

Court of Claims of Ohio

The Ohio Judicial Center
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JOANNE R. WISSLER

Plaintiff

v.

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES

Defendant

Case No. 2006-02218

Judge J. Craig Wright

DECISION

{¶ 1} Plaintiff brought this action alleging claims for wrongful discharge, defamation, intentional infliction of emotional distress, dereliction of duty, and violations of an implied contract and covenants of good faith and fair dealing. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} On October 25, 2004, plaintiff began her employment with defendant as a probationary employee in the position of Human Services Program Developer. Plaintiff received her initial training as a member of the “help-desk,” a staff group that provided information, referral, and assistance regarding child welfare and childcare development to legislators, constituents, and the general public. The help-desk staff also responded to calls seeking assistance concerning child services programs that were administered by county agencies. Help-desk staff would occasionally mediate disputes between county child services agencies and their clients. Problems or complaints that could not

be immediately resolved were referred to defendant's field offices for further investigation.

{¶ 3} Dorothy Hughes, a program administrator and the help-desk supervisor, testified regarding plaintiff's training. According to Hughes, plaintiff was initially trained by "shadowing" experienced help-desk staff. Hughes occasionally occupied a cubical near the help-desk to monitor the staff and to make herself available for questions and advice. Plaintiff was also encouraged to correspond with Hughes via email. Hughes testified that plaintiff received additional "hands-on" training during which she began taking calls while being monitored by experienced staff members, including Hughes. Hughes testified that plaintiff received continuing training by attending unit meetings and working with other staff members.

{¶ 4} Hughes testified that she instructed the staff to notify her of any information that would suggest that a county agency had failed to comply with state rules and regulations. Hughes was responsible for forwarding a credible report of noncompliance to the proper investigating agency.

{¶ 5} Plaintiff presented the testimony of several of defendant's employees who had worked with her at the help-desk. Peggy Blevins testified that she helped to train plaintiff, that plaintiff was receptive to her instruction, and that plaintiff would occasionally seek Blevins' advice. Denise Perdue testified that she did not recall any problem regarding plaintiff's conduct or demeanor and that plaintiff worked well with her. Plaintiff testified that during her first few months with the help-desk she believed she was performing adequately because she had received only positive comments concerning her performance.

{¶ 6} According to plaintiff, her relationship with Hughes began to deteriorate in December 2004 after Hughes became aware of a complaint from a county agency regarding plaintiff's interactions with the agency. On December 21, 2004, Hughes sent plaintiff a memorandum informing her that Hughes had received a complaint from Dean Sparks, Director of Lucas County Children Services, wherein Sparks had expressed his concern with plaintiff's "impatience" and "the antagonistic manner" that she exhibited during her conversations with employees at the county agency. (Defendant's Exhibit A.) In her memorandum, Hughes stated that she had developed concerns after reviewing

plaintiff's work log notes and the information that was provided by Director Sparks. Hughes characterized plaintiff's conduct as "completely inappropriate" and Hughes concluded that plaintiff had made an improper recommendation for administrative review concerning possible rules violations as a result of plaintiff's inaccurate "assumptions." Hughes testified that her opinion that plaintiff was not a "team player" was based upon her observations of plaintiff's interactions with co-workers and child care agency employees.

{¶ 7} On January 18, 2005, Hughes completed a mid-term probationary performance evaluation for plaintiff for the period October 25, 2004 to January 23, 2005. (Joint Exhibit A.) Hughes rated plaintiff as being "below target" for each of the four goals that addressed both plaintiff's technical knowledge and her professionalism. In her evaluation, Hughes recognized that plaintiff was working on developing her skills and noted that she had "difficulty identifying the immediate understanding of the principal of the call in order to assess the caller's issues in a timely manner." Hughes also noted that plaintiff had "difficulty gathering information from callers and maintaining an objective approach to resolving issues and concerns." Hughes recommended that plaintiff "continue to work on understanding the whole picture" and that she consult with Hughes for assistance in interpreting rules and reaching resolutions.

{¶ 8} Following the mid-term probationary evaluation, Hughes created a performance improvement plan for plaintiff that addressed issues such as developing customer service skills, presenting a courteous and professional image, and providing complete and correct information.

{¶ 9} On March 29, 2005, Hughes drafted a memorandum to inform plaintiff about Hughes' "serious concerns" regarding the manner in which plaintiff had handled a complaint involving the Sandusky County Department of Children Services. (Defendant's Exhibit C.) According to Hughes, her concerns were consistent with those that she had previously discussed with plaintiff. Specifically, Hughes noted that a Sandusky County employee had complained that plaintiff had expressed "a very judgmental manner and tone of voice" during a conversation with her. In her memorandum, Hughes instructed plaintiff not to express her personal opinions concerning the county agencies and their employees.

