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IN THE OHIO COURT OF CLAIMS
STATE OF OHIO

DAVID A. BENTKOWSKI)	CASE NO. 2014-00651
)	
Plaintiff,)	JUDGE PATRICK M. McGRATH
)	
vs.)	
)	
OHIO LOTTERY COMMISSION,)	
)	
Defendant.)	

**BRIEF IN OPPOSITION TO THE OHIO LOTTERY COMMISSION'S
MOTION FOR SUMMARY JUDGMENT**

Plaintiff, David A. Bentkowski, respectfully opposes the Ohio Lottery Commission's (the "Commission") motion for summary judgment filed on, or about, June 1, 2015. He submits there are genuine issues of material fact in dispute and the Commission is not entitled to judgment as a matter of law.

SUMMARY JUDGMENT STANDARD

Ohio R. Civ. Proc. 56(C) permits this Court to award summary judgment to the Lottery Commission appropriate only if: (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that

conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

“[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.” (Emphasis supplied.) *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996).

Once the moving party meets its initial burden, the non-movant must set forth specific facts demonstrating a genuine issue for trial. *Id.* at 293. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 604 N.E.2d 138 (1992).

THE COMMISSION’S MOTION FOR SUMMARY JUDGMENT

The Commission filed a very truncated (three-page) motion for summary judgment on May 29, 2015. No evidence was attached to or separately filed with the motion.¹ It appears the Commission contends that summary judgment should be granted because none of the Plaintiff’s claims withstands scrutiny as a matter of law.

PLAINTIFF’S CLAIMS

Plaintiff’s complaint contains two claims: (1) for wrongful discharge in violation of public policy; and (2) for retaliation as a result of protected activity (Complaint, 13-15).

¹ Ohio R. Civ. Proc. 56(C) provides that “[n]o evidence or stipulation may be considered except as stated in this rule.” Civ. R. 56(C). The types of evidence which may be considered on summary judgment are the “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any. . .” *Id.*

The complaint details the pertinent background facts including:

- Plaintiff is an attorney-at-law (Complaint, ¶ 1);
- Plaintiff was hired as a labor relations officer for the Commission effective October 11, 2011. *Id.* at ¶ 6;
- Plaintiff was the Mayor of Seven Hills, a Cuyahoga County municipality when he was hired by the Commission but was told that he had to resign from that position as a condition of working for the Commission. *Id.*, ¶ 8;
- Plaintiff was an exemplary employee who complied with all requirements of his job. *Id.* at ¶ 16. He was never disciplined, reprimanded, or cautioned regarding his job performance. *Id.* His personnel file contains no negative information of any kind;
- Plaintiff easily passed three evaluation periods, received two step-raises, finished his probation without incident, completed extensive and expensive training, was given access to sensitive information, assignments, received benefits, and was told he would be involved in many future work responsibilities. *Id.* at ¶ 47;
- Plaintiff was encouraged to enroll in graduate school at the Monte Ahuja College of Business at Cleveland State University. *Id.* ¶ 18 18). He did so and achieved a 4.0 grade point average during his employment with the Commission. *Id.* He incurred considerable expense in pursuing this graduate degree. *Id.* at ¶ 19. Plaintiff demonstrated such competence in the area of labor relations that he was hired by Cleveland State University to serve as an adjunct professor at the business school teaching labor law and teaching administrative law at the Cleveland Marshall College of Law. *Id.* at ¶ 20;
- Plaintiff's superior heaped praise about his work ethic and production. *Id.* at ¶ 22. She authorized him to attend Office of Collective Bargaining's "OCB Academy" which he completed in an extraordinarily short period of time. *Id.* at ¶ 38. The culmination of this training was participation in a one-week "Arbitration School" in Columbus, Ohio, which was completed shortly before Plaintiff was discharged. *Id.* at ¶ 38.
- During his employment, Plaintiff's supervisor, Elizabeth Popadiuk, frequently spoke with him about personal issues in her life, about which he was supportive. *Id.* at ¶ 26. Popadiuk often said inappropriate things about other employees to the Plaintiff, sharing confidential information with him despite him gently cautioning her not to do so. *Id.* at ¶ 27;

