

**IN THE COURT OF CLAIMS OF OHIO**

BEATRICE BERRY :  
 :  
 Plaintiff : CASE NO. 2003-03388  
 : Judge J. Warren Bettis  
 v. :  
 : DECISION  
 KENT STATE UNIVERSITY :  
 :  
 Defendant :  
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{¶ 1} Plaintiff brought this action against her employer, defendant Kent State University (KSU), alleging that she was unjustly suspended for 30 days without pay and subsequently demoted from her position as supervisor of housekeeping services to a position as a custodial worker. The issues of liability and damages were not bifurcated and the case proceeded to trial before the court.

{¶ 2} This case arose as a result of an altercation that occurred on November 27, 2001, between plaintiff and another KSU employee, Karen Watson. Plaintiff had been Watson’s direct supervisor prior to that time. Watson was a custodial worker and also served as union president for the AFSCME<sup>1</sup> Local 153.

{¶ 3} On or about November 13, 2001, plaintiff confronted Watson in a manner that Watson described as abusive. Consequently, Watson submitted a written request to John Walsh, manager of Custodial Services, for a change of supervisor. The request (Plaintiff’s Exhibit 1), detailed the circumstances of the November 13 incident and stated that “[t]his kind of harassment has gone on long enough. I do not want to be forced to file ‘Unfair Labor Practice’ charges against the department.” On November 19, 2001, Watson’s request was granted, effective immediately.

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The American Federation of State, County and Municipal Employees.

{¶ 4} Plaintiff was on vacation leave when the decision was made to reassign Watson to another supervisor. She became aware of the reassignment when she returned to work on November 27, 2001. At approximately 6:00 a.m. on that date, plaintiff confronted Watson regarding the request for a change of supervisor. There were no witnesses to the incident. According to the KSU police officer's report (Plaintiff's Exhibit 3), Watson related that plaintiff was verbally abusive to her; that she asked plaintiff to leave her work area but plaintiff refused; that she attempted to walk away but plaintiff blocked her path; that she attempted to go around plaintiff but was shoved backward and into a glass cabinet; and that she was ultimately "cornered" by plaintiff and slapped in the face. Watson reported the incident to Michael McDonald, director of the Campus Environment and Operations Department, the day after it occurred.

{¶ 5} Plaintiff has consistently denied striking Watson. However, plaintiff acknowledged that she went looking for Watson and that she asked Karen Dorst and another employee where she could find her. Plaintiff testified that she and Watson had a heated verbal argument but that there was no physical contact; that she had been working for KSU for 23 years; that she is a "people person"; that she does not believe in hurting others, and that she would not have struck Watson under the circumstances alleged herein.

{¶ 6} The evidence shows that McDonald and KSU Officer Joseph DeRamo met with and interviewed both plaintiff and Watson on November 28, 2001. The meeting was documented by McDonald in a confidential memorandum to Alvin Evans, associate vice president of the Human Resource Services Department. (Defendant's Exhibit E5.) Subsequently, by agreement of McDonald and Evans, plaintiff was placed on administrative leave, with pay, pending the outcome of further investigation.

{¶ 7} On January 10, 2002, a pre-disciplinary hearing was held. The summary of that hearing (Defendant's Exhibit F) states that the purpose of the hearing was "to afford Ms. Berry an opportunity to respond to the charge of failure of good behavior (physically assaulting an employee)." The summary also notes that the following persons were present at the hearing: 1) plaintiff; 2) Michael McDonald; 3) Mary Ann Pellerano, assistant director, Campus Environment and Operations; 4) Karen Watson; 5) John Walsh; 6) Diane Bishop, assistant manager, Custodial Services; 7) Officer DeRamo; and 8) Alvin Evans, who served as the hearing officer.

{¶ 8} According to Evans' report, everyone had an opportunity to speak at the hearing. The report states that plaintiff "categorically denied" having physically assaulted Watson. It also states that she acknowledged that she "occasionally has gotten upset and very emotional" but related that she would only speak to an employee in "a mean spirited manner" if an employee was disrespectful to her. Plaintiff maintained that Watson herself had knocked over the glass cabinet that was in the room where the incident took place, and that plaintiff merely caught it before it fell to the floor. Watson reiterated her former statements concerning the incident and the others offered their comments based upon their involvement in the matter. After hearing all of the evidence and information presented, Evans recommended that plaintiff be suspended for 30 days without pay, demoted, be required to take an anger management class and be given a last chance agreement. The recommendation was submitted to Dale Richards, associate vice president of the Human Resource Services Department, for review and an independent determination. Subsequently, plaintiff was suspended, and lost her supervisory position and corresponding pay rate.

{¶ 9} The essence of plaintiff's complaint is that she objects to the decision made by her employer. She contends that the incident was not fully investigated; that she never got to give her side of the story; that everyone involved believed Watson's version of the incident because Watson was the union president; and that the actions taken against her by KSU were unfair. Accordingly, she is seeking reinstatement to her former position and back pay.

