[Cite as *Liebling v. Columbus State Community College,* 2015-Ohio-5616.]

Court of Claims of Ohio
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PHILIP LIEBLING

Plaintiff

v.

COLUMBUS STATE COMMUNITY COLLEGE

Defendant

Case No. 2013-00584

Magistrate Holly True Shaver

DECISION OF THE MAGISTRATE

{¶1} On January 29, 2014, the court granted defendant's motion to dismiss plaintiff's complaint pursuant to Civ.R. 12(B)(6) based upon the expiration of the applicable two-year statute of limitations, and denied as moot plaintiff's motion for an immunity hearing pursuant to L.C.C.R. 4.1. On July 28, 2014, the Tenth District Court of Appeals issued a judgment entry which vacated this court's decision and remanded the case to address the immunity issues. On February 12, 2015, the court conducted an evidentiary hearing to determine whether Dr. Terrance Brown and Dr. Brenda Johnson are entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. At the start of the hearing, plaintiff's counsel represented that the date of the meeting that forms the basis of plaintiff's complaint was, in fact, February 23, 2012, not February 22, 2011, the date that this court relied upon to dismiss plaintiff's complaint on statute of limitations grounds. After a discussion was had on the record, plaintiff made an oral motion to amend his complaint pursuant to Civ.R. 15(B). Defendant did not object to the motion. Therefore, the court GRANTED plaintiff's motion, and by interlineation amended paragraph 10 of plaintiff's complaint to show that the meeting occurred on February 23, 2012. The court further ordered defendant to file an answer to plaintiff's amended complaint on or before February 27, 2015.

{¶2} At the hearing, counsel for plaintiff stated that although the change in the date of the incident may render the filing of his complaint timely, he does not intend to pursue any claims against defendant, and that he filed this action solely to obtain an immunity determination regarding Drs. Brown and Johnson so that he may pursue his claims against them in a court of common pleas. Plaintiff was ordered to file his intentions with regard to that issue, via a stipulation or otherwise, on or before March 13, 2015. On March 13, 2015, plaintiff filed a document wherein he stated that he was "unwilling to currently waive any rights he may have as a result of his amendment to his complaint" despite counsel's representations otherwise at the evidentiary hearing. On March 20, 2015, defendant filed a memorandum contra to plaintiff's filing.

{¶3} Plaintiff seeks a determination that Dr. Terrance Brown and Dr. Brenda Johnson are not entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶4} R.C. 2743.02(F) states, in part:

{¶5} "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, which 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."

{¶6} R.C. 9.86 states, in part:

{¶7} "[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."

{¶8} 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 (10th Dist.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 (10th Dist.1994), citing *Thomas v. Ohio Dept. of Rehab. & Corr.*, 48 Ohio App.3d 86, 89 (10th Dist.1988).

{¶9} In 2007, plaintiff began to take the necessary prerequisite classes at defendant, Columbus State Community College (CSCC), to enroll in defendant's veterinary technician (vet tech) program. Plaintiff retired from his career as a sales representative at General Foods and decided to begin a secondary career to take care of animals, as he had been volunteering for the Franklin County Dog Shelter for approximately 30 hours per week. In 2010, plaintiff was admitted into defendant's vet tech program. Dr. Brenda Johnson was plaintiff's advisor, and she reported to Dr. Terrance Brown. At the beginning of his vet tech classes, plaintiff soon discovered that he had difficulty with skills that required dexterity and vision using a microscope. Plaintiff testified that he had a good relationship with Dr. Johnson initially.

{¶10} Plaintiff suffers from Type 1 diabetes, and has vision problems that affect his ability to use a microscope. At some point, Dr. Johnson advised plaintiff to seek assistance from defendant's disability services office, where he was able to obtain a special microscope to accommodate his vision disability. After taking some clinical

classes, plaintiff realized that he would not be able to complete a degree in the vet tech program but plaintiff persevered in his studies and described it as an "educational adventure."

{¶11} On October 18, 2011, plaintiff sought special permission to withdraw from all of his classes and enroll in an internship out of sequence, without having completed the necessary classes prior to the internship. Although Dr. Johnson did not agree with plaintiff's wishes, in 2012, he was permitted to start an internship at The Ohio State University (OSU) vet clinic, which is a clinic that defendant partners with for its vet tech students. Plaintiff's supervisor at OSU was Lenore Sullivan. On February 17, 2012, plaintiff got into an altercation with another vet tech student at OSU. According to plaintiff, a young female student told him to "shut up" while they were waiting for test results. Plaintiff testified that he responded to her by saying, "Don't you ever tell me to shut up again!" and that he tapped her on the shoulder with his index finger as he said that to let her know that she had engaged in inappropriate behavior. After that incident, Sullivan told plaintiff to leave the OSU vet clinic.

