

# Court of Claims of Ohio

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CARRIE KULICH-GRIER

Plaintiff

v.

OHIO STATE UNIVERSITY WEXNER MEDICAL CENTER

Defendant

Case No. 2013-00248

Magistrate Anderson M. Renick

## DECISION OF THE MAGISTRATE

{¶1} Plaintiff brings this action retaliatory discharge in violation of the federal Civil Rights Act of 1964 and R.C. Chapter 4112. The case proceeded to trial on the issues of liability and damages.

{¶2} Plaintiff is a nurse who began her employment with defendant The Ohio State University Wexner Medical Center (OSUWMC) on October 11, 2011. Prior to working at OSUWMC, plaintiff was employed by the OhioHealth Corporation at the Grant Medical Center (Grant) from November 2008 to March 2011. Plaintiff testified that during the time she was employed at Grant, she had attended a wedding and that following the ceremony, she was sexually assaulted by a co-worker who had also attended the wedding. Plaintiff related that she experienced sexual harassment when she returned to work at Grant and that after she complained to her managers about the harassment, employees of Grant retaliated and recommended that she transfer to another hospital. Plaintiff testified that she refused to transfer and continued to complain about harassment by Grant employees. In March 2011, plaintiff ended her employment with Grant and pursued claims of sexual harassment, retaliation, and intentional infliction of emotional distress against Grant and OhioHealth with several

agencies, including the Ohio Civil Rights Commission (OCRC) and the Ohio Board of Nursing.

{¶3} Plaintiff accepted her position as a staff nurse with OSUWMC on September 28, 2011 and she began her orientation on October 11, 2011. (Plaintiff's Exhibit 1.) Plaintiff's acceptance letter provides that the position was subject to both the OSUWMC/Ohio Nurses Association bargaining agreement and a 180-day probationary period. Plaintiff testified that she typically worked 12-hour shifts beginning at 7:00 a.m. Plaintiff stated that she was required to use her badge to electronically "clock-in" for her shift no earlier than six minutes before 7:00 a.m. and that occasionally she would wait in line with other nurses. Plaintiff testified that she believed defendant had a "grace period," which allowed nurses to clock-in up to six minutes after 7:00 a.m. without being considered late for the shift. According to plaintiff, she was late for her shift on two occasions; however, her managers never discussed any problem with her timeliness during weekly progress meetings. During her probationary employment with defendant, plaintiff worked with Karen Raver, a nurse who had been trained as a "preceptor" to guide new nurses during orientation.

{¶4} Plaintiff testified that approximately one week prior to the termination of her employment with defendant, Linda Andrew, a nurse who had worked with her at Grant, was working as a float nurse at OSUWMC, recognized plaintiff, and asked "what happened" at Grant. Plaintiff testified she told Andrew that "some things had happened [at Grant]" and that she was filing a lawsuit as a result of those incidents. Plaintiff stated that she became emotional and visibly upset as a result of her conversation with Andrew, at which time Raver approached her and plaintiff related the circumstances which caused her to leave Grant. According to plaintiff, Raver recommended that plaintiff inform OSUWMC management because the incidents could be reported by the media.

{¶5} Plaintiff testified that she attended a class the next day and arrived before the class began. After she arrived at work the following day, she was instructed by a manager to change her time sheet to the exact time that she had arrived for the class the previous day. According to plaintiff, she did not know the exact time of her arrival and she agreed to change her timesheet to reflect the time that the class began.

{¶6} During plaintiff's next shift with Raver, plaintiff believed that "things were a little bit off" and that she was given a relatively easy assignment. Plaintiff testified that she asked Raver about her assignment, but Raver did not offer an explanation. The next day, plaintiff was advised by her supervisor, Kelly Torrence, that her tardiness had reached a level which required corrective action and that defendant had made the decision to terminate her probationary employment. Plaintiff related that she was shocked by the decision because she did not know her tardiness was an issue of concern. Later that day, plaintiff met with Torrence, a representative from defendant's human resources department, and another supervisor, Dawn Delpico, at which time plaintiff was given the option to resign her position. Plaintiff identified a letter which notified her that her position was being terminated effective January 17, 2012 "based on [her] demonstration of unsatisfactory attendance." (Plaintiff's Exhibit 2.)

