

and the Statewide Planning Group (SPG), which was to include the chairs of the local groups. There were two co-chairs for the SPG; one was a representative from defendant, and one was to be elected by the SPG community representatives.

{¶3} Defendant invited volunteers to submit applications to become members of the planning boards. In 1994, plaintiff applied for and was appointed to the Central Ohio Planning Group. He served without pay as part of a subgroup called the "gay and lesbian task group," and was elected as co-chair of that subgroup, thereby becoming part of the executive committee of the Central Ohio Planning Group.

{¶4} In 1995, plaintiff became Community Co-Chair of the SPG. Brenda Thomas, an employee of defendant and chief of the AIDS Prevention Unit, was the other co-chair. During the course of plaintiff's term as co-chair, his relationship with Thomas became strained. He and Thomas disagreed on many aspects of how the SPG should be run.

{¶5} Plaintiff expressed his concerns in various ways during his term as co-chair. He issued press releases using the Ohio HIV Prevention Community Planning Process letterhead to criticize defendant's decision to change the structure of the Community Planning Process; wrote a letter to the CDC and several elected officials criticizing defendant's reorganization of the community planning groups; and wrote a letter to Dr. Thomas Halpin, defendant's Chief of the Bureau of Preventive Medicine, seeking his intervention with regard to Thomas. In addition, he created and distributed fliers criticizing defendant and Thomas, one of which stated, "If you're concerned about keeping your HIV status confidential, Beware Brenda's Lists! The Ohio Department of Health has demonstrated an ongoing lack of sensitivity and an inability to manage confidential information with regard to HIV status within

the AIDS Prevention Unit!" Plaintiff produced another flier that also criticized Thomas and other individuals affiliated with defendant.

{¶6} Plaintiff asserts that all of his correspondence was directed at preserving Ohio's funding from the CDC and that, therefore, his actions were part of his official duties as a co-chair.

{¶7} In July 1995, Thomas was removed from her position as co-chair and was transferred to a different position with defendant. Thomas subsequently filed a complaint for employment discrimination in federal court against defendant, seven employees of defendant and plaintiff. Plaintiff requested representation and indemnification by defendant pursuant to R.C. 9.87 and 109.361. Defendant declined to represent plaintiff on the basis that his actions were not conducted during the performance of specific duties and responsibilities as a volunteer for defendant. Plaintiff obtained private counsel to defend the lawsuit.

{¶8} Thomas' lawsuit was dismissed by the federal court. Prior to the resolution of Thomas' appeal, the parties entered into a settlement whereby the state made a payment to Thomas in exchange for a release from liability of all defendants, including plaintiff. Subsequently, plaintiff filed this lawsuit to recover the expenses that he incurred in his defense.

{¶9} Plaintiff asserts that he was entitled to legal representation by the Attorney General pursuant to R.C. 109.364, because he was an officer or employee of the state when he was serving in his co-chair position. Defendant asserts that plaintiff was not an officer or employee, but that even if he were, his actions were manifestly outside the scope of his employment or official responsibilities.

{¶10} R.C. 109.36 states, in relevant part:

{¶11} "As used in this section and sections 109.361 [109.36.1] to 109.366 [109.36.6] of the Revised Code:

{¶12} "(A) (1) 'Officer or employee' means any of the following:

{¶13} "(a) A person who, at the time a cause of action against the person arises, is serving in an elected or appointed office or position with the state or is employed by the state.

{¶14} "***

{¶15} "(B) 'State' means the state of Ohio, including but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state of Ohio. ***"

{¶16} R.C. 109.361, provides in relevant part:

{¶17} "Upon the receipt of a written request by any officer or employee, the attorney general, *except as provided in section 109.362* *** shall represent and defend the officer or employee in any civil action instituted against the officer or employee. ***"
(Emphasis added.)

{¶18} R.C. 109.362 sets forth the following with regard to exceptions:

{¶19} "Prior to undertaking any defense under section 109.361 *** the attorney general shall conduct an investigation of the facts to determine whether the requirements of this section have been met. *If the attorney general determines that *** any *** officer or employee was acting manifestly outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner, the attorney general shall not represent and defend the officer or employee. An initial determination to represent and defend the officer or employee does*

not prohibit a later determination that the requirements of this section have not been met. ***" (Emphasis added.)

{¶20} R.C. 109.364 states the following:

{¶21} "If the attorney general denies representation to an officer or employee who made a request for representation under section 109.361 [109.36.1] of the Revised Code, the officer or employee may, upon the termination of the action for which he requested the representation, commence an action in the court of claims against the employer pursuant to sections 2743.01 to 2743.20 of the Revised Code for the reasonable expenses incurred in providing his own defense.

{¶22} ***

{¶23} "If the court of claims finds that the officer or employee was entitled to have the attorney general represent and defend him under section 109.361 [109.36.1] of the Revised Code, the court shall enter judgment against the employer in favor of the officer or employee in the amount of the reasonable expenses incurred by the officer or employee in providing his own defense and in bringing the action authorized by this section. ***"

{¶24} R.C. 9.86 provides, in part:

{¶25} *** no 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.* ***" (Emphasis added.)

