

FILED
COURT OF CLAIMS
OF OHIO

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ORIGINAL

IN THE COURT OF CLAIMS OF OHIO

DAVID A. BENTKOWSKI
6399 Crossview Road
Seven Hills, Ohio 44131

Plaintiff

vs.

ELIZABETH POPADIUK
6855 Hidden Lake Trail
Brecksville, Ohio 44141-3192

and

DENNIS R. BERG
8578 Fairlane Drive
Olmsted Township Ohio 44138-2143

and

JACK PATRICK McDONALD, JR.
3394 WOOSTER RD.
Rocky River, Ohio 44116-4168

and

OHIO LOTTERY COMMISSION
615 W. Superior Avenue
Cleveland, Ohio 44113

Defendants.

CASE NO.:

2014-00651

JUDGE:

COMPLAINT

ON COMPUTER

David A. Bentkowski, through his undersigned counsel of record, Brent L. English, states for his complaint the following:

PARTIES

1. Plaintiff is a resident of Seven Hills, Ohio, is an attorney-at-law and is a Councilman in the City of Seven Hills.
2. Defendant Elizabeth Popadiuk is the Director of Human Resources for the Ohio Lottery Commission.
3. Defendant Dennis Berg is the Director of the Ohio Lottery Commission.
4. Defendant Jack Patrick McDonald, Jr. is the Chairman of the Ohio Lottery Commission.
5. Defendant Ohio Lottery Commission is an agency of government in the State of Ohio.

GENERAL ALLEGATIONS

6. On October 11, 2011, Plaintiff began working at the Ohio Lottery Commission as a "Labor Relations Officer 3." Of the various labor relations officer positions throughout the State of Ohio, the highest ranking position is a "Labor Relations Officer 3." Plaintiff's years of experience and legal training made him qualified for this position.
7. As a condition of his employment by the Lottery, Plaintiff was required to resign from his position as the twice-elected Mayor of the City of Seven Hills.
8. Plaintiff accordingly resigned from the office of Mayor of Seven Hills on October 10, 2011, solely in order to begin his Lottery employment.

9. On January 3, 2012 based upon Defendant Popadiuk's direction and consistent with the Lottery's policy, Plaintiff completed his Mid-Probationary (90-days) Self Evaluation. Plaintiff gave himself a score of 95 ("Outstanding") on the rating level. Defendant Popadiuk accepted this rating and complemented Plaintiff on a great job he was doing at the Lottery.

10. Lottery policy calls for the immediate supervisor, in this case, Defendant Popadiuk, to write and issue her own evaluation of Plaintiff. Defendant Popadiuk failed to evaluate Plaintiff other than giving supportive words to Plaintiff's self-evaluation.

11. Defendant Popadiuk frequently failed to follow her own/Lottery policy regarding evaluations and also allowed many other managers to be lax in their departments regarding evaluations.

12. On March 28, 2012 Plaintiff completed his first training seminar for the Ohio Collective Bargaining Academy. Plaintiff then attended 15 more training days in Columbus, making the separate drive from Cleveland for each class, successfully completing all class requirements of the program by October of 2012. This was a spectacular accomplishment compared with many other state employees who took years to complete this training. Defendant Popadiuk authorized all aspects of the training including Plaintiff being away from the office, travel, and the expense of the actual courses themselves. Plaintiff did all of this training at the request of Defendant Popadiuk and the state's cost for this training of the Plaintiff was sizeable.

13. On April 9, 2012 and at Defendant Popadiuk's direction and in accordance with Lottery policy, Plaintiff completed his Final Probationary (180 days) Self-Evaluation. Plaintiff again gave himself a score of 95 ("Outstanding") on the rating level.

Defendant Popadiuk accepted this rating. She once again told the Plaintiff that he was doing a great job and authorized him to come off of probation. Plaintiff received a raise at this time. Defendant Popadiuk once again failed to conduct or issue any type of evaluation on her own regarding Plaintiff despite it being Lottery policy.

14. Throughout his employment at the Lottery, Plaintiff and other HR Staff were required to give Bi-Weekly Reports to Defendant Popadiuk. Plaintiff never missed giving a bi-weekly report and never received any negative feedback regarding his reports. Plaintiff never received any guidance or criticism that he was not completing assignments, that his work product was light, etc. In fact, Plaintiff repeatedly received positive affirmation and comments from Defendant Popadiuk, who was his sole supervisor and the only person at the Lottery who assigned work to him.

