[Cite as *Morway v. Bur. of Workers' Comp.*, 2004-Ohio-6577.]

IN THE COURT OF CLAIMS OF OHIO

LAURA L. MORWAY	:	
Plaintiff	:	CASE NO. 2003-10198 Judge J. Warren Bettis
v.	:	DECISION
OHIO BUREAU OF WORKERS' COMPENSATION, et al.	:	
Defendants	:	

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{¶ 1} The court[1] held an evidentiary hearing in this case to determine whether Arlene Overton and George Durkin, employees of defendant, the Ohio Bureau of Workers' Compensation (BWC), are entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶ 2} At the outset of the proceedings, plaintiff's counsel asserted an argument as to whether the court has jurisdiction to determine immunity in the instant case. Specifically, counsel argued that the Court of Claims can determine immunity only with respect to state law claims but that, here, all of plaintiff's claims are based upon the federal Fair Labor Standards Act, 29 U.S.C.S. §201, et seq. Accordingly, plaintiff's counsel contends that, lacking jurisdiction over federal law claims, this court must conclude that neither Overton nor Durkin is entitled to personal immunity under R.C. 9.86. In support of this argument, counsel cited the following case law: *Conley v. Shearer*, 64 Ohio St.3d 284, 1992-Ohio-284; *Gumpl v. Bost* (1992), 81 Ohio App.3d 370; and *Birchfield v. Mullins* (1992), Ohio App. Lexis 306.

{¶ 3} Upon due consideration, and for the reasons that follow, the court disagrees.

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This case is assigned to Judge J. Warren Bettis; however, the evidentiary hearing was held before Judge Joseph T. Clark.

{¶ 4} The court first notes that each of the cases relied upon by plaintiff involve alleged violations of Section 1983, Title 42, U.S.Code. A complaint alleging violations of Section 1983 must meet two requirements: 1) there must be an allegation that the conduct in question was performed by a person under color of law; and 2) the conduct must have deprived the person of a federal right. *Cooperman v. Univ. Surgical Assoc., Inc.* (1987), 32 Ohio St.3d 191, 199. It is well-settled that the state is not subject to liability under Section 1983 because the state is not a "person" within the meaning of that code section. See, e.g., *Jett v. Dallas Indep. School Dist.* (1989), 491 U.S. 701; *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App.3d 170; *White v. Chillicothe Correctional Institution* (Dec. 29, 1992), Franklin App. No. 92AP-1230. Thus, the cases cited by plaintiff provide no authority for determination of the jurisdictional issue presented herein.

{¶ 5} Nevertheless, plaintiff is correct in asserting that the procedure for determining immunity under R.C. 2743.02 applies only to causes of action under state law. See *Gumpl v. Bost*, supra, at 374, citing, *Besser v. Dexter* (1990), 68 Ohio App.3d 510. Upon review of the complaint in this case, the court finds that plaintiff does allege such causes of action or, at the very least, causes that are arguably premised upon state law.

{¶ 6} Briefly stated, plaintiff's complaint is based upon a series of incidents that occurred after she had attended a required training course in Columbus, Ohio from February 24-28, 2003, and had subsequently submitted a request to her supervisor, George Durkin, for overtime/compensatory time, at a rate of one-and-one-half times the hourly rate, for a period of 4.75 hours. Durkin advised plaintiff to "flex out" the time during the pay period within which she had submitted the request. Plaintiff challenged that decision pursuant to the terms of the Fair Labor Standards Act (FLSA). As a result, Durkin sought the advice of Arlene Overton, the service office manager, and thereafter notified plaintiff that her request for overtime compensation had been denied. Plaintiff then reported the outcome to her union representative. It was ultimately determined that plaintiff's overtime request should not have been denied. Durkin and Overton were advised of that outcome.

{¶ 7} Plaintiff contends that, after Durkin and Overton were proved to be wrong, they began to harass her and to engage in retaliatory actions. Her complaint states that their conduct included, but was not limited to, the following:

{¶ 8} "*** Durkin falsely accusing [her] of taking more than one (1) hour for lunch and falsely reporting the same to *** Overton;

{¶ 9} "*** Durkin falsely accusing [her] of directing a BWC customer to return to the BWC at a later date to be serviced by another BWC employee and falsely reporting said erroneous information to *** Overton;

{¶ 10} "*** Durkin forcing [her] to perform job functions which were not [her] job functions;

{¶ 11} "*** [n]ot allowing [her] to properly train for and/or providing [her] with proper training for the functions of her position;

{¶ 12} "*** Durkin verbally berating [her] in a loud and abusive fashion within the presence of and hearing of BWC customers, employees, and agents;

{¶ 13} "[h]arassing and belittling [her];

{¶ 14} "[s]electively and/or arbitrarily enforcing BWC policy against [her]."

