



A09-1154

**STATE OF MINNESOTA
In the Court of Appeals**

Minneapolis Police Department,

Appellant,

vs.

James F. Cannon,

Respondent,

**City of Minneapolis,
Commission on Civil Rights,**

Respondent.

**ON APPEAL FROM CITY OF MINNEAPOLIS,
COMMISSION ON CIVIL RIGHTS**

BRIEF, ADDENDUM AND APPENDIX OF APPELLANT

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

I. Did the Panel exceed its lawful authority?

The Panel did not address the issue.

Apposite Authority:

Hyatt v. Anoka Police Dep't, 700 N.W.2d 502 (Minn. App. 2005).

Edwards v. City of St. Anthony, 2008 U.S. Dist. 2008 WL 3417142006 (D. Minn. Feb. 7, 2008).

City of Minneapolis. Minneapolis, Minn., Charter, Ch. 6.

Minneapolis, Minn., Code of Ordinances, Ch. 171.

II. Did Cannon make a good faith complaint of discrimination?

The Panel ruled that Cannon made a good faith report of discrimination.

Apposite Authority:

Bahr v. Capella University, 765 N.W.2d 428 (Minn. App., 2009).

Wentz v. Maryland Cas. Co., 869 F.2d 1153 (8th Cir. 1989).

Carter v. Peace Officers Standards & Training Bd., 558 N.W.2d 267 (Minn. App. 1997).

III. Did speaking loudly to Cannon's wife in his presence and writing the license plate number of his wife's car constitute adverse action?

The Panel ruled that speaking loudly and writing a license plate number constituted adverse action and reprisal.

Apposite Authority:

White v. Burlington Northern & Santa Fe Ry. Co., 548 U.S. 53 (2006).

Hubbard v. United Press Int'l., 330 N.W.2d 428 (Minn. 1983).

Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir.1997).

IV. Did the Panel demonstrate bias?

The Panel did not address the issue.

Apposite Authority:

Goldberg v. Kelly, 397 U.S. 254 (1970).

Chanhassen Chiropractic Center v. City of Chanhassen, 663 N.W.2d 559 (Minn. App. 2003).

Texaco, Inc. v. Federal Trade Commission, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965).

V. Should the Panel have recused itself?

The Panel ruled that it did not need to be recused.

Apposite Authority:

Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976).

Greer v. State, 673 N.W.2d 151 (Minn. 2004).

Roatch v. Puera, 534 N.W.2d 560 (Minn. App. 1995).

VI. Were the damages and penalties awarded supported by the law and evidence?

The Panel awarded \$15,000.00 in emotional distress damages and doubled the award. The Panel awarded a \$7,500.00 civil penalty.

Apposite Authority:

Minneapolis, Minn., Code of Ordinances § 141.50(m).

STATEMENT OF THE CASE

Trial Court: City of Minneapolis, Commission on Civil Rights.

Presiding Commissioner: Sonja D. Peterson

On October 30, 2006, James F. Cannon filed a *Charge of Discrimination* alleging race discrimination with the Minneapolis Department of Civil Rights against the Minneapolis Police Department. (A. 1).¹

On November 21, 2006, the Minneapolis Police Department filed a *Response to the Charge of Discrimination* denying that discrimination had occurred. (A. 2).

On January 3, 2008, the Minneapolis Department of Civil Rights (“MDCR”) issued a *Determination* that there was probable cause with regard to the charge of race discrimination in public services. (A. 10). The matter was referred to the Minneapolis Commission on Civil Rights (“Commission”) on April 16, 2008.

On October 30, 2008, the Respondent brought a motion asking the Commission to recuse itself. (A. 25).

On November 7, 2008, the Respondent brought a motion seeking summary judgment.

¹ “A.” references refer to Appellant’s Appendix. “Ad.” references refer to the Addendum.

By Order dated March 16, 2009, the Commission, through Presiding Commissioner Sonja D. Peterson, denied Respondent's motions seeking recusal and summary judgment. (A. 41).

The matter came on for hearing before the Commission Panel on April 25, 2009. Commissioners Kenneth Brown, John Oberreuter and Sonja Peterson served as the hearing panel. Commissioner Peterson served as presiding officer. David L. Shulman appeared on behalf of the Respondent Cannon and Minneapolis Assistant City Attorney Timothy Skarda appeared on behalf of the Appellant. This case was tried before the Panel and the record was closed on April 25, 2009.

On May 27, 2009, the Commission issued *Findings of Fact, Conclusions of Law and Order for Judgment* reversing the probable cause finding of race discrimination made by the MDCR. (Ad. 10-11). The Commission found that the Respondent had engaged in reprisal discrimination. (Ad. 11-13). The hearing committee awarded \$30,000 in damages; and a civil penalty of \$7,500.00. (Ad. 14). By Order dated July 6, 2009, the Commission ordered the payment of \$22,283.09 in fees and costs to Cannon.

An appeal is authorized by Minneapolis, Minn., Code of Ordinances § 141.60(b) incorporating review in accordance with the provision of Minn. Stat. Chapter 14.

On June 22, 2009, the Minneapolis Police Department petitioned this Court for a Writ of Certiorari. (A. 54).

On June 29, 2009, the Court issued a Writ of Certiorari. (A. 55).

STATEMENT OF THE FACTS

1. Race Discrimination

The Panel reversed the finding of the MDCR because the Cannon did not establish a prima facie case of race discrimination. (Ad. 14, Order, #1). Neither the Respondent nor the Complainant has appealed the Order that Cannon did not establish a prima facie case of discrimination.

