



The authors—I'll call them the Seven Hills Six—first got under Bentkowski's thin skin in July with their first newsletter, which charged, among other things, that the city faces estimated budget deficits in 2011 and 2012. It also hit on such titillating topics as the suburb's sewer maintenance fund.

Bentkowski fought back in a community newsletter mailed to residents at taxpayer expense. "On July 29<sup>th</sup>, I went to be dreaming about my wedding day," he wrote. "On July 30<sup>th</sup>, my wedding day, you and I awoke to a perverse driveway flier besmirching my good name and the names and performance of City Council members." His response ran four pages.

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The second edition of the Seven Hills Reporter, distributed in late September, was more pointed, noting Bentkowski's friends and political allies who have been hired or received raises since he became mayor in 2003. It also devoted several pages to the recreation center frequently blamed for the city's financial stress and the subject of a lawsuit.

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The Seven Hills Six do have an agenda: They want new leadership. They are tired of Bentkowski's messianic tendencies. They have had enough of him using his part-time mayoral status to get close to celebrities in the name of the city. They are tired of his bullying newsletters and threats of lawsuits. The time has finally arrived for Seven Hills City Hall to be rid of Bentkowski. How long will it be before his ego shows up at the Lottery Commission?

(Emphasis added) That column was embarrassing to Mr. Bentkowski and to the Lottery too. But the Lottery did not fire him because of it. Instead, it kept him on the payroll for more than thirteen months—during which the bizarre tale of his years-long police reports against internet posters unfolded in the news.<sup>1</sup> The Lottery eventually terminated him on November 13, 2012 because he had proven not to be "a good fit." (Bentkowski Affidavit at ¶165;

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<sup>1</sup> An October 23, 2012 column by Mr. Naymik details those reports, which began when he filed a "police report in 2009 in the hope of determining the identities of people who made fun of him on the internet." (Bentkowski Affidavit at Ex. 29/Ex. D)

October 1, 2015 Notice of filing excerpts of McDonald and Popadiuk depositions—  
Popadiuk excerpt at 56).

Mr. Bentkowski has no contract or promissory-estoppel claim in this case. Instead he has a wrongful-termination-in-violation-of-public-policy claim and a “retaliation” claim.

## II. MR. BENTKOWSKI’S PUBLIC-POLICY CLAIM IS BASELESS.

Mr. Bentkowski asserts five so-called “clear” public policies that he says barred the Lottery from terminating his employment: (1) R.C. 2921.22, which says that “no person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities”; (2) a provision of the Seven Hills Charter, which he does not describe; (3) R.C. 1347.10(A), which says that a “person who is harmed [by the disclosure of confidential] personal information that relates to him may recover damages in a civil action”; (4) the constitutional “right of free speech and expression and the right to participate in governmental affairs.” (Bentkowski Complaint at ¶¶40, 51)(Emphasis added); (Bentkowski Brief in Opposition to Summary Judgment at 9)

R.C. 2921.22 requires some people to report felonies, but it says not a word about an employer’s terminating them for doing so.<sup>2</sup> No Seven Hills Charter provision can be deemed a clear public duty because the wrongful-discharge-in-violation-of-public-policy tort demands that the policy be statewide, and the Seven Hills Charter, obviously enough, does not apply to the Cleveland-based Lottery. *E.g., Dobme v Eward Am, Inc.*, 130 Oho St.3d 168, 173, 2011-Ohio-4609, ¶21. R.C. 1347.10(A) creates a cause of action in favor only of someone who’s confidential personal information was wrongfully disclosed, and Mr. Bentkowski does not allege that his information was disclosed. Finally, State actions that infringe on the constitutional right of free speech give rise to §1983 claims or to claims in

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<sup>2</sup> It says only that those who report known felonies cannot be liable for breaching a “privilege or confidence,” such as the physician-patient or cleric-congregant privileges. *Id.* at R.C. 2921.22(F).

Common Pleas courts, but the Court of Claims has no jurisdiction to hear them. *E.g., Deavors v Ohio Department of Rehabilitation & Correction*, Case No. 98 AP-1105 (10<sup>th</sup> Dist.), 1999 WL 333327 at \*2; *Shorter v Ohio Department of Rehabilitation & Correction*, 2005-Ohio-3343, ¶6 (Ct. of Claims); *Likes v Ohio Department of Rehabilitation & Correction*, 2006-Ohio-231, ¶9 (“To the extent that appellant is alleging a violation of his constitutional rights, it is clear that the Court of Claims does not possess jurisdiction to preside over such claims.