{¶ 15} Based upon the above-quoted allegations, plaintiff's complaint alleges that Durkin and Overton "acted and or failed to act with malicious purpose, in bad faith, or in a wanton or reckless manner" and that they are personally liable to her. She also sets forth claims for constructive discharge; wrongful discharge in violation of the "clear public policy manifested in Ohio Rev. Code §4112.01, et. seq.," and civil conspiracy.

{¶ 16} Under federal law, a government official or employee is entitled to immunity unless the official or employee knew or should have known that the conduct at issue would violate a clearly established right. *Harlow v. Fitzgerald* (1982), 457 U.S. 800. In comparison, under R.C. 9.86, the question is whether the employee was acting outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶ 17} In this case, plaintiff's complaint does not allege that defendant's employees knew or should have known that the conduct in question would violate a clearly established right. Rather, plaintiff relies on the language of R.C. 9.86 to describe Durkin and Overton's conduct and to establish that they are personally liable to her. Although her complaint alleges violations of the FLSA, the gravamen of her complaint concerns the conduct that followed; that is, allegations that on their face appear to assert state law claims. Moreover, the whistle blower protection afforded employees under the FLSA has been codified as Ohio law by the 1998 enactment of R.C. 4113.52.

{¶ 18} To the extent that plaintiff has asserted state law claims, R.C. 2743.02(F) grants exclusive, original jurisdiction to this court to determine the immunity of the employees whose conduct is in question; the same is true even where no recovery is sought from the state itself. *White v. Morris* (1990), 69 Ohio App.3d 90; *Wilson v. Patton* (1990), 66 Ohio App.3d 46. It is only where this court determines that an employee has acted outside the scope of employment or acted with malicious purpose, in bad faith, or in a wanton or reckless manner, that plaintiff may bring an action against the employee(s) in a court of common pleas. Id. In the present case, it is not clear where plaintiff wishes to pursue her claims. Although she insists that all of her claims are based upon federal law, there is nothing in the court's record to evidence that plaintiff has filed a complaint against Durkin or Overton in either a federal court or a court of common pleas. In any event, this court concludes that it does have jurisdiction to determine immunity for the purposes of any state law claims asserted in plaintiff's complaint.

{¶ 19} Turning then to the decision on immunity, R.C. 2743.02(F) provides, in part:

{¶ 20} "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 the officer's or employee's 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. ***"

{¶ 21} R.C. 9.86 provides, in part:

{¶ 22} "*** 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.)

{¶ 23} The issue whether Durkin and Overton are entitled to immunity is a question of law. *Nease v. Medical College Hosp.*, 64 Ohio St.3d 396, 1992-Ohio-97, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992-Ohio-133. The question whether they acted outside the scope of their employment, or with malicious purpose, in bad faith, or in a wanton or reckless manner is one of fact. *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9. Plaintiff bears the burden of proving that the state employee(s) should be stripped of immunity. *Fisher v. University of Cincinnati Med. Ctr.* (Aug. 25, 1998), Franklin App. No. 98AP-142.

{¶ 24} In her post-hearing proposed findings submitted to the court, plaintiff characterized the incidents in question as: 1) the overtime incident; 2)the lunch incident; 3)the grievance; 4)the corrective counseling/action plan; 5)the vehicle incident; and 6) the subsequent discipline. In certain cases, such as the one here before the court, the evidence put forth to establish immunity, or a lack thereof, is virtually the same as that required to establish liability in a trial on the merits of the claim. However, the decision on immunity is distinct from the determination on the merits. Accordingly, for the purposes of the decision herein, the court shall address the allegations pertinent to each of the six incidents at issue without passing upon the likelihood of plaintiff's prevailing on the merits.

{¶ 25} The allegations pertinent to the overtime incident were previously set forth in addressing the foundation of plaintiff's claims. That entire incident occurred between February 28 and March 7, 2003. Additional allegations relevant to this incident are that plaintiff asserts that Durkin and Overton "insisted" on violating the provisions of the FLSA in denying her overtime compensation request and that, inasmuch as Overton's managerial position was due for renewal in

March 2003, the error was an embarrassment to her. Plaintiff maintains that exposing the matter provided the basis for retaliation against her.

