

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
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TODD KITCHEN

Plaintiff

v.

THE OHIO STATE UNIVERSITY

Defendant

Case No. 2004-08855

Judge Joseph T. Clark

DECISION

{¶ 1} Plaintiff brought this action alleging wrongful termination in violation of public policy. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} Plaintiff was employed by defendant, The Ohio State University (OSU), from May 15, 2000, until September 9, 2002. He was a 1997 graduate of OSU with a degree in aeronautical engineering. Plaintiff worked as a Research Associate II at the Center for Automotive Research (CAR), which was an interdisciplinary research center within OSU's College of Engineering. CAR provided students with an opportunity to conduct automotive research and to participate in other related activities. CAR also performed research for both the automotive industry and the federal government. Approximately 95 percent of its funding came from external sources such as contracts and grants.

{¶ 3} CAR facilities were contained primarily within one building; however, there was also a separate structure that housed a workshop for undergraduate student

projects. Although the student projects were located on the same property as CAR, they were under the purview of the College of Engineering, and Robert Gustafson, Ph.D., who was the associate dean for undergraduate education and student studies. Nonetheless, because of the proximity of student projects to CAR, and because the students utilized some of CAR's equipment and facilities, CAR personnel assisted in the coordination and supervision of the student projects and the building.

{¶ 4} At the time that plaintiff was hired, Giorgio Rizzoni, Ph.D., a professor of mechanical and electrical engineering at OSU, was the director of CAR. When Dr. Rizzoni took over management of CAR, his staff consisted of one full-time administrative assistant and one part-time engineer. He hired plaintiff as part of his efforts to expand CAR by creating new staff positions and generating additional revenue. At about the same time that plaintiff was hired, CAR received a \$300,000 grant from the Ford Motor Company which was designated to be used in developing a power-train laboratory for teaching undergraduate courses. The lab was to be located in two existing classrooms at the Robinson Laboratory on OSU's main campus. The rooms needed extensive renovation and new equipment (the Robinson Lab project). Dr. Rizzoni was committed to completing the Robinson Lab project as soon as possible.

{¶ 5} Rizzoni and plaintiff met when plaintiff was an undergraduate student in charge of a student project over which Rizzoni served as a faculty advisor. Rizzoni created the Research Associate 2 position for plaintiff, based upon his experience working with plaintiff. From May to July 2000, plaintiff's salary was paid 100 percent from the Ford grant funds. (Plaintiff's Exhibit 8.) In accordance with OSU policy, plaintiff was expected to spend 100 percent of his time working on the Robinson Lab project.

{¶ 6} On July 1, 2000, plaintiff's salary-funding sources changed to more closely reflect the actual percentages of job functions set forth in the Research Associate II position description drafted by Rizzoni. Plaintiff then began to receive 50 percent of his salary from the Ford grant funds, 30 percent from a CAR endowment fund, and 20 percent from the College of Engineering. At that point, plaintiff was expected to spend 50 percent of his time on the Robinson Lab project; 20 percent working on maintenance and engineering operations at CAR; 20 percent in support of the engineering students'

projects; and 10 percent working with students on a Formula Lightning competition vehicle. (Plaintiff's Exhibit 5.) The percentages did not remain constant over the term of plaintiff's employment.

{¶ 7} In August 2000, Rizzoni hired Frank Ohlemacher, a research engineer, to act as Facilities Manager. The CAR staff, which continued to grow, then began to report directly to Ohlemacher rather than to Rizzoni. Plaintiff, Rizzoni, and Ohlemacher initially worked well together; however, their relationship deteriorated over time. Among other things, both Ohlemacher and Rizzoni became increasingly dissatisfied with plaintiff's progress on the Robinson Lab project. On the other hand, plaintiff was critical of Rizzoni and Ohlemacher for a wide variety of reasons, most pertinent to his cause of action: whether he was being required to spend more time on certain projects than his salary-funding percentages allowed, and whether it was appropriate to use Ford grant funds on the Robinson Lab project. With respect to the latter, it had become known at some point after the project began that the Robinson Lab building was going to be demolished, and that the Ford-funded labs would be moved to a new facility. Plaintiff objected to spending so much of both his time and Ford funds on the project. In essence, plaintiff insinuated that his funding sources and the Ford grant funds were being fraudulently misapplied.

