[Cite as *Franklin v. Miami Univ.*, 2008-Ohio-2446.]

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

AL FRANKLIN

Plaintiff

v.

MIAMI UNIVERSITY

Defendant

[Cite as *Franklin v. Miami Univ.*, 2008-Ohio-2446.]

Case No. 2005-11761

Judge Joseph T. Clark

DECISION

{¶1} On October 9, 2007, defendant filed a motion for summary judgment pursuant to Civ.R. 56(C). On November 5, 2007, plaintiff filed a memorandum contra. On February 7, 2008, 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} Defendant hired plaintiff in 1997 as a Building Services Worker assigned to perform various duties in defendant's Harris Dining Hall. One of plaintiff's responsibilities was to clean restrooms, and it was plaintiff's preference when performing this duty that others not enter the restroom that he was cleaning. To that end, plaintiff had a practice of placing on a restroom door a sign requesting that others not enter. From time to time, plaintiff also personally asked certain co-workers to refrain from using any restroom that he was cleaning.

{¶5} Veronica Collopy, Harris Dining Hall Executive Manager, states in an affidavit accompanying defendant's motion that standard procedure called for keeping restrooms open while being cleaned and that defendant did not provide plaintiff with the sign he used to discourage others from entering restrooms. In opposing defendant's motion, plaintiff did not contest these statements.

{¶6} Recurring conflicts related to plaintiff's closing of restrooms reached a climax on February 28, 2002, when Building Services Worker John Johnston used a restroom being cleaned by plaintiff. Upset by Johnston's act, plaintiff left to speak with

Collopy about the matter. As plaintiff and Collopy spoke, Johnston came upon the scene and a brief verbal altercation between him and plaintiff ensued. After plaintiff made a crude statement to the effect that he either could or would cause physical harm to Johnston, both Johnston and Collopy contacted the Miami University Police Department (police). Soon after, a police officer responded to the scene, investigated, and arrested plaintiff for menacing. Plaintiff was booked at the police station and released shortly thereafter.

{¶7} Later in the day, another of plaintiff's co-workers, Freeman Workman III, reported for work in Harris Dining Hall. After hearing of the altercation that had occurred a few hours prior, Workman decided to report to both Collopy and to the police that he recently had a similar confrontation with plaintiff. Workman describes this alleged incident in an affidavit accompanying defendant's motion, stating that on February 12, 2002, he entered a restroom being cleaned by plaintiff and proceeded to a stall, whereupon plaintiff urged him to leave and ultimately attempted to remove him by force. Workman's complaint to the police resulted in plaintiff's being charged with an additional count of menacing.

{¶8} Because of plaintiff's arrest and his status as a state university employee, defendant held a hearing on March 19, 2002, pursuant to R.C. 3345.22, to consider suspending his employment during the pendency of the criminal charges. This hearing resulted in plaintiff's employment being so suspended, with pay.

{¶9} At the time of plaintiff's suspension, his job performance was also being investigated by Nadine Glaub, the Assistant Director for Personnel Administration in the Housing, Dining, and Guest Services Department. Although Glaub's inquiry was triggered by the events of February 28, 2002, it entailed a much broader history of plaintiff's employment with defendant. Glaub's investigation culminated in a March 27, 2002 memorandum, which defendant submitted in support of its motion, wherein she recommended that plaintiff's employment be terminated for "failure of good behavior,

excessive absenteeism, unauthorized absence, neglect of duty, threatening and intimidating coworkers and for physically assaulting a co-worker."

{¶10} Glaub's memorandum was addressed to Dennis Deahl, the Senior Director of Personnel and Benefit Services. Upon receiving the memorandum, Deahl scheduled and conducted a disciplinary hearing separate from the hearing previously held pursuant to R.C. 3345.22. As a result of the hearing, Deahl adopted Glaub's recommendation, and defendant terminated plaintiff's employment, effective April 16, 2002.

{¶11} In August 2002, all criminal charges against plaintiff resulting from the incidents with Johnston and Workman were dismissed. In January 2003, plaintiff brought a suit in the United States District Court for the Southern District of Ohio, Western Division, against defendant and several of its employees based on the same occurrences involved in the case at bar; that case was dismissed in May 2007. See *Franklin v. Miami Univ.* (May 17, 2007), S.D. Ohio No. 1:03-CV-00011-SAS.

{¶12} Plaintiff brings this action claiming abuse of process, defamation, wrongful termination in violation of public policy, negligent infliction of emotional distress, retaliation, and violations of civil rights. Defendant contends that it is entitled to summary judgment as to all counts.

{¶13} Plaintiff's claim for abuse of process arises from the statements that Collopy, Johnston, and Workman made to the police that led to the criminal charges. Abuse of process connotes the use of process properly initiated for an improper purpose. *Robb v. Chagrin Lagoons Yacht Club* (1996), 75 Ohio St.3d 264, 271. "[T]he three elements of the tort of abuse of process are: (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process." *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 298, 1994-Ohio-503.