{¶ 26} With respect to the lunch incident, the allegation is that Durkin reprimanded plaintiff in a loud and discriminatory manner when she returned from lunch on March 7, 2003. Plaintiff maintains that she had left her work station at approximately 12:30 p.m., stopped at the restroom, then exited the building at 12:36. She contends that when she returned to work at 1:36 p.m., Durkin was waiting for her. According to plaintiff, Durkin falsely accused her of "stretching" her lunch hour and referred to her in inappropriate gender specific terms; specifically, that he yelled loudly at her: "Lady, what does that clock say?" Durkin denied making the comment. However, another witness, Mack Beck, a former security guard at BWC, testified that Durkin sounded as if he was "after her about something that she was supposed to have done." Beck described Durkin's tone of voice as unpleasant, and characterized the treatment of plaintiff as "embarrassing." Beck further stated that he heard plaintiff crying.

{¶ 27} In addition, plaintiff alleges that Durkin also mistreated her by accusing her of failing to use a required "call log" during her work shift, even though she had been filling in for another employee, performing a job that she was not familiar with, and for which she had received no training. Plaintiff testified that Durkin also yelled at her about another matter, demanding that she perform a task that she had already completed.

{¶ 28} Later on this same date, plaintiff spoke to Durkin about a BWC customer that she had been unable to assist, but that she was attempting to follow through with. She testified that Durkin accused her of failing to provide adequate service to the client. Plaintiff testified that the accusation was false because she had, in fact, attempted to provide the service requested but that she had not been able to contact Durkin for assistance either by telephone or after looking for him in his office. Plaintiff stated that she also attempted to get help from the Warren Service Office but was not successful. In her post-hearing filing, plaintiff contends that: "Overton and Durkin both admitted that they failed to contact the Customer to confirm their allegations *** neither Overton nor Durkin even knew who the customer was *** these facts [should] lead the Court to conclude that

Overton's and Durkin's purported 'concern' *** was disingenuous, that this allegation was pretextual and that Overton's and Durkin's real motivation was to retaliate against [plaintiff] following the Overtime Request incident."

{¶ 29} The next incident concerns a grievance plaintiff filed on March 12, 2003, as a result of her lunchtime confrontation with Durkin. A hearing was held on that grievance on March 13, 2003, with plaintiff, a union representative, Durkin, and Overton attending. Plaintiff contends that, despite the direction of labor relations personnel to interview all witnesses to the incident, Overton failed to contact Mack Beck regarding his observations. Plaintiff further maintains that inasmuch as the incident was not thoroughly investigated, Overton acted arbitrarily and capriciously when she denied her grievance on March 14, 2003.

{¶ 30} The incident involving the corrective counseling/action plan occurred on the following Tuesday. On that day, plaintiff met with Durkin and Overton for a corrective counseling session. Plaintiff asserts that even though such counseling can result in disciplinary action, she was denied union representation during the session. The purpose of the session was to counsel plaintiff, and to present her with an "Action Plan" in response to her alleged untimely return from lunch, the situation involving the BWC customer she had been unable to help, and her alleged failure to utilize the call log. Plaintiff maintains that each of the allegations against her were baseless; that they were never fully investigated by Overton; that the Action Plan could never reasonably have been complied with; and that the plan outlined duties of an account examiner II, a position for which she had been neither hired nor provided training. In short, plaintiff contends that the plan was implemented to cause her to fail in her position as an employer service specialist. By contrast, Durkin described the session as a "blue print for success" and stated that he and Overton had developed the plan together, and that they begun work on it several weeks prior to the events which took place in March 2003.

{¶ 31} The fifth incident occurred on March 19, 2003, when plaintiff and Durkin drove to an off-site location for a BWC presentation. Plaintiff alleges that during the trip she asked permission to handle a separate customer appointment by herself. She contends that Durkin became unreasonably angry, that he expressed his anger through words and conduct, and that he advised her

that she would not be going anywhere on her own, all of which she contends was in further retaliation for her insistence that he and Overton comply with federal law. Plaintiff stated that Durkin's behavior was frightening and that she became concerned for her safety. She contends that, as a result of the conduct, she filed a workplace violence charge against Durkin; however, the evidence does not support that such action was taken. Nevertheless, plaintiff maintains that because Overton supported Durkin, she effectively gave him "the green light to pretty much do whatever he wanted."

