Supreme Court of Ohio Clerk of Court - Filed October 27, 2015 - Case No. 2015-1577

IN THE SUPREME COURT OF OHIO

THOMAS MCMASTERS, Plaintiff-Appellant,	)	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
vs.	)	
ELIE GREEN and SERCO INC., NA, Defendants-Appellees.	)	Case No. 26563

DEFENDANTS-APPELLEES' MEMORANDUM IN RESPONSE TO PLAINTIFF-APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION AMENDED

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This is a simple case. Plaintiff-Appellant Thomas McMasters ("McMasters") was employed at-will by Defendant-Appellee Serco, Inc. ("Serco"). McMasters acknowledged that his employment was at-will. Due to a change in business circumstances, Serco notified McMasters and other Serco employees that it had to lower their salaries. Although McMasters told Serco that he rejected the salary reduction, McMasters notably did not quit and continued to work at the lower salary.

McMasters claims that Serco's reduction of his salary without his consent violates the equal protection and due process clauses of the Ohio Constitution. However, as discussed more fully below, this is misguided and there are no constitutional questions at play here. Serco is a private employer and there is no state action that would trigger a constitutional question. McMasters raises these constitutional issues because he believes the equal protection clause means that all citizens have equal leverage in contract negotiations. However, this is not what the Ohio Constitution guarantees.

Moreover, this is not a case of public or great general interest. It is merely a case of a plaintiff who misunderstands the nature of at-will employment. If McMasters had his way, no Ohio at-will employer could ever change any term or condition of an employee's employment without his or her express consent – a position blatantly inconsistent with this Court's prior holding in *Lake Land Emp. Group of Akron, LLC v. Columber*, and a position that no one other than McMasters advocates because it would hurt Ohio's business community, as every at-will employer would have to negotiate with every employee on every single change in the terms and conditions of his or her employment.

STATEMENT OF THE CASE AND FACTS

I. Defendant-Appellee Serco

Serco is a leading provider of professional, technology and management services to the federal government, including at Wright-Patterson Air Force Base ("WPAFB"). (Green Aff. ¶ 3).[1] Serco has various policies that impact the nature of its relationship with its employees. For example, Policy HR-8, "Employment at Will," provides:

> This policy states that employment with Serco is at will, meaning employment is voluntary and subject to termination by the employee or Serco at any time and for any reason not prohibited by law. ***Nothing in these policies shall be interpreted to be in conflict with or to eliminate or modify in any way the employment at-will status of Serco employees.*** . . . The only exception to this policy is a valid, written employment agreement approved by the CEO, Chief of Staff and/or Senior Vice President of HR.

(T. McMasters Dep. Ex. 6) (emphasis added).

II. Defendant-Appellee Elie Green

Elie Green was Interim Program Director for Serco from mid-March 2011 through April 25, 2014, when his employment was separated for lack of work. (Green Dep. 10-12; Green Aff. ¶ 2). During Green's employment at Serco, he supervised McMasters. (Green Dep. 45; Green Aff. ¶ 4).

III. The LMSS Contract

At the time it hired McMasters, Serco held a contract with the Army to supply services to WPAFB. This contract was entered into in March 2008; it was a one-year contract with the option for renewal in one-year increments for four years ("LMSS contract"). The LMSS contract was a "Best Value" contract, meaning the government, in awarding the contract, focused

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[1] Unless otherwise noted, cites to record evidence are cites to documents filed in support of Defendants' Motion for Summary Judgment filed with the Court of Common Pleas of Montgomery County, Ohio (the "Trial Court"), on November 4, 2014.

on obtaining the best value for the quality of services it received and retained the flexibility to award the contract to an offeror other than the lowest bidder. (Green Aff. ¶ 5). The LMSS contract provided for a bill rate of over $100/hour for the Senior Acquisition Analyst position, the position that McMasters eventually filled. (Green Dep. 27-30; Green Aff. ¶ 5).

IV. McMasters' Employment History

It is undisputed that McMasters signed two offer letters, on January 26, 2011 and February 5, 2011, in which he accepted employment at Serco. Both letters confirmed his employment relationship with Serco was at-will. Both letters provided:

> Your hiring is subject to your review and understanding of, and agreement to adhere to, the policies and practices of Serco, and the employment relationship is based on the mutual consent of the employee and Serco. ***Accordingly, this relationship is at will, and either you or the company can terminate this relationship, with or without cause or advance notice, at any time. Neither this letter nor any other oral or written representations may be considered a contract for any specific period of time.***

(T. McMasters Dep. Exs. 9 & 10; see also T. McMasters Dep. 80-82, 84-85) (emphasis added). By signing these offer letters, McMasters accepted a position at Serco as an Acquisition Management Specialist IV/T10 (Sr. Acquisition Analyst, Labor Category) and accepted that his employment relationship was at-will. At the time, Serco indicated that McMasters's pay would be $3,807.69 bi-weekly or $99,000.00 annually. (T. McMasters Dep. 80-82, 84-85, Exs. 9 & 10). His position was categorized in the T10 pay grade. (T. McMasters Dep. 91-92, 193 & Ex. 59). In his position, McMasters provided acquisition program management to government programs. (T. McMasters Dep. 91-92 & Ex. 59).

