that he was replaced by an employee outside the protected class. These facts, unrebutted by Sears, established a prima facie case of age discrimination.

**[\*P19]** The burden then shifted to Sears to set forth a legitimate, nondiscriminatory reason for terminating Allan. Joe Duganiero, a Sears Manager of Asset Protection, determined that Allan and a co-worker, Terry Cummings, violated several Sears policies by improperly selling and returning store merchandise. Sears relied upon these violations as grounds for terminating Allan's employment.

**[\*P20]** One violation involved Allan retaining loaned merchandise several months beyond its return date. On March 12, 1997, Allan properly borrowed a computer from Sears for a period of fifteen days; however, he failed to return the computer until it was several months past due.

**[\*P21]** The second violation involved Allan conducting his **[\*\*10]** own purchase and return transactions and then retaining a duplicate credit of \$ 1021.53 to his wife's credit card. Duganiero averred Sears prohibited employees from conducting their own transactions. Further, Allan retained the duplicate credit for at least two months without attempting to rectify the error.

**[\*P22]** The other violations involved Allan purchasing merchandise at prices well below their supposed values. On May 13, 1997, Cummings authorized the sale of returned patio furniture to Allan for \$ 30 two days after the original customer returned this merchandise. The furniture originally sold for \$ 420.99. On May 19, 1997, Cummings manually reduced the price of a returned lawnmower and, moments later, sold the item to Allan for \$ 79.99. Sears originally sold the lawnmower for \$ 159.99, and had restocked it less than one day prior to Allan's purchase.

**[\*P23]** According to Duganiero, merchandise returned by a customer is classified "991," and is automatically reduced in price by twenty percent. Additional price reductions are then considered after seven to ten days elapse from the return date. Selling items at a reduced price far in excess of twenty percent and less **[\*\*11]** than three days after their return violated Sears's company policy. Further, Duganiero stated that these transactions created the appearance of impropriety because the drastically reduced prices were not offered first to the general public before a Sears employee. In setting forth these company policy violations, Sears met its burden by demonstrating legitimate, nondiscriminatory reasons for Allan's termination.

**[\*P24]** We now look to whether Allan countered with proof that Sears's reasons were pretextual, or simply not worthy of credence. Allan did not deny he committed

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the acts upon which Sears relied in terminating him. Rather, he argues the violations are trivial and he did nothing other employees have not done. In failing to dispute the policy violations, Allan accedes Sears possessed a legitimate, nondiscriminatory reason for terminating his employment, but still insists he received disparate treatment in that Sears did not dismiss other employees who committed similar violations.

**[\*P25]** While a legal basis exists for finding discrimination based on dissimilar treatment of employees, such other employees must be similarly situated to the plaintiff in all respects. **[\*12]** n17 To establish the proper comparison, the plaintiff must demonstrate he and the other employees "have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." n18

n17 *Mitchell v. Toledo Hosp. (C.A.6, 1992), 964 F.2d 577.*

n18 *Id.*

**[\*P26]** Allan cited two examples of sales to fellow employees at considerably reduced prices, but failed to demonstrate these employees were similarly situated to himself. In the first example, the manager authorized the reduced price sales; in the second example, the sale took place at a different store and under the watch of a different manager than Allan. Thus, Allan failed to demonstrate a similarly situated employee was treated differently than he.

**[\*P27]** Allan also argued his termination resulted from his length of service, salary level, association with Cummings, **[\*13]** and marriage to Sharon Kanieski; however, Allan presented no evidence in support of these allegations. As no evidence exists to substantiate that Allan's termination was motivated by discriminatory intent, his allegations fail to demonstrate that Sears's legitimate, non-discriminatory reasons for termination were pretextual or simply not worthy of credence. Accordingly, Allan failed to establish Sears violated R.C. 4112.

