[Cite as *Schiavone v. Univ. of Toledo*, 2015-Ohio-5633.]

Court of Claims of Ohio
The Ohio Judicial Center
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JOSEPH M. SCHIAVONE

Plaintiff

v.

UNIVERSITY OF TOLEDO, etc.

Defendant

Case No. 2014-00011

Judge Patrick M. McGrath
Magistrate Anderson M. Renick

DECISION

{¶1} On January 28, 2015, defendant University of Toledo (UT) filed a motion for summary judgment pursuant to Civ.R. 56(B). On February 27, 2015, with leave of court, plaintiff filed a response. On March 6, 2015, defendant filed a reply. The motion for summary judgment is now before the court for a non-oral hearing.

{¶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*

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 began working for defendant in April 2011, as a service excellence specialist in UT's medical center (UTMC). Plaintiff's duties included developing customer service training programs and implementing the training with UTMC staff to improve customer service and patient satisfaction. Plaintiff also performed "rounds" with UTMC nurse managers. The evidence shows that hospital reimbursement from Medicare and Medicaid was directly tied to customer satisfaction and that, in 2011, UTMC's satisfaction scores were the lowest in northwestern Ohio.

{¶5} At the beginning of his employment, plaintiff's supervisor was Rosanne Plasky, the manager of iCare University, a division of the Service Excellence Department. Plasky reported to Ioan Duca, who was the manager of the Service Excellence Department. In September 2011, Duca announced a reorganization of the Service Excellence Department which included placing Frank LaPoint in charge of the iCare University, while Plasky remained as a manager. Plaintiff testified that he and other employees were often unsure to whom they reported because managerial positions "changed constantly."

{¶6} Beginning in 2011, UTMC senior managers held a series of meetings during which the elimination of certain positions was discussed in reaction to budget concerns due to decreasing revenue. (Tomlinson deposition, pages 19-24). Associate Vice President Norma Tomlinson explained that UTMC managers wanted to avoid eliminating positions that provided direct patient care. Tomlinson had conversations with UTMC's chief nursing officer and decided that nurse managers were capable of performing plaintiff's duties in the event that his position was eliminated.

{¶7} In November 2011, UTMC ended LaPoint's employment and plaintiff believed that he reported directly to Duca. Plaintiff testified that he was "uncomfortable" with certain changes that were made at UTMC, including changes in his job duties and comments by Duca which he believed constituted harassment and retaliation. (Plaintiff's deposition, pages 93-95, 101-104.) Specifically, plaintiff recalled Duca referring to "old ideas, old people." (*Id*. page 85.) Beginning in October 2011, plaintiff had a series of meetings with both Linda Torbet, a unit director in defendant's human relations department (HR), and Kevin West, a senior HR officer, to discuss alleged harassment and retaliation by Duca. During a November 7, 2011

meeting with Torbet, plaintiff complained that he believed that he and Plasky did not receive a recognition and retention bonus, while other department employees, including LaPoint and Tony Urbina, another Service Excellence employee, had received such a bonus. (Torbet deposition, page 74-78.) Plaintiff did not tell Duca he had made complaints to HR. Plaintiff subsequently filed an internal complaint against Duca. Duca testified that he was not aware of the complaint in 2011.

{¶8} After plaintiff filed his complaint, Duca met with plaintiff to discuss changes he intended to make to improve patient satisfaction, including having plaintiff focus on rounding on patient care floors and educating nurse managers, instead of training new employees. Plaintiff's job title and salary were not changed. However, plaintiff viewed the changes in his duties as a demotion, and he believed they were made in retaliation for filing his internal complaint. During either the end of January or the beginning of February 2012, plaintiff met with West and Dr. Scott Scarborough, Senior Vice President and UTMC Executive Director. Plaintiff was informed that he would be supervised by Plasky instead of Duca and that he would report to Tomlinson. Plaintiff continued to perform the same duties under Tomlinson and she decided to meet with him weekly. Plaintiff did not discuss his complaints against Duca with Tomlinson.

{¶9} In April 2012, Plasky completed a draft of plaintiff's annual performance evaluation, giving him the highest possible scores. (Defendant's Exhibit Q.) As Plasky's direct supervisor, Tomlinson reviewed the evaluation and determined that the scores were inflated. Tomlinson explained that she believed no one should get a perfect score and she obtained feedback from other department employees before adjusting plaintiff's evaluation. Although Tomlinson gave plaintiff lower scores, she included many favorable comments and plaintiff admits that she told him that the change in his evaluation would not affect his salary. According to plaintiff, Tomlinson "had numerous positive feedback," told him to continue to do a "great job," and the only change in his duties was that he no longer had to attend weekly meetings with Tomlinson because she believed he knew what he was doing. (Plaintiff's deposition, pages 202, 258.)

{¶10} On October 19, 2012, plaintiff received a letter notifying him that his employment would end at the close of business on January 16, 2013. Plaintiff recalled that Tomlinson explained the decision to eliminate his position was a budgetary

judgment which was not related to his job performance. On October 23, 2012, plaintiff filed a charge of retaliation with OCRC regarding the termination of his employment.

{¶11} Plaintiff alleges retaliation under R.C. 4112.02(I). R.C. 4112.02(I) provides that it is an unlawful discriminatory practice "[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." 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. No. 09AP-442, 2010-Ohio-4373, ¶ 55.