- During his employment, Plaintiff's supervisor, who was in charge of human relations at the Commission, engaged in prohibited conduct evidencing racial bias, sexual orientation discrimination, and also directed him to carrying out discipline against other Commission employees to induce them to retire, quit, or be terminated. *Id.* at ¶ 28;
- Notwithstanding the foregoing, Plaintiff treated all of the Commission's employees fairly and addressed their situations based upon the facts, rather than Popadiuk's unlawful actions. *Id.* at ¶ 29;
- Plaintiff was hired by the Commission with the assistance of the Commission's chairperson, Patrick McDonald, an "operative" for the Republican Party who made many contacts with Ohio Governor John Kasich's staff on behalf of the Plaintiff. *Id.*, ¶ 36. When Plaintiff was hired, he was told by McDonald that he (Plaintiff) better "stay out of the headlines" or else he would lose his job at the Commission. *Id.* at ¶ 36;
- On October 21, 2012, having been employed by the Commission for more than a year without incident, Plaintiff learned that a local newspaper intended to publish a story about him related to circumstances at the City of Seven Hills where he had been Mayor for nearly eight years. *Id.* at ¶ 34;
- In light of previously being cautioned by the Commission's chairperson that he should "stay out of the headlines" or else lose his job at the Commission (this occurred just before he started work at the Commission, *Id.* at ¶ 36), Plaintiff informed both Popadiuk and Chairperson McDonald of the anticipated story and the facts and circumstances which may be portrayed in that newspaper story. *Id.* at ¶ 34-35. McDonald told him that any "negative publicity" would "not be good" for the Plaintiff. *Id.* at ¶ 35;
- A "negative" story about the Plaintiff, written by a columnist for the Cleveland *Plain Dealer* appeared on October 23, 2012. The story inaccurately and negatively portrayed the Plaintiff about events which had taken place while Plaintiff was the Mayor of Seven Hills. *Id.* at ¶ 37;
- On October 29, 2012 Plaintiff sent a letter to Commission Director Dennis Berg, his supervisor, Human Resources Director Elizabeth Popadiuk, and to Lawrence J. Miltner, Esq., the Commission's legal counsel and its chief ethics officer, explaining that he had reported what he believed was criminal activity committed by others when he was the Mayor Seven Hills. *Id.* at ¶ 39. He also informed them that he was working with the Federal Bureau of Investigation and other law enforcement agencies pertaining to these matters. *Id.* at ¶ 40;

- Fourteen days later, Plaintiff was discharged by Commission purportedly “for cause and poor performance.” *Id.* at ¶ 46;
- During the meeting when he was discharged, Plaintiff told both Popadiuk and Berg that he believed he was being discharged illegally and for a retaliatory purpose. *Id.* at ¶ 46;
- Plaintiff’s standing with the Commission changed only after it was disclosed that he had reported crimes against him to various law enforcement agencies. *Id.* at ¶ 48.

PLAINTIFF’S EVIDENCE

Because the Commission has not offered any evidence to support its claims, Plaintiff has no reciprocal duty to do so. However, out of an abundance of caution, Plaintiff has prepared a detailed affidavit reflecting the background and the context of his claims, which clearly demonstrates the existence of genuine issues of fact for trial. That affidavit, along with excerpts from the depositions of Patrick McDonald, the Chairperson of the Ohio Lottery Commission, and of Elizabeth Popadiuk, its Human Resources Director, are being separately filed along with documents obtained during discovery, documents in Plaintiff’s possession, and several tape recordings which bring home the points in his Affidavit.

(A) SUMMARY JUDGMENT IS NOT WARRANTED ON PLAINTIFF’S WRONGFUL DISCHARGE CLAIM.

The Commission contends Plaintiff’s **wrongful discharge claim** is “nothing more than a disguised ‘whistleblower’ claim, the disguise being necessary because his claims are not actionable under Ohio’s whistleblower statutes.” (Brief at 2 at headnote II).