15. Plaintiff successfully completed every task given to him without delay throughout his tenure at the Lottery. Plaintiff accurately completed assignments so swiftly that he was most often waiting for Defendant Popadiuk to complete her portions. A review of Plaintiff's bi-weekly reports reveals an impressive record of accomplishments and shows Plaintiff timely completing all assignments.

16. In fact, Plaintiff was an exemplary employee. He was never late for work. He never called off sick once. The nominal hours of sick time he used were for pre-scheduled, pre-approved doctor's visits. The Lottery has various employment policies and work rules that include various levels of discipline and reprimand for various improper work actions. Plaintiff never received *any* discipline, reprimands, correction, or caution regarding his compliance with any of the Lottery's policies or work rules of any kind during his employment.

17. Ironically, as Labor Relations Officer 3, Plaintiff was the very person responsible for drafting, reviewing, and enforcing Lottery policies and rules across the State of Ohio for the Lottery. Despite being in the position of the Lottery's "disciplinarian," Plaintiff was well liked and respected by both management and employees.

18. In May of 2012 at the urging of and with the approval of Defendant Popadiuk, Plaintiff enrolled in the Human Resources/Labor Relations graduate school program at the Monte Ahuja College of Business at Cleveland State University. Plaintiff was already a law school graduate in 1996 from the Cleveland-Marshall College of Law at the same university. Defendant Popadiuk encouraged Plaintiff to take the same graduate school program she had taken and repeatedly discussed Plaintiff's "new career" in human relations and how this course work would greatly assist Plaintiff in serving with her for a long time at the Lottery. Over the summer and fall terms of 2012, Plaintiff successfully completed five different courses in the program and received five grades of A, for a 4.0 grade point average. Plaintiff has completed Labor Law, Employment Law, Leadership, and Management and Organizational Behavior courses. Plaintiff did not need this degree program and had not taken any schooling since graduating from law school in 1996, other than continuing legal education necessary to maintain his license to practice law.

19. Plaintiff entered the Human Resources/Labor Relations graduate program upon assurances from Defendant Popadiuk about his "Lottery" career. Upon this reliance, Plaintiff has spent thousands of dollars of his own money on tuition, fees, books, etc., while the State of Ohio has also spent thousands of dollars on his tuition.

20. Plaintiff displayed such competence in this area of endeavor that, upon his termination from the Lottery, he was hired by Cleveland State University to serve as an adjunct professor teaching Labor Law at the Monte Ahuja College of Business and teaching Administrative Law at the Cleveland-Marshall College of Law. Plaintiff taught Labor Law in the spring of 2013 and will again teach the course in fall of 2013 and spring of 2014. Also, Plaintiff will teach Administrative Law in the summer of 2013 and has other course offerings pending.

21. On September 25, 2012 and at Defendant Popadiuk's direction and consistent with Lottery policy, Plaintiff completed his Annual Self Evaluation. Plaintiff gave himself a score of 96 ("Outstanding") on the rating level. Defendant Popadiuk accepted this rating and again complemented Plaintiff on the great job he was doing for the Lottery. Plaintiff again received another step-raise. Plaintiff then became eligible for additional Lottery benefits upon completion of his one-year anniversary.

22. Around this period, Defendant Popadiuk rained praise on Plaintiff about his work product and made repeated comments about Plaintiff being given even more important assignments in the future. Defendant Popadiuk increased Plaintiff's access in the computer systems enabling him to have more access to confidential human resource materials so Plaintiff could take on additional duties.

23. Defendant Popadiuk directed Plaintiff to work with other human resources personnel at the Lottery to expand his information systems access at the Lottery over the coming six months. For the third time, Defendant Popadiuk failed to conduct or issue any official evaluation of the Plaintiff or contradict his outstanding self-evaluations.

24. In September 2012 Defendant Popadiuk instructed lottery HCM Senior Analyst Stefanie Zackery to provide to Plaintiff materials relating to his right to receive Dental, Vision and Life Insurance benefits effective October 11, 2012, Plaintiff's one-year anniversary with the Lottery. Per Ms. Zackery's instructions, Plaintiff applied for benefits with the Standard Insurance Company on September 23, 2012.

