[Cite as *Swoger v. Wright State Univ.*, 2007-Ohio-2751.]

Court of Claims of Ohio
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ROBERT D. SWOGER, et al.	Case No. 2004-06780
Plaintiffs	Judge Joseph T. Clark
v.	DECISION
WRIGHT STATE UNIVERSITY	
Defendant	

{¶1} Plaintiff, Robert Swoger, brought this action alleging claims of sex discrimination, sexual harassment, age discrimination, defamation, breach of contract, wrongful or abusive discharge, negligent retention, and intentional infliction of emotional distress. Plaintiff's wife has alleged a claim for loss of consortium. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} At the commencement of proceedings, the court heard arguments on defendant's August 25, 2005, motion in limine. Defendant's motion was subsequently DENIED.

{¶3} Plaintiff testified that in March of 2001 he was hired by Dr. Peoples, then chairman of the Department of Surgery at Wright State University (WSU) School of Medicine, to serve as the administrative director for the department at an annual salary of $50,000. At the same time, plaintiff was hired into a similar concurrent position as Practice Manager for the University Medical Services Association (UMSA), the private clinical practice plan of the faculty surgeons for which he was paid $45,000 annually. According to plaintiff, Dr. Peoples also directed him to manage financial matters relating to the Injury Prevention Center (IPC) which was located at Miami Valley Hospital (MVH).

{¶4} Plaintiff explained that in order to retain its status as a "Level 1 trauma center," WSU required the surgeons to participate in the implementation of a community outreach program. Thus, they created the IPC which offered programs to promote safety

through such avenues as informing the public about the proper use of seatbelts and infant car seats, and by encouraging adults and children to wear helmets when riding bicycles. According to plaintiff, Dr. Peoples specified that the IPC duties were not part of plaintiff's job responsibilities with WSU or UMSA, that he would work for and report to the director of the IPC, and that he was to receive a stipend for the hours worked for the IPC from funds allocated for the IPC budget.

{¶5} Plaintiff stated that in 2001, he agreed to waive his IPC payment at the request of the director, Dr. Ekeh, due to insufficient funds in the budget. In 2002, Dr. Ekeh was paid $10,000 and plaintiff received $4,000. Plaintiff testified that in order for each of them to be paid, he was required to bill the IPC and then submit each check request through the MVH cost center to be approved. According to plaintiff, Dr. Ekeh had notified him that their respective stipends would double in the next year, such that Dr. Ekeh would receive $20,000 and plaintiff would receive $8,000, which would be paid to each of them on a quarterly basis.

{¶6} Plaintiff recalled that Dr. Peoples was his direct supervisor and that he reported to him on a daily basis. Plaintiff related that he was successful at improving collections and that he streamlined billing procedures for the clinical practitioners. In addition, plaintiff stated that he received outstanding reviews after his first year and that he also received a modest annual cost of living raise from WSU, and a bonus from UMSA. Plaintiff identified John Bale as the dean of fiscal affairs for the university and related that Bale exercised control over the budget and approved financial decisions regarding the department. Plaintiff and Bale had offices at different locations (approximately 10-12 miles apart) and saw each other only sporadically. Most of their communications were via telephone or electronic mail (e-mail). Plaintiff alleges that Bale would, on occasion, send him e-mail that included references which plaintiff viewed as personal and inappropriate. Plaintiff testified that he perceived Bale to be "flirting" with him and that he thought Bale wanted to have a personal relationship with him outside of work. According to plaintiff, he

complained to Dr. Peoples on two separate occasions but no action was taken in response to his complaints.

{¶7} In the summer of 2002, Dr. Peoples died unexpectedly after a fall at home and Dr. Miller was appointed as interim chairman. Plaintiff alleged that although he complained to Dr. Miller about the e-mails from Bale, his complaints were not meaningfully addressed. Plaintiff explained that he did not press the matter because of all the changes the department was going through. Dr. Miller was not selected to replace Dr. Peoples; rather, Dr. Alex Little was hired in September 2003 as new chairman of the department. Plaintiff testified that during this difficult transition period he continued to perform his job duties successfully and competently. Indeed, plaintiff insisted that he had no indication or warning that his position with WSU was in jeopardy.

