[Cite as *Tod v. Cincinnati State Technical & Community College*, 2009-Ohio-3700.]

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

BETHANY TOD

Plaintiff

v.

CINCINNATI STATE TECHNICAL AND COMMUNITY COLLEGE

Defendant
Case No. 2006-07732

Judge Clark B. Weaver Sr.

DECISION

{¶ 1} Plaintiff brought this action alleging sexual harassment, unpaid overtime wages, and violation of the federal Uniformed Services Employment and Reemployment Act (USERRA). The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} In March 2005, plaintiff commenced employment as a business manager in defendant's Workforce Development Center (WDC). The WDC provides training to businesses in the greater Cincinnati area; plaintiff's role within the organization was to market training programs to potential clients and to coordinate any programs that she sold. At the time that plaintiff began working for defendant, the WDC consisted of Director Sherry Marshall, five business managers including plaintiff, three support staff, and part-time instructors who conducted training programs on a contractual basis.

{¶ 3} Plaintiff testified that due to medical concerns, she had received assurances during the interview process that the job would require her to work only 40 hours per week. Plaintiff stated that not long after beginning the job, however, she found that the volume of her workload usually required her to work more than 40 hours

per week. Plaintiff further stated that from early on, she encountered harassment and other unprofessional conduct by Marshall. Business Managers Brian Canteel and Jane Dunigan corroborated plaintiff's testimony regarding Marshall's lack of professionalism, stating that Marshall exhibited offensive and intimidating behavior, especially toward plaintiff, that created dysfunction within the WDC. Marshall, who testified by way of deposition, largely denied such allegations of misconduct.

{¶ 4} Canteel testified that in April 2006, he reported several allegations of misconduct by Marshall to both defendant's president, Ronald Wright, and defendant's director of human resources, Eugene Breyer. Dunigan testified that around this same time, she too filed a complaint with Breyer regarding Marshall's conduct.

{¶ 5} Plaintiff stated that in early May 2006, she also lodged a complaint with Breyer to report a confrontation that she had had with Marshall on April 24, 2006. Describing this incident, plaintiff testified that during a meeting among the business managers and Marshall, Marshall became angry and clenched her fists such that plaintiff feared Marshall would assault her. According to plaintiff, Marshall then stated that she needed to leave before she "whammed" plaintiff, and she brushed against plaintiff as she left. Canteel and Dunigan substantiated plaintiff's account of this incident, each testifying that they recalled Marshall threatening to "wham" plaintiff. Marshall acknowledged that she became upset during the meeting and left abruptly, but she denied threatening plaintiff.

{¶ 6} In light of the complaints against Marshall, Breyer conducted an investigation during which he met individually with plaintiff and other WDC employees. Following plaintiff's meeting with Breyer, she began sending him e-mails to report additional incidents of misconduct by Marshall as they occurred. For example, on May 19, 2006, plaintiff sent Breyer an e-mail informing him that within the past week, Marshall had made comments of a sexual nature to her, remarked on her physical appearance, and called her a "bitch" and a "cute young thing." (Plaintiff's Exhibit 24.)

{¶ 7} On May 25, 2006, Breyer met with Marshall for "oral counseling," which according to Breyer is the mildest form of discipline under defendant's progressive disciplinary plan. Breyer testified that according to his agenda for the meeting, he

advised Marshall to refrain from several activities, including using profanity; inappropriate touching; calling employees derogatory names; intimidating or threatening employees (with specific reference to the April 24, 2006 confrontation with plaintiff); and humiliating employees, such as by giving out a "moron award" when an employee made a mistake. (Plaintiff's Exhibit 26.)

{¶ 8} Independent of Breyer's efforts to investigate and discipline Marshall, the United States Department of Labor undertook a separate investigation into a complaint that it received from Canteel alleging that Marshall discriminated against him on the basis of his military service. Canteel's complaint to the Department of Labor included a supporting affidavit from plaintiff and plaintiff also provided statements to an investigator from that agency.

{¶ 9} Plaintiff testified that despite the investigations by Breyer and the Department of Labor, Marshall's harassing behavior did not abate. Moreover, plaintiff testified that Marshall learned of plaintiff's involvement in those investigations and, as a result, reduced her job duties and subjected her to closer scrutiny. Marshall testified that she did not know of plaintiff's involvement in the investigations.

