[Cite as *Sells v. Holiday Mgt. Ltd.*, 2011-Ohio-5974.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Raymond Sells,	:	
Plaintiff-Appellant,	:	
		No. 11AP-205
v.	:	(C.P.C. No. 09CVH-12-19273)
Holiday Management Limited,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on November 17, 2011

Adams & Liming LLC, *Roxi A. Liming*, and *Sharon Cason-Adams*, for appellant.

Andrew Cooke & Assoc., *LLC*, and *Adam J. Bennett*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Plaintiff-appellant, Raymond Sells ("Sells"), appeals the Franklin County Court of Common Pleas' entry of summary judgment in favor of defendant-appellee, Holiday Management Limited ("HML"), on Sells' complaint for wrongful termination in violation of public policy. For the following reasons, we affirm.

I. BACKGROUND

{¶2} From January 1, 2007 to March 3, 2009, Sells was employed as a maintenance technician by HML, an apartment management company. In this action, filed December 30, 2009, Sells alleged that HML wrongfully terminated his employment because of absences due to subpoenaed court appearances, in violation of the Ohio public policy set forth in Article I, Section 10, of the Ohio Constitution, and R.C. 2705.02.[1]

{¶3} HML moved for summary judgment on November 24, 2010, and the trial court granted HML's motion on January 12, 2011, after determining that reasonable minds could not find that Sells' discharge was motivated by conduct related to the public policy. The trial court entered final judgment in favor of HML on February 3, 2011.

II. ASSIGNMENTS OF ERROR

{¶4} Sells filed a timely notice of appeal and now raises the following assignments of error:

> 1. The trial court erred when it made a fact determination on the issue of causation regarding [Sells'] wrongful discharge in violation of Ohio public policy claim and in granting [HML's] Motion for Summary Judgment.
>
> 2. The trial court erred when it made a fact determination on the issue of overriding justification regarding [Sells'] wrongful discharge in violation of Ohio public policy claim and in granting [HML's] Motion for Summary Judgment when [HML] had not raised this [issue] in its Motion.

[1] Article I, Section 10, of the Ohio Constitution sets forth various rights of criminal defendants, including the right to meet witnesses face to face. R.C. 2705.02(C) provides, in part, that a failure to obey a subpoena is punishable as contempt of court.

III. DISCUSSION

A. FIRST ASSIGNMENT OF ERROR

{¶5} In his first assignment, Sells contends that the trial court erred by granting summary judgment in favor of HML. We review a summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. We apply the same standard as the trial court and conduct an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶6} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶7} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107. Once the moving party meets its initial burden, the non-movant must set forth specific facts demonstrating a genuine issue for trial. Id. at 293. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, quoting *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶8} In Ohio, the common-law doctrine of employment at will governs employment relationships. *Dohme v. Eurand Am., Inc.*, __ Ohio St.3d __, 2011-Ohio-4609, ¶11. Either party to an at-will employment relationship may generally terminate the relationship at any time and for any reason not contrary to law. *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 103. The termination of an at-will employment relationship does not usually give rise to an action for damages. *Collins v. Rizkana*, 73 Ohio St.3d 65, 67, 1995-Ohio-135. If, however, an employer discharges or disciplines an employee in contravention of a clear public policy articulated in the Ohio or United States Constitution, federal or state statutes, administrative rules and regulations or common law, a cause of action may exist in tort for wrongful discharge in violation of public policy. *Dohme* at ¶11.

{¶9} To succeed on a claim of wrongful discharge in violation of public policy, a plaintiff must establish the following four elements:

> " '1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element).
>
> " '2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element).
>
> " '3. The plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element).
>
> " '4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).' " (Emphasis sic.) * * *

Id. at ¶12-16, quoting *Painter v. Graley*, 70 Ohio St.3d 377, 384, fn. 8, 1994-Ohio-334, quoting Henry H. Perritt, Jr., The Future of Wrongful Dismissal Claims: Where Does Employer Self-Interest Lie? (1989), 58 U.Cin.L.Rev. 397, 398-99. The clarity and jeopardy elements are issues of law for the court, whereas the causation and overriding justification elements are questions of fact. *Collins* at 70.

