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IN THE COURT OF CLAIMS OF OHIO

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DAVID A. BENTKOWSKI	Case No. 2014-00651
Plaintiff	Judge Patrick M. McGrath
v.	ENTRY GRANTING, IN PART, AND DENYING, IN PART, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
OHIO LOTTERY COMMISSION	
Defendant	

On May 29, 2015, defendant filed a motion for summary judgment. After the court granted three separate motions for an extension of time for plaintiff to file a response, plaintiff filed a memorandum contra in opposition on October 1, 2015. On October 8, 2015, defendant filed a motion for leave to file a reply as well as the reply. Upon review, defendant's motion for leave is GRANTED. The motion for summary judgment is now before the court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4.

Civ.R. 56(C) states, in part, as follows:

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit*

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Cty., 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

This matter ultimately arises from plaintiff's termination from defendant Ohio Lottery Commission (OLC), but his allegations encompass two separate acts within two separate time frames—plaintiff's reporting of crimes committed against him while mayor of Seven Hills, in Cuyahoga County, Ohio, and plaintiff's opposition to alleged discriminatory actions taken by his supervisor during his time at OLC.

During his time as mayor, plaintiff was the subject of several negative newspaper articles in the Cleveland *Plain Dealer*, and many online comments posted anonymously in response to these articles were extremely negative about him. Because plaintiff perceived the comments as threatening to himself and his family, he reported the comments as a crime to the Seven Hills police department, and categorized the comments as "menacing by stalking." Subsequently, plaintiff approached the FBI and the Ohio Ethics Commission to open an investigation for the same acts.

Plaintiff also contends that throughout his time at OLC, his supervisor, Elizabeth Popadiuk (Popadiuk), discussed with him "confidential personal matters about various employees." Plaintiff's complaint, at p. 8. Plaintiff also alleges that Popadiuk engaged in discriminatory acts against other employees based on race and sexual orientation, and that he warned Popadiuk about her behavior. Bentkowski Affidavit, at p. 24-26. Plaintiff states that he was documenting these instances but had not discussed the alleged violations with anyone else nor had he reported the violations to anyone.

On October 21, 2012, after plaintiff had been working at OLC for more than a year, he learned that another article was going to be published about him regarding his time as mayor. Plaintiff informed Popadiuk, and OLC Chairperson, Patrick McDonald (McDonald), about the anticipated story. Fourteen days later, plaintiff was terminated from his position at OLC. In his complaint, plaintiff alleges wrongful discharge in violation of public policy and retaliation as a result of protected activity for both his

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reporting of crimes committed against him while mayor of Seven Hills as well as for his discussions with Popadiuk.

Defendant is seeking summary judgment on plaintiff's wrongful discharge claim based on the argument that plaintiff is actually alleging a claim under Ohio's whistleblower-protection statutes found in R.C. 124.341 and 4113.52. This court has consistently held that it lacks jurisdiction over such claims pursuant to the express language of R.C. 124.341 and 4113.52(D). *Dargart v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2002-09668, 2005-Ohio-4463. However, plaintiff argues that his claim is not a whistleblower claim but rather falls under the public policy exception to the employment-at-will doctrine.

As a general rule, the common law doctrine of employment-at-will governs employment relationships in Ohio. *Wiles v. Medina Auto Parts,* 96 Ohio St.3d 240, 2002-Ohio-3994. In an at-will employment relationship, either an employer or an employee may legally terminate the employment relationship at any time and for any reason. *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 103 (1985). However, a public policy exception to the employment-at-will doctrine applies "when an employee is discharged or disciplined for a reason which is prohibited by statute." *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 234 (1990). The public policy exception to the employment-at-will doctrine "is not limited to public policy expressed by the General Assembly in the form of statutory enactments" but "may [also] be discerned by the Ohio judiciary based on sources such as the Constitutions of Ohio and the United States, legislation, administrative rules and regulations, and the common law." *Painter v. Graley*, 70 Ohio St.3d 377, 383-384 (1994).

