



Court of Claims of Ohio

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BRENDA SAEED

Plaintiff

v.

OHIO DEPARTMENT OF YOUTH SERVICES

Defendant

Case No. 2011-04193

Magistrate Anderson M. Renick

DECISION OF THE MAGISTRATE

{¶ 1} Plaintiff brought this action alleging gender discrimination in violation of R.C. 4112.02(A) and retaliation. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} Plaintiff began her employment with defendant, the Ohio Department of Youth Services (DYS) in June 1986, when she was hired by Cuyahoga Hills Junior Correctional Facility (CHJCF). In January 2008, plaintiff was working as an operations manager at CHJCF when she applied for the newly created position of unit manager administrator (UMA). Another CHJCF operations manager, Larry Goodman, also applied for the UMA position. Plaintiff and Goodman completed the application process, which included both a written evaluation and an oral interview by a selection panel of three CHJCF administrators. Plaintiff subsequently learned that Goodman had received the promotion and, on March 28, 2008, she filed a charge of gender discrimination with the Ohio Civil Rights Commission (OCRC). (Plaintiff's Exhibit 35.)

{¶ 3} On June 18, 2008, plaintiff responded to an incident involving an unruly youth who was placed in handcuffs. The incident was reviewed by Sean Tuggle, an operations administrator, who concluded that defendant's employees had acted

properly. Kathryn Needham, CHJCF'S superintendent, reviewed Tuggle's report and determined that further investigation was warranted. On August 29, 2008, plaintiff received a verbal reprimand as a result of the incident.

{¶ 4} On October 3, 2008, a series of disturbances broke out among youths at CHJCF. At some point, several youths were handcuffed together and Goodman directed that they be escorted to a sally port. The next day, another disturbance occurred and plaintiff decided to place a number of the youths who were involved in a sally port for their safety. The second group of youths was released from the sally port on or about October 6, 2008. As a result of an anonymous letter that was sent to defendant's central office, an investigation of the incidents was conducted. Needham testified that she and several other staff members, including plaintiff, Tuggle, and Goodman were involved with managing the disturbances. On June 11, 2009, the State Personnel Board of Review (SPBR) issued a notification that plaintiff was being suspended for two days as a result of the sally port incident. (Plaintiff's Exhibit 43.) The stated reasons for the suspension included plaintiff's failure to provide for the youths' basic needs during their extended confinement in the sally port.

{¶ 5} According to Needham, both plaintiff and operations manager Avery Johnson were suspended as a result of their conduct during the sally port incident. Needham testified that she was not involved in either the sally port investigation or the decision to suspend plaintiff inasmuch as the investigation was conducted by defendant's chief inspector's office and Needham herself was also a subject of the investigation. Plaintiff testified that she appealed the suspension to the SPBR, but it was determined that the appeal was not timely submitted.

{¶ 6} Approximately three months later, operations manager Patrice Hudson initiated a complaint that plaintiff had been using defendant's computer system for personal matters during working hours. According to Hudson, she was working with plaintiff in the operations office when plaintiff forgot to log off the system before Hudson

began using the computer to work on a document. Hudson testified that she saw plaintiff using a “jump drive” and plaintiff stated that the document she was working on was school related. Hudson reported the incident to Deputy Superintendent Mark Dobrzynski, who notified Jennifer Fears, defendant’s chief inspector. Fears assigned investigator Jack Vicencio to conduct a preliminary interview with Hudson. Based upon information gathered during the interview, Vicencio was instructed to investigate the incident. Vicencio testified that his investigation proceeded concurrently with an investigation by the Ohio State Highway Patrol (OSHP). Vicencio testified that a search warrant was obtained which authorized the collection of three computers containing data related to the investigation. Vicencio explained that his investigation included witness interviews and a review of computer data obtained from defendant’s data security analyst which showed documents and websites that plaintiff had accessed.

{¶ 7} Dobrzynski testified that he was aware of Vicencio’s investigation and that two computers from other offices were moved to replace the three computers which had been removed from the operations office. Dobrzynski further testified that he met with Tuggle to ensure that plaintiff would be able to perform her job duties while her computer access was restricted.

