

# Court of Claims of Ohio

The Ohio Judicial Center  
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WANYUN ZHONG, et al.

Plaintiffs

v.

UNIVERSITY OF TOLEDO

Defendant

Case No. 2013-00506

Magistrate Holly True Shaver

## DECISION OF THE MAGISTRATE

{¶1} Plaintiffs brought this action alleging claims for breach of contract, discrimination, intentional and negligent infliction of emotional distress, harassment, verbal assault, violation of civil rights, and loss of consortium as a result of the conduct of defendant's employee, Associate Professor Vijay Devabhaktuni. On March 13, 2014, an evidentiary hearing was conducted to determine whether Professor Devabhaktuni, is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86

{¶2} R.C. 2743.02(F) states, in part:

{¶3} "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims that has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action."

{¶4} R.C. 9.86 states, in part:

{¶5} “[N]o officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer’s or employee’s actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.”

{¶6} The issue whether an employee is entitled to immunity is a question of law. *Nease v. Medical College Hosp.*, 64 Ohio St.3d 396, 1992-Ohio-97, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992-Ohio-133. The question whether the employee acted outside the scope of his employment, or with malicious purpose, in bad faith, or in a wanton or reckless manner is one of fact. *Tschantz v. Ferguson*, 49 Ohio App.3d 9 (1989). Plaintiff bears the burden of proving that the state employee should be stripped of immunity. *Fisher v. University of Cincinnati Med. Ctr.*, 10th Dist. Franklin No. 98AP-142, 1998 Ohio App. LEXIS 3900 (Aug. 25, 1998). In the context of immunity, an employee’s wrongful conduct, even if it is unnecessary, unjustified, excessive or improper, does not automatically subject the employee to personal liability unless the conduct is so divergent that it severs the employer-employee relationship. *Elliott v. Ohio Dept. of Rehab. & Corr.*, 92 Ohio App.3d 772, 775 (1994), citing *Thomas v. Ohio Dept. of Rehab. & Corr.*, 48 Ohio App.3d 86, 89 (1988).

{¶7} In 2012, plaintiff, Wanyun Zhong,<sup>1</sup> was enrolled as a student in a masters’ degree program at defendant’s university. Plaintiff is a native of China. Plaintiff’s claims arise out of events that occurred during her enrollment in a course titled “Computer Aided Modeling and Design of Electronic Circuits,” which is in the electrical engineering department and is offered to both masters and PhD students. Professor Devabhaktuni is a native of India and taught the course in question.

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<sup>1</sup>Plaintiff, Wanyun Zhong, is also known as Emily Zhong.

{¶8} Plaintiff testified about six specific instances where Professor Devabhaktuni's conduct made her feel harassed, humiliated, or frightened. The court will examine each instance separately.

{¶9} #1: Chinese student interpretation event

{¶10} The first incident occurred early in the class. According to plaintiff, Professor Devabhaktuni asked another Chinese student a question during class, and the student did not answer. Professor Devabhaktuni then asked plaintiff to translate the question into Chinese so that the student could understand. Plaintiff refused to translate the question and was offended that Professor Devabhaktuni would ask her to do so. Plaintiff testified that there were only three Chinese students in the class and that Professor Devabhaktuni repeatedly asked them to translate questions. On cross-examination, plaintiff admitted that Professor Devabhaktuni never asked that any questions be translated for her personally.

{¶11} #2: Mention of a gun

{¶12} The second incident occurred in the first class of the semester, on August 21, 2012. According to plaintiff, Professor Devabhaktuni asked another student, Simon Zhu, a question such as: "If I buy a gun and give it to you, what would happen?" Zhu then answered that nothing would happen. Professor Devabhaktuni then asked, "What if I gave a gun to a terrorist?" Although the answer was not clear, plaintiff testified that she was shocked and scared that Professor Devabhaktuni would talk about guns and terrorists in a computer class.

{¶13} #3: Having plaintiff work problem out in front of class

{¶14} The third incident occurred on September 4, 2012. Professor Devabhaktuni called on plaintiff to answer a question and she replied that she was not

prepared to answer it. Professor Devabhaktuni then demanded that plaintiff approach the front of the classroom to work out the problem on the board. According to plaintiff, Professor Devabhaktuni stated to her: "If you don't understand me, I will use a gun to shoot you."

**{¶15} #4: Incident in Professor Devabhaktuni's office**

**{¶16}** The fourth incident occurred after plaintiff and Zhu had tried to make an appointment to see Professor Devabhaktuni in his office to ask questions about the first homework assignment. Professor Devabhaktuni did not respond to Zhu's email requesting an appointment. Plaintiff and Zhu went to Professor Devabhaktuni's office on Monday, September 10, 2012. According to plaintiff, Zhu was talking to someone in the hallway while she went into Professor Devabhaktuni's office alone. When she began to ask him a question about the assignment, Professor Devabhaktuni refused to look at her homework, had a "bad attitude," and called her an "idiot." Plaintiff then immediately left Professor Devabhaktuni's office and cried. As a result of Professor Devabhaktuni's conduct, plaintiff felt scared and threatened.