The only clear, statewide public policies that both encourage the reporting of criminal wrongdoing and preclude employers from terminating employees who report that wrongdoing are found in Ohio’s whistleblowing statutes:

**In Ohio, historically, there was no public policy claim for retaliatory discharge before enactment of the Whistleblower Act. *Phung v Waste Mgt., Inc.* (1986), 23 Ohio St.3d 100, 23 OBR 260, 491 N.E.2d 1114. Consequently, the Whistleblower Act, R.C. 4113.52, created a new cause of action. A number of cases have held that the statute set forth the exclusive remedies for whistleblowers and that R.C. 4113.52 preempts any possible common-law remedies for retaliatory discharges based upon whistleblowing. *Bear v Geotronics, Inc.* (1992), 83 Ohio App.3d 163, 168-169, 614 N.E.2d 803, 806-807; *Rayel v Wackenbut Corp.* (June 8, 1995), Cuyahoga App. No. 67459, unreported, 1995 WL 350077. However, in *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 677 N.E.2d 308, our Supreme Court recently held that R.C. 4113.52 does not preempt a common-law cause of action against an employer who discharges or disciplines an employee in violation of that statute and further found that an at-will employee who is discharged or disciplined in violation of R.C. 4113.52 may maintain a statutory cause of action for the violation, a common-law cause of action in tort, or both, but is not entitled to double recovery. *Id.*, paragraphs two and five of the syllabus.**

As the basis for his public policy claims, appellant relies on the public policy to enforce criminal laws, the public policy in favor of the tax code, the public policy to encourage reports of criminal conduct, the public policy against discharging employees who insist on compliance with the law, and the public policy against discharging employees in order to prevent disclosure of unlawful conduct as the basis for his claim. Succinctly, appellant claims that he was discharged for attempting to report the criminal conduct of unlawful tax improprieties and that, in Ohio, there is public policy against

discharging him for attempting to do so. A clear expression of these public policies upon which appellant relies is manifest in the scope of the Whistleblower Act, R.C. 4113.52. The Supreme Court, in *Kulch*, stated, 78 Ohio St.3d at 153, 677 N.E.2d at 322-323:

“However, the public policy embodied in the Whistleblower Statute is limited. By imposing strict and detailed requirements on certain whistleblowers and restricting the statute’s applicability to a narrow set of circumstances, the legislature clearly intended to encourage whistleblowing only to the extent that the employee complies with the dictates of R.C. 4113.52. As we held in *Contreras*, *supra*, 73 Ohio St.3d 244, 652 N.E.2d 940, syllabus: ‘In order for an employee to be afforded protection as a “whistleblower,” such employee must strictly comply with the dictates of R.C. 4113.52. Failure to do so prevents the employee from claiming the protections embodied in the statute.’” (Emphasis *sic*.)

Consequently, appellant, here, is limited to bringing his claim for tortious wrongful discharge in violation of public policy pursuant to the requirements of the Whistleblower Act. “The obvious implication of *Contreras* is that an employee who fails to strictly comply with the requirements of R.C. 4113.52 cannot base a *Greeley* claim solely upon the public policy embodied in that statute.” *Kulch*, *supra*, 78 Ohio st.3d at 153, 677 N.E.2d at 323

*Davidson v BP Am, Inc*, 125 Ohio App.3d 643, 649-650 (8<sup>th</sup> Dist. 1997) (Emphasis added) In short, Mr. Bentkowski concedes that he does not have a valid whistleblowing claim, and the policies he offers as alternatives give him no right to sue the Lottery for wrongful termination.

### III. MR. BENTKOWSKI’S RETALIATION CLAIM IS BASELESS.

In his retaliation claim, Mr. Bentkowski says he “engaged in protected activities by reporting possible crimes to law enforcement agencies, by telling Defendant Popadiuk not to divulge confidential information about other Lottery employees and not to engage in prohibited employment discrimination . . . and by exercising his Federal and Ohio constitutional right to freedom of expression and of association.” (Complaint at 58) His claims concerning “possible crimes,” “confidential information,” and his “constitutional

right to freedom of expression and of association” are just as baseless when labeled “retaliation” as they are when labeled a “public-policy” tort. And his allegation that he delivered the unremarkable news to Ms. Popadiuk that discrimination is something to be avoided could never form the basis of a retaliation claim, whether as the common-law tort he pled or as the violation of R.C. 4112.02(I) he now claims to have pled.