{¶14} "Pursuant to *Yaklevich*, absence of probable cause to initiate criminal proceedings precludes an action for abuse of process." *Thompson v. R & R Serv. Systems, Inc.* (June 19, 1997), Franklin App. Nos. 96APE10-1277, 96APE10-1278. "Probable cause is defined as '[a] reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged.'" Id., quoting *Huber v. O'Neill* (1981), 66 Ohio St.2d 28.

{¶15} The crux of plaintiff's abuse of process claim is that Collopy, Johnston, and Workman conspired to initiate groundless criminal proceedings against him by making false statements to the police, all in an effort to cause plaintiff's employment to be terminated or otherwise negatively affected. However, if true, plaintiff's allegation that these employees initiated the proceedings without having reasonable grounds for doing so would prevent reasonable minds from concluding that the employees acted with probable cause. Thus, because probable cause is an element of the tort of abuse of process, plaintiff fails to allege a prima facie claim.[1] Next, plaintiff alleges defamation resulting from verbal statements that Collopy, Johnston, and Workman made to the police and other employees of defendant, and from written statements that the three submitted to the police. Plaintiff alleges that the statements falsely accused him of menacing behavior. Defendant contends that the statements were true and argues also that even if they were not true, the defense of privilege applies.

{¶16} Defamation, which includes both libel and slander, is a false publication causing injury to a person's reputation, exposing the person to public hatred, contempt, ridicule, shame or disgrace, or affecting the person adversely in his or her trade or

[1]To the extent that the facts underlying plaintiff's abuse of process claim may give rise to a claim for malicious prosecution, such claim would have accrued upon the dismissal of the criminal charges against plaintiff in August 2002. See *Nationwide Ins. Ent. v. Progressive Speciality Ins. Co.,* Franklin App. No. 01 AP-1223, 2002-Ohio-3070. Accordingly, because plaintiff did not file his complaint until December 27, 2005, a malicious prosecution claim would be barred by the one-year statute of limitations set forth in R.C. 2305.11(A).

business. *Sweitzer v. Outlet Communications, Inc*. (1999), 133 Ohio App.3d 102, 108. Under Ohio law, truth is a complete defense to a claim for defamation. *Ed Schory & Sons, Inc. v. Soc. Natl. Bank* (1996), 75 Ohio St.3d 433, 445.

{¶17} In the context of a defamation claim, the defense of privilege applies to statements that are "made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest. The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only." *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 244.

{¶18} In support of its motion, defendant submitted affidavits of Collopy, Johnston, and Workman, in which these employees attest to the truthful, good-faith nature of their statements to the police. In response to defendant's motion, plaintiff submitted a transcript of his January 2, 2003 testimony before the Unemployment Compensation Review Commission, wherein he refutes the statements that Collopy, Johnston, and Workman made to the police. Upon review, the court finds that genuine issues of material fact exist as to the veracity of the statements, as well as to the circumstances of the statements as they relate to the issue of privilege.

{¶19} For his claim of wrongful termination in violation of public policy, plaintiff alleges that once his employment was suspended pursuant to R.C. 3345.22, defendant was without the right to terminate him during the pendency of his criminal charges. Defendant argues that R.C. 3345.22 does not limit its ability to discipline an employee so long as it follows its standard procedure in doing so.

{¶20} As a general rule, the common-law doctrine of employment-at-will governs employment relationships in Ohio. *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 241, 2002-Ohio-3994. In an at-will employment relationship either an employer or an

employee may legally terminate the employment relationship at any time and for any reason. *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 103.

{¶21} A public policy exception to the employment-at-will doctrine was first recognized by the Supreme Court of Ohio in *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228. In *Greeley*, the court held that "public policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute." Id. at 234.

{¶22} In *Painter v. Graley*, 70 Ohio St.3d 377, 1994-Ohio-334, the public policy exception was extended to allow claims for wrongful terminations that violate public policy as expressed in sources other than the Ohio Revised Code. Under *Painter*, supra, the public policy exception to the employment-at-will doctrine "is not limited to public policy expressed by the General Assembly in the form of statutory enactments" but also "may be discerned by the Ohio judiciary based on sources such as the Constitutions of Ohio and the United States, legislation, administrative rules and regulations, and the common law." Id. at 383-384.

{¶23} Plaintiff claims that a public policy exception to the employment-at-will doctrine is warranted in this case because R.C. 3345.22 prohibited his termination.

{¶24} R.C. 3345.22 states, in part:

{¶25} "(A) A student, faculty or staff member, or employee of a college or university that receives any state funds in support thereof, arrested for any offense covered by division (D) of section 3345.23 of the Revised Code shall be afforded a hearing, as provided in this section, to determine whether the person shall be immediately suspended from the college or university. * * *

{¶26} "* * *

{¶27} "(E) * * * A suspension under this section is in effect until the person is acquitted or convicted of the crime for which the person was arrested. If convicted, the person is dismissed pursuant to section 3345.23 of the Revised Code.

