

{¶3} According to plaintiff, Dr. Fass was selected as the director of the infectious diseases division in late 1987 and, as such, he became plaintiff's supervisor. In the ensuing years, the division expanded as additional physicians were hired to assist with both AIDS research and the burgeoning caseload in the AIDS clinic. The division members applied for and received significant amounts of grant money to fund research projects. Plaintiff stated that the grant monies were channeled into one of two accounts identified as Infectious Diseases Education and Research Foundation (IDERF) and Ohio State University Research Foundation (OSURF). Smaller grants of educational research monies were deposited in IDERF, whereas federal and pharmaceutical grant funds typically went to OSURF.

Dr. Fass testified via deposition that plaintiff was an excellent clinician and teacher. However, Dr. Fass recalled that as the division became more focused on the treatment of AIDS, plaintiff's clinical participation and enthusiasm for his responsibilities within and to the division diminished. Dr. Fass testified that he believed plaintiff was unwilling to undertake his share of the clinical duties necessary for the smooth running of the division. Dr. Fass also testified that plaintiff increasingly spent time away from the hospital on personal or professional business which resulted in frequent absences from scheduled weekly division meetings and conferences.

{¶4} Plaintiff testified that patients with AIDS experienced a high mortality rate and he acknowledged that he asked to be excused from treating patients who presented to the AIDS clinic. Plaintiff admitted that he preferred to lecture and to work on research projects pertaining to pneumonia. Plaintiff explained that through his publications and lectures offered at national and international conferences he brought greater recognition to OSU and that he also increased the number of patient referrals.

{¶5} Dr. Fass asserted that it was his responsibility to run a fiscally solvent, self-supporting division and that in order to accomplish this, it became necessary for plaintiff to take more clinical rotations since his grant contribution had dwindled over the years. Both Dr. Fass and plaintiff acknowledged that the most lucrative grant monies were then being offered to fund AIDS research. Dr. Fass viewed plaintiff's refusal to participate in AIDS research as having a persistent negative impact on the department and its financial solvency. Inasmuch as plaintiff was not generating

sufficient income for the department to offset his salary, Dr. Fass assigned him to additional clinical rotations.

{¶6} Dr. Fass conceded that he attempted to prevent plaintiff from accepting an invitation to spend a year on sabbatical as a visiting professor at the Centers for Disease Control (CDC) since the division could not afford to subsidize plaintiff's salary without the income that plaintiff could generate either on clinical rotation or through research projects. Dr. Fass also expressed concerns about problems associated with the redistribution of the clinical and teaching assignments among available division members. Eventually, it was agreed that plaintiff could spend two, three-month periods at CDC, but plaintiff contends that when he returned to work at OSU, Dr. Fass retaliated by assigning him even more monthly clinical rotations than before. Plaintiff recalled that one time he was allotted six months of patient care, an amount that plaintiff insisted was excessive and which would have interfered with his research efforts.

{¶7} In contrast, Dr. Fass testified that he designated plaintiff for additional clinical practice in order to generate plaintiff's proportionate share of revenue for the division. Dr. Fass also testified that he believed plaintiff was abusing his position as a senior staff member by expecting other less senior physicians in the division to shoulder the bulk of the work assignments, which in turn allowed plaintiff to devote more of his time to pneumonia research and lectures. According to Dr. Fass, he expected plaintiff to contribute more effort than the other less-senior division members in terms of teaching medical students, accepting clinical practice rotations and securing research funding. Indeed, Dr. Fass testified that he became so concerned about the division's budget that in the summer of 2000, he proposed instituting a salary "hold-back" wherein a percentage of salary would not be paid until the individual physician secured sufficient revenue from clinical practice or grant monies to justify payout. Several witnesses testified at trial about the manner in which salaries were paid to physicians in the division whereby one component of salary was paid by defendant through "A-1" funds that corresponded to faculty teaching positions with the remainder supplied from clinical practice revenue generated by members of the private practice plan, Department of Medicine Foundation (DMF).

{¶8} Both plaintiff and Dr. Fass testified that for the purpose of enhancing their private retirement goals they had elected in the mid-1990s to receive two-thirds of their salary from DMF funds and one-third from OSU while less-senior physicians received the bulk of their salaries from OSU funds. Thus, when one-third of each physician's DMF monies was subjected to the hold-back, Drs. Fass and Plouffe necessarily experienced a significantly greater, albeit temporary, reduction in income. Dr. Fass stated that the hold-back was applied solely to DMF funds because members of the division could not easily manipulate the OSU component of their salaries. According to the testimony presented by Drs. Koletar, Maher, Winninger, Para, and Mangino, the expectation was that as each physician secured sufficient clinical practice or grant monies to support his or her salary, the hold-back would be restored to the individual.