{¶ 8} In July 2001 and May 2002, plaintiff received negative work performance reviews. In late June 2002, he was presented with a Performance Improvement Plan (PIP) that was further developed over the next two weeks and eventually dated July 17, 2002. (Plaintiff's Exhibit 23.) Also in late June, a fire occurred in the student projects building. Plaintiff was assigned the task of directing students in the removal and inventory of damaged items. According to plaintiff, that work required approximately 200 hours and prevented him from successfully completing the PIP by its anticipated August 23, 2002 end date.

{¶ 9} On August 27, 2002, plaintiff received his termination notice, with the effective date of September 10, 2002. (Plaintiff's Exhibit 24.) The letter cites several reasons for the dismissal including plaintiff's failure to complete the PIP and his failure to adhere to expected percentages of time to be spent on assigned job functions. At trial, plaintiff testified that he believed that he was fired because he "blew the whistle" on

his supervisors regarding alleged misuse of funds on the Robinson Lab project and on his own salary.

{¶ 10} Defendant contends that plaintiff is alleging a claim under R.C. 4113.52, Ohio's whistleblower-protection statute. However, this court has consistently held that it lacks jurisdiction over such claims pursuant to the express language of R.C. 4113.52(D) and 124. 341. See also *Dargart v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2002-09668, 2005-Ohio-4463; *Felts v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 2007-03552, 2008-Ohio-4797. Plaintiff insists that his sole claim is that he was wrongfully discharged in violation of the public policy exception to the employment-at-will doctrine. There is no question that plaintiff was an at-will employee.

{¶ 11} 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, 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.

{¶ 12} The *Greeley* 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. Pursuant to *Painter*, the exception "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.

{¶ 13} The issue whether an employment termination violates public policy must be analyzed according to a four-prong test which balances the justification for the termination against the effect it will have upon the public policy. *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 151, 1997-Ohio-219. The court must determine whether: 1) a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element); 2) dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element); 3) the

dismissal was motivated by conduct related to the public policy (the causation element); and 4) the employer lacked an overriding, legitimate business justification for the dismissal (the overriding justification element). *Id.* 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.

{¶ 14} 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.* The public policy asserted in this case is derived from three sources, Section 1.30 of the Ohio State University Policy and Procedure manual, and R.C. 102.04(C) and 2921.42(A).

{¶ 15} Section 1.30 of the Policies and Procedures Manual provides: “[S]taff shall not engage in any activities or outside employment that may result in a conflict of interest. A conflict of interest exists if financial interests or other opportunities for personal benefit may exert a substantial and improper influence upon an employee’s professional judgment in exercising any University duty or responsibility.” The policy goes on to provide that all staff members of state-assisted universities are covered by R.C. Chapters 102¹ and 2921.²

¹R.C. 102.04(C) provides in pertinent part that: “no person who is * * * employed by a * * * governmental entity * * * shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee.”

²R.C. 2921.42 (A) provides:

“No public official shall knowingly do any of the following:

“(1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest;

“(2) Authorize, or employ the authority or influence of his office to secure the investment of public funds in any share, bond, mortgage, or other security with respect to which he, a member of his family, or any of his business associates either has an interest, is an underwriter, or receives any brokerage, origination, or servicing fees;

“(3) During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which

{¶ 16} Plaintiff asserts that these provisions, when taken together, manifest a clear public policy that university employees are stewards of the funds entrusted to them and that no fraud or deception can be tolerated with respect to accounting for such funds. Plaintiff asserts that Rizzoni violated the conflict of interest policy as a result of a transaction that Rizzoni made using funds from the Ford grant. Specifically, plaintiff alleges that Rizzoni used approximately \$60,000 - \$70,000 of the grant funds to purchase used equipment that Rizzoni personally owned. Plaintiff contends that Rizzoni “set the price of the equipment and then paid the price with Ford money as purchaser of the equipment.” (Plaintiff’s Reply Brief, Page 5.) Plaintiff further asserts that such public policy reflected in OSU’s requirement that employees’ percentages of time spent on each job function should match the funding percentage for that job. Plaintiff argues that to allow otherwise is tantamount to fraud. Finally, plaintiff argues that use of the Ford grant funds to build a lab in a building scheduled to be demolished also violated these provisions.

{¶ 17} Whether or not the cited provisions indeed protect the public interest espoused by plaintiff, the court is nonetheless required to balance the justification for the dismissal against any effect that it may have on the public policy. *Kulch*, supra, at 151. The weight of the evidence in this case demonstrates that there was no causal relationship between plaintiff’s complaints concerning any alleged misconduct and his termination, and, further, that OSU had legitimate business reasons for terminating plaintiff’s employment. Moreover, the court is persuaded that plaintiff’s allegations of misconduct were unfounded.

{¶ 18} The court found both Ohlemacher and Rizzoni to be competent, credible witnesses. With respect to the allegation that funding sources for plaintiff’s salary were somehow misapplied, Rizzoni explained that it is not always possible to exactly match employees’ duties with their sources of funding on a day-to-day or week-to-week basis.

he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder;

“(4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected;

“(5) Have an interest in the profits or benefits of a public contract that is not let by competitive bidding if required by law and that involves more than one hundred fifty dollars.”

He testified that in creating job descriptions he tried to write them broadly enough that the employee could perform a variety of different functions in accordance with available funding or with funding that might become available. Rizzoni described the process as a “balancing act,” but stated that the overall objective was to match funding percentages as closely as possible to job duties. Both Rizzoni and Ohlemacher admitted that student projects involved more work than could be done in 20 percent of plaintiff’s work week, that there were as many as 85 students working on projects at a given time, and that plaintiff performed his work on student projects extremely well. However, the weight of the evidence establishes that plaintiff took on more work with student projects than either Rizzoni or Ohlemacher intended, and that he simply failed to prioritize his activities in accordance with expectations. As a result, CAR was sometimes put in the position of subsidizing student-project supervision out of its own funds. In short, the court is persuaded that any perceived misapplication of funding was caused by plaintiff’s own conduct and not that of either Rizzoni or Ohlemacher.

{¶ 19} With regard to use of Ford grant funds for the Robinson Lab project, the evidence is clear that the project was intended to be plaintiff’s top priority and that plaintiff understood such to be the case. Rizzoni testified that, even though the building was slated to be torn down, it was important to get the work accomplished to demonstrate to Ford that the grant was being used for its intended purpose. Rizzoni’s original goal was to have the labs operating by the fall of 2000. He stated that if the project were to be put off until the anticipated date for completion of the new facility, Ford might not have seen any results for as long as six years. Moreover, Rizzoni explained that, even when the physical structure of the labs was destroyed, the “overwhelming majority” of the lab equipment could be moved to the new location. Thus, the evidence fails to establish any wrongdoing with regard to use of the Ford grant funds on the project.

{¶ 20} With regard to Rizzoni’s transaction using Ford grant funds, Rizzoni explained that the rooms that the Robinson Labs were to occupy were rooms that he had previously used for teaching students; that he moved his research labs to CAR when he became director there; and, that after discussion with his colleagues and

department chair, it was decided that it would be cost effective to leave some of the existing equipment in the Robinson Labs in place and to use a portion of the Ford grant funds to purchase comparable equipment for his CAR labs. Rizzoni testified that he arrived at the monetary value for the equipment he left behind based upon his 20 years of experience in automotive research, and that it was approved by his colleagues and department chair. The equipment was not Rizzoni's personal property and there was no evidence that Rizzoni personally benefitted from the transaction in any respect. Moreover, there was no evidence that plaintiff ever questioned Rizzoni about the transaction or spoke to any other person who had a role in his dismissal about the matter. The court concludes that there was no conflict of interest involved in the transaction, and that there was no causal connection between plaintiff's allegations concerning this incident and his dismissal.

{¶ 21} Other than the Rizzoni transaction, there is no question that plaintiff complained frequently about numerous issues other than CAR's use of funds. Plaintiff's complaints escalated tensions between himself and his supervisors. Nevertheless, Ohlemacher and Rizzoni consistently attempted to make their expectations clear. For example, Ohlemacher required that his staff submit monthly tracking reports that listed the goal percentages for their various job functions and, next to that figure, included a column for the employee to insert the "actual" percentage of time spent on each function. (Plaintiff's Exhibit 10.) Not all of the monthly reports were available for submission into evidence. However, for the six months from July 2000 to December 2000, when plaintiff's goal percentage for the Robinson Lab project was 50 percent, there were only two months that complied with that expectation, the other months were far below the goal amount.

{¶ 22} In July 2001, plaintiff received his first performance evaluation from Ohlemacher. Plaintiff's overall rating was generally "above expectations"; however, the evaluation evidences that Ohlemacher's two main concerns were plaintiff's focus on student projects rather than the Robinson Lab project, and plaintiff's poor communication with his supervisors. Plaintiff refused to sign the evaluation and instead submitted a two-page written response setting forth his objections to Ohlemacher's assessment. In plaintiff's response he admitted to engaging in heated discussions with

supervisors, and that his Robinson Lab efforts were lacking. (Plaintiff's Exhibit 7.) Plaintiff was thereafter required to submit weekly tracking reports, which he agreed would be beneficial.

