[Cite as *Buckholz v. Bowling Green State Univ.*, 2006-Ohio-624.]

IN THE COURT OF CLAIMS OF OHIO
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RAY BUCKHOLZ :

Plaintiff : CASE NO. 2004-06879
Judge Joseph T. Clark

v. :

DECISION

BOWLING GREEN STATE UNIVERSITY :

Defendant :

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

{¶ 1} Plaintiff brought this action against defendant alleging claims of breach of contract, wrongful termination in violation of public policy, retaliation, intentional infliction of emotional distress, and age discrimination. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.[1]

{¶ 2} In 1980, plaintiff began his employment with defendant in the Office of Design and Construction. In 1985, after becoming a licensed architect, plaintiff left defendant's employ for a position in the private sector. In 1995, plaintiff was re-employed by defendant as an assistant university architect and he continued to work for defendant in that capacity under a series of one-year contracts.

{¶ 3} In 1997, the Office of Design and Construction began the student union project, a large, multi-year project that entailed the demolition of a dormitory and the construction of a new

[1]The court held the record open until June 24, 2005, for the parties to file additional deposition testimony. On June 20, 2005, the parties filed the deposition of Chuck McLaughlin, which is hereby marked as Joint Exhibit 1 and ADMITTED.

building. Plaintiff worked on the project until its completion in 2002.

{¶ 4} In 1999, the position of Interim Director became vacant. Plaintiff did not apply for the position but recommended his colleague, Jim McArthur. (Defendant's Exhibit A.) McArthur was eventually chosen as Interim Director and became plaintiff's direct supervisor.

{¶ 5} In May 2001, plaintiff received a salary increase and was promoted to Senior Project Architect. (Defendant's Exhibit Z.) Contemporaneously, McArthur was promoted to Director of the Office of Design and Construction, University Architect. Bob Waddle, assistant vice president for capital planning, was McArthur's direct supervisor.

{¶ 6} On February 15, 2002, after the student union occupancy deadline had been met, plaintiff sent a memo to Bob Waddle and Dr. J. Christopher Dalton, senior vice president for finance and administration, wherein plaintiff requested a promotion consisting of a pay raise, a title change, and a revision of his job description. (Plaintiff's Exhibit 11.) In the memorandum, plaintiff sought a pay raise that would increase his salary to a level higher than that of McArthur. Plaintiff included two attachments with the memo: Document A, titled "Suggestions for Changing My Job Description to a Higher Level," and Document B, titled "A Comparative Look at the Qualifications of Ray Buckholz and Jim McArthur for the Position of University Architect," wherein plaintiff compared his credentials to those of McArthur in a number of areas. The final paragraph of Document B stated: "In conclusion, it is extremely difficult for me to understand why Jim McArthur was promoted to 'University Architect' without my getting an interview. In an interview I would have been able to demonstrate that I was the logical choice for the position. Please

explain why I was not considered for the position; the only reason I can see is age discrimination." (Plaintiff's Exhibit 11.)

{¶ 7} On March 29, 2002, plaintiff sent a memo to Bob Waddle, Christopher Dalton, Rebecca Ferguson, assistant vice president of human resources, and Diane Regan, affirmative action officer, Office of Equity/Diversity/Immigration that referenced a grievance he had filed with Diane Regan and requested an equitable adjustment of his position "on par with Jim McArthur's position." (Plaintiff's Exhibit 14.) On the same date, plaintiff sent a memo to those individuals and Jim McArthur inquiring about the existence of any employment evaluation from fiscal year 1997-98.

{¶ 8} On July 17, 2002, plaintiff was offered a contract for employment for the 2002-2003 fiscal year. Plaintiff executed the contract on July 26, 2002. (Plaintiff's Exhibit 17.)

{¶ 9} In September 2002, plaintiff was assigned to work on a renovation project for Suite 450 of the student services building. When plaintiff told Waddle and McArthur during a staff meeting that a building permit was needed prior to commencement, plaintiff asserts they were frustrated by his suggestion.

{¶ 10} On October 22, 2002, Waddle and McArthur sent plaintiff a memo that identified "several recent occurrences" in his job performance that warranted immediate action. Among the issues addressed in the memo were instances of plaintiff expressing his personal views and opinions of others at work; not communicating effectively with clientele; making written statements that were not in the best interests of the university or the department; and not conducting himself in a professional manner, including being aggressive, threatening and not being able to control his emotions. (Plaintiff's Exhibit 20.)

{¶ 11} On November 6, 2002, plaintiff sent a memo to defendant's general counsel wherein he stated that he had filed a

complaint for age discrimination with the Equal Opportunity Office in Cleveland, Ohio in response to the October 22, 2002, memo. (Plaintiff's Exhibit 22.)

{¶ 12} On January 7, 2003, McArthur conducted a "mid-year performance review" of plaintiff, wherein McArthur specified 16 areas of concern. (Plaintiff's Exhibit 33.) On January 31, 2003, plaintiff sent a response to McArthur regarding the evaluation. (Plaintiff's Exhibit 34.) Thereafter, plaintiff requested a conciliation meeting which was conducted on March 25, 2003. Plaintiff testified that the meeting was "one-sided" and that nobody addressed his concerns. A second conciliation meeting was scheduled for April 23, 2003, but plaintiff did not appear for that meeting. Plaintiff's employment was terminated in July 2003, when he was 57 years old.

{¶ 13} Plaintiff asserts that his employment was terminated as retaliation for lawsuits that had been filed by contractors involved with the student union project and for his complaints that defendant did not comply with certain permit requirements. Plaintiff further asserts that defendant breached his employment contract by failing to give him notice that his contract would not be renewed and by failing to evaluate his job performance annually.

{¶ 14} Marc Brunner testified that he was a project manager in the Office of Design and Construction and that part of his job was to obtain building permits. Brunner recalled that plaintiff brought up the topic of permits in 2002, specifically, that plaintiff had questioned him about a remodeling job on the fifth floor of the administration building that had been started without first obtaining a permit. Brunner testified that after plaintiff's inquiry, a permit was obtained.

{¶ 15} Chuck McLaughlin, an employee from the Department of Commerce, Building Code Compliance Division, testified that in

2003, plaintiff contacted his office in Toledo to report concerns that defendant had not obtained permits for all jobs; that he had forwarded plaintiff's concerns to the inspection department; and that he was unaware of the outcome of those inspections.

{¶ 16} Rebecca Ferguson, assistant vice president of human resources, testified that plaintiff was terminated for cause; that termination for cause was infrequent with contract employees; and that the provisions in the administrative staff handbook were followed when plaintiff's employment was terminated. Ferguson conceded that the Office of Design and Construction had not complied with the administrative staff handbook's requirement of annual employment evaluations.

{¶ 17} Bob Waddle testified that in February 2002, he had a discussion with plaintiff regarding his request for a position and title change but explained to plaintiff that there was no vacant position at that time. Waddle further testified that plaintiff's behavior changed after his requests for a title change and salary increase were denied, that plaintiff became disrespectful of his supervisors and that his work began to suffer. Waddle explained that plaintiff did not provide "follow-through" on a number of his assigned projects, including the health center, the student services building, the Wooster Street widening project, Suite 450, and Phase 2 of the student union. Waddle stated that he had received phone calls from individuals on various projects who had complained about plaintiff's performance.

{¶ 18} Waddle testified that he advocated use of the "lightning rod" concept for his employees: that a project manager should collect all of the "strikes" of the job, identify the problems and decide how to solve them. Waddle stated that plaintiff did not abide by the lightning rod concept and that he did not follow up on other employees' work or take responsibility

for all of his projects from beginning to end. Waddle stated that an example of plaintiff's failure to follow through with a project occurred when the philosophy department missed a deadline to obtain grant money to finance the construction of a bookcase because plaintiff had failed to answer the department's repeated requests for information.

{¶ 19} Regarding plaintiff's assertions that his employment was terminated because of lawsuits that had been filed regarding the student union, Waddle testified that he had told plaintiff not to generate any documents that would be discoverable in litigation. (Plaintiff's Exhibit 20.) Waddle also denied instructing plaintiff to start construction jobs without obtaining permits.

{¶ 20} Waddle testified that a mid-year performance review was conducted for plaintiff on January 7, 2003, and that the year should read "2002-03," not "2001-02." (Plaintiff's Exhibit 33.) Waddle described the mid-year performance review as a negative evaluation of plaintiff's job performance with many requests for improvement. Waddle stated that he went through the evaluation "line by line" with plaintiff and that it was the most negative evaluation he had ever given. Waddle conceded that plaintiff was an asset to the department when he was doing his job but stated that, from October 2002 forward, there was no improvement in plaintiff's attitude or performance and that in his opinion the only solution was termination.

{¶ 21} Jim McArthur testified that plaintiff was not capable of managing multiple projects at one time, that he had never followed the lightning rod concept, that he was disorganized and that he was accusatory of other employees. McArthur concluded that plaintiff's employment should be terminated because plaintiff's insubordinate attitude was deteriorating staff morale, and other staff members became "bogged down" with work that plaintiff should have been

performing. McArthur denied that the issues that plaintiff had raised regarding permits, plaintiff's age, or any pending lawsuits had anything to do with his decision to terminate plaintiff's employment.

{¶ 22} I. Breach of Contract

{¶ 23} As a general rule, the goal of the court in construing written contracts is to ascertain the intent of the parties, which is presumed to be stated in the document itself. See *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 1997-Ohio-202; *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 1996-Ohio-393. Where the terms of a contract are clear and unambiguous, the court cannot find different intent from that expressed in the contract. *E.S. Preston Assoc., Inc. v. Preston* (1986), 24 Ohio St.3d 7. However, where the terms in a contract are ambiguous, extrinsic evidence may be relied upon to determine the intent of the parties. *Ohio Historical Society v. General Maintenance & Engineering Co.* (1989), 65 Ohio App.3d 139.

{¶ 24} Under "Conditions of Employment," plaintiff's 2002-2003 contract stated the following:

{¶ 25} "5. Obligations of the Appointee: In consideration of the terms of this appointment, the Appointee agrees to perform such professional duties and services as identified in the appointed position or title, and/or as may be assigned or changed, *to the satisfaction of the Appointee's immediate supervisor.* It is the responsibility of the officer(s) signing for the University to verify whether or not the Appointee's performance is in accord with prevailing University practice." (Plaintiff's Exhibit 17.) (Emphasis added.)

{¶ 26} Pursuant to the administrative staff handbook, in order for defendant to have not renewed plaintiff's contract, defendant must have given plaintiff notice of non-renewal by January 1, 2003.

(Plaintiff's Exhibit 49, page 27.) It is undisputed that defendant did not comply with that requirement, rather, defendant argues that plaintiff's employment was terminated for cause.

{¶ 27} Plaintiff's contract contains a "satisfaction clause"; his continued employment was contingent on performance satisfactory to his supervisor. *Knowles v. The Ohio State Univ.*, Franklin App. No. 02AP-527, 2002-Ohio-6962 at ¶40, citing *Hutton v. Monograms Plus, Inc.* (1992), 78 Ohio App.3d 176, 181. Satisfaction clauses are either subjective or objective. Where the subjective standard is applied, the test is whether the party is "actually satisfied," subject only to the limitation that the party act in good faith. Where the objective standard is applied, the test is whether the performance would satisfy a reasonable person. *Knowles v. The Ohio State Univ.*, Ct. of Claims No. 2001-03780, 2005-Ohio-3330 at ¶s 19-20.

{¶ 28} The court finds that whether a subjective or objective standard is used, McArthur and Waddle were not satisfied with plaintiff's job performance. The exhibits show that after plaintiff was put on notice of deficiencies in his performance in October 2002, plaintiff's job performance and attitude did not change for the better. By January 2003, plaintiff was given additional notice that changes had to be made in his performance but, again, those changes did not occur. The court finds that both McArthur and Waddle acted in good faith to try to rehabilitate plaintiff's job performance, but that rehabilitation was not accomplished. The court further finds that the evidence presented at trial would persuade a reasonable person to find that plaintiff's job performance was not satisfactory. Therefore, the court finds that defendant terminated plaintiff's employment for cause pursuant to the contract and that defendant did not breach its contract with plaintiff.

{¶ 29} Plaintiff also argues that defendant's failure to evaluate his job performance on an annual basis pursuant to the administrative staff handbook constitutes a breach of contract. However, plaintiff cites to no provision, either in the employment contract or in the administrative staff handbook, that mandates the remedy of re-employment for failure to comply with the evaluation procedure. See *State ex rel. Cassels v. Dayton City Sch. Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 222, 1994-Ohio-92. Therefore, plaintiff's claim for breach of contract on that basis also must fail.

{¶ 30} II. Wrongful Termination in Violation of Public Policy

{¶ 31} Plaintiff asserts a claim for wrongful termination in violation of public policy, in accordance with the holding of the Supreme Court of Ohio in *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228. However, in order for an employee to bring a cause of action pursuant to *Greeley,* supra, that employee must have been an employee at will. *Haynes v. Zoological Society of Cincinnati* (1995), 73 Ohio St.3d 254, syllabus. Plaintiff's employment was governed by a one-year contract. Therefore, plaintiff was not an employee at will. Accordingly, plaintiff has failed to state a claim for wrongful termination in violation of public policy.

{¶ 32} III. Retaliation

{¶ 33} Plaintiff also claims that he was discharged in retaliation for bringing up permit issues, for filing discrimination complaints and because of pending lawsuits. However, plaintiff has the burden of proving a prima facie case of retaliatory discharge before defendant must present any evidence that the adverse action against plaintiff was taken for a legitimate, nondiscriminatory reason. *Neal v. Hamilton County* (1993), 87 Ohio App.3d 670. Federal law provides the applicable

analysis for reviewing retaliation claims. *Chandler v. Empire Chemical, Inc.* (1994), 99 Ohio App.3d 396. In order for plaintiff to support his claim for retaliatory discharge under either R.C. 4112.02(I) or federal law, he must prove that: 1) he engaged in a protected activity under federal or Ohio law; 2) he was the subject of adverse employment action; and, 3) there was a causal link between his protected activity and the adverse action of his employer. *Cooper v. City of North Olmsted* (6th Cir. 1986), 795 F.2d 1265, 1272.

