

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WANDA L. ASHMAN,
Plaintiff,

v.

MEMORANDUM and ORDER
04-C-829-S

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN
SYSTEM, RICHARD BARROWS
and JANINE JENSEN,
Defendants.

Plaintiff Wanda L. Ashman commenced this civil action under 42 U.S.C. § 1983 claiming that defendants Board of Regents of the University of Wisconsin System, Richard Barrows and Janine Jensen violated her First Amendment rights. In her complaint plaintiff alleges she was not selected for the permanent IS Resource Support Technician position in retaliation for her protected speech.

On May 27, 2005 defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Defendants move to strike or ignore portions of plaintiff's affidavit. The Court will deny this motion and will consider plaintiff's affidavit.

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Wanda L. Ashman is an adult resident of Madison, Wisconsin. Defendant Board of Regents of the University of Wisconsin System is a legal entity created under the laws of Wisconsin. Defendant Richard Barrows is an Associate Dean of the

College of Agricultural and Life Sciences (CALs), University of Wisconsin, Madison (UW-Madison). Defendant Janine Jensen is the Student Services Coordinator, Department of Academic Student Affairs, CALs, UW-Madison and was plaintiff's supervisor.

Plaintiff began working in the Department of Academic Student Affairs, CALs, on July 8, 1985 in a Limited Term Employee (LTE) position. In 1992 plaintiff began working with the Degree Automated Reporting System (DARS) and was responsible for maintaining the department's website. On September 22, 2000 plaintiff complained to Barrows and Jensen that her job as DARS encoder/webmaster was undervalued and under compensated. In October 2000 Barrows and Jensen told plaintiff they were contemplating making her job permanent. Plaintiff provided them a copy of her resume, a description of the essential responsibilities of her position and a list of qualifications and/or skills needed for the position. Plaintiff indicated that 50% of her duties involved DARS encoding and that the other 50% was comprised of webmaster duties.

On February 26, 2001 plaintiff complained to Linda Heideman in the CALs Human Resources office that she had been in the same LTE position for eight years and had been unable to secure a permanent job. On March 6, 2001 Heideman meet with plaintiff to discuss plaintiff's options to obtain permanent employment in the state system.

On March 25, 2001 plaintiff's position was reclassified to IS Resource Support Technician Intermediate and she received a pay increase of twenty-five cents an hour. Heideman met with Barrows and Jensen on March 29, 2001 to discuss recruiting for a permanent position that would replace plaintiff's LTE position. She then sent an e-mail to CALS Human Resources Manager, Cynda DeMontigny, requesting that she work with Jensen to begin developing a job description that would meet the department's current needs.

On April 4, 2001 plaintiff sent an e-mail to Barrows and Jensen advising them that she wanted to help LTE's and had attended an April 3, 2001 meeting with Chancellor Wiley about legislation proposed by Senator Chvala to provide some mechanism to convert long time LTE positions into permanent positions.

A 50% permanent IS Resource Support Technician Intermediate position was posted on April 17, 2001 by DeMontigny.

On April 18, 2001 Barrows met with DoIT to discuss possible web revisions needed by the department to make the CALS website more user friendly. On May 1, 2001 Barrows met with two staff members from DoIT and learned of the new website systems organized around databases. On May 8, 2001 Barrows met with a DoIT staff member to discuss the DoIT process for moving to the database website system. On May 9, 2001 DoIT made its first presentation to CALS for a possible database-driven website. On June 1, 2001 a committee headed by Barrows recommended that CALS change to a

database website. This change impacted the IS Resources Support Technician Intermediate position that had been posted on April 17, 2001. On June 19, 2001 defendants Jensen and Barrows decided to cancel the recruitment for the position.

On June 22, 2001 an article appeared in the Isthmus alleging the abuse of LTE's on campus. It prominently featured plaintiff's comments about the misuse of LTE's.

The revised position description for the IS Resource Support Technician position prepared by Jensen reached CALS Human Resources on June 25, 2001. It provided that DARS encoding would comprise only 30 percent of the duties of the position and that the data base administrator duties would comprise another 30 percent.

