[Cite as *Barnett v. Ohio State Univ. Med. Ctr.*, 2007-Ohio-954.]

Court of Claims of Ohio
The Ohio Judicial Center
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GREGORY T. BARNETT

Plaintiff

v.

OHIO STATE UNIVERSITY MEDICAL CENTER

Defendant

Case No. 2005-10233

Judge Joseph T. Clark
Magistrate Holly True Shaver

MAGISTRATE DECISION

{¶1} On December 18, 2006, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On December 29, 2006, plaintiff filed a motion for an extension of time to file a response to defendant's motion. On January 2, 2007, plaintiff timely filed a response. Therefore, plaintiff's motion for an extension of time is DENIED as moot. On January 23, 2007, a magistrate of the court conducted an oral hearing on the motion.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "*** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. ***" See, also, *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶4} Plaintiff was employed as a supervisor in the distribution department of defendant's division of material systems. Plaintiff suffered from the condition of epilepsy and took prescribed medication to control seizures. In the summer of 2003, plaintiff's epilepsy medication became ineffective and he experienced problems with the other medications that had been prescribed as substitutes. In the fall of 2003, plaintiff was admitted to Talbot Hall, a residential treatment facility, for the condition of alcoholism. Plaintiff's supervisor, Carl Story, was aware of both plaintiff's epilepsy and alcoholism. Plaintiff's attendance records show that he used 445 hours of "ill time" from August 26, 2003, to July 8, 2004. Plaintiff's regular work shift was from 7:00 a.m. to 3:30 p.m. In July 2004, plaintiff had worked for defendant for over 27 years and had 484 hours of unused ill time available to him.

{¶5} On Monday, July 12, 2004, plaintiff worked a full shift as scheduled. Tuesday, July 13, was plaintiff's scheduled day off. On Wednesday, July 14, Thursday, July 15 and Friday, July 16, plaintiff's wife telephoned the "call-in" center to notify defendant that plaintiff was ill and would not report to work on those days. Plaintiff was not scheduled to work on the weekend of July 17-18.

{¶6} According to plaintiff, on Monday, July 19, his wife telephoned defendant again to report his absence, and on Tuesday, July 20, plaintiff left a voice mail message for Story stating that he needed the rest of the week off for health reasons. According to Story, on Monday, July 19, plaintiff did not report to work but left a voice mail message wherein he requested to use a "vacation day" for that day's absence and stated that he would return to work the following day; however, plaintiff did not call in or report to work on Tuesday, July 20, through Friday, July 23.

{¶7} After meeting with representatives from human resources, a decision to terminate plaintiff's employment was finalized on Friday, July 23, and Story drafted a termination letter that day. The letter was mailed to plaintiff on Monday, July 26. The letter states, in part: "[t]his letter will serve as notice that you are hereby removed from your

position of Supervisor-Material Systems and terminated from The Ohio State University Medical Center effective July 30, 2004." (Defendant's Exhibit 3.) The letter also states that plaintiff's employment was terminated for job abandonment.

{¶8} In the afternoon of Friday, July 23, plaintiff's mother telephoned Story and told him that plaintiff was unresponsive and that she was taking him to Talbot Hall. While waiting for admission, plaintiff suffered a seizure and was admitted to OSU Hospital East. Plaintiff's mother telephoned Story on Sunday, July 25 and stated that plaintiff had been admitted to the hospital. On Monday, July 26, plaintiff called Story and was told that his employment had been terminated on Friday, July 23.

{¶9} Plaintiff asserts five claims for relief in his complaint: 1) denial of his rights in violation of the Family Medical Leave Act of 1993 (FMLA); 2) failure to provide notice of his rights under the FMLA; 3) breach of implied contract; 4) promissory estoppel; and, 5) disability discrimination.

{¶10} Upon review, and construing the evidence most strongly in plaintiff's favor, the court finds that genuine issues of material fact exist. Specifically, plaintiff's assertion that he notified his supervisor during the week of July 19 and requested the entire week off directly conflicts with defendant's assertion that plaintiff did not call in from July 20-23. Because the stated reason for plaintiff's termination was job abandonment, the court finds that whether plaintiff gave proper notice of his absence is material to Counts 1, 3, and 5 of plaintiff's complaint. Furthermore, plaintiff stated in his deposition that he had not seen postings of FMLA rights in his place of employment, although defendant asserts that the notices were posted in Doan Hall. Therefore, the court finds that a genuine issue of material fact exists regarding Count 2 of plaintiff's complaint as to whether defendant's posting of notices in Doan Hall was sufficient under the requirements of the FMLA.

{¶11} With respect to Count 4, plaintiff's claim of promissory estoppel, the court finds, however, that there is no genuine issue as to any material fact and that defendant is

entitled to judgment in its favor as a matter of law. Promissory estoppel is defined as follows: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement of the Law, Contracts 2d (1973), Section 90; *McCroskey v. State* (1983), 8 Ohio St.3d 29, 30.

{¶12} In order for plaintiff's claim of promissory estoppel to succeed, the threshold element of a promise must be met. Defendant must have made a promise to plaintiff that should have reasonably been expected to induce action. *McCroskey*, at 30. In order to create an exception to the employment-at-will doctrine, specific promises of job security must be made. *Helmick v. Cincinnati Word Processing, Inc.* (1989) 45 Ohio St.3d 131.

{¶13} The court finds that plaintiff has not identified any specific promise that defendant or any of its employees made to him concerning job security. As a result, plaintiff could not have reasonably relied on any such promise. Therefore, the court finds that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law on plaintiff's claim for promissory estoppel.

{¶14} Accordingly, the magistrate recommends that defendant's motion for summary judgment be granted, in part, as to Count 4 of plaintiff's complaint, and that it be denied as to Counts 1, 2, 3, and 5.

A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual

finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

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HOLLY TRUE SHAVER
Magistrate

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HTS/cmd

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