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COURT OF CLAIMS
OF OHIO

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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.)	

PLAINTIFF'S FINAL PRETRIAL STATEMENT

In accordance with L.C.C.R. 7(B), and Magistrate Holly True Shaver's January 11, 2016 order following the final pretrial conference on January 6, 2016, Plaintiff, David A. Bentkowski submits his final pretrial statement:

1. FACTUAL AND LEGAL ISSUES PRESENTED

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).

SUMMARY OF ANTICIPATED EVIDENCE

The evidence will show that Plaintiff is an attorney-at-law. He was hired as a labor relations officer for the Commission effective October 11, 2011. He 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. Plaintiff was an exemplary employee who complied with all requirements of his job. He was never disciplined, reprimanded, or cautioned regarding his job performance. His personnel file contains no negative information of any kind. He easily passed three evaluation periods, received two step-raises, finished his probation without incident, completed extensive and expensive training, was increasingly given access to sensitive information, assignments, received benefits, and was told he would be involved in many future work responsibilities. He was encouraged to enroll in graduate school at the Monte Ahuja College of Business at Cleveland State University. Plaintiff did so and achieved a 4.0 grade point average during his employment with the Commission. He incurred considerable expense in pursuing this graduate degree. 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.

Plaintiff's superior, Elizabeth ("Liz") Popadiuk, heaped praise about his work ethic and production. She authorized him to attend the Office of Collective Bargaining's "OCB Academy" which he completed in an extraordinarily short period of time. The culmination of this training was participation in a one-week "Arbitration School" in Columbus, Ohio, which was completed shortly before Plaintiff was discharged.

During his employment, Popadiuk frequently spoke with him about personal issues in her life, about which he was supportive. Popadiuk often said inappropriate things about other employees to the Plaintiff, sharing confidential information with him despite him cautioning her not to do so.

During his employment, Plaintiff's supervisor, who was in charge of human resources at the Commission, engaged in prohibited conduct evidencing racial bias, sexual orientation discrimination, the disclosure of non-relevant confidential employee information, and also directed him to carry out discipline against other Commission employees to induce them to retire, quit, or be terminated.

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.

In October 2011, a highly negative story about the Plaintiff appeared in the Cleveland *Plain Dealer* relating to him being hired by the Commission and his prior service as a public official in Seven Hills, Ohio. James Trakas, a member of Ohio Governor John Kasich's cabinet, called the Plaintiff and told him to stay out of the paper because the Governor's office was upset about the article.

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. When Plaintiff was hired, he was expressly told by McDonald that he (Plaintiff) better "stay out of the headlines" or else he would lose his job at the Commission.

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.

In light of previously being cautioned by the Commission's chairperson and the Governor's surrogate, Mr. Trakas that he should "stay out of the headlines" or else lose his job at the Commission. Plaintiff informed Popadiuk, Trakas and Chairperson McDonald of the anticipated story and the facts and circumstances which may be portrayed in that newspaper story. McDonald told him that any "negative publicity" would "not be good" for the Plaintiff.

A columnist for the Cleveland *Plain Dealer* wrote a story about the Plaintiff which 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.

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. He also informed them that he was working with the Federal Bureau of Investigation and other law enforcement agencies pertaining to these matters.

Fourteen days later, Plaintiff was discharged by the Commission purportedly "for cause and poor performance." 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.

Plaintiff's standing with the Commission changed only after it was disclosed that he had reported crimes against him to various law enforcement agencies. Indeed, criminal charges have been filed against one of the persons whom Plaintiff reported as being involved in illegal activity

(That charge relates to other conduct of a similar nature.) Plaintiff understands that the Ohio Ethics Commission is currently investigating some of his other allegations.

Plaintiff lost his job with the Commission at which he was earning about \$64,000 a year. The loss of this job dramatically impacted his pension. Had Plaintiff continue to work for three years at the Lottery Commission as he was promised, his eventual pension would have been \$900,000.00 more than it would otherwise be.

In addition, Plaintiff lost the benefit of tuition for his graduate school education. He began this additional educational pursuit was because the Lottery Commission wanted him to it and was willing to pay \$3,000 a year for him to do it. He was about halfway through the program, had paid a significant amount of money himself by that time, and it would have been a waste not to complete the program. This cost him \$9,000.00.

2. LEGAL ISSUES AND AUTHORITIES IN SUPPORT

I. WRONGFUL DISCHARGE

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 v. Rizanka*, 73 Ohio St.3d 65, 69-70, 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. The clarity and jeopardy elements present questions of law, while the causation and overriding-justification elements present questions of fact. *Id.*

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

Plaintiff will show that his discharge violated these policies and was motivated by conduct related to these policies and that he suffered economic damages as a result.

The clarity 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.

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.

Additionally, 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).

Moreover, 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.

Plaintiff will also be able to satisfy 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).

There do not appear to be any existing remedies for the wrongful conduct alleged. Accordingly, the jeopardy element is met.

The causation element will likewise be met. Plaintiff will show that his dismissal “was motivated by conduct related to” the enumerated public policies (Complaint, ¶ 53). It should be noted that the Commission has offered no contrary evidence.

Lastly, the “overriding justification element” can 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.

II. RETALIATION

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 asserted that 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.

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) he or 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).

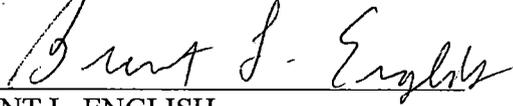
3. WITNESSES EXPECTED TO TESTIFY

1. David A. Bentkowski
2. Elizabeth Popadiuk
3. Patrick McDonald
4. James Trakas
5. Dennis Berg
6. Lawrence Miltner, Esq.
7. Notre LaBeach
8. Jim Zimmerman
9. Lora Tyner Watts
10. Representative, Ohio Public Employees Retirement System
11. Representative, Pension Evaluators, Medina, Ohio.

4. ANTICIPATED EXHIBITS

1. Cancelled checks and other documents showing cost of completion of Master's Degree in Human Resources/Labor Relations.
2. Attorney's fee bills
3. All Exhibits marked during the depositions taken in this case (Plaintiff, Popadiuk and McDonald).
4. Documents from Plaintiff's personnel file.
5. Documents provided by Defendant during discovery
6. Deposition transcript and exhibits for Plaintiff's deposition
7. Deposition transcript and exhibits for the Deposition of Elizabeth Popadiuk
8. Deposition transcript and exhibits for the deposition of Elizabeth Popadiuk
9. Deposition transcript and exhibits for the deposition of Jack Patrick McDonald
10. Tape recordings between Plaintiff and Jim Trakas
11. Tape recordings between Plaintiff and Elizabeth Popadiuk
12. Tape recordings between Plaintiff and Jack Patrick McDonald
13. Recorded telephone messages to the Plaintiff left by Jim Trakas
14. Video recordings of Elizabeth Popadiuk
15. Tax returns for David Bentkowski from 2010 to present.
16. Year-to-date income information for David A. Bentkowski

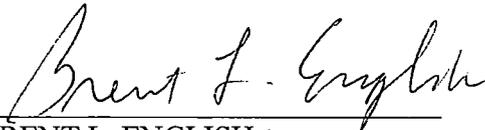
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and complete copy of Plaintiff's Final Pretrial Statement 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 __ day of January 2016.



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Attorney for Plaintiff, David A. Bentkowski