{¶12} That same day, plaintiff met with Dr. Brown to discuss plaintiff's concerns that Sullivan had made him leave the OSU vet clinic. According to plaintiff, Dr. Brown listened to his side of the story, but reiterated that plaintiff's conduct of yelling at and touching another student would not be tolerated. Plaintiff admitted to Dr. Brown that he "poked" the other student on the shoulder. Plaintiff was later contacted by Denise Anderson, an employee of defendant, who asked plaintiff to return to defendant's campus for a meeting on February 23, 2012. According to plaintiff, he knew that his internship was "over" and he thought that the meeting was scheduled so that he could say "goodbye." Plaintiff testified that prior to the February 23, 2012 meeting he knew that he had failed two rotations and could not continue with the coursework.

{¶13} When plaintiff arrived at the February 23, 2012 meeting, he had brought along a friend, his ex-wife, Dr. Lisa Raiz, for moral support. According to plaintiff, he

was distraught about the meeting because he had spent six years of his time at defendant's college and he knew he had "flunked out." Plaintiff stated that it was an emotional time for him.

{¶14} When plaintiff entered the conference room with Dr. Raiz, Drs. Johnson and Brown asked who Dr. Raiz was and why she was with plaintiff. According to plaintiff, he was confused by their questions, and he felt that Dr. Raiz had a right to be there with him. Dr. Raiz left the meeting to call her employer, OSU, to inquire about the Family Education Rights and Privacy Act (FERPA) regulations and whether plaintiff could sign a waiver of FERPA rights so that she could attend the meeting. After Dr. Raiz left, Drs. Brown and Johnson continued the meeting with plaintiff. Either Dr. Johnson or Dr. Brown began to read a written statement to plaintiff but plaintiff did not want to hear what they were telling him. Accordingly, plaintiff placed his hands over his ears and stated, "I'm not listening!" Plaintiff testified that at that point he felt as though he was being "set up."

{¶15} Plaintiff then said to Dr. Johnson, "This isn't over! You're going to regret this happened!" Plaintiff characterized his statement as being said in a loud, New York, aggressive manner, but denied that it was threatening. He also called Dr. Brown an "asshole" when Dr. Brown told him to stop. Plaintiff then left the conference room and walked to his car.

{¶16} After plaintiff left the building, Drs. Brown and Johnson contacted campus security, had plaintiff's student ID badge de-activated, and Dr. Brown reported the incident to his supervisor. Defendant also issued a "trespass alert" with regard to plaintiff. (Plaintiff's Exhibit 1.)

{¶17} Plaintiff admitted that when he had academic problems, Dr. Johnson referred him to disability services and that he was provided with assistance, including allowing him to take a microscope home. Plaintiff also admitted that defendant allowed him to withdraw from classes in 2011 after the normal withdrawal period. Plaintiff also

admitted that when he got into the altercation on February 17, 2012, he became loud and animated. Plaintiff also admitted that he was upset and frustrated at the February 23, 2012 meeting.

{¶18} Dr. Brenda Johnson testified that the purpose of the February 23, 2012 meeting was to discuss both plaintiff's academic performance and the fact that OSU had dismissed him from the clinic. According to Dr. Johnson, after Dr. Raiz left the conference room and she began to read from the prepared statement, plaintiff engaged in aggressive behavior by placing his finger near her face, almost touching her nose, and telling her that she would regret the meeting. According to Dr. Johnson, plaintiff was very agitated and his breath smelled strongly of alcohol. In Dr. Johnson's opinion, plaintiff physically threatened her.

{¶19} Dr. Johnson testified that she prepared a trespass alert after asking Officer Lewis from defendant's department of public safety how to secure the building. Dr. Johnson circulated the trespass alert to all students in the vet tech program, and stated that it was posted outside on the college campus grounds for one week. Dr. Johnson also contacted the Bexley police and asked that her house be patrolled, because plaintiff had told her in a previous conversation that he knew where she lived.

