[Cite as *Hannahs v. Edison State Community College*, 2008-Ohio-4798.]

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

JAMES HANNAHS

Plaintiff

v.

EDISON STATE COMMUNITY COLLEGE

Defendant

Case No. 2006-03583

Judge J. Craig Wright

DECISION

{¶ 1} Plaintiff brought this action alleging breach of contract and age discrimination. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} Plaintiff was hired by defendant in 1982 as an adjunct faculty member providing instruction in such introductory classes as English, computer science, and basic engineering. Plaintiff worked for defendant as a part-time adjunct professor for the next 18 years.

{¶ 3} In August 2000 plaintiff was promoted to the full-time position of assistant professor of manufacturing. As such, plaintiff continued teaching introductory classes and, in addition, he gave instruction in the upper-level engineering curriculum including strength of materials and engineering statistics. The terms of plaintiff's employment as an assistant professor were governed by a collective bargaining agreement by and between defendant and Edison State Education Association.

{¶ 4} In 2001 and 2002, plaintiff's performance was reviewed very favorably by Phil Lootens, Dean of the College of Engineering. (Plaintiff's Exhibit 18-1 and 18-2.) However, in April 2003 Raymond Lepore, defendant's Dean of the College of Engineering, Math, and Science drafted a performance review which was edited by Lootens. Although generally positive, the report does state:

{¶ 5} "One area of major concern is Jim's lack of initiative with regard to the MET mechanical design program. Jim was hired to manage, grow, and improve this program, but unlike the welding technology program, he is barely involved with it. He

has been asked repeatedly to teach the higher-level courses in the program and he refuses to do so."

{¶ 6} Lootens and Lepore testified that they met with plaintiff in April 2003 to discuss this review. Plaintiff claims that he did not see this review until just two weeks prior to trial and that he never met with Lootens or Lepore regarding this performance review.

{¶ 7} At the expiration of plaintiff's third, one-year probationary term, Lepore and Lootens met with plaintiff to discuss plaintiff's performance. Both Lootens and Lepore knew that under the terms of the collective bargaining agreement, an assistant professor may be offered a series of three one-year "probationary contracts," but that at the end of the third year, defendant is expected to decide whether to terminate the faculty member's employment or to offer a four-year contract. Lepore testified that after the meeting with plaintiff he still had hope that plaintiff could improve his performance and it was decided that defendant would take the unusual step of offering plaintiff a fourth one-year contract. According to Lootens and Lepore, this option was chosen because of the "personal problems" plaintiff was experiencing. In light of these issues, defendant chose to give plaintiff the opportunity to correct the deficiencies in his job performance.[1]

{¶ 8} During the 2003-2004 academic year, Lootens informed Lepore that he had continued to received complaints from students about plaintiff's performance. Specifically, the students claimed that plaintiff was not available during scheduled office hours, that he was not timely in grading assignments and tests, and that he had been leaving the classroom prior to the end of class. In addition to the student complaints, Lepore had other issues with plaintiff's job performance including plaintiff's refusal to teach certain upper-level courses and his failure to recruit students into the engineering program.

{¶ 9} Lootens and Lepore agreed that plaintiff's contract would not be renewed. In a subsequent meeting, Lepore explained to plaintiff that he was "not getting the job done" and that he would not be retained. According to Lepore, plaintiff was "very upset" and commented that the decision was the result of "poor management."

{¶ 10} In his complaint, plaintiff alleges breach of contract. Specifically, plaintiff alleges that defendant violated the employment agreement both in the 2002 and 2003 academic years by failing to provide him with an annual written performance review, by failing to conduct required classroom observation, and by failing to meet with him to discuss the deficiencies in his performance.

{¶ 11} However, as stated above, the terms of plaintiff's employment were governed by a collective bargaining agreement. Generally, "[a] direct action on a contract with the state, seeking monetary relief from the state, must be commenced and prosecuted in the Court of Claims and cannot be brought in the Court of Common Pleas." *State ex rel. Ferguson v. Shoemaker* (1975), 45 Ohio App.2d 83, 96. However, "R.C. Chapter 2743 was enacted to carry into effect an amendment to Ohio's constitution that permitted the abolishment of the defense of governmental immunity and gave to the General Assembly the authority to determine in what courts and in what manner suits may be brought against the state." *Dargart v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2002-09668, 2005-Ohio-4463 citing, *Raudabaugh v. State* (1917), 96 Ohio St. 513; *Krause v. State* (1972), 31 Ohio St.2d 132.

{¶ 12} In 1983, the General Assembly enacted Chapter 4117 of the Revised Code, and in so doing, gave public employees the right to organize as bargaining units. See R.C. 4117.03.