{¶10} HML did not dispute the clarity element of Sells' claim, and the trial court found that Sells satisfied that element. The trial court found a clear public policy manifested in R.C. 2945.451, which prohibits an employer from discharging or penalizing an employee because of absences for attendance at criminal court proceedings pursuant to a subpoena. A knowing violation of R.C. 2945.451 constitutes contempt of court.

{¶11} HML's arguments in support of summary judgment focused on the jeopardy and causation elements of Sells' claim. As to the jeopardy element, HML

argued that there is no need to recognize a wrongful discharge action to promote the public policy of R.C. 2945.451 because the General Assembly enacted a statutory remedy to promote that policy by making a knowing violation of that section punishable as contempt of court. For purposes of summary judgment, the trial court assumed that Sells satisfied the jeopardy element, but declined to discuss it.

{¶12} Because the trial court focused almost exclusively on the causation element, which is the subject of Sells' first assignment of error, we begin there as well. Sells argues that genuine issues of material fact remain as to whether his dismissal was motivated by conduct related to the public policy set forth in R.C. 2945.451. The trial court rejected Sells' argument and, instead, found "overwhelming" evidence that Sells' termination was not motivated by absences due to subpoenas, as well as "clear" evidence of numerous other reasons for Sells' termination. The court identified those reasons as follows:

> * * * (1) Plaintiff missing a total of twenty-eight (28) days of work between October 2008 and March 2009; (2) Plaintiff sending overly sexual text messages to co-workers; (3) Plaintiff arranging drug deals from work; (4) Plaintiff repeatedly failing to complete maintenance requests on time; and (5) Plaintiff's friends and family engaged in unruly behavior including the use of racial epithets at the apartment pool. * * *

In a footnote, the trial court stated that these reasons also demonstrate that Sells cannot establish a lack of overriding justification for his termination.

{¶13} Much of the evidence regarding Sells' employment, absences, and disciplinary record is undisputed. Sells acknowledged his receipt of HML's written disciplinary policy for "violation of [its] rules and procedures or for unacceptable

behavior" on February 7, 2008. The disciplinary policy contains four steps, consisting of oral counseling, written counseling, written warning, and termination, but states that it "is not a mandatory step-by-step procedure" and that, "[a]t the discretion of [HML], disciplinary action or termination can result immediately." The policy illustratively lists types of conduct that may subject an employee to immediate termination, but also states that "other types of misconduct can result in immediate termination."

{¶14} HML maintained records of employee discipline on documents entitled Employee Record of Counseling and Warning ("ROC"). A completed ROC identifies the employee, the date and nature of the violation, and the date of the warning. The ROC also includes space for company remarks, the employee's remarks regarding the violation, action to be taken, and signatures by the employee and the HML representative. The ROC states, "[t]he absence of any statement on the part of the EMPLOYEE indicates his/her agreement with the report as stated."

{¶15} From December 5, 2008 to March 3, 2009, Sells received three ROCs. Sells first received disciplinary counseling on December 5, 2008, from his supervisor, Scott Fields ("Fields"). The December 5, 2008 ROC identified the nature of Sells' violation as substandard work and stated that work orders were not completed in a timely manner and that residents had complained of work not being done. Sells signed the ROC and, in his deposition, agreed with it "because there [were] a few work orders that [weren't] resolved." (Sells Deposition 20.)

{¶16} Sells' second ROC, dated January 8, 2009, listed a violation date of January 5, 2009, and identified the nature of the violation as substandard work and

conduct. Fields wrote that there remained unresolved work orders and resident complaints and also noted rudeness to office staff and residents. A written statement from HML employee Donna Miller Howard ("Howard"), detailed two resident complaints from January 5, 2009, regarding maintenance issues that were Sells' responsibility. Howard also noted that one of the residents complained about Sells' rudeness. Sells refused to sign the January 8, 2009 ROC, but he did not provide a written statement to contest the violation. At his deposition, Sells testified that he believes Fields fabricated the basis for that ROC because of his disagreement with Sells over a work order regarding a resident's washing machine. One of the January 5, 2009 complaints stemmed from the work order for the washing machine.

