[Cite as *Hester v. Case W. Res. Univ.*, 2017-Ohio-103.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104415

CRYSTAL HESTER

PLAINTIFF-APPELLANT

vs.

CASE WESTERN RESERVE UNIVERSITY

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-843609

BEFORE: Jones, P.J., Boyle, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: January 12, 2017

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LARRY A. JONES, SR., P.J.:

{¶1} Plaintiff-appellant Crystal Hester appeals several of the trial court's judgments in this case, which collectively (1) denied her motion to strike the answer of defendant-appellee Case Western Reserve University ("CWRU" or "the university"); denied her motion to reconsider the Civ.R. 12(B) dismissal of some of her claims; and (3) granted summary judgment on her remaining claims in favor of the university. For the reasons that follow, we affirm in part and reverse and remand in part.

I. Procedural History and Factual Background[1]

{¶2} Hester was employed by CWRU from November 2006 through September 25, 2012, when her employment with the university was terminated. From November 2006 through July 1, 2012, Hester worked for the university as a library assistant. During her employment at the library, Hester was subject to at least one corrective action, after which she filed a grievance with the university. Hester contended that corrective action, which was given by a new manager she worked under, was because the new manager wanted to "micromanage" her.

{¶3} Hester sought and received a transfer to the university's registrar's office, where she worked as an operations analyst from July 2012 until her termination in September 2012. At all times, Hester was an at-will employee of CWRU.

{¶4} When Hester began her new position in the registrar's office, she was subject

[1]Some of the facts are adduced from an arbitration proceeding, which was recorded, transcribed, and is in the record.

to a 90-day probationary, orientation period as set forth in the university's staff employee handbook. Pursuant to the handbook, she was subject to three evaluations, one each after 30 days, 60 days, and 90 days, and during that orientation period, could be terminated without resort to the university's progressive discipline policy. According to Hester, she was advised that she could return to her former position within 90 days of beginning her new position if the new position was not suitable. When she asked to be returned to her former position, she was told "no." Hester admitted that she looked at the university's job postings at the time of her termination and did not see her prior job posted. It was later posted, but she did not apply because she was told when she was terminated that she would not be rehired.

{¶5} The first review of Hester's performance in the registrar's office was completed by Catherine Kraus, her supervisor. Kraus indicated that Hester's performance was mostly "outstanding." In the areas where Kraus did not rate Hester's performance as outstanding, she rated her performance as "good."[2] According to Kraus, July, the month in which Hester started, was generally a good time for new hires because the pace slowed from the general intense and busy pace that the office normally experienced.

{¶6} According to Kraus, after that first evaluation, she began receiving complaints about Hester, however. Specifically, Hester's coworkers complained to Kraus about Hester's attitude and lack of team work. Kraus documented the complaints and

[2]The possible ratings were: (1) "poor"; (2) "improvement needed"; (3) "satisfactory"; (4) "good"; or (5) "outstanding."

addressed them with Hester.

{¶7} On September 14, 2012, Kraus met with Hester to discuss her 60-day evaluation. When Kraus addressed some of the concerning areas with Hester, Hester became "defensive" and "emotional," to the point of making Kraus feel "very uncomfortable." Kraus testified that the complaints she had received about Hester, along with her encounter with Hester, left her with the impression that Hester was not a "good fit" for the job at the registrar's office. Thus, Kraus consulted with Kathryn Willson, an employee relations specialist at the university. The decision was made to terminate Hester's employment, effective September 25, 2012, which was approximately 70 days into her starting the new position.

{¶8} Kraus testified that as "professional courtesy" to Hester, she investigated whether it would be possible for Hester to return to her previous job at the library, but the library supervisor (the same one who had given Hester a corrective action) was not interested in retaining Hester. Kraus testified that she never told Hester about looking into her getting her prior job back.

{¶9} According to Hester, Kraus found out, against CWRU's policy, about the corrective action she was subject to when she worked at the library, which put Hester in a "bad light." Kraus then decided that she was going to terminate Hester and "coerced" employees to document "made up" or "blown out of proportion" incidents against her. Kraus denied having had any information about Hester from her library position, testifying that at the time she had hired Hester she was "disappointed that she did not have any of that information." Kraus testified that she first learned of the challenges Hester had at

the library on the day Hester was terminated.