{¶26} R.C. 9.87 states, in part:

{¶27} "(A) The state, except as provided in division (B) of this section, shall indemnify an officer or employee from liability incurred in the performance of his duties by paying any judgment

in, or amount negotiated in settlement of, any civil action arising under federal law, the law of another state, or the law of a foreign jurisdiction. ***

{¶28} "(B) The state shall not indemnify an officer or employee under any of the following circumstances:

{¶29} "(1) To the extent the officer or employee is covered by a policy of insurance for civil liability purchased by the state;

{¶30} "(2) When the officer or employee acts manifestly outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner, as determined by the employer of the officer or employee or by the attorney general. ***"

{¶31} In this case, plaintiff was not employed by defendant; rather, his service was that of a volunteer. Therefore, the court finds that plaintiff was not an employee of the state.

{¶32} However, plaintiff asserts that he was an officer of the state because he was appointed as co-chair of the SPG, a board that was created by defendant. The court notes that no judicial precedent exists regarding the specific issues raised in this case; however, four opinions of the Ohio Attorney General lend guidance.

{¶33} The Attorney General opined in 1989 Ohio Atty. Gen. Ops. No. 403 that members of the executive committee of the Ohio Commercial Market Assistance Plan (OCMAP) were "officers or employees" as that term is defined in R.C. 109.36(A). That opinion noted that the OCMAP was created by R.C. 3930.02 and was therefore, a state entity.

{¶34} Also, the Attorney General opined in 1989 Ohio Atty. Gen. Ops. No. 445 that members of the Ohio Emergency Medical Services Board were officers or employees as defined in R.C. 109.36(A). The

Emergency Medical Services Agency was created by R.C. 3303.09,¹ and board members are appointed by the superintendent of public instruction in the department of education.

{¶35} In addition, the Attorney General opined in 1991 Ohio Atty. Gen. Ops. No. 70 that persons who voluntarily render advice to the Emergency Response Commission were entitled to immunity from liability arising from civil actions. The Emergency Response Commission was created pursuant to R.C. 3750.02, and members of the board are appointed by the Governor. R.C. 3750.02(A) also states that "Except for the purposes of Chapters 102 and 2921 and sections 9.86 and 109.36 to 109.36.6 of the Revised Code, serving as an appointed member of the commission does not constitute holding a public office or position of employment under the laws of this state ***." Therefore, members appointed by the governor are considered "officials" for purposes of R.C. 9.86 and 109.36 to 109.36.6.

{¶36} Finally, the Attorney General opined in 1993 Ohio Atty. Gen. Ops. No. 144 that a member of the State Private Investigator and Security Guard Provider Advisory Commission is an "officer or employee," as defined in 109.36(A), and is, therefore, entitled to the civil immunity provided by R.C. 9.86. Former R.C. 4749.02² governed the creation of the Commission, which consisted of the director of commerce and seven members appointed by the Governor. The Attorney General stated that the members were "officers" because the code section described the position as an "office" and referred to a member's period of service as a "term."

1

R.C. 3303.09 was amended and renumbered R.C. 4765.02 in 144 v S 98, effective November 12, 1992.

2

R.C. 4749.02(D) was repealed in 146 v S 162, section 2, effective October 29, 1995.

{¶37} Although defendant was required in this case to select volunteer members of the community to serve on the community and statewide planning boards in order to receive federal funds, the community and statewide planning boards were not created by statute. Accordingly, the court finds that plaintiff was not an officer of defendant as that term is used in R.C. 9.86 or 109.36. Therefore, on that basis alone, plaintiff was not entitled to legal representation by the Attorney General pursuant to R.C. 109.361.

{¶38} Assuming arguendo that plaintiff was an officer or employee of defendant, the court finds that plaintiff's actions as referenced in Thomas' complaint constitute acts that were manifestly outside the scope of his employment or official duties pursuant to R.C. 9.86, 9.87, and 109.362. In her complaint, Thomas specifically alleged the following actions taken by plaintiff: his "letter writing campaign" that expressed opposition to the state plan and that contained personal attacks against Thomas; a letter to Halpin that called for Thomas' resignation; fliers and leaflets that criticized Thomas; and a telephone conversation between Thomas and plaintiff wherein plaintiff allegedly asked Thomas to resign her position as co-chair. Plaintiff testified that he did not seek or obtain defendant's approval to issue press releases, letters or fliers; that the press releases were not issued by defendant's press relations office or media relations office; and that none of the correspondence was written on defendant's letterhead.

{¶39} Based upon the evidence before the court, the court finds that all of the activities alleged in Thomas' complaint, whether or not they occurred, constitute actions that were manifestly outside the scope of plaintiff's employment or official responsibilities. For the foregoing reasons, the court finds that plaintiff has failed to prove his claims by a preponderance of the evidence. Judgment shall be rendered in favor of defendant.

{¶40} This case was tried to the court on the issues of liability and damages. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

FRED J. SHOEMAKER

Judge

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