{¶17} Sells received a third ROC, dated March 3, 2009, from Tim Arnold ("Arnold"), the President of HML. The March 3, 2009 ROC identified the nature of Sells' violation as conduct and tardiness/absenteeism based on "[t]oo much time missed from work and complaints regarding job performance." Sells neither signed nor provided a written response to the ROC, although he testified in his deposition that he believed the ROC was inaccurate. Arnold terminated Sells' employment on March 3, 2009. Sells testified that he believes he was terminated for missing too much work and for complaints regarding his job performance as stated on the ROCs, all of which he noted mentioned his job performance.

{¶18} From September 2008 through March 2009, Sells received numerous subpoenas requiring his presence at criminal court proceedings in two cases against his wife and her boyfriend, Wayne Saunders. Sells claims he was a victim in both cases.

From October 1, 2008 to March 3, 2009, Sells missed four full days and three partial days of work, a total of 43 hours, for subpoenaed appearances.[2] Nowhere in his deposition does Sells opine that he was fired for absences occasioned by the subpoenas.

{¶19} Sells maintains that the trial court erred in granting summary judgment because genuine issues of material fact remain as to whether his termination was motivated by his subpoenaed absences. Sells contends that his termination notice (the March 3, 2009 ROC), which stated that he was terminated for missing too much work and for complaints regarding his job performance, constitutes direct evidence that HML terminated his employment for conduct that implicates the public policy against penalizing an employee for complying with a subpoena. We disagree. Direct evidence is evidence that, if true, proves a fact without inference or presumption. Black's Law Dictionary (9th ed.2009). For example, where an employer's statement directly shows there was a discriminatory motive, the statement constitutes direct evidence of discrimination. *Olive v. Columbia/HCA Healthcare Corp.* (Mar. 9, 2000), 8th Dist. No. 75249. Although the ROC is evidence that Sells' absences contributed to HML's decision to terminate his employment, a trier of fact could not reach a finding of discriminatory motive without making additional inferences where, as here, Sells' absences were not limited to those occasioned by subpoenas.

{¶20} From October 1, 2008 to March 3, 2009, in addition to the 43 hours of work he missed to comply with the subpoenas, Sells' unrelated absences included nine

[2] Construing the evidence in the light most favorable to Sells, these figures include eight hours on January 27, 2009, during Sells' pre-scheduled, paid vacation.

full days, five of which were approved, paid vacation time, and 11 partial days, totaling 110.75 hours. The trial court erroneously stated that Sells missed 28 full days of work between October 1, 2008 and March 3, 2009, whereas the record establishes that, on many of those occasions, Sells missed only partial days. Nevertheless, the extent of Sells' absences is not disputed, and the trial court's misstatement does not affect our de novo review on appeal. Even excluding his vacation days, the majority of Sells' absences were unrelated to his subpoenaed court appearances. Accordingly, Arnold's statement that he terminated Sells, in part, for missing too much work does not constitute direct evidence that HML fired Sells for reasons that violate public policy.

{¶21} In support of his argument that the trial court erred by granting summary judgment on the basis of the causation element, Sells relies primarily on federal discrimination cases applying the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817. Under that framework, which applies in the absence of direct evidence of discrimination, a plaintiff must first establish a prima facie case, which creates a presumption that the employer discriminated against the plaintiff. See *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, ¶9-11. Once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate and present evidence of a legitimate, nondiscriminatory reason for its action. Id. at ¶12. If the employer meets its burden of production, the presumption created by the prima facie case drops away and the plaintiff bears the burden of proving that the reason offered by the employer was not its true reason, but was a pretext for discrimination. Id. at ¶12, 14. The Supreme Court of

Ohio has adopted that analytical framework, and Ohio courts apply it in discrimination and retaliation cases under Ohio law. See *Williams*; *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 1996-Ohio-265, citing *Barker v. Scovill, Inc., Schrader Bellows Div.* (1983), 6 Ohio St.3d 146; *Reid v. Plainsboro Partners, III*, 10th Dist. No. 09AP-442, 2010-Ohio-4373, ¶55.