{¶10} In April 2015, Hester filed this suit against the university; she amended her complaint in June 2015. Under her amended complaint, Hester sought damages based on the following ten causes of action: (1) wrongful discharge — implied contract; (2) wrongful discharge — promissory estoppel; (3) breach of covenant of good faith and fair dealing; (4) defamation; (5) intentional infliction of emotional distress; (6) retaliation; (7) breach of statutory duty; (8) constructive dismissal; (9) tortious interference with employment relationship; and (10) violation of due process and fair procedure.

{¶11} The university filed a motion to dismiss, which the trial court granted as to the claims for relief based on (1) breach of covenant of good faith and fair dealing; (2) defamation; (3) intentional infliction of emotional distress; (4) breach of statutory duty; (5) constructive dismissal; and (6) tortious interference with employment relationship. By agreement of the parties, the court referred the claims based on breach of implied contract, promissory estoppel, and retaliatory discharge to nonbinding arbitration. Hester filed a motion to reconsider the dismissal of the other claims; the trial court denied the motion.

{¶12} The matter proceeded to arbitration before a three-member panel. Hester, Kraus, Willson, and Carolyn Gerich Washick, the director of employee relations at CWRU, testified. The panel issued its report and award, finding for the university and against Hester.

{¶13} After the arbitrators' report and award was filed, Hester filed a motion for judgment on the pleadings and a motion for default judgment; the motion for judgment on the pleadings was denied as moot, and the motion for default judgment was denied. The

university filed a motion for leave to file its answer instanter; the trial court granted the motion, and the answer was filed. Hester filed motions to strike the answer and the university's affirmative defenses, which were both denied.

{¶14} Hester then appealed the arbitrators' decision to the common pleas court. Both parties filed motions for summary judgment. The trial court granted CWRU's motion and denied Hester's motion.[3] Hester now raises the following assignments of error for our consideration:

> I. The trial court abused its discretion when it denied the plaintiff's motion to strike.
>
> II. The trial court erred when it granted the appellee's motion for summary judgment without consideration of the appellant's opposition where triable issues exist.
>
> III. The trial court erred when it denied plaintiff's motion for summary judgment.
>
> IV. The trial court erred when it denied the plaintiff's motion for reconsideration.

{¶15} For ease of discussion we have considered some of the assignments of error out of order and together.

II. Law and Analysis

A. CWRU'S Answer and Denial of Hester's Motion to Strike

{¶16} In her first assignment of error, Hester contends that the trial court abused its discretion by denying her motion to strike CWRU's answer. Hester contends that the

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[3]The trial court's original judgment did not address Hester's violation of due process and fair procedure claim. A subsequent entry granted summary judgment in favor of the university on that claim as well.

case was never stayed and that the answer was filed out of time and not in accordance with Civ.R. 6(B)(2).

{¶17} Hester properly states the standard of review — abuse of discretion. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d. 217, 219, 450 N.E.2d 1140 (1983).

{¶18} In regard to Hester's contention that the case was not stayed, it is true that the trial court did not issue an order formally staying the case. But, under Loc.R. 29 governing arbitration, after a case is referred to arbitration, "[n]o further pleadings, motions, discovery or delays will be permitted." Thus, by rule, CWRU was not permitted to file its answer during the arbitration period.

{¶19} Further, CWRU actively defended itself throughout the pendency of this case. Hester filed her amended complaint on June 17, 2015, and the university, in lieu of an answer, filed its motion to dismiss on June 30, 2015. The docket indicates that at a pretrial held on August 18, 2015, the court stated that any remaining claims after consideration of the motion to dismiss would be referred to arbitration. The court issued its judgment regarding the motion to dismiss two days later on August 20. The arbitration hearing on the remaining claims was held on November 6, 2015, and the arbitrators filed their report and award on November 9, 2015. That same day, November 9, Hester filed her motions for judgment on the pleadings and default judgment. The following day, November 10, CWRU filed a motion for leave to file its answer. Because the university actively participated in this case from its inception, the trial court did not abuse its

discretion in allowing the university to file its answer; a judgment by default would not have been appropriate under these circumstances.

{¶20} A default judgment is a judgment entered against a defendant who has failed to timely plead in response to an affirmative pleading. *See* Civ.R. 55. Thus, only when a defendant "fails to contest the opposing party's allegations" by either pleading or otherwise defending does a default arise. *Ohio Valley Radiology Assocs., Inc. v. Ohio Valley Hosp. Assn.*, 28 Ohio St. 118, 121, 502 N.E.2d 599 (1986). As discussed, CWRU did defend itself in this case.

{¶21} We are also not persuaded that the university's answer should have been stricken for failure to comply with Civ.R. 6. Civ.R. 6 governs time in civil actions, and provides in pertinent part that when

> an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion * * * upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Civ.R. 6(B)(2). According to Hester, CWRU did not demonstrate "excusable neglect" to allow it to file its answer.

{¶22} In determining whether neglect is excusable or inexcusable, a trial court must consider all the surrounding facts and circumstances, and must also be mindful of the admonition that cases should be decided on their merits, where possible, rather than on procedural grounds. *Marion Prod. Credit Assn. v. Cochran*, 40 Ohio St.3d 265, 272, 533 N.E.2d 325 (1988). Inexcusable neglect under Civ.R. 6(B)(2) has been described as conduct that falls substantially below that which is reasonable under the circumstances.

State ex rel. Weiss v. Indus. Comm., 65 Ohio St.3d 470, 473, 605 N.E.2d 31 (1992).

{¶23} Upon review, the trial court did not abuse its discretion by granting leave to CWRU to file its answer. Although the case had not been formally stayed, the parties agreed to submit the remaining claims to nonbinding arbitration. The university sought leave to file its answer the day following the report and award of the arbitrators. The trial court did not abuse its discretion in allowing CWRU to defend against Hester's claims, as it had done throughout the pendency of the case.

{¶24} In light of the above, the first assignment of error is overruled.

B. Denial of Hester's Motion for Reconsideration

{¶25} In her fourth assignment of error, Hester contends that the trial court erred by denying her motion to reconsider its judgment on the claims it dismissed pursuant to the university's Civ.R. 12(B)(6) motion to dismiss.

{¶26} A trial court's determination of a motion for such reconsideration will not be disturbed on appeal absent an abuse of discretion. *Vanest v. Pillsbury Co.*, 124 Ohio App.3d 525, 535, 706 N.E.2d 824 (4th Dist.1997). Hester contended in her motion that the court's decision on the defamation, breach of statutory duty under R.C. 4101.11, tortious interference, and the due process and fair procedure claims was an "obvious error" or was based on issues not previously considered by the court.[4]

Defamation

[4]Hester did not challenge the dismissal of her claims based on breach of covenant and fair dealing, the intentional infliction of emotional distress, or constructive discharge in either her motion for reconsideration or here on appeal. We, therefore, do not address those claims.

{¶27} As ground for its motion to dismiss Hester's defamation claim, the university contended that it was time barred under R.C. 2305.11(A), which provides in relevant part that "[a]n action for libel [or] slander * * * shall be commenced within one year after the cause of action accrued." In her opposition to the university's motion to dismiss this claim, Hester contended that it was a personal injury claim subject to a two-year statute of limitations under R.C. 2305.10.

{¶28} R.C. 2305.10 governs the statute of limitations for "product liability claims[,] actions for bodily injury or injuring personal property[,] and childhood sexual abuse"; it does not govern the statute of limitations for defamation. Rather, as previously cited, R.C. 2305.11(A) sets a one-year statute of limitations for defamation claims.

{¶29} CWRU contends that Hester's claim of defamation relates to statements made prior to April 3, 2014, which was one year before the date she filed this action and, thus, were barred by the statute of limitations; the trial court agreed and dismissed the claim as time-barred.

{¶30} But the alleged statements, which appear to mainly be related to performance reviews from both of the jobs at the university, do not in and of themself trigger the running of the statute of limitations. That is, in order to be defamatory, the statements must be published, which according to Hester, they were when CWRU shared them with potential employers to whom she was applying after her termination from CWRU.