{¶12} 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) he engaged in protected activity; (2) [defendant] knew of his 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 v. Abercrombie & Fitch Co.*, 10th Dist. Franklin No. 13AP-591, 2014-Ohio-1600, ¶ 40. "The establishment of a prima facie case creates a presumption that the employer unlawfully retaliated against the plaintiff." *Id*.

{¶13} 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*.

{¶14} Defendant does not dispute that plaintiff has satisfied the first element establishing a prima facie case of retaliation and that the termination of his position was an adverse employment action. However, although plaintiff contends that Duca changed his job duties in retaliation for filing his internal complaint with HR, plaintiff admitted that he did not inform Duca of the complaint and Duca testified that he was

not aware that plaintiff had filed a complaint against him until after January 20, 2012 when plaintiff filed the OCRC complaint and plaintiff's duties had already been changed. (Duca affidavit ¶ 6; deposition page 186.) Plaintiff never discussed either his internal complaint or the OCRC complaint with anyone at UT outside of HR.

{¶15} West, who investigated plaintiff's internal complaint against Duca, testified that he neither told Duca of the complaint, nor did he tell Duca anything that would lead him to believe that a complaint had been filed. (West deposition, page 190.) Therefore, plaintiff cannot establish that his duties would not have been changed "but-for" the internal complaint he filed against Duca.

{¶16} Furthermore, to the extent that plaintiff alleges that his job location or some of his duties were changed in retaliation for filing complaints, the court notes that such reassignments do not ordinarily constitute adverse employment actions. "Factors to consider in determining whether an employment action was materially adverse include termination, demotion evidenced by a decrease in salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities or other indices unique to a particular situation. Not everything that makes an employee unhappy or resentful is an actionable adverse action. 'Employment actions that result in mere inconvenience or an alteration of job responsibilities are not disruptive enough to constitute adverse employment actions.'" (Internal citations omitted.) *Dautartas v. Abbott Labs.*, 10th Dist. Franklin No. 11AP-706, 2012-Ohio-1709, ¶ 52, quoting *Canady v. Rekau & Rekau, Inc.*, 10th Dist. No. 09AP-32, 2009-Ohio-4974, ¶ 25.

{¶17} Although plaintiff was dissatisfied with certain changes in his job duties, as noted above, plaintiff admitted that his job title and salary were not changed. Plaintiff's job duties were altered from a focus on training new employees to working directly with nurse managers; the goal remained improving patient satisfaction. Moreover, plaintiff cannot establish a causal connection between the change in his duties and his complaint against Duca inasmuch as there is no dispute that changes in his duties and office location began in September 2011, before he filed his internal complaint.

{¶18} Plaintiff contends that he can establish a causal connection between his complaints and the elimination of his position through temporal proximity. "Close temporal proximity between the employer's knowledge of the protected activity and the adverse employment action alone may be significant enough to constitute evidence of a causal connection, but only if the adverse employment action occurs "very close" in

time after an employee learns of a protected activity." *Knepper v. Ohio State Univ.*, 10th Dist. Franklin No. 10AP-1155, 2011-Ohio-6054, ¶ 27, citing *Clark Cty. School Dist. v. Breeden*, 532 U.S. 268, 273 (2001). The Tenth District Court of Appeals has held that an interval of two months between a complaint and adverse action "so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in [plaintiff's] favor on the matter of causal link." *Hall v. Banc One Mgt. Corp.*, 10th Dist. No. 04AP-905, 2006-Ohio-913, ¶ 47; *Aycox v. Columbus Bd. of Educ.,* 10th Dist. Franklin No. 03AP-1285, 2005-Ohio-69, ¶ 21.

{¶19} In this case, an interval of nine months passed between the date that plaintiff filed his OCRC charge and the date that he was given a 90-day notice his position would be eliminated. In his response to defendant's motion, plaintiff argues that statements made to Duca by HR personnel about complaints by employees constitutes additional evidence of retaliatory evidence. However, the statements that plaintiff references concerned a complaint by Plasky against Duca, which does not support an inference of causation regarding retaliation against plaintiff. Indeed, much of the evidence that plaintiff relies upon concerns Plasky and her interaction with Duca. The court notes that UT subsequently terminated both LaPoint's and Duca's employment and that Plasky resigned.

{¶20} Even if plaintiff were able to establish a prima facie case, he could not prevail if defendant had legitimate, nondiscriminatory reasons for terminating his employment. *McDonnell Douglas, supra*.

{¶21} Plaintiff admits he was told his position was eliminated due to a budgetary reduction and the evidence shows that UTMC senior managers began meeting in 2011 to discuss eliminating positions as a result of decreasing revenue. Tomlinson testified that certain vacant positions remained unfilled after employees left and that other positions which were not involved in direct patient care were designated for elimination. There is no dispute that such positions were eliminated both before and after plaintiff's employment was terminated. Plaintiff admitted that during the last few months of his employment, he received only positive feedback about his performance. Based upon the above facts and the applicable law, and construing the evidence most strongly in plaintiff's favor, the court finds that the only reasonable conclusion is that defendant

had legitimate, nondiscriminatory reasons for terminating plaintiff's position. Thus, defendant is entitled to judgment as a matter of law as to plaintiff's retaliation claim.

{¶22} 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. Accordingly, defendant's motion for summary judgment shall be granted.

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PATRICK M. MCGRATH
Judge

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JUDGMENT ENTRY

{¶23} 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. 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

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