{¶ 10} On April 11, 2005, plaintiff received her final probationary performance evaluation for the period January 17, 2005 to April 17, 2005. (Defendant's Exhibit E.) Plaintiff was advised that Hughes had recommended extending plaintiff's probationary period for 45 days to allow her to gain additional experience to resolve the concerns identified in the evaluation. Hughes rated plaintiff as being "below target" for three of the four goals on which she was evaluated. Hughes commented that plaintiff had developed a good knowledge base but that she had communicated "inappropriate" information and comments to callers and that she had shown an inability to remain "neutral and non-judgmental." Hughes also rated plaintiff poorly in the areas of communication, problem solving, decision making, and customer service.

{¶ 11} On April 12, 2005, plaintiff signed a counseling memorandum that Hughes wrote to document plaintiff's behavior during the April 11, 2005 meeting. (Defendant's Exhibit D.) Hughes testified that after plaintiff read the probationary evaluation, plaintiff became angry, aggressive, hostile, and loud. The counseling memorandum states that defendant's standards of employee conduct provide that incivility, such as rude, hostile, and volatile behavior could lead to disciplinary action up to and including removal. At trial, plaintiff conceded that she did get angry at the meeting and that she may have gotten "a little loud."

{¶ 12} On May 6, 2005, Hughes signed a "Performance Management Plan" (PMP) that memorialized both "the problem" that Hughes had discussed with plaintiff and the methods that were suggested for plaintiff to achieve successful performance. (Joint Exhibit G.) Plaintiff was advised that the plan was directive in nature and that failure to abide by the terms of the PMP could result in disciplinary action up to and including removal from her position. The last page of the PMP contains a handwritten note that is signed by Joan Van Hull, Hughes' supervisor, which states that Van Hull participated in the review and that plaintiff refused to sign the document until she had consulted with a union representative. Plaintiff did not sign the document.

{¶ 13} Beginning on May 11, 2005, Hughes provided plaintiff with weekly performance summaries to document plaintiff's progress in achieving the goals that were identified in the PMP. (Defendant's Exhibits H and I.) Hughes testified that plaintiff's efforts to comply with the PMP were "not going well" and that plaintiff had

repeatedly failed to complete assigned work. On May 18, 2005, plaintiff received her second weekly performance summary and, on the same date, Hughes sent a memorandum to Richard Corbin, chief of defendant's labor relations department, recommending a "probationary removal" of plaintiff from her employment with defendant. In her memorandum, Hughes advised Corbin that plaintiff had "ongoing difficulty with accepting and following supervisory instruction, failing to provide an objective, impartial attitude when relating to customers, and providing inappropriate and inadequate information to consumers." (Defendant's Exhibit L.) Plaintiff continued to work for defendant until May 20, 2005, when she was notified that she had been terminated from her probationary position and that she would be paid vacation leave for the period May 23, to May 27, 2005.

WRONGFUL DISCHARGE

{¶ 14} In Count One of her complaint, plaintiff alleges that she was wrongfully discharged from her position with defendant in violation of the public policy exception to the employment-at-will doctrine. Absent an employment contract, the employer-employee relationship is considered at-will. *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228. 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, 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.

{¶ 15} A public policy exception to the employment-at-will doctrine was first recognized by the Supreme Court of Ohio in *Greeley*, supra, wherein 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.

{¶ 16} The public policy exception was subsequently extended, and claims for wrongful discharge were allowed for employment terminations that violated public policy as expressed in sources other than the Ohio Revised Code. *Painter v. Graley*, 70 Ohio St.3d 377, 1994-Ohio-334. 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 “may [also] 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 384.

{¶ 17} In order to establish a claim for wrongful termination in violation of public policy, plaintiff must prove four elements: 1) a clear public policy was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element); 2) the firing would jeopardize that public policy (the jeopardy element); 3) the dismissal was motivated by conduct related to the public policy (the causation element); and, 4) the employer had a legitimate business justification for the termination (the overriding justification element). *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 151, 1997-Ohio-219. The clarity and jeopardy elements of a wrongful discharge claim are questions of law, whereas the causation and overriding justification elements are questions of fact. *Id.*; *Collins v. Rizkana*, 73 Ohio St.3d 65, 70, 1995-Ohio-135.