{¶20} Dr. Raiz testified that after she went into the hallway to call her employer, plaintiff met her in the hallway and stated that he was leaving. Dr. Johnson then went into the hallway and seemed upset. According to Dr. Raiz, Dr. Johnson stated that someone from OSU had complained that plaintiff had been intoxicated at the clinic, and Dr. Johnson further stated that she wanted plaintiff to be drug tested. Dr. Raiz testified that Johnson's conduct was unprofessional and inappropriate for an area where students were. Plaintiff testified that because he has diabetes, his breath tends to smell like alcohol. However, plaintiff denied that he drank any alcohol before the meeting. Dr. Johnson denied accusing plaintiff of being intoxicated or saying that he should be drug tested.

{¶21} Dr. Terrance Brown testified that he was plaintiff's department chairperson. Dr. Brown testified that there were two issues to discuss at the meeting: plaintiff's academic issues, and the February 17, 2012 incident at OSU. According to Dr. Brown, OSU decided to remove plaintiff from the clinical site based upon his behavior on February 17, 2012, and that plaintiff would not have been able to contest that decision.

{¶22} Dr. Brown testified that it was his understanding that the office of public safety had requested that the trespass alert be issued. Dr. Brown also testified that he had seen other trespass alerts similar to this one on campus and did not feel that it was unusual.

{¶23} With regard to the meeting on February 23, 2012, Dr. Brown testified that plaintiff became agitated, covered his ears and said, "I'm not listening!" and that Brown told him to lower his voice. Plaintiff then leaned over the conference table and got within three feet of Dr. Johnson. Dr. Brown was "shocked" at plaintiff's behavior during the meeting and he wanted to make sure that plaintiff had left the building. Dr. Brown testified that plaintiff's tone of voice was threatening and that he asked a secretary to call campus security.

{¶24} Plaintiff concedes that Dr. Johnson and Dr. Brown's conduct was not manifestly outside the scope of their employment. However, in his post-hearing brief plaintiff asserts that Dr. Johnson and Dr. Brown acted in a wanton or reckless manner toward him when Dr. Johnson followed him out of the conference room and publically accused him of being intoxicated, attributed his poor academic performance to issues with alcohol, and stated that she wanted him to be drug tested; when they notified campus security and subsequently prepared a "criminal sounding" trespass alert to be circulated to defendant's vet tech students, faculty, and on defendant's campus; and that they have "fabricated" the characterization of plaintiff as being hostile and unpredictable.

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

{¶26} "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. * * *

{¶27} "'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. * * *

{¶28} "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).

{¶29} Upon review of the evidence, the magistrate finds that Drs. Johnson and Brown did not act with malicious purpose, in bad faith, or in a wanton or reckless manner during any of their interactions with plaintiff. The magistrate further finds that plaintiff's behavior during the February 23, 2012 meeting was unprofessional and threatening. The magistrate further finds that plaintiff has failed to show how Dr. Brown acted in any way that would show that he either created an unnecessary risk of physical harm or perversely disregarded a known risk with regard to plaintiff.

{¶30} With regard to Dr. Johnson, the magistrate finds that she acted reasonably at all times with her interactions with plaintiff, and that it was not unreasonable for her to contact campus security and for a trespass alert to be issued based upon plaintiff's

threatening behavior toward her in the meeting. The magistrate further finds that it was reasonable for her to be fearful of plaintiff and to call the Bexley police to patrol her house. With regard to plaintiff's assertions that Dr. Johnson accused him of public intoxication and demanded that he be drug tested, plaintiff admitted that his breath occasionally smells of alcohol due to his diabetes. Therefore, whether or not he was actually intoxicated, the magistrate finds that Dr. Johnson had a reasonable basis to believe that he smelled of alcohol and to conclude that he was intoxicated. Although Dr. Johnson denied accusing plaintiff of being intoxicated, the magistrate finds that even if she did, her actions do not rise to the level of either creating an unnecessary risk of physical harm or perversely disregarding a known risk with regard to plaintiff. Furthermore, the magistrate finds that neither Dr. Johnson's nor Dr. Brown's conduct was so divergent that it severed the employer-employee relationship. *See Elliott, supra*.

{¶31} Therefore, the magistrate recommends that Drs. Johnson and Brown are 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 them based upon the allegations in this case.

{¶32} Inasmuch as plaintiff was permitted to amend his complaint to reflect the accurate date of the meeting that he had in 2012, and the Tenth District Court of Appeals vacated this court's earlier decision dismissing plaintiff's complaint, the magistrate recommends that this matter be set for trial with regard to the merits of plaintiff's claims.

{¶33} *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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Filed May 18, 2015
Sent to S.C. Reporter 1/27/16