**A. MR. BENTKOWSKI DID NOT ENGAGE IN A PROTECTED ACTIVITY.**

Mr. Bentkowski cannot establish that he engaged in protected activity under R.C. 4112.02(I). One engages in protected activity within the meaning of R.C. 4112.02(I) by opposing any unlawful discriminatory practice defined in §4112.02. *See Motley*, 2008-Ohio-2306 at ¶¶17-20, *citing Coch v Gem Indus. Inc.*, 2005-Ohio-3045 (6<sup>th</sup> Dist.), at ¶29. This is referred to as the “opposition clause.” *Id.* One also engages in protected activity by making a charge, testifying, assisting, or participating in an investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code. *Id.* This is referred to as the “participation clause.” *Id.* The distinction between the opposition and participation clauses is significant because courts have generally granted less protection for opposition activities than for participation in enforcement proceedings. *See Booker v Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6<sup>th</sup> Cir. 1989). Mr. Bentkowski alleges nothing that could invoke the participation clause. And the opposition clause requires much more than vague allegations of verbal comments that mention the word “discrimination.” *Id.* at 1313 (“An employee may not invoke the protections of the Act by making a vague charge of discrimination. Otherwise, every adverse employment decision by an employer would be subject to challenge under either state or federal civil rights legislation simply by an employee inserting a charge of discrimination. In our view, such would constitute an intolerable intrusion into the workplace.”).

## B. MR. BENTKOWSKI CANNOT PROVE CAUSATION.

Even if Mr. Bentkowski could demonstrate that he engaged in protected activity, he would have to establish a causal link between the purported protected activity— his so-called counseling of Ms. Popadiuk about Ohio’s discrimination laws— and his termination. First, retaliation under R.C. 4112.02(I) requires proof of “but for” causation, that Ms. Popadiuk intentionally fired him “because” he said she had violated those discrimination laws.<sup>3</sup> Yet Mr. Bentkowski’s own affidavit belies any claim of the sort. Over and over, Mr. Bentkowski contends that it was the Governor’s Office— not the Lottery— that both hired him and fired him. In fact, he does not even think Ms. Popadiuk even had the authority to fire him. (Bentkowski Affidavit at ¶174) And his overarching belief that he was fired for “being in the papers” has nothing to do with his private communications— if they occurred at all— with Ms. Popadiuk. The worst thing that Mr. Bentkowski could ever hope to prove is that the Lottery fired him because his constant appearances as the butt of jokes was embarrassing. But there is no law against that.

## IV. WITNESSES

The only witnesses who have anything of value to offer in this case are Mr. Bentkowski, Mr. McDonald and Ms. Popadiuk. The Lottery expects all of them to testify.

## V. EXHIBITS

The Lottery expects to introduce some or all of the following exhibits:

1. Articles concerning Mr. Bentkowski that appeared in the *Plain Dealer*, on Cleveland.com, in Cleveland Scene and other sources before his hiring at the Lottery, during his hiring at the Lottery and after his hiring at the Lottery.

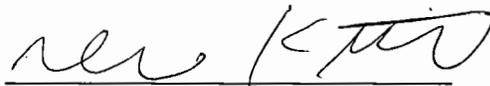
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<sup>3</sup> R.C. 4112 requires “but for” causation, not proof that age was “a motivating factor.” *E.g., Moore v Abbot Laboratories*, 780 F.Supp. 600, 611, n.7 (S.D. Ohio 2011).

2. Pleadings and decisions in cases involving his reporting of crimes in Seven Hills.
3. Documents produced to him by the Lottery during discovery in this case.
4. Any document identified by him or used by him either in discovery or at trial.

Respectfully Submitted,

MICHAEL DE WINE  
Ohio Attorney General

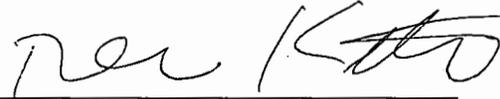


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CERTIFICATE OF SERVICE

I certify that I sent this document by regular United State mail, postage prepaid, on  
January 15, 2016 to:

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A handwritten signature in black ink, appearing to read "R. Knutti", written over a horizontal line.

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