

ORIGINAL

IN THE COURT OF CLAIMS OF OHIO

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COURT OF CLAIMS
OF OHIO

2016 MAR 21 PM 4:29

DAVID BENTKOWSKI,

Plaintiff,

vs.

OHIO LOTTERY COMMISSION

Defendant.

Case No. 2014-00651

JUDGE PATRICK MCGRATH

THE OHIO LOTTERY
COMMISSION'S
POST-TRIAL BRIEF

I. Overview

David Bentkowski is a former mayor of Seven Hills and a former labor relations officer at the Ohio Lottery Commission. He has long viewed himself as under attack— by Seven Hills citizens who circulated a newsletter criticizing his leadership; by others who mocked him online; by Mark Naymik— a *Plain-Dealer* and Cleveland.com columnist— who documented it all; and now by a cabal of high-ranking State officials ranging from the Governor’s office all the way down through middle-management at the Lottery. Initially, his focus in this case against the Lottery was his notion that his reporting of so-called crimes in Seven Hills after he resigned as mayor prompted the Governor’s office or Republican Party “operatives” to fire him because he did not “stay out of the headlines.” (Complaint at ¶¶34-36.) That was— and remains— an odd contention because Mr. Naymik’s first column about him, which was unflattering to say the least, appeared on October 13, 2011— *two days after he started at the Lottery*— and no one fired him then.¹

¹ See Tr. at 472.

Mr. Bentkowski introduced both that column and a second one Mr. Naymick published on October 23, 2012 as Ex. 23 at trial. The first column, titled "Former mayor wins Kasich lottery," summarized the Seven Hills' citizens' concerns:

David Bentkowski just left his part-time job as mayor of Seven Hills, a Cleveland suburb of about 12,000 people. His ego will linger through the November election.

* * *

Though Bentkowski's been trying for a while to leave his mayoral job, he hasn't been going quietly. He's running for one of three at-large council seats in the city. And on a recent Sunday—after learning people were distributing a newsletter critical of City Hall leadership— he grabbed his video camera and jumped into his car to record those with the audacity to question his record. Bentkowski followed Seven Hills resident Tim Fraundorf, one of six authors of the newsletter. The mayor warned him to stop distributing the paper because it contained false and libelous information.

Bentkowski— who likes to remind people he is a lawyer who could have earned six figures but instead worked as a mayor for \$14,000— also called or emailed each of the six authors.

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 . . . that the city faces estimated budget deficits in 2011 and 2012. . . .

Bentkowski fought back in a community newspaper mailed to residents at taxpayer expense. "On July 29th, I went to bed dreaming about my wedding day," he wrote. "On July 30th, 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."

* * *

The second edition of the Seven Hills Reporter . . . 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.

* * *

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?

(Ex. 23)(Emphasis added). The second column, titled "Seven Hills' David Bentkowski still doesn't understand what it means to be a public official," deemed Mr. Bentkowski's numerous complaints "as worthy as any conspiracy on the Internet." *Id*

When this Court gutted the bulk of Mr. Bentkowski's claims on summary judgment, his case required a new focus. That focus turned to Liz Popadiuk, his supervisor at the Lottery. Though he still maintains that the Governor's office or Republican Party "operatives" fired him, he now also maintains that Ms. Popadiuk fired him in retaliation for his "opposing" her "discrimination" against four African-American employees, one white employee who may have had diabetes and another employee in the Lottery's Dayton office who's race and name Mr. Bentkowski appears not to know and who may be gay. The Court has characterized that claim as an R.C. 4112.02(I) retaliation claim.² And Mr. Bentkowski cannot win it for four main reasons.

First, as a matter of law, his alleged comments to Ms. Popadiuk were far too vague and ambiguous to constitute "opposition" to discrimination under that statute, which

² In fact, Mr. Bentkowski asserted no claim under R.C. 4112. His "retaliation" claim was a common-law claim concerning a mélange of his grievances—that he had been terminated for "reporting possible crimes," for telling Ms. Popadiuk "not to divulge confidential information," for telling her "not to engage in prohibited discrimination" and for exercising his "Federal and Ohio constitutional right to freedom of expression and association." There is no common-law claim for discrimination in Ohio. *See, e.g., Leininger v Pioneer National Latex*, 115 Ohio St.3d 311, 319 (2007).