25. On September 27, 2012, Plaintiff and Defendant Popadiuk attended a training seminar titled "2012 Developments in EEO Law" sponsored by Calfee, Halter and Griswold, a large Cleveland law firm. This was just another example of Defendant Popadiuk's assurances to Plaintiff that his role at the Lottery would be expanded and that he would be tasked with reviewing department practices and coming up with improved protocols regarding various department efforts and new law changes. Plaintiff's relationship with Defendant Popadiuk seemed very positive at this time. Plaintiff had just submitted his self-evaluation of 96 and received affirmation from Defendant Popadiuk. Plaintiff was being given new access codes and was being given new assignments with promises of expanded roles in the future.

26. Throughout this time, Defendant Popadiuk was sharing unsolicited personal information with Plaintiff. While spending time together at the Calfee Halter event, Defendant Popadiuk volunteered personal information about her divorce from another Lottery employee and became emotional as she discussed her private troubles. Plaintiff was supportive and offered any assistance he could.

27. At multiple times throughout 2012 Plaintiff gently cautioned and guided Defendant Popadiuk about her questionable actions as the Lottery's Human Resources Director. As a lawyer, Plaintiff tried to caution Defendant Popadiuk about unnecessarily

discussing confidential personal matters about various employees. Defendant Popadiuk repeatedly joked about and discussed the sexual exploits and sexual orientation of various employees. In fact, Defendant Popadiuk gave Plaintiff extremely personal information about certain Lottery employees that should never have been divulged. This information was provided in a non-privileged and unsolicited manner.

28. On multiple occasions, Plaintiff was concerned about bias and acts of employment discrimination by Defendant Popadiuk. As Labor Relations Officer, Plaintiff was given instruction and direction by Defendant Popadiuk on how to execute discipline against certain employees. Plaintiff was alarmed by Defendant Popadiuk's desires to discipline, terminate, and/or force various Lottery employees into retirement. This included, without limitation, taking action against a 70 year-old African-American who was involved in a motor vehicle accident; another African-American employee that Popadiuk claimed "looks like she is on drugs;" a homosexual employee; and an employee that had been feuding with Defendant Popadiuk for years and who claimed to have disabilities.

29. Despite these entreaties and directives, Plaintiff worked hard to treat all employees fairly and address their situations based on their actions alone and not on the often inappropriate comment or direction of Defendant Popadiuk.

30. Given the foregoing, Plaintiff was working on documenting Defendant Popadiuk's actions. Since Defendant Popadiuk was the head of Human Resources at the Lottery, and Plaintiff's direct supervisor, Plaintiff was in the precarious position of trying to do his job and appease his supervisor.

31. On October 11, 2012 Defendant Popadiuk again instructed and authorized Ms. Zackery to forward to Plaintiff additional materials regarding Dental, Vision and Life Insurance, letting Plaintiff know that his one-year milestone had been reached and Plaintiff was now clear to enroll. Plaintiff enrolled for these benefits and simultaneously removed himself from his wife's work coverage. Also, Plaintiff was given materials regarding Flexible Spending Accounts for 2013.

32. On October 11-12, 2012 Defendant Popadiuk had approved Plaintiff to attend the Ohio State Bar Association's annual Employment Law training seminar.

33. During the week of October 15-19, 2012 Plaintiff executed on several important functions for the Lottery including final updates to Lottery policies, meeting with a disgruntled employee and member of the Labor Management Committee, investigating an employee discipline matter, hosted a quarterly Labor-Management meeting, and worked on other issues relating to new racinos/video lottery terminals, amongst other work. At this time, there were several important matters in existence that would happen in the future including some employee hearings where Plaintiff played a key role.

34. On Sunday night, October 21, 2012 Plaintiff spoke to Defendant Popadiuk by telephone advising her that Plaintiff had been contacted by a local newspaper reporter and that the reporter was going to be writing a story about Plaintiff and his reporting of crimes in Seven Hills. Plaintiff had begun reporting illegal activity back in spring of 2012 confidentially to the FBI. Plaintiff did not want Defendant Popadiuk caught off guard by the story and wanted to give her the back story in advance of its publication. Plaintiff walked Defendant Popadiuk through the various details and explained to her

how he was legally obligated to have reported these various crimes to the FBI and Ohio Ethics Commission. Defendant Popadiuk gave supportive commentary but also indicated she would have to discuss the matter with her supervisor Defendant Berg.