{¶ 10} Throughout the summer of 2006, plaintiff continued to send e-mails to Breyer complaining about Marshall's conduct. According to plaintiff, Breyer provided little or no response. Breyer acknowledged that he did not thoroughly respond to plaintiff's complaints, but he stated that WDC employees were sending him so many complaints around this time that it was difficult to address them all.

{¶ 11} In light of the continuing complaints, Wright and Breyer arranged a September 1, 2006 meeting with all WDC employees. Plaintiff, Canteel, and Dunigan each testified that at this meeting, they were admonished to stop complaining about Marshall and were told to respect Marshall's authority as director of the WDC.

{¶ 12} Around the same time as this meeting, defendant transferred supervision of the WDC from Wright's office to that of Douglas Heesten, vice president for institutional advancement. In October 2006, plaintiff communicated several concerns about Marshall to Heesten, leading Heesten and Breyer to conduct another investigation of Marshall. As a result of that investigation, on November 28, 2006,

defendant issued Marshall a written reprimand, faulting her for creating "an atmosphere of distrust and intimidation" in the workplace. (Defendant's Exhibit L.)

{¶ 13} Plaintiff testified that she had begun working from home in October 2006 due to a broken leg, but that Marshall continued to harass her by telephone. On December 22, 2006, plaintiff submitted a request to utilize leave time through March 16, 2007, which defendant granted. Plaintiff stated that she requested this leave due to both her broken leg and anxiety over the situation with Marshall.

{¶ 14} Plaintiff testified that in January 2007, she accepted a sales position with Citigroup in Florence, Kentucky, but intended to continue working for defendant as well. However, plaintiff did not return to work after the expiration of her leave time. As a result, defendant sent her a letter dated March 30, 2007, stating that in light of her failure to return to work, it considered her to have resigned from her position. (Defendant's Exhibit F.)

I. SEXUAL HARASSMENT

{¶ 15} Plaintiff testified that Marshall subjected her to offensive, harassing behavior throughout her employment with defendant and that such behavior was often sexual in nature or based upon gender. Specifically, plaintiff testified that Marshall: often used profanity; regularly made profane insults toward plaintiff, such as calling her a "fucking bitch"; told sexually explicit stories; made numerous comments about the size of plaintiff's breasts; called plaintiff a "cute young thing"; stated that plaintiff resembled a "Barbie doll"; stated that with her brain and plaintiff's looks, she could rule the world; stated, in response to plaintiff's request to be reimbursed for a meal with a client, that she would not approve any further reimbursements because plaintiff should be able to use her physical appearance to get clients to pay for her meals; accused plaintiff of having sexual relations on defendant's property; and stated during a meeting in which plaintiff complained of feeling ill that plaintiff must be pregnant. Plaintiff testified that many of these alleged incidents occurred in the presence of other WDC employees, particularly during monthly meetings that Marshall held with the business managers.

{¶ 16} Canteel testified that Marshall often used profanity, regularly told jokes of a sexual nature, made comments about plaintiff's breasts and buttocks, and suggested that plaintiff should use her physical appearance to get clients to pay for her meals.

{¶ 17} Dunigan testified that Marshall often used profanity, called plaintiff a "stupid bitch" during a meeting, told plaintiff that she should use her physical appearance to get clients to pay for her meals, stated that if she (Marshall) had plaintiff's breasts and hair she could "rule the world," and stated on an occasion in which plaintiff felt ill that her illness must be due to pregnancy.

{¶ 18} Business Manager Larry Cherveny testified that he recalled Marshall calling plaintiff "a cute young thing" and using some profanity.

{¶ 19} Marshall admitted to using some profanity and to telling plaintiff on one occasion that she looked like a Barbie doll, but Marshall otherwise denied plaintiff's allegations.

{¶ 20} Plaintiff alleges that Marshall's behavior created a hostile work environment in violation of the prohibition against sexual discrimination in R.C. 4112.02(A) and 42 U.S.C. 2000e, et seq. In order to establish such a claim, "plaintiff must show (1) that the harassment was unwelcome, (2) that the harassment was based on sex, (3) that the harassing conduct was sufficiently severe or pervasive to affect the 'terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment,' and (4) that either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action." *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 176-177, 2000-Ohio-128.