The Respondent, James F. Cannon, is an African-American male, who alleged that the Minneapolis Police Department subjected him to disparate treatment, harassment, and retaliation. (T. 21; A. 1). The incident occurred at the Wrecker Services, Inc. ("WSI") towing facility located at 200 East Lyndale Avenue North on September 5, 2006, at approximately 10:30 pm. (T. 23-24, 74; A.1). WSI is a private towing facility, not owned or operated by the City of Minneapolis that contracts with private property owners to tow illegally parked vehicles from private parking lots. (Trial Exhibit 5, p. 1).

Cannon, his wife, Lois, and son, James, Jr., went to the facility to retrieve his son's car. (T. 23, 74). Six people were present and waiting at the facility for their vehicles. (T. 25). The waiting area was approximately ten by fifteen feet with seven people crowded inside with no seating. (T. 24, 56). The waiting area had a concrete floor and cinder block walls. (T. 104).

Two Minneapolis Police Officers, Julie Hagen (Casper)² and Michael Meath, responded to a 911 call for service to WSI regarding mad customers banging on the service window and yelling at the WSI employee. (T. 163; Trial Exhibit 103, MECC Service Log).

People were talking loudly and the sound echoed. (T. 103-104). The WSI employee told Officer Hagen that the group had been yelling, swearing and pounding on the glass. (T. 104). The people had been waiting approximately forty-five minutes for their vehicles to be released when a customer struck the plexi-glass security window twice stating that he wanted his car. (T. 26, 43-44; Trial Exhibit 5, pp. 2, 5). Customers were conversing with the WSI employee, demanding their vehicles back and complaining about the extended wait. (T. 43-44). The customers were getting antsy. (Trial Exhibit 5, p. 5). The customers were upset at having their cars towed and having to wait forty-five minutes. (T. 64).

Cannon testified that Officer Hagen, after speaking with the WSI employee, said in a loud authoritative voice that the next person who banged on the glass would be going to jail for disorderly conduct. (T. 28, 57-58, 78, 104, 168). Everyone was talking at once. (T. 168). The room was loud and with nine people

² Officer Julie Casper has changed her name since the time of the incident and at the Panel hearing and subsequent proceedings is referred to as Officer Julie Hagen.

present and echoed like a Metrodome stadium bathroom. (T. 168). Officer Hagen had to speak louder than everyone else in order to be heard. (T. 106, 108-109).

After Officer Hagen made her statement, everyone began talking at once wanting to tell their story. (T. 106). Officer Hagen was trying to get people to quiet down so that she could explain what she had been told about the reason for the delay in releasing their vehicles. (T. 107). One man approached her and shook a paper in her face. (T. 108). Everybody kept on talking about their cars, claiming that the police towed the vehicles because of their race and that there was a conspiracy between the towing company and the police department to make money. (T. 111).

The officers testified that Mrs. Cannon was angry, called them racists, told them her husband was a judge and threatened to have their badges. (T. 112, 169). The officers did not respond to the comments. (T. 169). Cannon alleges that Officer Hagen told his wife that she could "use any tone I damn well please" when Mrs. Cannon complained about the officer's tone. (T. 28-29, 59, 80-81). Officer Hagen testified that she would use the tone she deemed necessary for the situation. (T. 111). Officer Hagen testified that she does not and did not swear. (T. 112, 169). Cannon alleges that when he explained how long the customers had been waiting for service Officer Hagen shouted, "I don't care if you've been waiting four days." (T. 29).

Cannon drove to the First Precinct and spoke with a sergeant about the incident and was advised about the process for making a complaint through either the police department or the Civilian Review Authority ("CRA"). (T. 34). The lieutenant in charge of the Minneapolis Police Department Internal Affairs Unit contacted Cannon later in response to his concerns. (T. 46-47).

The Respondent, James Cannon, filed a *Charge of Discrimination* that was investigated by the City of Minneapolis Department of Civil Rights. (A. 1). The Minneapolis Department of Civil Rights made a finding of probable cause and the matter was referred to the Minneapolis Commission of Civil Rights for a hearing. (A. 10).

2. Reprisal Discrimination.

In his November 6, 2006, statement to CRA Cannon stated that "I told my wife, 'Look I'm - We should go down to this First Precinct and just file a complaint. This doesn't make any sense to me.'" (Trial Exhibit 5, p. 3). At trial Cannon testified that he turned around to Officer Hagen and said, "I think this is discrimination, we're going to file a complaint." (T. 30, 82). Or, 'We're going to file a complaint, I think this is discrimination.'" (T. 44-45). When Cannon made his statement, Officer Hagen was allegedly yelling and screaming at the group and other people were engaged in separate conversations. (T. 82). Cannon testified

that Officer Hagen responded with words to the effect that they should go ahead and do what they wanted; they could not do anything to her. (T. 37-39; 52).

During the incident, James, Jr. responded, "Oh, by the way, my dad is a judge, and you're going to see what happens from here on in." (T. 39, 60-61, 85-86).

In her November 6, 2006, statement to CRA, Mrs. Cannon made no mention of a discrimination complaint. Mrs. Cannon stated that her husband said "Ma'am, we're just going to go and file a complaint." (Trial Exhibit 6, p. 5).

Officer Hagen has no recollection of anyone saying that they were going to file a complaint. (T. 119).

