

**The IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

AUSTIN TSCHIRHART §
§
V. § **Civil Action No. 5:23-cv-846**
§
THE CITY OF SAN ANTONIO §
BY AND THROUGH ITS AGENT §
THE SAN ANTONIO FIRE §
DEPARTMENT AND GERRILYN §
CASALS §

PLAINTIFF’S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES PLAINTIFF **AUSTIN TSCHIRHART** (“Plaintiff” or Tschirhart”), complaining of DEFENDANTS **THE CITY OF SAN ANTONIO BY AND THROUGH ITS AGENT THE SAN ANTONIO FIRE DEPARTMENT** “SAFD”) and **GERRILYN CASALS** (“Casals”) and files this Plaintiff’s Original Complaint, asserting claims for discrimination based on sex under Title VII and the Texas Commission on Human Rights Act as well as retaliation for opposing sex discrimination in violation of Title VII and the Texas Commission on Human Rights Act.

I.
PARTIES, JURISDICTION AND VENUE

1. Plaintiff Austin Tschirhart is an individual and a citizen and resident of Texas and is a former employee of Defendant SAFD. He worked for SAFD in San

Antonio, Texas and all relevant events occurred in San Antonio, Texas, which is within this Court's district.

2. Defendant The City of San Antonio by and through its agent the San Antonio Fire Department, is a governmental entity conducting operations in the State of Texas in the Western District of Texas, San Antonio Division. Defendant may be served by serving the City Attorney Andrew Segovia at Office of the City Attorney, 203 S. St. Mary's Street, 2nd Floor, San Antonio, Texas 78205. A waiver of service has been requested.

3. Defendant Gerrilyn Casals is an individual who was employed by SAFD at all times relevant to this action and who acted in the interests of the employer SAFD as defined in §§21.141 and 142 of the Texas Labor Code. Casals may be served with process by serving the City Attorney Andrew Segovia at Office of the City Attorney, 203 S. St. Mary's Street, 2nd Floor, San Antonio, Texas 78205. A waiver of service has been requested.

4. This Court has jurisdiction to hear the merits of Plaintiff's Title VII claims due to the federal question raised pursuant to 28 U.S.C. §1331.

5. This Court has supplemental jurisdiction over Plaintiff's state law claims under the Texas Commission on Human Rights Act pursuant to 28. U.S.C. §1331.

6. All of the acts alleged herein occurred in San Antonio, Bexar County, Texas, and are within the jurisdiction and district of this Court.

II.
FACTUAL BACKGROUND

7. Plaintiff Austin Tschirhart worked for Defendant SAFD as a fire fighter from November of 2018 until he was unlawfully constructively discharged due to his sexual orientation and opposition to sex discrimination in November of 2021.

8. Defendant Gerrilyn Casals was a Lieutenant who supervised Plaintiff during a portion of the time he worked at SAFD. She was aware that Plaintiff was being discriminated against due to his sexual orientation, but rather than taking corrective action, she told Plaintiff that he would not be welcome back to work.

9. Tschirhart began the process of applying for employment with SAFD in 2018. He met with investigator Jay Fuentes with SAFD who was performing a pre-employment background check in November 2021.

10. Fuentes advised Tschirhart to remove any mention of his sexual orientation from his social media and to not tell anyone at SAFD that he was gay until after his probationary employment period was over.

11. Fuentes also told Tschirhart that if others at SAFD knew that he was gay that word would get around quickly between the firefighters and that they may not support Tschirhart during an emergency.

12. Tschirhart completed the SAFD training and graduated from the academy in April 2020. His first assignment was a 1 month assignment at Station 17.

13. During his first week on assignment as a firefighter, he was called a “faggot” on two occasions by firefighters David Murillo and Peter Costanzo. Jacob Hernandez, another probationary firefighter who was not gay or not believed to be gay was not treated poorly like Tschirhart.