{¶22} Courts have applied a similar burden-shifting analysis in claims of wrongful discharge in violation of public policy. Both of Ohio's federal district courts and the Sixth Circuit Court of Appeals have specifically acknowledged that the causation and overriding justification elements of a wrongful discharge in violation of a public policy claim "are equivalent to [this] burden-shifting analysis." *Hall v. ITT Automotive* (N.D.Ohio 2005), 362 F.Supp.2d 952, 960, citing *White v. Simpson Industries, Inc.* (C.A.6, 2001), 1 Fed.Appx. 462; *Kittle v. Cynocom Corp.* (S.D.Ohio 2002), 232 F.Supp.2d 867, 874 (holding that the burden-shifting analysis employed by Ohio courts for discrimination cases "correlate[s] well with the third and fourth elements of a public policy tort"). In *Kittle*, the court explained as follows:

> * * * [T]o prove that Plaintiff's termination was motivated by conduct related to the public policy [against disability discrimination], Plaintiff must set forth a prima facie case for disability discrimination. Second, the overriding justification element of the public policy tort claim correlates with the second step of the disability discrimination analysis in which Defendant may present evidence of legitimate nondiscriminatory reasons for the termination of Plaintiff. Finally, although evidence of pretext is not an element of a public policy tort claim, just as it can serve to rebut evidence of a nondiscriminatory reason for termination for a statutory claim, evidence of pretext is also relevant to rebut evidence of a nondiscriminatory reason for termination under a public policy claim.

Id. at 874-75. This court has similarly held that the causation and overriding justification elements of a public policy wrongful discharge claim are equivalent to the issues of whether a plaintiff was unlawfully discharged in a statutory retaliation claim. *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 158 Ohio App.3d 356, 2004-Ohio-4653, ¶15.

{¶23} Sells argues that, based on the totality of the circumstantial evidence, the record presents genuine issues of material fact regarding causation. As examples of circumstantial evidence, Sells identifies the temporal proximity between his subpoenaed absences and his disciplinary counseling and termination, HML's allegedly shifting reasons for his termination, HML's solicitation of complaints against Sells, and HML's alleged failure to follow its disciplinary policy. The trial court found that none of the cited evidence was sufficient to demonstrate a genuine issue of material fact regarding the causation element of Sells' claim.

{¶24} We initially and summarily reject Sells' contention that HML deviated from its four-step disciplinary policy when it terminated his employment. The trial court held that HML's compliance with the disciplinary policy was discretionary in the absence of an employment contract or an employee handbook, such that HML's action did not establish a genuine issue of material fact as to causation. Based on the express language of the disciplinary policy, we agree with the trial court's conclusion that HML's action does not give rise to an issue of fact regarding causation. Although Sells correctly asserts that HML terminated him upon the third step of the disciplinary procedure, HML's written policy expressly states that the four-step process "is not a

mandatory step-by-step procedure." That language undermines Sells' argument that HML failed to follow its own policy. Indeed, given the discretionary nature of the four-step procedure, the record contains no evidence that HML deviated from its policy. We further reject Sells' argument that Arnold's citation of offenses that can subject an employee to immediate termination under HML's policy creates a question of fact as to causation simply because HML did not immediately terminate his employment.

{¶25} Sells also argues that HML has proffered inconsistent and shifting reasons for terminating his employment and that its inconsistency demonstrates a genuine issue of material fact as to the true cause for his termination. In his deposition, Arnold testified that he told Sells he was being terminated for the reasons stated on the March 3, 2009 ROC, namely too much time missed from work and complaints about Sells' job performance. Sells likewise testified that he believed he was fired for the reasons stated on the March 3, 2009 ROC, and he recognized that all three ROCs contained complaints about his job performance. Those complaints included untimely completion of work orders, unresolved work orders, resident complaints, and rudeness to office staff and residents.

{¶26} Based on additional testimony in Arnold's deposition and affidavit, Sells contends that HML has altered its proffered basis for his termination. In his deposition, Arnold testified that the reasons he gave Sells for his termination were those on the March 3, 2009 ROC, but when asked why he made the decision to fire Sells at that particular time, he stated, "[b]ecause several of my female employees were fearful of [Sells] due to his inappropriate texts and comments and drug use." (Arnold Deposition

53.) Prior to Sells' termination, female employees had reported to Arnold receiving inappropriate, sexual text messages from Sells, that Sells had come to work under the influence of drugs, and that Sells had been flashing pills and cash at work. Arnold did not personally observe the reported conduct and did not ask Sells about the reports, but he stated that he considered them in deciding to terminate Sells. He stated that he believed the reports given against Sells because the employees' stories corroborated each other. In his subsequently-executed affidavit, Arnold stated that he terminated Sells "for sexually harassing female employees, poor work performance, excessive absences, and rudeness to office staff and residents." (Arnold Affidavit ¶2.)

