

# Court of Claims of Ohio

The Ohio Judicial Center  
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JACK BASTIAN

Plaintiff

v.

EDISON STATE COMMUNITY COLLEGE

Defendant

Case No. 2013-00148

Magistrate Holly True Shaver

## DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action alleging breach of contract and “intentional tort.” The case proceeded to trial on the issues of liability and damages.<sup>1</sup>

{¶2} Plaintiff was enrolled as a student in defendant’s peace officer training program in the spring semester of 2011. After an incident that occurred on April 7, 2011, between plaintiff and Joseph Mahan, Commander of the Ohio Commission Peace Officer Training Program, plaintiff withdrew from the program. Plaintiff seeks a refund of his tuition and lost wages for the time that he spent as a full-time student.

{¶3} Plaintiff testified that he previously served in the military and currently works as a private investigator. Plaintiff enrolled in defendant’s peace officer training course at the age of 59. On April 6, 2011, plaintiff attended a class where the movie “The Last Castle,” starring Robert Redford, was being shown. Plaintiff advised Nancy Neal, Mahan’s assistant, that he could not hear the movie and asked her to turn up the volume. According to plaintiff, Neal refused to turn up the volume and told him to “deal with it.” Plaintiff was offended by her response and, since he had seen the movie previously several times, he left the class.

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<sup>1</sup>Defendant’s motion to dismiss plaintiff’s breach of contract claim pursuant to Civ.R. 41(B)(2) was taken under advisement at trial and is DENIED.

{¶4} The following day, prior to the start of class, Mahan asked plaintiff to go into the hallway with him. Plaintiff's account of what occurred in the hallway differs from Mahan's account. The following is plaintiff's version of events.

{¶5} Once in the hallway, Mahan informed plaintiff that he did not like the fact that plaintiff had abruptly left class the day before. Plaintiff listened to Mahan, but added that he would not allow Neal to speak to him that way again. Mahan then became angry and pushed plaintiff's back into the wall, using both of his index fingers in a pointing manner on both sides of his chest. Mahan told plaintiff, "If you keep this bullshit up, you will be kicked out of the program." Once he was backed up against the wall, plaintiff feared that Mahan was going to harm him. Plaintiff was afraid that he could not defend himself against Mahan. Plaintiff then left and did not return to class that day.

{¶6} According to plaintiff, on April 11, 2011, plaintiff's wife noticed slight bruising on his chest, which is depicted in Plaintiff's Exhibit 3. At that point, plaintiff decided to withdraw from the program. On April 14, 2011, plaintiff filed a grievance. A hearing was held, after which defendant found that Mahan should not have touched plaintiff.

{¶7} Joseph Mahan testified that he has been in charge of the basic police academies for defendant since 2003. Mahan described the peace officer training course as more structured than a typical undergraduate class in that the students need permission to leave the classroom, and that they must be courteous at all times. Mahan stated that physical contact is part of the course, such as when students are taught control techniques, and that all students must meet physical fitness requirements.

{¶8} Mahan's version of the events of April 7, 2011, is as follows: Mahan asked plaintiff to go into the hallway with him to discuss plaintiff's behavior, specifically, his interaction with Neal the day before, plus complaints that Mahan had received from fellow students. After plaintiff told Mahan that he would never take a "tongue-lashing"

from “that woman” again (referring to Neal) Mahan said something like, “Whoa, whoa, whoa, whoa,” using his index figure to point in a gesturing manner. Mahan stated while doing so, his index finger came into contact with plaintiff’s chest, simply because they were standing very close to one another. Mahan then told plaintiff, “If you don’t knock this bullshit off, I will kick you out of the class.” After the conversation was over, plaintiff shook Mahan’s hand. In Mahan’s opinion, plaintiff did not indicate to him that he was afraid during or after the encounter. Mahan also denied touching plaintiff on both sides of his chest, and denied that he caused the bruises shown in Plaintiff’s Exhibit 3.

{¶9} According to Mahan, prior to the hallway incident, plaintiff’s performance had been unsatisfactory in both his coursework and his conduct. For example, one day plaintiff wore an Islamic head scarf to class and was talking about “towel-heads” in front of students and instructors. When plaintiff was shown Defendant’s Exhibit K, a photograph of a man wearing an Islamic headscarf, plaintiff initially denied knowing who was depicted, but admitted that the individual had tattoos similar to his own. Later, plaintiff admitted that it was a photo of himself, but stated that it was a “joke.”

