[Cite as *Fischer v. Kent State Univ.*, 2014-Ohio-5980.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

NORMAN FISCHER

Plaintiff

v.

KENT STATE UNIVERSITY

Defendant

Case No. 2011-07729

Judge Patrick M. McGrath
Magistrate Holly True Shaver

DECISION

{¶1} On July 7, 2014, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On August 4, 2014, plaintiff filed his response.[1] Defendant's motion is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also*

[1]Plaintiff's July 14, 2014 motion for an extension of time in which to file a response is GRANTED, instanter.

Gilbert v. Summit Cty., 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977.)

{¶4} Plaintiff was employed as a professor in defendant's philosophy department from 1974 until his retirement, prior to the fall semester of 2010. On May 20, 2011, plaintiff filed a complaint asserting claims of defamation, breach of contract, intentional infliction of emotional distress, and violations of his First Amendment rights, R.C. 149, and R.C. 1347.10. On January 23, 2012, plaintiff filed an amended complaint to add a claim for retaliation.

{¶5} According to plaintiff's amended complaint, certain employees of defendant knowingly made false and malicious statements and allegations about him with regard to his conduct as a professor. Plaintiff asserts that the correspondence dated May 4, 2010, from the Chair of the Faculty Advisory Committee (FAC) of the Department of Philosophy, David Odell-Scott, to Provost Robert Frank, which refers to the April 30, 2010 FAC meeting, and a letter dated July 19, 2010 to plaintiff from the Provost, were defamatory and retaliatory in nature, adversely affected his employment, and caused him emotional distress. Plaintiff asserts that he initiated an EEOC complaint about the recommended sanctions for cause against him that were referred to in the above-mentioned correspondence, and that he received a notice of right to sue from the EEOC on October 26, 2011. Plaintiff also alleges that defendant intentionally maintained false or inaccurate personal information about him, in violation of R.C. 1347.10, and that defendant failed to comply with R.C. 149 when it did not furnish him with public records about his employment. Plaintiff also asserts that defendant violated a settlement agreement dated October 17, 1996, and that several of defendant's employees violated his First Amendment rights. Finally, plaintiff asserts that the May 4 and July 19, 2010 letters constitute retaliation.

{¶6} In its motion, defendant contends that plaintiff cannot prevail on any of his claims. The court agrees.

CONSTITUTIONAL CLAIMS

{¶7} Plaintiff asserts that defendant's employees violated his First Amendment right to free speech from May 20, 2009 to July 19, 2010, when he was found in violation of defendant's "speech codes," which he contends are unconstitutional, and when sanctions for cause were recommended against him, as noted in the May 4 and July

19, 2010 correspondence. However, it is well-established that claims premised upon the violation of constitutionally guaranteed rights state a claim for relief under 42 U.S.C. 1983. *Jett v. Dallas lndep. School Dist.*, 491 U.S. 701 (1989). Inasmuch as the state is not a "person" within the meaning of that section, such actions may not be brought against the state in the Court of Claims. *See, e.g., Burkey v. S. Ohio Corr. Facility*, 38 Ohio App.3d 170 (10th Dist.1988); *White v. Chillicothe Corr. lnst.*, 10th Dist. No. 92AP-1230, 1992 Ohio App. LEXIS 6718 (Dec. 29, 1992). Thus, this court is without jurisdiction to hear plaintiff's claims with regard to the alleged violations of his constitutional rights. Accordingly, Count VI of plaintiff's amended complaint shall be DISMISSED.

R.C. 149

{¶8} With regard to plaintiff's claims under R.C. 149, Ohio's Public Records Act, he asserts that defendant failed to comply with certain of his discovery requests. However, plaintiff's remedy for any such violation lies in another court.

{¶9} R.C. 149.43(C)(1) states, in part: "If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section * * * the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section. *The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution*." (Emphasis added.) Claims under R.C. 149.43 must be brought in a court of common pleas, an appellate court, or the Supreme Court. Thus, this court is without jurisdiction to hear plaintiff's claims with regard to violation of R.C. 149 and Count IV of his complaint shall be DISMISSED.