1. The Allegedly Disguised, but Actually Non-Existent Whistleblower Claim

Plaintiff’s complaint contains no allegation he was discharged as a result of being a “whistleblower.” Ohio Rev. Code § 124.341 provides in relevant part:

- (A) If an employee in the classified or unclassified civil service becomes aware in the course of employment of a violation of state or federal statutes, rules, or regulations or the misuse of public resources, and the employee's supervisor or appointing authority has authority to correct the violation or misuse, the employee may file a written report identifying the violation or misuse with the supervisor or appointing authority. In addition to or instead of filing a written report with the supervisor or appointing authority, the employee may file a written report with the office of internal auditing created under section 126.45 of the Revised Code . . .
- (B) Except as otherwise provided in division (C) of this section, no officer or employee in the classified or unclassified civil service shall take any disciplinary . . . action against an employee in the classified or unclassified civil service for making any report authorized by division (A) of this section, including, without limitation, doing any of the following: (1) Removing or suspending the employee from employment. . . (4) Denying the employee promotion that otherwise would have been received. . .

* * * * *

- (C) If an appointing authority takes any disciplinary or retaliatory action against a classified or unclassified employee as a result of the employee's having filed a report under division (A) of this section, the employee's sole and exclusive remedy, notwithstanding any other provision of law, is to file an appeal with the state personnel board of review within thirty days after receiving actual notice of the appointing authority's action. If the employee files such an appeal, the board shall immediately notify the employee's appointing authority and shall hear the appeal. The board may affirm or disaffirm the action of the appointing authority or may issue any other order as is appropriate. The order of the board is appealable in accordance with Chapter 119. of the Revised Code.

(Emphasis supplied.)

To invoke the jurisdiction of the State Personnel Board of Review and receive the protections afforded under R.C. 124.341, a state employee must show: (1) a written report, (2) that was transmitted to his/her supervisor, appointing authority, the state inspector general, or other appropriate legal official, and (3) which identified a violation of a state or federal statute, rule, or regulation, or a misuse of public resources. *Vivo v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 09AP-110, 2009-Ohio-6417, 2009 WL

4651976, ¶ 17, citing *Wade v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 98AP-997, 1999 WL 378409 (June 10, 1999); see, also *Haddox v. Ohio State Atty. Gen.*, 10th Dist. No. 07AP-857, 2008-Ohio-4355, 2008 WL 3918077, ¶ 21, discretionary appeal not allowed, *Haddox v. Ohio State Atty. Gen'l*, 120 Ohio St.3d 1506, 2009-Ohio-361, 900 N.E.2d 623. The burden is on the employee to demonstrate these procedural requirements by a preponderance of the evidence. *Vivo, supra* at ¶ 19, citing, *inter alia*, *Contreras v. Ferro Corp.* (1995), 73 Ohio St.3d 244, 652 N.E.2d 940.

Plaintiff makes no claim in the complaint that he was discharged as a result of reporting a violation of state or federal statutes, rules or regulations or the misuse of public resources, or that his supervisor or the appointing authority had authority to correct the violation or misuse. Accordingly, the Commission's citation to R.C. 124.341 is misdirection at best, and, more accurately, just plain nonsense.²

2. **PLAINTIFF'S WRONGFUL DISCHARGE CLAIM IS VIABLE.**

The Commission superficially describes a wrongful discharge claim owing to a violation of public policy and abruptly stops (Brief at 2-3). The Commission offers little, if any, analysis of the facts and its brief is bereft of a meaningful analysis of the law or a demonstration that summary judgment should be granted on this claim.

I

². Given the structure of the whistleblower statute, it is readily apparent that this Court does not have jurisdiction over such claims. ("the employee's sole and exclusive remedy, notwithstanding any other provision of law, is to file an appeal with the state personnel board of review within thirty days after receiving actual notice of the appointing authority's action." R.C. 124.341(C); See, also, *Dargart v. Ohio Dept. of Transp.*, Ohio Ct. Claims No. 2002-09668, 2005-Ohio-4463 2005 WL 2065179, ¶ 19 ("R.C. 124.341 expressly create[s] a right of action against the state for whistleblower protection claims and limit[s] the jurisdiction over such suits to the courts of common pleas or the SPBR.") (cited by the Commission, Br. At p. 2).