{¶28} "(F) Upon acquittal, or upon any final judicial determination not resulting in conviction, of the charges for which a person is suspended pursuant to this section, the suspension automatically terminates, and the person suspended shall be reinstated and the record of the suspension expunged from the person's college or university record."

{¶29} R.C. 3345.24(A) states:

{¶30} "Sections 3345.22 and 3345.23 of the Revised Code shall be applied and followed, notwithstanding any rule, regulation, or procedure of the college or university, but such sections shall not be construed to limit any duty or authority of the board of trustees, administrative officials, or faculty of such college or university to take appropriate disciplinary action, through such procedures as may be provided by rule, regulation, or custom of such college or university, against students, faculty or staff members, or employees, nor shall such sections be construed to modify, limit, or rescind any rule or regulation of the college or university not inconsistent therewith."

{¶31} R.C. 3345.24 expressly states that the procedure for suspension set forth in R.C. 3345.22 does not limit defendant's ability to take disciplinary action according to its standard practices. Given that plaintiff does not allege that defendant failed to follow its standard disciplinary procedure in terminating him, the court finds that R.C. 3345.22 did not prohibit plaintiff's termination. Furthermore, plaintiff identifies no other public policy that would prohibit his termination. Therefore, plaintiff's claim that his termination was wrongful under a public policy exception to the employment-at-will doctrine must fail.

{¶32} Plaintiff next claims negligent infliction of emotional distress resulting from the aforementioned actions of Collopy, Glaub, Johnston, and Workman. However, recovery under a theory of negligent infliction of emotional distress may be had only when the emotional distress is caused by fear of real physical peril. *Heiner v. Moretuzzo*, 73 Ohio St.3d 80, 1995-Ohio-65, syllabus. Given the absence of any allegation that plaintiff suffered such fear, and construing the evidence most strongly in

plaintiff's favor, the court finds that the only reasonable conclusion to draw is that plaintiff did not fear real physical peril. Accordingly, plaintiff fails to state a claim for negligent infliction of emotional distress.

{¶33} Next, plaintiff claims that defendant terminated his employment in retaliation for a federal suit that plaintiff filed in 2001 "under Title VII and §1981a, a protected activity." Defendant argues that this claim is barred by the doctrine of res judicata, inasmuch as an identical retaliation claim was fully adjudicated in *Franklin v. Miami Univ.* (Sept. 28, 2005), S.D. Ohio No. 1:03-CV-00011-SAS.

{¶34} The doctrine of res judicata provides that where a final judgment or decree has been rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, such judgment or decree constitutes a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them. See *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 1995-Ohio-331.

{¶35} Defendant has attached a copy of the opinion in Case No. 1:03-CV-00011-SAS that addressed the retaliation claim alleged by plaintiff in that case. The federal court entered summary judgment against plaintiff on the retaliation claim, finding that "[i]n light of the fact that the Court has found the University had appropriate reasons for Plaintiff's termination, for which Plaintiff has failed to offer disputed facts, i.e., contesting his absenteeism, etc., there simply is no factual basis for Plaintiff's retaliation claim." *Franklin v. Miami Univ.* (Sept. 28, 2005), S.D. Ohio No. 1:03-CV-00011-SAS.

{¶36} In the case at bar, plaintiff failed to address his retaliation claim both in his memorandum contra defendant's motion and at oral argument. As the non-moving party, plaintiff has the burden of producing more than a scintilla of evidence in support of his claims pursuant to Civ.R. 56(E). *Nu-Trend Homes, Inc. v. Law Offices of DeLibera, Lyons & Bibbo*, Franklin App. No. 01AP-1137, 2003-Ohio-1633, at ¶17. Upon review, the court determines that plaintiff's retaliation claim is precluded by the doctrine of res judicata.

{¶37} Finally, to the extent that plaintiff alleges claims based upon the denial of his constitutional and civil rights, it is well-settled that such claims are not actionable in the Court of Claims. See *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App.3d 170, 171; *Thompson v. Southern State Community College* (June 15, 1989), Franklin App. No. 89AP-114; *Bleicher v. University of Cincinnati College of Medicine* (1992), 78 Ohio App.3d 302.

{¶38} Upon consideration of the evidence and arguments presented by the parties, the court finds that genuine issues of material fact exist only as to plaintiff's claims of defamation. Accordingly, defendant's motion for summary judgment shall be denied, in part, as it pertains to plaintiff's defamation claims, but shall be granted, in part, as to plaintiff's remaining claims.

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Case No. 2005-11761

AL FRANKLIN

Plaintiff

Judge Joseph T. Clark

v.

JUDGMENT ENTRY

MIAMI UNIVERSITY

Defendant

An oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is DENIED, in part, as it pertains to plaintiff's defamation claims, but is GRANTED, in part, as to plaintiff's remaining claims.

_____

JOSEPH T. CLARK
Judge

cc:

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