In order to establish a claim for wrongful termination in violation of public policy, plaintiff must prove: 1) a clear public policy manifested in a statute, regulation, or the common law (the clarity element); 2) that discharging an employee under circumstances like those involved would jeopardize the policy (the jeopardy element); 3) that the

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discharge at issue was motivated by conduct related to the policy (the causation element); and 4) that there was no overriding business justification for the discharge (the overriding justification element). *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 151 (1997). The clarity and jeopardy elements are questions of law, while causation and overriding justification elements are questions of fact. *Collins v. Rizkana*, 73 Ohio St.3d 65, 70 (1995).

With regard to the clarity element, the question is whether there is a clear public policy to protect a specific public interest sufficient to justify an exception to the at-will-employment doctrine. *Id.* "Unless the plaintiff asserts a public policy and identifies federal or state constitutional provisions, statutes, regulations, or common law that support the policy, a court may not presume to sua sponte identify the source of that policy or fill in the blanks for the plaintiff." *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609.

First, plaintiff asserts that Ohio recognizes a policy for public officials and other citizens to report evidence of a crime to law enforcement agencies. Plaintiff seeks to have this policy apply to his reporting of crimes while mayor of Seven Hills. Plaintiff points to two cases to support his argument that there is a clear public policy to encourage reporting of crimes committed by others. Although language in these cases superficially indicate a policy to encourage the reporting of criminal activity, neither of the cases involve an employer action against an employee for reporting a crime. Furthermore, defendant argues that there is no authority for a claim of wrongful termination in violation of public policy with regard to actions taken against a third-party former employer. In a similar case, where an employee was terminated after filing a lawsuit against a former employer, the Tenth District Court of Appeals found that "no public policy exists in Ohio that prevents an employer from terminating an employee for filing a lawsuit against a third party." *Elam v. Carcorp, Inc.*, 10th Dist. Franklin No. 12AP-260, 2013-Ohio-1635, at ¶ 1. The court agrees with the reasoning in *Elam*

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and finds that no public policy exists that prevents an employer (OLC) from terminating an employee (plaintiff) for reporting crimes against him at a previous place of employment (Seven Hills).

Plaintiff also asserts that Ohio recognizes a clear public policy to protect information about state employees from wrongful exposure. Plaintiff seeks to have this policy apply to his allegations that Popadiuk disclosed confidential personal information of other OLC employees to plaintiff. Plaintiff relies on several cases for the proposition that there is a right of informational privacy. Plaintiff also cites R.C. 1347.10 which pertains to wrongful disclosure of personal information. Although two of the cases plaintiff cites, *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115, 715 N.E.2d 518, and *Lambert v. Hartman*, 517 F.3d 433 (6th Cir.2008), recognize an independent tort for divulging confidential information, the plaintiffs in those cases were claiming that their own information was being disclosed rather than bringing claims alleging that someone else's information was being disclosed. None of the other cases plaintiff cites relate to an employer-employee action but rather dealt with constitutional claims. R.C. 1347.10(A) also specifically states that a remedy is only available for "[a] person who is harmed by the use of personal information that *relates to him*." (Emphasis added). Based on the foregoing, the court finds that plaintiff has not established a clear public policy which supports his claim against defendant for divulging personal information about others.

Lastly, plaintiff asserts that there is a clear public policy of freedom of speech and expression and the right to participate in governmental affairs, and points to the U.S. and Ohio Constitutions in support. Although the U.S. and Ohio Constitutions do provide for such rights, "in order to make a claim that an employer's actions violated the First Amendment, a plaintiff must show that he or she was discharged because of his or her speech involving a matter of public concern." *Collyer v. Darling*, 98 F.3d 211, 228-229 (S.D.Ohio 1996), citing *Rankin v. McPherson*, 483 U.S. 378 (1987). In this case,

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plaintiff's speech was either during his time of employment as mayor of Seven Hills, reporting crimes against him personally, or in a private conversation with Popadiuk, neither of which involve a matter of public concern. Therefore, plaintiff has not shown that the public policy found in the U.S. and Ohio Constitutions is applicable to his claim, nor has he shown that his termination under the circumstances jeopardize the policy of freedom of speech.