The complaint does not make a claim that Plaintiff is an employee at will or whether he is a classified or unclassified employee. Civil service employees are divided into classified and unclassified positions. R.C. 124.11. A classified employee can be removed only for good cause and only after the procedures set forth in R.C. 124.34 have been followed. *Yarosh v. Becane*, 63 Ohio St.2d 5, 9, 406 N.E.2d 1355 (1980). An unclassified public employee generally can be terminated for any reason. *Olander v. Ohio Environmental Protection Agency*, 134 Ohio App. 3d 723, 732 N.E. 2d 400 (10th Dist. 1999); R.C. 124.11(A)(9).

Assuming Plaintiff was an unclassified civil servant, he could be terminated for any reason. The termination of such an employee generally does not give rise to an action for damages. See, *Collins v. Rizanka*, 73 Ohio St.3d 65, 67, 652 N.E.2d 653 (1995); see also *Dohme v. Eurand America, Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, ¶ 11. However, in *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990), the Supreme Court of Ohio recognized an exception to the employment-at-will doctrine. *Greeley* held that an at-will employee may maintain a cause of action for wrongful discharge when the employee is terminated in violation of a clearly expressed public policy. *Greeley* at 234, 551 N.E.2d 981.

II

To establish a claim for wrongful discharge in violation of public policy, an employee must demonstrate that a clear public policy existed (the clarity element); that the employee's dismissal jeopardized the public policy (the jeopardy element); that the employee's dismissal was motivated by conduct related to the public policy (the causation element); and that the employer did not have an overriding business justification to support dismissal of the employee (the overriding justification element). See *Collins*, at 69-70. The clarity and jeopardy elements

present questions of law, while the causation and overriding-justification elements present questions of fact. *Id.*

The Supreme Court of Ohio has held:

[T]he moving party bears the initial burden of *demonstrating* that there are no genuine issues of material fact concerning an essential element of the opponent's case. To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ. R. 56(C) that a court is to consider in rendering summary judgment.

Dresher v. Burt, 75 Ohio St. 3d 280, 292-93, 1996-Ohio-107, 662 N.E.2d 264.

One type of evidence a court may consider is the "pleadings." Ohio R. Civ. Proc. 56(C). Pleadings are defined by rule as a complaint, answer, reply to a counterclaim, answer to a cross-claim, third-party complaint, and a third-party answer. Civ. R. 7(A). Thus, if Plaintiff's complaint does not state a valid claim for retaliatory discharge, this Court may consider that in ruling on the Commission's motion for summary judgment.

In Count Two of his complaint, Plaintiff incorporated by reference all of the prior allegations in his complaint, including the allegations that it was only after a newspaper article appeared about him unrelated to his Commission job and only after divulging that he was talking with law enforcement officials about potential crimes and other misfeasance that he was precipitously discharged (Complaint, ¶ 49).

Plaintiff alleged in the complaint that Ohio recognizes a clear public policy for public officials and other citizens to report evidence of a crime to law enforcement agencies. *Id.* at ¶ 51. He also asserted that Ohio recognizes a policy to protect confidential information about state employees from wrongful, non-privileged exposure. *Id.* Moreover, claimed Ohio recognizes the right of free speech and expression and the right to participate in governmental affairs. *Id.*

Plaintiff claimed his discharge violated these policies and was motivated by conduct related to these policies. *Id.* at ¶ 53 and 54. He claimed economic damages as a result. *Id.*, at ¶ 55.

Inasmuch as the Commission relies only upon Plaintiff's Complaint, it is important to note Ohio is a notice pleading state. *State ex rel. Hanson, etc. v. Guernsey Co. Bd. Of Comm'rs*, 65 Ohio St. 3d 545, 549, 605 N.E. 2d 378 (1992); *Tuleta v. Med. Mut. of Ohio*, 8th Dist. Cuyahoga No. 100050, 2014-Ohio-396, 6 N.E.3d 106, ¶ 31. As such, Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity. Under the Ohio Rules of Civil Procedure, a complaint need only contain "a short and plain statement of the claim showing that the party is entitled to relief." Civ. R. 8(A)(1). Moreover, failure to set forth each element of a cause of action with "crystalline specificity" does not subject a complaint to dismissal. *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 81, 537 N.E.2d 641 (1980), citing *Border City S. & L. Assn. v. Moan*, 15 Ohio St.3d 65, 66, 15 OBR 159, 472 N.E.2d 350 (1984).

