[Cite as *Blackburn v. Am. Dental Ctrs.*, 2011-Ohio-5971.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Barbara Blackburn et al.,	:	
Plaintiffs-Appellants,	:	
		No. 10AP-958
v.	:	(C.P.C. No. 08CVH-01-0230)
American Dental Centers and Dr. Sam Jaffe & Associates, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on November 17, 2011

Law Offices of James P. Connors, and James P. Connors, for appellants.

Baker & Hostetler LLP, Elizabeth A. McNellie, and *William R. Post*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Barbara Blackburn and Heather Esposito, plaintiffs-appellants, appeal the judgment of the Franklin County Court of Common Pleas, in which the court granted the motion for summary judgment filed by American Dental Centers, Dr. Sam Jaffe & Associates, Inc. ("ADC"), and Sam S. Jaffe, D.D.S. ("Jaffe"), defendants-appellees.

{¶2} ADC has dental offices in several states. Jaffee is the sole shareholder in ADC. Esposito began working for appellees in November 1999 as a dental hygienist.

Blackburn began working for appellees in October 2001 as a dental assistant. Sherman Allen began working as a dentist for appellees sometime around June 2002. Appellants claimed in their complaint that, after being hired, they began investigating Allen's background and discovered he had lost his dentistry license in Michigan, had been convicted of criminal offenses in Michigan, and was not supposed to leave Michigan. Appellants also claimed to have witnessed Allen engage in substandard and dangerous patient treatment, bizarre behavior, and unnecessary dental procedures. Appellants further claim to have witnessed Allen at work with hangovers, smelling of alcohol, and falling asleep while examining patients. Appellants claimed that they informed appellees of these issues regarding Allen, but appellees retaliated against them by, among other things, harassing them, warning them not to lodge further complaints, threatening them with legal action for defamation, reducing their wages, assigning unfavorable work duties, and denying promotions.

{¶3} Allen's employment was terminated sometime during September 2002 to November 2002. Appellees terminated Esposito's employment on November 7, 2002. Blackburn wrote a letter to appellees on April 28, 2003, discussing Allen's behaviors, among other things. On May 5, 2003, Blackburn appeared, with her identity disguised, on a local television news program discussing the unsafe conditions at ADC, including Allen's dangerous and unethical actions. A co-worker, Janise Boggs, wrote a letter to appellees on May 6, 2003, indicating that she and Blackburn would not return to work until they felt safe working there. Blackburn never returned to work. Blackburn claims she was terminated from her employment, while appellees claim Blackburn abandoned her position.

{¶4} On January 4, 2008, appellants filed a complaint against appellees. Both appellants alleged wrongful termination in violation of public policy, violations of the Ohio whistle-blower statute (R.C. 4113.52), negligent hiring and retention in employment, slander and tortious interference with business relationships and employment, and intentional or negligent infliction of emotional distress, while Blackburn solely alleged malicious prosecution and abuse of process. Appellees filed an answer and counterclaim, alleging fraud, unjust enrichment, tortious interference with business relationships, and defamation.

{¶5} On November 20, 2009, appellees filed a motion for summary judgment. The trial court granted appellees' summary judgment motion with respect to Blackburn's and Esposito's claims based upon R.C. 4113.52, public policy wrongful termination, emotional distress, tortious interference with business relationships, and slander. The parties agreed to dismiss the remaining claims brought by appellants, as well as appellees' counterclaims. On September 7, 2010, the trial court issued its judgment. Appellants appeal the judgment of the trial court, asserting the following assignments of error:

> I. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO ADC AND JAFFE ON THE PUBLIC POLICY CLAIMS FOR WRONGFUL TERMINATION AND STATUTORY VIOLATIONS OF R.C. 4113.52.
>
> II. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON THE APPELLANTS' REMAINING CLAIMS.

{¶6} Appellants argue in both of their assignments of error that the trial court erred in granting summary judgment to appellees. Pursuant to Civ.R. 56(C), summary judgment is proper if: (1) No genuine issue as to any material fact remains to be litigated;

(2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. Appellate review of a lower court's entry of summary judgment is de novo, applying the same standard used by the trial court. *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491. The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. Id. Once this burden is satisfied, the non-moving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. Id. The non-moving party may not rest upon the allegations or denials in the pleadings, but must affirmatively demonstrate the existence of a genuine issue of material fact to prevent the granting of a motion for summary judgment. Civ.R. 56(C); *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115.