{¶ 8} Plaintiff testified that she became “sick from harassment” when she learned that her computer use was being investigated and that she was physically unable to comply with OSHP’s request to interview her due to a “breakdown.” According to plaintiff, her computer access was first restricted on December 3, 2009, and December 7, 2009 was the last day she worked at CHJCF before she began a medical leave of absence. On January 29, 2010, Ohio Department of Administrative Services sent plaintiff a letter informing her that it intended to deny her application for disability leave benefits because the application was untimely. Plaintiff was informed that she could submit a letter explaining any extenuating circumstances for the late filing and that her application would be denied if she did not complete the investigatory interview.

(Defendant's Exhibit D.) On February 17, 2010, plaintiff was interviewed by Vicencio regarding her use of CHJCF computers.

{¶ 9} Vicencio testified that as a result of his investigation, he was able to substantiate that while plaintiff was on duty she used defendant's computers to access online classes and perform class assignments. According to Vicencio, CHJCF staff witnessed, and plaintiff admitted, that she conveyed a personal "USB drive" into the institution; an item which is considered to be contraband. Vicencio testified that the evidence he collected showed that on one occasion plaintiff left CHJCF during an overtime shift without authorization. Vicencio completed his investigation on March 3, 2010. Fears signed the investigation report on March 5, 2010.

{¶ 10} On March 8, 2010, plaintiff's physician provided her with a release to return to full-time work without any restrictions. (Defendant's Exhibit E.) On the same date, plaintiff submitted a letter of resignation to Needham. Needham testified that plaintiff was not disciplined for improper use of CHJCF computers because she resigned soon after the investigation report was released.

STATUTE OF LIMITATIONS

{¶ 11} Defendant argues that plaintiff's claims are barred by the statute of limitations found in R.C. 2743.16(A). Plaintiff argues that the savings statute, found in R.C. 2305.19(A) renders her claims timely.

{¶ 12} R.C. 2743.16(A) states, in relevant part:

{¶ 13} "[C]ivil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties."

{¶ 14} R.C. 2305.19(A) states, in relevant part:

{¶ 15} “In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of the reversal of the judgment or the plaintiff’s failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.”

{¶ 16} The evidence shows that plaintiff filed a charge of gender discrimination with the OCRC and subsequently received a right to sue letter which gave her 90 days, until December 9, 2010, to file her action against defendant. Plaintiff filed an action against defendant in the Cuyahoga County Court of Common Pleas on December 8, 2010, which was voluntarily dismissed without prejudice on February 4, 2011. Plaintiff filed this case on March 21, 2011, within one year after the voluntary dismissal. Therefore, this case was timely filed.

GENDER DISCRIMINATION

{¶ 17} Plaintiff’s discrimination claim is based upon defendant’s decision to select Larry Goodman for the UMA position.

{¶ 18} R.C. 4112.02 states, in part: “It shall be an unlawful discriminatory practice: (A) For any employer, because of the * * * sex * * * of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.” Case law interpreting Title VII of the Civil Rights Act of 1964 is also applicable to R.C. Chapter 4112. *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm.*, 66 Ohio St.2d 192, 196 (1981).

{¶ 19} “Courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult, and [t]here will seldom be ‘eyewitness’ testimony as to the employer’s mental processes. * * * Thus, when analyzing [d]iscrimination claims that rely primarily upon circumstantial evidence, Ohio

courts employ the framework articulated in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792.” *Ohio Univ. v. Ohio Civ. Rights Commn.*, 175 Ohio App.3d 414, 2008-Ohio-1034, (4th Dist.) at ¶ 67 (internal citations omitted).

{¶ 20} Under *McDonnell Douglas*, a plaintiff establishes a prima facie case of race discrimination by establishing that she: 1) was a member of a protected class; 2) suffered an adverse employment action; 3) was qualified for the position held; and 4) that comparable, nonprotected persons were treated more favorably. *Id.* at 802. If plaintiff establishes a prima facie case, the burden of production shifts to defendant to “articulate some legitimate, nondiscriminatory reason for [its action].” *Id.* If defendant succeeds in doing so, then the burden shifts back to plaintiff to demonstrate that defendant’s proffered reason was not the true reason for the employment decision. *Id.* at 804.

{¶ 21} It is undisputed that plaintiff was a member of a protected class and that she was qualified to perform the position she sought. Generally, the denial of a promotion is an adverse employment action. See *Tepper v. Potter*, 505 F.3d 508, 515 (6th Cir.2007); *Walker v. Mortham*, 158 F.3d 1177, 1187 (11th Cir.1998). Although defendant contends that “[b]ecause the job in question was newly created, Goodman and plaintiff were not and could not be similarly situated employees,” the court finds that for the purpose of establishing a prima facie claim of gender discrimination, Goodman was a comparable, nonprotected person inasmuch as he was a qualified CHJCF operations manager at the time of the promotion. Accordingly, plaintiff has established a prima facie case of gender discrimination.