{¶9} Plaintiff stated that he openly opposed the hold-back and voiced his opinion at the meetings held with other division members. However, a majority of physicians approved the action and plaintiff subsequently experienced an immediate and substantial loss of income. Indeed, according to plaintiff, after the hold-back was in place his monthly salary from DMF funds amounted to zero dollars because the remaining funds were deducted as alimony payments to his ex-wife. Consequently, plaintiff's net monthly income consisted of his salary from OSU. Plaintiff subsequently complained to the chairman of the department, Dr. Grever, and also requested that he be allowed to transfer into the School of Public Health. The transfer was not approved because Drs. Grever and Fass would not allow plaintiff to take his A-1 funds from the division, and the School of Public Health did not have the funds available to pay plaintiff's salary. Plaintiff stated that he attended a meeting with Drs. Grever and Fass, and with Dr. Bornstein, who was the associate dean for faculty affairs. At this meeting, plaintiff was given the opportunity to fully express his displeasure with the changes instituted by Dr. Fass. Plaintiff testified that he viewed this meeting as the appropriate avenue to appeal the decisions made by Dr. Fass. However, according to plaintiff, Dr. Fass became defensive and changed the focus of the meeting by offering comments that negatively reflected on plaintiff's performance in the division. Plaintiff conceded at trial that he never pursued the filing of a formal grievance against Dr. Fass after this meeting. During the fall of 2000

and the spring of 2001, plaintiff was able to obtain \$30,000 in industry grant monies and another \$40,000 from Pfizer, a pharmaceutical company, for a project to be completed in the future. As a result, his hold-back of \$70,000 for fiscal year 2000-2001 was completely returned to him by June 2001. Plaintiff stated that throughout this time period he began to experience physical and emotional distress regarding his job and the deterioration in his relationships with his fellow physicians. Plaintiff described an atmosphere of tension and disharmony, particularly at division finance meetings. Plaintiff also described concurrent personal problems such as his divorce, feelings of despair and alcohol-related issues. Plaintiff eventually sought professional assistance from a psychiatrist, Dr. Janke. Plaintiff testified that most of his sessions focused on his frustrations with Dr. Fass and with the changes occurring within the division.

{¶10} According to plaintiff, in late June 2001, Dr. Fass once again proposed another salary hold-back for the next fiscal year until such time as plaintiff could acquire sufficient funding to support his DMF salary for the upcoming year. Although plaintiff argued that there were funds available that he directed into OSURF, Dr. Fass related that those projects had not been budgeted and the paperwork supporting the research had not been completed or submitted such that the funds could be credited to the division. Plaintiff further testified that he next requested the transfer of funds from IDERF to OSURF to support his salary; but that Dr. Fass opposed this action because he believed that such use of the funds would violate IDERF's non-profit status.

{¶11} Plaintiff acknowledged that he chose to resign rather than to accept increased clinical assignments or to seek additional grant monies and that he did so despite knowing that Dr. Fass was terminally ill and that he and the remaining faculty members were expected to assume responsibility for Dr. Fass' share of the clinical rotations. As a result of his departure, plaintiff never performed the research requested by Pfizer, and the division lost credit for the \$40,000.

{¶12} Defendant contends that plaintiff voluntarily retired after more than 20 years of public service. Defendant further asserts that plaintiff failed to sustain his burden of proof with regard to the remaining causes of action.

{¶13} Plaintiff acknowledged that he resigned his employment effective on September 1, 2001, but alleged that the action was not voluntary. For the court to find constructive discharge, plaintiff must establish that defendant's "actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign. *** In applying this test, courts seek to determine whether the cumulative effect of the employer's actions would make a reasonable person believe that termination was imminent." *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 589, 1996-Ohio-265. 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. Ohio Reformatory for Women*, Franklin App. No. 02AP-588, 2003-Ohio-988, citing *Jackson v. Champaign Nat'l. Bank & Trust Co.* (Sept. 26, 2000), Franklin App. No. 00AP-170. Plaintiff testified that his resignation was not by his own choice or design; that the decision was based on his concerns for his health; and that working conditions were so intolerable that he suffered stress-related medical conditions. However, the court finds that plaintiff's belief that he was forced to resign must be evaluated "without consideration of his undue sensitivities." *Risch v. Friendly's Ice Cream Corp.* (1999), 136 Ohio App.3d 109, quoting *Wilson v. Firestone Tire & Rubber Co.* (C.A.6, 1991), 932 F.2d 510, 515.

