



Mr. Bentkowski's sole evidence of his so-called "opposition" to Liz Popadiuk's "discrimination" is his own trial testimony. But that testimony, the 216-paragraph affidavit Ex. A) he composed, and his own exhibits demonstrate that he never charged her with discriminating against anyone.

**II. Mr. Bentkowski never took "an overt stand" against Ms. Popadiuk's allegedly discriminatory actions.**

R.C. 4112.02(A) limits "unlawful discriminatory practice[s]" by employers to these specific adverse job actions: "to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Mr. Bentkowski now identifies seven employees as to whom he contends he charged Ms. Popadiuk with unlawful discrimination.<sup>3</sup> Those seven are William Newsome, Lora Watts, Sam Erby, Loretta Washington, Notre LaBeach, James Zimmerman and Giovanna Evans. (Brief at 7-12.)

Mr. Newsome was the labor relations officer Mr. Bentkowski replaced. *See* Bentkowski testimony, Tr. at 266 ("Bill Newsome was the labor relations officer before me. And in January of 2011, . . . Governor Kasich . . . fired [him]. . . .") He was also a friend of Ms. Popadiuk's. *See* Bentkowski Affidavit (Ex. A) at ¶59 (referring to the "terminations of Ms. Popadiuk's close friend, then Lottery Chief Legal Counsel Pam DeGeeter and her other friend, Mr. William Newsome, the person I eventually replaces as Labor Relations Officer."). Mr. Bentkowski was hired as a labor relations officer at the Lottery in October 2011, some nine months after Mr. Newsome had left. (Tr. at 266.) The notion that Mr. Bentkowski

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<sup>3</sup> Mr. Bentkowski appears to have dropped the claim that she also discriminated against a gay man in the Lottery's Dayton office.

“opposed” employment discrimination by Ms. Popadiuk long after “Governor Kasich” had “fired” him as a Lottery employee is utter nonsense.

Mr. Bentkowski was “in charge of” the disciplinary proceeding against Ms. Watts, whose supervisors were Mr. Erby and Ms. Washington. *Id.* at 168, 493-94. The discipline concerned Ms. Watts’s personal phone calls. *Id.* at 66. She had made “over 300 personal phone calls in one month while at work.” (Bentkowski Affidavit—Ex. A—at ¶189.) Mr. Bentkowski says he “advised” Ms. Popadiuk to “[b]e careful . . . if you are going after [Ms. Watts because] someone might want to see the personal calls you are making.” *Id.* He also says he advised her against “stacking” Ms. Watts’s discipline, a technique he describes of bringing multiple charges against an employee for a single offense. (Tr. at 355.) That, not discrimination, was the employment-related action he claims to have discussed with Ms. Popadiuk. *Id.* at 356.

Ms. Watts’s supervisors—Mr. Erby and Ms. Washington—brought her misconduct to Ms. Popadiuk’s attention. *Id.* at 170. Mr. Bentkowski notes that they “casually discussed how various workers in the call center [which they managed] watch videos when they are not busy.” (Bentkowski Affidavit—Ex. A—at ¶193.) And other employees who reported to them were also “making hundreds of personal phone calls just a few desks away from them.” *Id.* Ms. Popadiuk, according to Mr. Bentkowski, “ultimately got [Mr. Erby] to . . . retire instead of fac[ing] discipline.” *Id.* But the discipline had nothing to do with personal phone calls. Both Ms. Watts and Mr. Erby resigned when it came to light in 2014—long after Mr. Bentkowski’s termination—that she had nude photos of him on her phone, which were taken at work. (Tr. at 172-73.) And Ms. Washington resigned in “late 2014.” *Id.* at 90. Her resignation likewise had nothing to do with Ms. Watts’s phone calls, which had occurred

years earlier. Mr. Bentkowski cannot seem to explain how anything about any of this was discriminatory.

Ms. LaBeach “literally ran down an Amish buggy from behind—destroying the buggy and severely injuring the horse.” (Bentkowski Affidavit—Ex. A— at ¶192.) She was not fired for that. *Id.* But Mr. Bentkowski was “in charge of” her discipline, which resulted only “in a verbal reprimand,” the “standard level of discipline” in a matter in which the injured party in an accident involving a Lottery employee’s car has made no claim. (Tr. at 175-76.)

Mr. Bentkowski thinks Mr. Zimmerman has a disability because he may have diabetes. But Mr. Zimmerman never raised a disability claim. *Id.* at 223-25. And, needless to say, every health condition does not rise to a “disability” within the meaning of R.C. 4112. As for Ms. Evans, the Court refused to accept any testimony concerning her allegations of discrimination. *Id.* at 83-87.