{¶10} Mahan also testified that plaintiff had accused another student in the class, Sean Haggerty, of stealing money from him. On April 6, 2011, in the classroom, Mahan found a computerized sketch of a toilet that has the words: “Sean Fagerty Hagerty’s law enforcement career” suspended above the open toilet seat. (Defendant’s Exhibit L.) Mahan suspected that plaintiff had made the image to humiliate Haggerty. Mahan confronted plaintiff about the image and plaintiff denied that he was responsible for it. However, near the end of the conversation, plaintiff told Mahan that “it would not happen again.”

{¶11} With regard to plaintiff’s coursework, Mahan testified that plaintiff’s notebook was not meeting academy standards, with parts that were missing,

incomplete, or copied from other students. (Defendant's Exhibit H.) Mahan stated that plaintiff had a "low D" grade at the time that he withdrew from the course.

{¶12} Finally, Mahan testified that he was called to participate in a Behavior Intervention Team (BIT) meeting regarding plaintiff on April 13, 2011. The notes from the BIT team meeting show that plaintiff was identified as a "Severe Risk – Level 7" and set forth six violations of the code of conduct that plaintiff had committed, including creating a hostile educational environment, failure to comply with directives, discrimination, and stalking. (Defendant's Exhibit R.) Plaintiff withdrew from the course on April 14, 2011.

### **BREACH OF CONTRACT**

{¶13} Although plaintiff did not point to a specific provision of the contract that defendant allegedly breached, plaintiff essentially argues that defendant's decision to allow Mahan to remain as plaintiff's instructor after Mahan had "verbally and physically assaulted" him was a breach of the student handbook. It is well-settled that the relationship between a university and a student who enrolls, pays tuition, and attends class is contractual in nature, and that the terms of this contractual relationship may be found in the handbook, catalog, and other guidelines supplied to students. *Bleicher v. Univ. of Cincinnati College of Med.*, 78 Ohio App.3d 302, 308 (10th Dist.1992). In addressing an alleged breach of such contract, a trial court is required to defer to academic decisions of a university unless it perceives "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.*, quoting *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985). The standard of review is not merely whether the court would have decided the matter differently but whether the faculty action was arbitrary and capricious. *Bleicher, supra*. See *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91 (1978).

{¶14} After plaintiff filed his grievance, defendant commenced an investigation and issued a decision. Plaintiff had asserted that defendant violated the Americans with Disabilities Act when Neal had refused to turn up the volume on the television. Defendant found that no violation was committed, inasmuch as Neal had offered a reasonable accommodation to plaintiff to move his chair, or sit in another chair that was closer to the television. With regard to Mahan putting his hands on plaintiff, defendant upheld the grievance and stated that appropriate recommendations would be made to the instructor's dean. Upon review of the evidence, the court cannot conclude that defendant's investigation and subsequent decision on plaintiff's grievance was arbitrary and capricious. Indeed, plaintiff's grievance was accepted, it was investigated, and a decision was timely issued. Therefore, the court finds that plaintiff has failed to prove his claim of breach of contract by a preponderance of the evidence.

{¶15} Moreover, plaintiff withdrew from the course before any action was taken by defendant to remove him. Therefore, there was no action taken by the faculty regarding plaintiff's enrollment status that can be found to be arbitrary or capricious. In fact, the evidence shows that plaintiff's poor performance in the class, both in coursework and behavior, most likely would have resulted in his failure of the course.

### **INTENTIONAL TORT**

{¶16} "To prove assault and battery under Ohio law, a plaintiff must establish that the defendant unlawfully touched him/her with the intent of inflicting injury or at least creating fear of injury." *Tarver v. Calex Corp.*, 125 Ohio App.3d 468, 483-484 (7th Dist.1998), citing *Blankenship v. Parke Care Centers, Inc.*, 913 F. Supp. 1045 (S.D.Ohio 1995). "To constitute battery, the conduct complained of must be harmful or offensive." *Id.* at 484.

{¶17} Upon review of the evidence, the court finds that Mahan's testimony was more credible than plaintiff's with regard to the hallway incident. The court finds

credible Mahan's testimony that he was gesturing with one index finger, as if making a point, and that due to the close proximity of where he was standing, his index finger made contact with plaintiff's chest. The court further finds that Mahan did not intend to make contact with plaintiff's chest or inflict injury when he did touch his chest. The court further finds that Mahan did not create a fear of injury to plaintiff, despite plaintiff's testimony to the contrary. Quite frankly, plaintiff's credibility was sorely lacking throughout his entire testimony at trial, and the court finds that the photographs that he submitted that purportedly show bruising on both sides of his chest do not convince the court that Mahan was the proximate cause of any such injury.

{¶18} In the final analysis, the court finds that plaintiff has failed to prove any of his claims by a preponderance of the evidence, and accordingly, judgment is recommended in favor of defendant.

{¶19} *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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