[Cite as *Sanderson v. Kent State Univ.*, 2014-Ohio-5930.]

Court of Claims of Ohio
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DOUG SANDERSON

Plaintiff

v.

KENT STATE UNIVERSITY

Defendant

Case No. 2012-07005

Magistrate Anderson M. Renick

DECISION OF THE MAGISTRATE

{¶1} Plaintiff brings this action alleging employment discrimination on the basis of age in violation of R.C. 4112.02, wrongful termination in violation of public policy, and intentional infliction of emotional distress.

{¶2} Plaintiff is an accomplished artist and professor of art who has taught a variety of courses, including painting and drawing. Plaintiff has been employed by numerous colleges and institutes of art. He was employed by defendant Kent State University (KSU) as an assistant adjunct professor in the School of Art from 1989 to 1996. In August 1999, plaintiff returned to KSU when he accepted an offer as a part-time temporary assistant professor. Beginning in August 2000, plaintiff was responsible for teaching "2D Composition," an introductory course that developed students' ability to present concepts and events through visual media.

{¶3} In 2010, KSU hired Mark Schatz as the foundation program coordinator in charge of managing the teaching staff at the School of Art. Schatz was hired to update the foundation program and organize the introductory core courses into a coherent program. After observing the existing state of the program, Schatz began to integrate emerging media and new technology into the program, such as implementing an on-line component which allowed students to document and share their work. For example,

Schatz directed professors to require students to create profiles and use a photo-studio to record and share their artwork. In December 2010, Schatz expressed his desire to synchronize the program courses and he informed plaintiff and another professor, Al Moss, that curriculum changes would "mean some new projects" for the professors. Specifically, Schatz related that each professor "did our own thing this semester" and that "[n]ext semester we'll do the opposite and teach the same exercises, same assignments, and same calendar, as much as possible." (Plaintiff's Exhibit 15.) Plaintiff responded that he was "prepping his spring classes without revision."

{¶4} In 2011, Schatz became more explicit in directing professors to emphasize the use of technology in program courses. Sometime during the spring in 2011, Schatz stated that he wanted to bring "new people" into the program. Schatz testified that he became frustrated with plaintiff's failure to comply with his efforts to make changes to the program. Schatz informed Christine Havice, Director of KSU's School of Art, that he was "done" with plaintiff. In April 2011, Schatz had become skeptical whether plaintiff had any intention of following his direction and he informed plaintiff that he would not recommend having plaintiff's contract with KSU renewed. Plaintiff testified that he believed he was being fired. Soon thereafter, Schatz met with plaintiff and Havice. Contrary to Schatz's recommendation, Havice decided to renew plaintiff's contract for the fall 2011 semester with the understanding that plaintiff would attempt to meet Schatz's expectations for program changes.

{¶5} During the fall of 2011, Schatz urged the professors to introduce changes to the program 2D composition curriculum including student use of a photo studio, a social network, and a blog using the "NING" network. Schatz's expectations for the curriculum were expressed in an August 16, 2011 email to plaintiff. (Defendant's Exhibit C). On August 30, 2011, Schatz responded to an email from plaintiff wherein Schatz clarified the distinction between a professor's freedom to adjust his class schedule and "a disregard for the priorities and format we have set out for this

semester." (Defendant's Exhibit D.) Schatz provided additional detailed expectations throughout the fall 2011 semester. (Defendant's Exhibits E, G, and J.) Schatz testified that plaintiff did not comply with his direction regarding curriculum changes. Plaintiff's contract was not renewed following the spring 2012 semester.

WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

{¶6} As an initial matter, there is no dispute that plaintiff was a contract employee, rather than an at-will employee. "Ohio courts have never recognized a claim for the wrongful termination of a contract employee in violation of public policy. A claim of wrongful termination in violation of public policy has only been permitted where the employee was an employee at will." *Schutte v. Danis Cos.*, 141 Ohio App. 3d 824, 832 (2nd Dist. 2001), citing *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St. 3d 228 (1990). Accordingly, plaintiff cannot prevail on his public-policy claim.

AGE DISCRIMINATION

{¶7} Plaintiff alleges that defendant's decision not to renew his employment contract was based on age discrimination.

{¶8} R.C. 4112.14 states, in part:

{¶9} "(A) No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee.

{¶10} "(B) Any person aged forty or older who is discriminated against in any job opening or discharged without just cause by an employer in violation of division (A) of this section may institute a civil action against the employer in a court of competent jurisdiction."

{¶11} "To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent" and may establish such intent through either direct or indirect methods of proof. *Mittler v. Ohiohealth Corp.*, 10 Dist. Franklin No. 12AP-119, 2013-Ohio-1634, ¶ 19, quoting *Ricker v. John Deere Ins. Co.*, 133 Ohio App.3d 759, 766 (10th Dist.1998); *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 583, 1996-Ohio-265 (1996). Absent direct evidence of age discrimination, a plaintiff may establish discriminatory intent indirectly pursuant to the analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146 (1983).

