[Cite as *Babcock v. Ohio State Univ.*, 2013-Ohio-5957.]

Court of Claims of Ohio
The Ohio Judicial Center
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LOREN BABCOCK

Plaintiff

v.

THE OHIO STATE UNIVERSITY

Defendant

Case No. 2012-07528

Judge Patrick M. McGrath
Magistrate Robert Van Schoyck

ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶ 1} On September 6, 2013, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). Plaintiff filed a memorandum in opposition, with leave of court, on September 27, 2013. Defendant filed a reply, with leave of court, on October 4, 2013. The motion is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶ 2} As an initial matter, on September 6, 2013, defendant filed a "motion to transfer discovery and evidence from previously filed case." Plaintiff has not opposed the motion, and, upon review, the same is hereby GRANTED.

{¶ 3} Civ.R. 56(C) states, in part, as follows:

{¶ 4} "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).

{¶ 5} Plaintiff, a Professor in defendant's School of Earth Sciences, brings this action asserting claims of assault and battery, copyright infringement, defamation, intentional infliction of emotional distress, and both "quid pro quo" and "hostile work environment" theories of sexual harassment in violation of R.C. 4112.02.

{¶ 6} Plaintiff's copyright infringement claim falls within the exclusive jurisdiction of the federal courts and shall therefore be dismissed for lack of subject matter jurisdiction. *See* 28 U.S.C. 1338(a); *Automated Solutions Corp. v. Paragon Data Sys., Inc.*, 167 Ohio App.3d 685, 2006-Ohio-3492, ¶ 17 (8th Dist.). Furthermore, judgment shall be entered for defendant on the assault and battery claims inasmuch as plaintiff concedes in his memorandum that they are barred by the applicable statute of limitations.

{¶ 7} Plaintiff's claim for sexual harassment arises from his dealings with Lara Ford, whom he met in 2004 when she was an undergraduate student in a course that he taught. Evidence presented by the parties shows that Ford later became employed with defendant at some point as a Research Aide in the Byrd Polar Research Center.

{¶ 8} Defendant provided a transcript of plaintiff's deposition wherein he testified that he and Ford became friends, but he insisted that they were not romantically involved, although he admitted that they exchanged gifts and greeting cards, that they called one another on the telephone, e-mailed one another, socialized together, that in December 2004 the two of them drove to a holiday party in Cincinnati where there was an incident in which he claims Ford kissed him without any reciprocation on his part,

and that there was another incident in 2005 in which they attended a conference in New Orleans and, after going out for drinks together, Ford slept overnight in his hotel room.

{¶ 9} In an affidavit that he filed in opposition to defendant's motion, plaintiff avers, in part, that "[f]rom 2005 to January 3, 2008, Ford made repeated unwanted sexual advances to me." Plaintiff also avers that in 2005 and 2007 he "filed written complaints of sexual harassment" that defendant failed to investigate, although it is unclear as to whom any such complaints were made. According to plaintiff, Ford came to his office one day in June 2007 to confront him for refusing her advances, punched him in the groin, and made various threats about having him fired if he would not submit to her advances. Still, plaintiff testified in his deposition that he continued to see Ford, call her on the telephone, and bought her at least one more gift. Plaintiff further testified that on January 3, 2008, Ford once again confronted and threatened him. There is no dispute that after that encounter, and no later than January 17, 2008, Ford and plaintiff filed complaints against one another with defendant's Office of Human Resources, an investigation occurred, and on June 9, 2008, the Office of Human Resources issued two separate reports that contained factual findings and "action steps" for plaintiff and Ford. Plaintiff testified that he and Ford had no further contact after filing their complaints against one another. (Deposition, p. 101.)

{¶ 10} There is no dispute that on January 22, 2010, plaintiff filed his original complaint in Case No. 2010-01646. The action was voluntarily dismissed on October 11, 2011, and re-filed under the saving statute, R.C. 2305.19(A), on October 10, 2012. Pursuant to R.C. 2743.16(A), plaintiff was required to commence the original action no later than two years after the date of accrual of the cause of action. Accordingly, any claim for harassment that occurred prior to January 22, 2008, is barred by the two-year statute of limitations. Upon review of plaintiff's deposition transcript, as well as an affidavit that he provided in opposition to defendant's motion, there does not appear to be any evidence of plaintiff being sexually harassed on or after that date. Accordingly, defendant is entitled to judgment on plaintiff's claims of sexual harassment.

{¶ 11} With regard to defamation, in order to prevail on such a claim it must be shown that: "(1) a false statement, (2) about the plaintiff, (3) was published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) the statement was either defamatory per se or caused special harm to the plaintiff." *Schmidt v. Northcoast Behavioral Healthcare*, 10th Dist. No. 10AP-565, 2011-Ohio-777, ¶ 8.

{¶ 12} Plaintiff asserts that defamatory statements were made in the investigative reports issued by the Office of Human Resources on June 9, 2008, in a story published on the Internet website of defendant's student newspaper, *The Lantern*, on April 14, 2010, and in the April 15, 2010 print edition of *The Lantern*.

{¶ 13} R.C. 2743.16(A) provides:

{¶ 14} "Subject to division (B) of this section, civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or *within any shorter period that is applicable to similar suits between private parties*." (Emphasis added.)

{¶ 15} Pursuant to R.C. 2305.11(A), an action for defamation must be brought within one year after the cause of action accrues. A cause of action for defamation accrues on the date when the allegedly defamatory matter is first published. *Fleming v. Ohio Attorney Gen.*, 10th Dist. No. 02AP-240, 2002-Ohio-7352, ¶ 13.

{¶ 16} Plaintiff filed his original complaint in Case No. 2010-01646 more than one year after the Office of Human Resources issued its investigative reports. And, the original complaint was not amended to include any allegation about the newspaper stories, nor did plaintiff re-file the action within one year after the newspaper stories were published. Accordingly, plaintiff's defamation claim is barred by the one-year statute of limitations.

{¶ 17} Plaintiff's claim for intentional infliction of emotional distress was not asserted in the original complaint in Case No. 2010-01646, a certified copy of which is

attached to defendant's motion. Defendant argues that the saving statute cannot operate to render the claim timely in the re-filed action. The saving provision in R.C. 2305.19(A) applies only to the extent that "the original suit and the new action are substantially the same." *Children's Hosp. v. Ohio Dept. of Pub. Welfare*, 69 Ohio St.2d 523, 525 (1982). "A new action is 'substantially the same,' when the new complaint differs not at all, or only to the extent that it adds 'new' theories of recovery based upon the same facts stated in the original complaint. If a re-filed complaint does add additional theories of recovery, those theories must be based upon allegations set forth in the original complaint which would give the defendant or defendants fair notice of the claims added to the second action." *Carl L. Brown, Inc. v. Lincoln Natl. Life Ins.*, 10th Dist. No. 02AP-225, 2003-Ohio-2577, ¶ 42.

{¶ 18} "A claim for intentional infliction of emotional distress requires plaintiff to show that (1) defendant intended to cause emotional distress, or knew or should have known that actions taken would result in serious emotional distress; (2) defendant's conduct was extreme and outrageous; (3) defendant's actions proximately caused plaintiff's psychic injury; and (4) the mental anguish plaintiff suffered was serious." *Hanly v. Riverside Methodist Hosps.*, 78 Ohio App.3d 73, 82 (10th Dist.1991).

{¶ 19} According to plaintiff's affidavit, he suffers from "ongoing emotional distress" as a result of "[h]ostility and intimidation, including such aggressive behavior as break-ins of Plaintiff's office." Plaintiff further avers that he suffers ongoing "stress" as a result of "negative annual work reviews, minimal annual salary adjustments, general hostility from faculty and administrators, loss of employer support, break-ins of my office, and ongoing fear of death from continued threats."

{¶ 20} A plaintiff who claims tortious infliction of emotional distress must present "some guarantee of genuineness" to support the claim, such as an expert opinion or the testimony of lay witnesses who are acquainted with the plaintiff, to prevent summary judgment in favor of defendant. *Ford Motor Credit Co. v. Ryan*, 189 Ohio App.3d 560, 2010-Ohio-4601, ¶ 57 (10th Dist.). Upon review, no reasonable trier of fact could

conclude that plaintiff has presented evidence to demonstrate that he suffered the severe and debilitating distress necessary to sustain such claims. Moreover, based upon the conduct that plaintiff has identified as supporting his claim, it is apparent that this new theory of recovery is substantially based upon allegations that were not timely asserted. For example, the complaint in the original action did not allege any sort of death threat being made on or after January 22, 2008, nor did it allege anything in the way of break-ins at plaintiff's office.

{¶ 21} For the foregoing reasons, the court concludes 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 is GRANTED, plaintiff's claim of copyright infringement is DISMISSED without prejudice, 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.

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PATRICK M. MCGRATH
Judge

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