Generally, a plaintiff is not required to provide specific facts or elements at the pleading stage and need only give reasonable notice of the claim. *State ex rel. Harris v. Toledo*, 74 Ohio St.3d 36, 37, 656 N.E.2d 334 (1995). Outside of a few exceptions, none of which apply here, a complaint need not contain more than "brief and sketchy allegations of fact to survive a motion to dismiss under the notice pleading rule." *Vinicky v. Pristas*, 163 Ohio App.3d 508, 2005-Ohio-5196, 839 N.E.2d 88 at ¶ 6, citing *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 146, 573 N.E.2d 1063 (1991). The simplified notice-pleading standard relies on liberal discovery rules and summary-judgment motions to define disputed facts and issues and to dispose of non-meritorious claims. *Id.*

A.

The allegations in the complaint are sufficient to allege a “clear public policy” satisfying the clarity element. That element is satisfied where a “clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law.” *Collins*, 73 Ohio St. 3d at 69.

First, Ohio has a clear public policy against divulging confidential information about others. *Biddle v. Warren Gen. Hosp.*, 86 Ohio St. 3d 395, 1999-Ohio-115, 715 N.E.2d 518. Moreover, R.C.1347.10(A)(2) permits recovery of damages in a civil action from “any person who directly and proximately causes harm resulting from the use of personal information maintained in a personal information system by . . . intentionally using or disclosing the personal information in a manner prohibited by law.” *Id.* Moreover, a “constitutional right of informational privacy” has been recognized. *Lambert v. Hartman*, 517 F.3d 433, 442 (6th Cir. 2008); *Bloch v. Ribar*, 156 F.3d 673, 683 (6th Cir.1998). This right protects a person’s “interest in avoiding disclosure of personal matters.” *Whalen v. Roe*, 429 U.S. 589, 599, 603-04, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (recognizing that a statute requiring that the state be provided with a copy of certain drug prescriptions implicated the individual’s interest in non-disclosure, but upholding the law because the statute contained adequate security measures); See, too, *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 465 [97 S.Ct. 2777, 53 L.Ed.2d 867] (1977).

Plaintiff contends that his supervisor wrongfully disclosed confidential information about other Commission employees to him and took actions against those employees for unlawful reasons including their race, their sexual orientation, and their age (Complaint, ¶ 27-30). He alleges the adverse employment action was taken, at least in part, because the Commission knew he was documenting and objecting to the conduct. *Id.* at 53.

Second, Ohio has a clear public policy to encourage persons to report crimes committed by others. This is evident from the Supreme Court of Ohio's decision in *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497, 634 N.E.2d 203 (1994) where the court observed that absolute privilege should apply to an affidavit or statement submitted to a prosecutor for purposes of reporting the commission of a crime. *Id.* at 507. This policy exists because "[c]itizens must be encouraged to report criminal activity without fear of reprisals in the form of civil liability." *Brown v. Chesser*, 4th Dist. Vinton No. 97 CA 510, 1998 WL 28264, at *4 (Jan. 28, 1998).

Third, Ohio has long recognized a policy of freedom of speech and association. Ohio Const., Section 11, Article I and Section 3, Article I; United States Constitution, Amend. 1.

Thus, Ohio has clear public policies which were implicated by the facts alleged by the Plaintiff.

B.

Plaintiff's complaint also satisfies the "jeopardy element." This element has been held to mean that without a common-law tort claim for wrongful discharge based on a violation of the foregoing public policies, Ohio's clear public policies would be would be compromised. meaning that without a common-law tort claim for wrongful discharge based on age, Ohio's clear policy against age discrimination would be compromised. *Leininger v. Pioneer Natl. Latex*, 115 Ohio St. 3d 311, 315, 2007-Ohio-4921. 875 N.E.2d 36, ¶ 21. The *Leininger* court recognized there "is confusion over the proper way to analyze the jeopardy element and 'whether the public policy tort should be rejected where the statute expressing the public policy already provides adequate remedies to protect the public interest.' *Collins v. Rizkana*, 73 Ohio St.3d at 73, 652 N.E.2d 653." *Leininger*, 125 Ohio St. 3d at 315 (¶ 22). The court concluded "it is unnecessary to recognize a common-law claim when remedy provisions are an essential part of the statutes upon

which the plaintiff depends for the public policy claim and when those remedies adequately protect society's interest by discouraging the wrongful conduct." *Id.* at 317 (¶ 27).