{¶8} It is undisputed that plaintiff was called to a meeting at the office of John Bale, on October 31, 2003. At that meeting, plaintiff was notified that he was being terminated by WSU for "no cause," and that he was entitled to two months severance such that his last day of employment would be December 31, 2003. Since plaintiff's position with UMSA was dependent upon continued employment with WSU, he was instructed by Bale that he could no longer return to his office, that he would be relocated from his office at MVH to an office on campus, and that he would report to and be supervised by Bale for the remaining two months. According to plaintiff, he was completely surprised at this turn of events and sought clarification from Bale as to the reason for the termination. Plaintiff related that Bale assured him that termination was chosen as an alternative to an investigation that could have involved criminal charges. The following week, plaintiff requested additional explanation and Bale mentioned to him the stipend plaintiff received for his work with IPC. Plaintiff testified that he interpreted Bale's comment to mean that the stipend was a significant factor leading to the decision to terminate his employment. Plaintiff further testified that he spent the next several weeks both attempting to understand why he was being terminated and trying to garner support for his reinstatement.

{¶9} Plaintiff sent a letter to the provost on November 11, 2003, requesting dispute resolution. In the letter, plaintiff provided a brief summary of his work history at WSU and stated that Bale "fraudulently" accused him of criminal actions. Plaintiff alluded to "something underhanded happening with other motives." The letter contained the following statement, "I am an older Caucasian male and most of the people in similar roles here at WSU are younger and or female. If I am doing a good job, I shouldn't be discriminated against for either. Also, I should not be discriminated against for simply refusing sexual advances." Plaintiff also stated in the letter that his involvement with the IPC had been misinterpreted and that he did not believe "something as insignificant as this" would be used to terminate his employment. Plaintiff next insinuated that this "makes me believe that my age, gender and or refusal of sexual advances are somehow at issue." (Plaintiffs' Exhibit 8.) The associate provost, Dean Rickert, responded to plaintiff by letter dated November 17, 2003, and explained that plaintiff was not eligible to appeal his termination and cited to WSU Policy No. 4004 for authority. (Plaintiffs' Exhibits 16, 20.) Plaintiff acknowledged that he never filed a discrimination or sexual harassment complaint with the Office of Affirmative Action at WSU.

{¶10} Dr. Howard Part testified that he was the dean of the medical school and that he participated in the process wherein plaintiff was hired. According to Dr. Part, members of the hiring committee expressed some concern over the amount of salary being offered to sign plaintiff, and he recalled that he had serious misgivings about hiring plaintiff in at such a high salary. Dr. Part related that as early as June 2002, Dr. Peoples requested that plaintiff be given a merit raise of ten percent and that the raise be "grossed up" in order that plaintiff would receive a net raise of ten percent. Dr. Part objected to this and notified Dr. Peoples that plaintiff's raise would be approved only as a percentage of gross and not net wages. Dr. Part reiterated at trial that he believed at the time of Dr. Peoples' request that plaintiff was already overpaid for his position.

{¶11} Dr. Part further related that he had become increasingly dissatisfied with the way in which departmental employees received bonuses and that he was particularly concerned about the lack of justification as well as the interdepartmental disparity. Consequently, in July 2002, he sent a memo notifying all departments that there was to be a moratorium on bonuses. Dr. Part testified that he subsequently relented to the extent that he approved bonuses for two employees at the request of the interim chairman, Dr. Miller. Dr. Part explained that those two employees had been promised raises by Dr. Peoples before his death and that, as such, he felt compelled to approve the request. Dr. Part later learned that plaintiff sent an e-mail (which was not copied to Dr. Part) announcing that Dr. Part had approved bonuses for every staff member in the department (including plaintiff) and he listed the amount of the individual adjustments. Thus, plaintiff received a second ten percent increase within a few months of the bonus Dr. Peoples had secured for him.