Officer Meath did not hear Cannon, or anyone, say that they were going to make a complaint. (T. 172). Officer Meath did not speak to Cannon inside or outside WSI. (T. 32, 93; Trial Exhibit 5, p. 8). Officer Meath was not paying attention to the conversations. (T. 170). His job was to provide backup and support for Officer Hagen, if necessary, since it was her call. (T. 167-170).

Officer Meath was daydreaming, thinking about what they would do after the call was completed. (T. 170).

Mrs. Cannon went back inside to ask for Officer Hagen's badge number. (T. 31, 83). When Mrs. Cannon went inside, Officer Hagen was still yelling and screaming and there was still pandemonium. (T. 83). Officer Hagen recited her

badge number loudly and slowly to Mrs. Cannon. (T. 84, 114-116). Mr. and Mrs. Cannon interpreted this as a mocking and demeaning response from Officer Hagen. (T. 32, 84).

After a tow truck arrived to release the towed vehicles, Officer Meath walked outside to be sure that everyone was calm and that there were no confrontations with the tow truck driver. (T. 171). Officer Meath walked out onto the sidewalk, ten or fifteen feet outside the door; watched the Cannons get into their vehicle; and wrote the license plate number on my hand. (T. 171). He wanted to check to vehicle to determine that the driver was validly licensed and do a routine warrant check. (T. 171). The squad car and the Cannon vehicle were the only vehicles parked outside. (T. 171; 185-186). The other customers were in the process of retrieving their vehicles. (T. 171). Officer Meath did not stop the Cannon vehicle from leaving. (T. 172).

Cannon testified that Officer Meath, who had not said or done anything to this point, followed him to his vehicle, stood in front of the vehicle and wrote down his license plate number. (T. 32, 47-48; A. 1; Trial Exhibit 5, p. 4, 8-9). Mrs. Cannon testified that Officer Meath was standing in front of her car and that they backed out and left. (T. 86-87). Mrs. Cannon did not testify that Officer Meath blocked her exit or that she had to maneuver around him. James, Jr.

recalled Officer Meath standing on the concrete sidewalk or curb writing a license number as his mother backed away. (T. 61).

Officer Meath testified that he routinely checks license numbers of vehicles to determine the status of the driver and vehicle. (T. 172). There was nothing inappropriate about the Cannon vehicle and he took no action. (T. 172). He checks thirty or more license numbers a day when he has the time. (T. 117, 173).

3. Panel Findings, Conclusions and Memorandum

The Panel reached its decision in a 2-1, split decision. (Ad. 20).

a. Report of Discrimination

Two of three panel members found Cannon's testimony credible, that he stated in Officer Hagen's presence, "I think this is discrimination. I'm going to file a complaint." (Ad. 5-6, Findings 21, 26).

The Commission concluded as a matter of law that Cannon in good faith opposed the Appellant's discriminatory practices by stating in Officers Hagen and Meath's presence, "I think this is discrimination. I'm going to file a complaint." (Ad. 11, Conclusion 8).

b. Adverse Action

The Panel found as adverse action Officer Hagen's alleged statement that Cannon could not do anything to her; that Officer Hagen spoke to the Cannon's wife in a disrespectful, demeaning, humiliating, embarrassing, and frightening

manner; and that Officer Meath followed Cannon out of the office, stood in front of his car as he wrote their license number on his hand and temporarily blocked their exit. (Ad. 11-12, Conclusion 9, 11).

c. Erroneous Findings

“Furthermore, the majority of the panel found that Officer Hagen adamantly believed it was "extremely inappropriate" for the Cannons to object to her conduct on the basis of race.” (Ad. 6, Finding 27). The Panel took the statement by Officer Hagen out of context and did not review the totality of the evidence in reaching the finding.

“Officer Meath stood in front of Mrs. Cannon's vehicle and wrote down their license plate number on his hand.” (Ad. 7, Finding 34). The Commission found that “Mrs. Cannon had to back her car up to get around Officer Meath to leave” inferring that Officer Meath was blocking Mrs. Cannon’s exit from the parking lot and delaying her departure. (*Id.*) The Finding is contradicted by the testimony that Officer Meath was on the curb next to the vehicle. There is no testimony about how the vehicle was parked, e.g. would the vehicle have been backed out regardless of the presence of Officer Meath.

The Panel found that “Officer Meath's targeting and scrutiny of the Cannon's registration was not random. After the Cannons opposed the Officers' discriminatory conduct, Officer Meath intentionally followed the Cannons out of

the building, blocked their exit while he obviously wrote down their license number on his hand, and then ran a check on their vehicle.” (Ad. 7-8, Finding 37).

The Panel made no finding that Officer Meath was aware of Mr. Cannon’s alleged statements regarding making a complaint. The Panel made no finding that Officer Meath was in a position to hear or heard the alleged statement from Cannon. The Cannon family and the officers testified that no member of the family spoke to Officer Meath and that Officer Meath spoke to no member of the family. The testimony is clear that Officer Meath was behind Officer Hagen when Cannon made his alleged statement; that Officer Meath was not paying attention to conversations; that nine people were in the ten foot by fifteen foot room; that there was pandemonium; and that, according to the Cannons, Officer Hagen was yelling in a voice louder than they had ever heard in his life, much like a participant in a sporting event. (T. 29, 58, 81).

d. Arbitrary and Capricious Findings and Conclusions

The Panel cited testimony by the officers that customers alleged a racial conspiracy between the towing company and the police (Ad. 3, Finding 11); that Mrs. Cannon had called Officer Hagen a racist and said that Officer Hagen’s conduct was racially motivated (Ad. 5, Finding 23); that Mrs. Cannon said you are doing this because you are white and we are black (Ad. 6, Finding 24); and that Officer Meath heard Mrs. Cannon call the officers racist (Ad. 6, Finding 25). The

Panel went on to conclude that Mrs. Cannon had not engaged in the alleged conduct (Ad. 6, Finding 27), yet found that the conduct in which Mrs. Cannon had not engaged in “establishes that they [the officers] were clearly aware that the Cannon family had voiced its opposition to their allegedly discriminatory conduct.” (*Id.*). The Cannon family has denied making or hearing any such comments. The Panel has relied on information that they found did not occur to support the finding that officers knew that Cannon was alleging discriminatory conduct.

The Panel found that “[r]ather than professionally let the claim “roll of her back” if it was indeed not true, Officer Hagen was upset and angered by the accusation that she was discriminatory and believed it was “extremely inappropriate” for the Cannon’s to accuse her of discrimination. (Ad. 12, Conclusion 12). The Conclusion misstates the record. Officer Hagen testified that it was inappropriate to be called a racist in the manner engaged in by Mrs. Cannon.

The Panel wrote that “[u]nder the Minneapolis Civil Rights Ordinance, complaints of discrimination are not “extremely inappropriate.” Rather, it is our civil right to oppose discrimination.” (Ad. 30, Memorandum, p. 25). Officer Hagen did not testify that it was extremely inappropriate to oppose discrimination. Officer Hagen testified:

Q: Okay. And so you understood -- well, let's take Mrs. Cannon then. Mrs. Cannon believed your actions were racially motivated, right?

A: She called me a racist, yes.

Q: It's hard to be much clearer than that, right?

A: Are you asking me what she thought or what her family thought?

Q: When she said to you, "You're doing this because you're white and I'm black," that was clear to you that she believed that racial bias was motivating (sic) your actions?

A: Yes.

Q: And you thought that it was extremely inappropriate for Mrs. Cannon to say that to you, right?

A: Yes.

(T. 134).

When the topic was initially raised in her CRA statement Officer Hagen stated:

QUES: Anything else you recall about this incident that I haven't asked you or you wish to add to your statement?

ANS: Mrs. Cannon seemed to rally the group into getting more angry than they even were by calling me a racist and by saying, "You're doing this because your (sic) white and I'm black." And I thought that was extremely inappropriate, especially from a judge's wife.

(Trial Ex. 8, p. 8).

The Panel relied on information outside the record. The Panel stated that

Each of the panel members had experiences with Minneapolis Police Officers where the officers acted

uncourteous, disrespectful, and impolite. It was agreed by the panel that the Minneapolis Police Department unfortunately has a bad reputation of treating the individuals they stop in a disrespectful manner. And as advocates for the City of Minneapolis, the panel wishes that the MPD's culture would improve. Yet, two of the panel members are Caucasian and one is African American. Thus, we were unable to conclude based on our experience or by a preponderance of the evidence that the Respondent's mistreatment of the Complainant was based on his race.

(Ad. 27-28, Memorandum, p. 22-23).

The Panel had been instructed that "you must decide the case on the evidence. Base your decision only on the evidence you have seen or heard in this courtroom. You must not let events outside the courtroom influence you. Your most important duty is to be impartial. You cannot take sides based on personal likes, dislikes or prejudices." (T. 220-221).

The Panel wrote that "[e]ven though the purpose of the stop [was] limited and the resulting detention quite brief," *Delaware v. Prouse*, 440 U.S. 648,653 (1979), it was a stop." (Ad. 31-32, Memorandum p. 26-27). However, Mrs. Cannon and James Cannon, Jr. testified that Officer Meath did not stop the vehicle but that he wrote the license plate number down as the vehicle was driving away.

e. Conduct of the Proceedings

Officer Hagen observed during her cross examination, "I'm sorry. People are laughing and talking behind you, it's hard for me to concentrate on your face when you're talking to me." (T. 182).

f. Evidence

The Panel, over objection, admitted into evidence Trial Exhibit 14, Minneapolis Department of Civil Rights interview notes. Exhibit 14 appears to be notes made by staff at the Minneapolis Department of Civil Rights of phone conversations with witnesses. The notes were not signed or notarized. The notes were not made by the party interviewed and were introduced for the truth of the matter asserted. No foundation was presented. The Panel found that Exhibit 14 was "the type of evidence which reasonable, prudent persons are accustomed to rely on in the conduct of their serious affairs." (Ad. 2-3, Finding 6, fn. 1). The Panel relied on Exhibit 14 in making Findings 6, 13, 16 and 21. (Ad. 2-3, 4, 5).

g. Conclusions of Law

The Panel concluded that the Respondent, Minneapolis Police Department, is a local governmental agency that provides services to the public within the City of Minneapolis, as defined in Minneapolis Ordinance § 139.20 as a "public service." (Ad. 10, Conclusion 2).

4. Recusal

The Complainant, James Cannon, initially filed a *Charge of Discrimination* that was investigated by the Minneapolis Department of Civil Rights. The Minneapolis Department of Civil Rights made a finding of probable cause and the matter was referred to the Minneapolis Commission of Civil Rights for a hearing. In his answers to interrogatories the Respondent revealed that he served on the Minneapolis Commission on Civil Rights from approximately September of 1988 to September of 1998. (Ad. 29-37).

