

[Cite as *Spohn v. Univ. of Akron*, 2008-Ohio-4799.]

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

CYDNEY SPOHN

Plaintiff

v.

UNIVERSITY OF AKRON

Defendant

Case No. 2007-04851

Judge Clark B. Weaver Sr.

DECISION

{¶ 1} On December 11, 2007, an evidentiary hearing was conducted in this matter to determine whether Susan Speers is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. On January 25, 2008, the parties filed post-hearing briefs. On February 11, 2008, plaintiff filed a motion for leave to file a reply brief. On February 25, 2008, defendant filed a memorandum contra plaintiff's motion for leave. Upon review, plaintiff's motion for leave is DENIED.

{¶ 2} R.C. 2743.02(F) provides, in part:

{¶ 3} "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action."

{¶ 4} R.C. 9.86 provides, in part:

{¶ 5} "[N]o officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶ 6} In 1998, defendant hired plaintiff as an instructor of dance in the School of Dance, Theatre, and Arts Administration (SDTAA). Although plaintiff was an accomplished professional ballet dancer at the time of her hiring, she lacked an educational degree beyond the high school level. Plaintiff therefore arranged to pursue an education with defendant while performing her teaching duties. Defendant conferred upon plaintiff a bachelor of science degree in 2003 and a master of arts degree in 2006. Since 2006, plaintiff has held the position of assistant professor of dance.

{¶ 7} Susan Speers, Ph.D. is a tenured professor of theatre in the SDTAA with considerable experience in academia, including teaching at the defendant institution since 1988. Speers had no involvement in plaintiff's hiring and did not directly supervise her.

{¶ 8} Plaintiff alleges that from "2003 until the present, Speers engaged in a course of conduct designed to destroy Plaintiff's reputation, career and professional relationships at [defendant]," and she claims that Speers' conduct was outside the scope of her official responsibilities and that she acted with malice, in bad faith, and in a wanton or reckless manner.

{¶ 9} In the context of immunity, "[i]f the Court of Claims determines that the employee's acts did not further the interests of the state, i.e., the employee was acting outside the scope of his employment, maliciously, in bad faith, or in a wanton or reckless manner, the state has not agreed to accept responsibility for the employee's acts and the employee is personally answerable for his acts in a court of common pleas." *Conley v. Shearer*, 64 Ohio St.3d 284, 287, 1992-Ohio-133. "The Revised Code does not define 'scope of employment.' The concept generally denotes an agency relationship in which the agent or employee is engaged in an activity that is logically related to the business of the principal or employer." *Theobald v Univ. of Cincinnati*, 111 Ohio St.3d 541, 544, 2006-Ohio-6208. "[A] state employee does not have personal immunity if his 'actions were manifestly outside the scope of his employment or official responsibilities,' even if he does not act 'with malicious purpose,

in bad faith, or in a wanton or reckless manner.” *Oye v. The Ohio State Univ.*, Franklin App. No. 02AP-1362, 2003-Ohio-5944 at ¶10, quoting R.C. 9.86.

{¶ 10} Whether an employee is entitled to immunity is a question of law. *Nease v. Med. College Hosp.*, 64 Ohio St.3d 396, 1992-Ohio-97. The question whether an employee acted outside the scope of her employment, or with malicious purpose, in bad faith, or in a wanton or reckless manner is one of fact. *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9. The burden of proving that an employee should be stripped of immunity rests with the plaintiff. *Fisher v. Univ. of Cincinnati Med. Ctr.* (Aug. 25, 1998), Franklin App. No. 98AP-142.

{¶ 11} Speers testified that she is considered a “senior faculty member,” and that this designation requires her to serve on Retention, Tenure, and Promotion (RTP) committees. An RTP committee generally convenes annually within the SDTAA to evaluate junior faculty who wish to be retained, promoted, or tenured. Upon review of a candidate, the RTP committee adopts a recommendation by majority vote as to whether retention, promotion, or tenure is warranted, and this recommendation is then forwarded to other committees and/or administrators for review. Final decisions on RTP matters are made by defendant’s board of trustees.

{¶ 12} Speers testified that she has broad authority to speak about RTP matters and she contends that, at all times relevant to this case, she acted within the scope of that authority. According to Speers, RTP procedure is bound by few rules and involves candid, indeed often confrontational, discussion of candidates.

{¶ 13} Plaintiff introduced numerous correspondence from Speers to administrators and other individuals as exhibits, nearly all of which concern RTP matters relating to plaintiff. The common themes in these writings were Speers’ concern for upholding defendant’s professional standards and her questioning of the sufficiency of plaintiff’s credentials. Speers was particularly concerned with the implications of a federal lawsuit and subsequent settlement between plaintiff and defendant that resulted in plaintiff’s appointment to an assistant professorship.

