

lottery.” (Brief at 1). Experience teaches that when a defendant attacks a plaintiff in this way the reason usually is to avoid the law and the evidence.

Stripped to the basics, the evidence in this case showed that Plaintiff is a well-educated, capable man who was very committed to doing an exemplary job at the Lottery. The evidence showed he performed at a very high level under an administrator who engaged in conduct that no rational person trained and experienced in human resources in the 21st century would have done. He objected to her callous and discriminatory conduct as the law permits him to do and she retaliated against him by firing him.

II

ALTERNATIVE PLEADING IS PERMITTED

The Lottery’s brief first emphasized that Plaintiff had asserted a claim in his complaint that he had been discharged because he was told to “stay out of the newspapers.” (Brief at 1-2; Complaint ¶ 34-36). This fact is not relevant to whether a retaliation claim was proved. As the Court well knows, Ohio R. Civ. Proc. 8(E)(2) “permits alternative or hypothetical pleading, or even the use of inconsistent claims, and states, in part, ‘(w)hen two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.’” *Dever v. Lucas*, 174 Ohio App.3d 725, 2008-Ohio-332, 884 N.E.2d 641, ¶ 36, quoting *Iacono v. Anderson Concrete Corp.*, 42 Ohio St.2d 88, 92, 326 N.E.2d 267 (1975). Thus, the Lottery is flatly wrong by urging this Court to consider arguably inconsistent claims made in the Complaint (before any

discovery was undertaken) in deciding Plaintiff's retaliation claim (which survived summary judgment).¹

III

BENTKOWSKI'S OPPOSITION TO UNLAWFUL EMPLOYMENT DISCRIMINATION WAS NEITHER VAGUE NOR AMBIGUOUS

The Lottery contends ("as a matter of law") that Plaintiff's "comments" to Elizabeth Popadiuk, the Deputy Director of Human Resources at the Lottery, were "too vague and ambiguous" to constitute "opposition" to her unlawful employment discrimination (Brief at 3-4; 6-7). In other words, it appears the Lottery is contending that Bentkowski did not engage in "protected activity."

The Lottery is both legally and factually mistaken. In *Crawford v. Metro. Govt. of Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 276, 129 S.Ct. 846, 849, 172 L.Ed.2d 650 (2009) the Supreme Court noted that "[w]hen an employee communicates to [his] employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee's opposition to the activity,'" quoting the Equal Employment Opportunity Commission Guidelines. Filing an informal complaint of discrimination is a protected activity. *Kudla v. Olympic Steel, Inc.*, 8th Dist. Cuyahoga No. 101104, 2014-Ohio-5142, 2014 WL 6483304, ¶ 69. In fact, a person opposing an apparently discriminatory practice must only have a good faith belief that the practice is unlawful. See *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir.1984); *Gifford v. Atchison, Topeka & Santa Fe Ry. Co.*, 685 F.2d 1149, 1157 (9th Cir.1982); *DeAnda v. St. Joseph Hosp.*, 671 F.2d 850, 853

¹. The Lottery appears to once again challenge this Court's decision that Plaintiff asserted a valid claim for unlawful retaliation under R.C. 4112.02(I) (Brief at 3). This argument was rejected by this Court when it denied the Lottery's motion for summary judgment.

n. 2 (5th Cir.1982); *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir.1982); *Croushorn v. Board of Trustees*, 518 F. Supp. 9, 25 (M.D. Tenn.1980). To be sure, R.C. 4112.02(A) makes it an “unlawful discriminatory practice . . . for any employer, because of race, color, religion, sex, military status, national origin, disability, age or ancestry . . . to discharge [any person] without cause.” (Emphasis supplied.)

Plaintiff testified that he expressly and repeatedly told Popadiuk that her racial epithets at black employees of the Lottery, and her unlawful decision-making regarding those employees, as well as another employee with a possible disability, was unlawful and that she was inviting a lawsuit for engaging in such behavior (Tr. 340; 349; 355; 633-634; 496; 499-500).

Thus, the record shows that rather than making “vague” or “ambiguous” statements about his opposition to this conduct, Bentkowski directly opposed that conduct and did so repeatedly throughout his 13-month tenure.

The Lottery takes one statement made by Bentkowski out of context to claim that he was merely “playing devil’s advocate.” (Brief at 4.) At the same time, the Lottery ignores Bentkowski’s testimony that he repeatedly told Popadiuk that what she was saying and doing was impermissible and that she was inviting a lawsuit (Tr. 499-500). The evidence showed that Bentkowski was so alarmed by her conduct that he began to research where else to report her conduct (Tr. 307). He also began to record some of her conversations so he could show that the Deputy Director of Human Resources was actually making statements that may be hard to believe for someone in that position (Tr. 401). Combined, these actions show he strongly opposed Popdiuk’s conduct.