5. Damages.

In two and a half years, Cannon has had five nightmares where he woke up after seeing Officer Hagen's face and not been able to get back to sleep. (T. 39). Cannon testified that he has constant depression in that he thinks and worries about the incident and the impact on his son. (T. 40-41). There was no evidence submitted regarding any medical or psychological treatment or costs. Cannon sought no medical or psychological treatment. (T. 49). There was no testimony regarding any economic loss. There was no testimony regarding any compensatory damages.

ARGUMENT

I. STANDARD OF REVIEW

In an appeal from a decision of a municipal agency, the court applies the same standard of review as it would apply to a decision by a state agency. *City of Minneapolis v. Moe*, 450 N.W.2d 367, 369 (Minn. App. 1990); *see also* Minn.Stat. § 14.69. The court will reverse the department's findings if they are unsupported by substantial evidence on the record, are arbitrary and capricious, or affected by other errors of law. *See* Minn.Stat. § 14.69. Substantial evidence is defined as (1.) Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2.) More than a scintilla of evidence; (3.) More than some evidence; (4.) More than any evidence; and (5.) Evidence considered in its entirety. *Hazelton v. Dep't of Human Servs.*, 612 N.W.2d 468, 471 (Minn. App. 2000).

The Minneapolis, Minn., Code of Ordinances § 141.60(b) provides that judicial review of a final decision in a contested case is available in accordance with Chapter 14 of Minnesota Statutes, the Administrative Procedure Act. Under the Act, a reviewing court may reverse an agency decision if the agency's findings, conclusions, or decisions are: (1) in violation of constitutional provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) legally erroneous; (5) unsupported by substantial evidence; or (6) arbitrary and capricious. Minn. Stat. § 14.69.

This Court independently reviews all agency decisions on questions of law or statutory interpretation. *In re Dougherty*, 482 N.W.2d 485, 488 (Minn. App. 1992), *review denied* (Minn. June 10, 1992).

II. THE PANEL EXCEEDED ITS AUTHORITY.

The Minneapolis Police Department is named as Respondent in the *Charge of Discrimination* and the Findings, Conclusions and Verdict were taken against the Minneapolis Police Department. The Minneapolis Police Department is not an independent entity subject to suit, but a subdivision of the City of Minneapolis. Minneapolis, Minn., Charter, Ch. 6 (A. 56-58) and Minneapolis, Minn., Code of Ordinances Ch. 171. (A. 59-60). See, e.g., *Edwards v. City of St. Anthony*, 2008 U.S. Dist. 2008 WL 3417142006 at *1 n. 4 (D. Minn. Feb. 7, 2008) (citing *Hyatt v. Anoka Police Dep't*, 700 N.W.2d 502, 506 (Minn. Ct. App. 2005))(A. 61); *Stepnes v. Tennesen*, 2006 U.S. Dist. 2006 WL 2375645 at *12 (D. Minn. Aug. 16, 2006)(A. 64).

III. THE DECISION BY THE PANEL IS ERRONEOUS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

a. Speaking loudly to Cannon's wife and writing a license plate number did not constitute reprisal.

The Minneapolis Civil Right Ordinance provides that it is an unfair discriminatory practice

To engage in any reprisal, economic or otherwise,
because another person opposed a discriminatory act

forbidden under this title, has filed a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this title, or has associated with a person or group of persons of a different race, color, creed, religion, ancestry, national origin, sex, sexual orientation, status with regard to disability, age, marital status, status with regard to public assistance or familial status.

Minneapolis, Minn., Code of Ordinances § 139.40(m)(3).

Reprisal includes

[B]ut is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any of the following with respect to a person because that person has engaged in the activities listed in subsection 139.40(1)(3) refuse to hire the person; depart from any customary employment practice; transfer or assign the person to a lesser position in terms of wages, hours, job classification, job security, or other employment status; or inform another employer that the person has engaged in the activities listed in subsection 139.40(1)(3).

Minneapolis, Minn., Code of Ordinances §139.20.

No cases have analyzed the provisions of the Minneapolis ordinance. The framework established by *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) is used by the Minneapolis Commission on Civil Rights to evaluate the evidence. *Minneapolis Police Dept. v. Minneapolis Comm'n on Civil Rights*, 402 N.W.2d 125,130 (Minn. App. 1987), *af'd*, 425 N.W.2d 235,239 (Minn. 1988).

To establish a prima facie case of reprisal a party must show (1) that he or she engaged in statutorily protected conduct, (2) that adverse action was taken, and

(3) that a causal connection exists between the employee's conduct and the employer's action. *Hubbard v. United Press Int'l.*, 330 N.W.2d 428, 444 (Minn. 1983) (applying test in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96 (Minn. 1999). If the party is able to establish this prima facie case, the burden then shifts to the other party to show a non-discriminatory reason for its actions. *Fletcher*, 589 N.W.2d at 102. If this is done, the burden then shifts back to the employee to show that the non-discriminatory reasons were pretextual. *Id.*

1. No Good Faith Complaint.

The good-faith, reasonable-belief standard requires that an objection to discrimination be an objectively reasonable opposition to a discriminatory practice. *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir.1997). Scrutiny of the retaliation cannot be avoided “merely by claiming such a belief” of a discriminatory practice, but rather, the party must provide facts supporting the claim that her belief was objectively reasonable. *Id.*; *Bahr v. Capella University*, 765 N.W.2d 428, 436 (Minn. App., 2009).