{¶7} In their first assignment of error, appellants argue that the trial court erred when it granted summary judgment to appellees on the public policy claims for wrongful termination and statutory violations of the whistle-blower statute, R.C. 4113.52. Blackburn alleged both whistleblower and public policy wrongful termination claims, while Esposito actively pursued only a public policy wrongful termination claim. With regard to Blackburn's whistle-blower claims under R.C. 4113.52, Blackburn first argues that the trial

court used the wrong version of the statute. Blackburn points out that her claims arose in 2003, when the 2001 version of the statute was in effect, but the trial court used the version of the statute revised in 2006. Appellees concede that the trial court used the wrong version of the statute but assert that it makes no difference to the trial court's analysis. Regardless, our de novo analysis will proceed utilizing the 2001 version of the statute. R.C. 4113.52, as effective at the time the present claims arose, provided:

> (A)(1)(a) If an employee becomes aware in the course of the employee's employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that the employee's employer has authority to correct and if the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony, the employee orally shall notify the employee's supervisor or other responsible officer of the employee's employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification or the receipt of the report, whichever is earlier, the employee may file a written report that provides sufficient detail to identify and describe the violation with the prosecuting authority of the county or municipal corporation in which the violation occurred, with a peace officer, with the inspector general if the violation is within the inspector general's jurisdiction, or with any other appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which the employer is engaged.
>
> (b) If an employee makes a report under division (A)(1)(a) of this section, the employer, within twenty-four hours after the oral notification was made or the report was received or by the close of business on the next regular business day following the day on which the oral notification was made or the report was received, whichever is later, shall notify the employee, in writing, of any effort of the employer to correct the alleged violation or hazard or of the absence of the

> alleged violation or hazard.
>
> * * *
>
> (3) If an employee becomes aware in the course of the employee's employment of a violation by a fellow employee of any state or federal statute, any ordinance or regulation of a political subdivision, or any work rule or company policy of the employee's employer and if the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony, the employee orally shall notify the employee's supervisor or other responsible officer of the employee's employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation.

In Ohio, absent an employment contract, an employee is an employee-at-will and may be terminated at any time for any lawful reason or for no reason at all. *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 102, fn. 1, citing *Henkel v. Educational Research Council of Am*. (1976), 45 Ohio St.2d 249, 255. However, an at-will employee may not be discharged or disciplined for reasons violative of a statute or public policy. *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, paragraph two of the syllabus. R.C. 4113.52, Ohio's whistle-blower statute, prohibits the discharge or discipline of an employee whose acts are protected by its provisions. An employee who is discharged or disciplined in violation of R.C. 4113.52 may bring a statutory cause of action for the violation, a common-law cause of action in tort, or both. *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 1997-Ohio-219, paragraph five of the syllabus. An employee must strictly comply with the dictates of the statute in order to receive its protection. *Contreras v. Ferro Corp.* (1995), 73 Ohio St.3d 244.

{¶8} In the context of a motion for summary judgment, the presentments required in a whistle-blower case are no different from those in any other retaliatory discharge suit. See *Chandler v. Empire Chem., Inc.* (1994), 99 Ohio App.3d 396, 400. The plaintiff must first make a prima facie case by showing that (1) he or she engaged in activity which would bring him or her under the protection of the statute; (2) was subject to an adverse employment action; and (3) there was a causal link between the protected activity and the adverse employment action. *Wright v. Petroleum Helicopter, Inc.* (Sept. 18, 1997), 8th Dist. No. 71168, citing *Cooper v. N. Olmsted* (C.A.6, 1986), 795 F.2d 1265, 1272.

{¶9} In the present case, Blackburn contends that R.C. 4113.52(A)(1)(a) and (A)(3) require that an employee reasonably believe either (a) a violation is a criminal offense that is likely to cause an imminent risk of physical harm to persons, or (b) a violation is a hazard to public health or safety, but the trial court here found these provisions require that either (a) a violation is a criminal offense that is likely to cause an imminent risk of physical harm to persons, or (b) a violation is a criminal offense that is a hazard to public health or safety. In other words, appellants contend that R.C. 4113.52(A)(1)(a) and (A)(3) do not require that a violation that is a hazard to public health or safety also be a criminal offense, relying on *Behm v. Progress Plastic Prods., Inc.*, 6th Dist. No. H-07-008, 2007-Ohio-6357, and *O'Brien v. Libbey Owens Ford Co*. (Oct. 31, 1997), 6th Dist. No. L-96-333.