McMasters began his employment on February 7, 2011. (T. McMasters Dep. Ex. 1, ¶ 17). During orientation, on February 8, 2011, McMasters signed an "Employee Proprietary and Confidential Information Agreement," which states:

> Employee understands and acknowledges ***that employment with Serco is on an 'at will' basis***, meaning that either Employee or Serco may terminate the employment relationship at any time, with or without cause or notice. Employee understands and acknowledges that ***nothing in this Agreement is intended to create a guarantee of employment or continued employment and should not be construed as such under any conditions.***

(T. McMasters Dep. 98-100 & Ex. 86, p. 2) (emphasis added).

The LMSS contract was set to expire on March 18, 2013. In December 2012, the government wanted to continue the contractor services on the LMSS contract but through a different arrangement—one forbidding Serco from serving as the prime contractor, and which required the government to award the contract to the lowest bidder whose proposal was technically acceptable. Specifically, the Air Force issued a request for proposals for an Acquisition of Consolidated Enterprise Support Service contract ("the ACCESS contract").[2] Serco proposed certain rates at which its employees would be billed under the ACCESS contract to its prime contractor Sumaria.[3] The government accepted Sumaria's bid, and Serco and Sumaria entered into a subcontract agreement. This subcontract agreement encompassed a bill rate of approximately $43-$46/hour for the Senior Acquisition Analyst position, which was a decrease of over $57/hour. Indeed, all of the positions Serco bid for the ACCESS work

[2] Under the ACCESS contract, Serco could not serve as a prime or direct contractor with the government. Instead, a small business had to serve as the prime contractor and Serco had to become a subcontractor to the prime's relationship with the government. Serco therefore partnered with Sumaria Systems, Inc. ("Sumaria") to bid for the ACCESS work. The ACCESS contract had different parameters set by the government—it is a "Lowest Price Technically Acceptable" ("LPTA") contract. Meaning, the government awarded the contract to the lowest price offeror whose proposal met the technical acceptability standards. (Green Dep. 20, 46, 51, 88-89; Green Aff. ¶ 6)

[3] Sumaria had the option to accept and use those rates or adjust them. Sumaria then submitted the proposal to the government. Serco viewed the ACCESS work as a must-win contract in which Serco felt it imperative to win the work and continue to remain visible at WPAFB. (Green Dep. 13-15; Green Aff. ¶ 7)

experienced a significant decrease in billing rates. (Green Aff. ¶¶ 6-7; Green Dep. 30, 13-14, 48).

Because of the decreased bill rates, Serco was forced to adjust employee salaries in early 2013. Green recommended a salary decrease for McMasters that would earn Serco a 3.98% profit, despite the company's typical desire to aim for an 8-10% profit. (Green Aff. ¶ 8; Green Dep. 26, 32-35). Although McMasters protested the salary reduction, it is undisputed that he never resigned from Serco, that his reduced pay was deposited into his bank account, that he did not refund any of his new salary to Serco, and that he used his new salary to pay his bills. (T. McMasters Dep. 167).

V. Statement Of The Case

McMasters and his wife filed this lawsuit against Serco and Green on August 23, 2013, alleging claims of (i) breach of express contract, (ii) loss of consortium, (iii) breach of implied contract, (iv) promissory estoppel, (v) quantum meruit, (vi) unjust enrichment, (vii) respondeat superior/ratification, (viii) fraud, (ix) punitive damages, and (x) equitable estoppel. On November 3, 2014, McMasters moved for summary judgment on his express and implied contract and promissory estoppel claims. On November 4, 2014, Serco and Green filed cross-motions for summary judgment to address all claims. On January 20, 2015, the trial court granted Serco's and Green's motion for summary judgment and denied McMasters's motion for summary judgment. McMasters filed his Notice of Appeal on January 23, 2015.

On May 27, 2015, this matter was heard for oral argument before the Second Appellate District. On August 14, 2015, the Court of Appeals issued its Opinion affirming judgment for Serco and Green and against McMasters (the "Appellate Opinion"). On August 24, 2015, McMasters filed a motion for reconsideration, which was denied on October 21, 2015.