{¶12} Dr. Part testified that he was very upset when he learned that the bonuses had been distributed to all the staff in the surgery department rather than to the two select employees whom he had authorized to receive bonuses. Dr. Part stated that he was especially disturbed that plaintiff had included himself on the list of employees to be compensated. Dr. Part maintained that he believed such conduct was entirely self-serving on the part of plaintiff. Moreover, Dr. Part conveyed to the court that he held plaintiff to a higher standard inasmuch as plaintiff was the financial officer and he already received one of the highest salaries for non-physicians in any department. Dr. Part opined that he had expected plaintiff to have exercised better judgment and restraint, even if there had been a miscommunication.

{¶13} Then, early in 2003, Dr. Miller notified Dr. Part that he was requesting a $20,000 bonus for plaintiff because plaintiff had performed “extra work” during several weeks that the office manager was out on an extended sick leave. Dr. Part explained to Dr. Miller that the request was inappropriate and would be denied inasmuch as the tasks

described were already included as part of plaintiff's job description. Dr. Part testified that he did not fault Dr. Miller for this misstep; rather, he believed that plaintiff had manipulated the situation as part of a continuing pattern to boost his own salary. Dr. Part stated that he thought plaintiff was taking advantage of the confusion and disruption in the department at a time when he should have been offering guidance and direction as well as sound fiscal advice to Dr. Miller.

{¶14} During fiscal year 2003, MVH changed its procedures such that plaintiff was required to submit all check requests for his work with the IPC to a director at MVH for approval. After plaintiff submitted another invoice seeking his third $2,000 stipend of the year, a director at MVH, Peter Ensor, became concerned. He subsequently sent a memo to Bale on October 21, 2003, informing him of the request and seeking clarification whether the request was appropriate. (Plaintiffs' Exhibit 35.) Bale testified that he forwarded the inquiry to Dr. Part, who authorized Bale to investigate the matter and to report back to him. Dr. Part testified that when he learned that plaintiff sought to double his stipend from $2,000 to $4,000, he viewed plaintiff's behavior as unprofessional and he became concerned that plaintiff was perhaps taking advantage of Dr. Ekeh. Dr. Part testified that he essentially lost confidence in plaintiff at that point. Dr. Part related that the timing was critical inasmuch as the surgery department was undergoing another change in leadership after Dr. Little had been selected as the new chairman of the department. Dr. Part stated that he ultimately decided to terminate plaintiff's employment and he chose a "no-cause" basis because he hoped that course would create the least amount of disruption within the department.

{¶15} According to defendant, plaintiff's termination was nondiscriminatory and lawful. Defendant insists that plaintiff failed to prove that there was any illegal or impermissible motive fueling Dr. Part's action. As such, defendant maintains that plaintiff's claims must be denied.

BREACH OF CONTRACT

{¶16} Plaintiff maintains that his employment was governed by a written employment contract and that defendant violated the terms of said contract. Defendant insists that plaintiff was an employee-at-will. Neither plaintiff nor defendant was able to produce a copy of a contract for trial. While the existence of at-will employment can be altered by express or implied contract, the burden is on the employee to prove that the relationship between employee and employer was modified. See *Chubb v. Ohio Bureau of Workers' Comp*. (1999), 115 Ohio Misc.2d 1, 5. Plaintiff did not present sufficient probative evidence to show that his employment was governed by a contract either express or implied. Based upon the testimony and exhibits presented, the court finds that plaintiff was an employee-at-will. As such, the court finds that plaintiff was subject to termination "for any reason not contrary to law." *Fouty v. Ohio Dep't of Youth Servs*., Ct. of Cl. No. 2002-07118, 2005- Ohio-177, ¶18; citing *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 103.