**[\*P28]** We now turn to whether Sears violated public policy in terminating Allan's employment. A claim for wrongful discharge in violation of public policy exists if the plaintiff can demonstrate: (1) the existence of a clear public policy manifested in a state or federal constitution, statute or administrative regulation, or in common law; (2) the employee's termination would jeopardize that public policy; (3) the employee's termination was motivated by conduct related to that

public policy; and (4) the employer lacked an overriding legitimate business justification. n19

n19 *Collins v. Rizkana (1995), 73 Ohio St.3d 65, 1995 Ohio 135, 652 N.E.2d 653.*

**[\*14]**

**[\*P29]** Although the public policy against terminating employees based upon age related discrimination is manifest in R.C. 4112, Allan did not establish any other element of the tort. The record does not demonstrate that Allan's termination would jeopardize public policy disfavoring age related discrimination or that Sears's underlying motivation was related to such public policy. Finally, Allan admitted violating company policies on several occasions, thus providing Sears with an overriding legitimate business justification for terminating his employment. Accordingly, appellants failed to establish that Sears violated public policy by terminating Allan's employment.

**[\*P30]** For the foregoing reasons, we conclude the trial court did not err by granting Sears's motion for summary judgment as to Allan's age discrimination and wrongful discharge claims. Accordingly, appellants' first assigned error is without merit.

**[\*P31]** In their second assigned error appellants argue the trial court erred by granting summary judgment on Sharon's claims for sexual harassment and wrongful discharge. Again, we disagree.

**[\*P32]** Before considering the merits of this assigned error, **[\*15]** we must first determine whether, as Sears argues, Sharon filed her sexual harassment claim outside the six-year statute of limitations. n20 Appellants filed their initial complaint on September 23, 1999; thus, an actionable event must have occurred on or after September 23, 1993.

n20 See *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc. (1994), 70 Ohio St.3d 281, 1994 Ohio 295, 638 N.E.2d 991* (holding that R.C. 4112.99 is a remedial statute and is thus subject to R.C. 2305.07's six-year statute of limitations.)

**[\*P33]** Although the record is not entirely clear as to when each alleged incident of sexual harassment occurred, Sharon stated via deposition that the harassing conduct continued until sometime between the fall of 1995 and her marriage to Allan in January of 1996. As this period falls after September 23, 1993, appellants brought Sharon's sexual harassment claim within the

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statute of limitations.

**[\*P34]** We now turn to the merits of Sharon's **[\*\*16]** complaints. Because this assigned error stems from summary judgment, we again proceed under a de novo standard of review.

**[\*P35]** *R.C. 4112.02(A)* makes it an unlawful discriminatory practice "for any employer, because of the \* \* \* sex \* \* \* of any person, \* \* \* to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."

**[\*P36]** Sexual harassment may take two general forms: quid pro quo, where the harassment "is directly linked to the grant or denial of a tangible economic benefit," and hostile work environment where the harassment "has the purpose or effect of creating a hostile or abusive working environment" while not affecting economic benefits. n21 On appeal, appellants solely argue hostile work environment.

n21 *Hampel v. Food Ingredients Specialties, Inc.* (2000), 89 Ohio St.3d 169, 176, 2000 Ohio 128, 729 N.E.2d 726.

**[\*P37]** To establish their claim **[\*\*17]** of hostile work environment sexual harassment, appellants must demonstrate: (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) the harassment complained of was based on sex; (4) the employee's submission to the unwelcome advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to the supervisor's sexual demands resulted in tangible job detriment; and (5) the existence of respondeat superior liability. n22 "Respondeat superior liability for the acts of an employee acting outside the scope of employment will only attach where the employer has the ability and knowledge to control the employee." n23

n22 *Steppe v. KMart Stores* (1999), 136 Ohio App 3d 454, 737 N.E.2d 58, citing *Madera v. Satellite Shelters, Inc.* (Aug. 12, 1998), *Cuyahoga App. No. 73172*, 1998 Ohio App. LEXIS 3726, quoting *Takach v. Am. Med. Tech., Inc.* (1998), 128 Ohio App. 3d 457, 464-466, 715 N.E.2d 577.

n23 *Steppe*, citing *Kerans v. Porter Paint Co.* (1991), 61 Ohio St.3d 486, 575 N.E.2d 428.