McMasters filed his Memorandum in Support of Jurisdiction on September 25, 2015. He filed his Memorandum in Support of Jurisdiction Amended ("McMasters Brief") on September 28, 2015.

ARGUMENT IN OPPOSITION TO MCMASTERS' PROPOSITIONS OF LAW[4]

I. Because Serco Is A Private Employer, Its At-Will Employment Of McMasters Raises No Due Process and Equal Protection Concerns.

McMasters' first proposition of law is that at-will employment relationships violate the due process and equal protection clauses of the Ohio Constitution. This is erroneous – Serco is a private employer, and because "due process and equal protection violations require an element of state action," there can be no Constitutional concerns regarding the terms under which it employs its employees. *Bell v. Ohio Dep't of Rehab. and Corr.*, 10th Dist. Franklin, No. 10AP-920, 2011-Ohio-6559, ¶ 22.

There quite simply is no due process violation here. "The Article I Section 16 due process provision of the Ohio Constitution does not directly apply to private non-governmental employers." *Wall v. Ohio Permanente Med. Group*, 8th Dist. Cuyahoga, No. 69841, 119 Ohio App. 3d 654, 670 (1997). "Due Process is a constitutional concept that vouchsafes rights against governmental, not private actions. There is no State action here. Thus, there is no Due Process issue." *Egan v. Mt. Sinai Hosp.*, 8th Dist. Cuyahoga, No. 44058, 1982 Ohio App. LEXIS 13488, at *4-5 (1982).

McMasters' equal protection claim fares no better. The root of McMasters' argument is that he believes there must be absolutely equal bargaining power between an employer and an employee in an at-will employment arrangement. He states in his brief, "the Ohio Bill of Rights

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[4] McMasters' Table of Contents lists three separate propositions of law. However, the body of his argument does not contain three separate sections correlating to these three propositions. For ease of organization, Serco will divide its argument into three sections refuting McMasters' three propositions of law.

requires that we be treated as equal." [McMasters Brief, p. 7]. He even refers to the "equality section of the Ohio Constitution." [*Id.*, p. 12]. This is a misunderstanding of the Constitution, as the equal protection clause guarantees only that the legislature will treat citizens equally, not that all citizens will have equal bargaining power in making private contracts.

In *Campo v. Daniel*, 8th Dist. Cuyahoga, No. 81419, 2002-Ohio-7257, the plaintiffs – a motorcycle rider who had an accident and his wife – sued their insurance company claiming violation of the equal protection clause because the wife's loss or consortium claim was not covered under their insurance agreement. The court disagreed, finding there was no Ohio legislation that could support an argument under the equal protection clause. "The preliminary step in analyzing an equal protection challenge involves scrutiny of classifications created by the legislation. Where there is no classification, there is no discrimination which would offend the Equal Protection Clauses of either the United States or Ohio Constitution." *Id.* at ¶ 29 (internal quotation omitted). The court also found that "matters of automobile insurance are matters of private contract that do not involve the state in any manner that would invoke equal protection. ... This freedom of contract does not involve state action in a way that would raise the specter of equal protection." *Id.* at ¶ 32. *See also Casey v. State Farm Mut. Auto. Ins. Co.*, 6th Dist. Lucas, No. L-87-145, 1987 Ohio App. LEXIS 10295, at *7 (1987) (holding no equal protection claim where there was a private contract involving no state action).

McMasters' employment relationship with Serco similarly does not implicate equal protection concerns. Serco is a private employer and there is no state action involved in Serco's employment of McMasters. McMasters freely entered into an employment relationship with Serco with full knowledge that his employment was at-will. He cannot now complain about the nature of that relationship because his employment did not work out as he wanted.

McMasters mistakenly believes that the equal protection and due process clauses of the Ohio Constitution provide equal bargaining power to every party to a contract, including at-will employment agreements with private employers. His point is not true. Such an interpretation "would completely eliminate at-will employment" and create gridlock and chaos, as private employers would not be able to change a single term or condition of any employee's employment unless the employee explicitly consented to the change. *Wall*, 119 Ohio App. 3d at 670. The state would drive out employers to other states, as every miniscule change in the employment relationship would have to be negotiated with each affected employee. McMasters' interpretation of at-will employment is not based on any legal precedent or law, is entirely unrealistic, and would have catastrophic effects on Ohio.

II. McMasters' Assertion That Contracts Are Made Of Distinct, Unrelated Parts Ignores The Law That Contracts Should Be Read As A Whole.