WRONGFUL OR ABUSIVE DISCHARGE

{¶17} Plaintiff alleges that defendant retaliated against him for refusing sexual advances by Bale and for complaining to his supervisors about such conduct. According to plaintiff, his complaints constituted protected activity. Plaintiff further posits that Bale retaliated by orchestrating defendant's termination of plaintiff's employment. For the reasons that follow, the court finds that plaintiff's claim of wrongful termination in violation of public policy must fail. In *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 1997-Ohio-219, the Supreme Court of Ohio held that "[a]n *at-will employee* who is discharged or disciplined in violation of the public policy embodied in R.C. 4113.52 may maintain a common-law cause of action against the employer pursuant to *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981, and its progeny, so long as that employee had *fully complied* with the statute and was subsequently discharged

or disciplined." Id. at paragraph 3 of the syllabus. (Additional citations omitted.) The court is not convinced that plaintiff ever reported a complaint of sexual harassment to Dr. Peoples, and Dr. Miller and Dr. Little both testified that they did not learn of the alleged harassment prior to October 2003. In essence, the court finds that plaintiff's testimony on this issue lacked credibility. In Ohio, courts have explained that "the statute mandates that the employer be informed of the violation both orally and in writing. Moreover, as the clear language of the statute indicates, an employee must file his written report of an alleged violation with the same supervisor or officer to whom he made his oral report. See R.C. 4113.52(A)(1)(a) (requiring that 'the employee orally shall notify the employee's supervisor or other responsible officer of the employee's employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation')." *Zeman v. Goodrich Corp*. (July 15, 2005), N.D. Ohio No.1:04 CV 1310.

{¶18} The court further finds that plaintiff never filed a written complaint of harassment or discrimination prior to receiving notice of his termination. Defendant argues that WSU had policies in place that were designed to address instances of harassment. WSU Policy No. 4001.21 prohibits any type of harassment or discrimination and specifically references the Affirmative Action Complaint Procedure listed in WSU Policy No. 4001.18. (Defendant's Exhibit X.) WSU Policy No. 4001.18 outlines the procedure for filing such complaint and declares that "no person shall be subjected to discharge, suspension, discipline, harassment, or any form of discrimination for having utilized *** the Affirmative Action Complaint Procedure." (Defendant's Exhibit W.) Upon review of the evidence submitted, the court finds that an educated and experienced business administrator such as plaintiff either knew or should have known of defendant's policies and procedures which were specifically created to address sexual harassment complaints. The court further finds that plaintiff failed to avail himself of the procedures in place at WSU. Therefore, the court finds that defendant could not have discharged plaintiff in

retaliation for protected activity when plaintiff failed to make a written report detailing the alleged harassment at any time prior to October 31, 2003.

SEX DISCRIMINATION

{¶19} Plaintiff also alleges that he was a victim of sex discrimination. R.C. 4112.02(A) provides in relevant part: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Specifically, plaintiff argues that another similarly situated female administrator received a stipend for editing a professional journal while employed by WSU and that she was not disciplined. In addition, plaintiff described the circumstances of a female administrator who allegedly mishandled departmental funds and who was not terminated or disciplined, but instead was transferred to another position and location affiliated with the university.

{¶20} Plaintiff may establish a prima facie case of sex 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. Under *McDonnell Douglas*, an inference of discriminatory intent may be made by establishing that plaintiff: 1) was a member of a protected class; 2) suffered an adverse employment action; 3) was qualified for the position held; and, 4) that comparable, nonprotected persons were treated more favorably. Id. See, also, *Goad v. Sterling Commerce, Inc.* (June 13, 2000), Franklin App. No. 99AP-321, following *McDonnell Douglas.*

{¶21} The parties do not dispute that plaintiff was in a protected class, that he was qualified for the position he held, and that he was terminated from that position. As to the fourth prong, however, the case law in Ohio makes clear that plaintiff must show that the other person referenced was comparable in all respects. *Mitchell v. Toledo Hosp.* (C.A.6,

1992), 964 F.2d 577, 582. Thus, "plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered 'similarly-situated'; rather, *** the plaintiff and the employee with whom the plaintiff seeks to compare himself *** must be similar in 'all of the relevant aspects.' The individuals with whom the plaintiff seeks to compare *** [his] treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Clark v. City of Dublin,* Franklin App. No. 01AP-458, 2002-Ohio-1440. (Citations omitted.)

