

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
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LORI A. RICE

Plaintiff

v.

COLUMBUS STATE COMMUNITY COLLEGE

Defendant

Case No. 2005-09162

Judge Joseph T. Clark

DECISION

{¶ 1} Plaintiff brought this action alleging that she was wrongfully terminated in violation of the federal Family Medical Leave Act (FMLA). The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} Plaintiff began her employment with defendant Columbus State Community College (CSCC) in 1996 and, in the fall of 2001, she became a full-time, tenure-track instructor in the Computer Information Technology Department. During a 40-hour workweek, defendant's full-time instructors were required to spend 16 hours teaching, 10 hours conducting office hours, and 14 hours pursuing "mission and learning" activities, such as serving on committees, development projects, and community activities. Defendant's instructors had an opportunity to earn additional income by teaching up to 12 additional "overload" hours each quarter. Plaintiff frequently taught overload classes.

{¶ 3} Elizabeth Daugherty, the chair of the Computer Science Department, was responsible for supervising plaintiff and writing annual performance evaluations for

department staff. According to plaintiff, her relationship with Daugherty began to deteriorate after plaintiff participated in an investigation concerning Daugherty's conduct. On February 18, 2004, plaintiff sent an e-mail to defendant's president, Dr. Valeriana Moeller, requesting permission to teach classes both for The Ohio State University (OSU) and for Tiffin University. (Plaintiff's Exhibit 11.) In her reply, Dr. Moeller informed plaintiff that defendant's policy required that she submit her request to her chairperson, Daugherty. On February 19, 2004, plaintiff sent an e-mail to Daugherty wherein she referred to a teaching opportunity at Tiffin University and expressed concern that she could not teach at another educational institution without receiving permission from Dr. Moeller. Daugherty informed plaintiff that there was "a protocol for approval to teach at another institution" and that she needed to have such a request approved by Dr. Moeller. (Plaintiff's Exhibit 12.) John Marr, dean of defendant's Career and Technical Program, testified that he recalled meeting with plaintiff in February 2004, at which time he explained the procedure that plaintiff was required to use to submit her request.

{¶ 4} In March 2004, plaintiff began treatment for anxiety and depression associated with her working relationship with Daugherty. Although plaintiff acknowledged that her symptoms had begun approximately two years prior to seeking treatment, she testified that her symptoms had worsened shortly before she sought treatment. According to plaintiff, her employment with defendant caused her "such great stress and anxiety" that she decided the only way to alleviate her stress was to find another job. (Plaintiff's Exhibit UU.) Nevertheless, plaintiff continued her employment with defendant.

{¶ 5} Plaintiff testified that she began working at the OSU Delaware Campus during the 2004 spring quarter without written permission from defendant "to get her foot in the door" at that institution. In June 2004, plaintiff began teaching two classes at the OSU Newark Campus for the summer quarter. During the 2004 fall quarter, plaintiff taught three classes at OSU Newark, which was considered a "full-time equivalent" teaching load. In January 2005, plaintiff accepted an appointment to teach three classes at OSU Newark for the winter quarter.

{¶ 6} Daugherty testified that she received complaints from plaintiff's students regarding plaintiff's timeliness and classroom management. Daugherty also had concerns about plaintiff's performance which Daugherty had attributed to plaintiff's teaching overload hours at CSCC. According to Daugherty, plaintiff became defensive when Daugherty requested a meeting to discuss plaintiff's performance. Over a period of several weeks in March and April 2005, Daugherty made a series of attempts to schedule a meeting with plaintiff; however, plaintiff repeatedly replied that she was either not available at the time of the meeting or otherwise unable to attend. In her correspondence with Daugherty, plaintiff requested that a union representative attend the proposed meeting and she demanded to know "the exact topic of this meeting" so that she would "not be caught off guard." (Defendant's Exhibit EE.)