{¶ 22} Defendant maintains that its decision to select Goodman was based upon legitimate non-discriminatory reasons. Plaintiff argues that she was the “most qualified” and “highest scoring candidate.” Specifically, plaintiff emphasized that she received a score of 10 out of a possible 10 points on a questionnaire; Goodman scored 7.5 out of 10, and his interview responses were not fully scored. However, Needham explained

that the scoring system that was utilized as part of the interview process was merely a “guideline” for the panel members. According to Needham, the best score did not necessarily indicate the best candidate. Needham testified that Goodman impressed the panel during his interview and during their post-interview discussion, the panel unanimously agreed that Goodman was the “best-fit” for the UMA position.

{¶ 23} Dobrzynski, who served on the promotion panel with Needham and Mary Moore, testified that both plaintiff and Goodman answered questions well, but that plaintiff seemed very nervous and “broke out in blotches” during the interview. According to Dobrzynski, plaintiff’s demeanor during the interview was a significant factor in his consideration of the candidates. Dobrzynski testified credibly that he was also impressed with Goodman’s detailed vision for the UMA position, his law enforcement experience, and his participation in defendant’s executive leadership program. Dobrzynski further testified that he was the only male on the selection panel and that the panel chose Goodman for the position based upon Goodman’s qualifications rather than his gender. Based upon the evidence presented, the court finds that defendant established legitimate, nondiscriminatory reasons for not selecting plaintiff for the UMA position.

{¶ 24} The court must next determine whether the legitimate, nondiscriminatory reasons offered by defendant were a mere pretext for discrimination. *McDonnell Douglas, supra*; *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981). The court must determine either: “(1) that the proffered reason had no basis in fact, (2) that the proffered reason did not actually motivate the [job denial], or (3) that the proffered reason was insufficient to motivate the [job denial].” *Owens v. Boulevard Motel Corp.*, 10th Dist. No. 97APE12-1728 (Nov. 5, 1998), quoting *Frantz v. Beechmont Pet. Hosp.*, 117 Ohio App.3d 351, 359 (1st Dist.1996).

{¶ 25} As a general rule, the court will not substitute its judgment for that of the employer and will not second-guess the business judgments of employers regarding personnel decisions. *Wissler v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No.

09AP-569, 2010-Ohio-3432, ¶ 27; *Dodson v. Wright State Univ.*, 91 Ohio Misc.2d 57 (Ct. of Cl.1997); *Washington v. Central State Univ.*, 92 Ohio Misc.2d 26 (Ct. of Cl.1998). Whether the best-qualified applicant was selected and whether the personnel decisions were correct are not the issues before this court. Rather, the court must determine whether defendant failed to hire plaintiff due to gender discrimination.

{¶ 26} Upon review, the court finds that the totality of the evidence demonstrates that defendant's proffered reasons were based in fact, that they were not a pretext, and that they were sufficient to justify selecting Goodman for the UMA position. Both Needham and Dobrzynski testified credibly that they believed Goodman was the best fit for the UMA position based upon factors including his work experience and interview performance. Needham's testimony that the interview scoring system was used as a guide rather than a decision making process was also credible. In the final analysis, plaintiff failed to prove by a preponderance of the evidence that she was treated less favorably as a result of her gender or that the decision not to select her for the UMA position was motivated by gender. Therefore, it is recommended that judgment be granted in favor of defendant on plaintiff's gender discrimination claim.

RETALIATION

{¶ 27} Plaintiff asserts that she engaged in a protected activity by filing a charge of discrimination with OCRC on March 28, 2008, and that defendant began to retaliate against her thereafter. Plaintiff contends that adverse actions by defendant constituted retaliation under R.C. 4112.02(I), which provides that it is unlawful "[f]or any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code."

{¶ 28} In order to establish a prima facie case of retaliation under R.C. 4112.02(I), plaintiff is required to prove that: “(1) plaintiff engaged in a protected activity; (2) the employer knew of plaintiff’s participation in the protected activity; (3) the employer engaged in retaliatory conduct; and (4) a causal link exists between the protected activity and the adverse action.” *Motley v. Ohio Civ. Rights Comm.*, 10th Dist. No. 07AP-923, 2008-Ohio-2306, ¶ 11, quoting *Zacchaeus v. Mt. Carmel Health Sys.*, 10th Dist. No. 01AP-683, 2002-Ohio-444. (Additional citations omitted.)