McMasters argues in his memorandum in support of jurisdiction that "[t]he whole of any contract is made up of individual sections" and that Serco's at-will policy did not apply to his compensation because Serco's compensation and at-will employment policies were separate. [McMasters Brief, pp. 10-12]. However, McMasters has argued that these policies and others collectively created an employment contract, and his theory that they should be interpreted in isolation is inconsistent with how contracts are interpreted.

As the Court of Appeals correctly stated, "[t]he Supreme Court of Ohio has 'long held that a contract is to be read as a whole and the intent of each part gathered from a consideration of the whole. ... If it is reasonable to do so, we must give effect to each provision of the contract." Appellate Opinion, ¶ 36, quoting *Saunders v. Mortensen*, 101 Ohio St. 3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ 16. If this were not the case, contracts would have to be drafted entirely differently so that each section could stand entirely alone, and language like an at-will

clause that is intended to apply across all the provisions of the employment relationship would have to be inserted into every section of the contract. This is not the current state of the law, and no one would advocate for such an impractical change.

Serco inserted language clearly stating that McMasters' employment was at-will in its at-will employment policy that it shared with McMasters, in McMasters' two offer letters, and in McMasters' "Employee Proprietary and Confidential Information Agreement," and McMasters freely acknowledges that he reviewed these documents and understood that his employment was at-will. He has no legal basis to claim now that he did not understand that the at-will relationship applied to all of the terms and conditions of his employment, including his compensation. In fact, Serco Policy HR-8 even explicitly states, "[n]othing in these policies shall be interpreted to be in conflict with or to eliminate or modify in any way the employment at-will status of Serco employees." Appellate Opinion, ¶ 48. It is clear that Serco communicated to McMasters that its at-will policy applied to every aspect of McMasters' employment, and that McMasters consented to this arrangement, so he cannot now claim that his compensation was exempt from this agreement.

III. Terms In An At-Will Employment Contract Are Subject To Change, And Serco Was Not Required To Have A Disclaimer That Its Policies Were Not Binding.

McMasters claims that "the Policies in the binding at-will contract between Serco and me do not have a disclaimer that they are not binding" and that "it is not appropriate to equate an at-will statement to a disclaimer that policies are not contractual in nature." [McMasters Brief, pp. 14-15]. This argument is unavailing, as Serco repeatedly informed McMasters that his employment was at-will, and this inherently means that Serco could propose changes to their employment relationship that he could either accept or refuse by quitting.

It is well-settled law in Ohio that in an at-will employment relationship, terms of employment are not set in stone, and either party may propose to change the terms at any time. In *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, 804 N.E.2d 27, the Court explained that either an employee or an employer in an at-will relationship may propose to change the terms of their employment relationship at any time, noting that "[i]f, for instance, an employer notifies an employee that the employee's compensation will be reduced, the employee's remedy, if dissatisfied, is to quit." *Id.* at ¶ 18; *see also Whisman v. Ford Motor Co.*, 157 Fed.Appx. 792, 801 (6th Cir. 2005) ("When ZFB changed the compensation terms of the plaintiffs' at-will employment, the plaintiffs' proper remedy was not to sue for breach of contract; it was to attempt to negotiate a more favorable benefits and compensation package, or quit. . . . Consequently, the plaintiffs have no basis on which to sue for breach of contract."); *Anderson v. Auto. Club Ins. Agency of Toledo, Inc.*, No. 3:07CV3870, 2009 U.S. Dist. LEXIS 107306, *7 (N.D. Ohio Nov. 18, 2009) ("With regard to her breach of contract claim, plaintiff overlooks -- indeed, ignores entirely -- her status as an at-will employee. As the Ohio Supreme Court has stated: if an employer changes the terms of an employee's work agreement, 'the employee's remedy, if dissatisfied, is to quit.'") *citing Lake Land.*

McMasters agreed to be employed at-will, and therefore agreed with the premise that either he or Serco could propose changes to the employment relationship from time to time. McMasters cannot require in the litigation contact further warning than he received that the terms and conditions of his employment could change. Moreover, once Serco proposed a change to his salary, McMasters still had a choice – he could accept the salary reduction or quit and find a new job at the salary of his choice. McMasters, by remaining employed, chose to accept the reduction, and he has no argument now that Serco acted unlawfully.

CONCLUSION

For the reasons discussed above, this case does not involve matters of public and great general interest or a substantial constitutional question. The appellee requests that this Court decline jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed with the court and has been served on October 27, 2015, via regular U. S. Mail, postage prepaid, and electronic mail, upon the following:

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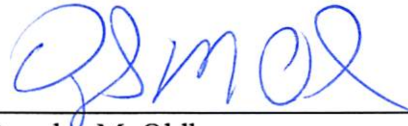

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