14. In May 2020, Tschirhart requested a transfer to the different fire station due to the poor treatment he was subjected to due to his sexual orientation. Fire Chief Lee found out about the request and asked Tschirhart why he wanted to move. Tschirhart informed the chief that it was for personality reasons.

15. Tschirhart did not want to tell the Chief that the reason he wanted to move was because he was being treated badly due to his sexual orientation because he was concerned about retaliation.

16. The Lieutenant at station 17 gave Tschirhart a poor review stating that Tschirhart did not want to train with the crew or be around them. Tschirhart was trying to avoid poor treatment the others subjected him to due to his sexual orientation.

17. In November, 2020, at the end of his probationary period, Tschirhart requested a transfer to Station 48 as a permanent assignment and was given it.

18. A couple of weeks after Tschirhart started at Station 48 he learned that there was gossip about him circulating among others at the department. Tschirhart's District Chief Brook Hildreth discussed these with Lieutenant Gerrilyn Casals. Tschirhart was informed that the rumors came from Station 17.

19. Tschirhart met with Chief Hildreth and told her that he believed this was happening because he was gay. Chief Hildreth told Tschirhart to contact HR and he did.

20. On December 9, 2020, Tschirhart submitted a statement to the City of San Antonio Human Resources Department. In it he described how he had been treated and stated his concerns that other firefighters would not help him because he was gay. Tschirhart further told HR that he had expressed these concerns to both Lieutenant Gerrilyn Casals and the Station Chief, Brooke Hildreth.

21. Over time, Tschirhart's co-workers' interactions with him got worse and worse.

22. In May of 2021, Chief Hildreth asked Tschirhart if he would volunteer to work from Station 46 until the new assignment list came out. Tschirhart agreed.

23. When the transfer list was made available in November 2021, Chief Hildreth told Tschirhart that he would need to get a permanent position at Station 46 if he wanted to stay there, otherwise he would be sent back to Station 48.

24. Tschirhart saw that other firefighters with more seniority, and therefore higher priority on transfers, were applying for Station 46, he decided to apply for Station 48.

25. On November 17, 2021, Tschirhart was contacted by Lieutenant Casals from Station 48. She told Tschirhart that although she could not officially tell him not to come back, that he would not be welcome at the station and needed to find somewhere else to go.

26. Tschirhart requested a transfer to Station 14 in his district. After doing so, Tschirhart began to receive calls from firefighters at Station 14.

27. Osama Elkhaili, a firefighter from Station 14 called Tschirhart and told him that he should not request assignment on the A shift at Station 14 because a crew from Station 17 was coming over and his request for that assignment was “messing that up.”

28. Tschirhart received text messages from Eric Aunkst, a fire fighter from the B shift that asked Tschirhart to apply for a different shift because they already had someone in mind for the position he was applying for.

29. Tschirhart also received a call from an unidentified man who asked if he was still trying to work at Station 14, when Tschirhart started to answer the caller said “we don’t need a faggot at our station” and hung up.

30. Tschirhart understood that his position at SAFD would be untenable and submitted his resignation.

III.
CAUSES OF ACTION

**COUNT 1 – SEX DISCRIMINATION IN VIOLATION OF TITLE VII AND
THE TCHRA AGAINST DEFENDANT SAFD**

31. The evidence will show that Defendant SAFD discriminated against Tschirhart based on his sex (sexual orientation/conforming to gender norms) in violation of Title VII and the Texas Labor Code. Specifically, the evidence will show that:

- a. Plaintiff is a member of a protected class based on sex. (Male/homosexual).
- b. Plaintiff was qualified for the position he held with Defendant SAFD. (Passed Academy and relevant training).
- c. Plaintiff was subject to an adverse employment action. (Termination-Constructive Discharge).
- d. The evidence will demonstrate that Plaintiff was treated less favorably than heterosexual/gender-conforming co-workers who were not subjected to the same treatment he was and were not constructively discharged. (Tschirhart was repeatedly referred to by the slur “faggot”, was told that he would not be welcome at different stations by both firefighters and management, he had been told by SAFD’s own investigator that he would face adverse treatment for being gay).