**[\*\*18]**

**[\*P38]** In moving for summary judgment, Sears

presented evidence that any sexual relationship between Sharon and Stewart was consensual, that Stewart was not her supervisor when she was denied the managerial position and he had no control over whether she received the position, and that even if harassment occurred, her failure to notify Sears of such conduct at a time when it could take curative measures absolved it of liability. These arguments, supported by affidavits and deposition testimony, satisfied Sears's initial burden of establishing that no genuine issue of material fact exists as to appellant's sexual harassment claim.

**[\*P39]** In response, Sharon maintained Stewart repeatedly told her that he "wanted to be with her [sexually]," touched her breasts and other body parts, threatened to commit suicide if she would not be with him, and "lured" her into having sex with him. Sharon further claimed that in 1994 she failed to secure a managerial position because she spurned Stewart's unwelcome sexual advances. Despite these complaints, Sharon admitted she consensually engaged in sexual intercourse with Stewart.

**[\*P40]** However, the issue before us is not Sharon's **[\*\*19]** credibility, rather, we are bound to determine whether each party sustained their respective summary judgment burdens. Following Sears's motion for summary judgment, Sharon failed to offer any evidence from which we may reasonably conclude that her submission to Stewart's unwelcome advances was an express or implied condition for receiving job benefits or that her refusal to submit to the supervisor's sexual demands resulted in tangible job detriment. Accordingly, Sharon failed to demonstrate a necessary element to sustain her hostile work environment sexual harassment claim.

**[\*P41]** Appellants also claim Sears violated public policy by discharging her in retaliation for spurning Stewart's alleged sexual harassment. However, Sharon stated she left the Mentor store because she was getting married and the store manager did not want married couples working together. Sharon failed to establish she was forced to leave the Mentor store because she spurned Stewart's sexual advances.

**[\*P42]** As appellants did not effectively claim Sears discharged or disciplined Sharon in violation of public policy, their argument reduces to sexual harassment in violation of public policy. n24 In **[\*\*20]** *Bell*, the appellant based a tortious violation of public policy claim on *Collins v. Rizkana* n25 and *Kulch v. Structural Fibers, Inc.*, n26 wherein the Ohio Supreme Court stated that Ohio recognizes claims for wrongful discharge in violation of public policy as an exception to the common law employment-at-will doctrine. n27 In *Bell*, we noted "the Supreme Court of Ohio first recognized wrongful discharge in violation of public policy as a viable cause of action in Ohio in *Greeley v.*

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*Miami Valley Maintenance Contractors, Inc. (1990), 49 Ohio St. 3d 228, 551 N.E.2d 981 \* \* \**. However, an employee may maintain a common-law cause of action against her employer pursuant to *Greeley* and its progeny only so long as that employee \* \* \* was subsequently discharged or disciplined." n28

n24 See *Bell v. Cuyahoga Community College (1998), 129 Ohio App.3d 461, 717 N.E.2d 1189.*

n25 (1995), 73 *Ohio St.3d 65, 1995 Ohio 135, 652 N.E.2d 653.*

n26 (1997), 78 *Ohio St.3d 134, 1997 Ohio 219, 677 N.E.2d 308.*

n27 *Bell, 129 Ohio App. 3d at 465.*

n28 Id.

[\*\*21]

[\*P43] We further stated:

[\*P44] "In the instant case, appellant is not claiming that she was discharged or disciplined in violation of public policy. Instead, appellant argues, in effect, that she was harassed in violation of public policy. Neither *Greeley* nor its progeny have recognized a tort for harassment in violation of public policy. Likewise,

this court refused to expand *Greeley* to create a cause of action for harassment in violation of public policy." n29

n29 Id.

[\*P45] Because appellants failed to fulfill their summary judgment burden of demonstrating a genuine issue of material fact as to whether Sharon suffered work-related detriment in violation of public policy, the trial court did not err by granting summary judgment on this issue.

[\*P46] For the foregoing reasons, we conclude the trial court did not err by granting Sears's motion for summary judgment as to Sharon's sexual harassment and wrongful discharge claims. Accordingly, appellants' second assigned error is [\*\*22] without merit.

Judgment affirmed.

JAMES D. SWEENEY, P.J., and

COLLEEN CONWAY COONEY, J., CONCUR.

PATRICIA ANN BLACKMON

JUDGE