[Cite as *Kastner v. Kent State Univ.*, 2015-Ohio-5659.]

KAREN S. KASTNER Plaintiff v. KENT STATE UNIVERSITY Defendant	Case No. 2014-00525 Judge Patrick M. McGrath Magistrate Holly True Shaver DECISION

{¶1} On October 2, 2015, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On October 30, 2015, plaintiff filed her response. On November 5, 2015, defendant filed a motion for leave to file a reply, which is GRANTED. The motion is now before the court on 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 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} In 2002, plaintiff began her employment as an Assistant Professor in defendant's School of Journalism and Mass Communication (JMC). Plaintiff's employment was governed by a collective bargaining agreement (CBA), and her position was on the non-tenure track. Plaintiff was employed under a series of one-year contracts, and was subject to a "three-year review" of her performance by a committee of JMC tenured faculty. Jeff Fruit, Director of the School of Journalism, recommended that plaintiff be reappointed in 2005 and again in 2008, as a result of plaintiff's three-year reviews, respectively. In his 2008 recommendation, Fruit noted that suggestions for improvement included plaintiff's teaching style. (Defendant's Exhibit A to plaintiff's deposition.) Specifically, Fruit stated that some students found her instruction to be harsh and sarcastic. *Id.* Fruit also stated that course organization was seen as "lacking" at times, and that faculty evaluators "felt that increased course preparation time in courses taught less frequently would yield stronger instruction." *Id.* Lastly, Fruit stated: "faculty evaluators noted that issues around completing dissertation work have been a distraction for Ms. Kastner this year, and that she should be able to put a renewed emphasis on improving instruction across the board next year." *Id.*

{¶5} In January 2011, plaintiff underwent her third, three-year review. After plaintiff's application and supporting materials were reviewed by a committee of JMC tenured-faculty, Fruit recommended to Stanley Wearden, Dean of the College of Communication and Information, that plaintiff's appointment not be renewed. (Defendant's Exhibit B.) Dean Wearden concurred with Fruit's recommendation, and plaintiff's employment was terminated when her contract expired on May 31, 2011. Plaintiff did not file a grievance pursuant to the CBA about her termination. (Plaintiff's deposition, page 60.)

{¶6} Plaintiff asserts three causes of action in her complaint: 1) gender based discrimination in violation of R.C. 4112, including a claim of hostile work environment; 2) defamation; and 3) false light invasion of privacy. In her response to defendant's

motion, plaintiff states that she is no longer pursuing either her defamation or false light claims. Therefore, Counts 2 and 3 of plaintiff's complaint are DISMISSED.

{¶7} Defendant asserts that the court lacks jurisdiction over plaintiff's gender based discrimination and sexual harassment claims, because her employment was governed by a CBA, and her claims arise from the terms and conditions of her employment.

{¶8} 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. Franklin No. 00AP-912 (June 14, 2001); *See Oglesby v. Columbus,* 10th Dist. Franklin No. 00AP-544 (Feb. 8, 2001).

{¶9} 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).

{¶10} In her deposition, plaintiff testified that defendant did not treat her fairly when she was not reappointed to her position. Specifically, plaintiff testified that she believes that she was not reappointed because she did not finish her doctorate. At the time of her review, plaintiff was "ABD" for her doctorate, which she explained stood for "all but dissertation." Although a PhD was not required for her position, plaintiff asserts

that part of the reason her contract was not renewed was because she did not complete her dissertation.

{¶11} Plaintiff submitted certain documents with her affidavit in support of her claims. Plaintiff's Exhibit 1 is a copy of her union representative's response to Fruit's January 29, 2011, recommendation for non-renewal. In Exhibit 1, the following issues were raised: 1) that errors were made in submitting materials for the review, including the addition of materials that were not relevant to the review time period, and the omission of certain materials that were relevant; 2) that plaintiff disagreed with Fruit's summary of her performance review; 3) that plaintiff's poor evaluations from students were not representative of her overall performance; 4) that Fruit cited an unusual number of student complaints about plaintiff's teaching that were not supported by documentation; 5) that Fruit included negative comments by the faculty review committee but failed to include positive comments; 6) and that although Fruit identified specific issues with plaintiff's performance in her 2008 review, Fruit failed to implement any specific plan for her to improve her performance in a measured way. In summary, plaintiff's union representative asked Dean Wearden to reconsider Fruit's recommendation and instead renew her contract for one year and provide a specific plan to address her teaching deficiencies.