{¶31} Specifically, to establish a claim for defamation, a plaintiff must show: (1) a false statement of fact was made about the plaintiff, (2) the statement was defamatory, (3) the statement was published, (4) the plaintiff suffered injury as a proximate result of

the publication, and (5) the defendant acted with the requisite degree of fault in publishing the statement. *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 77, citing *Pollock v. Rashid*, 117 Ohio App.3d 361, 368, 690 N.E.2d 903 (1st Dist.1996).

{¶32} In her amended complaint, Hester alleged that CWRU shared the statements with prospective employers, one with whom she did gain employment but was subsequently terminated allegedly because of the alleged defamatory statements, and others with whom she sought employment, and that they adversely affected her stance with the employers. She further alleged that the university knew that the statements were false, and that it acted with "malice to ruin and destroy [her] professional career."

{¶33} A Civ.R. 12(B)(6) motion to dismiss on statute of limitations grounds cannot succeed unless the complaint, on its face, established an expired statute of limitations. *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814, ¶ 13. The amended complaint here does not, on its face, establish an expired statute of limitations for the defamation claim. The defamation claim therefore should have survived a motion to dismiss.

Breach of Statutory Duty under R.C. 4101.11

{¶34} The trial court dismissed Hester's claim that CWRU breached its duty to her under R.C. 4101.11, and Hester requested reconsideration of the dismissal.

{¶35} R.C. 4101.11 sets forth the "duty of employer to protect employees and frequenters," and provides as follows:

> Every employer shall furnish employment which is safe for the employees engaged therein, shall furnish a place of employment which shall be safe for the employees therein and for frequenters thereof, shall furnish and use safety devices and safeguards, shall adopt and use methods and processes, follow and obey orders, and prescribe hours of labor reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters.

{¶36} Thus, R.C. 4101.11 relates to claims of physical injuries suffered by a plaintiff-employee due to an employer's failure to maintain a safe workplace. The gravamen of Hester's complaint was that the university wrongfully terminated her employment. She did not allege that the university failed to provide a safe place of employment and that she suffered physical injuries as a result. The trial court therefore properly dismissed Hester's claim for a breach of statutory duty under R.C. 4101.11.

Tortious Interference with Employment Relationship

{¶37} In Ohio, the elements of tortious interference with employment relationship are as follows: (1) the existence of an employment relationship between plaintiff and the employer; (2) the defendant was aware of this relationship; (3) the defendant intentionally interfered with this relationship; and (4) the plaintiff was injured as a proximate result of the defendant's acts. *Costaras v. Dunnerstick*, 9th Dist. Lorain No. 04CA008453, 2004-Ohio-6266, ¶ 8. Thus, there are three players in a tortious interference claim: the plaintiff, the defendant, and a third-party employer. *Lennon v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587, ¶ 19. The employer being sued cannot be the third party in this type of claim. *Id.* at ¶ 20.

{¶38} Hester alleged that there were two types of tortious interference: (1) that a

CWRU employee from the library interfered with her position at CWRU's registrar's office, and (2) that a CWRU employee interfered with an "external employer," causing her to lose her job with that external employer.

{¶39} In dismissing the claim, the trial court found that Hester only alleged that some of the university employees communicated with other university employees to interfere with her employment. For the reasons discussed above, Hester's claim that that occurred was properly dismissed, but her claim that the university interfered with another third-party employer should have survived a motion to dismiss.

Due Process and Fair Procedure Claim

{¶40} Hester's due process claim was not dismissed under CWRU's motion to dismiss; rather, it was disposed of under the university's motion for summary judgment, and we will consider it below.

{¶41} In light of the above, Hester's fourth assignment of error is sustained in part and overruled in part. It is sustained as it relates to her defamation and tortious interference claims;[5] it is overruled as it relates to her breach of statutory duty under R.C. 4101.11 and due process claims.

C. Summary Judgment in favor of CWRU and against Hester

{¶42} Hester's second and third assignments of error challenge the trial court's decision to grant summary judgment in favor of CWRU, and the denial of her motion for summary judgment, on her breach of implied contract, promissory estoppel, retaliatory

[5]Hester's tortious interference claim survives only as it relates to a true third-party employer, that is, an employer other than CWRU.

discharge, and due process and fair procedure claims.