DIRECT EVIDENCE

{¶12} Plaintiff alleges that statements made by Schatz establish that defendant's failure to renew his employment contract was a result of defendant's desire to employ younger professors. As noted above, plaintiff testified that in the spring of 2011, Schatz stated he wanted "to bring in new people" to the foundations program. Plaintiff also presented the deposition of Paul O'Keefe, wherein O'Keefe responds affirmatively to the question "You said [Schatz] wanted to bring in younger people?" (Plaintiff's Exhibit 30, page 16.)

{¶13} In order for a statement to be direct evidence of an unlawful employment decision, plaintiff must show a "nexus between the improper motive and the decision making process or personnel. Accordingly, courts consider (1) whether the comments were made by a decision maker; (2) whether the comments were related to the decision making process; (3) whether they were more than vague, isolated, or ambiguous; and (4) whether they were proximate in time to the act of alleged discrimination." *Birch v. Cuyahoga Cty. Probate Court*, 173 Ohio App.3d 696, 2007-Ohio-6189, ¶ 23 (8th Dist.). Where allegedly discriminatory comments are merely "stray remarks," unrelated to the decision-making process, such comments are not actionable. *See Bogdas v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-466, 2009-Ohio-6327, citing *Brewer v.*

Cleveland City School Bd. of Edn., 122 Ohio App.3d 378, 384 (8th Dist.1997); *see also Smith v. Firestone Tire and Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir.1989). "'[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, will constitute direct evidence of discrimination.'" *Dautartas v. Abbott Labs.*, 10th Dist. Franklin No. 11AP-706, 2012-Ohio-1709, ¶ 35, quoting *Southworth v. N. Trust Sec., Inc.*, 195 Ohio App.3d 357, 2011-Ohio-3467, ¶ 4 (8th Dist.).

{¶14} Although plaintiff asserts that O'Keefe's response establishes that Schatz wanted to replace older professors with young employees, O'Keefe clarified his testimony in his next answer:

{¶15} "Q. You said he wanted to bring in younger people?

{¶16} "A. Well, not younger – he didn't say he wanted to get rid of Doug to me, but he did say repeatedly Doug is not working." *Id*., page 17.

{¶17} Schatz testified adamantly that he would never state that he would want to bring in younger people. Furthermore, in the context of Schatz's direction for updating the foundation program, a reference to "new people" is consistent with his vision for using new teaching methods that involved current technology, rather than an indication of discriminatory animus. The court finds that Schatz's comments were isolated remarks that were not directly related to the decision not to renew plaintiff's contract. Inasmuch as Schatz's comments were made in spring 2011, the court finds that they were remote in time to the alleged discrimination. Accordingly, the court finds that Schatz's remarks do not constitute direct evidence of discrimination.

INDIRECT EVIDENCE

{¶18} To establish a prima facie case, plaintiff must demonstrate that he: "(1) was a member of the statutorily protected class, (2) was discharged, (3) was qualified for the position, and (4) was replaced by, or the discharge permitted the retention of, a

person of substantially younger age." *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, paragraph one of the syllabus.

{¶19} KSU does not dispute that plaintiff met his initial burden of establishing a prima facie case of age discrimination. Therefore, the burden of production shifts to the KSU to articulate some legitimate, nondiscriminatory reason for discharging the employee. *Caldwell v. Ohio State Univ.*, 10th Dist. No. 01AP-997, 2002-Ohio-2393, ¶ 61, quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253. The employer meets its burden of production by submitting admissible evidence that "'taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action,'" and in doing so rebuts the presumption of discrimination that the prima facie case establishes. *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, at ¶ 12, quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993).

{¶20} As discussed above, Schatz provided detailed testimony concerning his growing frustration with plaintiff's failure to comply with his direction to adopt changes to the 2D composition curriculum. According to Schatz, plaintiff's students did not enroll in the NING online social network. Schatz testified that he determined plaintiff's students did not post digital portfolios of their work; an expectation that was made clear to plaintiff. Schatz explained that blogging had become a central focus of the foundations program and plaintiff's students were not posting their art projects.

{¶21} Havice corroborated Schatz's testimony that his expectations for changes to the 2D composition curriculum were clearly communicated to plaintiff and that issues regarding plaintiff's failure to meet those expectations were addressed on several occasions. Havice testified that by late 2011, the NING network and the digital portfolio had become requirements for the 2D composition curriculum and that she became aware that plaintiff's students were not participating in those activities.

{¶22} Based upon the testimony and evidence presented, the court is persuaded that Schatz and Havice were focused on both improving utilization of technology by

students in the foundation program and achieving consistency among the different sections in the 2D composition program. The court finds that defendant established that plaintiff's failure to comply with Schatz's direction to update the 2D curriculum was a legitimate, nondiscriminatory reason for not renewing plaintiff's employment contract.