{¶7} Raver explained that it was important for a newly hired nurse to "bring her A game," which included being on-time, professional, and attentive. Raver testified that she did not recall any problems with plaintiff's clinical skills. However, she did recall that on more than one occasion, plaintiff arrived "at bedside" late and that she reminded plaintiff to be on time. Raver stated that she would give newly hired nurses up to three chances to correct their behavior before she would report a problem to management and that she verbally reported plaintiff's tardiness to Torrence and Delpico. Raver testified that she had no knowledge of when plaintiff clocked in and that she was only concerned about plaintiff's timeliness in performing her nursing duties. According to Raver, she had no role in the decision to terminate plaintiff's employment and, before

Raver learned of the decision, she had no idea that plaintiff would lose her job. Raver recalled talking to plaintiff about the sexual assault at Grant and she testified that she did not tell any employee of defendant about either the sexual assault or any related legal action. Raver testified that she was certain her conversation with plaintiff about the incidents involving Grant employees occurred early in plaintiff's employment. After plaintiff filed this action against defendant, Torrence approached Raver and, according to Raver, Torrence was surprised when she learned of the lawsuit because she had been unaware of either the alleged sexual assault or any action filed by plaintiff against OhioHealth.

{¶8} Tom Ramey, defendant's Director of Employee Relations, identified the attendance policy that applied to plaintiff's position. (Defendant's Exhibit A.) The policy provides that "Badge-in time will be **no sooner than** six minutes prior to the scheduled start time." *Id.* (Emphasis in original.) Tardiness is defined in the policy as "not being present in the department and available for work as determined by department schedules." The policy also provides that eight or more occurrences of tardiness within a six month period may result in corrective action up to and including termination.

{¶9} Ramey testified that he did not recall plaintiff, but he identified documents from her employment file which were used to make the decision to terminate her employment. (Defendant's Exhibit F.) An attendance tracking log showed that plaintiff had been tardy on eight occasions and that she had used "edit slips" to document her time on three other occasions. Ramey explained that edit slips were treated the same as being tardy and that his decision to terminate plaintiff's employment was "easy" because she had been tardy on eight occasions and used three edit slips in less than six months.

{¶10} According to Ramey, removal of a probationary employee occurs without either a formal meeting or progressive disciplinary action. Ramey noted that both

Torrence and Delpico had recommended termination of plaintiff's probationary employment. Ramey testified that he discussed employment decisions with his staff but he alone made the final decision to terminate plaintiff's employment. At the time he made the decision to terminate plaintiff's employment, Ramey was not aware either that plaintiff had been a victim of sexual assault or that she was planning to file a legal action as a result of the incident. Ramey testified that pursuant to the collective bargaining agreement, plaintiff could have challenged the termination of her employment through binding arbitration.

{¶11} Plaintiff alleges that defendant unlawfully retaliated against her under Title VII and R.C. Chapter 4112 when it terminated her employment "upon discovering that [she] intended to file a lawsuit against OhioHealth for unlawful sexual harassment and retaliation \* \* \*." (Complaint, ¶19.) "Under Title VII, an employee is protected against employer retaliation for opposing any practice that the employee reasonably believes to be a violation of Title VII." *Johnson v. University of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000). The Sixth Circuit Court of Appeals has observed that examples of conduct which is protected by Title VII include opposing unlawful acts by persons other than the plaintiff's employer, such as a former employer or coworker. *Id.*

{¶12} R.C. 4112.02(l) provides that it is unlawful "[f]or any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code."