{¶ 10} At the outset, the legal theory upon which plaintiff bases her claims is not clear. She is essentially seeking a review of her employer's decision. It is also unclear what plaintiff's status was as a KSU employee; that is, whether she was a member of the classified or unclassified civil service or whether she was a member of a collective bargaining unit. The burden of proof is upon plaintiff to prove her claims by a preponderance of the evidence. See, generally, 42 Ohio Jurisprudence 3d, Evidence and Witnesses §89 (2003).

{¶ 11} In support of her claims, plaintiff offered her own testimony and the following four exhibits: 1) Karen Watson's request for a change of supervisor; 2) Watson's statement to KSU police services; 3) KSU's police services report and investigation summary; and 4) a copy of the citation issued to plaintiff for disorderly conduct. In response, defendant presented the testimony of Alvin Evans and Dale Richards, and a variety of its own exhibits.

{¶ 12} Upon review of the evidence and testimony presented, the court finds that it is first necessary to examine whether this court has jurisdiction to determine plaintiff's claims. It has consistently been held that an action in this court cannot become a substitute for a statutorily created right of appeal in a different court. *Midland Ross Corp. v. Indus. Comm.* (1992), 63 Ohio Misc.2d 311. Further, absent a finding of illegal purpose or discriminatory intent, the general rule is that this court will not substitute its judgment for that of an employer and may not second-guess the business judgments of employers regarding personnel decisions. See, e.g., *Watson v. Kent State Univ.* (Aug. 8, 1994), Court of Claims No. 91-06627; *Dodson v. Wright State Univ.* (1997), 91 Ohio Misc.2d 57; *Washington v. Central State Univ.* (1998), 92 Ohio Misc.2d 26.

{¶ 13} In the present case, all of the evidence points to a finding that plaintiff was a member of the classified civil service. In contrast to unclassified employees, "those employed in the classified service may be removed for good cause only according to the procedures enumerated in R.C. 124.34 and related rules and regulations. The classified civil servant may appeal termination of employment whereas the unclassified employee is not affected by these statutory and regulatory procedures." *Chubb v. Ohio Bureau of Workers' Comp.*, 81 Ohio St.3d 275, 277-278, 1998-Ohio-628.

{¶ 14} The procedures enumerated in R.C. 124.34 provide that classified civil service employees may appeal certain actions, such as job abolishment, reduction in pay or position, layoff, suspensions in excess of three working days, discharge, and job classification to the State Personnel Board of Review. The decision of the board may then be appealed to the appropriate county court of common pleas. In the alternative, the classified employee's recourse lies with the internal grievance procedures of the employer. Here, KSU's "Administrative Policies and Procedures Regarding Grievances of Nonteaching Unclassified and Classified Staff," No. 3342-6-14, (Defendant's Exhibit C) specifically provides at section (A)(3) that actions which cannot be appealed to the State Personnel Board of Review are subject to appeal under the grievance procedure. The policy goes on to state that: "[i]f, however, an appeal is filed in a timely manner and that board denies jurisdiction, a grievance may be initiated at step three of this local grievance procedure."

{¶ 15} There is no evidence in this case that plaintiff availed herself of the KSU grievance procedures or that she filed an appeal with the State Personnel Board of Review. If

plaintiff was, in fact, a classified civil service employee, that would have been the appropriate recourse; however, this court is without jurisdiction to review such matters.

{¶ 16} Similarly, if plaintiff was an unclassified civil service employee, her only recourse under the circumstances presented, and absent a claim of discrimination or illegal purpose, would have been through the internal grievance procedures of KSU. Again, there is no evidence that plaintiff availed herself of those procedures. Additionally, there is no evidence that plaintiff was a member of a recognized bargaining unit. However, if that were the case, plaintiff's remedies would have been limited to those set forth in R.C. Chapter 4117 or, under certain circumstances, by suits brought in common pleas courts. *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9* (1991), 59 Ohio St.3d 167, paragraph 2 of the syllabus. As stated previously, plaintiff bears the burden of proving her claims by a preponderance of the evidence.

{¶ 17} In summary, the court concludes that, based upon the evidence presented, this court lacks jurisdiction to determine plaintiff's claims. Therefore, judgment shall be entered in favor of defendant.

### IN THE COURT OF CLAIMS OF OHIO

BEATRICE BERRY

:

Plaintiff :

CASE NO. 2003-03388

Judge J. Warren Bettis

v.

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JUDGMENT ENTRY

KENT STATE UNIVERSITY

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Defendant :

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This case was tried to the court. Upon consideration, and for the reasons set forth in the decision filed concurrently herewith, this court is without jurisdiction to determine the merits of plaintiff's claims. Accordingly, 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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J. WARREN BETTIS

Judge

Entry cc:

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Filed October 6, 2004

To S.C. reporter November 5, 2004