**{¶17} #5: September 11, 2012 incident**

**{¶18}** On September 11, 2012, plaintiff made an audio recording of Professor Devabhaktuni's class on her cell phone. (Plaintiff's Exhibit 1.) Plaintiff was mindful of the fact that it was the anniversary of the September 11, 2001 terrorist attack. Despite the significance of the day, Professor Devabhaktuni spoke about shooting a gun again. According to plaintiff, he stated: "How would you escape if I brought a gun and shot you all?" As a result of that class, plaintiff testified that she was terrified, especially

because it was the third time that Professor Devabhaktuni had mentioned a gun, she was in a computer programming class that had nothing to do with guns, and it was the anniversary of 9/11. Plaintiff testified that the CD was an accurate recording of Professor Devabhaktuni's statements.

{¶19} Near the end of the class, it was evident that many students had not finished their homework. Professor Devabhaktuni grouped students together in pairs, and plaintiff claims that he paired a "smart" student with a "dumb" student. Inasmuch as she was paired with a PhD student, plaintiff inferred that Professor Devabhaktuni considered her to be one of the "dumb" students. Plaintiff felt humiliated and insulted as a result of his comments. Plaintiff reported Professor Devabhaktuni's conduct to the university on September 13, 2012, and soon afterwards, she dropped the class.

{¶20} #6: After incident was reported

{¶21} Plaintiff testified that she, Zhu, and another student went together and reported Professor Devabhaktuni's conduct to Kevin West in the Human Resources (HR) department at defendant's university. An investigation was begun, and plaintiff was informed that Professor Devabhaktuni would be on administrative leave and was not allowed to return to campus. Plaintiff testified that she felt safe knowing that he was not allowed on campus. However, after she returned to campus from being in Cleveland for the weekend, she learned that Professor Devabhaktuni had, in fact, been seen on campus despite the directive for him not to be there. When she learned that information, plaintiff did not feel safe on campus except in her dormitory. In addition, plaintiff learned that Professor Devabhaktuni had repeatedly called Zhu Wang, another student, the weekend of September 28, 2012. On October 5, 2012, plaintiff sought medical treatment due to the stress and anxiety she felt as a result of Professor Devabhaktuni's conduct. On cross-examination, plaintiff testified that she never told

Professor Devabhaktuni that any of his conduct scared her, and she never saw him on campus after he was placed on administrative leave.

{¶22} Zhu Wang testified that he was friends with plaintiff and that he graduated from defendant's university with a degree in electrical engineering/computer science in August 2013. Wang is also a native of China. Wang testified that on September 29, 2012, Professor Devabhaktuni called him more than one time and then a student left a message for him on Professor Devabhaktuni's behalf. Wang testified that Professor Devabhaktuni wanted to speak to him privately. After he learned from plaintiff that Professor Devabhaktuni was not supposed to be contacting students, Wang reported the calls to defendant's HR department. Two days later, the HR department informed Wang that there was a post-doctorate position available in his field. Wang testified that he felt scared after he learned that Professor Devabhaktuni was on administrative leave and was still attempting to contact him. Wang stated that he was not in plaintiff's class, although he had taken two classes with Professor Devabhaktuni and that he had received grades of "A" in both classes.

{¶23} Professor Devabhaktuni testified that with regard to incident #1, he admitted that he asked someone to translate the question to a Chinese student because he felt that there was a language barrier with that particular question. Professor Devabhaktuni testified that he did not intend to humiliate anyone by asking for the translation. With regard to incident #2, Professor Devabhaktuni testified that he made the comment to the whole class as a hypothetical example to teach about a matrix. With regard to incident #3, Professor Devabhaktuni acknowledged that he had plaintiff work out a problem at the board, but vehemently denied threatening to shoot her. With regard to incident #4, Professor Devabhaktuni testified that when plaintiff and Zhu went to his office, it was his impression that they wanted him to solve their homework, because they did not show him any work that they had completed.

According to Professor Devabhaktuni, he will help students if they bring work that they have done and show him where they are having problems. Professor Devabhaktuni testified that he told plaintiff and Zhu to work on the homework and bring it back to him, and he denied calling plaintiff an idiot.

{¶24} With regard to incident #5, Professor Devabhaktuni admitted that he made the statements recorded on Plaintiff's Exhibit 1. As documented on the recording, Professor Devabhaktuni states to the class:

{¶25} "I can give you another example. If I had a gun and say I am going to shoot you, how are you going to escape? You are not going to think cleverly anymore, you are going to just think that I really need to escape. Similarly, when I ask a question, don't try to be smart, try to think, how to really solve that question. It doesn't matter whether you are smart or stupid. You just solve it. Like when you cook food, for example, it doesn't matter how efficient you are but if you cook well everybody is going to say, 'oh great, the food was very nice.' So when a question is asked always the focus must be on by hook or crook solving the question. That is the approach." (Plaintiff's Exhibit 1, at 24:00.)