Insofar as plaintiff's wrongful termination claim is characterized as retaliation in violation of public policy, it also fails to meet the jeopardy element. "An analysis of the jeopardy element necessarily involves inquiring into the existence of any alternative means of promoting the particular public policy to be vindicated by a common-law wrongful discharge claim. * * * Simply put, there is no need to recognize a common-law action for wrongful discharge if there already exists a statutory remedy that adequately protects society's interests." *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 244, 2002-Ohio-3994.

As discussed below, R.C. 4112.02(I) provides a remedy for those who are retaliated against for opposing unlawful discriminatory practices. Plaintiff even brings a separate retaliation claim with the same facts and allegations to supplement his common-law claim for wrongful termination in violation of public policy. Because there is a statutory remedy expressly covered in R.C. 4112.02 for plaintiff's retaliation claim, he cannot meet the jeopardy element for his common-law public policy claim. Therefore, the court finds that plaintiff has failed to meet the clarity and jeopardy elements (questions of law) to show a wrongful discharge in violation of public policy.

Defendant also seeks summary judgment on plaintiff's claim of retaliation as a result of protected activity. 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

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any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code." Plaintiff may prove a retaliation claim through either direct or circumstantial evidence that unlawful retaliation motivated defendant's adverse employment decision. *Reid v. Plainsboro Partners, III,* 10th Dist. Franklin No. 09AP-442, 2010-Ohio-4373, ¶ 55.

"To establish a prima facie case of retaliation under R.C. 4112.02(I), plaintiff ha[s] to establish the following: (1) [he] engaged in protected activity; (2) [defendant] knew of her participation in protected activity; (3) [defendant] engaged in retaliatory conduct; and (4) a causal link exists between the protected activity and the adverse action." *Nebozuk v. Abercrombie* & *Fitch* Co., 10th Dist. Franklin No. 13AP-591, 2014-Ohio-1600, ¶ 40. "The establishment of a prima facie case creates a presumption that the employer unlawfully retaliated against the plaintiff." *Id.*

If plaintiff establishes a prima facie case, the burden of production shifts to defendant to "articulate some legitimate, nondiscriminatory reason for [its action]." *McDonnell Douglas, supra,* at 802. If defendant succeeds in doing so, then the burden shifts back to plaintiff to demonstrate that defendant's proffered reason was not the true reason for the employment decision. *Id.*

Defendant argues that plaintiff's claim is too "vague" to give rise to a retaliation claim. However, plaintiff provides an affidavit in support[1] of its claim stating that he had warned Popadiuk against divulging confidential information about defendant's employees and to not engage in employment discrimination. Plaintiff also contends that he had been documenting Popadiuk's actions that he deemed to be improper and that he believed that Popadiuk knew he was keeping such records. Bentkowski Affidavit, at pgs. 23-28. Defendant has not proffered any supporting evidence contradicting

[1]Plaintiff also provided audio recordings of phone conversations he had with Popadiuk and McDonald. Audio recordings are not provided for in Civ.R. 56 as proper evidence for purposes of summary judgment and are not considered by the court. However, the substance of the recordings are considered insofar as they are incorporated into plaintiff's affidavit.

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plaintiff's assertion that he directly opposed the alleged discriminatory practice by Popadiuk or that plaintiff was not terminated because of his opposition. Therefore, viewing this matter in light most favorable to plaintiff, the court finds that defendant has failed to meet the summary judgment standard with regard to plaintiff's retaliation claim.

Upon review, the court finds that there are no genuine issues of material fact as to plaintiff's wrongful termination in violation of public policy claim but that there are genuine issues of material fact regarding plaintiff's retaliation claim. Accordingly, defendant's motion for summary judgment with regard to count one of plaintiff's complaint is GRANTED, and defendant's motion for summary judgment with regard to count two of plaintiff's complaint is DENIED.

PATRICK M. MCGRATH
Judge

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