{¶ 23} In November 2001, Ohlemacher held a meeting with plaintiff and Richard Fortner, a supervisor from another department at OSU. Ohlemacher testified that he selected Fortner because he thought that plaintiff and Fortner were friends and that, as such, Fortner's presence would serve to diffuse tensions between himself and plaintiff. The substance of the meeting was to address the various issues that had arisen between Ohlemacher and plaintiff. Ohlemacher contended that plaintiff was "argumentative, uncooperative, belligerent, and not performing the task for which his employment was defined." Plaintiff contended that Ohlemacher "did not support him when issues between students and [plaintiff] arose." (Plaintiff's Exhibit 12.) According to the testimony, Fortner commented to plaintiff to effect that "we all have supervisors, and we have to be responsible to them," to which plaintiff replied that he would not be responsible to Ohlemacher.

{¶ 24} In December 2001, Ohlemacher met with Fortner and Rizzoni in an effort to determine some means of dealing with what was described as the "worsening situation." (Plaintiff's Exhibit 12.) Several days after that meeting, plaintiff met with Rizzoni and Fortner to further discuss the issues. As a result of continuing difficulties, Rizzoni proposed to plaintiff, who was pursuing a master's degree part-time, that he return to school full-time and CAR would pay his full tuition and fees, plus a stipend as a graduate associate until he completed his degree requirements. Under this proposal, plaintiff would be able to spend all of his work hours on student projects. However, because the proposal significantly reduced his income, plaintiff was unwilling to accept it.

{¶ 25} In February 2002, Rizzoni and Ohlemacher temporarily reduced plaintiff's Robinson Lab goal to 25 percent to more closely reflect the amount of time that he was spending on the project. It is worth noting that plaintiff was involved in a special student project sponsored by Mac Tools that was taking up approximately 55 percent of his work hours. Rizzoni then assigned two graduate students to work on the Robinson Lab project.

{¶ 26} In May 2002, Ohlemacher issued a second performance evaluation for plaintiff, which rated plaintiff's performance as overall "below expectations." (Plaintiff's Exhibit 16.) Plaintiff did not sign the evaluation. In June 2002, after the special student project was completed, Ohlemacher restored plaintiff's Robinson Lab goal percentage to 50 percent. Shortly thereafter, with the assistance of human resources staff, Ohlemacher placed plaintiff on the PIP. The Robinson Lab project was not yet complete.

{¶ 27} As part of the effort to develop the PIP, Ohlemacher met with plaintiff at the Robinson Labs to discuss what work remained to be completed. Ohlemacher then created a list of tasks for plaintiff to accomplish, and set dates by which those tasks were to be completed. Ohlemacher provided the list to plaintiff for modifications, but plaintiff did not respond. As of July 31, 2002, plaintiff had not signed the PIP nor was he following the plan. Ohlemacher then contacted the department of human resources via e-mail, stating "I still do not know what [plaintiff] does (he does not send me any reports as required by the plan), where he is, or what hours he works. There are numerous other points made in the plan that [plaintiff] is ignoring. What's next?" (Defendant's Exhibit C.)

{¶ 28} On August 2, 2002, Ohlemacher e-mailed plaintiff regarding his lack of progress on the PIP and concluded by stating: "I must make it very clear that your continued refusal to comply * * * seriously places your position in jeopardy and that termination of your employment will take place." (Defendant's Exhibit D.) On August 12, 2002, Rizzoni recommended to the human resources' staff that plaintiff be dismissed, and as stated above, plaintiff was notified on August 27, 2002, that his employment was to be terminated with an effective date of September 10, 2002.

{¶ 29} Upon review of all of the evidence, the court concludes that plaintiff failed to prove by a preponderance of the evidence either that his dismissal was motivated by allegations of misuse of public funds or that defendant lacked a legitimate, overriding business justification for its decision to terminate his employment. The court is persuaded by the evidence that plaintiff's complaints and conduct were perceived as insubordination, failure of good behavior, and inability to accept direction from his supervisors. These, among others, clearly constitute legitimate business reasons for

termination of plaintiff's employment. Moreover, as a general rule, this 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.* (1997), 91 Ohio Misc.2d 57; *Washington v. Central State Univ.* (1998), 92 Ohio Misc.2d 26. Thus, plaintiff's claim of wrongful discharge in violation of public policy must fail. Accordingly, judgment shall be rendered in favor of defendant.

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Judge Joseph T. Clark

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. 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.

JOSEPH T. CLARK
Judge

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