{¶27} "An employer's changing rationale for making an adverse employment decision can be evidence of pretext" to establish discrimination. *Thurman v. Yellow Freight Sys., Inc.* (C.A.6, 1996), 90 F.3d 1160, 1167. In a more recent case involving a claim of retaliation, however, the Sixth Circuit explained as follows:

> * * * The *extent* to which such shifting justifications are probative of pretext depends upon the circumstances of a given case. At its root, pretext is a common-sense inquiry into whether the employer took the adverse employment action for the stated reason or not. * * * Hence, we look not only to whether changes in an employer's rationale have occurred, but to whether the circumstances could permit a rational factfinder to conclude that these changes are indicative that the currently-proffered explanation is false. * * *

Eades v. Brookdale Senior Living, Inc. (C.A.6, 2010), 401 Fed.Appx. 8, 13, citing *Chen v. Dow Chem. Co.* (C.A.6, 2009), 580 F.3d 394, 400, fn. 4, and *Reeves v. Sanderson Plumbing Prods., Inc.* (2000), 530 U.S. 133, 148-49, 120 S.Ct. 2097, 2109. (Emphasis sic.) Where a later rationale cannot be reconciled with an earlier rationale because of

logical contradictions or inconsistencies, evidence of pretext exists. *Eades* at 13. A court will not, however, infer pretext from an employer's assertion of different, although consistent, reasons for taking an adverse action. See *Aragon v. Republic Silver State Disposal, Inc.* (C.A.9, 2002), 292 F.3d 654, 661; *Johnson v. Nordstrom, Inc.* (C.A.7, 2001), 260 F.3d 727, 733-34 (finding no pretext where the employer's reasons for termination were neither inconsistent nor conflicting); *Stone v. Galaxy Carpet Mills, Inc.* (N.D.Ga.1993), 841 F.Supp. 1181, 1187 (finding no pretext where the singular reason initially given "is not inconsistent with [the employer's] more developed reasons articulated on motion for summary judgment"). Thus, the existence of undisclosed, nondiscriminatory reasons for an employer's adverse action, in addition to an employer's initially-proffered reason, does not establish pretext. See *Tidwell v. Carter Prods.* (C.A.11, 1998), 135 F.3d 1422, 1428.

{¶28} The evidence in the record regarding HML's reasons for terminating Sells' employment does not create a genuine issue of material fact as to whether the termination was motivated by conduct related to the public policy, i.e., Sells' absences to comply with duly-served subpoenas. HML has never contradicted the initial rationale expressed to Sells—that his termination was the result of excessive absences and complaints about his job performance. Issues with Sells' job performance are cited in each of the ROCs, Arnold's deposition and affidavit, and HML's motion for summary judgment. Sells' excessive absences are cited in the third ROC, Arnold's deposition and affidavit, and HML's motion for summary judgment. Undoubtedly, Arnold expanded on his rationale and noted additional reasons for Sells' termination in his deposition and

affidavit, but he did not contradict his initial reasons. Arnold's additional reasons, based on allegations of sexual text messages and drug-related conduct, are not inconsistent with the reasons provided to Sells, and, in fact, could be encompassed by the general justification of unsatisfactory job performance. While Sells disputes the veracity of the allegations by his female co-workers, he does not deny that Arnold received those complaints and allegations against him. For the same reasons that an employer's statement of additional, but consistent, reasons for an adverse employment action does not constitute evidence of pretext, Arnold's additional reasons for terminating Sells' employment do not constitute evidence that the termination was actually motivated by Sells' absences to comply with the subpoenas.

{¶29} Sells next argues that Arnold's solicitation of written complaints from other employees before terminating his employment creates a genuine issue of material fact regarding causation. Arnold testified that he asked female employees to write down any problems they had with Sells, although there is no evidence in the record regarding when Arnold made that request. The record contains three written complaints from female employees. One complaint is dated March 2, 2009 and two are undated. Two of the complaints allege sexual text messages and comments from Sells and statements regarding Sells' drug-related activity, including making phone calls from work to set up drug sales. The third statement simply related maintenance complaints the employee received from two residents on January 5, 2009, the violation date listed on the January 8, 2009 ROC. Arnold testified that he became aware of the claims of

inappropriate, sexual text messages, and complaints regarding Sells' drug-related activity in early 2009, prior to asking employees to document those claims in writing.