{¶10} We disagree with Blackburn's contention. This issue has already been addressed by this court as well as other appellate courts. In *Lesko v. Riverside Methodist Hosp.*, 10th Dist. No. 04AP-1130, 2005-Ohio-3142, this court specifically rejected *O'Brien*

and quoted the following reasoning from *Brooks v. Martin Marietta Util. Serv., Inc.* (C.A.6, 1998), No. 97-4068:

> Appellant presents us with an interesting interpretational question. Does [R.C. 4113.52] mean that the individual must reasonably believe the violation is either (a) a criminal offense that is likely to cause either (i) an imminent risk of physical harm to persons or (ii) a hazard to public health or safety, OR (b) is a felony ("the first interpretation")? Or does it mean that the violation is either (a) a criminal offense that is likely to cause an imminent risk of physical harm to persons, OR (b) a hazard to public health or safety, OR (c) a felony ("the second interpretation")? Put another way, does the employee have to believe that a violation that is a hazard to public health or safety must also be criminal?
>
> The first interpretation of the statute is correct. First, it is grammatically proper. The use of "either ... or" generally indicates that a binary relationship exists between the clauses that follow "either" (*i.e*., that there are two alternatives, not three). Additionally, the word "is" is used only before the words "a criminal offense" and "a felony," it is not used before the words "a hazard." This implies that the drafters of the statute did not mean that "a hazard to public health or safety" was to be an independent, third "option."
>
> Next, the first interpretation of the statute is the one that makes logical sense. On the second interpretation, the standard for a whistleblower exposing acts that present a non-particularized hazard to public health or safety is lower than the standard for whistleblowers exposing acts that will cause imminent harm to persons, which seems contrary to reason. One would expect the lower hurdle in cases of imminent harm.
>
> Third, this reading of the statute comports with language used by the Ohio Supreme Court in *Fox v. Bowling Green*, 76 Ohio St.3d 534, 668 N.E.2d 898 (1996). The *Fox* court, interpreting sections (A)(3) and (B) of § 4113.52, said that "if an employee reports to his employer that a fellow employee is violating a state statute and that the violation is a criminal offense *and* is likely to cause a hazard to public health, each informational component of that report-the violation, the criminality, and the risk to public safety-is 'information so reported' under § 4113.52(B)." *Id.* at 901 (emphasis added). If the second

> interpretation of § 4113.52(A)(1)(a) were correct, the *Fox* court would have used "or" in place of the italicized "and."

Thus, in *Lesko*, we found that a plaintiff must demonstrate that he or she had a reasonable belief in a criminal offense, or any claim under R.C. 4113.52 must fail as a matter of law. Id. at ¶27. See also *Duvall v. United Rehab. Servs. of Greater Dayton*, 2d Dist. No. 22500, 2008-Ohio-6231, ¶35-42. Therefore, we agree that R.C. 4113.52(A) requires an employee to reasonably believe her employer's behavior constituted a criminal offense.

{¶11} Appellants next argue that the trial court erred when it only analyzed R.C. 4113.52(A)(3) when Blackburn also made a claim under R.C. 4113.52(A)(1). It would seem that Blackburn's allegations would fall directly under R.C. 4113.52(A)(3), as they all relate to a co-employee's violations of statutes and company policy; however, insofar as our proceeding analysis would apply to both sections, we will consider Blackburn's claims under both R.C. 4113.52(A)(1) and (3).

{¶12} Appellants next argue that the trial court erred when it found that Blackburn failed to file a sufficient "written report" under R.C. 4113.52(A)(1) and (3). Appellants initially claim that the trial court erred by solely analyzing Blackburn's April 28, 2003 letter to appellees to determine whether it constituted a "written report," and by failing to also analyze a May 6, 2003 letter sent to appellees. Appellants maintain that the trial court overlooked this May 6, 2003 letter. The trial court, while not specifically referencing the May 6, 2003 letter, did indicate that Blackburn offered no argument to dispute that she was relying upon the April 28, 2003 letter as her "written report." We agree with the trial court that nowhere in the pleadings did Blackburn allege that anything other than the April 28, 2003 letter was her "written report," and she never raised any contention that the

May 6, 2003 letter constituted a "written report" under R.C. 4113.52. See *State v. Underwood* (1983), 3 Ohio St.3d 12, 13 (an appellant's failure to raise an error in the trial court constitutes a waiver of that issue on appeal). Furthermore, even if we were to consider the letter, Blackburn did not personally author, sign, or submit this letter. It was written, signed, and submitted by a co-worker, Janise Boggs. Blackburn's failure to personally author, sign, or submit the letter would be inconsistent with the strict mandates of R.C. 4113.52(A). See *Shaffer v. OhioHealth Corp.*, 10th Dist. No. 04AP-236, 2004-Ohio-6523, ¶23 (R.C. 4113.52(A) expressly states that the employee must file a written report with the employer; nowhere in the statute does it indicate that someone acting on behalf of the employee or at the employee's request may forward a written report to the employer or that the report may be authored by a third party). Based upon these reasons, we do not find the trial court erred when it did not analyze the May 6, 2003 letter.