{¶22} In this case, plaintiff failed to prove that those persons treated more favorably were similar to him in all relevant respects. The court notes that one of the female administrators did not work for plaintiff's supervisor and the other did not engage in the same conduct as plaintiff. In addition, Dr. Part described a series of incidents culminating in the IPC stipend situation that led to his decision to terminate plaintiff. The same cannot be said of the other female administrators identified, as the evidence failed to document that they engaged in a pattern of conduct that raised concerns about their ability to provide sound fiscal advice to their respective departments.

AGE DISCRIMINATION

{¶23} Plaintiff also contends that he was a victim of age discrimination and that he was replaced by David Astles, a younger male. In addition, plaintiff questions Astles' qualifications inasmuch as defendant allegedly hired a bookkeeper to assist Astles with the accounting aspect of his position within the department of surgery.

{¶24} In *Hall v. Banc One Mgmt. Corp*., Franklin App. No. 04AP-905, 2006-Ohio-913, the Tenth District Court of Appeals explained that "[t]o prevail on an employment discrimination claim, the plaintiff must prove discriminatory intent. *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 583, 1996-Ohio-265. In an age discrimination case, Ohio courts

follow the burden-shifting analytical framework set forth in *McDonnell Douglas Corp. v. Green*, [supra] and *Barker v. Scovill, Inc*. (1983), 6 Ohio St.3d 146, 147-148. If a plaintiff establishes a prima facie case of age discrimination, the defendant-employer may overcome the presumption of discrimination inherent therein by articulating a legitimate, non-discriminatory reason for the plaintiff's discharge. Id. at paragraph one of the syllabus. Finally, the plaintiff must have the opportunity to show that the defendant's proffered rationale was a pretext for unlawful discrimination. Id." *Hall* at ¶18.

{¶25} In *Hall,* the court noted that "plaintiff may directly establish a prima facie case of age discrimination by presenting evidence of any nature, direct or circumstantial, to show that the employer more likely than not was motivated by discriminatory animus. *Mauzy* at 586-587. Alternatively, a plaintiff may indirectly establish a prima facie case of age discrimination by demonstrating: '*** (1) That he or she was a member of the statutorily protected class, (2) that he or she was discharged, (3) that he or she was qualified for the position, and (4) that he or she was replaced by, or that the discharge permitted the retention of, a person not belonging to the protected class. ***' *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501." Id. at ¶19. The Supreme Court of Ohio subsequently revised the fourth prong "to require the plaintiff to demonstrate that he or she 'was replaced by, or the discharge permitted the retention of, a person of substantially younger age[,]' rather than a person outside the protected class." *Hall*, supra.

{¶26} According to the evidence adduced at trial, David Astles was hired months after plaintiff was terminated, and the decision to hire him was made by Dr. Little. Moreover, Astles was not employed in a dual capacity for WSU and UMSA. Rather, he was hired by and employed with WSU only. In addition, Astles was 36 years old when he was hired, plaintiff was 45 years old when he was fired. The court notes that "an age disparity of less than ten years is not sufficient to satisfy the 'substantially younger' element of an age discrimination prima facie case." *Zeman,* supra citing *Swiggum v. Ameritech Corp*. (Sept. 30, 1999), Franklin App. Nos. 98AP-1031 and 98AP-1040. Upon

review, the court finds that plaintiff failed to show that he was replaced by a substantially younger person. In addition, plaintiff did not assert that any statements regarding his age were ever directed at him or mentioned in his presence.

{¶27} Even assuming, arguendo, that plaintiff had presented a prima facie case of age discrimination, the court finds that Dr. Part offered a well-reasoned and convincing explanation for the decision he made to terminate plaintiff's employment.