{¶30} In discrimination and retaliation cases, federal courts have considered, as evidence of pretext, evidence that an employer subjected a plaintiff to increased scrutiny or made efforts to create a paper trail, especially a false one, to support disciplinary action or termination. See, e.g., *Hamilton v. Gen. Elec*. *Co.* (C.A.6, 2009), 556 F.3d 428 (plaintiff may establish a genuine issue of material fact as to whether an employer's proffered reason is pretext with evidence that the employer heightened its scrutiny and supervision of the plaintiff after the plaintiff filed a discrimination charge. Other courts, however, have rejected attempts to establish pretext with evidence that the employer created a paper trail to support an adverse employment action. For example, in *Anderson v. Stauffer Chem. Co.* (C.A.7, 1992), 965 F.2d 397, 402, the court held that, even if the plaintiff's allegation that his supervisor solicited complaint letters was true, "the fact remains that there were complaints and [the employer] claimed to have based his decision on the complaints." The court stated that termination was justified if the employer believed the complaints. See also *Wright v. Wyandotte Cty. Sheriff's Dept.* (D.Kan.1997), 963 F.Supp. 1029, 1037 (stating that the "[d]efendant's decision to protect itself in the face of potential litigation by documenting plaintiff's transgressions is not, without more, unlawful discrimination").

{¶31} Here, there is no evidence that Sells was treated differently than other HML employees or that HML increased its scrutiny of Sells after Sells engaged in protected conduct. Moreover, there is no evidence that Arnold acted to create a paper

trail after terminating Sells. Arnold did request female employees to document existing complaints about Sells, but the only dated complaint preceded Sells termination, albeit only by a day. Viewing the evidence in the light most favorable to Sells, as we are required to do on summary judgment, we determine that reasonable minds could not conclude that Arnold's request for written documentation of existing complaints against Arnold demonstrates that his proffered reasons for terminating Sells' employment, especially those unrelated to the content of the solicited complaints, were a pretext for terminating Sells for absences related to his subpoenaed court appearances. Nor does Sells' denial of the substantive content of the complaints regarding sexual text messages and drug-related conduct suggest that any of Arnold's reasons was a pretext for discharging Sells in violation of public policy.

{¶32} Lastly, Sells argues that temporal proximity between his subpoenaed absences and HML's disciplinary actions creates an issue of fact as to the causal connection between the protected activity and the adverse employment actions. Sells received his first ROC three days after missing two hours of work to respond to a subpoena. Prior to the first ROC, Sells had missed work on four occasions since October 1, 2008, to comply with subpoenas. Sells received his second ROC the day after missing work to respond to his next subpoena. From December 5, 2008 through January 8, 2009, however, Sells missed two full days and two partial days of work unrelated to the subpoenas, one of which was a paid vacation day. Sells received his third ROC and was terminated on March 3, 2009, one week after he missed one-half day of work to respond to a subpoena. Between the dates of his second and third

ROCs, Sells took five days of paid vacation, and missed an additional full day and five partial days of work, unrelated to the subpoenas. Prior to his termination, Sells informed Fields that he would need to miss half-days of work from March 4 through 6, 2009 for trial.

{¶33} Sells concedes that temporal proximity between protected activity and an adverse employment action is generally insufficient, without other indicia of retaliatory conduct, to establish the causation element in a retaliatory discharge claim. See *Tuttle v. Metro. Govt. of Nashville* (C.A.6, 2007), 474 F.3d 307, 321. Nevertheless, he points out the Sixth Circuit's holding in *Mickey v. Zeidler Tool & Die Co.* (C.A.6, 2008), 516 F.3d 516, 525, that, in limited cases, "[w]here an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation."[3] The *Mickey* court explained its rationale as follows: "if an employer immediately retaliates against an employee upon learning of his protected activity, the employee would be unable to couple temporal proximity with any such other evidence of retaliation because the two actions happened consecutively, and little other than the protected activity could motivate the retaliation." Id. at 525.