{¶ 14} Although Speers' writings were at times disrespectful and lacking tact, the court notes that an "employee's wrongful act, even if it is unnecessary, unjustified, excessive or improper, does not automatically take the act manifestly outside the scope of employment." *Elliott v. Ohio Dept. of Rehab. & Corr.* (1994), 92 Ohio App.3d 772, 775. (Citations omitted.) "The act must be so divergent that it severs the employer-employee relationship." *Id.*

{¶ 15} Upon review, the court finds that plaintiff has not proven by a preponderance of the evidence that Speers exceeded the duties of her employment. Accordingly, as to the conduct in question before the court, the court finds that Speers acted within the scope of her official responsibilities. Despite this finding, Speers is not entitled to immunity if she acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶ 16} The Tenth District Court of Appeals has held that for purposes of determining statutory immunity, malice is the "willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified." *Lowry v. State Hwy. Patrol* (Feb. 27, 1997), Franklin App. No. 96API07-835, quoting *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 453-454. Bad faith is defined as "a design to mislead or deceive another, * * * not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." *Id.*, quoting *Black's Law Dictionary* (5 Ed. 1979), 127. The Supreme Court of Ohio has held that the term reckless involves a risk of harm that "is substantially greater than that which is necessary to make [the actor's] conduct negligent" and a "reckless disregard of the safety of others * * * knowing or having reason to know of facts which would lead a reasonable man to realize" that his conduct creates an unreasonable risk of harm to another. *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105. The term reckless is often used interchangeably with the term wanton. *Id.*

{¶ 17} On September 26, 2003, Speers sent an e-mail to Interim Dean Mark Auburn, Interim SDTAA Director Neil Sapienza, and Provost Elizabeth Stroble. (Plaintiff's Exhibit 13.) Among other topics in her e-mail, Speers discussed plaintiff's qualifications for an assistant professorship, stating that "[t]he SDTAA requires a candidate to have their terminal degree to be considered for tenure and/or an Assistant Professor position." RTP guidelines adopted by the SDTAA in 1997 did, in fact, include "terminal degree" (i.e. the most advanced degree available in a particular academic discipline) among the criteria for appointment to assistant professor. (Plaintiff's Exhibit 60.) However, at the time of Speers' e-mail, plaintiff was instead subject to RTP guidelines adopted by the dance department in 2002, and these guidelines did not require a candidate to hold a terminal degree for appointment to assistant professor; this was true of later revisions as well. (Plaintiff's Exhibits 61, 62.) Speers went on to make similar statements in correspondence with administrators and SDTAA faculty on September 27, 2003, November 11, 2003, and March 7, 2004. (Plaintiff's Exhibits 14, 19, 22.)

{¶ 18} In response to Speers' March 7, 2004 e-mail, Sapienza sent an e-mail on March 8, 2004, to Speers and to all who received her message. (Plaintiff's Exhibit 23.) In his e-mail, Sapienza corrected and clarified several statements made by Speers and he attached thereto the 2002 guidelines. Speers testified that she received Sapienza's e-mail and acknowledged that it directed her and the other RTP committee members to review the attached guidelines. Despite her receipt of this message, however, Speers continued to misrepresent the RTP standards applicable to plaintiff in later communications with Sapienza, Stroble, Interim Dean James Lynn, University Counsel Ted Mallo, SDTAA faculty, and officers of the local chapter of the American Association of University Professors. (Plaintiff's Exhibits 27, 28, 30, 31, 33, 35, 37, 38, 45, 48, 52.)

{¶ 19} In her testimony, Speers admitted to misrepresenting RTP guidelines in certain correspondence even after Sapienza had corrected her prior misrepresentations and had directed her to read the appropriate guidelines in his March 8, 2004 e-mail.

Although Speers stated that the misrepresentations were unintentional, the court finds that by March 8, 2004, she should have known of the RTP guidelines applicable to plaintiff.

{¶ 20} Given Speers' tenured status and her experience in higher education, she either knew or should have known that her misleading statements to administrators and others regarding the RTP guidelines applicable to plaintiff had the potential to damage plaintiff's employment relationship with defendant, thereby exposing plaintiff to an unreasonable risk of harm. Accordingly, the court finds that Speers acted with recklessness in making such statements in Plaintiff's Exhibits 27, 28, 30, 31, 33, 35, 37, 38, 45, 48, and 52.

{¶ 21} For the foregoing reasons, the court finds that Speers is not entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F) as to her conduct in misrepresenting RTP guidelines in Plaintiff's Exhibits 27, 28, 30, 31, 33, 35, 37, 38, 45, 48, and 52. Therefore, to this limited extent, the courts of common pleas have jurisdiction over any civil actions that may be filed against Speers based upon the allegations in this case. As to all other allegations in this case, Speers is entitled to civil immunity and the courts of common pleas do not have jurisdiction to hear any civil actions based thereon.



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Judge Clark B. Weaver Sr.

JUDGMENT ENTRY

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The court held an evidentiary hearing to determine civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon hearing all the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that Susan Speers is not entitled to immunity pursuant to R.C. 9.86 and 2743.02(F) as to her conduct in misrepresenting RTP guidelines in Plaintiff's Exhibits 27, 28, 30, 31, 33, 35, 37, 38, 45, 48, and 52. To this limited extent, the courts of common pleas have jurisdiction over any civil actions that may be filed against Speers based upon the allegations in this case. As to all other allegations in this case, Speers is entitled to civil immunity and the courts of common pleas do not have jurisdiction to hear any civil actions based thereon.

CLARK B. WEAVER SR.
Judge

cc:

John F. Hill Michael Schmeltzer One Cascade Plaza, Suite 2000 Akron, Ohio 44308	Randall W. Knutti Assistant Attorney General 150 East Gay Street, 18th Floor Columbus, Ohio 43215-3130
Reid T. Caryer Assistant Attorney General 30 East Broad Street, 16th Floor Columbus, Ohio 43215	

RCV/cmd
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