{¶13} With regard to the April 28, 2003 letter, in order to comply with R.C. 4113.52(A)(1) and (3), the letter must "provide sufficient detail to identify and describe the violation." R.C. 4113.52(A)(1) and (3). Although the term "report" is not defined in R.C. 4113.52, it has been described as encompassing "more than mere idle conversation. In the context of the whistle blower statute, [the term] means delivery of accumulated information to a proper authority with an expectation that such authority will act on the information set forth." *Wood v. Dorcas* (2001), 142 Ohio App.3d 783, 790. Furthermore, the Supreme Court of Ohio has held that "to gain the protection of R.C. 4113.52(A)(3), an employee need not show that a co-worker had actually violated a statute, city ordinance, work rule, or company policy; it is sufficient that the employee had a reasonable belief that a violation occurred." *Fox v. Bowling Green*, 76 Ohio St.3d 534, 537, 1996-Ohio-104.

See also *Dargart v. Ohio Dept. of Transp.*, Ohio Ct. Claims No. 2002-09668, 2005-Ohio-1808 (an employee seeking protection under R.C. 4113.52 is not held to the standard of a lawyer as to whether an actual violation of law occurred; the employee must reasonably believe that the actions alleged could constitute a violation of the law).

{¶14} Here, the trial court found that Blackburn had failed to allege a criminal offense or felony in her April 28, 2003 letter. Our review of the letter reveals several alleged actions regarding Allen. The allegations were that Allen was "scary"; was "unprofessional"; "did unethical things"; "numbed a woman and hit her optical nerve"; "took a patient to prep a bridge without an exam or any consultation"; "had all this white goop coming from his tearducts [sic]" and then was "very shaky and got flustered and dropped the drill on the patient," after which he yelled the "F" word and ran out of the room; "was falling off his chair during exams"; "when he drilled he did not use water"; "did root canals in 15 minutes"; "hurt many people"; and "had strippers come to our back door on occasions." However, appellants do not specify how any of these actions constituted a criminal offense or felony, and, without more information, we fail to find that any of these allegations were criminal offenses. These actions all relate to ethical lapses and professional malpractice, and are not criminal acts as described. As explained above, an employee seeking protection under the whistle-blower statute must reasonably believe a criminal offense occurred. If Blackburn believed Allen committed criminal offenses or felonies with these actions, she was required to provide sufficient detail to identify and describe the violations of law in her written report. She failed to do so and, therefore, failed to comply with the mandates of R.C. 4113.52.

{¶15} Blackburn also alleged in the April 28, 2003 letter that Allen "harrassed me, he grabbed me, [and] he got in my car and Esposito's without us asking him." Of these allegations, that Allen "grabbed me," is the only one that we can see arguably alleges a criminal offense. Allen's act of grabbing Blackburn could conceivably constitute criminal offenses, such as, menacing, assault, kidnapping, or abduction, if certain circumstances accompanied his conduct. However, Blackburn neither supports this allegation with sufficient detail so that it describes any violation of law, nor cites any relevant Ohio Revised Code sections or names any specific offenses. Lacking sufficient detail, we cannot find the trial court erred when it found these allegations, as well as the others discussed above, failed to allege violations that were either criminal offenses that were likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or were felonies. Therefore, the trial court properly granted summary judgment to appellees on Blackburn's whistle-blower claim under R.C. 4113.52.

{¶16} Appellants next argue that summary judgment was improper on Blackburn's and Esposito's claims for wrongful termination in violation of public policy. As explained already, unless otherwise agreed, either party to an oral employment-at-will agreement may terminate the employment relationship for any reason which is not contrary to law. *Mers* at paragraph one of the syllabus. An exception to the employment-at-will doctrine exists where the employee's discharge violates public policy. *Painter v. Graley*, 70 Ohio St.3d 377, 1994-Ohio-334.

{¶17} To establish a prima facie claim of wrongful discharge in violation of public policy, the employee must demonstrate the following four elements: (1) a clear public policy existed and was manifested in a state or federal constitution, statute, or

administrative regulation, or in the common law (clarity element); (2) dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (jeopardy element); (3) dismissal was motivated by conduct related to the public policy (causation element); and (4) employer lacked overriding legitimate business justification for the dismissal (overriding justification element). *Collins v. Rizkana*, 73 Ohio St.3d 65, 69-70, 1995-Ohio-135. The clarity and jeopardy elements are questions of law to be decided by the court, and the causation and overriding justification elements are questions of fact, to be decided by the fact finder. Id. at 70.