In the case at bar, however, there do not appear to be any existing remedies for the wrongful conduct alleged. Accordingly, the jeopardy element is met.

C.

The causation element is likewise met. Plaintiff alleges his dismissal "was motivated by conduct related to" the enumerated public policies (Complaint, ¶ 53). The Commission has offered no contrary evidence.

D.

Lastly, the "overriding justification element" is also satisfied. See *Collins*, at 69-70. This element, like the causation element, presents a question of fact. *Id.* This element examines whether the employer lacked an overriding legitimate business justification for dismissal. *Id.* at 70. Plaintiff expressly alleged the Commission "lacked overriding legitimate business justification for dismissing [him]." (Complaint, ¶ 54). No evidence exists in the record refuting this assertion.

Based upon all of the foregoing, Plaintiff submits that summary judgment in the Commission's favor on Count I related to wrongful discharge is not proper and should therefore be denied.

(B). SUMMARY JUDGMENT IS LIKEWISE NOT WARRANTED ON PLAINTIFF'S RETALIATION CLAIM.

The Commission's brief in support of its motion for summary judgment on Count Two of the complaint alleging unlawful retaliation consists of four sentences in one paragraph (Brief at 3).

In Count Two of his complaint, Plaintiff alleged that while he was employed by the Commission he engaged in protected activities by (1) reporting possible crimes to law enforcement agencies; (2) telling his supervisor to not divulge confidential information about the Commission's employees; (3) telling his supervisor not to engage in illegal employment discrimination; and (4) by exercising his rights to free speech and association (Complaint, ¶ 58).

Plaintiff alleged a "causal link" exists between his protected activities and the adverse employment action taken against him. *Id.* at ¶ 61. He also claimed the Commission did not have a legitimate non-discriminatory reason for not taking the adverse employment action, and that he suffered economic damages. *Id.* at ¶ 61-62.

We again note that Ohio is a notice pleading state and refer the Court to the analysis of the implications of that status above.

The fact that Plaintiff said he "gently cautioned" his boss about her outrageous conduct (she violated virtually every tenet of a human resources professional), hardly suggests that, apparently as a matter of law in the Commission's view, an unlawful retaliation claim does not exist here.

R.C. 4112.02(I) provides that it is "an unlawful discriminatory practice . . . [f]or any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code."

To establish a case of retaliation, a claimant must prove that (1) she engaged in a protected activity, (2) the defending party was aware that the claimant had engaged in that activity, (3) the defending party took an adverse employment action against the employee, and

(4) there is a causal connection between the protected activity and adverse action. *Greer-Burger v. Temesi*, 116 Ohio St. 3d 324, 327, 2007-Ohio-6442, 879 N.E.2d 174, ¶ 13, citing *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990). If a complainant establishes a prima facie case, the burden then shifts to the employer to “articulate some legitimate, nondiscriminatory reason” for its actions. *Greer-Burger, supra*, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). If the employer satisfies this burden, the burden shifts back to the complainant to demonstrate “that the proffered reason was not the true reason for the employment decision.” *Id.* citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

Not only does Plaintiff outline the protected activity in which he engaged, he alleges a “causal link” between that activity and his wrongful discharge, and affirmative claims that no legitimate non-discriminatory basis exists for the employment action (Complaint, ¶ 58-60).

The Commission has not, and cannot demonstrate that no genuine issue of material fact exists on any of these points. Accordingly, it is not entitled to summary judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and complete copy of Plaintiff's Brief in Opposition to the Ohio Lottery Commission's Motion For Summary Judgment was served by e-mail upon Randall Knutti, Esq., Assistant Attorney General, 150 East Gay Street, 25th Floor, Columbus, Ohio 43215, randall.knutti@OhioAttorneyGeneral.gov on this 1st day of October 2015.


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