Standard of Review

{¶43} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). A motion for summary judgment may be granted only when it is demonstrated that: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his or her favor. *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978); Civ.R. 56(C).

{¶44} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733

N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Breach of Implied Contract

{¶45} Ohio adheres to the doctrine of at-will employment. *Brzozowski v. Stouffer Hotel Co.*, 64 Ohio App.3d 540, 543, 582 N.E.2d 24 (8th Dist.1989). Pursuant to that doctrine, either party may terminate the employment relationship for any reason not contrary to law. *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 103, 483 N.E.2d 150 (1985). An implied contract is one exception to the employment-at-will doctrine. *Id.*; *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990).

{¶46} Consistent with the presumption of at-will employment, it is recognized that "the party asserting an implied contract of employment has a heavy burden. [She] must prove the existence of each element necessary to the formation of a contract." *Penwell v. Amherst Hosp.*, 84 Ohio App.3d 16, 21, 616 N.E.2d 254 (9th Dist.1992). Therefore, Hester needed to show a "meeting of the minds" of the parties that the employment was other than at-will. *Schwartz v. Comcorp., Inc.*, 91 Ohio App.3d 639, 647, 633 N.E.2d 551 (8th Dist.1993).

{¶47} Upon review, we find that Hester failed to show that there was a meeting of the minds that her employment at the university was other than at-will. Hester contended that the following altered the employment relationship: (1) the university's offer letter to her; (2) the university's completion of a form verifying her employment; (3) the

university's employee handbook; and (4) the university's policy relating to returning to a previous position after a transfer to another position.

i. The Offer Letter

{¶48} CWRU sent Hester an offer letter stating that it was "pleased to confirm your promotion to the position of Operations Analyst," and providing general information including her "next review date." According to Hester, CWRU's inclusion of a next review date created a contract for employment. We disagree.

{¶49} The first 90 days of Hester's employment with the register's office were under a probationary, orientation period. During that period, she was subject to three reviews, one each after 30 days, 60 days, and 90 days. The university's policy specifically stated that during that probationary period, Hester could be terminated without resort to the university's progressive discipline policy. The mention of a next review date in the offer letter in no way created an implied contract.

ii. The Employment Verification Form

{¶50} The verification form likewise did not alter the parties employment relationship. Hester submitted the form to the university because she had applied for funds for a home improvement/upgrades program. CWRU completed the form, indicating that Hester was an employee of the university and her salary, and providing other general information such as her hire date and title. The form did not create an implied contract.

iii. CWRU's Employee Handbook

{¶51} Hester claimed that the university's handbook created contractual rights.

The first page of the handbook contains the following disclaimer, however:

> **Reminder**
>
> This handbook should not be construed in any way to constitute an agreement between the university and its employees with respect to level of compensation, duration of employment or any other matter. Under no circumstances should this handbook or the Human Resources Policies and Procedures be considered a contract of employment or a legally binding agreement.

(Emphasis sic.) Thus, the handbook makes clear that it did not create contractual rights and Hester's claim to the contrary fails. Moreover, Hester testified at the arbitration proceeding that she had read and understood the handbook, and that she understood she was employed at-will and could be terminated at any time and for any reasons not contrary to law.

iv. CWRU's Policy regarding Return to Former Position after Transfer

{¶52} Hester contends that the university violated its policy of not returning her to her library position after the job at the registrar's office did not work out. According to Hester, the university's policy was to hold prior jobs "open" for transferring employees for the duration of the probationary period. The relevant policy provides as follows:

> If at any time during or at the end of the orientation period the employee or the supervisor believes that the job change was inappropriate, the employee is exempt from the internal employment requirement of twelve months in the current assignment and may apply for other positions, including the former position if it has not been filled.

{¶53} That policy did not stand for the proposition Hester contends it did. That is, it did not guarantee that her former job would be "held open" for her. Rather, it provided that a transferred employee could apply for another job at the university within the

orientation period if the new job had not been a good fit for him or her. The policy therefore required that (1) the employee apply, and (2) for an open position.

{¶54} By Hester's own admission during her testimony at the arbitration proceeding, she never applied for her former library job, or any other job at CWRU. Further, both Kraus and Willson testified that Hester's former position at the library was not "open" at the time of termination.[6] Moreover, Kraus testified that as a "professional courtesy" to Hester, she asked Willson to see about the possibility of Hester returning to the library. Willson agreed and called the library supervisor; the supervisor said that she was not interested in retaining Hester as an employee, however.

