



Court of Claims of Ohio

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SCOTT A. SAVAGE

Plaintiff

v.

OHIO STATE UNIVERSITY

Defendant

Case No. 2009-06575

Judge Patrick M. McGrath
Magistrate Holly True Shaver

JUDGMENT ENTRY

{¶ 1} On June 25, 2013, the magistrate issued a decision recommending judgment for defendant.

{¶ 2} Civ.R. 53(D)(3)(b)(i) states, in part: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i)." Plaintiff timely filed his objections on July 9, 2013. Defendant did not file a response.

{¶ 3} Plaintiff, former head of reference and library instruction at the Broomfield Library on defendant's Ohio State University-Mansfield (OSU-M) campus, recommended to OSU-M's First Year Reading Experience Committee (the committee) that a book entitled *The Marketing of Evil* be included on a list of required reading for incoming freshman. Plaintiff's selection and defense of the book quickly became the source of contention between plaintiff and other OSU-M faculty members. As the controversy continued to escalate, plaintiff believed his right to speak freely was in danger of being suppressed. As a result, plaintiff forwarded an e-mail chain between

members of the committee to a member of the Foundation for Individual Rights in Education. Eventually, the controversy at OSU-M received widespread national media attention.

{¶ 4} At an April 17, 2006 faculty assembly meeting, OSU-M faculty member Hannibal Hamlin accused plaintiff of taking actions that were “unethical and against the university.” Additionally, Hamlin and one other committee member filed discrimination and sexual harassment complaints against plaintiff with OSU-M’s Human Resources office; however, after an investigation, plaintiff was found not guilty of the charges. In July 2006, plaintiff took a leave of absence, but he did not return to his position. In his complaint, plaintiff alleged defamation and intentional infliction of emotional distress.¹

{¶ 5} The magistrate determined that plaintiff failed to prove his claims of defamation and intentional infliction of emotional distress by a preponderance of the evidence. Additionally, the magistrate determined, that “even though plaintiff did not assert a claim for constructive discharge, the evidence does not support such a claim.” Magistrate’s decision, page 14. Accordingly, the magistrate recommended that judgment be entered in favor of defendant.

{¶ 6} In his first objection, plaintiff argues that the magistrate erred by finding that the statement made by Hamlin was an expression of opinion, not verifiable, entitled to a qualified privilege, and not made with actual malice. Hamlin’s statement to OSU-M faculty that plaintiff’s actions were “unethical and against the university” forms the basis for the claim of defamation.

{¶ 7} Upon review, the court agrees with the magistrate’s conclusion. Hamlin’s statement was made during a faculty meeting called by Dean Evelyn Freeman. After Dean Freeman’s preliminary remarks, she opened the meeting to comments and

¹ On March 2, 2011, the court granted defendant’s motion for summary judgment as to all claims of defamation with the exception of the comments made by Hamlin during the April 17, 2006 faculty meeting. The court denied summary judgment regarding plaintiff’s claim for intentional infliction of emotional distress.

questions from the faculty. Although Hamlin's statement implies firsthand knowledge of the situation, the meaning of the statement is not readily ascertainable and is too general in nature to be verified. Additionally, Hamlin's statement is subject to a qualified privilege and was made in good faith. Plaintiff's first objection is **OVERRULED**.

{¶ 8} In his second objection, plaintiff argues that the magistrate erred by concluding that Hamlin and other OSU-M faculty members' conduct did not amount to intentional infliction of emotional distress. However, upon review, the court is unable to conclude that the conduct of OSU-M faculty members, including Hamlin, constituted intentional infliction of emotional distress. Plaintiff's second objection is **OVERRULED**.

{¶ 9} In his third objection, plaintiff argues that the magistrate erred by finding that he was not constructively discharged. The magistrate noted that "even though plaintiff did not assert a claim for constructive discharge, the evidence does not support such a claim." Magistrate's decision, page 14.

{¶ 10} Constructive discharge occurs when an employer, with discriminatory purpose, makes working conditions "so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign." *Kocsis v. Multi-Care Mgt., Inc.*, 97 F.3d 876, 882 (6th Cir.1996) quoting *Easter v. Jeep Corp.*, 750 F.2d 520, 522-23 (6th Cir.1984). "Constructive discharge from employment is not itself a cause of action. First there must exist an underlying cause of action for employment discrimination." *Starks v. New Par*, 6th Cir. No. 98-1300, 1999 U.S. App. LEXIS 9145 (May 11, 1999); see also *Fernandez v. City of Pataskala*, S.D.Ohio No. 2:05-CV-75, 2006 U.S. Dist. LEXIS 82136 (Nov. 9, 2006) ("constructive discharge is not itself a cause of action, but rather a means of proving the element of an adverse employment action where the employee resigns instead of being fired.") "The test for determining whether an employee was constructively discharged is whether the employer's actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign." *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 1996-Ohio-265, paragraph four of the syllabus.

{¶ 11} Constructive discharge is unavailable for three reasons. First, plaintiff did not allege constructive discharge. Second, constructive discharge is not available without an underlying cognizable claim. Third, the evidence does not support a finding that plaintiff's working conditions were so intolerable that a reasonable person would have felt compelled to resign. Therefore, the magistrate's decision shall be modified consistent with this decision. Plaintiff's third objection is **OVERRULED**.

{¶ 12} Plaintiff's fourth objection "incorporates and re-asserts here all previous arguments and objections made during this case, including those based on statute of limitations and immunity granted to the state employees." The court notes that plaintiff objects to matters that were not before the magistrate. Accordingly, plaintiff's fourth objection is **OVERRULED**.

{¶ 13} Upon review of the record, the magistrate's decision and the objections, the court finds that the magistrate has properly determined the factual issues and appropriately applied the law, with the exception noted above. Therefore, the objections are **OVERRULED** and, with the exception noted above, the court adopts the magistrate's decision and recommendation as its own, including findings of fact and conclusions of law contained therein. 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.

PATRICK M. MCGRATH
Judge

cc:

Case No. 2009-06575

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JUDGMENT ENTRY

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Filed September 19, 2013
To S.C. Reporter April 17, 2015