{¶26} Later on in the class, Professor Devabhaktuni states:

{¶27} "How many students are there in the class now, 12? Just for this homework I'm going to make you into groups. So let me see. If I put the smartest kid with the dumbest kid. \* \* \* Tell me your first names then I will make the team assignments. Tell me some easy names. Simon. Emily. Who is left? Three people left. Feel free to ask them. Ok folks so see you Thursday and we will solve the rest of the problems." (Plaintiff's Exhibit 1, at 1:20:45.)

{¶28} According to Professor Devabhaktuni, his "escape plan" comment was an attempt to teach about theory vs. practice, and it was not his intent to threaten the students. With regard to his "smart vs. dumb" comment, Professor Devabhaktuni

explained that he was attempting to be humorous, that there was a wide range of experience and ability in the class, and that he paired students together in an attempt to bridge the differences between the students. Finally, Professor Devabhaktuni testified that he never made any effort to contact plaintiff after she reported his conduct. Professor Devabhaktuni admitted that he called Zhu Wang about a post-doctoral position, and that he wanted to speak privately to him because of the nature of the position. Defendant's Exhibit B is an email to Kevin West from Professor Devabhaktuni, dated October 2, 2012, that references the post-doctoral position.

{¶29} Plaintiff asserts that Professor Devabhaktuni's actions were outside the scope of his employment and were made with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶30} The Tenth District Court of Appeals has stated:

{¶31} "Malicious purpose encompasses exercising 'malice,' which can be defined as the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct that is unlawful or unjustified. \* \* \*

{¶32} "'Bad faith' has been defined as the opposite of good faith, generally implying or involving actual or constructive fraud or a design to mislead or deceive another. \* \* \* Bad faith is not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. \* \* \*

{¶33} "Finally, 'reckless conduct' refers to an act done with knowledge or reason to know of facts that would lead a reasonable person to believe that the conduct creates an unnecessary risk of physical harm and that such risk is greater than that necessary to make the conduct negligent. \* \* \* The term 'reckless' is often used interchangeably with the word 'wanton' and has also been held to be a perverse disregard of a known risk. \* \* \* As to all of the above terms, their definitions connote a mental state of greater culpability than simple carelessness or negligence. \* \* \*"



(Internal citations omitted.) *Wrinn v. Ohio State Highway Patrol*, 10th Dist. Franklin No. 11AP-1006, 2013-Ohio-1141, ¶ 12, quoting *Caruso v. State*, 136 Ohio App.3d 616, 620-22 (10th Dist.2000).

{¶34} Although plaintiff testified that she was extremely upset with Professor Devabhaktuni's repeated gun references in class, the evidence shows that his references were made in the context of teaching his class, that they did not pose a credible threat to anyone's safety, and that they were merely hypothetical questions. Indeed, upon review of Plaintiff's Exhibit 1, the court notes that the tone of Professor Devabhaktuni's voice is measured, he is not shouting and does not seem upset. Moreover, near the end of the recording, plaintiff's voice is heard on the CD, where she is speaking to the student that she was paired with, asking questions about scheduling a time to meet to do the assignment, and exchanging cell phone numbers with her partner. The court notes that plaintiff's voice is at a normal tone and she does not sound upset when speaking to the student she was paired with. Upon review of the evidence, the magistrate finds that Professor Devabhaktuni was a state employee, that he was acting on behalf of the state, and that he did not act with malicious purpose, in bad faith, or in a wanton or reckless manner during any of his interactions with plaintiff in the fall semester of 2012.

{¶35} With regard to plaintiff's allegations that Professor Devabhaktuni threatened to shoot her if she did not understand his questions while she was at the board in class, the court finds that plaintiff's testimony was not credible. Although plaintiff testified that "everyone" in the class heard that threat, and that Zhu and others provided written statements to that effect, no other testimony or documents were presented at the hearing to substantiate that any direct threat was made. In addition, Professor Devabhaktuni vehemently denied threatening to shoot plaintiff. Therefore,

the court finds that plaintiff has failed to prove that Professor Devabhaktuni issued any direct threat against her.

{¶36} Moreover, the court finds that any attempts that Professor Devabhaktuni made to contact Wang after he had been placed on administrative leave were not made in an effort to harm plaintiff. Indeed, although plaintiff testified that she was frightened when she learned about the telephone calls to Wang, plaintiff has failed to prove that any such conduct was directed at her in any way.

{¶37} Although Professor Devabhaktuni's analogies and the manner in which he taught his class may have been insensitive at times, the court cannot conclude that Professor Devabhaktuni acted with malicious purpose, in bad faith, or in a wanton or reckless manner during any of his interactions with plaintiff in the fall semester of 2012. Therefore, the magistrate recommends that Professor Devabhaktuni is entitled to immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case.

{¶38} *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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HOLLY TRUE SHAVER  
Magistrate

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