IV

BENTKOWSKI PROVED A DIRECT CAUSAL CONNECTION BETWEEN HIS OPPOSITION TO UNLAWFUL EMPLOYMENT DISCRIMINATION AND HIS DISCHARGE

The Lottery claims that Mr. Bentkowski did not prove the causation element of R.C. 4511.02(I). In *Wholf v. Tremco, Inc.*, 8th Dist. Cuyahoga No. 100711, 2015-Ohio-171, 26 N.E.3d 902, *appeal not allowed*, 143 Ohio St. 3d 1442, 36 N.E.3d 189, 2015-Ohio-3427, the Court held that R.C. 4111.02(I) requires “cause-in-fact” causation rather than a “mixed motives standard.” *Id.* at ¶ 44; See, also, *Univ. of Texas S.W. Med. Ctr. v. Nassar*, 570 U.S. ___, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013).

The Lottery argues that Plaintiff has “offered multiple reasons” for his termination (Brief at 5). This is not correct. The evidence showed Plaintiff contended, and proved, that the only reason he was discharged was because of his repeated opposition to Popadiuk’s unlawful employment discrimination. While Plaintiff pleaded an alternative theory, he proceeded to trial on the claim that, but-for his opposition to Popadiuk’ actions, he would not have been discharged. No evidence was offered that he was discharged because he supposedly complained about Popadiuk going to Starbucks during work hours (which he did not do), or for any other reason.

The Lottery ignores the three-step burden shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct.1817, 36 L.Ed.2d 668 (1973). Under this well-established framework, Mr. Bentkowski merely had to establish a prima facie case of discrimination. *Id.* at 802. The burden of production shifts to the Lottery to articulate some legitimate, nondiscriminatory reason for the employment decision. *Id.* at 802-803. If the Lottery successfully met this burden, then the burden would shift to the Plaintiff to show, by a

preponderance of the evidence, that the proffered reason was really a pretext for unlawful discrimination. *Id.* at 804. As the Supreme Court held in *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), a plaintiff's initial "burden of establishing a prima facie case of disparate treatment is not onerous." *Id.* at 253. The plaintiff is not required to conclusively establish all the elements of his discrimination claim in the prima facie case because the prima facie case simply creates a presumption of discrimination that forces the employer to produce evidence of a legitimate, non-discriminatory reason for the adverse employment action. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

The Lottery contends that Popadiuk "fully explained" her reasons for "recommending" Mr. Bentkowski's termination (Brief at 5). In truth, the *only* explanation she offered was that he was "not a good fit." (Tr. 92.) While she claimed the decision was part of a "cumulative on-going process" (Tr. 92), the competent, credible evidence belied this claim.

First, only Popadiuk testified for the Lottery and she never described any part of the "cumulative on-going process" she claims resulted in Plaintiff's discharge.

Second, it is undisputed that Popadiuk never reviewed Plaintiff's three self-evaluations (at 90 days; 180 days; and at the end of one year), and she failed to provide him with a written review as she was obligated to do (explaining her failure with the lame excuse that she was "too busy.") (Tr. 46-53; 139).

Third, she took no action to extend Plaintiff's 180-day probationary period (which was an option available if he was truly not performing properly) (Tr. 52-53; 240-241). She likewise took no action to terminate the Plaintiff during his probationary period (Tr. 54).

Fourth, Plaintiff testified that when he asked Popadiuk how he was doing, she told him everything was "great." (Tr. 241; 243).

Fifth, Popadiuk attempted to blame Bentkowski for a "poor investigation" of Lora Watts, which allegedly resulted in her having to dial back proposed punishment of her (Tr. 129). However, she admitted the investigation was done by another person prior to him ever being hired (Tr. 67; 129-130). And the evidence showed that the punishment for Watts was predetermined in any event (Tr. 508; Exh. 35). Thus, Popadiuk's claims in this regard are meritless.

While Popadiuk claimed she did not like Plaintiff's writing style (Tr. 132), none of his supposedly poor writing was ever produced, nor were any claimed edits to anything he ever wrote for her or the Lottery ever produced. Popadiuk could not identify a single document that Plaintiff wrote that she edited or changed, and that he supposedly "argued about." (Tr. 134). Plaintiff testified that Popadiuk made small edits to his work and sent out documents mostly as he had written them (Tr. 362-363). What's more, he never complained about any edits or changes she made to what he wrote (Tr. 362).

However, by the time of the trial, Popadiuk had conjured up a new narrative that she did not like the manner in which Plaintiff interacted with her. She offered no specifics other than to complain that Mr. Bentkowski would tell her about the law. While she said she had "no problem with her employees taking a position opposite of mine or discussing it," (Tr. 52), her later trial testimony and, now, the Lottery's brief, seizes upon this supposed reason for discharge.