DEFAMATION

{¶10} "An action for libel, slander * * * shall be commenced within one year after the cause of action accrued * * *." R.C. 2305.11(A). A cause of action for defamation accrues upon the date of publication of the defamatory matter. *Reimund v. Brown*, 10th Dist. No. 95APE04-487, 1995 Ohio App. LEXIS 4824 (Nov. 2, 1995). Plaintiff asserts in his amended complaint that his cause of action arose on May 20, 2009. Plaintiff filed his complaint on May 20, 2011. Accordingly, pursuant to R.C. 2305.11(A), any claims of defamation are limited to statements made on May 20, 2010 forward. However, for purposes of this motion, even if the court were to consider the statements made prior to May 20, 2010, plaintiff's defamation claims fail as a matter of law.

{¶11} In plaintiff's answers to defendant's interrogatories, he identifies the basis of his defamation claim as those statements that are found in the following documents: 1) the April 30, 2010 FAC meeting minutes (Defendant's Exhibit D); 2) Odell-Scott's May 4, 2010 letter to Provost Frank (Defendant's Exhibit E); 3) Provost Frank's July 19, 2010 letter to plaintiff (Defendant's Exhibit F); 4) the affidavits of Odell-Scott, Sue Averill, and Timothy Moerland that were filed in response to plaintiff's EEOC complaint in 2010; 5) a legal brief filed by attorneys David Ochmann and Michael Pfahl in the course of the EEOC investigation; and 6) the depositions of Averill, Odell-Scott, Polycarp Ikuenobe, Tiffany Murray, and Deborah Smith. (Defendant's Exhibit C, answer to interrogatory number 4.)

{¶12} The minutes of the April 30, 2010 meeting show that plaintiff attended the meeting. Item A on the agenda was presented by Professor Odell-Scott, and was captioned: "Professor Fischer was professionally negligent in the performance of instructional duties as a professor: Course disorganization, including assignments, students' attendance and grade records, lack of clarity and consistency in the assignment of graded work; lack of consistency in the calculation of course grades; lack of consistency in the keeping of his office hours; and questionable quality of the review of student course work." (Defendant's Exhibit D.) A motion was made to recommend to the Provost consideration of sanctions against plaintiff, pursuant to Article VIII, Section 3 of the Tenured/Tenure-Track Faculty Contract of the AAUP. Plaintiff was offered an opportunity to respond, a vote was taken, and the motion was passed. Item

B was that plaintiff had violated university policy regarding the faculty code of professional ethics in the assignment of course grades, in that he allegedly raised certain grades without academic reasons in order to influence students not to file academic complaints against him. A motion was made for the FAC to recommend sanctions to the Provost. Plaintiff was given an opportunity to respond. A vote was taken and the motion was passed.

{¶13} Item C made reference to an October 2, 2009 motion concerning a sanction for cause against plaintiff for intimidation of students by attempting to record them during an informal resolution of a complaint. Again, a motion was made that sanctions be recommended to the Provost. Plaintiff was given an opportunity to respond, a vote was taken, and the motion was passed. (Defendant's Exhibit D.)

{¶14} On May 4, 2010, David Odell-Scott, Chair of the Department of Philosophy, sent a letter to Robert Frank, Provost, regarding the April 30, 2010 FAC meeting. Odell-Scott notes that Professor Kara Robinson, President of the Kent Chapter of the AAUP attended the meeting as a guest observer at plaintiff's request.

{¶15} In the letter, Odell-Scott summarizes what occurred during the meeting, and provides a history of sanctions that had been taken against plaintiff in recent years, including a Thesis Defense Sanction in 2007; an Affirmative Action Sanction in 2008; and a sanction that had been resolved through informal resolution in 2010 from an incident regarding tampering with student evaluations in 2008. In summary, Odell-Scott recommended that the Provost consider the possibility of the imposition of a sanction for cause as stipulated in Section 3, Article VIII, of the Collective Bargaining Agreement for Tenured/Tenure-Track Faculty between the Kent State Chapter of the AAUP and Kent State University. (Defendant's Exhibit E.)

{¶16} On July 19, 2010, Frank sent plaintiff a letter stating that: "Pursuant to the *Collective Bargaining Agreement* between Kent State University and the tenure-track faculty unit of the Kent State Chapter of the American Association of University Professors (AAUP-KSU), Article VIII, Sanctions for Cause, I write to inform you that the University, through my office as Provost and Senior Vice President for Academic Affairs, intends to proceed with sanctions for cause against you." (Emphasis in original.) (Defendant's Exhibit F.) Frank continues: "A full and complete review of this matter will be undertaken in accord [with] the procedures outlined in the *Collective Bargaining Agreement*. Your due process rights and the sanction procedures are

outlined in Article VIII of the *Collective Bargaining Agreement*. A copy of Article VIII is enclosed with this letter. After consultation with AAUP-KSU, as required by the *Collective Bargaining Agreement*, five (5) members of the Provost's Advisory Committee (PAC) have been identified to conduct the hearing on this matter. You will receive formal notice of this hearing in the next few days." (Emphasis in original.) *Id*.

