

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

PAUL BARROWS,

Plaintiff,

v.

MEMORANDUM and ORDER

JOHN WILEY and LUOLUO HONG,

05-C-658-S

Defendants.

Plaintiff Paul Barrows commenced this civil action against defendants John Wiley and Luoluo Hong claiming that defendant Wiley deprived him of a property right without due process and that defendant Hong intentionally interfered with his contract.

On December 12, 2005 defendant Wiley filed a motion for summary judgment on the basis of qualified immunity pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, 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).

FACTS

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

Plaintiff Paul Barrows is an adult resident of the State of Wisconsin who has been employed by the University of Wisconsin-Madison (the University) since 1989. Defendant John Wiley is an adult resident of the State of Wisconsin who at all times material to this action was the Chancellor of the University. Defendant

Luoluo Hong was at all times material to this case the Dean of Students at the University.

Plaintiff accepted a limited appointment as Vice Chancellor for Student Affairs in July 2000. Plaintiff also held an indefinite back-up appointment in the Provost's Office. The University's policy is that when a limited appointee with a back up position is terminated from the limited position he has the right to assume the back-up appointment without a separation in service.

On November 4, 2004 Wiley told Barrows that he must step down from his position as Vice Chancellor. He was not immediately placed in his back up position but he was not separated from service or terminated. He continued to be paid his pay rate as Vice Chancellor but was forced to use sick leave and vacation leave.

On June 23, 2005 plaintiff was placed in his back up position of Senior Administrator Program Specialist at the salary of \$72,880 per year. That same day Wiley placed Barrows on administrative leave with pay in order to conduct a due process investigation concerning allegations of misconduct.

On July 8, 2005 the University appointed Susan Steingass to conduct the investigation of these allegations. On August 29, 2005 she issued her investigative report.

Plaintiff did not request to be immediately placed in the back up position.

From November 1, 2004 through June 23, 2005 plaintiff received \$124,140.18 in gross wages by submitting sick leave and vacation leave requests. Had plaintiff been placed in his back up position in November 2004 he would have earned \$47,170.23.

Between November 4, 2004 and June 20, 2005 plaintiff used 524 hours of sick leave, 186 hours of vacation and 124 hours of Annual Leave Reserve Account (ALRA) leave. Plaintiff calculates the value of these benefits to be \$124,521.48.

MEMORANDUM.

Defendant Wiley moves for summary judgment on the basis of qualified immunity. To defeat this motion plaintiff must show a violation of a constitutional right and that this right was clearly established at the time of the violation. Plaintiff claims that defendant Wiley denied him due process when he was not placed in his back up position immediately.

The Court must first determine whether plaintiff's due process rights were violated. To prevail on his claim plaintiff must show that he was deprived of a protected property interest. In other words he must show that he has a legitimate entitlement to the benefit. Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). Plaintiff argues that the policy was to place a person who is terminated from a limited appointment in a back up position with no separation in service. He has not shown that this was an

entitlement created by state law. Further, plaintiff was not terminated nor separated from service prior to his placement in the back up position. He continued to be paid at the Vice Chancellor pay rate even though he was relieved of his duties. Plaintiff has not shown that he was entitled to be placed in a back up position sooner than he was. See Deen v. Darosa, 414 F.3d 731, 734 (7th Cir. 2005).

Had plaintiff shown that he had a legal entitlement to be placed in the back up position sooner he would also have to show that he suffered some economic harm. Unless they suffer economic harm public employees who continue in employment are not deprived of due process by any actions or inactions related to their employment. Ulichny v. Merton Community School Dist., 249 F.3d 686, 701(7th Cir. 2001); Bordelon v. Chicago, School Reform Board of Trustees, 233 F.3d 524, 530-31 (7th Cir. 2000).

In Swick v. City of Chicago, 11 F. 3d 85 (7th Cir. 1993), the Court held that a police officer's due process rights were not violated when he was placed on involuntary sick leave. The Court stated: "We do not think that "property" within the sense of the amendment should be extended to the purely dignitary or otherwise non pecuniary dimensions of employment." Id. at p. 87. The Court further stated that due process should not be "extended beyond harms that may include however a loss of pecuniary benefits not limited to wages or other compensation." Id. See also Lifton v.

Board of Educ. of City of Chicago, 416 F.3d 571, 578 (7th Cir. 2005).

Plaintiff argues that he suffered economic harm even though he received considerably more gross pay because he lost accumulated leave days which could have been cashed in at retirement for credits to pay health insurance premiums. This argument is pure speculation. It is based on the following assumptions: that he would retire from state service, that at that time he would meet the eligibility requirements for cashing in his sick and vacation leave at the Vice Chancellor's rate of pay, and that he would not have otherwise depleted his leave days. Further, he was not terminated from his employment and retained the ability to earn more leave days.

In plaintiff's calculation of the value of lost leave benefits he does not account for the present value of this future benefit of credit towards health insurance premiums. Further, he does not discount this figure by the benefits he would have earned had he been placed in the back up position. Where plaintiff had provided a competently computed present value figure of the lost credit toward his insurance premiums he would then have to show that figure was greater than the \$76, 969.75 difference between the gross wages he received \$124,140.18 from November 2004 through June 23, 2005 and the gross wages he would have received in the backup position \$47,170.23. Since plaintiff has not made this showing, he

has not demonstrated that he suffered any economic harm. Plaintiff has not shown that he had any protected property interest in placement in the back up position. Accordingly, he has not shown that his due process rights were violated.

Had plaintiff shown that his due process rights were violated he would then have to show that such right was clearly established at the time of the alleged deprivation. It is plaintiff's burden to set forth clearly established law demonstrating that defendant Wiley failed to provide constitutionally required due process in the same or closely analogous situation. See Upton v. Thompson, 930 F. 2d 1209, 1212 (7th Cir. 1991). Plaintiff has failed to do so. Defendant Wiley was entitled to his reasonable belief that what he did was lawful based on Loudermill and Swick. Defendant Wiley is entitled to qualified immunity and his motion for summary judgment will be granted.

The only remaining claim in this action is plaintiff's state law claim against defendant Luoluo Hong. This Court declines to exercise continuing supplemental jurisdiction over this claim pursuant to 28 U.S.C. §1367(c)(3) and United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1986). See Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1993). The Court will remand this state law claim to Dane County Circuit Court.

ORDER

IT IS ORDERED that defendant Wiley's motion for summary judgment based on qualified immunity is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant Wiley against plaintiff dismissing plaintiff's claims against him with prejudice and costs.

IT IS FURTHER ORDERED that plaintiff's state law claim against defendant Hong is REMANDED to Dane County Circuit Court.

Entered this 23rd day of January, 2006.

BY THE COURT:

s/

JOHN C. SHABAZ
District Judge