{¶ 34} The court finds that plaintiff has not shown that he engaged in a "protected activity" simply by alleging that he was terminated because lawsuits were pending. Therefore, plaintiff's claim of retaliation on this basis fails. In addition, the court finds that plaintiff has proven, by a preponderance of the evidence, that he engaged in a protected activity both when he filed discrimination complaints and when he called the permit issue to the attention of his supervisors. Plaintiff has also proven by a preponderance of the evidence that he was subject to an adverse employment action, namely, termination. However, the court finds that plaintiff's claims for retaliation fail because he has not proven by a preponderance of the evidence that there was a causal link between his protected activity and the adverse action of his employer.

{¶ 35} To determine whether a causal connection exists, courts have considered the amount of time between the protected activity and the adverse employment action. An employee must show that "the alleged retaliatory action followed [the employee's] participation in the protected activity sufficiently close in time to warrant an inference of retaliatory motivation." *Neal v. Hamilton County*, supra, at 678. In this case, plaintiff first filed claims of discrimination in February 2002 and brought permit issues to light

in October 2002. Plaintiff's employment was terminated in July 2003. The amount of time that passed between the alleged protected conduct and plaintiff's termination was too long to infer a retaliatory motive on the part of defendant. See *Reeves v. Digital Equipment Corp.* (N.D. Ohio 1989), 710 F.Supp. 675, 677, ("*** as a matter of law, three months is too long to support an inference of retaliation"). Therefore, plaintiff has failed to state a claim of retaliatory discharge.

{¶ 36} IV. Intentional Infliction of Emotional Distress

{¶ 37} To state a cause of action for intentional infliction of emotional distress, plaintiff must show that: 1) defendant intended to cause emotional distress, or knew or should have known that actions taken would result in serious emotional distress; 2) defendant's conduct was extreme and outrageous; 3) defendant's actions proximately caused plaintiff's psychic injury; and 4) the mental anguish plaintiff suffered was serious. *Hanly v. Riverside Methodist Hospitals* (1991), 78 Ohio App.3d 73, 82, citing *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 34.

{¶ 38} "*** It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Yeager v. Local*

Union 20 (1983), 6 Ohio St.3d 369, 374-375, quoting 1 Restatement of the Law 2d, Torts (1965) 73, Section 46, Comment d.

{¶ 39} Plaintiff has failed to provide any evidence that any actions by McArthur or Waddle or the eventual termination of his employment were "utterly intolerable in a civilized community." Therefore, plaintiff has failed to state a claim of intentional infliction of emotional distress.

{¶ 40} V. Age Discrimination

{¶ 41} The Supreme Court of Ohio has held that age discrimination cases brought in state courts should be construed and decided in accordance with federal guidelines and requirements. *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, 147. A plaintiff may establish a prima facie case of discrimination either by direct evidence or by the indirect method established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. In this case, plaintiff did not present any direct evidence of age discrimination. However, an inference of discriminatory intent may be drawn where plaintiff establishes that he: 1) was at least 40 years old at the time of the alleged discrimination; 2) was subjected to an adverse employment action; 3) was otherwise qualified for the position; and 4) that after plaintiff was rejected, a substantially younger applicant was selected. *Burzynski v. Cohen* (6th Cir. 2001), 264 F.3d 611, 622.

{¶ 42} In the case of age discrimination, it must be shown that age was the motivating factor for the adverse employment action. *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501. Generally, the denial of a promotion is an adverse employment action. See *Walker v. Mortham* (C.A. 11, 1998), 158 F.3d 1177, 1187.

{¶ 43} Plaintiff has met three requirements of a prima facie case of age discrimination: he was over 40 years old, he was not selected for University Architect and was eventually terminated,

and he was qualified for the position that he held and for the University Architect position.

{¶ 44} However, plaintiff's claims of age discrimination fail because he did not present any evidence regarding the age of anyone who was selected for a position that he desired. Plaintiff did not inform the court of Jim McArthur's age, nor did plaintiff present any evidence whether someone replaced him after his employment was terminated. Moreover, the mere fact that plaintiff did not receive a new position and title does not amount to a claim of age discrimination.

{¶ 45} For the foregoing reasons, the court finds that plaintiff has failed to prove any of his claims by a preponderance of the evidence and accordingly, judgment shall be rendered in favor of defendant.

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RAY BUCKHOLZ :

Plaintiff : CASE NO. 2004-06879
Judge Joseph T. Clark

v. :

JUDGMENT ENTRY

BOWLING GREEN STATE UNIVERSITY :

Defendant :

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

JOSEPH T. CLARK
Judge

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