{¶17} Attached to defendant's motion is an affidavit of Sue Averill, Associate Provost for Faculty Affairs. (Defendant's Exhibit A.) Averill avers that when plaintiff was employed as a tenured professor in defendant's department of philosophy, the Kent State Chapter of the American Association of University Professors (AAUP), a labor organization, represented him concerning the terms and conditions of his employment, and also filed a number of grievances on his behalf. (*Id*., ¶ 5-6.) Averill also avers that she concurred with the recommendations in the May 4 and July 19, 2010 correspondence shown in Defendant's Exhibits E and F. (*Id*., ¶ 27-28.)

{¶18} Under Ohio law, "parties * * * are absolutely immune from civil suits for defamatory remarks made during and relevant to judicial proceedings." *Willitzer v. McCloud*, 6 Ohio St.3d 447, 448-449 (1983). The statements made by attorneys Pfahl and Ochmann in their EEOC brief were made during and relevant to judicial proceedings. The affidavits and depositions taken in either this matter or the EEOC matter likewise are absolutely immune. The remaining statements made during the FAC meeting and in the correspondence referencing the FAC meeting are subject to a qualified privilege. "The purpose of a qualified privilege is to protect speakers in circumstances where there is a need for full and unrestricted communication concerning a matter in which the parties have an interest or duty. * * * A qualified privilege exists when a statement is: made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest. The essential elements of a communication protected by qualified privilege are: good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication made in a proper manner and to proper parties only. Finally, if all five elements are established, a plaintiff can defeat its application only by showing by clear and convincing evidence that the defendant acted with actual malice." (Internal citations omitted.) *Mallory v. Ohio University*, 10th

Dist. Franklin No. 01AP-278, 2001-Ohio-8762, ¶ 21-22. Plaintiff has not brought forth any evidence, other than his own assertions, that defendant's employees acted with actual malice. Therefore, defendant is entitled to summary judgment as a matter of law with respect to plaintiff's defamation claims.

BREACH OF CONTRACT, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, AND RETALIATION

{¶19} With regard to plaintiff's breach of contract claim, plaintiff states in his answers to interrogatories that Attorney Ochmann's filings with the EEOC in 2010 "contain numerous documents of my work file preceding October 17, 1996, and violates [sic]" the settlement agreement. Plaintiff also states that Odell-Scott gave him "punitive" course schedules, which violated the settlement agreement and "helped destroy [his] career and forced him to retire." (Defendant's Exhibit C, p. 15). Plaintiff attached a copy of the October 17, 1996 settlement agreement to his response to defendant's motion, which is an agreement by and between defendant, the AAUP – Kent State Chapter (AAUP-KSU) and plaintiff. The settlement agreement states that plaintiff "has previously filed grievances * * * alleging certain violations of the collective bargaining agreement between the AAUP-KSU and the University."

{¶20} The evidence submitted shows that plaintiff was a member of the AAUP and that he had an "observer" present from the AAUP on his behalf during the April meeting. As such, plaintiff's claims are based upon the terms of his employment and are preempted by the collective bargaining agreement.

{¶21} R.C. Chapter 4117 establishes a framework for resolving public sector labor disputes by creating procedures and remedies to enforce those rights. R.C. 4117.10(A) provides that a collective bargaining agreement between a public employer and the bargaining unit "controls all matters related to the terms and conditions of employment and, further, when the collective bargaining agreement provides for binding arbitration, R.C. 4117.10(A) recognizes that arbitration provides the exclusive remedy for violations of an employee's employment rights." *Gudin v. Western Reserve Psychiatric Hosp.*, 10th Dist. No. 00AP-912 (June 14, 2001); *See Oglesby v. Columbus*, 10th Dist. No. 00AP-544 (Feb. 8, 2001).

{¶22} R.C. 4117.09(B)(1) provides that a party to a bargaining unit agreement "may bring suits for violation of agreements * * * in the court of common pleas of any

county wherein a party resides or transacts business." Pursuant to R.C. 4117.09(B)(1), jurisdiction over suits alleging violations of collective bargaining agreements lie with the courts of common pleas alone. *Moore v. Youngstown State Univ.*, 63 Ohio App.3d 238, 242 (10th Dist.1989).