{¶13} The Tenth District Court of Appeals has observed that "[d]ue to the similarities in Title VII and R.C. Chapter 4112, Ohio courts look to federal case law addressing Title VII for assistance in interpreting R.C. Chapter 4112. *Smith v. Ohio Dept. of Pub. Safety*, 2013-Ohio-4210, ¶ 60 (10th Dist.), citing *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶ 12; *Nebozuk v. Abercrombie & Fitch Co.*,

2014-Ohio-1600, ¶ 45 (10th Dist.). Furthermore, both Title VII and R.C. 4112.02(I) require plaintiff to prove that retaliation is not just a motivating factor, but a determinative factor (but-for cause) in defendant's decision to take an adverse employment action.

{¶14} Plaintiff may prove a retaliation claim through either direct or circumstantial evidence that unlawful retaliation motivated defendant's adverse employment decision. *Reid v. Plainsboro Partners, III*, 10th Dist. Franklin No. 09AP-442, 2010-Ohio-4373, ¶ 55.

{¶15} Plaintiff may establish retaliation through circumstantial evidence using the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, (1973). Under the *McDonnell Douglas* framework, a plaintiff bears the initial burden of establishing a prima facie case of retaliation. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). "To establish a prima facie case of retaliation under R.C. 4112.02(I), plaintiff had to establish the following: (1) [she] engaged in protected activity; (2) [defendant] knew of [her] participation in protected activity; (3) [defendant] engaged in retaliatory conduct; and (4) a causal link exists between the protected activity and the adverse action." *Nebozuk, supra*, ¶ 40. "The establishment of a prima facie case creates a presumption that the employer unlawfully retaliated against the plaintiff." *Id.*

{¶16} If plaintiff establishes a prima facie case, the burden of production shifts to defendant to "articulate some legitimate, nondiscriminatory reason for [its action]." *McDonnell Douglas, supra*, at 802. If defendant succeeds in doing so, then the burden shifts back to plaintiff to demonstrate that defendant's proffered reason was not the true reason for the employment decision. *Id.*

{¶17} With regard to the first element of a prima facie case of retaliation, generally, "[a]nyone who participates in bringing a claim of unlawful discriminatory practice is engaging in a protected activity." *HLS Bonding v. Ohio Civ. Rights Commn.*,

10th Dist. Franklin No. 07AP-1071, 2008 Ohio 4107, ¶ 21, citing *Thatcher v. Goodwill Industries of Akron*, 117 Ohio App.3d 525, 535, 690 N.E.2d 1320 (1997). The court finds that plaintiff engaged in the protected activity of filing a charge of discrimination based upon sex with OCRC in September 2011 against Ohio Health-Grant Medical Center. (Plaintiff's Exhibit 3.)

{¶18} However, plaintiff has failed to prove a causal connection between filing the OCRC action and the termination of her employment. Although Raver knew about the alleged sexual assault and the charge filed with the OCRC, there is no evidence to suggest that either Raver or Andrew discussed the incidents with other employees. Plaintiff testified that she asked Raver to keep their conversation to herself, and Raver testified that she did not convey that information to anyone. Plaintiff admitted that Raver did not say that she was going to talk to management about the incidents at Grant, only that she recommended that plaintiff talk to management. During cross examination, plaintiff testified that the only employees who she knew for certain were aware of the events related to her employment at Grant were Raver and Andrew. Moreover, Ramey testified that he was solely responsible for the decision to remove plaintiff from her position and that he was unaware of either the alleged sexual assault or the discrimination charge plaintiff filed with OCRC. Even if plaintiff had shown that OSUWMC's management knew that she had filed a discrimination charge against OhioHealth, she did not prove that defendant's actions were motivated by retaliatory animus or that those actions were the but-for cause of her termination.

{¶19} Furthermore, the court finds that defendant has brought forth a legitimate, nondiscriminatory reason for her termination. The termination letter that was provided to plaintiff states she was removed from her position for unsatisfactory attendance. There is no evidence to suggest that plaintiff's attendance log was not accurate. As discussed above, Ramey stated that it was an easy decision to terminate plaintiff's probationary employment based upon her attendance record. Ramey also noted that

both of plaintiff's supervisors had recommended termination. Furthermore, plaintiff has not presented any credible evidence to demonstrate that defendant's stated reason for her termination was a pretext for discrimination.

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

{¶21} *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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