In sum, Mr. Bentkowski— who worked for Ms. Popadiuk— says he tried to have her pursue lesser disciplinary charges against several employees, he says that sometimes she agreed with him, and he says that at other times she disagreed with him. Nothing about that could possibly have alerted her that he was charging her with discrimination. *See, e.g., Evans v D.E. Foxx & Associates, Inc.*, Case No. 11-261-HJW-JGW (S.D. Ohio July 25, 2013), 2013 WL 3867598 at \*14 and fn. 21 (noting that an employee’s “cautioning her superiors about improprieties with an eye toward correcting them and minimizing the risk of liability” is not protected activity). He, and he alone, also says that Ms. Popadiuk made racial remarks. But not one mention of those remarks appears in any of his exhibits, in any of his bi-weekly reports or even in his last-gasp letter alerting her, the Lottery’s director and its chief legal counsel of the ramifications of retaliating against him for his “crime-reporting” in

Seven Hills. *See* Exs. 22-27. And, in any event, the allegation that a supervisor made racially-tinged statements is not an allegation of a discriminatory employment practice. It is instead an allegation of “racial intolerance,” which is not actionable under discrimination law. *See Booker v Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989).<sup>4</sup>

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

Ms. Popadiuk testified that Mr. Bentkowski continually debated and argued with her, routinely standing “in [her] face” and saying, “I’m a lawyer, I know, I’m a lawyer,” which made it “very difficult to communicate with him.” (Tr. at 56, 62.) Mr. Bentkowski is, of course, a lawyer. But he has never practiced law. *Id.* at 345. The labor relations position he held did not require a law degree. *Id.* at 165-66. Yet, he mentioned that law degree often. He says he “told her about the law” with respect to “stacking.” *Id.* at 356. And he knew it offended her. “This was literally the only time we didn’t get along, when I would raise these issues. These are the only disagreements or arguments or heated discussions we would ever have because she felt like I was, you know, highlighting the law for her. And I think she took offense. Like, she didn’t know the law or that she was the HR person and who was I to tell her?”) *Id.* at 47. Mark Naymik’s first column about Mr. Bentkowski noted that he “likes to remind people he is a lawyer.” (Ex. 23.) That is an understatement. His affidavit mentioned his law license some thirteen separate times. (Ex. A at ¶¶53, 70, 108, 112, 136, 140, 150, 155, 157, 158, 162, 195, 203.) He told Ms. Popadiuk—a human resources professional with twenty-plus years of experience—over and over again that he was right and she was wrong because he was a lawyer; and that is condescending and offensive.

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<sup>4</sup> Mr. Bentkowski’s separate allegation that Ms. Popadiuk took race into account would be true only in a world devoid of context. What she said was this: “You can’t just . . . do something X. We may have an EEO claim here. . . . [T]hat’s what we do in human resources and labor relations. We evaluate claims. \* \* \* And, no, I don’t just consider race as an item, but it is discussed. You know, do we have the potential for an EEO claim?” Tr. at 106-07.

IV. Mr. Bentkowski's has failed to prove damages.

Mr. Bentkowski thinks that Ms. Popadiuk "retaliated" against him and that his damages for that should reflect the "promise" he says he was made by "the Governor and the Republican Party" that he would have that job as long "as the Governor was in office," a period he calculates at seven years. See Brief at 18; Bentkowski Affidavit— Ex. A— at ¶49. That is an odd way to measure damages. And Mr. Bentkowski's belief that three years remained in the Governor's first term when his employment ended and that he would have remained employed for four more years "assuming" the Governor "was reelected" is just wrong. Governor Kasich was elected in November 2010, nearly a year before Mr. Bentkowski obtained his job at the Lottery. He was reelected in November 2014, two years after Mr. Bentkowski's employment ended, and a new governor will be elected in November 2016. Hence, even if his method of measuring damages were logical, he would be entitled to no more than four years of damages, from November 2012 through November 2016. Plaintiffs are entitled to front pay, which is what Mr. Bentkowski seeks only if they prove that they are "reasonably certain to incur" losses in the future. *Fouty v Ohio Department of Youth Services*, 167 Ohio App.3d 508, 2006-Ohio-2957, ¶34 (Tenth Dist.). Front pay may be awarded only for "an interim period." *Id.* at ¶¶42-43. See also *Worrell v Multipress, Inc.*, 45 Ohio ST.3d, 241, 246-47. (noting the "temporary" nature of front pay). Mr. Bentkowski has offered nothing other than his own testimony and idle speculation to suggest that he cannot find a job paying a salary similar to the \$65,000 he earned in 2012. (Brief at 18.) And the OPERS document on which he relies— which is laden with disclaimers and indicates that he is estimated to have earned a \$1016.99 pension per month<sup>5</sup> if he had worked an additional

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<sup>5</sup> Mr. Bentkowski appears to have advised OPERS that he is single and has no beneficiary. OPERS requires retirees with beneficiaries to select joint survivorship annuities, a selection which reduces the benefit.

year— does not make it “reasonably certain” that he has sustained pension losses of \$480,000,168 or recoverable wage losses in any amount.

**V. Conclusion**

Mr. Bentkowski was required to prove that retaliation was the but-for cause of his termination. He failed to do that, and his evidence as to damages is insufficient as a matter of law.

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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