{¶23} Furthermore, The Tenth District Court of Appeals has held that whether claims, such as retaliatory discharge and intentional infliction of emotional distress, are preempted by the collective bargaining agreement is dependent upon a case-by-case analysis of the alleged conduct forming the basis for the claim. *Gudin, supra*. Such claims "are preempted in two situations: (1) if the state claim is founded on rights created by collective bargaining agreements; or (2) if the rights are created by state law but the application of the law is dependent on an analysis or interpretation of a collective bargaining agreement." *Id*.

{¶24} Construing the evidence most strongly in favor of plaintiff, the only reasonable conclusion is that his claims related to the events of the April 30, 2010 FAC meeting, the May 4 and July 19, 2010 correspondence, and his August 17, 2010 EEOC retaliation charge, are predicated on allegedly wrongful conduct that is directly related to the terms and conditions of his employment and that such claims are dependent on an analysis or interpretation of the Tenured/Tenure-Track Faculty Contract of the AAUP. Accordingly, those claims are preempted by the collective bargaining agreement and the court is without jurisdiction to decide those claims. Therefore, plaintiff's claims of breach of contract, intentional infliction of emotional distress, and retaliation are DISMISSED.

R.C. 1347.10

{¶25} Finally, in his answers to defendant's interrogatories, plaintiff states that his claim under R.C. 1347.10 is based upon a legal brief, written by Attorneys Ochmann and Pfahl in his EEOC proceedings, wherein plaintiff contends that an assertion in the brief is false.

{¶26} Although plaintiff asserts that defendant violated R.C. 1347.10 [2] by intentionally maintaining personal information about him that defendant knows is false,

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[2]R.C. 1347.10 states, in relevant part:

"(A) A person who is harmed by the use of personal information that relates to him and that is maintained in a personal information system may recover damages in civil action from any person who directly and proximately caused the harm by doing any of the following:

that information is contained in a legal brief filed in response to plaintiff's EEOC complaint. Federal courts have found that an EEOC right-to-sue letter is a public record. *See Pearson v. PeopleScout, Inc.*, N.D. Ill. No. 10c5542, 2011 WL 1575990, (Apr. 26, 2011).

{¶27} R.C. 1347.04(B) states, in relevant part: "The provisions of this chapter shall not be construed to prohibit the release of public records, or the disclosure of personal information in public records, as defined in R.C. 149.43 of the Revised Code, * * *.

{¶28} "The disclosure to members of the general public of personal information contained in a public record, as defined in R.C. 149.43 of the Revised Code, is not an improper use of personal information under this chapter."

{¶29} Construing the evidence most strongly in plaintiff's favor, the only reasonable conclusion is that defendant did not violate R.C. 1347.10. Plaintiff has brought forth no evidence to show that the legal brief written by Ochmann and Pfahl in response to his EEOC complaint is exempt from disclosure pursuant to R.C. 149.43. Therefore, the only reasonable conclusion is that defendant is entitled to summary judgment as a matter of law on plaintiff's R.C. 1347.10 claim.

{¶30} For the foregoing reasons, the court finds that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law on plaintiff's claims of defamation and violations of R.C. 1347.10. The court further finds that it lacks jurisdiction over plaintiff's claims of breach of contract, intentional infliction of emotional distress, retaliation, constitutional claims, and violations of R.C. 149, and those claims are therefore DISMISSED. Accordingly, defendant's motion for summary judgment shall be granted.

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PATRICK M. MCGRATH
Judge

"(1) Intentionally maintaining personal information that he knows, or has reason to know, is inaccurate, irrelevant, no longer timely, or incomplete and may result in such harm;

"(2) Intentionally using or disclosing the personal information in a manner prohibited by law;

"(3) Intentionally supplying personal information for storage in, or using or disclosing personal information maintained in, a personal information system, that he knows, or has reason to know, is false;

"(4) Intentionally denying to the person the right to inspect and dispute the personal information at a time when inspection or correction might have prevented the harm."

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JUDGMENT ENTRY

{¶31} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant on plaintiff's claims of defamation and violation of R.C. 1347.10. Plaintiff's claims of breach of contract, intentional infliction of emotional distress, retaliation, constitutional claims, and violations of R.C. 149 are DISMISSED. All pending motions are DENIED as moot. All previously scheduled events are VACATED. 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:

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