{¶ 32} Shortly after these incidents, plaintiff took a voluntary demotion to her former position as a claims specialist, at a lower pay rate, where she would not be under Durkin's supervision. She contends that she took this step as a result of a constructive discharge and, as of the date of the evidentiary hearing, she continued to work in the claims specialist position.

{¶ 33} The sixth incident occurred after plaintiff had returned to her job as claims specialist. At some time during the autumn of 2003, plaintiff received a written reprimand for allegedly referring to Durkin as an "asshole." The comment was purportedly made during a conversation between plaintiff and a co-worker that was overheard by an area supervisor. The person who reported the matter to Overton was someone who Durkin had previously called to sit in as a witness during a meeting he had had with plaintiff. Plaintiff contends that she received discipline even though Overton was never able to corroborate the allegation and despite the fact that Durkin never heard any such comment himself. Plaintiff maintains that this incident also evidences continued retaliation against her.

{¶ 34} After due consideration, this court finds that, even assuming that all of plaintiff's substantive allegations are credible and uncontroverted, the evidence is wholly insufficient to establish that conduct of either Durkin or Overton was manifestly outside the scope of their state employment, or that any of their actions were taken with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶ 35} In the context of immunity, an employee's wrongful conduct, even if it is unnecessary, unjustified, excessive or improper, does not automatically subject the employee to

personal liability unless the conduct is so divergent that it severs the employer-employee relationship. *Elliott v. Ohio Dept. of Rehab. & Corr.* (1994), 92 Ohio App.3d 772, 775, citing *Thomas v. Ohio Dept. of Rehab. & Corr*. (1988), 48 Ohio App. 3d 86, 89. In order to find malicious purpose, bad faith, or wanton or reckless conduct there must be a showing that the employee harbored a willful or intentional design to do injury; acted upon self-interest or sinister motive; and/or perversely disregarded a known risk. See, e.g., *Jackson v. Butler Cty. Bd. of Cty. Commrs*. (1991), 76 Ohio App.3d 448, 453-454; *Lowry v. Ohio State Highway Patrol* (Feb. 27, 1997), Franklin App. No. 96API07-835; *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 771; *Thompson v. McNeill* (1990), 53 Ohio St. 3d 102, 105, quoting Restatement of the Law 2d, Torts (1965) 590, Section 500, Comment f.

{¶ 36} While the conduct alleged in this case may have been at times unprofessional, unnecessary, and/or excessive, there is nothing in the evidence that persuades this court that either Durkin or Overton engaged in conduct that was so divergent from their roles that it severed their employer-employee relationship.

{¶ 37} Further, the court finds that the testimony of both Durkin and Overton was candid and credible, and that there was nothing in their testimony or demeanor that compelled this court to believe that either of them harbored willful, intentional, sinister or perverse motives or dispositions toward plaintiff. In so holding, the court reiterates that this decision does not disallow plaintiff the opportunity to subsequently prove that defendant is liable to her on one of her state law causes of action. Rather, the court simply concludes that the evidence fails to demonstrate that the conduct of Durkin or Overton rises to the level necessary to strip them of civil immunity under R.C. 2743.02(F) and 9.86.

{¶ 38} Judgment shall, therefore, be entered accordingly.

IN THE COURT OF CLAIMS OF OHIO

LAURA L. MORWAY :

Plaintiff :

v. :

OHIO BUREAU OF WORKERS' COMPENSATION, et al. :

:

Defendants

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CASE NO. 2003-10198
Judge J. Warren Bettis

JUDGMENT ENTRY

The court conducted an evidentiary hearing to determine whether Arlene Overton or George Durkin is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon review of the evidence, and for the reasons set forth in the decision filed concurrently herewith, the court finds that Arlene Overton and George Durkin acted within the scope of their employment with defendant at all times relevant hereto. The court further finds that Arlene Overton and George Durkin did not act with malicious purpose, in bad faith, or in a wanton or reckless manner toward plaintiff. Consequently, Arlene Overton and George Durkin are entitled to civil immunity. Therefore, the courts of common pleas do not have jurisdiction over civil actions against them based upon the allegations in this case. Pursuant to Civ.R. 54(B), this court makes the express determination that there is no just reason for delay. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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JOSEPH T. CLARK
Judge

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