{¶12} Construing the evidence most strongly in favor of plaintiff, the only reasonable conclusion is that the concerns that plaintiff raised in her union representative's response to Fruit's recommendation for non-renewal would have been directly related to the terms and conditions of her employment, and those claims would be dependent upon an analysis or interpretation of the CBA. Therefore, this court lacks jurisdiction over any claims that plaintiff has about the three-year review process that resulted in her termination.

{¶13} However, inasmuch as plaintiff asserts claims gender discrimination, the court finds that those claims are independent of an analysis of her CBA.

{¶14} R.C. 4112.02 provides, in pertinent part, that: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the * * * sex * * * of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." In Ohio, "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.*, 66 Ohio St.2d 192, 196 (1981).

{¶15} Absent direct evidence of discriminatory intent, Ohio courts resolve claims of disparate treatment using the evidentiary framework established by the Supreme Court of the United States in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Canady v. Rekau & Rekau, Inc.*, 10th Dist. Franklin No. 09AP-32, 2009-Ohio-4974, ¶ 22. "Under the *McDonnell Douglas* framework, a plaintiff bears the initial burden of establishing a prima facie case of discrimination. In order to do so, the plaintiff must present evidence that: (1) [she] is a member of a protected class, (2) [she] suffered an adverse employment action, (3) [she] was qualified for the position in question, and (4) either [she] was replaced by someone outside the protected class or a non-protected similarly situated person was treated better." *Id.* at ¶ 23.

{¶16} It is undisputed that plaintiff, as a female, is a member of a protected class, that she suffered an adverse employment action when her contract was not renewed, and that she was qualified for the position that she held. Plaintiff asserts that she was replaced by Timothy Roberts, a colleague who was hired in 2003 as a part-time adjunct professor. Plaintiff testified that at some point in time in the fall of 2010, Fruit assigned her Media Writing Coordinating duties to Roberts, and "relegated" her to teaching Fundamentals of Media Messages. (Plaintiff's deposition, pages 127-8.) At that time,

plaintiff was also doing administrative work in an effort to have the School become accredited. (Plaintiff's deposition, page 130.)

{¶17} "A person is 'replaced' only when another employee is hired or reassigned to perform that person's duties. A person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. It is well-established that '[s]preading the former duties of a terminated employee among the remaining employees does not constitute a replacement.'" (Internal citations omitted.) *Alexander v. Columbus State Cmty. Coll.*, 10th Dist. Franklin No. 14AP-798, 2015-Ohio-2170, ¶ 43.

{¶18} Although plaintiff testified that Roberts was assigned some of her classes, plaintiff has not provided evidence to show that Roberts was reassigned to all of her duties. Despite the lack of clarity that Roberts eventually replaced her, construing the facts most strongly in favor of plaintiff, the court will assume that plaintiff has met her burden of establishing a prima facie case of discrimination.

{¶19} "[I]f the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981), quoting McDonnell Douglas, at 802.

{¶20} In support of its motion, defendant filed an affidavit of Jeff Fruit, in which he states, in relevant part:

{¶21} "4. Ex. B is my January 29, 2011 memorandum expressing my recommendation that [plaintiff] not be reappointed. My reasons are detailed in that memorandum. Ex. C is a collection of comments I solicited from tenured faculty members concerning Ms. Kastner's performance. I did not discriminate *against* Ms. Kastner when I recommended that she be denied reappointment in 2011; nor did I

discriminate *in favor of* Ms. Kastner when I recommended that she be reappointed in 2005 and 2008.

{¶22} "5. Stanley Wearden, the dean of the College of Communication and Information, concurred with my recommendation not to reappoint Ms. Kastner in 2011, and her employment terminated as a result."