{¶28} Taking the assumption one step further, plaintiff would then be granted the "'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.' *Texas Dept. of Comm. Affairs v. Burdine* (1981), 450 U.S. 248, 253, citing *McDonnell Douglas* at 804." *Hall* at ¶31. Thus, plaintiff must show either: "'(1) that the proffered reason had no basis in fact, (2) that the proffered reason did not actually motivate the discharge, or (3) that the proffered reason was insufficient to motivate the discharge.'" Id. at ¶32 citing *Owens v. Boulevard Motel Corp*. (Nov. 5, 1998), Franklin App. No. 97APE12-1728, quoting *Frantz v. Beechmont Pet Hosp.* (1996), 117 Ohio App.3d 351. Upon review of the testimony, the court finds that Dr. Part described a series of events that spanned several years and several different managers but which included the same or similar misconduct, that being fiscal irresponsibility. Dr. Part testified that he was ready to terminate plaintiff's employment months earlier and that he had "red-flagged" plaintiff as someone whose actions gave him cause for grave concern. Dr. Part's testimony on this aspect was corroborated by Associate Dean Margaret Dunn, Dr. Miller and John Bale, as well. Dr. Part offered a legitimate explanation of how he came to the decision to terminate plaintiff's employment. Indeed, Dr. Part maintained that he based his decision, at least in part, upon his own observations and perceptions and that the problem which plaintiff presented was one of trust and poor judgment, not of age or gender. Dr. Part also testified that regardless of any input from employees of UMSA and WSU, he alone made the final decision to terminate plaintiff's employment.

{¶29} Defendant established that there were legitimate, nondiscriminatory reasons for terminating plaintiff's employment. The court finds that defendant's decision was based upon and generated in response to the dean's perception of plaintiff's avarice. The court notes that Dr. Part's testimony was credible and wholly dispassionate. As such, plaintiff has failed to convince the court that defendant's motive for discharging plaintiff was to replace him with a younger male employee.

SEXUAL HARASSMENT

{¶30} Plaintiff maintains that he suffered sexual harassment and was required to work in a hostile environment not only while he was employed at WSU but also during the 60-day notice period when he worked primarily with Bale.

{¶31} As noted previously, R.C. 4112.02(A) states that it is an unlawful discriminatory practice: "for any employer, because of the *** sex *** of any person, *** to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." The Supreme Court of Ohio has held that federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) *et seq.*, Title 42, U.S.Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112. *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civil Rights Comm.* (1981), 66 Ohio St.2d 192, 196.

{¶32}Plaintiff may establish a violation of R.C. 4112.02(A) by proving either of two types of sexual harassment: "1) 'quid pro quo' harassment, *i.e.*, harassment that is directly linked to the grant or denial of a tangible economic benefit, or 2) 'hostile environment' harassment, *i.e.*, harassment that, while not affecting economic benefits, has the purpose or effect of creating a hostile or abusive working environment." *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 176, 2000-Ohio-128.

{¶33} To prove a quid pro quo claim, plaintiff must show "(1) that the employee was a member of a protected class, (2) that the employee was subjected to unwelcome sexual

harassment in the form of sexual advances or requests for sexual favors, (3) that the harassment complained of was based on gender, and (4) that the employee's submission to the unwelcome advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to the supervisor's sexual demands resulted in a tangible job detriment." *Kinnison v. Advance Stores Co.*, Richland App. No. 02CA73, 2003-Ohio-3387, ¶14.

{¶34} It is undisputed that Bale's office was located on the campus of WSU and that plaintiff's office was several miles away at MVH. Plaintiff testified at length about the content of various e-mail communications that he received from Bale. Plaintiff claims that the communications were intended by Bale to compel plaintiff to engage in an intimate relationship with Bale and that plaintiff's refusal to cooperate would be detrimental to his continued employment at WSU. "R.C. 4112.02(A) protects men as well as women from all forms of sex discrimination in the workplace, including discrimination consisting of same-sex sexual harassment." *Hampel* , supra. The e-mails contained references to song lyrics and upcoming vacations, impromptu invitations, and such phrases as "I care," as well as mundane references to financial business and accounting issues relevant to the department. The court notes that many responses from plaintiff to Bale contain similar friendly notations, including such phrases as "your man, Bob," "you are FANTASTIC," and "hope to see you soon." While Bale acknowledged that his e-mail communications were "too personal in nature" and that they should have been more business-oriented and professional, he denied that he had ever "flirted" with plaintiff. Bale maintained that he was not emotionally attached to plaintiff nor did he desire to have an intimate relationship with plaintiff. Bale asserted that plaintiff never informed him that the e-mail communications were offensive nor did he complain about either the content or the style of writing. Bale testified that he related to plaintiff in the same or similar manner that he addressed other coworkers, both male and female. Bale testified that he was not plaintiff's supervisor, that

plaintiff reported first to the chairman of the department of surgery and then to the dean of the school of medicine and ultimately to the provost.