{¶ 29} The first element of a prima facie case of retaliation is that plaintiff must have engaged in a “protected activity.” Generally, “[a]nyone who participates in bringing a claim of unlawful discriminatory practice is engaging in a protected activity.” *HLS Bonding v. Ohio Civ. Rights Commn.*, 10th Dist. No. 07AP-1071, 2008-Ohio-4107, ¶ 21, citing *Thatcher v. Goodwill Industries of Akron*, 117 Ohio App.3d 525, 535 (1997). Accordingly, there is no question that plaintiff engaged in a protected activity by filing a charge of gender discrimination with OCRC.

{¶ 30} With regard to the alleged retaliatory conduct, the court notes that the discipline resulting from the handcuffing incident was a verbal reprimand issued on August 29, 2008. However, informal discipline, such as verbal reprimands, cannot support claims of retaliation. *Handshoe v. Mercy Medical Center*, 34 Fed.Appx. 441, 447 (6th Cir.2002); *Allen v. Michigan Dept. of Corrections*, 165 F.3d 405 (6th Cir.1999); *Reid v. Madison County, Tenn.*, 1999 U.S. App. LEXIS 6274, (6th Cir.1999) (finding that a verbal reprimand is not an adverse employment action). Furthermore, the decision to restrict plaintiff’s computer access, beginning December 3, 2009, was the result of the joint investigation by defendant’s chief inspector’s office and the OSHP. Plaintiff began a medical leave of absence a few days after the restriction was implemented. Inasmuch as plaintiff resigned soon after she learned of the outcome of the investigation, no discipline was imposed as a result of Vicencio’s investigation. Furthermore, as stated above, Dobrzynski testified that he and Tuggle determined that plaintiff would be able to perform her job duties while her computer access was restricted. Inasmuch as the

evidence showed that plaintiff was able to perform the essential duties of her position and that she was not disciplined as a result of the investigation, the court finds that the computer restriction did not detrimentally alter the terms or conditions of her employment. Thus, the court finds that the restriction was not an adverse employment action.

{¶ 31} Plaintiff's retaliation claim also stems from defendant's decision to suspend her for two days, effective June 17, 2009, as a result of the sally port incident. However, the court finds that plaintiff has failed to prove any causal link between the alleged adverse employment actions and the filing of her OCRC complaint. To determine whether a causal connection exists, courts have considered the amount of time between the protected activity and the adverse employment action. An employee must show that "the alleged retaliatory action followed [the employee's] participation in the protected activity sufficiently close in time to warrant an inference of retaliatory motivation." *Neal v. Hamilton County*, 87 Ohio App.3d 670, 678 (1993). Plaintiff's OCRC charge was filed on March 28, 2008. Plaintiff's two-day suspension and restricted computer access began on June 17, 2009 and December 3, 2009, respectively. The court finds that the amount of time that passed between the protected conduct and the alleged adverse employment actions precludes the inference of a retaliatory motive on the part of defendant. *See Reeves v. Digital Equipment Corp.*, 710 F.Supp. 675, 677 (N.D.Ohio 1989) (finding that as a matter of law, three months is too long to support an inference of retaliation).

{¶ 32} With regard to plaintiff's allegations concerning constructive discharge, "[c]onstructive 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." *Fernandez v. City of Pataskala*, S.D.Ohio No. 2:05-CV-75, 2006 U.S. Dist. LEXIS 82136 (Nov. 9, 2006). "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. “In applying this test, courts seek to determine whether the cumulative effect of the employer’s actions would make a reasonable person believe that termination was imminent. They recognize that there is no sound reason to compel an employee to struggle with the inevitable simply to attain the ‘discharge’ label.” *Id.* at 589. Conversely, “[a]n employee has an obligation not to jump to conclusions and assume that every conflict with an employer evidences a hidden intent by the employer to terminate the employment relationship.” *Simpson v. Ohio Reformatory for Women*, 10th Dist. No. 02AP-588, 2003-Ohio-988, ¶ 25, citing *Jackson v. Champaign Natl. Bank & Trust Co.*, 10th Dist. No. 00AP-170 (Sept. 26, 2000).

