

[Cite as *Oye v. Ohio State Univ.*, 2002-Ohio-6252.]

IN THE COURT OF CLAIMS OF OHIO

DIANE L. OYE :

Plaintiff : CASE NO. 2001-11634

v. : DECISION

THE OHIO STATE UNIVERSITY : Judge Fred J. Shoemaker

Defendant :

: : : : : : : : : : : : : : : :

{¶1} Plaintiff, Diane Oye, was at all times relevant to this case, employed by Department of Surgery Corporation (DOSC), a private practice corporation for surgeons. Plaintiff alleged that Jerome Johnson, while working in a supervisory capacity, subjected her to sexual harassment, a hostile workplace, and intentional infliction of emotional distress to the extent that she was constructively discharged from her position. When plaintiff brought suit against Mr. Johnson in the Franklin County Court of Common Pleas, Mr. Johnson claimed that he was an employee of defendant and, as such, that he was entitled to civil immunity. Plaintiff subsequently filed this action alleging that even if Mr. Johnson is a state employee, his conduct was manifestly outside the scope of his employment with defendant and that he acted maliciously, in bad faith or in a wanton and reckless manner toward her.

{¶2} On July 25, 2002, the court held an evidentiary hearing in this case to determine whether Mr. Johnson is entitled to personal

immunity pursuant to R.C. 2743.02(F) and 9.86. The court renders the following determination.

{¶3} R.C. 2743.02(F) provides, in part:

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

{¶5} R.C. 9.86 provides, in part:

{¶6} "*** 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.)

{¶7} In *Thomson v. University of Cincinnati College of Medicine* (October 17, 1996), Franklin App. No. 96 API02-260, at pp. 10-11, the court noted that:

{¶8} "Under R.C. 9.86, an employee who acts in the performance of his duties is immune from liability. However, if the state employee acts manifestly outside the scope of his or her employment or acts with malicious purpose, in bad faith, or in a wanton or

reckless manner, the employee will be liable in a court of general jurisdiction. 'It is only where the acts of state employees are motivated by actual malice or other such reasons giving rise to punitive damages that their conduct may be outside the scope of their state employment.' *James H. v. Dept. of Mental Health & Mental Retardation* (1980), 1 Ohio App.3d 60, 61. Even if an employee acts wrongfully, it does not automatically take the act outside the scope of the employee's employment even if the act is unnecessary, unjustified, excessive, or improper. *Thomas v. Ohio Dept. of Rehab. and Corr.* (1988), 48 Ohio App.3d 86. The act must be so divergent that its very character severs the relationship of employer and employee. *Wiebold Studio, Inc. v. Old World Restorations, Inc.* (1985), 19 Ohio App.3d 246."

{¶9} At the hearing, the parties stipulated that Mr. Johnson was an employee of defendant. However, plaintiff argued that Mr. Johnson had "dual employment" such that he was also an employee of DOSC. Plaintiff testified that she worked with Mr. Johnson on a daily basis, that he signed her time sheets and that he was responsible for approving her vacation requests. Mr. Johnson testified that although he worked closely with DOSC and its employees, he was at all times relevant to this matter employed by defendant in the academic section of the Department of Surgery. He explained that the university received three percent of all the money collected by the private corporation and at the request of the university, he developed programs to coordinate collections between the university and the surgeons and to help increase the return on patient billings. Mr. Johnson testified that he occasionally processed administrative paperwork for DOSC. Mr. Johnson acknowledged he received things of economic value from DOSC

which included annual bonuses and payment of his monthly cellular phone charges. However, his salary, health and life insurance, fringe benefits, and retirement contributions were provided solely by defendant. Mr. Johnson insisted he never applied for, interviewed with or accepted a job from DOSC.

{¶10} Based upon the totality of the evidence, the court finds that Mr. Johnson was an employee of defendant and not DOSC. The court further finds that Mr. Johnson acted within the scope of his employment with defendant and that he did not act with malice, in bad faith, or in a wanton or reckless manner during the interactions regarding plaintiff that are at issue. Although the comments made by Mr. Johnson were certainly boorish and at times noisome, the totality of his misconduct did not rise to the level necessary for this court to determine that the employment relationship had been severed. Consequently, Mr. Johnson is entitled to personal immunity pursuant to R.C. 9.86 and the courts of common pleas do not have jurisdiction over civil actions against him based upon his alleged actions in this case.

{¶11} The court held an evidentiary hearing to determine civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon consideration of all the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that Jerome Johnson is entitled to immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, the courts of common pleas do not have jurisdiction over this matter.

FRED J. SHOEMAKER
Judge

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