{¶23} Inasmuch as KSU has met its burden of production, plaintiff must prove by a preponderance of the evidence that the employer's legitimate, nondiscriminatory reason was merely a pretext for unlawful discrimination. *Barker* at 148. "'The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Ohio Univ. v. Ohio Civ. Rights Comm.*, 175 Ohio App.3d 414, 2008-Ohio-1034, ¶ 67, (4th Dist.), quoting *Burdine* at 253. "'[A] reason cannot be proved to be "a pretext for discrimination" unless'" plaintiff demonstrates "'both that the reason was false, and that discrimination was the real reason.'" *Williams* at ¶ 14, quoting *St. Mary's Honor* at 515.

{¶24} Plaintiff argues that KSU's reason for its employment decision was a pretext for discrimination inasmuch as KSU did not implement a photo studio, blog, or social network into the 2D curriculum until after Schatz had recommended that both plaintiff and Moss should not have their contracts renewed. Specifically, plaintiff contends that Schatz made the decision to terminate the employment of both plaintiff and Moss during the spring 2011 semester and that the social network, photo studio, and blog components of the 2D composition curriculum were not requirements at that time.

{¶25} In order to establish that defendant's reason was pretext, plaintiff must prove either "'(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge.'" *Sweet v. Abbott Foods, Inc.*, 10th Dist. No. 04AP-1145, 2005-Ohio-6880, ¶ 34, quoting *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d

1078, 1084 (6th Cir.1994). *Knepper v. Ohio State Univ.*, 10th Dist. No. 10AP-1155, 2011-Ohio-6054, ¶ 12.

{¶26} Although the evidence showed that the curriculum changes Schatz attempted to implement were not required in spring 2011, it is clear that plaintiff had expressed an unwillingness to incorporate Schatz's requests into his class curriculum by that time. As noted above, in December 2010, Schatz urged plaintiff to conform his course schedule by "teaching the same exercises, same assignments, and same calendar, as much as possible" and incorporating certain "core principles." However, plaintiff replied curtly that while "[e]very new idea has its moment. I am prepping my Spring classes without revision." (Plaintiff's Exhibit 15.) Furthermore, the decision not to renew plaintiff's contract was made by Havice in May 2012, after plaintiff had repeatedly failed to adequately adopt the foundation's program changes.

{¶27} Plaintiff argues that the court should apply a "cat's paw" theory of causation based upon plaintiff's assertion that Havice was duped into acting as a conduit for Schatz's discriminatory animus. "An employer may be held liable under a cat's paw theory of liability "'[w]hen an adverse * * * decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias.'" *Nebozuk v. Abercrombie & Fitch Co. et al.*, 10th Dist. Franklin No. 13AP-591, 2014-Ohio-1600, ¶ 45, quoting *Bishop v. Ohio Dept. of Rehab. & Corr.*, 529 Fed. Appx. 685, (6th Cir.2013); *Arendale v. Memphis*, 519 F.3d 587, 604 (6th Cir.2008), fn. 13.

{¶28} The evidence shows that Havice understood and supported Schatz's vision for implementing curriculum changes. However, Havice was not duped into acting as a conduit for discriminatory animus. Indeed, Havice declined to adopt Schatz's recommendation not to renew plaintiff's contract for the fall 2011 semester. Inasmuch as the court finds that Havice independently determined that plaintiff's performance

warranted the decision not to renew his employment contract, plaintiff has failed to establish causation under a cat's paw theory. *See Nebozuk* at ¶ 49.

{¶29} Therefore, plaintiff failed to prove that KSU's legitimate, nondiscriminatory reason was insufficient to motivate discharge. Plaintiff also failed to present evidence that discrimination was the "but for" cause for defendant's decision. *Nebozuk*, ¶ 46; *Dautartas v. Abbott Laboratories*, 10th Dist. No. 11AP-706, 2012-Ohio-1709, ¶ 31; *Coryell*, at ¶ 18. Consequently, plaintiff cannot establish that KSU's legitimate nondiscriminatory reason was pretext for discrimination based on age.

{¶30} In short, the court finds that plaintiff has failed to prove that KSU's decision not to renew his contract was motivated by his age.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

{¶31} To establish a claim for intentional infliction of emotional distress, plaintiff must show that defendant, through extreme and outrageous conduct, intentionally or recklessly caused him severe emotional distress. *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 374 (1983). Liability for intentional infliction of emotional distress "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id*. at 375.

{¶32} Even if plaintiff had prevailed on his discrimination claim, not every discriminatory act by an employer will be severe enough to impose liability for intentional infliction of emotional distress. *See Roush v. KFC Natl. Mgt. Co.*, 10 F.3d 392, 396-397 (C.A.6, 1993). The evidence presented by plaintiff fails to demonstrate conduct that was so extreme and outrageous to go beyond all bounds of human decency, as required by Ohio law.

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

{¶34} *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).*

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ANDERSON M. RENICK
Magistrate

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