{¶34} In *Mickey*, where the employer laid off the plaintiff the day it learned that he had filed an EEOC charge, the court found the temporal proximity between those

[3] To establish a prima facie case of retaliation, a plaintiff must establish the following elements: (1) that he engaged in protected activity; (2) that the employer had knowledge of the protected activity; (3) that the employer took an adverse action against the plaintiff; and (4) that there was a causal connection between the adverse employment action and the protected activity. *Mickey* at 523.

actions sufficient to create a prima facie case of retaliation. The court noted that " '[t]he burden of establishing a *prima facie* case in a retaliation action is not onerous, but one easily met.' " Id. at 525-26, quoting *Nguyen v. Cleveland* (C.A.6, 2000), 229 F.3d 559, 563. Because the *McDonnell Douglas* framework governs retaliation claims based on circumstantial evidence, the court continued through the burden-shifting paradigm. After determining that the employer successfully advanced three nondiscriminatory reasons for its action, the court went on to consider whether the plaintiff met his burden of showing that those reasons were merely a pretext for retaliation. The Sixth Circuit did not suggest that temporal proximity alone, even if sufficient for purposes of establishing a prima facie case, was sufficient to establish pretext or to avoid summary judgment after the employer has advanced a legitimate, nondiscriminatory reason for its actions. See also *Hill v. Nicholson* (C.A.6, 2010), 383 Fed.Appx. 503, 514, quoting *Asmo v. Keane, Inc.* (C.A.6, 2006), 471 F.3d 588, 598 (" 'while temporal proximity … cannot alone prove pretext, temporal proximity can be used [as] indirect evidence to support an employee's claim of pretext' "). To the contrary, the court there found ample evidence to reject the specific reasons advanced by the employer as having little basis in fact, no basis in the record or as unworthy of credence.

{¶35} In Ohio, the First District Court of Appeals has held that, "[w]hile the employee need not present evidence of a 'smoking gun,' temporal proximity alone is insufficient to show pretext." *Mortensen v. Intercontinental Chem. Corp.*, 178 Ohio App.3d 393, 2008-Ohio-4723, ¶32, citing *Cunningham v. Steubenville Orthopedics & Sports Medicine, Inc.*, 175 Ohio App.3d 627, 642, 2008-Ohio-1172, and *Buehler v.*

AmPam Commercial Midwest, 1st Dist. No. C-060475, 2007-Ohio-4708. More generally, Ohio courts have held that, although the timing of an employee's termination can contribute to an inference of retaliation to meet the causal connection element of a claim, " 'temporal proximity alone is insufficient to support a finding of a causal connection' " even with respect to a prima facie case. *Cunningham* at ¶73, quoting *Buehler* at ¶25. It is especially true that mere temporal proximity between a protected activity and an adverse employment action, without other indicia of retaliatory conduct, is generally insufficient to establish a causal connection when the evidence demonstrates intervening performance concerns. *Putney v. Contract Bldg. Components*, 3d Dist. No. 14-09-21, 2009-Ohio-6718, ¶52, citing *Nguyen* at 566-67. The *Putney* court, at ¶57, described the circumstances where temporal proximity alone may be sufficient to establish causation as "rare" and applicable to only a "small subset of cases." Just as evidence of temporal proximity alone is insufficient to establish pretext in a statutory retaliation claim, evidence of temporal proximity alone is insufficient to create a genuine issue of material fact as to the ultimate issue of whether HML terminated Sells' employment for reasons in violation of public policy.

{¶36} In his appellate brief, Sells states that he does not rely on temporal proximity alone, but argues that temporal proximity, coupled with the other purported circumstantial evidence addressed above, establishes a genuine issue of material fact as to whether his termination was motivated by his missing work for subpoenaed court appearances. We disagree.

{¶37} The evidence supports the nondiscriminatory reasons HML asserts as the basis for its decision to terminate Sells' employment. Sells does not dispute the number of work days or hours he missed during the months preceding his termination, nor is there any dispute about the number of those hours that related to the subpoenas. While Sells argues that his non-court-related absences were for legitimate reasons and were excused, Arnold testified that, although Sells' absences individually seemed legitimate, "there were just a lot of them." (Arnold Deposition 40.) He explained that Sells' absences "were excused up to the point where [they] started affecting his performance," toward the end of 2008. (Arnold Deposition 40.) It was then, according to Arnold, that HML began receiving increased complaints from residents about Sells' work. As stated above, less than half of Sells' absences from October 2008 to March 2009 were related to the subpoenas.