{¶18} To state a claim of wrongful discharge in violation of public policy, a plaintiff must allege facts demonstrating that the employer's act of discharging him contravened a "clear public policy." *Greeley* at 233. "An at-will employee who is discharged or disciplined in violation of the public policy embodied in R.C. 4113.52 may maintain a common-law cause of action against the employer pursuant to *Greeley* * * * and its progeny, so long as that employee had fully complied with the statute and was subsequently discharged or disciplined." *Kulch* at paragraph three of the syllabus. However, if an employee fails to strictly comply with the requirements of R.C. 4113.52, the employee cannot base a *Greeley* claim solely upon the public policy embodied in that statute. Id. at 153. Rather, the employee must identify an independent source of public policy to support her claim. See *Thompson v. Gynecologic Oncology & Pelvic Surgery Assoc.*, 10th Dist. No. 06AP–340, 2006-Ohio-6377, ¶50 ("[A] plaintiff may not bring a public policy tort claim based on the public policy embodied in a statute unless she either complies with the statute embodying the public policy or identifies an independent source of public policy supporting her claim."); *Lesko* at ¶34 ("[A]ppellant is entitled to bring a

public policy tort claim regardless of whether she complied with R.C. 4113.52, as long as she can identify a source of public policy separate from the public policy embodied in R.C. 4113.52.").

{¶19} Here, as we found above, Blackburn did not comply with the requirements set forth in R.C. 4113.52, and Esposito does not allege she complied with the requirements of R.C. 4113.52. Because appellants did not comply with the requirements of R.C. 4113.52, they cannot maintain a common-law wrongful discharge claim based upon the public policy embodied in the whistle-blower statute, and must identify an independent source of public policy to proceed with a *Greeley* claim.

{¶20} The trial court found that appellants failed to allege any independent source of public policy in paragraph 46 of their complaint. In paragraph 46, appellants alleged that their discharge was motivated by conduct related to the public policy prohibiting retaliation for investigating and reporting unlawful activity. The court found that the public policy embodied in R.C. 4113.52 is, likewise, to prevent retaliation for investigating and reporting unlawful activity. Thus, the court found, it was clear that the public policy upon which appellants based their wrongful discharge against public policy claim was embodied in R.C. 4113.52. Appellants do not contest this finding.

{¶21} Appellants contend herein that the trial court erred when it held that their public policy wrongful termination claims were limited to paragraph 46 of their complaint. Appellants claim they also identified the public policies of workplace safety and patient safety in paragraph 45 of the complaint, and the public policies of drug and substance abuse in the workplace in paragraphs 14 and 15. In rejecting appellants' argument that the court should have considered its other public policy claims outside of paragraph 46,

the trial court concluded, "when prosecuting a claim, a plaintiff is confined to what she had pled in the Complaint."

{¶22} Although we generally agree with the trial court's above proposition, clearly appellants raised public-policy claims in other paragraphs of their complaint besides paragraph 46. In paragraph 45, which is included under the same count as paragraph 46, entitled "Wrongful Discharge against Public Policy," appellants specifically alleged that their "discharge * * * jeopardizes the public policy prohibiting retaliation for reporting unlawful activity and maintaining workplace safety and patient safety." Thus, appellants did, in fact, specifically allege other violations of public policy in their complaint beyond those embodied by R.C. 4113.52; namely, public policy regarding workplace safety and patient safety. Accordingly, the trial court should have addressed these claims, as well.

{¶23} Appellants also contend that paragraphs 14 and 15 alleged public policy claims for drug and substance abuse in the workplace. Paragraphs 14 and 15 allege the following:

> 14. Allen frequently came into work with hangovers, bloodshot eyes, unkempt clothing, unsure on his feet and in his physical movements, smelling of alcohol, and, on one occasion on September 18, 2002, appeared with a white substance oozing from his eyes, and closed his eyes and nodded off while examining patients, and even dropped a drill while with a patient. The plaintiffs advised Lynn Haney, the office manager, about this and insisted that patients be sent home and the office be closed. Haney refused and said that "he (Allen)'s fine, he just had a couple of Vicodin."
>
> 15. Plaintiffs were subjected to Allen's unwelcome sexual advances and comments, knowledge of his criminal record, and his odd, erratic, and bizarre behavior, creating an unsafe workplace, and causing a hostile working environment. Plaintiffs did not encourage, invite or solicit the above-described harassment, submission to which was demanded in exchange for continued employment.