35. On Monday morning, October 22, 2012 Plaintiff spoke to Defendant McDonald while driving to Columbus for OCB Arbitration School. Just as he did with Defendant Popadiuk, Plaintiff explained that he expected a newspaper story to be published about him. Defendant McDonald was short with the Plaintiff and told him that any negative publicity would not be “good” for the Plaintiff.

36. Defendant McDonald had played a key role in the Plaintiff being hired at the Commission as he serves as an operative for the Republican Party and had made multiple contacts with the key hiring officials in the Governor’s Office on behalf of the Plaintiff during his hire. After Plaintiff’s initial hiring, Defendant McDonald had cautioned the Plaintiff that he better “stay out of the headlines” or else he would lose his job at the Lottery.

37. On October 23, 2012 the *Plain Dealer* published a story authored by columnist Mark Naymik titled “Seven Hills’ David Bentkowski still doesn’t understand what it means to be a public official.” The story was very negative toward the Plaintiff and was filled with inaccurate portrayals about the Plaintiff. In fact, Naymik was not privy to the pertinent information that involved the ongoing investigations by the FBI and the Ohio Ethics Commission.

38. From October 22-26, 2012 Plaintiff had been scheduled for months to attend Arbitration School training from the Ohio Office of Collective Bargaining in Columbus, Ohio. This week-long training was the culmination of Plaintiff’s year-long

OCB Academy training. Upon completion of this program, Plaintiff had completed all offerings by the OCB Academy in less than a year, an unusually short time frame. With his 16 years of experience as an attorney, his nearly 8 years as mayor running a city with three unions, his additional training via his graduate school program in Human Resources and Labor Relations, his 16 years of continuing legal education training, and the completion of the OCB Academy, Plaintiff was easily one of the most qualified Labor Relations Officers in the State of Ohio.

39. On October 29, 2012 Plaintiff sent a five-page letter to Defendant Berg, Defendant Popadiuk with a copy to the Commission's counsel, who also serves as the Lottery's "chief ethics officer," explaining some of the criminal activity Plaintiff had reported. Plaintiff's letter discusses how he believes "to this day, [that] various crimes such as intimidation, menacing, conspiracy, obstruction of justice, and elected officials having an unlawful interest in public contracts [had occurred and that he believed such illegal]. . . activities are still taking place."

40. Plaintiff also put Defendants on notice of his legal obligations stating "When I went to the law director, I was attempting to fulfill my legal obligations as mayor. As an attorney, I was aware that the Ohio Revised Code requires me to report any activity that I believed to be illegal. Also the Charter of the City of Seven Hills requires me, as the mayor, to enforce all local laws and ordinances and to report illegal activity. Please see O.R.C. 2921.2 and the Seven Hills Charter at Section IV-5-9." Plaintiff also put the Defendants on notice that the matter was being investigated by other law enforcement agencies, stating, "Also, you should know that I have been working with the F.B.I. and the Ohio Ethics Commission. There are a series of other activities taking

place in Seven Hills that I reported to those agencies and I believe the efforts against me have been in response to those reports.”

41. At all times Plaintiff was actively working on assignments of importance that were given to him by Defendant Popadiuk. On November 2, 2012, Plaintiff and Defendant Popadiuk received an email from Lottery Assistant Legal Counsel Aaron Schmidt regarding the Lottery’s faulty employee handbook. Mr. Schmidt indicated, in pertinent part, as follows: “While there is currently language that disclaims permanent employment, the term ‘employee at will’ is not used.”

42. Plaintiff had been working in close contact with Mr. Schmidt for months on improving the Lottery’s various policies and procedures. In fact, and upon information and belief, Plaintiff’s background as an attorney was a tremendous value for the Lottery’s Human Resource Department and the Legal Department as they attempted to update their flawed materials.

43. On November 8, 2012, at the Lottery’s urging and approval, Plaintiff attended an Ohio State Bar sponsored training “How to Handle Difficult Situations.”