{¶ 18} As to the issue of clarity, the question is whether there is a clear public policy to protect a specific public interest sufficient to justify an exception to the at will employment doctrine. *Id.* Plaintiff argues that the termination of her employment violated clear public policy as manifested in Ohio Adm.Code 5101:2-5-11, which sets forth rules for handling a complaint that alleges a child care agency is in violation of any of the requirements of Ohio Adm.Code Chapter 5101. Plaintiff asserts that her employment was terminated for referring to Hughes certain complaints that she had received at the help-desk. However, plaintiff has not presented any authority extending the narrow public policy exception to the employment-at-will doctrine to a case with similar facts. Thus, the court finds that plaintiff has failed to articulate a sufficiently clear expression of public policy on which to base her claim.

{¶ 19} Moreover, plaintiff failed to present any evidence that would suggest that Hughes was critical of any legitimate concern that plaintiff had expressed regarding a county agency. Plaintiff alleges only that Hughes gave her misleading instructions and unfounded criticism that made it difficult for plaintiff to perform her job assignments.

Plaintiff made no showing that defendant violated a clear public policy with respect to rules and regulations set forth in Ohio Adm.Code Chapter 5101.

{¶ 20} Even assuming that plaintiff's termination would somehow jeopardize a clear public policy, the court concludes that she has failed to prove by a preponderance of the evidence that the termination of her probationary employment was motivated by any complaint that plaintiff may have made concerning compliance with rules and regulations established by Ohio Adm.Code Chapter 5101. Contrary to plaintiff's assertion, the court finds that defendant's decision to terminate plaintiff's probationary employment was primarily related to concerns about her unprofessional demeanor, her inadequate customer relations skills, and her failure to respond to supervisory instruction.

{¶ 21} As discussed above, Hughes had received complaints from county children services agencies that characterized plaintiff's demeanor as judgmental and antagonistic. Plaintiff conceded that, even after she had been counseled regarding her professional conduct, she reacted in a loud and angry manner when she received what she believed to be unfounded criticism during a meeting to discuss her performance evaluation. Furthermore, the weekly performance summaries that Hughes completed during the last few weeks of plaintiff's employment show that plaintiff failed to exhibit progress with regard to the goals that were identified in the PMP. The court found credible the testimony of Hughes that plaintiff failed to comply with the objectives of the PMP. The general rule is that the court will not substitute its judgment for that of the employer and may not second-guess the business judgments of employers regarding personnel decisions. See, e.g., *Watson v. Kent State Univ.* (Aug. 8, 1994), Ct. of Cl. No. 91-06627; *Dodson v. Wright State Univ.* (Dec. 3, 1997), Ct. of Cl. No. 93-03196; *Washington v. Central State Univ.* (April 24, 1998), Ct. of Cl. No. 96-08849.

{¶ 22} Based upon the testimony and evidence presented at trial, the court concludes that defendant had a legitimate business justification for its decision to terminate plaintiff's probationary employment. Accordingly, the court finds that plaintiff's claim for violation of public policy is without merit.

DERELICTION OF DUTY

{¶ 23} Plaintiff also alleges “dereliction of duty” based upon her assertion that defendant’s actions in terminating her employment violated certain statutes, administrative rules, and internal department policies. Plaintiff specifically refers to R.C. 124.06 (addressing the appointment and removal of civil service employees) and Ohio Adm.Code 123:1-29-1 (addressing the performance evaluation system for civil service employees).

{¶ 24} The court finds that plaintiff’s claim of dereliction of duty is essentially a restatement of her wrongful discharge claim. Moreover, the dereliction of duty claim is not a recognized civil claim for relief, and therefore fails. See *White v. Stafford* (Jan. 14, 1993), Cuyahoga App. No. 61838.

BREACH OF IMPLIED CONTRACT

{¶ 25} In Count 4 of her complaint, plaintiff alleges that the PMP constituted an implied employment contract and that defendant violated a covenant of good faith and fair dealing by terminating her employment. Plaintiff asserts that the PMP contained statements regarding instruction, supervision, and performance expectations that are similar to statements that are typically found in employment manuals which have been construed as employment contracts.

{¶ 26} To establish that an implied contract existed, plaintiff must prove the existence of each element necessary to the formation of a contract. *Penwell v. Amherst Hosp.* (1992), 84 Ohio App.3d 16, 21. Under the implied contract exception to the at-will employment doctrine, “a handbook may be found to alter the terms of employment at will only if the employee and employer have agreed to create a contract from the writing.” *Tohline v. Central Trust Co., N.A.* (1988), 48 Ohio App.3d 280, 282-283. However, there is a strong presumption against the existence of an implied contract of employment. *Srail v. RJF Internatl. Corp.* (1998), 126 Ohio App.3d 689, 709.