{¶55} In light of the above, the record does not demonstrate that an implied contract between Hester and CWRU was formed, and the trial court properly granted summary judgment in favor of the university on the claim.

Promissory Estoppel

{¶56} Promissory estoppel is another exception to the at-will doctrine. *See Mers*, 19 Ohio St.3d 100, at 104, 483 N.E.2d 150. In order to establish a cause of action based upon promissory estoppel, an employee must establish the following: (1) a promise made by the employer that the employer reasonably should expect would induce action or forbearance on the part of its employee; (2) evidence that the expected action or

[6]Hester contends that a temporary employee took her position at the library when she was promoted to the register's office and this evidenced that the university was holding the job "open" for her. Willson testified that the university routinely uses temporary employees in various positions, depending on the university's needs at particular times, and such use does not automatically indicate that a position is "open."

forbearance actually resulted; and (3) such action or forbearance must have been detrimental to the employee. *Id.* at paragraph three of the syllabus.

{¶57} Hester's promissory estoppel claim was based on the alleged promise the university made to her to go back to her former library position if the new job did not work out. For the reasons discussed above, the university did not promise Hester that it would hold her old job for her. The university's policy stated that she could apply for the old job, or any other university job, during or at the conclusion of the probationary, orientation period, if the new position was not a good fit. It is undisputed that Hester did not apply for her old job or any other university job. The trial court therefore properly granted summary judgment in favor of CWRU on Hester's promissory estoppel claim.

Retaliatory Discharge

{¶58} Hester claimed that she was terminated from her position at the registrar's office because she had filed a grievance regarding a poor review she received when she worked at the library. For the reasons that follow, the trial court properly granted summary judgment in favor of CWRU on this claim.

{¶59} To prove a prima facie case of retaliation, Hester needed to demonstrate that (1) she engaged in a protected activity; (2) her employer knew about the protected activity; (3) her employer took adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action. *Wille v. Hunkar Lab., Inc.*, 132 Ohio App.3d 92, 107-108, 724 N.E.2d 492 (1st Dist.1998).

{¶60} The "mere assertion of a union grievance, not based upon opposition to discrimination, does not constitute protected activity." *Motley v. Ohio Civ. Rights*

Comm., 10th Dist. Franklin No. 07AP-923, 2008-Ohio-2306, ¶ 16. Further, Kraus testified that at the time she sought to terminate Hester's employment, she did not even know about the grievance. On this record, the trial court properly granted summary judgment in favor of CWRU on Hester's retaliatory discharge claim.

Due Process and Fair Procedure

{¶61} Hester claimed that CWRU violated its own policies, namely that the university terminated her "without just cause" and despite the "oral assurances" to her and the policy of keeping her old job "open" for her. As discussed, there was no policy of keeping jobs "open" for transferred employees. Further, an at-will employee can be terminated any time, with or without just cause. *Wright v. Honda of Am. Mfg. Inc.*, 73 Ohio St.3d 571, 574, 653 N.E.2d 381 (1995). Therefore, the trial court's judgment in favor of the university on this claim was proper.

III. Conclusion

{¶62} The trial court's judgments are affirmed in part and reversed in part, as follows: (1) the judgment denying Hester's motion to strike CWRU's answer is affirmed; (2) the portion of the judgments dismissing Hester's defamation and tortious interference with employment relationship[7] claims and denying her reconsideration on same are reversed; (3) the portion of the judgment dismissing Hester's claim of breach of statutory duty under R.C. 4101.11 is affirmed; and (4) the trial court's judgments granting summary judgment in favor of CWRU on Hester's breach of implied contract, promissory estoppel,

[7]As mentioned, the tortious interference claim only survives as it relates to interference with a third-party employer other than CWRU.

retaliatory discharge, and due process and fair procedure claims are affirmed.

{¶63} Affirmed in part, reversed in part; case remanded to trial court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., PRESIDING JUDGE

MARY J. BOYLE, J., and
ANITA LASTER MAYS, J., CONCUR