{¶14} The court notes that while certain incidents may have been personally or professionally upsetting to plaintiff, the incidents described by him were not objectively threatening or so egregious or pervasive as to render the working conditions intolerable. Dr. Fass was a very credible witness who stated in his deposition, quite convincingly, that he was frustrated and disappointed with both plaintiff's apparent lack of initiative and his failure to recognize or appreciate the seriousness of the fiscal dilemma facing the division. Dr. Para also stated in his testimony that Dr. Fass treated plaintiff fairly and that he merely tried to motivate plaintiff to acquire more research dollars.

{¶15} Furthermore, the incidents described by plaintiff did not signify that his termination was imminent. In fact, the court finds that the evidence adduced at trial was in direct

contrast to plaintiff's position on this issue. Specifically, defendant stated there was a complex, administrative review process to be followed in order to effect the discharge of a tenured faculty member. No evidence was presented to show that defendant had attempted such process. Indeed, Dr. Para testified that plaintiff's departure was sudden, unexpected, and created an additional burden on a division that was already strained due to the inability of Dr. Fass to accept patient care assignments because of his failing health. Based upon the totality of the evidence presented at trial, the court concludes that plaintiff voluntarily resigned his position and that he was not constructively discharged. Accordingly, plaintiff has also failed to show that OSU violated plaintiff's right to a hearing or that defendant deprived plaintiff of any property right in regard to his tenured position.

{¶16} In addition, plaintiff cannot prevail on his retaliation claim because he has failed to prove that Dr. Fass acted with malice or with the intent to harm, ridicule or embarrass him. The court found Dr. Fass to be a candid, credible witness who appeared to be a dedicated and capable manager. Dr. Koletar testified that Dr. Fass was even-tempered and fair; and that he was committed to the work being done by the division. According to Dr. Mangino, Dr. Fass never voiced hatred or malice toward plaintiff, never raised his voice, and treated everyone fairly. Drs. Maher and Winninger concurred that Dr. Fass was fair. Dr. Winninger added that Dr. Fass was viewed as being both firm and controlled. Based on the testimony of plaintiff and his fellow division members, the court is of the opinion that, in all probability, plaintiff never accepted Dr. Fass as his supervisor. Upon review, the court concludes that plaintiff was not treated unfairly with respect to his clinical assignments; that Dr. Fass was motivated solely by the fiscal concerns he was facing in the division and that he was executing his duties and responsibilities as the director of the infectious diseases division when he instituted the salary adjustments.

{¶17} This court is the only court with authority to determine whether a state employee is immune from personal liability pursuant to R.C. 9.86 and 2743.02(F). If this court determines that Dr. Fass was acting within the scope of his state employment, then plaintiff may not pursue a claim against the estate of Dr. Fass in common pleas court based on the allegations that form the basis of this action.

{¶18} After careful consideration, the court finds that, at all times relevant to the issues presented in this matter, Dr. Fass was acting as an employee of defendant and not as a clinical practitioner when he made assignments and decisions affecting plaintiff's duties and salary. The court further finds that Dr. Fass acted within the scope of his state employment at all times relevant to the incidents described by plaintiff in this matter and that he did not act with malicious purpose, in bad faith, or in a wanton or reckless manner toward plaintiff. Consequently, the court finds that Dr. Fass is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86 and that the courts of common pleas do not have jurisdiction over civil actions against his estate based on allegations made in this case. Plaintiff also claims that Dr. Fass uttered defamatory remarks about his performance to Drs. Grever and Bornstein during their meeting. Specifically, plaintiff alleges that Dr. Fass stated that plaintiff "dumped on a junior staff member responsibility for his duties at the last minute." Plaintiff further alleges that the statement was untrue and that it caused both the chairman and the associate dean to view him unfavorably. Defendant argues that the comments were expressions of opinion; that they were not malicious; and that they are protected by qualified privilege.