{¶ 33} To the extent that plaintiff alleges that she experienced emotional distress as a result of perceived retaliation by defendant’s employees, for the reasons stated above, the court finds that the circumstances described by her were not objectively threatening or so egregious or pervasive as to render her working conditions intolerable. Specifically, plaintiff testified that she suffered an emotional breakdown when she learned her computer use was being investigated and she contends that her treating psychologist, David Falk, Ph.D., advised her that her working conditions were causing her severe depression. However, Dr. Falk acknowledged that his counseling notes show that plaintiff stated that she was planning to leave her employment with defendant knowing that she had not liked working for defendant for years.

{¶ 34} Although plaintiff testified that she was unable to adequately perform her duties while her computer access was restricted, Dobrzynski testified that plaintiff had sufficient resources to perform the essential functions of her job. Furthermore, “even if one’s job becomes significantly more difficult” as a result of an employer’s action, that fact alone is insufficient as a matter of law constitute an adverse employment action. *Broska v. Henderson*, 6th Cir. No. 01-4013, 2003 U.S. App. LEXIS 13450 (June 30, 2003). “Changes in employment conditions that result merely in inconvenience or an

alteration of job responsibilities are not disruptive enough to constitute an adverse employment action.” (Citations omitted.) *Mowery v. City of Columbus*, 10th Dist. No. 05AP-266, 2006-Ohio1153, ¶ 22.

{¶ 35} The incidents related to both the sally port and plaintiff’s computer use were thoroughly investigated by defendant’s chief inspector and plaintiff had the opportunity to file a grievance for any discipline she received. Indeed, other employees were disciplined as a result of the sally port incident and plaintiff was never disciplined regarding her use of defendant’s computers. Furthermore, the evidence does not show that plaintiff was in imminent danger of being terminated. Based upon the totality of the evidence, the court concludes that plaintiff voluntarily resigned her position and that she was not constructively discharged.

{¶ 36} Even if plaintiff were to prove a prima facie case of retaliation, she could not prevail if defendant had legitimate, nondiscriminatory reasons for the adverse employment actions. *McDonnell Douglas, supra*. With regard to the sally port incident, the evidence established that the chief inspector’s investigation resulted from an anonymous letter that was sent to defendant’s director. Based upon the investigation, several CHJCF employees were suspended, including plaintiff, Johnson, and Needham. Similarly, the evidence showed that plaintiff’s computer access was not restricted as a result of discriminatory animus. Hudson testified that at the time she reported plaintiff’s misuse of defendant’s computer, she had been upset with plaintiff regarding a work assignment when plaintiff “left [Hudson] alone.” As an operations manager, Hudson had a duty to report improper use of CHJCF computers and there is no question that the chief inspector’s office had the discretion to investigate the allegation. In short, the evidence does not support plaintiff’s assertion that she was singled out for retaliation as a result of her OCRC complaint. The court concludes that defendant has brought forth legitimate, nondiscriminatory reasons for the employment actions at issue and that

plaintiff has failed to demonstrate that defendant's stated reason for those actions was a pretext for retaliation.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

{¶ 37} Finally, plaintiff asserts intentional infliction of emotional distress predicated on defendant's allegedly extreme and outrageous conduct. According to plaintiff, Dr. Falk's testimony shows that she suffered severe emotional distress which ultimately resulted in her constructive discharge. Although plaintiff testified that her emotional breakdown resulted from learning that she was under investigation for improper computer use, Dr. Falk testified that he did not recall plaintiff relating either that had her computer access had been restricted or that she was being investigated for improper use of CHJCF computers. (Plaintiff's Exhibit 86, p. 30.) Furthermore, termination of employment, even if discriminatory, in and of itself cannot rise to the level of extreme and outrageous conduct required to prove intentional infliction of emotional distress. *Godfredson v. Hess & Clark*, 173 F.3d 365 (6th Cir.1999). The court finds that conduct at issue in this case falls far short of the extreme and outrageous conduct required to support a claim for intentional infliction of emotional distress. *Mowery v. Columbus*, 10th Dist. No. 05AP-266, 2006-Ohio-1153, ¶ 49; *Yeager v. Local Union 20*, 6 Ohio St.3d 369 (1983).

{¶ 38} For the foregoing reasons, the court finds that plaintiff has failed to prove her claims by a preponderance of the evidence. Therefore, judgment is recommended in favor of defendant.

{¶ 39} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a*

finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

ANDERSON M. RENICK
Magistrate

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