{¶23} In Defendant's Exhibit B, Fruit explained that plaintiff's work over the past three years did not meet an acceptable standard of quality in student instruction, which is the primary mission of a non-tenure track faculty position. Specifically, Fruit noted that her teaching since 2008 had been "quite uneven;" that student evaluations were dramatically below the mean for comparable courses and among the lowest in the school; that recommendations for improvement in performance that were identified in 2008 were not implemented; and that additional issues had arisen since 2008 with regard to complaints, comments and negative reports on her instruction. Although Fruit acknowledged that some positive aspects were noted by other faculty, he concluded that those positive aspects did not outweigh the evidence of uneven and unacceptable quality of instruction.

{¶24} Included in Exhibit D are the written comments that Fruit received from the JMC faculty who were involved in plaintiff's 2011 three-year review. Eight faculty members submitted written comments. Of the four female faculty members who submitted written comments, two recommended non-reappointment, one recommended re-appointment "with reservations," and one recommended reappointment. (Defendant's Exhibit D.) Of the four male faculty members who submitted written comments, three recommended non-reappointment, and one recommended re-appointment for one year with "stipulations for specific performance improvements." *Id.* Two other faculty members, one male and one female, declined to give a recommendation. The negative comments focused on plaintiff's problems with teaching, as noted in student evaluations and from complaints of colleagues. The

positive comments focused on giving plaintiff more time to improve her performance, and noted that there was no "paper trail" documenting plaintiff's shortcomings, other than student evaluations. *Id.*

{¶25} Upon review, defendant has articulated legitimate, nondiscriminatory reasons for plaintiff's termination. If the employer articulates a nondiscriminatory reason for its actions, then the employer has successfully rebutted the presumption of discrimination that was raised by the prima facie case. *See Weiper v. W.A. Hill & Assocs.*, 104 Ohio App.3d 250, 263 (1st Dist.1995). Then, the burden shifts back to plaintiff, to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *McDonnell Douglas*, supra, at 804.

{¶26} "To establish pretext, a plaintiff must demonstrate that the proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct. Regardless of which option is chosen, the plaintiff must produce sufficient evidence from which the trier of fact could reasonably reject the employer's explanation and infer that the employer intentionally discriminated against [her]. A reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." (Internal citations omitted.) *Knepper v. Ohio State Univ.*, 10th Dist. Franklin No. 10AP-1155, 2011-Ohio-6054, ¶ 12. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine, supra*, at 253.

{¶27} The documentation that plaintiff submitted in response to defendant's motion includes her own affidavit, wherein she identifies certain exhibits. Plaintiff's Exhibit 1 is her union representative's response to Fruit's January 29, 2011 recommendation; (discussed infra); Plaintiff's Exhibit 2 is her December 16, 2010 submission in support of her reappointment; Plaintiff's Exhibit 3 is a copy of her resume

that she submitted with her application for reappointment; Plaintiff's Exhibit 4 is a copy of Roberts' resume that was produced by defendant during discovery; Plaintiff's Exhibit 5 is a peer review of one of her classes conducted in 2010 by Bill Sledzik; and Plaintiff's Exhibit 6 is a peer review of one of her classes conducted in 2010 by Tim Smith. The court notes that Sledzik was the male faculty member who declined to make a recommendation, and that Smith was the male faculty member who recommended reappointment with stipulations for specific performance improvements.

{¶28} Despite plaintiff's assertions that the negative student evaluations were insufficient to warrant her termination, plaintiff acknowledges that she had received poor student evaluations, stating: "I honestly do believe that many students who get the poorer grades in a class account for many poor evaluations, but, as I say, there was no excuse; I should have spoken to someone much sooner. My peer evaluations have always been quite positive, and I should have turned to my peers as soon as I sensed class had gone awry. If anything like that should ever happen again, rest assured I will take action immediately as I value deeply our reputation as a pleasant and enjoyable place to attend 'j-school.' My evaluations for online fundamentals the last couple of years are skewed because very few students complete them." (Plaintiff's Exhibit 2.) However, even construing the evidence most strongly in plaintiff's favor, the evidence she has submitted does not permit a reasonable inference that defendant's reasons for plaintiff's non-renewal were insufficient for her termination and that that discrimination on the basis of her gender was the real reason that she was not reappointed.

