

Court of Claims of Ohio

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MICHAEL D. SHERMAN

Plaintiff

v.

UNIVERSITY OF TOLEDO, et al.

Defendants

Case No. 2007-09062

Judge Clark B. Weaver Sr.

JUDGMENT ENTRY

{¶ 1} Plaintiff brought this action alleging a claim of defamation against defendant's employee, Linda Bowyer, PhD. Both plaintiff and Bowyer are professors at defendant, University of Toledo. On May 23, 2008, the court held an evidentiary hearing to determine whether Dr. Bowyer is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶ 2} R.C. 2743.02(F) provides, in part:

{¶ 3} "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is

entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.”

{¶ 4} R.C. 9.86 provides, in part:

{¶ 5} “[N]o officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer’s or employee’s actions were *manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.*” (Emphasis added.)

{¶ 6} The issue whether an employee is entitled to immunity is a question of law. *Nease v. Medical College Hosp.*, 64 Ohio St.3d 396, 1992-Ohio-97, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992-Ohio-133. The question whether the employee acted outside the scope of her employment, or with malicious purpose, in bad faith, or in a wanton or reckless manner is one of fact. *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9. Plaintiff bears the burden of proving that the state employee should be stripped of immunity. *Fisher v. University of Cincinnati Med. Ctr.* (Aug. 25, 1998), Franklin App. No. 98AP-142.

{¶ 7} In the context of immunity, an “employee’s wrongful act, even if it is unnecessary, unjustified, excessive or improper, does not automatically take [such] act manifestly outside the scope of employment.” *Elliott v. Ohio Dept. of Rehab. & Corr.* (1994), 92 Ohio App.3d 772, 775, citing *Thomas v. Ohio Dept. of Rehab. & Corr.* (1988), 48 Ohio App.3d 86, 89. “It is only where the acts of state employees are motivated by actual malice or other such reasons giving rise to punitive damages that their conduct may be outside the scope of their state employment.” *James H. v. Dept. of Mental Health and Mental Retardation* (1980), 1 Ohio App.3d 60, 61. “The act must be so divergent that it severs the employer-employee relationship.” *Elliott, supra.*

{¶ 8} At the evidentiary hearing, the only evidence presented with regard to any “wrongful act” on the part of Dr. Bowyer was that she may have disagreed with plaintiff’s teaching methods and/or abilities, and on several occasions had been “very critical” of

plaintiff in the presence of other staff members. The court finds that Dr. Bowyer acted within the scope of her employment with defendant at all times relevant hereto. The court further finds that Dr. Bowyer did not act with malicious purpose, in bad faith, or in a wanton or reckless manner toward plaintiff. Consequently, Dr. Bowyer is entitled to civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F). Therefore, the courts of common pleas do not have jurisdiction over any civil actions that may be filed against her based upon the allegations in this case.

{¶ 9} Nevertheless, in making this determination, the court makes no finding as to whether Dr. Bowyer acted with actual malice for the purposes of plaintiff's defamation claim. The case is hereby scheduled for a status conference on *July 2, 2008, at 11:30 a.m.*, to discuss how plaintiff intends to proceed with this action.

CLARK B. WEAVER SR.
Judge

cc:

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