{¶24} At the outset, we disagree that the subject matter of both of these paragraphs relate to drug and substance abuse. The allegations in paragraph 15 relate to harassment claims. However, we do agree that paragraph 14 clearly alleges Allen engaged in drug and substance abuse in the workplace. Having found such, we must determine whether the allegations in paragraph 14 sufficiently raised a public policy wrongful discharge claim. We first note that paragraph 14 is included under the Jurisdiction and Venue section of the complaint and not under any particular cause of action. Also, in the paragraphs following paragraph 14, appellants seem to be claiming these allegations relate to a cause of action for unlawful discriminatory practices under R.C. 4112. Notwithstanding, in determining what causes of actions a plaintiff has alleged in a complaint, we are required to look to the "actual nature or subject matter pleaded in the complaint," rather than "labels" used to identify a particular cause of action. *Funk v. Rent-All Mart, Inc.*, 91 Ohio St.3d 78, 80, 2001-Ohio-270. Civ.R. 8(A) requires only that a pleading contain a short and plain statement of the circumstances entitling the party to relief and the relief sought. A party is not required to plead the legal theory of recovery. *Illinois Controls, Inc. v. Langham*, 70 Ohio St.3d 512, 526, 1994-Ohio-99. Furthermore, Civ.R. 8(F) provides that all pleadings shall be so construed as to do substantial justice. The rules make it clear that a pleader is not bound by any particular theory of a claim but that the facts of the claim as developed by the proof establish the right to relief. Id., quoting McCormac, Ohio Civil Rules Practice (2 Ed.1992) 102, Section 5.01. See also *Fancher v. Fancher* (1982), 8 Ohio App.3d 79, 82.

{¶25} The allegations in paragraphs 14 do not make any reference to public policy wrongful discharge. However, this paragraph clearly asserts that Allen came to work

smelling of alcohol and under the influence of narcotics, and appellees terminated appellants from their positions after they reported this behavior to them. This language in the complaint could be read to assert a cause of action for public policy wrongful discharge based upon drug abuse and substance abuse in the workplace. Furthermore, paragraph 43, which is under the wrongful discharge against public policy count, specifically indicates that all allegations of the prior paragraphs are incorporated therein, which would bring the allegations of paragraph 14 under the wrongful discharge against public policy count.

{¶26} In concluding that appellants sufficiently alleged a claim for public policy wrongful termination relating to drug and substance abuse in the workplace, we are mindful of the Supreme Court of Ohio's opinion in *Sabo v. Schott*, 70 Ohio St.3d 527, 1994-Ohio-249, in which the court reversed the decision of the appellate court that had found the plaintiff"s allegations in his complaint were insufficient to allege a public policy wrongful discharge claim because he did not plead in his complaint that the appellees had acted contrary to a statute by discharging him. In a three-sentence opinion, the Supreme Court of Ohio reversed the court of appeals, finding that the plaintiff's allegation in his complaint that he was fired as a result of having testified truthfully was sufficient because, if proven to be true, it would constitute conduct on the part of the defendants that violates the public policy of Ohio. The Supreme Court's liberal view of what is sufficient to allege a public policy wrongful discharge claim supports our conclusion that appellants' allegations in their complaint in the present case sufficiently raised a claim for public policy wrongful discharge based upon drug and substance abuse in the workplace.

{¶27} Having found that appellants did not sufficiently raise claims for public policy wrongful discharge based upon drug and substance abuse in the workplace, patient safety, and workplace safety, the trial court never addressed whether appellees were entitled to summary judgment on these claims. We decline to address these issues for the first time on appeal. Therefore, we remand the matter for the trial court to address whether appellees were entitled to summary judgment based upon these public policy wrongful discharge claims. For these reasons, appellants' first assignment of error is sustained in part and overruled in part.

{¶28} Appellants argue in their second assignment of error that the trial court erred when it granted summary judgment on appellants' remaining claims of negligent or intentional infliction of emotional distress, slander, and tortious interference with business relationship, and Blackburn's separate claims for malicious prosecution and abuse of process. With regard to appellants' claims for negligent infliction of emotional distress, we agree with the trial court that Ohio courts, including this one, have refused to recognize a separate tort for negligent infliction of emotional distress in the employment context. See, e.g., *Tschantz v. Ferguson* (1994), 97 Ohio App.3d 693, 724; *Meek v. Solze*, 6th Dist. No. OT-05-055, 2006-Ohio-6633, ¶17; *Peitsmeyer v. Jackson Twp. Bd. of Trustees*, 10th Dist. No. 02AP-1174, 2003-Ohio-4302, fn. 3. Accordingly, appellants' negligent infliction of emotional distress claims do not merit further consideration.