{¶19} To establish a claim for defamation, plaintiff must prove by a preponderance of the evidence that a false publication caused injury to his reputation, or exposed him to public hatred, contempt, ridicule, shame, or disgrace, or affected him adversely in his trade or business. *Ashcroft v. Mt. Sinai Medical Ctr.* (1990), 68 Ohio App.3d 359, 365. The court finds that plaintiff failed to prove by a preponderance of the evidence that the communications were false. The court heard testimony from less senior physicians who cited instances where they were required to appear at meetings, attend conferences, or cover clinical rounds because Dr. Plouffe was absent. Additionally, plaintiff failed to provide sufficient evidence that he had been subject to ridicule, shame, disgrace, or an adverse effect upon his trade or business. Therefore, the court finds that the verbal statements in question were not defamatory. Even if the court had found the communications to be defamatory, the court notes that they would be protected by qualified privilege. According to *McKenna v. Mansfield Leland Hotel Co.* (1936), 55 Ohio App. 163, 167, qualified privilege is explained as follows:

{¶20} “A publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty, or where the person is so situated that it becomes right in the interests of society and he should tell third persons certain facts, which he in good faith proceeds to do.

{¶21} “The preponderance of authority supports the view that communications between an employer and an employee, or between two employees, concerning the conduct of a third employee or former employee, are qualifiedly privileged, and thus, even though such a communication contain matter defamatory to such other or former employee, he cannot recover in the absence of sufficient proof of actual malice to overcome the privilege of the occasion.

{¶22} “A communication between officers of a corporation on the subject of the conduct of one of its servants is privileged.” (Citations omitted.)

{¶23} In accordance with this precedent, even where the communication is found to be defamatory, it may be protected by a qualified privilege unless there is sufficient proof of actual malice. The court finds that the comment made by Dr. Fass was well within the interests of the employer. Since Dr. Fass was attempting to explain his decisions as necessary to carry out his responsibilities as director of the division and to meet the standards set by the department his statements were privileged. Where the communication was protected by qualified privilege, plaintiff has the burden of proof to show actual malice. However, as the court has previously found, the actions taken by Dr. Fass were not motivated by malice. The court is convinced that Dr. Fass did not act maliciously in his discussions and judgments regarding plaintiff. Therefore, plaintiff failed to prove his claim of defamation by a preponderance of the evidence.

{¶24} Plaintiff next argues that defendant should be held liable for intentional infliction of emotional distress regarding the actions taken by Dr. Fass. The following elements must be met in order to sustain a claim for intentional infliction of emotional distress:

{¶25} “(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. *** Serious emotional distress requires an emotional injury which is both severe and debilitating." *Burkes v. Stidham* (1995), 107 Ohio App.3d 363, 375, citing *Ashcroft v. Mt. Sinai Medical Ctr.*, supra.

{¶26} Plaintiff argues that the first and third prongs of the above-cited elements were satisfied in this case, inasmuch as Dr. Fass admitted he was aware of plaintiff's financial obligations to his ex-wife and he knew that the salary hold-back would be upsetting to plaintiff and that plaintiff associated most of his emotional distress to job-related stress. The court finds that Fass did not intend to cause plaintiff serious emotional distress; Fass consistently testified that he tried to motivate plaintiff to increase his revenue production. The court is convinced that Dr. Fass attempted to balance plaintiff's needs with the needs of the division as a whole. Dr. Fass articulated reasonably sound fiscal policies that were introduced to the group and voted on in committee. The court concludes that none of the elements have been met by a preponderance of the evidence. "*** Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community ***. The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Restatement of the Law 2d, Torts (1965) 71, Section 46. The court finds that the actions taken by Dr. Fass in regard to plaintiff do not rise to the level of outrageous conduct that is necessary to establish liability. In addition, Dr. Fass presented a legitimate and convincing explanation for his need to act decisively with regard to the division's financial instability. Thus, the court concludes that plaintiff's claim for intentional infliction of emotional distress is without merit.

{¶27} In the final analysis, the court finds that plaintiff has failed to prove any of his claims by a preponderance of the evidence. Judgment shall therefore be rendered in favor of defendant.

IN THE COURT OF CLAIMS OF OHIO

JOSEPH F. PLOUFFE, M.D.	:	
Plaintiff	:	CASE NO. 2001-08048
	:	Judge Fred J. Shoemaker
v.	:	
	:	<u>JUDGMENT ENTRY</u>
THE OHIO STATE UNIVERSITY	:	
Defendant	:	
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This case was tried to the court on the issues of both liability and on the determination of civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon hearing all the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that the estate of Robert J. Fass, M.D. is entitled to immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, the courts of common pleas do not have jurisdiction over this matter. 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.

FRED J. SHOEMAKER
Judge

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