{¶35} In order to establish a claim of hostile-environment sexual harassment, "plaintiff must show (1) that the harassment was unwelcome, (2) that the harassment was based on sex, (3) that the harassing conduct was sufficiently severe or pervasive to affect the 'terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment,' and (4) that either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action." *Hampel*, supra at 176-177.

{¶36} "Conduct that is merely offensive is not actionable as hostile work environment harassment under Title VII." *Peterson v. Buckeye Steel Casings* (1999), 133 Ohio App.3d 715, 723 citing *Harris v. Forklift Systems, Inc.* (1993), 510 U.S. 17, 21.

{¶37} Upon review, the court does not find plaintiff's testimony regarding the allegations of sexual harassment to be credible. The content of the communications does not rise to the level of harassment nor does the e-mail contain implicit or even veiled threats regarding coercion or retaliation. In addition, the court is unable to read into Bale's communications the ulterior motive or underlying sexual message inferred by plaintiff. Upon review of the exhibits submitted, the court finds that many of the e-mails sent by plaintiff to Bale contained upbeat and positive messages complete with friendly salutations and complimentary phrases. Thus, it has not been shown that plaintiff found Bale's tone or style to be too informal or personal. The court also is not convinced that plaintiff was exposed to a hostile environment by Bale prior to October 2003, given the sheer lack of proximity of their respective locations. In addition, the only episode of physical contact that was mentioned by plaintiff allegedly occurred at the termination interview, and Bale denied that he attempted to hug plaintiff. Bale stated that he merely "touched or patted" plaintiff's arm.

{¶38} Upon review of the testimony and evidence, the court finds that plaintiff failed to prove that he was subjected to sexual harassment or that WSU knew or should have known that plaintiff believed he was being sexually harassed. As to the final notice period where plaintiff reported to Bale, the court finds that no evidence was presented to show that Bale engaged in any acts or made any statements to plaintiff that were offensive or harassing. Indeed, Bale recalled that he had lunch with plaintiff in November 2003, that they were on friendly terms, that plaintiff made no mention of any forthcoming accusations, and that plaintiff even solicited suggestions from Bale on how to improve his resume. Based on the foregoing analysis, the court concludes that plaintiff has not carried his burden of proving he was subjected to discrimination or that his discharge was based upon a discriminatory animus.

NEGLIGENT RETENTION

{¶39} The factors relevant to a claim for negligent retention are: "1) the existence of an employment relationship; 2) the employee's incompetence; 3) the employer's actual or constructive knowledge of such incompetence; 4) the employer's act or omission causing plaintiff's injuries; and 5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries." *Peterson*, supra at 729, citing *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 729, 739. Both Bale and Dr. Part testified that they first learned of the allegations regarding sexual harassment after plaintiff's counsel notified WSU of his intent to file suit. No one other than plaintiff testified that plaintiff complained about or even mentioned allegations of sexual harassment prior to October 2003. Dr. Part further testified that he had no recollection of reading plaintiff's appeal letter in November 2003 nor did he view the content of the letter as a formal complaint of sexual harassment. Upon review, the court finds that plaintiff failed to prove that Bale engaged in sexual harassment or that defendant knew or should have known that

plaintiff perceived he was being harassed. Plaintiff failed to produce any evidence in support of his claim alleging negligent retention.