{¶ 21} With regard to the first element, "[t]he conduct at issue must be 'unwelcome' in that the plaintiff neither solicited it nor invited it and regarded the conduct as undesirable or offensive." *Bell v. Berryman*, Franklin App. No. 03AP-500, 2004-Ohio-4708, ¶ 57. The proper inquiry is whether plaintiff indicated by her conduct that the alleged harassment was unwelcome. Id.

{¶ 22} Plaintiff testified that Marshall's conduct offended her and there is no evidence to suggest that plaintiff solicited or invited such conduct. Plaintiff made numerous reports to defendant's administrators from May to October 2006 both informing them of Marshall's offensive conduct and requesting corrective action against Marshall. Therefore, the court finds that Marshall's conduct toward plaintiff was "unwelcome."

{¶ 23} The second element of plaintiff's claim concerns whether the harassment was based on sex. Harassment need not be of an explicitly sexual nature in order to satisfy this element; rather, the harassment must be based upon sex such that it would not occur but for the sex of the employee. *Hampel*, supra, at 178-179.

{¶ 24} Much of the conduct at issue was inherently gender-specific, such as Marshall's calling plaintiff a "bitch," commenting on plaintiff's anatomy, telling plaintiff that she looked like a Barbie doll, and telling plaintiff to use her physical appearance to get clients to pay for her meals. Such remarks, and Marshall's broader pattern of harassment toward plaintiff, went beyond the merely unprofessional behavior that Marshall at times exhibited toward other employees of both sexes. Given that Marshall's harassment of plaintiff was permeated with gender-specific, derogatory remarks, and that Marshall did not similarly harass other employees, the court concludes that the harassment of plaintiff would not have occurred but for her gender. Accordingly, the court finds that the harassment was based upon sex.

{¶ 25} The third element of plaintiff's claim concerns whether the harassment was sufficiently severe and pervasive as to alter the terms and conditions of her employment. In assessing this element, the court "must view the work environment as a whole and consider the totality of all the facts and surrounding circumstances, including the cumulative effect of all episodes of sexual or other abusive treatment." *Hampel*, supra, at 181. "While no single factor is required, circumstances to consider may include the frequency and severity of the conduct, whether the conduct is physically threatening or humiliating as opposed to merely an offensive utterance, whether the conduct unreasonably interferes with an employee's work performance, and whether psychological harm results." *Hoyt v. Nationwide Mut. Ins. Co.*, Franklin

App. No. 04AP-941, 2005-Ohio-6367, ¶ 76. "Conduct that is merely offensive, without more, is not actionable as hostile work environment harassment * * *." *Bell*, supra, at ¶ 60, citing *Harris v. Forklift Systems, Inc.* (1993), 510 U.S. 17, 21.

{¶ 26} The evidence adduced at trial demonstrates that throughout most or all of plaintiff's employment with defendant, she experienced frequent, and often intimidating, harassment by Marshall. Much of that harassment occurred in the presence of plaintiff's co-workers, which, according to plaintiff, caused her great embarrassment and humiliation. Plaintiff also stated that inasmuch as she was unmarried, she took particular offense with both Marshall's accusation that she had sexual relations on defendant's property and Marshall's speculation that she was pregnant. Furthermore, plaintiff, Canteel, and Dunigan credibly testified that Marshall's harassment of plaintiff went so far as to include a physical threat during a meeting on April 24, 2006.

{¶ 27} Additionally, by at least mid-2006, Marshall's behavior was impeding plaintiff's ability to carry out her job responsibilities, as evidenced by her efforts to report Marshall to defendant's administrators. According to plaintiff, the harassment ultimately caused her to suffer a diagnosed anxiety disorder that was severe enough by late 2006 that she could no longer work.

{¶ 28} Considering both the cumulative effect of Marshall's harassment of plaintiff and the professional office environment in which it occurred, the court finds that the harassment was sufficiently severe and pervasive as to alter the terms and conditions of plaintiff's employment.

{¶ 29} Going to the fourth element of plaintiff's claim, it is undisputed that Marshall was plaintiff's supervisor. Accordingly, the court finds that plaintiff has established the elements of her claim for sexual harassment by a preponderance of the evidence.