{¶29} With regard to intentional infliction of emotional distress, to assert a claim for intentional infliction of emotional distress, a plaintiff is required to show that: (1) defendant intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress; (2) defendant's conduct was

extreme and outrageous; (3) defendant's action proximately caused plaintiff's psychic injury; and (4) the mental anguish plaintiff suffered was serious. *Sultaana v. Giant Eagle*, 8th Dist. No. 90294, 2008-Ohio-3658, ¶25, citing *Mitnaul v. Fairmount Presbyterian Church*, 149 Ohio App.3d 769, 2002-Ohio-5833. An action to recover for emotional distress may not be premised upon mere embarrassment or hurt feelings, but must be predicated upon a psychic injury that is both severe and debilitating. *Mitnaul* at 781, citing *Uebelacker v. Cincom Sys., Inc.* (1988), 48 Ohio App.3d 268, 276. Indeed, as the Supreme Court held, "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. * * * The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 374-75 (overruled on other grounds). A plaintiff claiming severe and debilitating emotional injury must present some evidence in support of his or her claim, such as expert evidence or lay witness testimony, to prevent summary judgment in favor of the defendant. *Coleman v. Beachwood,* 8th Dist No. 92399, 2009-Ohio-5560, ¶48, citing *Sultaana* at ¶26.

{¶30} In the present case, the trial court found that appellants cited no evidence that they had suffered serious mental anguish. In their appellate briefs, appellants once again failed to illuminate any evidence of psychic injury or serious mental anguish, and did not even mention these elements. Like the trial court, we find no allegations or proof in any of the depositions or affidavits that appellees' actions caused psychic injury or that appellants sustained serious mental anguish. Although Blackburn averred she did not feel

"safe" returning to work, watched some of Allen's work in "horror," and had nightmares about Allen, she presents no details that would suggest that any of these rose to the level of severe and debilitating. She also admitted she never sought any psychiatric treatment for her distress. Esposito testified that, although she had sleeping problems, nightmares, and stress related to Allen and her employment at ADC, she never sought any treatment for stress, sleeping problems, or any related issues to her employment; she never sought psychological treatment; and she never discussed ADC, Allen, or Jaffe with any doctor. Esposito also said she was "afraid" of Allen when he requested that she drive him places, and she was "very fearful" when at work. However, none of Esposito's descriptions rise to the level necessary for an intentional infliction of emotional distress claim. For these reasons, we find appellants failed to raise a genuine issue of material fact regarding their claims for intentional infliction of emotional distress.

{¶31} With regard to appellants' claims for slander, a defamation cause of action, such as slander, consists of five elements: (1) a false and defamatory statement; (2) about plaintiff; (3) published without privilege to a third party; (4) with fault of at least negligence on the part of the defendant; and (5) that was either defamatory per se or caused special harm to the plaintiff. *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 206.

{¶32} Here, appellants' lone argument on appeal is, "Jaffe's further statements to a personnel agency regarding the plaintiffs are equally egregious." With regard to Esposito, the trial court granted summary judgment to appellees on her slander claim based upon Esposito's failure to present any evidence to support this claim, as well as appellees' citation to Esposito's deposition testimony in which she failed to identify a statement that was harmful to her reputation. In that deposition testimony, Esposito stated

she had no proof of any statement appellees made that was harmful to her reputation. We find no other evidence to support Esposito's claim, and appellants do not direct us to any statement made by appellees. Therefore, we find the trial court properly granted summary judgment on Esposito's slander claim.

{¶33} As for Blackburn's slander claim, the trial court relied upon Blackburn's deposition testimony to find there remained no genuine issue of material fact. In that testimony, Blackburn indicates that appellees telephoned all of the places she had tried to get a job. Specifically, Blackburn said that she called a dentist's office to apply for a position, and a person at that office told Blackburn that someone from ADC had just called and said "odd things" about her. However, she admitted that the person from the dentist's office did not specify what the person from ADC had said about her. We agree with the trial court that this non-specific statement is insufficient to create a genuine issue of material fact as to whether appellees made a slanderous statement regarding Blackburn. The rest of Blackburn's deposition testimony fails to reveal Blackburn had any knowledge of slanderous statements made by appellees to prospective employers. Additionally, appellants fail to direct us to any place in the record that supports their argument on appeal that appellees made any statements to a personnel agency. For these reasons, we find the trial court did not err when it granted summary judgment on appellants' slander claims.

{¶34} Appellants also argue that the trial court erred when it granted summary judgment on their claims for tortious interference with a business relationship. The tort of interference with a business relationship occurs when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a

business relationship with another. *Geo–Pro Serv., Inc. v. Solar Testing Laboratories, Inc.* (2001), 145 Ohio App.3d 514, 525. The elements of tortious interference with a business relationship are: (1) a business relationship; (2) the wrongdoer's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom. Id.

{¶35} We first note that the trial court denied summary judgment regarding Blackburn's claims for tortious interference with a business relationship. With regard to Esposito's claim, we agree with the trial court that Esposito's depositions are fatal to her claim. Esposito testified that she had no evidence that any of her prospective employers were contacted by appellees after she left ADC. She also specifically admitted she had no evidence to substantiate a claim that ADC has in any way interfered with her ability to get a job. Lacking such evidence, summary judgment in favor of appellees on Esposito's claim for tortious interference with a business relationship was appropriate.