precludes discrimination “against any other person because that person has **opposed any unlawful discriminatory practice defined in this section . . .**” *Id.* (Emphasis added.) Employees who say their employers retaliated against them for “opposing” discrimination against others must have alerted those employers to at least one specific instance of discrimination. Vague and ambiguous remarks are insufficient. *See, e.g., Fox v Eagle Distributing Co., Inc.*, 510 F.3d 587, 591-92 (3d Cir. 2007) (“**An employee may not invoke the protections of [the ADEA] 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.**”) Mr. Bentkowski was a labor relations officer whose job was to prosecute employees on behalf of management, and that is exactly what he did. If he is to be believed at all, he did nothing more than “play[] devil’s advocate” in internal discussions with Ms. Popadiuk over the strategy that she and he should use in prosecuting those employees:

So I’m making this case. I’m affirming for my boss that . . . I’m going to do whatever [she wants]. You know, I’m playing devil’s advocate. I’m telling her all the strengths of . . . a good case against Lora Watts. But then very strategically I’m also saying, you know, why aren’t you going to go against Weintraub, though? And why—you know, if I’m the union, here’s what I’m going to say.

(Tr. at 279)(Emphasis added). If Mr. Bentkowski intended his “devil’s advocacy” to be a *cri de coeur* against Ms. Popadiuk because she had engaged in illegal discrimination, suffice it to say that his remarks were much too vague and ambiguous to have amounted to that.

Second, R.C. 4112 retaliation claims require proof of but-for causation. *E.g., Wholf v Tremco Inc.*, 26 N.E.3d 902 (8th Dist.), 2015-Ohio-171, ¶29 (“**Therefore, the plain language of R.C. 4112.02(I) provides a ‘cause-in-fact’ causation standard rather than a mixed-motives standard.**”). *See also Smith v Dept. of Public Safety*, 2013-Ohio-4210, ¶59 (10th Dist.),

citing *University of Texas Southwestern Med. Ctr. V. Nassar*, 133 S.Ct. 2517, 2533 (2013) (“Both Title VII’s and R.C. 4112.02’s anti-retaliation provisions make it unlawful for an employer to take [an] adverse employment action against an employee ‘because’ of certain criteria. . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”). But Mr. Bentkowski has himself offered multiple reasons for his termination, ranging from his reporting of crimes in Seven Hills to a high-level directive for him to “stay out of the headlines” to his criticisms of Ms. Popadiuk’s getting coffee at Starbuck’s during working hours. And that means that he cannot meet the required but-for causation standard. *See, e.g., Wardlaw v City of Philadelphia Streets Dept.*, Case Nos. 05-3387, 07-160 (E.D. Pa, Aug. 11, 2009), 2009 WL 2461890 at *4 (“Wardlaw has asserted that she was the victim of discrimination and retaliation based on her gender, race, and disability; *her age was not the ‘but-for’ cause of the discrimination and retaliation she alleges.*”) (Emphasis added).

Third, Ms. Popadiuk has fully explained her reasons for recommending Mr. Bentkowski’s termination; and those reasons are both credible and compelling. And fourth, Mr. Bentkowski says he first “opposed” Ms. Popadiuk’s so-called discrimination by February of 2012, within the first four months of his employment. But he was not terminated until nine months after that. And Mr. Bentkowski takes care to emphasize that Ms. Popadiuk was “supportive” of him as late as October 21, 2012. That is when he called her at home to alert her that the second damning column by Mr. Naymik would be published soon. He recorded that call—Mr. Bentkowski secretly records and videotapes many of his encounters—and he says Ms. Popadiuk offered him “supportive concern” and said that what he was enduring was “awful” and “insane.” Those are hardly the words of a human-resources supervisor whose colleague has *charged her with discrimination*. And a nine-month delay between a

complaint of discrimination and the termination of the complainant is, as a matter of law, too remote to establish retaliation. *See, e.g., Dautartas v Abbot Laboratories*, 2012-Ohio-1709, ¶55 (10th Dist.), quoting *Kipp v Missouri Hwy. & Transp. Comm.*, 280 F.3d 893, 897 (8th Cir. 2002) (an “interval of two months between complaint and adverse action ‘so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in [plaintiff’s] favor on the matter of causal link.’”) (Internal citations omitted).