The Minneapolis City Ordinance uses only the most general of language to describe reprisal. While a complainant need not establish that the underlying discrimination took place, he must he must demonstrate a good faith, reasonable belief that the underlying challenged action violated the law. *Manoharan v.*

Columbia Univ. College of Physicians & Surgeons, 842 F.2d 590, 593 (2d Cir.1988); *Sisco v. J.S. Alberici Constr. Co.*, 655 F.2d 146, 150 (8th Cir.1981); *Wentz v. Maryland Cas. Co.*, 869 F.2d 1153, 1155 (8th Cir. 1989).

The ordinance lists specific conduct that is subject to protection from reprisal such as having “filed a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing... .” Cannon engaged in none of the specific activities at the time of the alleged retaliation. The Panel relied on the catchall phrase that the complainant must have “opposed a discriminatory act forbidden under this title... .” The ordinance contemplates something more than an argument between individuals as the operative discrimination. Cannon’s alleged complaint fails to satisfy the reasonable good faith requirement because the complaint was based entirely on his subjective impressions.

The objective evidence shows, at most, rudeness on the part of one police officer prior to the alleged complaint. The objective evidence relates to the attitude and demeanor of Officer Hagen. There is no evidence independently probative of discrimination. There is no evidence of any racially derogatory language. There is no evidence that individuals of other races were treated differently. There is no evidence of an arrest. There is no evidence of use of force or touching by the police of any party. The Panel concluded that the conduct was *not* so at variance with what would reasonably be anticipated absent discrimination that

discrimination is the probable explanation. (Ad. 27, Memorandum p. 22). The only evidence related to race is that the people waiting for their vehicles were African or African American. The evidence does not support an objective belief that discrimination had occurred, therefore, the alleged complaint is not objectively reasonable.

The Panel noted that there were non-discriminatory reasons for Officer Hagen's conduct including her youth, the need for a female officer to demonstrate herself; and the lack of assistance from her partner. (*Id.*). Other non-discriminatory factors, not examined by the Panel, included an officer facing seven towing victims who had paid their money, but not received their cars, standing for forty-five minutes in a small room without chairs attempting to explain their plight all at once. The rise in volume and changes in demeanor does not objectively demonstrate a reasonable belief in discrimination, but support only Cannon's subjective impression., especially considering that he had been subjected to the same frustrations as the other towing victims by WSI.

Additionally, the comment by Cannon that he intended to make a complaint is not a complaint of discrimination. Cannon does not specify what part of the ordinance is being violated or how it is being violated. At most, Cannon says that 'this' is discrimination. The general voicing of issues and concerns does not

constitute statutorily protected opposition to discrimination. *Carter v. Peace Officers Standards & Training Bd.*, 558 N.W.2d 267, 273 (Minn. App. 1997).

Cannon's statement was part of a continuing dispute and not a unique complaint of discrimination. The interpretation adopted by the Panel is overly broad and would result in absurd results. Applying the Panel's analysis, anytime the phrase 'discrimination' or 'complaint' was uttered a complaint of discrimination is made. All protocols and legal requirements relating to the processing and investigation of discrimination complaints would then be invoked. Any subsequent action by a respondent would be reprisal, according to the Panel. Opposition must be specifically directed at the alleged discriminatory practice; it may not concern merely conditions in general. *See, e.g., Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 326 (Minn.1995) (sufficient evidence for district court to find that plaintiff did not make a specific accusation of age discrimination); *Tretter v. Liquipak Int'l.*, 356 N.W.2d 713, 715 (Minn.App.1984) (plaintiff who told sexual harasser to stop and reported him to personnel director engaged in statutorily protected conduct).

A rational and reasonable interpretation of the ordinance requires a complaint be made to someone other than the person about whom the complaint is being made.

Finally, Cannon did follow through and his concerns were investigated by several department of the City of Minneapolis. There is no evidence that any action took place to inhibit his access to the complaint process.

2. No Adverse Action.

The Panel cites three instances of adverse action; Officer Hagen's alleged statement that he could not do anything to her; Officer Hagen speaking to the Complainant's wife in a disrespectful manner; and Officer Meath writing of a license plate number. (Ad. 12, Conclusion 11).

Officer Hagen's statements to Cannon and Mrs. Cannon cannot amount to adverse action. Officer Hagen took no action toward Cannon. She did not follow him, touch him, threaten him, issue him a citation or have any contact with him of any type. The allegedly disrespectful conversation regarding the badge number was not with Cannon. It is only the subjective impression of Cannon that the language of Officer Hagen amounted to harassment or retaliation. The words uttered by Officer Hagen, even if in response to a complaint of discrimination, do not amount to adverse action.

Officer Meath was outside WSI at the same time as Cannon but he took no action toward Cannon. Cannon admits that Officer Meath never spoke to him or any member of his family. Cannon admits that neither Cannon nor any member of his family spoke to Officer Meath.

There is no evidence in the record that Officer Meath was aware of the alleged complaint by Cannon. The Panel made no finding regarding Officer Meath's knowledge of the alleged complaint, other than that he was in the presence of Officer Hagen. Officer Meath has testified that he did not hear Cannon make a complaint to Officer Hagen. The testimony indicates Officer Meath was standing away from Officer Hagen providing assistance should Officer Hagen need it. Officer Meath's knowledge of the complaint by Cannon is based entirely on wishful thinking and speculation and is not supported by the record. When Cannon made the alleged statement to his wife, the room was full, the Cannons testified Officer Hagen was screaming at the top of her lungs and Officer Meath was standing approximately three feet behind her daydreaming about lunch. (T. 51, 170, 179). Officer Meath could not have retaliated for a complaint of which he was not aware.

Assuming that Officer Meath was aware of the complaint, his actions do not amount to adverse action. At most, he acquired information, a license plate number, that could be used to retaliate in the future. He did not stop, cite or even speak to Cannon. He walked out of the WSI facility with the people getting their cars when the tow truck arrived to assure that no hostility was directed toward the tardy truck driver.

To establish adverse action, the Complainant must show that the Respondent departed from a customary practice. Adverse action applies to all material acts by the respondent which might dissuade a reasonable person from making a report of an actual or suspected violation of the law. *See White v. Burlington N & Santa Fe Ry. Co.*, 548 U.S. 53, 66-67 (2006). The actions taken by Officer Hagen were taken before any alleged discussion by the Complainant of making a complaint and did not depart from accepted crowd control techniques. The Complainant had no discussion with Officer Meath.

3. No Causal Connection.

The Complainant cannot show a causal connection between the conduct of the officers and his alleged opposition to discrimination because his threat to make a complaint was not a motivating factor in the officers' actions.

Complaining about discrimination is not the same as a complaint of discrimination. Nothing was done to impede making a complaint. The Minneapolis Police Department was responsive and helpful.

The evidence is compelling that Officer Meath did not and could not have heard the alleged complaint. One cannot retaliate for a complaint of which one is unaware.

IV. THE PANEL DEMONSTRATED BIAS TOWARD APPELLANT.

The Minneapolis ordinance does not address the issue of bias. However, under the Due Process Clause, “an impartial decisionmaker is essential.” *Goldberg v. Kelly*, 397 U.S. 254, 270, (1970). See also, *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912), and *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *Chanhassen Chiropractic Center v. City of Chanhassen*, 663 N.W.2d 559 (Minn. App. 2003); *Humenansky v. Minn. Bd. of Medical Examiners*, 525 N.W.2d 559 (Minn. App. 1994), *rev. den.* (Minn. 1995); and *Ginsberg v. Minnesota Department of Jobs and Training*, 481 N.W.2d 138 (Minn. App. 1992).

The Minnesota Administrative Procedures Act provides guidance to the Court standards to be applied in evaluating the Panel. The Act directs administrative law judges to “see to it that all hearings are conducted in a fair and impartial manner.” Minn. Stat. § 14.50. The Act also requires that judges “be free of any political or economic association that would impair their ability to function officially in a fair and objective manner.” Minn. Stat. § 14.48. Whether a hearing officer is impartial is a fact-specific inquiry that depends on the context in which an appeal is heard. *Chanhassen Chiropractic Center*, 663 N.W.2d at 562.

A decision-maker need not be disqualified “simply because he has taken a position, even in public, on a policy issue related to the dispute” in the absence of a showing of his incapacity to fairly judge the particular controversy. *Hortonville*

Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482, 493 (1976). Nonetheless, strong convictions as to law or public policy, e.g., law and order, civil rights, environmental protection, strong federal government, or compensation of accident victims, may color a decision-makers whole approach to a case and thus may be the most pervasive and decisive kind of bias.

Bias or prejudice against, or favoritism toward, a particular party or a group to which the party belongs may disqualify the decision-maker. Danger of personal bias may also exist where the decision-maker has been the target of personal abuse by a party. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). Here the Panel indicated that they relied on personal negative experiences with the Minneapolis Police Department in evaluating the evidence. The Panel made Findings and reached Conclusions that were not supported by the evidence and in keeping with their stated distrust and negative contacts with police. (Ad. 27-28). The Panel indicated that they were 'advocates' not impartial fact finders. (*Id.*). In *Texaco, Inc. v. Federal Trade Commission*, the court held that the chair of the Commission was disqualified by reason of a speech given to petroleum retailers in which he promised to rid them of the predatory practices of the big, specifically-named oil companies which plagued them. The court noted that the speech "plainly reveals that he had already concluded that Texaco and Goodrich were violating the [a]ct."

Texaco, Inc. v. Federal Trade Commission, 336 F.2d 754, 760 (D.C. Cir. 1964),
vacated on other grounds, 381 U.S. 739 (1965).

V. THE PANEL ERRED BY NOT RECUSING ITSELF.

Impartiality is the very foundation of the judicial system in the United States. *Reserve Mining Co. v. Lord*, 529 F.2d 181 (8th Cir. 1976). Any justice, judge, or magistrate of the United States must disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned. *Greer v. State*, 673 N.W.2d 151 (Minn. 2004).

The Minnesota Office of Administrative Hearings has adopted a code of professional responsibility for administrative law judges. In administrative proceedings not governed by the Minnesota Administrative Procedure Act, the court of appeals has suggested that Canon 3(c) of the *Minnesota Code of Judicial Conduct* dealing with disqualification may apply. *Pinkney v. Independent School Dist. No. 691*, 366 N.W.2d 362 (Minn. App. 1985).

Under Minnesota Rule of Civil Procedure 63.02, no judge shall sit in any case if that judge is interested in its determination or if that judge might be excluded for bias from acting therein as a juror.