On July 10, 2001 Barrows requested in writing to CALS Associate Dean Frank Kooistra that he and Jensen be removed from the recruitment process for the new IS position because of the recent publicity surrounding LTE's. CALS Human Resources accepted the responsibilities of recruiting and hiring for the position.

The new position was posted and listed the job duties as degree certification, designing/updating web pages and serving as the data base administrator. An examination was developed by DeMontigny. On August 28, 2001 at the request of DeMontigny, Jensen requested information from job expert Don Woolston concerning DARS questions for the exam. Georgiana Lowe, Human Resource Specialist Senior, had final approval of the job posting

and the examination. On August 23, 2001 Heideman met with plaintiff to explain the examination process, to encourage her to apply and to instruct her about the application process.

Plaintiff picked up her examination on September 18, 2001. On September 19, 2001 plaintiff e-mailed DeMontigny and Heideman advising that the examination did not reflect the job duties very well. She expressed her concerns that the questions on the exam were directed toward a database administrator and training coordinator. DeMontigny responded and said she would provide her with a copy of the job description.

Plaintiff ranked 20 in 34 applicants and was not invited for an interview. The interview panel, Stuart Baker, Cynda DeMontigny, Nancy Hilmanowski and Frank Kooistra selected five individuals for interviews. The panel offered Kelly Osborn the job. On November 21, 2001 Kelly Osborne was hired for the position. Jensen, Barrows and Kooistra met with plaintiff on November 21, 2001 to inform her that her LTE position was being eliminated and that it was her last day of work with her paid employment ending effective December 14, 2001.

Plaintiff was subsequently hired as an LTE DARS Encoder in the UW-Madison College of Letters and Science at a higher rate of pay and her position is now a permanent half time position.

It is disputed whether defendant Barrows was angry at plaintiff after reading the Isthmus article.

MEMORANDUM

Defendants moved for summary judgment on plaintiff's First Amendment retaliation claim. Plaintiff agrees to the dismissal of the Board of Regents of the University of Wisconsin System. She opposes the motion for summary judgment by defendants Barrows and Jensen. Plaintiff claims that defendants Barrows and Jensen caused her to be rejected for the permanent position of IS Resource Support Technician because of her protected speech.

To prevail on her First Amendment claim plaintiff must first show that her speech is a matter of public concern. Plaintiff must then prove that this protected speech was a motivating factor in defendants' decision to terminate her. Spiegla v. Hull, 371 F.3d 928, 935 (7th Cir. 2004). Finally, the employer can prevail if it can show that it would have taken the adverse employment action even in the absence of the protected speech. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977).

In this case it is undisputed that plaintiff's speech was about a matter of public concern. Connick v. Meyers, 461 U.S. 138, 147-148 (1983). The next question is whether it was a motivating factor in the employer's decision to reject her application for the permanent IS Resource Support Technician position. Defendants were not involved in the recruitment process for the position after July 10, 2001. Plaintiff argues that defendant Barrows was angry at plaintiff after the article appeared in the Isthmus and influenced

Jensen to change the job description which precluded plaintiff from being considered for the position. This argument is highly speculative and not supported by plaintiff's deposition testimony or any evidence. Plaintiff has not shown that her protected speech was a motivating factor in the decision not to select her for the position because neither defendant was the decision maker. Further, she has not shown that the interview panel's decision was influenced by either defendant.

Had plaintiff shown that her protected speech was a motivating factor in the decision not to hire her it is then defendants' burden to show that absent the protected speech plaintiff would not have been selected for the position. It is undisputed that the position description was changed because of CALS move to a database web page on June 1, 2001. This change in the position description and her ranking precluded plaintiff's selection for the position. Defendants have shown that she would have not been selected absent her protected speech.

Accordingly, defendants Barrows and Jensen are entitled to judgment in their favor on plaintiff's First Amendment claim as a matter of law. Defendants' motion for summary judgment will be granted.

ORDER

IT IS ORDERED that defendants' motion to strike plaintiff's affidavit is DENIED.

Ashman v. Board of Regents, et al., 04-C-829-S

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiff DISMISSING her complaint and all claims contained therein.

Entered this 12th day of July, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge