

REPORT OF INVESTIGATION

Complainant: Ms. Kelly Beers
Respondent: Dr. Eddie Howard, Jr.
Investigator: Nathan Pangrace, Shareholder, Roetzel & Andress
Date of Report: August 20, 2020
Conclusion: Insufficient Evidence of Policy Violation–Discrimination/Harassment

I. ALLEGATIONS

Complainant, Kelly Beers, is the Director of Housing & Off-Campus Living at Youngstown State University (the “University”). Respondent, Eddie Howard, Jr., is the University’s Vice President of Student Affairs. Beers alleges that Howard retaliated against her because she filed an anonymous ethics complaint. In that complaint, she claimed Howard failed to follow CDC guidelines necessary to protect the health and safety of University staff during the COVID-19 pandemic. Beers also alleges that Howard retaliated against her because she sought leave under the Families First Coronavirus Response Act (“FFCRA”)

II. APPLICABLE POLICIES

University Policy No. 3356-2-03, “Discrimination/harassment” contains the following prohibition:

(A) Policy statement. Youngstown State University (“university”) does not discriminate on the basis of...any other basis protected by law in its programs or activities...

(D) Definitions. For the purpose of determining whether a particular behavior or course of conduct constitutes discrimination or harassment under this policy, the following definitions shall be used:

(1) “Discrimination.” Conduct that is based on...any other basis protected by law that:

(a) Adversely affects a term or condition of an individual’s employment, education, or participation in a university activity or program; or

(b) Is used as the basis for a decision affecting an individual’s employment, education, or participation in a university activity or program; or

(c) Is sufficiently severe and pervasive to a reasonable person that it substantially interferes with an individual’s employment or educational performance or create a working, living, or educational environment that is intimidating, hostile, or abusive.

Two federal laws are relevant to this investigation because they create categories of

employees who are protected by law.

1. Section 11(c) of the Occupational Safety and Health Act provides that no person shall discharge or in any manner discriminate against any employee because the employee filed a complaint under or related to the OSH Act. A “complaint under or related to” the OSH Act includes a safety complaint by an employee to an employer, if made in good faith. *See* 29 C.F.R. 1977.9(c).

2. Employees who use leave under the FFCRA are statutorily-protected from retaliation in relation to their use of that leave. *See* 29 C.F.R. § 826.151. Employees who believe their rights have been violated may pursue remedies through the Department of Labor or by filing a private action in court.

III. **DESCRIPTION OF INVESTIGATION**

A. **Interviews of Parties and Witnesses**

1. **Complainant’s Statement**

Kelly Beers’ counsel, John F. Myers, sent correspondence to the University on June 19, 2020, that detailed her allegations of retaliation by Eddie Howard. (See Exhibit A.) I contacted Attorney Myers by telephone on July 22, 2020 and inquired whether he would make Beers available for an interview. Attorney Myers declined. I also asked Attorney Myers via email on August 4, 2020 whether his client wanted to produce witnesses or documents in furtherance of this investigation. Attorney Myers did not respond. I will therefore rely on Myers’ June 19th letter as the Complainant’s Statement.

2. **Respondent’s Statement**

I interviewed Dr. Eddie Howard, Vice President of Student Affairs, by telephone on July 22, 2020. Howard initially hired Beers to work at the University. After several years, he moved her into University Housing, where she reported to John Young. In March of 2020, the COVID-19 pandemic caused the Ohio Department of Health to issue a Stay-at-Home Order, creating widespread novel issues on university campuses across the country. Howard had to become more directly involved with the day to day housing operations. Howard emailed her on March 19, 2020 stating that he was going to handle all University housing operations going forward. He believed this was the best course of action given the Stay-at-Home Order. As a result, Beers resisted this increased management by her supervisor. She created problems because she told her staff not to do anything unless they heard from her first, which was directly opposite what was being asked of her by her supervisor. In addition, as the majority of employees, including managers, were sent home to work remotely, Howard was working on campus more than most and was in the best position to give direction to his staff, including managers and employees.

University administration decided that students remaining on campus during the pandemic needed to be consolidated and moved into a central location. Howard decided to move these students into the Kilcawley building. He wanted to have the rooms cleaned first, but Beers disagreed and raised concerns about COVID-19. Beers felt it was best to let the rooms remain unoccupied for a longer period of time before cleaning them for new residents to move into.

Shortly after, they received a complaint on the Anonymous Reporting hotline at Youngstown State University. This complaint system is available for employees to report fraud, fiscal abuse or policy violations anonymously when they do not feel comfortable discussing concerns with supervisors. The Hotline is operated by an independent company, EthicsPoint, and the complaints are reviewed by the YSU's Office of Internal Audit, Director Kelli Miller. The complaint was reviewed and investigated by Ms. Miller, who determined that there was no OSHA or policy violation for the process that Howard had directed his staff to follow. There was no discipline or negative issues that resulted from the complaint, investigation/review or the outcome. Howard felt that it was part of the University process and did not take offense to the issue. The Housing Office moved forward with cleaning right away and Howard never discussed the complaint with Beers.

Howard and Beers enjoyed a good working relationship for many years, evidenced by Howard promoting Beers into a Title IX Coordinator position, and later into the Director of University Housing & Off-Campus Living. However, the relationship became increasingly difficult to the point they were no longer able to work effectively together. Howard terminated Beers because of her pattern of poor decision-making and failure to follow Howard's direction. For example:

- Beers cancelled cable services for students in the middle of year. They could not do this because students had already paid for it.
- Howard gave specific instructions to Beers' employee (Stephanie Reed) regarding a project, but Reed did not follow his directions. Howard told Beers to document the situation and write up Reed. Beers disagreed and second-guessed Howard's decision.
- Beers announced to her staff that she was resigning via a web meeting on April 28, 2020. She had not told Howard at the time and Howard viewed this lack of communication as critical and potentially working to undermine University operations.
- Beers approved a variety of student refunds and failed to communicate the approval to Howard. Howard needed her to communicate regularly, particularly on financial decisions
- Beers disregarded Howard's specific instruction to not permit a student to move into a building.
- Beers hired desk managers, gave them free room and board, and paid them equal to what they pay resident assistants. Beers did not seek Howard's approval beforehand.
- Beers emailed Howard about using a facility for quarantine. Beers disagreed, even though it was management's decision.

Howard met with Beers and Young on May 21, 2020 to discuss the situations regarding Beers' job prospect and to clarify whether she was leaving YSU's employ. Howard told her that she needed to let him know what was going on and whether she was going to stay or take a new job. He described three options: (1) Beers could be terminated, (2) they could work it out or (3) Beers could be moved to another area. Howard asked for something in writing indicating she was no longer pursuing another position. She responded that she did not need to tell him anything about

pursuing another position.

On May 26, 2020, John Young, Executive Director of Auxiliary Services and Beers' immediate supervisor asked Beers for a return to work plan for her department. That same day, while in a meeting and asked about childcare issues preventing employees from returning to work, Howard indicated that childcare issues are not an absolute reason not to return to work, but that employees needed to consult with the Office of Human Resources because that was the office authorized to make those decisions.

On May 28, 2020, after reviewing the return to work plans, Young sent an email to Beers informing her that she and others would be required to report to work on June 1st. Young also recommended that Beers go through HR with childcare issues.

Howard went to the Office of Human Resources on May 29, 2020 and informed Ms. Kravitz, the Director of Human Resources, that he could no longer work with Beers because their relationship had deteriorated beyond repair. Beers' employment circumstances were similar to many management employees at YSU and included a 60-Day Notice of Removal provision. After consulting with Human Resources, Howard called Beers on the phone on May 29, 2020, and said he had decided to give her the 60-day notice, in which she received notice that her position would end 60 days thereafter. She received her pay; however, she never came back to work.

Howard knew very little about Beers' childcare situation. Howard was not aware that Beers' requested FFCRA leave until after he issued her the 60-day notice. Howard first became aware when he received an email from Kravitz on June 5, 2020.

3. Witnesses

a. Mark Weir, Director of Equal Opportunity, Policy Development & Title IX

I interviewed Mark Weir by telephone on July 14, 2020. Weir stated that he received an email from Beers on May 21, 2020, regarding a meeting she recently had with John Young and Eddie Howard. Weir scheduled a phone call to discuss the issue with Beers one week later. On their May 28th call, Beers went into detail about the meeting, stating that Howard was upset that Beers was looking for another job. Beers also discussed recent issues with her job performance where Howard was not satisfied with her work.

Weir and Beers also discussed the anonymous Hotline complaint. She filed the complaint on the evening of March 18, 2020. She did not know whether Howard knew it was her. Beers mentioned that Howard emailed her on March 19, 2020 stating that he would handle all University housing operations going forward because Beers was off work "caring for her family." Beers also said Howard was retaliating against her because she was looking for another job. The "crux" of Howard's retaliation was the she was being disloyal because she was looking for a new job. Beers did not mention any other reasons that Howard was retaliating. Later, Beers sent Weir an email on May 28, 2020, stating that Howard was deliberately taking actions against her by requiring that she return to work on June 1st, even though many other staff members were also required to return on June 1st.

Weir asked whether Beers suffered any negative employment action, such as a cut in pay or work hours or responsibilities. She replied that everything was status quo. Weir told Beers that there was no retaliation against her because nothing had been done to her. When asked whether gender played a role, Beers indicated that it had not. Beers felt that she was being singled out because she was the only employee with childcare issues, even though many others were also being asked to report to work.

b. John Young, Executive Director of Auxiliary Services

I interviewed John Young by telephone on July 17, 2020. Young was involved in the search committee that hired Beers. When she was promoted by Howard to the Director of Housing in mid-2019, Beers reported directly to Young. Beers, Young and Howard all had a good working relationship.

Young stated that in March 2020, the University was preparing to consolidate the remaining students into one residence hall as a result of the Stay-at-Home Order from the Ohio Department of Health. A complaint was filed because someone was concerned about the process and COVID-19. Young had conversations with Beers about the issue prior to her complaint. Young did not know the complaint was filed by Beers. Howard sent an e-mail to the housing staff addressing the safety concerns and explaining the process that would be used. There were a lot of safety concerns and a lot of unknowns at the time. Safety was a top priority. Howard addressed the concerns with Kelli Miller.

After weeks of remote work, Howard wanted housing operations to be working on campus each day. On May 28, 2020, Young emailed Beers and stated that most staff, including Beers, had to report to work on June 1, 2020. She responded that she had not gotten full time day care. She and Young talked about her going through Human Resources. HR said that those employees with child care or medical issues needed to complete the appropriate paperwork. Young does not remember Howard's alleged statement about childcare not being a reason not to come back to work at the Executive Director's meeting on May 27, 2020.

In spring 2020, Young noticed a string of poor decision-making and lack of communication by Beers:

- Young would ask for things from Beers' subordinates, and the subordinates were instructed to let Beers know first before complying with Young's request.
- Beers decided to end an agreement the University had with a cable company. Canceling the cable was going to end up costing the University more.
- Beers offered student employees a job compensation package included meal plans, which was something she was not allowed to do under University policy.
- University administration asked the housing department to clear out smaller residence halls for quarantine space in the fall. One building was going to be left empty. Beers suggested other recommendations and contradicted what was asked of her.
- She moved a new student into a building and he had to be relocated.

- Beers also was not following protocol regarding issuing student refunds.

Howard made the decision to issue the 60-day notice. Young and Howard called Beers to let her know. Howard said they were issuing the termination because of things they had discussed previously. They had met a few weeks prior about challenges and issues Beers was having. Beers was making decisions without following the chain of command. During the meeting, Beers said that she could not work with college-age students anymore. Young doesn't believe that the ethics complaint or child care issues played a part in Howard's decision to remove Beers. Howard and Young didn't spend much time discussing the complaint when it came in.

c. Cynthia Kravitz, Associate Vice President and Chief Human Resource Officer

I interviewed Cynthia Kravitz on July 21, 2020. Kravitz stated that Beers applied for an outside position in April 2020, but she did not receive a job offer. Beers told people in her department that she had the job and would be leaving; however, she did not inform Howard. Howard and Young met with Beers on May 21, 2020. Howard was upset that she had applied for another job. Beers called Kravitz after the meeting and was concerned that she might lose her job. Kravitz then called Howard, who said that Beers had done a lot of things that she did not have the authority to do. He was upset that Beers told her subordinates she was leaving YSU without informing him.

Howard came to Kravitz's office on May 29, 2020 and said he could not work with Beers anymore. He wanted to do a 60-day notice. Howard had lost all confidence in Beers. Howard mentioned a problem with a cable contract and with moving students. He wanted to keep a dorm open for students who might get COVID-19 and Beers did not agree with that. Also, there was an employee who reported to Beers that Howard wanted disciplined and Beers resisted. Beers wanted to discuss it with the employee first, but Howard said no. He wanted it written up and put in her personnel file. The relationship between Beers and Howard was increasingly strained, which was obvious in Beers' action in looking for another job. Kravitz believed the new job was the final straw. Howard thought she should have been more upfront with him about it. Howard never mentioned anything about the anonymous complaint or the cleaning of the dorms. Kravitz doesn't think this played any role in his decision to terminate Beers.

Kravitz followed through with the 60-day notice. Howard gave her the 60-day notice later that day. As Kravitz was walking to her car, she got a call from Beers. Beers was very upset and crying. Beers mentioned her meeting with Young and Howard on May 21, 2020. Kravitz told Beers that she was sorry this happened.

Beers had childcare issues prior to receiving the 60-day notice. She had been working remotely and Howard wanted his people to start coming back on June 1, 2020. Beers told HR that she only had childcare for two days per week and needed to take leave for the other days. HR provided her with the necessary leave paperwork, which she returned on June 4, 2020.

B. Documentary Evidence

60-Day Notification to Kelly Beers; Cynthia Kravitz Handwritten Notes; Director of Housing and Off Campus Living Job Description; Emergency Family and Medical Leave

Expansion Request by Beers dated June 4, 2020; Ethics Complaint dated March 19, 2020; Internal Audit File from Kelli Miller; Kelly Beers Personnel File; Letter from John F. Myers dated June 19, 2020; Mark Weir Handwritten Notes; Post Move-Out Janitorial Plan; Text message from John Young; Various emails dated March-June 2020 between Kelly Beers, Mark Weir, Eddie Howard, John Young, Stephanie Reed, Stacey Luce, and Cynthia Kravitz.

IV. **FACTUAL FINDINGS**

Findings in this Investigation Report are based on a "preponderance of the evidence" standard. In other words, after reviewing all the evidence, including the relative credibility of the parties and their statements during interviews, whether it is more likely than not that the conduct occurred as alleged. If the conduct did occur as alleged, then an analysis is completed to determine whether the conduct violated University policy. (Please note: the report's findings do not reach conclusions whether the alleged conduct violated state or federal laws, but instead address whether the University's policies were violated.)

The definition of "discrimination" under University policy "Conduct that is based on...[a] basis protected by law that...[a]dversely affects a term or condition of an individual's employment..." Beers' receipt of a 60-day notice and subsequent termination were an adverse employment action. Further, raising safety concerns with an employer and requesting leave under the FFCRA are protected activity. The critical question for this investigation is therefore whether Howard's decision to terminate Beers was based on her protected activity.

Here, there is insufficient evidence that Howard terminated Beers based on her filing the anonymous ethics complaint. Howard never made disparaging remarks to Beers about the complaint. In fact, they never discussed the complaint at all. The auditor's investigation vindicated Howard and his plan to move forward with cleaning the residence halls. As a Vice President of the University, Howard understood that complaints could be received about anyone's decisions or performance. This goes with the territory of working for a state university. Howard offered a credible explanation for his decision to pull duties away from Beers and eventually terminate her. Howard was attempting to manage University housing operations during an emergency. He needed Beers' cooperation, but she did not work effectively with her boss. It is clear they are two headstrong individuals and were no longer seeing eye-to-eye on many issues. Beers was reported to be a good and hardworking employee by many interviewed. Unfortunately, the pandemic circumstances required an understanding by Beers that she needed to work together with Howard and set aside their differences under the trying circumstances. Between her not telling him about potentially leaving YSU and not working as a team member during a crisis, Howard chose to implement the 60 day notice provision. Howard's explanation was corroborated by Young and Kravitz.

Likewise, there is insufficient evidence that Howard terminated Beers because she requested leave under the FFCRA. Howard did not know that Beers' had requested FFCRA leave until *after* he issued her 60-day notice. This, in addition to the fact that she was not singled out as the sole person to return to on-campus work on June 1st, suggests that Beers' request for FFCRA leave did not motivate Howard's decision. Further, as mentioned above, Howard offered a credible non-retaliatory explanation for his decision to remove her.

Finally, Beers alleged that Howard retaliated against her because she was looking for a new job. Even if this allegation was true, it would not be a violation of University policies or state or federal law. Therefore, there is insufficient evidence that Howard discriminated or retaliated against Beers in violation of University policies.

V. **CONCLUSION**

There is insufficient evidence Respondent violated Policy No. 3356-2-03, “Discrimination/harassment”.

EXHIBIT A

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June 19, 2020

Cynthia A Kravitz
Associate Vice President and
Chief Human Resources Officer
One University Plaza
Youngstown, Ohio 44555

Re: Kelly Beers: For Settlement Purposes Only

Dear Ms. Kravitz:

I and Billi Copeland King represent Kelly Beers in matters arising out of her employment with Youngstown State University. As you are aware, on May 29, 2020 you sent Ms. Beers a 60-day notice that her employment with YSU would end effective July 29, 2020.¹

On March 18, 2020 Ms. Beers went home for the afternoon as her children were sick. Later that evening Ms. Beers filed an anonymous ethics complaint in which she expressed concern that Eddie Howard, Vice President of Student Affairs, contrary to her recommendation that YSU follow CDC guidelines in order to protect the health, safety and welfare of her staff, many of whom were of an age or suffered from health conditions that put them at risk if they would contract COVID 19. Her understanding of CDC recommendations was based upon guidance from Julie Gentile, Director of Environmental Health and Safety. Mr. Howard expressed that YSU wanted the dormitories cleaned out right away and that he was not aware of any students who tested positive for COVID-19, so it was not a problem. Ms. Beers had expressed her concerns in a meeting with Mr. Howard. On March 19, 2020, within less than twenty four hours of her complaint, Mr. Howard relieved her of her duties. His purported reason was that he needed "boots on the ground" and that it was too hard for her staff to work through her while she was working from home. Prior to the complaint, Ms. Beers had no issues directing her staff as she worked from home.

In mid-May 2020, after Governor DeWine announced a potential reopening by the end of May, Ms. Beers reached out to her children's daycare provider to determine if there was space available. She was told spaces were being held for essential workers who were required to return to work. She kept her immediate supervisor, John Young, apprised of her day care situation.

¹ Note your correspondence was dated March 29, 2020. I trust this was simply an error on your part, or on the part of the individual who actually authored this correspondence.

During this timeframe Ms. Beers was pursuing an opening at Central State University. This became an issue with Mr. Howard and Mr. Young. After a series of conversations, Ms. Beers committed to remain in her position at YSU. At this point she considered the issue to have been resolved. However, in a meeting on May 21, 2020 Mr. Howard questioned her loyalty and outlined three options: "I don't want you in the position and don't need you as an employee; I could move you; We could find a way to repair this and move forward".

On May 26, 2020 Mr. Young asked Ms. Beers to prepare a return to work plan, which she completed and returned to Mr. Young. She informed Mr. Young that she could not secure full-time daycare. He told her it was no problem and that she could continue on an adjusted schedule working on site and at home until she could obtain full time childcare. At this time Ms. Beers had protections from adverse job action under FFCRA on account of daycare issues attributed to the COVID-19 pandemic.

On May 27, 2020, Ms. Beers was informed by a coworker that Mr. Howard stated in an Executive Director's meeting that childcare issues were not a reason to refuse to return to work on June 1, 2020. He specifically stated that Ms. Beers needed to return to work on-site.

On May 28, 2020 Ms. Beers spoke to you and you assured her that Mr. Howard wanted her to remain employed at YSU. She explained to you that she was not convinced that Mr. Howard was not going to fire her. You asked Ms. Beers if she had provided a letter Mr. Howard requested from CSU stating that she withdrew from consideration for the position. She informed you that she was not sure she would have a position at YSU, so she was hesitant to obtain such a letter from CSU. You expressed your understanding of her situation.

On May 28, 2020 Ms. Beers also received an email from Mr. Young stating that the majority of her staff, including her, were to report to work on-site from 8:00 a.m. to 5:00 p.m. daily beginning June 1, 2020. She responded to Mr. Young again informing him that she had not yet secured full-time daycare for her children and that she was going to reach out to HR so that she could utilize the expanded FMLA coverage afforded under FFCRA. She also sent an email to Mr. Howard informing him that she would not provide him a letter that she had withdrawn from or was no longer in consideration for the CSU position.

On May 29, 2020 Ms. Beers sent an email to Mr. Weir updating him that she was being required to return to work full-time, upon short notice and that she did not have daycare for her children. Subsequently, Mr. Howard and Mr. Young called her. Mr. Howard stated that she was not able to "meet his vision" and that he was giving her a 60-day notice of termination. Ms. Beers immediately texted you. Ms. Beers then contacted Mr. Weir who responded that he did not have permission to speak with her. You called Ms. Beers and told her you were sorry that your name was on the 60-day notice, but it was simply because you were the Chief Human Resources Officer.

Throughout this time frame Ms. Beers had been communicating with you and Mark Weir, Director of Equal Opportunity, about the manner in which Mr. Howard was treating her. On May 28, 2020 she told Mr. Weir she was concerned that Mr. Howard was retaliating against her on

account of her "anonymous" ethics complaint. He stated that because she had no change in status that there had been no retaliation. He did express concern about some of Mr. Howard's comments. When the retaliatory act occurred, Mr. Weir was not authorized to speak with her, and you distanced yourself from the situation by claiming signed the 60-day notice simply because of your position as Chief Human Resources Officer.

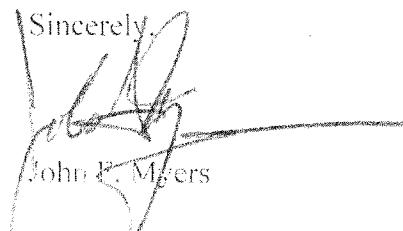

It is apparent that Mr. Howard took issue with Ms. Beers advocating for the health, safety, and welfare of her staff in light of the COVID pandemic that is coursing throughout the world. In a meeting with Mr. Howard and others, Ms. Beers advocated for compliance with CDC guidelines and Mr. Howard chose an expedient process of cleaning out the dormitories that placed employees at risk. Ms. Beers filed the anonymous complaint shortly thereafter. His immediate act of relieving her of her job responsibilities clearly demonstrates his retaliatory intent which was further demonstrated by his actions leading to her termination. Such retaliatory actions may well run afoul of OSHA regulations as well as other state and federal statutes.

Mr. Howard also took issue with Ms. Beers seeking relief under FFCRA expanded family and medical leave and retaliated by terminating her employment after she repeatedly informed Mr. Young that she was having issues obtaining full-time childcare. His actions run afoul of the remedial provisions of FFCRA.

Ms. Beers desires to remain employed at YSU. She has served in several roles and has performed well: Mr. Howard has promoted her twice. It was only after she implicated him in an ethics complaint, and she dared to invoke her rights under FFCRA that Mr. Howard had a change of his "vision" of Ms. Beers.

In order to resolve this matter, Ms. Beers would accept immediate reinstatement to her position as Director of Housing & Off-Campus Living with an express agreement from Mr. Howard that he will not engage in any further retaliatory actions against her on account of her expressed complaints regarding compliance with CDC and Ohio Department of Health guidelines addressing the response to the COVID 19 pandemic in the workplace or on account of her seeking to invoke her rights under FFCRA.

Please contact me so we may discuss this matter further. I look forward to working toward an amicable resolution of this matter.

Sincerely,

John R. Meers

Billi Copeland King

cc: Kelly Beers