{¶ 7} On April 8, 2005, plaintiff finally met with Daugherty and representatives who attended as observers from both plaintiff's union and defendant's human resources department. During the meeting, Daugherty discussed her concerns with plaintiff's performance and attendance. Daugherty testified that plaintiff became confrontational and exhibited an angry and aggressive demeanor. Plaintiff testified on cross-examination that at some point during the meeting she expressed her frustration by announcing to Daugherty that she "quit."

{¶ 8} Plaintiff testified that on Monday, April 11, 2005, she sent Daugherty an e-mail stating that she was receiving ongoing treatment by a psychiatrist and that she would not be able to work during the week of April 11-15, 2005. Nevertheless, plaintiff continued to teach that week at OSU and on April 14, 2005, she signed a contract to work full-time at OSU for the following academic quarter. On April 18, 2005, plaintiff submitted a request to defendant for FMLA leave. Plaintiff testified that she required medical leave because she was unable to work for defendant due to stress and anxiety that she experienced as a result of Daugherty's supervision. According to Tim Wagner, defendant's Vice President of Human Resources, plaintiff's FMLA request was approved based upon the information that she had submitted.

{¶ 9} In May 2005, Wagner learned that plaintiff was teaching at OSU. On May 26, 2005, Wagner sent plaintiff a letter to inform her that defendant had decided not to

renew her “probationary contractual appointment” and that her employment contract would expire at the end of the 2005 spring quarter. (Plaintiff’s Exhibit 10.)

{¶ 10} On May 27, 2005, Dean Marr sent a memorandum to plaintiff wherein he informed her that he had recommended “nonrenewal” of her probationary employment contract. (Plaintiff’s Exhibit 9.) In his memorandum, Marr stated that defendant had “recently learned” of her outside employment with OSU and that plaintiff had engaged in “unethical and dishonest behavior” and “a serious breach of trust” by failing to notify defendant of her intent to teach at OSU, “abandoning” her classes, and misusing paid sick leave. Marr testified that his recommendation was based upon his belief that plaintiff had ignored his direction to obtain written permission before accepting the teaching position at OSU.

{¶ 11} Plaintiff alleges that she was wrongfully terminated from her position in violation of the FMLA. Defendant argues that plaintiff was a probationary employee and that defendant opted not to renew her contract when it learned that she had purposefully violated its rules regarding outside employment.

{¶ 12} The FMLA allows an eligible employee to take up to 12 weeks of unpaid leave from work for a qualifying medical or family reason.¹ To prevail on a claim for interference with FMLA benefits a plaintiff must establish that “(1) [she] is an ‘eligible employee’; (2) the defendant is an ‘employer’; (3) the employee was entitled to leave under the FMLA; (4) the employee gave the employer notice of [her] intention to take leave; and (5) the employer denied the employee FMLA benefits to which [she] was entitled.” (Citations omitted.) *Cavin v. Honda of Am. Mfg.* (C.A.6, 2003), 346 F.3d 713, 719.

{¶ 13} Although defendant approved plaintiff’s request for FMLA leave, it argues that plaintiff was not entitled to medical leave because she did not have a “serious medical condition.” Plaintiff asserts that her psychiatrist, Dr. Delaney Smith, diagnosed

¹29 U.S.C. §2612 states, in part:

“Leave requirement (a) In general. (1) Entitlement to leave. Subject to section 103 [29 USCS § 2613], an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: * * *

“(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.”

her with major depression and that Dr. Smith completed an FMLA certification form that shows she was incapacitated for more than three consecutive days. Plaintiff maintains that she received psychiatric care for three to four weeks.

{¶ 14} A plaintiff bringing suit under the FMLA has the burden of establishing the objective existence of a serious health condition. *Bauer v. Varsity Dayton-Walther Corp.* (C.A.6, 1997), 118 F.3d 1109, 1112. “For purposes of FMLA, ‘serious health condition’ entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care * * * or continuing treatment by a health care provider * * * .”

{¶ 15} “(b) The term ‘incapacity’ means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.” 29 C.F.R. 825.113; 29 U.S.C. 2611(11).