During trial, Popadiuk claimed Plaintiff was "condescending, argumentative, and difficult to deal with." (Tr. 121.) When she was pressed for examples, she provided none.

Of course, these characterizations are self-serving and meaningless without context and substance. The Lottery offered no evidence from any other witness about whether, or when, Plaintiff was “condescending, argumentative, and difficult to deal with.” If Plaintiff was difficult to get along with, it certainly would be reasonable for the Lottery to offer evidence from those individuals with whom he worked to establish this. That the Lottery offered no witness but Popadiuk speaks volumes. For his part, Plaintiff testified that he was well liked by his colleagues:

I proactively tried to be as involved as possible., I volunteered for everything . . . I gave people cards for their birthdays and going away parties . . . I couldn't have been nicer to everyone. Everybody liked me. I never had one manager that I deal with say anything bad about me. The [labor relations job] was perfect . . . for me. It merged all of my years as mayor, all of my years as a lawyer dealing with . . . labor and employment issues, all of my experiences with government.

(Tr. 406-407).

If Plaintiff was actually “condescending, argumentative and difficult to deal with” as Popadiuk claimed, she, as the Deputy Director of Human Resources for the Lottery (who admitted she had been trained to document such issues, Tr. 137), would have documented instances of difficulties (Tr. 137-138). However, she conceded she had never “committed anything to writing about [Plaintiff].” (Tr. 101; 397). Plaintiff submits that this is strong evidence that Popadiuk’s position is, to put it charitably, apocryphal.

For his part, Plaintiff testified that Popadiuk instead repeatedly “complimented” him on his work (Tr. 397). Moreover, he “got along with everyone.” *Id.*

Plaintiff testified that the only time he had “any friction or tension [with Popadiuk] was when she would do things [Plaintiff believed] were discriminatory and crossed the line.” (Tr. 252-253; 356; 358). When Popadiuk would make racist comments about Lottery employees, Plaintiff pointed out that she “can’t say stuff like that” and tried to refocus her on the actual issue

at hand (Tr. 269). Plaintiff told her that her actions were illegal and could easily result in litigation (Tr. 298-299; 354; 359; 500).

After being given "approval to separate [Plaintiff] from employment" with the Lottery (Tr. 100), Popadiuk quickly did so (Tr. 100-101; 263). When she told Plaintiff he was "fired," he promptly told her that she was retaliating against him for opposing her unlawful employment practices (Tr. 263). She refused to comment. *Id.* The stance was also taken by Dennis Berg, the Director of the Commission (Tr. 264).

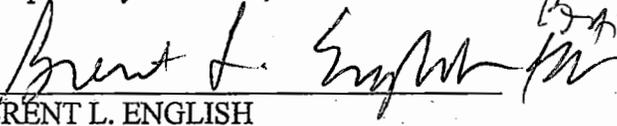
As set forth above, the evidence showed that Plaintiff repeatedly opposed Popadiuk's conduct throughout his employment. He initially opposed the harsh and racially-motivated treatment provided to employees Lora Watts and Notre LaBeach. He was able to ameliorate some of this harsh discipline. Near the end of his employment, Popadiuk renewed her interest in Watts, wanting to write her up for having a low sick time balance. When Popadiuk directed him to go after Watts again, Bentkowski remonstrated, explaining Watts was a "beaten broken woman" by that time and telling Popadiuk he did not "feel comfortable with this type of pursuit" (Tr. 390-391). Further, near the end of his employment, he told Popadiuk she need to take Jim Zimmerman's disability issue seriously (Tr. 316). Popadiuk bristled at the thought, having previously said she wanted nothing more than for Zimmerman to lose his job.

The complaints of unlawful employment action were made to Popadiuk about Popadiuk because she was Mr. Bentkowski's boss and was the Deputy Director of Human Resources, the highest-ranking person at the agency in charge of personnel. Accordingly, the suggestion that there was not a direct causal relationship between Plaintiff's outspoken opposition to her conduct and her adverse employment action is just sophistry.

CONCLUSION

David Bentkowski proved that he engaged in protected activity, that his employer was aware of his protected activity, that he was subjected to an adverse employment action, and that a direct causal link existed between a protected activity and the adverse action. The Lottery's post-hearing brief avoids most of the evidence adduced on these points and cherry picks snippets in an effort to show these elements were not met. This Court should carefully review the evidence presented and enter judgment in Plaintiff's favor for the damages set forth in his Closing Argument.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and complete copy of Plaintiff, David A. Bentkowski's Reply to the Ohio Lottery Commission's Post-Trial Brief 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 28 day of March 2016.


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