{¶29} Finally, plaintiff testified in her deposition regarding her perception that Fruit, Blasé and Hanson harbored discriminatory animus against women. Plaintiff testified that Fruit and Blasé referred to one another as "brother." Plaintiff testified that use of that term offended her because it seemed as though certain men in her department belonged to a private club from which she was excluded. Plaintiff also testified that Fruit and Blasé began to call Roberts "brother" as well. Plaintiff testified

that her relationship with Fruit changed in 2010 when she began to sense that Roberts was going to take her job. Plaintiff also testified that Gary Hanson worked with her before she worked for defendant, and that she believed that he harbored discriminatory animus against women because one time in a meeting in 1994 he threw some papers at her and said, "File these for me, Karen. Put those in alphabetical order and file those for me." (Plaintiff's Deposition p. 58.)

{¶30} To survive a summary judgment motion, plaintiff must show that a reasonable fact-finder could conclude that the actual reasons offered by defendant were a mere pretext for unlawful discrimination because of her gender, not that other reasonable decision makers might have retained her. See *Frick v. Potash Corp. of Sask., Inc*., 3rd Dist. Allen No. 1-09-59, 2010-Ohio-4292, ¶ 24. The issue is not whether defendant made the best possible decision but whether it made a discriminatory decision. *Id.*

{¶31} With regard to the "brother" comments, to constitute proof of discrimination there must be a nexus between the alleged comments and the prohibited act of discrimination. *Byrnes v. LCI Communications*, 77 Ohio St.3d 125, 130, 1996-Ohio-307. Absent some causal connection or link between an employer's discriminatory statements or conduct and a plaintiff-employee, there is no permissible inference that the employer was motivated by discriminatory animus to act against the plaintiff-employee. *Id.* Accordingly, courts consider: 1) whether the comments were made by a decision maker; 2) whether the comments were related to the decision making process; 3) whether they were more than vague, isolated, or ambiguous; and, 4) whether they were made proximate in time to the act of termination. *Birch v. Cuyahoga Cty. Probate Court*, 173 Ohio App.3d. 696, 705, 2007-Ohio-6189, ¶ 23 (8th Dist.). Although plaintiff testified that Fruit and Blasé called each other "brother," and then at some point in time they called Roberts "brother," there is no assertion that the "brother" comments were made in reference to the decision-making process. Furthermore, Hanson's comments

to plaintiff in 1994 were not made during plaintiff's employment with defendant. The only reasonable conclusion is that plaintiff has not produced sufficient evidence to support an inference that defendant's proffered legitimate, nondiscriminatory reasons for her nonrenewal were but a pretext for gender discrimination. The "brother" comments were not directed at plaintiff and although she testified that she felt excluded, reasonable minds could not conclude that those comments were based on plaintiff's status as a female.

{¶32} Plaintiff also asserts in her complaint that defendant created a hostile work environment. Under Ohio law "in order to establish a claim of hostile-environment sexual harassment, the plaintiff must show (1) that the harassment was unwelcome, (2) that the harassment was based on sex, (3) that the harassing conduct was sufficiently severe or pervasive to affect the 'terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment,' and (4) that either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action." *Hampel v. Food Ingredients Specialties, Inc.,* 89 Ohio St.3d 169, 2000-Ohio-128, paragraph two of the syllabus. Based upon the evidence presented in support of her motion, the only reasonable conclusion is that plaintiff has failed to state a claim for hostile work environment sexual harassment. Accordingly, defendant's motion for summary judgment shall be granted.

PATRICK M. MCGRATH
Judge

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KAREN S. KASTNER Plaintiff v. KENT STATE UNIVERSITY Defendant	Case No. 2014-00525 Judge Patrick M. McGrath Magistrate Holly True Shaver JUDGMENT ENTRY

{¶33} 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. 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

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Filed November 20, 2015
Sent To S.C. Reporter 2/24/16