44. On the weekend of November 9-11, 2012, Defendants had Plaintiff work as a representative of the Lottery at the Fabulous Food Show at the IX Center. He was to receive “comp time” for the hours that he spent at this show.

45. On November 12, 2012, the Lottery was closed due to Veteran’s Day.

46. On November 13, 2012, Plaintiff was called into a meeting by Defendant Popadiuk and informed he was terminated “for cause and poor performance.” Plaintiff immediately told her that this was an unlawful retaliatory firing. Defendant Berg joined the meeting late and Plaintiff also advised him that this firing was retaliatory and that it

was illegal. Defendants Berg and Popadiuk wouldn't discuss the matter – ended the meeting – and had security escort Plaintiff out of the building.

47. Plaintiff was an outstanding Lottery employee that was never disciplined or reprimanded or told he was failing in any manner. Plaintiff's personnel file contained no negative information of any kind. He passed three evaluation periods, received two step-raises, came off probation, completed extensive/expensive training, was given additional access, assignments, benefits, and pledges of further responsibilities into the future, and at all times, executed every assignment ever given to him.

48. Plaintiff's standing with the Lottery only changed after public disclosure that he had reported crimes to law enforcement.

COUNT ONE
[Wrongful Discharge in Violation of Public Policy]

49. Plaintiff incorporates by reference all allegations above as if fully reproduced herein.

50. The elements for the tort of wrongful discharge in violation of public policy are: (1) that clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law, (2) that dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy, (3) the plaintiff's dismissal was motivated by conduct related to the public policy, and (4) the employer lacked overriding legitimate business justification for the dismissal.

51. Ohio recognizes a clear public policy for public officials and other citizens to report evidence of a crime to one or more law enforcement agencies. It further recognizes a policy to protect confidential information about its employees from

wrongful, non-privileged exposure. Ohio also recognizes the right of free speech and expression and the right to participate in governmental affairs.

52. By dismissing the Plaintiff from his employment by the Lottery, Defendants jointly and severally jeopardized these public policies.

53. Plaintiff's dismissal was motivated by conduct related to the above public policies.

54. The Defendants lacked overriding legitimate business justification for dismissing the Plaintiff.

55. As a direct and proximate result of the foregoing unlawful actions by the Defendants, jointly and severally, Plaintiff has sustained significant economic losses in the amount of \$1 million.

56. This claim was previously made in Case No. 13-CV-807100 in the Court of Common Pleas of Cuyahoga County, Ohio but was dismissed, without prejudice, and otherwise than upon the merits, on May 19, 2013. This claim is brought in the Ohio Court of Claims within one year of the failure of the prior case other than on the merits.

COUNT TWO
[Retaliation as a Result of Protected Activity]

57. Plaintiff incorporates by reference all allegations above as if fully reproduced herein.

58. While employed at the Lottery, Plaintiff engaged in protected activities by reporting possible crimes to law enforce agencies, by telling Defendant Popadiuk not to divulge confidential information about other Lottery employees and not to engage in prohibited employment discrimination which, ironically, was her duty to guard against

but which she clearly engaged, and by exercising his Federal and Ohio constitutional right to freedom of expression and of association.

59. Plaintiff was subjected to an adverse employment action.

60. A causal link exists between the foregoing protected activities and the adverse action taken against him.

61. Defendants cannot show that there was a legitimate non-discriminatory reason for their action and, even if they attempt to, Plaintiff can demonstrate that any claimed reason was pretext.

62. As a direct and proximate result of the foregoing retaliatory conduct, Plaintiff has sustained damages in the amount of \$1 million.

63. This claim was previously made in Case No. 13-CV-807100 in the Court of Common Pleas of Cuyahoga County, Ohio but was dismissed, without prejudice, and otherwise than upon the merits, on May 19, 2013. This claim is brought in the Ohio Court of Claims within one year of the failure of the prior case other than on the merits.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for the sum of \$1 million, plus interest, costs, and reasonable attorney's fees on each Count of this Complaint. Plaintiff further demands that he be restored to his former position of employment, that he be granted back pay, all benefits to which he would otherwise have been entitled, including pension benefits to which he would have been entitled under the Ohio Public Employees Retirement System, and such other and further relief as to the Court may order.


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