32. Plaintiff re-alleges and incorporates the factual allegations set out above as if fully stated herein.

**COUNT 2 – SEX HARASSMENT IN VIOLATION OF TITLE VII AND
THE TCHRA AGAINST DEFENDANT SAFD**

33. The evidence will further show that Plaintiff was subject to a hostile work environment based on sex, sexual orientation, and not conforming to gender norms, in violation of Title VII and the Texas Labor Code. Specifically, the evidence will show that:

- a. Plaintiff is a member of a protected group. (Male/homosexual).
- b. Plaintiff was the victim of uninvited sexual harassment. (Was repeatedly called a faggot and treated less favorably than heterosexual/perceived to be heterosexual gender conforming co-workers).
- c. The harassment was based on sex. (The treatment and comments were based on Plaintiff being male, homosexual, and not conforming to gender norms, Tschirhart was called a faggot on multiple occasions).
- d. The harassment affected a term, condition, or privilege of his employment. (The harassment was both severe and pervasive and affected both Plaintiff's mental health and his ability to do his job, culminating in his constructive discharge, he was told he was not welcome at stations, he had rumors spread about him that negatively affected his reputation, he was told "we don't need a faggot at our station", he had been told that if others knew he was gay they may not help him in an emergency.).
- e. Defendant SAFD knew or should have known of the harassment and failed to take prompt remedial action. (Plaintiff reported the harassment and instead of correcting it, SAFD took no action and even told him he would not be welcome).

34. Plaintiff re-alleges and incorporates the factual allegations above as if fully stated herein.

**COUNT 3 – RETALIATION FOR REPORTING SEX DISCRIMINATION
AND HARASSMENT IN VIOLATION OF TITLE VII AND THE TCHRA
AGAINST DEFENDANT SAFD**

35. The evidence will show that Defendant SAFD retaliated against Plaintiff because he complained about sex discrimination, in violation of Title VII and the Texas Labor Code. Specifically:

- a. Plaintiff engaged in protected activity. (Reporting sexually discriminatory and harassing conduct, Tschirhart made formal complaints in December 2020, also made informal complaints).
- b. An adverse employment action occurred. (Plaintiff was terminated, constructive discharge, by SAFD).
- c. A causal link exists between the protected activity and the adverse employment action. (The other employees' treatment of Tschirhart worsened after he made complaints, he was told he was not welcome at stations where he had made complaints, ultimately leading to his constructive discharge).

36. Plaintiff re-alleges and incorporates the factual allegations above as if fully stated herein.

**COUNT 4 – UNLAWFUL EMPLOYMENT PRACTICE – FAILING TO
CORRECT SEXUAL HARASSMENT IN VIOLATION OF TEXAS LABOR
CODE §21.141 ET. SEQ. AGAINST DEFENDANT CASALS**

37. The evidence will show that Defendant Casals violated §21.141 and §21.142 of the Texas Labor Code by not taking immediate and appropriate corrective action to remedy sexual harassment against Plaintiff. Specifically:

- a. Casals was an employer as defined by Tex. Lab. Code. §21.141(1)(B) in that she acted directly in the interests of the

employer SAFD in relation to the employee Tschirhart. (Lieutenant, member of management, responsible for directing Tschirhart and other firefighters).

- b. Tschirhart was subject to sexual harassment as defined by Tex. Lab. Code. §21.141(2)(C) and (D) in that he was subject to verbal conduct of a sexual nature that had the purpose and effect of unreasonably interfering with Tschirhart's work performance and created an intimidating, hostile, or offensive working environment. (Tschirhart was repeatedly called a faggot and mistreated due to his sexual orientation).
- c. Casals knew or should have known that the conduct constituting sexual harassment was occurring; (Tschirhart reported the treatment to Casals and others in management at Station 48) and,
- d. Casals failed to take immediate and appropriate corrective action. (Rather than try to stop the harassment of Tschirhart, Casals did the opposite and told him he was not welcome at Station 48, this took place in November 2021, after §§21.141-142 came into effect).