{¶ 13} R.C. 4117.09 provides the blueprint for public employee collective bargaining agreements as follows:

{¶ 14} "(B) The agreement shall contain a provision that:

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[1]There was no evidence admitted regarding the nature of plaintiff's alleged "personal problems."

{¶ 15} "(1) Provides for a grievance procedure which may culminate with final and binding arbitration of unresolved grievances, and disputed interpretations of agreements, and which is valid and enforceable under its terms when entered into in accordance with this chapter. No publication thereof is required to make it effective. *A party to the agreement may bring suits for violation of agreements or the enforcement of an award by an arbitrator in the court of common pleas of any county wherein a party resides or transacts business*." (Emphasis added.)

{¶ 16} A copy of the collective bargaining agreement was admitted into evidence as an attachment to Joint Exhibit 1, and the parties acknowledge that plaintiff was a member of the bargaining unit. Indeed, plaintiff has cited specific provisions of the agreement in support of his breach of contract claim. R.C. 4117.09 requires that plaintiff commence such an action in common pleas court. See *Moore v. Youngstown State Univ.* (1989), 63 Ohio App.3d 238. Therefore, this court is without jurisdiction to consider plaintiff's breach of contract claim

{¶ 17} Turning to plaintiff's claim of age discrimination, plaintiff testified that he was born on December 23, 1942, and was 61 years of age when he last worked for defendant. Tom Looker was hired to replace plaintiff, albeit as an assistant professor of mechanical engineering. Lootens speculated that Looker was hired as an assistant professor of mechanical engineering rather than assistant professor of manufacturing simply because Looker had a degree in mechanical engineering. Both Lepore and Lootens acknowledged that Looker was hired into the position that plaintiff had held. Lepore also acknowledged that Looker was younger than plaintiff, and he estimated Looker's age at "late thirties."

{¶ 18} In order to establish a prima facie case of age discrimination under R.C. 4101.17, plaintiff must demonstrate: 1) that he was a member of the statutorily-protected class; 2) that he was discharged; 3) that he was qualified for the position; and 4) that he was replaced by, or that his discharge permitted the retention of, a person not belonging to the protected class. *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146.

Defendant may overcome the presumption inherent in the prima facie case by propounding a legitimate, nondiscriminatory reason for plaintiff's discharge. Id. Finally, plaintiff must be allowed to show that the rationale set forth by defendant was only a pretext for unlawful discrimination. Id. Pretext is established by a direct showing that a discriminatory reason more likely motivated the employer or by an indirect showing that the employer's explanation is not credible. *Detzel v. Brush Wellman, Inc.* (2001), 141 Ohio App.3d 474, 483.

{¶ 19} Inasmuch as there is no direct evidence of age discrimination, plaintiff must prove his case circumstantially. In other words, for plaintiff to prevail on his claim of age discrimination he must produce evidence to support a finding that the performance issues identified by Lootens and Lepore were merely a pretext and that plaintiff's age was the true reason for nonrenewal.

{¶ 20} The evidence does not support such a finding. After all, it was Lootens who had hired plaintiff as an associate professor in 2000, just four years prior to his nonrenewal. It is difficult to conceive how Lootens could have harbored a discriminatory animus towards plaintiff with regard to his age under such circumstances. Moreover, Lootens testified credibly that he did not even know plaintiff's age at the time that he and Lepore made the decision not to renew plaintiff's contract; he was adamant that plaintiff's age was not a consideration. Lepore maintained that the deficiencies in plaintiff's job performance that were discussed with plaintiff in April 2003 had persisted, and that those performance- related deficiencies were the sole reason for nonrenewal. Lepore stated that plaintiff's age was not a factor in the decision.

{¶ 21} Plaintiff failed to present any convincing evidence either that his age played a role in the decision to terminate his employment or that the reasons for nonrenewal articulated by Lootens and Lepore were pretextual. Although plaintiff strongly disagreed with the decision and may believe that any perceived deficiencies in his performance were the result of "poor management" rather than any shortcomings on

his part, the court finds that Lootens and Lepore made the decision not to renew his contract based upon plaintiff's job performance and not his age.

{¶ 22} For the foregoing reasons, the court finds that it does not have subject matter jurisdiction of plaintiff's claim for breach of contract, and that plaintiff has failed to prove his claim of age discrimination by a preponderance of the evidence. Accordingly, plaintiff's claim for breach of contract shall be dismissed for lack of subject matter jurisdiction. Additionally, judgment shall be rendered in favor of defendant as to plaintiff's claim of age discrimination.

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JUDGMENT ENTRY

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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, plaintiff's claim for breach of contract is DISMISSED. Additionally, judgment is rendered in favor of defendant as to plaintiff's claim of age discrimination. 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.

_____

J. CRAIG WRIGHT
Judge

cc:

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LP/cmd
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