{¶ 16} Plaintiff “must first demonstrate that [s]he suffered from a period of incapacity within the meaning of [the] regulation. Under the plain language of the statute and regulations, this is the threshold consideration.” *Olsen v. Ohio Edison Co.* (N.D. Ohio 1997), 979 F.Supp. 1159, 1164. “It is only where an incapacity is shown that the Court need proceed to a consideration of whether the employee received ‘continuing treatment’ within the meaning of the Act.” *Id.* at 1164-1165.

{¶ 17} Plaintiff testified that she became unable to work at defendant’s campus due to the stress which she experienced in that environment. However, plaintiff testified that four of the five classes that she taught at CSCC in the 2005 spring quarter were “distance learning” courses that were taught via the internet and that her remaining class was taught during the evening when Daugherty was not on campus. Furthermore, while she was on FMLA leave, plaintiff continued to teach full-time at OSU. Wagner testified that he was unaware that plaintiff was teaching at OSU when she submitted her FMLA request and that if he had known that plaintiff intended to continue teaching at another university, he would have consulted with Daugherty and requested an independent medical examination before approving plaintiff’s FMLA request.

{¶ 18} Although plaintiff testified that Daugherty’s conduct towards her was the cause of her anxiety and stress, she conceded that she had little interaction with Daugherty during her last quarter at CSCC. According to plaintiff’s own testimony, she

performed essentially the same duties at OSU that she contends she was unable to accomplish at CSCC. “The possibility that a person can work removes FMLA protection.” *Cole v. Sisters of Charity of the Incarnate Word* (E.D.Tx., 1999), 79 F.Supp.2d 668, 672, citing *Murray v. Red Kap Industries, Inc.* (C.A.5, 1997), 124 F.3d 695, 699. In determining whether a plaintiff is incapacitated for the purposes of the FMLA, courts have focused on the employee’s ability to work. *Id.*

{¶ 19} Based upon the testimony and other evidence, the court finds that plaintiff has failed to establish the objective existence of a serious health condition inasmuch as she was able to perform the functions for which she was employed.

{¶ 20} Furthermore, even if plaintiff had proved that she was entitled to FMLA leave, she still could not prevail on her interference claim if defendant can establish that plaintiff would have been dismissed regardless of her request for an FMLA leave. “A reason for dismissal that is unrelated to a request for an FMLA leave will not support recovery under an interference theory.” *Bones v. Honeywell Int’l, Inc.*(C.A.10, 2004), 366 F.3d 869, 877; *Anderson v. Wellman Prods. Group* (2004), 157 Ohio App.3d 565, 573. “[A]n employee who requests FMLA leave would have no greater protection against his or her employment being terminated for reasons not related to his or her FMLA request than he or she did before submitting the request.” *Smith v. Diffe Ford-Lincoln-Mercury, Inc.*(C.A.10, 2002), 298 F.3d 955, 960, citing 29 C.F.R. 825.216(a).

{¶ 21} Defendant asserts that the decision not to renew plaintiff’s contract was made after it discovered that she was teaching at OSU in violation of university policy. At the time of plaintiff’s request, defendant had the following policy in effect for faculty who desired to hold secondary employment outside the university:

{¶ 22} “CONFLICT OF INTEREST/NEPOTISM

{¶ 23} “Procedure No. 3-20(C)

{¶ 24} “(1) No employee will engage in any non-college activity for which the employee receives financial remuneration or equivalent goods or services if such activity occurs during the employee’s assigned working hours without the express consent, in writing, of the President. In the case of faculty members who have a non-traditional teaching schedule such as distance learning, practicum, or primarily night or weekend classes, such faculty may not engage in non-college activity for the purpose of

profit or gain to the degree that such activity hinders their ability to fully carry out the duties of their instruction/counseling. * * * Any faculty member who has a non-traditional teaching schedule and wants to engage in non-college activity for profit or gain shall notify the President of the college prior to commencing the activity.