DEFAMATION

{¶40} Plaintiff asserts a claim of defamation wherein he contends that defendant's employees accused him of engaging in criminal conduct and implied that such conduct was a reason for his termination. To establish a claim for defamation, plaintiff must prove by a preponderance of the evidence that a false publication caused injury to his reputation, or exposed him to public hatred, contempt, ridicule, shame, or disgrace, or affected him adversely in his trade or business. *Ashcroft v. Mt. Sinai Medical Ctr*. (1990), 68 Ohio App.3d 359, 365. Plaintiff maintains that the allegations of criminal conduct are false and that they were communicated to various employees of the department of surgery at WSU by Bale, Dr. Part, and Associate Dean Margaret Dunn.

{¶41} The evidence adduced at trial shows that plaintiff accepted financial compensation from a source outside of the university and that such compensation was not paid to him via either the WSU or the UMSA components of his salary. Defendant argues that engaging in such conduct had criminal ramifications inasmuch as state employees are prohibited from receiving outside compensation for the performance of their state duties. Indeed, Dr. Part sent a memorandum in July 2002, that was distributed to all managers reminding them that WSU employees are prohibited from accepting supplementary compensation that is related in any way to the performance of their official state duties. (Defendant's Exhibit HH.) The memorandum referenced R.C. 2921.43 which provides that:

{¶42} "(A) No public servant shall knowingly solicit or accept and no person shall knowingly promise or give to a public servant either of the following:

{¶43} "(1) Any compensation, *** to perform the public servant's official duties, to perform any other act or service in the public servant's public capacity, for the general

performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation; ***."

{¶44} Thus, defendant argues that the statements were not false. Even assuming the statements were defamatory, WSU maintains that the communications were not broadcast outside the university and that such communications were protected by a qualified privilege. Qualified privilege is explained as follows: "A publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty, or where the person is so situated that it becomes right in the interests of society and he should tell third persons certain facts, which he in good faith proceeds to do." *McKenna v. Mansfield Leland Hotel Co.* (1936), 55 Ohio App. 163, 167. The court in *McKenna* stated that, "communications between an employer and an employee, or between two employees, concerning the conduct of a third employee or former employee, are qualifiedly privileged, and thus, even though such a communication contain matter defamatory to such other or former employee, he cannot recover in the absence of sufficient proof of actual malice to overcome the privilege of the occasion." See, also, *Plouffe v. Ohio State Univ*., Ct. of Cl. No. 2001-08048, 2004-Ohio-4716, ¶19-21. The court finds that the communication was protected by qualified privilege; thus, plaintiff has the burden of proof to show actual malice. The court finds that after review of all the testimony and evidence, plaintiff failed to prove by a preponderance of the evidence that defendant's employees were motivated by actual malice. Therefore, based upon the foregoing analysis, the court finds that plaintiff's defamation claim fails as well.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

{¶45} To state a cause of action for intentional infliction of emotional distress, plaintiff must show that: 1) defendant intended to cause emotional distress, or that

defendant knew or should have known that its actions 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. *Hanley v. Riverside Methodist Hosp.* (1991), 78 Ohio App.3d 73, 82, citing *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 34. However, the court finds that plaintiff has failed to prove that Bale's conduct was extreme and outrageous.

{¶46} In *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 375, quoting Restatement of the Law 2d, Torts (1965) 73, Section 46, comment d, the court explained that "'[l]iability 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'!"

{¶47} While Bale's communications were at times unprofessional, the court cannot find that his conduct was "utterly intolerable in a civilized community." Plaintiff described only one instance of physical contact which was an alleged attempt by Bale to hug him while plaintiff was leaving Bale's office after learning that his employment had been terminated. Although Bale and plaintiff acknowledge that some physical contact occurred, the court finds that the entire incident falls far short of conduct that would be considered outrageous and utterly intolerable. Therefore, the court finds that plaintiff has failed to state a claim for intentional infliction of emotional distress.

{¶48} For the foregoing reasons, judgment shall be rendered in favor of defendant.

ROBERT D. SWOGER, et al.

Plaintiffs

v.

WRIGHT STATE UNIVERSITY

Defendant

Case No. 2004-06780

Judge Joseph T. Clark

JUDGMENT ENTRY

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 plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____

JOSEPH T. CLARK
Judge

cc:

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SJM/cmd	

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