Complainant James F. Cannon served as a Commissioner for the Minneapolis Civil Rights Commission from September 1988 to September 1998. The appearance of bias may be sufficient in itself to require that a judge be

removed. *Roatch v. Puera*, 534 N.W.2d 560, 563 (Minn. App. 1995). Where judge's impartiality is questioned, to avoid any suspicion of favoritism, all doubt concerning compliance with rules should be resolved in favor of his disqualification. *In re Hormel's Trusts*, 1968, 282 Minn. 197, 163 N.W.2d 844.

The hearing of the allegations and the application of law to disputed facts before a Commission upon which the Complainant sat for ten years give the appearance of impropriety. The Commission on Civil Rights should have recused itself from hearing the instant case.

VI. THE DAMAGES AND PENALTIES AWARDED WERE NOT SUPPORTED BY THE LAW AND THE FACTS.

The Panel awarded Cannon \$10,000.00 for past pain, embarrassment and emotional distress. (Ad. 14, 18-19). The Panel awarded Cannon \$5,000.00 for future pain, embarrassment and emotional distress. (*Id.*). The Panel doubled the award to \$30,000.00. (*Id.*). The Panel did not award punitive damages but did award a civil penalty of \$7,500.00, payable by the City of Minneapolis to the City of Minneapolis. (*Id.*).

The damages awarded by the Panel are not supported by the law or evidence. The Panel erred in the award of damages.

a. Pain, Embarrassment and Emotional Distress.

The Minneapolis Code of Ordinances provides that the Commission may award damages:

In all cases, the hearing committee may order the respondent to pay an aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three (3) times the actual damages sustained. In all cases, the hearing committee may also order the respondent to pay an aggrieved party, who has suffered discrimination, damages for mental anguish or suffering and reasonable attorneys fees in addition to punitive damages in an amount not more than eight thousand five hundred dollars (\$8,500.00).

Minneapolis, Minn., Code of Ordinances § 141.50(m).

There is no evidence in the record that Cannon suffered any physical injury or incurred any expenses related to the incident. The only evidence is the record related to sleeplessness, nightmares and concern for his son. The Panel found that Cannon had suffered past emotional harm of \$10,000.00 and will suffer future emotional harm of \$5,000.00. (Ad. 9, Findings 47-48). All damages relate to mental anguish or suffering.

The Minneapolis, Minn., Code of Ordinances § 141.50(m) caps emotional damages at \$8,500.00 and does not provide for multiplying the award of damages for mental anguish. Clearly, if the intent of the Ordinance was to provide for multiplying mental anguish or suffering damages, the provision would have been included in the sentence providing for multiplication of damages. The award of \$30,000.00 is not supported by the record and is contrary to the Ordinance.

b. Civil penalty.

Minneapolis, Minn., Code of Ordinances § 141.50(m) provides for a civil penalty

This penalty is in addition to compensatory and punitive damages to be paid to an aggrieved party. The hearing committee shall determine the amount of the civil penalty to be paid, taking into account the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, the cost of investigation incurred by the City of Minneapolis, and the financial resources of the respondent.

The civil penalty in the amount of \$7,500.00 is not supported by the evidence and is moot. The Panel found that “[t]aking into account the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the Respondent, the civil penalty the Respondent shall pay to the general fund of the City of Minneapolis is \$7,500.” (Ad. 10, Finding 50).

The civil penalty is moot in that the City of Minneapolis is ordered to pay the City of Minneapolis \$7,500.00. The *Charge of Discrimination* has been asserted against the Minneapolis Police Department. However, the Minneapolis Police Department is not an independent entity subject to suit, but a subdivision of the City of Minneapolis. See, Minneapolis, Minn., Charter, Ch. 6 (A. 22-24) and Minneapolis, Minn., Code of Ordinances Ch. 171. (A. 25-26). It the situation

presented the civil penalty serves no purpose because the City of Minneapolis is ordered to pay the City of Minneapolis the penalty amount.

CONCLUSION

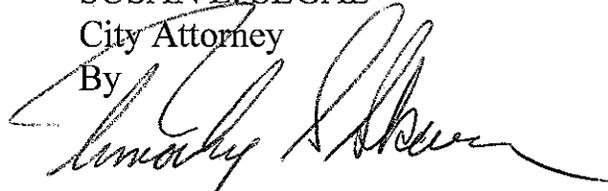
For the reasons stated herein the decision of the Panel of the Minneapolis Civil Rights Commission should be reversed and judgment entered for the Appellant.

Dated: September 29, 2009

SUSAN L. SEGAL

City Attorney

By

A handwritten signature in black ink, appearing to read "Timothy S. Skarda", written over the word "By".

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CERTIFICATE OF COMPLIANCE

Timothy S. Skarda, Attorney for Respondent, certifies that this brief complies with the type-volume limitation contained in Rule 132 of the Rules of Civil Appellate Procedure as follows:

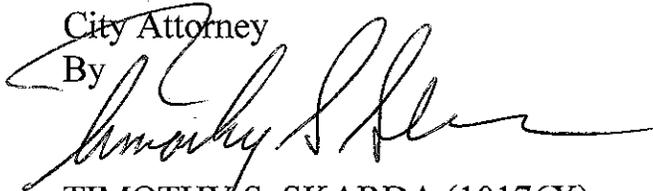
There are 7,521 words in this brief. The word processing software used to prepare this brief was Microsoft Office Word 2003, (11.8237.8221) SP 3, using Times New Roman 14 point proportional spaced font containing Serifs.

Dated: September 29, 2009

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