{¶38} Also during this time, Sells received three disciplinary write-ups related to his job performance. Sells agreed with HML's concerns regarding his job performance noted in his first ROC. With respect to the second ROC, Sells opined that a disagreement between himself and Fields about his job performance led to Fields leveling the complaints listed in the ROC. Although Sells did not agree with the bases of the second and third ROCs, he did not provide a written response to either of those ROCs. Sells understood the ROC form and the statement therein that the absence of written remarks from the employee indicates the employee's agreement to the ROC as written. During this time, as noted on the first and second ROCs and in a written statement from another HML employee, residents complained about Sells' failure to

complete work orders in a timely manner and about Sells' rudeness. Sells does not contest that HML received complaints about his job performance by residents and other employees.

{¶39} Although causation and overriding justification are factual elements, "courts routinely grant summary judgment when the plaintiff fails to raise an issue of material fact with respect to either element." *Kirk v. Shaw Environmental, Inc.* (May 25, 2010), N.D.Ohio No. 1:09-cv-1405. "[U]pon the movant's showing the lack of causation and the existence of overriding justification through depositions, the [plaintiff] has the reciprocal burden to demonstrate causation and the lack of an overriding justification" to avoid summary judgment. *Barnes v. Cadiz*, 7th Dist. No. 01 531 CA, 2002-Ohio-1534, ¶15, citing *Wood v. Dorcas* (2001), 142 Ohio App.3d 783, 793, and *Chapman v. Adia Servs., Inc.* (1997), 116 Ohio App.3d 534, 542.

{¶40} Here, Sells does not satisfy his reciprocal burden. Sells has presented no evidence that the reasons proffered by HML are themselves false or are not the true reasons for his termination. See *Kittle* at 878, citing *Manzer v. Diamond Shamrock Chems. Co.* (C.A.6, 1994), 29 F.3d 1078, 1084 (a plaintiff can establish pretext by showing that the proffered reason has no basis in fact, did not actually motivate the discharge or was insufficient to motivate the discharge). Even with respect to the allegations of sexual harassment and drug-related conduct, the substance of which Sells denies, Sells does not dispute that those allegations were made to Arnold or that Arnold believed those allegations. "The relevant question is whether the employer honestly believed its proffered reason for discharge, not whether the employer was

mistaken, acted unfairly, or based its decision on a bad policy." *Nolen v. S. Bend Pub. Transp. Corp.* (N.D.Ind.2000), 99 F.Supp.2d 953, 963, citing *Bahl v. Royal Indemn. Co.* (C.A.7, 1997), 115 F.3d 1283, 1291. The record simply contains no evidence from which reasonable minds could conclude that HML terminated Sells for conduct related to the public policy against penalizing employees for absences resulting from compliance with a duly-served subpoena. Therefore, we overrule Sells' first assignment of error.

B. SECOND ASSIGNMENT OF ERROR

{¶41} By his second assignment of error, Sells argues that the trial court erred by stating, in a footnote, that the reasons supporting his termination "also show that [Sells] cannot satisfy the overriding justification element of the wrongful termination test." Sells contends that the trial court's statement was erroneous because HML did not make an argument regarding that element in its motion for summary judgment. A party seeking summary judgment must specifically delineate the basis of its motion. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus. If a party files a motion for summary judgment based on some, but not all, of the issues in a case, the trial court should restrict its ruling to the matters raised. *Charvat v. Farmers Ins. Columbus, Inc.*, 10th Dist. No. 07AP-1078, 2008-Ohio-4353, ¶31, citing *Ferro Corp. v. Blaw Knox Food & Chem. Equip. Co.* (1997), 121 Ohio App.3d 434. While we agree that HML did not specifically argue Sells' inability to satisfy the overriding justification element in its motion for summary judgment, HML's arguments regarding the reasons for its termination of Sells' employment certainly go to that element, as well as to the element

of causation. Nevertheless, having determined that Sells presented no evidence to demonstrate a genuine issue of fact as to the causation element of his claim, Sells' argument regarding the trial court's statement regarding the overriding justification element is moot. Therefore, we overrule it.

IV. CONCLUSION

{¶42} In conclusion, we overrule Sells' first assignment of error and render his second assignment of error moot. We affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and DORRIAN, JJ., concur.