{¶36} Appellants also argue that the trial court erred when it granted summary judgment to appellees on Blackburn's claims for malicious prosecution and abuse of process. The basis for both of these claims centers on a forged dental assistant radiographer license bearing Blackburn's name that appellees forwarded to the Ohio State Dental Board ("board"). In Ohio, the elements of the tort of abuse of process are: (1) a legal proceeding has been set in motion in proper form and with probable cause; (2) the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) direct damage has resulted from the wrongful use of process. *Yaklevich v. Kemp, Schaeffer & Rowe Co.*, *L.P.A.*, 68 Ohio St.3d 294, 298, 1994-Ohio-503.

{¶37} The elements of a claim for malicious prosecution in Ohio are: (1) malice in instituting or continuing the prosecution; (2) lack of probable cause; and (3) termination of the prosecution in favor of the accused. *Criss v. Springfield Twp.* (1990), 56 Ohio St.3d 82, 84. For purposes of malicious prosecution, malice means an improper purpose or any purpose other than the legitimate interest of bringing an offender to justice. Id. at 85.

{¶38} We find Blackburn failed to sustain her burden on the first element of both of these claims. Appellees did not set in motion any legal proceeding or institute any prosecution. Jaffe averred in his deposition that he merely forwarded Blackburn's radiological license to the board, and he took no further actions with regard to the subsequent criminal or administrative actions against Blackburn. In his deposition he said he did not recall ever contacting the board about Blackburn or being involved in the board's investigation of her. He did not recall ever communicating with the board about Blackburn. He testified that he did not offer any opinion to the board as to whether her radiological license was valid, and he did not recommend to the board that she be criminally prosecuted.

{¶39} Blackburn also testified that she believed it was ADC that brought these criminal charges against her; however, a criminal action is actually brought by the prosecutor's office. Generally, "a citizen who serves only as an informer of criminal activity is not regarded as having instituted the criminal proceedings." *Robbins v. Fry* (1991), 72 Ohio App.3d 360, 362. "The test of liability in such an action is: Was defendant actively instrumental in putting the law in force? To sustain the action, it must affirmatively appear as a part of the case of the party demanding damages that the party sought to be

charged was the proximate and efficient cause of maliciously putting the law in motion." *Siegel v. O.M. Scott & Sons Co.* (1943), 73 Ohio App. 347, 351.

{¶40} The Supreme Court of Ohio set out the law governing malicious prosecution as follows:

> " 'A private person who gives to a public official information of another's supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving such information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. Where a private person gives to a prosecuting officer information which he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this section even though the information proves to be false and his belief therein was one which a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.' "

Archer v. Cachat (1956), 165 Ohio St. 286, 287-88, quoting Restatement (Third) of Torts, page 386. "The protected status of informer can be lost, however, when * * * the informer demonstrates a desire, direction, request or pressure for the initiation of criminal proceedings." *Robbins* at 362.

{¶41} The only argument in appellants' brief on appeal regarding these claims is that "Jaffe had no right to pursue criminal charges against Blackburn when he knew from the moment that she was hired that she did not have an Ohio license, that he ordered her to perform services knowing that she did not have the license is outrageous and an abuse of process." This statement does not further advance Blackburn's claims. As explained

above, Jaffe did not pursue criminal charges. ADC forwarded Blackburn's radiological license and had nothing further to do in either the board's investigation or the prosecutor's investigation. Further, that Jaffe allegedly knew Blackburn did not have a radiological license from the time she was hired and still ordered her to do radiological services is irrelevant to the claims of malicious prosecution and abuse of process. Blackburn has also failed to point to any evidence that appellees pressured the prosecutor to charge her or had any specific desire or request that she be criminally charged. There is nothing to suggest that the prosecutor did not practice his or her own independent discretion in deciding whether to charge Blackburn with a crime. In addition, Blackburn cites no evidence to support her claim that the criminal proceedings were perverted in an attempt to accomplish some ulterior purpose. For these reasons, we find the trial court properly granted summary judgment to appellees on Blackburn's claims of abuse of process and malicious prosecution. Therefore, appellants' second assignment of error is overruled.

{¶42} Accordingly, appellants' first assignment of error is sustained in part and overruled in part, and appellants' second assignment of error is overruled. The judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this matter is remanded to that court for proceedings consistent with this decision.

Judgment affirmed in part and reversed in part; cause remanded.

SADLER and DORRIAN, JJ., concur.

_____