II. Mr. Bentkowski’s “opposition” to discrimination consisted exclusively of his prosecuting the very cases he now says involved the discrimination he “opposed.” His communications with Ms. Popadiuk were, under the circumstances, much too vague and ambiguous to have alerted her that he was accusing her of discrimination.

Mr. Bentkowski was a labor relations officer who prosecuted claims for employee discipline under the supervision of Ms. Popadiuk, the Lottery’s chief Human Resources officer. He now says she retaliated against him because he “opposed” her “discriminatory” treatment of Notre LaBeach, Lora Watts and Ms. Watt’s supervisors— Sam Erby and Loretta Washington— all of whom are African-American. He also says she retaliated against him because he “opposed” her treatment of Jim Zimmerman, a white man who he says has diabetes, and she retaliated against him because he “opposed” her treatment of a gay man in the Lottery’s Dayton office whom he cannot identify. His claim concerning the gay man is baseless as a matter of law because R.C. 4112 does not cover sexual orientation. *See, e.g., Burns v Ohio State University College of Veterinary Medicine*, 2014-Ohio-1190, ¶10 (10th Dist.) (“[W]e cannot conclude that the term ‘sex’ under R.C. 4112.02(A) encompasses sexual orientation.”). With respect to the other five employees, Mr. Bentkowski did nothing more than his routine job duties by prosecuting those employees on Lottery management’s behalf.

As for Ms. LaBeach, he contends that Ms. Popadiuk used racially-tinged language in referring to her, and, in response, he mentioned a few of his “African-American friends.” (Tr. at 496.) He was “in charge of” the discipline to be prosecuted against Ms. Watts. (Tr. at 493-94.) And he did nothing more than play “devil’s advocate” about the level of discipline she would face. *Id.* at 279. Moreover, Ms. Popadiuk *did what he advised her to do.* *Id.* at 497-98. He says that Ms. Popadiuk expressed her inclination “to go after” Ms. Watts’s supervisors—Sam Erby and Loretta Washington—“because they’re the managers and they weren’t . . . reining her in.” *Id.* at 390. Faulting managers for the repeated work-rule violations of their staff members seems reasonable, and Mr. Bentkowski can point to no instance in which he told Ms. Popadiuk that her pursuit of discipline against them was discriminatory. Jim Zimmerman, the man with diabetes, never claimed that that his condition was a “disability.” *Id.* at 223-25. And Mr. Bentkowski never told Ms. Popadiuk that she was discriminating against him on the basis of any disability. In sum, Mr. Bentkowski’s claim rests on vague allegations that could never amount to “opposition” within the meaning of an R.C. 4112 claim. *See, e.g., Fox*, 510 F.3d 587, 591-92 (3d Cir. 2007) (“An employee may not invoke the protections of [the ADEA] by making a vague charge of discrimination.”)³ Moreover, because Mr. Bentkowski’s so-called complaints about Ms. Popadiuk cannot be separated from his and her day-to-day interactions about the minutiae of prosecuting Lottery employees, she could never have “reasonably interpreted” them “as opposition to . . . discrimination.” *See, e.g., Nyarkob-Ocran v Home Depot USA, Inc.*, Case No. 2:13-cv-1120 (S.D. Ohio Oct. 15, 2014), 2014 Fair Empl. Prac. Cas (BNA) 170,007, 2014 WL 5305544 at *8 (citing EEOC Compliance Manual §8-II.B.2, Example 4.

³ *Accord, Booker v Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989); *Brown v O’Reilly Automotive Stores, Inc.*, 2015-Ohio-5146, ¶36 (8th Dist.).

III. Mr. Bentkowski still maintains that he was terminated for reporting crimes at seven hills, for not “staying out of the headlines,” and in retaliation for “opposing” discrimination. Retaliation, though, requires but-for proof of causation, which means that he cannot win his retaliation claim by tossing it and the rest of his theories into a hat and asking the court to pick one of them.

