

[Cite as *Browder v. Ohio Dept. of Rehab. & Corr.*, 2022-Ohio-3088.]

ROBERTA D. BROWDER

Plaintiff

v.

OHIO DEPARTMENT OF  
REHABILITATION AND CORRECTION

Defendant

Case No. 2021-00328JD

Magistrate Scott Sheets

DECISION OF THE MAGISTRATE

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{¶1} Plaintiff's complaint asserts claims for sexual harassment, hostile work environment, assault, intentional infliction of emotional distress, and retaliation. Plaintiff's complaint alleges that Kenneth Myers (Myers), while in defendant's employ, engaged "in a pattern of sexual misconduct and harassment" including "unwanted sexual advances and behavior." The complaint alleges that Myers' actions included making sexual comments and touching her on more than one occasion, including on intimate areas of her body. On June 30, 2022 and pursuant to R.C. 2743.02(F), the magistrate conducted an evidentiary hearing to consider and determine whether Myers is entitled to civil immunity pursuant to R.C. 9.86. Through counsel, plaintiff and defendant both appeared and presented evidence. Myers did not appear at the hearing. Plaintiff testified as did one witness for defendant, Joanna Factor. The magistrate also admitted several documentary exhibits into evidence. As discussed below, the magistrate recommends that the court issue a determination that Mr. Myers is not entitled to civil immunity pursuant to R.C. 9.86 and that the courts of common pleas have jurisdiction over any civil actions that may be filed against him based upon the allegations of this case.

Findings of Fact

{¶2} Plaintiff worked at defendant's Allen-Oakwood Correctional Institution (AOCI) from January of 2019 to November of 2019. From January of 2019 until July of 2019, plaintiff endured repeated, often severe, unwanted and uninvited sexual comments and advances from Myers. At the time, Myers acted as defendant's Safety and Health Coordinator. His job duties were to coordinate and/or help ensure AOCI's compliance with applicable health and safety standards such as OSHA standards, fire safety standards, and EPA standards. Plaintiff, who was employed as a Health Information Technologist, had to interact with Myers in performing her job duties. However, Myers was not plaintiff's supervisor.

{¶3} Plaintiff testified extensively regarding Myers' aggressive harassment and the documents admitted into evidence as well as portions of Ms. Factor's testimony corroborate plaintiff's testimony. The magistrate found plaintiff to be entirely and unquestionably credible.

{¶4} Myers' harassment of plaintiff was chronic and involved a range of unacceptable conduct. Myers made comments to plaintiff regarding her body and appearance including comments about her butt, breasts and undergarments. He also made sexually suggestive comments. For instance, he would suggest that plaintiff sit on his lap. He pulled at plaintiff's clothing, rubbed against her, and touched her. This included rubbing her shoulders and touching her on or near her breasts. Myers told plaintiff that he watched her and other women at AOCI using the facility's cameras. Myers would block plaintiff's path and/or position himself in a way that forced plaintiff to touch him if she attempted to move past him. In one of the vilest incidents, Myers asked plaintiff to come into his office and to look at something on the facility's cameras. While sitting at his desk chair, Myers then told plaintiff to "sit on this" and pointed at his crotch area where plaintiff observed that Myers had an erection. Myers' conduct sometimes occurred in front of others including inmates and only ceased after plaintiff reported his conduct to defendant in July of 2019, at which point defendant began to investigate the matter.

### Conclusions of Law and Analysis

{¶5} R.C. 2743.02(F) provides this court with “exclusive jurisdiction to determine whether a state employee is immune from liability under R.C. 9.86.” *Nix v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 13AP-547, 2014-Ohio-2902, ¶ 22, quoting *Johns v. Univ. of Cincinnati Med. Assocs.*, 101 Ohio St.3d 234, 2004-Ohio-824, syllabus. There is no dispute and the magistrate finds that Myers was, at all times relevant, a state employee.

R.C. 9.86 states, in part:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee 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.

Though whether a state employee is entitled to immunity is a question of law, its determination requires the consideration of specific facts. *Morway v. Ohio Bur. of Workers’ Comp.*, 10th Dist. Franklin No. 04AP-1323, 2005-Ohio-5701, ¶ 17; *Peachock v. Northcoast Behavioral Health Ctr.*, 10th Dist. Franklin No. 07AP-195, 2007-Ohio-5160, ¶ 21.

{¶6} Initially, the magistrate notes that both parties have taken the position that Myers’ actions were outside the scope of his employment. Whether a state employee acted within the scope of employment turns “on what the [employee’s] duties are as a state employee and whether the [employee] was engaged in those duties at the time of an injury.” *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 23. It “is a fact-based inquiry that turns on proof of the employee’s specific job description with the state and focuses on whether the employee’s conduct is related to and promotes the

state's interests." *Ries v. Ohio State Univ. Med. Ctr.*, 137 Ohio St.3d 151, 2013-Ohio-4545, ¶ 23.

{¶7} Actions "that bear no relationship to the conduct of the state's business" are manifestly outside the scope of employment. *Oye v. Ohio State Univ.*, 10th Dist. No. 02AP-1362, 2003-Ohio-5944, ¶ 7. The act "must be so divergent that it severs the employer-employee relationship." *Elliott v. Ohio Dept. of Rehab. & Corr.*, 92 Ohio App.3d 772, 775 (10th Dist.1994). Further, an employee acts manifestly outside the scope of his or her employment "where the employee deviated or departed from his employer's business to engage upon a matter for his own personal purposes without benefit to the employer." *Caruso v. State*, 136 Ohio App.3d 616, 621 (10th Dist.2000).

{¶8} Here, the magistrate finds that Myers' actions toward plaintiff were manifestly outside the scope of his employment and, therefore, that he is not entitled to immunity pursuant to R.C. 9.86. Myers' actions did not further the interests of the state and they had no relation to his duties as Health and Safety Coordinator. Myers' conduct toward plaintiff did not effectuate the duties of his position. Instead, Myers diverged from any official job duties and responsibilities to satisfy his own prurient, personal self-interests. See *Oye*, ¶ 12-14 (An employee's offensive, sexual and/or sexist comments were manifestly outside the scope of employment). As Myers acted manifestly outside the scope of employment, "the state has not agreed to accept responsibility for the employee's acts and the employee is personally answerable for his acts in a court of common pleas." *Conley v. Shearer*, 64 Ohio St.3d 284, 287 (1992).

{¶9} For the above stated reasons, the magistrate finds that, at all times relevant, Kenneth Myers, acted manifestly outside the scope of his employment. Therefore, it is recommended that the court issue a determination that Myers is not entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas have jurisdiction over any civil actions that may be filed against him based upon the allegations of this case.

*{¶10} A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

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SCOTT SHEETS  
Magistrate