{¶ 25} “* * *

{¶ 26} “(4) Employees shall not conduct classes under their own auspices or on behalf of another educational institution or agency using the college’s resources without the express consent, in writing, of the President. This includes use of institutional time and facilities for personal purposes.

{¶ 27} “* * *

{¶ 28} “(7) *Failure to obtain consent for activities mentioned in this procedure or falsification of the conflict of interest questionnaire shall be grounds for disciplinary action, up to and including immediate discharge.*” (Emphasis added.)

{¶ 29} Plaintiff asserts that she complied with defendant’s policy when she sent her February 18, 2004 e-mail to Dr. Moeller wherein she requested permission to teach a class both at Tiffin University and at OSU. Although Dr. Moeller responded to plaintiff by directing her to “first go to [plaintiff’s] chairperson and follow the different approval steps,” plaintiff contends that she was not required to follow those directions because defendant did not have a written policy that explicitly required her to adhere to such protocol.

{¶ 30} However, plaintiff’s assertions are belied by statements she made in correspondence that she sent to Daugherty on the same date that she received Dr. Moeller’s direction. In her e-mail to Daugherty, plaintiff referred to a teaching opportunity at Tiffin and she expressed concern that she could not teach at another institution “without the President’s permission.” (Plaintiff’s Exhibit 12.) Plaintiff did not inform Daugherty that she was also interested in a teaching position at OSU. On February 21, 2004, Daugherty responded to plaintiff’s inquiry by notifying her that Dr. Moeller would approve such a request “only after it has gone through the channels” which “starts with the chair, dean, provost, and then the president.” (Plaintiff’s Exhibit 12.) Daugherty also informed plaintiff that she wished to discuss plaintiff’s interest in obtaining outside employment. On March 16, 2004, Daugherty met with plaintiff and

reiterated defendant's policy that written approval was needed to work at another educational institution. According to Daugherty's notes from the meeting, she expressed concern about plaintiff's teaching performance, her tardiness, and her lack of participation in departmental activities.

{¶ 31} Plaintiff's annual performance appraisals documented Daugherty's concerns that plaintiff was "spreading herself too thin" and was not spending enough time on her job duties. On October 27, 2004, while plaintiff was employed at OSU, she received her third annual performance appraisal wherein Daugherty advised plaintiff to "limit her teaching workload," to spend more time on campus, and to become more actively involved in her support activities. (Defendant's Exhibit AA.) Mary Insabella, a faculty member in defendant's Computer Information Technology Department, testified that on numerous occasions plaintiff was late for class and that students complained about plaintiff's tardiness.

{¶ 32} Despite Daugherty's concerns and plaintiff's knowledge of defendant's policy, plaintiff taught at OSU for six academic quarters without first obtaining written approval. Defendant's assertion that plaintiff intentionally refused to comply with defendant's policy is further supported by a report which shows that plaintiff was present at a department meeting when Daugherty discussed Procedure No. 3-20(C). According to the report, Daugherty reminded her staff that written approval was required to teach at another institution and that she agreed to create a "template" that could be used by faculty members to facilitate such requests. Insabella testified that plaintiff later complained that Daugherty had "singled out" plaintiff by discussing the policy at the meeting. Based upon the testimony and other evidence, the court is convinced that plaintiff was aware of the policy when she accepted the teaching positions at Tiffin and OSU.

{¶ 33} Plaintiff attempted to prove her FMLA retaliation claim circumstantially by showing that Daugherty's behavior towards her had become hostile. However, the court finds that plaintiff failed to present any convincing evidence either that her relationship with Daugherty was the basis for the decision to terminate her employment or that the reasons for nonrenewal articulated by Dean Marr were pretextual. Rather, the court finds that the decision by Wagner and Marr not to renew plaintiff's contract

was based upon plaintiff's failure to comply with defendant's policy and not related to plaintiff's decision to apply for FMLA leave.

{¶ 34} For the foregoing reasons, 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 plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

JOSEPH T. CLARK

Judge

cc:

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