{¶ 27} The court finds that the provisions of the PMP amount to no more than managerial guidance that was intended to help plaintiff achieve successful performance. The PMP advised plaintiff to utilize an attached checklist as a reference during conversations with county agency staff and customers. The PMP set goals regarding work product and timeliness and it specified both a monitoring process and an

assessment period during which the plan would be in effect. Furthermore, plaintiff did not sign the PMP and, as discussed above, Joan Van Hull noted on the signature page that plaintiff did not intend to sign the document until she had consulted with a union representative. Based upon the terms of the PMP, and in light of the evidence that suggests that plaintiff did not agree to those terms, the court finds that the PMP was clearly intended to be a management tool rather than a contract for continued employment.

{¶ 28} Plaintiff further asserts that defendant breached a covenant of good faith and fair dealing by terminating her employment.

{¶ 29} “Parties to a contract are bound toward one another by standards of good faith and fair dealing. However, this does not stand for the proposition that breach of good faith exists as a separate claim. Instead, good faith is part of a contract claim and does not stand alone.” *Dawson v. Blockbuster, Inc.*, Cuyahoga App. No. 86451, 2006-Ohio-1240, ¶ 35, citing *Wauseon Plaza, Ltd. Partnership v. Wauseon Hardware Co.*, 156 Ohio App.3d 575, 2004-Ohio-1661. Furthermore, the duty of good faith and fair dealing is not recognized in Ohio as a cause of action when it involves the termination of an at-will employee. *Dunina v. Lifecare Hosps.*, Montgomery App. No. 21142, 2006-Ohio-2824, ¶ 29.

{¶ 30} Inasmuch as plaintiff has failed to establish the existence of an employment contract, express or implied, her claims for breach of an implied contract and breach of a covenant of good faith and fair dealing are without merit.

DEFAMATION

{¶ 31} Plaintiff alleges that statements that were made by Hughes in her performance reviews are false and defamatory. Plaintiff also asserts that Hughes’ statements resulted in the termination of her employment and interfered with her later attempts to find employment.

{¶ 32} 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 business. *Sweitzer v. Outlet Communications, Inc.* (1999), 133 Ohio App.3d 102, 108.

The essential elements of a defamation action are that a false statement was made, that the false statement was defamatory, that the false defamatory statement was published, that plaintiff was injured, and that defendant acted with the required degree of fault. *Celebrezze v. Dayton Newspapers, Inc.* (1988), 41 Ohio App.3d 343, 346.

{¶ 33} Plaintiff has not identified any false statement that was published to another party. An adverse employment action is not a “statement,” it is an action. *Lawson v. AK Steel Corp.* (1997), 121 Ohio App.3d 251, 257. Conduct, standing alone, does not constitute defamation. *Paolucci v. Robinson Memorial Hospital* (1995), Portage App. No. 94-P-0022.

{¶ 34} In addition, “[g]enerally, a communication made in good faith on a matter of common interest between an employer and an employee, or between two employees concerning a third employee, is protected by qualified privilege.” *Hanly v. Riverside Methodist Hosp.* (1991), 78 Ohio App.3d 73, 81. Once the defense of qualified privilege attaches, a plaintiff can only defeat the privilege with clear and convincing evidence that the defendant made the statements at issue with actual malice. *A & B-Abell Elevator Co., Inc. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 11, 1995-Ohio-66.

{¶ 35} The court finds that the statements made by Hughes were well within the interests of defendant, were not motivated by malice and, therefore, were protected by qualified privilege. Accordingly, plaintiff has failed to prove her claim of defamation by a preponderance of the evidence.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

{¶ 36} To prevail on an intentional infliction of emotional distress claim, plaintiff must “show that: 1) defendant intended to cause emotional distress, or knew or should have known that actions taken 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.” *Hanly*, supra, at 82, citing *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 34.

{¶ 37} “It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even

that his conduct has been characterized by ‘malice,’ or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability 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!’” *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 374-375, quoting 1 Restatement of the Law 2d, Torts (1965) 73, Section 46, Comment d.

{¶ 38} The act of terminating employment falls short of the extreme or outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Adverse employment actions, without more, do not meet this standard. *Katterhenrich v. Fed. Hocking Local School Dist. Bd. of Edn.* (1997), 121 Ohio App.3d 579, 590.

{¶ 39} Finally, in light of the above findings, the court concludes that the actions of Hughes were not outside the scope of her employment and that she did not act with malicious purpose, in bad faith, or in a wanton or reckless manner. Thus, the court finds that Hughes is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against her based upon the allegations in this case.

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

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Defendant

Case No. 2006-02218

Judge J. Craig Wright

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. Additionally, the court finds that Dorothy Hughes is entitled to immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against her based upon the allegations in this case. 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

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