

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

CHANTANA KUNG, et al.

Plaintiffs

v.

OHIO DEPARTMENT OF INSURANCE

Defendant

Case No. 2007-02033

Judge J. Craig Wright

DECISION

{¶ 1} Plaintiffs brought this action against defendant, Ohio Department of Insurance (ODI), alleging intentional infliction of emotional distress and retaliation.¹ The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} Plaintiff was hired by ODI in April 1998, as a network administrator. He was later promoted to Information Technology (IT) Consultant. His job duties entailed maintaining and upgrading ODI's computer system including the network, the servers, and applicable software. In March 2005, plaintiff was terminated from his position. He filed a grievance and, in June 2005, he also filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). According to plaintiff, he prevailed on his grievance and he was returned to work on May 15, 2006, with full back pay and benefits restored.

{¶ 3} Upon his return to work, plaintiff was notified that the computer services department had been reorganized for security reasons and that, as a result, his duties had changed. For example, plaintiff no longer had access to all servers or to certain passwords necessary to log on to those servers. Plaintiff alleges that commencing in May 2006 he has suffered slights and indignities at work; for example, when his supervisor refused to allow him to reconfigure his work space, refused to assign him a laptop computer, and failed to provide him with the combination to a locked closet. Plaintiff testified that he continued to work as best he could despite these obstacles. Then, in March 2007, he was placed on administrative leave pending an investigation into possible misuse of computer services. At the conclusion of the investigation, plaintiff was cleared of any wrongdoing and returned to work. According to plaintiff, defendant's employees have engaged in egregious misconduct and acts of retaliation in response to the EEOC charge and federal lawsuit that plaintiff had filed. Plaintiff also contends that he has suffered severe emotional distress as a result of such conduct.

{¶ 4} Defendant denies liability and maintains that all of plaintiff's complaints were the subject of grievances which have been resolved in accordance with the collective bargaining agreement. In addition, defendant contends that plaintiff has not been subjected to retaliation, but rather, that plaintiff has had difficulty adjusting to the changes that were made in the department during his absence. Finally, defendant argues that the incidents cited by plaintiff do not rise to the level necessary to constitute the intentional infliction of emotional distress, nor has plaintiff presented sufficient evidence to show that he suffered severe emotional distress.

{¶ 5} Dominic Lacich testified that he began his employment with ODI in September 2005 and that he was plaintiff's supervisor in May 2006. Lacich explained that under his direction as the network administration manager, the IT department had been reorganized in order that no one person had access to all components of the computer system. Consequently, the corresponding position descriptions were changed to reflect the separation of duties within the department.

{¶ 6} Lacich denied engaging in any act of retaliation against plaintiff. According to Lacich, there was a laptop available in the department for use by both

¹On June 4, 2008, the court granted judgment for defendant on plaintiffs' third cause of action.

plaintiff and his co-worker, Mark Hutchinson, and that he saw no need to permanently assign the equipment to one person or the other. Lacich acknowledged that he did not allow plaintiff to rearrange his work space as requested inasmuch as the reconfiguration would have compromised Lacich's ability to supervise other employees while maintaining confidentiality. Indeed, Lacich noted that plaintiff's request was subsequently granted after Lacich's office was moved to another area. Lacich also testified that he provided plaintiff with those passwords relative to the servers to which he was assigned within a few days of his return to work in 2006. Lacich stated that although plaintiff no longer held the same responsibilities which he had previously held, the same was true for the rest of the employees in the department. Such changes had been implemented to match the individual's expertise with an assigned task and to ensure that no individual had unlimited access to the computer system.

{¶ 7} Plaintiff claims that he was mistreated in retaliation for filing both an EEOC charge and a federal lawsuit alleging that he was discriminated against on the basis of his race.

{¶ 8} R.C. 4112.02 provides, in pertinent part, that: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, * * *, disability, age, or ancestry 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."

{¶ 9} R.C. 4112.02(I) states 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."

{¶ 10} In order to establish a prima facie case of retaliation, pursuant to R.C. 4112.02(I), a plaintiff is required to prove that: "(1) plaintiff engaged in a protected activity; (2) the employer knew of plaintiff's participation in the protected activity; (3) the employer engaged in retaliatory conduct; and (4) a causal link exists between the

protected activity and the adverse action.” *Motley v. Ohio Civil Rights Commission*, Franklin App. No. 07AP-923, 2008-Ohio-2306, ¶11 quoting *Zacchaeus v. Mt. Carmel Health Sys.*, Franklin App. No. 01AP-683, 2002-Ohio-444. (Additional citations omitted.)

{¶ 11} The first element of a prima facie case of retaliation is that plaintiff must have engaged in a “protected activity.” 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 Comm'n.*, Franklin App. No. 07AP-1071, 2008-Ohio-4107, ¶21, citing *Thatcher v. Goodwill Industries of Akron* (1997), 117 Ohio App.3d 525, 535.

{¶ 12} The court finds that plaintiff has met his burden with regard to the first element and arguably with the second element despite Lacich’s testimony to the contrary. Nonetheless, the court concludes that plaintiff cannot prevail on his retaliation claim because he has failed to prove either that he was subjected to retaliatory conduct or that he suffered an adverse employment action. Factors that courts consider when determining whether an employment action was materially adverse include “termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.” *Crady v. Liberty Nat’l Bank and Trust Co.* (C.A.7, 1993), 993 F.2d 132, 136.

{¶ 13} Upon review, the court finds that plaintiff was never demoted; his salary remained unchanged; and any change in his duties and responsibilities resulted from ODI’s legitimate business concerns regarding security issues within the IT department. In addition, Ohio courts have held that an “employee has an obligation not to jump to conclusions and assume that every conflict with an employer evidences a hidden intent by the employer to terminate the employment relationship.” *Simpson v. Depart. of Rehab & Corr.*, Franklin App. No. 02AP-588, 2003-Ohio-988, citing *Jackson v. Champaign Nat’l. Bank & Trust Co.* (Sept. 26, 2000), Franklin App. No. 00-170. For the foregoing reasons, the court concludes that defendant did not engage in retaliation against plaintiff.

{¶ 14} Plaintiff’s complaint also alleges a claim for intentional infliction of emotional distress. Under Ohio law, a plaintiff claiming the tort of intentional infliction of

emotional distress must show: “(1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff, (2) that the actor’s conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community, (3) that the actor’s actions were the proximate cause of the plaintiff’s psychic injury, and (4) that the mental anguish suffered by the plaintiff is serious and of a nature that no reasonable man could be expected to endure it.” *Burkes v. Stidham* (1995), 107 Ohio App.3d 363, 375.

{¶ 15} “It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice,’ or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. * * * The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 374-375.

{¶ 16} The Tenth District Court of Appeals has also addressed this issue and held that “to constitute extreme and outrageous behavior, the actions must go beyond all possible bounds of decency and can be considered as utterly intolerable in a civilized community.” *Perry v. Speedway SuperAmerica, L.L.C.*, Franklin App. No. 01AP-908, 2002-Ohio-1260.

{¶ 17} Upon review of all the testimony and evidence submitted, the court finds that plaintiffs have failed to show extreme and outrageous conduct on the part of defendant. As noted above, the record indicates that defendant acted reasonably under the circumstances and did not engage in outrageous behavior.

{¶ 18} For the foregoing reasons, the court finds that plaintiffs have failed to prove any of their claims by a preponderance of the evidence and, accordingly, judgment shall be rendered in favor of defendant.

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JUDGMENT ENTRY

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. CRAIG WRIGHT
Judge

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SJM/cmd
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