II. OVERTIME COMPENSATION

{¶ 30} Plaintiff claims that over the course of her employment with defendant, she worked approximately 1,300 overtime hours for which she was not compensated.

Defendant contends that plaintiff was an overtime exempt employee under the Fair Labor Standards Act (FLSA).

{¶ 31} R.C. 4111.03(A) provides, in part:

{¶ 32} "An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one workweek, in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the 'Fair Labor Standards Act of 1938,' 52 Stat. 1060, 29 U.S.C.A. 207, 213, as amended."

{¶ 33} The FLSA provides that employers are not required to pay overtime wages to individuals employed in a "bona fide administrative capacity" as that term is defined in regulations set by the Department of Labor. 29 U.S.C. 213(a)(1). The Department of Labor's definition of the term is set forth at 29 C.F.R. 541.200, which provides:

{¶ 34} "(a) The term 'employee employed in a bona fide administrative capacity' in section 13(a)(1) of the Act shall mean any employee:

{¶ 35} "(1) Compensated on a salary or fee basis at a rate of not less than $455 per week * * *, exclusive of board, lodging or other facilities;

{¶ 36} "(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

{¶ 37} "(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. * * *"

{¶ 38} Overtime exemptions to the FLSA are to be narrowly construed. *Johnson v. Ohio Dept. of Youth Services* (2000), 140 Ohio App.3d 774, 776.

{¶ 39} The parties agree that plaintiff received compensation at a rate of not less than $455 per week, thus satisfying the first element described in 29 C.F.R. 541.200.

{¶ 40} With regard to the second element, in order to qualify for the administrative exemption, plaintiff's primary duty must have been the performance of office or non-manual work directly related to the management or general business operations of defendant. "The phrase 'directly related to the management or general

business operations' refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. 541.201(a).

{¶ 41} Plaintiff's job description states that "[t]o achieve the college's mission to create a well-prepared workforce, this position provides the link between the business community and the college to provide training needs assessment, affordable training options, and delivery of customized training, which is a key to economic development. * * * The essential function of this position is to assess the need for, design, plan, and deliver workforce training, job analysis, and process improvement services to businesses and industries in the Greater Cincinnati region." (Plaintiff's Exhibit 3.)

{¶ 42} Practically speaking, as a business manager plaintiff marketed WDC's services, cultivated relationships with potential and existing clients, and investigated the training needs of potential and existing clients in order to develop proposals for customized training programs for them. If a proposal were accepted, plaintiff then prepared a contract and made arrangements to facilitate the training, including recruiting instructors, monitoring training sessions while they were in progress, and following up with clients after training sessions to ensure their satisfaction.

{¶ 43} Although plaintiff's responsibilities were numerous, they were primarily office-based, non-manual in nature, and integral in multiple respects to the running of the WDC. Moreover, plaintiff's marketing responsibilities, which included representing the WDC at local networking events, played a significant role in projecting the WDC's "public face" and carrying its services to the local business community. See *Darveau v. Detecon, Inc.* (C.A.4, 2008), 515 F.3d 334, 338. Thus, the court finds that plaintiff meets the second element in the definition of an administrative employee.

{¶ 44} As to the third element, the court must determine whether the primary duty of plaintiff's position was the exercising of discretion and independent judgment with respect to matters of significance. "In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses

of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed." 29 C.F.R. 541.202(a).

{¶ 45} "Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances." 29 C.F.R. 541.202(b).

{¶ 46} Plaintiff exercised discretion both in researching and identifying potential clients and in developing customized training proposals for them. Although potential clients were often found on sales lists that Marshall provided to plaintiff, plaintiff exercised discretion in selecting both whom to call and what type of training program to offer. Plaintiff elicited information from potential clients in order to assess their unique needs and to tailor the WDC's offerings accordingly. Plaintiff had various means of brokering sales with potential clients, including meeting with them in person outside the WDC offices.

{¶ 47} Plaintiff was responsible for preparing sales contracts between defendant and its clients. Although such contracts had to be approved by Marshall, Marshall testified that she rarely, if ever, declined to approve them. The court notes that

plaintiff's recommending contracts for approval, rather than approving them herself, may nonetheless qualify as the exercise of discretion and independent judgment inasmuch as "[t]he decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment." 29 C.F.R. 541.202(c).

{¶ 48} Once a contract was in place, plaintiff had various responsibilities relating to the delivery of the training program that required her to exercise discretion and independent judgment, including identifying and recruiting instructors to provide the desired training. Plaintiff testified that she enjoyed such latitude in this respect and, that on one occasion, she selected herself to serve as an instructor in a customer service training program for the Kroger Company. Plaintiff negotiated payment with instructors in order to prepare their contracts, and although plaintiff lacked authority to bind defendant to these contracts, Marshall testified that she routinely approved them. After instructors were in place, plaintiff coordinated the details of training sessions with the instructor and the client. When a training session was under way, plaintiff typically visited the training site to observe the session in progress. Once a training session was over, plaintiff followed up with the client to ensure that it was satisfied with the training program it received.

{¶ 49} Upon review, the court finds that these primary duties of plaintiff's position required her to exercise discretion and independent judgment with respect to matters of significance. Accordingly, the court concludes that plaintiff was employed in a bona fide administrative capacity as defined in 29 C.F.R. 541.200, thus rendering her an overtime exempt employee under Section 213 of the FLSA and R.C. 4111.03.

III. USERRA

{¶ 50} Canteel, who was a United States Army reservist with a long history of military service, filed complaints in 2006 with both defendant's human resources

department and the Department of Labor alleging that Marshall discriminated against him on the basis of his military service in violation of USERRA, 38 U.S.C. 4301, et seq. Plaintiff supported Canteel in these efforts by providing an affidavit in support of his complaint to the Department of Labor and by giving statements to both Breyer and a federal investigator during their separate investigations.

{¶ 51} According to plaintiff, when Marshall learned of her efforts to support Canteel, Marshall reduced her job duties and subjected her to closer scrutiny. Plaintiff asserts that to the extent that her actions in support of Canteel were protected under USERRA at 38 U.S.C. 4311, the alleged reduction of her job duties constituted unlawful discrimination.

{¶ 52} "When a person brings an action under USERRA against a state employer, 'the action may be brought in a State court of competent jurisdiction *in accordance with the laws of the State*.'" (Emphasis sic.) *State ex rel. Turner v. Houk*, 112 Ohio St.3d 561, 2007-Ohio-814, ¶ 6, quoting 38 U.S.C. 4323(b)(2). In other words, such a cause of action only exists if separately provided for under state law. *Townsend v. Univ. of Alaska* (C.A.9, 2008), 543 F.3d 478, 484, fn. 2. Congress drafted the jurisdictional provisions of USERRA in this manner "for the apparent reason that 'the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.'" Id., quoting *Alden v. Maine* (1999), 527 U.S. 706, 712.

{¶ 53} With regard to Ohio law, the General Assembly enacted a statute and authorized the adoption of rules by the Director of Administrative Services to implement portions of USERRA that concern the reinstatement of state employees who take military leave. See R.C. 5903.02; *Turner*, supra, at ¶ 7 (citing former R.C. 124.29). However, the portion of USERRA upon which plaintiff bases her claim has not been similarly implemented so as to authorize an action against the state. Accordingly, the court finds that it lacks subject matter jurisdiction over plaintiff's claim for violation of USERRA and such claim shall be dismissed.

{¶ 54} Based upon the foregoing, the court finds that plaintiff proved her claim for sexual harassment, but failed to prove her claim for overtime compensation. Judgment shall be entered accordingly.

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

BETHANY TOD

Plaintiff

v.

CINCINNATI STATE TECHNICAL AND COMMUNITY COLLEGE

Defendant
Case No. 2006-07732

Judge Clark B. Weaver Sr.

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 plaintiff on her claim for sexual harassment. Judgment is rendered in favor of defendant on plaintiff's claim for overtime compensation and the claim for violation of USERRA is DISMISSED. The case will be set for trial on the issue of damages.

_____

CLARK B. WEAVER SR.
Judge

cc:

David A. Bhaerman
Assistant Attorney General
Education Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

Eric A. Walker
Jennifer A. Adair
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Peter A. Burr
3074 Madison Road
Cincinnati, Ohio 45209

RCV/cmd
Filed June 12, 2009
To S.C. reporter July 20, 2009