IV.
JURY DEMAND

38. Plaintiff requests trial by jury on all claims.

V.
PLAINTIFF HAS EXHAUSED ADMINISTRATIVE REMEDIES

39. Plaintiff filed his Charge of Discrimination concurrently with the Equal Employment Opportunity Commission and Texas Workforce Commission alleging that the Defendants had committed unlawful employment practices against him in violation of Title VII and the TCHRA.

40. Thereafter, Plaintiff received a “Notice of Right to Sue,” dated April 10, 2023, giving Plaintiff notice of his right to sue Defendants within 90 days of its receipt.

41. Plaintiff has exhausted all administrative remedies and timely files this suit.

PRAYER FOR RELIEF

Wherefore, Plaintiff requests that on final trial, Plaintiff have judgment against Defendants as follows:

1. Judgment against Defendants for Plaintiff’s actual damages, including lost wages, bonuses, salary and benefits (both back pay and front pay), in an amount to be determined by the jury;
2. Judgment against Defendants for Plaintiff’s compensatory damages for mental anguish, inconvenience, and damages to his professional reputation, past and future, in an amount to be determined by the jury;
3. An order that Defendants take such other and further actions as may be necessary to redress Defendants’ violation and any other applicable claims including reinstatement, if warranted or feasible;
4. Pre-judgment and post-judgment interest at the maximum amount allowed by law;
5. Costs of suit, including expert’s fees and attorney’s fees;
6. The award of such other and further relief, both at law and in equity, including injunctive relief and reinstatement, to which Plaintiff may be justly entitled.

Respectfully submitted,

PONCIO LAW OFFICES
A Professional Corporation
5410 Fredericksburg Road, Suite 109
San Antonio, Texas 78229-3550
Telephone: (210) 212-7979
Facsimile: (210) 212-5880

/s/Adam Poncio

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ATTORNEYS FOR PLAINTIFF

JS 44 (Rev. 04/21)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS</p> <p style="text-align: center;">AUSTIN TSCHIRHART</p> <p>(b) County of Residence of First Listed Plaintiff _____ <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number) Poncio Law Offices, PC 5410 Fredericksburg Rd., Suite 109 San Antonio, TX 78229</p>	<p style="text-align: center;">DEFENDANTS</p> <p style="text-align: center;">The City of San Antonio by and through its Agent the San Antonio Fire Department and Gerrilyn Casals</p> <p>County of Residence of First Listed Defendant _____ <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input checked="" type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <th></th> <th>PTF</th> <th>DEF</th> <th></th> <th>PTF</th> <th>DEF</th> </tr> <tr> <td>Citizen of This State</td> <td><input type="checkbox"/> 1</td> <td><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td><input type="checkbox"/> 4</td> <td><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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IV. NATURE OF SUIT (Place an "X" in One Box Only) Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p>PERSONAL INJURY</p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<p>PERSONAL INJURY</p> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p>PERSONAL PROPERTY</p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <p style="text-align: center;">INTELLECTUAL PROPERTY RIGHTS</p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 <p style="text-align: center;">SOCIAL SECURITY</p> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <p style="text-align: center;">FEDERAL TAX SUITS</p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	IMMIGRATION	
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input checked="" type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<p>Habeas Corpus:</p> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <p>Other:</p> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from Another District (specify)
 6 Multidistrict Litigation - Transfer
 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
 TITLE VII AND THE TCHRA AND TEXAS LABOR CODE

Brief description of cause:
 Discrimination based on sex

VII. REQUESTED IN COMPLAINT:
 CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.
 DEMAND \$ _____
 CHECK YES only if demanded in complaint:
 JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):
 JUDGE _____ DOCKET NUMBER _____

DATE: Jul 7, 2023 SIGNATURE OF ATTORNEY OF RECORD: /s/ Adam Poncio

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____