Retaliation claims require but-for proof of causation. *E.g., Wholf*, 2015-Ohio-171 at ¶29; In other words, Mr. Bentkowski must show that Ms. Popadiuk’s alleged retaliation was determinative— meaning that he would not have been fired in its absence. *Smith v Dept. of Public Safety*, 2013-Ohio-4210, ¶59 (10th Dist.). But Mr. Bentkowski has himself maintained through trial that he was terminated for a raft of reasons other than retaliation. *See* Tr. at 470-71 (standing by the affidavit—Ex. A—he filed before the bulk of his case was dismissed); at 474 (affirming his belief that he would be fired if he “were ever in the paper again for any reason or in any way that caused the governor any embarrassment”).

He is emphatic that Ms. Popadiuk did not even have the authority to fire him without the approval of the Governor’s office. *Id.* at 480-81. And he is equally emphatic that the sole concern the Governor’s office had with him was that it did not want him to be “in the paper again” in yet another embarrassing column about his dealings in Seven Hills. *Id.* at 473-74. As a result, Mr. Bentkowski has himself presented the Court with two competing theories of his case—first, that the cause of his termination was political and was directly related to his “crime reporting” about Seven Hills; and second, that the cause of his termination was Ms. Popadiuk’s “retaliation” against him for charging her with discrimination. It seems clear that Mr. Bentkowski decided he had a “public policy” claim concerning Seven Hills long before he decided he had a “retaliation” claim about Ms. Popadiuk. In fact, the five-page manifesto he wrote to Ms. Popadiuk, Lottery Director Dennis Berg and Lottery Chief Legal Counsel Larry Miltner two weeks before his termination—in which he warned them that “it would be a nightmare situation if something

were to happen to me in my lottery capacity as a result of this unfair assault against me”—
never mentioned his having “warned” Ms. Popadiuk about discrimination at all. See
Ex. 27 at 5. It was, instead, entirely designed to stop the Governor’s office or Republican
“operatives” from firing him for embarrassing them.

IV. Ms. Popadiuk recommended Mr. Bentkowski’s termination for legitimate and non-discriminatory reasons.

He “would oppose and debate and argue” with Ms. Popadiuk. (Tr. at 56.) He could not get along with his co-workers. *Id.* at 57. Every document he submitted required revision. *Id.* at 60. He routinely stood “in [Ms. Popadiuk’s] face” and said “I’m a lawyer, I know, I’m a lawyer,” which made it “very difficult to communicate with him.” *Id.* at 62. His recommendations were too often based not on facts but on his opinions, and, as Ms. Popadiuk put it, “our cases are based on fact, not opinion, not what we think and feel about things.” *Id.* at 63. He was “very condescending, very argumentative and difficult to deal with.” *Id.* at 121. That “was becoming more and more exhausting” to her. *Id.* And, with respect to the Watts prosecution—in which he appeared to be unaware that Ms. Watts’s supervisors had regularly tolerated misconduct similar to hers—he simply “did not properly handle [the] case.” *Id.* at 123. “Ultimately, he is . . . management if he’s serving as the management advocate. It’s his responsibility to make sure that all facets of [the] investigation are thorough [and] that all the supporting evidence and documentation is there so that he can put on an adequate case.” *Id.* at 125. And he did not do that.

V. Mr. Bentkowski’s alleged complaints of discrimination could not, as a matter of law, have caused his termination.

As little as a two-month delay between a retaliation plaintiff’s complaint and his or her employer’s adverse job action results in an absence of causation as a matter of law. See, e.g., *Dautartas v Abbot Laboratories*, 2012-Ohio-1709, ¶55 (10th Dist.), quoting *Kipp v Missouri*

Highway & Transp. Comm., 280 F.3d 893, 897 (8th Cir. 2002) (an “interval of two months between complaint and adverse action ‘so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in [plaintiff’s] favor on the matter of causal link.’”) (Internal citations omitted). The delay between Mr. Bentkowski’s alleged complaint concerning Ms. Watts was nine months. (Tr. at 493-94; Ex. 29.) His claim is baseless on that ground alone.

VI. Conclusion

Mr. Bentkowski’s retaliation claim was never his real focus in this case. His real focus was on proving that he stood at the epicenter of a grand conspiracy at the highest level of State government and that he was fired for reporting so-called crimes in Seven Hills— which had nothing to do with the Lottery— to agencies other than the Lottery. That claim was baseless as a matter of law, and the retaliation claim that still remains is baseless both as a matter of law and as a matter of fact.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I emailed this document to Brent L. English, Mr. Bentkowski's counsel,
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